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# WORKSHOP

Number 4

## “TITLE IX: ITS IMPACT ON HIGHER EDUCATION”

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**MILLS:** Good morning and welcome to the Workshop “Title IX and Its Impact on Higher Education.” I am sure all of you know Title IX and the Higher Education Amendments of 1972, signed in June of 1972, effective July 1, 1973, with the goal of assuring that sex discrimination would not be permitted in educational programs or in communities receiving Federal financial assistance. I think the title of our program today is excellent in the sense that the period that HEW allowed for comments to the proposed regulations just ended October 15, and we are fortunate in having as one of the panel members, someone who had a large role in shaping those regulations, and is knowledgeable about its current status. I would like to start by introducing Dr. Mary Lepper who is Director of the Higher Education Division of the Office for Civil Rights of the Department of Health, Education and Welfare at its national headquarters.

**LEPPER:** Thank you. I don't claim to be either the world's leading authority on Title IX nor HEW. Title IX has engendered so much public interest and comment that it has very much been dealt with as even over and above the civil rights issue as very much an HEW issue. As Mr. Holmes indicated and I want to stress again today, it is under serious attack before the Regulations are ever issued. The attack is of several kinds.

I find it rather intriguing as a political scientist to have my first experience dealing with what I had always taught to students, that Congress in its effort to pass laws generally is very ambiguous about what they intend, and certainly they were ambiguous about what they intended in Title IX. I was re-reading last night in preparation for this, and for instance, Senator Pell recently wrote Secretary Weinberger saying we really only intended Title IX to apply to post-secondary education and a very few limited aspects of elementary and secondary education. That wasn't the way the bill was written.

Now having said what Congress did wrong, let me also hasten to add that HEW decided to follow Congress' example. That is, we studied the record, the hearings and hopefully we were trying to ascertain the intent of

Congress. But there were a number of issues on which we couldn't ascertain the intent of Congress, because we couldn't decide within HEW and that is we had to find some compromise positions in order to get any kind of a Regulation out. I see some people in the audience this morning who have been very critical about how long it took HEW to write these Regulations. You know, two years to write the Regulations is an enormous amount of time. The problem though was how to get language that was so ambiguous in the Regulations that all parts of HEW would agree to and sign off, so that the Secretary would issue the proposed Regulations.

When the Panel Chairman asked me last night if I would give you the history of the Regulations, I sort of laughed and I wasn't exactly kind in my laugh because I really didn't want to relate the history of the writing of the Regulations to anyone. Each line in each page went through so many revisions. It was an attempt to try to accurately reflect the intent of Congress and we felt that the intent of Congress was to follow very much the language that had been used in Title VI of the Civil Rights Act of 1964, with the one exception that Title IX through some fancy foot work included employment, whereas Title VI had left that area rather ambiguous. So we had a much clearer mandate for Title IX with what we could do in regard to employment than we thought at that time.

Now those of you who are interested in this and interested in civil rights in general, we do need that you become concerned with talking and writing to your Congressperson. First of all, we were just asked about Congressman O'Hara. Congressman O'Hara is Chairman of the Subcommittee on Education in the House Committee on Labor and Education. He is from Illinois. He has been holding hearings which when they were planned we were told would deal with Title IX, student financial assistance and the amendment of that, and we would be asked to testify on that. The hearings have very much veered off the topic of admissions and what are the needs of students into the whole area of affirmative action. They have gotten very confused as to what is discrimination and what is affirmative action, and they have dealt with employment. I did not hear a speech to the American Council on Education. I understand that he was proclaiming success for all the reasons that those interested in civil rights would not like him to have been. I think, and he has said as much to Mr. Holmes and I, that if he had his way we would amend the Executive Order to exclude institutions of higher education from any of the employment requirements. I don't think he can do that because that's an administrative decision and not a legislative one. However, it is possible for them to kill the effectiveness of the Executive Order and Title IX and Title VI in an indirect way. And that is the one that was referred to yesterday as the Holt Amendment.

Marjorie Holt is a Congresswoman from Maryland who feels that the federal government is abusing its power to collect data and on the floor of the House she has attached a rider on her appropriations bill saying that none of the HEW money could be used to collect data by race or sex. If this goes through—I believe that many of you may have read the statement which Secretary Weinberger gave on *Meet the Press*—he literally said to the Congress, look, if you want to repeal Title VI, then repeal Title VI and Title IX but don't go about it in this indirect fashion. There is no way that

we could enforce either of those three major pieces of civil rights work if we cannot collect data by ethnic group and sex. Someone just mentioned to me that they were just beginning at their university to collect data on graduate students by ethnic group this year and I was appalled. However, this has been one of the things I heard yesterday that bothered me when everyone was talking about "the lack of availability of minorities." We don't know what the availability of minorities for higher education employment is because nobody kept those records. So, I feel very, very strongly that, yes, in HEW we don't have to follow any new legislation given us, but I would hope that those of you that are concerned will voice your concern on whichever side it is.

Now, I am opposed to excessive data collection to the extent that it would require excessive maintenance of data, data over and above what is needed to support findings of discrimination. As a former academic and one who wants to go back there some day, I would oppose it.

I would like to add a little bit of humor to this. I have a son teaching at one of the major institutions right now and he is very critical of my office and everything we are doing. He tells me that at least 20% of his time is spent filling out forms to satisfy the affirmative action officer on his campus and that you know, Mother, that I would try to hire women and minorities and I just mind having to fill out all of these forms. Well, I had to point out to him that the institution that has hired him has told us that as its criteria for selection in the school he is in, the criteria for selection as a minimum would be an M.D. or a Ph.D., and yet he is selected on the tenure track making a full professor's salary without either of those degrees—he is a white male. This causes me to raise questions and suggest that from what is happening in my own family, I am very well aware that the selection criteria moves around depending upon what it is one is looking for. Now I am sure that the university that hired him can justify his being hired, I am not anxious to go against them and suggest they violated the Civil Rights Act. But I am suggesting to you that if we don't maintain our vigilance we are going to lose what little progress we've made in the whole civil rights area. And I say little progress because maybe I am ambivalent and one of the Regional Civil Rights Directors, Mr. Bynoe's colleague, accuses me of not knowing whether I want to be the Tortoise or the Hare and I guess that is true. Sometimes I want to take the slow, deliberate approach to things, but then when I look at the growth in minority enrollment, the growth in women in professional schools, and in the academic world, I really move over to the other position.

But let me now address specifically what I think most of you are probably familiar with—what Title IX covers and what it doesn't cover. And more than that bring you up to date about what has happened during the comment period.

The coverage of Title IX is all institutions of higher education, with a number of exceptions and that is the private undergraduate single sex institutions and certain religious institutions where the single sex requirement has relevance to the religious tenets. I want to add a caveat there and it's one that a number of private schools have had to face. If a private single sex institution decides to admit people of the other sex then the treatment

must be equal once they are admitted. There can be no disparate treatment once you make the decision to admit. The major areas in Title IX and they break down into a number of topics, are admissions of students, treatment of students, employment and essentially the procedures under which it will operate.

As I indicated to you, it seems to me that we purposely left vague some of the procedures waiting for public comment as to how those people in institutions of higher education felt we could best proceed both in terms of the reporting of data and the complaint process.

Within those areas that I discussed, the only major area of comment to come up on admission of students over and above the existing language, is the question of the private undergraduate professional schools. What about a private undergraduate school that does have a school of engineering? That school happens to be primarily an undergraduate school. So this would have the effect, long range, that is not changed, of eliminating women from certain schools of that type that are professional schools, but they are undergraduate. An undergraduate school may be single sex but their graduate school must admit members of both sexes essentially the way it goes, and the only place where we have run into this has been in the professional schools.

Another area that has come in for a great deal of comment is the whole area of the Regulation under the 86.31 Section which deals with special educational programs and activities. The question here is whether in certain educational programs and activities there should be an exemption of certain groups. As you know, following the publication of the Regulation, Secretary Weinberger issued some clarifying language dealing with sex education classes indicating that they could remain segregated. In terms of looking at this, the educational programs that there have been questions raised primarily about, have been those dealing with the elementary and secondary education level, sex education classes and physical education classes, a little bit on the shop classes and the home economics classes. Those though have primarily dealt with issues of whether a skill requirement should be entered into before people could participate in a heterosexual class. However, the exemption for certain groups has raised a very different problem.

Congresswoman Green from Oregon has indicated, and she has been supported by Senator Strom Thurmond, that when Congress returns from recess that she will introduce an Amendment to Title IX. We do not have a copy of the exact language right now in HEW. She said she has only given it to select colleagues to look at so I don't know the definite language. Her staff has indicated to me that the special groups that would be exempt would be the Boy Scouts, the Girl Scouts, sororities, fraternities and physical education classes. This is a real possibility and as I indicated, she has support for it both in the Senate and with Senator Strom Thurmond. Still, I am not saying anything off the record.

Last night I began to think how much of this that I could quote as coming from individual sources and went back and read in the Regulation that you are entitled to read to the public the comments during this comment period before we decide what to do with them. So, that anything

that I am saying to you, you have access from your Regional Office to read the comments of any group or any individual that you want to see. It became a matter of public record.

Senator Pell though has said that he will also support this Amendment because he does not believe that the intent was to impinge so heavily on the elementary and secondary school.

Another area that has come under considerable comment in terms of student treatment is the whole financial aid section. Those of you who have tried to follow this in your Regulations, it's 86.35. There are a number of positions that have been taken and as you know we have indicated that the language is open to interpretation at this time; whether you have to have equal scholarships or not or whether a university may take its total, and whether you can have single sex scholarships, which is what we are saying you cannot have right now, in the language.

The American Council on Education has taken the position that they should be allowed but that universities be required to look at their financial package as a whole and be sure that there is equal opportunity to equal amounts of money, but that it should be looked at as a total package rather than our trying to go back and change scholarships that were in the millions of dollars.

A very interesting comment here that I told Dr. Pondrom about last night which surprised her is that HEW got themselves into foreign policy on this area notably in regard to the Rhodes Scholarship. And they decided to exempt the Rhodes Scholarship and we did it under the same that we would exempt all foreign scholarships.

I find it intriguing that we have received 41 comments about that one section, that one scholarship, the fact that we exempted it. We have received only one comment saying that we did what was right and that comes from the State Department. All of the other comments have been negative to what we did. Now, the assumption that everybody automatically makes of those other 40 comments is that the majority of them would have come from women's groups. They did not. Two-thirds of them came from individual professors saying that we should not have exempted foreign scholarships because the position is the prestige of those foreign scholarships and that even if you could equate dollar value, that is the quantity, you can't evaluate the qualitative aspects of receiving one of those foreign scholarships. I found that a very, very interesting comment; that the majority of those individual ones have come from college presidents and professors saying that we should not have done that. I might also add that in the meantime a bill has been introduced into the Parliament of England to change the Rhodes Scholarship abolishing its single sex aspect.

Financial assistance though, is going to continue to constitute a major problem as we deal with this area. The athletic section as you well know has been very, very controversial, that is 86.38. Most comments that have been received have dealt with whether or not the Regulations should exempt revenue-producing sports. At the present time the Regulations basically require equal access. They do not require equal amounts of money to be spent on the sport. NOW, and WEAL have taken very strong opposition points to this and have gotten the support of Bill Taylor's group in the

research for legal precedents (see comments of Lepper p. 324) to say that they believe that there is precedent in this area as well as in the area of textbooks, which I will come to in a minute, for not exempting revenue-producing sports. Again, just a personal comment.

I happen to be originally from the deep South and several weeks ago I had to make a trip down there on business and visited my family. Generally these are rather tense visits anyway because of my job, but this time it was doubly tense for another reason. Football season had just started and my father said, now I understand that you people at HEW just can't leave well enough alone, you are going to abolish college football. Well, I don't really think that has been the intent, but unfortunately, the general public believes this. He was sincere and he started talking and it was clear that because of what the sports commentators have said, that many, many people have come up with the impression that the Regulations would abolish college football, and he was a strong supporter of college football. I asked him if he likened them to being a farm club, and why couldn't professional football pay for its own farm clubs the way baseball did. But he didn't take to that very kindly, so we decided that that would be one more area that would never be discussed when I come home. It's not humorous. I would like to deal with it humorously but it is a serious subject.

Women are not being able to compete equally in the athletic area in the United States at the present time. I say this because I read through the comments again last night and maybe there are 15 letters in there that say, why destroy the best athletic program in the world. Well, look at the records in the Olympics. I am not sure we do have the best athletic program in the world. Certainly our women have not been able to compete to the degree that women from other nations have. And I think this is because they are denied equal training, it isn't only access to specific sports, but equal training in sports and it begins in the elementary and secondary area.

When people tell me that it has got to be done by a skill basis; the problem is that by the time a girl gets to college, it is too late to go back and redevelop those skills that the males got all the way through elementary and secondary school. I don't know what is going to happen. I would say that is probably the most controversial area in the whole Regulation and again it's one that bothers me because I would like to see women have an equal opportunity to compete. I am far more concerned about these other areas and there is so much emphasis being given to the athletic area that I am afraid that sufficient policy making decisions will not be addressed to what are other real issues such as financial aid, the educational programs and activities.

There is one other area that has come up, a current and existing Regulation that has come under attack, and that is the one that deals with the treatment of students under marital and parental status and this is the Regulation—actually I could read it to you. But, what has created controversy is that a number of Senators, but more specifically Senator Buckley believes, that if we leave the Regulation as it is now written, that HEW is in essence advocating abortion. It was not intended that way. Let me read you the statement here because I didn't even read it this way when it was written and until he wrote the letter to the Secretary, I had no idea that it would be

interpreted that way.

It simply says "a recipient shall not discriminate against any student or exclude any student from its education program or activity, including any class or extra-curricular activity on the basis of such student's pregnancy, childbirth, false-pregnancy, miscarriage, abortion, or recovery therefrom." Now, it seemed to me, and I am sure to our attorneys when we were drafting the wording of this, that we were simply trying to deal with all aspects of the condition of pregnancy. But I did not even anticipate that anyone would see that. And certainly that is a very controversial participation part.

Now one other area that has come under a great deal of attack is an area that we addressed in the Preamble but not in the Regulations and that deals with textbooks and curriculum. Textbooks and curriculum were not dealt with under Title VI of the Civil Rights Act and they were left out of Title IX of the Higher Education Regulations. Again, a number of groups have taken strong exception. They believe that there is sufficient case law to support that, some mentioned that some Regulation would not be in violation of First Amendment freedoms. In general, the case appears to be more clear when we are talking about textbooks for the elementary and secondary school, that is where state financial assistance is used to purchase the textbooks. There appear to be ways that we can say that if you are going to use sex-biased textbooks that you would have to use some other material that would counteract it. I suspect that that could be done under First Amendment Freedoms. It is more tenuous as to what we could do in higher education where these are not required texts, but selected texts by individual professors, and no group has advocated that we extend the Regulation to cover library books or anything of this sort, or extra material.

One of the things that people often say is that they would have to give up teaching Shakespeare and Milton and Freud if we are going to pull out sex-biased material in the higher education field. That was not ever the intent of those people who have written in to complain about the Regulations. There is no consensus in HEW at this particular point on that particular item. It is one that the attorneys are dealing with and trying to research in terms of case law as to what could be said and how far we could go.

I would say that the ones that are giving us the most trouble in terms of defining clearly to the public what we mean, would be the textbook area, where we added a new section on textbooks; what and how we will deal with financial aid, and finally the athletics—and the issues in athletics break down into six separate issues. They are not just scholarship issues. They are the nature of sports, whether they be intramural, interscholastic, separate but equal opportunity, full expenditures, etc. It requires that a school provide the activity if there is sufficient student interest, and as one of those people that might have to implement it, I would hate to see the Boston Regional Office having to go out and do a total investigation of an athletic program because one complainant said they wanted to play basketball. What would determine sufficient student interest is a real problem because I am looking at it as an administrator with very limited resources. And we have not yet been able to define our own Regulations as to what that determination of



student interest would mean.

I think that is essentially where we are. If it sounds like we are confused, we are. And I am saying to the staff, and I say this with deference knowing that I have representatives from a number of groups in this audience, I have said proceed very cautiously on any Title IX complaints. It is the law. It has been the law for two years. We must enforce it. But proceed in those areas where it's relatively clear that we know what the law means and investigate through finding out additional information. Let me say that we are fairly sure about a couple of things. That is, you can't have discriminatory dormitory regulations but we are still getting a lot of resistance from a number of Southern schools as well as a few others, but it is primarily Southern schools.

In one letter that the Secretary of HEW got and referred it down to Mr. Holmes, who referred it down to me, and I answered, the gentleman wanted his daughter's dormitory regulations to be different than the males in the school. And he told me that until I was willing to pay her tuition that I shouldn't try to determine what time she comes in at night, he wanted to. That's all right, but I wish he would understand that we are not talking about just his daughter, but all of those females and all of those males. But we are proceeding with those investigations. We are trying to enforce. But we have got limited resources and where some of these issues are so unclear I feel that it is better that we try to proceed cautiously and maybe find out what the facts are. Maybe some of these issues are not as serious a problem as we had envisioned.

**MILLS:** Thank you, Dr. Lepper. The next panelist will be Mr. John Bynoe who is Director of the Office for Civil Rights for the Boston Regional Office of the Department of Health, Education and Welfare.

**BYNOE:** First of all I would like to make it perfectly clear that today I will speak of the role not only of the devil's advocate, but my own personal consensus, and that of the people who are in the protected class that we are trying to reach. One of the problems that a lot of people have had all day and the last two days is, have we truly identified the protected classes?

When we talk about Title IX and particularly in higher education, we are talking about the students and the faculty. But I like to view the protected class as those youngsters who are way back in the schools and coming up now through a system who if not given a chance, will never get to this protected class. It is the responsibility of the Office for Civil Rights to try to open the way for a lot of people that we are not even beginning to consider here today and won't be considering in groups such as this because we are already—I guess some of those people who have had the opportunity for higher education would say—that we are now giving super protection to a protected class that's already in existence. And that argument is real, I think.

With Title IX, as Mary Lepper has said, we have had it for two years and we are going to enforce it. Yes, we are going to enforce it, but we have had Title VI for ten years or more. I will not sit here and try to tell you that I expect the powers that be will have any great dramatic change because of Title IX or if they did I would question it very seriously, when I haven't

noticed that much of a dramatic change in Title VI after 10 years of existence. But I think there is a parallel here because my office and my responsibility is going to work with both of these in the same manner. I don't expect that anyone is going to say that now with Title IX, now we are going to have to run out and do the Title IX reviews. It's impossible, we don't have the staff. I think we will take it in the same context that we have taken Title VI.

But let me go back now in really looking at the protected classes and maybe I have to talk somewhat about the organizations that are concerned with Title IX. I guess it was about two years ago here at Harvard that I raised the question before a women's group that I could agree with their concerns and I know there has been discrimination against women, but I cannot accept that any women's group can solely be concerned with only women's rights and forget children's rights in America.

Just look at what has been happening in Boston in the past few weeks. The youngsters were trying to go to school, under Title VI. But who was out there in the streets blocking the way? I think the women's groups have a responsibility to say that all of these things are connected. There is no way that we can go ahead and get women's rights if we forget all the rights of all the other protected classes over here. And if it should happen in this great country of ours then I think it points up some real serious questions as to whether we are really about what we say we are about.

I think that we are going to have to look—you know I really would like to know what I am supposed to say to the parents of the poor disadvantaged youngsters in Boston both Black and white, who want a better educational system but they want us to come there and find causes and make them do it. When they say what are you doing over here in Charlestown talking about athletics? We are not worried about our children playing we want them to learn how to read. I just wonder if you recognize what is going to happen to us as administrators and as people working in this field. Are we putting this in a total context? How do we set the priorities on the problems? How about all of the protected classes that have to be reached?

I raise these questions. I have to have the answers. I would like to hear from some of you later on. I am not saying let's get on it. Maybe what I am saying comes in the next session. But I think it's very, very important and I think that maybe what we have to do if we are really serious is to find a way to get a consensus going that tells people that rights are rights, and you can't go down any specific avenue and only work for that one. You have got to try somehow to bring them all together if we are really going to make the effort worthwhile.

**MILLS:** Thank you, Mr. Bynoe. Our third panelist will be Dr. Cyrena Pondrom, Assistant Chancellor and Director of Affirmative Action at the University of Wisconsin in Madison.

**PONDROM:** The subject of this panel is the Impact of Title IX on Higher Education and as perhaps one of the few representatives of a higher education administration on the conference panels, I would like very precisely to focus on that. I think there has been some misunderstanding of

the position of higher education in regard to Title IX. I understand from a report of one of my colleagues who attended the ACE national conference in San Diego, that Congressman O'Hara brought the group to its feet by pledging that his committee to whom the Regulations or Guidelines of Title IX must come for action before they are signed by the President, would simply send them back.

That is not the thrust of the comments of higher education on the Title IX Guidelines, and it would be a grievous mistake for any of us to think that Title IX is expendable, to think that it is a document which should be shuffled to the rear of priorities in enforcement and administration. Nor is that the texture or tenor of higher education's comments. Rather, we see a document, Mr. Bynoe, that can be enforced. We see the document which has provisions so carefully drafted and so attentive to the actual circumstances of higher education that it will not be necessary to ignore the document. One of the things which has plagued Executive Order enforcement is that the Order is drafted in the fashion so inapplicable for higher education that it has been imperative that Executive Order enforcement largely be neglected in some areas. Consequently, it is in that context that I want you to understand my expression of concerns about some of the issues raised in Title IX.

There are four that I want to address specifically. Each has ramifications that are extensive. The first is one which has not yet been mentioned this morning. It is the question of validation and it is one which has appeared in previous documents in different contexts. The first appearance of the notion of validation in the Title IX Guidelines is not in its more familiar employment context, but in the context of the review of admission credentials. And I submit to you that there is a great deal of mischief indeed to be done by the way this is formulated and presented in the Guidelines. The specific statement is, "a recipient shall not administer or operate any test or other criteria for admission which adversely affects any person on the basis of sex unless use of such test or criteria is shown to predict validly successful completion of the education program or activity in question."

Now, in the first place, the notion of valid completion of the program is a very different notion from that of valid performance of a job with specified duties. For the faculty of an institution determines what constitutes completion of a program and one is locked immediately into circular reasoning when one discussed then the validation of those requirements. It is interesting to produce a change in what is necessary to complete it. So, one doesn't have a meaningful statement in the first place when one applies the concept of validation to admissions requirements. But let's waive that aside for the moment and say that it would be possible to construe the meaning of this passage in such a fashion that one were seeking genuinely essential attributes for the program. The way it is drafted, it would be equally possible to apply this section to prerequisite requirements, and I suspect that none of the drafters of these Regulations intended for the graduate school, for example, perhaps to be forced to drop a language requirement for admission to graduate school because it was not necessary to read French or German in order to study sociology. There were purposes behind the language requirement. There are purposes behind some math-

matics and statistics requirements which are different indeed from the purpose of guaranteeing that the individual can get an A, B, or C, in the introductory course in graduate sociology.

Now, beyond those two things, there is another issue raised here in the validation section which really is applicable to all the regulations which HEW has drafted and is one really of the most grievous problems which institutions have encountered in dealing with compliance agencies. As it is drafted, there is an open-ended assumption that the institution must be prepared to show in detail that every action taken with respect to admissions is statistically justifiable. Now since there are 15, 20, or more components to any admissions or selection procedure, and these differ from department to department throughout an institution—and my own institution happens to have 140 such departments—the data collection gathering and analysis requirement implicit in such a phrasing of the Regulation is staggering beyond the potential for comprehension for most of us in higher education administration. But there is a very simple shift which would permit the Regulation to retain a thrust which is of great importance, that of assuring that arbitrary and capricious standards for admission shall not intrude to exclude members of one sex from an educational program or activity. That is the simple requirement that the agency identify the specific practice being challenged before the institution is obligated to bring forward the data which shows whether it (A) has or has not a disparate effect and (B) whether it is or is not predictive of success of the program. That simple change alone would lift what has already amounted to many millions of dollars of expenditure in needless and fruitless record-keeping on the part of institutions and which is threatened by such blanket provisions of Title IX grossly to be extended.

Now, having said this, let me re-emphasize what I said when I began. That is, I have not heard a single person in the deliberations of the American Association of Universities and the American Council on Education—both groups of which I have shared in the drafting of responses—I have not heard a single person in those deliberations suggest for an instant that any association or any individual university with which they were acquainted opposed government guarantee that admissions procedures are handled fairly and equitably. All of the college presidents who have moved to comment on these regulations would second the premise that there shall be no denial of opportunity to individuals on the basis of race or sex.

Those same comments about the way the provision of data should be handled requiring the compliance agency to identify the requirement being challenged before the institution shoulders the burden of proving that the requirement is just or not, should also be applied to Section 86.42A, which is the employment section of the same Guidelines and I would further urge, though it is out of the context of these discussions, that the Equal Employment Opportunity Coordinating Council would be well advised to introduce exactly the same provision in the testing guidelines which are now under formulation.

The second question that I am very gravely concerned about in the Title IX Regulations is the question of the standing of affirmative action within them. The Regulations are unremittingly confusing in what they call

for in the area of affirmative action. We begin with an affirmative action clause which assures that there shall be mandatory remedial action and there shall be permissive affirmative action. Let me quote that clause to you. "A recipient which has previously discriminated against persons on the basis of sex in an education program or activity shall take such remedial action as is necessary to overcome the effects of such previous discrimination." Now, no one, again, that I have heard comment on this section from within higher education, would deny the necessity that such remedial action should be taken. But there is open-looping. The question is when is remedial action required.

I think there is a very simple answer and one I think perhaps you, Mary, would be able to say HEW is almost certainly going to rule on and that is that remedial action should be required whenever a compliance agency has brought in a finding of discrimination. Very simple. But, let's say it. So that it isn't a question of it being an open target as to whether or not remedial action is a part.

Now, let's go one step beyond that. In affirmative action the assurance is, in the absence of prior discrimination on the basis of sex in an education program or activity, a recipient may take an affirmative action to overcome the effects of conditions which resulted in limited participation therein by persons of a particular sex. Now, that is very well stated indeed. There is only one problem. Successive sections of the Regulation present two contradictory perspectives on that affirmative action policy.

Let's keep it just like it is and let's make sure that that option exists throughout the Guidelines in places where broadly drawn they simply prohibit disparate treatment. Sometimes disparate treatment is desirable in order to achieve uniform effect. I submit that one example of this may very well be in those aptitude and counseling tests which help to identify potential for performance in an area. It may very well be that I, raised as a tomboy as I was, in a milieu which expected certain things of women and different things of men, would have performed far less well on a test determining engineering skill that was designed principally for persons who had had such opportunity and that I might have required a test more clearly adapted to the kind of background I might have been expected to have to identify whether I had any engineering skill or not, or whether, as I did, I should go into the study of the English language.

Now, in one section of the Guidelines, the financial aid section, there appears to be a strict prohibition against the development of special remedial programs voluntarily. Now the voluntary aspect of it is something that is very dear to the heart of higher education and there was an important statement on a panel on the previous day in response, Mary, I think to your question on the role of higher education in mandating special programs. The response was, in the area of the creation of special programs for minorities and the disadvantaged, institutions have been relatively innovative. Perhaps the thing to do is to make sure that they can continue to be. I think that is the answer and that the voluntary approach is very important. But note that as the financial aid section is currently drafted, any kind of special fellowship such as for example, the Danforth Foundation Fellowship for

Graduate Women, would be prohibited for there is a simple prohibition against providing different amounts or types of financial aid on the basis of sex or limiting the eligibility for such assistance which is of any particular type or source applying different criteria or otherwise discriminating. As I read that, if there were any way in which the institutions cooperated in the Danforth Foundation's programs of graduate fellowships for returning adult women, it would be impossible for the institution to continue to make those awards.

Now that is a section in which the voluntariness of an affirmative action program appears to be prohibited. Yet there is another section in which it appears to be mandated, and once again, I will submit that it is important that affirmative action in the absence of a finding of a discrimination which must be remediated, should be valid—that is in the section on athletics. At that point the institution is enjoined to provide additional opportunity for members of a sex which has received fewer opportunities in the past.

The third section that I am concerned with is one that Dr. Lepper has touched on and I will pass over rapidly: the question of financial aid. The position of both the American Association of Universities and the American Council on Education is that the financial aid should be available on a non-discriminatory basis to all applicants without regard to race or sex, but that individual sources of financial aid should be pooled into a common resource without requiring that sources in which a limitation on sex is made be declined.

It is founded on a very simple premise and that is this, any time you exclude from the total pool of dollars to be administered some funds, you have reduced the total number of funds available. Even having studied the English language instead of mathematics that's a computation I find myself able to make. Consequently, if we will follow the simple principle of guaranteeing that the outcome is not lessened and we will continue to accept those sources of income which make a bequest in memory of a beloved son whose life was lost in etc., etc., etc., I think the ultimate effect will be to the advantage of men and women alike, minorities and non-minorities alike.

There is a legitimate question concerning the stature and status that accompany certain awards. That is a sacrifice which would be made were this approach to financial aid adopted. I will venture the hope that as access to financial aid is equivalent and as admissions to higher education programs are made without respect to considerations other than ability that there will be programs that are directed to women, directed to minorities, that have the stature that those programs that have been directed to men have had.

Finally, the question of athletics. I think it would be grievous indeed, if Edith Green's proposal that all physical classes be exempted from the provisions of this Regulation were to be passed. I think there are many effects on the performance of women in circumstances in which something that I can loosely call team play is required, which are different from the performance of men. Perhaps largely because there has been little opportunity for women to share in the experience of competition in which they were dependent upon the performance of other members of the team in order to win, in which the rules of the game were such that they fought hard today

and were friends again tomorrow.

I think it is great, that the athletic provision of the section be retained and that its application be consistent throughout. But this does not mean that one need cast away the differences between income-producing and non-income-producing sports or that one need in a rigid and mechanical way to require the comparison of particular sports when, one played predominantly by men is income-producing and the same one played predominantly by women is not income-producing.

Let me submit to you what I think would be an appropriate way to deal with the just and necessary requirement, equality of opportunity in this section. I think it would be just and appropriate that opportunities be offered to men and to women in proportion to their demand for those opportunities. Not on a head for head basis, but in a fashion proportionate to the demand. And that comparison between sports be made between sports being performed and offered at a particular level of competition. With the understanding that there is a difference in the level of competition between income-producing sports and non-income-producing sports. In short, if your women's basketball team is a non-income-producing team in the same fashion that the Harvard Crew Team is a non-income-producing team, let there be justice in the provision of aid, facilities, travel, and all other expenditures among those non-income-producing sports whether played by men or by women. And let us not say, carry the argument to the extent that we are compelled perhaps to have it discarded. Let us not say that because the Harvard basketball team can draw 10,000 people to the stadium, and because there is a women's basketball team, there must therefore be exactly the same kind of resources. Now I didn't say space, but the number of coaches, the number of trainers, the number of trips; there must be the same kind of resources provided to the women's basketball team as is provided for the men. I think it is that kind of extremity which has illicited the tumult of mistaken response from the NCAA on which it fairly succeeded in dragging enough red herrings across the road that we may lose a provision which is essential and valuable on that question.

Simply put then, Title IX is important. It is something which education should comply with. It is something which should be drafted in a fashion that it can be complied with and can be enforced. Let us now go forward together, not challenging the Regulations to the extent that we lose them, nor enforcing them to the extent that public opinion turns away from them. Thank you.

MILLS: Ready for questions?

LEPPER: A couple of comments raised by Dr. Pondrom really reflect that at the time the drafting of the Title IX Regulations were going on, there was still a lack of clarity among everyone in HEW about the difference between what is required as affirmative action and what is required for "remedial action." At one point in time, financial aid particularly had a section in there urging remedial action to overcome previous discrimination. The lawyers said you couldn't do that, it may go back in. What I am suggesting—her points are very well taken. This section has got to be cleaned up all the way through the Regulations as to what we are saying is

an affirmative action to take and what must be done once discrimination is identified and there is a finding of discrimination. I think we are aware of that.

**BYNOE:** Mary, on that same point, what she is asking for is also in Title VI. But in Title VI also, there has to be a finding of discrimination before affirmative action can be required to be taken.

**COMMENT:** I was amused about what Senator Pell said that he didn't understand that it covered elementary and secondary education because on February 1—I happen to have a copy of what Senator Pell said on the floor of the Senate—he said this includes elementary and secondary schools as well; he probably doesn't read his own stuff.

I think it is a myth to say that Congress didn't understand what they were doing. I had the privilege of working with Edith Green in the hearings and several of them came to those hearings. Several representatives testified in favor of the bill. There was no opposition whatsoever on the educational committee. They all had people on their staffs who dealt with nothing but looking at special legislation. It went through the whole committee process on the House side, it was introduced on the floor of the Senate, it was debated on both the floor of the Senate and later on the floor of the House, there were amendments to it. I think to say that they didn't know what they were doing is to denigrate the work of the Congress.

I want to talk about enforcement very briefly and also the funding. Cyrena and I worked together on a lot of issues, these are two we disagree on so I have to get my licks in here, and incidentally the statutes strictly prohibit disparate treatment. I have trouble with that particular provision but that is in the legislation and cannot be changed. In terms of basketball for example, if we exempt revenue-producing sports, we end up with precisely what we have now essentially, that the women's basketball is underfunded, it cannot grow. We have women's teams in college that have to sell apples and cookies to pay for their uniforms, etc., etc. If we are going to have more trainers and more teams it seems to me that that is not very fair to say that on one hand we will share the money but not share those coaches.

We need to be very clear that there is a very tight relationship between Titles VI and IX and to feed it into the point you were making, Mr. Bynoe, and I hope you will come when I talk later today on the section having to do with sex criteria. If we are beginning to tighten up on Title VI precisely equal to Title IX then some of the procedural requirements proposed by the Regulations are better and they will indeed be made identical. Title VI will have to be brought up to the level of those better procedures as they have been defined in the new legislation. Title VI procedures will be improved because of the pressure on Title IX. Otherwise we will have minority women saying I have been discriminated against on the basis of my sex and my race.

**BYNOE:** I think your important point is directed to Title IX. But Title IX would only advocate ability to deliver a school's potential at such a time and point that Title VI is implemented at the initial stages to give opportunity to



a hell of a lot more people than it has now. I don't think Title IX gets into the work of it at that point. What I am talking about is that you know, are we really saying that what exists now is the full, is this all we can be concerned with. I don't think we can. I think we know historically, even myself, I have had special kinds of treatment to be where I am, but the average kid out here does not get that, white or Black. If you are in a certain economic status, you are in trouble. And I think unless we address ourselves to that whole thing, if we really believe, you know, that we want equality, that we are going to build a big mousetrap and find that those left out don't even care anything about the system at all and we think we are protecting them. I think it's right, it's as clear as day. In fact, the more we protect the special groups that we have, I think it is a greater problem we have because unless we really turn around as a special group and take our responsibility to the total picture of people who can't help themselves. I am sorry, that's where I am coming from.

**PONDROM:** I would like to reply to one of the things that Ms. Sandler said. I am not usually fortunate enough to have her in the back of the room when I am in front. The question on athletics does not have the implications that were suggested. It is not the case that defining income-producing sports and non-income-producing sports particularly in competition, removes from the institution the obligation to find funds, to provide the equality of opportunity for women in athletics—indeed to find the equality of opportunity for women in athletics in income-producing sports if that is where the interest and ability of women lie in a particular sport. Indeed, if the institution had a great deal of income, a few receive income from income-producing sports and if it needed resources in order to create an active women's program, I suspect it would find it there, it voluntarily would find it there. There is nothing about saying that there must not be an identity made between an income-producing and non-income-producing sport that in anyway removes the obligation of the institution to find the necessary resources to offer equal opportunity. That, I think, is terribly important.

**LEPPER:** I would like to speak to one point that Dr. Sandler made about what Title IX could do for Title VI. I suspect, and again I am not going to attribute motives to the Congress, and when I say that they didn't know what they were doing, I don't think that Congress very often assesses the impact, the long range impact of legislation. But the same thing is true, I don't want to attribute motives to people who are critical of Title IX on the textbook section, but I suspect that many people think that we will upgrade Title VI to deal with textbooks and curriculum if we get it in Title IX. I suspect that is at the heart of the whole controversy over the textbook issue in Title IX. It's not really that we will push it so much in Title IX but that once we get it in Title IX we will put it in Title VI which is where it should have been all the time.

**BYNOE:** You are speaking of what the objectives are. I think you know there is a school of thought that says that if we get through the textbook and curriculum area, then HEW becomes the censor and you are dealing with First Amendment rights. There is a big argument going on out there and I think it has to be listened to. There also was an article a few weeks ago that

pointed out, it was felt by the writer that there is no need for textbook censoring, that they know that groups like civil rights groups and so forth have straightened out the matter in some way. They have done a pretty good job in terms of straightening out the matter in terms of racial stereotypes, etc., in textbooks today and that maybe this kind of approach should be used by women's groups. It is more dangerous to place the censorship in any federal organization which forces you to attempt to use the normal process to bring about change.

**COMMENT:** One small thing on the athletic question. I found Ms. Pondrom's analysis to be very good, except that it seems to me that there is a mistaken assumption that somehow the men's sports which we have are the product of male student interest and that the women's sports we have, by virtue of the guideline requirements would be somehow the product of a female student's assessment because we have to assess it. I would just suggest that in the male sports that we have, that the level of competition is tied to the institution's value on the sport and not to the male students in the institution.

**PONDROM:** We have already decided that.

**QUESTION:** Well, possibly, but it's the institution which amounts the program. I find the Guidelines to be defective there in the sense that there is this whole question of assessment. One wonders well, do you assess women's interest by only polling women for example? Or do you poll the total student body to see if the men want to suggest what women's sports ought to be?

**PONDROM:** I think there is a lot of misunderstanding on the student assessment. I know many people have been climbing right up the wall about the student interest section. I don't think it is necessary. There are very simple devices for getting a sense of student interest in both spectator and participant sports and there is no reason to think that such simple indicators could not be helpful to us on an advisory basis in formulating procedures.

**QUESTION:** Don't you think that in your introductory remarks, which I think were a very accurate characterization of our problem, that these guidelines that were given to us simply do not in any real way point the way to institutions? Once you admit that you have got the limited resources for enforcement and if you aren't clear yourself in HEW as to what some of this stuff means, I think that can only lead to the most capricious and uneven kind of enforcement. So that even on the question of assessment of student interest, if one college were to appoint some sort of sham advisory committee, and another were to go out and do a real effort to assess, the one that made the greater effort and as a result had a program which is more out of line is going to be suffering in your hands in a greater way than one that made the sham effort.

**LEPPER:** That is a problem we have to deal with in HEW all the time. It is a question of whether or not 25 complaints of discrimination in an institution means that it's as discriminatory as some other. It may mean that those people at some other institutions didn't know what their rights were.

That's unfortunately a real live issue that we have to face every day in trying to set priorities of where we do our enforcement.

**COMMENT:** I think the theory of caution is going to be translated into a program of inaction. I can't see how, if we have to wait until we can look around the country to see what you have done at various institutions in the different regions as a way to determine how we might want to plan a program, which is about where it stands. The commitment that HEW has to classify the issues may satisfy Congress more than you think it does.

**QUESTION:** Would someone comment on the application of Title IX in the area of women's studies programs or/and particularly in the area of women's resource centers?

**LEPPER:** In terms of women's studies programs—you cannot exclude or set up exclusionary courses under Title IX for a single sex any more than you can set up exclusionary courses under Title VI. We have had to deal with this under Title VI in the whole Black studies area and ethnic resource centers. I believe that you cannot under Title IX any more than you can under Title VI.

**PONDROM:** Actually, one of the laments that I have heard from university administrators, some of whom are supposed to be the real militants on Title IX, is the possibility that we will have to dismantle things very important like continuing education services to women. Unless there is clarification on this question, I am very much afraid that we are in a situation where a continued backlash might push us right over the brink into a refusal to treat the specialities of any group. Under the strict interpretation of the requirements there would never be disparate treatment.

**LEPPER:** This is one place where I think me and Dr. Pondrom might disagree in that I want continuing education for all those people who did not get it and it seems to me that I am willing to take that chance and hope that the universities in their wisdom will set up continuing education programs so that the 35-40 year old male minority who didn't get a chance to go to college will get to do so through some continuing education program. So I am willing to pay that price.

**PONDROM:** But the institution may not have the money to pay the price for it. The question exists of a selection of targets for the application of resources. And we need the heterogeneity of institutions choosing diverse targets for their own special excellence.

**COMMENT:** I want to get back to the athletics thing for just one minute. I am interested in it not only as an affirmative action officer but also because I have a couple of kids, male and female, both of whom are very interested in sports. But when one of them, the female, gets to the university atmosphere, I am a little worried about how she is going to be able to get the programs that she wants to get into if there are not enough people who are demanding, as you said, Cyrena. I am very wary of that demand because I feel that the assessment of resources necessary to run an athletic program for women shouldn't be tied necessarily to the demand but to developing the demand, to letting women know what kind of training can be

available to them so that they will want to demand more sports and more athletic facilities. On our campus at the moment there is not a very big athletic program. There is a finite amount of money that will be expended and all kinds of ideas that we must do it in a way that the alumni will feel good about and we know what that means. I have a head of the women's athletic club, which is a very small group, in my office once a week asking what do we do to show them? I have done surveys myself which show we have women who want to play basketball, we have women who want to do this, they are not listening to us. They say no, if we build up a program we only have money for a certain thing and it has got to be this one.

**PONDROM:** There is an answer to this, and it's taken right out of the employment book. If you argue that women and minorities are not available, the only really valid argument is if the offer made is rejected. The same is true on the sports issue. If the institution has not created equivalent participation opportunities, I think the only valid proof that it is genuinely from lack of interest is the fact that they announced an opportunity for participation and gave it substantial publicity and no one came out.

**COMMENT:** But when people are arguing for those programs there is a negation of giving them.

**LEPPER:** I think we ought to point out too that we have this same issue around a long time except that few of the universities have dealt with it and that's in terms of their marching bands. At one point in time the marching bands were almost exclusively male. Most of the marching bands have been integrated now so that women can participate in them. But I had occasion to go down to Florida A. and M. last fall and sure enough there was still an exclusion that only males could be in the marching band and they were enrolling that day and I pointed out to the president of the university that he couldn't do that. He called up the band director who gave me all the reasons that women couldn't physically march and I said that I just wasn't going to accept that. They then opened it up, but there was a lack of interest. No women signed up. Now, of course they didn't sign up. They knew good and well that band director didn't want them. So that's what Cyrena is pointing up. But we can deal with that under the discriminatory chapter.

**PONDROM:** We had to tell our band director that no women, no band.

**COMMENT:** I am both a Black and a woman. I naturally have interest in both the concerns, the increase of opportunity and access. I am a bit frightened as I sit here and I listen to us talk about the lack of necessity to establish priorities. As I sit here and I think of the life and death of kinds of struggle of minorities in this country for some kind of economic access and you talk about basketball, and you talk about other things, you know, I was really getting upset. We look at the title of this panel about the impact on higher education of Title IX and I hope in many ways it has an extremely positive impact that will affect the rights of women and particularly minority women, but it cannot in any way supersede the kind of need in terms of monies, resources and energies that are needed to fight the other kind of battle and struggle to offer opportunities and access to the minorities both male and female, Blacks and women too, in different areas. I really become

frightened when I hear us using the kind of energies that we are expending right now talking about basketball. That is important, there is no doubt about that. But where along the line do we as people working in affirmative action put our energies to do something about that versus seeing that we have access?

**PONDROM:** You know, Title IX oughtn't cost a lot of money. I think there is a spurious conflict introduced here. Title IX really ought not cost a large amount of money in most cases. There are some which will. By and large it is a matter of saying, yes, out of the existing campus resources men and women shall use the money on a proportional basis.

**COMMENT:** I just don't want us to get side-tracked with whatever monies or energies or resources that are needed.

**COMMENT:** I am also concerned about the relationship and the ways in which Title VI and Title IX will be enforced. I also share your feeling talking about sports. I think it's important but I think there are a lot of other things we haven't dealt with. I am particularly interested in the relationship between Title VI and Title IX in admissions and in regard to financial aid. I would like to make one comment and then ask one question.

The comment is in relation to what Mr. Bynoe said. Back in 1970 I worked in HEW and in the Office for Civil Rights as an investigator, a compliance review investigator, and that was the year in which the prohibition against sex discrimination and the fuller issue of sex discrimination in affirmative action really began to be enforced with compliance reviews. I know from my experience there, that prior to 1970 the Executive Order wasn't enforced, period. In 1970, because of the women's pressure, pressure within, there began an effort to enforce the Executive Order. There then rose the issue, shall we have separate reviews for women and separate reviews for minorities? The answer from HEW and I heartily agree with the answer, is absolutely not. They were all to be done simultaneously. Now you are talking about one law there and there may be some differences in the law between Title VI and Title IX, there may be some difference in their version. But now as an administrator in a college, as well as just a general person interested in civil rights, I would want to have Title VI and Title IX simultaneously reviewed, and I would like to know if that is what HEW intends to do?

**LEPPER:** Yes, I can answer to that. To the degree possible, there are certain issues that are separate. Let me, HEW has taken the position that now we have or at least within the area of higher education, we have two areas of concern. One is employment and the other is student treatment and that includes admissions and everything. We are not any longer divided in the higher education division by the Executive Order and Title VI, which is the way it used to be divided. We will do the reviews to the extent that they are the same obviously. The reason, I think I stressed in the beginning that I am distressed with the amount of time and the amount of public attention the athletic issue has gotten is because the other issues seem so critical to me, the matter of admissions and financial aid. So that there is a different issue in athletics for minorities and for women. That we will do under the

whole thing of compliance reviews. The instruction that will go to the investigative teams is they will have a student affairs investigative manual and they will have an employment investigative manual. It has nothing to do with the jurisdiction under which we go in to do those.

I might add that we now have statistics that, you are quite right, that the Executive Order had not been enforced by HEW very vigorously before the women did this. This was one time the minorities have benefited. But most minorities still do not realize that the Executive Order is there for their protection in higher education. Our complaints in higher education employment issues are 80 percent from women, a fraction of that will be minority women. But primarily they are women. However, as a result of doing these reviews, as you said, when we do that we look at the minorities, when we look at affirmative action plans, a number of universities have tried to tell us, okay we will only set goals and timetables for women because we know the availability, we won't do anything for minorities and I have consistently held to the view that that I will not accept as an acceptable plan. You figure out a way of finding availability or defining what you are going to do in your minority employment program.

BYNOE: Well, Mary Lepper, again you understand fully what, why they don't have minorities in higher education. Just recently we started getting them from students because Title VI opened up the entering opportunity and after we get them out of college and on to the next professional level then we will have complaints. That is what I am talking about. You know the selected classes that exist, okay. How do you balance? I don't know, I am asking you. It's a problem. And there is a class outside that doesn't even recognize what is going on. What do these titles all mean? One day they will wake up and say, by God, nobody looked out for me, I haven't got anything, the hell with them, down with the house. Let's recognize that.

QUESTION: I would like to ask a question about the fear of infringing on First Amendment freedoms. It seems to me that we have a history where rights are in collision, that we have limited First Amendment freedoms. All of the lobbying laws against unions and corporations which have been on the books since 1925 and 1943 were challenged because they limited First Amendment freedoms and are still on the books and we have a history of carefully drawn regulations that do not constitute violation and why at this point are we discovering that?

LEPPER: I can give you a constitutional law answer—even though I am not a lawyer—that's the only one that I can think makes any sense at this point and that is that at this point in time the Supreme Court has not yet ruled that women are an affected class in the concept of the due process clause and they have for minorities. And that is why I am saying that until that due process part, they came very close to it in the *Fontera* decision, but they did not in fact consider that women were under the due process clause—and so until the Supreme Court makes up its mind, it has waffled on it in each decision and if you would look up the *Fontera* decision I think you will see that they came closest to the finding.

QUESTION: But won't this force that decision?

LEPPER: It may. Who can judge what the Supreme Court is going to do?

PONDROM: I would like to respond to that too without commenting on what may be the circumstances in primary or secondary education where there is the issue of state adopted textbooks, from which there is no appeal or little appeal. I think the issue is different in higher education in which the tradition has been that ideas must stand or fall from collision with other ideas. And that is a very important aspect of intellectual accounting in higher education. I think that you and I are fully competent to dismantle the erroneous argument that it is discriminatory among our colleagues. And I think that is how we will do it rather than forbid them to express those ideas and declare some things not subject to examination because out of that kind of collision of ideas I would think that the proof of an issue can be determined.

LEPPER: I would like to recommend that any of you that are concerned about this send for a copy of the Center for National Policy Review's critique of the Title IX guidelines that they did for NOW and WEAL because they do a far better job of discussing it than I can and of all of the ramifications. That is, the Center for National Policy Review is located at the School of Law, Catholic University of America (Washington, D. C.) and it is directed by William L. Taylor. It seems to me that that lays out the issues on both sides better as it applies to First Amendment freedoms than I can do in this brief discussion and it presents both philosophic issues as well as the political issues that I raised.

QUESTION: I would like to bring up the issues of the impact of Title IX on medical education, none of which have been brought up here and there are three that I would like to talk about. I know that some of the complaints about Title IX are the complaints which ask that the univeristy take responsibility for the facilities that they basically sub-contract to. In medical education over half a student's education takes place in teaching hospitals. In almost every teaching hospital that I know of, for women, and this is something that really only does affect women and not minorities—the facilities are grossly inadequate. For the fact that women on surgery wear gloves that are about this much too big, which makes it very difficult to assist in an operation. We are going into wards with coats which come down to your ankles which make you look like Harpo Marx; not being able to get whites at all, which means that women students often make their rounds in their own clothes while men have the protection of whites and also look like doctors. The on-call rooms for women are invariably not on the floor of their service. That means when you get a night on with only two hours to sleep, you go up five floors, you often are not called to answer cases which you are responsible for. You are not called for your patient consultations but you are responsible for those consultations. Women's bathrooms are so scarce that often in hospitals that most women students I know use men's bathrooms. They simply cannot be bothered with finding a women's bathroom four floors away. So I would stress very much that despite the fact that universities are coming out against having to be responsible for that, that unless medical schools are responsible for the hospitals having equal facilities, that the women medical student's education becomes a lot

less equal I would think. Now the women will survive this and the women have survived it but it is unnecessary. The same thing for textbooks.

**LEPPER:** Let me tell you something on that though. The reason that nothing has come out on that in the context of Title IX is that we have another protection and the women could have been fighting under it all the time—Public Health Manpower Regs. 799 and 845 specifically address these. I must admit, those fine regulations have not been published but we can protect women students under them. Again the language is Title VI language and we can protect.

**COMMENT:** Let me bring up two other points very quickly and these points both affect women and minorities. One is textbooks. Physiology textbooks, the ones that students have brought me are based on values for 70 kilograms as Dr. Pierce said yesterday—a white male. Now often they are not adopted, but the physiological values for women are different. And often the sources of diseases are different for various races than they are for whites and it isn't exactly stereotyping and I guess it would come under inadequate education. But it is very important and I think it should be considered that if the textbooks which they have considered as a norm for white males, that not only does that hurt the minorities and women who are students in that school, it hurts all patients of all doctors because the doctors are being trained to treat white males and that is very important.

The last thing which isn't covered at all in the Regulations but I think bears on them is unequal education by virtue of the way in which the faculty regards the students. Now, this has been documented in a number of medical schools for women. I am convinced the same kind of thing goes on with minorities. For women it comes under the category of saying what's a woman doing here, women can't be surgeons, ignore her while she is trying to learn, not being able to ask questions, not being given equivalent training. You can't prove it from one incident. You can prove it from a pattern of incidents. And I think, as I said, again, it does affect minorities. And it affects not only the education women and minorities receive to be doctors, it affects the kind of role models we have for young people who want to go into medicine. If you only see white male doctors, that has an impact on what children think that they can be when they grow up and I am not quite sure how the Regulations can cover this. I know the Regulations do talk about character discrimination and we have actually sent in our comments to HEW on this and an article by Mary Hollins on Women in Medicine which documents this kind of discrimination. But I think it's something that should be considered and I think at the same time this kind of documentation should be assembled for minorities although it has not yet been done.

**PONDROM:** My experience in speaking to the Council of Medical School Deans makes me pessimistic about how fast this is likely to change, but I think there is one thing that Title IX can do about it. I think rigorous enforcement on the admission consideration will result in a rapidly rising admission of women and minorities in the medical schools and it has been certainly true from my own experience, and that of others in similar situations, that when the enrollment of a previously under-represented group reaches a certain critical mass, for us it was about 10 or 15% female,



that reached that mass, then those students themselves can become effective in policing these kinds of things.

COMMENT: It's very hard though. The institutions that I know about are well represented by men and the problem that women express is that if you are on a clerkship and that is when you learn to do medicine and surgery, etc., in a hospital, you are doing rounds with all of these white doctors who are teaching and they make condescending remarks about a Black woman patient, for example, without any provocation, which you feel are inappropriate in terms of the patient, or remarks that reflect on the kind of training that you are receiving as a woman or a minority and you point that out, it is very hard to not be marked against and not to be evaluated as a trouble maker and then have trouble getting an internship. Even in medical schools with a much higher percentage than 15%, that is a real problem. And I think the women have attempted to try to take it in their own hands, and have tried to begin to educate faculty in a gentle way about both the effects on patients and the effects on students. But I think people have to realize that they do take a risk and they take a risk in the grades they get, they take a risk in the contact, and contacts in medical school as in all professional schools are tremendously valuable, and they take a risk on their internships, residency and future success in medicine.