

the extent necessary to assure equality of opportunity to and nondiscriminatory treatment of beneficiaries.

(3) Paragraph (a)(1) also applies to covered employment as defined in § 1040.12(a)(2).

(b) Enforcement of title VI compliance with respect to covered employment practices is not to be superseded by State or local merit systems relating to the employment practices of the same recipient.

Subpart C—Nondiscrimination on the Basis of Sex—Title IX of the Education Amendments of 1972, as Amended

§ 1040.21 Purpose.

The purpose of this subpart is to implement title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by Pub. L. 93-568, and Pub. L. 94-482, which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not the program or activity is offered or sponsored by an educational institution as defined in this subpart.

§ 1040.22 Application.

Except as provided in §§ 1040.25, 1040.26, and 1040.27, this subpart applies to every recipient and to each education program or activity operated by the recipient which receives or benefits from Federal financial assistance.

§ 1040.23 Definitions.

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by sec. 3 of Pub. L. 93-568, 88 Stat. 1855, (except secs. 904 and 906 of the Amendments), 20 U.S.C. 1681, 1682, 1683, 1685, and 1686.

(b) *Educational Institution* means a local educational agency (L.E.A.) as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 881), a pre-school, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraphs (c), (d), (e), or (f) of this section.

(c) *Institution of graduate higher education* means an institution which:

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

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in the field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(d) *Institution of undergraduate higher education* means:

(1) An institution offering at least two, but less than four years of college level study beyond the high school level leading to a diploma or an associate degree or wholly or principally creditable toward a baccalaureate degree; or

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

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

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

(f) *Institution of vocational education* means a school or institution (except an institution of professional, graduate, or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semi-skilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full time study.

(g) *Administratively separate unit* means a school, department, or college of an educational institution (other

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than a local educational agency), admission to which is independent of admission to any other component of the institution.

(h) *Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(i) *Student* means a person who has gained admission.

(j) *Transition plan* means a plan subject to the approval of the United States Commissioner of Education under sec. 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination. The definitions set forth in §1040.3 of subpart A of this part, to the extent not inconsistent with this subpart, are made applicable to and incorporated into this subpart.

§1040.24 Effects of other requirements.

(a) Effect of other Federal provisions. The obligations imposed by this subpart are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); Executive Order 11246, as amended; Sec. 799A and Sec. 845 of the Public Health Service Act (42 U.S.C. 295h-9 and 298b-2); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

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

(c) Effect of rules or regulations of private organizations. The obligation to comply with this subpart is not obviated or alleviated by any rule or regulation of any organization, club, ath-

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letic or other league or association, which would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and which receives or benefits from Federal financial assistance.

§1040.25 Educational institutions controlled by religious organizations.

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

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

§1040.26 Military and merchant marine educational institutions.

This subpart does not apply to an educational institution whose primary purpose is the training of individuals for military service of the United States or for the merchant marine.

§1040.27 Membership practices of certain organizations.

(a) Social fraternities and sororities. This subpart does not apply to the membership practices of social fraternities and sororities which are exempt from taxation under Sec. 501(a) of the Internal Revenue Code of 1954, the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) Y.M.C.A., Y.W.C.A., Girl Scouts, Boy Scouts, and Camp Fire Girls. This subpart does not apply to the membership practices of the Young Men's Christian Association, the Young Women's Christian Association, the Girl Scouts, the Boy Scouts, and the Camp Fire Girls.

(c) Voluntary youth service organizations. This subpart does not apply to

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the membership practices of voluntary youth service organizations which are exempt from taxation under Sec. 501(a) of the Internal Revenue Code of 1954, the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

§ 1040.28 Admissions.

(a) Admission to education institutions prior to June 24, 1973 are not covered by this subpart.

(b) *Administratively separate units.* For the purposes, only, of this section, §§ 1040.28 and 1040.29, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 1040.31 through 1040.33.* Except as provided in paragraphs (c) and (d) of this section, §§ 1040.31 through 1040.33 apply to each recipient. A recipient to which §§ 1040.31 through 1040.33 apply shall not discriminate on the basis of sex in admission or recruitment in violation of those sections.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients which are educational institutions, §§ 1040.31 through 1040.33 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* Sections 1040.31 through 1040.33 do not apply to any public institutions of undergraduate higher education which, traditionally and continually from its establishment, has had a policy of admitting only students of one sex.

§ 1040.29 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 1040.31 through 1040.33 apply which:

(1) Admitted only students of one sex as regular students as of June 23, 1972; or

(2) Admitted only students of one sex as regular students as of June 23, 1965, but after that admitted as regular students individuals of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies is not to discriminate on the basis of sex in admission or recruitment in violation of §§ 1040.31 through 1040.33 unless it is carrying out a transition plan approved by the United States Commissioner of Education as described in § 1040.30, which plan provides for the elimination of discrimination by the earliest practicable date but in no event later than 90 days following final publication of this regulation.

§ 1040.30 Transition plans.

(a) *Submission of plans.* Any institution to which § 1040.28 applies and which is composed of more than one administratively separate unit may submit either a single transition plan applicable to all units or separate transition plans applicable to each unit.

(b) *Content of plans.* In order to be approved by the United States Commissioner of Education, a transition plan is to:

(1) State the name, address, and Federal Interagency Committee on Education (FICE) Code of the educational institution submitting the plan, the administratively separate units to which the plan is applicable, the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe, with respect to the educational institution or administratively separate unit, any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle identified and indicate the schedule for taking these steps and the individual responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply

for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 1040.29 applies is to result in treatment of applicants to, or students of, the recipient in violation of §§ 1040.31 through 1040.33 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 1040.29 applies is to include in its transition plan and implement specific steps designed to encourage individuals of the previously excluded sex to apply for admission to the institution. The steps are to include instituting recruitment programs which emphasize the institution's commitment to enrolling students of the sex previously excluded.

§ 1040.31 Discrimination on the basis of sex in admission and recruitment prohibited: admission.

(a) *General.* No person shall, on the basis of sex, be denied admission or be subjected to discrimination in admission by any recipient to which §§ 1040.31, 1040.32, and 1040.33 apply, except as provided in §§ 1040.29 and 1040.30.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on that basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Deny an equal opportunity for admission on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission which has a disproportionate adverse effect on persons on the basis of sex unless the use of the test or criterion is shown to predict validly success in the education pro-

gram or activity and alternative tests or criteria which do not have a disproportionate adverse affect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 1040.31, 1040.32, and 1040.33 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any persons on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which discriminates or excludes;

(3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; or

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Miss" or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission but only if the inquiry is made equally of applicants of both sexes and if the results of the inquiry are not used in connection with discrimination prohibited by this subpart.

§ 1040.32 Preference in admission.

A recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not give preference to applicants for admission on the basis of attendance at any educational institution or other school or entity which admits as students or predominantly members of one sex if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 1040.31, 1040.32, and 1040.33.

§ 1040.33 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may

be required to undertake additional recruitment efforts for one sex as remedial action under § 1040.7(a) and may choose to undertake these efforts as affirmative action under § 1040.7(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 1040.31, 1040.32, and 1040.33 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities which admit as students only or predominantly members of one sex, if these actions have the effect of discriminating on the basis of sex in violation of §§ 1040.31, 1040.32, and 1040.33.

§ 1040.34 Education programs and activities.

(a) *General.* Except as provided elsewhere in this subpart, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of—

(1) A recipient to which §§ 1040.31, 1040.32, and 1040.33 do not apply; or

(2) An entity, not a recipient, to which §§ 1040.31, 1040.32, and 1040.33 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 1040.34 through 1040.45, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

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

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

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

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

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

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

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

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

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

(d) *Programs not operated by recipient.*

(1) This paragraph applies to recipients which require participation by any applicant or student in any education program or activity not operated wholly by the recipient, or which facilitates, permits, or considers participation in educational consortia and cooperative employment and student-teaching assignments.

(2) The recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of the recipient which this subpart would prohibit the recipient from taking; and

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

§ 1040.35 Housing.

(a) *General.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

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

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by the recipient.

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

(i) Proportionate in quantity; and

(ii) Comparable in quality and cost to the student. A recipient may render this assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

§ 1040.36 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but the facilities provided for students of one sex are to be comparable to the facilities provided for students of the other sex.

§ 1040.37 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its

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education program or activity separately on the basis of sex, or require or refuse participation by any of its students on that basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact.

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

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

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

§ 1040.38 Access to schools operated by LEAs.

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

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

(b) Any other school or educational unit operated by the recipient, unless the recipient otherwise makes available to a person, under the same policies and criteria of admission, courses, services, and facilities comparable to

each course, service, and facility offered in or through the schools.

§ 1040.39 Counseling and use of appraisal and counseling materials.

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

(b) *Use of appraisal and counseling materials.* A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on the basis of sex unless the different materials cover the same occupations and interest areas and use of the different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take action to assure itself that the disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take action to assure itself that the disproportion is not the result of discrimination on the basis of sex in counseling, appraisal materials, or by counselors.

§ 1040.40 Financial assistance.

(a) *General.* Except as provided in paragraphs (b), (c), and (d) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of assistance, limit eligibility for assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which

provides assistance to any of the recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for assistance which treats persons of one sex different from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which require that awards be made to members of a particular sex specified in those documents provided that the overall effect of the award of such sex-restricted scholarships, fellowships and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(a)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it shall provide reasonable opportunities for the awards for members of each sex in proportion to the number of students of each sex participating in intercollegiate or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams of members of each sex

to the extent consistent with this section and § 1040.44 of this subpart.

§ 1040.41 Employment assistance to students.

(a) *Assistance by recipient in making available outside employment.* A recipient which assists any agency, organization or person in making employment available to any of its students—

(1) Shall assure itself that the employment is made available without discrimination on the basis of sex; and

(2) Shall not render services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient which employs any of its students shall assure itself that all employment is made available without discrimination on the basis of sex.

§ 1040.42 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex. This section is not to prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

§ 1040.43 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of the student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require the student to obtain the certification of a

physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as the certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its educational program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy which the recipient administers, operates, offers or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for a period of time considered medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

§ 1040.44 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by the recipient, and no recipient shall provide any athletics separately on the basis of sex.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of

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each sex where selection for teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex shall be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this subpart, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports, the purpose of major activity of which involves bodily contact.

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

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; and
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams, if a recipient operates or sponsors separate teams, will not constitute non-compliance with this section, but the Director, FAPD, may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

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

§ 1040.45 Textbooks and curricular material.

Nothing in this regulation is to be interpreted as requiring, prohibiting, or abridging, in any way, the use of particular textbooks or curricular materials.

§ 1040.46 Procedures.

The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are adopted and incorporated in this section by reference. These procedures may be found in subparts G and H of this part.

EMPLOYMENT PRACTICES

§ 1040.47 Employment.

(a) *General.* (1) No person shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in recruitment, employment consideration, or selection, whether for full-time or part-time employment, under any educational program or activity operated by a recipient which receives or benefits from Federal financial assistance.

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

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

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

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

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

(2) Hiring, upgrading, promotion, consideration for an award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

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

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

§ 1040.48 Employment criteria.

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

(a) Use of such test or other criterion is shown to predict validly successful

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performance in the position in question; and

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

§ 1040.49 Recruitment.

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

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

§ 1040.50 Compensation.

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

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

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

§ 1040.51 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex, unless sex is a

bona-fide occupational qualification for the positions in question as set forth in § 1040.57.

§ 1040.52 Fringe benefits.

(a) *Fringe benefits* defined. For purposes of this part, *fringe benefits* means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service for employment not subject to the provision of § 1040.50.

(b) *Prohibitions*. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

§ 1040.53 Marital or parental status.

(a) *General*. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy*. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability*. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery there-

from and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave*. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time. At the conclusion of the leave of absence, the employee shall be reinstated to the status which she held when the leave began or to a comparable position without decrease in rate of compensation or loss of promotional opportunities or any other right or privilege of employment.

§ 1040.54 Effect of State or local law or other requirements.

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

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

§ 1040.55 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona-fide occupational qualification for the particular job in question.

§ 1040.56 Pre-employment inquiries.

(a) *Marital status*. A recipient shall not make pre-employment inquiry as

to the marital status of an applicant for employment, including whether such applicant is “Miss or Mrs.”

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

§ 1040.57 Sex as a bona-fide occupational qualification.

A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Subpart D—Nondiscrimination on the Basis of Handicap—Section 504 of the Rehabilitation Act of 1973, as Amended

GENERAL PROVISIONS

§ 1040.61 Purpose and application.

(a) The purpose of this subpart is to implement sec. 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

(b) This subpart applies to each recipient or subrecipient of Federal financial assistance from DOE and to each program or activity that receives or benefits from assistance.

§ 1040.62 Definitions.

(a) *Executive Order* means Executive Order 11914, titled “Nondiscrimination With Respect to the Handicapped in Federally Assisted Programs” issued on April 28, 1976.

(b) *Section 504* means sec. 504 of the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(c) *Handicapped person* means any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment.

(d) As used in paragraph (c) of this section, the phrase:

(1) *Physical or mental impairment* means—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness and drug addiction and alcoholism, when current use of drugs and/or alcohol is not detrimental to or interferes with the employee's performance, nor constitutes a direct threat to property or safety of others.

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated