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Title IX and Employment Discrimination: North Haven Board of Education v. Bell

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TITLE IX AND EMPLOYMENT DISCRIMINATION: *NORTH HAVEN BOARD OF EDUCATION v. BELL*

I. INTRODUCTION

In 1972, Congress enacted Title IX of the Education Amendments in response to widespread sex discrimination by educational institutions.[1] The goal of the statute was to prevent the use of federal funds to support discriminatory practices by institutions of higher education.[2] In 1975, the Department of Health, Education and Welfare (HEW) issued regulations pursuant to sections 901 and 902 of Title IX.[3] These regulations were specifically directed at the employment practices of federally funded education programs.

In the recent case of *North Haven Board of Education v. Bell*,[4] the United States Supreme Court held that employment discrimination is within the scope of Title IX of the Education Amendments of 1972.[5] The Court also held the Subpart E regulations,[6] promulgated by HEW pursuant to Title IX, valid.[7] In doing so, the Supreme Court affirmed the decision of the Court of Appeals for the Second Circuit, departing from the holdings of five other courts of appeals[8] and various district courts.[9]

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1. *See Discrimination Against Women: Hearing on § 805 of H.R. 16098 Before a Special Subcommittee of the House Committee on Education and Labor*, 91st Cong., 2d Sess. (1970).

2. *Id.*

3. Section 901(a) provides that "[n]o person in the United States shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681 (1976). Section 902 provides in pertinent part that agencies authorized to extend federal financial assistance shall issue regulations necessary for the enforcement of § 901, that compliance with § 901 may be achieved by the termination of or refusal to grant or continue to provide federal funds, or by any means authorized by law. *See* North Haven Board of Education v. Bell, 102 S. Ct. 1912, 1914 (1982).

4. 102 S. Ct. 1912 (1982).

5. 20 U.S.C. §§ 1681-85 (1976).

6. 34 C.F.R. §§ 106.51-.61 (1980). The regulations were initially issued by HEW in 45 C.F.R. §§ 86.1-.71 (1979). On May 4, 1980, the Department of Education assumed the responsibility of enforcing Title IX and its regulations. In the interest of consistency, however, this comment will continue to refer to HEW as the enforcing agency.

7. 102 S. Ct. at 1927.

8. *See, e.g.*, Dougherty County School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980), *vacated*, 102 S. Ct. 2264 (1982); Seattle Univ. v. HEW, 621 F.2d 992 (9th Cir. 1980) (per curiam), *vacated*, 102 S. Ct. 2264 (1982); 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).

9. *See, e.g.*, 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); University of Toledo v. HEW, 464 F. Supp. 693 (N.D. Ohio 1979); McCarthy v. Burkholder, 448 F.

These courts had uniformly held HEW's regulations invalid and unenforceable because they exceeded the authority granted by Title IX.

This comment focuses upon the approach of the Supreme Court in resolving the scope of Title IX and the propriety of HEW's regulations issued pursuant to it. The superiority of the reasoning underlying the Supreme Court's conclusion, as compared to that of the lower courts, is emphasized. To establish the historical background which ultimately led to the Supreme Court's resolution, the development of the issues in the lower courts is first explored.

II. Development of the Issue in the Circuit Courts

The scope of Title IX was first addressed in a federal appellate court in 1979 by the First Circuit in *Islesboro School Committee v. Califano.*[10] In this case HEW declared Islesboro's maternity leave policies violative of one of the agency's regulations[11] because the school committee treated pregnancy differently from other temporary disabilities. Threatened with termination of its federal funds, Islesboro sought and obtained an injunction against HEW's enforcement measures. The court also declared that HEW's regulations were promulgated in excess of the authority conferred upon it by Title IX and thus were invalid and unenforceable. Affirming the lower court's decision, the First Circuit examined the language of sections 901 and 902 of Title IX[12] and concluded that the goal of the statute was to protect the beneficiaries of federal assistance. These beneficiaries were identified as students participating in the programs or teachers involved in federally funded research.[13] Looking at the exceptions set forth in section 902, the court determined that because these exceptions dealt only with student admissions or activities, Congress did not intend to include employment in section 901's general proscription of sex discrimination.[14] Finding no express exclusion of employment in the language of the statute, the court then examined the statute's legislative history. The court found the various discussions of employment within the legislative history to be identifiable exclusively with the proposed amendments to Title VII of the 1964 Civil Rights Act[15] and the Equal Pay Act.[16] Consequently, the court refused to view any of the references to employment as

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Supp. 41 (D. Kan. 1978).

10. 593 F.2d 424 (1st Cir. 1979) (complainant alleged that the school district employing her discriminated in their maternity leave policies).

11. 45 C.F.R. § 86.57(c) (requiring a recipient of federal funds to treat pregnancy or any resulting disability as any other temporary disability for all job-related purposes).

12. *See supra* note 3.

13. *Islesboro*, 593 F.2d at 426.

14. *See supra* note 3.

15. 42 U.S.C. § 2000e (1976).

16. 29 U.S.C. § 213 (1976).

indicators of a Title IX proscription of employment discrimination.[17] Additionally, the First Circuit rejected the argument that Congress' failure to include a clause specifically excluding employment[18] reflected an intent to include employment practices under Title IX. The court justified the absence of such an exclusionary clause by asserting that it would have created an inconsistency with other portions of the same bill.[19]

In *Junior College District of St. Louis v. Califano*,[20] the Eighth Circuit, relying heavily upon the *Islesboro* opinion, held that Title IX did not cover employment practices. As in *Islesboro*, the Eighth Circuit determined that neither the "plain language" of the statute nor the legislative history revealed a congressional intent to prohibit sex discrimination in education-related employment under Title IX.[21]

Two weeks after the Eighth Circuit's decision, the Sixth Circuit held in *Romeo Community Schools v. HEW*[22] that sections 901 and 902 of Title IX applied solely to students in federally assisted programs and activities, not to employees of educational institutions receiving federal funds. Again the court sought to interpret the language and legislative intent of the statute. In rejecting HEW's argument that the broadest possible designation of beneficiaries[23] was intended by Congress' use of the word "person" in section 901,[24] the court called this interpretation "strained."[25] The court further noted that the term "person" was modified by subsequent language which clearly limited its meaning to students. Another reason underlying the court's holding was the lack of employment-related exceptions in section 902.[26]

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17. *Islesboro*, 593 F.2d at 426-28.

18. *Id.* at 428. HEW argued that if Congress had wanted to exclude employment it could have done so expressly through a clause similar to § 604 of Title VI of the Civil Rights Act of 1964 which reads: "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." 42 U.S.C. § 2000d-3 (1976).

19. *Islesboro*, 593 F.2d at 428. *See* proposed amendments to Title VII and the Equal Pay Act, *supra* notes 15-16 and accompanying text.

20. 597 F.2d 119 (8th Cir. 1979) (complaint alleged discrimination on the basis of her sex regarding the salary she received).

21. *Id.* at 121.

22. 600 F.2d 581 (6th Cir. 1979) (complainant alleged gender-based discrimination in the school board's treatment of pregnancy in its collective bargaining agreements).

23. HEW argued that "teachers and counselors, as well as students, are 'persons' who participate in and benefit from federally assisted programs and are vulnerable to discrimination under such programs." *Id.* at 583.

24. *See supra* note 3.

25. *Romeo*, 600 F.2d at 584.

26. *Id.* at 583-84. The court stated that "exceptions deal with the same subject matter as that covered generally by the preceding language" and concluded that since the exceptions in § 902 did not relate to employment, it was not the subject of § 901. *Id.* at 584.

The court also gave great weight to the fact that Title IX was part of a legislative package aimed at eliminating discrimination against women in the education field. Two preexisting laws, Title VII[27] and the Equal Pay Act,[28] were amended by another section of this package to prohibit the subjection of educational employees to sex discrimination.[29] The court asserted that a disclaimer clause specifically excluding employment from Title IX's coverage would have created an inconsistency within the package.[30] The Sixth Circuit also addressed the issue of the remedial sanction available to HEW under its regulations. Disapprovingly, the court noted that the single sanction of fund termination penalized students. Such a penalty was justifiable in the court's eyes only as a means of preventing or ending student discrimination and not for "enforcing individual rights of teachers and other school employees."[31] Comparing the harshness of HEW's Title IX remedy with the direct and superior remedies for sex discrimination provided in other portions of the same bill, the court concluded that Congress did not intend for Title IX to cover discriminatory employment practices.[32] Finally, in its examination of the legislative record, the court pointed to a "breakdown" made by the sponsor, Senator Birch Bayh, in which he purportedly treated sex discrimination in federally funded programs as a separate issue from the prohibition against discrimination in educational employment.[33]

In *Seattle University v. HEW*,[34] the Ninth Circuit, following the lead of three other circuit courts, found that neither the language of Title IX nor its legislative history reflected an intent by Congress to cover sex discrimination in employment.[35]

Taking a somewhat different approach, the Fifth Circuit in *Dougherty County School System v. Harris*,[36] invalidated HEW's regulations on the

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27. *See supra* note 15.

28. *See supra* note 16.

29. *Romeo*, 600 F.2d at 584. Section 906 of Pub. L. No. 92-318 brought employees of schools engaged in educational activities within the coverage of Title VII and the Equal Pay Act.

30. *Romeo*, 600 F.2d at 584.

31. *Id. But see* United States v. Jefferson Co. Bd. of Educ., 372 F.2d 836, 882-86 (5th Cir. 1966) (racial discrimination against faculty members perpetrated racial discrimination against students because a school could not be completely desegregated with a segregated faculty; students have a right to be free from racial discrimination in the form of a segregated faculty). *See also* Board of Pub. Instr. v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969) (where federal funds support a program "so affected by discriminatory practices elsewhere in the school system that [the program] thereby becomes discriminatory" against students, fund termination is appropriate). *Id.* at 1079.

32. *Romeo*, 600 F.2d at 584.

33. *Id.* at 585.

34. 621 F.2d 992 (9th Cir. 1980) (HEW charged the university with discrimination in the award of salaries), *vacated*, 102 S. Ct. 2264 (1982).

35. *Seattle*, 621 F.2d at 993.

36. 622 F.2d 735 (5th Cir. 1980) (female economics teacher complained she was paid less

grounds they lacked the program-specificity required by Title IX. The court noted that the enforcing agency had exceeded its authority by enacting regulations prohibiting sex discrimination in employment without limiting their effect to the specific programs that receive federal financial assistance.[37] Unlike the First, Sixth, Eighth and Ninth Circuits, this court upheld HEW's authority to promulgate regulations governing employment practices, but stated that such regulations had to be limited in scope to those programs staffed by a faculty paid with federal funds.[38]

To summarize, with the exception of the Fifth Circuit, all of the federal appellate courts which addressed this issue prior to *North Haven* uniformly held that employment practices of educational institutions are outside the scope of Title IX. All of these circuit courts, including the Fifth Circuit, held the regulations promulgated by HEW invalid and unenforceable.

The Second Circuit in *North Haven Board of Education v. Hufstedler*[39] completely departed from the reasoning of the other circuit courts and unanimously held that HEW's regulations did not exceed the statutory grant of authority. The court relied heavily on its interpretation of the legislative history of Title IX.[40] The failure of Congress to provide a clause excluding employment was deemed convincing evidence of a legislative intent that Title IX cover employment.[41] The court also viewed the sponsoring remarks of Senator Bayh as revealing an intention that the statute apply to employment practices.[42]

III. The United States Supreme Court Opinion in North Haven

In *North Haven Board of Education v. Bell*[43] the United States Supreme Court upheld the Second Circuit's decision in *North Haven Board of Education v. Hufstedler*. For the first time the Supreme Court addressed this much debated issue, declaring that employment was within

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than male teachers in the same program), *vacated*, 102 S. Ct. 2264 (1982).

37. *Dougherty*, 622 F.2d at 738. *See infra* text accompanying notes 75-85.

38. *Dougherty*, 622 F.2d at 738.

39. 629 F.2d 773 (2d Cir. 1980). This case involved two disputes consolidated on appeal: North Haven Bd. of Educ. v. Califano, 19 Fair Empl. Prac. Cas. (BNA) 1505 (D. Conn. 1979) and Trumbull Bd. of Educ. v. HEW, No. B78-401 (D. Conn. May 24, 1979). In *North Haven* a female tenured teacher was denied reemployment following maternity leave, and in *Turnbull* a female guidance counselor complained of being subjected to sexual discrimination with respect to working conditions, job assignments and contract renewal. The district court in both cases held HEW's regulations proscribing gender-based discrimination by federally funded educational institutions invalid and unenforceable.

40. *North Haven*, 629 F.2d at 778-84.

41. *Id.* at 783.

42. *Id.* at 779-81. "This portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment practices for faculty and administrators. . . ." *Id.* at 780.

43. 102 S. Ct. 1912 (1982), *aff'g* 629 F.2d 773 (2d Cir. 1980).

the scope of Title IX and that HEW's Subpart E regulations were valid and enforceable.[44] Using a three-pronged inquiry, the Court sought to discern the legislative intent behind the statute to the greatest certainty possible. In its attempt to determine the scope of Title IX, the Court looked first to the statutory language, then examined the legislative history of the statute. The Court also considered Congress' subsequent treatment of Title IX. Regarding the propriety of HEW's regulations, the Court considered both the absence of Congressional disapproval subsequent to a required review of agency regulations and the compliance of the regulations with the program-specificity requirements of Title IX.[45]

A. *Three-Pronged Inquiry Into Legislative Intent*

1. Statutory Language

In examining the language of Title IX, the Court emphasized the significance of Congress' use of a broad directive against sex discrimination. Focusing upon the language of section 901(a) that "no person" may be discriminated against on the basis of their sex, the Court noted that, on its face, the statute included employees as well as students.[46] The Court deemed this broad directive to encompass employees paid from federal funds as well as those participating in a federally funded program. This approach to the language of the statute was summarized by the Court, stating that "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."[47]

In further examination of the statutory language, the Court addressed the petitioning school board's argument concerning the nine exceptions to section 901's coverage.[48] Petitioners argued that because these exemptions were directed solely at student related matters, section 901 must cover only students.[49] In response to this argument, however, the Court

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44. In addressing the arguments of petitioners (the North Haven Board of Education), the Supreme Court effectively refuted all of the major premises upon which the First, Fifth, Sixth, Eighth and Ninth Circuits had based their holdings.

45. *See infra* notes 68-71, 85-86 and accompanying text.

46. North Haven Bd. of Ed. v. Bell, 102 S.Ct. 1912, 1917 (1982).

47. *Id.* at 1917-18 (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

48. *North Haven*, 102 S. Ct. at 1918. These exceptions were set forth in §§ 901(a)(1)-(9). Specifically exempted from Title IX's proscription of sex discrimination are schools that initiate a change to become coeducational for the first time, § 901(a)(2); schools of a religious organization with contrary religious tenents, § 901(a)(3); military training institutions, § 901(a)(4); public undergraduate institutions that have traditionally and continually admitted students of only one sex, § 901(a)(5); social fraternities or sororities or voluntary service clubs, § 901(a)(6); boy or girl scout conferences, § 901(a)(7); father-son and mother-daughter activities at schools, § 901(a)(8); and higher education institutions awarding "beauty" pageant scholarships, § 901(a)(9). 20 U.S.C. § 1681(a) (1976).

49. *See supra* note 26 and accompanying text.

noted that two of the exceptions, namely section 901(a)(3)[50] and section 901(a)(4),[51] exempted entire classes of institutions and thus were not limited to student-related matters. The Court further noted that the absence of any employment-related exemption supported the conclusion that Title IX's protection extends to employees.[52]

2. Legislative History

Because the language of Title IX did not expressly include employees, the Supreme Court turned to the Act's legislative history. Relying heavily upon the comments of the amendment's sponsor, Senator Bayh,[53] the Court concluded that the congressional objective behind sections 901 and 902 of Title IX was to prohibit discriminatory employment practices in federally assisted educational programs.[54] The Court found that Senator Bayh's reference to section 901(a) as the "heart" of his amendment illustrated that this section as well as Title VII and the Equal Pay Act were aimed at employment discrimination.[55] To further refute petitioners' argument that references to employment were made exclusively in the context of Title VII and the Equal Pay Act, the Court again quoted Senator Bayh. The Court emphasized the Senator's inclusion of "employment practices for faculty and administrators" among the areas of discrimination at which the amendment was aimed.[56] While conceding that a sponsoring legislator's remarks are not controlling, the Court deemed Bayh's remarks an "authoritative guide to the statute's construction."[57] The Court additionally noted that these remarks were made on the same day as the amendment was passed and were prepared rather than spontane-

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50. *See supra* note 48.

51. *Id.*

52. *North Haven*, 102 S. Ct. at 1918.

53. Summarizing this proposal Senator Bayh stated:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . *[T]he heart of this amendment* is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment*, with limited exceptions. 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 for the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

118 CONG. REC. 5803 (1972) (emphasis added), *cited in* 102 S. Ct. at 1919.

54. 102 S. Ct. at 1919-20.

55. *Id.* at 1919. *See supra* note 53.

56. *Id.* at 1920. *See id.* at 1919-20 n.14.

57. 102 S. Ct. at 1920-21.

ous and were the only authoritative indications of congressional intent.[58]

Other evidence in the legislative record upon which the Supreme Court based its decision was the refusal of Congress to include an exemption clause[59] excluding employment practices from Title IX. Pointing to Congress' express choice to omit such a clause,[60] and refusing to accept prior judicial analysis of this omission,[61] the Court concluded that Congress intended for Title IX to cover employment practices.[62] Noting the ease with which Congress could have explained its omission of the exclusionary clause as necessary to avoid an inconsistency with other portions of the bill, the Court rejected the inconsistency argument.[63] In addition, the Court found little weight in the petitioners' argument that a specific exclusion for employment was unnecessary. Petitioners based their argument upon the similarity between Title VI and Title IX, asserting that Title VI was agreed not to cover employment even before the section[64] specifically excluding that area was added. In response to this analogy the Supreme Court stated that "although two statutes may be similar in language and objective, we must not fail to give effect to the differences between them."[65] The Court thus concluded that while Title VI explicitly excluded employment discrimination from its coverage, Title IX did not, and therefore employment was covered under Title IX.

In concluding its inquiry into the legislative history of Title IX, the Supreme Court found corroboration of its statutory interpretation that Title IX prohibited discriminatory employment practices.[66]

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58. *Id.* at 1921.

59. The proposed exclusionary clause, section 1004 provided: "[N]othing in this title may be taken to authorize action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." H.R. REP. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2462, 2566-67.

60. 102 S. Ct. at 1921. Although the House version of the amendment contained a clause excluding employment similar to section 604 of Title VI, the final version passed by Congress lacked such a clause.

61. *See supra* notes 18, 35 and accompanying text. The First, Sixth and Ninth Circuits accepted petitioner's contention that § 1004 was deleted to avoid an inconsistency with other portions of the bill, and not to make an affirmative statement that employment was to be covered by Title IX.

62. 102 S. Ct. at 1921-22.

63. *Id. See supra* note 60.

64. *See supra* note 18.

65. 102 S. Ct. at 1922. More specifically, the Court stated that "[i]f Congress had intended that Title IX have the same reach as Title VI, . . . we assume that it would have enacted counterparts to both § 601 and § 604." *Id.* For a more extensive discussion of the Title IX and Title VI analogy, see generally Note, *Title IX Does Not Apply to Faculty Employment*, 1981 DUKE L.J. 566, 582-86.

66. 102 S. Ct. at 1922-23.

3. Postenactment History

The Court's examination of the postenactment history of Title IX confirmed the conclusion that Congress, through this statute, sought to ban education-related employment discrimination. The Court focused upon a portion of the Congressional Record[67] set forth after Title IX's enactment in which Senator Bayh recognized the purposeful omission of an employment exemption from the general provisions of section 901. Next, the Court pointed to the relative absence of a disapproving congressional response to HEW's Subpart E regulations directed at employment practices, despite the formal opportunity to respond negatively.[68] The Court further noted Congress' refusal to pass bills[69] amending section 901 to limit its coverage of employment discrimination.[70]

Acknowledging that postenactment developments do not carry the authoritative weight of legislative history or statutory language, the Court nevertheless found that such developments further supported its decision. The Supreme Court viewed Congress' refusal to amend the statute to limit its employment coverage and the absence of congressional disapproval of HEW's Subpart E regulations as "authoritative expressions" defining the scope of Title IX.[71]

4. Summary of Inquiry Into Legislative Intent

The Supreme Court's examination of the language, legislative history and postenactment treatment of Title IX far exceeded that of the First, Fifth, Sixth, Eighth and Ninth Circuits. Focusing upon the same areas as these circuit courts, the Supreme Court reached an opposing but more efficiently reasoned conclusion. Regarding the language of Title IX, the Supreme Court abided by the recognized canon of statutory construction[72] which suggests that the words of a statute be given their literal meaning as they are understood in everyday usage.[73] The Court also used a widely accepted method[74] of establishing a statute's purpose when it

67. *Id.* at 1923 (citing 118 CONG. REC. 24,684 n.1 (1972)).

68. 102 S. Ct. at 1923-24. Pursuant to 39 Fed. Reg. 22,228 (1974) (requiring an agency to receive formal comments on regulations issued pursuant to its statutory authority) and 40 Fed. Reg. 24,128 (1975) (requiring HEW to submit its regulations for congressional review), Congress twice had the opportunity to review formally and respond to HEW's regulations aimed at employment practices.

69. *See, e.g.*, 122 CONG. REC. 28,136 (1976); 121 CONG. REC. 23,845, 23,845-47 (1975).

70. 102 S. Ct. at 1925.

71. *Id.*

72. *See* Malat v. Riddell, 383 U.S. 569, 571 (1966).

73. *See supra* notes 46-47 and accompanying text.

74. 102 S. Ct. at 1923 n.21. *See supra* text accompanying notes 53-71. *See also* Cannon v. University of Chicago, 441 U.S. 677 (1979); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); United States v. Zacks, 375 U.S. 59 (1963); United States v. Wise, 370 U.S. 405 (1962).

used the legislative history and postenactment events as a guide in interpreting the language of Title IX. By deferring to HEW's interpretation of its own regulations, the Court again followed a well-established course of judicial review[75] with respect to the propriety of regulations promulgated by an agency.

B. *The Program-Specificity Requirement*

Although the Supreme Court affirmed the opinion of the Second Circuit both as to Title IX's coverage of employment and the validity of HEW's regulations, the Court noted that the Second Circuit failed to deal sufficiently with a most significant aspect of the statute—program specificity. This issue represents perhaps the most crucial point in the Supreme Court's decision. The Court stressed that Title IX's provisions authorizing fund termination[76] and regulation issuance,[77] as well as its provision containing the general proscription of gender discrimination,[78] all contain a program-specific limitation.[79] The single point of contention which the Supreme Court found with the Second Circuit opinion involves the Second Circuit's failure to acknowledge that HEW's power to issue regulations is limited to the same program-specificity as its enforcement powers. Stating that "it makes little sense to interpret the statute . . . to authorize an agency to promulgate regulations that it cannot enforce,"[80] the Supreme Court emphasized the need for clear judicial recognition of the program-specific character of Title IX.[81]

In addition to the limiting language of the statute itself, the Court

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75. *See, e.g.*, Udall v. Tallman, 380 U.S. 1, 16-17 (1965).

76. 20 U.S.C. § 1682(1) (1976).

77. 20 U.S.C. § 1682 (1976).

78. 20 U.S.C. § 1681 (1976).

79. 102 S. Ct. at 1926-27. In short, the program-specific limitation means that remedial measures may only be taken with respect to the particular program in which sex discrimination is found and not to the entire institution.

80. *Id.* at 1926. *See generally* Salomone, *North Haven and Dougherty & Narrowing the Scope of Title IX*, 10 J.L. & EDUC. 191 (1981) (discussing a "middle approach" to Title IX: it covers employment but only as to faculty whose salaries are paid through federal funds).

81. It is significant to note that the Supreme Court in *North Haven* discussed the program-specific nature of Title IX in a limited realm—the effect of the limitation on HEW's power to issue regulations governing employment practices. Unlike those in the previous federal court cases dealing with Title IX's program-specificity, *see supra* note 78, the petitioners in *North Haven* did not object to the investigation for Title IX violations on the grounds that the parties complaining of discrimination were not involved in an educational program that received federal financial assistance or that the discrimination they suffered did not affect a federally funded program. Rather, the petitioners in *North Haven* challenged HEW's authority to regulate any employment practices whatsoever. 102 S. Ct. at 1927-28. In other words, the Supreme Court dealt with the question of whether employment was intended by Congress to be included under the terms "program" or "activity" in their most general definition. Consequently, the Court never reached any questions of whether any federal funds were received directly or not.

found the legislative history to support the statute's program-specificity. The Court cited both unsuccessful attempts in Congress to adopt proposals that generally would have prohibited discriminatory practices in federally funded institutions[82] and the sponsoring Senator Bayh's indication that the amendment was program-specific.[83] Finally, the Court pointed out that the language of Title VI, virtually identical to that of Title IX, had been interpreted as being program-specific.[84]

Despite its contention with the Second Circuit's interpretation of HEW's authority to issue regulations, the Supreme Court nonetheless affirmed the lower court by upholding HEW's Subpart E regulations. The Court rejected the petitioners' claim that the regulations were invalid on their face. In reference to HEW's regulations the Court stated:

> Although their import is by no means unambiguous, we do not view them as inconsistent with Title IX's program-specific character. The employment regulations do speak in general terms of an educational institution's employment practices, but they are limited by the provision that states their general purpose: "to effectuate title IX . . . [,] which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education *program or activity*, receiving federal financial assistance. . . ."[85]

In addition, the Court considered HEW's comments accompanying the publication of its Subpart E regulations. It found them to support the conclusion that the regulations complied with Title IX's program-specificity requirement.[86]

IV. Conclusion

The split between the United States Supreme Court's decision and those of the various circuit courts which had previously addressed the issue reflects the inherent problem in judicial attempts to clarify the intended scope of an ambiguously worded statute. The controversy over whether Title IX prohibits sexually discriminatory employment practices in educational institutions is an important one. Sex discrimination in employment is occurring on a wide scale in the very institutions which Con-

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82. 102 S. Ct. at 1926.

83. *Id.*

84. *Id.*

85. *Id.* at 1926-27 (quoting 34 C.F.R. § 106.1 (1980) (emphasis added)). *But see* Dougherty City School Sys. v. Harris, 622 F.2d 735 (5th Cir. 1980) (Title IX permits HEW to regulate at least some unemployment practices but invalidated Subpart E regulations on the ground that they did not apply to specific programs receiving federal financial assistance), *vacated*, 102 S. Ct. 2264 (1982).

86. 102 S. Ct. at 1927 (recognizing that its authority was limited, HEW stated that "[f]ederal funds may be terminated . . . upon a finding that they 'are infected by a discriminatory environment. . . .'" Board of Pub. Instr. v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969); 40 Fed. Reg. 24,128 (1975), *cited in* 102 S. Ct. at 1927).

gress sought to support with federal financial assistance through the Education Amendments of 1972.[87] Of equal significance to the goal of providing financial support through Title IX is Congress' desire to prevent the use of those funds by institutions practicing sex discrimination. To effectuate fully this intent, employees as well as students of federally funded institutions must be afforded the protection of Title IX's prohibition. In the absence of congressional resolution of this heavily litigated issue, the Supreme Court's holding in *North Haven* constitutes the most appropriate way of ensuring that these congressional objectives will be meaningfully fulfilled.

Of great significance for the future is the Supreme Court's stipulation that the scope of Title IX's employment coverage is limited to specific programs or activities actually receiving federal funds. The Court read a program-specific limitation into the scope of Title IX as to its prohibition of sex discrimination as well as to its enforcement power under which HEW had promulgated regulations. Although the effect of the decision was to extend Title IX's coverage to employment, it restricted the scope of the statute by reading in a program-specific requirement. Inherent to the Court's definition of program-specificity is the issue of what constitutes the receipt of federal financial aid.

In *University of Richmond v. Bell*,[88] the issue of funding was not before the court; therefore, the court did not resolve the intended meaning of Title IX's reference to an "education program or activity receiving federal financial assistance."[89] No test was set forth by the court to determine when a program, although receiving no direct funds, still benefits from federal aid, but the court did indicate that direct funding or funding closely associated with the program would be necessary.[90]

Certainly, such a vague standard regarding the program-specificity requirement will lay the groundwork for future litigation. It is conceivable that any attempt to impose Title IX's prohibition upon any aspect of an educational institution not already recognized as subject to the statute will have to focus upon this issue of direct and indirect funding. Given the split which has already developed in the lower courts regarding this question,[91] Supreme Court resolution of the issue will be difficult but nec-

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87. *See Sex Discrimination Regulations: Hearings Before the Subcommittee on Post-Secondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 466 *passim* (1975).

88. 543 F. Supp. 321 (E.D. Va. 1982). *See supra* note 80.

89. *Id.* at 326.

90. *Id.*

91. The Court's program-specific reading of Title IX in *North Haven* left the lower courts with the question: Must a program receive federal funds which are "ear marked" for use by that specific program in order for it to fall within the purview of the statute, or should the program be subject to Title IX scrutiny if it "benefits" from federal funds received by other programs or the institution generally? The federal courts addressing this question have gen-

essary to the more consistent and effective implementation of an important statute.

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erally been evenly split in their answers. For courts which have held that a direct funding requirement should not be imposed as a prerequisite to Title IX jurisdiction, see Grove City College v. Bell, 687 F.2d 684 (2d Cir. 1982) (receipt by students of Basic Educational Opportunity Grant (BEOG) and Guaranteed Student Loan (GSL) funds constitutes aid to the institution, therefore the entire institution was subject to Title IX's prohibition of sex discrimination); Haffer v. Temple University, 524 F. Supp. 531 (E.D. Pa. 1981), *aff'd*, 688 F.2d 14 (3d Cir. 1982) (Because student financial aid from College Work Study (CWS), National Direct Student Loan (NDSL), BEOG and GSL funds "enlarge the pool of student athletes available [to the University], at least some of the federal funding going to Temple University is closely connected to the intercollegiate athletic program." *Id.* at 540); Wright v. Columbia University, 520 F. Supp. 789 (E.D. Pa. 1981) (direct receipt of federal funds earmarked for athletics not a prerequisite for Title IX jurisdiction). *But see* Rice v. President and Fellows of Harvard College, 636 F.2d 336 (1st Cir. 1981) (CWS funds to law students would not extend Title IX coverage to the law school in general but would only preclude discrimination in the CWS program); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (federal financial aid received through a Library Resources Grant, Housing and Urban Development Loans and various student financial aid programs like CWS, BEOG, NDSL and GSL did not extend jurisdiction under Title IX beyond those programs); Bennett v. West Texas State University, 525 F. Supp. 77 (N.D. Tex. 1981) (court found that Congress indicated a clear intent that Title IX should apply only to specific programs and activities which were receiving direct federal financial aid); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981) ("[T]he Act's provisions and requirements apply only to the specific class of educational programs or activities which receive *direct* federal financial assistance." *Id.* at 1381 (emphasis added)).