

NOTES

DOES TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 PROHIBIT EMPLOYMENT DISCRIMINATION — AN ANALYSIS

Title IX of the Education Amendments of 1972¹ prohibits discrimination based on sex in any federally funded educational program. Section 901 of title IX provides in pertinent part that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"² In enacting title IX, Congress sought to accomplish two related objectives: it wanted to avoid the use of federal funds to support discriminatory practices, and it wanted to provide individuals with effective protection against those practices.³ To accomplish these ends, Congress patterned title IX after title VI of the Civil Rights Act of 1964,⁴ which prohibits discrimination on the basis of race, color or national origin in federally funded programs or activities.⁵ Congress intended title IX to do for women students what title VI had done for minorities. In fact, the language in section 901 of title IX is almost identical to that of section 601 of title VI.⁶ The major difference between the two statutes is that title VI contains a provision, section 604, which explicitly excludes employment from title VI's coverage by providing that, "[n]othing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment."⁷ Title IX, however, lacks a provision that explicitly excludes employment from its coverage.

When the Department of Health, Education and Welfare (HEW) promulgated regulations to give effect to title IX,⁸ it included employment prac-

¹ 20 U.S.C. §§ 1681-1686 (1976).

² 20 U.S.C. § 1681(a) (1976).

³ *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979). In support of this declaration, the Court cited a comment made by title IX's Senate sponsor, Senator Bayh, while the bill was pending, "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers." *Id.* at 704 n.36 (quoting 118 CONG. REC. 5806-07 (1972)).

⁴ *See, e.g.*, 118 CONG. REC. 5803, 5807 (1972).

⁵ 42 U.S.C. §§ 2000d-2000d-6 (1976).

⁶ Section 601 of title VI provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1976).

⁷ 42 U.S.C. § 2000d-3 (1976).

⁸ This authority was granted by 20 U.S.C. § 1682 (1976). Jurisdiction over educational matters was transferred from HEW to the new Department of Education on May 4, 1980. Pub. L. No. 96-88, § 301, 93 Stat. 677 (codified at 20 U.S.C. § 3441 (Supp. III 1979)). Due to this transfer of functions, the HEW regulations effectuating title IX, 45 C.F.R. §§ 86.1-86.71

tices of educational institutions within the reach of the Act's prohibitions.⁹ The validity of these employment-related regulations has been challenged in several courts as exceeding the authority granted to HEW by title IX.¹⁰ The issue considered by these courts is whether title IX includes a prohibition against sex discrimination in the employment practices of educational institutions or whether it only prohibits discrimination against students based on sex. If title IX does not encompass employment discrimination, then HEW has exceeded its authority by promulgating the title IX employment regulations and they are invalid.

The controversy over whether title IX protects the employees of educational institutions as well as the students has arisen for several reasons. First, the statutory language of section 901 of title IX is ambiguous. Second, unlike title VI, the statute fails to prohibit employment from its coverage in explicit terms. Finally, the legislative history contains remarks that are susceptible to more than one interpretation. The confusion created by these factors is illustrated by the three different interpretations of the scope of title IX's coverage that have been espoused by courts that have addressed this issue: (1) title IX does not include employment,¹¹ (2) title IX covers all employment practices of schools receiving federal money,¹² and (3) title IX regulates employment practices only in specific, federally funded programs.¹³

The view held by a majority of the courts of appeals which have decided this issue is that title IX does not cover employment practices and that HEW has exceeded its authority under title IX by promulgating regulations govern-

(1979), have been reissued in identical form in 34 C.F.R. §§ 106.1-106.71 (1980). 45 Fed. Reg. 30802 (May 9, 1980). In order to be consistent with the previously decided cases, this note will continue to refer to HEW and to the original regulations.

⁹ 45 C.F.R. §§ 86.51-86.61 (1979). Although these regulations cover a wide range of employment practices, such as compensation, job classification and fringe benefits, the major thrust of the regulations is contained in 45 C.F.R. § 86.51(a)(1) (1979) which provides:

No person shall, on the basis of sex, be excluded from participation in, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

Id.

¹⁰ See *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980); *North Haven Bd. of Educ. v. Hufstедler*, 621 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986); *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir. 1980) *cert. granted sub nom.* *Department of Educ. v. Seattle Univ.*, 101 S.Ct. 563 (1980) (No. 80-493); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist. of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹¹ *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir. 1980) *cert. granted sub nom.* *Department of Educ. v. Seattle Univ.*, 101 S.Ct. 563 (1980) (No. 80-493); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist. of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹² *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

¹³ *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980).

ing the employment practices of educational institutions.¹⁴ The leading case adhering to this view is *Islesboro School Committee v. Califano*.¹⁵ In that case, several school districts in Maine were accused of discrimination on the basis of sex in their maternity leave policies because they treated maternity differently from other temporary disabilities.¹⁶ These policies were alleged to violate title IX and an HEW regulation.¹⁷ The First Circuit Court of Appeals, however, held that title IX is limited to prohibiting sex discrimination against students and other direct beneficiaries of federal educational assistance funds and does not extend to the employment practices of educational institutions receiving such funds.¹⁸ Accordingly, the court held that HEW had no power to promulgate the regulations concerning employment.¹⁹

In contrast to the First Circuit's determination that employment is not covered under title IX, the Second Circuit Court of Appeals in *North Haven Board of Education v. Hufstедler* held that title IX does authorize the regulation of employment practices by HEW.²⁰ In that case, it was alleged that the North Haven Board of Education had violated title IX and the HEW regulations by refusing to rehire a tenured teacher after a one year maternity leave.²¹ In examining the scope of title IX and the validity of the regulations, the court held that title IX gave HEW the authority to promulgate its employment discrimination regulations.²²

The third interpretation of the scope of title IX was recently espoused in *Dougherty County School System v. Harris* by the Fifth Circuit Court of Appeals, which held that HEW's regulations must be program-specific.²³ HEW found that the Dougherty County School System had violated HEW regulations by paying a salary supplement to industrial arts teachers, but not to home economics teachers.²⁴ The Fifth Circuit held that the regulations were invalid because they were not limited in effect to the specific programs that receive federal financial assistance.²⁵ Thus, under this view employment is covered by title IX, but that coverage is limited to the specific programs that receive federal funds.

¹⁴ See cases cited at note 11 *supra*.

¹⁵ 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹⁶ *Id.* at 426.

¹⁷ *Id.* The HEW regulation allegedly violated provided:

A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

45 C.F.R. § 86.57(c) (1979).

¹⁸ 593 F.2d at 428.

¹⁹ *Id.* at 429.

²⁰ 629 F.2d 773, 786 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 101 S.Ct. 1345 (1981) (No. 80-986).

²¹ *Id.* at 775.

²² *Id.* at 786.

²³ 622 F.2d 735, 738 (5th Cir. 1980).

²⁴ *Id.* at 736.

²⁵ *Id.* at 738.

In sum, title IX prohibits sex discrimination in federally funded education programs. The statutory language of title IX does not explicitly include or exclude employment practices. As a result, the courts are in disagreement over whether title IX includes a prohibition against sex discrimination in the employment practices of federally funded education programs.

This note will suggest that an examination of title IX's language, legislative history, and the policy behind title IX leads to the conclusion that title IX does not cover the employment practices of educational programs receiving federal financial assistance. As a result, the HEW employment regulations are invalid. In reaching this conclusion, this note will begin with an examination of title IX's language. This investigation will be followed by a review of the legislative history of title IX, and of post-passage developments, which have been claimed to support the view that title IX covers employment. Then, because title IX was patterned after title VI, that title will be examined. The enforcement powers of HEW as limited by title IX will then be discussed because the remedial measures offered by the statute suggest that its scope was intended to be narrow. Finally, this note will turn to an examination of the policy factors which favor the view that title IX is aimed at and limited to prohibiting discrimination against students.

I. STATUTORY LANGUAGE

None of the language in title IX directly states whether or not employment practices are covered. It may be inferred, however, that title IX covers only students, not employees, because all of the specific exceptions to the broad prohibitory language of section 901 focus exclusively on discrimination against students. It is unlikely that title IX was enacted to cover employment without a single caveat. Indeed, title VII of the Civil Rights Act of 1964²⁶ and the Equal Pay Act,²⁷ which explicitly cover employment, both contain significant restrictions. There is no reason to believe that Congress intended to lift these restrictions in enacting title IX.

Title IX, by its terms, does not specifically mention employment in its prohibition of sex discrimination.²⁸ The basic prohibition against sex discrimination is set forth in section 901 of title IX.²⁹ This section also contains nine exceptions to its ban; none of these exceptions is employment-related.³⁰ Of the nine exemptions, five were a part of the statute as it was originally passed and are related to institutions.³¹ The remaining four exceptions were added later

²⁶ 42 U.S.C. §§ 2000e-2000e-17 (1976).

²⁷ 29 U.S.C. § 206(d) (1976).

²⁸ See text and note at note 2 *supra*.

²⁹ 20 U.S.C. § 1681(a) (1976).

³⁰ See 20 U.S.C. §§ 1681(a)(1)-1681(a)(9) (1976).

³¹ Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, §§ 901(a)(1)-901(a)(5), 86 Stat. 235, 373 (codified at 20 U.S.C. §§ 1681(a)(1)-1681(a)(5) (1976)).

and are directed at student activities and organizations.³² Specifically, the original five exemptions describe the types of institutions to which title IX's prohibition applies and set time deadlines for reaching full compliance.³³ The first exception lists the classes of educational institutions subject to section 901's prohibition in regard to their admission practices.³⁴ Thus, in regard to admissions, title IX applies only to institutions of vocational education, professional education, graduate higher education and public institutions of undergraduate higher education.³⁵ The second exception provides that for a specified number of years title IX shall not apply to the admission practices of an educational institution that is in the process of becoming a co-educational school.³⁶ An exemption for institutions controlled by religious organizations where the application of title IX would be inconsistent with its religious tenets is contained in the third exemption.³⁷ This is followed by a proviso for institutions that train individuals for military service or the merchant marine.³⁸ The fifth exception provides that title IX shall not apply in regard to admissions to public institutions of undergraduate higher education that continually from their establishment have admitted only students of one sex.³⁹

In addition, the four later exceptions⁴⁰ are concerned only with removing certain student activities and organizations from title IX's coverage. Membership in social fraternities and sororities and voluntary youth service organizations that traditionally have been limited to persons of one sex, such as the Girl Scouts and Boy Scouts, are exempt.⁴¹ Similarly excluded are the activities of the American Legion and educational institutions with regard to Boys Nation or State Conferences and Girls Nation or State Conferences.⁴² An educational institution is also allowed to have father-son or mother-daughter activities as long as both sexes have opportunities for reasonably comparable activities.⁴³ In addition, an educational institution may award financial assistance to a participant of a pageant which is limited to individuals of one sex.⁴⁴

None of these exceptions deals with or mentions employment. The inference to be drawn is that Congress's focus was on the students and the insti-

³² See 20 U.S.C. §§ 1681(a)(6)-1681(a)(9) (1976). Section 1681(a)(6) was added by Pub. L. No. 93-568, § 3(a), 88 Stat. 1855, 1862 in 1974. Sections 1681(a)(7), (a)(8) and (a)(9) were added by the Education Amendments of 1976, Pub. L. No. 94-482, tit. IV, § 412(a), 90 Stat. 2081, 2234.

³³ See 20 U.S.C. §§ 1681(a)(1)-1681(a)(5) (1976).

³⁴ 20 U.S.C. § 1681(a)(1) (1976).

³⁵ *Id.*

³⁶ 20 U.S.C. § 1681(a)(2) (1976).

³⁷ 20 U.S.C. § 1681(a)(3) (1976).

³⁸ 20 U.S.C. § 1681(a)(4) (1976).

³⁹ 20 U.S.C. § 1681(a)(5) (1976).

⁴⁰ 20 U.S.C. §§ 1681(a)(6)-1681(a)(9) (1976).

⁴¹ 20 U.S.C. § 1681(a)(6) (1976).

⁴² 20 U.S.C. § 1681(a)(7) (1976).

⁴³ 20 U.S.C. § 1681(a)(8) (1976).

⁴⁴ 20 U.S.C. § 1681(a)(9) (1976).

tutions, not on employees and employment practices. Further, these institution- and activity-related exceptions are evidence of the concern Congress had for very specific, detailed matters regarding title IX's coverage and application, and of the close attention it paid to detail when enacting legislation in the area of sex discrimination. It is likely that Congress would have been equally specific and detailed in employment matters, if it had intended that they be covered. There are only two possible explanations for the absence of any employment-related exceptions. First, it could be argued that Congress intended to allow wide-open coverage of employment under title IX, while closely regulating its application with respect to students and the types of institutions involved. Alternatively, the absence of employment-related exceptions could be viewed as evidence that Congress never meant employment practices to be regulated by title IX.⁴⁵ The latter explanation is the more likely of the two choices because when Congress has regulated employment discrimination, it usually has done so in more explicit terms.

An examination of both title VII, which prohibits employment discrimination because of race, color, religion, sex, or national origin,⁴⁶ and the Equal Pay Act, which prohibits discrimination on account of sex in the payment of wages to employees by employers,⁴⁷ demonstrates the careful delineation of employment coverage used by Congress.⁴⁸ For example, section 3 of the Equal Pay Act prohibits sex discrimination in the wage rate of employees doing equal work on jobs requiring equal skill, effort, and responsibility, and which are performed under similar working conditions.⁴⁹ But this prohibition is explicitly excepted when such payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or production, or a wage differential based on any other factor other than sex.⁵⁰ Similarly, section 703(a) of title VII declares that it is an unlawful employment practice to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.⁵¹ This provision is modified by section 703(e)(1), which allows employers to employ an individual on the basis of religion, sex, or national origin where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.⁵² Thus, title VII and the Equal Pay Act reveal that Congress was cognizant of the complexity of the employment discrimination area and illustrate Congress's careful attention to detail in deline-

⁴⁵ *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1032 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

⁴⁶ 42 U.S.C. §§ 2000e-2000e-17 (1976).

⁴⁷ 29 U.S.C. § 206(d) (1976).

⁴⁸ This argument is even more significant because amendments to both title VII and the Equal Pay Act were enacted as part of title IX. See text and notes at notes 100-05 *infra*.

⁴⁹ 29 U.S.C. § 206(d) (1976).

⁵⁰ *Id.*

⁵¹ 42 U.S.C. § 2000e-2(a) (1976).

⁵² 42 U.S.C. § 2000e-2(e)(1) (1976).

ating the parameters of such legislation. Since title IX does not even contain a reference to employment, it seems unlikely that title IX's language was intended to extend to the complicated area of employment discrimination.

Providing additional support for the view that Congress did not intend title IX's language to include a prohibition of employment discrimination is the absence of any directive by Congress that title IX's prohibition be consistent with title VII or the Equal Pay Act.⁵³ It has been argued that the possible inconsistency between title VII and title IX has been eliminated because HEW included an exemption in its regulations similar to the statutory exemption in title VII which permits sex discrimination where it is a bona fide occupational qualification.⁵⁴ While this HEW regulation is evidence that HEW has chosen to be consistent with title VII, the argument fails to recognize that there is nothing in title IX that requires HEW to do so. Under title IX, HEW could promulgate a regulation allowing it to withdraw funds for a type of sex discrimination that is expressly authorized under title VII. HEW also could write regulations requiring wage rates to be equal regardless of any seniority system, merit system, or other wage differential allowed under the Equal Pay Act.⁵⁵ Thus, the possibility of direct conflict between the HEW regulations and the Equal Pay Act and title VII would exist if title IX extended to employment discrimination.

Possible conflicts between employment discrimination statutes have been avoided in the past. For example, the Equal Pay Act became effective while title VII was pending before the Senate.⁵⁶ The following day a provision was added to title VII providing that if a wage differential were authorized by the Equal Pay Act it would not be unlawful under title VII.⁵⁷ This provision eliminated any possible conflicts between title VII and the Equal Pay Act. This effort to achieve consistency supports the view that title IX does not prohibit employment discrimination. Furthermore, the argument that HEW's regulations are not inconsistent with title VII or the Equal Pay Act avoids the real issue, which is whether or not HEW has the authority to regulate employment

⁵³ See 20 U.S.C. §§ 1681-1686 (1976).

⁵⁴ See, e.g., *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 785 n.12 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986). See 45 C.F.R. § 86.61 (1979).

⁵⁵ 45 C.F.R. § 86.54 (1979) provides:

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

- (a) Makes distinctions in rates of pay or other compensation;
- (b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

This regulation could be construed in a manner that would conflict with the Equal Pay Act since it does not explicitly allow the differentials authorized by the Equal Pay Act.

⁵⁶ The Equal Pay Act of 1963 was enacted on June 10, 1963 and went into effect on June 10, 1964. Equal Pay Act of 1963, Pub. L. No. 88-38, § 4, 77 Stat. 56, 57 (1963).

⁵⁷ 42 U.S.C. § 2000e-3(h) (1976). See 110 CONG. REC. 13647 (1964).

under title IX, not whether HEW has, by its actions, eliminated any possible conflicts.

In light of both the congressional attention to detail in regulating employment and the possibility of conflict with other statutes governing employment discrimination, Congress's silence should not be construed as evidence that employment discrimination is within the scope of title IX's prohibition. On the contrary, the silence is strong evidence that employment is not covered by title IX.⁵⁸ While it is true that Congress could have specifically exempted employment from title IX's coverage,⁵⁹ it is equally true that if Congress had meant employment to be covered, it could have specifically said so. It is imprudent to presume coverage on the basis of silence where the statutory language is unclear and there is so much room for conflict with other statutory schemes if coverage is assumed. In such a situation, caution and reason dictate the conclusion that the absence of any mention of employment in title IX supports a finding that employment discrimination is not within the scope of title IX.

In summary, Congress's silence should not be construed as evidence that employment discrimination is prohibited under title IX. Title IX's nine exceptions reveal that its focus is on institutions and student activities, not on employees. This interpretation is furthered by the explicit, detailed language that is present in employment discrimination legislation, such as title VII and the Equal Pay Act, but that is not present in title IX. Additionally, the possibility of inconsistencies between title IX and title VII and the Equal Pay Act would exist if title IX extended to employment discrimination. Congress has avoided conflict between the other statutes in this area. In light of these factors, the better view is that the language of title IX does not include a prohibition against employment discrimination. Admittedly, however, the statutory language is ambiguous as to the class of people to which its protection extends. Therefore, title IX's legislative history will be examined next to discern Congress's intent. This examination will show that, on the whole, neither the House of Representatives nor the Senate considered title IX to be directed toward employment practices.

II. LEGISLATIVE HISTORY

Title IX was one portion of the Education Amendments of 1972.⁶⁰ The Act originated as separate bills in both Houses of Congress which were considered simultaneously.⁶¹ In the House, title IX was a part of the bill when it was in-

⁵⁸ As the Supreme Court has noted, "[t]he intention of the legislature constitutes the law. That intention is manifested alike by what they have said *and by what they have omitted to say.*" *Bates v. Brown*, 72 U.S. 710, 718 (1866) (emphasis added).

⁵⁹ *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 783 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

⁶⁰ Pub. L. No. 92-318, 86 Stat. 235 (1972).

⁶¹ H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 9829 (1971); S. 659, 92d Cong., 1st Sess., 117 CONG. REC. 1994 (1971).

troduced and went through the regular committee procedure.⁶² In the Senate, title IX was not part of the bill that was considered in committee, but was added as an amendment while the bill was on the Senate floor.⁶³ Both bills were passed⁶⁴ and sent to conference where agreement over differing provisions was reached, and the resulting conference bill became law.⁶⁵

A. House History

The prohibition of sex discrimination which ultimately became title IX was originally introduced in the House of Representatives in 1970 as a section of an education bill.⁶⁶ This section proposed three changes in existing law. First, it provided that title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance, be amended by adding a prohibition against sex discrimination.⁶⁷ Second, this section of the bill further proposed that title VII's prohibition of employment discrimination be extended by deleting the exemption for educational institutions.⁶⁸ Finally, the section sought to eliminate the Equal Pay Act's provision exempting executive, administrative, and professional employees from its coverage.⁶⁹ That exemption had excluded teachers and educational administrators from the protections

⁶² See H.R. REP. NO. 554, 92d Cong., 1st Sess. 1, 108 (1971), *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 2462, 2566.

⁶³ 118 CONG. REC. 5802-03, 5815 (1972).

⁶⁴ The Senate version, S. 659, which did not contain any provisions prohibiting sex discrimination was passed first on August 6, 1971. 117 CONG. REC. 30500 (1971). The House bill, H.R. 7248, which did contain provisions prohibiting sex discrimination was passed by the House on November 4, 1971. *Id.* at 39354. The House, when it considered S. 659, as passed by the Senate, deleted the substance of the Senate bill and inserted in lieu thereof the contents of H.R. 7248. *Id.* at 39354, 39374. The resulting bill, S. 659, which now included sex discrimination bans, then went to the Senate. 118 CONG. REC. 4953 (1972). The Senate offered yet another substitute. *Id.* at 4974. This Senate substitute did not contain provisions on sex discrimination. *See id.* at 4974-5013. Ultimately, by amendment on the Senate floor, *id.* at 5802-03, sex discrimination prohibitions were incorporated into the substitute Senate bill. *Id.* at 5815. This substitute bill was enacted by the Senate. *Id.* at 6277. The House objected to the Senate substitute bill as passed and moved for a conference. *Id.* at 7540, 7562-63. The Senate agreed to a conference. *Id.* at 7961. A conference bill, S. 659, the Education Amendments of 1972, which included title IX, was reported by the conference committee. *Id.* at 18451-517. *See* S. CONF. REP. NO. 798, 92d Cong., 2d Sess. 1, *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 2608. This bill was agreed to in the Senate, 118 CONG. REC. 18862 (1972), and in the House. *Id.* at 20340. The bill became law on June 27, 1972 when it was approved by the President. *Id.* at 22702.

⁶⁵ *See* note 64 *supra*.

⁶⁶ H.R. 16098, § 805, 91st Cong., 2d Sess., 116 CONG. REC. 4072 (1970). For the text of section 805 *see* *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. 1 (1970) [hereinafter cited as *Section 805 Hearings*]. *See* 42 U.S.C. § 2000d (1976).

⁶⁷ H.R. 16098, § 805(a), *Section 805 Hearings*, *supra* note 66, at 1.

⁶⁸ H.R. 16098, § 805(b), *Section 805 Hearings*, *supra* note 66, at 1. *See* 42 U.S.C. § 2000e-1 (1970) (amended 1972).

⁶⁹ H.R. 16098, § 805(d), *Section 805 Hearings*, *supra* note 66, at 1. *See* 29 U.S.C. § 213(a) (1970) (amended 1972).

of the Equal Pay Act.⁷⁰ Thus, what eventually was to become section 901 of title IX of the Education Amendments of 1972 originally was introduced as a simple amendment to include sex as a prohibited basis of discrimination in title VI. Significantly, title VI does not regulate employment.⁷¹ Employment was to be regulated under the other provisions of the section.

There are other indications that, in its genesis, title IX was not considered to include employment. For example, during the hearings on this section of the bill, a representative of the Justice Department suggested that, instead of amending title VI, separate legislation be enacted that would prohibit sex discrimination in educational programs receiving federal financial assistance and that this prohibition be extended to employment discrimination.⁷² The Justice Department submitted a bill embodying their proposed alternative in two subsections.⁷³ The first subsection contained the same language as what was to become section 901 of title IX.⁷⁴ The second subsection explicitly stated that discrimination on the basis of sex was prohibited in an educational institution's employment practices.⁷⁵ This proposed bill was not acted upon by the House, but it does show that the language which became section 901 of title IX was not interpreted by the Justice Department as covering employment practices and that this information was conveyed to a Subcommittee of the House Committee that drafted title IX.⁷⁶

Although the 1970 bill was not passed, it did form the basis of the House version of the Education Amendments of 1972.⁷⁷ Instead of amending title VI, the new bill contained title IX, which prohibited sex discrimination in federally

⁷⁰ See 29 U.S.C. § 213(a) (1970) (amended 1972). See also 118 CONG. REC. 5807 (1972).

⁷¹ 42 U.S.C. § 2000d-3 (1976).

⁷² *Section 805 Hearings*, *supra* note 66, at 677-78.

⁷³ *Id.* at 690-91.

⁷⁴ Compare § 2(a) of the Justice Department proposal, *Section 805 Hearings*, *supra* note 66, at 690 with § 901 of title IX, 20 U.S.C. § 1681 (1976).

⁷⁵ Section 2(b) of the Justice Department proposal provided that:

No recipient of Federal financial assistance for an education program or activity shall, because of an individual's sex,

(1) fail or refuse to hire (except in instances where sex is a bona fide occupational qualification) or discharge that individual, or otherwise discriminate against him or her with respect to compensation, terms, conditions, or privileges of employment; or

(2) limit, segregate, or classify employees in any way which would deprive or tend to deprive that individual of employment opportunities or otherwise adversely affect his or her status as an employee.

Section 805 Hearings, *supra* note 66, at 690-91.

⁷⁶ The House Committee on Education and Labor drafted title IX. See H.R. REP. NO. 554, 92d Cong., 1st Sess. 1, 51-52 (1971), *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 2462, 2511-12.

⁷⁷ H.R. 7248, 92d Cong., 1st Sess. (1971). See H.R. REP. NO. 554, 92d Cong., 1st Sess. 1, 1-2 (1971), *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 2462, 2463. The title and section numbers used herein are the same as those contained in the final, enacted version of the Education Amendments of 1972. In earlier versions, title IX was designated as title X and the sections were numbered 1001, 1002, 1003, etc. rather than sections 901, 902, 903, etc.

assisted educational institutions and explicitly stated that employment practices were exempted from this prohibition.⁷⁸ Other sections of title IX provided for the deletion of title VII's exemption for employment in education and the deletion of the exemption for executive, administrative, and professional employees in the Equal Pay Act just as the 1970 bill had done.⁷⁹ Thus, although the House now proposed to create a new title for discrimination in education, rather than merely amend title VI, it did not intend that title to cover employment in the education field.

An examination of the House Committee Report on this bill⁸⁰ demonstrates that when the Committee mentioned employment discrimination, it was referring to title VII and the Equal Pay Act.⁸¹ For example, the Committee Report referred to employment discrimination as being an area related to section 901's basic prohibition and discussed the problem of sex discrimination in employment in conjunction with its description of title VII and the Equal Pay Act provisions.⁸² This careful demarcation of the sections in the House bill is significant given that the bill contained an explicit exemption for employment under section 901⁸³ because it demonstrates that the House thought employment discrimination was only a related area to section 901. Therefore, an inference can be drawn that the House did not believe employment discrimination would be covered under title IX even in the absence of an explicit exemption. The exemption's existence has been explained as having been inadvertently included since title IX was patterned after title VI which contained such an exemption.⁸⁴

Thus, throughout the evolution of title IX in the House of Representatives, it was never thought or intended that employment would be covered under title IX. In the final House version of title IX, there was an express provision that excluded employment. The Committee Report strongly suggests, however, that even if there were no express provision exempting it, the House believed that employment discrimination would only be covered under the Equal Pay Act and title VII.

B. Senate History

On the whole, the history of title IX in the Senate also indicates that employment was not intended to be a part of title IX's protection. Unlike the

⁷⁸ H.R. 7248, §§ 1001-1004, 92d Cong., 1st Sess., *reprinted in* 117 CONG. REC. 39098-99 (1971).

⁷⁹ H.R. 7248, § 1006, § 1008, 92d Cong., 1st Sess., *reprinted in* 117 CONG. REC. 39099 (1971).

⁸⁰ H.R. REP. NO. 554, 92d Cong., 1st Sess. 1, *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 2462.

⁸¹ *Id.* at 2511-12.

⁸² *Id.* at 2512.

⁸³ H.R. 7248, § 1004, 92d Cong., 1st Sess., *reprinted in* 117 CONG. REC. 39099 (1971).

⁸⁴ Representative O'Hara, who was one of the drafters of title IX, declared that the in-

House version, title IX did not originate in the education bill drafted by the Senate, but was added on as an amendment to the education bill when it was on the Senate floor.⁸⁵ The Senate version of title IX originated as an attempted amendment that was not accepted. The history of this attempted amendment will be examined first because it contained the same language as title IX in its final form. A second amendment was accepted and became title IX of the bill. The history of this actual title IX provision in the Senate will then be discussed.

In addition to prohibiting sex discrimination in education, the actual title IX provisions adopted by the Senate contained the provisions from the House version amending title VII and the Equal Pay Act which explains why references to employment were made in connection with title IX. A detailed examination of comments and dialogues of Senator Bayh, the amendment's sponsor, will follow because of their importance to the courts in arriving at a determination whether or not title IX extends to employment discrimination. Possible alternative interpretations of these comments will be presented which demonstrate that the better view is that Senator Bayh's comments are not evidence of an intention to include employment under title IX. This review will conclude that congressional intention to include employment within title IX's coverage can not be proven from the Senate history as a whole.

While the Senate education bill was pending on the Senate floor, Senator Birch Bayh offered an amendment which provided for the prohibition of sex discrimination in educational institutions.⁸⁶ This amendment was not accepted,⁸⁷ but it did form the basis of title IX as it was finally enacted by the Senate.⁸⁸ This precursor to title IX illustrates that title IX's language was not interpreted or intended to include employment in its coverage. During the floor debates on this proposed amendment, the amendment's sponsor, Senator Bayh, clearly and precisely stated that the intended scope of his amendment was to provide equal access for students.⁸⁹ He did not mention employees.⁹⁰ In addition, Senator Bayh specifically construed the amendment's language as

clusion of the employment exemption was a drafting error because it was a cut and paste job of title VI. He further stated that significance should not be assigned to the deletion of the employment exemption at conference. These comments, however, were made after title IX was enacted. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 409 (1975)* [hereinafter cited as *Hearings on title IX regulations*].

⁸⁵ S. 659, amend. 398, 92d Cong., 1st Sess., 117 CONG. REC. 30155 (1971).

⁸⁶ *Id.*

⁸⁷ *Id.* at 30412.

⁸⁸ 118 CONG. REC. 5808, 5815 (1972). Compare S. 659, amend. 398, 92d Cong., 1st Sess., 117 CONG. REC. 30156 (1971) with 20 U.S.C. §§ 1681-1682 (1976).

⁸⁹ Senator Bayh stated "[w]hat we are trying to do is provide equal access for women and men *students* to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved." 117 CONG. REC. 30407 (1971) (emphasis added).

⁹⁰ See 117 CONG. REC. 30407 (1971).

not doing anything more than title VI does,⁹¹ and title VI does not extend to employment practices.⁹²

In spite of these clear statements, other remarks made by Senator Bayh before he introduced this amendment have been construed as indicating, at the very least, an initial intention to prohibit employment discrimination through title IX's language.⁹³ These remarks concerned the widespread problem of discrimination in both admissions and employment in education.⁹⁴ These remarks, however, were not made with specific reference to the provision of the amendment, but rather were a part of his introduction aimed at directing Congress's attention to the major discrimination problems existing in educational institutions. Further, these comments were made at the same time Senator Bayh stated his amendment was needed to ensure access to higher education and guarantee an equal educational opportunity for women.⁹⁵ Moreover, Senator Bayh did not discuss employment in his explanation of the amendment.⁹⁶ Employment was not mentioned by Senator Bayh or any other Senators throughout the debate.⁹⁷ Thus, it does not appear to have been contemplated that this amendment would include a prohibition against employment discrimination.

Although when it was first introduced, this proposed amendment was ruled non-germane,⁹⁸ as noted above, it formed the basis for the actual title IX amendment that was introduced and adopted the following year.⁹⁹ The actual

⁹¹ Senator Bayh specifically stated that,

[S]o far as involvement or supervision by the Secretary of HEW is concerned, we really are not doing anything to the private school that is not now in the law under title VI of the Civil Rights Act, relating to discrimination in other areas.

We are saying that the power which now resides in the Federal Government over private institutions shall be extended. We are only adding the 3-letter [sic] word "sex" to existing law.

117 CONG. REC. 30408 (1971).

⁹² See 42 U.S.C. § 2000d-3 (1976).

⁹³ *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 779 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

⁹⁴ *Id.* The *North Haven* court relied on the following remarks made by Senator Bayh before he introduced his amendment:

While over 50 percent of our population is female, there is no effective protection for them as they seek admission *and employment* in educational facilities. The anti-discrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning.

...

Today, women seeking *employment* in higher education face an array of obstacles almost as insuperable as those which used to face blacks.

Id. (citing 117 CONG. REC. 30155-56 (1971)) (emphasis added by the court).

⁹⁵ 117 CONG. REC. 30155 (1971).

⁹⁶ See *id.* at 30155-58, 30399-415 (1971).

⁹⁷ *Id.* at 30399-415.

⁹⁸ *Id.* at 30412, 30415.

⁹⁹ The amendment was introduced on February 28, 1972, 118 CONG. REC. 5802-03 (1972), and adopted on the same day, *id.* at 5815.

title IX amendment incorporated "not only the key provisions of [the] earlier amendment, but also the strongest points of the antidiscrimination amendments approved by the House."¹⁰⁰ These House amendments proposed the deletion of title VII's exemption for educational institutions and the removal of the exception for executive, administrative, and professional personnel from the Equal Pay Act.¹⁰¹ As a result of the addition of these provisions from the House amendments, the amendment introduced in the Senate was a package containing three major provisions. The first provision, section 901, prohibited sex discrimination in federally assisted programs or activities in educational institutions.¹⁰² Second, the amendment compelled educational institutions to comply with title VII's prohibition against employment discrimination by deleting the educational institution exemption from title VII.¹⁰³ The third major provision prohibited wage discrimination on the basis of sex among executive, administrative, and professional employees by removing this exception from the Equal Pay Act.¹⁰⁴ These last two provisions explicitly govern employment practices, whereas title IX is silent concerning employment. Therefore, the logical conclusion is that employment coverage was being added to the amendment under the title VII and the Equal Pay Act provisions, rather than being included under title IX. Even if it could be argued that Senator Bayh originally intended employment to be covered by his earlier amendment, the expansion of this second amendment to include the employment provisions from the House bill indicates that student discrimination was being separated from employment discrimination.

Comments made by Senator Bayh and exchanges between him and other Senate members during the course of the Senate debate on this amendment have been pivotal in the courts' resolution of the conflict over title IX's employment coverage.¹⁰⁵ The courts have relied heavily on their interpretation of Senator Bayh's comments in deciding whether or not employment is covered under title IX.¹⁰⁶ These comments are subject to differing interpretations by the courts because of unclear remarks made by Senator Bayh while the amendment was pending in the Senate. Senator Bayh introduced his amendment by explaining that:

¹⁰⁰ *Id.* at 5808.

¹⁰¹ Compare H.R. 7248, §§ 1001-1009, 92d Cong., 1st Sess., 117 CONG. REC. 39098-99 (1971) with S. 659, amend. 398, 92d Cong., 1st Sess., 117 CONG. REC. 30156-57 (1971) and S. 659, amend. 874, 92d Cong., 2d Sess., 118 CONG. REC. 5803 (1972).

¹⁰² S. 659, amend. 874, § 1001, 92d Cong., 2d Sess., 118 CONG. REC. 5803 (1972).

¹⁰³ *Id.* § 1005.

¹⁰⁴ *Id.* § 1009.

¹⁰⁵ See, *Dougherty County School System v. Harris*, 622 F.2d 735, 738 (5th Cir. 1980); *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 779-82 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986); *Romeo Community Schools v. HEW*, 600 F.2d 581, 585 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 427-28 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹⁰⁶ *Id.*

It is clear to me that sex discrimination reaches into all facets of education — admissions, scholarship programs, faculty hiring and promotion, professional staffing and pay scales. . . .

The *only* antidote is a *comprehensive amendment* such as the one now before the Senate.

Amendment 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs. . . . More specifically, the *heart of this amendment* is a *provision* banning sex discrimination in educational programs receiving Federal funds. The *amendment* would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions. Enforcement powers *include* fund termination provisions — and appropriate safeguards — parallel to those found in title VI of the 1964 Civil Rights Act. Other important *provisions* in the *amendment* would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.¹⁰⁷

These remarks by Senator Bayh have been interpreted by one court as “quite clearly” referring to faculty employment in conjunction with section 901 of title IX as well as to the “[o]ther important provisions” dealing with title VII and the Equal Pay Act.¹⁰⁸

This interpretation fails to recognize that Senator Bayh used two terms, “amendment” and “provision,” in his explanation of the scope of his amendment. Logically, the term “amendment” was used when discussing the entire package, and the term “provision” was used when discussing a specific portion of the amendment package. Senator Bayh began his introduction by referring to the *amendment* — the entire package — in broad terms.¹⁰⁹ He then referred to the heart of the amendment, the *provision* creating section 901, because it was something new.¹¹⁰ Sex discrimination was being prohibited in education for the first time, while the other provisions, although significant, merely broadened the coverage of existing statutes. The discussion then shifted back to the areas covered by the *amendment*. After that, Senator Bayh explained that the enforcement powers *included* but were not limited to those provided in title IX, and then he referred to the “[o]ther important provisions,” namely, title VII and the Equal Pay Act amendments.¹¹¹ At this point, Senator Bayh was distinguishing the “[o]ther important provisions” from the preceding discussion of

¹⁰⁷ 118 CONG. REC. 5803 (1972) (emphasis added).

¹⁰⁸ North Haven Bd. of Educ. v. Hufstедler, 629 F.2d 773, 780 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 101 S.Ct. 1345 (1981) (No. 80-986).

¹⁰⁹ See 118 CONG. REC. 5803 (1972).

¹¹⁰ *Id.*

¹¹¹ *Id.*

title IX's enforcement powers. He was not distinguishing the title VII and Equal Pay Act provisions from the broad discussion of the *amendment*. So viewed, it becomes apparent that Senator Bayh referred to employment only when he was talking about the *amendment* and not when he was discussing the individual *provision* of section 901 of title IX.

In addition to his introductory remarks, an oral summation of his amendment and its contents given by Senator Bayh on the Senate floor¹¹² has been the focus of judicial scrutiny.¹¹³ This summation supports a finding that employment was meant to be covered under title VII and the Equal Pay Act, not under title IX. This summation was divided into four parts. The first section of the summation was entitled "A. Prohibition of Sex Discrimination in Federally Funded Education Programs."¹¹⁴ The following section, labeled "B. Prohibition of Education-Related Employment Discrimination," described the amendments to title VII and the Equal Pay Act.¹¹⁵ The first part of section A began with Senator Bayh stating that "[c]entral to my amendment are sections 1001-1005. . . ."¹¹⁶ Later in this discussion of sections 1001-1005, Senator Bayh explained that "[t]his portion of the amendment covers discrimination in all areas where abuse has been mentioned — employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes and so forth."¹¹⁷ Sections 1001-1004 created the title IX prohibition against sex discrimination in educational institutions, and section 1005 amended title VII.¹¹⁸

The proposed amendment to title VII was also discussed in section B, the second part of the summary. Consequently, it has been asserted that the mention of section 1005 in the first part of the summary was simply an oversight,¹¹⁹ and, therefore, Senator Bayh's reference to employment in the above-quoted statement indicates that section 901 of title IX prohibits employment discrimination.¹²⁰ This argument, however, does not hold up for several reasons. First, the conclusion that the discussion of title VII under section B means its discussion under section A was a mistake is an assumption without sound basis. Title VII's inclusion in both sections A and B is reasonable. In section A of the summation, Senator Bayh in effect stated that sections 1001-1005 — title IX and title VII together — would cover all of the areas of sex discrimination in edu-

¹¹² 118 CONG. REC. 5806-08 (1972).

¹¹³ *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 780-81 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 428 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹¹⁴ 118 CONG. REC. 5807 (1972).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 5803. These sections were later renumbered 901-905. *See* H. CONF. REP. NO. 1085, 92d Cong., 2d Sess., 118 CONG. REC. 18452, 18493-94 (1972).

¹¹⁹ *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 781 n.11 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

¹²⁰ *Id.*

cational institutions.¹²¹ Since either title IX or title VII by itself would leave gaps in the coverage of this area, together they were "[c]entral to [his] amendment. . . ."¹²² Section B of the summation was then used to explain the need for the amendments to title VII and the Equal Pay Act.¹²³ Viewed in this light, title VII's inclusion in both sections A and B of the summation makes perfectly good sense. Second, it is less reasonable to assume that Senator Bayh did not know which sections of his amendment were which or that he made a careless error, than that he intentionally grouped the title IX and title VII amendments together in section A. Finally, the conclusion that this reference to title VII in the first part of the summary was an oversight does not constitute an analysis of the legislative history as it exists; it is instead an attempt to rewrite it. Therefore, Senator Bayh's summation supports the view that employment is not included under title IX because he included title VII in section A where he mentioned employment and there would have been no need to do so if title IX covered employment practices.

Following this summation, a section-by-section summary also was printed in the Congressional Record.¹²⁴ It began with a description of section 1001, the principal section of title IX, under the heading "*Basic Prohibition.*"¹²⁵ This description did not mention employment.¹²⁶ The summary also included a description of section 1005, the title VII amendment, under the heading "*Employment Discrimination.*"¹²⁷ These explanations of the provisions, along with the descriptive word headings, suggest that employment discrimination was intended to be covered only under title VII and the Equal Pay Act, not under title IX.

After Senator Bayh finished his presentation, the floor was opened for questions and debate. One particular exchange that discussed employment¹²⁸ has been much examined and is the subject of controversy.¹²⁹ The dialogue began with Senator Pell asking Senator Bayh whether sections 1001(a) and (b) excluded admissions practices of nonpublic institutions at the elementary and secondary level.¹³⁰ Senator Bayh replied that they were not covered and then stated that three different types of discrimination were being dealt with, admissions, available student services, and employment.¹³¹ He stated that there were no exceptions to the types of employment covered in the area of employment.

¹²¹ See 118 CONG. REC. 5807 (1972).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ 118 CONG. REC. 5808 (1972).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 5812-13 (remarks of Sen. Bayh and Sen. Pell).

¹²⁹ *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 781-82 (2d Cir. 1980), *cert. granted sub nom. North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 427 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹³⁰ 118 CONG. REC. 5812 (1972).

¹³¹ *Id.*

He was then asked if the faculty of private schools would have to reflect a sexual balance and he pronounced that the *amendment* only guaranteed equality of opportunity.¹³² In response to further inquiries, Senator Bayh stated that the employment practices of educational institutions controlled by religious organizations and military schools were explicitly excluded from coverage.¹³³

While it has been argued that this dialogue reveals Senator Bayh's clear intention to include employment in section 901 of title IX because his responses would not have made sense if it were not included,¹³⁴ other explanations are possible. In the first exchange, Senator Bayh's response was divided into three sections, two of which — admissions and services — were aimed specifically at students, the third — employment — at employees.¹³⁵ While his response was more extended than necessary for a direct answer to the question, it does not prove that title IX encompasses employment practices. It is important to note that in response to the question about the sexual balance of faculty, Senator Bayh responded that the *amendment* only guaranteed equality of opportunity.¹³⁶ He did not discuss it in terms of what title IX required. He instead referred to the entire amendment package. Thus, when the discussion was centered on employment, it is probable that Senator Bayh was referring to title VII.

This explanation is not defeated by Senator Bayh's responses concerning the exclusions for teachers at schools run by religious organizations and military schools. First, the Senate amendment, unlike the House version, contained an exemption under title VII for educational institutions with respect to the employment of individuals of a particular religion to perform work connected with its religious activities.¹³⁷ Second, with respect to the exclusion for military schools, title VII already contained a provision that an employer is not required to hire any individual who does not fulfill a requirement imposed under the security program where national security is concerned.¹³⁸ Thus, while Senator Bayh's language is somewhat ambiguous here, the more reasonable view is that all references to employment were references to title VII, rather than title IX. Therefore, even if Senator Bayh's intention was that title IX cover employment, it was never clearly manifested to the Senate.

There is nothing in the Senate debates that makes it clear that Congress thought title IX and employment were connected. Extreme caution should be exercised in attaching congressional intent to ambiguous and obscure statements. In sum, this examination of title IX from its inception in the Senate to its final passage in the Senate demonstrates that, on the whole, the Senate

¹³² *Id.*

¹³³ *Id.* at 5812-13.

¹³⁴ *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 782 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

¹³⁵ See 118 CONG. REC. 5812 (1972).

¹³⁶ *Id.*

¹³⁷ S. 659, amend. 874, § 1005(b)(1), 92d Cong., 2d Sess., 118 CONG. REC. 5803 (1972).

¹³⁸ 42 U.S.C. § 2000e-2(g) (1976).

history does not manifest an intention to have title IX incorporate employment practices in its prohibition of sex discrimination.

After the Senate passed its education bill,¹³⁹ which contained the title IX amendments, the bill went to conference along with the House version.¹⁴⁰ At conference, the House provision explicitly exempting employment from title IX's basic prohibition was deleted without explanation¹⁴¹ and the resulting bill became law.¹⁴² The deletion of title IX's explicit employment exemption will be examined and explained in conjunction with the analysis of title IX's prototype, title VI, in section IV of this note.¹⁴³

III. POST-PASSAGE DEVELOPMENTS

Certain post-passage developments concerning title IX have been cited as providing evidence that employment discrimination was intended to be prohibited by title IX.¹⁴⁴ First, after title IX was enacted, Senator Bayh stated that title IX did cover employment.¹⁴⁵ Second, Congress did not disapprove the regulations promulgated by HEW regulating the employment practices of educational institutions.¹⁴⁶ This section, however, will show that these post-passage developments are of no effect because they cannot be used as evidence of legislative intent or purpose. In addition, it will be demonstrated that Congress's failure to disapprove the HEW regulations does not support the view that employment is governed by title IX.

Senator Bayh's comments, made after title IX's passage, were clear expressions of his personal view that title IX does encompass employment. These comments, however, contrast sharply with the absence of any such clear expressions while his amendment was pending. The absence of any forthright statements by Senator Bayh that employment was covered under title IX before title IX's passage indicates that if he had this intention at that time, he was unclear about it. Thus, the Senate may not have intended the inclusion of employment under title IX despite Senator Bayh's later assertions that it did.

After title IX was enacted, a summary of title IX's requirements was prepared by Bernice Sandler of the Association of American Colleges and

¹³⁹ 118 CONG. REC. 6277 (1972).

¹⁴⁰ See *id.* at 7563, 7961.

¹⁴¹ See H. CONF. REP. NO. 1085, 92d Cong., 2d Sess., 118 CONG. REC. 18452 (1972); S. CONF. REP. NO. 798, 92d Cong., 2d Sess., *reprinted in* (1972) U.S. CODE CONG. & AD. NEWS 2608.

¹⁴² See 118 CONG. REC. 18862, 20340, 22702 (1972). The title IX provision amending title VII was deleted prior to the Act's enrollment as public law because the title VII amendment had already been enacted in another bill. See The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-04 (1972) amending 42 U.S.C. § 2000e-1 (1970).

¹⁴³ See text and notes at notes 190-96 *infra*.

¹⁴⁴ See *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 782, 783-84 (2d Cir. 1980), *cert. granted sub nom. North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

¹⁴⁵ See 118 CONG. REC. 24684 n.1 (1972). See also *Hearings on title IX regulations*, *supra* note 84, at 173.

¹⁴⁶ See text and notes at notes 155-68 *infra*.

printed in the Congressional Record at Senator Bayh's request.¹⁴⁷ This summary stated that title IX's provisions are patterned after title VI, and in a *footnote* to this statement, Sandler stated that "[t]itle VI also specifically excludes *employment* from coverage. . . . There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs."¹⁴⁸ The language in this footnote and Senator Bayh's implicit endorsement of it suggest that after title IX was enacted, Senator Bayh supported the position that title IX covers employment. Although it is the sponsors that are looked to when the meaning of statutory words are in doubt,¹⁴⁹ it is the sponsor's statements that are made while the Act is pending that are accorded substantial weight in interpreting the statute, *not* those statements made after its passage¹⁵⁰ because "statutes are construed by the courts with reference to the circumstances existing at the time of the passage."¹⁵¹ In the words of the United States Supreme Court, "post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. . . . Such statements 'represent only the personal views of these legislators since the statements were [made] after passage of the Act.'"¹⁵² As a result, only those comments made by Senator Bayh before title IX's passage can be used as evidence of congressional intent, and those comments were, at best, unclear about the scope of title IX regarding employment.¹⁵³ It was only after title IX's enactment that Senator Bayh more clearly suggested that employment was covered. Such post-passage comments do not indicate legislative intent and cannot be used to demonstrate the Senate's intent at the time it was passed.

Another post-passage development that has been cited in support of the view that title IX covers employment is Congress's failure to disapprove the HEW regulations on employment.¹⁵⁴ Three years after title IX was enacted, HEW's final title IX regulations were published.¹⁵⁵ Before they could go into effect, however, they had to undergo a statutorily mandated review by Congress.¹⁵⁶ The statute required agency regulations to be sent to Congress, and it

¹⁴⁷ 118 CONG. REC. 24683-85 (1972).

¹⁴⁸ *Id.* at 24684 n.1 (emphasis in original).

¹⁴⁹ *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 640 (1967). *But see* *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) (remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history).

¹⁵⁰ *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States v. United Mine Workers of America*, 330 U.S. 258, 282 (1947).

¹⁵¹ *United States v. Wise*, 370 U.S. 405, 411 (1962).

¹⁵² *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974) (quoting *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 639 n.34 (1967)).

¹⁵³ See text and notes at notes 105-39 *supra*.

¹⁵⁴ See *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 783-84 (2d Cir. 1980), *cert. granted sub nom. North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

¹⁵⁵ 40 Fed. Reg. 24127 (1975).

¹⁵⁶ See 20 U.S.C. § 1232(d)(1) (1976). This was made applicable to title IX by 20 U.S.C. § 1232(f) (1976) which became effective August 21, 1974.

provided that they would take effect forty-five days later unless Congress, by concurrent resolution, found the regulations to be inconsistent with the authorizing act and disapproved them.¹⁵⁷ Pursuant to this mandate, the HEW regulations were laid before Congress.¹⁵⁸ Resolutions were introduced in both the House and the Senate but no action was taken on the Senate resolutions.¹⁵⁹ Of the four resolutions introduced in the House,¹⁶⁰ only one had any action taken on it.¹⁶¹ An amendment to this one resolution sought specifically to disapprove the employment sections of the regulations.¹⁶²

The House Subcommittee on Post-Secondary Education held six days of hearings to determine whether the regulations were consistent with title IX.¹⁶³ During these hearings, Senator Bayh testified in support of the HEW regulations, stating that HEW's "title IX guidelines, as the Congress mandated, call for equality in admissions, financial aid, course offerings, career counseling, and in the case of teachers and other educational personnel, employment, pay and promotions."¹⁶⁴ This is just another post-passage comment that reflects Senator Bayh's personal view, not congressional intent. At this point, Senator Bayh could strive for the broadest application of title IX since it had already been passed and the regulations promulgated.

After these hearings, the Subcommittee reported the resolution to the full committee, which voted to refer it to the Equal Opportunities Subcom-

¹⁵⁷ The statute provides in pertinent part that:

Concurrently with the publication in the Federal Register of any final regulation as required in subsection (b) of this section, such final regulation shall be transmitted to the Speaker of the House of Representatives and the President of the Senate. Such final regulations shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority and disapprove such regulation.

20 U.S.C. § 1232(d)(1) (1976).

¹⁵⁸ Senator Helms stated that the regulations were submitted to the Senate on June 3, 1975. 121 CONG. REC. 17301 (1975). The regulations were submitted to the House on June 4, 1975. Executive Communication 1168, 121 CONG. REC. 16924 (1975).

¹⁵⁹ On June 5, 1975, Senator Helms introduced a concurrent resolution which was a blanket disapproval of the regulations. S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17301 (1975). On July 16, 1975, Senator Laxalt introduced a resolution disapproving those sections of the regulations regulating athletics. S. Con. Res. 52, 94th Cong., 1st Sess., 121 CONG. REC. 22940 (1975). According to Senator Helms, the Senate Committee met in executive session on his resolution and without conducting any public hearings decided not to report the resolution to the full Senate. 121 CONG. REC. 23846 (1975).

¹⁶⁰ Representative Martin introduced two resolutions: a broad disapproval of the regulations and a disapproval of the athletic regulations. H.R. Con. Res. 310 and H.R. Con. Res. 311, 94th Cong., 1st Sess., 121 CONG. REC. 19209 (1975). On July 8, 1975, two resolutions were introduced by Representative O'Hara for himself and seven other Representatives. H.R. Con. Res. 329 and H.R. Con. Res. 330, 94th Cong., 1st Sess., 121 CONG. REC. 21687 (1975).

¹⁶¹ This was H.R. Con. Res. 330, 94th Cong., 1st Sess. (1975). See *Hearings on title IX regulations*, *supra* note 84, at 1.

¹⁶² Unpublished Amendment to H.R. Con. Res. 330, *Hearings on title IX regulations*, *supra* note 84, on file with the House Committee on Education and Labor.

¹⁶³ See *Hearings on title IX regulations*, *supra* note 84.

¹⁶⁴ *Id.* at 173.

mittee.¹⁶⁵ This subcommittee held a one-day hearing,¹⁶⁶ and then recommended that the full committee reject the resolution.¹⁶⁷ It was never passed out of the Committee. Thus, no concurrent resolution was passed by either House of Congress and HEW's regulations went into effect.¹⁶⁸

That Congress did not disapprove the regulations should not be given any weight with respect to Congress's intent at the time it passed title IX. First, congressional inaction cannot operate to make a regulation into an Act of Congress.¹⁶⁹ If employment is not within the scope of title IX as enacted, as evidenced by the statutory language and legislative history, the failure of Congress to disapprove the employment regulations after its passage cannot change it so that it is within the scope of title IX.¹⁷⁰

Second, congressional inaction should not be construed as approval. At the time Congress reviewed the HEW regulations, it was in the process of passing an amendment to the review statute.¹⁷¹ This amendment, added four months after the title IX regulations took effect, stated that the failure of Congress to adopt a concurrent resolution disapproving a regulation shall neither represent an approval or finding of consistency with its authorizing Act, nor shall it be construed as evidence of such in establishing a *prima facie* case, an inference, or a presumption in any judicial proceeding.¹⁷² Although this amendment had not yet taken effect when the HEW regulations were reviewed, its adoption shows that Congress did not approve of congressional inaction being used in support of a regulation. Thus, the absence of congressional disapproval of the title IX regulations should not be used as evidence that employment is covered under title IX.¹⁷³

Furthermore, only a few members of the House and Senate considered and voted on the merits of any of the resolutions in committee.¹⁷⁴ A committee is not Congress, therefore, committee inaction is not necessarily indicative of congressional intent and purpose in enacting title IX.¹⁷⁵

¹⁶⁵ 33 CONG. Q. 1484 (1975).

¹⁶⁶ *Hearing on House Concurrent Resolution 330 (Title IX Regulation) Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 1* (1975).

¹⁶⁷ *Id.* at 39-40.

¹⁶⁸ The regulations went into effect on July 21, 1975. See 40 Fed. Reg. ii (July 21, 1975); 121 CONG. REC. 23846 (1975).

¹⁶⁹ Every bill must pass both the House of Representatives and the Senate and then be presented to the President. If the President signs it, it becomes law. If he does not take any action within ten days, the bill will become law. If the President returns it to the Congress, both Houses must approve the bill by a two-thirds vote in order for the bill to become law. U.S. CONST. art. I, § 7, cl. 2.

¹⁷⁰ See text at notes 151-52 *supra*.

¹⁷¹ H.R. 7217, § 13, 94th Cong., 1st Sess., 121 CONG. REC. 25530 (1975).

¹⁷² Pub. L. No. 94-142, § 7(b), 89 Stat. 796 (amending 20 U.S.C. § 1232(d)(1) (Supp. IV 1974)).

¹⁷³ *Islesboro School Comm. v. Califano*, 593 F.2d 424, 428 n.3 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹⁷⁴ See text and notes at notes 159-68 *supra*.

¹⁷⁵ After the HEW regulations became effective, Senator McClure sought to amend title IX. He stated:

In sum, post-passage comments are not indicative of congressional intent at the time an Act is passed. Therefore, Senator Bayh's statements concerning title IX's coverage of employment represent only a personal view that cannot be used as evidence of Congress's intent when it enacted title IX. Further, Congress's failure to disapprove the HEW employment regulations should not be used in determining congressional intent for two reasons. First, Congress has declared expressly through legislation that failure to disapprove a regulation does not represent approval of it, and second, the entire Congress did not have an opportunity to disapprove the regulations because none of the resolutions ever got out of committee.

IV. TITLE VI'S HISTORY

Title VI, which was the prototype for title IX,¹⁷⁶ prohibits discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance.¹⁷⁷ While title VI has an express exemption for employment that title IX does not have,¹⁷⁸ title VI's legislative history reveals that even without this exemption Congress did not interpret the

Those of us who would have [the title IX regulations] put back into the context of the original congressional enactment are faced with the frustration of a committee that desires to overreach, but is not expressive of the will of the majority of Congress. That is absolutely the case in this particular matter, because there is no question that Congress did not intend the length and breadth of the regulations under title IX. . . .

. . . I say that with respect to title IX, because there are a number of us, who, for 2 years have been trying to get this committee to act on title IX regulations and the committee refuses to act.

122 CONG. REC. 28144 (1976).

Another argument which has been made in rejecting the contention that Congress's failure to disapprove HEW's employment regulations proves that employment is included under title IX is that the regulations came before Congress three years after title IX was enacted. See Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. REV. 133, 156-57, which argues that although there was a substantial continuity of membership between the 92d Congress, which enacted title IX, and the 94th Congress, which reviewed the HEW regulations, there were many members in the 94th Congress who did not take part in title IX's enactment. In support of this contention, the article reports that thirteen of the forty members of the House Committee on Education and Labor of the 94th Congress were not members of the 92d Congress and, therefore, had no direct access to the intent of Congress other than the legislative history of title IX. *Id.*

On the day the HEW regulations became effective, a bill proposing to limit several areas of title IX's coverage, including employment, was introduced. S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23845-47 (1975). The sponsor, Senator Helms, declared that the reason he was introducing this bill was because HEW effectively had rewritten title IX by extending its scope beyond that authorized by title IX. *Id.* at 23845. This bill was never adopted. Once again, this is a post-passage event, which should have no bearing on a determination of congressional intent at the time title IX was enacted.

¹⁷⁶ See, e.g., 118 CONG. REC. 5803, 5807 (1972).

¹⁷⁷ Section 601 of title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1976). Title IX's language is substantially similar. See text at note 2 *supra*.

¹⁷⁸ 42 U.S.C. § 2000d-3 (1976).

language in title VI as including employment practices. Thus, the legislative history of title VI is instructive in interpreting the scope of title IX's coverage. Possible explanations for the deletion of title IX's employment exemption at conference will then be explored.

When title VI of the Civil Rights Act of 1964 was introduced originally in the House of Representatives, its first section, section 601, contained language expressly prohibiting employment discrimination in federally assisted programs.¹⁷⁹ Subsequently, this version of title VI was revised by the House Committee on the Judiciary so that the language relating to employment was deleted.¹⁸⁰ This revision became section 601 of title VI as it was finally enacted by the House.¹⁸¹ Logically, when the House Committee deleted the express prohibition against employment discrimination, it intended to remove employment from title VI's coverage. Similarly, when Congress used nearly identical language in title IX, without mentioning employment, it intended not to include employment.

In considering title VI, members of both the House and the Senate emphasized that the revised version of title VI applied only to the beneficiaries of federal programs and did not cover those employed in connection with such programs.¹⁸² For example, during the hearings before the House Rules Committee, the Chairman of the House Judiciary Committee stated that title VI was concerned only with the integration of students.¹⁸³ He noted specifically

¹⁷⁹ H.R. 7152, § 601, 88th Cong., 1st Sess., 109 CONG. REC. 11252 (1963) in pertinent part provided that, "[a]ll contracts made in connection with any such program or activity shall contain such conditions as the President may prescribe for the purpose of assuring that there shall be no discrimination in employment by any contractor or subcontractor on the ground of race, color, religion, or national origin." *Civil Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 88th Cong., 1st Sess. 659 (1963) [hereinafter cited as *Civil Rights Hearings*].

¹⁸⁰ Subcommittee No. 5 of the House Judiciary Committee met in executive session and struck out of H.R. 7152, as amended, all after the enacting clause and inserted in lieu thereof an amendment in the nature of a substitute. H.R. REP. NO. 914, 88th Cong., 1st Sess. 1 (1963), reprinted in (1964) U.S. CODE CONG. & AD. NEWS 2391, 2392. The text of the substitute version of title VI is found in H.R. REP. NO. 914, 88th Cong., 1st Sess. 8 (1963).

Title VII was also revised from its original three sections, see *Civil Rights Hearings*, *supra* note 178, at 659, to its expanded and strengthened final form to cover employment more thoroughly. See H.R. REP. NO. 914, 88th Cong., 1st Sess. 9-15 (1963).

¹⁸¹ 110 CONG. REC. 15896, 15897 (1964).

¹⁸² *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 198 (1964) [hereinafter cited as *H.R. 7152 Hearings*] (statements of Rep. Celler); *id.* at 228 (statement of Rep. McCulloch).

Before section 601's language was revised, Senator Ervin declared that title VI was closely related to title VII because part of title VI dealt with the same question as title VII. *Civil Rights — The President's Program, 1963: Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. 331 (1963). After title VI's revision, Senator Ervin commented that the revision of title VI deleting the second sentence of title VI removed the provisions pertaining to the Fair Employment Practices Committee procedure. *Id.* at 335.

Also a letter from the Attorney General, which was twice printed in the Congressional Record, declared that title VI would not cover employment unless employees were the intended beneficiaries of federal funding. 110 CONG. REC. 10076, 11941 (1964).

¹⁸³ *H.R. 7152 Hearings*, *supra* note 182, at 198 (statement of Rep. Celler).

that employment was not covered. As an example, he declared that discrimination against a dishwasher employed by a recipient of federal aid would not be protected from possible employment discrimination by title VI.¹⁸⁴ Thus, the history of title VI in the House reveals that title VI's language was not meant to include employment.

The legislative history of title VI in the Senate leads to the same conclusion. There, an amendment in the way of a substitute for the version of the bill passed by the House was introduced.¹⁸⁵ This substitute included a new provision added to title VI, section 604, which explicitly exempted employment.¹⁸⁶ There was no specific discussion on the Senate floor about this particular portion of the amendment, and it became a part of title VI when the whole substitute was adopted by the Senate.¹⁸⁷ In explaining the substitute, the Senate floor manager of title VI emphasized that no substantive changes had been made in title VI.¹⁸⁸ He declared that any language change was only to make explicit the declared intention of title VI.¹⁸⁹ The Senate history demonstrates that title VI's explicit employment exemption was not deemed necessary for employment to be excluded from title VI's coverage. Therefore, the absence of an explicit exemption in title IX does not support the view that employment is included in title IX's prohibition.

As originally passed by the House, title IX contained a provision, section 904, which paralleled section 604 of title VI, explicitly excluding employment.¹⁹⁰ This section was deleted at conference without explanation.¹⁹¹ The Conference Report simply stated that the House receded.¹⁹² Thus, the provision was deleted. The absence of a provision in title IX explicitly exempting employment from coverage was viewed by one court as a key factor in determining that title IX extends to employment.¹⁹³ While this conclusion was facilitated by Congress's failure to explain the deletion, such a conclusion does not follow ineluctably from the omission of the explicit exemption.

Several arguments can be made to support the conclusion that the elimination of section 904 was not intended to permit employment coverage under title IX. First, the inclusion of section 904 in the House bill was nothing more than a drafting mistake which was corrected at conference by deleting the section.¹⁹⁴ Second, the language of section 901 of title IX should be interpreted

¹⁸⁴ *Id.*

¹⁸⁵ H.R. 7152, amend. 656, 88th Cong., 2d Sess., 110 CONG. REC. 11926-35 (1964).

¹⁸⁶ *Id.* at 11930.

¹⁸⁷ *Id.* at 14511.

¹⁸⁸ *Id.* at 12714.

¹⁸⁹ *Id.* (statement of Sen. Humphrey).

¹⁹⁰ H.R. 7248, § 904, 92d Cong., 1st Sess., 117 CONG. REC. 39365 (1972).

¹⁹¹ S. CONF. REP. NO. 798, 92d Cong., 2d Sess. 1, 221, reprinted in (1972) U.S. CODE CONG. & AD. NEWS. 2608, 2671-72.

¹⁹² *Id.* at 2672.

¹⁹³ *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 783 (2d Cir. 1980), cert. granted *sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

¹⁹⁴ See *Hearings on title IX regulations*, *supra* note 84, at 409 (statement of Rep. O'Hara);

in the same way as section 601 of title VI was and employment was not thought to be covered by title VI's language. Further, a reasonable explanation for the deletion may be that some members of the conference were concerned that the employment exception in title IX conflicted with the other title IX provisions amending title VII and the Equal Pay Act so as to include employment under their coverage. Therefore, since the employment exclusion provision was designed only to clarify, it was deleted because it could be the source of confusion.¹⁹⁵ Although it is true that if Congress was concerned about any possible inconsistencies, it could have drafted an exclusion provision applicable only to section 901 of title IX,¹⁹⁶ it is equally true that Congress may not have included an exclusion provision because, as suggested above, it was not deemed necessary.

In sum, since title VI neither covers employment nor was its language intended to do so, title IX should be interpreted the same way since Congress intended title IX's language to have the same meaning as the parallel title VI language. That an employment exemption clause was deleted at title IX's conference should not be assumed to mean that employment is covered where there is no evidence or indication of Congress's intent to do so.

V. POLICY

An examination of the congressional policy concerning the remedies for discrimination which are available under title IX provides additional support for the view that title IX does not encompass employment practices. Title VII and the Equal Pay Act provide effective remedies for the problem of employment discrimination. The only remedy that would be added to title VII and the Equal Pay Act's coverage by title IX is fund termination. This is a severe remedy that should not be used when other remedies are available. Since other effective remedies are available under title VII and the Equal Pay Act, Congress could not have intended title IX to apply to the area of employment discrimination.

Section 902 of title IX states the methods of enforcing title IX available to a federal department.¹⁹⁷ It authorizes each federal department and agency that

see note 84 *supra*.

¹⁹⁵ *Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979).

¹⁹⁶ *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 783 (2d Cir. 1980), *cert. granted sub nom. North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

¹⁹⁷ Section 902 provides in pertinent part:

Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the

is empowered to extend federal financial assistance to any education program or activity to investigate reported violations and to initiate action to enforce compliance if it does not obtain voluntary compliance.¹⁹⁸ Compliance may be effected (1) by a termination of funds after a hearing has been held where a failure to comply with a requirement was expressly found or (2) by any other means authorized by law.¹⁹⁹ Thus, to enforce the title IX regulations, there are two options. One option is to use "other means authorized by law" which HEW listed as including but not limited to (1) referring the matter to the Justice Department with a recommendation that it bring appropriate proceedings to enforce the regulations or (2) proceeding under state or local law, if appropriate.²⁰⁰ Although title IX created the authority to apply these means to student sex discrimination, these other means of enforcement were already provided for sex discrimination in employment under other statutes. Under the first alternative, the option to proceed is left to the Justice Department and is also authorized in title VII.²⁰¹ Under the second alternative, there must be a state right of action in order to proceed, and if there is one, then there is no need to use title IX. Further, these enforcement provisions are not as detailed or tailored as those found in title VII or the Equal Pay Act.²⁰² Moreover, even though these options exist under title IX, it does not appear that HEW used them.²⁰³ This leaves HEW with the other option — fund termination — created by title IX.²⁰⁴ Thus, if title IX were to cover employment, this remedy would be the only new item which title IX would offer to the area of employment discrimination.

The fund termination option has been declared by the United States Supreme Court to be a severe remedy that often may not provide an appropriate means of accomplishing title IX's objective of effectively protecting in-

department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

20 U.S.C. § 1682 (1976).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ 45 C.F.R. § 80.8 (1979).

²⁰¹ 42 U.S.C. § 2000e-5(f)(1) (1976).

²⁰² Compare 45 C.F.R. § 80.8 (1979) with 42 U.S.C. §§ 2000e-4(g) and 2000e-5 (1976) and 29 U.S.C. §§ 216(b) and 216(c) (1976).

²⁰³ Four of the six cases decided in the circuit courts arose because of threatened cutoff of funds, while the other two involved a threat of unspecified administrative proceedings that could have meant a cutoff of funds. See *Dougherty County School System v. Harris*, 622 F.2d 735, 736 (5th Cir. 1980) (deferral of federal funds); *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 775 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ.* 101 S.Ct. 1345 (1981) (No. 80-986) (administrative proceedings); *Seattle Univ. v. HEW*, 621 F.2d 992, 993 (9th Cir. 1980) *cert. granted sub nom.* *Department of Educ. v. Seattle Univ.*, 101 S.Ct. 563 (1980) (No. 80-493) (cutoff of federal funds); *Romeo Community Schools v. HEW*, 600 F.2d 581, 583 (6th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979) (type of administrative enforcement proceeding not specified); *Junior College Dist. of St. Louis v. Califano*, 597 F.2d 119, 120 (8th Cir. 1979), *cert. denied*, 444 U.S. 972 (1979) (administrative proceeding to terminate funding); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 426 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (cutoff of federal funds).

²⁰⁴ See 20 U.S.C. § 1682 (1976)

dividuals against discriminatory practices, where merely an isolated violation has occurred.²⁰⁵ Congress itself has recognized the severity of cutting off funds as a remedy and has described it as a last resort, when all else, including lawsuits, has failed.²⁰⁶

Thus, both Congress and the United States Supreme Court have recognized the severity of HEW's enforcement power. It, therefore, would make no sense for Congress to have included employment under title IX when title VII already addressed this problem and has effective, tailored remedies that are less harsh on the innocent people involved. Title VII has been acknowledged as an effective remedy for employment discrimination. Senator Bayh even stated that title VII "has been extremely effective in helping to eliminate sex discrimination in employment."²⁰⁷ Title VII is tailored to address the problem of employment discrimination and to compensate those discriminated against with the least possible injury to others. Thus, the only thing that can be gained under title IX is the fund cutoff provision, and in regard to this same provision in title VI, it was said that "[a]s a general rule, cutoff of funds would not be consistent with the objective of the Federal assistance statutes if other effective means of ending discrimination are available."²⁰⁸ This view supports the common sense argument, that innocent people should not be hurt for the acts of others when it is not necessary. There is no reason for students in educational programs to suffer as a result of employment discrimination when there are already effective remedies available under title VII and the Equal Pay Act which do not injure students. This is particularly true since the same bill that created title IX also included the amendments that gave school employees direct and superior remedies for sex discrimination under title VII and the Equal Pay Act. These remedies involve no loss of student benefits. It seems more reasonable that Congress would have students bear the burden only when the objective is to remedy discrimination against fellow students. Even if it were thought that faculty discrimination adversely affected students, this discrimination is handled by title VII and the Equal Pay Act.

Consequently, title IX would provide an additional remedy for employment discrimination that is much more harsh and harder to work with because it is so inflexible. Although Congress has allowed duplicate remedies in the civil rights area,²⁰⁹ it is evident that this remedy is not to be taken lightly. Fund termination is a severe remedy which should only be used as a last resort. Hence, in an area already effectively protected, it does not make sense for Congress to have intended employment discrimination to be covered under title IX.

²⁰⁵ *Cannon v. University of Chicago*, 441 U.S. 677, 704-05 (1979).

²⁰⁶ *See, e.g.*, 110 CONG. REC. 7067 (1964) (remarks of Sen. Ribicoff): "Personally, I think it would be a rare case when funds would actually be cut off. In most cases alternative remedies, principally lawsuits to end discrimination, would be the preferable and more effective remedy." *See also id.* at 6544 (statement of Sen. Humphrey); *id.* at 7063 (remark of Sen. Pastore).

²⁰⁷ 118 CONG. REC. 5807 (1972).

²⁰⁸ 110 CONG. REC. 7063 (1964) (statement of Sen. Pastore).

²⁰⁹ *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974).

Furthermore, if Congress had wanted to create a fund termination remedy for employment discrimination, it would have done so through the Equal Employment Opportunity Commission (EEOC), not through HEW. Under title VII, the EEOC was established specifically for the purpose of preventing any person from engaging in any unlawful employment practices.²¹⁰ The EEOC's only area of responsibility is employment.²¹¹ It has the authority to investigate charges, to use informal methods, such as conciliation, to bring compliance, and to bring action for temporary or permanent relief.²¹² In addition, EEOC has the power to cooperate with and utilize agencies, to pay witness' fees for depositions, to furnish technical assistance to persons, to make technical studies, and to intervene in civil actions.²¹³ In short, EEOC has the expertise and enforcement machinery available that HEW does not have.²¹⁴

It has also been argued that Congress wanted to have a more potent remedy than title VII, which has been described by one court as usually involving piecemeal sanctions.²¹⁵ This description, however, does not accurately portray the extent and effectiveness of title VII's coverage. Title VII is a powerful tool for preventing employment discrimination and its piecemeal sanctions, among other features, makes it preferable to title IX. It handles individual problems without injury to others and when it needs to do more it provides for class action suits.²¹⁶ Accordingly, title IX's fund termination remedy is a severe remedy which is not to be invoked unless all other remedies fail. Since title VII and the Equal Pay Act provide less severe remedies which are also effective, Congress could not have intended to include employment under title IX because employment's inclusion under title IX would then be in conflict with Congress's declared policy concerning fund termination.

As demonstrated, the weight of the evidence examined thus far in regard to the scope of title IX reveals that discriminatory employment practices are not proscribed by title IX. The statutory language of title IX does not mention employment, which is the usual practice in regulating this area. In addition, the possibility of conflicts between title IX and other employment discrimination statutes has not been eliminated as it has been in the past between other statutes governing this area. Title IX's legislative history also indicates that Congress did not intend to cover employment under title IX. Further, title VI's legislative history reveals that the language contained in title IX was not interpreted or intended to encompass employment practices. Policy reasons also dictate that employment is not covered by title IX. Hence, the overwhelming evidence demonstrates that title IX does not include a prohibition against employment discrimination.

²¹⁰ 42 U.S.C. § 2000e-5 (1976).

²¹¹ *Id.*

²¹² 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(2) (1976).

²¹³ 42 U.S.C. § 2000e-4(g) (1976).

²¹⁴ Compare 42 U.S.C. §§ 2000e-4-2000e-5 (1976) with 20 U.S.C. § 1682 (1976).

²¹⁵ *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 785 (2d Cir. 1980), *cert. granted sub nom.* *North Haven Bd. of Educ. v. Bell*, 101 S.Ct. 1345 (1981) (No. 80-986).

²¹⁶ 42 U.S.C. § 2000e-6(e) (1976).

Nevertheless, an argument has been made that even if title IX does not authorize the direct regulation of employment practices by HEW, employment practices can be regulated under the "infection theory." The following section will analyze this theory to determine whether it is applicable to title IX and what the results would be if it did apply.

VI. INFECTION THEORY

A theory that has been advanced in support of HEW's regulation of employment practices under title IX is that title IX authorizes the regulation of sex discrimination in employment practices when such discrimination "infects" a program so as to constitute sex discrimination against students in the program.²¹⁷ The "infection theory" would apply when discrimination in employment necessarily causes discrimination against students.

The infection theory was first advanced under title VI. Initially, race discrimination against students in public schools was held to violate the equal protection clause of the fourteenth amendment²¹⁸ and the due process clause of the fifth amendment.²¹⁹ Under the United States Constitution, it was also determined that faculty discrimination on the basis of race had a direct impact on student race discrimination.²²⁰ Consequently, the rights of students in public schools to be free from race discrimination in the form of a segregated faculty was found to be part of their broader right to equal protection under the constitution.²²¹ Title VI was enacted by Congress to extend the constraints of the fourteenth amendment to private parties who receive federal funds.²²² Thus, the infection theory has been advanced under title VI and approved by some circuit courts where it has been determined that eliminating student discrimination would be impossible in the absence of eliminating faculty discrimination.²²³ This same theory may be warranted under title IX where sex

²¹⁷ See *Islesboro School Comm. v. Califano*, 593 F.2d 424, 430 (1st Cir. 1979), *cert. denied*, 444 U.S. 972 (1979). This theory has been accepted by one district court as applying to title IX. *Caulfield v. Board of Educ. of City of New York*, 486 F. Supp. 862, 885 (E.D.N.Y. 1979).

²¹⁸ *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

²¹⁹ *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

²²⁰ See, e.g., *United States v. Montgomery County Bd. of Educ.*, 395 U.S. 225, 231-32 (1969) (faculty and staff desegregation "an important aspect of the basic task of achieving a public school system wholly free from racial discrimination."); *Rogers v. Paul*, 382 U.S. 198, 200 (1965) (students have standing to sue on theory that "racial allocation of faculty denies them equality of educational opportunity without regard to segregation of pupils."); *Bradley v. School Bd. of City of Richmond*, 382 U.S. 103, 105 (1965) ("no merit to the suggestion that the relation between faculty allocation on an alleged racial basis and the adequacy of the desegregation plans is entirely speculative.").

²²¹ See note 220 *supra*.

²²² See, e.g., 110 CONG. REC. 5254, 6553, 13442 (1964) (statements of Sen. Humphrey); *id.* at 7057, 13333 (remarks of Sen. Ribicoff); *id.* at 7057 (statement of Sen. Pastore); *id.* at 2766 (remarks of Rep. Matsunaga). *Accord*, *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 284-87 (1978) (opinion of Powell, J.); *id.* at 327-29 (opinion of Brennan, joined by White, Marshall and Blackmun, J.J.).

²²³ *Trageser v. Libbie Rehabilitation Center*, 590 F.2d 87, 89 (4th Cir. 1978) (dictum), *cert. denied*, 442 U.S. 947 (1979); *Caulfield v. Board of Educ. of the City of New York*, 583 F.2d

discrimination is impossible to eliminate unless faculty discrimination is obliterated.

Even assuming, however, that the infection theory is applicable to title IX, the HEW regulations are still invalid. The infection theory authorizes only the regulation of employment practices that result in substantial sex discrimination against students. HEW's regulations regulate employment practices generally, without regard to resultant student discrimination.²²⁴ If HEW could regulate employment practices under title IX through the use of the infection theory, it would have to promulgate regulations similar to the regulation promulgated under title VI using the infection theory.²²⁵ Since HEW has not promulgated specific regulations limited to those employment practices that result in student discrimination, its employment regulations are invalid even if the infection theory could be applied to title IX.

VII. TITLE IX'S ENFORCEMENT LIMITS

Even if the evidence offered thus far is found to be insufficient to prove that employment practices are beyond the scope of title IX, nonetheless, the HEW employment regulations as written must fail as exceeding statutory authority. An examination of title IX's language will reveal that authorized regulations must be limited in scope to the specific funded programs of an institution which are found to be discriminatory. HEW's regulations, however, are not limited, instead they regulate employment practices generally throughout the entire institution.

Title IX's enforcement provisions reveal that if title IX did prohibit sex discrimination in employment practices, then HEW could promulgate only regulations prohibiting discriminatory practices in connection with specific programs receiving federal funds. Because, however, the HEW regulations regulate sex discrimination in employment practices generally with respect to an entire institution, rather than a specific program, even if employment were covered by title IX, the HEW regulations would be overbroad and, therefore, invalid.²²⁶

605, 611 (2d Cir. 1978); *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 883 (5th Cir. 1966), *aff'd on rehearing*, 380 F.2d 385, *cert. denied sub nom.* Board of Educ. of City of Bessemer v. *United States*, 389 U.S. 840 (1967).

²²⁴ See 45 C.F.R. §§ 86.51-86.61 (1979).

²²⁵ 45 C.F.R. § 80.3(c)(3) (1980) provides:

Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other person subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the foregoing provisions of this paragraph (c) shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of beneficiaries.

Id.

²²⁶ *Dougherty County School System v. Harris*, 622 F.2d 735, 738 (5th Cir. 1980).

Title IX's enforcement provisions are contained in section 902.²²⁷ This section directs each federal department "to effectuate the provisions of section 901 of this title with *respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the *financial assistance in connection with which the action is taken.*"²²⁸ Section 902 also authorizes HEW to initiate administrative proceedings to enforce compliance if it does not obtain voluntary compliance.²²⁹ The primary sanction for noncompliance is termination of funds. A termination, however, "shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found. . . ." ²³⁰ Thus, the statutory language of section 902 states that regulations are to be directed at funded programs and that termination of funds is limited to them. Moreover, section 902 speaks in terms of entities. In regard to fund termination powers, section 902 provides that termination of funds *shall be limited* and then states that this limitation is to the particular program, or *part thereof*, which is discriminatory.²³¹ Under this section, HEW cannot terminate funds to an entire institution because title IX's enforcement provision would be without meaning since the effect would not be limited as mandated and the phrase "or part thereof" would be useless. This effect cannot be allowed since, as a matter of statutory construction, a court must give effect, if possible, to every clause and word of a statute.²³² In this instance, it is possible to give meaning to the words of section 902 by limiting the enforcement to discriminatory programs. This analysis leads to the conclusion that HEW's regulations exceed the authority granted by title IX since they regulate sex discrimination in employment practices generally with respect to the entire institution.

Further support for the interpretation that section 902 requires regulations and fund termination to be limited to specific programs is found in title IX's legislative history. In his presentation of title IX, Senator Bayh explained that the effect of termination of funds is limited to the particular program in which non-compliance is found.²³³ He also noted that this language was identical to that in title VI and was specifically taken from it.²³⁴ With respect to title VI, that language consistently was interpreted as limiting HEW's power to terminate funds to a particular program of an entity, or a part of a program, that

²²⁷ 20 U.S.C. § 1682 (1976).

²²⁸ *Id.* (emphasis added).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* (emphasis added).

²³² See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882).

²³³ 118 CONG. REC. 5807 (1972).

²³⁴ 117 CONG. REC. 30407-08, 30156 (1971). This was said in regard to the original amendment introduced by Senator Bayh which was ruled nongermane. This earlier amendment, however, contained the same language as title IX in its final form. Compare S. 659, amend. 398, 92d Cong., 1st Sess., 117 CONG. REC. 30156-57 (1971) with S. 659, amend. 874, 92d Cong., 2d Sess., 118 CONG. REC. 5803 (1972) and 42 U.S.C. § 2000d-1 (1976).

was discriminatory in order to protect innocent beneficiaries of programs that were not tainted by discriminatory practices.²³⁵

As demonstrated, a fair reading of title IX's statutory language, as well as the legislative history of both title IX and title VI, reveal that the HEW regulations must be "program-specific." HEW cannot assume, contrary to Congress's mandate in section 902, that discrimination in one part of a school automatically means that the entire school is discriminatory. Therefore, even if employment practices were within the scope of title IX, the HEW regulations would be overbroad and, as a result, invalid.

CONCLUSION

A controversy has arisen over whether or not title IX of the Education Amendments of 1972, which prohibits sex discrimination in federally funded programs of educational institutions, encompasses employment practices within its ban. For a variety of reasons, it must be concluded that title IX does not extend to employment. The statutory language supports the view that employment is not covered by title IX because neither title IX's prohibition nor its nine exemptions mention employment. This absence of any explicit language concerning employment practices stands in sharp contrast to the specific explications found in the other statutes regulating discriminatory employment practices. Further, title IX's legislative history demonstrates that, although some statements concerning title IX's coverage are unclear, on the whole, it appears that Congress did not intend employment to be within the scope of title IX. The legislative history also reveals that title IX was patterned after title VI of the Civil Rights Act of 1964, which contains an explicit exemption for employment. While title IX does not contain such an explicit exemption, title VI's legislative history indicates that its basic prohibitory language, which is substantially the same as that in title IX, was not believed to include employment.

Developments after title IX's passage also have been shown to be inapplicable in discerning Congress's intent in enacting title IX. Additionally, policy reasons indicate that title IX does not encompass employment because the primary sanction for non-compliance, fund termination, is a severe remedy that should not be used when other effective remedies, such as those provided in title VII and the Equal Pay Act, are available. It has also been demonstrated that even if employment could be reached under title IX through the infection theory, the HEW regulations are still invalid because they regulate all employment practices in an institution, rather than just those found to perpetuate stu-

²³⁵ During title VI's passage, some Senators expressed fear that all federal assistance to an entity would be cancelled if it were discriminatory in any federally assisted program. One of title VI's major sponsors declared this interpretation to be inaccurate, that the termination would only affect the particular program, or part thereof, in which a violation took place. 110 CONG. REC. 12714-15 (1964) (statement of Sen. Humphrey). See also *id.* at 5253 (statements of Sen. Humphrey); *id.* at 7063 (remarks of Sen. Pastore).

dent discrimination. Finally, even if title IX were found to encompass employment, the HEW regulations as written are invalid because they apply to the entire institution, rather than to the specific federally funded programs which are found to be discriminatory. Thus, the evidence reveals that employment practices of federally funded educational programs are not within the scope of title IX's coverage and the HEW regulations are invalid.

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