

1981

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Recommended Citation

Catherine M. Kelly, *The Regulation of Employment Under Title IX--The Proper Scope of Administrative Authority*, 49 Fordham L. Rev. 745 (1981).

Available at: <https://ir.lawnet.fordham.edu/flr/vol49/iss5/12>

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THE REGULATION OF EMPLOYMENT UNDER TITLE IX— THE PROPER SCOPE OF ADMINISTRATIVE AUTHORITY

INTRODUCTION

In 1972, Congress enacted the Higher Education Amendments¹ to provide federal funds to institutions of higher learning² and to combat sex discrimination at the elementary, secondary, and university level.³ Section 901 of Title IX of the Amendments provides that “[n]o 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 [f]ederal financial assistance.”⁴ Any federal department that extends funds to a school district or university is directed to issue regulations to effectuate the objectives of Title IX.⁵ If a department finds that a regulation has been violated, and the offending institution refuses to alter the discriminatory practice voluntarily, the department can terminate or refuse to grant further federal funding.⁶

In 1975, pursuant to the authority granted by Title IX, the Department of Health Education and Welfare (HEW) issued regulations⁷

1. Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-86 (1976) and in scattered sections of 29, 42 U.S.C.) The amendments provided nearly \$19 billion to post-secondary educational institutions. The legislation expanded assistance available to needy students and provided for money to be paid directly to the institutions. 28 Cong. Q. Almanac 385-98 (1972).

2. 20 U.S.C. § 1681 (1976).

3. *Id.*

4. *Id.* § 1681(9).

5. *Id.* § 1682. “Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.” *Id.*

6. *Id.* “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 . . . of a failure to comply with such requirement, but such termination . . . shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.” *Id.* Although § 1682 also provides that enforcement may be obtained by “any other means authorized by law,” *id.*, the termination of federal funds, or the threat thereof, has been HEW’s primary tool in attempting to enforce the regulations. *See, e.g.,* Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979).

7. *See* 45 C.F.R. §§ 86.21-23 (1980). At the time the regulations were issued and a majority of the cases were decided, HEW was responsible for the enforcement of Title IX. On May 4, 1980, jurisdiction over educational matters was transferred to

concerning many aspects of the operation of an educational institution, including admissions,⁸ financial assistance,⁹ choice of textbooks,¹⁰ and athletics.¹¹ At the same time, HEW interpreted the term "person" in section 901 to encompass employees. As a result of this interpretation, HEW issued Subpart E, which governs various employment practices of an educational institution that receives federal funds.¹² The regulations apply to practices ranging from employee recruitment to job classification and structure.¹³ Furthermore, the regulations are worded in such a way that their application is not limited to those specific programs supported in whole or in part by federal aid. Rather, they are applicable to *all* programs operated by an educational facility that is the recipient of federal funds.¹⁴

There has been considerable resistance to HEW's attempts to enforce these regulations. Local school districts and universities have challenged HEW's authority to regulate employment under Title IX and, until 1980, every circuit that considered the issue declared that the regulations were invalid, concluding that Congress did not intend Title IX to deal with employees.¹⁵ In 1980, however, the Second Circuit held that HEW did not exceed its authority in issuing the employment regulations.¹⁶ Similarly, the Fifth Circuit declined to

the newly created Department of Education. The employment regulations have been reissued by this department in the same form at 34 C.F.R. § 106.51 (1980). *See also* 45 Fed. Reg. 30802 (1980). In this Note, both departments will be referred to as HEW.

8. 45 C.F.R. §§ 86.21-.23 (1980).

9. *Id.* § 86.37.

10. *Id.* § 86.42.

11. *Id.* § 86.41.

12. *Id.* §§ 86.51-.71.

13. *Id.*

14. *Id.* § 86.51(a). "No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, 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.*

15. *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir.), *cert. granted*, 49 U.S.L.W. 3409 (U.S. Dec. 2, 1980) (No. 80-493); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist. v. Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979); *Grove City College v. Harris*, 500 F. Supp. 253 (W.D. Pa. 1980); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979); *Hoth v. Grinnel*, 23 FEP Cases (BNA) 528 (S.D. Iowa 1980); *Board of Educ. v. HEW*, 19 FEP Cases (BNA) 457 (N.D. Ohio 1979). The District Court for Maine did, however, note that employment could be regulated when the objective of a federal program is to provide employment. *Brunswick School Bd. v. Califano*, 449 F. Supp. 866, 870 n.4 (D. Maine 1978), *aff'd sub nom. Islesboro School Comm. v. Califano*, 593 F.2d 424, 426 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979).

16. *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 786-87 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

join the circuits that had found employees beyond the scope of Title IX and declared that there could be circumstances when regulation of employment would be permissible.¹⁷ The court held, however, that the regulations as written went beyond the intent of Congress because they apply to all employment practices within an institution receiving federal aid, rather than merely to those programs that receive federal funds.¹⁸

HEW has contended that its interpretation of section 901 should be given great weight.¹⁹ Admittedly, it is a well established doctrine of statutory construction that courts should regard the contemporaneous interpretation of a statute by an agency charged with its enforcement as persuasive.²⁰ Nevertheless, an evaluation of an administrative act is dependent upon the extent to which a particular set of regulations comports with legislative intent. Courts do not view themselves as mere "rubber stamps" of an agency decision.²¹ An agency interpretation that is inconsistent with the congressional policy underlying a statute will not be sustained.²² The validity of HEW's position, therefore, is contingent upon the extent to which it reflects the intent of Congress in enacting section 901.

This Note argues that the legislative history and a consideration of other factors demonstrates that employees of educational institutions are entitled to protection under Title IX. The regulations as written, however, are invalid because Congress did not intend to draft a general prohibition against sex discrimination in schools. Rather, Congress sought to prevent the use of federal funds in support of discriminatory practices in a recipient program or activity. This Note contends, therefore, that the regulations should be rewritten to permit the termination of federal funding only when the funds are used in support of discriminatory employment practices.

17. *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 736-37 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3495 (U.S. Jan. 22, 1981) (No. 80-1023).

18. *Id.*

19. Brief for Appellants at 14, *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

20. *United States v. Hammers*, 221 U.S. 220, 225 (1911) ("[T]he rule often authoritatively announced is that 'where a court is doubtful about the meaning of an act of Congress, the construction placed upon the act by the department charged with its enforcement is in the highest degree persuasive if not controlling.'"); *see NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974); *Fawcus Mach. Co. v. United States*, 282 U.S. 375, 378 (1931).

21. *NLRB v. Brown*, 380 U.S. 278, 291 (1965).

22. *E.g., id.*; *Volkswagenwerk Ag. v. FMC*, 390 U.S. 261, 272, *modified*, 392 U.S. 901 (1968). A court will also not allow an agency to "bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

I. EMPLOYEES AS "PERSONS" WITHIN SECTION 901

A. *Statutory Language*

Whether employees come within the scope of Title IX is essentially an issue of statutory construction. Therefore, the analysis must begin with the language of the statute itself.²³ HEW has contended that the term "person" in section 901²⁴ is general enough to include employees of educational institutions among those who are "in a position to 'be excluded from participation in, be denied the benefits of, or be subjected to discrimination under' such programs or activities."²⁵ Furthermore, it has stated that such an interpretation is supported by the established practice of broadly construing civil rights acts to effectuate their remedial purposes.²⁶ A number of courts, however, have rejected this interpretation.²⁷ One has declared that such a reading "does violence to the specific wording of the statute."²⁸ Other courts have viewed the statute as only protecting school children for whom federally assisted education programs are established,²⁹ or as "on its face . . . aimed at . . . students attending institutions receiving federal funds or teachers engaged in *special research*."³⁰

A similar divergence of opinion concerning the appropriate interpretation of the "no person" language was generated by the wording of the act on which Title IX was patterned, Section 601 of Title VI of the Civil Rights Act of 1964.³¹ To eliminate the confusion, Congress added a provision specifically barring the application of Title VI to

23. 2A C. Sands, *Sutherland's Statutes and Statutory Construction* § 46.01 (3d rev. ed. 1973).

24. 20 U.S.C. § 1681(a) (1976).

25. Brief for Appellants at 14, *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

26. See *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969), *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 437 (1968); *United States v. Price*, 383 U.S. 787, 801 (1966).

27. See e.g., *Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist. v. Califano*, 597 F.2d 119, 121 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 426 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979).

28. *Brunswick School Bd. v. Califano*, 449 F. Supp. 866, 870 (D. Maine 1978), *aff'd sub nom. Islesboro School Comm. v. Califano*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

29. See *Junior College Dist. v. Califano*, 597 F.2d 119, 120-21 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *University of Toledo v. HEW*, 464 F. Supp. 693, 696 (N.D. Ohio 1979).

30. *Islesboro School Comm. v. Califano*, 593 F.2d 424, 426 (1st Cir.) (emphasis added), *cert. denied*, 444 U.S. 972 (1979).

31. 42 U.S.C. § 2000d (1976); see *Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979).

employment.³² Title IX contains no parallel provision. There are nine other exemptions in Title IX, but none mentions employment in any context.³³

An analysis of the failure to include employment as an exemption, as well as an examination of the subjects that are exempted, has led to both the inclusion and exclusion of employees from Title IX coverage. HEW views the absence of such a provision as an indication of congressional intent to regulate employment.³⁴ The Sixth Circuit, however, has taken the position that the failure to include such a provision, coupled with the fact that most of the listed exemptions relate to students, leads to the fair assumption that only students are the subject of section 901.³⁵ Moreover, a number of courts have reasoned that section 901 does not include an employment exemption because such a provision would have been inconsistent with the portions of the proposal specifically amending employment related statutes.³⁶

The statutory language is not conclusive as to whether employees were intended to be within the scope of Title IX. There is ambiguity concerning both the proper meaning to be given to the term "person" and the rationale behind the absence of an employment exclusion. Accordingly, an examination of the legislative history must be made to resolve the conflict.

32. 42 U.S.C. § 2000d-3 (1976). For a discussion of the applicability of Title VI to employment, see 110 Cong. Rec. 12484 (1964) (exchange between Reps. Poff, Rodino, and McCulloch); *id.* at 12707 (remarks of Sen. Humphrey). See generally Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 50-54 (1976).

33. 20 U.S.C. § 1681 (a)(1)-(9) (1976).

34. Brief for Appellants at 16, *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986). HEW also contends that the corollary to the principle of broad interpretation of civil rights legislation, see note 26 *supra* and accompanying text, that exemptions from such situations are to be narrowly drawn, see *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945), also supports their position. Brief for Appellants at 17.

35. *Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). In *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986), the court noted that although seven of the nine exemptions relate to student matters such as admissions and extracurricular activities, two of the exceptions "do not mention students at all, but rather exempt entire categories of institutions." *Id.* at 778.

36. *E.g.*, *Romeo Community Schools v. HEW*, 600 F.2d 581, 584-85 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 427-28 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). See generally *Junior College Dist. v. Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979). The statutes to which the courts referred were The Equal Pay Act, 29 U.S.C. § 213(a) (1976), and Title VII of the Civil Rights Act of 1964, 41 U.S.C. § 2000e (1976).

B. Legislative History of Section 901

1. The Impetus for Section 901

There were two reasons behind the perceived need for legislation designed to prohibit sex discrimination in schools. The first concerned action taken by the women's movement to publicize the extent of sex discrimination in American education.³⁷ National attention was focused on the problem in a series of congressional hearings held in 1970.³⁸ In these hearings and in subsequent reports,³⁹ sex discrimination was found to exist in many areas, including admissions,⁴⁰ the award of financial aid,⁴¹ and placement.⁴² Employment discrimination was found to be particularly acute.⁴³ Studies indicated that women were hired less often than men and, when employed, were appointed to less prestigious positions than men with equal qualifications.⁴⁴ Furthermore, it was demonstrated that female faculty members were hired at lower salaries; subsequently, they lagged behind their male counterparts in both salary increases and promotions.⁴⁵

The second factor was the lack of legal tools available to remedy this situation.⁴⁶ Although women had secured protection against some employment discrimination in Title VII of the Civil Rights Act of 1964⁴⁷ and the Equal Pay Act of 1963,⁴⁸ these acts specifically exempted educational institutions from coverage.⁴⁹ As of 1971,

37. See Comment, *HEW's Regulations Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U.L. Rev. 133, 137 [hereinafter cited as *Ultra Vires Challenges*].

38. See *Discrimination Against Women: Hearings on § 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess., pts. 1 & 2 (1970) [hereinafter cited as *1970 Hearings*].

39. For a summary of the testimony and evidence gathered at the hearings, see Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 Val. U.L. Rev. 237, 247-70 (1971).

40. *1970 Hearings*, *supra* note 38, at 643-47 (statement of Peter Muirhead).

41. See 118 Cong. Rec. 5808-09 (1972) (remarks of Sen. Bayh).

42. Murray, *supra* note 39, at 257-58.

43. *1970 Hearings*, *supra* note 38, at 196, 312 (report submitted by Dr. Ann Scott). See generally *Ultra Vires Challenges*, *supra* note 37, at 141.

44. Robinson, *Institutional Variation in the Status of Academic Women*, in *Academic Women on the Move* 199 (1973).

45. Morlock, *Discipline Variation in the Status of Academic Woman*, in *Academic Women on the Move* 255, 277-81, 286-92 (1973); Robinson, *supra* note 44, at 214-23.

46. *Ultra Vires Challenges*, *supra* note 37, at 138-42.

47. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

48. 29 U.S.C. § 206(d) (1976).

49. 29 U.S.C. § 213(a)(1) (1976). The original § 702 of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 255, provided that "[t]his title shall not apply to . . . an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution." *Id.* Section 214 of the Fair Labor Standards Act stated that § 206, the Equal Pay Act, did

women⁵⁰ did not have statutory recourse to combat sex discrimination in educational employment effectively.⁵¹

2. The Enactment of Section 901

In response to these problems, and as a general reaction to pressure from the women's movement,⁵² a number of bills designed to prohibit sex discrimination in educational facilities were introduced in the early seventies. In August 1971, Senator Bayh proposed an amendment to the pending Higher Education Act.⁵³ The amendment would have proscribed sex discrimination by educational institutions that received federal financial assistance.⁵⁴ The amendment, how-

not apply with respect to "any employee employed . . . in the capacity of academic administrative personnel or teacher in elementary or secondary schools." Fair Labor Standard Amendments of 1966, Pub. L. No. 89-601, § 214, 80 Stat. 837 (1966) (current version at 29 U.S.C. § 213(a) (1976)).

50. The hearings held in 1970, as well as the legislation eventually enacted, 20 U.S.C. § 1681 (1976), were concerned with sex discrimination against both students and employees in educational institutions. This Note, however, will focus solely on employment discrimination.

51. *Ultra Vires Challenges*, *supra* note 37, at 138. This is not to imply that women were entirely without legal remedy. Exec. Order No. 11,246, 3 C.F.R. 567 (1966), *as amended by* Exec. Order No. 11,375, 3 C.F.R. 684 (1966-70) (superseded by Exec. Order No. 11,478, 3 C.F.R. 169 (1975)), barred sex discrimination by employers, including colleges and universities that held contracts with the federal government. Available sanctions under this executive order included allowing the Secretary of Labor to publish the names of those who have failed to comply with the order, Exec. Order No. 11,246, § 209(a)(1), 3 C.F.R. 570 (1966), and the termination or suspension of a government contract with an offending party. *Id.*, 3 C.F.R. 570 (1966). Although the means provided by the executive order are not ineffective in combatting sex discrimination, the enforcement process is protracted, and the departments of Labor and HEW, charged with its enforcement, have not always been active in pursuing complaints filed. *Ultra Vires Challenges*, *supra* note 37, at 139-40. For a full discussion of the uses of Executive Order No. 11,246, see B. Babcock, A. Freedman, E. Norton & S. Ross, *Sex Discrimination and the Law* 509-59 (1975) [hereinafter cited as B. Babcock]. In 1972, a plaintiff alleging sex discrimination on constitutional grounds had to demonstrate that the classification on the basis of sex did not bear a "fair and substantial relation" to the goal of the conduct in question. *Reed v. Reed*, 404 U.S. 71, 76 (1971). Subsequently, in *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of the Court held that classification based on sex was inherently suspect. *Id.* at 682. Since this decision, the Court has both upheld and invalidated gender based classifications. *Compare Geduldig v. Aiello*, 417 U.S. 484 (1974) (upholding classification) *with Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (invalidating classification). Presently, sex discrimination is not afforded the strict judicial scrutiny reserved for suspect classes, although it may be "well on the way toward becoming a suspect classification." See B. Schwartz, *Constitutional Law* 391 (2d ed. 1979).

52. See generally 33 Cong. Q. 1484-85 (1975).

53. 117 Cong. Rec. 30155-58 (1971).

54. *Id.* at 30156. The amendment, No. 398, stated that "[n]o person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity

ever, never came to a vote.⁵⁵ In February 1972, Senator Bayh again introduced on the floor of the Senate legislation designed to combat sex discrimination in education. This amendment⁵⁶ to the Higher Education Act of 1972 incorporated most of the earlier proposal⁵⁷ and also contained amendments to Title VII of the Civil Rights Act of 1964⁵⁸ and the Equal Pay Act.⁵⁹ According to Senator Bayh, the purpose of this legislation was to close loopholes that existed in "education programs and [in] *employment* resulting from those programs."⁶⁰ Section 901, the ban on sex discrimination in education programs receiving federal funds, was declared to be "the heart of [the] amendment,"⁶¹ and employment was specifically included as a problem that this part of the proposal would confront.⁶²

Courts that have invalidated the regulations and have construed the statute as applicable only to students have discounted the above statements by concluding that Senator Bayh's introductory remarks concerning employment discrimination were in reference to the parts

conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of [f]ederal financial assistance for any education program or activity." *Id.* Although the language of this first proposal differed slightly from that which was eventually enacted, the purpose was identical—to prevent the use of federal funds in sexually discriminatory educational programs. The remarks of Senator Bayh demonstrate that the protections embodied in this initial amendment were intended to extend to faculty as well as students. He described the barriers that women face when "seek[ing] admission and employment in educational facilities." *Id.* at 30155 (remarks of Sen. Bayh). This amendment contained no provision to amend either the Equal Pay Act, 29 U.S.C. § 206(d) (1976), or Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976). This indicates that Senator Bayh intended the sanction of fund termination to be available in instances of employment discrimination. Any other interpretation would render his extensive description of the "array of obstacles" facing women in academia pointless.

55. 117 Cong. Rec. 30412 (1971).

56. S. 874, 92 Cong., 1st Sess., 118 Cong. Rec. 5803 (1972). The amendment was divided into ten sections. The first outlined the general prohibition against the use of federal funds in support of discriminatory programs. *Id.* § 1001(a), 118 Cong. Rec. 5803 (1972) ("No person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance."). Other sections outlined enforcement procedures, provided for judicial review, and exempted financial assistance provided in the form of a contract of insurance or guaranty. The final sections brought educational institutions within the coverage of section 702 of the Civil Rights Act of 1964 and extended the Equal Pay Act to include executive, administrative, and professional women. *Id.* §§ 1002-1010, 118 Cong. Rec. 5803 (1972).

57. See notes 53-55 *supra* and accompanying text.

58. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

59. 29 U.S.C. § 206(d) (1976).

60. 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh) (emphasis added).

61. *Id.*

62. *Id.* ("The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment . . .").

of his proposal amending Title VII and the Equal Pay Act.⁶³ A close reading of these introductory remarks, however, demonstrates that this interpretation is without merit. After outlining the "heart" of the amendment, Senator Bayh noted that the enforcement powers in section 901 paralleled those in Title VI of the Civil Rights Act of 1964.⁶⁴ Employment discrimination, therefore, was initially discussed in the context of incorporating the funding termination provisions of Title VI into section 901. Only subsequently did he discuss the "[o]ther important provisions" of his proposal, including the amendments to Title VII and the Equal Pay Act.⁶⁵ There is no indication that these are the only parts of the amendment in which the Senator intended to deal with employment. Rather, it can be assumed that he regarded the latter two proposals as additional tools with which to confront the problem of sex discrimination.

The summary of the amendment published by Senator Bayh and his responses to questions concerning the scope of its application further demonstrate his intent to include employment within Title IX coverage.⁶⁶ The summary begins with a statement that the first five sections are central to the amendment.⁶⁷ Because the fifth section of the amendment refers to Title VII, some courts have taken this to be an indication that Senator Bayh intended Title VII to deal with employment and that it was his oversight or confusion that led him to include a discussion of employment in the funding termination sections.⁶⁸ The remainder of the summary, however, undermines the validity of this interpretation. In a specific reference to the Title IX provisions governing the termination of federal funds, he stated that

63. *Brunswick School Bd. v. Califano*, 449 F. Supp. 866, 873 (S.D. Maine 1978), *aff'd sub nom. Islesboro School Comm. v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). The court stated that "Senator Bayh's remarks [do not] support [HEW's] position. Amendment 874, to which Senator Bayh referred, was the original draft of Title IX, which included both § 901 and the Title VII and Equal Pay Act amendments. It is apparent that his remarks, as well as his synopsis of Title IX, insofar as they pertained to employment discrimination, can only reasonably be understood as alluding to the Title VII and Equal Pay Act amendments, and not to § 901." *Id.*; *accord*, *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1030 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

64. 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh) (referring to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-6 (1976)).

65. *Id.*

66. *Id.* at 5807, 5812-13.

67. *Id.*

68. *See, e.g., Junior College Dist. v. Califano*, 597 F.2d 119, 121 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Comm. v. Califano*, 593 F.2d 424, 427-28 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979); *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1030 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

[t]his portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment practices for faculty and administrators. . . . The provisions have been tested under Title VI of the 1964 Civil Rights Act for the last [eight] years so that we have evidence of their effectiveness and flexibility.⁶⁹

Following this summary, Senator Bayh was specifically questioned about the sections referring to the ban on federal support for sexually discriminatory practices by educational institutions.⁷⁰ In response to one question, he outlined the effect that these provisions would have on the faculty of various types of schools.⁷¹ If employees were to be outside the ambit of this section of the amendment, it is likely that Bayh would have so indicated and would not have explained the application of the section to the faculties of particular schools.

Further questions regarding those sections concerned whether faculty of religious schools and military academies would come within the scope of the amendment. In response, Senator Bayh stated that both institutions would be exempt from the employee sex discrimination provision.⁷² This exchange is of particular significance because neither Title VII nor the Equal Pay Act contain similar funding termination provisions.⁷³

69. 118 Cong. Rec. 5807 (1972) (remarks of Sen. Bayh).

70. *Id.* at 5812-13.

71. *Id.* The relevant portions of the exchange follow: "Mr. Pell. . . . Sections 1001 (a) and (b) include all educational institutions which receive [f]ederal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level? Mr. Bayh. At the elementary and secondary levels, admissions policies are not covered. . . . We are dealing with . . . discrimination in employment within an institution, as a member of a faculty or whatever. In the area of employment we permit no exceptions Mr. Pell. Mr. President, do I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance? Mr. Bayh. This amendment sets no quotas. It only guarantees equality of opportunity. . . . [A]s far as employment opportunities are concerned, the answer would be '[y]es.' Mr. Pell. The Senator means that a private school for girls . . . would have to accept men teachers, or vice versa? Mr. Bayh. . . . The Senator is correct insofar as he is saying that discrimination on the basis of sex would be forbidden." *Id.*

72. *Id.* at 5813. "Mr. Pell. Would this apply to a parochial school where they have nuns as teachers? Mr. Bayh. No. There is an explicit exception for educational institutions controlled by a religious organization. . . . Mr. Pell. [What about] Peekskill Military Institute which is [a military school] at the high school level. Would that school be expected to have women teachers? . . . Mr. Bayh. All military schools are excluded." *Id.*

73. Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e) (1976), does exempt an employer from coverage when job classification on the basis of sex can be shown to be a bona-fide occupational qualification "reasonably necessary to the normal operation" of a particular enterprise. *Id.* This is not, however, the same type of blanket exemption for particular classes of educational institutions that Sen. Bayh included in his second proposal.

It is clear, therefore, that Senator Bayh, the sponsor of the bill, intended section 901 to prohibit employee discrimination.⁷⁴ His statements, although not controlling,⁷⁵ should be regarded as an authoritative⁷⁶ guide to the interpretation of the section.⁷⁷

In the House, two bills to eliminate sex discrimination were introduced. The Nixon administration sponsored a proposal that would have banned sex discrimination in education programs receiving federal funds.⁷⁸ This proposal, however, left a large loophole that per-

74. Any lingering doubts as to Senator Bayh's intention to bring employment within the coverage of § 901 can be dispelled by an examination of a summary that he published in the Congressional Record soon after the bill was signed by President Nixon. In part, the summary stated that although "Title VI also specifically excludes employment from coverage . . . [t]here is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs." 118 Cong. Rec. 24684 n.1 (1972) (remarks of Sen. Bayh).

75. *Jennison v. Kirk*, 98 U.S. 453, 459-60 (1878). In evaluating the remarks of a congressman, the context in which they were made is of considerable importance. In general, statements made in the course of congressional debates "are not appropriate sources of information from which to discover the meaning of the language of a statute." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897). See also *United States v. Union Pac. R.R.*, 91 U.S. 72, 79 (1875). Justice Jackson noted that courts should refuse to treat such statements as authoritative because they are "casual statements . . . not always distinguished for candor or accuracy." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring). Similarly, the remarks of a legislator not a member of the committee that considered a bill are not accorded much weight. See *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921) ("By repeated decisions of this court it has come to be well established that the debates of Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body."). See generally *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897); *United States v. UMW*, 330 U.S. 258, 276-77 (1947). In contrast, statements by the author or sponsor of a bill on the floor of Congress are given far greater weight. *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 562-64, 567-68 (1976); *Galvan v. Press*, 347 U.S. 522, 526-27 (1954); see *United States v. Great N. Ry.*, 287 U.S. 144, 154-55 (1932); *United States v. St. Paul, M. & M. Ry.*, 247 U.S. 310, 318 (1918); *United States v. Coca-Cola Co.*, 241 U.S. 265, 281-83 (1916); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 198-99 (1913); *Binns v. United States*, 194 U.S. 486, 495 (1904).

76. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951). "It is the sponsors that we look to when the meaning of the statutory words is in doubt." *Id.* at 394-95; accord, *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 67-68 (1964); *Wright v. Vinton Branch*, 300 U.S. 440, 463-64 n.8 (1937); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 475 (1921); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 616 (3d Cir. 1961), cert. denied, 372 U.S. 965 (1973).

77. See *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Wright v. Vinton Branch*, 300 U.S. 440, 463-64 n.8 (1937).

78. H.R. 5191, 92d Cong., 1st Sess. § 1001 (b) (1971), reprinted in *Ultra Vires Challenges*, supra note 37, at 142 n.35.

mitted the sexes to be treated differently⁷⁹ if a bona fide ground for such treatment could be shown. The bill was strongly criticized and was never adopted because the bona fide loophole would have enabled the intent of the proposal to be circumvented easily.⁸⁰

At the same time, Representative Green of Oregon introduced a bill that, like Senator Bayh's second proposal, prohibited sex discrimination in federally funded educational institutions.⁸¹ It also included the amendments of Title VII of the Civil Rights Act of 1964⁸² and the Equal Pay Act.⁸³ This proposal, in the form eventually adopted by the House, also included section 1004, a provision conspicuously absent from the Senate bill.⁸⁴ This section excluded employment practices from coverage except when the primary objective of the federal financial assistance was to provide jobs.⁸⁵ The language of this section was taken directly from section 604 of Title VI of the Civil Rights Act of 1964.⁸⁶ While the Senate and House bills were in

79. Section 1001 (b) provided that "[n]o recipient of federal financial assistance for an education program or activity shall, because of an individual's sex—(1) discharge that individual, fail or refuse to hire (except in instances where sex is a *bona fide* occupational qualification) 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 effect his or her status as an employee." *Id.* § 1001(b), reprinted in *Ultra Vires Challenges*, *supra* note 37, at 142 n.35.

80. *Ultra Vires Challenges*, *supra* note 37, at 142.

81. H.R. 7248, 92d Cong., 1st Sess. § 1001, 117 Cong. Rec. 39098-99 (1971).

82. *Id.* § 1006, 117 Cong. Rec. 39099 (1971).

83. *Id.* §§ 1008-1009, 117 Cong. Rec. 39099 (1971). Only the amendment to the Equal Pay Act of 1963 was included as a part of Title IX of the Higher Education Amendments of 1972 as finally enacted. Pub. L. No. 92-318, § 906 (b), 86 Stat. 375 (codified at 29 U.S.C. § 213(a) (1976)). The proposed amendment to Title VII of the 1964 Civil Rights Act was enacted in another bill, the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103-04 (codified at 42 U.S.C. § 2000e-1 (1976)).

84. See H.R. No. 884, 92d Cong., 1st Sess. 108 (1971) [hereinafter cited as House Report], reprinted in [1972] U.S. Code Cong. & Ad. News 2462, 2566.

85. *Id.*, reprinted in [1972] U.S. Code Cong. & Ad. News at 2566 ("[N]othing in this title may be taken to authorize action 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.").

86. Compare House Report, *supra* note 84, at 108, reprinted in [1972] U.S. Code Cong. & Ad. News at 2566 with 42 U.S.C. § 2000d-3 (1976). In the House review of Representative Green's proposal, there was no specific discussion of § 1004. The only reference by the House to employees coming within the Act's coverage occurred in the discussion of an amendment to the Green proposal. In regard to this amendment, Representative Smith of New York stated that "[this] amendment would exempt out of this title all undergraduate schools and would leave the prohibition against sex discrimination to apply to graduate education and faculty employment and salaries." 117 Cong. Rec. 39255 (1971) (remarks of Rep. Smith). Such a

the Conference Committee, section 1004 was deleted from the House bill.⁸⁷ Specifically, the House "receded" from including the section in the final draft.⁸⁸ The House and Senate ultimately adopted the Conference Committee version of the sex discrimination provisions as Title IX of the Higher Education Amendments of 1972, and the bill was signed into law by President Nixon.⁸⁹

The Conference Committee's deletion of section 1004 from the final version of the bill has been interpreted in a number of ways. Courts that have excluded employees from section 901 have concluded that section 1004 was eliminated because such an employment exclusion would have been inconsistent with the sections amending Title VII and the Equal Pay Act.⁹⁰ One commentator has regarded its initial inclusion a "drafting mistake."⁹¹ The Second Circuit, however, in *North Haven Board of Education v. Hufstедler*,⁹² has found this theory to be unpersuasive because "Congress could easily have drafted an employment exclusion [that would have been] applicable solely to the first portion of the Act,"⁹³ without affecting the amendments of Title VII and the Equal Pay Act.

An analysis of "recede," as used in the Conference Committee report, supports the Second Circuit's position. In the context of congressional action, the term means "to withdraw opposition to an amendment passed by the other house of a bicameral legislature."⁹⁴

statement can be seen as indicative of House intent to include employees within Title IX. This single statement was made, however, by a congressman who was neither the sponsor of the bill nor involved in its drafting. It should not, therefore, be given great weight. See note 75 *supra*.

87. Conference Rep. No. 798, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Ad. News 2608, 2671-72.

88. *Id.*, reprinted in [1972] U.S. Code Cong. & Ad. News at 2671-72. The Conference Committee report stated that "[i]n addition, the House Amendment, but not the Senate Amendment, provided that nothing in the title authorizes action by any department . . . with respect to any employment practice of any employer. . . . The House recedes." *Id.*

89. Higher Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-86 (1976) and in scattered sections of 29, 42 U.S.C.).

90. *Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir.), cert. denied, 444 U.S. 972 (1979). The court stated that "[t]he elimination of this language [the employment exclusion,] does not indicate that Title IX was intended to cover employment practices. Rather it reflects the fact that at that point in the legislative process such a provision . . . would have been inaccurate and contradictory in light of this statute's extension of existing laws to cover employment practices of educational institutions." *Id.* at 584; see *Islesboro School Comm. v. Califano*, 593 F.2d 424, 428 (1st Cir.), cert. denied, 444 U.S. 972 (1979).

91. Kuhn, *supra* note 32, at 57.

92. 629 F.2d 773 (2d Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

93. *Id.* at 783.

94. Webster's Third New International Dictionary 1894 (1976 ed.)

In *Gulf Oil v. Copp Paving Co.*,⁹⁵ for example, the Supreme Court refused to interpret a congressional act to include a provision that a conference committee had specifically deleted. Referring to the deletion, it stated that such "action strongly militates against a judgment that Congress intended a result it expressly declined to enact."⁹⁶ The House, therefore, along with the Senate, did not intend to exclude employment practices from coverage when it enacted Title IX. This conclusion is further supported by an examination of the congressional reaction to the Title IX regulations and the failure of subsequent attempts to amend section 901.

3. Subsequent Action by Congress

Congressional review of HEW's Title IX regulations, in the "laying before procedure,"⁹⁷ was conducted immediately following their issuance in 1975.⁹⁸ During the forty-five day reviewing period, a

95. 419 U.S. 186 (1974).

96. *Id.* at 200; accord *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 391-92 (1951) ("In view of th[e] history [of the bill and previous amendments] we can only conclude that, if the draftsman intended [a particular result], it was strange indeed that he omitted the one clear provision that would have accomplished that result.").

97. Since 1938, a variety of statutes have included provisions designed to subject administrative construction of regulations to congressional review. By means of this procedure, termed a "laying before provision," Congress has a final opportunity to correct administrative "errors and ambiguities [in] the law." H.R. Rep. No. 805, 93d Cong., 2d Sess. 73, reprinted in [1974] U.S. Code Cong. & Ad. News 4093, 4154. The Title IX regulations were subjected to legislative scrutiny pursuant to 20 U.S.C. § 1232 (d)(1) (1976), which requires all regulations issued by agencies that receive federal educational funds to submit administrative rulings for congressional review. Commentators have viewed the laying before procedure as narrowing the role of subsequent judicial review by creating a presumption in favor of congressional approval, Note, "*Laying on the Table*"—A Device for Legislative Control over Delegated Powers, 65 Harv. L. Rev. 637, 647 (1952) [hereinafter *Laying on the Table*], and perhaps, even eliminating it. Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 Fordham L. Rev. 638, 665 (1957) ("Such legislative participation in agency rule-making would . . . eliminate in part the possibility of future voiding of the regulation by the courts on an ultra vires basis, since such laying could be interpreted as congressional approval of the agency regulation."). The procedure has been the subject of controversy, with a number of commentators challenging it on constitutional grounds. *E.g.*, J. Harris, *Congressional Control of Administration* 204-38 (1964); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 Harv. L. Rev. 569, 593-99 (1953); Comment, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1068-81 (1975). Another author, however, has argued that the procedure is indeed valid. Schwartz, *Legislative Control of Administrative Rules and Regulations: 1. The American Experience*, 30 N.Y.U. L. Rev. 1031, 1042 (1955).

98. The regulations were published in the Federal Register on June 4, 1975. 40 Fed. Reg. 24127 (1975).

number of resolutions challenging various aspects of the regulations were introduced in both houses of Congress. In the Senate, a resolution disapproving of all regulations issued under Title IX, including those relating to employment, was introduced.⁹⁹ This resolution was referred to the Senate Committee on Labor and Public Welfare, which took no action.¹⁰⁰ In the House, a resolution specifically disapproving of the employment regulations was drafted by Representatives Quie and Eilenborn.¹⁰¹ Like its Senate counterpart, this resolution died in committee.¹⁰²

HEW has argued that the failure of Congress to enact these resolutions excluding employees from coverage is demonstrative of support for the inclusion of employees in section 901.¹⁰³ One commentator, however, has suggested that the length of time that elapsed between the enactment of the original Title IX legislation and the reviewing process should diminish the significance of the failure to disapprove¹⁰⁴ because many of those who reviewed the regulations had not been members of Congress when Title IX was enacted and, therefore, had no personal knowledge of the original congressional intent.¹⁰⁵ Furthermore, it is argued that even those who had been present in 1971 would not remember the original intent because of the three year delay.¹⁰⁶ None of these criticisms, however, is relevant to the resolutions seeking to disapprove of the employment regulations. Senator Bayh, in testimony before the committee considering the Quie/Eilenborn amendment, stated that he had intended Title IX to require equality in educational employment.¹⁰⁷ His testimony, therefore, was available to jog dulled memories and enlighten the uninformed.

There are, however, factors that militate against viewing the result of the laying before procedure as conclusive evidence of congressional approval. First, because each resolution was referred to a committee for action, few members of either house had an opportunity to hear

99. S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17301 (1975).

100. *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 783 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

101. *Id.* at 783-84 (citing Unpublished Amendment to H.R. Con. Res. 330, 94th Cong., 1st Sess. (1975) (on file with the House Comm. on Education and Labor)).

102. *Id.* at 784.

103. Brief for Appellant at 33-35, *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

104. *Ultra Vires Challenges*, *supra* note 37, at 156-57.

105. *Id.* at 156.

106. *Id.* at 157.

107. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 173 (1975) (statement of Sen. Bayh) ("[T]itle IX guidelines, as the Congress mandated, call for equality in . . . the case of teachers, and other educational personnel, employment, pay and promotions."). *See generally* 33 Cong. Q. 1484 (1975).

Senator Bayh's statements or to vote on the merits of either the Senate or House resolution.¹⁰⁸ Second, the review was conducted in the midst of substantial pressure by feminist lobbying groups.¹⁰⁹ Any congressman considering disapproval of the regulations would have been aware of the potential political impact of such a vote.¹¹⁰ Finally, the statute requiring the legislative review of administrative regulations was amended, in November 1975, within six months after the review of Title IX took place, to provide that failure to disapprove of a set of regulations should not be construed as approval or as a finding of consistency with the authorizing statute.¹¹¹ Due to this amendment, the result of the laying before procedure cannot be viewed as conclusively establishing congressional intent. Nevertheless, it does provide "some evidence that coverage was intended."¹¹² Moreover, it does not support the conclusion that Congress intended to exclude employees from coverage.

Further support for the inclusion of employees within section 901 as written can be ascertained from the failure of subsequent congressional attempts to limit the scope of section 901. In 1975, Senator Helms introduced a bill to amend Title IX of the Educational Amendments of 1972.¹¹³ The relevant portion of the bill stated that "[n]othing in [section 901] shall apply to any employees of any educational institution subject to this title."¹¹⁴ The bill was never adopted. A year later, Senator McClure proposed legislation that would have limited the scope of section 901 to the "curriculum or graduate requirements of the institutions" receiving federal aid.¹¹⁵ It would have excluded employment, as well as scholarship aid and extracurricular activities, from section 901.¹¹⁶ This bill was also never passed.¹¹⁷ The Supreme Court has stated that "the failure to amend [an act] in the face of the consistent administrative construction, is . . . persuasive of legislative recognition and approval of the statute as construed."¹¹⁸ This is especially true in instances of congressional inaction in the face of specific attempts to amend.¹¹⁹ In addition, the failure to

108. *Ultra Vires Challenges*, *supra* note 37, at 156.

109. 33 Cong. Q. 1484 (1975).

110. *See id.*

111. 20 U.S.C. § 1232(d)(1) (1976).

112. *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 784 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

113. S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23845-47 (1975).

114. *Id.* § 2(2), 121 Cong. Rec. 23847 (1975).

115. Amend. No. 389 to S. 2657, 95th Cong., 1st Sess., 122 Cong. Rec. 28136 (1976).

116. *Id.* § 178, 122 Cong. Rec. 28144 (1976).

117. 122 Cong. Rec. 28147 (1976).

118. *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492-93 (1931).

119. *United States v. Bergh*, 352 U.S. 40, 46-47 (1956) ("Several efforts were made to repeal this [administrative] interpretation by specific Act of Congress, but in

amend section 901 is significant because Congress, on two separate occasions, has amended Title IX when it has disagreed with HEW's interpretation of the statute.¹²⁰ The complete legislative record is conclusive, therefore, as to the intent of Congress to include employees within section 901.

C. Title IX, Title VII and the Equal Pay Act

Some courts that have determined that employees are outside of the scope of section 901 have concluded that Congress could not have intended such a result when other remedies for employment discrimination are available¹²¹ under Title VII¹²² and the Equal Pay Act.¹²³ They have implied that employees have no *need* for Title IX because other acts fulfill the same purpose and provide adequate remedies. Emphasizing that the termination of federal funds is the primary remedy available to HEW, these courts have contended that the application of such a sanction to employment discrimination is illogical because it penalizes students in the enforcement of employees' rights.¹²⁴

The contention that employees need not look to Title IX is without merit for two reasons. First, the purpose of Title IX is distinct from Title VII and the Equal Pay Act.¹²⁵ Title IX is intended "to avoid the

each instance the bill failed to pass. . . . [This] acquiescence of the Congress, must be given great weight." (footnote omitted); *Alstate Constr. Co. v. Durkin*, 345 U.S. 13, 17 (1953) ("We decline to repudiate an administrative interpretation of [an] [a]ct which Congress refused to repudiate after being repeatedly urged to do so.").

120. *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 784 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986).

121. *See, e.g., Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *North Haven Bd. of Educ. v. Califano*, 19 FEP Cases (BNA) 1505, 1507-08 (D. Conn. 1979), *rev'd sub nom. North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986); *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1213-15 (E.D. Mo. 1978), *aff'd*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979).

122. 42 U.S.C. §§ 2000e to 2000e-17 (1976).

123. 29 U.S.C. § 206(d) (1976).

124. *See, e.g., Romeo Community Schools v. HEW*, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); *North Haven Bd. of Educ. v. Califano*, 19 FEP Cases (BNA) 1505, 1507-08 (D. Conn. 1979), *rev'd sub nom. North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986); *Junior College Dist. v. Califano*, 455 F. Supp. 1212, 1212-15 (E.D. Mo. 1978), *aff'd*, 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979).

125. Admittedly, the same conduct could lead to charges of sex discrimination against an educational employer under any or all of the three acts. A school district that receives federal funds under 20 U.S.C. § 238 (1976), for example, can violate Titles IX and VII, as well as the Equal Pay Act, if it pays female faculty members

use of federal resources to support discriminatory practices.”¹²⁶ The focus, therefore, is on the ways in which federal aid is utilized. In contrast, both the Equal Pay Act and Title VII focus on the barriers encountered by women in the job market. The Equal Pay Act is designed as a “broad charter of women’s rights in the economic field.”¹²⁷ Its goals are to equalize traditional differences in wages paid to male and female workers and to alleviate the resulting adverse economic and social consequences.¹²⁸ Title VII is a more comprehensive prohibition against private acts of employment discrimination. “[T]o assure equality of employment opportunities,”¹²⁹ Title VII makes it unlawful for an employer to discriminate not only with respect to compensation, but to all the terms, privileges, and conditions of employment.¹³⁰

less than their male counterparts with equivalent professional credentials. As a result, the federal government may refuse, under Title IX, to continue to participate in the program, or aggrieved parties may seek the remedies provided for in the other two acts. That the three acts could be used in the same instance, however, should not eliminate the availability of Title IX. In general, concurrent jurisdiction among civil rights statutes has long been upheld. Courts have consistently held that although Title VII was intended as a comprehensive solution for the problem of employment discrimination, it was not intended to be the only avenue of relief available to an aggrieved individual. *E.g.*, *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (“[T]he remedies available to the individual under Title VII are co-extensive with the individual’s right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and . . . the two procedures augment each other and are not mutually exclusive.” (quoting H.R. Rep. No. 238, 92d Cong., 1st Sess. 19 (1971))); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974) (“[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes.”); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976) (The failure of Congress to make “Title VII the exclusive remedy for the unlawful employment practices it covers . . . evince[s] a congressional purpose to leave open other modes of relief available to victims of discriminatory employment practices.” (footnote omitted)), *cert. denied*, 434 U.S. 1086 (1978). Additionally, the legislative history of Title VII indicates that Congress did not intend it to diminish the usefulness of the Equal Pay Act as a remedy for employment discrimination. 118 Cong. Rec. 1677 (1972) (remarks of Sen. Williams) (“[I]t is not our intention in any way to affect or diminish the remedies available under the Equal Pay Act of 1963.”). In fact, Congress has defeated amendments that would have made Title VII the exclusive federal remedy for most unlawful employment practices in both 1964, 110 Cong. Rec. 13650-52 (1964) (remarks of Rep. Tower) and 1972. *Joint Explanatory Statement of Managers at Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers*, [1972] U.S. Code Cong. & Ad. News, 92d Cong., 2d Sess. 2179, 2183.

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

127. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

128. *Id.*

129. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

130. 42 U.S.C. § 2000e-2(a)(1) (1976).

Second, educational employees need the protection of Title IX because the extent and nature of its procedure and the ultimate remedy it provides are clearly superior to those of Title VII and the Equal Pay Act. Under Title IX, a person who believes himself to be the subject of discrimination must file a complaint within 180 days.¹³¹ HEW must conduct a "prompt investigation"¹³² and, if a violation is established, seek resolution by informal means.¹³³ If this informal procedure is unsuccessful, compliance can be effected by suspension of or refusal to grant federal funds.¹³⁴ This threat of the cutoff of federal money has been termed "a powerful weapon"¹³⁵ and has been praised for its "effectiveness and flexibility."¹³⁶

Responsibility for the enforcement of Title VII rests with the Equal Employment Opportunity Commission (EEOC), which was created to achieve the goals of the Civil Rights Act of 1964.¹³⁷ An individual who believes that her employer has violated Title VII must file a charge with the EEOC, detailing the allegedly discriminatory practice.¹³⁸ If the complainant resides in a city or state that has passed a fair employment practice law, the EEOC may not take action concerning the complaint for sixty days. Rather, it must allow the local agency to attempt to resolve the dispute.¹³⁹ If no action has been taken at the end of this waiting period, the EEOC must notify the employer of the complaint and investigate the charges of discrimination.¹⁴⁰

When a violation is found, the emphasis, as in Title IX, is on "[c]ooperation and voluntary compliance"¹⁴¹ rather than judicial

131. 45 C.F.R. § 80.7(b) (1980). HEW can also impose the "ultimate remedy"—the termination of funds—if an educational institution fails to comply with 45 C.F.R. § 86.4(a) (1980). This section requires every applicant for federal funds to submit an assurance that the program will be operated in compliance with the regulations. *Id.*

132. *Id.* § 80.7(c).

133. *Id.* § 80.7(d).

134. *Id.* § 80.8(a). This is not to imply that funding can be terminated immediately upon the finding of a violation. An order suspending the funds must be preceded by a hearing in which an express finding of the violation is placed on the record, *id.* § 80.8(c)(2), and by the notification of the committee of each house of Congress having jurisdiction over the program involved. *Id.* § 80.8(c)(3).

135. S. Ross, *The Rights of Women* 134 (1973).

136. 118 Cong. Rec. 5807 (1972) (remarks of Sen. Bayh).

137. 42 U.S.C. §§ 2000e to 2000e-17 (1976); see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

138. 42 U.S.C. § 2000e-5 (1976).

139. *Id.* § 2000e-5(c); see *New York Gaslight Club, Inc. v. Carey*, 100 S. Ct. 2024, 2031 (1980) ("Initial resort to state and local remedies is mandated, and recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief."). See also *Moore v. Sunbeam Corp.*, 459 F.2d 811, 824 (7th Cir. 1972); *EEOC v. Union Bank*, 408 F.2d 867, 870 (9th Cir. 1968).

140. 42 U.S.C. § 2000e-5(b) (1976).

141. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).

resolution. "Conference, conciliation, and persuasion" are required before aggrieved parties can file a lawsuit.¹⁴² Unlike the Secretary of HEW, however, the Commissioner of the EEOC has no direct powers of enforcement. He can neither adjudicate claims nor impose any administrative sanctions.¹⁴³ If efforts to achieve conciliation fail, he may bring a civil action against a non-governmental offender,¹⁴⁴ or in the case of a governmental entity, refer the case to the Attorney General, with whom the final decision to prosecute rests.¹⁴⁵ Thus, unlike the procedures under Title IX, which provide the administrative agency with the means to compel compliance, the procedures of Title VII vest the courts with final enforcement responsibility.

Moreover, although the enforcement procedures provided for in Title VII appear to provide an efficient means of resolving charges of sex discrimination in employment, they have proven otherwise. The EEOC has been confronted with an overload of cases,¹⁴⁶ and resolution of a claim under Title VII has been a lengthy process.¹⁴⁷ Even when a Title VII case reaches a federal court, it is unlikely that the victim of sexually discriminatory practices will gain redress. First, it is difficult to prove sex discrimination in an academic setting.¹⁴⁸ Almost every female plaintiff who has brought allegations of Title VII sex discrimination against a college or university has been unsuccessful.¹⁴⁹ Second, courts have professed reluctance to inter-

142. *Id.*

143. *Id.*

144. 42 U.S.C. § 2000e-5(f) (1976).

145. *Id.* Although it is true that Title VII also provides an individual with a private right of action, 42 U.S.C. § 2000e-5(f)(1) (1976), this statute still forces a party to go to court to ensure compliance. Under Title IX, compliance can be obtained without resort to judicial intervention.

146. It has been alleged that failure to provide support for the EEOC in the form of funding is the cause of this delay. I. Murphy, *Public Policy on the Status of Women* 39 (1973). In any case, statistics showed that as of June 30, 1972, 53,000 cases were awaiting resolution. *Id.* (citing EEOC Ann. Rep. (1972)).

147. It can be argued, however, that despite the possibility of delay, the remedies provided for in Title VII make it a more attractive avenue of relief. The cutoff of funds or the threat thereof is the primary sanction available under Title IX. See notes 5-6 *supra* and accompanying text. *But see* note 173 *infra* (discussion of fashioning other remedies). Although the cutoff of funds results in the elimination of discrimination, it does not compensate an individual financially injured as a result of the violation. Title VII, on the other hand, is seemingly more economically beneficial to an individual employee. Because the EEOC process and any ensuing litigation may drag on for a number of years, however, it may be to an employee's economic advantage to use the Title IX process, thus halting the discriminatory practice at an earlier point and having her salary immediately increased, rather than using Title VII and receiving the compensation many years later.

148. *Sweeney v. Board of Trustees*, 569 F.2d 169, 175 (1st Cir.), *vacated and remanded on other grounds per curiam*, 439 U.S. 24 (1978).

149. *See, e.g., Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Peters v. Middlebury College*, 409 F. Supp. 857 (D. Vt. 1976); *Van de Vate v. Boling*, 379 F. Supp. 925 (E.D. Tenn. 1974).

vene in the employment decisions of a private university or college.¹⁵⁰ They have been hesitant to interject themselves in what they view as subjective evaluations that would more appropriately be made by persons in the academic setting.¹⁵¹ As one court has noted, faculty appointments at a university level are poorly suited for federal court supervision.¹⁵²

In contrast, if a Title IX complaint ultimately requires judicial resolution, a court will be less hesitant to intervene because the discriminatory practice involves more than just the internal affairs of an academic facility; it also involves the use of federal funds. The Supreme Court has expressed support for a national commitment to eliminate sex discrimination¹⁵³ and the desire of Congress to prohibit the use of federal funds in discriminatory ways.¹⁵⁴ It is likely, therefore, that the traditional judicial laissez-faire approach to academic decision-making will give way to a commitment to eliminate governmental support of practices that offend the "moral sense of the [n]ation."¹⁵⁵

A comparison of Title IX and the Equal Pay Act¹⁵⁶ also establishes section 901 as a superior remedy. The Equal Pay Act has proven to be an effective remedy¹⁵⁷ and the Department of Labor, unlike the EEOC, has gained a reputation for prompt and effective processing of complaints and efficient awarding of damages.¹⁵⁸ Nevertheless, there is a glaring deficiency in this act when compared with Title IX. The Equal Pay Act can only remedy differences in compensation; any other terms or conditions of employment are beyond its scope.¹⁵⁹ Therefore, its usefulness as a tool in combatting employment discrimination in educational institutions is very limited.

150. *Sweeney v. Board of Trustees*, 569 F.2d 169, 176 & n.13 (1st Cir.), *vacated and remanded on other grounds per curiam*, 439 U.S. 24 (1978).

151. *Id.*; *cf. Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (academic freedom is a special concern of the first amendment); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (essential to maintain academic freedom in universities). See generally *Murphy, Academic Freedom—An Emerging Constitutional Right*, 28 *Law & Contemp. Prob.* 447 (1963); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 *Harv. L. Rev.* 879 (1979).

152. *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974).

153. See *Caban v. Mohammed*, 441 U.S. 380 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Reed v. Reed*, 404 U.S. 71 (1971).

154. *Cannon v. University of Chicago*, 441 U.S. 677, 703-04 (1979).

155. 110 *Cong. Rec.* 6544 (1964) (remarks of Sen. Humphrey) (discussion of rationale underlying Title VI).

156. 29 U.S.C. § 206(d) (1976).

157. *I. Murphy*, *supra* note 146, at 87. The Equal Pay Act requires employers to pay equal salaries to a man and a woman when their jobs require "equal skill, effort, and responsibility, and . . . are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (1976). One court has held that the work need be only "substantially equal" to require equal pay. *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

158. *I. Murphy*, *supra* note 146, at 87.

159. 29 U.S.C. § 206(d) (1976).

The analysis of the statutory language and the legislative history have shown that Congress clearly intended employees to be within the scope of section 901. Furthermore, section 901 provides employees of an educational institution with a means of combatting sex discrimination unequalled in other statutes. It remains to be determined, however, whether HEW has exceeded its authority in issuing the section 901 employment regulations.

II. THE INVALIDITY OF THE REGULATIONS UNDER SECTION 901

HEW has validly construed the "no person" language of section 901 to include the employees of an educational institution that receives federal financial assistance. It has, however, exceeded the scope of its authority in its use of expansive language in the employment regulations.¹⁶⁰ The language of the regulations issued by HEW differs from that of section 901 in two respects. First, it brings every program of a recipient institution within the statute's coverage.¹⁶¹ The statute, in contrast, is directed at the specific program that receives the federal aid.¹⁶² Second, the language of the regulations allows HEW to regulate a program that is a beneficiary, but not a recipient, of the federal assistance.¹⁶³

160. Some courts that have excluded employment coverage from 20 U.S.C. § 1681 (1976) have concluded that there is an implicit limitation on the power of HEW to regulate under § 901 because 20 U.S.C. § 1682 (1976) (§ 902 of Title IX) permits fund termination only in the particular portion of a program in which noncompliance exists. *North Haven Bd. of Educ. v. Califano*, 19 FEP Cases (BNA) 1505, 1507-08 (D. Conn. 1979), *rev'd sub nom. North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986); *Romeo Community Schools v. HEW*, 438 F. Supp. 1021, 1033 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). These courts have concluded that, because employment practices are usually systemwide, employment regulations that would satisfy their interpretation of § 1681 could not be drafted. These courts, therefore, did not reach the question whether regulations consistent with legislative intent could possibly be drawn. The Second Circuit, in *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3467 (U.S. Jan. 6, 1981) (No. 80-986), accepted the present regulations as valid and therefore saw no need to suggest alternatives. *Id.* at 786. The Fifth Circuit indicated that there are circumstances in which employment regulation is warranted, but did not suggest specific reforms. *Dougherty County School Sys. v. Harris*, 622 F.2d 735, 738 (5th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3945 (U.S. Jan. 22, 1981) (No. 80-1023).

161. 45 C.F.R. § 86.51(a)(1) (1980) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefore, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from [f]ederal financial assistance.").

162. 20 U.S.C. § 1681 (1976).

163. 45 C.F.R. § 86.51(a) (1980).

The validity of these regulations depends on the extent to which they comply with the legislative purpose of section 901.¹⁶⁴ The Supreme Court has stated that the section was intended to prohibit the use of federal funds in support of discriminatory practices in a recipient program or activity.¹⁶⁵ Under a number of federal grant programs, the funds received directly support employment practices, and therefore, regulation is valid. At the university level, for example, grants to develop programs to educate the elderly,¹⁶⁶ to establish cooperative arrangements among universities,¹⁶⁷ and to develop programs of combined academic study and employment,¹⁶⁸ all require personnel to operate. At the local level, school districts have access to federal grants to defray the costs of salaries in innovative educational curriculums,¹⁶⁹ programs for the education of the handicapped,¹⁷⁰ and local educational agencies serving areas with a high concentration of children from low income families.¹⁷¹ An employee who is victimized by differential treatment on the basis of sex in any of these recipient programs has been "subjected to discrimination under [an] education program . . . receiving federal financial assistance"¹⁷² and is, therefore, deserving of Title IX protection.¹⁷³

164. See note 126 *supra* and accompanying text; note 174 *infra* and accompanying text.

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

166. 20 U.S.C. § 1008a(a) (1976).

167. *Id.* § 1054(b)(1).

168. *Id.* § 1133.

169. *Id.* § 843(b)(2).

170. *Id.* § 2771 (Supp. II 1978).

171. *Id.* § 241(a) (1976).

172. *Id.* § 1681(a).

173. This potential termination of federal funds could be extremely burdensome on a local school district in light of the current inflationary conditions, see generally *Wall St. J.*, March 4, 1981, at 3, cols. 2-3; *id.* March 3, 1981, at 2, col. 2, and the enactment of state legislation significantly reducing local property taxes, see generally *N.Y. Times*, Jan. 30, 1978, at 21, col. 4; *id.* June 9, 1978, at 1, col. 4, one of the main sources of support for local school systems. See generally *id.* Jan. 14, 1979, § XI, at 1, col. 1. As long as the wording of the statute remains as is, however, employees cannot justifiably be excluded on these grounds. There are two possible legislative solutions to this problem. First, Congress could add a provision similar to § 604 of Title VI, expressly excluding employees from coverage. As an alternative, far less drastic measure, Congress could redraft the employment section utilizing the statutory language that permits the HEW to employ "any other means authorized by law," 20 U.S.C. § 1682 (1976), to effect compliance. Under such an amendment, the HEW, by means of the conciliation procedures, would have to seek reinstatement and backpay, as well as assurances that the practice will not be continued. The termination of funds would be employed only as a last resort. Because the Court has held that Title IX contains an implied private right of action, *Cannon v. University of Chicago*, 441 U.S. 677 (1979), such a provision would be particularly useful to an employee seeking redress without resort to administrative enforcement.

When applied to programs that do not receive federal funds, however, the regulations are invalid. Importantly, the legislative history indicates that Title IX was intended not as a general prohibition against employment discrimination on the basis of sex within a recipient institution, but as a prohibition against federal support for such discrimination.¹⁷⁴ Consequently, regulation of non-recipient programs is permissible only when federal funds flow from the recipient to the non-recipient programs. This occurs if, as a result of the receipt of the federal funding, an institution reduces the expenditures it makes in the recipient area and utilizes the "freed up" funds in support of employment throughout the institution. An examination of the effect on an institution's resources of the receipt of the funds included within HEW's definition of "[f]ederal financial assistance,"¹⁷⁵ however, reveals that in many cases there is little connection between the funds received by one program and the resources available to others.

The federal grants included in the definition of federal financial assistance can be categorized as indirect and direct. In the first category is aid that a school receives when a student who is the recipient of government assistance makes a tuition payment.¹⁷⁶ One court has held that a university that enrolls students who make federally assisted tuition payments can become subject to regulation by HEW solely on this basis.¹⁷⁷ Reliance on indirect student aid as the basis

174. The legislative history in this area is not very extensive. The available record, however, militates against interpreting § 901 as a blanket prohibition against sex discrimination by an educational employer. Congress had the opportunity but did not enact legislation that would have provided for institution-wide coverage. In 1971 the Nixon administration proposed a bill, H.R. 5191, 92d Cong., 1st Sess. (1971), that prohibited sex discrimination in any program by a school that was a recipient of federal financial assistance. Senator Bayh's first proposal, *see* notes 53-55 *supra* and accompanying text, made such discrimination unlawful throughout an educational institution that received federal aid. Amendment 398 to S.659, 92d Cong., 1st Sess., 117 Cong. Rec. 30155-57 (1971). The legislation as finally enacted adopted a far more limited approach. It only permitted regulation within the particular program that received the federal aid. *See* notes 2-4 *supra* and accompanying text; *cf.* Cannon v. University of Chicago, 441 U.S. 677, 691-93 (1979) (In "drafting Title IX with an unmistakable focus on the benefited class, [Congress has not] written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices." (footnote omitted)).

175. 45 C.F.R. § 86.2(g) (1980) (emphasis deleted).

176. *Id.* § 86.2(g)(1)(ii).

177. *Grove City College v. Harris*, 500 F. Supp. 253 (W.D. Pa. 1980). Although the court held that the receipt of such student funds was sufficient to make the college a recipient, it refused to order the college to issue the requested assurances of compliance because they were in reference to employment practices. In refusing, it adopted the position of those courts that have found employees beyond the scope of the statute. *Id.* at 269; *cf.* *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597, 602-03

for classifying an institution as a recipient, however, has little support in the legislative history. Although the record in this area is very sparse, the available statements indicate that Senator Bayh never intended the curtailment of student assistance as a means of implementing Title IX's objectives.¹⁷⁵

Even if one assumes that a university is held to be a recipient based on its use of indirect student aid, a link between the funds received from the students and the regulated employment practices must still be established.¹⁷⁹ Within an educational institution it will be difficult to demonstrate this link. In each case, HEW would have to prove that the funds received by a university through federally assisted tuition payments increased the resources it had at its disposal to spend in an employment related context.¹⁸⁰

Even when a university receives the federal funding directly,¹⁸¹ rather than through indirect payments, the necessary support, in a number of instances, cannot be established. An examination of the types of assistance received by both universities and local school districts indicates that there is often little, if any, flow of money from supported to unsupported activities. With respect to universities, many federal grant statutes contain provisions requiring a school to continue funding programs that receive federal money at traditional levels.¹⁸² In such instances, the university receives no windfall prof-

(D.S.C. 1974) (all aid awarded to students by Veteran's Administration could be terminated due to university's failure to comply with Title VI regulations issued by that agency), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

178. The only reference that the Senator made to the relationship between student aid and the termination of funding for a statutory violation took place in an exchange concerning his 1971 proposal. He stated that "[i]t is unquestionable, in my judgment, that [the termination provisions] would not be directed at specific assistance that was being received by individual students, but would be directed at the institution." 117 Cong. Rec. 30408 (1971) (remarks of Sen. Bayh). If the Senator did not view this as a permissible sanction in a proposal that made the receipt of federal funds a sufficient basis for regulation throughout an institution, *see note 54 supra* and accompanying text, it is highly unlikely that he would have seen it as appropriate in the bill as passed, in which a nexus between the funds received and the program sought to be regulated must be shown. *See note 174 supra* and accompanying text.

179. *See note 174 supra* and accompanying text.

180. A two step process is required to arrive at such a conclusion. First, the HEW must show that students who are enrolled in a particular university receive federal assistance and utilize it in making tuition payments. Second, the university, on the basis of the receipt of these payments, must decrease its own expenditures for financial aid and concurrently increase the money it allocates for salaries or transfer it to a general fund so that its use can be linked to employment practices.

181. 45 C.F.R. § 86.2(g)(1)-(5) (1980).

182. *See* 20 U.S.C. § 1022(1)(A)(B) (1976) (financial assistance for college library programs may be obtained provided the institution provides assurances that the university, in the year federal aid is received, will allocate not less than the average amount spent for the same purpose in the preceding two years). *See also id.* §§ 1023, 1070e(c)(A)(iii), 1124c, 1125(b)(5)(c), 1134s(c)(2)B (1976).

its, nor does it suddenly discover a treasure trove that can be spread among its various operating expenses. Rather, only the specifically assisted federal program enjoys an increase in funds. At the elementary and secondary school levels, the federal money often creates programs that otherwise might be non-existent.¹⁸³ Because the school district has made no expenditures in this area in the first place, no funds are released to be used in support of other programs.

CONCLUSION

As presently written, the employment regulations conflict with the language of section 901 and congressional intent. To resolve this conflict, HEW should reword the present regulations in one of two ways. First, it can incorporate the statutory language and limit the scope of the regulations to programs that are the recipients of federal funds. Alternatively, if HEW desires to continue to regulate employment practices in non-recipient programs, it must rewrite the regulations to apply only when it can be demonstrated that such programs are supported by federal funds received elsewhere in the institution. Only then will the regulations reflect congressional intent.

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183. See, e.g., *id.* §§ 841, 887(a), 900, 1531 (1976).