

DEPARTMENT OF JUSTICE**Executive Order 13160 Guidance Document: Ensuring Equal Opportunity in Federally Conducted Education and Training Programs****AGENCY:** Department of Justice.**ACTION:** Notice: Guidance document.

SUMMARY: This Guidance Document entitled "Executive Order 13160 Guidance Document" is being issued pursuant to Executive Order 13160, which was issued on June 23, 2000. Executive Order 13160 prohibits discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent in federally conducted education and training programs. The Executive Order was issued in order to achieve equal opportunity in all federally conducted education and training programs and is premised upon the notion that the federal government should hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to the educational programs and activities of recipients of federal financial assistance. Toward that end, the Executive Order is intended to supplement existing laws and regulations that already prohibit many forms of discrimination in both federally conducted and federally assisted educational programs. The purpose of this Guidance Document is to assist all federal agencies in complying with the nondiscrimination mandates of Executive Order 13160 by providing a basic framework for implementation of the Executive Order. Among the topics addressed in this Guidance Document are the scope of covered educational programs, applicable legal principles, examples of discriminatory conduct, enforcement procedures, remedies, and agency reporting requirements. The text of the Guidance Document appears at the end of this Notice.

DATES: Effective January 18, 2001.**ADDRESSES:** Coordination and Review Section, Civil Rights Division, P.O. Box 66560, Washington, D.C., 20035-6560.**FOR FURTHER INFORMATION CONTACT:** Merrily A. Friedlander, Chief, Coordination and Review Section, Civil Rights Division, (202) 307-2222.

Dated: January 11, 2001.

Janet Reno,*Attorney General, Department of Justice.***Executive Order 13160 Guidance Document****I. Introduction**

On June 23, 2000, the President of the United States issued Executive Order 13160 in order to achieve equal opportunity in all federally conducted education and training programs. More specifically, Executive Order 13160 was designed to ensure nondiscrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent in federally conducted education and training programs and activities.

Executive Order 13160 is premised upon the notion that the federal government should hold itself to at least the same principles of nondiscrimination in educational opportunities as it applies to the educational programs and activities of recipients of federal financial assistance. Toward that end, the Executive Order is intended to supplement existing laws and regulations that already prohibit many forms of discrimination in both federally conducted and federally assisted educational programs. Among the most significant of these nondiscrimination laws are the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*, as amended; the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, *et seq.*; Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d, as amended; 42 U.S.C. 2000e-17, as amended; and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

In order to achieve equal opportunity in all federally conducted education programs, Section 1-102 of Executive Order 13160 provides that:

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, or be subjected to discrimination in, a federally conducted education or training program or activity.

All federal agencies that conduct education and training programs must therefore commit themselves to providing educational environments that are entirely free from discrimination based on race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent.

Pursuant to section 5-501 of Executive Order 13160, this Guidance Document has been developed to assist all federal agencies in complying with

the nondiscrimination mandates of the Executive Order. Among the topics addressed herein are the scope of covered educational programs, applicable legal principles, examples of discriminatory conduct, enforcement procedures, remedies, and agency reporting requirements.

This Guidance Document is intended only to provide a basic framework for implementation of Executive Order 13160. This Guidance Document is not intended to be a comprehensive guide for compliance. Rather, this Guidance Document is designed only to provide a starting point for agency implementation, and this Document's failure to address a particular issue should in no way be interpreted to mean that such an issue falls outside the scope of the nondiscrimination protections established by the Executive Order or this Guidance.

In order to supplement the basic principles established in this Guidance Document, it is anticipated that, from time to time, the Department of Justice will publish additional policies or guidance documents to assist with the enforcement of this Executive Order. In addition, section 5-505 of the Executive Order provides that, "[u]pon request and to the extent practicable, the Attorney General shall provide advice and assistance to executive departments and agencies to assist in full compliance with this order." Responsibility for providing such advice and technical assistance is delegated to the Assistant Attorney General for Civil Rights, who shall conduct, handle, or supervise the performance of these functions.

II. Covered Education Programs and Activities

Executive Order 13160 applies to all federally conducted education and training programs and activities. Pursuant to section 2-201, "federally conducted education and training programs" include those that are "conducted, operated, or undertaken by" an executive department or agency.

Section 2-202 of the Executive Order provides that federally conducted "education and training programs and activities" may include, but are not limited to, the following:

- (1) formal schools,
- (2) extracurricular activities,
- (3) academic programs,
- (4) occupational training,
- (5) scholarships and fellowships,
- (6) student internships,
- (7) training for industry members,
- (8) summer enrichment camps, and
- (9) teacher training programs.

As this definition makes clear, education programs covered by

Executive Order 13160 may include both long-term, formal academic institutions (such as Department of Defense Dependents Schools, Department of Defense Domestic Dependent Elementary and Secondary Schools, and elementary or secondary schools operated by the Department of Interior, Bureau of Indian Affairs), as well as short-term job training programs (such as computer training courses for federal employees).

Some examples¹ of the types of education and training programs and activities that might be covered by Executive Order 13160 are discussed below:

Ex. 1. The Office of Government Ethics runs an agency ethics training course for federal employees from other agencies.

Ex. 2. The Federal Deposit Insurance Corporation operates a small computer school which teaches state examiners to analyze the weaknesses in the supervision of a small bank data processing operation.

Ex. 3. The Department of Veteran Affairs (VA) runs the VA Home Loan Training Program, which offers information and training to numerous private sector enterprises that cooperate in providing VA home loan benefits.

Ex. 4. The Nuclear Regulatory Commission provides radiation control training for state and local government personnel under the State Agreements Program.

Ex. 5. The Federal Bureau of Investigation (FBI) runs the FBI National Academy, an 11-week multi-disciplinary program in Quantico, Virginia, for federal, state, local, and foreign officers who are considered to have potential for further advancement in their careers.

Ex. 6. The Department of Housing and Urban Development operates the Community First Leadership Program, which provides in-depth training for representatives from state and local governments and non-profit organizations involved in housing and community development programs.

Ex. 7. The Maritime Administration conducts a Firefighting Training Program for private, licensed and unlicensed U.S. seafarers, who pay a fee for instruction in fire-fighting safety.

Ex. 8. The United States Department of Agriculture (USDA) operates the Graduate School, USDA, which provides career-related continuing education courses primarily designed to meet the educational needs of government employees.

Ex. 9. The Bureau of Alcohol, Tobacco, and Firearms operates the Anacostia Neighborhood Prevention Initiative, which provides crime prevention training to the public.

Ex. 10. The Peace Corps offers a World Wise Schools program to students interested

in broadening their geographic and cultural horizons.

Ex. 11. The National Aeronautics and Space Administration conducts a tour of its facilities to educate the public about the Space Shuttle Program.

Ex. 12. The Department of Justice conducts computer training courses to regularly update its employees on new software.

Ex. 13. The Federal Bureau of Prisons conducts an inmate boot camp to prepare inmates for reintegration into society.

Ex. 14. The U.S. Department of Agriculture conducts an annual Summer Intern Program for roughly 150 college students, who are hired to work with professional staff on projects related to the students' majors and career plans.

Ex. 15. The General Counsel's Office at the Federal Emergency Management Agency hires law students to work as unpaid student interns during the school year.

III. Exemptions From Coverage

Although Executive Order 13160 is intended to provide broad-based coverage for federally conducted education and training programs, section 3 of the Executive Order does provide some exemptions from coverage. As discussed below, there are several circumstances under which the nondiscrimination prohibitions of the Executive Order do not apply to certain federally conducted education and training programs.

Military Programs

Section 3–301 explicitly states that the Executive Order does not apply to “members of the armed forces, military education or training programs, or authorized intelligence activities.” Military education or training programs are defined as education programs conducted by the Department of Defense (or, where the Coast Guard is concerned, by the Department of Transportation) for the “primary purpose” of training members of the armed forces or meeting a statutory requirement to educate or train federal, state, or local civilian law enforcement officials pursuant to 10 U.S.C. chapter 18. This includes military academies, military programs that provide drug traffic prevention training to non-military law enforcement agencies, Department of Defense foreign language training and survival schools for non-military law enforcement agencies, and military training to non-military law enforcement agencies in the operation and maintenance of equipment used in the detection, monitoring, aerial reconnaissance, and communication intercepts of illegal drug trafficking.

Members of the armed forces, including students at military academies, are, however, protected from certain forms of discrimination pursuant

to regulations currently enforced by the Department of Defense and individual service branches. See, e.g., 32 CFR part 51, “Department of Defense Military Equal Opportunity Program,” and 32 CFR part 56, “Nondiscrimination on the basis of Handicap in Programs and Activities Assisted or Conducted by Department of Defense.” In addition, section 3–301 of Executive Order 13160 specifically provides that the Department of Defense shall develop procedures to protect the rights of, and to provide redress to, civilians involved in Department of Defense federally conducted military education and training programs if such civilians are not otherwise protected by existing federal law from discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent.

Finally, it is important to emphasize that this exemption does not apply to the Department of Defense Dependent Schools and Department of Defense Domestic Dependent Elementary and Secondary Schools. These schools must comply with the Executive Order and with all applicable legal principles set forth in this Guidance Document.

Affirmative Action

Any otherwise lawful affirmative action plan or program is exempt from coverage under the Executive Order. Pursuant to section 3–302, the Executive Order “does not apply to, affect, interfere with, or modify the operation of any otherwise lawful affirmative action plan or program.”

Programs Established Consistent With Federal Law

Section 3–303 of the Executive Order provides that an individual shall not be deemed subject to discrimination by virtue of his or her “exclusion from the benefits of a program established consistent with federal law or limited by federal law to individuals of a particular race, sex, color, disability, national origin, age, religion, sexual orientation, or status as a parent different from his or her own.” For example, pursuant to 25 CFR §§ 31.1 and 31.3, education or training programs or activities conducted by the Department of Interior's Bureau of Indian Affairs are, subject to a few exceptions, limited to Native American students “of one-fourth or more degree of Indian blood.”

Bureau of Indian Affairs Programs

Section 3–304 of the Executive Order exempts from coverage any ceremonial or similar education or training program or activity of a school conducted by the Department of Interior's Bureau of

¹ These examples were drawn from data provided by various federal agencies during the development of Executive Order 13160. The programs enumerated above, however, are not necessarily still in existence and, in some cases, are merely hypothetical examples.

Indian Affairs, provided such program is "culturally relevant" to the children represented in the school. The Executive Order defines "culturally relevant" as any class, program, or activity that is "fundamental" to a tribe's "culture, customs, traditions, heritage, or religion." For example, certain educational classes involving traditional Native American dance instruction may be "culturally relevant" to the children represented in the school and therefore exempt from coverage under the Executive Order. In making determinations as to whether classes, programs, or activities are "culturally relevant," substantial deference shall be given to the views of the relevant tribes.

Selections of Foreign Nationals and Selections Made Outside the Executive Branch

Section 3-305 provides an exemption for selections of foreign nationals based on national origin if the selections pertain to participation in covered education programs or activities that "primarily concern national security or foreign policy matters." Thus, for example, the Executive Order would not cover the selection of participants, on the basis of national origin, for the Department of State's Antiterrorism Assistance training programs if the primary mission of these programs is to train foreign nationals in deterring and managing terrorist threats.

Section 3-305 further provides an exemption for "selections or other decisions made by entities outside the executive branch." For example, if a local school district selects students to participate in a federally conducted education program, the selection decisions of the local school district would not be subject to Executive Order 13160 as they represent selection decisions made by an entity outside the executive branch.² However, the students selected for participation in the federally conducted education program would be protected from discrimination under Executive Order 13160 during the duration of their participation in the federally education conducted program.

In addition, section 3-305 provides that it "shall be the policy of the executive branch that education or training programs or activities shall not be available to entities that select persons for participation in violation of Federal or State law." Thus, if a company responsible for selecting employees to participate in a federally

conducted education program were to refuse to consider selecting members of a particular race in violation of Title VII of the Civil Rights Act of 1964, as amended, executive departments should, as a matter of policy, refrain from making their educational programs available to such a company.

Age-Based Admissions

Section 3-306 provides an exemption for age-based admissions to federally conducted education and training programs if such programs have "traditionally been age-specific" or "must be age-limited for reasons related to health or national security." See Section XI of this Guidance Document for further information regarding these age-related exemptions.

Final Determinations Regarding Coverage and Exemptions

As a general matter, Executive Order 13160 will apply to all federally conducted education and training programs or activities not subject to a specific exemption set forth in Section 3 of the Executive Order. Executive departments or agencies and individuals with questions regarding whether a particular program or activity is subject to Executive Order 13160 should contact the Department of Justice's Civil Rights Division.

Pursuant to section 2-203 of the Executive Order, the Attorney General is authorized to make final determinations as to whether a given program falls within the scope of covered education and training programs under section 2-202 or is excluded from coverage under section 3. See Section XIV(C), "Administrative Enforcement," for further information pertaining to applicable procedures for requesting a final determination from the Attorney General regarding coverage of a particular program.

IV. Applicable Legal Principles

Executive Order 13160 requires executive departments and agencies to ensure nondiscrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent in all federally conducted education and training programs. In order to comply with the antidiscrimination mandates of this Executive Order, agencies must ensure that individuals involved in federally conducted education and training programs and activities are not subjected to discrimination on the basis of any one of these protected characteristics. The most common forms of discrimination prohibited by the Executive Order are discussed below.

Disparate Treatment

Under Executive Order 13160, all individuals involved in federally conducted education or training programs or activities must be treated equally and not be subjected to discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, or status as a parent. In order to comply with the Executive Order, all federal agencies that provide education or training programs or activities must ensure that individuals are not subjected to unjustified disparate treatment based on a protected status.³ Examples of disparate treatment may include, but are not limited to:

- Selecting or failing to select an individual because of his or her protected status.
- Denying an individual any aid, benefit, or service offered in connection with a federally conducted education program because of his or her protected status.
- Failing to provide or allocate aid, benefits, or services as a result of an individual's protected status.
- Promoting or failing to promote an individual because of his or her protected status.
- Giving a positive or negative performance evaluation to an individual because of his or her protected status.
- Segregating an individual because of his or her protected status.
- Assigning an individual to a particular education or training program or activity, or a particular project, because of his or her protected status.
- Treating an individual less favorably with respect to the terms, conditions, or privileges of an education or training program or activity because of his or her protected status.

In addition to prohibiting individual instances of unjustified disparate treatment, the Executive Order also prohibits federal agencies from engaging in a "pattern or practice" of unlawful discrimination. Moreover, federal agencies may not rely on policies or practices that explicitly classify individuals on the basis of a protected characteristic absent a lawful justification for the use of such a classification.

It is important to note, however, that, under certain circumstances, compliance with the Executive Order may permit federal agencies to treat

² Such selection decisions might, however, be covered by other civil rights statutes, including Title VI of the Civil Rights Act of 1964, as amended, and Title IX of the Education Amendments of 1972, as amended.

³ Throughout the remainder of this document, the term "protected status" may be used to refer generally to the nine protected characteristics which are the subject of this Executive Order: race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent.

individuals differently on the basis of a protected characteristic. For example, under certain limited circumstances, agencies may legitimately treat individuals differently on the basis of sex if sex is a bona fide occupational qualification (BFOQ). Similarly, remedial situations may justify differential treatment. Moreover, in educational environments, narrowly-tailored measures designed to promote the educational benefits of diversity may lawfully treat individuals differently on the basis of a protected characteristic.

In some cases, the Executive Order may even require federal agencies to treat individuals differently in order to avoid discriminating against an individual on the basis of a protected characteristic. For example, the prohibition on religious discrimination may require an agency to provide an individual with a reasonable accommodation for religious practices as discussed in section X of this Guidance Document. Similarly, under many circumstances, federal agencies have an obligation to provide reasonable accommodations for individuals with disabilities. See Section IX of this Guidance Document. As such, the examples of disparate treatment enumerated above are designed merely to illustrate the types of conduct generally prohibited by this Executive Order and agencies must, of course, evaluate individual claims of disparate treatment on a case-by-case basis.

Hostile Environment

Pursuant to Executive Order 13160, a federal agency that provides education or training programs or activities must maintain a learning environment that is free of discrimination on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent.

- Federal agencies must ensure that the learning environment is free of harassment that is so severe, persistent, or pervasive that it alters the conditions of the federally conducted education or training program or activity for a participant on the basis of a protected status. Federal agencies should ensure that no individual is subject to a hostile environment that effectively denies or limits equal access to (e.g., negatively affects an individual's participation or performance in) educational or training opportunities and benefits based on his or her protected status.

- Federal agencies should be aware that the sort of harassment that can create a hostile environment, when it is sufficiently severe, persistent, or pervasive, may take many forms

including: slurs, epithets, jokes, cartoons, unwelcome advances, and other verbal or physical derogatory conduct that targets individuals on the basis of a protected status. Federal agencies should further be aware that hostile environments may be created by supervisors, instructors, administrators, other officials, or peers.

Disparate Impact

As a general matter, federally conducted education and training programs and activities may not utilize policies, procedures, criteria, or other methods of administration which, although facially neutral, have a disproportionate and adverse effect on certain individuals on the basis of a protected characteristic, unless:

- (1) There is an educational or business necessity for the policy, procedure, criteria, or method of administration; and
- (2) There are no equally effective alternative practices that would result in less adverse impact.

Retaliation

Federal agencies that operate education and training programs may not retaliate against any individual because he or she has raised concerns, reported claims, or filed complaints alleging discrimination. Federal agencies are similarly prohibited from retaliating against any individual who has testified, assisted, or participated in any manner in an investigation or other proceeding raising claims of discrimination.

Prohibited retaliation may take many forms including, but not limited to, intimidation, threats, coercion, harassment, discrimination, and adverse actions (e.g., poor grades or performance evaluations) motivated by retaliatory purpose. Federal agencies must ensure that no individual is subject to any form of retaliation regardless of the merits (or lack thereof) of any underlying claim.

Specific Principles and Examples

The following sections address more specific applicable legal principles and examples of discriminatory conduct related to each of the nine protected bases covered by the Executive Order. It is important to note, however, that each of the following sections is intended merely to highlight certain specific forms of prohibited discrimination. The failure to include a particular legal principle (or a particular example of prohibited conduct) in one section of this Guidance Document should in no way be interpreted to mean that the legal principle (or prohibited conduct) is not covered with respect to another

protected basis. Rather, all sections of this Guidance Document should be read in conjunction with each other to provide a fuller picture of the breadth and application of the Executive Order's antidiscrimination prohibitions.⁴

V. Discrimination on the Basis of Race

Federal agencies must ensure that no individual is discriminated against on the basis of his or her race in any federally conducted education or training program or activity.

- Federal agencies must ensure that all individuals are treated equally without regard to race in any federally conducted education or training program or activity.

- Federal agencies may not utilize policies, procedures, or methods of administration which, although facially neutral, have a disproportionate and adverse effect on participants or applicants on the basis of their race, unless there is an educational or business necessity for the use of such policies and there are no equally effective alternative practices that would result in less of a disproportionate impact.

- Federal agencies may not base any decisions regarding individuals in federally conducted education or training programs on race-based stereotypes or assumptions regarding interests, competency levels, or expectations of success.

- Federal agencies must take steps to ensure that no federally conducted education or training program takes place in an environment that is intimidating, abusive, offensive, or hostile on the basis of race.

Examples⁵ of Prohibited Conduct:

- A federal law enforcement agency conducts an anti-terrorist training program in which it groups participants in various teams. Although the instructor generally makes random assignments for this exercise, he states that he has decided to assign all of the African-American participants to a single team because he believes that African-Americans work most effectively with members of their own race. The instructor's conduct violates the Executive Order.

- The Department of Justice offers an advanced prosecutorial course for its

⁴ Of course, it is also true that not every principle will be applicable to every protected basis. For example, only certain protected characteristics trigger a reasonable accommodation requirement. Individuals or agencies with specific questions regarding the Executive Order's antidiscrimination provisions should contact the Department of Justice's civil Rights Division.

⁵ All of the examples of discriminatory conduct set forth in this Guidance Document are hypothetical and are not intended to suggest that any federal agency actually engages in such discriminatory practices or necessarily even operates such an educational program.

attorneys at the Department's National Advocacy Center in Columbia, South Carolina. Due to the high demand for this course, the limited number of openings available, and the difficulty the Department has had in determining which candidates should be selected, the Department decides to require candidates to take an aptitude test and to select candidates in descending rank order of their test scores. However, the test results in disparate impact upon members of a particular race. Further, the Department lacks evidence that the test is valid; namely, that it predicts success in the course or even that it is necessary to pass the test in order to satisfactorily complete the course. Accordingly, the Department's use of this test violates the Executive Order.

VI. Discrimination on the Basis of Sex

Federal agencies must ensure that no individual is discriminated against on the basis of sex in any federally conducted education or training program or activity.

- No executive agency may admit, refuse to admit, promote, refuse to promote, or otherwise favor or disfavor, a participant or prospective participant in a federally conducted education program on the basis of sex.
- An agency may not impose, explicitly or implicitly, stricter admission or completion requirements for one sex as compared to the other.
- Federal agencies operating education or training programs may not utilize policies, procedures, or methods of administration which, although facially neutral, have a disproportionate and adverse effect on participants or applicants on the basis of sex unless there is an educational or business necessity for the use of such policies and there are no equally effective alternative practices that would result in less of an impact on the basis of sex.
- Federal agencies should ensure that no individual is subjected to gender-based harassment, which may include harassment based on sex or sex-stereotyping, in any federally conducted education or training program. Gender-based harassment may be based upon stereotypical notions regarding how persons of each gender should act or look.
- Discrimination on the basis of sex includes discrimination on the basis of pregnancy. Federal agencies must ensure that no woman is discriminated against on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, in any education or training program or activity.

Examples of prohibited conduct:

- The Director of Athletics at a Department of Defense School for dependent children of military personnel decides to allocate all of his annual athletics budget to male sports because he does not believe that female students need or want the same quality and variety of athletic services as males. Despite repeated requests from female students for a variety of programs and services, the Director refuses to consider the provision of any funding for co-ed or female sports. The Director's conduct would violate the Executive Order.⁶
- The Federal Bureau of Investigation conducts a firearms training program for state and local officials. The admissions director refuses to admit women because he believes that only men should be permitted to train for dangerous jobs. The director's refusal to consider women for participation in the program would violate the Executive Order.
- The Department of Health and Human Services conducts a nurses' training program on childhood vaccinations. One of the instructors requires the male participants to attend a seminar on infant care, but does not require the female students to attend the same seminar because she assumes that female students already possess such skills. The instructor's conduct would violate the Executive Order.
- A physical fitness instructor at the Federal Bureau of Prisons refuses to allow a pregnant inmate to participate in the physical fitness training program because he believes that pregnant women should not be physically active. Although the prison has a policy of permitting inmates with temporary disabilities to participate in physical fitness programs upon receipt of approval from a physician, the instructor refuses to consider a letter from the inmate's doctor explaining that physical activities pose no health risk to her. The instructor's decision to exclude the woman would violate the Executive Order.
- The Department of Labor conducts a week-long training seminar during which participants are evaluated for their approaches to management. Future promotion decisions are based on these evaluations. One of the evaluators gives high ratings to men who exhibit an aggressive interpersonal style, but deducts points for women who exhibit the same characteristics. The evaluator's judgments are based on sex-stereotypes and thus violate the Executive Order.

⁶ Further information on the application of these nondiscrimination principles to athletic programs in educational institutions may be obtained by consulting Guidance Documents developed by the Department of Education's Office for Civil Rights, including *Policy Interpretation—Title IX and Intercollegiate Athletics*, 45 CFR part 26 (1979); *Equal Opportunity in Intercollegiate Athletics: Requirements under Title IX of the Education Amendments of 1972*, 34 CFR part 106; *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (January 16, 1996); and various other pamphlets, memoranda, and documents that may be found on the Department of Education's website at www.ed.gov/offices/OCR/ocrprod.html.

- The Department of Justice operates an advanced law enforcement training course on an annual basis for ten individuals. During one session of the course, nine of the ten participants are male. The only woman enrolled in the course is continually taunted and hazed by her male peers who do not believe that women are capable of serving as law enforcement officers. The male instructor not only fails to take appropriate corrective action, but joins the male students in subjecting the woman to a barrage of derogatory epithets. The gender-based harassment to which the woman is subjected violates the Executive Order.

Sexual Harassment

The Executive Order's prohibition on sex discrimination requires federal agencies to ensure that no individual is subjected to sexual harassment in any federally conducted education or training program.

- Sexual harassment entails unwanted or unwelcome sexual conduct including sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.
- Federal agencies must ensure that no individual involved in a federally conducted education or training program is subjected to any form of sexual harassment.
- No instructor, supervisor, administrator, or other official involved in a federally conducted education program may (1) Explicitly or implicitly make submission to sexual conduct a term or condition of an individual's participation in an education program, or (2) use submission to or rejection of such conduct as the basis for any decision affecting an individual. Sexual harassment of this type violates the Executive Order whether an individual resists and suffers the threatened harm or submits and thus avoids the threatened harm.
- Federal agencies must ensure that no individual involved in a federally conducted education or training program is subjected to a hostile environment on the basis of sex. An impermissible hostile environment may consist of unwelcome sexual conduct that is sufficiently severe, persistent, or pervasive so as to (1) Limit an individual's ability to participate in, or benefit from, an education or training program or activity, or (2) create a hostile or abusive educational environment. Hostile environments may be created by supervisors, instructors, administrators, other officials, or peers.

Examples of prohibited conduct:

- A male student attending a high school operated by the Bureau of Indian Affairs is told by a female teacher that he will fail algebra if he does not accompany her on a date. The student refuses the teacher's request and receives a failing grade as a result. The teacher's conduct violates the Executive Order.
- The Federal Emergency Management Agency conducts emergency preparedness training for local firefighters. A training supervisor refuses to certify that a trainee has completed the program until she accompanies him on a date. Fearing that she will lose her job if she is not certified, the trainee acquiesces to the supervisor's demand. The supervisor's behavior constitutes sexual harassment and violates the Executive Order.
- A volunteer student intern at the Department of Veterans Affairs has made repeated unwelcome sexual gestures of a graphic and physical nature toward a fellow intern. On several occasions, the intern has made such gestures while following the victim and threatening to "get her alone." The victim no longer feels that she can be by herself at the office. This conduct has been both severe and pervasive and has created a hostile educational environment. The intern tells her supervisor and the Senior Managers who oversee the program, but they refuse to investigate or otherwise stop or prevent the conduct. The failure to investigate and/or take appropriate corrective action violates the Executive Order.

VII. Discrimination on the Basis of Color

Federal agencies must ensure that no individual is discriminated against on the basis of color in any education or training program or activity.

- Discrimination on the basis of color may include, but is not limited to, discrimination on the basis of the appearance of an individual's skin tone, racial complexion, pigmentation, or hue.
- A federal agency may not, on the basis of color, admit, refuse to admit, promote, refuse to promote, or otherwise favor or disfavor, a participant or prospective participant in an education or training program or activity.
- A federal agency may not use color as a proxy for determining an individual's race or national origin.
- Federal agencies must ensure that participants in education or training programs or activities are not subjected to harassment, in the form of color-based animus, bias, hostility, stereotype, ridicule or insult, whether by instructors or fellow participants, that is sufficiently severe, persistent, or pervasive to create a hostile environment.
- Federal agencies may not utilize policies, procedures, criteria or methods

of administration which, although facially neutral, have a disproportionate and adverse impact on the basis of color, unless there is an educational or business necessity for the use of such policies and there are no equally effective alternative practices that would result in less of an impact on the basis of color.

Examples of prohibited conduct:

- An executive agency conducts a vocational training program that includes an advanced course in media and broadcast education. The only criteria for admission is that the individual demonstrate a long-term interest in the field. After conducting interviews, however, a member of the admissions committee rejects an applicant with dark skin solely because she has seen statistical data that demonstrates that individuals with dark skin experience greater difficulty in finding permanent employment in these fields. The admissions committee member's conduct violates the Executive Order.
- A federal agency is planning an education seminar to address the Native American experience during the 20th Century. The program coordinator receives applications from numerous Native Americans who wish to participate as panelists. The program coordinator refuses to select any light-skinned applicants because he believes that such individuals do not appear to be "Native American" and thus cannot effectively address this topic. The coordinator's conduct violates the Executive Order.

VIII. Discrimination on the Basis of National Origin

Federal agencies must ensure that no individual is discriminated against on the basis of national origin in any federally conducted education or training program or activity.

- Discrimination on the basis of national origin may include discrimination based upon an individual's country of birth, ancestry, or accent.
- Federal agencies must ensure that individuals are not subjected to disparate treatment on the basis of national origin.
- Federal agencies may not utilize policies, procedures, criteria or methods of administration which, although facially neutral, have a disproportionate and adverse impact on the basis of national origin unless there is an educational or business necessity for the use of such policies and there are no equally effective alternative practices that would result in less of an impact on the basis of national origin.
- Participants in a federally conducted education or training program or activity must not be

subjected to a hostile environment based upon national origin.

- Exempt from coverage under this Executive Order are selections based on national origin of foreign nationals to participate in covered education or training programs which primarily concern national security or foreign policy matters.

Examples of Prohibited Conduct:

- The Department of Health and Human Services decides to hold a conference focused on training community groups on Latino health issues. A non-Latino representative from one of these community groups wishes to attend the conference, but the Conference Coordinator denies the request because the individual is not Latino. The Conference Coordinator's conduct would violate the Executive Order.
- An agency plans to hold a training session in a large city. The conference is designed to help low-income and minority individuals across the city start their own small businesses. The agency decides to advertise the training session by posting announcements in all low-income areas of the city. An agency coordinator, however, decides not to post announcements in the Chinatown section, even though the area has a high population of low income and minority individuals, because the coordinator does not think people from that area will be interested and/or will understand the English-language training. The coordinator's decision would violate the Executive Order.
- A federal agency is conducting an educational program regarding citizenship and civic duty. An employee applies to be a member of the speakers' panel during the program, but her supervisor refuses to select her because he believes that she has a foreign accent which would undermine her credibility with the audience. The supervisor's conduct violates the Executive Order.

Limited English Proficiency

Under certain circumstances, a federal agency's failure to provide language assistance to an individual whose primary language is not English and who has a limited ability to read, write, speak, or understand English may constitute national origin discrimination. Agency obligations with respect to such individuals who are limited English proficient (LEP) are discussed below.⁷

- Agencies have an obligation to take reasonable steps to ensure that LEP

⁷ Further guidance on these principles and agency obligations with respect to LEP issues may be found by consulting Executive Order 13166, "Improving Access to Services for Persons with Limited English Proficiency," 65 FR 50121 (August 16, 2000), and the Department of Justice's Policy Document, "Enforcement of Title VI of the Civil Rights Act of 1964—National Origin Discrimination Against Persons with Limited English Proficiency." 65 FR 50123 (August 16, 2000).

individuals have meaningful access to federally conducted education and training programs and activities.

- Agencies must determine what constitutes "reasonable steps" by considering a number of factors including: (1) the number or proportion of LEP persons in the eligible population to be served by the education or training program or activity; (2) the frequency with which LEP individuals come into contact with the program or activity; (3) the importance of the service provided by the program or activity; and (4) the resources available to the agency.

- If the federally conducted education program is an elementary or secondary school (e.g., Department of Defense Dependent Schools or schools operated by the Department of Interior, Bureau of Indian Affairs), the executive department or agency should comply with the Department of Education's guidance on the provision of language services to elementary and secondary education LEP students.⁸

Examples of Prohibited Conduct:

- A prison operated by the Bureau of Prisons has a very large proportion of adult LEP inmates who speak the same native language. The prison has a drug and alcohol rehabilitation program for inmates who have drug or alcohol addictions. Due to the size of this single-language speaking LEP population, the fact that this population of inmates has the same percentage of drug and alcohol addictions as the rest of the inmate population, and the importance of the program, the prison's failure to provide this group of LEP inmates with access to the program (such as a separate class in their native language or a competent interpreter) would violate the Executive Order.

- Military parents have adopted a child who is limited English proficient. They decide to enroll her in the federally conducted K-12 school for children of military personnel. The school's refusal to consider providing the LEP child with any services to overcome language barriers would constitute a violation of the Executive Order.

IX. Discrimination on the Basis of Disability

Federal agencies must ensure that no individual is discriminated against on the basis of disability in any federally conducted education or training program or activity.

- Section 504 of the Rehabilitation Act already prohibits discrimination on

the basis of disability in all federally conducted education and training programs as Section 504 applies to all federally conducted activities. Accordingly, executive departments and agencies may comply with the Executive Order by ensuring that all of their education and training programs are operated in accordance with their Section 504 regulations governing federally conducted activities.

- An individual with a disability refers to any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. Major life activities include walking, seeing, hearing, speaking, breathing, learning, performing manual tasks, caring for oneself, working, sitting, standing, lifting, and reading.

- Federal agencies must ensure that no otherwise qualified individual, on the basis of disability, is excluded from participation in, denied the benefits of, or subjected to discrimination in any federally conducted education or training program or activity.

- A qualified individual with a disability is any person who, with or without reasonable accommodation, can meet the essential eligibility requirements for involvement in the education or training program.

- Agencies must ensure that federally conducted education or training programs are readily accessible to qualified individuals with disabilities. In order to ensure accessibility, an agency may:

- (i) Relocate the education or training program or activity to an accessible facility;

- (ii) Provide the aid, benefit, or service in another manner; or

- (iii) Make modifications to the building or facility itself.

- In determining how to achieve accessibility, agencies should attempt to provide aid, benefits, or services in the most integrated setting possible.

Examples of prohibited conduct:

- The National Endowment for the Arts conducts an education program on art history. The instructor has a limited number of tickets to a new movie regarding French impressionist works and decides to draw names randomly to decide which students can attend. When the instructor draws the name of a visually impaired participant, he reassigns the ticket because he believes that the visually impaired individual would not be able to enjoy the movie as much as a non-visually impaired participant. The instructor's conduct would violate the Executive Order.

- The Office of Government Ethics holds an ethics briefing for another agency's ethics officials in a building that has three stairs

leading up the main entrance. There is no ramp, lift, or alternative accessible entrance. Several participants use wheelchairs and, thus, cannot get into the building. The instructor tells the participants that they will not be able to attend and refuses to relocate the briefing to an available and accessible facility, despite the fact that to do so would not constitute an undue burden. The instructor's refusal to relocate the briefing would violate the Executive Order.

Reasonable Accommodation

Agencies have an obligation to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the agency can demonstrate that the accommodation would impose an undue hardship.

- Agencies must furnish appropriate auxiliary aids and services when necessary to afford a qualified individual with a disability an equal opportunity to participate in a federally conducted education or training program or activity.

- Agencies must afford an individual with a disability an opportunity to request the auxiliary aid or service of his or her choice, and should honor that choice unless another effective aid or service is available.

- An agency may not charge an individual with a disability for the use of an auxiliary aid or service.

- The obligation to provide reasonable accommodations extends only to individuals with disabilities; an agency's failure to provide similar accommodations for individuals without disabilities does not constitute unlawful discrimination.

Examples of prohibited conduct:

- The Department of Justice conducts training seminars on compliance with civil rights laws for employees from other agencies. A prospective participant who is hearing impaired requests a sign language interpreter for an upcoming seminar. Although the agency employs a full-time sign language interpreter who is available to attend the seminar in question, the training coordinator refuses to enlist the interpreter's services and informs the participant that the agency will provide a video with closed-captioning that will be available ten days after the seminar is over. The coordinator's conduct would violate the Executive Order.

- A visually impaired student attending a high school operated by the Bureau of Indian Affairs requests that his class handouts be provided in Braille or on audio cassette. The principal refuses to translate any materials and urges that the student transfer to a private high school where such materials are more readily available. The principal's conduct would violate the Executive Order.

⁸ See, for example, *Identification of Discrimination and Denial of Services on the Basis of National Origin* (May 1970), 35 FR 11595; "The Office for Civil Rights Title VI Language Minority Compliance Procedures" (Dec. 3, 1985); and *Policy Updates on Schools' Obligations Toward National Origin Minority Students with Limited-English Proficiency (LEP)* (Sept. 27, 1991).

X. Discrimination on the Basis of Religion

Federal agencies must ensure that no individual is discriminated against on the basis of religion in any education or training program or activity.

- Discrimination on the basis of religion may include discrimination on the basis of an individual's religion (or lack thereof), religious beliefs, religious expression, or religious practices. Religious practices may include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.⁹

- Discrimination on the basis of religion also may include discrimination on the basis of an individual's relationship with a person of a particular religion or an individual's affiliation with a group, including an employee or student organization, that is associated with religious issues or whose membership is composed largely of people of a particular religion.

- No executive agency may admit, refuse to admit, promote, refuse to promote, or otherwise favor or disfavor, a participant or prospective participant in a federally conducted education program because of his or her religion (or lack thereof), religious beliefs, religious expression, or religious practices.

- An agency may not impose, explicitly or implicitly, stricter admission or completion requirements for a particular religious group or an individual who espouses particular religious beliefs.

- Individuals involved in a federally conducted education program may not be subjected to a hostile environment in the form of religiously-based discriminatory intimidation, or pervasive or severe religious abuse, ridicule or insult, whether by instructors or fellow participants. A hostile environment is not created, however, simply by virtue of religious expression with which some participants might disagree.

Examples of prohibited conduct:

- An instructor in a Department of Justice computer training course requires a participant who is an atheist to complete five extra hours of training because that participant does not share the instructor's religious beliefs. The instructor's conduct would violate the Executive Order.

- A group of participants, attending a federally conducted training course, share a common faith. This group engages in a pattern of verbal attacks on other participants

who do not share their religious views. These attacks occur repeatedly and are both severe and pervasive, creating a hostile educational environment. The agency is aware of this situation but fails to take effective corrective action. The agency's failure to take effective corrective action would violate the Executive Order.

Reasonable Accommodation of Religious Practices

The Executive Order's prohibition on religious discrimination also includes an obligation on the part of federal agencies to provide reasonable accommodation for religious practices. If an individual notifies an executive department or agency of his or her need for a religious accommodation with respect to a federally conducted education program, the agency has an obligation to reasonably accommodate the individual's religious observances or practices.

- Reasonable accommodations for religious observances or practices are those that do not impose an undue hardship. Though an agency need not make an accommodation that will result in more than a *de minimis* burden to the agency, the cost or other hardship nevertheless must be real rather than speculative or hypothetical. An accommodation should be made unless: (1) It would create an actual cost for the agency or other participants, (2) it would cause an actual disruption in the conduct of the education program, or (3) such accommodation is otherwise barred by law.

- Individuals involved in federally conducted education programs must be permitted to wear religious clothing, jewelry, or other accessories, if wearing such attire is part of an individual's religious practice or expression, so long as the wearing of such attire does not unduly interfere with the conduct of the education program.

- Agencies should be flexible in the scheduling of education and training courses when participants request scheduling changes in order to observe religious traditions, such as the Sabbath or particular holidays, unless to do so would result in more than a *de minimis* burden.

- Agencies should attempt to honor requests for alternative work assignments when completion of a particular work assignment would contravene an individual's religious practices or beliefs.

Examples of prohibited conduct:

- The National Aeronautics and Space Administration conducts a space camp program every Saturday and Sunday morning, and participants are randomly assigned to each session. The agency refuses

to even consider a Catholic youth group's request to be placed in the Saturday morning program so that the group can participate without missing Mass. The agency's failure to even consider providing this religious accommodation would violate the Executive Order.

- The Department of Interior requires its national park service employees to wear uniforms during public instruction, and imposes sanctions for deviation from specific guidelines. A Muslim employee wishes to wear a head scarf or hijab during instruction, but her supervisor refuses to consider her request. The supervisor's refusal to consider the employee's request would violate the Executive Order.

XI. Discrimination on the Basis of Age

Federal agencies must ensure that no individual is discriminated against on the basis of age in any federally conducted education or training program or activity.

As a general matter, age may not be used as a basis upon which to condition the allocation of benefits within, or qualification for, or participation in, a federally conducted education or training program or activity. More specifically:

- Age distinctions may not be used to exclude individuals from a program or activity unless age is a bona fide qualification for participation in the program or activity, that is necessary to the achievement of a programmatic objective or necessary to the normal operation of the program or activity.

- Although agencies may, under certain circumstances, rely on age-based distinctions because it is impracticable to measure characteristics that are necessary to the achievement of an essential programmatic objective on an individualized basis, age may *not* be used as a proxy if it is not a substantially accurate measure of those characteristics.

- Age-based classifications may not be used to achieve any objective that is not essential to the achievement of a statutory objective or the normal operation of a program or activity.

Under certain circumstances, however, agencies may legitimately use age distinctions with respect to the operation of federally conducted education or training programs. For example:

- Agencies may use age-based admissions policies for education or training programs that have traditionally been age-specific.

- Agencies may use age-based admissions policies for education or training programs that must be age-limited for reasons related to health or national security.

- Agencies may rely on age when acting in accordance with laws designed

⁹ See Equal Employment Opportunity Commission "Guidelines On Discrimination Because Of Religion," 29 CFR 1605.1.

to provide special benefits or assistance to members of a particular age group, such as children or the elderly.

Examples of Prohibited Conduct:

- An executive agency conducts an education program through which it provides computer science training for high school graduates. The agency permits only individuals under the age of 30 to apply for, and participate in, the program. The agency's policy is based upon the belief that age can be used as an acceptable proxy for measuring an individual's likely long-term commitment to a career in computer science. The agency's policy would violate the Executive Order because age is not an accurate or acceptable measure of an individual's likely commitment to a long-term career in computer science.
- An executive agency operates a business development training program to train entrepreneurs starting new and novel businesses. The training program is only available to individuals under the age of 50. The agency claims that it uses this age requirement to measure characteristics, such as entrepreneurial ingenuity, that are essential to an individual's ability to start a novel business. The agency's conduct violates the Executive Order because age is not an accurate measure of entrepreneurial ingenuity—a characteristic which may be necessary to the achievement of an essential programmatic objective, but which is properly assessed on an individualized basis, such as by reviewing applicant business plans.

XII. Discrimination on the Basis of Sexual Orientation

Federal agencies must ensure that no individual is subjected to discrimination on the basis of his or her sexual orientation in any federally conducted education or training program or activity.

- "Sexual orientation" refers to heterosexuality, homosexuality, or bisexuality.
- Discrimination on the basis of sexual orientation includes discrimination on the basis of an individual's:
 - (i) Sexual orientation or perceived sexual orientation;
 - (ii) Relationship with an individual of a particular sexual orientation;
 - (iii) Affiliation with a group, including an employee or student organization, that is associated with sexual orientation issues or whose membership is composed largely of people of a particular sexual orientation.
- Federal agencies must ensure that all individuals involved in federally conducted education or training programs are treated without regard to sexual orientation.
- Federal agencies must ensure that no individual involved in a federally conducted education program is

subjected to harassment based on his or her sexual orientation. Sexual orientation harassment may include slurs, epithets, unwelcome sexual advances, jokes, cartoons, or other derogatory behaviors that target individuals on the basis of sexual orientation and that are sufficiently severe, persistent, or pervasive to create a hostile educational environment.

Examples of Prohibited Conduct:

- A teacher in a Bureau of Indian Affairs federally conducted school is discharged on the basis of her sexual orientation. The discharge would violate the Executive Order.
- A student in a federally conducted school is harassed by his fellow students as a result of his perceived sexual orientation. The harassment causes him severe emotional distress and, as a result, his grades drop and he is often absent from school. The harassment creates a hostile educational environment, and the student notifies his teachers and the school principal. The failure of his teachers and the principal to investigate his claims and/or take appropriate corrective action would violate the Executive Order.
- A guidance counselor at a Department of Defense high school for the dependent children of military personnel refuses to permit a homosexual student to attend a training session on developing a career in business. The guidance counselor advises the student to consider a career as an interior decorator or a chef because she believes these professions are among the most suitable for gay men. The guidance counselor's conduct would violate the Executive Order.
- The internship coordinator at a federal agency refuses to select a heterosexual student as a summer intern because the student is being raised by two homosexual men. The coordinator's decision would violate the Executive Order.
- A federal agency holds an annual training retreat and invites the spouses or significant others of participating employees to accompany the group. However, when a homosexual employee arrives at the retreat with his partner, the retreat coordinator refuses to allow his partner to attend. The retreat coordinator's conduct violates the Executive Order.

XIII. Discrimination on the Basis of Status as a Parent

Federal agencies must ensure that no individual is discriminated against on the basis of his or her status as a parent in any federally conducted education or training program or activity.

- "Status as a Parent" refers to the status of any individual who, with respect to an individual who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:
 - (i) A biological parent;
 - (ii) An adoptive parent;
 - (iii) A foster parent;
 - (iv) A stepparent;

- (v) A custodian of a legal ward;
- (vi) In loco parentis over such an individual; or

(vii) Actively seeking legal custody or adoption of such an individual.

- The prohibition on discrimination based on status as a parent is designed to protect both men and women who become fathers and mothers through childbirth, foster parentage, adoption, legal guardianship, or marriage.
- Federal agencies may not rely on an individual's status as a parent in determining whether a person satisfies any policy or criterion for selection or admission to a federally conducted education program.
- Federal agencies may not rely on an individual's status as a parent in recruiting and/or selecting participants and instructors for federally conducted education programs.
- An individual may not be excluded from, denied the benefits of, or subjected to discrimination in any federally conducted education program as result of his or her perceived parental responsibilities.

Examples of prohibited conduct:

- The Admissions Committee for a summer training program operated by the Department of Health and Human Services refuses to admit mothers of young children because the committee members believe mothers should stay home and take care of their children. The Admissions Committee's conduct violates the Executive Order.
- The head of the French Department at the Department of Agriculture's Graduate Language Program twice passed over a single father with custody of two young children for promotion to a Senior Instructor position because she believed that the father would not be interested in a position with evening and weekend obligations due to his parental responsibilities. The failure to consider the father for promotion based upon his status as a parent violates the Executive Order.
- The Nuclear Regulatory Commission does not recruit graduate students with children for their Graduate Fellowship Program because the agency believes that the Graduate Fellowship Program is too rigorous for students with parental responsibilities. This recruitment practice constitutes discrimination on the basis of status as a parent and violates the Executive Order.
- An instructor for the VA Home Loan Training Program at the Department of Veterans Affairs is told by his supervisor that, if he proceeds to become a foster parent, he will not be eligible for a promotion to Senior Instructor because the new position will require too much travel. The instructor becomes a foster parent and is passed over for promotion as a result. The failure to consider the instructor for promotion based on his status as a foster parent violates the Executive Order.
- The Department of Justice is conducting a day-long training seminar for its employees and is planning to offer the course on three consecutive dates. Employees are assigned to

dates alphabetically on the basis of their last names. One of the employees requests to take the training course on a different date as she is scheduled to attend a parent-teacher conference at her child's school. Although the training coordinator has honored other employee requests to switch dates, he refuses to grant the mother's request because he believes that she should prioritize work over her parental responsibilities. The training coordinator's conduct violates the Executive Order.

XIV. Administrative Enforcement

Section 4 provides for administrative enforcement of the antidiscrimination provisions of Executive Order 13160. General guidelines for administrative enforcement are discussed below. Before turning to these guidelines, however, it is important to address three preliminary matters.

First, Executive Order 13160 covers all individuals involved in federally conducted education and training programs. Although many such individuals are likely to be members of the general public, rather than federal employees, there will, of course, be many federal employees covered by the Executive Order by virtue of their employment-related participation in federally conducted educational programs. Such individuals, however, are already protected under a number of existing Equal Employment Opportunity (EEO) laws, regulations, and Executive Orders, including Title VII of the Civil Rights Act of 1964 (Title VII) (race, color, religion, sex, and national origin), sections 501 and 504 of the Rehabilitation Act (Sections 501 and 504) (disability), the Age Discrimination in Employment Act (ADEA) (age), the Equal Employment Opportunity Commission's Federal Sector Equal Employment Opportunity Regulations, 29 CFR 1614, and Executive Order 11478, as amended, (race, color, religion, sex, national origin, disability, age, sexual orientation, and status as a parent). Therefore, in order to promote the consistent and effective enforcement of equal employment opportunity mandates for all federal employees, and to preserve the integrity of statutorily protected equal employment opportunity rights, complaints filed under both this Executive Order and existing equal employment opportunity laws should be consolidated and adjudicated under the relevant equal employment opportunity statutes (*i.e.*, Title VII, sections 501/504, and/or the ADEA).¹⁰ This approach will not only

provide a streamlined procedure for resolving complaints, but will also protect an aggrieved employee's opportunity to recover any monetary damages that are available under the EEO statutes but not under this Executive Order.

As a practical matter, this means that a federal employee seeking to file a complaint under this Executive Order must indicate whether the complaint is related to his or her employment¹¹ and, if so, whether he or she has filed any other EEO claims arising out of the same circumstances. If so, the complaint filed under this Executive Order should be transferred to the office handling the related claim and the enforcement procedures set forth below will be deemed inapplicable. If a federal employee chooses to proceed solely under this Executive Order, the enforcement procedures set forth below will govern the disposition of his or her complaint.¹²

If a federal employee indicates that he or she has not filed any other EEO claims at the time of filing a complaint under this Executive Order, the employee may nevertheless subsequently elect to file a related claim under Title VII, section 504, the ADEA, or Executive Order 11478, provided the employee follows the appropriate EEO filing procedures and contacts an EEO counselor and files a complaint within the relevant statutory time limit. In such

depend upon whether the federal agency conducting the education program has an existing complaint process for handling claims filed under Executive Order 11478. If a federal agency has complaint procedures for claims filed under Executive Order 11478, claims filed under both Executive Order 13160 and Executive Order 11478 may be consolidated and adjudicated under Executive Order 11478. If a federal agency does not have a complaint procedure for claims arising under Executive Order 11478, and a complaint alleges a violation of Executive Order 13160 and Executive Order 11478 (but does not raise any statutory claims), the complaint should be processed in accordance with the procedures for Executive Order 13160 set forth below. If a complainant raises claims under Executive Order 13160, Executive Order 11478, and an EEO statute, the complaint should be consolidated and adjudicated under the relevant EEO processes.

¹¹ Federal employees participating as members of the general public in a federally conducted education program will, of course, be subject to the same enforcement procedures as outside participants.

¹² For instance, the enforcement procedures set forth in this Guidance Document may govern the resolution of a complaint filed by an employee involved in a training program conducted by a federal agency other than the federal agency for whom the employee works. For example, if an employee of the Department of Justice participates in a training course conducted by the Department of Education, the employee may choose to file an Executive Order 13160 claim directly against the Department of Education if he or she chooses not to, or is not able to, invoke existing EEO laws and regulations at the Department of Justice.

cases, the employee should notify the investigating office that he or she has decided to contact an EEO counselor and file a related EEO claim so that the Executive Order 13160 complaint may be transferred to the appropriate office as provided for above. Federal agencies must ensure that all federal employees filing Executive Order 13160 complaints have adequate notice that they should advise the investigating office handling the Executive Order 13160 complaint if they decide to pursue their claims through the EEO process.

Second, the enforcement procedures set forth below are designed solely to provide general guidance. Under Section 5–502 of the Executive Order, all executive departments and agencies must establish procedures to receive and review complaints within 90 days of January 18, 2001. As all executive departments and agencies already have procedures in place for adjudicating claims regarding federally conducted programs under Section 504 of the Rehabilitation Act, it is recommended that agencies consider utilizing the same investigative and adjudicative offices for handling complaints under Executive Order 13160. However, agencies are of course free to develop different procedures and to supplement or modify the following enforcement procedures as appropriate.

Third, after developing individual procedures to receive and review complaints, each executive department and agency should prepare some sort of outreach materials to ensure that all individuals involved in federally conducted education and training programs are aware of Executive Order 13160 and are advised as to the proper procedures for filing complaints. These outreach materials should provide individuals with specific information, including, but not limited to, the general antidiscrimination mandates of Executive Order 13160, details regarding how to obtain copies of this Guidance Document, timelines for filing complaints, the name(s) and address(es) of the office(s) to which such complaints should be sent, and specific procedures established by the relevant federal agency regarding the processing of complaints.

All executive departments and agencies should further ensure that these outreach materials provide clear instructions to federal employees regarding their respective rights under Executive Order 13160 and Title VII, sections 501/504, the ADEA, and Executive Order 11478. Specifically, these outreach materials should clearly state the differing timelines for filing claims under the Executive Order and

¹⁰ In cases where a complaint raises claims under both Executive Order 13160 and Executive Order 11478 (but does not raise statutory claims), the appropriate complaint processing procedures will

these three statutes, as well as the availability (or unavailability) of different remedies. As discussed above, federal employees should also be clearly advised that claims filed under both the Executive Order and an equal employment opportunity statute will be adjudicated only under the relevant statute (or under Executive Order 11478, if an agency has existing procedures for receiving such complaints).

The development of these outreach materials should ensure that all individuals receive adequate notice of their rights under Executive Order 13160. These materials will also serve to ensure that individuals participating in federally conducted education and training programs are properly advised as to the appropriate procedures for filing complaints. Finally, these materials should assist in clarifying questions federal employees may have regarding the ramifications of filing a complaint under Executive Order 13160 versus filing a complaint under Title VII, sections 501/504, the ADEA, or Executive Order 11478.

A. Definitions

For purposes of this Guidance Document, the term—

Appropriate agency official means the officer or officers within an executive department or agency designated to determine what, if any, disciplinary action, remedial action, or corrective action should be taken as a result of a violation of the Executive Order.

Complete complaint means a written statement that contains the complainant's name, address, and phone number, describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and approximate date of the alleged violation, and identifies whether the complainant is an employee of the agency alleged to have committed the discrimination and whether the complainant's involvement in the relevant education or training program was related to his or her employment. A complete complaint must be signed by the complainant or by someone authorized by the complainant to sign on his or her behalf.

Investigating office means the office or offices within an executive department or agency that are designated to investigate complaints regarding violations of this Order or its implementing rules, regulations, policies, or guidance.

Respondent means the organizational unit in which the alleged discrimination occurred.

B. Filing a Complaint

Any individual who believes himself or herself to be aggrieved by a violation of Executive Order 13160 or its implementing regulations, rules, policies or guidance, including this Guidance Document, may, personally or through a representative, file a written complaint with the agency that he or she believes is in violation of this Order or any of its implementing regulations, rules, policies, or guidance. All written complaints should be filed with the appropriate Investigating Office as designated by the relevant agency.

1. Complete Complaints

In order to be accepted by an agency's Investigating Office, all written complaints must be "complete complaints." As defined above, a complete complaint must include the name, address, and phone number of the complainant, must identify whether the complainant is a federal employee and whether the complainant's involvement in the relevant education program was related to his or her employment, and must describe the alleged discriminatory conduct in sufficient detail to inform the agency as to the nature and approximate date of the alleged violation. A complete complaint also must be signed by the complainant or by someone authorized by the complainant to sign on his or her behalf.

2. Time Limits for Filing Complaints

As a general matter, all complaints must be filed within 180 days of the alleged discrimination. However, the appropriate Investigating Office may extend this time limit:

(a) If the complainant can demonstrate that he or she had no notice of the time limit and was not otherwise aware of it; or

(b) If the complainant can demonstrate that he or she was prevented by circumstances beyond his or her control from submitting the complaint in a timely fashion; or

(c) For other reasons, or under other circumstances, considered sufficient by the agency.

For purposes of determining when a complaint is timely filed, a complaint mailed to the agency will be deemed filed on the date that it is postmarked. Any other complaint will be deemed filed on the date that it is received by the appropriate Investigative Office, by any agency supervisor, or by any other agency employee designated by the agency to receive such complaints.

If a complaint is filed within 180 days of the alleged discrimination, but the agency subsequently determines that the complaint is not a "complete complaint," the complainant's claims

shall nevertheless be deemed filed in a timely manner, and the complainant shall be given an appropriate opportunity to amend his or her original complaint. See Section C below for further information regarding the process for requesting additional information from a complainant in order to supplement an incomplete complaint.

3. Class Complaints

Any individual who believes that any specific class of persons has been subjected to discrimination prohibited by Executive Order 13160 or any of its implementing regulations, rules, policies, or guidance, including this Guidance Document, may file a class complaint with the appropriate Investigative Office, provided that individual is either a member of the allegedly aggrieved class of persons or a representative of a member of the allegedly aggrieved class of persons. Each executive department or agency should develop specific procedures to deal with the resolution of class complaints.

4. Legal Representation

Any individual filing a complaint under Executive Order 13160 or any of its implementing regulations, rules, policies, or guidance may be represented and assisted in all stages of these proceedings by an attorney or representative of his or her own choosing. An individual has a responsibility to promptly inform the agency if legal counsel is retained. In addition, an individual has an obligation to notify the appropriate Investigating Office if he or she wishes to have any other representative included in these proceedings. It is the responsibility of the complainant to provide the appropriate Investigating Office with the name, address, and phone number of any attorney or other representative. In addition, it is an ongoing responsibility of the complainant to advise the appropriate Investigating Office as to any changes with respect to the status of his or her legal and/or non-legal representation in any proceeding under this Executive Order or any of its implementing regulations, rules, policies, or guidance. Each federal agency has a duty to ensure that all complainants have adequate notice of these obligations.

C. Initial Review by the Investigating Office

Upon receipt of a complaint filed under this Executive Order, the investigating office must assess the complaint and determine how to proceed. The investigating office should

specifically consider whether the complaint is a complete complaint, whether it was filed in a timely manner, and, in the case of a federal employee, whether the complaint should be consolidated with another complaint and transferred, if necessary.

After reviewing the complaint, the investigating office may need to obtain additional information from the complainant. For example, the investigating office may ask the complainant to supply additional information if the complaint is not complete. Additional information also may be required by the investigating office to determine whether to waive the time limits for filing a complaint or whether to consolidate and transfer a federal employee's claim. If a complainant fails to provide additional information, or otherwise respond to the investigating office's request, within 30 days, without good cause shown, the investigating office may dismiss the complaint.

In certain instances, the investigating office may determine that a complaint should be dismissed because the alleged discriminatory conduct did not occur in a federally conducted education or training program. In such cases, the investigating office should issue a brief written determination setting forth the basis for the dismissal and advising the complainant of his or her right to appeal this decision to the Attorney General for a final determination regarding coverage pursuant to Section 2-203 of the Executive Order. Responsibility for issuing such final determinations regarding coverage is delegated to the Assistant Attorney General for Civil Rights, who shall conduct, handle, or supervise the performance of this function.

D. Informal Resolution or Formal Investigation

Before undertaking a formal investigation, agencies are strongly encouraged to pursue resolution of all complaints filed under this Executive Order through efforts to achieve voluntary compliance. Toward this end, agencies should make use of alternative dispute resolution techniques whenever appropriate.

If an informal resolution of a complaint between a complainant and respondent cannot be reached within a reasonable period of time (generally 45 days), or if efforts to achieve an informal resolution appear to become futile, the investigating office should initiate a formal investigation. However, efforts to achieve voluntary compliance should be undertaken whenever possible and should continue throughout the course

of a formal investigation if and when appropriate opportunities arise.

If a decision is made to initiate a formal investigation, the investigating office must notify the complainant in writing. The investigating office should attempt to complete the investigation within 180 days of the agency's receipt of a complete complaint. The investigation should include a thorough review of the circumstances under which the alleged discrimination occurred and any other circumstances which may constitute, or appear to constitute, discrimination against the complainant.

A formal investigation may require the cooperation and participation of other agency employees. Employees who are required by the investigating office to participate in any investigation concerning violations of this Executive Order will do so as part of their official duties and during the course of regular working hours.

Upon completion of a formal investigation, the investigating office must prepare a written report setting forth the results of the investigation. If a determination is made that any agency employee has not complied with the Executive Order or any of its implementing rules, regulations, policies, or guidance, Section 4-402 requires the investigating office to complete a report and refer a copy of the report and any relevant findings or supporting evidence to the appropriate agency official. The investigating office also may make recommendations for any corrective and/or remedial action. A copy of the investigative report should be sent to both the complainant and the respondent, including the employee who is the subject of the report.

If a determination is made that there has been no violation of the Executive Order or any of its implementing rules, regulations, policies, or guidance, a copy of the report also shall be sent to both the complainant and the respondent. In such cases, although no action is required, a copy of the report should nevertheless be sent to the appropriate agency official.

E. Referral to the Appropriate Agency Official

Upon receipt of a report from an investigating office that indicates there has been a violation of the Executive Order or its implementing rules, regulations, policies, or guidance, the appropriate agency official shall review the report and all relevant supporting material in order to determine what, if any, disciplinary action is appropriate. Any action taken to discipline an employee, including removal, must be

taken in compliance with otherwise applicable procedures, including the Civil Service Reform Act of 1978, Public Law No. 95-454, 92 Stat. 1111.

The appropriate agency official also shall review the report of the investigating office in order to determine whether any corrective or remedial action should be initiated. Pursuant to Section 4-402(b), however, nothing in the Executive Order authorizes monetary relief to the complainant as a form of remedial or corrective action. If the appropriate agency official does determine that the complainant is entitled to some form of remedial or corrective action, the appropriate agency official shall so notify the complainant in writing. The appropriate agency official also shall take all necessary steps to ensure that the corrective or remedial action ordered is implemented. If a determination is made that the complainant is not entitled to any corrective or remedial action, the appropriate agency official shall notify the complainant of this decision and the reasons for this determination.

Although agencies are free to designate any employee as the appropriate agency official, agencies should bear in mind that section 5-503 provides that the head of each executive department or agency shall be responsible for ensuring compliance with the Executive Order. As such, agencies should consider designating a senior level official for this important post.

XV. Remedies

As discussed above, in addition to making final decisions regarding disciplinary measures, the appropriate agency official shall have the authority to order corrective and/or remedial action, where appropriate. As a general matter, if there has been a violation of the Executive Order, the complainant shall be entitled to all appropriate, non-monetary, equitable relief. The appropriate agency official should attempt to ensure that the aggrieved individual ends up in the same position he or she would have occupied absent discrimination, or a substantially equivalent position. In the context of violations of this Executive Order, specific remedies are likely to include placement in the next available education or training program of a comparable nature; the development of an individualized training opportunity; the cancellation of an unwarranted personnel action or the expungement of adverse materials from agency records; the awarding of a diploma, other certificate, or specific grade; and the

provision of reasonable accommodations.

Federal agencies must ensure that appropriate agency officials are accorded sufficient authority to provide all appropriate forms of relief. Complainants should be aware, though, that Section 8 of the Executive Order specifically provides that the Order “is not intended, and should not be construed, to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees.” Section 8 further provides, however, that the Order is not intended “to preclude judicial review of final decisions in accordance with the Administrative Procedures Act, 5 U.S.C. 701, *et seq.*”

XVI. Reporting Requirements

Section 6 of the Executive Order establishes reporting requirements for federal agencies. For the first three years following issuance of this Executive

Order, all federal agencies shall file annual reports with the Attorney General that summarize the number, nature, and disposition of complaints filed under the Executive Order. Such reports are to be submitted to the Assistant Attorney General for Civil Rights within 90 days of the end of the preceding year’s activities. Subsequent reports are to be submitted every three years and within 90 days of the end of each three year period.

XVII. Conclusion

As discussed above, this Guidance Document is intended to provide executive departments and agencies with a basic framework for ensuring compliance with Executive Order 13160. Pursuant to Section 5–502 of the Executive Order, each agency has 90 days from January 18, 2001 to establish procedures for receiving and addressing complaints. Each agency also shall take “all necessary steps” to effectuate any

subsequent rules, regulations, policies, or guidance issued by the Attorney General or the Assistant Attorney General for Civil Rights in connection with this Executive Order within 90 days of issuance.

The mandate of Executive Order 13160 is clear: to ensure that all individuals, on the basis of race, sex, color, national origin, disability, religion, age, sexual orientation, and status as a parent, have an equal opportunity to participate in, enjoy the benefits of, and be free from discrimination in, federally conducted education and training programs. Federal agencies should strive to achieve these objectives to the fullest extent possible and are encouraged to use this Guidance Document as a starting point for achieving these important goals.

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