NOTES

TITLE IX DOES NOT APPLY TO FACULTY EMPLOYMENT

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any educational program or activity receiving federal financial assistance.[1] In 1975 the Department of Health, Education, and Welfare (HEW) promulgated regulations implementing Title IX.[2] Subpart E of these regulations, entitled "Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited,"[3] addresses employment,[4] employment criteria,[5] recruitment,[6] compensation,[7] job classification and structure,[8] fringe benefits,[9] marital or parental status,[10] advertising,[11] pre-employment inquiries,[12] and sex as a bona fide occupational qualification.[13]

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1. Education Amendments of 1972, Title IX, 20 U.S.C. §§ 1681-1685 (1976). Title IX includes sections 901-905 of the Education Amendments. Section 901(a) is reproduced in part in the text accompanying note 18 *infra*.

2. 45 C.F.R. §§ 86.1-.71 (1978). Section 86.51(a)(1) of the HEW regulations provides:

> 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 recipient which receives or benefits from Federal financial assistance.

Id. § 86.51(a)(1). The authority to issue these regulations is derived from section 902 of Title IX:

> 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 . . . 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 to general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in counection with which the action is taken.

20 U.S.C. § 1682 (1976). On May 4, 1980, jurisdiction over educational matters was transferred to the new Department of Education. The new regulations have been reissued in identical form by the department at 34 C.F.R. §§ 106.1-.71; *see* 45 Fed. Reg. 30,802 (May 9, 1980). To be consistent with the cases and secondary literature on the subject, this note refers throughout to the regulations promulgated by HEW and to HEW's authority under Title IX.

3. 45 C.F.R. §§ 86.51-.61 (1978).
4. *Id.* § 86.51.
5. *Id.* § 86.52.
6. *Id.* § 86.53.
7. *Id.* § 86.54.
8. *Id.* § 86.55.
9. *Id.* § 86.56.
10. *Id.* § 86.57.
11. *Id.* § 86.59.
12. *Id.* § 86.60.
13. *Id.* § 86.61.

These regulations were immediately and unsuccessfully challenged in Congress as being in excess of the authority granted by Title IX because HEW had included faculty employment practices within their purview.[14] Although the regulations survived two more congressional challenges,[15] by the end of July, 1980, the Courts of Appeals for the First, Fifth, Sixth, Eighth, and Ninth circuits had uniformly held that various sections of subpart E exceeded HEW's authority under Title IX and were therefore invalid and unenforceable.[16] The Court of Appeals for the Second Circuit, however, recently decided in *North Haven Board of Education v. Hufstedler*[17] that the HEW regulations are valid.

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14. Regulations issued under Title 20 of the United States Code become effective not less than 45 days after transmission to Congress "unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation, in whole or in part." 20 U.S.C.A. § 1232(d)(1) (West Supp. 1980). (At the time of the congressional challenge, the statutory language differed slightly.) Senator Helms and Representative O'Hara introduced concurrent resolutions disapproving all or part of the HEW regulations, but both resolutions were defeated. *See* S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17,301 (1975); H.R. Con. Res. 330, 94th Cong., 1st Sess., 121 CONG. REC. 21,687 (1975). *See also* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 783 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 101 S. Ct. 1345 (1981).

15. In 1975 Senator Helms introduced a bill, S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23,845 (1975), that in part would have amended section 901 to exempt employees from coverage under Title IX, thereby limiting the scope of the regulations. The bill failed. *Id.* In 1976 Senator McClure introduced Amendment No. 389, 94th Cong., 2d Sess. (1976), to the Education Amendments bill of 1976, 94th Cong., 2d Sess. (1976), to clarify section 901 by adding a definition of "education program or activity." This amendment, which also would have limited the scope of the regulations, likewise failed. 122 CONG. REC. 28,136 (1976).

16. *See, e.g.*, Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980), *petition for cert. filed sub nom.* Hufstedler v. Dougherty County School Sys., 49 U.S.L.W. 3495 (U.S. Jan. 13, 1981) (No. 80-1023); Seattle Univ. v. HEW, 621 F.2d 992 (9th Cir. 1980) (per curiam), *cert. granted sub nom.* Dep't of Educ. v. Seattle Univ., 101 S. Ct. 563 (1980); 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). The lower courts in other circuits have also uniformly held that HEW's regulations exceed Title IX's authority. *See* Grove City College v. Harris, 500 F. Supp. 253 (W.D. Pa. 1980); Kneeland v. Bloom Township High School Dist. No. 206, 484 F. Supp. 1280 (N.D. Ill. 1980); Caulfield v. Board of Educ., 486 F. Supp. 862 (E.D.N.Y. 1979), *aff'd*, 632 F.2d 999 (2d Cir. 1980); Auburn School Dist. v. HEW, 19 Fair Empl. Prac. Cas. 1504 (D.N.H. 1979), *appeal dismissed*, No. 79-1261 (1st Cir. Jan. 16, 1980); Board of Educ. v. HEW, No. C78-177, 19 Fair Empl. Prac. Cas. 457 (N.D. Ohio 1979). Arthur Larson, in his treatise on employment discrimination, agrees with these cases. *See* 1 A. LARSON, EMPLOYMENT DISCRIMINATION 2-121 to 2-123 (1980) ("The argument based on legislative history . . . is almost completely on the side of the decided cases").

17. 629 F.2d 773 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 101 S. Ct. 1345 (1981). The *North Haven* court actually decided two cases together on appeal from the District Court for the District of Counecticut. Both cases squarely addressed whether HEW's implementing regulations had exceeded the authority of Title IX. In both cases the district judge ruled that HEW had exceeded its authority, and the Government appealed. 629 F.2d at 774-75.

This Note discusses the controversy over the regulations implementing Title IX, concluding that they exceed statutory authority and that the *North Haven* case was wrongly decided. In addition, this Note suggests that Title IX authorizes supervision of the employment practices of educational institutions receiving federal financial assistance only when gender discrimination has a deleterious effect on students who are direct beneficiaries of the federal financial assistance.

I. THE CONTROVERSY

The controversy over HEW's interpretation of Title IX centers on the wording of section 901(a), which provides that "[n]o person . . . 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 . . . ."[18] Every court to interpret section 901(a) except the *North Haven* court has concluded that it is limited in coverage either to students or prospective students, or to teachers engaged in federally financed special research.[19] In the implementing regulations, however, HEW interpreted section 901(a) to extend also to employment discrimination on the basis of sex.[20] Under this interpretation, an educational institution's hiring and promotion practices, as well as its treatment of students, come under the scrutiny of HEW if that institution receives federal funds. The HEW position and the *North Haven* decision are based on an expansive reading of section 901(a) and on a unique interpretation of the legislative history of Title IX.

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18. 20 U.S.C. § 1681(a) (1976).

19. *See, e.g.*, Romeo Community Schools v. HEW, 438 F. Supp. 1021, 1031-32, (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979):

> Though cast in broad terms, § 1681 nevertheless addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs. Section 1681 must therefore be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established, and this can only mean the school children in those programs. As a reference to faculty employees, the language of § 1681 is indirect, if not obscure. Teachers participate in these programs only to the extent that they may teach and help administer some of them; teachers benefit from these programs only to the extent that the funds for them may be used to pay their salaries; teachers are "subjected to discrimination *under*" these programs, (emphasis added), only to the extent that the programs themselves may be established and operated in an employment-related discriminatory way. Teachers, in short, are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face.

20. *See* 45 C.F.R. § 86.51(a)(1) (1979); Petitioner's Brief for Certiorari at 14, Harris v. Isleboro School Comm., 444 U.S. 972 (1979): "Title IX . . . unambiguously prohibits sex discrimination against employees in education programs and activities receiving federal aid without regard to the primary objective of the aid, and it accordingly authorizes HEW to issue and enforce regulations effectuating that prohibition."

The *North Haven* court began its opinion by noting the disagreement between HEW and the courts concerning the proper interpretation of section 901(a),[21] and by asserting that the statute was ambiguous. Thus, at the outset the court rejected HEW's argument that the language of section 901(a) plainly encompasses employment discrimination. Instead, the court concluded the true meaning can be found only by examining the congressional intent behind Title IX.[22]

Turning to the legislative history, the court discussed what it considered to be a stronger argument: HEW contended that Congress's failure to enact a provision proposed by the House of Representatives (section 904) that would have expressly excluded employment discrimination from the purview of Title IX showed that Congress intended Title IX to cover employment discrimination.[23] Relying primarily on the written and oral remarks of Title IX's sponsor, Senator Bayh, the court concluded that HEW's contention was correct.[24] This conclusion constitutes the main pillar of the *North Haven* court's holding. The court attempted to bolster its conclusion by examining the post-enactment history of Title IX, but recognized that such an examination was "not conclusive" and did little more than add "some additional weight to the view that section 901 was expressly intended to relate to employment practices."[25] A detailed analysis of the language and the legislative history of Title IX demonstrates, however, that the *North Haven* decision was erroneous.

II. THE LANGUAGE OF TITLE IX

In the many cases involving section 901(a), HEW has consistently argued that an analysis of the statutory language conclusively shows that Title IX protects employees as well as students.[26] In its brief sup-

21. 629 F.2d at 777-78.

22. *Id.* at 778.

23. *Id.*

24. *Id.* at 778-83.

25. *Id.* at 784.

26. During the congressional hearings on the Title IX implementing regulations, HEW Secretary Caspar Weinberger asserted that the plain language of section 901(a) encompasses employment discrimination. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Educ. and Labor*, 94th Cong., 1st Sess. 466 (1975) [hereinafter cited as *Hearings*]. He offered no explanation for his assertion, however, and since section 901(a) does not contain the word "employment," it is difficult to understand the basis of this assertion. The wording of the regulation affecting faculty employment, 45 C.F.R. § 86.51(a)(1) (1979), is largely a copy of section 901(a), *compare* note 2 *supra with* text accompanying note 18 *supra*, with the exception that the word "employment" is contained in the regulation but not in the statute. If the plain language of the statute encompasses employment, it is difficult to understand why the writers of the HEW regulation believed it necessary to add an employment

porting its petition for certiorari in *Islesboro School Committee v. Califano*,[27] for example, HEW stated that "[e]mployees of an educational institution are as susceptible of being . . . 'subjected to discrimination' " under federally-funded programs as students, and concluded that the "no person" language of section 901(a) should be interpreted broadly to include faculty employment.[28] Likewise, the court in *Dougherty County School Systems v. Harris*,[29] agreeing with HEW's interpretation, emphasized that section 901(a) begins with the words "no person" rather than a more limited category like "no student."[30]

No other court has accepted HEW's analysis of the "no person" language. Even the *North Haven* court thought the language of section 901(a) "ambiguous,"[31] and indicated that the actual meaning of the statute could be determined only by examining the legislative history.[32] The Court of Appeals for the First Circuit emphatically rejected

clause to the language of the statute in writing the regulation. HEW's "plain language" argument, in short, is without adequate foundation.

27. 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979).

28. Petitioner's Brief for Certiorari, *supra* note 20, at 13. One commentator has recently agreed with this argument, stating that "[i]f some portion of a school's federal financial aid is allocated to paying teacher salaries, those employees should be viewed as performing federally-assisted educational activities," and therefore are within the purview of the "subjected to discrimination" clause of section 901(a). Friedman, *Congress, the Courts, and Sex-based Employment Discrimination in Higher Education: A Tale of Two Titles*, 34 VAND. L. REV. 37, 59 (1981). If this view is correct, any employees of federally-financed educational institutions, not just teachers, would be protected by Title IX. No one has ever suggested such a broad mandate for Title IX.

29. 622 F.2d 735 (5th Cir. 1980), *petition for cert. filed sub nom.* Hufstedler v. Dougherty County School Sys., 49 U.S.L.W. 3495 (U.S. Jan. 13, 1981) (No. 80-1023).

30. *Id.* at 737. Although the *Dougherty* court affirmed without analysis the lower court's ruling that the implementing regulations exceeded statutory authority, *id.* at 738, the court stated in dictum that because section 901(a) does not begin with a more limited phrase than "no person," such as "no student," Congress intended section 901(a) to encompass persons other than students, such as faculty, *id.* at 737-38. The court purported to find a "middle ground" between HEW and the courts that had previously decided the issue, stating that a "female teacher whose salary is defrayed by federal funds and who is paid less than a male teacher in the same program is subjected to discrimination under the program." *Id.* This idea, however, is not new. The Court of Appeals for the First Circuit held that section 901(a) is aimed not only at students, but also at "teachers engaged in special research being funded by the United States government." Islesboro School Comm. v. Califano, 593 F.2d at 426. The *Islesboro* court based its reasoning on the idea that such teachers would be "beneficiaries of . . . federal monies." *Id.* at 426. The *Dougherty* court's analysis, however, while reaching the same conclusion—that Title IX could reach faculty employment—proceeded on the idea that the "no person" language of the statute is not limited to students. This analysis overlooks the fact that a more limited phrase such as "no student" would have been too restrictive for the purposes of section 901(a). For example, a person denied admission to a federally financed institution on the basis of sex might not be a "student," yet should be protected by the title. The "no person" language employed in the statute is appropriately broad to encompass such situations; more limiting language such as "no student" would be inappropriately narrow.

31. 629 F.2d at 777.

32. *Id.* at 778.

HEW's "no person" argument: "The language of section 901, . . . on its face, is aimed at the beneficiaries of the federal monies . . . . The section does not include employees within its terms."[33] The Court of Appeals for the Sixth Circuit found HEW's "construction . . . to be strained."[34]

Acceptance of HEW's interpretation of the "no person" language of the statute would incorrectly broaden the scope of section 901(a). HEW's interpretation effectively rewords section 901(a) to read, "No person . . . shall, on the basis of sex, be subjected to discrimination under any education program or activity receiving federal financial assistance."[35] The actual statutory language that no person shall, because of sex discrimination, "be excluded from participation in"[36] or "be denied the benefits of"[37] programs receiving federal assistance is unnecessary under the HEW interpretation because, in HEW's view, anyone who is "excluded from participation in" or "denied the benefits of" a federally funded program on the basis of sex is also "subjected to discrimination" on the basis of sex. The "participation" and "benefits" clauses thus become surplusage in the presence of the more general "discrimination" clause, and may be removed without altering the meaning HEW imputes to the statute.

To render clauses of the statute surplusage in this manner violates the rule of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ."[38] HEW's interpretation of section 901(a) broadens the effect of the "discrimination" clause, swallowing up the other enumerating clauses in the statute, so that those clauses no longer have meaning.

Furthermore, section 901(a) enumerates three types of sex discrimination[39]—discrimination preventing participation, discrimination denying benefits, and discrimination in general—so that the last, a general phrase, is preceded by more specific phrases. Under the construction doctrine of *ejusdem generis*, when "general words follow spe-

33. Islesboro School Comm. v. Califano, 593 F.2d at 426.

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

35. See text accompanying note 18 *supra* for the actual language of the statute.

36. 20 U.S.C. § 1681(a) (1976).

37. *Id.*

38. 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 63 (4th ed. 1973). "[It is a] general proposition that a statute should not be construed in such a way as to render certain provisions superfluous or insignificant." Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 406 (D.C. Cir. 1976); *accord*, United States v. Menasche, 348 U.S. 528, 538-39 (1955).

39. *See* Petitioner's Brief for Certiorari, *supra* note 20, at 12-13.

cific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[40] The language in section 901(a) prohibiting discrimination in general should be limited to the scope of the more specific terms, which do not embrace employment discrimination.[41]

Limiting the "subjected to discrimination" language of section 901(a) in this manner does not strip it of meaning. For example, the "subjected to discrimination" clause would apply to a female medical student who was accepted into a federally funded human anatomy course (and therefore was not "excluded from participation"), and given a federal scholarship (and therefore was not "denied the benefits of"), but was awarded a blatantly unfair low grade by a professor who believed that women have no place in medicine (and therefore was "subjected to discrimination" on the basis of sex). The meaning of the "subject to discrimination" clause is not of inherently greater scope than the other clauses in section 901(a); rather, it stands on equal footing with them.[42]

The real question raised by section 901(a), as the *North Haven* court recognized,[43] is not whether the "no person" language was meant to encompass employees, but whether employees may be properly considered participants in, or beneficiaries of, the federally funded programs covered by the statute. As the *North Haven* court noted, an examination of the legislative history of Title IX is necessary to answer this question.[44]

III. THE LEGISLATIVE HISTORY OF TITLE IX

The legislative history of Title IX is less complete than many others because no committee hearings were held on the bill that became Title IX.[45] Moreover, there was no discussion or debate on the

40. 2A J. SUTHERLAND, *supra* note 38, at 103; *see* Judge Gignoux's discussion in Brunswick School Bd. v. Califano, 449 F. Supp. 866, 870 (D. Me. 1978), *aff'd sub nom.* Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979).

41. Because the first two clauses of the statute appear to be limited in scope to "participants" and "beneficiaries," respectively, the last clause must accordingly be limited to participants and beneficiaries, despite its seemingly broader language.

42. *Cf.* Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977) (a female student who allegedly received a poor grade because of her rejection of a male professor's sexual demands was within the protection of Title IX).

43. 629 F.2d at 778.

44. *Id.*

45. Title IX stemmed from Amendment No. 874, 92d Cong., 2d Sess. (1972), to a pending higher education bill, S. 659, 92d Cong., 2d Sess. (1972). See note 48 *infra*. The Senate accepted the amendment the same day it was introduced, without a committee hearing. 118 CONG. REC.

Senate floor about whether section 901(a) was intended to cover employment discrimination, other than the remarks of Senator Bayh, the bill's sponsor.[46]

There are three main elements to the analysis HEW and the *North Haven* court used to support the contention that Congress intended section 901(a) to encompass employment discrimination: (1) the remarks of the Senate sponsor of Title IX, Senator Bayh; (2) the failure of Congress to enact a provision (section 904) that would have explicitly excluded employment discrimination from Title IX; and (3) the post-enactment action and inaction of Congress with respect to the HEW Title IX implementing regulations.

A. *The Remarks of Senator Bayh.*

In interpreting legislative history the comments of the law's sponsor are entitled to great weight.[47] Accordingly, the *North Haven* court

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5815 (1972). Upon introducing his proposed amendment to section 901 in 1975, Senator Helms made the following statement about the sparse legislative history of Title IX:

> In 1972, Congress enacted legislation for the purpose of insuring that members of both sexes are afforded an equal educational opportunity. . . . [I]n the House of Representatives, that legislation was made a part of the education amendments of that year in the full Education and Labor Committee, rather than the subcommittee, and it was not a product of adequate public hearings. In the Senate, that legislation was made a part of those amendments on the Senate floor, completely circumventing the committee and hearing process. Therefore, no adequate record of the legislative intent of Title IX exists. Senators, Representatives, and bureaucrats alike must view and construe this legislation in a virtual vacuum.

121 CONG. REC. 23,845 (1975).

46. *See* 118 CONG. REC. 5,803-15 (1972). There was a brief exchange between Senator Bayh and Senator Pell about sexual balance on the faculties of private schools, *id.* 5,812-13, but it is not clear that Senator Bayh was referring to section 901(a) in discussing this issue. The *North Haven* court stated, however, that the colloquy between Senators Pell and Bayh "leaves little doubt that Senator Bayh intended employment practices to be covered under what is now § 901." 629 F.2d at 781. The Court of Appeals for the First Circuit gave a different view:

> While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think [the *North Haven* court's] reading is strained. . . .
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> . . .While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections [of Amendment No. 874], thereby suggesting that employment was to be covered under the basic provisions of Title IX, a careful examination of the debates ha[s] led us to conclude that these were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment.

Islesboro School Comm. v. Califano, 593 F.2d 424, 427-28 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979).

47. National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 640 (1967) ("It is the sponsors that we look to when the meaning of the statutory words is in doubt") (quoting Schwegmann Bros. v. Calvert Distillers Co., 341 U.S. 384, 394-95 (1951)). *See* 2A J. SUTHERLAND, *supra* note 38, at 221-22 ("In the course of deliberations on a bill, legislators look to its sponsor . . . as one who is expected to be particularly well informed about its purpose, meaning, and intended effect. In recognition of this reality of legislative practice, courts give consideration to statements made by a bill's sponsor. . .").

and HEW turned to Senator Bayh's remarks to discover Congress's intent in enacting Title IX. Senator Bayh made his comments upon introducing Amendment No. 874 to the Education Amendments of 1972,[48] which amendment included the provisions that eventually became Title IX. Amendment No. 874 also amended Title VII[49] and the Equal Pay Act[50] by specifically providing remedies for sex discrimination at educational institutions.[51] The *North Haven* court concluded from Senator Bayh's remarks that he intended that Title IX encompass employment discrimination.[52]

Because Senator Bayh never directly stated that the portion of Amendment No. 874 that became Title IX was specifically intended to encompass employment discrimination, the *North Haven* court drew its conclusion from the juxtaposition of Senator Bayh's statements. In his introductory remarks about Amendment No. 874, Senator Bayh explained:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and *employment* resulting from those programs. . . . More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment*, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in title VI of the 1964 Civil Rights Act. Other important provisions in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative, and professional women.[53]

The *North Haven* court inferred from Senator Bayh's reference to faculty employment that faculty employment practices were meant to

48. Senator Bayh introduced Amendment No. 874, 92d Cong., 2d Sess. (1972), on Feb. 28, 1972. 118 CONG. REC. 5802-03 (1972); *see* H.R. 7248, §§ 1006, 1008, 92d Cong., 1st Sess. (1971) (extending coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (1976), to previously exempt educational agencies and institutions); H.R. REP. No. 554, 92d Cong., 1st Sess. 51, 108 (1971). Ultimately, the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (1976), amended Title VII, because it passed prior to the Education Amendments of 1972. The Equal Employment Opportunity Commission administers Title VII. 42 U.S.C. § 2000e-5(a) (1976), *amending* 42 U.S.C. §§ 2000e-5(a), (b) (1970). Section 1006 of Amendment No. 874 also repealed the exemption for executive, administrative, and professional personnel previously contained in the Equal Pay Act of 1963, 29 U.S.C. § 213 (1976), *amending* 29 U.S.C. § 213 (1970), which is administered by the Department of Labor.

49. 42 U.S.C. § 2000e (1976).

50. 29 U.S.C. § 213 (1976).

51. See note 48 *supra*.

52. 629 F.2d at 780, 782.

53. 118 CONG. REC. 5,803 (1972) (emphasis added).

be included under Title IX.[54] Equally valid considerations, however, can lead to the opposite conclusion. For instance, Senator Bayh's remarks may be read as referring to Amendment No. 874 as a whole, encompassing the amendments to Title VII and the Equal Pay Act as well as Title IX. Interpreted in this manner, the remarks about faculty employment do not relate to the scope of section 901 and therefore do not signify that Title IX was intended to embrace employment discrimination.[55]

The *North Haven* court also discussed Senator Bayh's prepared summary of his amendment, which he entered into the record immediately after his introductory remarks.[56] In the section of his summary entitled "Prohibition of Sex Discrimination in Federally Funded Education Programs," Senator Bayh wrote:

> Central to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs. . . .
>
> 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.[57]

Because Senator Bayh referred to employment practices in the portion of his prepared summary that discussed both the basic prohibition against sex discrimination and the enforcement provisions, the *North Haven* court inferred that he intended section 1001 (now section 901) to encompass employment practices.[58] Although this inference seems to support strongly the court's view, the *North Haven* court itself pointed

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54. 629 F.2d at 780.

55. Judge Gignoux disagreed with the *North Haven* court's interpretation:

> Nor do Senator Bayh's remarks support defendants' 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.

Brunswick School Bd. v. Califano, 449 F. Supp. 866, 873 (D. Me. 1978), *aff'd sub nom.* Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). One commentator has recently agreed with Judge Gignoux, concluding that "[a] careful reading of the Senator's comments . . . reveals that these references to employment addressed that portion of the bill seeking to amend Title VII, not the portion that became section 901(a) of what is now known as Title IX." Friedman, *supra* note 28, at 64-65.

56. 118 CONG. REC. 5,806-08 (1972).

57. *Id.* 5,807 (emphasis added). At this stage in the legislative process, the portion of Amendment No. 874 that subsequently became Title IX was designated Title X, and its sections were numbered 1001, 1002, and so on. In the final version of the Act, these sections were renumbered 901, 902, and so on. *See* 118 CONG. REC. 5,803 (1972).

58. 629 F.2d at 780-81.

out that Senator Bayh referred to section 1005 as one of the sections "central to my amendment."[59] Section 1005 contained the proposed amendment to Title VII of the Civil Rights Act of 1964[60] eliminating the exception of educational institutions from the coverage of Title VII.[61] Thus, it is not clear whether Senator Bayh was referring to Title VII or Title IX when he wrote that "this portion of the amendment covers discrimination in all areas where abuse has been mentioned" and included "employment practices for faculty and administrators" as one of the areas of abuse.[62]

The *North Haven* court called this reference to section 1005 an "oversight."[63] If the court is correct, Senator Bayh failed to correct this purported oversight three years later when he testified about Title IX at the House hearings concerning HEW's Title IX implementing regulations.[64] At these hearings, in both his prepared statement and his oral remarks, Senator Bayh quoted his statement of February 28, 1972, without correction.[65] Apparently Senator Bayh himself did not consider his reference to section 1005 to be an oversight; the *North Haven* court's assertion that it was an oversight seems incorrect.

In short, no unequivocal indication of Senator Bayh's intent emerges from his oral or written remarks about Amendment No. 874. For every argument HEW and the *North Haven* court make in support of the contention that Senator Bayh intended Title IX to cover employment discrimination, there is an equally valid argument that the sena-

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59. *Id.* at 781 n.11. See text accompanying note 57 *supra*.

60. 42 U.S.C. § 2000e-1 (1976).

61. The section read as follows:

> SEC. 1005 (a) Clause (1) of section 701(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b)(1)) is amended by inserting at the end thereof the following: "(except that this clause shall not apply with respect to employees of a State, or a political subdivision thereof, employed in an educational institution)".
>
> (b) Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended by (1) inserting the words "educational institution," after the word "association," wherever it appears in such section, and (2) by inserting a period after "religious activities" and deleting the remainder of the sentence.

118 CONG. REC. 5803 (1972). This section was ultimately enacted as part of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e (1976). See note 48 *supra*.

62. 118 CONG. REC. 5,807 (1972).

63. 629 F.2d at 781 n.11. The reference to section 1005 has caused others difficulty as well. In its brief in support of its petition for a writ of certiorari in Islesboro School Comm. v. Califano, 593 F.2d 424 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979), the Department of Justice called the reference to section 1005 a "misprint." Petitioner's Brief for Certiorari, *supra* note 20, at 16 n.13. Even those opposed to HEW's regulations have called the reference to section 1005 inadvertent. Brief in Opposition to Petition for a Writ of Certiorari at 21, Harris v. Junior College Dist., 597 F.2d 119 (8th Cir.), *cert. denied*, 444 U.S. 972 (1979).

64. See note 26 *supra*.

65. *Hearings*, *supra* note 26, at 170, 174.

tor did not have that intent. Senator Bayh's remarks are simply too equivocal to support HEW's interpretation of Title IX.

B. *Congress's Failure to Enact Section 904.*

The language of Title IX is almost identical to the language of Title VI of the Civil Rights Act of 1964.[66] Despite this similarity, there is one important difference: section 604 in Title VI[67] specifically excludes employment discrimination from Title VI's purview, but there is no similar provision in Title IX.

During the development of Title IX in Congress, a provision identical to section 604—section 904—was proposed by the House of Representatives.[68] In conference committee the Senate declined to approve section 904 and the House receded without explanation.[69] From Congress's failure to add a section specifically excluding employment from the purview of Title IX, HEW has argued[70] and the *North Haven* court agreed[71] that Congress intended Title IX to cover employment discrimination.

Most courts have rejected this argument, concluding instead that section 904 was deleted in conference because its inclusion would have been inconsistent with the amendments to Title VII of the Civil Rights Act of 1964 and to the Equal Pay Act of 1963, which were included in Amendment No. 874.[72] Because the Title VII and Equal Pay amend-

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66. 42 U.S.C. § 2000d (1976); *see* 117 CONG. REC. 30,407 (1971) (remarks of Sen. Bayh).

67. 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 organization except where a primary objective of the Federal financial assistance is to provide employment."

68. H.R. REP. No. 554, 92d Cong., 1st Sess. 108, *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2462, 2566.

69. The Conference Committee Report contains the following statement:

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorizes 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. The House recedes.

Id. 2671-72.

70. Petitioner's Brief for Certiorari, *supra* note 20, at 18-19.

71. 629 F.2d at 778.

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

> The elimination of [§ 904] 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 in Pub. L. 92-318 would have been inaccurate and contradictory in light of this statute's extension of existing laws to cover employment practices of educational institutions.

Accord, Islesboro School Comm. v. Califano, 593 F.2d 424, 428 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). *See also* Petitioner's Brief for Certiorari, *supra* note 20, at 18-19.

ments dealt explicitly with employment discrimination, it would have been inconsistent for Congress to include in Amendment No. 874 a provision specifically excluding employment discrimination from the purview of Amendment No. 874. Section 904 was accordingly deleted. The *North Haven* court, however, decided that any inconsistency caused by section 904 could have been so easily corrected that section 904 must have been deleted for some other reason.[73] The court pointed out that Congress could easily have avoided any inconsistency caused by section 904 by limiting its effect to section 901: "Congress could readily have said: 'Nothing in § 901 shall apply to any employees of any educational institution subject to this title except where a primary objective of the Federal financial assistance is to provide employment.' "[74] It is far more sensible to assume, however, that if Congress had intended section 901 to encompass employment discrimination, it would have expressed its intent simply and directly by including employment language in section 901, as HEW did in its implementing regulation.[75] Senator McGovern provided an example that could have expressed such intent. In 1971 he intended to offer an amendment to the Omnibus Education Amendments Act of 1971[76] that would have prohibited discrimination in higher education on the basis of sex. Senator McGovern's amendment, like Senator Bayh's, was modeled after Title VI and contained this provision: "No person in the United States shall be excluded on the grounds of sex from participation in, be denied the benefits of, be subjected to discrimination under *or be denied employment* in connection with any program or activity assisted under this Act."[77] Senator McGovern ultimately did not introduce his amendment out of deference to an amendment introduced earlier by Senator Bayh (a precursor to Amendment No. 874),[78] but his proposal indicates the ease with which Congress could have made Title IX cover employment discrimination. The *North Haven* court's argument that section 904 was deleted for reasons other than its apparent inconsistency with Amendment No. 874 as a whole is therefore unpersuasive.

The *North Haven* court also rejected an assertion that section 904 had been omitted simply to correct a drafting mistake—to remove a provision that had been inadvertently included in the initial drafting of

73. 629 F.2d at 783.

74. *Id.*

75. See note 2 *supra*.

76. S. 659, 92d Cong., 1st Sess. (1971).

77. 117 CONG. REC. 30,411 (1971) (emphasis added).

78. *Id*; *see id.* 30,399 for Senator Bayh's amendment (Amendment No. 398 to S. 659, 92d Cong., 1st Sess. (1971)).

Title IX.[79] The court concluded:

> In light of the ease with which an appropriate employment exclusion could have been substituted, and in light of the Senate sponsor's view of his amendment as expressed in his summary and in the debates from which we have quoted above, we cannot agree that the omission was simply correction of a "drafting mistake." Rather, the deletion of the House provision supports HEW's broader interpretation of the Act. Appellees point us to no language anywhere in the legislative history that even suggests that the conference committee deleted the provision merely for reasons of consistency, and we have not been able to find any. In short, this was *not*, in our view a matter of simply correcting legislative inadvertence.[80]

As the court's language indicates, this conclusion rests squarely on the inference of congressional intent drawn from the deletion of section 904 from the final version of Title IX.[81] The *North Haven* court was apparently not made aware of evidence establishing that the omission of section 904 was in fact the correction of a drafting mistake. This evidence is contained in remarks by Congressman O'Hara, Chairman of the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, during hearings held to review the HEW Title IX implementing regulations in 1975.[82] Congressman O'Hara made his remarks immediately after testimony that section 904 was omitted because it was inconsistent with Title IX as a whole.[83] Congressman O'Hara spoke of the fate of section 904:

> . . . If you want to know, 904 got in by mistake, by a drafting error. At my instigation in the committee the title, or what became title IX, was rewritten. You see . . . title IX was brought to us . . . as an amendment to title VI and I had a number of objections to that because I had a lot to do, I thought at least, with getting title VI into the Civil Rights Act of 1964.
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> . . . .
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> . . . So I was very nervous about this effort to amend title VI because it opened up, it made all of title VI open to amendment when we hit the floor with the bill.
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> . . . .
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> So I insisted instead of amending title VI that we write and put into the bill a new title that was equivalent to title VI in terms of discrimination on the basis of sex, but it would not then, in a parliamentarian sense, open up title VI to amendments on the floor.

79. 629 F.2d at 783. The "drafting mistake" theory was put forth in Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 57 (1976).

80. 629 F.2d at 783.

81. See notes 73-74 *supra* and accompanying text.

82. *Hearings*, *supra* note 26.

83. *Id.* See note 72 *supra* and accompanying text.

> The staff was given overnight to draft this whole thing and they goofed. 904 got in there by mistake. It was a cut and paste job. There was a Xerox of the Civil Rights Act that they just pasted in.
>
> Then when we got around to straightening things out in conference we improved the drafting and dropped it out.
>
> Now, great significance is being given to the fact that it was dropped out. It was dropped out because it got in through a drafting error. So the quiet, easy way to get it out was to slide it out somewhere along the line without having to go through a long explanation as to how it got in. So much for that part of the argument.[84]

Although "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,"[85] Congressman O'Hara was not relating a personal version of the intent of an earlier Congress; rather, he was describing a mechanical error that occurred during the drafting of the House version of Title IX.[86] Congressman O'Hara's remarks emphatically refute the contention that section 904 was deleted because Congress intended Title IX to encompass employment discrimination.[87] The deletion merely remedied a drafting mistake and thus removed a provision that would have been inconsistent with the Title VII and Equal Pay Act amendments in Amendment No. 874.[88]

C. *The Post-Enactment History of Title IX.*

Although the *North Haven* court recognized that the action or inaction of a subsequent Congress is usually not probative of the views of an earlier Congress,[89] it nevertheless decided that "congressional reaction to the Title IX regulations, in the context of the legislative history as a whole, lends some additional weight to the view that § 901 was

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84. *Hearings*, *supra* note 26, at 409.

85. United States v. Price, 361 U.S. 304, 313 (1959).

86. There is no need to question the veracity of his statement. Congressman O'Hara has consistently opposed HEW's Title IX implementing regulations. See note 14 *supra*.

87. No federal court that has decided the question of the validity of HEW's Title IX implementing regulations has quoted Congressman O'Hara's statement. A possible explanation for this failure is that when the Kuhn article, *supra* note 79, asserted that section 904 was a drafting mistake, the author did not explain the origin of this assertion. The citation the article gives to support the "drafting mistake" theory is to "*Minutes of the House Comm. on Education and Labor*, at 9 (Sept. 30, 1971)." Kuhn, *supra* note 79, at 57 n.43. Had Ms. Kuhn explained that she knew section 904 was a drafting mistake because Congressman O'Hara had told her so at a public hearing, the *North Haven* court might have given her assertion more weight. It is not clear why Ms. Kuhn failed to cite to Cougressman O'Hara's statement in her article. Another commentator, who recently concluded that the Title IX implementing regulations are valid, cited to the exact page on which Cougressman O'Hara's remarks appear, yet failed to discuss O'Hara's explanation of the history of section 904. *See* Comment, *Eliminating Sex Discrimination in Educational Institutions: Does Title IX Reach Employment?*, 129 U. PA. L. REV. 417, 427 n.47 (1980).

88. See note 72 *supra* and accompanying text.

89. 629 F.2d at 784.

expressly intended to relate to employment practices."[90] Close examination of the post-enactment history, however, reveals that it has less probative force than the *North Haven* court attributed to it.

The court pointed first to the failure of the House and Senate to disapprove by resolution the HEW Title IX implementing regulations,[91] stating that this failure "is not without significance . . . ."[92] The court overlooked, however, the fact that the resolution introduced by Senator Helms[93] called for approval of *all* the HEW regulations, not just the subpart that included section 901. There is therefore no way to ascertain the intent of the Senate with respect to the employment regulation specifically. Likewise, in the House of Representatives Congressmen Quie and Erlenborn introduced an amendment to Congressman O'Hara's concurrent resolution disapproving all of HEW's Title IX regulations.[94] Their amendment stated: "Subpart E [of the HEW regulations] . . . is inconsistent with the Act [section 901(a)] since by the amendment to Title VII of the Civl Rights Act of 1964 and the Fair Labor Standards Act of 1938, Congress has conferred such jurisdiction upon the United States Equal Employment Opportunity Commission and the Department of Labor."[95] Congressman O'Hara's concurrent resolution as a whole never passed out of the Education and Labor Committee,[96] so there is no way to know whether the rejection of the resolution had anything to do with the Quie/Erlenborn amendment. In sum, Congress's failure to disapprove the Title IX regulations says nothing about whether Congress intended Title IX to cover employment practices.

The *North Haven* court also discussed the Senate's failure to pass a bill Senator Helms introduced later in 1975.[97] This bill read in part: "Nothing in [section 901] shall apply to any employee of any educational institution subject to this title."[98] The court failed to note, however, that there were nine other substantive provisions of Senator

90. *Id.*

91. See note 14 *supra*.

92. 629 F.2d at 783.

93. S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17,301 (1975). "The resolution was referred to the Senate Committee on Labor and Public Welfare, which took no action on it." 629 F.2d at 783.

94. See note 14 *supra*.

95. Unpublished Amendment to H.R. Con. Res. 330, *Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong., 1st Sess. (1975) (on file with the Committee), *quoted in* North Haven Bd. of Educ. v. Hufstedler, 629 F.2d 773, 783 (2d Cir. 1980), *cert. granted sub nom.* North Haven Bd. of Educ. v. Bell, 101 S. Ct. 1345 (1981).

96. 629 F.2d at 784.

97. S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23,845 (1975). See note 14 *supra*.

98. S. 2146, 94th Cong., 1st Sess., 121 CONG. REC. 23,845 (1975).

Helms's bill that were intended to limit the scope of other portions of HEW's Title IX implementing regulations.[99] Because the bill as a whole failed to pass, it is again impossible to isolate the Senate's intent with respect to the proposed change to section 901.

D. *Summary.*

The *North Haven* court's interpretation of congressional intent was based largely on Congress's deletion of a proposed provision of Title IX that would have explicitly excluded employment discrimination from the purview of Title IX.[100] The purpose of this deletion, however, was to correct a drafting mistake; it is incorrect to infer that the deletion evidences Congress's intent regarding employment practices.[101] Moreover, the comments of Title IX's sponsor at best provide only equivocal support for the HEW regulations.[102] Finally, the post-enactment legislative history of Title IX provides little or no support for the *North Haven* court's interpretation of congressional intent with respect to the HEW regulations.[103]

II. THE ANALOGY OF TITLE IX TO TITLE VI: A NEW APPROACH

Title IX is based on Title VI of the Civil Rights Act of 1964.[104] "The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."[105] It is therefore appropriate to investigate the regulatory and

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99. *See id.* 23,847.

100. See notes 73-74 *supra* and accompanying text.

101. See notes 82-87 *supra* and accompanying text.

102. See notes 47-65 *supra* and accompanying text.

103. See notes 89-99 *supra* and accompanying text.

104. Cannon v. University of Chicago, 441 U.S. 677, 694 (1979) (holding in part by analogy to Title VI that Title IX created a private right of action).

105. *Id.* at 696. If anything is clear concerning Senator Bayh's intent with regard to Title IX, it is that he expected Title IX to work the same way Title VI had been working. In the senator's summary of Title IX, which he entered into the Congressional Record when he introduced Title IX, Senator Bayh wrote:

> Discrimination against the beneficiaries of federally assisted programs and activities is already prohibited by title VI of the 1964 Civil Rights Act, but unfortunately the prohibition does not apply to discrimination on the basis of sex. In order to close this loophole, my amendment sets forth prohibition and enforcement provisions which generally parallel the provisions of title VI.

118 CONG. REC. 5807 (1972). Later that year, in a letter to Senator Pell, Senator Bayh wrote:

> It is helpful to remember that the provisions of my amendment in question are parallel to those found in the 1964 Civil Rights Act. Since 1964, there has been ample opportunity to establish enforcement procedure with respect to discrimination on the basis of race; enforcement of my amendment will draw heavily on those precedents.

Id. 18,437. Three years later, while testifying at the hearings on the Title IX implementing regulations, Senator Bayh stated: "[T]he setting up of an identical administrative structure and the use of virtually identical statutory language substantiate the intent of the Congress that the interpreta-

judicial history of Title VI to determine how Title VI has been interpreted by HEW and the courts to determine the proper scope of Title IX.

Despite the presence of section 604, which seemingly excludes employment discrimination from Title VI,[106] the Court of Appeals for the Fifth Circuit in *United States v. Jefferson County Board of Education*[107] held that Title VI may be applied to prevent segregation in the allocation of faculty to schools in a school district. The court reasoned that

> [f]aculty intergration is essential to student desegregation. . . . Section 604 was never intended as a limitation on desegregation of schools. If the defendant's view of Section 604 were correct the purposes of the statute would be frustrated, for one of the keys to desegregation is the integration of faculty. As long as a school has a Negro faculty it will always have a Negro student body. As the District Court for the Western District of Virginia put it in Brown v. County School Board of Frederick County, 1965, 245 F. Supp. 549, 560: "[T]he presence of all Negro teachers in a school attended solely by Negro pupils in the past denotes that school a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters."[108]

Other courts have also concluded that Title VI may be interpreted broadly enough to affect employment practices, despite the prohibition of section 604. In a recent decision the Court of Appeals for the Fourth Circuit held that "because of § 604, Title VI does not provide a judicial remedy for employment discrimination by institutions receiving federal funds *unless* . . . discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid."[109] These cases teach that Title VI applies to discriminatory employment practices ouly when such practices have a discriminatory effect on students through the creation of a discriminatory environment.

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tion of Title IX was to provide the same coverage as had been provided under Title VI." *Hearings*, *supra* note 26, at 170.

106. See note 67 *supra*.

107. 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied*, 389 U.S. 840 (1967).

108. 372 F.2d at 883.

109. Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 89 (4th Cir. 1978) (emphasis in original), *cert. denied*, 442 U.S. 947 (1979); *accord*, Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969) ("If the funds provided by [the federal government] . . . support a program which is infected by a discriminatory environment, then termination of such funds is proper [under Title VI]") (dictum); United States v. El Camino Community College Dist., 454 F. Supp. 825 (C.D. Cal. 1978), *aff'd*, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980) (Title VI authorizes the Office for Civil Rights to investigate the employment practices of a college receiving federal aid to determine whether there is discrimination on the grounds of race, color, or national origin that affects the students at the college).

In 1973 HEW amended its Title VI implementing regulations to embody the *Jefferson County* holding. The amendment reads:

> Where a primary objective of the Federal financial assistance is not to provide employment, but discrimination on the ground of race, color, or national origin in the employment practices of the recipient or other persons subject to the regulation tends, on the ground of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimnation under any program to which this regulation applies, [this regulation] shall apply to the employment practices of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries.[110]

Recently, in *Caulfield v. Board of Education*,[111] Judge Weinstein of the District Court for the Eastern District of New York upheld the validity of this regulation and simultaneously showed how Title IX may similarly be applied to employment discrimination on the basis of sex in educational institutions. In *Caulfield* local school officials, school boards, supervisors, teachers, and parents challenged an agreement between the New York City Board of Education and HEW's Office for Civil Rights that purported to remedy alleged violations of Titles VI and IX by the Board of Education in the hiring and assignment of teachers and in the hiring of supervisory personnel. The plaintiffs argued "that under Title VI and Title IX, HEW and [the Office of Civil Rights] had no jurisdiction to investigate or seek compliance with regard to the Board's teacher and supervisory employment practices."[112] Judge Weinstein, addressing the Title VI question first, adopted the *Jefferson County* court's reasoning and concluded that

> [d]iscrimination by race in the hiring and assignment of teachers or supervisors, as a matter of law and of fact, constitutes discrimination against students. And because students are clearly the ultimate beneficiaries of federal assistance to school systems, HEW's [Title VI] regulation . . ., as applied to this case, constitutes a valid interpretation of the statutory mandate.[113]

Judge Weinstein then addressed the question of Title IX's applicability. Agreeing with the holdings of courts that have found HEW's Title IX implementing regulations overbroad,[114] Judge Weinstein concluded:

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110. 45 C.F.R. § 80.3(c)(3) (1980).

111. 486 F. Supp. 862 (E.D.N.Y. 1979), *aff'd*, 632 F.2d 999 (2d Cir. 1980).

112. *Id.* at 879.

113. *Id.* at 882.

114. Judge Weinstein first summarized the arguments of the courts that have found HEW's Title IX implementing regulations overbroad. He then stated: "It would be hard to sustain HEW's Title IX jurisdiction in this case under the direct authority of the department's 'employ-

> To the extent that [defendant's argument] proceeds on the general assumption that wherever a grantee's employee has substantial contact with a direct beneficiary, all the grantee's employment practices with regard to that employee are subject to Title IX, it is overbroad under the teaching of the *Romeo* line of cases. But insofar as this theory proceeds by analogy to that accepted for reaching school employment practices under Title VI—that such practices may be reached where there is an arguable discriminatory impact on direct beneficiary students—it provides a colorable basis for the exercise of jurisdiction in this case.[115]

Under the *Caulfield* rationale Title IX, as an analogue of Title VI, may operate to prevent sex discrimination in faculty employment in the same way that Title VI operates to prevent racial discrimination in faculty employment. For either statute to apply, there must be a showing that the discriminatory employment practices have a discriminatory impact on the beneficiaries of federal financial assistance—the students. The *Jefferson County* court noted that racial discrimination in faculty hiring has a discriminatory effect on students and defeats the attainment of desegregated schools.[116] Judge Weinstein, however, recognized that similar reasoning may not be so facilely applied to sex discrimination:

> This is not to suggest that the possible effect of sexually discriminatory school employment practices on students is as clear or severe as that of racially discriminatory practices, nor that our society's discrimination against women—often based on outmoded notions rather than animus—is as pernicious or historically ingrained in law and practice as that against blacks. All this court concludes is that HEW could reasonably proceed in this case under Title IX on a theory that school employment practices which involve systemic discrimination against women in access to supervisory positions had, or would have, a deleterious impact on students as direct beneficiaries of federal financial assistance.[117]

Although Title IX may well confer upon HEW the authority to regulate sexually discriminatory employment practices where a deleterious impact on students can be shown, Judge Weinstein is arguably incorrect in saying that HEW can proceed on this theory under the authority of the Title IX implementing regulations as currently written. Judge Feikens pointed out in *Romeo Community Schools v. HEW*,[118] a district court decision invalidating the Title IX regulations, that

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ment' regulations . . . . [C]ases considering the validity of these regulations have almost uniformly concluded that they are beyond the authority granted by the statute." *Id.* at 883.

115. *Id.* at 884.

116. See text accompanying note 108 *supra*.

117. 486 F. Supp. at 885.

118. 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 444 U.S. 972 (1979).

> [t]here is no provision in any of these regulations which specifies that the particular employment practice regulated must result in substantial sex discrimination against students in federally financed education programs, nor does it appear that HEW considers itself under any obligation to establish such resultant student discrimination before the requirements of Subpart E may be enforced.[119]

Thus, in the absence of a provision in the Title IX regulations requiring a showing of harmful impact upon students resulting from discriminatory faculty employment practices, HEW does not have the authority under Title IX to regulate the employment practices of educational institutions receiving federal financial assistance.

Judge Weinstein's analysis of the scope of Title IX reconciles some inconsistencies in the various readings of Title IX's legislative history. The analysis reveals, for instance, how Title IX may be construed to affect faculty employment. There may, therefore, have been no inconsistency or error when Senator Bayh referred to section 901 as encompassing faculty employment; he may have had in mind the *Jefferson County* court's rationale for applying Title VI to racial discrimination in faculty employment.[120] This possibility is supported by Senator Bayh's statement that he envisioned that the Title VI enforcement scheme would be used to enforce Title IX.[121] Because Senator Bayh's intent regarding the close relationship between Title VI and Title IX is clear, it is difficult to understand why HEW did not simply transfer the enforcement scheme embodied in the Title VI regulations[122] to the Title IX implementing regulations. To do so would have sensibly and consistently analogized the Title VI implementing regulations to the Title IX implementing regulations, and would have been in accord with Senator Bayh's view of the relationship of Title IX to Title VI.

III. CONCLUSION

Although HEW's Title IX implementing regulations are overbroad as written, Title IX may apply to sex discrimination in faculty employment in the same way that Title VI applies to racial discrimination in faculty employment. In order to implement Title IX in a manner consistent with its intended scope, the Department of Education

119. 438 F. Supp. at 1035; *accord*, Seattle Univ. v. HEW, 621 F.2d 992, 993-94 (9th Cir. 1980) (per curiam), *cert. granted sub nom.* Dep't of Educ. v. Seattle Univ., 101 S. Ct. 563 (1980); Islesboro School Comm. v. Califano, 593 F.2d 424, 430 (1st Cir.), *cert. denied*, 444 U.S. 972 (1979). The *North Haven* court never reached this question because it held that Title IX authorizes the HEW regulations as written. 629 F.2d at 786.

120. See notes 106-09 *supra* and accompanying text.

121. See note 105 *supra*.

122. See note 110 *supra* and accompanying text.

should eliminate the "employment" language from its Title IX regulations and substitute the language of the Title VI regulations governing employment practices. This proposal would allow the Department to regulate faculty employment where faculty discrimination on the basis of sex has a harmful effect on students, who are the true beneficiaries of federal financial assistance under Title IX.

Bernard H. Friedman