

Report for Congress

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Agency Enforcement of the Prohibition Against Sex Discrimination Mandated by Title IX and EO 13160

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Summary

This report provides a summary of the federal agencies' enforcement of and compliance with the prohibition against sex discrimination mandated by Title IX and Executive Order 13160. Specifically, this report discusses the implementation of regulations and procedures for enforcing the Title IX compliance of grant recipients and for enforcing the compliance of the federal agencies themselves with President Clinton's Executive Order. In particular, this report focuses on the nondiscrimination policies of four science-oriented agencies: the National Aeronautics and Space Administration (NASA), the National Science Foundation (NSF), the National Institutes of Health (NIH), and the Department of Energy (DOE). For purposes of comparison, this report also examines the policies and procedures of the Department of Education (ED). This report will not be updated.

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Agency Enforcement of the Prohibition Against Sex Discrimination Mandated by Title IX and EO 13160

Introduction

On the 25th anniversary of the enactment of Title IX of the Education Amendments of 1972¹ - which prohibits discrimination on the basis of sex in federally funded education programs - President Clinton announced two new efforts to expand equal opportunity for the sexes. First, he directed federal agencies to develop procedures for strengthening their enforcement of Title IX. Second, he announced his intention to issue an executive order barring sex discrimination in federally conducted education programs.² By the summer of 2000, these two initiatives had become a reality.

This report provides a summary of the federal agencies' enforcement of and compliance with the prohibition against sex discrimination mandated by Title IX and Executive Order 13160.³ Specifically, this report discusses the implementation of regulations and procedures for enforcing the Title IX compliance of grant recipients and for enforcing the compliance of the federal agencies themselves with President Clinton's Executive Order.⁴ In particular, this report focuses on the nondiscrimination policies of four science-oriented agencies: the National Aeronautics and Space Administration (NASA), the National Science Foundation (NSF), the National Institutes of Health (NIH), and the Department of Energy (DOE). For purposes of comparison, this report also examines the policies and procedures of the Department of Education (ED).

The responsibility of federal agencies to enforce policies that prohibit discrimination on the basis of sex is two-fold. Under Title IX and its implementing regulations, agencies must ensure that recipients of federal financial assistance do not

¹20 U.S.C. §§ 1681, et seq.

²Memorandum From President Clinton to the Heads of Executive Departments and Agencies (1997), *available at* <http://www.usdoj.gov/crt/cor/coord/titleixmemo.htm>.

³Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 27, 2000). This order also bars discrimination in federally conducted education and training programs on the basis of race, color, national origin, disability, religion, age, sexual orientation, and status as a parent.

⁴For detailed information regarding Title IX and Executive Order 13160, consult the website of the Coordination and Review Section of the Civil Rights Division of the Department of Justice at <http://www.usdoj.gov/crt/crt-home.html>.

engage in sex discrimination in their educational programs and activities.⁵ Under separate authority established by Executive Order 13160, agencies must also ensure that they themselves do not discriminate with regard to their federally conducted education and training programs and activities.⁶ This executive order is designed to guarantee that the federal government “hold[s] itself to at least the same principles of nondiscrimination in educational opportunities as it applies to State and local governments, and to private institutions receiving Federal financial assistance.”⁷

Agency Enforcement of Title IX with Respect to Grant Recipients

Enacted in 1972, Title IX is designed to prevent sex discrimination by barring recipients of federal funds from discriminating in their education programs or activities. Specifically, the statute declares, “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,” subject to certain exceptions.⁸ Because Title IX’s prohibition against sex discrimination focuses on federal funding recipients who operate education programs or activities, the scope of Title IX extends to noneducational institutions as well as to traditional education organizations. For example, many entities that receive federal funds from agencies such as NASA, NSF, NIH, and DOE operate science-oriented education and training programs and are therefore subject to Title IX’s prohibition against sex discrimination.

A. The Title IX Common Rule. In order to comply with a long-standing statutory directive that all federal agencies which provide funds to covered recipients must adopt Title IX implementing regulations, the Department of Justice (DOJ) issued a final common rule in August 2000 providing for agency enforcement of Title IX among recipients of federal financial assistance who operate education programs or activities.⁹ According to DOJ, the regulations were issued as a common rule because “the standards [and procedures] established for the enforcement of Title IX are the same for all of the participating agencies.”¹⁰ The final common rule promulgated identical sex nondiscrimination regulations for twenty agencies, including NASA and NSF.¹¹ Neither the Department of Health and Human Services

⁵20 U.S.C. § 1682; Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000).

⁶Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 27, 2000).

⁷*Id.* at 39,775.

⁸20 U.S.C. § 1681(a).

⁹Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (Aug. 30, 2000).

¹⁰*Id.* at 52,858.

¹¹NASA’s Title IX regulations are codified at 14 CFR Part 1253. NSF’s Title IX regulations are codified at 45 CFR Part 618. The twenty agencies are: the Nuclear Regulatory Commission, the Small Business Administration, NASA, the Department of Commerce, the
(continued...)

(HHS), which houses NIH, nor DOE were included in the Title IX common rule because they are among four agencies that had previously published Title IX rules.¹² The following discussion describes the Title IX requirements promulgated in the common rule and then compares the separate Title IX regulations issued by HHS and DOE.

As noted in the common rule, recipients of federal financial assistance who administer education programs or activities have long been required to comply with the nondiscrimination mandate of Title IX. The common rule, however, “ensures that individuals [participating in these programs] receive notice of their rights under Title IX and outlines a process for handling administrative complaints for those agencies that do not yet have such a process in place.”¹³ Furthermore, the Title IX regulations issued in the common rule are patterned on the Title IX regulations originally issued by ED in 1975.¹⁴ Citing the need for consistency in legal interpretation and ED’s leadership role in Title IX enforcement, DOJ selected ED’s regulations as the Title IX model. Although ED’s Title IX regulations and the regulations contained in the common rule are not exactly the same,¹⁵ the enforcement portions for both sets of regulations are identical.

Under the general Title IX regulations, recipients are required to provide assurances that their education programs or activities are operated in compliance with Title IX, to designate at least one employee to coordinate its compliance efforts, to establish grievance procedures to resolve student and employee Title IX complaints, and to notify program participants that sex discrimination is prohibited in the recipients’ education programs or activities. The regulations also bar recipients from discriminating on the basis of sex in: student admissions, recruitment, scholarship awards and tuition assistance, housing, access to courses and other academic offerings, counseling, financial assistance, employment assistance to students, health and insurance benefits and services, athletics, and all aspects of employment, including recruitment, hiring, promotion, tenure, demotion, transfer, layoff,

¹¹(...continued)

Tennessee Valley Authority, the Department of State, the Agency for International Development, the Department of Housing and Urban Development, the Department of Justice, the Department of the Treasury, the Department of Defense, the National Archives and Records Administration, the Department of Veterans Affairs, the Environmental Protection Agency, the General Services Administration, the Department of the Interior, the Federal Emergency Management Agency, NSF, the Corporation for National and Community Service, and the Department of Transportation.

¹²HHS’s Title IX regulations are codified at 45 CFR Part 86. DOE’s Title IX regulations are codified at 10 CFR Part 1042. The other two agencies that had previously published Title IX regulations are ED and the Department of Agriculture.

¹³Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,864 (Aug. 30, 2000).

¹⁴34 CFR Part 106. ED’s Like other agencies, ED adopted its Title VI enforcement regulations as its Title IX enforcement procedures. These Title VI regulations are found at 34 CFR §§ 100.6-100.12.

¹⁵Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,859 (Aug. 30, 2000).

termination, compensation, benefits, job assignments and classifications, leave, and training.¹⁶

Notably, the enforcement measures established by the common rule closely parallel the anti-discrimination procedures required under other civil rights laws and regulations. Indeed, because the enforcement provisions of Title VI of the Civil Rights Act of 1964 are identical to Title IX, the common rule simply adopts the existing Title VI enforcement procedures of each participating agency and applies them to the respective agency's Title IX regulations.¹⁷ Thus, the Title IX enforcement provisions for NASA and NSF are identical to each agency's respective Title VI enforcement provisions, the latter of which are substantially the same for both agencies.¹⁸

Under the enforcement regulations, agencies are required to conduct compliance reviews and investigations of their grant recipients and to suspend or terminate federal financial assistance where there is evidence of noncompliance. According to the regulations, both NASA and NSF are required to assist recipients in complying with Title IX. If the agency requests a compliance report from a recipient, that recipient is required to provide whatever information the agency specifies. Furthermore, the agency is entitled to access recipient records and other sources of information in order to ensure compliance, and recipients must make such information available to their program beneficiaries and participants.¹⁹ In addition, agencies are responsible for making periodic compliance reviews of recipients in order to enforce Title IX.

Agencies also must "make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply."²⁰ For example, an agency must conduct investigations in response to timely, written complaints from individuals who suspect that they have been victims of sex discrimination. Regardless of the outcome of the investigation, recipients are barred from retaliating against any individual who has made a complaint. If the investigating agency does not find evidence that the recipient has failed to comply with Title IX, then it must inform the recipient and the complainant in writing. If the investigating agency does find evidence of noncompliance with Title IX, then the agency must first attempt to resolve the matter informally. If the matter cannot be resolved informally, then the agency may take additional steps to secure compliance.²¹

These additional procedures for securing compliance, which may only be undertaken if the noncompliance has not been corrected through informal means,

¹⁶*Id.* at 52,867-74.

¹⁷*Id.* at 52,874-95.

¹⁸NASA's Title VI enforcement provisions are codified at 14 CFR §§1250.105-1250.110. NSF's Title VI enforcement provisions are codified at 45 CFR Part 611.

¹⁹*See, e.g.*, 14 CFR § 1250.105; 45 CFR § 611.6.

²⁰14 CFR § 1250.106(c). *See also*, 45 CFR § 611.7(c).

²¹*See, e.g.*, 14 CFR § 1250.106; 45 CFR § 611.7.

include the suspension, termination, or refusal to grant or to continue federal funding. In addition, the investigating agency may refer the complaint to DOJ or to state or local officials for further action.²² Likewise, if the recipient fails to provide the assurances required under Title IX, an agency may terminate or refuse to grant or continue federal financial assistance.²³ However, prior to suspending, terminating, or refusing to grant funds to its recipients, an agency must notify the recipient of its noncompliance, provide an opportunity for an administrative hearing, make an explicit finding of noncompliance, secure the approval of the appropriate agency official, and file a report with the congressional committees that have jurisdiction over the program involved.²⁴

By November 28, 2000, each agency subject to the common rule was required to publish in the *Federal Register* a list of the programs covered by Title IX.²⁵ In addition, the agencies are required to periodically publish updates to these lists. Although NASA issued its notice of covered programs and activities,²⁶ NSF does not appear to have done so. However, as with many agencies, the NSF Title VI regulations contain an appendix that lists the statutory provisions under which NSF provides federal financial assistance, and this list may be sufficient to comply with the Title IX requirement.²⁷

B. Title IX Regulations for Agencies Not Covered by the Common Rule. Like NASA and NSF, both HHS, whose regulations apply to NIH, and DOE adopted their existing Title VI enforcement regulations to serve as their Title IX compliance procedures.²⁸ The Title VI regulations of HHS are identical to the Title VI procedures for NASA and NSF described above. Although not identical, the Title VI enforcement procedures of DOE are substantially similar to the Title VI enforcement regulations of the other agencies. As noted above, ED's Title IX regulations, which form the basis for the common rule, are substantially the same as the Title IX regulations for other agencies.

Agency Compliance with Executive Order 13160

Issued in 2000, Executive Order 13160 declares, "No individual, on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent, shall be excluded from participation in, be denied the benefits of,

²²See, e.g., 14 CFR § 1250.107(a); 45 CFR § 611.8(a).

²³See, e.g., 14 CFR § 1250.107(b); 45 CFR § 611.8(b).

²⁴See, e.g., 14 CFR § 1250.107(c); 45 CFR § 611.8(c).

²⁵Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858, 52,874 (Aug. 30, 2000).

²⁶Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 77,673 (Dec. 12, 2000).

²⁷45 CFR Part 611, Appendix A.

²⁸At 45 CFR § 86.71, HHS adopted the Title VI enforcement regulations found at 45 CFR §§ 80-6 - 80-11 as its Title IX procedures. At 10 CFR § 1042.605, DOE adopted the Title VI enforcement regulations found at 10 CFR §§1040,101-31 as its Title IX procedures.

or be subjected to discrimination in, a federally conducted education or training program or activity.”²⁹ The order is designed to ensure that the federal government follows the same nondiscrimination policy when conducting its own education programs and activities as recipients of federal funding must follow under other federal laws, including Title IX.

The types of education and training programs covered under the Executive Order include a wide array of activities conducted by federal agencies, including “schools, extracurricular activities, academic programs, occupational training, scholarships and fellowships, student internships, training for industry members, summer enrichment camps, and teacher training programs.”³⁰ For example, in an effort to educate the public about its space programs, NASA conducts tours of its facilities.³¹ Were the agency to unjustifiably discriminate against women when conducting its tours, it would violate the Executive Order.

Under the Executive Order, any individual who suspects that she has been a victim of discrimination in violation of the order may file a written complaint with the agency in question.³² Agencies are required to conduct investigations of these complaints in accordance with procedures established under guidance developed by DOJ,³³ which was published in January 2001.³⁴ Within 90 days of publication of the DOJ guidance, agencies were required to establish a procedure for processing complaints. DOJ anticipates that agencies will use the same procedures that currently exist within all federal agencies for processing complaints regarding federally conducted programs under section 504 of the Rehabilitation Act.³⁵ Agencies are also required to submit periodic reports to DOJ summarizing “the number and nature of

²⁹Exec. Order No. 13,160, 65 Fed. Reg. 39,775, 39,775 (June 27, 2000).

³⁰*Id.* Notably, the Executive Order contains some exceptions. For example, certain education and training programs operated by the military and the Bureau of Indian Affairs are exempt from coverage, as are otherwise lawful affirmative action programs. *Id.* at 39,776.

³¹Executive Order 13160 Guidance Document: Ensuring Equal Opportunity in Federally Conducted Education and Training Programs, 66 Fed. Reg. 5,398 (Jan. 18, 2001).

³²Individuals who are federal employees are also protected from discrimination under additional federal laws. For example, the Equal Employment Opportunity Commission (EEOC)’s regulations prohibit sex discrimination in federal employment, as does Executive Order 11478. According to the DOJ guidance, “in order to promote the consistent and effective enforcement of equal employment opportunity mandates for all federal employees, . . . complaints filed under both this Executive Order and existing equal employment opportunity laws should be consolidated and adjudicated under the relevant equal employment opportunity [laws].” *Id.* at 5,407. For further details on the enforcement procedures for complaints by federal employees, consult the DOJ guidance at 66 Fed. Reg. 5,398, 5,407 (Jan. 18, 2001).

³³Exec. Order No. 13,160, 65 Fed. Reg. 39,775, 39,777 (June 27, 2000).

³⁴Executive Order 13160 Guidance Document: Ensuring Equal Opportunity in Federally Conducted Education and Training Programs, 66 Fed. Reg. 5,398 (Jan. 18, 2001).

³⁵*Id.* at 5,407.

complaints filed with the agency and the disposition of such complaints.”³⁶ The first such reports should have been submitted by March 31, 2002.³⁷

The DOJ guidance is designed to assist federal agencies with implementing Executive Order 13160, and it includes a description of the educational programs and activities subject to coverage, examples of conduct that violates the order, enforcement procedures, remedies, and reporting requirements. According to the guidance, the Executive Order bars both the disparate treatment and disparate impact forms of sex discrimination, as well as sexual harassment.³⁸

Although agencies are expected to develop their own procedures to enforce Executive Order 13160, the guidance sets forth certain minimal requirements. First, agencies are required to establish procedures for receiving and reviewing complaints. Second, agencies are expected to develop outreach materials in order to inform individuals about the prohibition against sex discrimination in federally conducted education or training programs and about the procedures for filing a complaint.³⁹ Third, agencies must investigate the complaints received, although they may dismiss complaints if they determine that no federally conducted education or training program was involved. Fourth, agencies are strongly urged to resolve complaints informally before embarking on a formal investigation. Fifth, agencies are required to produce a written report that describes the results of a completed investigation. Finally, if a report reveals a violation of the Executive Order, then the appropriate agency official must determine what remedies are available to the complainant. Although monetary relief is not available, complainants are entitled to other forms of equitable relief.⁴⁰

Assessment of Agency Enforcement

Because federal agencies do not, as a general rule, release specific information on the nature and number of the complaints that they receive, it is difficult to assess agency efforts to enforce the prohibition against sex discrimination mandated by Title IX and Executive Order 13160. Nevertheless, some information is publicly available, particularly where the civil rights office within each agency posts outreach materials on its website or provides enforcement data in its budget documents.

In HHS, for example, the Office for Civil Rights (OCR) notifies visitors to its website of their right to be free from sex discrimination in education programs

³⁶Exec. Order No. 13,160, 65 Fed. Reg. 39,775, 39,778 (June 27, 2000). These complaints must be filed annually for the first three years after the issuance of the Executive Order and then once every three years subsequent to that period. *Id.*

³⁷Memorandum from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, Department of Justice to General Counsels or Agency Heads/Civil Rights Directors 2 (April 12, 2002), *available at* <http://www.usdoj.gov/crt/cor/Pubs/BoydEO13160rptmemo.pdf>.

³⁸Executive Order 13160 Guidance Document: Ensuring Equal Opportunity in Federally Conducted Education and Training Programs, 66 Fed. Reg. 5,398, 5,400-03 (Jan. 18, 2001).

³⁹*Id.* at 5,407.

⁴⁰*Id.* at 5,408-10.

funded by HHS and of the procedures that they must follow in order to file a complaint. The office also details the department's enforcement activities in its annual budget, but it is difficult to identify whether NIH or another agency within HHS is the source of the complaint or to determine the legal basis for the complaint in question (*e.g.*, Title VI, Title XI, the Americans with Disabilities Act, etc.).⁴¹ Overall, however, OCR reports that it receives between 1,600 and 2,300 discrimination complaints per year. The majority of its enforcement efforts fall within the high priority areas of adoption, managed care, services for limited-English proficient persons, welfare reform, nondiscriminatory quality health care, and services in the most-integrated setting for individuals with disabilities.⁴²

Like HHS, DOE's Office of Civil Rights provides a variety of outreach materials on its website, including information about its Title IX policies and procedures and the Title IX compliance requirements for grant recipients and DOE employees. It appears, however, that DOE does not make information regarding the number and nature of discrimination complaints public. Similarly, NASA's Office of Equal Opportunity Programs posts information about which divisions are responsible for monitoring the compliance of federally assisted and conducted programs and for processing discrimination complaints, but the availability of detailed guidance and outreach materials appears to be limited. Likewise, NSF's Office of Equal Opportunity Programs notifies visitors to its website about their Title IX rights and complaint procedures, but outreach materials again appear to be limited.

In contrast, ED's Office for Civil Rights (OCR) maintains a detailed web site with a wide array of outreach materials on Title IX and other civil rights laws. These materials provide information on legal rights and remedies, complaint procedures, relevant laws and regulations, general civil rights data, and reports to Congress. According to OCR, ED received 4,897 complaints of discrimination in FY 2000. Of these complaints, 55 percent concerned disability discrimination, 18 percent concerned race and national origin discrimination, and 8 percent concerned sex discrimination.⁴³ ED reports that in FY 2000 more than 2,000 recipients of federal financial assistance made changes to their policies or practices as a consequence of OCR's intervention.⁴⁴

Despite the data provided by ED, there remains little public information available about the number and nature of Title IX discrimination complaints that the federal agencies handle. Although all of the agencies in question have developed Title IX implementing regulations, it remains unclear how agencies enforce Title IX compliance among their grant recipients or whether agencies have complied with Executive Order 13160's requirement to report complaint data and to develop their

⁴¹Department of Health and Human Services, Office for Civil Rights, FY 2003 Budget (March 18, 2002), *available at* <http://www.hhs.gov/ocr/fy03budget.html>.

⁴²*Id.*

⁴³Department of Education, Office for Civil Rights, 2000 Annual Report to Congress, *available at* <http://www.ed.gov/offices/OCR/AnnRpt2000/index.html>.

⁴⁴*Id.*

own enforcement procedures. Thus, it remains difficult to assess the efforts of federal agencies to enforce the prohibition against sex discrimination mandated by these two laws.