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Legal Developments: Sex Discrimination in Education

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The new Title IX Regulations¹, which became effective July 21, 1975, are practically guaranteed to please practically no one. Feminist groups are decrying the regulations as having no teeth and of being a paper tiger. Football and basketball coaches are predicting the demise of those two sports on college campuses. The National Organization for Women has pointed out that the regulations followed the law by three years, an unnecessarily long time. The National Collegiate Athletic Association attempted (unsuccessfully) to obtain a time extension and is now supporting amendments in Congress to exempt revenue-producing sports from the law. This would allow revenues produced by sports such as basketball and football to be used solely to support those sports.²

Although the biggest flap is being raised over sports (which, admittedly, is very important), the law is, in actuality, a major thrust forward in several areas. The Regulations apply to any educational institution receiving Federal assistance. This includes 16,000 public school systems and about 2,700 post-secondary institutions.

The law reads "no person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ."³ The statement appears to be a rela-

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tively clear-cut indication of the intent of Congress. In the interim three years, proposed regulations have been subject to public comments (numbering nearly 10,000 from June through October, 1974, alone) and, as a consequence, have been modified in six major areas. These six areas will be discussed first, followed by a discussion of the areas covered by the Regulations. A question-and-answer format will be used next to illustrate the regulations and, finally, the enforcement procedures will be reviewed.

Modifications

Public comments upon the proposed regulations have resulted in modifications in six major areas in the final regulations.

1. *Physical Education Classes.* Originally, it was proposed to make all physical education classes co-educational. The final regulations allow segregated classes in sports involving bodily contact and in classes in sex education.

In addition, schools have from one to three years to comply with the desegregation of other physical education classes.

2. *Financial Aid.* The proposed provision was that schools would be prohibited from administering scholarships designating a particular sex in wills and trusts. A two-step "pooling" procedure is now allowed. First, students (regardless of sex) would be selected to receive financial aid. Then, funds from sex-restricted sources could be given to members of that designated sex from the "pool" of recipients, provided there are enough non-restrictive funds to go to members of the other sex. If there are not enough funds available from non-restrictive sources, then the school must either provide the funds or award less funds from the sex-restricted sources.

3. *Foreign Scholarships.* In both the proposed and final regulations, schools can still administer sex-discriminatory scholarships under foreign wills, trusts and other legal instruments (such as the Rhodes Scholarship), provided that the school also makes available "reasonable" (not "equal") foreign-study opportunities for the other sex.

4. *Pension Benefits.* This is still up in the air as the Equal Employment Opportunity Coordination Council has until October 15, 1975, to report its recommendations to the President. In the meantime, schools can provide for either equal contributions or equal periodic benefits to men and women employees in its pension plan.

5. *Curriculum and Textbooks.* Neither the original nor the final regulations cover sexist stereotyping in textbooks or in curriculum. The administration maintains that this is a state and local problem and that, anyway, it might be unconstitutional under the freedom of speech provisions.

6. *Athletics.* The final regulations require that schools must provide equal opportunity in sports. They allow separate teams in contact sports and in "those sports in which competitive skill is the basis for selecting team members." Just what this means is anybody's guess.

In non-contact sports, a school can provide separate teams or allow women to try out for the male team.

In terms of expenditures, the regulations specifically state that dollar-for-dollar matching expenditures for each sex is not a requirement. However, the school must provide *necessary* funds for teams for women to meet the equality of opportunity criteria. This provision is quite murky and is wide open for almost any

kind of interpretation. This will probably be the area where the most disputes arise. The final outcome remains to be seen, especially in view of the fact that Congress is now studying an amendment to exempt contact sports from all Title IX provisions.

Areas Covered By Title IX

Five major areas of discrimination are covered by the Title IX Regulations.

1. *Coverage.* As stated previously, all schools receiving Federal financial assistance are subject to the Title IX Regulations. However, there are two specific exemptions to the entire act: military institutions (at all levels) and religious schools, where compliance is inconsistent with religious tenets. In addition, exemptions from the admissions regulations are allowed to pre-schools, elementary schools, secondary schools and the few public undergraduate schools which have been traditionally and continually single-sex.

Even if a school is exempt from the admission requirements, it must treat all students equally once they have been admitted (except, again, for military and religious schools).

2. *Admissions.* The final regulations include recruitment in the admission provisions. Comparable efforts must be made to recruit members of both sexes and additional recruitment efforts must be made in those schools where past discriminatory policies have existed. Schools cannot have a quota system nor can they give preference to graduates of other schools where to do so would result in sex discrimination.

In admitting students, no school can separately rank the members of the sexes, administer sex-biased tests, discriminate on the basis of parental or marital status, and pregnancy must be treated as any other temporary disability or physical condition.

3. *Treatment.* Students cannot be treated differently on the basis of sex. This treatment extends to participation in course offerings and extracurricular activities. The extracurricular activities area is interesting in that it includes campus organizations and competitive athletics. Exempt from the provisions of nondiscrimination are social fraternities and sororities and several specific organizations such as the Boy and Girl Scouts, Y.M.C.A., etc. *Not* exempt are the professional fraternities which bar membership of one sex, such as Delta Sigma Pi, the business honorary fraternity.

Treatment also includes all benefits, services and financial aid offered by the school. Finally, treatment includes the use

of facilities and rules concerning housing (single-sex housing will be allowed). No longer can a university have a curfew for women unless it also has the same curfew for men.

4. *Employment.* Perhaps the most important area covered is that of employment. One would think that Title VII of the 1964 Civil Rights Act would have eliminated all sex discrimination in this area, but it hasn't. Now no school (except military and religious) can discriminate in any way in terms of employment criteria, recruitment, compensation, job classification and structure, fringe benefits, marital or parental status, advertising, pre-employment inquiries, etc. Again, pregnancy and related illness must be given the same treatment as temporary disability where leave and fringe benefits are concerned.

5. *Enforcement of Title IX.* This will be discussed after illustrations of the regulations are given.

Illustrations⁴

QUESTION: Who is covered by Title IX?

ANSWER: Virtually every college, university, elementary and secondary school and preschool is covered by some portion of the law. Many clubs and other organizations receive Federal funds for educational programs and activities and likewise are covered by Title IX in some manner.

QUESTION: Who is exempt from Title IX's provisions?

ANSWER: Congress has specifically exempted all military schools and has exempted religious schools to the extent that the provisions of Title IX would be inconsistent with the basic religious tenets of the school.

Not included with regard to admission requirements **ONLY** are private undergraduate colleges, non-vocational elementary and secondary schools and those public undergraduate schools which have been traditionally and continuously single-sex since their establishment.

However, even institutions whose admissions are exempt from coverage must treat all students without discrimination once they have admitted members of both sexes.

QUESTION: Does the law cover social sororities and fraternities?

ANSWER: Congress has exempted the membership practices of social

fraternities and sororities at the postsecondary level, the Boy Scouts, Girl Scouts, Camp Fire Girls, Y.W.C.A., Y.M.C.A., and certain voluntary youth services organizations. However, if any of these organizations conduct educational programs which receive Federal funds open to nonmembers, those programs must be operated in a nondiscriminatory manner.

QUESTION: May a vocational school limit enrollment of members of one sex because of limited availability of job opportunities for members of that sex?

ANSWER: No. Further, a school may not assist a discriminatory employer by referral of students or any other manner.

QUESTION: In athletics, what is equal opportunity?

ANSWER: In determining whether equal opportunities are available, such factors as these will be considered:

- whether the sports selected reflect the interests and abilities of both sexes;
- provision of supplies and equipment;
- game and practice schedules;
- travel and per diem allowances;
- coaching and academic tutoring opportunities and the assignment and pay of the coaches and tutors;
- locker rooms, practice and competitive facilities;
- medical and training services;
- housing and dining facilities and services;
- publicity.

QUESTION: Must an institution provide equal opportunities in each of these categories?

ANSWER: Yes. However, equal expenditures in each category are not required.

QUESTION: If there are sufficient numbers of women interested in basketball to form a viable women's basketball team, is an institution which fields a men's basketball team required to provide such a team for women?

ANSWER: One of the factors to be considered by the Director in determining whether equal opportunities are provided is whether the selection of sports and levels of competition effectively accommo-

date the interests and abilities of members of both sexes. Therefore, if a school offers basketball for men and the only way in which the institution can accommodate the interests and abilities of women is by offering a separate basketball team for women, such a team must be provided.

QUESTION: If there are insufficient women interested in participating on a women's track team, must the institution allow an interested woman to compete for a slot on the men's track team?

ANSWER: If athletic opportunities have previously been limited for women at that school, it must allow women to compete for the men's team if the sport is a noncontact sport such as track. The school may preclude women from participating on a men's team in a contact sport. A school may preclude men or women from participating on teams for the other sex if athletic opportunities have not been limited in the past for them, regardless of whether the sport is contact or noncontact.

QUESTION: Can a school be exempt from Title IX if its athletic conference forbids men and women on the same noncontact team?

ANSWER: No. Title IX preempts all state or local laws or other requirements which conflict with Title IX.

QUESTION: How can a school athletics department be covered by Title IX if the department itself receives no direct Federal aid?

ANSWER: Section 844 of the Education Amendments of 1974 specifically states that: "The Secretary shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in Federally-assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."

In addition, athletics constitutes an integral part of the educational processes of schools and colleges and, thus, are fully subject to the requirements of Title IX, even in absence of Federal funds going directly to the athletic programs.

The courts have consistently considered athletics sponsored by an educational institution to be an in-

tegral part of the institution's education program and, therefore, have required institutions to provide equal opportunity.

QUESTION: Does a school have to provide athletic scholarships for women?

ANSWER: Specifically, the regulation provides: "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

QUESTION: How can schools and colleges interested in a positive approach to Title IX deal with its provisions?

ANSWER: To encourage each school and college to look at its policies in light of the law, the final regulation now includes a self-evaluation provision. This requires that during the next year the educational institution look at its policies and modify them to comply with the law as expressed by the regulation. This includes remedying the effects of any past discrimination.

QUESTION: Does Title IX cover textbooks?

ANSWER: No. While the Department recognizes that sex stereotyping in curricula and educational material is a serious matter, it is of the view that any specific regulatory requirement in this area raises constitutional questions under the First Amendment. The Department believes that local education agencies must deal with this problem in the exercise of their traditional authority and control over curriculum and course content.

QUESTION: Many universities administer substantial sums of scholarship money created by wills and trusts which are restricted to one sex. If the will or trust cannot be changed to remove the restriction, must the universities cease administration of the scholarship?

ANSWER: Where colleges administer domestic or foreign scholarships designated by a will, trust or similar legal instrument, exclusively for one sex or the other, the scholarship recipients should initially be chosen without regard to sex. Then, when the time comes to award the

money, sex may be taken into consideration in matching available money with students to be awarded the money. Scholarships, awards or prizes which are not created by a will, trust, or similar legal instrument, may not be sex-restricted.

QUESTION: What are the Title IX requirements for counseling in schools and colleges?

ANSWER: An institution using testing or other materials for counseling may not use different materials for males and females, nor may it use materials which lead to different treatment of students on the basis of sex.

If there is a class or course of study which has a disproportionate number of members of one sex, the school is required to assure that the disproportion does not stem from discrimination by counselors or materials.

QUESTION: May a college administer or assist in the administration of sex-restrictive scholarships, such as the Rhodes, which provide opportunities for students to study abroad?

ANSWER: Yes, if (1) The scholarship was created by a will, trust, or similar legal instrument, or by an act of a foreign government, and (2) The institution otherwise makes available reasonable opportunities for similar studies abroad by members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

Enforcement

Another interesting provision in Title IX is in the enforcement and remedy procedures. In other civil rights legislation, the cases were decided on an individual complaint basis (for the most part). There is a proposed regulation that was published simultaneously with the Title IX Regulations which calls for a "consolidated enforcement approach to all of the Department's statutory civil rights responsibilities, Title IX, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and other authorities."³ It is hoped that this consolidation will concentrate the Department's resources on getting rid of the systemic forms of discrimination rather than on individual complaints. This does not mean that individual complaints will be ignored; rather these complaints will serve as evidence and a starting point for de-

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is successful from an economical standpoint. By the natures of the services rendered and the size of the client firms, it is improbable that the billings will be comparable to those charged for tax, auditing or management services. Fees must be in line with service performed and within a range that the small client can afford to pay.

CPAs have always tried to place the work at the highest level of competency. These services, to be economically feasible, must be placed at the lowest level of competency in the profession. An efficient, intelligent bookkeeper is a necessary factor in a write-up service practice. A factor that makes write-up services more than bookkeeping services is the computer. Because the computer has the effect of many bookkeepers, the CPA has the challenge of designing a system that produces detailed financial data that heretofore were available only to large business firms.

Now, with the availability of the computer and the well-supervised services of a competent bookkeeper, CPAs can offer the business community a much needed professional service within an acceptable fee range.

An efficient procedure is for the CPA to design a system tailored to the individual client, be it simple or sophisticated, using the proper terminology associated with this business. Working from a custom chart of accounts, the bookkeeper does the routine work of reconciling bank statements and coding the computer input data from the original source documents as well as all payroll tax returns. The coding is the most important phase of the write-up work. It is much easier and less expensive to correct an error before it is put into the computer than after the print-out, whether the work is on an in-house computer or with a service bureau. When the financial statements and general ledger are prepared, they are thoroughly reviewed by the CPA for accuracy and proper disclosure.

What has been accomplished? The owners of small businesses can receive the same kind of information to help them grow that the large business firms have available to them, at a cost which is considerably less than that of a full-time qualified accountant, i.e. a minimal charge for the CPA and computer, not because the standard billing rates have been cut but because the time spent is less, and a greater charge for the bookkeeper at lower, but still profitable, billing rates.

If the client's needs are such that information in great detail is not required, a one time write-up, or pegboard, system may be considered. The books of original entry are written in the client's office by client personnel which further reduces costs.

Both the computer and pegboard systems are flexible enough to allow the CPA to tailor the accounting records to the individual need of the client making this an accounting service rather than a bookkeeping service.

Conclusion

Some may wonder why a CPA firm would want to develop a practice of write-up services. It almost seems like a step backwards. This is not so.

First, the "small clients" have never been defined. They are not necessarily the corner grocers. They can be foreign steel distributors, medical clinics, furniture stores, real estate developers and any number of other industries and professions that are most interesting.

Second, their professional requirements are usually the same as those of the larger business firm, except on a smaller scale. The CPA, therefore, has the opportunity of growing with the client and at the same time building a rare kind of goodwill that exists only in this kind of a practice.

And third, a write-up service practice generates a steady income which creates a nucleus from which audit, tax and management service practices can develop on a selective basis.

There are some pitfalls that the CPA must be aware of. If there is any potential of the client being governed by SEC rules, the CPA firm might find itself in a position of not being able to render an opinion on the financial statements because of a lack of independence. Of course, the CPA does not want to be in this position.

If a retainer is agreed upon, the CPA might be trapped in a situation where the client is growing: the work has increased, but the fee has not.

Then, there are the annoyances of constant interruptions for seemingly unimportant matters that are inherent in a write-up service practice.

If the CPA has developed a write-up service practice by acquiring one account at a time, he or she has encountered the problems gradually and resolved them. But, if the CPA intends to acquire an established write-up service practice, all of the advantages and disadvantages should be weighed before the final decision is made, because the practice is only as successful as the CPA makes it.

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termining enforcement priorities of the Department.

Based upon the evidence of systemic noncompliance, the Department will first endeavor to obtain voluntary compliance. If this attempt is unsuccessful, the Department can then begin administrative proceedings to terminate Federal assistance until the discrimination ceases, or it may turn the matter over to the Justice Department for court proceedings. (Under the latter procedure, the school's Federal funds are not jeopardized until the case is decided.)

Conclusion

This short discussion has barely touched upon the major provisions of the Title IX Regulations. As with almost any set of regulations, these are wieldy and difficult to follow. The excesses of the past have resulted in some rather strict regulations but hopefully the spirit of the law will dominate and women will have a truly equal opportunity for an equal education.

Footnotes

¹"Nondiscrimination on Basis of Sex," Department of Health, Education, and Welfare, *Federal Register*, Volume 40, no. 108, June 4, 1975.

²The NCAA position appears to be somewhat inconsistent. While they want the law to be amended to allow revenue-producing sports to retain all those revenues for those sports, they staunchly maintain that football and basketball actually support other sports: "You can't treat the revenue and non-revenue sports the same," John Fuzak, NAA President, said. "In many intercollegiate programs both men's and women's sports are largely or totally supported by earned income from, and contributions to, football and basketball." If these two sports do, in fact, support other sports, why is the NCAA seeking an amendment which would insure that the money is spent only on football and basketball?

Furthermore, the NCAA's own figures show that "fewer than one-fifth of its own member colleges clear more than expenses in one sport." (This is including only 700 schools with big time sports, not the 2,000 smaller schools where sports are even less likely to turn a profit.) And, as any *Woman CPA* reader knows, it is the profit, not the revenues which must be considered in this sort of analysis.

Quotes are from A-P Report, printed by the *Seattle Post Intelligencer*, Tuesday, July 23, 1975, p. c-2 and Newhouse News Service, printed by the *Seattle Times*, July 27, 1975, p. g-1.

³*Education Amendments of 1972*, Title IX, Government Printing Office, Washington, D.C., 1972.

⁴Taken from *Final Title IX Regulation Implementing Education Amendments of 1972 Prohibiting Sex Discrimination in Education*, U.S. Department of Health, Education and Welfare/Office for Civil Rights, Washington, D.C. 1975.

⁵*op. cit.*, p. 5.