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Since 1975 when the former Department of Health, Education and Welfare (hereinafter referred to as HEW)[1] initially promulgated regulations pursuant to Title IX of the Education Amendments of 1972 (hereinafter referred to as Title IX),[2] four Courts of Appeals and numerous District Courts[3] have declared invalid the Title IX regulations governing the employment practices and policies of educational

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[1] On May 4, 1980, jurisdiction over educational matters was transferred from the Department of Health, Education and Welfare to the newly created Department of Education. In order to maintain consistency with all court opinions regarding Title IX to date, this article will continue to refer to the jurisdictional agency as HEW.

[2] 20 U.S.C. §1681 (1972) states:

> 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 any program or activity receiving Federal financial assistance.

20 U.S.C. §1682 (1972) states:

> Each federal department and agency which is empowered to extend Federal financial assistance . . . is authorized and directed to effectuate the provisions of §1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

[3] Seattle Univ. v. HEW, No. 78-1746 (9th Cir. June 19, 1980) (*per curiam*) (affirming 166 FEP Cases 719 (W.D. Wash. 1978); Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), *cert. denied,* 100 S.Ct. 467 (1979) (affirming 438 F. Supp. 1021 (E.D. Mich. 1977)); Junior College Dist. of St. Louis v. Califano, 597 F.2d 119 (8th Cir.) *cert. denied,* 100 S. Ct. 467 (1979) (affirming 455 F. Supp. 1212 (E.D. Mo. 1978)); Isleboro School Committee v. Califano, 593 F.2d 44 (1st Cir.), *cert. denied,* 100 S.Ct. 467 (1979) (affirming Brunswick School Bd. v. Califano, 449 F. Supp. 866 (D. Me. 1978)); Grove City College v. Harris, No. 78-1293 (W.D. Pa. March 10, 1980); Auburn School Dist. v. HEW, No. 78-154 (D.N.H. March 29, 1979), *appeal dismissed,* No. 79-1261 (1st Cir. 1980); Board of Educ. of Bowling Green City v. HEW, No. C78-177, 19 FEP cases 457 (N.D. Ohio March 14, 1979); Dougherty County School System v. Califano, No. 78-30-ALB, 19 FEP Cases 688 (M.D. Ga. August 22, 1978); *rev'd,* No. 78-3384 (5th Cir. July 28, 1980); North Haven Bd. of Educ. v. Hufstedler, No. 6136 (S.D. Conn. April 26, 1979), *rev'd,* No. 79-6136 (2d Cir. July 24, 1980); Trumbull Bd. of Educ. v. U.S. Dept. of Educ., No. 6247 (S.D. Conn. May 24, 1979), *rev'd,* No. 6247 (2d Cir. July 24, 1980).

institutions.[4] In an attempt to avoid administrative chaos resulting from enforcement inconsistencies, the Justice Department petitioned the Supreme Court to review the decisions of the First, Sixth and Eighth Circuits. This petition was denied on November 26, 1979, thereby letting the appeals court decisions stand. Interested parties on both sides of the issue have awaited a circuit court opinion upholding the regulations. Dissonance among the circuits probably would persuade the Supreme Court to grant certiorari on a future petition and thereby reach closure on the issue of Title IX and employment discrimination.[5]

Two recent Court of Appeals opinions, *North Haven Board of Education v. Hufstedler*[6] and *Dougherty County School System v. Harris*[7] may well provide the Court with the necessary impetus to review not only the issue as to the validity of the Title IX employment regulations but also the broader issue as to the scope of the new Department of Education's power to regulate under Title IX in general. The latter issue presents far-reaching implications for civil rights enforcement in the educational areas including sex, race and handicap discrimination.[8]

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[4] The regulations in question were printed originally at 45 C.F.R. Part 86, Subpart E. Simultaneous with the transfer of HEW jurisdiction over Title IX to the new Department of Education, these regulations were reissued in identical form by that department at 34 C.F.R. Part 106, Subpart E, 45 F.R. 30802 (May 9, 1980). To be consistent with all court decisions to date, this article will continue to make reference to the originally published regulations at 45 C.F.R. Part 86.

The Title IX employment regulations state as follows:

> §86.51 Employment
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> (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination in employment, or recruitment, consideration or selection therefore, whether full-time or part-time, by a recipient which receives or benefits from Federal financial assistance.

[5] For a general discussion of Title IX and employment discrimination prior to the cases here under consideration, *see* Salomone, *Title IX and Employment Discrimination: A Wrong in Search of a Remedy*, 9 J.L. & EDUC. 433 (1980).

[6] No. 79-6136 (2d Cir. July 24, 1980).

[7] No. 78-3384 (5th Cir. July 28, 1980).

[8] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* (1964) (hereinafter referred to as Title VI) upon which Title IX based states:

> 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.

§504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1973) (hereinafter referred to as §504) which was modeled after Title VI and Title IX states:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

This article will discuss the Second and Fifth Circuit opinions in view of their analysis of the legislative intent of Title IX as compared to the analysis engaged in by the earlier courts declaring the Title IX employment regulations invalid. A middle approach will be proposed similar in effect to the Fifth Circuit ruling which upheld employment coverage under Title IX but narrowed the scope of the regulations as promulgated by HEW. However, in contrast with that opinion which relied upon the limitations in enforcement powers under §1682, modeled after the pinpoint provision in Title VI of the Civil Rights Act of 1964 (hereinafter referred to as Title VI), to justify the limitation of regulatory powers, the proposed model is based upon a comparison of statutory and regulatory language.[9]

Legislative History of Title IX

The earlier Courts of Appeals had searched the legislative history of Title IX and had found the legislative intent to deny employment coverage. In similar fashion, the Second Circuit in *North Haven Bd. of Educ. v. Hufstedler* proceeded through the legislative history but, this time, found what it considered to be adequate evidence of intent to include employment within the scope of the Act.

The decision in *North Haven* represents a reversal of two orders of summary judgment in the court below. Following in the steps of the previous decisions on the issue, the district court, in two separate opinions, had declared invalid the Title IX regulations governing employment and had enjoined HEW from withholding or threatening to withhold any federal funds under those regulations from the North Haven and Trumbull school districts. The two cases involved essentially the same legal questions and were consolidated on appeal to the Second Circuit. In both cases, the district court had found that the school districts in question had received substantial federal financial assistance and therefore were governed by the provisions of Title IX. The district court had determined further that, since the 1975-76 school year, the North Haven Board of Education had used between 46.8% and 66.9% of its federal financial assistance to pay salaries. In the case of the Trumbull Board, it was unclear how much,

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[9] 42 U.S.C.§1682 (1972) states:

> [C]ompliance with any requirement adopted pursuant to this section may be affected (1) by the termination of or refusal to grant or to continue assistance under such program or activity . . . but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been so found.

if any, of the federal financial aid received had been allocated toward the hiring of guidance counselors such as the plaintiff in question.

The particular facts in each case are as follows. In January 1978, a tenured teacher who had been denied rehiring by the North Haven School Board after a one-year maternity leave filed a complaint alleging a Title IX violation. The school board refused HEW's request for specific information concerning its policies on hiring, leaves of absence, seniority and tenure on the grounds that HEW had acted *ultra vires* in promulgating the Title IX employment regulations. Upon notificaton by HEW that the matter had been referred to the Office for Civil Rights (hereinafter referred to as OCR) for possible administrative and enforcement proceedings, North Haven brought an action for declaratory and injunctive relief. The complaint alleged that promulgation by HEW of the Title IX employment regulations "was in excess of the statutory authority conferred by Congress." In April 1979, the district court granted the school board's motion for summary judgment relying principally upon the district court opinion in *Romeo Community Schools v. HEW*,[10] the first case to have held invalid the regulations in question.

In *Romeo,* the school district had advanced several arguments based upon statutory language and legislative history.[11] One argument, however, deserves particular attention in view of the present discussion. The district courts in both *Romeo* and *North Haven* rejected HEW's "infection theory" whereby employment discrimination infects the beneficiaries of the programs, i.e., the students. Therefore, even if the legislative intent were to limit Title IX coverage to students, employment practices and policies may be so discriminatory as to impact upon them and bring employment indirectly within the purview of Title IX.[12] The district court in *North Haven* further adopted the *Romeo* argument in limiting the termination of funds to "the particular program or part thereof in which . . . non-

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[10] See note 3 *supra.*

[11] For a more detailed discussion of the district court opinion in *Romeo, see* Salomone, *Title IX and Employment Discrimination: A Wrong in Search of a Remedy,* 9 J.L. & Educ. 433, 440 (1980).

[12] The "infection theory" has been relied upon in two earlier cases interpreting Title VI, Caulfield v. Bd. of Educ. of the City of New York, 583 F.2d 605, 610-11 (2d Cir. 1978); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 882-86 (5th Cir. 1966), *adopted en banc per curiam,* 380 F.2d 385 (5th Cir.), *cert. denied,* 389 U.S. 840 (1967). Unlike Title IX, Title VI contains an express exclusion of employment, §604, 42 U.S.C. §2000 d-3, which provides:

> 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 . . . except where a primary objective of the Federal financial assistance is to provide employment.

compliance has been . . . found," and concluding that regulation of employment practices is inherently "non-program specific" and therefore inconsistent with fund termination powers.

The *Trumbull* case presented the court with similar facts. The defendent, a former guidance counselor in the Trumbull public schools, had filed a complaint with HEW alleging that the board of education had discriminated against her on the basis of sex. According to the complaint, the board had assigned her to inferior tasks, including typing and running errands not required of male teachers, had provided her with inferior work space, and had refused to renew her contract. The school board refused to comply with HEW's order to take corrective action and reinstate her. Instead, the board filed an action for declaratory and injunctive relief against HEW and the teacher challenging HEW's authority to promulgate employment regulations under Title IX. The district court granted Trumbull's motion for summary judgment based upon the reasoning in *Romeo*. According to the court, the legislative history suggested "that Title IX's focus was upon students and other beneficiaries."

North Haven and *Trumbull* were consolidated on appeal to the Second Circuit which reversed the orders of the district court. As the first Court of Appeals to uphold the Title IX regulations, the Second Circuit drew upon the legislative history of the Act, analyzing the debates in Congress and in the congressional conference committee to find consistency between the regulations and the congressional objectives. The quotations taken from Senator Birch Bayh, sponsor of the Title IX legislation in the Senate, are particularly persuasive. In introducing his amendment to a pending higher education bill on February 28, 1972 as Amendment No. 874 to S.659, Senator Bayh stated:

> 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*. Enforcement powers include fund termination provisions . . . *Other important provisions* in the amendment would extend the equal employment opportunities provisions of Title VII of the Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.[13]

Prior decisions had interpreted the above introductory remarks concerning employment coverage to refer not to what was later to become Title IX but rather to the provisions removing the educational

[13] 118 Cong. Rec. 5802-03 (1972) (emphasis added).

institution exemption from Title VII of the Civil Rights Act of 1964 (hereinafter referred to as Title VII)[14] and extending the protection of the Equal Pay Act to executive, administrative, and professional positions.[15] However, a careful reading of the statement clearly indicates that Senator Bayh was referring to Title IX when he spoke of faculty employment. Had he been referring to Title VII or the Equal Pay Act, he would not have included fund termination in the enforcement powers. Of the three laws, only Title IX provides termination of federal funding as a sanction for noncompliance. Furthermore, Senator Bayh followed his remarks on faculty employment and funding termination with a discussion of "other important provisions in the amendment" relating to Title VII and the Equal Pay Act.

In a prepared summary of his amendment, Senator Bayh divided that amendment into four parts, the first labeled, "A Prohibition of Sex Discrimination in Federally Funded Education Programs." Under this heading, he stated:

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned — employment practices for faculty and administrators, scholarship and, admissions, access to programs . . .[16]

The Second Circuit interpreted the above discussion as a strong indication that Title IX covers not only students and other beneficiaries but also employees. The court further relied upon a debate on the Senate floor between Senator Pell and Senator Bayh, just prior to Senate passage of Title IX, concerning the scope of §1001 (a) and (b) of the Bayh Amendment, the predecessors of §§901 (a) and (c) of Title IX. In response to Senator Pell's question regarding the exclusion of nonpublic elementary and secondary institutions from coverage as to admissions practices, Senator Bayh stated:

> [W]e 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.[17]

On the basis of the above remarks, the Second Circuit concluded

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[14] That portion of the amendment relating to Title VII was not ultimately enacted in the same legislative package as Title IX but rather as §§2 and 3 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e(a) and 2000e-1.

[15] That portion of the amendment relating to the Equal Pay Act was enacted as §906 (b)(1) of Title IX, 29 U.S.C. §213 (a).

[16] 118 Cong. Rec. 5807 (1972).

[17] 118 Cong. Rec. 5812-13 (1972).

that Senator Bayh clearly had intended Title IX to cover employment. Finally, the court quoted a statement read into the *Congressional Record* by Senator Bayh one month after passage of Title IX as part of the Higher Education Amendments of 1972. In comparing Title IX to Title VI, he stated:

> Title VI also 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.[18]

While the Court of Appeals took heed of Justice Jackson's warning against selecting casual statements from floor debates,[19] the court in *New Haven* held that such statements by the sponsor of a piece of legislation are at times helpful and may be authoritative. The above remarks of Senator Bayh, sponsor of the amendments which were ultimately enacted as Title IX, are convincing, at the very least, that the intent of the sponsor was to include employment coverage under Title IX. Whether such coverage was intended by the Congress itself in enacting the law demands further analysis of the legislative history and as to this latter analysis the Second Circuit stands on less firm ground.

In its broader analysis, the court first discussed the original inclusion in the House bill introducing Title IX of an employment exclusion, §1004, paralleling the language of §604 of Title VI.[20] The court refuted the arguments advanced by the court below and the other circuits that the deletion of this provision in conference was to avoid inconsistency with the Title VII and Equal Pay Act amendment provisions of the bill. Congress could have drafted an employment exclusion applicable solely to the first portion of the Act. The court, on the other hand, interpreted the deletion of the House provision as support for HEW's broader interpretation of the Act. Neither the consis-

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[18] 118 Cong. Rec. 24684, n.1 (1972).

[19] Resort to legislation is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports . . . But to select casual statements from floor debates not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. Swegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring).

[20] The House Committee report states:
Section 1004 provides that nothing in this title may be taken to authorize action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. 1972 U.S. CODE CONG. AND ADM. NEWS 2566.

tency rationale advanced by the earlier decisions nor the counter-argument of the Second Circuit provides a compelling argument for either position.

The Court of Appeals further attached significance to Congressional review of the regulations themselves.[21] During the 45 day "laying before" period in Congress, two concurrent resolutions were introduced, one by Representatives Quie and Erlenborn disapproving the employment sections only[22] and one by Senator Helms disapproving the entire set of HEW regulations issued under Title IX, including those governing employment.[23] However, as the court noted in *Romeo,* three years had elapsed between the enactment of Title IX and congressional review of the regulations. Some former congressional members were no longer present, while time may have dulled the memories of others. Congress itself later amended the statute requiring congressional review of regulations to provide that failure to adopt a concurrent resolution disapproving a final regulation should not be construed as approval of the regulation or as a finding of consistency with the authorizing statute.[24] Therefore, while the Second Circuit concluded that such failure provides "some evidence" that coverage was intended, such evidence is weak, at best, and not dispositive of the issue of congressional intent to cover employment under Title IX.

The Second Circuit recognized that review of subsequent congressional action with respect to regulations is not conclusive, and agreed with the First Circuit that "congressional inaction should not be lightly construed as approval."[25] However, the court concluded that congressional failure to adopt subsequent amendments limiting the scope of Title IX to exclude employment,[26] when viewed in the con-

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[21] 20 U.S.C.§ 1232 (d)(1)(1974) provides that any regulation becomes effective not less than 45 days after transmission "unless Congress shall by concurrent resolution find that the standard, rule, regulation or requirement is inconsistent with the Act from which it derives its authority and disapprove such standard, rule, regulation or requirement."

[22] Unpublished Amendment to H.R. Con. Res. 330, HEARINGS BEFORE THE SUBCOMMITTEE ON POSTSECONDARY EDUCATION OF THE HOUSE COMMITTEE ON EDUCATION AND LABOR, 94th Cong., 1st Sess. (1975).

[23] S. Con. Res. 46, 94th Cong., 1st Sess., 121 CONG. REC. 17301. A careful reading of Senator Helms' remarks reveal, in fact, that these constitute not a blanket rejection of the regulations in general, but were limited to specific provisions pertaining to athletics, extracurricular activities and pregnancy.

[24] 20 U.S.C. §1232 (d)(1)(1975).

[25] Islesboro School Committee v. Califano, 593 F.2d 424, 428 (1st Cir. 1979).

[26] In 1975, Senator Helms introduced a bill, S. 2146, proposing to amend Title IX to include an employment exclusion providing that, "Nothing in (§901 of Title IX) shall apply to any employees of any educational institution subject to this title." 121 CONG. REC. 23845-47 (1975). This bill was not adopted; nor was a bill proposed by Senator McClure in 1976 limiting

text of the legislative history as a whole, lends "some additional weight" to the view that Title IX was expressly intended to relate to employment practices. Again, such failure of subsequent congressional action provides only weak evidence of original legislative intent.

In *North Haven,* the school districts asserted that Title IX had been enacted as part of a legislative package wherein Title VII and the Equal Pay Act were amended to include educational institutions and administrative positions respectively, thereby obviating the necessity for employment coverage under Title IX. The Second Circuit rejected this argument, refusing to recognize any overlap in jurisdiction. The court based its conclusion upon a questionable distinction between the former two laws and the latter. The court visualized Congress as having distinguished between individual remedies such as reinstatement and back pay as provided under Title VII or back pay alone as provided under the Equal Pay Act on the one hand, and the fund termination sanctions of Title IX on the other. The implication that the former two laws provide an individual remedy while Title IX provides only an institutional remedy is problematic in view of *Cannon v. University of Chicago,*[27] wherein the Court recognized a private right to sue under Title IX in addition to the institutional remedy of fund termination.

Pinpoint Provision

The final argument addressed by the Second Circuit in *North Haven* concerning the scope of fund termination powers and the implications of that limitation upon the agency's regulatory powers was addressed by the Fifth Circuit, just four days later, in *Dougherty County School System v. Harris.*[28] The approaches taken by these two circuits deserve particular note in their contrast not only with each other, but also with that of other courts in prior decisions.

The provision of the Act upon which these arguments rest is contained in §1682 which states that termination or refusal of federal monies "shall be limited in its effects to the particular program, or part thereof, in which such noncompliance has been so found."[29] This provision is popularly known as the "pinpoint provision," modeled

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the scope of §901 to "curriculum or graduation requirements of the institutions" receiving federal aid. 122 CONG. REC. 28136 (1976).

[27] 99 S. Ct. 1946 (1979).

[28] 19 FEP Cases 688 (M.D.Ga. 1978).

[29] See note 9 *Supra.*

after that contained in its Title VI counterpart.[30] The name is taken from the legislative history of Title VI indicating that the particular provision was meant to "pinpoint . . . the situation where discriminatory practices prevail."[31] In *North Haven,* the Second Circuit agreed with the court below as well as with the district court in *Romeo*, that an order terminating federal funds be limited in effect to the particular program or part thereof in which noncompliance is found.[32] However, the earlier decisions had concluded that this limitation on HEW's funding termination powers is also a limitation on the agency's power to regulate. According to their reasoning, employment discrimination generally is not program specific but rather is practiced through application of system wide policies. Therefore, the regulation of employment under Title IX would be inconsistent with the "program specific" requirement of fund termination.

The court in *New Haven* found this construction to be contrary to judicial approval granted the broad HEW guidelines under Title VI after which Title IX had been fashioned.[33] Furthermore, employment discrimination is no less program specific than other areas recognized under Title IX such as admissions. Finally, the program specific requirement as to enforcement does not require HEW to specify prior to fund termination which particular programs receiving federal assistance are covered by the regulations. The court concluded, therefore, that the program specific argument as to the scope of fund termination powers is inapplicable with regard to the scope of regulatory powers.

In between the positions of the earlier courts extending the en-

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[30] 42 U.S.C. §2000 d-1 (1964).

[31] H.R. REP. No. 914, 88th Cong., 2d Sess. (1963).

[32] The literature contains considerable discussion on the issue of what constitutes a "program or activity" for fund termination purposes. A broad interpretation would permit the wholesale termination of federal funds from an entire institution or school district where there is found a violation in any one program or activity, thereby treating the entire institution or school district as one "program." The narrow interpretation would allow fund termination only from those programs wherein the violation is actually found. The only case prior to *North Haven* to directly deal with the issue, *Board of Public Instruction of Taylor County v. Firch,* 414 F.2d 1068 (5th Cir. 1969), followed the narrower approach. HEW has leaned toward the broader interpretation in theory if not in practice. *See* Note, *Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program,"* 52 IND. L.J. 65 (1977); Note, *Title IV, Title IX and the Private University: Defining "Recipient" and "Program or Part Thereof,"* 78 MICH. L. REV. 608 (1980).

[33] Unlike Title IX, Title VI contains a provision expressly excluding employment, §604. However, courts have recognized employment coverage under Title VI under both a "principal purpose" theory, *Felicianio v. Romney,* 672 F. Supp. 656 (S.D.N.Y. 1973) and under an "infection theory," *Caufield v. Bd. of Educ.,* 583 F.2d 605, 610-11 (2d Cir. 1978); *U.S. v. Jefferson County Bd. of Educ.,* 372 F.2d 836, 883 (5th Cir. 1966). See note 12, *supra.*

forcement limitations to regulation and that of the Second Circuit negating any connection between the two powers, lies the Fifth Circuit opinion in *Dougherty*. The facts of this case, similar to those of the preceding cases, are as follows. A complaint was filed by a home economics teacher based upon unequal salary supplements paid to home economics teachers, traditionally females, as compared to those paid to industrial arts teachers, traditionally males. Following an investigation, HEW found such inequality in pay to constitute a Title IX violation under 45 C.F.R. §86.51 (b) and notified the Dougherty School System that all federal funding for new elementary and secondary activities would be deferred. Subsequently, the school district filed suit for declaratory and injunctive relief.

A careful analysis of the Fifth Circuit opinion in *Dougherty* reveals that the court, in effect, upheld HEW's authority to promulgate regulations governing employment but limited the scope of such regulations to those programs in which faculty are paid through federal funds. The court rejected the broad holdings of the First, Sixth, Eighth and Ninth Circuits[34] which had been based upon legislative intent to deny employment coverage to Title IX. Borrowing a quote from Senator Bayh as used by the Second Circuit in *North Haven*, the court found the legislative history to support an interpretation that reaches at least some employment practices.[35] According to the Fifth Circuit, the problem lies not in the regulation of employment *per se* but in the broad scope of the employment regulations as promulgated by HEW. The Secretary had exceeded his authority by enacting general regulations prohibiting sex discrimination without limiting their effect to the specific programs in which faculty are paid through federal funds. What the court said, in essence, is that there must exist a tight fit between the remedy and the violation, that is, federal regulation is permissible as regards Title IX only where federal monies are expended.[36]

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[34] See note 3 *supra*.

[35] See note 16 *supra*.

[36] The court rejected HEW's argument that discrimination in an entire school so "taints" the system as to permit termination of all federal aid even though no discrimination is found in federally assisted programs per se. The notion of "tainting" as well as its obverse of "benefiting" have been relied upon to broaden the definition of "program or activity" contained in §1682 as to HEW's enforcement powers in terminating federal funds. According to this theory, if two programs, one federally funded and one locally funded, are both administered by the same school district or institution for the same group of students, and if the funding of the former facilities the latter by freeing funds for its use or if discrimination in the latter affects the former by inhibiting or prohibiting a student's participation in that program, then both will be considered part of the same program in order to bring the latter within the scope of Title IX. *See* Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in*

The court founded its position on the "pinpoint provision" of §1682. Following the same line of reasoning as that of the prior courts, the Fifth Circuit in *Dougherty* extended the interpretive limitations imposed upon enforcement procedures to the power to regulate in the first instance.[37] However, rather than deny employment coverage to Title IX totally, the court concluded that in order for the sanction of fund termination to be imposed, the violation must be found in the federally funded program. The logical yet absurd result of such a holding is a situation wherein a school district may establish a dual set of employment practices and policies, one for teachers paid from non-federal funds in which sex discrimination may be rampant and the other in compliance with Title IX for teachers whose salaries are provided through federal funds. It would also appear permissible for a school district or institution to engage in discriminatory practices or policies against staff in a project wherein substantial federal funds are received for all aspects of program operation, including curriculum materials, transportation, staff development and parental involvement but not faculty salaries. An even more unworkable situation would arise where a project receives substantial federal funds with only certain staff members paid through federal funds, for example guidance counselors or curriculum specialists and others, such as classroom teachers, are paid through local funds.[38] This "middle approach" taken by the Fifth Circuit is not only untenable in its practical application but it is also legally problematic. The court, in essence, reasoned that if HEW can only apply its enforcement powers, that is, fund termination, where a violation is found, then it makes no sense for regulations to exist beyond the scope of those powers. Regulations covering other areas would exist for their own sake and could be violated without any sanction imposed. However, in addition to enforcement compliance through fund termination, §1682 (2) also provides for "any other means authorized by law."[39] In addition, in *Cannon v. University of Chicago* the court recognized a private right to sue under Title IX, thereby leaving open

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Public Schools, 53 TEX. L. REV. 103 (1974).

[37] See note 29 *supra*.

[38] The opinion is not clear as to whether Title IX regulations may apply only to those teachers actually paid through federal funds or to all teachers employed in programs receiving a substantial portion of federal monies for teacher salaries regardless of the direct source of faculty salaries. The court initially framed its position in the narrower first context. However, it concluded that, based upon the facts of the present case wherein a substantial portion of federal funds goes toward the salaries of home economics and industrial arts teachers, all such teachers are covered by Title IX.

[39] See Note 9 *supra*.

the possibility of individual remedies.[40] If the sole remedy available under Title IX were fund termination, then the arguments supporting the "program specific" interpretation of "program or activity" in §1682 (1) would be completely applicable to the scope of HEW's regulatory powers. However, given the possibility of other available remedies as provided in §1682 (2) as well as judicial recognition of a private right of action, the limitations on fund termination powers may not delimit the scope of regulatory powers.

An Alternative Model for a Middle Approach

While the Fifth Circuit opinion in *Dougherty* is based upon a questionable line of reasoning, it represents the first Court of Appeals decision to raise the possibility of a middle approach to Title IX and employment coverage. Support can be found in the legislative history of the Act for either extreme position. Whether the Supreme Court ultimately upholds or denies coverage as to employment, there exists a distinction between the statute and the regulations on their face which may limit the scope of the entire set of Title IX regulations.

Section §1681 of the statute prohibits "discrimination under any program or activity *receiving* Federal financial assistance."[41] Interpreting the language of the statute, the scope of coverage is clearly limited to the program or activity wherein the discrimination is found. The Title IX regulations, on the other hand, disgress from the wording of the statute. Both §86.11[42] governing general coverage of the regulations as well as §86.31[43] governing programs and activities and §86.51[44] governing employment apply to "any education program or activity *operated by a recipient which receives or benefits from*

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[40] See note 27 *supra*.

[41] See note 2 *supra* (emphasis added).

[42] C.F.R. §86.11 states:
Except as provided in this subpart, this Part 86 applies to every recipient and to each *education program or activity operated by such recipient* which receives or benefits from Federal financial assistance (emphasis added).

[43] C.F.R.§86.31 states:
(a) *General.* Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic extracurricular, research, occupational training, or other *education program or activity operated by a recipient* which receives or benefits from Federal financial assistance (emphasis added).

[44] 45 C.F.R.§86.57 states:
(a) *General.* No person shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor whether full-time or part-time, under any *education program or activity operated by a recipient* which receives or benefits from Federal financial assistance. (emphasis added).

Federal financial assistance." The emphasis here is upon the recipient which receives or benefits from federal funds as opposed to the program or activity itself. A literal reading of the statute would limit Title IX's coverage to those programs or activities directly receiving federal funding whereas the regulations broaden the scope of the law to any program or activity whether federally funded or not which is operated by a school district or institution receiving federal funds perhaps for programs wherein a violation is not found. In other words, as per the language of the regulations, a Title IX violation can be found in any program or activity regardless of the source of funds, provided it is operated by an institution identified as a "recipient" of federal funds.

It appears that the regulations in question represent an unauthorized extension of Title IX coverage in violation of congressional intent as evidenced by the statutory language itself.[45] Based upon this analysis, it can be argued that HEW acted *ultra vires* not in its promulgation of regulations governing employment as held by the First, Sixth, Eighth and Ninth Circuits, but in its extension of their coverage to programs not federally assisted but merely operated by a school system or institution which receives any federal assistance. This line of reasoning reaches the same conclusion as that of the Fifth Circuit in *Dougherty,* that is, that the scope of the employment regulations under Title IX is limited to the program or activity in which the discrimination is found. However, the impact is even broader. Coverage is so limited not only as to the employment regulations but as to the entire body of Title IX regulations based upon their inconsistency with the language of the statute itself. In addition, the limitation in coverage would apply not only to fund termination sanctions as that of the *Dougherty* opinion, but also to the granting of all available remedies. Naturally, the narrow language of the statute gives rise to all the absurd situations discussed as related to *Dougherty,* including dual sets of policies and practices within a

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[45] This narrow interpretation of Title IX coverage was advanced by the petitioners in *Hillside College v. HEW,* appeal pending No. 80-3207 (6th Cir.). This case represents an appeal from a Final Decison of the Reviewing Authority, Civil Rights which ruled that the petitioner college had violated the Title IX regulations, 45 C.F.R.§86.4, in failing to submit to HEW the required Assurance of Compliance as a condition precedent to the continued receipt of federally financed grants and insured loans. The college argues that Title IX coverage is limited to any education program or activity which receives federal financial assistance, i.e., a program or activity authorized by and funded under a federal assistance statute. Since the college itself operates no such federally assisted programs, the students being the direct recipients of grants and loans, it therefore should not be subject to the Title IX regulations. See Brief for Petitioner at 7-9, Hillsdale College v. HEW, supra.

given school system, institution or program. However, the same arguments advanced as to the broad definition of "program or activity" in the enforcement provision of §1682, particularly the taint/benefit theory, may be applied here to broaden the definition in the coverage provision of §1681.

Conclusion

The issue of employment discrimination has become one of the most widely-debated and by far the most litigated issue concerning Title IX. To date, four Courts of Appeals have denied employment coverage under the Act and one has upheld coverage based upon diametrically opposed interpretations of congressional intent as evidenced by legislative history. The most recent Court of Appeals to address the issue has taken a middle approach. The Fifth Circuit opinion, in effect, upholds the authority of HEW, now the new Department of Education, to regulate employment under Title IX but rejects the general employment regulations as promulgated by HEW in 1975 for overbreadth. According to the court, Title IX employment coverage is limited in scope to specific programs or activities actually receiving federal funds and perhaps, in a narrower interpretation of the opinion, to employees whose salaries are paid through federal funds.

This position represents a legally defensible approach, particularly in view of the ambiguities in the legislative history supporting either of the extreme positions taken by the earlier courts. However, the decision is based upon a problematic extension of an express limitation on the Department's powers to terminate funds for noncompliance to its power to regulate.

Whether Title IX ultimately is decided to govern employment or not, an alternative approach is suggested which would have broad implications for Title IX coverage in general and not just as to employment. Searching for congressional intent through an alternative means of the statutory language itself, a clear distinction may be drawn between the statute and the regulations on their face. It is suggested that the intent of Title IX is to limit coverage to programs directly receiving federal assistance with a possible broadening of scope based upon a tainting/benefiting theory. The proposed approach precludes the blanket coverage of the Act to an entire institution resulting from the mere receipt of federal funds for any program regardless of where the violation is found. The approach further avoids reliance upon ambiguous excerpts from legislative history as had the earlier opinions as well as the limited application of the

pinpoint provision as advanced by the Fifth Circuit. The proposed model presents a conservative approach to maintaining the spirit of Title IX within the confines of a legally defensible frame of analysis. Finally, it sheds light upon the scope of regulatory powers under Title VI and §504 which are worded similarly as to Title IX.