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DISCRIMINATION LAW—TITLE IX AND SEX DISCRIMINATION IN EDUCATIONAL EMPLOYMENT—North Haven Board of Education v. Hufstedler, 629 F.2d 773 (2d Cir. 1980)

Carl T. Holt

DISCRIMINATION LAW—TITLE IX AND SEX DISCRIMINATION IN EDUCATIONAL EMPLOYMENT—*North Haven Board of Education v. Hufstedler*, 629 F.2d 773 (2d Cir. 1980).

I. INTRODUCTION

"Today, education is perhaps the most important function of state and local government."[1] This statement, made by the United States Supreme Court in 1954, still holds true almost three decades later. In school buildings and on college campuses across the nation, thousands of people exchange ideas, are instilled with values, and prepare for entrance into American society. For the American educational system to carry on these functions in a manner that conforms to this country's ideals, there must be equal treatment in the educational system for every citizen regardless of race, creed, national origin, or sex. Title IX of the Education Amendments of 1972 (title IX)[2] was enacted to promote equal treatment in education for people of both sexes. Title IX sought to reduce, or stop, the expenditure of federal monies to educational programs or activities in which sex discrimination occurred: "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. . . ."[3]

The Education Amendments of 1972 empowered the Department of Health, Education and Welfare (HEW) to promulgate regulations implementing title IX.[4] The final regulations were issued in 1975 and were controversial when released because, among other things, they attempted to regulate sex discrimination in educational employment.[5] This controversy was brought before the United

1. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

2. 20 U.S.C. §§ 1681-1686 (1976) [hereinafter referred to as title IX].

3. *Id.* at § 1681(a).

4. The responsibility for the promulgation of regulations under title IX has been transferred from HEW to the newly created Department of Education, 20 U.S.C. § 3401; 3 C.F.R. Exec. Order No. 12212, (1980). The creation of the Department of Education resulted in a change in references to the regulations issued under title IX. The Code of Federal Regulations reference to the regulations as issued by HEW was 45 C.F.R. §§ 86.51-.61 (1980). The identical regulations have been reissued by the Department of Education as 34 C.F.R. §§ 106.51-106.61 (1980). The numbering used in this case note will be those of the HEW regulations.

5. 45 C.F.R. §§ 86.51-.61 (1980).

States District Court for the Eastern District of Michigan in *Romeo Community Schools v. HEW* (*Romeo I*).[6] The issue was whether HEW had authority under title IX to regulate the employment practices of educational institutions by withholding federal funds that were used by those institutions in a sexually discriminatory manner. Within three years of *Romeo I*, thirteen separate courts confronted this issue, and each of the thirteen courts decided that the regulations exceeded the authority granted to HEW by title IX.[7] On July 24, 1980, in *North Haven Board of Education v. Hufstedler* (*North Haven*)[8] the United States Court of Appeals for the Second Circuit became the first court to hold the regulations valid.[9] This note will explore the rationale for *North Haven* and will consider the possible ramifications of the case.

II. FACTUAL BACKGROUND

The North Haven branch of the case arose when Ms. Elaine Dove, a former teacher in the North Haven school system, filed a complaint with HEW alleging a violation of title IX based on the school board's failure to rehire her following a maternity leave.[10] After an exchange of letters between HEW and the North Haven

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

7. *See* Seattle Univ. v. HEW, 621 F.2d 992 (6th Cir. 1979), *aff'g*, 16 Fair Empl. Prac. Cas. 719, 16 Empl. Prac. Dec. ¶ 8241 (W.D. Wash. 1978), *cert. granted*, 449 U.S. 1009 (1980); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir. 1979), *aff'g*, 438 F. Supp. 1021 (E.D. Mich. 1977), *cert. denied*, 444 U.S. 972 (1979); Junior College Dist. v. Califano, 597 F.2d 119 (8th Cir. 1979), *aff'g*, 455 F. Supp. 1212 (E.D. Mo. 1978); Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir. 1979), *aff'g*, 449 F. Supp. 866 (D. Me. 1978), *cert. denied*, 444 U.S. 972 (1979); Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980); North Haven Bd. of Educ. v. Califano, 19 Fair Empl. Prac. Cas. 1505, 20 Empl. Prac. Dec. ¶ 30,198 (D. Conn. 1979), *rev'd sub nom.* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 450 U.S. 909 (1981); Auburn School Dist. v. HEW, 19 Fair Empl. Prac. Cas. 1504, 20 Empl. Prac. Dec. ¶ 30,146 (D.N.H. 1979); Board of Educ. v. HEW, 19 Fair Empl. Prac. Cas. 457, 20 Empl. Prac. Dec. ¶ 30,085 (N.D. Ohio 1979); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); Dougherty School Sys. v. Califano, 19 Fair Empl. Prac. Cas. 688 (M.D. Ga. 1978).

8. 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 450 U.S. 909 (1981). The United States Court of Appeals for the Second Circuit decided two separate appeals under the designation of North Haven Bd. of Educ. v. Hufstedler. The appeals were taken in North Haven Bd. of Educ. v. Califano, 19 Fair Empl. Prac. Cas. 1505, 20 Empl. Prac. Dec. ¶ 30,198 (D. Conn. 1979) and Trumbull Bd. of Educ. v. HEW, No. 78-401 (D. Conn. Sept. 13, 1979) (unreported). The cases involved are treated differently on factual points, but both involve the same legal issue. 629 F.2d at 774.

9. 629 F.2d at 786.

10. North Haven Bd. of Educ. v. Califano, 19 Fair Empl. Prac. Cas. 1505, 1506 n.1,

Board of Education,[11] the school board filed a complaint in the United States District Court for the District of Connecticut[12] asserting that the regulation[13] promulgated by HEW requiring that pregnancy be treated as a temporary disability was beyond the authority granted to the agency under title IX.[14] Judge Ellen Bree Burns granted summary judgment for the North Haven board based on *Romeo I*, which held that the regulations[15] exceeded the intention of Congress, were beyond the meaning of the statutory language, and called for remedies that were too drastic and far-reaching.[16]

The Trumbull branch of the case began when Ms. Linda Potz, a former guidance counselor at a junior high school in Trumbull, Connecticut, filed a complaint with HEW.[17] An investigation conducted by HEW concluded that: Ms. Potz was the only female guidance counselor at the junior high school level in the Trumbull system; she had been asked to falsify a title IX self-evaluation report; she had been replaced by a male; and that she had been required to type notices and run errands for the male principal.[18] HEW concluded that the school board was motivated by Ms. Potz' gender when the board made its decision not to renew her contract.[19]

After its investigation, HEW ordered the Trumbull board to take corrective action.[20] The school board instead brought suit in the United States District Court for the District of Connecticut[21] contending that HEW lacked authority under title IX to promulgate regulations concerning sex discrimination in educational employ-

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20 Empl. Prac. Dec. ¶ 30,198, at 12061 n.1 (D. Conn. 1979) (Secretary Hufstedler was substituted for former Secretary Califano).

11. *Id.* at 1506, 20 Empl. Prac. Dec. at 12,062.

12. *Id.* at 1505, 20 Empl. Prac. Dec. at 12,061.

13. 45 C.F.R. § 86.57(c) (1980).

14. Joint Brief for Plaintiffs-Appellees at 1, North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 450 U.S. 909 (1981) [hereinafter cited as Brief for Plaintiffs-Appellees].

15. 45 C.F.R. §§ 86.51-.61 (1980).

16. North Haven Bd. of Educ. v. Califano, 19 Fair Empl. Prac. Cas. 1505, 1507-09, 20 Empl. Prac. Dec., ¶ 30,198, at 12,062-64.

17. Brief for Appellant Linda Potz at 4-7, North Haven v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 450 U.S. 909 (1981) [hereinafter cited as Brief for Appellant Linda Potz].

18. *Id.* at 6-7. None of these activities were required of her male colleagues. *Id.*

19. *Id.* at 7.

20. *Id.* at 5.

21. Trumbull Bd. of Educ. v. HEW, No. 78-401 (D. Conn. Sept. 13, 1979) (unreported).

ment.[22] Judge Burns granted a motion for summary judgment referring to her previous decision in the North Haven branch of the case in which she held that the regulations exceeded HEW's authority under title IX.[23] HEW and Ms. Potz appealed to the United States Court of Appeals for the Second Circuit.[24]

III. ANALYSIS BY THE COURTS

The issue before the Second Circuit in *North Haven* was whether HEW had authority under title IX to regulate the employment practices of the North Haven and Trumbull boards of education. The inquiry commenced with an examination of the language of the statute.[25]

HEW argued that the term "no person" indicated a broad category of potential beneficiaries limited only by the language of the statute.[26] The qualifications for a potential beneficiary are that the person must "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance. . . ."[27] In *Romeo I*, Judge John Feikens concluded that it was difficult to fit teachers within these boundaries because teachers: Participate only to the extent of teaching; benefit only to the extent of salaries; and are subject to discrimination only to the extent that the programs themselves may be established or operated in a discriminatory manner.[28] In *North Haven*, the Second Circuit found that the language of the statute was ambiguous as to whether teachers were included.[29] In support of its position, the Second Circuit pointed to similar confusion in Congress over a parallel section of Title VI of the Civil

22. Brief for Appellant Linda Potz at 5, *supra* note 17; Brief for Plaintiffs-Appellees at 3, *supra* note 14.

23. 629 F.2d at 775; Brief for Plaintiffs-Appellees at 3-4, *supra* note 14.

24. 629 F.2d at 773.

25. *Id.* at 777. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) . ("The starting point in every case involving construction of a statute is the language itself.")

26. Brief for Federal Appellants at 13-14, North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 450 U.S. 909 (1980) [hereinafter cited as Brief for Fed. Appellants].

27. 20 U.S.C. § 1681(a) (1976). There is potential confusion about the numbering of the section of title IX at its various stages of development. During the congressional debate, the proposal was designated title X and numbered accordingly. Finally, title IX was codified at 20 U.S.C. §§ 1681-1686 (1976) and a third set of numbers was created.

28. 438 F. Supp. at 1031-32. *See also* Islesboro School Comm. v. Califano, 593 F.2d 424, 426 (1st Cir. 1979).

29. 629 F.2d at 777-78.

Rights Act of 1964 (title VI).[30] Congress clarified title VI by amending it to explicitly exclude employment from coverage.[31] Title IX was not clarified in any corresponding manner.[32]

Title IX also contained a series of exceptions or delays in implementation for special institutions, organizations, or activities.[33] None of these exceptions precisely dealt with any aspect of employment. The exceptions excluded whole classes of educational institutions,[34] certain types of activities that might be undertaken at an institution otherwise covered,[35] and scholarships received as prizes in beauty contests.[36] When *Romeo Community Schools v. HEW* (*Romeo II*)[37] reached the United States Court of Appeals for the Sixth Circuit, the court decided that all the exceptions related exclusively to students, student bodies, or participants in educational programs.[38] It therefore "may be fairly assumed" that professional education employees were not covered by title IX.[39] The Second Circuit disagreed with the Sixth Circuit and noted that the exceptions for religious and military schools did not mention students at all, but excluded entire institutions from coverage.[40] It concluded that the exceptions were ambiguous.[41] Whether professional employees, in addition to students, were to be protected against sex discrimination under title IX was unclear from the statutory language.[42]

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30. *Id.* at 778; *see* notes 95-98 *infra* and accompanying text.

31. 42 U.S.C. § 2000d-3 (1976); 110 CONG. REC. 11930 (1964); *see* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 53-54 (1976).

32. CONF. REP. NO. 798, 92d Cong., 2d Sess. 221, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2608, 2671-72.

33. Exceptions to 20 U.S.C. § 1681(a) (1976) are: (1) Classes of educational institutions subject to prohibition; (2) educational institutions commencing planned change in admissions; (3) educational institutions of religious organizations with contrary religious tenets; (4) educational institutions training individuals for military services or merchant marine; (5) public educational institutions with traditional and continuing admissions policies admitting only one sex; (6) social fraternities or sororities, voluntary youth service organizations; (7) boy or girl conferences; (8) father-son or mother-daughter activities at educational institutions; and (9) scholarship awards from "beauty" pageants that facilitate attendance at institutions of higher education. *Id.* § 1681(a)(1)-(9).

34. *Id.* § 1681(a)(2)-(5).

35. *Id.* § 1681(a)(6)-(8).

36. *Id.* § 1681(a)(9).

37. 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

38. *Id.* at 584.

39. *Id. See also* 118 CONG. REC. 5812 (1972) (comment of Senator Bayh, "In the area of employment, we permit no exceptions.").

40. 629 F.2d at 778.

41. *Id.*

42. *Id.*

IV. LEGISLATIVE HISTORY OF TITLE IX

The United States Court of Appeals for the Second Circuit concluded that the language of title IX was unclear regarding Congress' intention to cover professional education employees. The court then considered the legislative history in its attempt to decipher the legislative purpose of title IX.[43] The legislative history can be divided into four parts. This note first considers proposals similar to title IX that were offered in Congress prior to title IX, but either were withdrawn or were not approved. Second, the debate of title IX itself is considered. Third, the reports of the House, Senate, and Conference Committees are examined. Finally, the amendments and the proposed amendments to title IX that were offered after the law was passed will be reviewed.

A. *Proposals Offered Prior To Title IX*

Prior to the consideration of the bill that later became title IX, Senator Birch Bayh offered a bill in 1971[44] that clearly was described as covering employment.[45] Senator George McGovern indicated that rather than introduce a bill of his own dealing with sex discrimination, he would support Senator Bayh's bill.[46] When announcing the retraction of his proposal, Senator McGovern adverted to statistics indicating the low national percentage of female college professors in order to demonstrate a problem he hoped Senator Bayh's bill would rectify.[47] In the House of Representatives, Representative Edith Green submitted an amendment to insert the word "sex" after "race, religion, and national origin" in title VI.[48] None of these bills were enacted,[49] but they indicate congressional awareness of the need to deal with the problem of sex discrimination in education. In

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43. *Id.* at 778-83; *see* 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION 184-90 (4th ed. 1973); Buek & Orleans, *Sex Discrimination - A Bar to A Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973).

44. 117 CONG. REC. 30155-56 (1971).

45. *Id.*

46. *Id.* at 30411.

47. *Id.*

48. *Id.* at 9822. The process of amending title VI by the introduction of "sex" where appropriate was dropped because under Senate rules the whole of title VI might have been opened for amendment.. Legislative Reorganization Act of 1946, § 135(a), 60 Stat. 812, 832 (1946) (current version codified at 2 U.S.C. § 190c (1976)).

49. Senator Bayh's bill was dropped as nongermane. 117 CONG. REC. 30412-15 (1971). Senator McGovern supported Senator Bayh's bill rather than introduce a proposal of his own. *Id.* at 30411. Congresswoman Green's bill was withdrawn. H.R. REP. No. 16098, 91st Cong., 2d Sess. (1970).

addition, at least two sponsors characterized sex discrimination in educational employment as a portion of the larger problem of sex discrimination in all professions.[50]

In 1972, Senator Bayh introduced an amendment[51] that was to become title IX.[52] Senator Bayh said that his amendment was "broad" and would close loopholes in previous legislation relating to educational programs and employment.[53] He pointed to "admissions procedures, scholarships, and faculty employment" as being covered by the amendment.[54]

In *Romeo I*, Judge Feikens referred to only this passage from the debate on title IX in his analysis of the legislative history.[55] He concluded that, since the comments applied to all of Senator Bayh's amendment, including the amendments to Title VII of the Equal Rights Act of 1964 (title VII)[56] and the Equal Pay for Professional Women Act (Equal Pay Act),[57] the employment references were to those amendments and not to title IX.[58]

B. *Senate Debate On Title IX*

The quantity of congressional debate considered relevant by the judiciary increased in later cases. Where Judge Feikens had considered only one passage of the Bayh debate in *Romeo I*, three passages from the same debate were examined by the United States Court of Appeals for the First Circuit when the court delivered its decision in *Islesboro School Committee v. Califano*.[59] The passages are: First, a dialogue between Senators Bayh and Claiborne Pell; second, a state-

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50. 117 CONG. REC. 13546-62, 30411 (1971).

51. 118 CONG. REC. 5802-03 (1972).

52. *Id. See* 29 U.S.C. § 206(a) (1976); 42 U.S.C. § 2000e (1976). *See also* Brief for Fed. Appellants at 24, *supra* note 26.

53. 118 CONG. REC. 5803 (1972). Senator Bayh said,

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and *employment* resulting from those programs. . . . [T]he 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. . . .

Id. (emphasis added).

54. *Id.*

55. 438 F. Supp. at 1030.

56. 42 U.S.C. § 2000e

57. § 2000e-16 (1976).

58. 438 F. Supp. at 1030.

59. 593 F.2d 424, 426-28 (1st Cir. 1979), *aff'g*, 449 F. Supp. 866 (D. Me. 1978), *cert. denied*, 444 U.S. 972 (1979) (The First Circuit invalidated HEW's regulation under title IX of the school board's maternity leave policy.)

ment by Senator Bayh correlating the employment sections of his bill with the amendments to title VII and the Equal Pay Act; and third, a summary of the bill that Senator Bayh read into the record.[60]

The dialogue between Senators Pell and Bayh was quoted by the First Circuit as follows:

> Mr. Pell: . . . Sections 1011 [sic] (a) and (b) [these sections, in large measure, became 20 U.S.C. § 1681(a) and (c)] include all educational institutions which receive Federal 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 this 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. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.
>
> In the area of employment, we permit no exceptions. In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.[61]

The court concluded that a reading of the passage in context would not support HEW's conclusion that the dialogue showed congressional intention that title IX cover employment.[62] The court noted: "While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained."[63]

The *Islesboro* court next considered a part of Senator Bayh's comments in which he said that the second major portion of his amendment would expand the coverage of title VII and the Equal Pay Act to those "who 'perform work connected with the educa-

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60. *Id.* at 427-28. The passage upon which Judge Feikens relied was not mentioned in *Islesboro*. The court noted occasional lapses in the debate where some senators appeared to suggest that title IX covered employment. *Id.* at 428.

61. *Id.* at 427 (quoting 118 CONG. REC. 5812 (1972) (dialogue of Senator Bayh & Senator Pell)).

62. *Id.*

63. *Id.*

tional activities' of the institution."[64] The court believed this passage reinforced the idea that Senator Bayh linked employment with his amendments to title VII and to the Equal Pay Act, while he linked title IX to students.[65]

The third portion of the debate considered by the court was a summary of Senator Bayh's amendment as put in the record.[66] This summary, the First Circuit contended, included, *inter alia*, four parts: First, Basic Prohibition; second, Enforcement and Related Provisions; third, Employment; and finally, Equal Pay for Professional Women.[67] The employment section referred to the amendments to title VII[68] and the Equal Pay Act.[69] The court concluded that this division demonstrated that title IX was concerned with admissions and services, while the amendments to title VII and the Equal Pay Act dealt with employment.[70]

Two of the three passages noted by the First Circuit in *Islesboro* reappeared in the briefs[71] submitted to the Second Circuit.[72] The North Haven and Trumbull school boards used Senator Bayh's summary in a broader fashion than did the court in *Islesboro*. The school boards looked not only at the concise, section-by-section summary, but also at the summary given in Senator Bayh's own words.[73] They argued that Part A, "Prohibition of Sex Discrimination in Federally Funded Education Programs,"[74] dealt with discrimination against "beneficiaries" under title IX.[75] Plaintiffs believed that Part B, "Prohibition of Education-Related Employment Discrimination,"[76] referred to the amendments to title VII and the Equal Pay

64. *Id.* at 428.

65. *Id.*

66. 118 CONG. REC. 5806-08 (1972).

67. 593 F.2d at 428.

68. *Id.*

69. *Id. See also* Romeo Community Schools v. HEW, 600 F.2d 581, 585 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

70. 593 F.2d at 428.

71. Brief for Plaintiffs-Appellees at 18-20, *supra* note 14; Reply Brief for Federal Appellants at 2; North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom*. North Haven Bd. of Educ. v. Bell, 450 U.S. 909 (1981) [hereinafter cited as Brief for Fed. Appellants].

72. The passage purporting to show Senator Bayh's linking of employment with title VII and the Equal Pay Act does not reappear. *See* notes 62-63 *supra* and accompanying text.

73. Brief for Plaintiffs-Appellees at 19, *supra* note 14; *see* 118 CONG. REC. 5807-08 (1972).

74. Brief for Plaintiffs-Appellees at 19, *supra* note 14.

75. *Id.* at 18.

76. *Id.* at 19.

Act.[77] In its reply brief, HEW noted that a passage appeared in Part A (which the school board contended applied to title IX) that explicitly referred to "employment practices for faculty and administrators."[78] In *North Haven*, the Second Circuit remarked on the significance of this passage in its analysis of the case.[79]

The dialogue between Senators Pell and Bayh[80] was utilized by HEW in its brief submitted to the Second Circuit.[81] The Second Circuit critically reviewed the debate, considered both the initial exchange and the questions following, and concluded that the dialogue indicated a link between title IX and employment.[82]

The dialogue specifically focused on the part of Senator Bayh's amendment that became title IX.[83] Employment was mentioned explicitly as an area to be covered by the amendment.[84] The discussion did not stop there. Senator Pell followed up with a series of questions that directly related to specific exceptions to title IX.[85] The Second Circuit considered the followup questions asked by Senator Pell and Senator Bayh's responses to them in its analysis. The court concluded that the entire dialogue was so closely related to the ex-

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77. *Id.* at 18.

78. Reply Brief for Fed. Appellants at 2, *supra* note 71. The portion of Senator Bayh's summary omitted by plaintiffs-appellees reads as follows:

> This 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. The provisions have been tested under Title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

118 CONG. REC. 5807 (1972) (emphasis added).

79. 629 F.2d at 780-81. *See* Dougherty School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980), *cert. filed*, 50 U.S.L.W. 3079 (U.S. Dec. 22, 1980) (No. 80-1023).

80. 118 CONG. REC. 5812-13 (1972); *see* notes 84-85 *infra* and accompanying text.

81. Brief for Fed. Appellants at 27-28, *supra* note 26.

82. 629 F.2d at 782.

83. 118 CONG. REC. 5812-13 (1972).

84. *Id.*

85. Mr. PELL: Thank you. Sections 1001(a) and (b) include all educational institutions which receive Federal 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. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

In the area of employment, we permit no exceptions. In the area of services, once a student is accepted within an institution, we permit no exceptions.

ceptions to title IX as to make no sense if title IX did not cover employment.[86]

In its brief, HEW also asked the court to consider the explanation that Senator Bayh offered concerning the scope of his amendment.[87] After quoting Senator Bayh's introductory passage, which said that his amendment would close loopholes in previous legislation related to education and employment, HEW quoted Senator Bayh further: "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."[88] The structure of the passage thus takes on a two-part organization. The first part, which Judge Feikens discussed, refers to title IX; while the second portion, quoted by HEW, refers to the amendments to title VII and the Equal Pay Act.[89]

The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.

Mr. PELL: That is in the area of nonpublic elementary and secondary schools.

Mr. BAYH: The Senator is correct. This is one of the 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. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

Mr. PELL: The Senator means that a private school for girls, for the sake of argument, would have to accept men teachers, or vice versa?

Mr. BAYH: Someone would have to prove that they did discriminate against teachers first. The Senator is correct insofar as he is saying that discrimination on the basis of sex would be forbidden.

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 a boys' prep school? Would there have to be women on the faculty there?

Mr. BAYH: The answer is "Yes." That does not guarantee a balance, as the Senator knows. However, if discrimination can be proven, the answer is "Yes."

Mr. PELL: Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have women teachers?

Mr. BAYH: I am not sure. Is this a military school?

Mr. PELL: It is a military school. However, it is at the high school level.

Mr. BAYH: All military schools are excluded.

Id.

86. 629 F.2d at 782.

87. Brief for Fed. Appellants at 24-25, *supra* note 26.

88. *Id.* at 24 (emphasis omitted).

89. The debate conducted in the House of Representatives is not really at issue. HEW has conceded that the House bill was not intended to cover employment. Reply

C. *Congressional Committee Reports On Title IX*

Both the Senate and the House of Representatives passed education amendments in 1972.[90] The amendments were different and a Conference Committee was convened to reconcile the bills.[91] "Title IX was patterned after Title VI of the Civil Rights Act of 1964."[92] The wording of the basic provision of title VI is virtually the same as that of title IX.[93] Such an obvious parallel seems to indicate that Congress intended the two bills to be interpreted similarly.[94] During the congressional debate on title VI, confusion arose as to whether title VI covered discrimination in employment.[95] To clarify the scope of title VI, section 604 was added.[96] Section 604 explicitly removed employment from the bill's coverage.[97] The House version of title IX incorporated a section 1004,[98] a duplicate of section 604 that later was deleted by the Conference Committee from the final version.[99]

In *Romeo I*, Judge Feikens observed the absence of a section in title IX that paralleled section 604 of title VI.[100] This, he concluded, was not an indication of an intent to cover employment, but was an effort to be consistent with the amendments to title VII and the

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Brief for Fed. Appellants at 2-4, *supra* note 70. The House clearly intended to reach employment through the amendments to title VII or the Equal Pay Act. H.R. REP. NO. 554, 92nd Cong., 2d Sess. 108 (1971), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2462, 2566, (The section in the House bill excluding employment from coverage was section 1004 of title X.)

90. Senate bill S. 659 passed on March 1, 1972. 118 CONG. REC. 6277 (1972). House bill 7248 passed on June 8, 1972. *Id.* at 20340.

91. CONF. REP. NO. 798, 92d Cong., 2d Sess. 1 (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2608, 2608.

92. Cannon v. University of Chicago, 441 U.S. 677, 694-96 (1979).

93. 42 U.S.C. § 2000d (1976). "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." *Id. Compare id. with* 20 U.S.C. § 1681(a) (1976).

94. Cannon v. University of Chicago, 441 U.S. 677, 696 (1979); *see* Kokoska v. Belford, 417 U.S. 642, 650 (1974).

95. 110 CONG. REC. 2484 (1964); *id.* at 12707; Kuhn, *supra* note 31, at 53.

96. 110 CONG. REC. 11930 (1964).

97. 42 U.S.C. § 2000d-3 (1976). "Nothing 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 oganization except where a primary objective of the Federal financial assistance is to provide employment." *Id.*

98. 118 CONG. REC. 20340 (1972).

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

100. 438 F. Supp. at 1030.

Equal Pay Act that were parts of the Education Amendments of 1972.[101] Support for Judge Feikens' conclusion came from Representative James O'Hara, who indicated at hearings that section 1004 of the House bill never should have been included, but was carried over erroneously from a mockup of title VI that had been used in the drafting process.[102] The Conference Committee, according to Representative O'Hara, simply corrected the error.[103]

In *North Haven*, the Second Circuit disagreed with this analysis.[104] The court found no language in the Conference Committee report, or elsewhere in the legislative history, that indicated the deletion was necessary to maintain consistency with title VII and the Equal Pay Act portions of the amendments.[105] A limited exception, similar to section 1004, easily could have been drafted to avoid any inconsistency;[106] thus, the deletion of section 1004 by the Conference Committee may have indicated disagreement with the section.

D. *Post-Enactment Events Impact On Interpretation Of Title IX*

Since the enactment of title IX, Congress has been vocal regarding its proper interpretation. Post-enactment events first were discussed in *Islesboro* by the United States District Court for the District of Maine.[107] *Islesboro* held invalid the regulation, under title IX, of the school board's maternity leave policy.[108] Judge Edward Thaxter Gignoux gave momentary consideration to comments supporting title IX's coverage of employment that were made during the hearings of the regulations promulgated by HEW under title IX.[109] The judge instead focused on congressional failure to disapprove the regulations.[110] Judge Gignoux interpreted the failure to

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101. *Id. See also* Romeo Community Schools v. HEW, 600 F.2d 581, 584 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979); Islesboro School Comm. v. Califano, 593 F.2d 424, 428-29 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979); Kuhn, *supra* note 31, at 60-61.

102. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor—Review of Regulations to Implement Title IX*, 94th Cong., 1st Sess., 408-09 (1975) [hereinafter cited as *Postsecondary Hearings*].

103. *Id.*

104. 629 F.2d at 782-83.

105. *Id.*

106. *Id.* at 783. Judge Oakes, writing for the Second Circuit, suggested the following example: " 'Nothing in § 901 shall apply to any employees of any educational institution subject to this title except where a primary objective of the Federal assistance is to provide employment.' " *Id. See* notes 127-28 *infra* and accompanying text.

107. 449 F. Supp. at 872-73.

108. *Id.* at 872.

109. *Id.*; *see Postsecondary Hearings*, *supra* note 102, at 164, 173, 201.

110. 449 F. Supp. at 873.

disapprove in light of Title 20 of the United States Code, section 1232(d)(1),[111] which said that failure to disapprove regulations was not to be deemed approval or a "finding of consistency with the Act from which it derives its authority. . . ."[112] The court concluded that section 1232(d)(1) vitiates the HEW interpretation of Congress' action.[113]

When the issue came before the United States Court of Appeals for the Second Circuit in *North Haven*, the post-enactment events received further analysis. The Second Circuit initially looked at a summary of title IX prepared by Dr. Bernice Sandler of the Association of American Colleges.[114] The summary had been introduced into the *Congressional Record* by Senator Bayh.[115] The court pointed to a footnote in Dr. Sandler's summary[116] which said, in part: "Title VI . . . specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs."[117] Senator Bayh, only two months after title IX became law, apparently felt this was a fair statement of congressional purpose, because he introduced the summary into the *Congressional Record*.[118]

The Second Circuit also considered Senator Bayh's testimony at the hearings before the Subcommittee on Postsecondary Education of the Committee of Education and Labor.[119] After three years, Senator Bayh still insisted that congressional intent in passing title IX was to cover employment.[120] The Senator testified that title IX mandated equality in "admissions, financial aid, course offerings, career counseling, and in the case of teachers and other educational personnel, employment, pay and promotions."[121]

HEW was required to submit to Congress the regulations it

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111. *Id.*; *see* 20 U.S.C. § 1232(d)(1) (1976).

112. 20 U.S.C. § 1232(d)(1) (1976). *But see* 43 Op. Att'y Gen. 25 (1980) (Attorney General Civiletti suggested that 20 U.S.C. § 1232(d) is unconstitutional as a violation of the separation of powers.).

113. 449 F. Supp. at 873.

114. 629 F.2d at 782.

115. 118 CONG. REC. 24684 (1972).

116. 629 F.2d at 782.

117. 118 CONG. REC. 24684 n.1 (1972) (emphasis in original).

118. 629 F.2d at 782. *But see* Kuhn, *supra* note 31, at 56-57.

119. *Postsecondary Hearings*, *supra* note 102, at 173.

120. *Id.*

121. *Id.*

promulgated under title IX. Congress had a forty-five day period during which it could disapprove any of the regulations by concurrent resolution.[122] Two resolutions were submitted. The first, by Senator Jesse Helms, resolved to disapprove all title IX regulations.[123] The second resolution was submitted by Representatives Albert Quie and John Erlenborn[124] and recommended Congress disapprove only subpart E of the regulations.[125] Congress did not accept either of the proposed resolutions.[126]

Two amendments to eliminate employment from the scope of title IX have been introduced in Congress since the hearings on the regulations. Senator Jesse Helms attempted to limit coverage by an amendment which said in part: "Nothing in [section 901 of title IX] shall apply to any employees of any educational institution subject to this title."[127] This amendment was not adopted.[128] Senator James McClure tried to limit coverage of title IX to the "curriculum or graduation requirements of the institutions" receiving federal assistance.[129] This proposed amendment also was defeated.[130]

V. APPLICABILITY OF REMEDIES IN TITLE IX EMPLOYMENT DISCRIMINATION

Following a review of both the language of title IX and its legislative history, the courts considered the difficulties and ramifications of the application of title IX to the problem of sex discrimination in educational employment. The primary remedy provided by title IX was the termination of federal assistance to any institution administratively adjudged to be in violation of the statute and the accompanying regulations.[131] Judge Feikens, in *Romeo I*, considered the termination of federal funding a drastic remedy[132] and believed it would be arbitrary to terminate funding that was provided for stu-

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122. 20 U.S.C. § 1232(d)(1) (1976).

123. 121 CONG. REC. 17301 (1975).

124. *Hearings on H. Con. Res. 330 Before the Subcomm. on of the Comm. on Educ. and Labor*, 94th Cong., 1st Sess. (1975) (A copy is on file with the Committee).

125. *Id.* The disputed regulations, 45 C.F.R. §§ 86.51-.61, are the same as Subpart E.

126. *See* 629 F.2d at 784.

127. 121 CONG. REC. 23845-47 (1975).

128. *See* 629 F.2d at 784.

129. 122 CONG. REC. 28147 (1976).

130. *Id.*

131. 20 U.S.C. § 1682(1) (1976).

132. 438 F. Supp. at 1032-33. Judge Feikens offered no suggestions as to what less drastic remedies there might be.

dents because of discrimination against employees.[133]

The Second Circuit dismissed Judge Feikens' argument even though it "purports to speak both to the heart and to 'common sense' . . . ."[134] Arbitrary action would not be confined to termination of federal funds because of discrimination against employees, but also would occur in some cases involving students. If one student was discriminated against, HEW could terminate funds to the entire school district. As a result, those students not discriminated against would be deprived of the benefits of the federal assistance.[135]

The remedy provision of title IX also contained a stipulation that any fund termination "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. . . ."[136] Judge Feikens said, "[R]egulation of employment practices, however, is inherently non-'program specific.' An educational institution's employment policies are general in nature, covering, by and large, all faculty employees involved in all of an institution's education programs, whether federally funded or not."[137] Application of the fund termination remedy to discrimination in employment would then be impossible because the statute requires "program specific" application. Judge Feikens concluded that Congress could not have intended title IX to cover sex discrimination in employment because employment cannot be regulated in a "program specific" manner.[138]

The Second Circuit disagreed with Judge Feikens' determination that employment is inherently nonprogram specific within the meaning of the remedy provision of title IX.[139] The court pointed to the example of admissions and said, "[D]iscrimination in admissions . . . is clearly prohibited by Title IX regardless of whether the discrimination occurs solely in one . . . program or all . . . programs."[140] The objection by Judge Feikens could be applied to

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133. *Id.* at 1032.

134. 629 F.2d at 785.

135. *Id.*

136. 20 U.S.C. § 1682 (1976).

137. 438 F. Supp. at 1033. *See* Junior College Dist. v. Califano, 455 F. Supp. 1212, 1215 (E.D. Mo. 1978); Seattle Univ. v. HEW, 16 Fair Empl. Prac. Cas. 719, 721-22, 16 Empl. Prac. Dec. ¶ 8241 at 5245 (W.D. Wash. 1978), *aff'd*, 621 F.2d 992 (6th Cir. 1979), *cert. granted*, 449 U.S. 1009 (1980).

138. 438 F. Supp. at 1033.

139. 629 F.2d at 785.

140. *Id. See also Postsecondary Hearings*, *supra* note 102, at 414.

admissions programs that Congress clearly intended to be covered. The objection that employment is nonprogram specific sweeps too broadly and leads to more inconsistencies than it prevents. Although the fund termination remedy presents some problems in its application, the Second Circuit felt that none of the difficulties were sufficient to prevent coverage of employment under title IX.[141]

VI. SECOND CIRCUIT CONCLUSIONS

The United States Court of Appeals for the Second Circuit reached three conclusions about title IX and employment. First, the language of title IX is ambiguous as to whether employment is covered.[142] Second, the legislative history "lends some additional weight to the view that [section 1681] was expressly intended to relate to employment practices."[143] Finally, no practical or theoretical objections to coverage of employment were sufficient to disrupt the other two conclusions.[144] Since the question whether title IX covered employment was resolved in the affirmative, a new issue arose. Did Congress intend title IX to cover all aspects of employment? The Second Circuit concluded that the regulations issued by HEW under title IX were valid.[145] This conclusion apparently endorsed all the regulations on sex discrimination in educational employment promulgated under title IX by HEW.[146]

VII. ANALYSIS OF TITLE IX AND EDUCATIONAL EMPLOYMENT

The analysis and the resolution of whether Congress intended to reach sex discrimination in educational employment through title IX cannot be separated from the social and cultural setting of the early 1970's. In 1970 and 1971, the United States population became increasingly aware of the inequalities facing women in American society. For three days in May 1970, the Subcommittee on Constitutional Amendments conducted hearings on the Equal Rights Amendment.[147] During that year and the following year,

141. 629 F.2d at 785.

142. *Id.* at 777-78.

143. *Id.* at 784.

144. *Id.* at 784-85. Neither the possible overlapping of jurisdiction between title VII and the Equal Pay Act with title IX, nor the possible penalties which might accrue to students, nor the program specific limitation are sufficient to overcome the evidence of congressional intent to cover employment under title IX. *Id.*

145. *Id.* at 786.

146. 45 C.F.R. §§ 86.51-.61 (1979).

147. *See also Hearings on S. Joint Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., (1970); *Hearings*

three bills that attempted to deal with sex discrimination in education were introduced in the Congress.[148] Congressional awareness of the issue was raised, and the milieu for legislative action existed.

Educational systems in American have been a major force in shaping the consciousness of the population; thus, education was considered a priority for "equalization."[149] Congress learned from the desegregation efforts of the 1960's that the nation's educational systems were places of potential conflict in any effort to provide equal treatment for citizens. The lesson resulted in the use of title VI,[150] the legal keystone of the desegregation struggle, as a model for title IX.[151]

The United States Supreme Court defined the congressional purpose of title IX as seeking to avoid the use of federal resources in support of discriminatory practices.[152] If that understanding of the congressional purpose is combined with a definition of "education" that includes both the teacher and the pupil,[153] a realistic conclusion is that Congress intended to protect all parties to the educational process from discrimination. The existence of such a reasonable possibility, however, does not establish such a congressional intent.

A. *Statutory Language Of Title IX*

In order to determine the scope that Congress proposed to give to title IX, the literal meaning of the statute must be interpreted.[154] The first phrase is "no person."[155] "No person" is an inclusive term that encompasses a wide spectrum of individuals. Inclusive language often is followed by modifications and limitations. The significant modifications in title IX's language are the limitation of the

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on S. Joint Res. 61 and S. Joint Res. 231 Before the Senate Comm. on the Judiciary, 91st Cong., 2d Sess., (1970).

148. *See* notes 44-50 *supra* and accompanying text.

149. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

150. 42 U.S.C. § 2000d (1976).

151. Cannon v. University of Chicago, 441 U.S. 677, 694 (1970).

152. *Id.* at 704.

153. *See* Ambach v. Norwick, 441 U.S. 68, 75-80 (1979). "[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities." *Id.* at 78-79. *See also* Perkins, *Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1048 (1968); Philpot, *Title IX Sex Discrimination Regulations: Impact on Private Education*, 65 KY. L.J. 656, 658 (1979).

154. C. SANDS, *supra* note 43, at 70.

155. 20 U.S.C. § 1681(a) (1976).

statute to those persons who, on the basis of sex, are "excluded from participation in, [are] denied the benefits of, or [are] subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[156]

Two of these limitations arguably apply to employees. First, a teacher who was prevented from performing his or her function because of discrimination would be "excluded from participation in" the particular program or activity. The mutuality of the educational process and the indispensible function of the instructor[157] strongly indicate that his or her exclusion because of discrimination based on sex would be sufficient to violate title IX.[158] Second, as the Fifth Circuit suggested in *Dougherty County School System v. Harris*,[159] "if a female . . . teacher receives less pay than a male . . . teacher for equal work, she is being 'subject to discrimination under' a program receiving federal financial assistance."[160] Either of these understandings of the limitations of title IX is sufficient to include employees within the class of persons protected under title IX.

B. *Legislative Process Of Title IX*

The legislative history of title IX also supports the inclusion of employees under the title IX protections. It is noteworthy that the possibility that employment was not covered by title IX, was never raised during the Senate debate or the comment period on the preliminary regulations.[161] The entire issue did not arise until 1975, the year of the hearings on the regulations.[162]

Senator Bayh, in both his introductory comments and his summary of title IX, divided his discussion into two parts. In both instances the first part dealt with title IX and the second part dealt with the amendments to title VII and the Equal Pay Act. He specifically mentioned employment in both the first and the second portions of his discussion.

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156. *Id.*

157. Ambach v. Norwick, 441 U.S. 68, 78-79 (1979).

158. *Contra* Romeo Comm. Schools v. HEW, 438 F. Supp. 1021, 1031 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979). Judge Feikens said that teachers participate only to the extent of teaching. *Id.* Why is that not sufficient? For example, suppose a male teacher was prevented from teaching in a kindergarten class because the administration felt that small children needed a maternal figure. He would be excluded from participation in the educational activity or program.

159. 622 F.2d 735 (5th Cir. 1980).

160. *Id.* at 738.

161. *Postsecondary Hearings*, *supra* note 102, at 479-80.

162. *Id.* at 465-68, 477-80. *See also* 121 CONG. REC. 59714 (1975).

Senator Bayh introduced his bill and said, "Amendment No. 874 [the number of his bill] is broad, but basically it closes loopholes in existing legislation relating to general education programs and *employment* resulting from these programs."[163] After additional comments in which employment was mentioned further, Senator Bayh changed his emphasis and referred to "other important provisions."[164] It was only after this new subject designator that he mentioned the amendments to title VII and the Equal Pay Act.[165] Senator Bayh linked equal employment opportunities for "executive, administrative and professional women" to these amendments.[166]

Senator Bayh's own summary of his bill was divided into four parts; the first two are relevant here.[167] Part A was entitled, "Prohibition Of Sex Discrimination In Federally Funded Education Programs."[168] Under this heading Senator Bayh referred to sections 1001 to 1005[169] of his amendment.[170] He explicitly noted the existing parallels to parts of title VI, the remedy of fund termination, and the exemptions he would allow under title IX.[171] He did not mention title VII or the Equal Pay Act under this heading.[172] The third paragraph of Part A says in part: "This 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."[173] Conversely, Part B was headed, "Prohibition Of Education—Related Employment Discrimination"[174] and, under this heading, Senator Bayh referred to title VII and the Equal Pay Act but made no mention of any of the provisions that were to become title IX.[175] Thus, Part A of Senator Bayh's summary created an explicit relationship between employment and

163. 118 CONG. REC. 5803 (1972) (emphasis added).

164. *Id.* *See also* Brief for Appellant Linda Potz at 19, *supra* note 17.

165. 118 CONG. REC. 5803 (1972).

166. *Id.*

167. Parts C and D dealt with "Studies Of Sex Discrimination" and "Suits by the Attorney General" respectively. *Id.* at 5807-08.

168. *Id.* at 5807.

169. Section 1005 does not appear to fit under this heading and its inclusion appears inadvertant. *Id.* *See* 629 F.2d at 781 n.11.

170. 118 CONG. REC. 5807 (1972).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 5812.

those sections of his bill that became title IX. Part B related employment to title VII and the Equal Pay Act.

Senator Bayh's introduction and summary had the same division between title IX and the amendments to title VII and the Equal Pay Act and, in both instances, he explicitly mentioned employment in relation to each portion. For such a division to occur once might be deemed inadvertant, but for it to occur twice raises the reasonable inference that Senator Bayh, the proponent of the amendment, intended to include sex discrimination in educational employment under title IX as well as under title VII and the Equal Pay Act.

The third relevant portion of the debate is the dialogue between Senators Bayh and Pell. Senator Pell began the dialogue by asking specifically about sections 1001(a) and (b), which became sections 1681(a) and (c) of Title 20 of the United States Code.[176] Senator Pell's question related to the exclusion of admissions policies of private undergraduate colleges from coverage and whether the exclusion applied to "nonpublic institutions at the elementary and secondary level. . . ."[177] In response, Senator Bayh said, "[W]e are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever. In the area of employment, we permit no exceptions."[178]

Senator Pell followed with a series of questions.[179] Each question linked an element of title IX with an employment practice. In essence he asked: Does a private school have to have a faculty made up equally of men and women? May a parochial school use only nuns as teachers? Must a military school for boys have female faculty members?[180] The Second Circuit correctly concluded that the questions posed by Senator Pell made no sense if both he and Senator Bayh did not think that employment was covered by title IX.[181] The intent to include sex discrimination in educational employment under title IX is buttressed when the exchange between Senators Bayh and Pell is considered in light of the statements of Senator Bayh, who twice linked title IX and employment.[182]

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176. *Id.*
177. *Id.*
178. *Id.* at 5812-13.
179. *Id.*
180. *Id.*
181. 629 F.2d at 782.
182. *See* text accompanying notes 163-75 *supra*.

The passage of similar bills by the House of Representatives and the Senate made it necessary for the matter to go to a Conference Committee where any differences would be reconciled. The Conference Committee made only one important change in the bills: It dropped section 1004 of the House bill, an explicit exclusion of employment from coverage.[183] The deletion of section 1004 was explained by Representative O'Hara as the correction of a drafting error.[184] He contended that the exemption in section 1004 contradicted the amendments to title VII and the Equal Pay Act that were part of the bill.[185] This is the kind of ex post facto explanation by a member of Congress, however, that traditionally has been given little weight by the courts when there is no corroborative evidence in the legislative record.[186] The ease with which Congress could have limited the section exempting employment to only title IX,[187] or the ease with which the main provision could have been applied explicitly to students only,[188] undermines the view of Mr. O'Hara. The testimony of Senator Bayh at the postsecondary hearings indicated that title IX covered employment, and no reference was made to any error involving section 1004 of the House bill.[189]

Another indication that title IX was intended to include employment was Congress' failure to either disapprove of the regulations or amend title IX to exclude employment. Representatives Quie and Erlenborn introduced an amendment to a concurrent resolution to disapprove the HEW regulations relating to sex discrimination in educational employment.[190] This resolution was not reported out by the Education and Labor Committee.[191] Also, amendments introduced by Senators Helms[192] and McClure[193] that would have

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

184. *Postsecondary Hearings*, *supra* note 102, at 408-09.

185. *Id.*

186. Rogers v. Frito-Lay, 611 F.2d 1074, 1080 (5th Cir. 1980). *See also* Cannon v. University of Chicago, 441 U.S. 677, 686 n.7 (1970). The weight which the Supreme Court the comments of senators and representatives after the passage of title IX about a private right of action does not apply to Representative O'Hara's comments. His comments were not on the floor nor were they made in relation to any legislation which was adopted. *Id. See also* 611 F.2d at 1081.

187. 629 F.2d at 783.

188. *See* MASS. ANN. LAWS ch. 76, § 5 (Law. Co-op 1978) (amended in 1971 to prohibit discrimination in education based on sex).

189. *Postsecondary Hearings*, *supra* note 102, at 164. *See also id.* at 173, 201.

190. 629 F.2d at 783.

191. *See id.* at 784.

192. 121 CONG. REC. 23845-47 (1975).

193. 122 CONG. REC. 28136-37 (1976). Senator Bayh opposed Senator McClure's

altered title IX radically were not adopted.[194] If title IX was not intended to cover employment, Congress had sufficient opportunity to amend it or alter the regulations; but did not do so.

C. *Remedy Provisions Of Title IX And Employment*

The North Haven and Trumbull school boards argued that if title IX were construed as covering employment, two inconsistencies would be created between the main portion of the statute and the remedy provision.[195] The first conflict allegedly would exist between the program specific fund termination remedy and the "inherent," nonprogram specific nature of employment.[196] Title IX mandates that if funds are terminated because of discrimination, the funds must be terminated only to the specific program in which the discrimination has occurred.[197] The school boards contended that employment does not relate to specific programs and therefore the fund termination remedy could not be applied as the statute requires.[198]

The argument that program specific fund termination is inconsistent with the inherently nonprogram nature of employment may be applied equally to other areas that undisputedly are covered by title IX. The Second Circuit has noted that the difficulty of application could be raised against the fund termination remedy in general.[199] "For instance, discrimination in admissions to an institution's graduate schools is clearly prohibited by Title IX regardless of whether the discrimination occurs solely in one graduate program or all graduate programs."[200] The argument, therefore, offers no logical reason why Congress would not have intended title IX to reach sex discrimination in educational employment.[201]

The school boards also advanced a second argument recognized by the Second Circuit as speaking "both to the heart and to 'common

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amendment and commented on its enormous impact on title IX specifically pointing to employment. *Id.* at 28144.

194. 121 CONG. REC. 23847 (1975) (amendment of Senator Helms); 122 CONG. REC. 28147 (1976) (amendment of Senator McClure).

195. Brief for Plaintiffs-Appellees at 34-37, *supra* note 14.

196. *Id.*; 438 F. Supp. at 1033.

197. 20 U.S.C. § 1682 (1976).

198. Brief for Plaintiffs-Appellees at 34-37, *supra* note 14.

199. 629 F.2d at 785.

200. *Id.*

201. A factual question might arise as to whether the difficulty in terminating the funds of a particular program was created by the educational system itself. If the internal distribution of the federal funds in question was determined by the school board, it hardly would be equitable to allow the board to perpetuate discrimination by asserting that nontainted programs would be injured.

sense.' "[202] The argument suggested that Congress could not have intended to deprive students of the benefit of federal money based upon discrimination against teachers.[203] The argument, however, encounters two difficulties. First, as the Second Circuit noted, the same unfairness would occur if funds were terminated because one student was discriminated against.[204] The termination of funds would cause the remaining students to suffer.[205] The sweep of the argument is too expansive.

Second, the argument rests on a mistaken premise. The school boards contended that "[t]he principal (indeed the only) enforcement method specifically mentioned is fund termination."[206] Although that is true, the argument requires that the remedy of fund termination be either the only remedy or be an arbitrarily utilized remedy. Title IX, however, does provide for other remedies when it says enforcement may be effected "by any other means authorized by law. . . ."[207] In *Cannon v. University of Chicago*,[208] the United States Supreme Court recognized fund termination to be a drastic remedy and declared it inappropriate if only "an isolated violation has occurred."[209] The Court specifically noted the priority of remedies in title IX: "Congress itself has noted the severity of the fund-cutoff remedy and has described it as a last resort all else—including 'lawsuits'—failing."[210] Thus in the case of a single teacher who was discriminated against, HEW could seek a court order for reinstatement, back pay, an injunction, or other appropriate remedy. The ultimate threat of fund termination would be held in reserve to be used against recalcitrant offenders.

Safeguards also exist against arbitrary utilization of title IX. Any remedy imposed on an educational institution under HEW regulations must proceed through the established administrative pro-

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202. 629 F.2d at 785.

203. *Id.*

204. *Id.*

205. *Id.*

206. Brief for Plaintiffs-Appellees at 34, *supra* note 14. Judge Feikens clearly misconstrued the thrust of section 1682 when he said, "[T]he *only* sanction permitted under section 1682 is a termination of federal funds to the noncomplying institution." 438 F. Supp. at 1032 (emphasis added). *See also* Brief for Appellant Linda Potz at 23, *supra* note 17.

207. 20 U.S.C. § 1682 (1976).

208. 441 U.S. 677 (1979).

209. *Id.* at 705.

210. *Id.* at 705 n.38. *See also* United States v. Frazer, 297 F. Supp. 319, 322 (M.D. Ala. 1968).

cess[211] and is subject to judicial review.[212] In the final instance, Congress can intervene by amending the statute if it determines that the agency has overreached its authority.[213]

D. *Regulatory Scope Of Title IX*

The analysis of the language, the internal structure, the legislative history, and the post-enactment events relating to title IX point conclusively to Congress' intent to cover sex discrimination in educational employment under title IX. A further issue, however, remains: What is the scope to be given to title IX in the area of employment? In this context, "scope" has two components. First, title IX only applies to "programs or activities" that receive federal funds.[214] How narrowly are the terms "programs" or "activities" to be interpreted? HEW has interpreted "program" so broadly that it can encompass the entire educational institution.[215] Thus, if one dollar of federal money goes to an institution, all facets of the institution are subject to title IX. The institutions, conversely, have insisted that "program" refers to a limited element of the institution's life, that the particular element must be a recipient of federal assistance, and that the element must be proven to have been administered in a discriminatory manner.[216]

In *North Haven*, the United States Court of Appeals for the Second Circuit dealt with the program specific issue by concluding that the program specific requirement applied to the implementation of the fund termination remedy and not to HEW's authority to issue regulations.[217] The court, in dicta, said that broad regulations covering all aspects of employment can be promulgated; but, if HEW seeks fund termination, a specific program that receives federal funds must be designated as discriminatory.[218] Federal assistance to an entire system can be terminated only if the discrimination permeates the entire system.[219] This analysis rested on *United States v. Jefferson County Board of Education*,[220] in which a broad interpretation

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211. 5 U.S.C. §§ 551-559 (1976).

212. 20 U.S.C. § 1683 (1976). *But see* 600 F.2d at 584.

213. For example, consider the exceptions that Congress has added since the passage of title IX. 20 U.S.C. § 1681(a)(6)-(9).

214. *Id.* § 1681 (1976).

215. *See* Brief for Fed. Appellants at 41-45, *supra* note 26.

216. *See* Brief for Plaintiffs-Appellees at 34-37, *supra* note 14.

217. 629 F.2d at 785-86.

218. *Id.*

219. *Id.*

220. 372 F.2d 836, 847-61 (1966).

was given to identical language in title VI.[221] The same point was made regarding the "pinpoint" provision of title VI in *Flanagan v. President and Directors of Georgetown College*,[222] in which the use of federal funds in the construction of the Law Center was held sufficient to bring all the institution's programs under title VI.[223] The court said, "This provision (Title 42 of the United States Code, Section 2000d-1) of course is directed towards the efforts of federal agencies *in effecting compliance* with Title VI and is not a restriction on the types of discrimination outlawed by the statute."[224] The statutory structure of title IX lends support to this conclusion. The program specific language appears in the section dealing with remedies and not the section authorizing HEW to promulgate the regulations.[225]

The second aspect of the scope problem raises the question whether all employment practices can be regulated under title IX. The United States Court of Appeals for the Fifth Circuit, in *Dougherty*, hinted that some aspects of employment might be covered, but the court offered no real clues as to how any division should be made.[226] The sole example the court used, the disparity in pay between a male teacher and a female teacher performing equivalent work and paid with federal funds, is not particularly helpful.[227] The best solution is to step back and consider the policies underlying title IX. The general policy is to prevent the use of federal resources to support discriminatory practices.[228] A more specific policy is to prevent the use of federal resources to support discriminatory practices in education. If education is the focus, then the employment practices that Congress intended to reach through title IX ought to be those practices that impinge on the educational process. For example, consider the facts as presented in the cases joined in *North Haven*. The North Haven branch involved the maternity leave policies of the school system.[229] Whether the maternity leave policies of the school system were discriminatory was a serious issue, but it did not impinge on or have a nexus with the educational process in a way that reduced the quality of that process. On the other hand, the issue

221. *See* 42 U.S.C. § 2000d-1 (1976).
222. 417 F. Supp. 377 (D.D.C. 1976).
223. *Id.* at 385.
224. *Id.* at 383 (emphasis added).
225. 20 U.S.C. § 1682 (1976).
226. 622 F.2d at 738.
227. *Id.*
228. 441 U.S. at 704.
229. 629 F.2d at 775.

in the Trumbull branch allegedly involved procedures that demeaned and eventually resulted in the termination of the only female counselor at the junior high school level in the school system.[230] The lack of any female counselors to respond to questions from the female students in an adolescent school population effectively denied those students many benefits of that program. The alleged sexual discrimination against Ms. Potz impinged upon the access to the counseling program of all students at the junior high school level in the Trumbull school system. The residual effect of such a deprivation on the educational process as a whole would be a question of fact, but could be hypothesized as effecting classroom behavior, socialization, course selection, and career choices. If such impairments could be proven, title IX ought to protect the educational process and provide relief to Ms. Potz. Such relief might be any appropriate remedy, including fund termination, if the school board was recalcitrant.[231]

The proposed pattern of analysis would permit HEW to investigate complaints on the basis of broadly drawn regulations. The specific facts of each case would be measured against strictly construed elements when trying to prove a particular title IX violation.[232] There are four elements that HEW or the private plaintiff would have to prove. First, a sexually discriminatory employment practice would have to be shown to exist. Second, the discriminatory practice would have to be linked to the educational process.[233] Third, a program or activity receiving federal assistance would have to be shown to be discriminatory.[234] Finally, the appropriate remedy would have to be selected. The appropriate remedy, of course, must be the least intrusive means toward eliminating the discrimination.[235]

Such an application of title IX would fulfill the policy of preventing the use of federal funds to support discriminatory actions. Simultaneously, the educational institutions would be assured of a fair remedy for isolated violations, while HEW would retain the fund termination remedy for recalcitrant defendants.

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230. *Id.*; Brief for Appellant Linda Potz at 25-32, *supra* note 17.

231. *See* text accompanying notes 206-13 *supra*.

232. A similar pattern has developed in suits brought under the Securities Act of 1934, 15 U.S.C. § 78j (1976). *See generally* Aaron v. SEC, 446 U.S. 680 (1980); Chiarella v. United States, 445 U.S. 222 (1980); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 404 U.S. 1005 (1971).

233. *See* notes 226-32 *supra* and accompanying text.

234. *See* notes 214-25 *supra* and accompanying text.

235. *See* notes 209-13 *supra* and accompanying text.

VIII. CONCLUSION

In *North Haven Board of Education v. Hufstedler*,[236] the United States Court of Appeals for the Second Circuit validated regulations issued by HEW that included sex discrimination in educational employment under Title IX of the Education Amendments of 1972.[237] *North Haven* is contrary to the decisions of fourteen other federal courts that have invalidated the same regulations. *North Haven* is ripe for consideration by the United States Supreme Court.

The Second Circuit, in its attempt to construe congressional intent, found the language of title IX ambiguous regarding the statute's coverage of sex-based, employment discrimination.[238] The main support for interpreting title IX as covering employment discrimination was found in the legislative history and the subsequent failure by Congress to exclude employment from coverage.[239] The court specifically noted the deletion of an explicit exclusion of employment from the House version of title IX by the Conference Committee.[240] In dicta, the court discussed the remedies available under title IX and decided that the main remedy, termination of federal assistance to the discriminating institution, was drastic but not so extreme that Congress could not have intended it to be applied in employment cases.[241]

The conclusion that employment can be regulated under title IX does not end the inquiry. The issue of the scope of title IX within the area of employment remains. The scope issue has two components. First, as title IX only applies to programs or activities receiving federal funds, how broadly are the words program and activity to be interpreted? The Second Circuit correctly interpreted the intention of Congress to restrict the application of the remedies to specific programs or activities that receive federal assistance and not to restrict the ability of HEW to regulate potential instances of sex discrimination in education.[242] The second question regarding the scope of title IX is whether all employment practices are covered. In light of the title IX policy to prevent the use of federal resources to support discriminatory practices in education, it is logical that the

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236. 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 450 U.S. 909 (1981) (cases joined for decision).

237. *Id.* at 786.

238. *See* notes 27-32 *supra* and accompanying text.

239. *See* notes 44-88 & 128-31 *supra* and accompanying text.

240. *See* notes 89-106 *supra* and accompanying text.

241. *See* notes 132-41 *supra* and accompanying text.

242. 629 F.2d at 785.

employment practices covered be those that have a nexus with the educational process.

If liability under title IX is established, there remains the selection of an appropriate remedy. Title IX allows HEW or the court to tailor the remedy to fit the severity of the discrimination. All the usual legal remedies are available but, in the case of a recalcitrant school board, the federal funds may be terminated.

Title IX authorizes HEW to regulate sex discrimination in educational employment. The broad regulations promulgated by HEW are within the scope of title IX. In any particular case, however, the plaintiff has to establish that a sexually discriminatory employment practice exists, that the practice is linked to the educational process, that the program or activity affected receives federal assistance, and that an appropriate remedy exists before he or she can prevail under title IX.[243]

Carl T. Holt

243. *See* notes 235-36 *supra* and accompanying text.