BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. SAN LUIS OBISPO COASTAL UNIFIED SCHOOL DISTRICT, Respondent. ---------- MARLENE ANNE MENDES, Complainant.	)	Case No. E95-96 L-0725-00s 98-14 DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter. The Commission also designates the decision as precedential pursuant to Government Code sections 12935, subdivision (h), and 11425.60.

Commissioner Cheng has filed a separate concurring opinion.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition

for judicial review and related papers should be served on the Department, Commission, respondents, and complainant.

DATED: October 7, 1998

FAIR EMPLOYMENT AND HOUSING COMMISSION

LYDIA I. BEEBE

PHYLLIS W. CHENG

EUIWON CHOUGH

THERON E. JOHNSON

CONCURRENCE

I concur in all respects with this decision. I write only to add that the Commission's decision in upholding the BFOQ exception here is further supported by other federal and state authority specific to educational institutions.

Title IX of the 1972 Education Amendments (20 U.S.C. §§ 1681 et. seq.) is the federal statute which prohibits sex discrimination in educational programs or activities receiving federal financial assistance. The Title IX Regulations (34 C.F.R. part 106.61) state:

Sec. 106.61 Sex as a bona-fide occupational qualification.

> A recipient may take action otherwise prohibited by this subpart provided it is shown that sex is a bona-fide occupational qualification for that action, such that consideration of sex with regard to such action is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section which is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

Similar language is contained under the comparable California Sex Equity in Education Act (Ed. Code §§ 200 et. seq):

> §230. For purposes of this chapter, harassment and other discrimination on the basis of sex include, but are not limited to, the following practices:
> . . .
>
> (d) On the basis of sex, harassment or other discrimination among persons, including, but not limited to, students and nonstudents, or academic and nonacademic personnel, in employment and the conditions thereof, except as it relates to a bona fide occupational qualification.
> . . .
>
> §231. Nothing herein shall be construed to prohibit any educational institution from maintaining separate toilet facilities, locker rooms, or living facilities for the different sexes, so long as comparable facilities are provided.

Accordingly, consistent with the FEHA, federal and state authorities specific to the education setting also recognize a BFOQ exception to sex-based employment in locker rooms.

PHYLLIS W. CHENG

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the	)	
DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING	)	Case No. FEP 95-96 L-0725-00s
v.	)	
SAN LUIS OBISPO COASTAL UNIFIED SCHOOL DISTRICT,	)	
Respondent.	)	PROPOSED DECISION

MARLENE ANNE MENDES,)
)
Complainant.)
)

Hearing Officer Jo Anne Frankfurt heard this matter on behalf of the Fair Employment and Housing Commission on February 5 and 6, March 4, 5, and 6, and May 19, 1998. James A. Otto, Staff Counsel, represented the Department of Fair Employment and Housing. Richard Fisher, Esq., of O. Melveny and Meyers, represented respondent San Luis Obispo Coastal Unified School District. Complainant Marlene Mendes and respondent representatives Helen Robinson and Jean Burns were present at the hearing. The transcripts were received on June 2, 1998. Respondent San Luis Obispo School District filed a post-hearing brief on June 26, 1998, and the Department waived filing a reply brief on July 22, 1998. The case was submitted on July 22, 1998.

After consideration of the entire record and arguments, the Hearing Officer makes the following Findings of Fact, Determination of Issues, and Order.

FINDINGS OF FACT

1. On June 12, 1996, Marlene Anne Mendes (complainant) filed a written, verified complaint with the Department of Fair Employment and Housing (Department) alleging that San Luis Obispo Coastal Unified School District had discriminated against her in violation of the Fair Employment and Housing Act (Act) (Gov. Code §12900 et seq.). The complaint alleged that San Luis Obispo Coastal Unified School District had refused to transfer complainant to a physical education teacher position at another school because of her sex.

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930. On June 11, 1997, Nancy C. Gutierrez, in her official capacity as the Director of the Department, issued an accusation against San Luis Obispo Coastal Unified School District (respondent or District). The accusation alleged that respondent discriminated against complainant by refusing to transfer her to a physical education teacher position at another school because of her sex, in violation of Government Code section 12940, subdivision (a). The accusation also alleged that respondent failed to take all reasonable steps necessary to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (i).

3. Respondent is a public school district in San Luis Obispo, California. Laguna Middle School is a middle school and San Luis Obispo High School is a high school in the District. Respondent is an employer within the meaning of Government Code section 12926, subdivision (d).

4. In August 1994, respondent hired complainant, a female, to work as a physical education teacher at San Luis Obispo High School. Complainant continued to work in that capacity through the dates of hearing.

5. On March 2, 1995, complainant requested that respondent transfer her to Laguna Middle School as a physical education instructor for the upcoming 1995-96 school year.

Complainant is credentialed and qualified to teach physical education at both the middle and high school levels.

6. When a District school has a job opening, the District's Director of Personnel gives the principal of the school with the opening the names of District employees who have requested a transfer and who are eligible for the open position. The District's Director of Personnel is Richard Andrus, and the principal of Laguna Middle School is Jean Burns.

7. In May 1995, Laguna Middle School had an opening for a physical education teacher for the 1995-96 school year because one of its physical education teachers, a male, had retired. In addition to the open position, Laguna Middle School had one male physical education teacher and the full time equivalent of 2.5 female physical education teachers. The 2.5 full time equivalent positions resulted from the schedules of four female teachers -- one worked as a full time physical education teacher, one taught three periods of physical education (the half time position) and the other two had a job share arrangement, sharing one full time physical education teacher position.

8. Male and female students take physical education classes together at Laguna Middle School, with each class consisting of roughly an equal amount of boys and girls. While the classes are co-educational, the students' locker rooms are segregated by gender. The students spend 15 or 20 minutes of the 50 minute physical education class period in the locker room. Students generally spend the first five to ten minutes and the last ten minutes of the class period in the locker room changing into and out of physical education clothes, and showering.

9. Laguna Middle School serves seventh and eighth grade students, who are between the ages of 12 and 14. For many boys at Laguna Middle School, the physical education locker room setting is the first time they have undressed and been nude in front of their peers, and taken care of their personnel hygiene in a large group. Students of this age are at different levels of physical and emotional maturity. Some of these students tend to make fun of each other, tease, and test the limits of the setting. In the locker room at Laguna Middle School, boys have engaged in misbehavior, including theft, pushing, shoving,

fighting, pranks, and horseplay. As a result, the locker room can be hazardous. The metal lockers, concrete benches, and wet surfaces create an environment where students can easily injure themselves. Student intimidation also is a hazard. In 1994, a male student was sexually assaulted by several other boys in the locker room. In an effort to prevent such problems, it is the policy and practice of Laguna Middle School that the students must be supervised in the locker rooms as they change clothes and shower. Laguna Middle School maintains a staffing ratio in the locker room of one teacher to approximately 40 students.

10. At all times relevant to these proceedings, Laguna Middle School physical education teachers did all locker room supervision during their assigned teaching periods. Such supervision consumes 30 to 40 percent of the physical education teacher's instructional time, and is an integral part of a physical education teacher's job.

11. At hearing, the parties stipulated that "[t]eachers of one gender cannot supervise the locker rooms of students of the opposite gender because such supervision would unreasonably invade the privacy rights of those students."

12. In June 1995, District Director of Personnel Richard Andrus and Laguna Middle School principal Jean Burns discussed the job opening for a physical education instructor at Laguna Middle School. They determined that, based upon the need for same gender locker room supervision, the open position needed to be filled by a male. As a result of this discussion, Andrus forwarded to Burns only the names of three male applicants and did not forward complainant's name for consideration.

13. When Richard Andrus and Jean Burns had their June 1995 discussion, Burns knew the projected number of students who would attend Laguna Middle School in the Fall 1995 semester and anticipated that she would have 22 physical education classes for the 1995-96 school year. She also knew how many physical education teachers were on staff, including the gender of these teachers, and that the physical education teacher who had retired was male. Thus, Burns knew that there were fewer male physical education teachers than female physical education teachers on staff, and concluded that she would need additional male

supervision of the locker rooms in order to provide adequate supervision in the boys' locker room.

14. On June 12, 1995, Richard Andrus advised complainant that, as a female, she would not be considered further for the physical education opening at Laguna Middle School because respondent needed a male in that position in order to provide adequate boys' locker room supervision.

15. Thereafter, the District did not interview complainant and did not further consider her for the physical education opening at Laguna Middle School. Instead, the District filled the position with a male physical education teacher.

16. Laguna Middle School assigns teachers to supervise students in a variety of settings away from the classroom. Teachers supervise students during break time, study period, and bus-loading time after school. These three supervisory duties are called "extra supervision."

17. In addition to these "extra supervision" duties, prior to each period during which a teacher will teach a class, that teacher is expected to supervise students in the hallways during the five minute period between classes. Between-class supervision and locker room supervision are assigned to teachers in conjunction with their instructional periods, and are not included in calculations of "extra supervision" duties.

18. In an effort to promote a supportive student transition between elementary and high school, Laguna Middle School emphasizes a student-focused "team" approach to learning. This approach places students into two groups. First, students are assigned to a "core team," in which the same four teachers teach approximately 125 - 150 students math, social studies, English, and science throughout the course of the day. The "core team" is intended to limit a student's exposure to small numbers of students and teachers, and to give teachers an opportunity to integrate the curriculum between the different classes. Secondly, each "core team" is divided into eight smaller "advisory" groups with its own assigned adult. These eight adults include the four core teachers and four other staff drawn from either the school's administrative staff, or the school's elective teachers. The purpose of the "advisory" group is to

provide each student with a designated adult for personal, social and academic counseling.

19. Of the two middle schools and two high schools in the District, at all relevant times herein, Laguna Middle School was the only school which used the "core team" approach to learning.

20. The school day at Laguna Middle School is divided into seven 50-minute class periods and a lunch period. Teachers teach five periods during the seven-period school day. The two remaining periods are designated as a preparation and a supervision period.

21. The preparation period at Laguna Middle School is reserved for professional work, such as preparing for classes and meeting with parents and other staff. The only occasions when a teacher's preparation period is used for supervisory duties are when a teacher volunteers for such duties, or when unanticipated circumstances make such supervisory assignments necessary on a temporary basis. This practice is the same for both core teachers and non-core teachers.

22. Laguna Middle School's practice regarding the supervision period differs for "core team" teachers (core teachers) and non-core teachers. For core teachers, the supervision period is "protected" time. This means that each core of teachers has a common supervision period that they are supposed to use only for "core team" tasks, such as team curriculum planning and team parent meetings, but not for non-core related tasks, such as "extra supervision" duties. Core teachers' "extra supervision" duties are considered to be a separate and additional obligation, and are scheduled at other times. Non-core teachers do not have "core team" duties, so their supervision period is not "protected" time. Thus, non-core teachers are scheduled for "extra supervision" duties during their supervision period.

23. In practice, not all core teachers have used every supervision period to meet with the other members of their team to conduct "core team" duties. During the 1995-96 school year, at least some core teachers did not meet every day with the other

members of their team. Moreover, at least some "core team" duties consume only part of the 50-minute preparation period. For example, meetings with parents and students can take only 30 minutes of the 50 minute period. Nevertheless, the supervision period is intended by the Laguna Middle School administration to be used only for "core team" duties by core teachers, and is used by the teachers in this way through full team meetings or other methods, such as partial team meetings.

24. If the District had filled the physical education teacher opening in question with a female teacher, for the Fall 1995 semester there would not have been a sufficient number of male physical education or non-physical education teachers on staff available to supervise the boys' locker rooms.

25. During the 1995-96 school year and continuing through the time of hearing, a male San Luis Obispo City police officer has worked at Laguna Middle School two full school days each week. The officer's duties include visiting classes to talk to students about their rights and responsibilities, participating in drug prevention programs and activities, visiting the homes of truant students, conducting criminal investigations and arrests, and providing a visible law enforcement presence at the school. This position is funded jointly by the District and the San Luis Obispo Police Department.

26. Every physical education instructor is assigned one student-aide per class period. A student-aide is an eighth grade student who assists the instructor with calisthenics, managing equipment, and refereeing student activities. On occasion, student-aides have been subjected to intimidation by other students while the aides are refereeing and monitoring student activities. Other students have openly disobeyed the authority of student-aides.

DETERMINATION OF ISSUES

The Department asserts that respondent unlawfully discriminated against complainant because of her sex, by refusing to consider her for the physical education teacher position at

Laguna Middle School. The Department seeks various forms of relief, including instatement into the position, out-of-pocket damages, emotional distress damages, an administrative fine and other affirmative relief.1/ Respondent will be found liable if the conduct complained of constitutes discrimination under the Act, and the conduct is not excused by an affirmative defense.

A. Discrimination

Discrimination is established if a preponderance of the evidence demonstrates the existence of a causal connection between complainant's sex and respondent's adverse action against her. (DFEH v. Hoag Memorial Hospital Presbyterian (1985) FEHC Dec. No. 85-10, at p. 11 [1985 WL 62889; 1984-85 CEB 14]; DFEH v. Globe Battery (1987) FEHC Dec. No. 87-19, at p. 8 [1987 WL 114867; 1986-87 CEB 9], decision aff'd., Johnson Controls, Inc. v. Fair Employment & Housing Com. (1990) 218 Cal.App.3d 517, rehrg. den. & opn. mod., rev. den.) Here, respondent admits that it refused to consider complainant for the physical education position at Laguna Middle School because of her sex. Thus, respondent discriminated against complainant because of her gender, female, within the meaning of the Act.

1/ In closing argument, the Department sought an administrative fine of $50,000, emotional distress damages of $1,500, and an order giving a Department consultant the authority to veto respondent's future personnel decisions involving the hiring and transferring of teachers. The Commission, however, has no authority to award administrative fines against a public entity, and, in any event, cannot award emotional distress damages in combination with administrative fines in an amount over $50,000. (Gov. Code §12970, subds. (a)(4) and (d).) Moreover, the Commission's authority to issue affirmative relief in an individual case has never resulted in the proposal suggested by the Department -- i.e, empowering a Department consultant to review and overturn respondent's post-hearing personnel decisions, including decisions unrelated to this matter.

B. Affirmative Defense

Respondent asserts, however, that its refusal to consider complainant for the physical education position is legally justified by the bona fide occupational qualification (BFOQ) affirmative defense. (Gov. Code, §12940; Cal. Code of Regs., tit. 2, §7286.7, subd. (a), §7290.8, subd. (b).) This defense is available in cases where an employer has a practice which on its face excludes an entire group of individuals on a basis enumerated in the Act. Because the effect of a valid BFOQ is to excuse class-wide discrimination, this defense has been construed very narrowly and the burden is on the employer to establish the defense by a preponderance of the evidence. (DFEH v. Hoag Memorial Hospital Presbyterian, supra, 1984-85 CEB 14, at p. 11; County of Alameda v. Fair Employment & Housing Com. (1984) 153 Cal.App.3d 499, 505; Long v. State Personnel Bd. (1974) 41 Cal.App.3d 1000, 1016, citing Weeks v. Southern Bell Telephone & Telegraph Co. (5th Cir. 1969) 408 F.2d. 228.)

Respondent does not assert that women cannot serve as physical education teachers. Indeed, when respondent sought a teacher to fill the opening in question, respondent employed more female than male physical education teachers at Laguna Middle School. Here, respondent relies upon the BFOQ defense only as it pertains to the physical education staffing needs of Laguna Middle School when complainant sought a position with the school. Respondent asserts that it excluded complainant from the position in question because, at that time, there were not enough male physical education teachers to supervise the boys、 locker room.

1. Sexual Privacy

Sexual privacy concerns may, in very limited circumstances, justify a BFOQ defense. (DFEH v. Hoag Memorial Hospital Presbyterian, supra, 1984-85 CEB 14, at p. 12.) Commission regulations provide that personal privacy considerations justify a BFOQ only where the following three elements are proven:

> (1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and

(2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and

(3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.

(Cal. Code of Regs., tit. 2, §7290.8, subd. (b).)

All three elements of this standard are met here. The evidence showed that an integral part of the physical education teacher's job at Laguna Middle School requires observation of students undressing and showering in the locker room. Thus, the first element is met. Moreover, the parties do not dispute that the second and third elements are met, stipulating that opposite gender locker room supervision would unreasonably invade the privacy rights of Laguna Middle School students. Commission decisions and case law are in accord. The mere observation of individuals in the nude by others of the opposite sex has been found sufficiently offensive and detrimental to satisfy the BFOQ test. (DFEH v. Hoag Memorial Hospital Presbyterian, supra, 1984-85 CEB 14, at p. 12.) Courts have been especially careful to protect the privacy interests of juveniles. (See, e.g., Long v. State Personnel Bd., supra, 41 Cal.App.3d at p. 1010.) Therefore, it is determined that locker room supervision duties required of physical education instructors at the Laguna Middle School satisfy the requirements for a personal privacy BFOQ.

2. Reasonable Accommodation

The Department argues that respondent violated the Act by failing to reasonably accommodate complainant. At hearing, the Department raised a number of accommodations which it asserts would have allowed respondent to hire complainant. Each of the accommodations proposed by the Department would involve assigning boys' locker room supervision duties to other, male, personnel.

An employer must assign job duties and make other reasonable accommodation so as to minimize the number of jobs for which sex is a BFOQ. (Cal. Code of Regs., tit. 2, §7290.8, subd. (c).) Locker room supervision is an integral part of the

physical education teacher's job at Laguna Middle School, and occupies 30 to 40 percent of the physical education teacher's instructional time. Each of the Department's proposals would require shifting 30 to 40 percent of the physical education position to male teachers who were not physical education teachers, or to other males (police officer, student-aides, community volunteers, locker room attendant), who were not teachers at all. Neither the Act nor our regulations requires this. Here, the purpose of reasonable accommodation is to enable the complainant to perform the essential functions of the physical education teacher's job. In this context, reasonable accommodation does not require an employer to supplant the essential job functions of the position in question or otherwise adopt an alternative which results in undue hardship. (Cf. DFEH v. City of Anaheim, Police Department (1982) FEHC Dec. No. 82-08, at p. 11 [1982 WL 36753; 1982-83 CEB 4].)

Moreover, the Department's proposals would require respondent to change and coordinate the schedules of numerous individuals outside the physical education department to ensure that a male would be available to supervise the boys' locker room at the beginning and end of numerous physical education classes, even to the extent of requiring respondent to dismantle its "core-team" educational program. Neither our Act nor our regulations requires this kind of accommodation.

The Department argues, however, that respondent failed to explore possible accommodation before refusing to consider complainant for the job opening. The evidence substantiates this contention. After principal Jean Burns and personnel director Richard Andrus concluded that hiring a female physical education teacher would result in inadequate supervision of the boys' locker room, the District did not explore any accommodation or further consider complainant for the position. Instead, respondent selected a male physical education teacher.

"[E]xcept in extreme circumstances, government agencies must attempt to make *suitable accommodations* in matters where the privacy interests of the population to be served clash with the applicant's right to obtain a job without fear of sexual discrimination." (County of Alameda v. Fair Employment & Housing Com., supra, 15 Cal.App.3d at p. 506 (emphasis in original).) When an employer neither explores the possibility of providing

reasonable accommodation nor provides a feasible accommodation which will serve both the privacy concern and the interest of equal employment opportunity, the employer may have violated the Act. (Cf. E.E.O.C. v. Ithaca Industries (4th Cir. 1988) 849 F.2d 116 [failure to explore accommodation for religious beliefs is a violation of Title VII where evidence at trial showed that accommodation would have been possible].) Yet, "[i]f an employer can show that no accommodation was possible without undue hardship, it makes no sense to require that . . . [the employer] . . . engage in a futile act; and, under these circumstances, the employer will not be liable under the Act. (Cf. E.E.O.C. v. Townley Engineering & Manufacturing Co. (9th Cir. 1988) 859 F.2d. 610, 614.) At hearing, the employer must establish that it had a "factual basis for believing that sex is a BFOQ," but the employer does not "need to show that, at the time it implemented the same-sex policy, it could have proven that sex was a BFOQ." (Cf. Hernandez v. Univ. of St. Thomas (D. Minn 1992) 793 F.Supp. 214, 217.)

Here, assuming *arguendo* that the Act requires respondent to shift 30 to 40 percent of the physical education position's duties to individuals who are not physical education teachers, the evidence at hearing showed that it would have been "futile" to explore possible accommodation because there were no feasible alternatives.

First, respondent established that rescheduling the male non-physical education teachers on staff was not a feasible alternative. Each teacher taught his own classes for five of the seven teaching periods and was entitled to one additional "preparation" period. The only remaining period was the "supervision" period. For core teachers, the supervision period was "protected" time and not available for reassignment.

At hearing, respondent evaluated a variety of rescheduling scenarios involving the male non-physical education teachers at Laguna Middle School. None of these options, however, would have resulted in adequate supervision of the boys' locker room. Principal Burns testified that if the respondent had filled the physical education opening with a female teacher, for the Fall 1995 semester there would have been five class periods each day with an insufficient number of male physical education teachers available to supervise the boys' locker room.

Alternatively, if Burns had scheduled all available "non-core" teachers to cover the boys' locker room during their "supervision" period, at least two periods would have inadequate boys' locker room supervision. And, even assuming that Burns dismantled the "core-team" educational program, by scheduling both "core" and "non-core" male teachers to cover the boys' locker room during their "supervision" period, there would still be one period daily without adequate supervision of the boys' locker room. 1/ Thus, there simply were not enough male teachers on staff to supervise the boys' locker room.

Second, the Department's assertion that respondent could have accommodated complainant by using male student-aides or community volunteers to supervise the boys' locker room also was not feasible. The record contained ample evidence on the importance and difficulty of locker room supervision. For many students, the middle school physical education class is the first time they must undress in front of their peers. Adequate locker room supervision is critical to ensure that students do not engage in inappropriate or unsafe behavior. Student-aides are not a reasonable substitute for supervision by physical education teachers because seventh and eight grade students lack the maturity, judgment, self-confidence, knowledge, and authority to supervise their peers. Similarly, the Department's proposal to use community volunteers is troubling, and fraught with potential safety and liability problems. Moreover, the District should not have to make permanent personnel decisions based upon the contingency of finding community volunteers to perform 30 to 40 percent of a teaching position.

Third, the Department's proposal to assign locker room supervision to the campus police officer was not a feasible option. The police officer was on the school premises only two days per week, and had other duties to perform. Finally, the Department's suggestion that respondent create a new position for

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2/ In making these calculations, Burns looked at the class schedule, the gender of the teachers of staff, the "supervision" periods when each male teacher was available, whether teachers were "core" or "non-core," and the number of students scheduled for physical education for each period.

the sole purpose of supervising the boys' locker room would require respondent to hire an additional person to supplant the essential job functions of the position in question. This is an alternative which the Act does not require. (Cf. DFEH v. City of Anaheim, Police Department, supra, 1982-83 CEB 4. at p. 11].)

For the reasons described above, respondent's exploration of possible accommodation would have been a "futile act," because none of the proposed accommodations was feasible. Accordingly, respondent's failure to explore accommodation did not violate the Act.

In light of the foregoing, respondent has met its burden of showing that reasonable accommodation was unavailable. Therefore, respondent has met the BFOQ defense.

C. Conclusion

As the Commission noted in DFEH v. Hoag Memorial Hospital Presbyterian, supra, 1984-85 CEB 14, at p. 16, the existence of a BFOQ defense is always dependent upon the particular facts of the case. Here, respondent has proved that the privacy rights of students at Laguna Middle School, in conjunction with legitimate and necessary concerns for educational and staffing needs of the school, warrant the recognition of a BFOQ for the position in question. Thus, respondent has established legal justification for its sex discrimination against complainant, and the accusation will be dismissed.1/

1/ In the accusation, the Department alleged that respondent failed to take all reasonable steps to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (i). At closing argument, however, the Department did not address this allegation. In any event, there was insufficient evidence to establish a violation of subdivision (i).

ORDER

The accusation is dismissed.

Any party adversely affected by this Decision may seek judicial review of the Decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Commission and copies should be delivered to all parties and complainant.

DATED: September 10, 1998

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Jo Anne Frankfurt
Hearing Officer