U.S. Department of Justice
Civil Rights Division

CIVIL RIGHTS FORUM

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Twenty-four agencies publish joint proposed Title IX regulation

Executive Order 12250 Working Group members, many of whose agencies are participating in the joint Title IX regulation, discuss its provisions.

In This Issue . . .

Twenty-four Federal agencies have published a joint proposed regulation to implement Title IX of the Education Amendments of 1972, as amended. This Notice of Proposed Rulemaking (NPRM), which was published in the Federal Register on October 29, 1999, is designed to provide an enforcement mechanism for the 24 participating agencies (including the Department of Justice) that currently do not have their own Title IX regulations.

Enacted in 1972, Title IX prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance. In a June 1997 White House ceremony marking the 25th anniversary of Title IX, President Clinton announced plans to reinvigorate enforcement of this landmark statute. President Clinton remarked on the tremendous progress that Title IX has made possible for women, commenting that "Title IX has broken down barriers and expanded opportunities — opening classroom doors, playing fields, and even the frontiers of space to women and girls across this country."

At the same time, however, President Clinton noted the need for more vigorous enforcement of the

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Department of Health and Human Services issues guidance on civil rights laws and welfare reform

The Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) has issued a two-part guidance document, jointly drafted with the Department of Justice and several other agencies, to give welfare providers, their employees, caseworkers, and contractors an overview of Federal laws that prohibit discrimination in federally assisted programs, and to alert them to stereotypes or other actions that, even if unintended, may violate Federal law.

These materials, entitled *Civil Rights Laws* and *Welfare Reform--An Overview and Technical Assistance for Caseworkers on Civil Rights Law and Welfare Reform,* are intended as one part of HHS's continuing efforts to provide education and technical assistance about civil rights issues to those involved in administering welfare programs.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 transforms our nation's welfare system into one that requires work, promotes parental responsibility, and protects children. The Temporary Assistance to Needy Families provision of this law gives States broad discretion in the implementation of programs to meet the work requirements in ways that promote work, responsibility, and self-sufficiency.

The implementation of welfare-to-work programs raises a series of challenges and opportunities for welfare providers and their employees to ensure that all eligible people have equal opportunities to participate in welfare-to-work programs free from discrimination. A variety of Federal civil rights laws prohibit federally assisted programs, including welfare programs, from being administered in a manner that discriminates or has the effect of discriminating on the basis of race, color, national origin, disability, sex, age, religion, or political belief.

The first part of the guidance document provides an overview of civil rights laws and welfare reform. The technical assistance document provides welfare program administrators with illustrative examples of commonly encountered casework situations in which civil rights laws apply, such as the following:

- A predominantly minority community is provided lower benefits, fewer services, or is subject to harsher rules than a predominantly nonminority community.

- A local welfare office makes assumptions regarding a person's citizenship, immigration status, and eligibility for benefits based on the person's race, surname, accent, or ability to speak English, and asks only those individuals who look or sound foreign about their citizenship or immigration status.

- A provider offering job training opportunities in electrical repair work has accepted no women into the training program, even though several qualified women have applied.

The guidance document was distributed to the States during the Fall, and is available on the HHS Website at www:hhs.gov/progorg/ocr.

Tacoma Police Department institutes voluntary changes in response to Department of Justice "Letter of Concern"

A "Letter of Concern" from the Department of Justice to the Tacoma, Washington Police Department, and the Police Department's positive response to it, demonstrate how civil rights laws can be used in innovative ways to encourage and assist police departments in providing effective and nondiscriminatory police services to the community.

The Letter of Concern, jointly signed on August 20, 1999, by Bill Lann Lee, Acting Assistant Attorney General for Civil Rights, and Kate Pflaumer, United States Attorney, Western District of Washington, was the outgrowth of an administrative investigation of the Tacoma Police Department (TPD) pursuant to Title VI of the Civil Rights Act of 1964 and the Omnibus Crime Control and Safe Streets Act of 1968. The investigation was precipitated by an African American complainant who

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statute. The President, therefore, issued a directive to the heads of all agencies that provide financial assistance to educational programs or activities to take all necessary steps to ensure compliance with the mandates of Title IX.

In response to this directive, the Justice Department drafted the proposed regulation to facilitate the effective enforcement of Title IX. In an effort to ensure consistent enforcement of the statute, the NPRM is modeled after the Department of Education's Title IX regulation, with modifications to reflect subsequent changes in the law. Moreover, it is expected that the four Federal agencies that do have Title IX regulations (the Departments of Education, Agriculture, Energy, and Health and Human Services) will publish amendments to their existing regulations in order to be consistent with the common rule.

The primary focus of this proposed regulation is to provide guidance to recipients of Federal financial assistance who administer educational programs or activities and to promote continuity in the enforcement of Title IX by government agencies. The regulation addresses the scope of Title IX's coverage and deals with nondiscrimination on the basis of sex in a wide variety of areas including admission and recruitment practices, housing, financial and employment assistance, health insurance benefits and services, athletics, marital and parental status, and employment. In addition, the regulation addresses procedures for the implementation and enforcement of Title IX.

Although many educational programs already are covered by the Department of Education's Title IX regulation, the NPRM will facilitate the coverage of educational programs and activities funded by other Federal agencies. For example, the proposed Title IX regulations will apply to such diverse activities as a forestry workshop run by a State park receiving funds from the Department of Interior; a boater education program sponsored by a county parks and recreation department receiving funding from the Coast Guard; a local course concerning how to start a small business, sponsored by the State department of labor that receives funding from the Small Business Administration; and State and local courses funded by the Federal Emergency Management Agency in disaster response planning. All of these programs currently are covered by Title IX but, without regulations, compliance is less uniform.

The proposed regulation also will apply to a museum lecture series when the museum receives a grant from the Institute for Museum and Library Services, or a lecture series on the history of dance given at a local school of ballet receiving funding from the National Endowment for the Arts. Vocational training for inmates in prisons receiving assistance from the Department of Justice also will be covered.

In short, the NPRM will apply to the educational programs or activities of any entity receiving financial assistance from the agencies promulgating these proposed regulations.

Because the implementation of regulations furthers the effective enforcement of Title IX, the proposed regulation represents a major step toward eradicating sex-based discrimination in federally assisted education programs and activities. The 60-day comment period for the proposed Title IX regulation ended on December 28, 1999, and the Department of Justice plans to work closely with the other participating agencies in developing the final rule. ✦

Coordination and Review Section Attorney Beth Pincus (at left) reviews highlights of the proposed Title IX joint regulation.

Tacoma Police Department institutes voluntary changes

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alleged he was stopped and harassed by police officers because of his race. He alleged that this was happening to other African Americans as well.

The Civil Rights Division's Coordination and Review Section (which assists the Department of Justice's funding component, the Office of Justice Programs, in enforcing Title VI and the funding statute) conducted an investigation, which concluded that the Police Department was not engaging in a pattern or practice of discrimination against minorities.

Although the evidence did not demonstrate specific violations of law, the investigation, nevertheless, revealed many problems. It became clear during the investigation that the African American community perceived itself to be harassed by TPD officers, and that some of the policies and procedures used by the TPD had the potential of subjecting minorities to discrimination or impairing the objective of providing effective, nondiscriminatory police services. In addition, the TPD failed to keep appropriate records of complaints of discrimination.

The Letter of Concern, which emphasized voluntary cooperation, addressed several critical areas needing improvement and provided specific recommendations. These included: the establishment and dissemination of nondiscrimination policies; the improvement of discrimination complaint record keeping procedures; the development of enhanced diversity training modules; increased community outreach and education efforts; and the establishment and maintenance of a computer database to track race and national origin data of motorists who are issued traffic citations and of those who are stopped but are not issued citations.

Throughout the investigation, the Civil Rights Division kept the TPD advised as to its concerns and offered verbal recommendations, many of which the Chief already had begun to implement. The Chief advised the Division that he welcomed issuance of the Letter of Concern as he believed that it could be used as a vehicle for change. After the Letter of Concern was issued, the Chief concurred with its findings and committed to begin addressing the concerns and recommendations in a collaborative approach with the Division. Also, an important result of the Letter of Concern was that the police union agreed to work with the Chief to address many of the letter's recommendations.

As the experience in Tacoma reflects, the Department of Justice is using the administrative processes of Title VI and the funding statute to forge voluntary partnerships with police departments in an effort to further build confidence and trust between the police departments and the minority communities they serve. These processes are being used to effect change even when the evidence uncovered in an administrative investigation does not rise to the level of a violation of law, but nonetheless identifies problems that could lead to future violations. (See the related article on this subject in the Summer 1999 issue of the *Civil Rights Forum.*) ✦

Department of Education issues revised draft Resource Guide addressing nondiscrimination in high-stakes testing

After receiving extensive comments from stakeholders, the Department of Education's Office for Civil Rights (OCR) issued a revised draft Resource Guide on December 14, 1999, which addresses nondiscrimination in the use of tests for making high-stakes educational decisions such as graduation or promotion. The purpose of the guide is to assist educators and policymakers in good test use practices that promote high standards and equal opportunity.

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Something to share? The *Forum* is looking foragency "happenings" and news of interest to other agencies and the civil rights community. Contact us at: (202) 307-2222 (voice); (202) 307-2678 (TDD), orwrite to:

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Department of Education issues revised draft Resource Guide addressing nondiscrimination in high-stakes testing

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During the past year, OCR held a number of meetings with stakeholders from the education, testing, and civil rights communities to discuss the draft guide. Many parties also provided written comments and recommendations. OCR also plans to provide an opportunity for public comment on the revised draft.

The draft guide outlines the existing requirements of Federal law prohibiting the misuse of tests that results in discrimination based on race, national origin, or sex. It provides the general analytical framework under Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 for determining the proper use of tests in the educational context. The testing of students with limited English proficiency is discussed in the new draft, as well as the requirements for testing students with disabilities under Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act of 1990, and the Individuals with Disabilities Education Act.

The Resource Guide also provides information about generally accepted professional test measurement standards that should inform decisions regarding testing policies and practices, and provides information on promising practices and resources. These psychometric standards include the Standards for Educational and Psychological Testing, and the Code of Fair Testing Practices. These standards are referenced in discussions of issues such as test validity, reliability, and fairness; the appropriate use of test results; and how to evaluate the technical merit of tests.

The Resource Guide includes a discussion of the two legal theories of discrimination that are based on settled Federal legal principles under Title VI and Title IX: disparate treatment and disparate impact. However, the Resource Guide cautions that the finding of a disparate impact by itself does not necessarily mean that discrimination has taken place. Under the disparate impact analysis, a test's disparate impact may lead to a finding of discrimination only when use of the test in question is not educationally necessary, or when there is no practicable alternative form of assessment that would meet the educational institution's educational goals and have less of a disparate impact on the basis of race, national origin, or sex.

The previous draft of the Resource Guide generated some controversy as evidenced in news and op-ed columns. The Department of Education has sought to make it clear that the goals of promoting high educational standards and ensuring nondiscrimination are complementary objectives. OCR Deputy Assistant Secretary Arthur L. Coleman asserts that "the promotion of challenging learning standards for all students — coupled with assessment systems that monitor progress and hold schools accountable — has been the centerpiece of the Clinton Administration's educational policy." He further states: "If we want this generation of test-taking students and their teachers and schools to meet high standards, then we should insist that the tests they take meet high standards. When performance gaps are based on the results of educationally valid and reliable tests, our concern should be upon the quality of educational opportunities afforded to under-performing students — not the integrity of the test itself."

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Lawsuits allege school funding procedures violate civil rights laws

The Department of Justice is participating in several court actions challenging State financing of public schools. In New York, Kansas, and Pennsylvania, the Department has filed amicus briefs supporting plaintiffs who charge that their States' formulas for allocating and financing educational funds to school districts disproportionately affect minority students in violation of Title VI of the Civil Rights Act of 1964.

In the Pennsylvania action, Powell v. Ridge, Nos. 98-2096, 98-2157 (3rd Cir.), the plaintiffs include several parents of inner-city students; several nonprofit advocacy organizations; the Philadelphia School District and its superinten-

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Lawsuits allege school funding procedures violate civil rights laws

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dent; the Board of Education; the Mayor; and several other individuals. They allege that Pennsylvania's practices in providing funds for public education throughout the State have a racially discriminatory effect on predominantly minority students in inner-city schools in favor of predominantly white students outside these cities. In a decision in that case, the Third Circuit Court of Appeals overturned the district court decision and declared that these plaintiffs have a private right of action to state a claim under Title VI and its implementing regulations. The court also held that the plaintiffs' complaint had stated a claim under these regulations. Powell, 189 F.3d 387 (3rd Cir. 1999). The defendants'petitions for certiorari with the U.S. Supreme Court on the private right of action issue were denied on December 6, 1999, 120 S. Ct. 579.

In its amicus brief filed with the Third Circuit, the Department of Justice argued that plaintiffs could enforce the Title VI discriminatory effects regulations through 42 U.S.C. § 1983 and through an implied private right of action. The Department also argued that plaintiffs' complaint stated a claim sufficient to survive a motion to dismiss for failure to state a claim, as they had expressly alleged that the system had a disparate impact on minorities, and had alleged sufficient facts for a factfinder to infer that the defendants had engaged in purposeful discrimination.

In the Kansas case, Robinson v. Kansas, No. 99-1193-JTM (D. Kan.), several mid-sized Kansas school districts contend that the State's school funding formula discriminates against minority and disabled students by perpetuating a dual system of education in Kansas that favors mostly white, rural schools. The plaintiffs allege that, although the State's funding formula appears neutral on its face, the funding formula causes a disparate impact on minorities because, statistically, more minorities attend schools in mid-size districts that receive less funding per pupil on a State-wide basis. The plaintiffs allege that, as a result of the disparity in funding, these students receive fewer educational opportunities than white and nondisabled students, in violation of the Department of Education's Title VI regulations and Section 504 of the Rehabilitation Act of 1973. In its memorandum in support of intervention in the Kansas action, the Department of Justice argued to the district court that Congress validly abrogated States' immunity to suit under Title VI and Section 504. The Department also argued that the Kansas plaintiffs have stated an actionable claim under regulations effectuating Title VI and Section 504.

In the New York case, Campaign for Fiscal Equity v. State of New York, _N.Y.S._, 1999 WL 1127798 (Nov. 29, 1999), a coalition of New York City advocacy groups challenged New York State's funding formula, alleging that the formula provides predominantly minority city students with less than their proportionate share of aid compared to other districts with similar numbers of students. The Department of Justice's amicus brief argues to the district court that caselaw and relevant legislative history demonstrate that Title VI regulations are privately enforceable; that all of the State's education-related operations are subject to Title VI; and that the State properly may be sued under Title VI for discriminatory conduct in State programs or activities receiving Federal financial assistance. ✥

Effect of Supreme Court decision felt in sexual harassment cases

Earlier this year, the Supreme Court ruled in Davis v. Monroe County Board of Education, 119 S.Ct. 1661 (1999), that a school could be held liable for money damages under Title IX of the Education Amendments of 1972, for student-on-student sexual harassment, only if school officials had actual knowledge of the conduct, and the school responded to this knowledge with deliberate indifference. Deliberate indifference means that the school must

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Sexual harassment cases

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have failed to take steps to stop the misconduct that were reasonable in light of the circumstances. Several pending court cases will now feel the impact of this intervening decision.

For instance, in Linson v. University of Pennsylvania, No. 96-2098 (3rd Cir.), the plaintiff alleges that he was sexually harassed by another student while both were graduate students at the University of Pennsylvania. He brought this action asserting a number of claims, including a contention that the University had violated Title IX by subjecting him to a hostile environment in response to his harassment claim. The district court decided in favor of the University, concluding that the plaintiff's hostile environment claim failed because he had produced no evidence that the University's response to his complaint was motivated by his gender.

The Department of Justice previously filed an amicus brief in Linson arguing that the district court applied the wrong legal standard when it required a showing that the University's response was intentionally discriminatory. At the Court's request, the Department has filed a supplemental brief on the impact of the Davis decision. In that brief, the Department argued again that the district court applied the wrong legal standard but that, even under the Davis standard, the University was entitled to summary judgment on the hostile environment claim because the school's response to plaintiff's harassment complaint was not deliberately indifferent. The Court of Appeals decision is still pending.

Recently, the Tenth Circuit issued its opinion in another case involving peer sex harassment. In Murrell v. School District No. 1, No. 97-1055 (10th Cir. 1999), the mother of a high school student sued the Denver Public Schools under Title IX, alleging that defendants had failed to stop or remedy the multiple sexual assaults her daughter was subjected to in school by another student, even though her teachers and the school principal were aware of the misconduct. The district court dismissed the plaintiff's action, deciding that a school cannot be held liable under Title IX for its failure to prevent and remedy student-on-student sexual harassment, and that the school district had no constitutional duty to protect the plaintiff's daughter from assaults by a fellow student.

The Department also filed an amicus brief in Murrell, arguing that schools are liable when there is actual or constructive knowledge of the sexual harassment but the school does not take appropriate and timely action to remedy it. Following the Supreme Court's decision in Davis, the Tenth Circuit held that the plaintiff had properly stated a claim under Title IX by alleging that the school principal knew of the harassment and was deliberately indifferent to it. The Court reversed the district court ruling and remanded the case for further proceedings.

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Attorney General.

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