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ABSTRACT

This document contains testimony on House Concurrent Resolution 330, disapproving certain provisions of the regulation implementing Title IX of the Education Amendments of 1972. The concurrent resolution cites three provisions of the Title IX regulation as inconsistent with the statute: Section 83.3 (c) and (d), requiring recipient institutions to conduct self-evaluation and maintain records; section 86.8, requiring institutions to adopt a grievance procedure; and section 86.12 (b), requiring religious institutions to submit a statement identifying the provisions of the regulation that conflict with a specific religious tenet in order to claim an exemption. (Author/KE)

HEARING ON HOUSE CONCURRENT RESOLUTION 330
(Title IX Regulation)

HEARING

BEFORE THE

SUBCOMMITTEE ON EQUAL OPPORTUNITIES

OF THE

COMMITTEE ON EDUCATION AND LABOR
HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H. Con. Res. 330

HEARING HELD IN WASHINGTON, D.C., JULY 14, 1975

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CARL D. PERKINS, *Chairman*

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HEARING ON HOUSE CONCURRENT RESOLUTION 330
(Title IX Regulation)

MONDAY, JULY 14, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON EQUAL OPPORTUNITIES
OF THE COMMITTEE ON EDUCATION AND LABOR,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:45 a.m. in room 2175, Rayburn House Office Building, Hon. Augustus F. Hawkins (chairman) presiding.

Members present: Representatives Perkins, O'Hara, Hawkins, Clay, Benitez, Miller, Hall, and Buchanan.

Staff present: Susan D. Grayson, staff director; William Higgs, legislative assistant; Carole Schanzer, clerk; and Richard Mosse, assistant minority counsel.

Mr. HAWKINS. The Subcommittee on Equal Opportunities is called to order. The Chair has an opening statement which will be read at this time.

Mr. O'Hara, we will somewhat delay the proceeding until Mr. Buchanan, who is on the way, arrives. Possibly after I have read my opening statement, it may be that he will have arrived. This is the reason for the short delay.

The subcommittee is convened this morning to hear testimony on House Concurrent Resolution 330, disapproving certain provisions of the regulation implementing title IX of the Education Amendments of 1972.

The subcommittee is acting upon a vote on July 9, by the Committee on Education and Labor, to refer House Concurrent Resolution 330 to the Subcommittee on Equal Opportunities for its consideration for 5 legislative days.

Under section 431(d) of the General Education Provisions Act, Congress has 45 days to review the regulation to determine whether it is consistent with the authorizing legislation. Upon a finding of inconsistency, Congress may, by concurrent resolution, disapprove the regulation.

The concurrent resolution before us cites three provisions of the title IX regulation as inconsistent with the statute: Section 83.3 (c) and (d), requiring recipient institutions to conduct self-evaluation and maintain records; section 86.8, requiring the institutions to adopt a grievance procedure; and section 86.12(b), requiring religious institutions to submit a statement identifying the provisions of the regulation which conflict with a specific religious tenet in order to claim an exemption.

Though none of us is entirely satisfied with all the provisions of this regulation implementing title IX, our duty is to examine the provisions, in particular the three cited as inconsistent in the concurrent resolution, to determine their consistency with the authorizing statute.

[Text of H. Con. Res. 330 follows:]

CONCURRENT RESOLUTION

[H. Con. Res. 330, 94th Cong., 1st sess.]

Whereas the Secretary of Health, Education, and Welfare on June 4, 1975, submitted to the President of the Senate and the Speaker of the House of Representatives certain regulations for the implementation of certain sections of title IX of the Education Amendments of 1972, pursuant to the Secretary's duty under section 431 of the General Education Provisions Act; and

Whereas the Congress, in the exercise of its authority under article I of the Constitution and in accordance with the procedure established by said section of the General Education Provisions Act for the safeguarding of that authority, has reviewed said regulations and finds certain of them inconsistent with the Act from which they must derive their authority, as follows:

(1) subsections 86.3 (c) and (d), requiring each recipient educational institution to conduct a self evaluation and maintain records thereof, are inconsistent with the Act since there is no authority contained in the Act for such a requirement,

(2) section 86.8, requiring each recipient to adopt and public grievance procedures providing for resolution of student and employee complaints is inconsistent with the Act, since there is no authority contained in the Act for such a requirement, and

(3) section 86.12(b), requiring an educational institution to claim a religious exemption is inconsistent with the Act, since section 901(a)(3) specifically exempts educational institutions from coverage under subsection (a) and would not require an institution to be forced to petition or claim such exemption from the Department of Health, Education, and Welfare: Now, therefore, be it

Resolved by the House of Representatives (the Senate concurring), That those regulations, submitted to the Congress on June 4, 1975, proposing to add subsections 86.3 (c) and (d) and section 86.8 and section 86.12(b), part 86 to title 45 of the Code of Federal Regulations, for the implementation of title IX of the Education Amendments of 1972, are disapproved by the Congress on the grounds of their inconsistency with the Act from which they derive their authority, as set forth in the preamble to this resolution, and are returned to the Secretary of Health, Education, and Welfare to be modified or otherwise disposed of as provided in section 431(e) of the General Education Provisions Act.

Mr. HAWKINS. As our first witness this morning, the subcommittee welcomes the chairman of the Subcommittee on Postsecondary Education, and the author of House Concurrent Resolution 330, Mr. James G. O'Hara, the Representative from the 12th District in Michigan.

Mr. O'Hara, I am quite sure that Mr. Buchanan will be joining us very shortly. Unless you wish to delay the start of hearing until he arrives, I would certainly welcome at this time your statement in support of the resolution.

STATEMENT OF HON. JAMES G. O'HARA, U.S. REPRESENTATIVE FROM MICHIGAN

Mr. O'HARA. Thank you very much, Mr. Chairman, for this opportunity. I will proceed now, and I certainly will be happy to answer any questions that Mr. Buchanan might have with respect to matters about which I will have testified before his arrival.

Mr. Chairman, I appreciate this opportunity to appear at your subcommittee's hearing on House Concurrent Resolution 330. This concurrent resolution deals with an important subject matter in and of itself, but the procedural and constitutional questions involved are even more significant. So I will turn my attention first to those issues.

House Concurrent Resolution 330 is the first example of the exercise by Congress of a new procedure, created by law in the summer of 1974, designed to safeguard the exercise by the Congress of its most fundamental constitutional duty.

The very first sentence of the Constitution of the United States says: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

That Constitution, which we have taken an oath to protect and defend, gives the executive branch the duty to see that the laws are faithfully executed, and it gives to the judiciary the right to determine cases and controversies arising under those laws.

But to the Congress, and to the Congress alone, it gives the right to make law.

This was not an accident, Mr. Chairman. The men who wrote the Constitution knew from bitter experience that the authority to make law had to be kept jealously guarded in the hands of those who could be held responsible to the people.

They did not assume that the Congress would be necessarily possessed of greater wisdom than the employees of the executive branch, or the judges. They did not believe that the Members of the Congress would be more benevolent, more understanding, more selfless than their fellow citizens. It was not for any of these reasons that they gave the exclusive and unshared legislative power to the Congress.

They gave that authority to the Congress because the Congress is answerable, at very frequent intervals, to the people from whom all government power is borrowed, and to whom its use must always be accountable.

That fundamental constitutional concept of separation of powers has frequently been under attack. And for most of the time any of us have been in this Congress, it has been under unremitting attack. The attacks were not begun in this administration, nor in its ill-fated predecessor. But the efforts of the executive branch to assume the power to make the law, to rise above the law when its policies suggested it, and to violate the law when it thought it was doing so in a good cause, certainly rose to a crescendo in the last 6 years—and led directly to the constitutional crisis which was so narrowly avoided less than a year ago.

The attack on the right of the Congress to make the law, and on the duty of the executive branch to abide by the law, did not, of course, take the form of a violent coup d'etat. There were no 7 days in some recent May, with armed hordes of GS-12's charging Capitol Hill to oust the Representatives and Senators from their work. It didn't even take the form of flamboyant defiance of the express prohibitions of the law.

The assault was more insidious and more difficult to resist than an outright confrontation. The bureaucracy doesn't simply tell us to buzz off while they do what they think is right. No: very politely and with a great outward show of deference, they take the laws and busily

write regulations, explaining the laws to themselves, defining the terms already defined in the laws, adding exceptions and exemptions and explications and explanations until what the public is told to do by regulation bears only a general resemblance to what the law tells them to do.

We are always assured, Mr. Chairman, that the regulations are only what is necessary. We are frequently assured that they are only meant to carry out the "intent of the Congress." And we are constantly assured that these regulations, these "improvements" in the text of the law, are so desirable, so righteous, so necessary for some high cause or another that they transcend the need of mere legality.

Secretary Weinberger expressed that frame of mind very eloquently in his testimony on the recent title IX regulations when he appeared before my subcommittee. He said of the process of developing those regulations: "It has been extraordinarily difficult, first, to interpret the intent of Congress, and secondly, to accommodate the concerns of a wide diversity of interest groups and individuals."

In other words, the Secretary of HEW, in devising a set of regulations designed to carry out the law, and deriving all of their authority from the law, has felt himself empowered not only to follow the law but also to exercise the separate legislative function of trying "to accommodate the concerns of a wide diversity of interest groups and individuals."

And this bureaucratic attitude leads beyond the mere rewriting of statute. It leads to the widespread view that the only real law in town is the regulation, and that until some GS 15 has explained the statute, there is no real law out there to concern anyone.

Title IX is a good, but not the only, example. Many of the individuals and groups who supported us when we enacted title IX have accepted without serious argument the incredible proposition that a law, enacted by the Congress and signed by the President in 1972, has not yet become effective, and will not, until and unless a set of regulations is issued by the executive branch.

"The Congress may propose, the President may endorse, but until the bureaucracy has acted," runs the theory, "there is no law worthy of the name."

It was with the phenomenon of administrative lawmaking in mind, Mr. Chairman, that a year and more ago I offered in this very committee an amendment to a then pending education bill. My proposal, which was unanimously agreed to by the Committee on Education and Labor, and which became law with a few minor changes, but without serious opposition on either side of the aisle or in either House, is now section 431 (d), (e), and (f) of the General Education Provisions Act. I ask unanimous consent that the text of section 431 be inserted at this point in the hearing record, but I will summarize their impact.

[Text of section 431 follows:]

SUBPART 2—ADMINISTRATION: REQUIREMENTS AND LIMITATIONS

RULES: REQUIREMENTS AND ENFORCEMENT

SEC. 431. (a) Rules, regulations, guidelines, or other published interpretations or orders issued by the Department of Health, Education, and Welfare or the Office of Education, or by any official of such agencies, in connection with, or affecting, the administration of any applicable program shall contain immediately

following each substantive provision of such rules, regulations, guidelines, interpretations, or orders, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based.

(b)(1) No standard, rule, regulation, or requirement of general applicability prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.

(2)(A) During the thirty-day period prior to the date upon which such standard, rule, regulation, or general requirement is to be effective, the Commissioner shall, in accordance with the provisions of section 553 of title 5, United States Code, offer any interested party an opportunity to make comment upon, and take exception to, such standard, rule, regulation, or general requirement and shall reconsider any such standard, rule, regulation, or general requirement upon which comment is made or to which exception is taken.

(B) If the Commissioner determines that the thirty-day requirement in paragraph (1) will cause undue delay in the implementation of a regulation, thereby causing extreme hardship for the intended beneficiaries of an applicable program, he shall notify the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate. If neither committee disagrees with the determination of the Commissioner within 10 days after such notice, the Commissioner may waive such requirement with respect to such regulation.

(c) All such rules, regulations, guidelines, interpretations, or orders shall be uniformly applied and enforced throughout the fifty States.

(d)(1) Concurrently with the publication in the Federal Register of any standard, rule, regulation, or requirement of general applicability as required in subsection (b) of this section, such standard, rule, regulation, or requirement shall be transmitted to the Speaker of the House of Representatives and the President of the Senate. Such standard, rule, regulation, or requirement shall become effective not less than forty five days after such transmission unless the Congress shall, by concurrent resolution, find that the standard, rule, regulation, or requirement is inconsistent with the Act from which it derives its authority, and disapprove such standard, rule, regulation, or requirement.

(2) The forty-five-day period specified in paragraph (1) shall be deemed to run without interruption except during periods when either House is in adjournment sine die, in adjournment subject to the call of the chair, or in adjournment to a day certain for a period of more than four consecutive days. In any such period of adjournment, the forty-five days shall continue to run, but if such period of adjournment is thirty calendar days, or less, the forty-five-day period shall not be deemed to have elapsed earlier than ten days after the end of such adjournment. In any period of adjournment which lasts more than thirty days, the forty-five-day period shall be deemed to have elapsed after thirty calendar days has elapsed, unless, during those thirty calendar days, either the Committee on Education and Labor of the House of Representatives, or the Committee on Labor and Public Welfare of the Senate, or both, shall have directed its chairman, in accordance with said committee's rules, and the rules of that House, to transmit to the appropriate department or agency head a formal statement of objection to the proposed standard, rule, regulation, or requirement. Such letter shall suspend the effective date of the standard, rule, regulation, or requirement until not less than twenty days after the end of such adjournment, during which the Congress may enact the concurrent resolution provided for in this subsection. In no event shall the standard, rule, regulation, or requirement go into effect until the forty five day period shall have elapsed, as provided for in this subsection, for both Houses of the Congress.

(e) Whenever a concurrent resolution of disapproval is enacted by the Congress under the provisions of this section, the agency which issued such standard, rule, regulation, or requirement may thereafter issue a modified standard, rule, regulation, or requirement to govern the same or substantially identical circumstances, but shall, in publishing such modification in the Federal Register and submitting it to the Speaker of the House of Representatives and the President of the Senate, indicate how the modification differs from the proposed standard, rule, regulation, or requirement of general applicability earlier disapproved, and how the agency believes the modification disposes of the findings by the Congress in the concurrent resolution of disapproval.

(f) For the purposes of subsections (d) and (e) of this section, activities under sections 404, 407, and 406 of this title, and under title IX of the Education Amendments of 1972 shall be deemed to be applicable programs.

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(g) Not later than sixty days after the enactment of any part of any Act affecting the administration of any applicable program, the Commissioner shall submit to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Public Welfare of the Senate a schedule in accordance with which the Commission has planned to promulgate rules, regulations, and guidelines implementing such Act or part of such Act. Such schedule shall provide that all such rules, regulations, and guidelines shall be promulgated within one hundred and eighty days after the submission of such schedule. Except as is provided in the following sentence, all such rules, regulations, and guidelines shall be promulgated in accordance with such schedule. If the Commissioner finds that, due to circumstances unforseen at the time of the submission of any such schedule, he cannot comply with a schedule submitted pursuant to this subsection he shall notify such committees of such findings and submit a new schedule. If both such committees notify the Commissioner of their approval of such new schedule, such rules, regulations, and guidelines shall be promulgated in accordance with such new schedule.

20 U.S.C. 1232) Enacted April 13, 1970, P.L. 91-230, Title IV, sec. 401(a) (108), 84 Stat. 169; renumbered June 23, 1972, P.L. 92-318, sec. 301(a) (1), 86 Stat. 326, amended August 21, 1974, P.L. 93-380, sec. 509(a)(), 88 Stat. 566, 568.

Mr. O'HARA. In effect: these subsections provide that whenever rules, regulations, or guidelines are issued to govern a Federal education program, they shall lay before the Congress for the last 45 days prior to their going into effect. And during those 45 days, the Congress can review them to find if they are, in fact, consistent with the statutory authority from which they must derive all of their force.

If the Congress makes a finding of inconsistency, the regulations, to the extent they are inconsistent, may be returned to the agency by a concurrent resolution. The resolution must specify the findings of inconsistency, and the agency has the option to return those inconsistent regulations to the Congress, modified to meet the objections, for another review.

Section 431 does not give the right to change statute by concurrent resolution, of course. That would be in violation of the Constitution. It does not give us the right to amend regulations. It does not give us the right to return regulations because we don't like them, or because they are just plain dumb, or because we have changed our minds since we wrote the law, or because we think we can do the work of the bureaucrats better than they can. We must make a finding of inconsistency with the law, and we may not apply that finding to any of the regulations except to those which it fits.

I had no particular law or set of pending regulations in mind when I offered section 431. It was a bipartisan effort to stem the phenomenon I have described above—the attitude one might call the spirit of San Clemente.

And although there have been no concurrent resolutions offered under section 431 until now, there have been several sets of regulations submitted to the Congress in accordance with its provisions, and to the extent they have been brought before my subcommittee, they have been carefully examined with section 431 very much in mind.

The title IX regulations are the first to which these procedures have been applied to the extent of actually developing a resolution of disapproval and conducting public hearings.

Let me now turn to the specifics of what the resolution of disapproval finds wrong with the title IX regulations.

House Concurrent Resolution 330 would disapprove four of the regulations contained in the June 1 submission to the Congress.

Regulation 86.3(c) requires each institution to meditate on its past sins, write them down, and refrain from committing them in the future. The whole law and the whole set of regulations requires the latter, of course, but the law is totally silent on requiring a formal process of self-contemplation.

House Concurrent Resolution 330 finds that regulation to fail because it requires something the law does not require. The regulation writer in this case, perceiving the failure of the good-hearted but inept Congress, drew upon his experience and assumed authority to make good our inadequacies.

Regulation 86.3(d) requires the preservation, to be made available to the Director, of the record of this self-evaluation. Again, the regulation writer has decided here to add to the requirements of the law.

Regulation 86.5 requires every recipient institution in America to appoint an employee to work on compliance, and to establish an internal grievance procedure to settle sex discrimination complaints.

In all three of these cases, the regulation writer has come up with a pretty good idea. Perhaps the Congress ought to have at least strongly recommended internal grievance procedures. I consider internal grievance procedures to be far better ways to assure individuals of their right to equal treatment under the law than those "affirmative action" procedures that so often, in plain unvarnished fact, require that one person be discriminated against on the basis of race or sex so that some other person can be compensated for earlier discrimination against another on the basis of race or sex.

But, Mr. Chairman, the Congress did not mandate internal grievance procedures. It did not mandate self-evaluation. It did not mandate preservation and production of the records of such self-evaluation. And until and unless the Congress mandates such behavior under the law, no bureaucrat, however exalted, can constitutionally require private persons or institutions in this country to obey his will under the color of requiring obedience to the law.

I know, Mr. Chairman, that it has been argued that these provisions are necessary for the implementation of title IX, and that they are generally similar to what is required under various Executive orders.

But I think a little history of title IX could usefully be described at this point to shed some light on whether or not these regulations are required or even whether there is useful precedent for them.

When title IX was first proposed in this committee by our former colleague, the gentlewoman from Oregon, Mrs. Green, she suggested that we simply add the word "sex" to title VI. I think there was a substantial majority of us in the committee in agreement that this was a worthy and desirable objective.

But when it was raised in committee, it was I who pointed out the immediate parliamentary impact of such an amendment. "If we go to the floor with an amendment to title VI," I said, "it will open all of title VI to further amendment—and most of those amendments will be very hostile to title VI as well as to the concept we are seeking to extend in the proposed title IX." So, to protect the substance of title VI from hostile amendment, the committee instead wrote a statute embodying the words of title VI, but substituting the word "sex" for the word "race."

In the course of the process, certain exceptions were made, largely at the insistance of certain prestigious private colleges and universities, but otherwise, the language and method of title IX is the language and method of title VI.

Mr. Chairman, I point out that the regulations issued by HEW for the implementation of title VI of the Civil Rights Act of 1964 do not and never have provided for self-evaluation. They do not require an internal grievance procedure. Perhaps, here, too, title VI ought to be changed and the regulations changed with it. But it has not been done, and it is, in my opinion, a further expression of the boundless and growing effrontery of the executive branch that they are able to find in 1975 authority to require behavior that the same language did not give them authority for in 1964.

The fourth regulation disapproved by the concurrent resolution, Mr. Chairman, dealt with the procedure for applying for the religious exemption which the Congress wrote into the law. Regulation 86.12(a) merely repeats the language of the law, and was not subject to the resolution of disapproval.

But regulation 86.12(b), in the opinion of the subcommittee, prescribed a procedure for applying for that exemption which seemed to some of us to put some GS–18 in the Office of Civil Rights in the role of a Government theologian, deciding whether or not a regulation was or was not, as humbly claimed by an applicant institution, in contravention of the religious tenets of that institution. The regulation sought, Mr. Chairman, not very subtly, to shift the burden of proof from the Government to the institution.

Secretary Weinberger, to be sure, sent us a letter assuring us that he certainly did not intend to have any of his underlings actually do anything about these applications. And that letter left me just as bewildered as ever as to why such an application was considered necessary.

I have elsewhere used a metaphorical example in another legislative field, Mr. Chairman, and I would share that metaphor with you today because I think it is applicable.

The laws of the land now impose a 55 miles per hour speed limit upon drivers. This is the law. There is no ambiguity about it. It is enforceable like other laws are enforceable. If a driver is found exceeding 55 miles per hour, he can be stopped, ticketed, and otherwise dealt with by the normal processes of the traffic laws.

The speed limit is a matter of grave national concern. It is directed both at the crucial task of saving petroleum resources, and at the equally vital task of saving lives. These are not small matters.

But let us suppose the Department of Health, Education, and Welfare's regulation writers had been turned loose upon the 55 miles an hour law, and told to write regulations for its enforcement. Along about the third or fourth page of the regulations, the creative imagination of the regulation writers could begin to ferment.

Under the heading of self-evaluation, for example, they could require each driver to maintain a log of his driving. Every time he took out the car, the odometer readings would have to be logged, together with the time he started and the time he ended a particular segment of his trip.

If a driver were suspected of exceeding the speed limit, the traffic law enforcement people could ask him to produce his log, which would,

by a simple arithmetical process, be utilized to prove that he had, or had not broken the speed limit.

Finally, as a form of internal grievance procedure, each automobile could be outfitted with a warning system. Whenever the driver exceeds the national speed limit, the regulation could provide for a mandatory alarm system.

It is no more absurd to predicate that kind of proliferation of regulations on the basis of a simple statutory prohibition against exceeding the speed limit than it is to base the offending parts of the title IX regulations on the simple statutory language of title IX.

Some of those traffic safety regulations might be legitimate and praiseworthy, Mr. Chairman. I think a subdued alarm system, for example, might be a very good idea. But until and unless the law requires it, I trust no bureaucrat in the traffic safety business will start thinking he has the authority to do so.

So it is with the title IX regulations.

Mr. Chairman, let me get back to the key issues involved, because they can easily get lost among accusations of improper motives to which the supporters of this resolution have been loudly subjected in the past few days.

There are, Mr. Chairman, two charges which have been directed at the resolution of disapproval which I believe must be exposed here and now, not as honest differences of opinion, but as downright misstatements.

The resolution of disapproval, Mr. Chairman, has no relevance whatever to the so-called athletic issue. We looked at the athletic regulation along with the rest of the set of regulations, and whatever our individual conclusions about its wisdom or its importance, there was no finding of inconsistency with regard to that regulation.

I have reservations about the wisdom of those regulations, and I have introduced legislation to clarify the law in this respect. But that is a very different thing than disapproving the regulations.

Whatever the fate of the concurrent resolution, the athletic regulation will go into effect a week from today along with the rest of the regulations which are not disapproved by the resolution before us.

There we hit on one other continuing misrepresentation of the process involved in section 431. As the author of section 431, I think I can speak with some degree of authority as to its impact, and I can state unequivocally here and now that it is not true that disapproving one regulation will disapprove the whole group.

If the pending resolution were enacted by the Congress, every one of the regulations except the four singled out for disapproval would go into effect next Monday, unless HEW, of its own volition, were to completely reverse its own stated position and, in spite of not being directed to do so by the Congress, were to withdraw those regulations which were not found inconsistent.

Even I, who have not always expressed perfect faith in HEW's good intentions, would not anticipate that kind of administrative blackmail on the Department's part.

Let me reiterate that once more. If the resolution before you were enacted, the bulk of the title IX regulations would go into effect right away, including the enforcement mechanism which would be as complete as the present enforcement mechanism under title VI, on which title IX is wholly based.

The substantive matters involved in the resolution of disapproval were not of monumental proportions. Honest people can easily disagree over whether or not self-evaluation, record maintenance, and the imposition of a grievance procedure are good ideas, and do or do not serve the purposes of title IX. Honest and concerned defenders of religious freedom can differ over the wisdom of regulation 86.12(b).

But there are some issues on which I think we do have to draw the line. There are some issues which can have an impact on the future of our constitutional system. One of these issues is the supremacy of law—the supremacy of law over the transient opinions of particular legislators, particular Cabinet members, particular Presidents, or particular pressure groups.

Honest people may differ about the merits of title IX itself, though I know of no one in this room who opposed it. I was certainly one of the enthusiastic supporters of the law when it was before us 3 years ago, and I would vote for it again today, if it were coming before us to be legislated.

But it does not follow from our unanimity about title IX that we must always be unanimously supportive of everything that is done in its name.

One of the most disturbing arguments I have heard is the one that suggests if the regulations are good—if they achieve a desired purpose, then we should not even question whether or not they are within the law.

This is, from my point of view, indistinguishable from the argument on the other side that if a regulation achieves a purpose we do not support, we should quickly and casually make a finding of inconsistency with the law whether or not there is any evidence on which to base such a finding.

Both such arguments have been advanced with regard to certain of the title IX regulations. The former argument was advanced as an objection to the whole process of review, and the latter was advanced by stern foes of one provision of both the law and the regulations.

Mr. Chairman, this is a constitutional and procedural issue, not a substantive one. Whatever we may think about the merits of the regulations, it is their authority in the legislation to which we must address ourselves, and that alone must be the basis for whatever action we take.

If we don't like a given set of legitimate regulations, we are free to proceed with legislation to change the law. And if we think a given regulation is beyond substantive criticism, but it has no basis in the law, we have not only the right but the duty to reject it.

Mr. Chairman, it is always easy to oppose the plans of those who seek to do us harm. It is the plans of those who want to do us good that we have to look out for.

As Mr. Justice Brandeis observed:

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent * * * men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers * * * the greatest dangers to liberty lurk in insidious encroachment of men of zeal, well meaning but without understanding.

The ancient Roman jurists had a different maxim, Mr. Chairman, on which they rested a good deal of their legal system—a legal system which prevails to this day, but a legal system which provides a basis for authoritarian governments in much of the world.

That maxim was, "What pleases the prince has the force of law."

Mr. Chairman, what pleases the prince does not have the force of law—not as long as this Congress sits and a free people are able to tell our princes that they are wrong.

Mr. HAWKINS. Thank you, Mr. O'Hara. As usual you have done a very excellent, competent job. We certainly wish to express appreciation for the views that you have expressed before this subcommittee, and also the most distinguished contribution which you have made in this particular field, regardless of the difference of views that some of us may have.

I think that we must certainly salute the manner in which you have worked on this issue; the great deal of time that you have spent on it, and the commitment that you have to your views.

Mr. O'HARA. Thank you, Mr. Chairman.

Mr. HAWKINS. First, with respect to the actual resolution, may I first suggest that on page 2 there seem to be some corrections which need to be made to the resolution. Let us see whether or not you agree.

On page 2 of the resolution, in paragraph 3, beginning at line 3, where you speak specifically of exempting educational institutions, do you not mean religious institutions?

Mr. O'HARA. Yes; that is correct, Mr. Chairman.

Mr. HAWKINS. I think that we should have that corrected.

Then, on line 5, where you say: "* * * and would not require an institution to be forced * * *," Do you not mean "would require an institution to be forced." Would that make the meaning in line with your intent?

Mr. O'HARA. Mr. Chairman, let me review that syntax there. That particular provision was put in the original resolution by amendment in the subcommittee, and I want to review it.

But I believe that it is correct as it reads, since the language was intended to emphasize that the "law" would not require an institution to petition the Department for the exemption the statute gives it. I would defer to the sponsors, but I think in the case you mention, the language of the resolution accurately reflects what the sponsors intended.

Mr. HAWKINS. It would seem to me that this was the intent.

Mr. O'HARA. It is possible to argue whether it refers to 901(a)(3) or 86.12(b). Of course, it would be "would" in the one case, and "would not" in the other.

I think that it needs to be clarified. The fact that it reads either way is a defect in the paragraph.

Mr. HAWKINS. Mr. O'Hara, I have had some time to review this issue over the weekend. In going back to the original authorization of title IX, section 902 says, and I will read it only in part:

> Each Federal department or agency which is in power to extend financial assistance to any educational program or activity by way of grant-loan or contract, other than a contract of insurance and guarantee, is authorized and directed to effectuate the provisions of section 901 with respect to such programs or activities by issuing rules, regulations, or orders.

Now, this seems to me to be a rather broad, general authorization that is given to an agency which administers the act, title IX in this instance. So, it would seem to me that the issue revolves around whether or not in issuing those rules or guidelines that we not misconstrue the word "inconsistent" with "unauthorized."

There was a distinction that would seem to be made in that, if it is authorized. The burden of proof is certainly, then, on one who insists that it is inconsistent.

In that connection, may I simply ask you, do you believe that inconsistent and unauthorized mean the same thing?

Mr. O'HARA. I don't know whether they mean the same thing, but in any event, Mr. Chairman, let me put the constitutional argument as I see it.

In the first place, as we both thoroughly understand the legislative power is vested solely in the Congress. If the Congress were, for instance, to write a statute that simply stated the objectives it wanted to achieve, and then charged the executive branch with the responsibility for deciding how to achieve the objectives, I am pretty sure that the courts would rule that to be an unconstitutional delegation of legislative authority by the Congress to the executive branch, and the statute would be held null and void.

So, there is a line beyond which we cannot go, no matter how much we want it, in terms of delegating legislative authority to the executive branch.

If you will look back in the legislative history, Mr. Chairman, for instance, about the meaning of that phase "* * * is authorized and directed to effectuate the provisions of Section 601 with respect to such programs or activities by issuing rules, regulations or orders of general applicability, which shall be consistent with the achievement of the objectives of the statute, authorizing the financial assistance in connection with which the action is taken."

Now, this is the "consistent with" that they are talking about, and this is taken directly from title VI. It is word for word a repeat of section 601. If you will look back into the history of title VI, you find out what is meant by that.

What they meant was, for instance, that if there was discrimination in a school lunch program, that you need not necessarily cut off all aid of any kind to the recipient institution, and second, that you ought to handle your cutoff authority in a manner that tries to get food in the mouth of children.

So, I think that that "consistent with" language has to be read in that totality, and let me read it again: "* * * is authorized and directed to effectuate the provisions of section 601 with respect to such programs and activities by issuing rules, regulations or orders of general applicability, which shall be consistent with the achievement of the object of the statute authorizing the financial assistance in connection with which the action was taken." In other words, consistent with the provisions of title I, or consistent with the purposes of the school lunch, or consistent with the purposes of the Federal loan guarantee program, or whatever.

Mr. HAWKINS. Mr. O'Hara, I have had the staff researching all of the court cases involving this issue for the past several days. We have not found one court decision that upholds the standards which you have used in terms of a resolution, for example.

In *Lau* v. *Nichols*, that was the *Chinese* case in San Francisco, as you probably know, the court did say that the critical question is whether the regulations and guidelines, promulgated by HEW, go beyond the authority of section 601, using the analogous situation that you developed.

In the case of *Morning* v. *Family Publications Service*, we have had the validity of the regulation, promulgated under a general authorization provision, such as section 602 of title IV, sustained so long as it is reasonably related to the purposes of the enabling legislation.

You have not, in your defense of this resolution, used the standard of reasonableness; that is, whether or not, self-evaluation for example, is a reasonable extension of enforcement.

Mr. O'HARA. I would like to respond to that, if I may, Mr. Chairman. I don't recall the factual situation of the *Lau* case, but I notice in your reading from the case, that the court, for authority for its decision, cited the case of *Morning* v. *Family Publications*.

I am familiar with *Morning* v. *Family Publications*. It is the one from which that language used in that case was derived, and it is the one which was cited by the counsel for the Department of Health, Education, and Welfare to justify the regulations.

I think that it is important to examine exactly what that case decided and the factual situation. Congress had passed the Truth in Lending Act in which we required that there be a statement made in connection with each extension of credit or each loan, of the exact amount of the interest charges and the dollar amount that the person involved would be paying over and above the regular amount, if they bought on an installment contract or what-have-you.

We passed that law, and we gave authority to issue regulations. During the discussions, the debate in the Congress, and the discussions in the committee, an objection was raised that this law would not get at the situation in which the credit cost was loaded into the price of the article.

The Congress insisted that the way the law was written, with the authority to issue regulations, would permit the Federal Reserve Board, by regulation, to cover all cases, however sophisticated, in which credit was actually extended to require the reporting of the truthful charges.

So, that was the background of the matter. It was suggested by some that if you did not give the Federal Reserve Board this authority, the lenders would right away find where the line was, and they would immediately draw their contracts just outside that line, so as to fall out of the purview of the statute.

There is an important distinction here, Mr. Chairman. That regulation was directed at requiring compliance with the law in a particular new, or sophisticated form of credit extension that was novel, as it were, a novel form of credit extension.

So, the Federal Reserve had the authority to cover these new, sophisticated, novel forms of credit extension, and make them subject to the law, which was our intention.

Now, I think it would have been a different case, and I think a different decision if Federal Reserve had, instead, provided for a new remedy. All we provided for in the statute was a truthful reporting of the cost of credit. If they had gone ahead and required six or seven other things, and required the extender of credit to institute a system of self-evaluation to determine how well he was complying with the credit reporting law, and required the lender to establish an internal grievance procedure where each borrower, who felt he had been done wrong, had a chance to come in and have his case determined by an

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internal procedure within the lender's own establishment, that, I think, would have been a different case.

Now, under the regulations of title IX, it is perfectly clear to me that if some recipient educational institutions were to invent some new, sophisticated way of discriminating on the basis of sex, that the regulations could be changed to cover that.

For instance, if the university wanted to say that the head of the Department of Romance Languages was an independent contractor, and what he did about his employees, the professors and instructors, was his business and not covered by the law, or, for that matter, if, as was claimed during our hearings, the athletic department was declared independent of the school, and, therefore, claiming that they were not subject to the law, the regulation could make it clear that they were subject to the law.

That would be analogous to Mofning versus Family publications.

Mr. HAWKINS. We have differences as to the facts. I will not argue with you on that particular point. The only reason for quoting it was to show that under title IV, the courts had sustained activities and regulations that were not specifically stated in an authorizing way in title IV, to which you had referred to earlier as being analogous.

Mr. O'HARA. It is a clear principle of law, Mr. Chairman, that a decision by the Supreme Court covers only the factual situation to which it is applied, and other factual situations which are on all fours with the one you cited.

Mr. HAWKINS. We have been unable to locate one factual situation or one decision based on any factual situation which supports the contention of the standards that you have used in determining that title IX regulations, somehow, are inconsistent. We are trying to get down to that determination.

Mr. O'HARA. I think that this has been a growing trend. I think that the executive branch feels more license than they used to have, or used to feel. A good example of it is the difference between the title VI regulations, which are based upon exactly the same language, and the title IX regulations.

In the interim, the extent to which their boldness has grown is demonstrated by the additional enforcement procedures they put in the title IX regulations.

Mr. HAWKINS. In the *Gardner* v. *Alabama* case, and that was decided quite some time ago, in 1967, we had exactly the same situation in which the State of Alabama was required by the Department of Health, Education, and Welfare to self-evaluate itself with respect to title VI.

The State was asked to identify the areas where racial discrimination was being practiced in its programs, and to commit itself to assuming the responsibility of making a good faith, conscientious effort to eliminate such racial discrimination.

Now, that is certainly analogous to the very regulation which you say is inconsistent. It seems to me that it would be required of you to show specifically whether or not self-evaluation as an activity, or the keeping of records on which some finding can be made by an agency, and without which it cannot make a finding of discrimination, are unreasonable.

Are they reasonable methods of enforcement? Are you saying that we should deprive an agency of its encouragement to those who may be discriminating. I am not so sure that I would want to go too far in wanting to do so.

Are you saying that we should deprive the agency of the efforts to try to get enforcement by a reasonable self-evaluation, a reasonable looking inward by those who may be discriminating by their own practices? What is unreasonable about that?

I personally believe that it goes too far in allowing individual flexibility, or latitude. What is unreasonable about requiring the agency to keep records which may show that recipient is discriminating?

Mr. O'HARA. There is nothing unreasonable about doing that, Mr. Chairman, if the Congress had chosen to do it. If you had offered such an amendment when title IX was before the committee, I might have voted for it.

The plain fact of the matter is that we did not require that. We imposed a very simple duty on recipient institutions. We said, very simply, that they must refrain from discriminating. We did not require them to do anything else in addition. We did not require them to do self-evaluation. We did not require them to establish grievance procedures.

I think that these things are reasonable things, and things that we might have required, had somebody suggested it, but it was not even suggested at the time, and we didn't do it.

Here, in this regulation, we say, with respect to every single recipient institution, without any determination of whether or not they have complied with the law, whether or not they have ever been in violation of the law, every single one of them must start keeping a self-evaluation system, and must start the internal grievance procedure, and so forth.

Mr. HAWKINS. Let us take the example of the Equal Employment Opportunity Commission, in which the law does not say anything at all about utilization studies to be made by recipients. Yet, we know that such studies must be made in the implementation of the law: that each agency receiving Federal assistance must make a study of its employment pattern, to see whether or not minorities are being utilized. The law itself does not say anything about such studies.

Take the case of the Federal Communications Commission, the law does not say that it is necessary for a license applicant to go out into the community and to locate where problems may exist before a license is granted to that applicant. Yet, it is required.

These are just two simple examples which come to mind of things that are required by regulations that certainly were not specifically authorized, but have been determined to be reasonable in the implementation of the law.

If the law spelled out everything that was sought to be regulated by administrative regulations, then we would have to put all the regulations into the law, and there would be no reason to publish regulations, as I see it.

Mr. O'HARA. The employment cases arise under Executive Order 11246, having to do with employment practices of Federal contractors. Under those regulations Federal contractors are required to do certain things, under the authority of the Executive order.

Mr. Chairman, we need not look very far afield for analogies. When in this committee 3 years ago, Mrs. Green presented an amendment, she said that what she wanted was title VI to cover sex.

She had in mind title VI as it then operated, and she offered an amendment that just simply inserted the word "sex" following the word "race" each time it appeared in title VI. So it was clear what we all had in mind.

We all had in mind the same thing, that title VI, as it has been developed in the years subsequent to its enactment in 1964, would be applied to sex discrimination. We all knew that there was no such requirement under title VI as those that are contained in the resolution of disapproval. There were not any such requirements in title VI.

The only reason that we did not simply amend title VI was to avoid a situation where we would hit the floor with amendments to any aspect of title VI. So, we took the exact words. It was a cut and paste job.

At my suggestion, we took the first section of 601 of title VI and we rewrote it to put the word "sex" in, and then for 602, and then subsequently. We just took it right out of the law, and pasted it on to a sheet and Xeroxed it.

Now, you tell me a clearer case of a Congress intending to do exactly the same thing with one law as they did with another.

At that time no suggestion was made that there would be additional enforcement procedures available, therefore, under title IX that were not available under title VI, yet this is exactly what the executive branch has done.

They found somewhere in there authority to impose not only the enforcement procedures of title VI, but additional ones of their own invention. Now, if they want to do that, Mr. Chairman, let them run for Congress.

Mr. HAWKINS. Are you saying that what they have done is unreasonable in enforcement procedures? That is a point which the courts have yet to use as a standard rather than the differences with the executive branch. I certainly join you in that great difference. I don't think that any two persons could be more in agreement on that particular thinking.

I agree, I think, with at least 95 percent of what your statement says, and I am certainly not a great defender of HEW. However, it seems to me that we are addressing ourselves to whether or not HEW has acted in a reasonable manner. It would seem to me to be the standard used in the cases.

Regulation 86.5 which relates to transfer of property states:

If the recipient sells or otherwise transfers property financed in whole or in part with Federal funds, to a transferee which operates any education program or activity, and the Federal share of the fair market value of the properties, upon such sale or transfer of the property, will be accounted for to the Federal Government, both the transferer and the transferee shall be deemed to be recipients.

There is nothing which is authorized for that language, for example, Yet, apparently, you did not find that to be inconsistent. It reasonably follows that it is a reasonable provision.

I see nothing that authorizes it. There are many parts of the regulation that I think would have made a much better case than the ones which you have actually selected.

Mr. O'HARA. Mr. Chairman. I am very glad that you brought that up. I should have thought of bringing that up.

Mr. HAWKINS. But you did not.

Mr. O'HARA. That is an exact analogy to the *Morning* v. *Family Publications* case. The recipient institution cannot evade the requirements of title IV by selling or otherwise transferring property financed, in whole or in part, et cetera, for instance, to a private academy, or an institution run, perhaps, by a religious order, or something of that nature, and thereby evade the coverage of the statute of the activities that you are carrying on, which are ones that the Congress intended to cover.

This is analogous to *Morning* v. *Family Publications*, which is a publications outfit saying that they were not exerting any finance charge, but said that they were just charging those people what they would have paid anyway, but, in fact, they were frontloading on the price.

The authority of the regulation is unlike *Morning* v. *Family Publications*. They have not only done this sort of thing, which I think is OK, but in addition to refraining from discriminating, which is what the law requires, you must do these other things besides.

They impose new duties on the recipient institutions which the law did not impose.

Mr. HAWKINS. The Chair at this point has a definition of "inconsistent," as defined by Black's Law Dictionary as being mutually repugnant, or contradictory, contrary one to the other so that one cannot stand: establishment of the one implies the abrogation or the abandonment of the other as in speaking of inconsistent defenses. Certain citations are made.

Without objection, I would like to have that definition entered into the record as being a fairly reasonable definition of "inconsistent."

BLACK'S LAW DICTIONARY

"Inconsistent—Mutually repugnant or contradictory, contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other; as in speaking of 'inconsistent defenses' or the repeal by a statute of 'all laws inconsistent herewith.'" *Borough of Oakland* v. *Board of Conservation and Development*, 98 N.J. L. 99, 118 A. 787, 788. *Berry* v. *City of Fort Worth, Tex.*, Civ. App., 110 S.W.2d 95, 103.

Mr. HAWKINS. Thank you, Mr. O'Hara.

Mr. O'HARA. Thank you. Mr. Chairman, I have very much enjoyed our conversation.

Mr. HAWKINS. Mr. Buchanan.

Mr. BUCHANAN. Mr. Chairman, I would like to join with the chairman in commending our colleague, the chairman of the Postsecondary Education Subcommittee, for the excellence of his statement.

He so eloquently and powerfully defended his point of view that to tell you the truth I was almost persuaded.

Mr. O'HARA. I may talk a little more, then.

Mr. BUCHANAN. I was almost convinced, but my leader in this subcommittee has raised some very interesting questions, I think, and I have a couple of others.

I think that you have clearly made some distinctions here. In the first place, we have the basic question of whether sections 431(d) and

(e) are something that would stand up in the courts. I rather wish that we could have a test of it.

There is some real question about the validity because it appears to be an attempt to amend or clarify the constitutional prerogatives of the President without constitutional amendment, and I have a question as to whether that could be done.

In a similar vein, I am not certain that we can legislate in this way, through concurrent resolution. You have done it carefully believing that it would stand on constitutional grounds, but don't you agree that the courts would have to clarify that?

Mr. O'HARA. I am sure that Secretary Weinberger was speaking truly when he said that if we tried to disapprove any of the regs, he would try to enforce them anyway. Then, some recipient institution against whom a disapproved reg had been enforced, would have to take the matter to court.

That would get you a judicial determination of the validity of the section 431 procedure. I just want to say to my friend from Alabama that the only way we can get a court test is by adopting the concurrent resolution of disapproval.

Mr. BUCHANAN. I understand that, and I say to my friend that we are in the right place at the wrong time, however.

Mr. O'HARA. I wish that it would have been with a less emotional subject that we had had our first test of section 431(d) and (e), because there are some people who are not prepared to listen when you say: "Well, look, I am not complaining about the objectives to be reached by the regulations. I am complaining about the way in which the regulation writer has conducted his responsibilities."

There are some who feel so very, very strongly about the substantive question that they cannot really look at the procedural question, and that has caused us most of the difficulty that we have had on these regulations.

Mr. BUCHANAN. I rather feel strongly that this is an area where we are dealing with a majority of the population, 40 percent of the work force at the present time, and an area where there appears to be widespread discrimination built into the institutions and traditions and customs of our society.

So, in this kind of situation, you would have virtually all institutions needing to do a self-evaluation, and perhaps establish grievance procedures to be sure you are covering everyone.

I have always believed that racial discrimination was far more widespread than any of us seemed to think when we started out zeroing in on the Southeast, where, of course, we had a problem.

I always felt that this was a more widespread problem than we always indicated it to be by legislative and executive decision in this area. Would you agree that this is an area where we have a widespread problem, where many, or most, institutions might need some kind of self-evaluation?

Mr. O'HARA. I think that perhaps they do, although I really think that it sort of assumes something, where we say that every institution in America is suspect, because we require all of them to do a self-evaluation program.

I am not sure that I want to assume that they have all been doing wrong. I know that a lot of them have. I know that sex discrimination

has been widespread, and maybe the Congress ought to consider requiring institutions to conduct self-evaluation, but it should be the Congress and not the regulation writer that does it.

Mr. BUCHANAN. Since we are dealing with an unclear area, at least one where there is no clear court decision, to my knowledge, as to whether or not we can proceed with concurrent resolution of disapproval. I wonder if we do not have the alternative, as the gentleman said, when we take up legislation to amend title IX, to consider the inclusion of self-evaluation in that legislation and also the grievance procedures, perhaps. Would that option not be before us?

Mr. O'HARA. Yes, it would. I have been considering that route. In addition, I have been considering the question of whether or not a Member of Congress might have standing to sue in these particular circumstances. That is an area in which there has been some recent development in the law.

So I am looking into other options, because very frankly, as the gentleman from Alabama knows, I think that there is practically a zero chance of getting this resolution adopted in time to disapprove those regulations, even if the full committee were to meet tomorrow and report the resolution. Any member is entitled to 3 days in which to compose and file additional views, I am sure that someone would claim the right, and that action would, in itself, take us beyond the time in which we must act.

Mr. BUCHANAN. Would my distinguished colleague agree that the most certain way for the Congress to exercise its constitutional prerogative, and for the people's branch of Government to recapture its legislative powers, would be for us to clearly, specifically legislate in this or any other field.

Mr. O'HARA. Yes. You are exactly right about that. I think that the Congress was remiss in just sort of slapdashing this thing into the law without really considering some of the complicated ramifications of it.

In particular, I think that it is so in the athletic area, where we had a responsibility to spell out our intentions more clearly than we did.

But in this particular area, I don't think that one could have anticipated, based on the title VI regulations—and we were told that what we were trying to do was to enact title VI for sex discrimination—that the regulations that we now have before us would have been presented with the ones that were disapproved.

So I think that in that regard, maybe, we are not at fault. The trouble with going the statutory route to change it is that it accepts Secretary Weinberger's thesis that when they decide that a regulation is OK, that it is final as far as the Congress is concerned, unless the Congress subsequently amends the law to say what they meant to say in the first place.

I don't want to accept that thesis, and that is why I have been hesitant about going the statutory route.

Mr. BUCHANAN. As I said, we are in the right place at the wrong time. I would like to see this tested in the courts. I doubt if it can be done, but if it can, it would be useful and innovative legislation, too.

I would strongly support the idea of amending the legislation before the gentleman's subcommittee to include the self evaluation and maybe the grievance procedures, because I think that these things are needed.

If we need to spell it out in the law for them to have legal basis, then I would hope that we would do so when we take that up.

Mr. O'HARA. If we go into enforcement procedures, I think that we ought to review the whole question of enforcement procedures.

As the gentleman from Alabama knows, I have had serious reservations about some of these systems that involve the use of numerical goals and timetables because of the way they inevitably lead to quota systems.

As I said in my statement, I really think that internal grievance procedures in deciding complaints of sex discrimination on a case-by-case basis, is a lot better method of enforcing title IX than are some of the affirmative action procedures which I think in the end sometimes lead to injustices themselves.

However, I would want to review the whole thing, if we are going to review that. That is all I want to say.

Mr. BUCHANAN. Perhaps it would be a good idea down the road for our subcommittee.

I thank the gentleman. I would say again, Mr. Chairman, that our colleague, Mr. O'Hara, is dealing with a most important question of our time, and that is: What has happened to the power of the people's branch of the Government? I do commend his efforts to do something about it.

Mr. O'HARA. I thank the gentleman from Alabama. I have been trying to get across the fact that that is my problem, and not the internal grievance procedures, which I generally think is a good idea.

Mr. HAWKINS. One final question, Mr. O'Hara.

With respect to the procedural regulations which have been submitted concurrently with the title IX regulations, is it your understanding that these proposed procedural regulations that are now being circulated for comment by HEW, will have to be submitted to the Congress for their approval under section 431(d)?

Mr. O'HARA. Yes: it is my understanding that they would have to be submitted for approval under 431(d). Secretary Weinberger has taken the position, mistakenly in my view, that simply sending the regulations to the Congress at the same time that the notice of proposed rulemaking is printed in the Federal Register, and giving the Congress the same opportunity to respond as the general public has, except for 15 days longer, meets the requirements of 431(d).

That was not our intention when we wrote 431(d), and it is not my understanding of the way the law works. The way that I understand it, and I would certainly insist on this interpretation, the executive branch places in the Federal Register a notice of rulemaking under the requirements of the Administrative Procedures Act, and at that time the public must have at least 30 days.

The Secretary will review the comments made, and conduct hearings, possibly. Then they decide on their regulations, and they publish their regulations. It is at that point that 431(d) comes into effect, and it is 45 days from then that we must take action. This is my understanding, Mr. Chairman.

Mr. HAWKINS. The Chair has regretfully overlooked our colleague, Mr. Miller, who is seated so far away. Perhaps Mr. Miller would like to ask a question also.

Mr. MILLER. I have no questions, Mr. Chairman. I want to thank you for this opportunity that you have offered to the full committee to attend this hearing.

I want to commend Mr. O'Hara on his defense of the separation of powers. I do, however, have a couple of observations.

I think that the chairman was quite right when he read Black's law dictionary for the term "inconsistent." We read into this question of consistency and inconsistency the term "reasonableness."

I think that what we have to do is compare title VI with title IX, and see whether or not we have learned something in 10 years. Are these the proper tools to carry out that intent?

In terms of your analogy to the 55 miles per-hour speed limit, I would suggest that perhaps, maybe, these regulations are more in line with the regulations requiring flight recorders on an airplane so that those who are present at the crash know what happened prior to that crash. Then, the agency which has to enforce the law, knows what took place. Those individuals who want to sue for losses and damages, and grievances, know exactly what happened.

I think that the recordkeeping, and possibly the self-evaluation process, all these tools, as the chairman pointed out, as I understand, are reasonable. That is the test on which we have to base the argument on consistency or inconsistency, without an absolute prohibition in the law against such case.

I do share your concern with the license that we have seen just recently in the service contract, in this committee and other subcommittees, where I don't think that they ever read the law when they wrote the regulations. They are in absolute opposition to what the letter of the law had stated was the purpose.

So, I think that it is very important that your case be made. I think that it is a question of whether or not we accept——

I want to thank you, Mr. Chairman, for making the invitation.

Mr. HAWKINS. Thank you. Mr. Miller, for your contribution.

Thank you, again, Mr. O'Hara.

Mr. O'HARA. Thank you.

Mr. HAWKINS. It is our intent to act on this matter today, and possibly file some sort of a report before the end of the day.

Mr. O'HARA. I very much appreciate that, Mr. Chairman, and I will ask for a full committee meeting tomorrow on the subject, if I can, but I am not encouraged about the timetable.

Mr. HAWKINS. The next witnesses will consist of representatives from the Department of Health, Education, and Welfare: Ms. Gwendolyn Gregory, Director of the Office of Policy Communications of the Office for Civil Rights; Mr. John B. Rhinelander, General Counsel of the Department; and Mr. Richard Hastings, Acting Deputy Assistant Secretary for Legislation of the Department.

We are very pleased to have the witnesses before us, and we look forward to their testimony.

Ms. Gregory, we do have your prepared statement, which will be entered in the record in its entirety at this point. You may either read from it, or proceed to give us the highlights, or deal with it as you so desire.

[Prepared statement of Gwendolyn Gregory follows:]

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PREPARED STATEMENT OF GWENDOLYN GREGORY, DIRECTOR, OFFICE OF POLICY COMMUNICATIONS, OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Mr. Chairman, members of the subcommittee, we are pleased to be with you today to testify on behalf of the Secretary of Health, Education, and Welfare on House Concurrent Resolution 330. I am Gwendolyn Gregory, Director of the Office of Policy Communications of the Office for Civil Rights of HEW, and I am accompanied by John B. Rhinelander, General Counsel of the Department; and Richard A. Hastings, Acting Deputy Assistant Secretary for Legislation (Education).

House Concurrent Resolution 330 provides that paragraphs 86.3 (c) and (d), section 86.8, and paragraph 86.12(b) of HEW's regulation implementing title IX of the Education Amendments of 1972, are "inconsistent with the Act, since there is no authority contained in the act for such * * * requirement[s]." With this conclusion we disagree and, consequently, urge that this subcommittee not report the resolution favorably to the full committee.

As a preliminary matter, we would like to bring to the attention of the subcommittee the fact that House Concurrent Resolution 330 is directed at disapproval of all of section 86.8 even though the intent appears to be only to strike paragraph 86.8(b) dealing with grievance procedures. The concurrent resolution reads as follows:

> (2) Section 86.8, requiring each recipient to adopt and publish grievance procedures providing for resolution of student and employee complaints is inconsistent with the Act. . . .

Thus, it appears that the concern is with grievance procedures and, since only subsection (b) of section 86.8 deals with grievance procedures, I will limit my comments to paragraphs 86.3 (c) and (d), paragraph 86.8(b), and paragraph 86.12(b).

Section 901 of title IX provides, in pertinent part, that:

> No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

The authority of HEW to issue regulations to effectuate section 901 is explicitly stated in the statute. Section 902 thereof provides, in pertinent part, that.

> Each Federal department . . . empowered to extend Federal financial assistance to any education program or activity . . . is *authorized* and *directed* to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability. . . . [Emphasis supplied.]

Not only is HEW "authorized" to issue regulations implementing the nondiscrimination provisions of section 901, but it is "directed" to do so. The issue is whether paragraphs 86.3 (c) and (d) "effectuate the provisions of section 901 . . ." as required by section 902, or whether they are "inconsistent" with section 901 as contended in the resolution before this committee.

Clearly, paragraph 86.3(c)(i) effectuates the provisions of § 901(a) of the statute. Under that paragraph of the regulation recipients are required, on a one time basis, to read the regulation and then determine whether they are in compliance. Paragraph 86.3(c)(ii) requires recipients to modify their policies and procedures if, after reading the regulation, they determine that they are not in compliance. This procedure is consistent with title IX, since it is designed to effectuate the statute through application of regulatory provisions articulating the nondiscrimination requirements of the statue which were authorized and directed by the Congress to be issued. Similarly, the requirements of § 86.3(d) "effectuate" the provisions of § 901(a) since they require recipients to maintain for a reasonable period of time—three years—a description of the steps, *if any*, they have deemed necessary to comply with the title IX regulation. A recipient may be required to maintain nothing if it determines that no modifications to its policies or practices are necessary after reading the regulation.

With respect to § 86.8(b), requiring the establishment of a grievance procedure, this provision, like those just discussed, is not "inconsistent" with the Act since it too is designed to "effectuate" the nondiscrimination requirements of § 901(a). Section 901(a) prohibits discrimination. Section 86.8(b) of the HEW regulation implementing § 901(a) merely establishes what we believe is an efficient mechanism to eliminate discrimination by giving institutions an opportunity to resolve allegations of discrimination in-house before the Federal government becomes involved.

With regard to both paragraphs 86.3 (c) and (d) and paragraph 86.8(b), section 902 of title IX requires that before taking formal enforcement action against a recipient, the Department shall determine that "compliance cannot be secured by voluntary means." Both the self-evaluation and grievance procedure requirements have a direct relationship to the Department's obligation under this provision. Certainly, the best manner in which the Department can secure such "voluntary compliance" is through a requirement that recipients evaluate their own policies and practices and take voluntary action to correct deficiencies. Further, where individuals bring issues of possible non-compliance to the attention of the recipient, these requirements will provide a method of voluntarily resolving such issues.

We believe that the HEW title IX regulation is authorized and is consistent with the plain meaning of the statute. However, we would also note that title IX must be viewed as remedial legislation, as it is designed to correct and alleviate discrimination on the basis of sex in education programs or activities receiving Federal financial assistance. Under standard rules of statutory construction, remedial legislation should be broadly interpreted in order to effectuate its remedial purpose. This conclusion is supported by Sutherland's well-known treatise on statutory construction which states as follows:

> There has now come to be widespread agreement . . . *that civil rights acts are remedial and should be liberally construed in order that their beneficient objectives may be realized to the fullest extent possible.* To this end, courts favor broad and inclusive application of statutory language by which the coverage of legislation to protect and implement civil rights is defined. [Emphasis added; citations deleted.] 3 *Sutherland Statutory Construction*, 4th ed., § 72.05, p. 392 (1974).

In considering whether regulations of the Executive Branch are within the delegation given by Congress, courts have traditionally applied three criteria: (1) whether the regulations are authorized by statutory language; (2) whether they are issued pursuant to proper procedure; and (3) whether they are reasonable. 1 Davis, *Administrative Law Treatise*, 358 (1958). We have already pointed out that the regulation is specifically authorized by the statute. Since no one has challenged the procedure followed in adopting the regulation, we feel it unnecessary to address this point at length, except to point out that we conducted an extensive rulemaking proceeding, making presentations in different cities and receiving over 10,000 public comments. Finally, we firmly believe that the provisions in question are reasonable.

The only thing required by paragraphs 86.3 (c) and (d) is that a recipient, on a one-time only basis, read the regulation and examine its policies and practices in conjunction with the provisions to determine whether or not it is in compliance. In the words of Nellie M. Varner, testifying on behalf of the Nation Association of State Universities and Land-Grant Colleges, the American Council on Education and the Association of American Universities, before the House Subcommittee on Post-Secondary Education

> I believe there is no other way to begin this process [implementation of title IX]. Self-evaluation traditionally has been a means used by colleges and universities to assist with the formulation of sound educational policy. Furthermore, it allows the institution to design and institute new policies and procedures which correct unwitting discrimination. [Typed statement of Nellie M. Varner, p. 3, June 25, 1975.]

The only thing required by paragraph 86.8(b) is that a recipient adopt and publish a grievance procedure providing for prompt and equitable resolution of student and employee complaints and thus, hopefully, avoiding Federal intervention. We think this requirement is reasonable from the point of view of the students and employees, since it provides a visable mechanism by which individual rights under § 901(a) may be enforced.

We think it is reasonable from the recipient's point of view, since it enables the institution to solve its own problems in-house, with minimal Federal involvement, and, in the words of Carolyn I. Polowy, testifying on behalf of the American Association of University Professors, before the House Subcommittee on Post-Secondary Education, is "a concomitant characteristic of responsible institutional self-governance." [Typed statement of Carolyn I. Polowy, p. 3, June 24, 1975.] The only criterion imposed is that the procedures provide for "prompt" and "equitable" resolution of alleged cases of noncompliance. They may be as informal or formal as the recipient chooses, and they may be established at minimum expense. Indeed, paragraph 86.8(b) will probably save recipients money, since if

the grievance procedures are effective, recipients can avoid the expense and time involved in defending complaints filed with HEW or the Federal courts.

RELIGIOUS EXEMPTION

The concurrent resolution cites with disapproval section 86.12(b) of the regulation. At the outset, I should note that the language of the statute itself makes it clear that an institution is not exempt from Title IX merely because it is controlled by a religious organization. The language of the statute provides that the nondiscrimination requirements shall not apply to an educational institution which is controlled by a religious organization "if the application of this subsection would not be consistent with the religious tenets of such organization." Thus, the Department must determine, first, whether the institution is controlled by a religious organization, and second, whether the application of Title IX to the institution would be consistent with the religious tenets of the organization. If the Congress had desired an outright exemption for religious schools such as that provided in the statute for military schools, it would not have included the language in section 901(a)(3) referring to inconsistency between religious tenets and the Act.

The concurrent resolution's disapproval of the religious exemption provision of the regulation (§ 86.12(b)) is apparently based upon a misinterpretation of its language and upon a belief, not shared by this Department, that the requirement will create an administrative burden to the instutions affected. Simply, § 86.12(b) establishes a procedure for determining which activities and practices of various institutions are not covered by title IX because they are exempt under § 901(a)(3) of the Act. It does not, and was not intended to place the Department in the position of judging the validity of religious tenets.

With respect to the question of administrative burden, it is clear that some mechanism is necessary by which the Department can be made aware of which institutions are claiming an exemption and for what activities or practices such exemption is claimed. Such information is required to insure vigorous enforcement of the statute where appropriate as well as to avoid any entanglement with religion, or action respecting establishment thereof as prohibited by the First Amendment. The Department believes that the affected institutions themselves are best qualified to assess whether their religious tenets conflict with the regulation, and section 86.12(b) is designed to allow them to make that assessment rather than forcing the Department into the position of attempting to enforce the regulation with respect to those institutions and of being told, after such an attempt has been initiated, that the institution is exempt. While there is no penalty under the regulation for an institution's failing to claim an exemption at the earliest possible time, § 86.12(b) is designed to encourage such action for the administrative convenience of both the affected institutions and the Department.

An institution controlled by a religious organization may satisfy the regulation by stating through its highest ranking official that its religious tenets require, for example, the exclusion of students of a particular sex, or the exclusion of faculty candidates on the basis of sex where the faculty of the institution is composed of a particular religious order which itself is limited to members of one sex. Under the regulation, the statement must identify the provisions of the regulation which conflict with a specific religious tenet, but it need not cite or explain that tenet other than as may be necessary to clarify what portion of the regulation is affected.

There may be, of course, limited situations where the veracity of the person making the statement under § 86.12(b) may be questioned. An inquiry in such a situation, however, would concern only questions of fact as to, for example, whether the institution is controlled by a religious organization, or whether the person making the statement is stating what he or she believes to be the truth. Such inquiries are consistent with the case law developed in selective service and internal revenue code litigation.

The last point which I would like to raise with you today is a reiteration of our position on section 431(d) of the General Education Provisions Act. In his letter transmitting the Title IX regulation to Speaker Albert and Vice President Rockefeller, Secretary Weinberger said:

> I feel obligated to indicate our continuing reservations as to the validity of certain provisions of section 431(d), as we understand its operation.

He continued by stating that the President, in his comments accompanying his signing of the Education Amendments of 1974 which included section 431(d), indicated his belief that such provisions were questionable on practical as well as constitutional grounds. We continue to take that position.

Again, as Secretary Weinberger stated in his transmittal letter:

> In light of the widespread interest in the Title IX regulation, we anticipate that the coverage, exclusion or treatment of various matters may be the subject of intense consideration by Congress. If Congress determines that a course different from that set forth in the regulation is warranted, then we believe that it should proceed by way of amendatory or clarifying legislation rather than by concurrent resolution aimed at deferring the effectiveness of a particular provision of these rules. Whatever the constitutional validity of section 431(d), it is our view that section 431(d) is largely ineffective other than requiring a forty-five day waiting period. If the final Title IX regulation is within the present statutory authority, section 431(d) would not by its terms apply since Congressional disapproval is limited to a matter "inconsistent with the act from which it derives its authority." While we recognize that Congress and the Executive might differ on the legality of a particular standard in the Title IX regulation, we believe that any such Congressional judgment might be challenged in the courts by a party supporting the position in the Title IX regulation as transmitted. Further, the Department would be on untenable legal grounds if it were to accede to the views of Congress expressed in a concurrent resolution on a matter which we believe must be covered under the present statute.
>
> Indeed, some of the most sensitive matters in the Title IX regulation relate to positions which we believe are required by the Title IX statute and which would, therefore, not be susceptible to alteration by concurrent resolution. In short, while we can conceive of reasonable differences as to policy alternatives to be followed, and while we believe that far greater specificity in the statute would have been desirable, we think that nothing but confusion and delay in meeting the legitimate expectations of millions of citizens can be engendered by an attempt of the Congress to perform its proper legislative function through a concurrent resolution rather than the constitutional procedure for enacting legislation.

As the Secretary promised, I can assure you that the Department will review any proposed legislative changes introduced in Congress and will provide its comments. Further, we will, of course, amend the final Title IX regulation as necessary to accommodate any such changes enacted into law by the procedures proscribed in the Constitution for such enactments. We will, however, oppose an amendment to Title IX which would remove HEW's authority to require self-evaluation and grievance procedures to be set up by the recipients themselves. This position is based on the Department's strongly held belief that these elements are necessary to the successful enforcement of Title IX as part of our plan to rely heavily on self-enforcement efforts by the institutions themselves, and thus to minimize federal intrusion into recipient affairs.

Again, Mr. Chairman, let me thank you for this opportunity to appear and to present the Department's views on this matter. We would be happy to answer any questions which you or the members of your subcommittee may have.

STATEMENT OF MS. GWENDOLYN GREGORY, DIRECTOR OF THE OFFICE OF POLICY COMMUNICATIONS, OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE; JOHN B. RHINELANDER, GENERAL COUNSEL; AND RICHARD A. HASTINGS, ACTING DEPUTY ASSISTANT SECRETARY FOR LEGISLATION (EDUCATION)

Ms. GREGORY. Mr. Chairman, and members of the subcommittee, and the full committee, we are pleased to be with you today to testify on behalf of the Secretary of Health, Education, and Welfare on House Concurrent Resolution 330.

I am Gwen Gregory, Director of the Office of Policy Communications of the Office for Civil Rights of HEW. I am accompanied by

John B. Rhinelander, general counsel of the Department, on my right; and Richard A. Hastings, acting deputy assistant secretary for legislation, on my left.

House Concurrent Resolution 330 provides that paragraphs 86.3 (c) and (d), section 86.8, and paragraph 86.12(b) of HEW's regulation implementing title IX of the Education Amendments of 1972, are "inconsistent with the act, since there is no authority contained in the act for such * * * requirement(s)."

With this conclusion, we disagree, and consequently urge that this subcommittee not report the resolution favorably to the full committee.

As a preliminary matter, we would like to bring to the attention of the subcommittee the fact that House Concurrent Resolution 330 is directed at disapproval of all of section 86.8 even though the intent appears to be only to strike paragraph 86.8(b) dealing with grievance procedures.

Thus, it appears that the concern is with grievance procedures and, since only subsection (b) of section 86.8 deals with grievance procedures, I will limit my comments to paragraph 86.3 (c) and (d), paragraph 86.8(b) and paragraph 86.12(b).

Section 901 of title IX provides, and I have a quote in my prepared statement, and I will try to skip some of those quotes, but I feel that the important quote for today is the section which states that:

> Each Federal department * * * empowered to extend Federal financial assistance to any education program or activity * * * is authorized and directed to effectuate the provisions of Section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability.

Not only is HEW "authorized" to issue regulations implementing the nondiscrimination provisions of section 901, but it is "directed" to do so.

The issue is whether paragraphs 86.3 (c) and (d) "* * * effectuate the provisions of section 901 * * *" as required by section 902, or whether they are "inconsistent with section 901 as contended in the resolution before this committee.

Clearly, paragraph 86.3(c)(i) effectuates the provisions of section 901(a) of the statute. Under that paragraph of the regulation, recipients are required, on a one-time basis, to read the regulations and then determine whether they are in compliance.

Paragraph 86.3(c)(ii) requires recipients to modify their policies and procedures if, after reading the regulation, they determine they are not in compliance.

This procedure is clearly consistent with title IX, since it is designed to effectuate the statute through application of regulatory provisions articulating the nondiscrimination requirements of the statute which were authorized and directed by the Congress to be issued.

Similiarly, the requirements of section 86.3(d) "* * * effectuate * * *" the provisions of section 901(a), since they require recipients to maintain for a reasonable period of time—3 years—a description of the steps, if any, they have deemed necessary to comply with the title IX regulation.

A recipient may be required to maintain nothing if it determines that no modifications to its policies or practices are necessary after reading the regulation.

With respect to 86.8(b), requiring the establishment of a grievance procedure, this provision, like those just discussed, is not "inconsistent" with the act, since it, too, is designed to "effectuate" the nondiscrimination requirements of section 901(a). Section 901(a) prohibits discrimination.

Section 86.8(b) of the HEW regulation implementing section 901(a) merely establishes what we believe is an efficient mechanism to eliminate discrimination by giving institutions an opportunity to resolve allegations of discrimination in-house before the Federal Government becomes involved.

With regard to both paragraphs 86.3 (c) and (d) and paragraph 86.8(b), section 902 of title IX requires that before taking formal enforcement action against a recipient, the Department shall determine that "compliance cannot be secured by voluntary means."

Both the self-evaluation and grievance procedure requirements have a direct relationship to the Department's obligation under this provision.

Certainly, the best manner in which the Department can secure such "voluntary compliance" is through a requirement that the recipients evaluate their own policies and practices and take voluntary action to correct deficiencies.

Further, where individuals bring issues of possible noncompliance to the attention of the recipient, these requirements will provide a method of voluntarily resolving such issues.

We believe that the HEW title IX regulation is authorized and is consistent with the plain meaning of the statute. However, we would also note that title IX must be viewed as remedial legislation, as it is designed to correct and alleviate discrimination on the basis of sex in education programs or activities receiving Federal financial assistance. Under standard rules of statutory construction, remedial legislation should be broadly interpreted in order to effectuate its remedial purpose.

I have set forth a couple of quotes that would support this proposition.

In considering whether regulations of the executive branch are within the delegation given by Congress, courts have traditionally applied three criteria, which I believe the chairman has earlier quoted:

(1) Whether the regulations are authorized by statutory language;

(2) Whether they are issued pursuant to proper procedure;

(3) Whether they are reasonable.

We have already pointed out that the regulation is specifically authorized by the statute, not only authorized, but required.

Since no one has challenged the procedure followed in adopting the regulation, we feel it unnecessary to address this point at length.

Finally, we firmly believe that the provisions in question are reasonable.

The only thing required by paragraphs 86.3(c) and (d) is that a recipient, on a one-time only basis, read the regulations and examine its policies and practices in conjunction with the provisions to determine whether or not it is in compliance.

I have set forth a quote from Nellis M. Varner, who represented several institutions and organizations, stating to the effect that self-evaluation is being used now by colleges and universities and that such a provision is proper.

The only thing required by paragraph 86.8(b) is that a recipient adopt and publish a grievance procedure providing for prompt and equitable resolution of student and employee complaints and thus, hopefully, avoiding Federal intervention.

We think this requirement is reasonable from the point of view of the students and employees, since it provides a visable mechanism by which individual rights under section 901(a) of the statute may be enforced.

We think that it is reasonable from the recipient's point of view, since it enables the institution to solve its own problems in-house with minimal Federal involvement, and again I include a quote to that effect.

The next section of the concurrent resolution of disapproval is the religious exemption. The concurrent resolution cites with disapproval section 86.12(b) of the regulation.

At the outset, I should note that the language of the statute itself makes it clear that an institution is not exempt from title IX merely because it is controlled by a religious organization.

The language of the statute provides that the nondiscrimination requirements shall not apply to an educational institution which is controlled by a religious organization "if the application of this subsection would not be consistent with the religious tenets of such organization."

Thus, the Department must determine: first, whether the institution is controlled by a religious organization; and second, whether the application of title IX to the institution would be consistent with the religious tenets of the organization.

If the Congress had desired an outright exemption for religious schools such as that provided in the statute for military schools, it would not have included the language in section 901(a)(3) referring to inconsistency between religious tenets and the act.

The concurrent resolution's disapproval of the religious exemption provision of the regulation is apparently based upon a misinterpretation of its language and upon a belief, not shared by this department, that the requirement will create an administrative burden to the institutions affected.

Simply, section 86.12(b) establishes a procedure for determining which activities and practices of various institutions are not covered by title IX because they are exempt under section 901(a)(3) of the act. It does not, and was not intended to place the department in the position of judging the validity of religious tenets.

With respect to the question of administrative burden, it is clear that some mechanism is necessary by which the department can be made aware of which institutions are claiming an exemption and for what activities or practices such exemption is claimed.

Such information is required to insure vigorous enforcement of the statute where appropriate as well as to avoid any entanglement with religion, or action respecting establishment thereof as prohibited by the first amendment.

An institution controlled by a religious organization may satisfy the regulation by stating, through its highest ranking official, that its

religious tenets require, for example, the exclusion of students of a particular sex, or the exclusion of faculty candidates on the basis of sex where the faculty of the institution is composed of a particular religious order which itself is limited to members of one sex.

Under the regulation, the statement must identify the provisions of the regulation which conflict with a specific religious tenet, but it need not cite or explain that tenet other than as may be necessary to clarify what portion of the regulation is affected.

The last point which I would like to raise with you today is the reiteration of our position on section 431(d) of the General Education Provisions Act.

In his letter transmitting the title IX regulation to Speaker Albert and Vice President Rockefeller, Secretary Weinberger said:

"I feel obligated to indicate our continuing reservation as to the validity of certain provisions of section 431(d), as we understand its operation."

I will forego any further discussion at this point, however, it is included in the record.

As the Secretary promised, I can assure you that the department will review any proposed legislative changes introduced in Congress and will provide its comments. Further, we will, of course, amend the final title IX regulation as necessary to accommodate any such changes enacted into law by the procedures prescribed in the Constitution for such enactments.

We will, however, oppose an amendment to title IX which would remove HEW's authority to require self-evaluation and grievance procedures to be set up by the recipients themselves.

This position is based on the department's strongly held belief that these elements are necessary to the successful enforcement of title IX as part of our plan to rely heavily on self-enforcement efforts by the institutions themselves, and thus to minimize Federal intrusion into recipient affairs.

Again, Mr. Chairman, let me thank you for this opportunity to appear and to present the department's views on this matter. We would be happy to answer any questions which you or the members of your subcommittee may have.

Mr. HAWKINS. Thank you, Ms. Gregory.

Let me ask you first whether any of the other witnesses would like to make a statement before we get into the question period.

Ms. GREGORY. No, Mr. Chairman.

Mr. HAWKINS. You concluded with the statement that you would oppose an amendment to title IX which removes HEW's authority to require self-evaluation and grievance procedures.

You say that you would oppose an amendment, but let us assume, however, that a concurrent resolution disapproving those actions of the regulation is passed. What is the position of the Department with respect to enforcing those provisions?

Mr. RHINELANDER. Our position is stated in the statement. It is that such concurrent resolution would not have the effect of law. Therefore, it would be a policy position. I believe that the statement to the effect that we would oppose an amendment would give rise to the fact that the Department's position is that it is a wise policy.

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In the absence of an amendment to title IX directing us to take a different position, we would continue to take the position which is set forth in the final regulations.

Mr. HAWKINS. Also, with respect to the religious exemption, you indicated that it had been said that this requirement would create an administrative burden to the institutions affected. Is that statement based on any evidence, or any supported by institutions having communicated that as being a burden, or not a burden?

Have you had any indication that such a provision would constitute any administrative burden to the institutions?

Ms. GREGORY. It is my understanding that some of the testimony before Mr. O'Hara's subcommittee was to the effect that it would cause some administrative burden to the institutions. But, I believe that that rationale is based on a misinterpretation of the provision.

I might add, Mr. Chairman, that the proposed title IX regulation stated that the institution must, in a sense, cite chapter and verse in support of a religious exemption, and we did change the regulation in answer to comments filed by many religious organizations and schools, which are controlled by a religious organization, so that the requirement now is merely a statement by the highest ranking official: (1) that it is controlled by a religious organization; (2) that religious tenets could prohibit compliance with title IX regulation, and then listing the provisions in the regulation.

Mr. HAWKINS. Would the specific religious tenet that is in conflict with the regulation have to be listed?

Ms. GREGORY. They do not need to list the tenets, but they do need to state which provisions of the regulation would violate tenets. The statute, as I mentioned in my written remarks, the statute itself states that there is an exemption if religious tenets prohibit compliance.

I suppose that in certain cases it might be that religious tenets prohibit compliance with any part of the regulation. If that is the case, then the highest ranking official could so state in the statement.

Mr. HAWKINS. The institution on its own initiative would have to do that, or would that be only in response to your request?

Ms. GREGORY. We plan at this time, when we send out the assurances, as required, by, 86.4—there is a section in the regulation that requires an assurance, and we plan at that time to include a letter to the effect that if an institution wishes to claim a religious exemption at the time it sends in its assurance, it shall include a statement claiming that exemption.

I might also add that there are no sanctions set forth in the regulation. So, theoretically, I suppose, they could not do it, or refuse to do it. As a practical, administrative matter, it makes our lives a little easier if they would do it at the time that they are filing the assurance, so that we will not have people answering complaints, or going onsite and finding later on that there is a claim of exemption.

Mr. HAWKINS. You construe that as being a certification procedure, then, or not?

Ms. GREGORY. No, I don't think that I would call it that formal. It is not even as formal, I might add, as what the IRS requires with regard to exempt status of religious organizations.

We do not delve into the religious tenets as, let us say, the selective service does with regard to consciencious objectors.

Mr. HAWKINS. Would it be fair to say that since the guidelines were originally issued, that the regulation pertaining to the religious exemption has undergone considerable change. Whereas there was great opposition to the original one, you feel that you now have eliminated the main objections which were cited by these institutions with respect to this particular regulation?

Ms. GREGORY. I believe so. I have discussed this section with some of the religious organizations, and they agree that that interpretation would be sufficient. They had either misread the final regulation, or were concerned with the language of the proposed regulation, which, as I stated earlier, has been amended.

Mr. HAWKINS. Ms. Gregory, may I ask you this: In your view, is there authority in the title IX legislation for including employment under title IX regulations?

Ms. GREGORY. Absolutely. Using the basic rules of statutory construction, if the language of the statute is clear, is unambiguous, there is no need to go beyond it or behind it and determine legislative history and the like.

In the case of title IX, the prohibitory language states ". . . no person shall be discriminated against, etc.," that includes students and employees in the absence of other language, exemption language.

Title VI, as you know, after which title IX is modeled, includes an exemption for employment. Title IX includes no such exemption. Even were we to go to the legislative history, and as I said I don't think that there is a need to do so, but even if we did, we still find support for the coverage of employment under title IX. Title VI exempted employment and title IX does not.

Further, in the interpretation of title VI, even with that exemption, if the discrimination in employment affects the beneficiaries, you can still cover employment under title VI.

For example, discrimination against teachers has a direct effect on the beneficiaries, that is students in the school system, or colleges and universities. Therefore, employment is covered with regard to at least the teachers under title VI. An analogy would carry over to title IX.

So, I think that there is clear support for coverage of employment. As a matter of fact, I think that we would be in violation of the terms of the statute itself if we did not include employment within our regulation.

Mr. HAWKINS. Would you interpret "inconsistent" as meaning the same thing as "unauthorized"?

Ms. GREGORY. Yes, but I think that the language that you used, I would support more heavily because it is my opinion that the word "inconsistent" means almost in violation of, more than "unauthorized."

Under our interpretation of the statute, it is not only authorized, but it is not inconsistent. It is authorized, so we never need to reach that point.

Mr. HAWKINS. The definition that you have been given——

Mr. RHINELANDER. Mr. Chairman, we have interpreted "inconsistent" as meaning "unauthorized." The House report which accompanied the Education Amendments of 1964, I think, support that position.

On page 72, in discussing the 431 procedure, it states that the Congress can, by concurrent resolution, find that the proposed rule is not supported by the legislative authority on which it is based. I think

that in the legislative history, "inconsistent" as used in the statute really means "unauthorized."

Mr. HAWKINS. We will go back to Ms. Gregory.

Is it your understanding that the procedural regulations which have been submitted concurrently with the title IX regulation will follow the same course as the present regulation, in that they will be submitted to the Congress for approval or disapproval?

Ms. GREGORY. If there are material changes in the final regulations as opposed to the proposed ones; yes, they would. If there are no material changes, they would not be. We would not be required to submit them.

Mr. HAWKINS. Who is going to make that determination as to what is the position of Congress? Does that put the Congress in the position of not knowing whether to move on them now, or not? Who is to make the determination is the question as to whether or not basic changes will be made, or have been made.

Mr. RHINELANDER. Mr. Chairman, I would like to answer that question first. We prepared and submitted to Mr. O'Hara's committee a staff memorandum on the procedures we have followed under 431(d).

Our basic position has been that if there have been any material changes, which would be a decision that we would make in the first instance, we would submit the regulations to Congress for another 45-day period.

If you like, I could make a copy of that staff memorandum available to your committee.

Mr. HAWKINS. We have been trying to understand the answer.

Do I understand that you have, in effect, said that if no changes are made, they will go into effect in 45 days?

Mr. RHINELANDER. We have published the regulations for public comment. We will examine the comments. In light of those comments, it is conceivable that the regulations would be published without change.

More likely, there will be some changes in the regulations. If in our view they are material, and let me say that I don't believe there has been any question to date, under the 431(d) procedure, as to whether changes have been material or not, then we would, in fact, when we publish them in final form in the Federal Register, transmit them to the Congress for another 45-day period.

Mr. O'HARA. Mr. Chairman, would you yield to me for a minute?

Mr. HAWKINS. Mr. O'Hara.

Mr. O'HARA. Am I to gather from the statement by Mr. Rhinelander that if they decide not to change the regulations- and of course, Congress has no way of knowing whether or not they are going to decide to change the regulations -that they would not submit them, at the time they make the decision, to the Congress for review?

Mr. RHINELANDER. If there were no material changes in the regulations as published in final form from the regulations as published in proposed form, we would not transmit them to the Congress, again, for the 45-day period.

Mr. O'HARA. Mr. Chairman, may I comment on that, if I can?

Mr. HAWKINS. You may, if you will, Mr. O'Hara.

Mr. O'HARA. That is, Mr. Chairman, entirely inconsistent with the requirements of 431(d). What the Congress intended with the enactment of 431(d) was that when the Department had made the determination as to what the final regulations would be, at that point they would be submitted to the Congress, and 45 days would have to elapse before they took effect.

We don't know with respect to these proposed regulations, that were published in connection with the proposed rulemaking notice, whether or not they are the final regulations. It is just a game playing, if we have to go out at it each time, and object to things that are not going to be in the final regulations anyway. We will just waste everyone's time.

I think I know the Department's position, which is that section 431(d) is constitutionally invalid. I understand that position, but I think that until we get a court case of that, it would be better if the Department would at least send the regulations over at the time, and in the manner intended by 431(d), which, after all, was enacted by the Congress and signed by the President.

Mr. HAWKINS. Certainly, it is the chair's understanding that this is inconsistent with what we thought; that after all comments had been obtained, and all changes made, the final regulations would be submitted to the Congress in their final form, and the Congress would, then, have 45 days.

Do you differ on that interpretation?

Mr. RHINELANDER. The assumption in your statement is if there were changes made. The earlier question was, if there were no changes made in the regulations at all.

Mr. HAWKINS. You would assume that the 45 days have already started?

Mr. RHINELANDER. We believe that the statute, under that circumstance, would only require the transmittal once. If, in fact, the rule is modified, we believe that under your rule 431(d) it would require that the rule be submitted for a second 45-day period.

Mr. HAWKINS. Our understanding is that all you have submitted so far is a notice of proposed rulemaking. These are not the final regulations that have been submitted to the Congress.

Mr. RHINELANDER. That is correct. It is the notice of proposed rulemaking which was transmitted to the Congress pursuant to 431(d).

Mr. HAWKINS. When the final regulations are submitted, we will get that in a formal way, and the time commences as of that particular date.

Mr. RHINELANDER. Assuming that there are changes in the regulations, as published in final form, I think that in a regulation of that scope it is a fair assumption, then they will be transmitted to the Congress for a 45-day period pursuant to 431(d).

Mr. HAWKINS. It is my understanding that whether or not changes are made, the regulations would be submitted to us. I don't think that the question of changes having been made affects it one way or the other.

Mr. RHINELANDER. We don't believe that it is legally required by the 431(d). We believe that the rule published——

Mr. HAWKINS. That is inconsistent, I think.

Mr. MILLER. Would the gentleman yield?

Mr. HAWKINS. Mr. Miller.

Mr. MILLER. Maybe you can clarify where Mr. O'Hara is. In his efforts to void some of these provisions, if he should not get this taken up according to the timetable that he has laid out, which is Tuesday, and therefore loses his efforts, which you oppose, if we don't approve any of the changes, then the ball game is over.

If you should happen to lose and he wins, then you start another 45-day period. Is that right? What 45-day period are we in, here?

Mr. O'HARA. I think that their position is, if the gentleman from California will yield, that they can, by putting in the Federal Register a notice of proposed rulemaking where they can state that they are going to write some rules regarding a certain subject, anybody who has any observations or comments can submit them; or, and this has become the more common procedure, they print in the Federal Register a notice that they are going to undertake proposed rulemaking — and they print the rules that they propose.

OK, this is what they did a long time ago with title IX. Under their interpretation, we would have, then, at that moment, have had 45 days in which to disapprove something in these proposed regulations.

Then, if they change them two or three times, they would, at the end of the process, have to come back to us with another 45-day period.

They are saying: "We don't know whether we are going to change them or not." At the time of the proposed rulemaking, they sent them to us, and those are not the final regulations. They may be or they may not be. We can guess, and we have to start moving at that time, or else we are out of the ball game, if they decide to publish them without change.

Mr. MILLER. If that interpretation is correct, I really find it outrageous, because there are a lot of people here who are spending an awful lot of time, effort, and money to either support or defeat what Mr. O'Hara is doing, only to find out that they may have to come back and do it again, if you have another 45-day period.

Mr. RHINELANDER. Let me clarify a couple of things. If title IX had been published subsequent to the enactment of the 431(d), which was not the case, they were published before 431(d) was enacted into law, but if it had been published subsequently, we would have submitted the title IX substantive regulation to the Congress for 45 days.

Assuming that we had put title IX in final form and then changed them, we would have submitted the title IX regulation again to the Congress for 45 days because of the changes.

I believe, Mr. Chairman, that you were referring to the consolidated procedure regulation.

Mr. HAWKINS. I just wanted to make the point that I think there is some confusion that we were referring to the regulations which will be published on Monday. That is not what the question was about.

The question was about the consolidated proposed rulemaking rather than the ones that the members thought you were talking about, which are those that will be published on Monday.

We just wanted to make sure that the same procedure would take place with respect to the proposed procedural regulations as has taken place with respect to the title IX regulation which becomes effective on Monday, July 21, unless, of course, they are disapproved.

Mr. RHINELANDER. Just to clarify the record. We published simultaneously the title IX regulations and the proposed form of the consolidated procedural regulations. Both forms of regulations were transmitted to Congress. Title IX because that was the first time we had issued title IX regulations, subsequent to the enactment of 431(d), the proposed regulations, because our practice has been to transmit in proposed form all education regulations when they are published for the first time, which is a notice of proposed rulemaking.

Mr. HAWKINS. You are not saying that the procedural regulations would also become effective on Monday, July 21?

Mr. RHINELANDER. No, sir.

Mr. HAWKINS. As long as we understand that.

The Chair recognizes Mr. Buchanan.

Mr. BUCHANAN. Thank you, Mr. Chairman.

I am really intrigued. I happen to agree with your reservations regarding the section 431(d) in the general education provisions as to whether or not we can legislate in this way. Yet, I am intrigued by what I understand now.

According to those provisions, you did submit the regulation to the Congress. You are complying with that part, and you have done so with proposed regulations.

However, you proposed, if I understand the Secretary's words, and I have been directed on this point, to implement your title IX regulations regardless of the action we take on this concurrent resolution of disapproval. Is that correct?

Ms. GREGORY. I guess that this is true.

Mr. RHINELANDER. The Secretary indicated that the views we have with respect to the constitutionality of 431(d), clearly we would have to take a look at whatever the Congress did, but we have stated very clearly that we do believe that this violates the separation of powers.

Mr. BUCHANAN. The Secretary's words spell out pretty clearly his position. He stated:

> We recognize that the Congress and the Executive Branch might differ on the legality of a particular standard in the Title IX regulation. We believe that any such congressional judgment might be challenged in the courts by a party supporting the position in the Title IX regulation as transmitted. Further, the Department would be on untenable legal grounds if it were to accede to the views of Congress expressed in a concurrent resolution on a matter which we believe must be covered under the present statute.

You mean that this does not necessarily mean that you will proceed regardless of the action we take?

Mr. RHINELANDER. Let me give you two concrete examples.

With respect to athletics. Mr. O'Hara indicated in his testimony that he questioned some of the wisdom in the regulation. He accepted that we had the legal authority to cover athletics under the title IX regulation.

If Congress were to pass a concurrent resolution disapproving the coverage of athletics, we believe that this would be the kind of example Secretary Weinberger pointed out, where we would be in an untenable legal position.

We believe that athletics must be covered under title IX. Under those circumstances, I believe that the Department's position certainly would be that we would put those regulations into effect, and very clearly at some point in time there would be a challenge in the courts.

Mr. BUCHANAN. But you would not necessarily take that view as to the grievance procedures, or the self-evaluation?

Mr. RHINELANDER. I cannot give you a categorical answer. My belief is that we would do it. The Secretary indicated that we believe that it is policy, and that we have the legal authority to do it, and that we would oppose legislation which denied us the power to do it.

So, I think that it is a fair assumption to say that the Department would put them into effect.

Mr. BUCHANAN. Do you know what position you are going to take on these proposed procedural regulations in the same area? I gather that this will be your same basic posture, that you will implement regardless of our action in any area where you feel that you have the authority.

Ms. GREGORY. I think that the issue is whether or not the concurrent resolution addresses a matter where we feel that we would not be violating title IX if we followed it. I think that under the procedural regulations, a great deal of that particular regulation is policy rather than a legal mandate as such.

So, I think it would depend on the reason for the concurrent resolution of disapproval. We would feel that we would not be obligated to follow it, but as a policy matter might decide that we would follow it. So, I think that this would have to be a determination that we would make at the time.

Mr. BUCHANAN. That is a useful distinction, I think.

Ms. GREGORY. Also, during the comment period, until we have drafted the final procedural regulations, we will encourage comments, obviously, from the Congress as well as everyone else.

Mr. BUCHANAN. Ms. Gregory, on this question of the religious provisions pertaining to the religious institutions, you mentioned that you felt you were in line with the Internal Revenue Service regulations and policies on the subject.

Ms. GREGORY. I don't think we have gone as far. We are not even close.

Mr. BUCHANAN. I guess you are aware of the regulations of IRS pertaining to churches which operate private schools, and the new regulations pertaining to discrimination by race in those private schools.

As I understand them, I question their constitutionality because they would take away from a church its tax exemption if it operated a school which discriminated by race. The entire parent organization of the church could lose its exemption.

Ms. GREGORY. I am not making any statement as to whether those regulations are constitutional or not, but they go much, much further than we have gone. All we are asking for is a statement telling us: "We want an exemption," and telling us why.

We will say, "Fine, you will have your exemption," and this is about it.

The problem is that the statute itself, as I mentioned, does not give an outright exemption to all religious schools. That might be an appropriate amendment by the Congress. It states that there is an exemption given to religious schools, if the title IX regulation would be inconsistent with their religious tenets.

So, therefore, we feel obligated to find out exactly in what areas of the regulation, the religious tenets would prohibit compliance.

Mr. BUCHANAN. Just so that there will be one lonely voice on the other side, I am not certain that you have been tough enough. I think that it is OK to have nuns only or monks only as faculty, or to have a boys' school or a girls' school; we tried to provide for this, I believe.

I think that if you got much beyond that, you are getting into real questions of how much one can use religious beliefs to foster policies in educational institutions receiving Federal funds, which practices may be in violation of the Federal law.

I am not sure that you have to give the people's money to an institution that, on the basis of a religious belief, would insist on racial segregation, for example.

I think that you have a little different situation under title VI, because you definitely have the 14th amendment, and you have clear constitutional coverage basis to cover anything that the legislation may not cover as to what you do about discrimination with regard to race.

You don't necessarily have that under title IX, because the Equal Rights Amendment has not been passed on that. I am not a lawyer, and I don't know whether there is any difference in these two situations or not.

Let us suppose that I should be the president of an institution, and there are some, that believe that the Bible taught segregation by race. It would be wrong for my institution to fail to do other than to segregate by race. If I were to ask HEW to support, with Federal money, my institution, which segregated by race as a matter of religious belief, would you do it?

Ms. GREGORY. *The Bob Jones University* case, where the university refused to sign an assurance of compliance with title IX for that reason. Therefore, their funds were terminated, and they are no longer receiving Federal funds. The case involved veterans' benefits, so they are no longer qualifiable for veterans.

There is certainly a dual issue here. One is the "establishment of religion" issue by giving funds to a religious institution, and the other is the intrusion of the Federal Government into religious practices by telling them that they cannot do this, or they cannot do that, and examining their religious tenets. We are not getting into that particular issue.

Mr. BUCHANAN. I am against the funding of sectarian institutions with Federal money.

Beyond that, I gather that we are making some kind of distinction between discrimination by sex and discrimination by race because, as I understand your regulations, there are not any sanctions in your regulations. The only sanction you would have, if you had any, I assume would be to cut off the money.

Yet, I assume that if this were a title VI matter, you would do something about an institution that was seeking Federal funds, or seeking to continue to receive Federal funds, which wrote you and said: "It is against our religion to desegregate."

Ms. GREGORY. Title VI does not include the religious exemption that title IX includes. The provision that is the subject of the concurrent resolution is merely an implementation of the specific exemption in the legislation itself.

There was no need for such language in the regulation implementing title VI for the reason that there was not an exemption specifically set forth in that statute.

Mr. BUCHANAN. Thank you very much. This is all, Mr. Chairman.

Mr. HAWKINS. Let me see whether or not Mr. O'Hara has any questions.

Mr. O'HARA. Just a very quick one, Mr. Chairman.

If I understand your position, if the concurrent resolution of disapproval were to be agreed to, in the form that you now have it before you, within the time permitted, it is your position that it would certainly not affect those parts of the regulation that were not disapproved and on which you would move ahead with immediate implementation.

While you have no final decision on the question of what you would do with those parts of the regulation that were disapproved, it is your impression that you would probably move ahead with immediate enforcement of them as well.

Ms. GREGORY. At least with the self-evaluation and the grievance procedure. That is a fair interpretation.

Mr. O'HARA. So the contention that has been heard, which was heard here last week, that adoption of the concurrent resolution of disapproval would delay the implementation of the title IX regulations, is not correct.

Ms. GREGORY. I think that there might have been some misinterpretation of the Secretary's statement in that regard. What we meant was that although we, as a department, would continue to attempt to implement the regulation, the problem arises when you get to an institution, a school district, or a college, and you quote the regulation, and cite them for noncompliance, and try and resolve the matter.

The college says: "The Congress says that we don't have to do that." You get that sort of a problem in our enforcement effort.

Mr. O'HARA. With respect to those grievance procedures and the self-evaluation, but not with respect to any of the others.

Ms. GREGORY. That is correct.

Mr. O'HARA. Finally, Mr. Chairman, I want to thank the witnesses for the statement. It sets forth the point of view of the Department very well, I believe, but I would like to point out that the real problem that we are dealing with is what happens to the laws after we enact them.

I think that the interpretation that the counsel has placed on 431(d), a tortuous interpretation in my opinion, in order to achieve—to read it in a way that is most in keeping with their own views of what we should have said, is just another example of the kind of thing that we are trying to combat here.

I am very sorry that the whole question came up in the context of discrimination against women, or discrimination on the basis of sex. I wish that it had come up in connection with a less emotional subject. But, perhaps, if my assessment is right, and we fail on the time-table problem on this point, I am sure that HEW will do me the courtesy of sending over some equally bad regulations before long on some other subject. I will take it up then.

I thank the Chairman.

Mr. BUCHANAN. Do I understand your position to be that where we have authorized and directed you to do something, that is to end dis-

crimination in education programs that are federally funded, that you feel your position would be unlawful if you did not, by regulation, make it broad enough to fulfill that obligation under the law?

The concern that we have expressed is that you, in your grievance procedures and self-evaluation, have exceeded the law. You have done that which the law provides you cannot do. Do I understand that to be your position, that under the law, in order to fill our direction you have so acted. I don't want to put words in your mouth.

Ms. GREGORY. If I understand your question correctly, I don't think that we are saying necessarily that under the grievance and self-evaluation procedure that we have to nave a provision on that in the regulation, otherwise we will be in violation of the title IX. I don't think that we are saying that at all.

However, because of our questions with regard to the constitutionality of 431(d), the concurrent resolution of disapproval requiring us to remove these provisions from title IX, we would feel that it would not have the force and effect of law. Therefore, it would leave us with a policy determination as to whether or not to leave them in.

That is the policy determination that has not been officially made at this point.

Mr. BUCHANAN. The grievance and self-evaluation procedures——

Ms. GREGORY. They are not contained in the title VI regulation.

The title VI regulation, as Mr. O'Hara has mentioned, is not as comprehensive for the reason that we did not have the knowledge that we have now.

Certainly, had we known what we know now at the time we passed the regulations, they would have been more comprehensive I am sure. I might add that we have had a substantial amount of comments from the public as to the proposed regulations which did not include those provisions, especially with regard to self-evaluation, requesting us to put the self-evaluation provision in the regulation.

As a matter of fact, those comments requested something much more strong than the self-evaluation requirements that we have in there now.

Mr. BUCHANAN. I think that it is a useful initiative.

Ms. GREGORY. It is explicit in the statute. How else can you voluntarily comply, if you have not looked at your policies to determine whether you are in compliance?

Mr. BUCHANAN. I would praise your intent.

Thank you, Mr. Chairman.

Mr. HAWKINS. Thank you, Mr. Buchanan.

We do not have enough members of the subcommittee who favor the resolution. At the same time, we do not want to take action to block consideration of the resolution by the full committee because it would be useless, since the full committee can withdraw the resolution anyway.

The Chair recognizes Mr. Benitez.

Mr. BENITEZ. Mr. Chairman, I wish to ask that House Concurrent Resolution 330 be reported to the full committee with recommendation that it not be passed.

Mr. HAWKINS. The motion is seconded by Mr. Perkins that the resolution be reported to the full committee with a recommendation that it not be passed.

Mr. BUCHANAN. Mr. Chairman, I would third the motion, or have a rollcall vote, because I want to be clearly on the record in line with the gentleman's motion.

Mr. HAWKINS. Without objection, the motion is adopted unanimously. The committee stands adjourned.

[Material submitted for inclusion in the record follows:]

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,
Washington, D.C., July 14, 1975:

To: House Subcommittee on Equal Opportunities.
From: American Law Division.
Subject: Self Evaluation and Grievance Procedures Prescribed by HEW Regulations Under Title IX.

Reference is made to your inquiry of July 11, 1975 relative to the above. Specifically, you inquire as to the validity of the proposed regulations of the Department of HEW under Title IX of the 1972 Education Act Amendments (20 U.S.C. 1681 et. seq.) insofar as they would require educational agencies to undertake programs of self evaluation and establish internal grievance procedures for processing complaints under the Act. Briefly, section 86.3(c) of those regulations would require recipient institutions to evaluate their current policies and practices with a view to ascertaining their compliance posture and modify any offending policies or practices. Section 86.8 would require the recipient to adopt and publish grievance procedures for the resolution of student and employee complaints of violation of the Act.

Since Title IX affords little express guidance on the matter, the validity of these procedures would seem to depend on whether they are somehow inconsistent with the express provisions statute or might reasonably be implied from its terms. Section 902 grants the agency authority to issue rules and regulations consistent with the objectives of Title IX and agency discretion is expressly limited only with respect to the termination of assistance. Thus, before taking action to cut off aid, HEW must notify the recipient, afford opportunity for hearing; make an express finding of noncompliance; file a written report with both Houses of Congress; and wait thirty days from the filing of this report. In each instance, however, these requirements appear designed to insure against arbitrary exercise by the Department of the ultimate sanction prescribed by the Act and do not seem at odds with HEW's exercising its rule making authority to prescribe other means of securing voluntary compliance short of terminating assistance.

Moreover section 902 specifically provides as an additional safeguard that some form of voluntary compliance effort be undertaken. That is, the agency is required to satisfy itself that "compliance cannot be achieved by voluntary means." While the methods contemplated by this latter requirement are spelled out neither in the statute or the legislative history, it would seem to at least impliedly authorize the means chosen by the Department.

Additionally, it should be noted that the establishment of such procedures in the absence of express statutory authorization is not without some precedent in the current law. Title IV of the Public Health Services Act, which makes funds available to the States for the construction and modernization of hospitals, requires assurances from the State that such facilities be made available to all persons in the community and, further, that a reasonable volume of services be made available to those unable to pay. 42 U.S.C. 291c(e). The statute is otherwise silent on the matter. The regulations issued by HEW, however, require that the States enforce these assurances by annual evaluation of compliance by facilities and that they establish procedures for investigation of complaints that the assurances are being violated. 42 C.F.R. 53.111(i); 53.113(f).

It is hoped that this will assist in your consideration of this matter.

CHARLES V. DALE,
Legislative Attorney.

OFFICE OF GOVERNMENT LIAISON,
Washington, D.C., July 10, 1975.

Hon. AUGUSTUS F. HAWKINS,
Chairman, Subcommittee on Equal Opportunities, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the United States Catholic Conference, I would like to express our views on the Concurrent Resolution dealing with the Regulation governing the implementation of Title IX of the Education Amendments of 1972 (P.L. 92-318). It is my understanding that H. Con. Res. 330 as

amended (Erlenborn-Quie Amendment) by the Subcommittee on Postsecondary Education has now been referred by action of the full Committee for further consideration by your Subcommittee.

The United States Catholic Conference supports the retention of the Erlenborn-Quie Amendment to disapprove Sec. 86.12(b) which might be interpreted as requiring an educational institution to claim the religious exemption granted to them in the Act by Sec. 901(a)(3). Since the Act clearly exempts these institutions, there is no necessity to devise an administrative procedure which would, in effect, force such institutions to petition the Department of Health, Education and Welfare to enjoy that exemption.

Furthermore Section 86.12(b) requires the institution to submit in writing the "*specific tenet*" of the religious organization which is in conflict with any provisions of the Regulation. This procedure could require all educational institutions controlled by a religious organization to somehow justify their religious tenets to a governmental ageucy and would surely create some serious First Amendment constitutional problems concerning the separation of Church and State.

Therefore, we think that the elimination of ahy such procedure from the regulations would significantly improve these regulations.

I am also enclosing copies of some recent correspondence on this same subject to all of the members of the Committee on Education and Labor as well as our comments on the proposed Title IX regulations. These documents will provide you with more detailed information about our concerns.

I am requesting that this letter and the attached documents be entered into the record of your Subcommittee's hearings on this matter.

Sincerely,

JAMES L. ROBINSON,
Director.

OFFICE OF GOVERNMENT LIAISON,
Washington, D.C., June 30, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Committee on Education and Labor, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the United States Catholic Conference, I would like to express our views on certain aspects of the recently promulgated Regulation to implement Title IX of the Education Amendments of 1972 (P.L. 92-318).

This Regulation provides for an exemption for educational institutions which are controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization." (Sec. 86.12) It is our understanding that this exemption applies to any requirements of this Regulation which are inconsistent with the religous tenets of a religious organization that operates an educational institution. We feel that this was clearly the intent of Congress in creating this exemption and that there should be no ambiguity about this in either the Regulation or in any new amendments to title IX which the Congress might enact.

There are two situations which this Regulation does not address directly and which should be clarified by any new legislative amendments. One involves the appointment of teachers or administrators within an educational institution who are either clergy or members of a religious order. If the operation of an educational institution is part of the religious mission or apostolate of a religious order, preference in personnel appointments is often given to members of that religious order. In such a case, this preference is based on membership or nonmembership in that religious order and not on the sex of the persons involved. However, since all religious orders are comprised exclusively of either males or females, one might argue, for example, that the preference for a female member of a religious order rather than a male layman for a school principalship would in fact constitutee sexual discrimination.

In a situation such as that described above, it would frustrate the fulfillment of the religious apostolate of the members of the religious order if the school was required to place a man in charge of the school which they are operating. This is not a proprietary consideration but one which directly relates to the maintenance of religious orders and their religious mission.

The second situation concerns the Regulation as it affects vocational education schools. Our vocational schools receive little assistance, if any, under current vocational education federal assistance laws. Their situation is aggravated by the fact that the few vocational schools maintained by the Church, are in some instances operated by religious orders, whose Rule requires that they confine their education to a particular sex. In short, religious order, by dedication, education and religious tradition, have limited their activities to a particular sex. Since these schools differ substantially from the Congressional concept of a vocational education school, we submit that they were never intended to be included in Title IX. Accordingly, consideration should be given to administrative treatment directed to their unique position.

Enclosed you will find a copy of our comments in the proposed Regulation dated October 11, 1974. This will provide you with a more detailed analysis of the constitutional issues involved in this matter.

We are submitting these views to be incorporated in the record of the Hearings of your Subcommittee and request that you and the members of your Subcommittee give them full consideration in any further legislative action.

Sincerely,

JAMES L. ROBINSON,
Director.

Enclosure.

OFFICE OF GENERAL COUNSEL,
Washington, D.C., October 11, 1974.

THE DIRECTOR OF THE OFFICE OF CIVIL RIGHTS,
Department of Health, Education, and Welfare,
Washington, D.C.

DEAR MR. HOLMES: On June 20, 1974, the Office of Civil Rights of the Department of Health, Education, and Welfare published Notice of Rule Making to effectuate Title IX of the Educational Amendments of 1972 to eliminate discrimination on the basis of sex in any education program or activity receiving federal financial assistance (Federal Register, Volume 39, No. 120, Thursday, June 20, 1974).

On behalf of the United States Catholic Conference, we wish to offer the following observations and comments.

The purpose of the legislation is understandable and commendable. However, the implementation of the law impinges on specific areas of religious freedom and, additionally, goes substantially beyond the intention of Congress, especially in its application to the internal operation of church-related schools.

Section 86.12 of Subpart C appropriately provides that this part does not apply to an educational institution which is controlled by a religious organization to the extent that application of the part "would be inconsistent with the religious tenets of the organization." In order to take advantage of this statutory exemption, the Notice of Rule Making provides that the educational institution shall submit in writing to the Director statements of he religious tenets under which the exemption is claimed, and any other information which might aid the Director "*in determining whether the institution qualifies for such exemption.*" (Emphasis supplied)

As we interpret this regulation, the Director would have the authority to examine the religious tenets of the organization and the discretion to determine whether such religious tenets warrant the application of the statutory exemption. We submit that this procedure is inconsistent with repeated pronouncements of the Supreme Court of the United States, especially since 1970. We will not cite all of the relevant cases, but limit our reference to *Walz* v. *Commissioner*, 397 U.S. 664 (1970), and *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), where the Supreme Court of the United States stated categorically that the First Amendment mandates neutrality between church and state, and that, in order to preserve this neutrality, the state must refrain from a surveillance of religion or religious activities. This judicial mandate against entanglement is totally ignored in the proposed regulation.

A similar situation arose in the development of regulations involving the Selective Service Act which provided for the exemption of seminarians attending "recognized theological or divinity schools." Originally, the Selective Service System requested documentation of religious tenets. Finally, after reviewing its policy with religious groups, it agreed to accept certification of the status of the seminary. We urge that Section 86.12 be amended to delete the reference to the

submission of documents containing the religious tenets and to substitute therefore a certification procedure. This will avoid serious constitutional issues and at the same time provide a workable administrative procedure.

Moreover, it would be a particularly appropriate procedure for our seminaries, both with respect to the question of admissions and employment policies. Seminaries have been a part of the training of the Catholic priesthood for centuries and the controlling procedures of which are rooted in religious tenets and religions tradition with respect to the training of priests, supplemented by diocesan regulations and other rules concerning the training of seminarians. The training of priests is at the very heart of "Free Exercise of Religion" and Government surveillance is especially proscribed. Under the above circumstances, we submit that the certificate procedures would be particularly appropriate.

The second important principle which we wish to emphasize is that a church-related institution, especially at the elementary and secondary level, has a right to maintain internal discipline to the extent that it reflects religious tenets and beliefs. The Supreme Court of the United States in *Lemon* v. *Kurtzman, supra*, characterized the parochial school as "an integral part of the religious mission of the Catholic Church." On the basis of that asserted proposition, we submit that internal discipline imposed on a parochial school must be consistent with the mission of the Church and its basic tenets.

This proposition is especially applicable to every subparagraph of the ruling which would prevent the school authorities from taking appropriate action where a student, a teacher, or an applicant for the teaching profession is involved in abortion procedures or pregnancy outside of marriage. Both of these situations have a direct relationship to internal discipline which reflects the teaching of the Catholic Church. We cannot teach our children one thing and implicitly approve that which is diametrically opposed to our basic religious tenets.

In addition to this constitutional position, there is the physiological anomaly of equating pregnancy with abortion. Pregnancy is a natural biological condition involving life. Abortion is not a part of this process. Its end is death.

The school authorities must, on the basis of various religious considerations, make the final judgment. Congress never intended such preemptive action in this delicate area. It is not the proper function of the federal government to preempt this prerogative. This proposition applies to internal discipline, program and employment policies. Additionally, it applies to preemployment policies, especially marital status. In this respect, we see no element of discrimination because it applies equally to men and women.

A third proposition, and a very important one, involves the appointment of teachers to administrative and faculty posts, who are members of religious orders. Many of our schools are conducted by religious orders of men and women. Teaching in these schools is a part of their religious apostolate. Where, for example, a religious order of women is responsible for the conduct of a parochial school, or alternatively, is operating it as a part of their religious mission, then we submit that it would be a violation of their religious apostolate to require that they place a man in charge of the school or to a faculty position which they are operating. This is not a proprietary consideration but one which directly relates to the maintenance of religious orders and their religious mission.

If these basic recommendations are not implemented, the regulation would have the effect of imposing arbitrary guidelines on the exercise of recognized religious beliefs and convictions. It would impose specific burdens on the receipt of federal funds. Both, the First Amendment and the Due Process Clause of the Fourteenth Amendment prohibit the imposition of arbitrary burdens upon the exercise of constitutional rights and inhibit the attachment of conditions to the exercise of constitutional privileges. *Speiser* v. *Randall*, 357 U.S. 513, 518–519 (1958); *Spevack* v. *Klein*, 385 U.S. 511 (1967); *Sherbert* v. *Verner*, 74 U.S. 398 (1963). In the *Speiser* case, the State of California conditioned tax exemption on the taking of a particular oath of allegiance. The Supreme Court of the United States, in holding that the statute was unconstitutional stated:

"So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech."

Similarly, the proposed regulation would have the effect of coercing our institutions to violate their consciences in order to retain or receive federal funds. This obviously violates the letter and spirit of our constitution.

Our obvious concern with this regulation is aggravated by its ambiguity. For example, it is not clear whether such programs as ESEA and ESAA subject

parochial schools to coverage. The schools themselves do not receive any financial assistance, the children do. Clarification of this uncertain situation is imperative.

In addition to ESEA and ESAA, we express our concern over proposed rules in the area of vocational education. Our schools receive little, if anything, under these laws, and their situation is aggravated by the fact that the few vocational schools maintained by the Church, are in some instances operated by religious orders, whose Rule requires that they confine their education to a particular sex. In short, religious orders, by dedication, education and religious tradition, have limited their activities to a particular sex. Since these schools differ substantially from the Congressional concept of a vocational education school, we submit that they were never intended to be included in Title IX. Accordingly, consideration should be given to administrative treatment directed to their unique position.

Finally, there is a special situation which deserves comment. The Secretary of HEW stated in a proposed rule (Federal Register, July 12, 1974, Page 25667) that the proposed regulation, which is the subject of this comment, would not apply to sex education. We heartily endorse this position; it is consistent with all of the observations made above and avoids serious interference in a highly sensitive area.

We trust that the above observations concerning the relationship of the regulation to certain critical constitutional considerations, especially the Free Exercise Clause of the First Amendment, will be of assistance to your office in restructuring the regulation so that there will be no conflict between the regulation and the law or, more importantly, between the regulation and constitutional rights.

You may be assured that we will be more than happy to confer with your office in order to more fully articulate our position.

Sincerely yours,

EUGENE KRASICKY.

PREPARED STATEMENT OF DIANE CROTHERS, PRESIDENT, NEW YORK ASSOCIATION FOR EQUAL OPPORTUNITY IN HIGHER EDUCATION

I am Diane Crothers, President of the New York Association for Equal Opportunity in Higher Education, and Director of Affirmative Action at Staten Island Community College.

Mr. Chairman, and distinguished members of the House Special Sub-Committee on Education, I am happy to be here today to represent the New York Association for Equal Opportunity in Higher Education, an organization of affirmative action and equal opportunity officers from colleges, universities and medical schools in the New York metropolitan area. I am presenting testimony on implementing proposed Title IX guidelines.

Over the past few years the United States government has made great strides in its efforts to guarantee equal educational and employment opportunities for all Americans, regardless of sex. Congress has passed laws, agencies have been funded, regulations have been proposed, revised and proposed again—all in the name of one cause: to make the American promise of equality a reality for the "other" sex. For the final Title IX regulations to be delayed any further would be to deny your commitment to equal rights and hold useless the laudatory efforts of the Department of Health, Education and Welfare, Congressional leaders, advocates of women's rights and representatives of concerned community groups.

Many of us have been in the battle for equal opportunity in academe for many years, the expertise garnered through our efforts to implement the Higher Education Guidelines and other equal opportunity regulations applicable to federal contractors has focused our concern for the guidelines currently under discussion. We have learned that the more specific and detailed the regulations accompanying equal rights legislation, the more valuable they are in ensuring and furthering equal protection of those they are designed to protect. Unconscious and inadvertent discrimination are extremely difficult to document, and while this more subtle kind of discrimination remains an insidious enemy of all Americans committed to equality, the analyses of statistical trends and systematic barriers required by the Executive Orders have, at least, brought the tip of the iceberg to national attention. Because of the self-analysis of educational institutions mandated under these Orders, new and thoughtful programs will be developed to lift the systematic institutional barriers which have blocked women's access to equal educational and employment opportunities.

For far too long the American woman has been educationally and environmentally trained to believe that she is less than equal, a second sex, a sex for whom the highest strata of business, education, law, government or any career is closed. While it may be difficult to verbalize the impact of sex discrimination, it is painfully and tragically understood when experienced.

I am certain that it is a challenge for the gentlemen on the Committee to understand the consequences of sex discrimination. Thus, in the time-honored tradition of consciousness-raising, I would like to share with you some of my experiences, and those of my women colleagues, in our search for equality and education.

Of course, textbooks and teachers in the primary grades taught me to believe in my ability to be a wife and mother, while my male counterparts might be policemen, doctors, or even President. The zenith for a career-oriented third grade female might be nursing, or secondary school teaching.

Ironically, the range of professional and vocational opportunities did not expand with the educational level.

During my first semester at college, a male professor, also my adviser, attempted to seduce me, saying he hoped I would not misunderstand. I recall thinking, "Perhaps this is the best career advice he can give me!"

A woman colleague recalls that during her college days, less than ten years ago, female students were required to enroll in a course entitled "Hostess Problems" prior to graduation. Here, women were taught the fine art of serving tea and making finger sandwiches. As I look around, I wonder how many of the gentleman members of the Committee attended colleges where "Bartending" or "Successful Backyard Barbecues" were curriculum requirements.

By the time I reached law school I had gone further than anyone expected I could, or would want to. When I attended my first class, a professor of Torts told abortion jokes, prostitute stories, and assured us that there was no need for abortion reform, since pregnancy was the means women used to trap unsuspecting men into marriage. I sat through required criminal law and evidence cases in which the male professor called only on female students to recite rape cases. I shared the psychological burden of other women law students as we approached examinations with far more than the ordinary nervousness. Taught that we had no right to places in law school, we had to be academically superior to justify our right to legal education.

Some student mothers were convinced that their children would suffer irreparable harm because of their attendance at law school. An esteemed faculty member counselled one female applicant, who was the mother of a young child, "You must decide. You can either be a lawyer or a mother." Once again I must wonder how many of the gentlemen here have been told that careers in government service or elected office, and fatherhood, are mutually exclusive.

In yet another incident, the Director of Financial Aid, approached for emergency help from a divorced woman student, also a mother, chastised her for not winning a larger alimony settlement, since her husband was responsible for her support, not the law school.

Yet, ten years have not changed the pattern greatly. Recently, an older married female student at my institution was asked why she wished to pursue higher education; after all, she is already married.

By now the facts and figures about working women are widely known and well documented in the hearings of this Committee. Qualified women are proportionately underemployed, more frequently denied tenure and promotion, and, of course, earn less than their male counterparts.

Surely, we cannot ask women students and faculty to continue to bear this injustice and harassment any longer.

Through the occurrence of thousands of incidents like these, the American female student has been educated into a warped and diminished sense of her own potential and ability. Is it any wonder that women so often downgrade the professional accomplishments of other women?

The debilitating effects of the psychological warfare which occurs daily in our colleges and universities show up in each individual woman. Much too often women believe that they are not qualified, even when they have amassed the same publications record, years of experience, degrees and positions of responsibility as men. It is a bitter pill to swallow that you will not be justly rewarded and praised for behavior which, in a male, would reap approval, promotion and accolades of leadership ability and vision. But much too frequently affirmative action officers hear sex discrimination cases in which the female complainant,

denied promotion or tenure, is referred to as "abrasive," "brash," "uncompromising," "disruptive," or "provocative," when similar behavior in a male would be termed "initiative," "risk-taking," or "independent thinking."

The more far-sighted affirmative action programs in our universities have already included student discrimination problems as part of their concern even though this is not mandatory. Affirmative Action officers hear a wide variety of student complaints of sex discrimination. The more obvious areas of concern include faculty attitudes, uncritical use of sexist textbooks, lack of funding and financial aid for women, exclusion of female students from college-sponsored sports teams, lack of sensitivity to the returning woman student who has interrupted her education to bear children and raise a family, and a pervasive notion that women students are not serious, not in training for careers, and do not need access to lucrative and responsible positions.

Yet, if we are to make inroads into changing these overt and covert barriers which bar women's maximum participation in society, we must put teeth into the law. Enforceable regulations and guidelines are an essential weapon in the arsenal of the affirmative action officer. No longer can we permit female children, students and employees to see careers through the looking glass of their fathers, husbands or male supervisors; nor can we permit them to be sociologically invisible except as wives and mothers, nor can we permit them to accept second best solely because of their sex.

Recently, President Ford spoke to a group of small businessmen about their difficulties with federal regulation of business. He assured them: "I hear your cries of anguish and suffering, and I pledge I will not allow you to suffocate."

This is our message to you today. In the course of fulfilling our educational and professional obligation to students, faculty and administrators we hear the cries of anguish from the women among them. We are here to ask that you hear them also. Do not let them suffocate for want of federal protection of their legal right to equality under the law—protection which only you can, and must, provide.

Thank you for this opportunity to state the views of the New York Association for Equal Opportunity in Higher Education.

[Whereupon, at 12 p.m., the subcommittee adjourned, subject to call of the Chair.]

STATEMENTS
SUBMITTED TO THE
SUBCOMMITTEE ON EQUAL OPPORTUNITIES

The letters which follow were submitted to the Subcommittee on Equal Opportunities in response to the request of Chairman Augustus F. Hawkins for statements regarding regulations issued by the Department of Health, Education, and Welfare to implement Title IX of the Education Amendments of 1972.

AMERICAN ALLIANCE FOR HEALTH,
PHYSICAL EDUCATION, AND RECREATION.
June 19, 1975.

Hon. JAMES G. O'HARA,
Chairman, Subcommittee on Postsecondary Education, Rayburn House Office Building, Washington, D.C.

DEAR MR. O'HARA. Enclosed herewith is a copy of the testimony offered by the American Alliance for Health, Physical Education, and Recreation (AAHPER) which is in support of the Title IX guidelines assigned to your subcommittee for hearings. Since we were not provided the opportunity for testimony, this document should serve as the voice for more than 50,000 men and women of AAPHER who are strong in their affirmation of equal opportunity for all people. I respectfully request that this testimony be introduced into the official record of the hearings of your committee. You will note that copies are being sent to all members of the U.S. House of Representatives, Committee on Education and Labor.

Sincerely yours,

ROGER C. WILEY, *President.*

Enclosure.

STATEMENT OF AMERICAN ALLIANCE FOR HEALTH, PHYSICAL EDUCATION, AND RECREATION

The 50,000 men and women of the American Alliance for Health, Physical Education and Recreation (AAHPER), the national association concerned with the organization, administration and study of health, sport, physical education, recreation, dance and safety for our country, strongly support the proposed guidelines signed by President Gerald Ford which implement the interpretations of the Title IX of the Higher Education Act of 1972. The AAHPER has among its constituency 11,000 coaches, 3,200 athletic directors, 7,000 intramural directors, 5,000 athletic trainers and 4,000 officials. In addition, AAHPER is concerned with both national and international sport and is the largest association in the United States to be involved in the athletic interests of our nation.

The AAHPER, believing in equal opportunity for all people, endorses the intent of the guidelines to insure the disadvantaged sex the same opportunities in physical education, athletics, health, recreation and dance programs as those provided for the advantaged sex. The Alliance believes that social custom has created a history of unequal opportunity between the sexes and supports the intent of Title IX to rectify this situation. Activities which are an integral part of the program of education (including athletics) utilize public funds and facilities and as extensions of education must be subject to legal regulations which will guarantee equality.

The proposed guidelines are a significant beginning for the assurance that all people will be treated fairly. The disadvantaged sex will have many more opportunities to participate in quality programs of athletics, dance, physical education, recreation and health. Such an extension of equality will enhance the meaning of democracy in education, even as the concept continues to support opportunities for the advataged sex.

The AAHPER is hopeful that the legislative body of the United States will continue to affirm its belief in equal opportunity for all people in our democratic republic.

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LOUISIANA TECH UNIVERSITY,
INTERCOLLEGIATE ATHLETICS,
Ruston, La., June 18, 1975.

HON. AUGUSTUS F. HAWKINS,
The House of Representatives,
Washington, D.C.

MY DEAR MR. HAWKINS: First, let me say that as Athletic Director at Louisiana Tech University, I am not against women's athletics, we presently have several intercollegiate athletic teams for these young ladies. I must, however, for the survival of the athletic programs at our institution and those all across this great nation, speak out as strongly as I can against HEW's interpretations in Title IX stating what we must do in our programs if we are to continue to receive Federal money.

It is impossible for me to believe that these interpretations were meant to be a part of the original Title IX draft; I say this because I do not believe the draftees intended to destroy college athletics as we now know them. This will most assuredly happen if the Title IX implementation regulations become law on July 21, 1975. These regulations, simply and tragically, are not responsive to the financial and social realities of intercollegiate athletics.

We should all hope, particularly at this time, that no legislation be passed without the full realization of all its ramifications. This scrutiny must be applied to Title IX because I personally believe that intercollegiate athletics have played an important part in the history of our nation and is today part of our American heritage.

Many athletic departments today are operating in the "red", and HEW's regulations would impose a tremendous hardship on some and would be the death knell of many others. It would be an impossibility for most universities to fund an athletic program for women that would be comparable to the men's programs as we now have them. We are presently, and have been for several months, operating several areas of our department on moneys received from outside sources. And for HEW to say, at a time when costs are spiralling, that we must almost if not double our expenditures, is asinine and unrealistic.

The NCAA, conferences, institutions and athletic directors are continuously searching for ways to reduce costs in athletics and still keep a program which is attractive to the paying public, for without them there would be no program. The NCAA has called a special meeting in Chicago on August 14-15 (only the second time in history) for this specific purpose. Some items to be discussed are fewer scholarships, limited number of coaches, less scouting, less recruiting, devaluation of scholarships, limiting the size of traveling squads, and many other things.

I respectfully urge you to please consider the plight of all our universities and reject HEW's Title IX regulations and return them for an in depth study on the impact it would have on American athletics. This is necessary for our survival and should be done because practically every school in the country is doing something for women's athletics on their own volition, and this is just a beginning.

Sincerely,

MAXIE T. LAMBRIGHT,
Athletic Director.

LOYOLA UNIVERSITY OF CHICAGO,
Chicago, Ill., June 16, 1975.

Congressman AUGUSTUS F. HAWKINS,
House of Representatives Office,
Washington, D.C.

DEAR CONGRESSMAN: Will make this note short. Please vote to send Title IX back to H.E.W. for a detailed impact study. Otherwise, our whole program, both men and women, will go down the drain.

I have been a coach and a teacher for 35 years, my intentions are not selfish.

Best wishes,

GEORGE M. IRELAND,
Director of Athletics.

WOMEN'S EQUITY ACTION LEAGUE,
Washington, D.C., June 26, 1975.

HON. AUGUSTUS F. HAWKINS,
Chairman, Equal Opportunities Subcommittee, Rayburn House Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: As you have invited comments and opinions on Title IX, I am sending you a copy of testimony I presented before the Special Subcommittee on Education on June 25, 1975.

WEAL believes that, taken as a whole, the Title IX regulations provide a reasonable framework within which Title IX can be implemented and urges that the Congress allow these regulations to become effective on July 21, so that long overdue and much needed enforcement can begin.

Sincerely,

NORMA RAFFEL.

TESTIMONY OF NORMA RAFFEL, HEAD, EDUCATION COMMITTEE, WOMEN'S EQUITY ACTION LEAGUE (WEAL)

I am Dr. Norma Raffel. Head of the Education Committee of the Women's Equity Action League (WEAL). WEAL is a national voluntary organization which promotes equality in education and employment through legislaiton, litigation, and by pressing for full enforcement of anti-discrimination laws on behalf of women. Also, I am a Commissioner on the Pennsylvania Commission for Women and represent it on the Pennsylvania Department of Education's Task Force to eliminate sexism from the schools.

In 1972 when I was national president of WEAL, Congress passed Title IX of the Education Amendments which prohibits discrimination because of sex in educational programs or activities that receive Federal financial assistance. This law affects nearly every educational institution in the country and promises, if enforced, to assure girls and women the same opportunities that their male counterparts have enjoyed in the area of education. Title IX was enacted because there was a clear need for such legislation. Hearings had been held which revealed pervasive sex discrimination in all aspects of educational programs and activities including admission, treatment of students and employment practices. For two years women waited, sometimes impatiently, for HEW's Office for Civil Rights to develop regulations so the law could be enforced. Finally, in June 1974 the proposed regulations were published in the *Federal Register* and comment was invited. After reviewing nearly 10,000 comments, HEW made some changes and President Ford signed the regulations last month. Since then Congress has 45 days during which it can take no action and allow the regulations to become effective on July 21, 1975 or vote disapproval which may return them to HEW for further changes.

Now, three years after Title IX was enacted, there is real hope that HEW will have regulations so the law can finally be enforced. It becomes obvious as the regulations were being developed that eliminating sex discrimination from educational institutions was a large, complicated undertaking—mainly because the discrimination was so pervasive and had gone unrecognized for so long.

Eliminating discrimination because of sex in education will mean changing time-worn establishment practices to conform with the legal requirement of nondiscrimination. Quite naturally many groups and persons that have enjoyed or benefited by the preference given to males in the past will object to the application of the law, question its intent or scope and attempt to delay equal opportunity in education.

It is up to us now to look calmly and clearly at the intent of Congress and the law and to allow these regulations which provide a reasonable framework to carry out the nondiscrimination principles of Title IX to become effective so that enforcement can proceed.

There are two areas which seem to be of major concern and I should like to briefly comment on them. They are the scope of coverage and athletics.

Scope of Title IX Coverage. There is some controversy over whether Title IX prohibits discrimination in all of the educational programs and activities of an educational institution or just those programs and activities directly receiving Federal financial assistance. Crucial to resolving this problem is the interpretation of the phrase "education program or activity" found in Section 901 of Title IX.

Also in question is Section 902 which deals with the scope of HEW's termination authority. Can HEW terminate all Federal financial assistance received by an educational institution which is found to be in violation of the law, only that financial assistance which goes directly to a specific program which discriminates, or can HEW terminate funds to any program which is affected by the overall discrimination in the institution.

Two excellent legal memoranda, one from the American Law Division of the Library of Congress and the other from the Center for National Policy Review at the Catholic University of America's School of Law address the interpretation of Sections 901 and 902. They discuss the similarity between Sections 901 and 902 and Title VI of the Civil Rights Act of 1964. Because almost identical statutory language is used, it seems clear that Title IX would provide the same kind of coverage as Title VI and that the interpretation of Title VI should be a guide for the interpretation of Title IX.

Title VI has been interpreted as prohibiting racial discrimination in all aspects of the educational program in a school district receiving Federal aid. Therefore, in Title IX the term "education program" should also be interpreted in its broadest sense to encompass the entire education program offered by an education institution receiving Federal financial assistance.

Title IX was legislated to "provide equal access to men and women to the educational process and the extracurricular activities of the school: (117 Cong. Rec. 30407) by prohibiting discrimination in employment, admissions with certain exceptions, and in access to the programs and activities of the institution.

The intent of Congress would be defeated by anything but a broad interpretation. A narrow interpretation--that the law prohibits discrimination only in programs directly receiving Federal aid would be virtually impossible to enforce.

Federal money in many cases simply cannot be traced down to a specific program. Federal revenue sharing funds permeate educational institutions providing direct and indirect aid to all educational programs including athletics. The Commissioner of Basic Education in Pennsylvania said that it was impossible to trace revenue sharing funds and he had to work on the assumption that all educational institutions in the state received some.

If the money could be traced and only programs receiving direct aid were prohibited from discriminating, enforcement would be difficult, if not impossible. For example, Federal money is used to buy a piece of school equipment. Would every class using that particular piece of equipment be obliged not to discriminate while adjacent classes not using the equipment be allowed to discriminate? Suppose the class used the equipment one semester and not the other. Could they discriminate one semester, but not the other? Imagine the kind of enforcement and record-keeping involved in such a situation!

Many programs not directly receiving Federal monies benefit indirectly from Federal assistance given to institutions for construction programs, development of programs and student aid. Money released because of Federal funding may be reallocated. For example, a school district receives a grant to develop an individual, flexible course of study in high school. Part of teachers and administrative salaries involved in that project could be recaptured and returned to the general funds or be diverted to other programs.

Congress in Section 901 provided a broad general prohibition against sex discrimination in education and then limited its scope by exempting certain institutions from the admission requirement - one aspect of the total program. If Congress had intended the scope of Section 901 to be limited, there would be no need to mention the admission exemptions.

Section 902 of Title IX deals with the scope of authority in terminating funds. Again, the same language is used in this section as in Title VI. In the court case of the Board of Public Instruction of Taylor County, Florida v. Finch, 41 F. 2d (5th Cir. 1969) interpreted Title VI to mean that funds should be cut off to programs directly receiving Federal aid and any other part of the total program which is "infected" by discrimination. The concept of "infection" is discussed in the legal memoranda I mentioned earlier. This concept is as relevant to sex discrimination as it is to race discrimination.

Thus we have in section 901 a general prohibition of sex discrimination and in section 902 a narrowing of the fund termination to those areas where discrimination has affected the program or activity. Any other interpretation would make equal opportunity for girls and women almost impossible to achieve under Title IX.

Athletics: No other area of the Title IX regulations have provoked as much comment, discussion, publicity, and emotion as the section which pertains to athletics. One sports commentator said that Title IX the biggest thing to hit athletics since the invention of the whistle. That will indeed be true if it results in first class citizenship for women in athletics. In no other area of the educational program has the progress toward equal opportunity been more difficult and the inequities more apparent than in interscholastic and intercollegiate athletics.

WEAL has conducted studies of interscholastic sports programs in several states and found that girls programs were grossly underfunded, girls could use the facilities only when not needed or wanted by boys, and there was little inclination to change the situation.

For example. A survey of Pennsylvania, excluding Philadelphia, revealed that 70% of the secondary schools (junior and senior high schools) offered no interscholastic sports programs for girls. In those that did, there was an average of 7 sports offered for boys each year compared to 2.5 for girls. There were no interscholastic programs for girls in the junior high schools although the average junior high school offered 4 interscholastic sports for boys during the year.

A detailed study of one school district in a middle class university community revealed that ten times as much money was spent on the boys as on the girls programs, $74,874 for boys athletics and $7,704 for girls. The junior high schools in that area did not allow girls to use the gyms after school at all because they were used for boys programs. Only when it was pointed out that the school district was in probable violation of the law was any progress made. Girls in Pennsylvania certainly wanted more opportunities. The assistant to the Secretary of Education wrote as early as 1972, "We have been swamped with complaints about girls' lack of access to athletic programs, facilities, equipment and teams."

A study of sex discrimination in the Waco Independent School District of Texas revealed that $250,000 was allocated annually for boys athletics in the junior and senior high schools. The girls program was allocated $970—four tenths of one percent of the boys. Girls were prohibited use of stadiums, athletic fields, equipment and gymnasiums. No interscholastic, intercity or intramural girls teams were permitted in Waco. An athletic committee was appointed by the school board to recommend changes in athletic policies. They recommended and received approval for an expansion of the boys' programs with an estimated increase of $154,000 annually for that program and no allotment for a girls' athletic program! The need and desire for a girls' program was demonstrated by public protests by several parents' groups and the attempt to organize informally some girls' basketball teams at the junior high level.

The American public has supported athletic programs because it is convinced such activities help develop sound minds and bodies. Yet, half of the students—girls and women—are largely excluded. They are deprived the benefits of active sports participation including the opportunity to establish life-time habits of exercise which promote an increased level of good health in adult life.

If participation in competitive sports programs are as beneficial to women as they are to men; why has there been such difficulty in increasing opportunities for women in this area? In large part the answer lies in a statement from the NCA to collegiate athletic directors.

"Finally hammer the impossibility of meeting the requirement of overall program equity for men and women without severe curtailment of men's programs which you have built carefully over the years . . ." It appears that the NCAA is as opposed to the law itself which requires equity as it is opposed to the regulations which determine how equity is to be achieved!

Those of us who have worked direcly with school administrators have often heard the same thought. We can't take anything from the boy's program and there's no money to develop one for girls." Of course, when boys have had virtually all of the money and facilities, sharing will be difficult. Going from preferential treatment to equal treatment will be something of a shock. However, this may be an appropriate time for educational institutions to reassess their total athletic program taking into account the goals of education as well as the interests and needs of *all* of its students.

It is highly unlikely that women's competitive sports programs will approach the expenditures that the men's programs now enjoy. Equal expenditures for male and female programs are not required by the regulations, only that those females who have an interest be given an equal opportunity at her ability level.

Money is one of the major obstacles in approving the athletic section of the regulations. Therefore, it is important to remember that most of the money now supporting men's sports in colleges and universities throughout the country come from either student activities fees or the educational dollar. According to the March 15, 1974 New York Times, only one athletic department in ten makes a profit. The other nine run at a deficit.

According to the NCAA, the annual deficit of its members in conducting intercollegiate athletic programs in 1974 was $19.5 million. That fact, more than equal opportunity, may destroy intercollegiate athletics as we have known it".

The NCAA advocates that if all else fails, at least exempt revenue from revenue-producing sports from the requirements of Title IX. Certainly this would be one way to ensure the perpetuation of the *status quo.*

If an institution were one of the few fortunate ones which makes a profit in a sport as basketball, it could, with such an exemption, award up to about 18 scholarships plus monthly allowances for players, provide recruiting expenses, tutoring and training meals for the team. Awards such as rings, jackets or blankets could be given to players. They could fly the team, bands, families and others to games. Equipment and facilities would be limited only by the amount of profit. Any extravagant expenditure directly or in-directly related to the sport would be allowed. All of this could be done, not because it builds sounder minds and bodies, but because the sport earns money. In contrast, the women's basketball team continues to operate in the same old way—often with no scholarships, certainly no monthly allowances, no recruiting expenses, no tutoring nor training meals. Busing would be provided as well as limited equipment and training facilities. The difference is the women's team doesn't earn a profit.

Supporting an exemption for intercollegiate athletic programs because they earn money seems to say that when dollars come in, principle goes out!

Congress has already dealt with this aspect of the regulations. Senator Tower introduced an amendment to the Education Amendments of 1974 specifically exempting revenueproducing intercollegiate athletics from Title IX. It passed the Senate, but was deleted by conference committee and was replaced by the "Javits Amendment" calling for reasonable regulations governing intercollegiate athletics.

Achieving equal opportunity for women in sports has been further complicated by the differing physiology of women and men. That there are differences we are certain, but if, when and how much those differences should affect the participation of men and women in competitive athletics is not so certain. Research on the physiology of women in sports is relatively recent and many questions are still unanswered. Cultural attitudes and physiological factors have not yet been thoroughly separated. We are entering a largely untested area. There are many different predictions about the best way to achieve equal opportunity in athletics. Experience and measurable results will identify those programs which are most effective.

The courts have given some direction and in general the regulations are compatible with those decisions. The flexibility allowed in the regulations regarding mixed and single-sex competitive athletics may be prudent at this stage.

WEAL believes that, taken as a whole, the Title IX regulations provide a reasonable framework within which Title IX can be implemented and urge that Congress allow these regulations to become effective in July. Then the long overdue and much needed enforcement can begin.

More than 100 years ago at a conference in Pennsylvania, women called for equal educational opportunities for their daughters—a goal not yet achieved. The Title IX regulationse will be a giant step toward that goal!

STATEMENT OF NATIONAL WOMEN'S POLITICAL CAUCUS, WASHINGTON, D.C.

The National Women's Political Caucus endorses the final Title IX regulations as released by HEW on June 3, 1975. While disappointed that several of the provisions, particularly with regard to athletics, have been weakened, the Caucus also recognizes that the regulations as they stand are, on the whole, satisfactory. Furthermore, too much time has already passed since passage of Title IX in 1972.

If enforced in the true spirit of the Act, the net result of the regulations could be far reaching and beneficial in mitigating the subtle and all pervasive effects of sex-discrimination in American culture. The Caucus admonishes HEW to remember, however, that the subtle nature of sex discrimination requires a positive and

affirmative role on the part of the Office for Civil Rights in enforcement of the regulations. Clearly, the self-examination on the part of educational institutions suggested by Mr. Weinberger in his June statement, while a highly important aspect of enforcement, cannot begin to identify a process of discrimination which is not only largely unconscious but has long been encouraged and upheld by our American social institutions.

To summarize, the N.W.P.C. stands in support of the June Title IX regulations and hopes that the Office for Civil Rights will enforce them "in a spirit that fully embraces the real purposes of the law."

The N.W.P.C. cannot, however, similarly support HEW's proposed Consolidated Procedural Rules for Administration and Enforcement of Certain Civil Rights Laws and Authorities (45 CFR 81). While recognizing the expanded statutory responsibilities and increased work load of the OCR since the 1960's, the Caucus does not then conclude that HEW would more efficiently meet its responsibilities by being absolved of an essential provision of its original mandate, direct response to individual complain. Indeed, this solution is a simplistic and naive remedy for a highly complex and sophisticated problem.

Furthermore, committed to the proposition that, in a democracy, the law should be responsive to the individual, the Caucus strongly believes that individual citizen complaint is an indispensable and *irreplaceable* source of information. It is a source from which a civil rights enforcement agency ethically cannot divorce itself. Response to individual complaint should, in fact, serve HEW well in its enforcement responsibilities, for without the subtle threat that a single individual complaint could automatically bring down a full compliance review, educational institutions will not be easily coerced into self-examination and cleansing. Further, individual complaint is the foundation of the time-tested tradition of influence-by-precedent-case. These cases never start as "precedents," but rather find their origin in the common individual grievance. It is well known how quickly some of these cases have become the cornerstone of opinion, merely referring to such a case becomes substantive argument in later cases. Thus, rather than being a wasteful use of staff time and energy, as suggested by the Rules, such individual cases can serve the Department well in time and money saved.

In spite of the obvious need for *a balanced combination* of complaint response and general compliance reviews for an effective program of enforcement, however, HEW's Rules reveal a discouraging lack of respect for the value of meritorious individual or group complaint. Referring to complaints occasionally as "specious," not broadly representative," "disproportionate," and "skewed" in the direction of sex discrimination, the apparent effort is to discredit all individual complaints, while Mr. Holmes himself has stated that almost 50% of the complaints received by the Office for Civil Rights are meritorious.

The Rules state that "individual complaints will continue to be an important factor in scheduling and conducting compliance reviews," but it is difficult to believe that there will *be* any complaints directed to the Department under these circumstances. It is not difficult to foresee that aggrieved citizens will cease to send letters of complaint to a Department which can offer only a hope that *perhaps sometime* in the next twelve months the Department may conduct a general compliance review which may or may not take into consideration the individual's specific complaint. This is as much as the drafted Rules require of the Department.

Without individual complaints, what are HEW's alternative sources of information for possible non-compliance? It is not at all clear in the Rules. Educational institutions are admonished to cleanse themselves, institutions are required to develop and maintain their own data to be submitted to the Director on request; but there is no indication of when or on what basis the request will be made. In fact, there is little or no accountability for the methods and responsibilities of either HEW or the institutions in this respect. How are institutions to be chosen for review? On what schedule? We are told only that relieving HEW of its obligation to respond to individual complaints (an original mandate of the Act, but apparently only a problem since *Adams v. Weinberger*) will allow HEW to take "a more assertive role in planning and effectuating overall civil rights objectives." This Act requires more than a planning and analysis project for enforcement!.

Mr. Weinberger is clearly telling us that HEW cannot fulfill its mandates under current Title IV enforcement procedures. The N.W.P.C. agrees that reorganization of HEW's methods, priorities and objectives is clearly in order,

but not at the sacrifice of the Act itself. The Caucus therefore urges Mr. Weinberger to withdraw the drafted Rules as presently submitted, and to re-evaluate HEW's original responsibilities in terms of the full spirit of the Act.

The Caucus suggests that the Office for Civil Rights would profit by consultation on the restructuring of these Rules with one or several of the highly qualified, professionally staffed women's organizations. they, more than anyone, are familiar with the subtleties of sex discrimination.

THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC.,
June 20, 1975.

Hon. AUGUSTUS F. HAWKINS,
Subcommittee on Equal Opportunities, Committee on Education and Labor, House Office Building Annex, Washington, D.C.

DEAR MR. HAWKINS. We appreciate this opportunity to present our views on the regulations issued by the Department of Health, Education and Welfare for enforcement of Title IX of the Education Amendments of 1972.

Enclosed is our brief statement in which we urge that the regulations be adopted so that implementation of this most important piece of legislation can finally begin.

You have also asked for our views on H.E.W's new proposed procedural regulations for handling civil rights complaints. We are still in the process of examining these proposals and are unable to give you a comprehensive answer at this time.

However, our initial reaction is one of great concern about the virtual elimination of individual complaint investigation and resolution by H.E.W.'s Office of Civil Rights.

While we understand that OCR is operating under a very heavy work load, we nevertheless believe it would be a great mistake for individual complaints to be neglected or relegated to second class treatment. If individuals cannot go to the federal government for enforcement of Federal laws which affect them, then what meaning do these laws have?

We agree with Senator Birch Bayh's recent comment that compliance reviews, if they are conducted thoroughly and enforced properly, can be helpful in attacking systematic discrimination, *but* they are not a guarantee that justice is being met for an individual or for a particular set of individuals in a given case.

Thus, we urge that your Subcommittee exert every effort to get the Department of Health, Education, and Welfare to withdraw these proposed procedural regulations.

We will be happy to supply you with a copy of our formal response to the proposed regulations when it is completed.

Again, thank you for giving us this opportunity to express our opinions to you and your Subcommittee.

Sincerely,

MARIE B. BOWDEN,
National President.

Enclosure.

STATEMENT OF THE NATIONAL FEDERATION OF BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, INC.

The National Federation of Business and Professional Women's Clubs, Inc., is pleased to have this opportunity to present its views on the final regulations for enforcement of Title IX of the Education Amendments of 1972.

Our organization is composed of nearly 170,000 working women who reside in every one of the 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands.

Ever since our inception in 1919, the National Federation has placed equality of educational opportunity high among its goals. One of our four major Federation objectives is directly related to this subject: To extend opportunities to business and professional women through education along lines of industrial, scientific, and vocational activities.

Many of our members are actively involved in rooting out sex discrimination where it exists in education, and in promoting the development of new opportunities for women to put them on an equal basis with men.

The elimination of sex discrimination in education is a major item on our National Legislative Platform, and we strongly supported passage of Title IX. Because many of our members are teachers and educators, our interest includes equality of educational employment as well as equality of educational opportunity.

We were particularly pleased that Title IX was enacted because we felt this indicated that Congress was truly aware of the magnitude of the problem, and that Federal government support of equality of educational opportunity would have a tremendous impact.

We have been greatly distressed by the fact that three years have passed without regulations for enforcement of Title IX. While passage of legislation is important, it means little if there is no enforcement.

It is unreasonable to expect that much movement can be made toward implementing Title IX, or that enforcement can truly begin, without the existence of guidelines.

Therefore, we strongly believe that the final regulations issued by the Department of Health, Education and Welfare should be approved.

While these regulations are not all that we had hoped they would be, while we would like to have seen more comprehensive and far reaching guidelines, we still think it is crucial that they be approved in their present form so that enforcement of this most important law can begin—now.

Already too many young women and girls who would have been affected by Title IX have passed through the educational system without the benefit of educational opportunities taken for granted by young men and boys. Since passage of Title IX in 1972, too many opportunities have been lost, too many doors have been closed, too many lives have been altered because of sex discrimination in education.

While these past opportunities may never be recovered, it is important that there be no more delay, that no more girls and women be adversely affected simply because they were born female. Congressional approval of the regulations in their present form will assure that a beginning can be made now to develop the talents and aspirations of a sizeable portion of our population.

We would like to comment briefly on the matter of athletics, a subject which has, in our opinion, received a disproportionate amount of publicity. We believe that athletics and sports programs are an important part of the education and development of the whole person, male or female. We agree that athletics are an integral part of an institution's educational program, and that they should be covered by Title IX.

In conclusion, we urge that Congress approve the regulations in their present form.

AMERICAN VETERANS COMMITTEE.
Washington, D.C., June 20, 1975.

Hon. AUGUSTUS F. HAWKINS,
Chairman, Subcommittee on Equal Opportunities, House Office Building Annex, Washington, D.C.

DEAR CONGRESSMAN HAWKINS: Enclosed is a statement by the American Veterans Committee in the Title IX regulations proposed by HEW. We respectfully request that this statement be made a part of the record.

Thank you.

Sincerely yours,

JUNE A. WILLENZ,
Executive Director.

STATEMENT OF THE AMERICAN VETERANS COMMITTEE

The American Veterans Committee has been very concerned over the years with all aspects of discrimination against any group of individuals and after a long history of dedicated efforts on behalf of civil rights, has championed equal rights. We have supported passage of the E.R.A. and also have participated in the legal struggle for equal rights.

Our platform states, "A.V.C. stands for equality for all, regardless of race, color, ancestry, national origin, religion, sex or age, and for the constitutional guarantees of such equality." and "A.V.C. supports an educational system and a public health system which will give the American people and America's youth in particular, the knowledge, skills, and training, and the physical and mental health and stamina, to continue their forward march toward America's democratic fulfillment.

Sex discrimination in the nation's schools and colleges is one of our concerns. We assume that any programs dedicated to youth's education and fulfillment means all youth female as well as male. The rampant sex-discrimination that

has been practiced in almost all educational institutions and has barred females from participating in programs, sports and other activities, must be stopped. While Title IX does not address all the problems of sex discrimination in educational institutions, it does address itself to a large number of institutions.

We urge that the Congress allow the regulations relating to Title IX become effective on July 21, 1975 as approved by the President. Even though we have some reservations concerning some of the provisions of the regulations which omit other provisions which would have strengthened the Title IX mandate, but nevertheless we support the proposed regulations as an important beginning step to meet the nation's obligation to provide equal opportunity for women in this country. We had hoped that stronger affirmative action requirements and a more even handed treatment of athletic programs would have been included. However, the regulations do come to grips with some of the major issues of sex discrimination in many aspects of education.

Therefore, we urge that these regulations should not be watered down or deferred, but approved by the Congress immediately.

We call upon the Congress to approve this regulation and to monitor closely how educational institutions comply with them. We would hope that Congress will also oversee diligently the track record of HEW in administering and enforcing these regulations.

STATEMENT OF JAMES A. HARRIS, PRESIDENT, NATIONAL EDUCATION ASSOCIATION

The National Education Association is pleased to testify before this Subcommittee on the federal regulations implementing Title IX of the 1972 Education Amendments. NEA worked to ensure passage of the original legislation and submitted comments last fall to the Department of Health, Education and Welfare urging the development of strong, effective regulations.

Although other federal nondiscrimination laws have previously prohibited sex discrimination in educational employment, Title IX is the first and only legislation to prohibit sex discrimination against students in federally assisted educational programs. More than 60 million students enrolled in programs from early childhood through higher education will be affected by this coverage. Title IX is truly a milestone in the quest for equality in education.

Sex discrimination in education admissions, vocational education programs, counseling and guidance materials, and mandatory maternity leave for female employees was recognized by Congress as significant denial of equality for women. Potential effectiveness of the regulations now before this Subcommittee cannot be overemphasized, although they do not speak to all the sources of sex bias in education. Nonetheless, we believe that this is the beginning of a good faith effort on the part of HEW to enforce the Congressional intent of Title IX.

Recognizing that the purposes of these hearings is to determine only whether or not the regulations conform to the intent of the law—and we believe that they do—we would like to point out several areas which we feel deserve special commendation.

In our initial comments on the proposed regulations, NEA urged that institutions to encouraged to begin a self-evaluation process to identify overt and covert forms of discrimination within their agencies and institutions and initiate voluntary efforts toward compliance with the law. We are pleased to note that the final regulations have incorporated that recommendation.

The NEA is also pleased to see that HEW modified its proposed requirement for use of an internal grievance procedure prior to the filing of a complaint with HEW. Although such a requirement was not in the initial draft of the regulations, it was reported to have been a part of the regulations submitted to the President earlier this year. We found no legislative history to justify such a requirement and are gratified that it is not included in the final document's provsion regarding internal grievance procedures.

Certainly, there are areas which HEW might have emphasized more strongly. For instance, there are still no provisions requiring review of sex bias in textbooks and instructional materials nor is there any provision for equal benefits in retirement plans for employees, nor for the development of essential inservices training programs for school personnel. In addition, we are concerned that HEW has not yet established an active, aggressive record in relation to the enforcement of Title IX. In the nearly three-year interim between passage of the legislation and the release of these regulations, millions of students and employees have been denied full equality. With the release of

the final regulations which implement the intent of the law, the issue of enforcement will now become paramount.

Since the passage of Title IX, 18 States have moved toward increasing equality through the passage of some form of legislation dealing with sex equality in education. In addition, at least eight state laws or administrative mandates move beyond the proposed Title IX regulations in their requirements for affirmative or remedial action in both employment and educational programs. These actions reflect growing recognition of the urgency of the matter. We cannot afford to delay, and face the passage of another school year without beginning the difficult task of moving toward sex equality in education.

We would hope that the hearing record of this Subcommittee and of the other Committees involved will establish a focus for future Congressional oversight. NEA has begun an active information and training program for notifying our membership of the new regulations and the implications for schools. We are hopeful that with the watchful assistance of the Congress, private organizations, and individuals, HEW will implement the regulations quickly and fully so that sex equality can become a reality in our educational agencies and institutions.

STATEMENT OF U.S. REPRESENTATIVE AUGUSTUS F. HAWKINS, CHAIRMAN OF THE SUBCOMMITTEE ON EQUAL OPPORTUNITIES, COMMITTEE ON EDUCATION AND LABOR

This statement is submitted on behalf of the Federation of Organizations for Professional Women. The Federation, which was formed three years ago, is an umbrella organization of 64 affiliates with a wide range of professional identifications. Our purpose is to provide a mechanism for improving the status of women by promoting equality of opportunity in education and employment. Among our affiliates are the American Association of University Women, the American Medical Women's Association, Graduate Women in Science, the National Association of Women Deans, Administrators, and Counselors, the Association of Women in Science, women's caucuses in the American Political Science Association and the American Economics Association, and the Intercollegiate Association of Women Students.

THE FINAL PROGRAM REGULATIONS OF TITLE IX SHOULD GO INTO EFFECT IMMEDIATELY

Title IX of the Education Amendments of 1972 suggested the beginning of a new era of equality for the girls and women of the United States of America. As a mechanism for permitting them to make a maximum contribution to society, the importance of Title IX cannot be exaggerated. The final regulations are consistent with the letter and intent of the statute, and if properly implemented, should go far towards removing the blemish of sexism which now disfigures the face of our society.

The Federation applauds the inclusion of several provisions in the final regulations.

VOLUNTARY COMPLIANCE MECHANISMS

We agree with the Secretary of Health, Education, and Welfare that much discrimination results from a lack of awareness in our educational institutions and therefore wholeheartedly support section 86.3(c) which provides for recipient self evaluation. We feel that the self awareness resulting from these evaluations will prove invaluable in promoting the voluntary elimination of discrimination. The Federation is disappointed in the lack of specificity in the provisions requiring institutional grievance procedures (§86.8(b)), but hopes that they too will provide a viable mechanism for voluntary compliance. We are encouraged in this hope by the inclusion of provisions for wider dissemination of more specific materials (§86.8(a) and §86.9(a)(i)) which we feel will provide impetus for equitable resolution of complaints.

The Federation also commends the agency for incorporating provisions on assurance procedures and self evaluation (§ 86.3(c)(iii) and § 86.4(a)) which extend remedial action requirements into the sphere of voluntary compliance. These changes and inclusions all help to provide a firm basis for the voluntary compliance mandated by the statute.

SCHOLARSHIPS

The area of financial assistance also contains several significant provisions. While the Federation recognizes the difficulties in dealing with this area due to the restrictive nature of many gifts, we are also aware of the overwhelming need for corrective action, particularly since many women face, in addition to reduced opportunities for scholarships, discriminatory credit practices which severely limit the availability of other funding. We are particularly pleased by the inclusion of *all* scholarships, including all of those for foreign study (§86.36 (c)), and feel that with proper implementation, much-needed financial assistance will be more equitably distributed among America's able students regardless of sex.

COUNSELING AND SEX-BIASED TESTING

The Federation endorses the section on counseling and counseling materials (§86.36), and the section prohibiting the use of sex-biased testing materials (§86.21(b)(2)) which are carefully drafted, very inclusive, and hold great promise for overcoming the channeling of boys and girls, men and women into school and career choices which may reflect societal standards rather than personal needs and preferences.

EMPLOYMENT

The provisions dealing with employment are equally well drafted, and the Federation particularly applauds those sections which bring the regulation into conformity with the Equal Pay Act (§86.54(b)), and those sections which provide for the treatment of pregnancy as a temporary disability (§86.57(2)(c)). We feel, however, that provision should be made to protect those whose jobs are abolished when certain sex-restricted programs merge. We do not approve the provision which allows for unequal benefits in pension payments (§86.56(b)(2)). We are aware that several agencies are submitting a joint pension recommendation to President Ford on October 15, 1975, but we feel the issue of pensions is so important that it should have been dealt with here as well.

ATHLETICS

The Federation of Organizations for Professional Women firmly believes that the athletic programs of a school fall under the purview of Title IX regulation. The overwhelming body of precedent set by Title VI case law, as well as the Congressional mandate to provide athletic regulations for the Education Amendments of 1971 thoroughly establish the basis for Title IX athletic regulation.

The Federation believes that many groups have promulgated "scare stories" based on their ignorance of the provisions and their fear of change. We are quick to point out that the regulations do not require equal aggregate expenditures, but merely require that funding accommodate the "interests and abilities" of both sexes. In fact, we believe that these regulations will prove beneficial to both sexes by opening the door to changes which will reorient athletic education to the needs of all students, not just the needs of the "star athletes" of one sex. We absolutely reject the statements of those who decry Title IX as signaling the end of college athletics".

We would also like to point out that these regulations are not limited to college students, but promise vast improvements in opportunities to elementary and high school students as well.

The Federation cannot help but note that many who disagree with the athletic regulations base their opposition on monetary considerations. This was most obviously the case with a contingent of football coaches from that fraction of schools with "golden goose" football teams who testified in the O'Hara subcommittee on June 17, 1975. In contrast to their statements, we believe that no one should be allowed to put a price tag on freedom. Physical fitness is not a sex linked trait and no athletic program in the United States should deprive any citizen of the opportunity to achieve it.

We view as utterly irresponsible those who would delay the enactment of such wide ranging regulations solely on the grounds of their objections to the athletic provisions.

IN CONCLUSION

The Federation would like to point out that the regulations maintain certain distinctions that a majority of persons would consider valuable. Exemptions for sex restricted locker rooms, toilet facilities, choruses, and sexual education

classes (§86.33, §86.34(c) (f)), are clearly spelled out. In addition, the Federation calls attention to the well worded general exemptions for certain social organizations (§86.14). These carefully drafted provisions preserve certain social organizations such as Girl Scouts while prohibiting discrimination in the honor and professional societies, denial of membership in which is a hinderance to a successful career. Opening the doors of these societies can only benefit the nation as a whole by bringing both sexes into the mainstream of their professions and allowing them to make the fullest possible contributions in their chosen fields.

After examining them thoroughly, the Federation of Organizations for Professional Women feels that these regulations should be adopted with all speed to further the cause of equal opportunity for women in the United States. Congress should not be persuaded to delay the enforcement of Title IX by disapproving these regulations. We have been waiting for them since 1972, and in a time when this nation needs to develop the potentials of all of its citizens, we cannot afford to wait any longer.

THE PROPOSED CONSOLIDATED PROCEDURAL REGULATIONS SHOULD NOT GO INTO EFFECT

The Federation's endorsement of the Title IX regulations in no way implies approval of the proposed procedural regulations released by the Secretary at the same time. The Federation feels that this simultaneous release was a deliberate attempt to confuse the public and the legislature about the coverage and intent of these two entirely distinct regulations. In the preceding pages we outlined our reasons for approving the Title IX regulations, in the next few pages we will outline our reasons for disapproving the proposed procedural regulations.

FAULTY SUBMISSION OF THE REGULATIONS

The Federation of Organizations for Professional Women is unalterably opposed to the HEW proposed procedural regulations. They were submitted in draft form under an adoption procedure which does not allow sufficient time for constructive public comment. We consider this method of governmental operation highly irresponsible, particularly since these regulations are so extensive in their implications for major civil rights legislation.

INADEQUATE ENFORCEMENT AND DUE PROCESS OF LAW

In addition to the deficiencies in their submission, the Federation feels that the proposed regulations provide an entirely inadequate mechanism of enforcement. We are particularly concerned about section 81.7, which does away with HEW's obligation to respond to individual complaint. This section, together with section 81.6 effectively instructs any persons who have suffered from illegal discrimination to take their troubles elsewhere. Complainants are advised to seek redress not from the federal agencies, but rather from "grievance procedures required to be available pursuant to the statute" (§.81.6(b) (2)). Such provisions completely ignore the fact that institutions whose actions give rise to complaints are likely to have pitifully inadequate grievance mechanisms.

The Federation of Organizations for Professional Women believes there is a real question of due process at stake here. The whole of subparts C and E, by far and away the lion's share of the proposed regulations, are devoted to a detailed description of the legal rights of an institution already suspected of having broken the law, while the rights of the victims of such illegal actions are dismissed in two sections. Deprived of federal redress, an individual injured by institutional discrimination can be shunted from agency to agency at the local or state level. The Federation finds it inconceivable that there is no federal relief built into regulations which purport to enforce federal law.

SYSTEMATIC DISCRIMINATION AND INSUFFICIENCY OF AGENCY ACCOUNTABILITY

The publication in the *Federal Register* devotes a great deal of space to an apologia which describes the need for HEW to address itself to broad based systemic discrimination. While this need is well established, the Federation feels we cannot afford to accommodate it at the expense of procedures dealing with individual complaints. The concept which is the heart and soul of our political system is accountability. We elect our legislators and look to our courts for final redress in law. Ours is meant to be a government of the people, by the people,

and for the people, ultimately responsible to the needs of the people. In the absence of a requirement for the investigation of individual complaints, the regulation loses a dimension of accountability which has been of great service to aggrieved American citizens.

The fact that these regulations leave HEW largely to its own devices is particularly dangerous in the light of the agency's deplorable record in civil rights enforcement. Although during the 1960's HEW terminated the funds of over two hundred school systems and noticed for hearings six to eight hundred others, since 1970, HEW has terminated the funds of only four school systems and noticed for hearings only a handful of others. Furthermore, HEW has not once noticed a system on the basis of sex discrimination under the provisions of Title IX.

HEW now justifies its proposed regulations by claiming that its present resources are incapable of investigating individual complaints, but for fiscal year 1976, the Office of Civil Rights did not request a single new position in the Elementary and Secondary Education Division, and only requested six new positions in the Higher Education Division. In addition, the Office of Civil Rights estimates that during fiscal year 1976, over 40% of the full-time staff in the regional offices in Philadelphia, Chicago, and Los Angeles will be performing "big city reviews", enormous projects expected to require years of work which completely ignore the needs of non-urban areas.

Finally, although the regulations provide that systemic discrimination will be detected through sources other than individual complaints, beginning in the fall of 1975, the Office of Civil Rights is reducing the scope of its civil rights high school survey, thereby cutting back a major source of necessary information.

The Federation of Organizations for Professional Women is extremely disappointed in HEW's performance in civil rights enforcement. In view of this poor record, we feel it incumbent upon us to resist the adoption of these regulations, and to oppose them in every forum. They would have a far reaching negative impact on the civil rights freedoms guaranteed by the laws and Constitution of this nation.

Finally, the Federation calls attention to the fact that that unlike the Title IX regulations, the proposed procedural regulations are signed only by HEW Secretary Caspar Weinberger. The President of the United States would not endorse them, and neither do we.

FLORIDA SOUTHERN COLLEGE.
Lakeland, Fla., June 23, 1975.

Hon. AUGUSTUS F. HAWKINS,
House of Representatives,
Washington, D.C.

DEAR MR. HAWKINS: Please let me bring to your attention a most serious concern many of us in private higher education have about the regulations regarding nondiscrimination based on sex," Title IX of the Educational Amendments of 1972, which were drawn up by the Department of Health, Education, and Welfare, signed by the President, and passed on to Congress for review. I understand that the regulations will take effect July 21, 1975, unless Congress acts before that date.

Perhaps the most deleterious of the regulations from the point of view of a small, private college is the one mandating identical dormitory regulations for men and women students. It is an incontrovertible fact that the safety requirements for men and women students differ on a college campus. Women students are far more likely to be victims of sexual assaults and rape than men. Greater security arrangements are necessary in women's housing than in men's. I do not believe it was the intent of Congress when it passed the education Amendments of 1972 to go so far as to force a private college administration arbitrarily to implement identical dormitory regulations for men and women students in situations where there clearly exists a reasonable relationship between the regulations of a women's dormitory and the safety requirements of those women students living there and at the same time a reasonable relationship between the regulations of a men's dormitory and the safety requirements of the men students housed there. Surely in America a private college has the right as well as the responsibility to implement housing regulations commensurate with the safety requirements of students housed in its dormitories.

Furthermore, the regulation will deter private educational institutions from the pursuit of their legitimate educational goal of preparing men and women for living in the world that actually exists. The precautions for personal safety

which a woman must take in our society do in fact differ from those of men. It is the right of a private college to [illegible] this fact by reflecting it in its philosophy and structure. For a private college, against its best judgment and conscience, to pretend that the safety requirements for men and women are identical in our society and to govern itself accordingly, so ordering its life and teaching its students, would misguide students creating a dangerous illusion in the minds of both men and women students. We as a private college are in the business of preparing persons to live wisely in the world that *is*, not in a world that exists only in someone's Utopian fancy.

Such a regulation if forced on a small, private, residential college will take away from private higher education the right to be distinctive and reflect legitimate parental concerns and will have a homogenizing effect on American colleges and universities. It will so alter private higher education as to threaten the existence of the creative pluralism which makes American higher education great, composed as it is of both the public and private sector.

I urgently plead for enough latitude in the regulation to permit a private college to meet adequately the differing safety requirements of its male and female students in regard to college housing and to proceed with its legitimate educational task in a way that does not discriminate against either sex but rather rationally provides for the well-being of all of its students. This regulation patently exceeds the intent of Congress. I implore you to do all you can to delay the implementation of the regulation so that Congress will have time to bring it into line with what the Congress intended when it passed the law in 1972.

Sincerely,

WALTER Y. MURPHY.
Executive Vice President.

[Mailgram]

Representative AUGUSTUS F. HAWKINS,
House Office Building Annex,
Washington, D.C.

Learned today that House Subcommittee on Equal Opportunities solicits written comments regarding Title IX of 1972 Education Amendments. Please know the National Federation opposes Section 86.41. The section is illegal. Interscholastics athletics receive no Federal financial assistance and were not intended to be regulated by Title IX. The inclusion is arbitrary. Why is there no similar section for band activities, English courses or most other parts of school curricular and extracurricular life?

The section is excessive in its involvement in school programs. Schools must constantly document programs and participation for potential proof of compliance.

The ambiguity of the regulations permits inconsistent interpretation and enforcement. Schools will be unable to establish programs with confidence.

The section is unwarranted. Schools have achieved near equality without regulations which will only cause confusion, frustration and expense. We urge disapproval of 86.41.

CLIFFORD B. FAGAN,
Executive Secretary,
National Federation of State
High Schools Association, Elgin, Ill.

BAYLOR UNIVERSITY,
Waco, Tex., June 18, 1975.

Hon. AUGUSTUS F. HAWKINS,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HAWKINS: The President approved the HEW draft of the Title IX regulations on May 27 and sent them to Congress for its approval by July 21. I urge you to vote against such approval.

I believe the federal regulations should be restricted just to educational programs which receive federal aid and not to entire school systems. Under the HEW interpretation, if one student on the GI Bill attends a university with 10,000 students, the whole university with all its programs and schools is subject to Federal regulation. As one educator put it, 'The federal government has

furnished the thread to sew on a button and demands the right to design the whole suit."

Particularly onerous are the regulations concerning intercollegiate athletics, which in many cases might be called an unrelated business conducted by some universities for the amusement of alumni and local citizens. This business will likely be destroyed by these regulations under which bureaucrats will inevitably require the same expenditures on women as men's sports. The regulations should allow the revenue produced by a sport to be spent on that sport.

I hope you will use your influence in Congress in an effort to bring about these changes.

Sincerely,

ABNER V. MCCALL, *President.*

COX, LANGFORD & BROWN,
Washington, D.C., June 23, 1975.

Hon. AUGUSTUS F. HAWKINS,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HAWKINS: At the request of Bill Foster, President of the National Association of Basketball Coaches, I send you herewith copy of his statement opposing the application of HEW Title IX regulations to intercollegiate athletics. If we can be of further assistance, please let us know.

Very truly yours,

MICHAEL SCOTT.

Enclosure.

STATEMENT FROM BILL FOSTER, DUKE UNIVERSITY, NATIONAL ASSOCIATION OF BASKETBALL COACHES PRESIDENT

The National Association of Basketball Coaches (NABC) Board of Directors has adopted the position that the Title IX regulations promulgated by HEW will place intercollegiate athletics under the *full* control of the Federal Government and will eventually destroy many intercollegiate programs.

The NABC Board made a strong appeal to its 2,000 member coaches to join its efforts to delay application of the regulations until HEW has studied the impact on college programs. The NABC also encourages basketball fans throughout the country who have enjoyed and supported intercollegiate basketball, to be aware of this position and join the membership in contacting Congressmen to support the Association's concern.

The regulations, written under the pretense of eliminating sex-discrimination, are not responsive to the financial and social realities of intercollegiate athletics, the NABC stated.

Basketball and football have produced revenues which have benefited many male and female collegiate sports, and implementation of this legislation could place each of these activities in danger of collapse, the NABC added.

JUNE 18, 1975.

NATIONAL COUNCIL OF JEWISH WOMEN,
New York, N.Y., June 20, 1975.

Hon. AUGUSTUS F. HAWKINS,
Chairman, Subcommittee on Equal Opportunities, Committee on Education and Labor, House of Representatives, Washington, D.C.

DEAR MR. HAWKINS: Enclosed please find the statement of the National Council of Jewish Women commenting on Title IX Regulations and on the Proposed Procedural Regulation for Civil Rights Enforcement.

While the Title IX Regulation does not address all of our concerns, we need the regulation now, so that schools and colleges can comply with the law.

The implementation of the Procedural Regulation would thwart the national commitment to equality. It therefore, should not be permitted to go into effect and Congress should take every possible step to achieve this end.

Sincerely yours,

MRS. DOROTHY LASDAY, *Chairwoman,*
National Affairs Committee.

Encl.

STATEMENT SUBMITTED TO THE SUBCOMMITTEE ON EQUAL OPPORTUNITIES

Throughout its 83-year history the National Council of Jewish Women, a social action and community service organization of 100,000 women in communities across the country, has been committed to the principle of equal opportunity for all, including equal legal rights, equal access to educational services, and equal employment opportunities. At every level of government our members have worked consistently in support of legislation to ban discrimination and to protect the rights of the individual. However, we are well aware that the passage of legislation is but a first step in bringing about desirable change, the manner in which legislation is implemented is of critical importance in achieving the intended results. Guidelines, regulations—all the procedures promulgated by the Executive Departments of the government—determine to a large degree the substance of any piece of legislation and the Executive disposition to adhere to the Legislative intent and spirit. Nowhere is this fact more dramatically illustrated than in the proposed regulations for Title IX of the Education Amendments of 1972 and in the *Proposed Procedural Regulation for Civil Rights Enforcement* both issued by the Department of Health, Education and Welfare on June 4, 1975.

The unconscionable delay in issuing Title IX Regulations has already blocked implementation of the law for 3 years. Public and private statements by HEW Secretary Caspar Weinberger have made it abundantly evident that he was under no compulsion to carry out the mandate of the Congress. To compound this deplorable delay, the proposed Title IX Regulations have several major defects, which in our judgment will thwart the will of Congress to bar sex discrimination in education. Among the more serious shortcomings we note the following: (1) the absence of any requirement that remedial and affirmative action plans be made mandatory, and that relevant guidelines be developed to accomplish the same. Although the provision for self-evaluation may prove to be very helpful it is not a substitute for affirmative action; (2) the lack of due process for complainants, comparable to the procedures available to recipient institutions; (3) the provision that a federally-funded institution may assist its students to gain admission to an education program which discriminates, if such discrimination is permissible under sub-part B (single-sex private undergraduate institutions); (4) the failure to address the basic problem of sex-biased text books and curriculum materials.

The net result of these and other flaws in the regulations is to negate the purpose for which the Act was adopted, namely, to eliminate discriminatory practices in education based on sex.

The Proposed Procedural Regulation for Civil Rights Enforcement also issued by the Department of HEW on June 4, would eliminate investigations of individual complaints of discrimination by the Office of Civil Rights. Instead, the Department would undertake occasional compliance reviews with the objective of removing "systemic discrimination."

The proposed Regulation would apply not only to Title IX, but also to Title VI of the Civil Rights Act of 1964, Titles VII and VIII of the Public Health Service Act, and other existing HEW mandates for civil rights enforcement with the exception of Executive Order 11246 (sex discrimination by Federal Contractors). Although HEW is mandated by the law to enforce the non-discrimination provisions in all these Acts, under the new procedures individuals suffering discrimination will no longer be able to petition the HEW Office of Civil Rights for relief. The decision to deal with discriminatory practices by systems and not by redressing the wrongs visited on individuals is contrary both to the spirit and the letter of the law. Our long cherished concept of equality under the law refers to individuals, not to systems.

In its announcement of the new procedures, the Department of Health, Education and Welfare details the inability of its staff in the Office of Civil Rights to deal with the increased case load. However, instead of taking steps to provide a more adequate and efficient staff, the Secretary has recommended that the problem of case overload be solved by the Department's abrogation of its proper and legal responsibilities. A careful reading of the proposed regulation leads one to question whether the Department of HEW has in fact made a decision not to enforce the various laws dealing with discrimination. Certainly there is a notable lack of concern about enforcing legislation relating to discrimination and individual rights.

Existing civil rights laws are the result of long years of sustained effort. They reflect the determination of our citizens to end discrimination on the basis of sex, race, religion, origin or physical disability. This national commitment to equality

must not now be thwarted by administrative fiat. We urge the Congress to take every step possible to prevent the implementation of this proposed Regulation.

NATIONAL ASSOCIATION OF COLLEGIATE DIRECTORS OF ATHLETICS.
Cleveland, Ohio, June 19, 1975.

HON. AUGUSTUS F. HAWKINS,
U.S. House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN HAWKINS: Enclosed please find comments of the National Association of Collegiate Directors of Athletics concerning the implementation regulations of Title IX

NACDA's members are directly involved in the day-to-day administration of the nation's college athletic programs. On the basis of this expertise, we submit the regulations issued by the Department of Health, Education, and Welfare will, if allowed to go into effect, lead to the financial destruction of college athletic programs for both men and women.

For this reason, we urge your Subcommittee to sponsor a resolution which would return the regulations to HEW, accompanied with instructions for redrafting which reflect the points made in our comments.

We are confident Congress did not intend the regulations to extend to programs such as college athletic which receive no Federal funds, nor to threaten the financial base of athletic programs for men and women, and urge action confirming our position.

We appreciate your consideration of our views.

Sincerely,

HARRY H. FOUKE. *President.*

Enclosure:

STATEMENT OF HARRY FOUKE, PRESIDENT, NATIONAL ASSOCIATION OF COLLEGIATE DIRECTORS OF ATHLETICS

I am Harry Fouke, Director of Athletics at the University of Houston, Houston, Texas. This statement is submitted on behalf of The National Association of Collegiate Directors of Athletics (NACDA) of which I am President. Our members are directors of athletics at the educational institutions that are members of the National Junior College Athletic Association, the National Association of Intercollegiate Athletics and the National Collegiate Athletic Association. NACDA appreciates this opportunity to submit the views of its members.

We believe that the athletics provisions of the HEW regulations (§§ 86.37(c) and 86.41) are inconsistent with the plain language of Title IX and the intent of Congress, in that:

1. They attempt to regulate programs and activities that do not receive Federal financial assistance.

2. They impose arbitrary and unreasonable requirements which exceed Title IX's non-discrimination mandate and threaten serious damage to existing intercollegiate athletic programs.

We recognize that the issues posed in these hearings are in large part legal issues. We are athletic directors, not lawyers, and our training and experience is in the conduct and administration of college athletic programs, not the interpretation of Federal laws and regulations.

We can read, however, and we therefore cannot believe that under a statute which applies to education programs or activities "*receiving Federal financial assistance*," Congress meant to give HEW the authority to tell educational institutions what to do with their football and basketball gate receipts. We know of no Federal program providing financial assistance for intercollegiate athletics and, in view of the well publicized financial crisis in which college athletics finds itself, I feel sure that if there were any such program, we would have heard of it. Yet, the HEW regulations impose stringent requirements on college athletic programs. We do not believe Congress intended this result.

Even if Title IX requirements were properly applicable to privately-financed intercollegiate athletic programs, the rules which HEW proposes are unrealistic, completely unreasonable and inconsistent with the statute. HEW's regulations are not easy to understand, but it appears that they are intended to require colleges and universities to offer intercollegiate athletic programs for women which

(assuming that comparable interest is shown) are in every respect—from coaching salaries to travel schedules—the same as those available to male student-athletes. Moreover, the regulations require that where athletically-related scholarships are granted, they are to be allocated between males and females in a predetermined ratio, corresponding to the relative numbers of total participants in an institution's athletic program. Meeting these directives will require either a massive increase in funding of programs for women or drastic curtailment of existing programs for men.

In imposing these new financial imperatives, HEW has adamantly refused to recognize that men's football and basketball programs frequently are successful in generating substantial revenues which provide support for their own continuation—and which at many institutions supply important financial support for other programs as well—while other programs generally provide no revenues and must be supported from other sources.

Funds of the magnitude necessary to match major revenue-producing programs (particularly football) with nonincome programs for women are simply not available at most institutions. HEW's attempt to impose rigid uniformity upon college athletic programs without regard to the sources of financial support of those programs will yield absurd and disastrous results, results which we feel are not required by the language of Title IX and never were intended by Congress.

We believe that HEW's direction to eliminate all differences between the athletic programs available to men and women student-athletes without regard to the source of financial support for the individual programs concerned goes beyond the elimination of sex-based distinctions and seeks to require the elimination of differences based on economics and spectator interest. For example, the gap between an institution's football program and many of its other sports programs for men is as wide or wider than the gap between its football program and its intercollegiate sports programs for women. In each case, however, the differences are due to revenue-producing experience, not *sex-based* distinctions.

We also believe that the imposition of a sex test for athletic scholarships contemplated by HEW's regulations is not only not authorized by Title IX, but that such a requirement constructs an artificial sex barrier in direct conflict with the provisions and objectives of the law.

We understand that HEW takes the position that under Title IX as written by Congress it does not have the authority necessary to avoid these irrational results and the damage which its regulations would impose on college athletics. In particular, HEW asserts that it has no authority to make special provisions in its regulations for revenues produced by particular sports activities. In view of the distinctions which HEW has seen fit to draw between sports where selection for teams is "based on competitive skill" and those where it is not, the distinction between "contact" and "non-contact" sports, and the special "separate but equal" provisions which it has written into the athletic provisions, to say nothing of other exceptions and distinctions—for example, the special rules regarding sex education classes—found elsewhere in the regulations, all without any mention of such distinctions or exceptions in the law, we can make no sense of HEW's position.

For the reasons outlined above, we believe the athletic provisions of the HEW regulations exceed the authority delegated by Title IX, are inconsistent with the plain language of the statute and do not reflect Congressional intent. We urge that they be disapproved by Congress.

CENTER FOR NATIONAL POLICY REVIEW,
CATHOLIC UNIVERSITY OF AMERICA SCHOOL OF LAW.
Washington, D.C., June 20, 1975.

Hon. AUGUSTUS F. HAWKINS,
Chairman, Subcommittee on Equal Opportunities, Committee on Education and Labor, House Office Building Annex, Washington, D.C.

DEAR CHAIRMAN HAWKINS: We appreciate the opportunity given us by your phone call and press release of June 12, 1975, to comment upon the proposed HEW regulations implementing Title IX and abolishing the current procedures for the investigation of individual complaints of civil rights violations.

Since we believe that many other organizations will focus their comments upon the substance of the Title IX regulations, we have chosen to focus our response on the revised complaint procedure regulations. We believe that these latter

regulations are doubly important because they will largely nullify the effectiveness of the Title IX standards, as well as those of all of the other programs to which they will be applied, if they are adopted.

Sincerely,

WILLIAM L. TAYLOR, *Director.*

COMMENTS OF THE CENTER FOR NATIONAL POLICY REVIEW, CATHOLIC UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

On May 4, 1973, the Director of the Office of Civil Rights, Department of Health, Education and Welfare, Mr. Peter Holmes, told his executive staff ". . . there is no domestic program that is more important to the well-being of the country than enforcement of the civil rights provisions under our jurisdiction. And the law doesn't give us the choice to postpone the enjoyment of rights under these provisions. . . ."

Exactly twenty-five months later, on June 4, 1975, the Federal Register contained the long awaited proposed regulations designed to implement the prohibition of sex discrimination under Title IX of the Education Amendments of 1972. It also contained proposed new regulations which would relieve HEW-OCR of any obligation to investigate and resolve complaints filed by individuals of alleged violations of those rights under Title IX and the various other civil rights programs which it administers.

Simultaneously, the Office of Civil Rights went into court to obtain a delay in the timetables for the investigation of nearly 200 such complaints concerning discrimination in elementary and secondary education programs in seventeen Southern and Border states.

The rationale provided in both instances was similar. the investigation of individual complaints makes excessive demands upon the agency's limited personnel and diverts it from other more important duties. Further, individual complaints do not accurately reflect enforcement needs since some groups, especially women in higher education are over represented in the complaints currently being filed.

These explanations, even if they were true, would not justify the elimination of an essential civil rights enforcement mechanism. But they are clearly undermined by OCR's past behavior and even by past statements of OCR's incumbent director.

If these new regulations are allowed to go into effect, many Americans will lose the only realistic hope for redress of their civil rights grievances available to them. Whether the complainant is the parent of a child denied educational opportunities because of his or her handicap or a non-English speaking child provided with no bi lingual, bi cultural instruction, or an elderly black man denied admittance to a nursing home because of his race, or a young woman denied admittance to a vocational training program because of her sex all are victims of policies and practices which if the new regulations go into effect may now go uninvestigated and unredressed.

If additional staff is required to expeditiously investigate and resolve allegations of denial of civil rights, it should have been requested. Only once in its history has Congress denied OCR additional staff when it was requested. The request was reduced - not denied - in that instance because of the excessive number of unfilled positions on its staff roster. In fact no additional staff has been requested for several years in the important area of elementary and secondary education enforcement personnel. In fact, only on June 4, 1975, did the agency come forth with the argument that it was so understaffed that it could not comply with a two year old court order to investigate specific allegation of denials of civil rights.

As an alternative to the investigation and redress of individual complaints, OCR proposes to define its own investigation and enforcement priorities. This position might be tenable, if its past record of self initiated reviews were more impressive (See *Justice Delayed and Denied. HEW and Northern School Desegregation*, Washington, 1974.) The credibility of OCR's proposed alternative further suffers from its simultaneous plans to eliminate some of its most basic information gathering devices (forms 101 and 102). This information is of critical importance in discerning patterns of discriminatory activities which can be used in determining priorities for self-initated reviews.

Of course some individual complaints are clearly unfounded - obviously lacking in jurisdiction or the work of cranks—but as recently as July 7, 1975, Mr. Holmes admitted under oath that approximately 50% are generally meritorious

and do result in findings of noncompliance. (*Adams v. Weinberger*, Deposition of Peter Holmes, pp. 6–7).

In place of its own investigation of such complaints, OCR proposes to refer complainants to other local, state and federal bodies which may also have jurisdiction over their subject matter. In many instances being shunted to such agencies is a purely illusory remedy since those agencies are often severely under-funded and under-staffed and frequently possess very limited remedial powers. For instance, to refer complaints of employment discrimination against women to the Equal Employment Opportunity Commission is illusory so long as that agency continues to have a blacklog in excess of 103,000 cases.

Perhaps OCR's desire to be free of its constitutionally and legislatively mandated (as well as court ordered) duty to investigate all information of discrimination has its basis in grounds other than those recited on June 4, 1973. In Mr. Holmes' May 4, 1973, speech (pp. 2 and 3) to his staff, he stated:

. . . rhetoric alone will not answer the kinds of problems that have been accumulating and that are now on the verge of threatening this program with paralysis.

It is time to deal candidly with the facts of our situation.

They indicate that the problems we face today are primarily of our own making, and that unless we undertake an effort to effectively resolve these problems, enforcement will continue to suffer the consequences. These problems are essentially managerial:

Staffing, and the quality of the work product.

Morale, which seems to be uncomfortably low.

In some program areas, a lack of coherent objectives, policy, and procedures to guide the annual enforcement effort.

Weak coordination of problems of overlapping jurisdiction, between Washington and the regions, and between program and support areas.

The nefarious consequences of lax work habits, quarrels, cliques, and petty resentments among staff which in some cases may have assumed racial overtones.

Too many active commitments, all crying out for attention at once, with the result that some cases collect dust for months on end, and follow-up work is scarce, spotty, and seldom timely.

A concentration of authority in a few hands in Washington which, over the years, has effectively served to bottle things up and make superiors timid.

In the next fiscal year OCR staff continued to grow and a scheme of decentralization and reorganization designed to remedy many of these defects was instituted. Now, however, it appears that the Office of Civil Rights is seeking to deal with its managerial and resources problems not by making its staff and program more efficient and effective but by abdicating the responsibilities it was established to carry out.

It is our position that the question is not whether OCR should focus on an individual complaint or self-initiated reviews. Both are clearly necessary and, given the proper utilization of this agency's resources, possible.

The agency currently takes the position that most individual complaints have required extensive on-site investigations in order to verify or refute the alleged violations. Further, it contends that large amounts of staff time are required for their resolution. For instance, "The resolution of Title VI complaints involves a total of 20 person days." (*Adams v. Weinberger*, Affidavit of Peter Holmes, June 3, 1975.) Neither of these assertions is consistent with the agency's past or current practice. In the first nine months of fiscal year 1973, only 2 of 134 complaints received by the Dallas Regional Office alleging discrimination in elementary and secondary education resulted in on-site investigations. (United States Commission of Civil Rights, *The Federal Civil Rights Enforcement Efforts*—1974. Vol. III, *To Ensure Equal Educational Opportunity* (Washington 1975), p. 118. footnote 292.) Affidavits, based on analyses of the agency's current practice in handling individual complaints, filed this month in the *Adams v. Weinberger* case indicate that no more than 26% of such complaints result in on-site investigations. Estimates of staff time utilization prepared by the Regional Directors, actually in charge of investigating such complaints, indicate that such on-site investigations normally require only 6 to 10 person-days to carry out. Further, such on-site follow-up of individual complaints is often carried out in connection with visits designed to monitor the institution's compliance status for other programs or purposes. Finally, in 1974 the Director informed a Subcommittee of the Senate Appropriation Committee that "In the Elementary and Secondary Division, three working days were expanded on the average, per complaint." (Hear-

lings on H.R. 15580 before a Subcommittee of the Committee on Appropriations of the United States Senate, Ninety Third Congress, Second Session, p. 3945).

In summary, it is our position that the agency's reasons for abdicating a crucial part of its civil rights enforcement responsibilities are unpersuasive. Given proper leadership and utilization of its available resources, it can and must carry out its responsibilities both to respond effectively to individual complaints and to carry out a meaningful program of self-initiated reviews.

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
Washington, D.C., June 20, 1975.

Hon. AUGUSTUS F. HAWKINS,
Chairman, Equal Opportunities Subcommittee, Committee on Education and Labor.

DEAR GUS: On behalf of the Women's Equal Rights Task Force of the Leadership Conference on Civil Rights, I am submitting these comments on HEW's proposed regulations to prohibit sex discrimination in federally supported education programs and other activities. The Task Force is chaired by Arvonne Fraser, Legislative Chair of the Women's Equity Action League.

In the Leadership Conference, comments on issues of civil rights enforcement are carried out by specialized Task Forces. Although these comments were adopted by the particular Task Force, I am sure they express the sentiments of the national organizations that participate in the Leadership Conference.

Sincerely,

MARVIN CAPLAN, *Director.*

Enclosure.

STATEMENT OF THE WOMEN'S EQUAL RIGHTS TASK FORCE OF THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

We believe the H.E.W. regulations approved by the President provide a good structure of regulations and guidelines for making substantial progress toward achieving the goal of Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, etc.) to eliminate sex discrimination in the programs and activities of the educational institutions covered by that law. We, therefore urge that the Congress allow the regulations to become effective on July 1, 1975, as approved by the President.

Sex discrimination has been for many years, and still is pervasively practiced and followed in virtually all educational programs and activities in our nation's schools, colleges and universities. It is so widespread and so deeply imbedded in the educational structure and in the habits of thought and action by most school administrators, faculty, employees and students, that its eradication will require substantial efforts and massive reorientation of attitudes.

The HEW regulations contain some provisions which we would oppose or think are unnecessary, and they omit provisions which we would favor as necessary or useful to eradicate existing sex discrimination practices in the institutions covered by Title IX. However, the regulations do tackle the major issues of sex discrimination vigorously in most aspects of school activities, including recruitment and admission of students, employment of faculty and others, research, extracurricular activities, housing, use of facilities, financial assistance, health and insurance benefits, physical education and athletics, student status, and classes. In some respects, the policies and guidelines are precisely drawn to achieve the elimination of sex discrimination. In other respects, the HEW regulations are either vague or not fully committed to the principle of promptly eliminating sex discrimination.

Those who now urge Congress to defer or weaken these regulations (which already are two years after the enactment of Title IX) are really seeking to preserve sex discrimination in our educational institutions. Their predictions of "disaster" if sex discrimination is barred in their favorite programs remind us of the rhetoric of those who since time immemorial have opposed or tried to undermine the principle of equal opportunities regardless of race, color, religion, national origin or sex. We believe their predictions are wrong, and we regret that HEW was apparently influenced by such arguments.

In appraising the HEW regulations and the extent to which they carry out the purposes and policy of Title IX, we have weighed and compared both their

strengths and their deficiencies. We believe that, on balance, they provide a good structure upon which to begin the process of ending sex discrimination in the educational institutions covered by Title IX. It is also our hope that the progress which we there expect will also provide the example for expanding equal opportunities for males and females throughout our educational system.

For these reasons, we urge that Congress allow the regulations to become effective on July 21, 1975, as approved by the President. We further urge that Congress maintain close and careful watch on how the educational institutions comply with the regulations and how effectively HEW administers and enforces them.