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THE EQUAL RIGHTS AMENDMENT AND EDUCATION

Cecelia H. Foxley*

America has prided herself (now . . . how are we going to deal with this one?) for having the most extensive, advanced educational system in the world. Indeed, education is seen as a "right" of every American and has been viewed as the one thing that can provide upward social mobility for those who were not born "advantaged."

Education is fundamental to achievement. Sure, we can all name individuals who achieved greatness without formal education, individuals who were self-educated or who were tutored by a family member or an associate. But these individuals are exceptions. Most persons of prominence, especially in recent times, have taken full advantage of educational systems. Therefore, if opportunities are to be equally available to all persons, then education must be equally available to all persons. But is education equally available to all persons? Some contend--and I am one of those--that it is not. I agree with the findings that the Newman Task Force (1971) that ". . . discrimination against women, in contrast to that against minorities, is still overt and socially acceptable within the academic community."¹ Put a bit differently, the Presidential Task Force on Women's Rights and Responsibilities concluded in a 1969 report that "discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second-class self-image."² In a time of increasing need for highly trained, highly skilled professionals to solve our social, economic, environmental and political problems, it is a serious fault that approximately one half of our human resources are not being fully utilized because of discriminatory practices

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and attitudes against women in education.

What are some of these discriminatory attitudes and practices? Any examples one might cite do not apply to all educational institutions, because we are experiencing some slow progress and change in a considerable number of individual schools and school systems. There still exist, however, practices and attitudes in many schools which have a discriminatory effect on women. Consider, for example, what effect the following might have on the developing young women in our schools:

- Junior high and high school female students are usually required to take home economics courses but are excluded from taking industrial arts or auto mechanics courses. ³
- Resources and facilities are provided for physical education and athletic programs for males at all levels of education to a much greater extent than they are provided for females.⁴
- Many school counselors still tend to view college as necessary for boys and not-quite-so-necessary for girls. Thus boys are given more encouragement to excel in math and science and are more frequently advised to take college preparatory courses than are girls. When girls are counseled to continue their education beyond high school, they are usually advised to consider only those fields of study which have been traditionally viewed as appropriate for women, e.g. teaching, nursing, secretarial science, social work, etc.⁵
- Women seeking admission to institutions of higher education and advanced technical training are still experiencing obstacles such as single-sex schools,⁶ informal quotas,⁷ higher admission standards,⁸ and little financial support.
- Texts and teaching materials at all levels of education show women in stereotyped roles such as homemaker, teacher, nurse, etc., and are void of an accurate reflection of the contributions women have made in a variety of fields.⁹
- Different parietal rules are applied to women students in

the form of on-campus residence requirements, dormitory visitation rules, etc.¹⁰

---Few role models in education are provided women students. Most secondary school teachers, higher education faculty members, and administrators at all levels are men. Only in elementary education do female teachers outnumber male teachers. And, while it is believed that salary differentials based on sex have largely been eliminated for elementary and secondary teachers, the same is not true for college and university faculty.¹¹

How will the above practices, and many others which could not be cited because of space limitations, be affected by the Equal Rights Amendment (ERA)? What will the brief statement, "Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex," added to the U.S. Constitution mean for education? Generally speaking, the ERA would require that the law treat men and women equally by either extending laws which currently apply only to one sex to the other sex, or by rendering laws which deny equal rights to one sex as unconstitutional. In interpreting the ERA, the Courts will consider the intent of Congress. As reflected in the House debate and Senate reports, two of the specific effects of the ERA on education will be to prohibit restriction of public schools to one sex and to prohibit public institutions from requiring higher admission standards for one sex. But the general effects of the ERA on education could be very broad.

Opponents of the ERA argue that the proposed amendment is unnecessary since the 5th and 14th amendments provide constitutional protection against laws and official practices that treat men and women differently. However, women have not been very successful in obtaining judicial relief from sex discrimination in cases challenging the constitutionality of discriminatory laws under these provisions. Only a short decade ago, the Committee on Civil and Political Rights, President's Commission

on the Status of Women (1963), reported that "In no 14th amendment case alleging discrimination on account of sex has the United States Supreme Court held that a law classifying persons on the basis of sex is unreasonable and therefore unconstitutional."¹² Two cases concerning education which are frequently cited to illustrate this same point are ones dealing with admissions policies at Texas A. & M.¹³ and public institutions of higher learning in the State of Virginia.¹⁴ In the first case, the Texas Court of Civil Appeals had upheld the exclusion of women from a State college, Texas A. & M., and the Supreme Court declined a hearing. In a second case, a three-judge Federal court dismissed as "moot" a class action in which women sought to desegregate the single-sex institutions of higher learning in the State of Virginia. The Court, however, had previously ordered the University to consider without regard to sex the female plaintiffs' applications for admission to the University of Virginia at Charlottesville and to submit a three-year plan for desegregating the University at Charlottesville.

It is cases such as these that have appeared time and time again in studies concerning the various types of laws which discriminate on the basis of sex. Some of the more recent studies have been conducted by the Citizens' Advisory Council on the Status of Women, the President's Commission on the Status of Women and variety of State commissions, women's organizations and interested individuals.¹⁵ These studies all appear to have a common thread: the position of women under the Constitution remains ambiguous. As stated by the President's Commission on the Status of Women,

. . . the U.S. Constitution now embodies equality of rights for men and women . . . But judicial clarification is imperative in order that remaining ambiguities with respect to the constitutional protection of women's rights be eliminated. Early and definitive court pronouncement, particularly by the U.S. Supreme Court, is urgently needed with regard to the validity under the 5th and 14th amendments of laws and official practices discriminating against women, to the end that the principle of equality become firmly established in constitutional doctrine.¹⁶

While it is possible that the 5th and 14th amendments may be interpreted in the future by the courts as prohibiting all sex dis-

tinctions in the law, judging from the past, expectations of such enlightened interpretations are not very hopeful. Therefore, the proposed ERA is very crucial for correct interpretation of law.

Opponents of the ERA also argue that recent Federal laws and regulations concerning sex discrimination in educational institutions--namely, Executive Order 11246 as amended by 11375; Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972; Equal Pay Act of 1963 as amended by the Education Amendments of 1972, Higher Education Act; Title IX of the Education Amendments of 1972, Higher Education Act; and Title VII (Section 799A) and Title VIII (Section 845) of the Public Health Service Act as amended by the Comprehensive Health Manpower Act and the Nurse Training Amendments Act of 1971--already give adequate coverage to education. While these six legal provisions have done and will continue to do a great deal for equal opportunity for women in our educational institutions, they could all use the additional support and backing of a constitutional amendment and, indeed, some are in need of revising so as to remove discriminatory exemptions. Three of these six legal provisions have to do with students and three provisions have to do with employees of educational institutions. Each of these will be discussed individually.

Title IX

Title IX of the Education Amendments of 1972 insures that "No person in the United States shall, on the basis of sex, be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." Therefore, effective July 1, 1972, all public and private preschools, elementary and secondary schools, institutions of vocational education, professional education, and undergraduate and graduate higher education which receive Federal monies must make all benefits and services available to students without discrimination on the basis of sex. Thus, all course offerings, school

facilities, financial assistance, and auxiliary programs and services must be available to students of both sexes. For example, no longer will schools be able to provide athletic and recreational equipment, facilities and programs for male students only. No longer will sex-stereotyped courses such as home economics and auto mechanics be allowed to exclude members of one sex. No longer will schools get away with applying different parietal rules to female students than to male students.

Title IX also contains admissions provisions which will go into effect July 1, 1973. Institutions which are prohibited from sex discrimination in admitting students are public and private institutions of vocational education, professional education, and graduate higher education. Also covered are public undergraduate institutions of higher education which have not been traditionally and continually single-sex. Institutions which are exempt from complying with the prohibition against discrimination in admissions are private undergraduate institutions of higher education, elementary and secondary schools other than secondary vocational and technical areas, and public institutions of undergraduate higher education which have been traditionally and continually single-sex.

Other institutions exempt from Title IX are religious institutions, if the application of the anti-discrimination provision is not consistent with the religious tenets of such organizations, and military schools whose primary purpose is the training of individuals for the U.S. military services or merchant marine.

While institutions cannot be required to set quotas or grant "preferential or disparate" treatment to members of one sex when an imbalance exists with respect to the numbers of persons of one sex participating in or receiving benefits of federally assisted educational programs and activities, they may be required to take "corrective actions" to overcome past discrimination.

Ratification of the Equal Rights Amendment could very well mean removal of Title IX exemptions. The U.S. Air Force is already

making plans to admit up to 80 qualified women in the 1975 school year if the ERA is ratified. Institutions have operated co-ed auxiliary or drill units in conjunction with Army ROTC programs for several years, but participating women students have not been eligible for college credit or for commissioning.

While HEW's Office for Civil Rights, Division of Higher Education has primary enforcement powers to conduct investigations and reviews, all Federal departments and agencies which extend financial aid to educational institutions are expected to enforce these provisions.

Title IX also extends the Equal Pay Act provisions to executive, administrative and professional personnel. This extension will be discussed in more detail below.

Comprehensive Health Manpower Act and Nurse Training Amendments Act of 1971

These two acts amend Title VII (Section 799A) and Title VIII (Section 845) of the Public Health Service Act and became effective November 18, 1971. The comprehensive Health Manpower Act assures women of equal access to medical education by prohibiting sex discrimination in the admissions procedures of schools of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, public health, or any training center for allied health personnel. A similar ban on sex discrimination in admissions to nursing schools is provided for by the Nurses Training Amendments Act. As this provision illustrates, the fight against sex discrimination benefits both sexes. Among those who now have a better chance at getting admitted to nursing schools are Vietnam veterans with Medical Corps and Navy Hospital Corps Training.

All institutions receiving a contract under Title VII or VIII of the Public Health Service Act or benefiting from a loan guarantee, grant or interest subsidy to health personnel training programs are covered. No institutions are exempted. The provisions are enforced by HEW's Office for Civil Rights, Division of Higher Education.

Executive Orders 11246 and 11375

In September of 1965 President Johnson issued Executive Order 11246 which prohibited all Federal contractors from discriminating in employment practices--including recruitment, hiring, promotion, salaries and benefits, training, termination, etc.--because of race, religion, color or national origin. Two years later Executive Order 11375 added a prohibition against discrimination because of sex which became effective October 13, 1968. All institutions holding Federal contracts of over \$10,000 are covered by the Order. In addition, institutions with contracts of \$50,000 or more and 50 or more employees must have an affirmative action plan, with numerical goals and timetables, for overcoming deficiencies and taking corrective action to eliminate discriminatory practices and further employment opportunity for women and minorities. Thus, covered institutions which do not have (or have very few) women employed at the higher teaching ranks and executive or administrative levels are required to develop procedures for locating and hiring qualified women.

The Office of Federal Contract Compliance has designated HEW as the Compliance Agency responsible for enforcing the Executive Order with educational institutions. As with Title IX, the Comprehensive Health Manpower Act and the Nurse Training Amendments Act, HEW's Office for Civil Rights, Division of Higher Education conducts class action investigations and reviews and has the authority to hold up or cut off Federal monies to those institutions who refuse to comply. Individual complaints are handled by the Equal Employment Opportunity Commission.

It is noteworthy that until the Women's Equity Action League (WEAL) filed the first complaint of sex discrimination against the academic community in January, 1970 (a class action against all colleges and universities receiving Federal contracts and a specific charge of sex discrimination against the University of Maryland), the Executive Order was literally unknown to academicians. Indeed, at the time of

the WEAL complaint no one had testified before the Congress concerning the subject of discrimination against women in education. Since WEAL's action, hundreds of complaints have been filed by individuals and women's groups against colleges and universities throughout the country.

Equal Employment Opportunity Act of 1972

Passed in March of 1972, the EEOA nullified a previous exemption of Title VII of the Civil Rights Act of 1964 and brought coverage to educators and professional employees. Educational institutions are now bound by the provisions of Title VII which forbid discrimination against all employees because of race, color, religion, sex or national origin. Effective March 24, 1972, approximately 120,000 educational institutions with about 2.8 million teachers and professional staff members and 1.5 million nonprofessional staff members are covered.

Like the Executive Order, Title VII as revised by the EEOA prohibits educational institutions from discriminatory practices in employment and requires them, for example, to recruit women for teaching positions just as energetically as they recruit men, to pay women faculty members salaries equal to those of their male counterparts with like qualifications and responsibilities, and to consider women faculty for promotion on the same criteria used for male faculty.

Religious institutions are the only exemption with respect to the employment of individuals of a particular religion or religious order; they are not, however, exempt from prohibiting discrimination based on sex, color or national origin.

The Equal Employment Opportunity Commission (EEOC) has enforcement responsibility for the Civil Rights Act, and under the 1972 amendments may bring a civil suit in a federal district court for an injunction and other remedies against a charged employer.

Equal Pay Act of 1963

As mentioned above, an important result of the Education Amendments of 1972 was the changes it provides in the Equal Pay Act of 1963. On July 1, 1972, educators and professional employees were included so that all employees in all educational institutions--whether or not Federal funding is involved--are now covered. No institutions are exempt. This means that discrimination in salaries (and most fringe benefits) on the basis of sex is prohibited. Put another way, men and women performing work in the same institution under similar conditions must receive the same pay if their jobs require substantially the same responsibility, effort and skill. Thus, women teachers who have been traditionally paid less than their male counterparts, at all levels of education in both public and private institutions, federally funded or not, now have legal backing for requiring equal pay for equal work.

The Wage and Hour Division of the Employment Standards Administration of the Department of Labor has enforcement responsibility for the provisions of the Equal Pay Act.

The legal provisions discussed above are already in effect and are helping improve the status of women in education. The ERA would provide added strength, and needed revision to these laws and regulations. Below, a newly proposed bill for improving the education of women, which could also use support of the ERA, will be discussed.

A Proposed Bill on Women's Education

Currently pending in Congress is a bill that has broad and far-reaching implications for the education of women. Currently entitled the Women's Education Act (I understand the name may change), the bill is authored by Representative Patsy T. Mink (D-Hawaii) who in her introductory remarks to the House summarized the current status of the education of women and its consequences:

Our educational system has divided the sexes into an insidious form of role-playing. Women provide the services and men exploit them. Women are the secretaries, nurses, teachers, and domestics, and men are the bosses, doctors, professors, and foremen. Textbooks, media, curricula, testing, counseling, and so forth, are all based on the correctness of this division of labor, and serve to reinforce the sex-role stereotype that is so devastating for our postindustrial society. More importantly, this division of labor according to sex is a totally false assumption of roles. Women are no longer going to accept being forced into a secondary role. Demands of family life in this century just are not all-consuming any more. Given the fact that our life expectancy is well into the seventies, that women will spend more than half their adult lives in the work force outside the home, it is essential to the existence of our country that sincere and realistic attention to the realignment of our attitudes and educational priorities be made. I suggest that education is the first place to start in a reexamination of our national goals.¹⁷

The proposed bill would establish a Council on Women's Educational Programs within the Office of Education and would be responsible for administration of the bill's programs and coordination of activities within the Federal Government which are related to the education of women.

In order to enhance the status of women by providing for educational programs which will enable them to more fully participate in American society, the bill would make possible the appropriation of funds for such activities as:

- 1) the development of curricula;
- 2) dissemination of information to public and private elementary, secondary, higher, adult, and community education programs;
- 3) the support of women's educational programs at all educational levels;
- 4) preservice and inservice training programs;
- 5) projects including courses of study, fellowship programs, conferences, institutes, workshops, symposiums, and seminars;
- 6) research development of curricula, texts and materials, non-discriminatory tests, and programs for adequate and non-discriminatory vocational educational and career counseling for women;
- 7) development of new and expanded programs of physical educational and sports activities for women in all educational institutions;
- 8) planning of women's resource centers;

- 9) community education programs concerning women, including special programs for adults;
- 10) preparation and distribution of materials;
- 11) programs or projects to recruit, train, and organize and employ professional and other persons, and to organize and participate in women's educational programs;
- 12) research and evaluation of the effectiveness of such programs;
- 13) research and development of programs aimed at increasing the number of women in administrative positions at all levels in institutions of education and;
- 14) research and development of programs aimed at increasing the number of male teachers in elementary and preschool education programs with the aim of obtaining and maintaining an adequate distribution of both sexes teaching in our educational institutions.¹⁸

Such a bill would help provide the necessary support for the many changes needed in our educational system (some of which are mentioned at the beginning of this article) if women are to achieve equal educational opportunity.

In conclusion, I again pose the question, What will the ERA mean for education? First, the ERA will provide a constitutional basis for equal rights for women in education at all levels--as students, teachers, professional and nonprofessional staff. With such a constitutional basis, additional support, strength, and in some instances needed revision, will be given already existing laws and regulations concerning sex discrimination in educational institutions. Six of these laws have been discussed in this article as they relate to equal opportunity for women. Three of these, Title IX of the Education Amendments of 1972 and the amendments to the Public Health Service Act (specifically, the Comprehensive Health Manpower Act and the Nurse Training Amendments Act of 1971) affect students. The other three, Executive Order 11246 as amended by 11375, the Equal Employment Opportunity Act of 1972, and the amended Equal Pay Act of 1963 affect employees of educational institutions. In addition to the existing legal provisions for women in education, the ERA would provide a constitutional basis for the development and passage of new legislation such as the Women's Education Act of 1972.

Second, and perhaps more importantly, however, ratification of

the ERA would provide a climate of opinion in which sex discrimination and its consequences are taken seriously. Since enforcement of any legal provision is dependent upon litigation which is a very slow process, and the enforcement agencies of the laws and regulations summarized in this paper already have a tremendous backlog, an over-all climate of taking sex discrimination in education seriously is crucial.

Educational institutions need further impetus for becoming familiar with the various legal provisions regarding sex discrimination, diagnosing policies and practices involving students and employees, and working internally to guarantee women equal rights. Women's groups, educational institutions, State legislative bodies, Congress, and governmental enforcement agencies all need to work more diligently and in concert with each other to (1) provide additional new legislation which would insure equal opportunity for women and (2) provide ways in which preventive action can be taken. The ERA could be the impetus needed to turn such contemplations into realities.

FOOTNOTES

1. Newman, F. Task Force, Chm, Report on Higher Education, U.S. Office of Education, Washington, D.C.: Government Printing Office, 1971.
2. A Matter of Simple Justice, Report of the Presidential Task Force on Women's Rights and Responsibilities, Washington, D.C.: Government Printing Office, 1969.
3. See, e.g., Robinson v. State of Washington et. al. (U.S. District Court - W.D. Wash-N Div, #9576, filed Mar 22 1971). See also Sanchez et. al. v. Baron et. al. (U.S. District Court-EDNY, #69-C-1615).
4. See, e.g., Gergorio v. Board of Education of Asbury Park et. al. (NJ Superior Court-Monmouth County, #C-1988-69, ruling Mar 16 1971, NJ Superior Court-Appellate Division, A-1277-70, ruling April 5 1971; NJ Supreme Court).
5. See Plans for Widening Women's Educational Opportunities, Women's Bureau, Employment Standards Administration, U.S. Department of Labor, 1972.
6. See, e.g., Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Comm. on the Judiciary, 91st Cong., 2nd Sess., at 574 (1970). HEW reported 15 publically supportive institutions of higher education admit only male students.
7. See, e.g., Record of the University of North Carolina at Chapel Hill (May 25, 1970). The University's catalog states that quotas are assigned as to the number of applicants accepted to various programs. These quotas are based on the limited number of facilities for women.
8. See, e.g., E. Walster, T. Cleary and M. Clifford, "The Effect of Race and Sex on College Admissions," 1970 (unpublished study, University of Wisconsin). See also Supra note 6, at 457.
9. See, e.g., Report on Sex Bias in the Public Schools, National Organization for Women (NOW), N.Y.C., 1971; and Need for Studies on Sex Discrimination in Public Schools, Citizens' Advisory Council on the Status of Women, U.S. Department of Labor, 1972.
10. See, e.g., Greever et. al. v. Arizona Board of Regents et. al. (U.S. District Court-Ariz-Civ #70-161-TNC--filed Nov 13 1970).
11. See, e.g., Handbook on Women Workers, Women's Bureau, Employment Standards Administration, U.S. Department of Labor, Bulletin 294, 1969; The Status of Academic Women, ERIC Clearinghouse on Higher Education, George Washington University, April 1971; and Campus 1970, Where Do Women Stand?, American Association of University Women, Washington, D.C., December, 1970.
12. Report of the Committee on Civil and Political Rights, President's Commission on the Status of Women, Washington, D.C.: Government Printing Office, 1963.
13. Allred v. Heaton, 336 S.W. 2d 251 (1960), appeal dismissed and cert. denied, 364 U.S. 517, rehearing denied, 364 U.S. 944; see also Heaton v. Bristol, 317 S.W. 2d 86 (1958), appeal dismissed

and cert. denied, 359 U.S. 230, rehearing denied, 359 U.S. 999.

14. Kirstein v. Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).
15. See, e.g., Supra note 2; Report of the Task Force on Labor Standards, Citizens' Advisory Council on the Status of Women (GPO, 1968); Report of the Task Force on Family Law and Policy, CACSW (GPO, 1968). See also Women's Rights Law Reporter, N.Y.; and Kanowitz's Women and the Law: The Unfinished Revolution (1969) and Sex Roles in Law and Society (1973), both U. of N.M. Press.
16. American Women, Report of the President's Commission on the Status of Women, Washington, D.C.: Government Printing Office, 1963.
17. Mink, P. "Introduction of the Women's Education Act of 1972," CONGRESSIONAL RECORD, H3259, April 18, 1972.
18. Id. at H3260.