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Alice R. Senechal

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Title IX as a Tool for Eliminating Gender-Based Employment Discrimination at Educational Institutions, *North Haven Board of Education v. Bell*

I. INTRODUCTION

In *North Haven Board of Education v. Bell*,¹ the Supreme Court ruled that the Department of Education (ED),² under Title IX of the Education Amendments of 1972,³ has authority to prohibit gender-based employment discrimination by educational institutions receiving financial assistance from the Federal Government. Title IX prohibits gender-based discrimination within educational programs or activities that receive federal financial assistance.⁴ Regulations promulgated by ED⁵ pursuant to Title IX prohibit gender-based discrimination in employment practices of educational institutions receiving federal financial assistance.⁶

North Haven challenged ED's authority to regulate employment practices.⁷ The plaintiffs, two Connecticut public school boards, North Haven Board of Education (North Haven) and Trumbull Board of Education (Trumbull) both received federal funding⁸ and so were subject to the mandates of Title IX. Both school systems faced administrative proceedings and potential loss of federal funds because of violations of

1 456 U.S. 512 (1982).

2 In 1979, the Department of Education (ED) assumed functions of the Department of Health, Education, and Welfare (HEW) relating to Title IX. 20 U.S.C. § 3441(a)(3) (Supp. V 1981). Both agencies are referred to as ED herein, though some actions relevant to this case occurred prior to agency reorganization.

3 Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. §§ 1681-1686 (1976)).

4 "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance" 20 U.S.C. § 1681(a) (1976).

5 Each federal department or agency which has authority to grant financial assistance to any education program or activity is authorized to issue rules and regulations to effectuate Title IX with respect to such program or activity. 20 U.S.C. § 1682 (1976). Employment regulations implementing Title IX have been issued by ED, 34 C.F.R. §§ 106.51-.61 (1982), the Department of Agriculture, 7 C.F.R. §§ 15a.51-.61 (1983), and the Small Business Administration, 13 C.F.R. §§ 113.1-.10 (1983).

6 "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." 34 C.F.R. § 106.51 (1982).

7 *Id.*

8 *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 774-75 (2d Cir. 1980).

216 NORTH CAROLINA CENTRAL LAW JOURNAL

ED's employment regulations.⁹ The boards argued that Title IX's protections extended only to students and that ED's authority under Title IX was thus limited to those aspects of educational programs which directly affected students.¹⁰

A tenured teacher in the North Haven school system, Elaine Dove, filed an administrative complaint with ED in January, 1978. She alleged the school board had violated Title IX by refusing to rehire her after a one-year maternity leave.¹¹ ED requested information from the school board concerning its policies on hiring, leaves of absence, seniority, and tenure.¹² North Haven, however, refused to supply the information requested.¹³ ED then notified North Haven of possible administrative enforcement proceedings.¹⁴ North Haven responded by bringing suit against ED in the United States District Court for the District of Connecticut. North Haven requested a declaratory judgment that ED did not have power to regulate employment under Title IX. They also requested an injunction prohibiting ED from attempting to terminate the district's federal funding for alleged violations of ED's employment regulations.¹⁵ The district court ruled that Title IX did not extend to employment practices and permanently enjoined ED from terminating North Haven's federal funding for violations of ED's employment regulations.¹⁶

A former guidance counselor in the Trumbull school system, Linda Potz, filed an administrative complaint with ED in October, 1977. She alleged the school board was guilty of gender-based discrimination with respect to job assignments, working conditions, and renewal of employment contracts.¹⁷ ED investigated the complaint and advised the board that it had violated Title IX's employment regulations.¹⁸ ED specified four violations. The board had required Potz to perform clerical tasks not required of the male counselors.¹⁹ Her office had been moved to a smaller, poorly heated, and less comfortable space away from the other counselors.²⁰ Supervisors had asked Potz to change a report which showed she had seen many more students in a given week

9. *Id.* at 774-75

10. *Id.* at 775

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *North Haven Bd. of Educ. v. Califano*, 19 Fair Empl. Prac. Cas. (BNA) 1505, 20 Empl. Prac. Dec. (CCH) ¶ 30,198 (D. Conn. 1979)

17. *North Haven Bd. of Educ. v. Hufstedler*, 629 F.2d 773, 775 (2d Cir. 1980)

18. *Id.*

19. *Id.*

20. *Id.*

EMPLOYMENT DISCRIMINATION

217

than had her male counterparts.²¹ Finally, Trumbull had refused to renew Potz's contract on the basis of her sex.²² ED advised the board that corrective action was needed specifically advising that Potz be reinstated, that she be given back pay, and that all adverse documents be removed from her personnel file.²³ ED further advised Trumbull that formal administrative proceedings might be initiated if Trumbull failed to comply voluntarily.²⁴

Trumbull did not implement the requested corrective actions, but rather filed suit against ED in the United States District Court of the District of Connecticut.²⁵ Trumbull, like North Haven, alleged that regulation of employment was beyond the scope of ED's power under Title IX. Trumbull also requested declaratory and injunctive relief.²⁶ The district court, on the basis of its decision in the North Haven case, granted Trumbull's motion for summary judgment.²⁷ The North Haven and Trumbull cases were consolidated on appeal before the Court of Appeals for the Second Circuit.²⁸

The Second Circuit reversed the decisions of the district court, ruling that ED had authority under Title IX to regulate employment and that ED's employment regulations were valid as promulgated.²⁹ The decision of the Second Circuit in *North Haven* was clearly inconsistent with decisions of four other courts of appeals,³⁰ and the Supreme Court granted certiorari to resolve this conflict.³¹

North Haven raised several issues of statutory construction. The

21 *Id.*

22 *Id.*

23 *Id.* See also 20 U.S.C. § 1682 (1976) (authority to seek voluntary compliance). See *infra* note 37.

24 Brief for the Federal Respondents, Appendix at 34, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

25 *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 775 (2d Cir. 1980).

26 *Id.*

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

28 *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 774 (2d Cir. 1980).

29 *Id.* at 786.

30 See *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir. 1980) (gender discrimination in salaries paid to faculty members in School of Nursing), *vacated*, *United States Dep't of Educ. v. Seattle Univ.*, 456 U.S. 986 (1982); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.) (school refused to alter maternity leave policy to conform to ED's regulations), *cert. denied*, 444 U.S. 972 (1979); *Junior College Dist. v. Califano*, 597 F.2d 119 (8th Cir.) (discrimination in salaries), *cert. denied*, 444 U.S. 972 (1979); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.) (pregnancy not treated in same manner as other temporary disabilities by school's leave of absence policy), *cert. denied*, 444 U.S. 972 (1979).

31. The Court had granted certiorari in another case involving the same issue prior to granting certiorari in *North Haven*. *Seattle Univ. v. HEW*, 621 F.2d 992 (9th Cir.), *cert. granted sub nom.* *United States Dep't of Educ. v. Seattle Univ.*, 449 U.S. 1009 (1980). The respondent in that case, Seattle University, considered the question moot and did not intend to prosecute the appeal. Petition for a Writ of Certiorari at 19, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982). A petition for a writ of certiorari had also been filed in *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980). Shortly after its decision in *North Haven*, the Court granted certio-

218 NORTH CAROLINA CENTRAL LAW JOURNAL

Supreme Court first faced the question of whether employment regulation was included within the statutory language of Title IX. Since the language of Title IX did not expressly include or exclude employment regulation,³² the Court looked to congressional intent to include employment regulation within the scope of Title IX.³³

To ascertain congressional intent to regulate employment, the Court reviewed the legislative history of Title IX. Examination of Title IX's legislative history involved consideration of three different factors. First, did statements made during floor debate indicate intent to include employment regulation within the scope of Title IX. Second, did the action of the House-Senate conference committee indicate such intent. Third, did congressional inaction following the adoption of Title IX indicate congressional approval of ED's employment regulations. The Court then considered three other issues of statutory construction. First, was Title IX to be interpreted identically to Title VI of the Civil Rights Act of 1964³⁴ in all respects. Second, did Congress intend to establish a remedy for gender-based employment discrimination in addition to those remedies already existing.³⁵ Third, was regulation of employment consistent with Congress' overall purposes in enacting Title IX.

After determining that regulation of employment was within ED's authority under Title IX, the Court dealt with the validity of ED's employment regulations as promulgated.³⁶ This raised the issue of whether the regulations were consistent with the statutory language of Title IX.³⁷ The Court also discussed, but did not define, the scope of

rari in *Dougherty County* and vacated the judgments in both *Seattle University* and *Dougherty County*. 456 U.S. 986 (1982).

32 See 20 U.S.C. § 1681(a) (1976). See *supra* note 4.

33 North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 522 (1982).

34 42 U.S.C. § 2000d (1976). See *infra* note 45.

35 The Equal Pay Act, 29 *id.* § 206(d)(1) (1976), provides a remedy for discrimination in salaries. See *infra* note 197. Title VII of the Civil Rights Act of 1964 may provide a remedy for discrimination at any stage of the employment relationship. 42 *id.* §§ 2000e to 2000e-17 (1976). See *infra* note 196.

36 North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 535 (1982).

37 Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after an opportunity for hearing, of a failure to comply with such requirement, 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 [emphasis added], or (2) by any other means authorized by law: Provided, however [emphasis in original], That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program

EMPLOYMENT DISCRIMINATION

219

application of Title IX.³⁸

This comment examines the history of Title IX, the Court's decision in *North Haven*, and the possible ramifications of that decision. This comment demonstrates that the Court correctly decided that ED has authority to regulate employment and that ED's regulation will be most effective if the scope of application is defined broadly.

II. LEGISLATIVE AND POSTENACTMENT HISTORY OF TITLE IX

An overview of the legislative history of Title IX is essential to understanding the reasoning of the Supreme Court in *North Haven*.³⁹ Title IX is one provision of a comprehensive program of federal support for elementary, secondary, and higher education.⁴⁰ The House version of Title IX was part of the original comprehensive legislation, but the Senate version of Title IX originated as a floor amendment.⁴¹ The House and Senate versions of Title IX were almost identical with the exception of a provision of the House bill expressly exempting employment regulation.⁴² This provision was deleted by the House-Senate Conference Committee.⁴³

Title IX declares that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"⁴⁴ The language of Title IX is patterned after that of Title VI of the Civil Rights Act of 1964.⁴⁵ Title VI prohibits discrimination on the basis of race, color, religion, and national origin in programs receiving federal financial assistance and authorizes effectuation of compliance with its provisions

or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

20 U.S.C. § 1682 (1976).

38. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 540 (1982).

39. See generally Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. REV. 133.

40. See generally Wolanin & Gladieux, *A Charter for Federal Policy Toward Postsecondary Education: The Education Amendments of 1972*, 4 J.L. & EDUC. 301 (1975); Buck & Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973).

41. Compare H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 39,354 (1971) with S. 659, 92d Cong., 1st Sess., 117 CONG. REC. 30500 (1971). See also 118 CONG. REC. 5803 (1972) (language of floor amendment).

42. See *supra* note 41.

43. S. Rep. No. 798, 92d Cong., 2d Sess. 221, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2608, 2671-72.

44. 20 U.S.C. § 1681(a) (1976).

45. "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." 42 *id.* § 2000d (1976).

220 *NORTH CAROLINA CENTRAL LAW JOURNAL*

through funding termination.⁴⁶ Title IX substituted "on the basis of sex" for Title VI's bases of race, color, religion, and national origin.⁴⁷ Title IX and Title VI differ in one important respect: Title VI expressly excludes employment from its coverage, but Title IX includes no specific provision dealing with employment.⁴⁸

In addition to its general prohibition against gender-based discrimination, Title IX amended the Equal Pay Act of 1963.⁴⁹ This amendment extended coverage of the Equal Pay Act to previously excepted professional employees.⁵⁰ Title IX, as originally proposed in both the House and Senate, would also have amended Title VII of the Civil Rights Act of 1964⁵¹ by eliminating an exception for educational institutions. This amendment was enacted as part of the Equal Employment Opportunity Act of 1972 rather than as part of Title IX.⁵²

Remarks made during Senate floor debate provide indications of legislative intent. Senator Birch Bayh, Title IX's sponsor, addressed the scope of Title IX's coverage. In a prepared statement summarizing the floor amendment, Senator Bayh stated:

Central to my amendment are sections . . . 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.⁵³

In response to an inquiry about the scope of Title IX, 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 . . . , and discrimination in employment within an institution, as a member of a faculty or whatever. In the area of employment, we permit no exceptions.⁵⁴

Action of the House-Senate Conference Committee provides further indication of legislative intent. The original House version of the Education Amendments of 1972 expressly excluded employment from pro-

46 *Id.* §§ 2000d to 2000d-4 (1976).

47 20 *id.* § 1681(a) (1976). See *supra* note 4.

48 Compare *id.* with 42 *id.* §§ 2000d to 2000d-4 (1976).

49 Compare 29 *id.* § 213(1) (1970) with *id.* § 213(1) (1976).

50 Employees in bona fide executive, administrative, and professional capacities were not covered by the Equal Pay Act before the 1972 amendment. *Id.* § 213(1) (1970).

51 Compare 117 CONG. REC. 39,365 (1971) (original House version of Title IX) with 118 *id.* 5803 (1972) (original version of Senate floor amendment).

52 Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e-1 (1976)).

53 118 CONG. REC. 5807 (1972).

54 *Id.* at 5812.

EMPLOYMENT DISCRIMINATION

221

visions prohibiting gender-based discrimination.⁵⁵ Floor debate in the House included no discussion of this limitation.⁵⁶ The Senate version did not exclude authority to regulate employment, and the House version's limitation was eliminated by the conference committee.⁵⁷ The conference committee report explained this action only briefly: "[T]he House amendment, but not the Senate amendment, provided that nothing in the title authorizes action . . . with respect to any employment practice . . . except where a primary objective of the Federal financial assistance is to provide employment. The House recedes."⁵⁸

Title IX's postenactment history also provides some indication of congressional intent to include employment regulation within the scope of ED's authority under Title IX. ED submitted its regulations to Congress for review.⁵⁹ Congress could have disapproved the regulations, but did not do so.⁶⁰ In the ten years following Title IX's enactment, Congress has considered two amendments that would have limited Title IX's coverage of employment discrimination.⁶¹ Neither amendment passed.

III. DECISIONS BY THE COURTS OF APPEALS

Prior to the Supreme Court's decision in *North Haven*, six of the federal courts of appeals had addressed ED's authority under Title IX to regulate employment practices. The Courts of Appeals of the First, Sixth, Eighth, and Ninth Circuits determined that employment regulation was not included within the scope of Title IX.⁶² The Second Circuit ruled that ED had authority to regulate employment and that its regulations were valid as promulgated.⁶³ The Fifth Circuit found that

55 H.R. 7248, 92d Cong., 1st Sess., 117 CONG. REC. 38,354 (1971).

56 See 117 CONG. REC. 39,248-63 (1971).

57 S. Rep. No. 798, 92d Cong., 2d Sess. 221, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2608, 2671-72.

58 *Id.*

59 40 Fed. Reg. 24,128 (1975). Congress then had 45 days in which to adopt a resolution of disapproval; since no such resolution was adopted, the regulations became effective. 20 U.S.C. § 1232(d)(1) (1976).

60 Though two resolutions of disapproval were introduced in the House, the House passed neither. H.R. Con. Res. 329, 94th Cong., 1st Sess. (1975); H.R. Con. Res. 330, 94th Cong., 1st Sess. (1975). See 121 CONG. REC. 21,687 (1975). An amendment to H.R. Con. Res. 330 would have expressly disapproved ED's employment regulations. Unpublished Amendment to H.R. Con. Res. 330, quoted in *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 783 (2d Cir. 1980). Since Congress did not pass a resolution of disapproval, the Title IX regulations became effective July 21, 1975.

61 S. 2146 § 2(1), 94th Cong., 1st Sess. (1975), would have expressly excluded employment from Title IX's coverage. The Senate took no action on this bill. S. 1361, 97th Cong., 1st Sess., 127 CONG. REC. 6125 (1981), would have excluded employment from the scope of Title IX and would have expressly prohibited an institutional approach to the definition of program for purposes of Title IX. The Senate took no action on this bill.

62 See *supra* note 30 and cases cited therein.

63 *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773 (2d Cir. 1980).

222 NORTH CAROLINA CENTRAL LAW JOURNAL

Congress intended Title IX to include some employment practices, but found ED's regulations invalid insofar as they were not limited to practices directly affecting those employees who derived compensation directly, in whole, or in part, from federal financial assistance.⁶⁴

The First Circuit, in *Islesboro School Committee v. Califano*,⁶⁵ was the first court of appeals to address ED's authority to regulate employment. The court began with an analysis of the language of Title IX and determined that Title IX extended only to direct beneficiaries of student funds, *i.e.*, students and those teachers working directly under federal grants.⁶⁶ The court found further support for this interpretation because all of Title IX's specific exemptions deal with student activities.⁶⁷ Since Title IX does not expressly include or exclude employment regulation,⁶⁸ the First Circuit examined legislative history for indications of congressional intent.⁶⁹ The court regarded Senator Bayh's remarks during floor debate as imprecise and inconclusive on congressional intent.⁷⁰ The court reasoned that the House provision expressly exempting employment regulation was eliminated to avoid conflict with Title IX provisions relating to the Equal Pay Act⁷¹ and refused to construe congressional inaction as approval of ED's regulations.⁷² The First Circuit also refused to accept ED's argument that discrimination against employees infected the school environment and was harmful to students as well as employees.⁷³

Three courts of appeals followed the reasoning of the *Islesboro* court.

64 *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980) (salary supplement paid to industrial arts teachers, but not to home economics teachers), *vacated*, *Bell v. Dougherty County School System*, 456 U.S. 986 (1982).

65 593 F.2d 424 (1st Cir.) (pregnancy not treated in same manner as other temporary disabilities by school's leave of absence policy), *cert. denied*, 444 U.S. 972 (1979).

66 *Id.* at 426.

67 Specific exceptions are made for schools that begin admitting students of both sexes for the first time, religious schools, military schools, institutions that have traditionally admitted students of only one sex, social fraternities and sororities, Boys/Girls State/Nation conferences, father-son and mother-daughter activities, and scholarships awarded in "beauty" pageants. 20 U.S.C. § 1681(a)(1)-(9) (1976). Under a doctrine of *ejusdem generis*, general provisions are interpreted through more specific provisions. *See generally* Comment, *supra* note 39. *Ejusdem generis* is generally applied only when the general terms follow the specific terms. *United States v. Powell*, 423 U.S. 87 (1975). The general terms of Title IX precede, rather than follow, the specific exemptions. 20 U.S.C. § 1681(a) (1976).

68 *See* 20 U.S.C. § 1681(a) (1976). *See supra* note 4.

69 *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.) (pregnancy not treated in same manner as other temporary disabilities by school's leave of absence policy), *cert. denied*, 444 U.S. 972 (1979).

70. The court reasoned that references to employment addressed those portions of Title IX which amended the Equal Pay Act and Title VII. *Id.* at 428.

71 *Id.*

72 *Id.* n 3. *See also supra* text accompanying notes 59-60.

73 *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.) (pregnancy not treated in same manner as other temporary disabilities by school's leave of absence policy), *cert. denied*, 444 U.S. 972 (1979).

EMPLOYMENT DISCRIMINATION

223

The Sixth Circuit, in *Romeo Community Schools v. HEW*,⁷⁴ essentially adopted the reasoning of the First Circuit. Moreover, the *Romeo* court reasoned that the ultimate sanction for Title IX violations, funding termination, would be an unreasonable burden on students when imposed because of institutional discrimination against an employee.⁷⁵ The Eighth Circuit, in *Junior College District of St. Louis v. Califano*,⁷⁶ expressly adopted the reasoning of the *Islesboro* court. The Ninth Circuit, in *Seattle University v. HEW*,⁷⁷ also adopted the *Islesboro* reasoning, in finding ED had no power to regulate employment.

The Court of Appeals for the Second Circuit, when faced with the *North Haven* controversy, refused to follow the reasoning of the courts of appeals that had previously decided the issue consistent with *Islesboro*.⁷⁸ The Second Circuit examined the legislative history of Title IX thoroughly. That court found support for the inclusion of employment within Title IX's coverage based on: remarks made during floor debate; deletion of the House provision exempting employment; and, based on Congress' failure to timely disapprove ED's employment regulations.⁷⁹ The Second Circuit reasoned that this interpretation was consistent with the overall objectives of Congress in enacting Title IX.⁸⁰

The Fifth Circuit, in its brief opinion in *Dougherty County School System v. Harris*,⁸¹ adopted an intermediate position. It found that Title IX was intended to cover some employment practices, but ruled that ED's authority to regulate employment was limited to practices directly affecting those employees whose compensation was supported directly, in whole, or in part, by federal financial assistance.⁸² The Fifth Circuit held ED's employment regulations were invalid insofar as they were broadly worded to apply to all employees of an educational system receiving federal financial assistance for any purpose.⁸³

74. 600 F.2d 581 (6th Cir.) (school refused to alter maternity leave policy to conform to ED's regulations), *cert. denied*, 444 U.S. 972 (1979).

75. *Id.* at 584.

76. 597 F.2d 119 (8th Cir.) (discrimination in salaries), *cert. denied*, 444 U.S. 972 (1979).

77. 621 F.2d 992 (9th Cir. 1980) (gender discrimination in salaries paid to faculty members in School of Nursing), *vacated*, United States Dep't of Educ. v. Seattle Univ., 456 U.S. 986 (1982).

78. *North Haven Bd. of Educ. v. Hufstetler*, 629 F.2d 773, 777 (2d Cir. 1980).

79. *Id.* at 778.

80. *Id.*

81. 622 F.2d 735 (5th Cir. 1980) (salary supplement paid to industrial arts teachers, but not to home economics teachers), *vacated*, *Bell v. Dougherty County School System*, 456 U.S. 986 (1982).

82. This would include only employees in activities directly funded by federal monies. *Id.* at 738.

83. *Id.*

IV. SUPREME COURT'S DECISION IN *NORTH HAVEN*

The Supreme Court⁸⁴ began its analysis in *North Haven* by examining the statutory language of Title IX.⁸⁵ It determined that the broadly worded directive, that "no person" be discriminated against on the basis of sex, favored inclusion of employees within the scope of Title IX protection.⁸⁶ Since Title IX does not, however, expressly include or exclude employees from its scope, the Court looked at the legislative history of Title IX to determine whether Congress intended to limit the expansive statutory language in any way.⁸⁷

The Court focused on three factors which support congressional intent to include employment within the scope of ED's authority under Title IX. First, remarks made during Senate floor debate on Title IX indicated an intent to include prohibition of employment discrimination within its scope.⁸⁸ Second, the House-Senate Conference Committee removed a provision of the original House version expressly exempting employment from coverage of Title IX.⁸⁹ Third, postenactment history indicated that Congress, though aware of the controversy surrounding Title IX's employment regulations, failed to pass legislation eliminating employment from the coverage of Title IX.⁹⁰ The Court considered these factors corroborative of each other and of congressional intent to include employment regulation within the scope of Title IX.

The Court considered remarks made by Senator Bayh the only authoritative indicia of congressional intent regarding the scope of Title IX.⁹¹ Though recognizing that remarks of a single legislator made during debate may not be controlling, the Court found reliance on such remarks justified in light of the scarcity of other evidence of legislative intent.⁹²

The *North Haven* Court regarded deletion of the House provision exempting employment regulation as a conscious choice suggesting Congress intended to prohibit employment discrimination under Title IX.⁹³ The school boards argued that Congress deleted this provision to avoid an inconsistency with Title IX provisions relating to the Equal

84. The majority (6-3) opinion was written by Justice Blackmun. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

85. *Id.* at 520.

86. *Id.* at 521.

87. *Id.* at 522.

88. *Id.* at 524. See *supra* notes 49-54 and accompanying text.

89. *Id.* at 527. See *supra* notes 55-58 and accompanying text.

90. *Id.* at 530-31. See *supra* notes 59-61 and accompanying text.

91. *Id.* at 526.

92. *Id.* at 527.

93. *Id.* at 528.

EMPLOYMENT DISCRIMINATION

225

Pay Act.⁹⁴ The majority refused to accept this argument, but instead noted that Congress could have easily altered the language of Title IX to eliminate any inconsistency.⁹⁵

The Court viewed Title IX's postenactment history as additional confirmation of congressional intent to prohibit gender-based employment discrimination in federally funded education programs.⁹⁶ The Court did, however, recognize that Congress' failure to disapprove ED's employment regulations did not conclusively demonstrate that Congress considered those regulations valid and consistent with legislative intent.⁹⁷ Although recognizing that postenactment developments could not be accorded the weight of contemporary legislative history, the majority observed:

[W]e would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX . . . [Where] an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.⁹⁸

The Court then addressed the similarity of Title IX and Title VI of the Civil Rights Act of 1964.⁹⁹ The North Haven and Trumbull school boards argued that Title IX should be interpreted identically to Title VI.¹⁰⁰ A provision of Title VI expressly exempts its application to employment discrimination.¹⁰¹ Although recognizing interpretations of Title VI as useful guides in construing Title IX, the *North Haven* majority refused to interpret Title IX as analogous to Title VI in all respects.¹⁰² The Court reasoned that Title VI should be used to interpret Title IX only when a different interpretation was not suggested by the language and history of Title IX itself.¹⁰³ The Court refused to interpret Title IX as analogous to Title VI insofar as regulation of employment was concerned because the language of Title IX was not identical to that of Title VI where employment regulation was involved¹⁰⁴ and because there was evidence suggesting Congress did not intend Title IX

94 *Compure* 29 U.S.C. § 213(a)(1) (1970) with *id.* § 213(a)(1) (1976).

95 *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529 (1982).

96 *Id.* at 530.

97 *Id.* at 533. See also 20 U.S.C. § 1232(d)(1) (1976), which provides that failure of Congress to disapprove regulations issued by ED shall not be conclusively presumed evidence of congressional approval of the regulations.

98 *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 687 n.7 (1979) and *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979)) (emphasis added).

99 42 U.S.C. §§ 2000d to 2000d-4 (1976).

100 *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 529 (1982).

101 42 U.S.C. § 2000d-3 (1976).

102 *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982).

103 *Id.* at 529.

104 *Compure* 20 U.S.C. §§ 1681-1686 (1976) with 42 *id.* §§ 2000d to 2000d-4 (1976).

226 NORTH CAROLINA CENTRAL LAW JOURNAL

to have the same restrictions as Title VI.¹⁰⁵

The Court's decision in *North Haven* established an alternative remedy for victims of gender-based employment discrimination by federally funded educational institutions. An aggrieved employee would now have grounds for action under Title IX, the Equal Pay Act,¹⁰⁶ or Title VII of the Civil Rights Act of 1964.¹⁰⁷ The dissent argued that an intent for such duplication of remedies was not supported by Title IX's legislative history,¹⁰⁸ but the majority considered duplication of remedies a policy decision made by Congress.¹⁰⁹ Congress, the majority reasoned, had also chosen to provide overlapping remedies in other areas of discrimination.¹¹⁰ The Court thus concluded that duplication of remedies should not be deemed indicative of congressional intent to exempt employment regulation under Title IX.¹¹¹

The *North Haven* majority did not grant the traditional deference to administrative interpretation of a statute because of conflict between the administrative agencies responsible for enforcement of Title IX.¹¹² The Secretary of Education, in a letter to the Attorney General, proposed that employment regulations apply "only when the complaint shows a clear nexus between the alleged employment discrimination and discrimination against the students, or when the complaint shows that the complainant is a beneficiary of a program in which a primary objective of the Federal financial assistance is to provide employment."¹¹³ The Attorney General refused to adopt this suggestion and continued to support the regulations as promulgated.¹¹⁴

After determining that Title IX gave ED authority to regulate employment practices at educational institutions receiving federal financial assistance, the Court examined ED's regulations as promulgated to determine their validity.¹¹⁵ The Court discussed the program-specific nature of Title IX, criticizing that portion of the Second Circuit's decision which implied that ED's authority to issue regulations

105. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982).

106. 29 U.S.C. § 206(d)(1) (1976). See *infra* note 197 and accompanying text.

107. 42 *id.* § 2000e-2(a) (1976). See *infra* note 196 and accompanying text.

108. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 544 (1982) (Powell, J., dissenting).

109. *Id.* at 535 n.26.

110. *Id.* See, e.g., *International Union of Elec., Radio & Mach. Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-39 (1976) (remedies under Title VII of the Civil Rights Act independent of other pre-existing remedies).

111. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 n.26 (1982).

112. *Id.* at 522 n.12.

113. Letter from Terrell H. Bell to William French Smith (July 27, 1981), reprinted in *Daily Lab. Rep.* No. 150, at A-5 (Aug. 5, 1981), quoted in *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982). See also Jenkins, *The Solicitor General's Winning Ways*, 69 A.B.A. J. 734, 737 (1983).

114. Brief for the Federal Respondents at 37, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

115. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

EMPLOYMENT DISCRIMINATION

227

was broader than its power to terminate funding.¹¹⁶ The Court analyzed ED's authority to issue regulations by looking to language of the implementing legislation:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 901 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.¹¹⁷ (Emphasis by the Court.)

The Court thus concluded that ED's authority to issue regulations was program-specific.

Though ED's employment regulations refer in general terms to employment practices of an educational institution,¹¹⁸ the majority found a program-specific limitation in a provision which states the general purpose of the regulations.¹¹⁹ The purpose of the regulations was "to effectuate Title IX . . . which is designed to eliminate . . . discrimination on the basis of sex in any education *program or activity* receiving Federal financial assistance."¹²⁰ (Emphasis by the Court.) The Court thus concluded that ED's employment regulations were valid as promulgated.

Though determining that ED has program-specific authority to regulate employment practices through use of funding termination, the *North Haven* Court remanded the case¹²¹ without determining whether funding termination would be an appropriate remedy.¹²² Remand was necessary because the district court disposed of both the *North Haven* and *Trumbull* cases on motions for summary judgment without a factual determination of whether gender-based employment discrimination actually occurred within either school system.¹²³ The Supreme Court noted, however, that neither school board contested issues of fact

116. See *North Haven Bd. of Educ. v. Hufstедler*, 629 F.2d 773, 785 (2d Cir. 1980). The Second Circuit reasoned that though ED's funding termination powers were program-specific, ED was not required to specify prior to termination which particular programs receiving financial assistance were covered by its regulations.

117. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 537 (1982).

118. 34 C.F.R. § 106.51 (1982). See *supra* note 6.

119. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 537 (1982). See also 34 C.F.R. § 106.1 (1982). The *North Haven* majority cited *Board of Pub. Instruction v. Finch*, 414 F.2d 1068 (5th Cir. 1969), a case involving funding termination under Title VI. Comments accompanying ED's Title IX regulations cited *Finch* as consistent with Title VI's program specific requirements. See 40 Fed. Reg. 24,128 (1975). *Finch* held that federal funds may be terminated under Title VI on a finding that they are "infected by a discriminatory environment." *Finch*, 414 F.2d at 1078-79.

120. 34 C.F.R. § 106.1 (1982).

121. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 (1982).

122. *Id.* at 540.

123. *Id.*

228 NORTH CAROLINA CENTRAL LAW JOURNAL

in the district court, but argued instead that ED was completely without authority to regulate employment.¹²⁴

The majority discussed, but did not define, "program" for purposes of Title IX.¹²⁵ Neither school board defended on grounds that the complaining employee did not work in a federally funded program, so the lower courts were not forced to address the definition of program.¹²⁶ The Court reasoned that a definition was inappropriate at this stage of the case.

In dissent, Justice Powell urged that the Court adopt the position of the First, Sixth, Eighth, and Ninth Circuits.¹²⁷ Powell argued that a natural reading of Title IX would limit its coverage to students.¹²⁸ The dissent also argued that the legislative history of Title IX was ambiguous and should not be relied upon to read in operative language not included by Congress.¹²⁹

Several policy considerations were implicit in the Court's decision in *North Haven*. The majority relied on the overall legislative objective of eliminating gender-based discrimination in federally funded educational programs.¹³⁰ The majority refused to accept two policy arguments advanced by the school boards. *North Haven* and *Trumbull* argued that a remedy for employment discrimination should not be recognized under Title IX because other remedies were available to victims of gender-based employment discrimination at educational institutions.¹³¹ The boards also argued that Congress did not intend any harm caused to students by funding termination to be predicated on discrimination against an employee.¹³² The majority considered both questions to be Congressional judgments and so refused to base their decision on either argument.¹³³

V. ANALYSIS OF THE COURT'S APPROACH

The Supreme Court in *North Haven* relied on its earlier determination of the legislature's underlying purpose in enacting Title IX. In *Cannon v. University of Chicago*,¹³⁴ the Court determined that Con-

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 542 (Powell, J., dissenting). See also *supra* text accompanying notes 65-77.

128. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 541 (1982) (Powell, J., dissenting).

129. *Id.* at 550.

130. *Id.* at 531.

131. *Id.* at 535 n.26.

132. *Id.*

133. *Id.*

134. 441 U.S. 677 (1979). The plaintiff in *Cannon* was denied admission to medical school under a school policy which denied admission to persons over age thirty. The plaintiff alleged that this policy excluded a disproportionate number of females and sought money damages. The

EMPLOYMENT DISCRIMINATION

229

gress enacted Title IX to eliminate federal support of gender discrimination in the nation's schools and to provide individual citizens effective protection against such discrimination.¹³⁵ Legislative debate revealed that Congress considered Title IX to serve both these purposes. During House debate, Representative Mink observed: "Any college or university which discriminates against women applicants . . . is free to do so under [Title IX] but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination."¹³⁶ In the Senate, Senator Bayh argued: "[Title IX] is a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers . . ."¹³⁷ Congress' choice of ultimate sanction for Title IX violations, funding termination, also indicated that Title IX was enacted to eliminate federal support of gender discrimination. This choice of remedy is perhaps the strongest indication of the overall legislative purpose.

The *North Haven* decision is consistent with a long-standing principle of flexible construction of remedial statutes.¹³⁸ Remedial statutes are those enacted to benefit a special class of persons.¹³⁹ Here again, the Court looked to its earlier interpretation of Title IX in *Cannon*.¹⁴⁰ In *Cannon*, the Court determined that Title IX's language focused on the benefited class where it mandated, "No person . . . shall, on the basis of sex . . . be subjected to discrimination."¹⁴¹ Congress chose to center the language of Title IX on the persons involved rather than on the agencies or the federal funds involved.¹⁴² Such a choice supported the Court's classification of Title IX as a remedial statute.

Prior decisions supported the Court's reliance on available legislative history. Committee reports have been used most often as evidence of legislative purpose and intent,¹⁴³ but when such reports have been un-

Court recognized a private right of action under Title IX. In reaching its decision, the *Cannon* Court examined the special class for whose benefit Title IX was enacted, implied legislative intent, advancement of statutory purpose, and the historically federal function in protection against discrimination. *Id.* at 689. See also Condo-Caritis, *Civil Rights—Sex Discrimination—Title IX of the Education Amendments of 1972—Implied Right of Action*, 18 DUQ. L. REV. 983 (1980).

135. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (recognized private right of action under Title IX).

136. *Id.* at 704 n.36 (quoting 117 Cong. Rec. 39,252 (1971)).

137. *Id.* (quoting 118 Cong. Rec. 5806-07 (1972)).

138. See, e.g., *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939) (remedial legislation for benefit and protection of workers liberally construed).

139. See, e.g., *Cort v. Ash*, 422 U.S. 66 (1975).

140. *Cannon v. University of Chicago*, 441 U.S. 677, 690 (1979) (recognized private right of action under Title IX).

141. *Id.*

142. *Id.* at 693

143. See Carro & Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 304 (1982).

230 NORTH CAROLINA CENTRAL LAW JOURNAL

available the Court has often looked to other available sources.¹⁴⁴ In *North Haven*, the Court relied on three such sources of legislative history and noted precedents supporting reliance on each of these sources.¹⁴⁵ The Court addressed opposing interpretations of each source of legislative history, but found those interpretations unpersuasive in light of Title IX's overall purpose and remedial nature.

VI. RAMIFICATIONS OF THE DECISION

The ultimate ramifications of the Supreme Court's decision in *North Haven* may not be apparent for some time. Effective use of funding termination as a remedy for violations of Title IX's employment regulations will depend on interpretations of its program-specific requirements. The issue of the definition of "program" for purposes of Title IX has yet to be addressed, since it was not specifically raised in the *North Haven* case.¹⁴⁶

At least two approaches to the definition of "program" are possible. Under an "institutional" approach, an entire school district would be considered a program for purposes of Title IX.¹⁴⁷ The entire district would be subject to all mandates of Title IX if the district received federal monies for any purpose.¹⁴⁸ All federal funding could be terminated if any violation of Title IX's requirements were found. A "pin-point" approach to the definition of program would limit the application of Title IX's requirements to those individual activities funded in whole or in part by federal monies.¹⁴⁹ A factual nexus between the person discriminated against on the basis of gender and the funded activity would be necessary to invoke Title IX's funding termination provision.

Title IX's language and legislative history provide little indication of

144. *Id.*

145. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527-35 (1982). *See also* *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976) (statements of legislation's sponsor deserve substantial weight); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 199 (1974) (deletion of a provision by a conference committee militates against a judgment that Congress intended a result that it expressly declined to enact); *United States v. Rutherford*, 442 U.S. 544, 554 (1979) (congressional inaction construed as indication that intent properly discerned).

146. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 540 (1982). *See also supra* text accompanying notes 121-24.

147. *See* Comment, *supra* note 39, at 169.

148. Federal financial assistance is directed toward specific activities within educational institutions. *E.g.*, money to purchase books or equipment, 20 U.S.C. §§ 1801-1821 (1976); education of the handicapped, *id.* §§ 1401-1461 (1976), and school lunch programs, 42 *id.* §§ 1751-1769(a) (1976).

149. *See* Crow, *Does Title IX of the Education Amendments of 1972 Prohibit Employment Discrimination—An Analysis*, 22 B.C.L. REV. 1099, 1129 (1981).

EMPLOYMENT DISCRIMINATION

231

congressional intent on the definition of program.¹⁵⁰ An institutional approach would seem consistent with the general purpose of Title IX, *i.e.*, elimination of gender discrimination in educational institutions. Because of its potential impact on an institution receiving federal funding for a variety of activities, it would likely serve to increase voluntary compliance.

The similarity of enforcement provisions of Title IX and Title VI implies adoption of an institutional approach to the definition of program. The Supreme Court in *Cannon* determined that enforcement provisions of Title IX were intended to be identical to those of Title VI.¹⁵¹ Under Title VI, educational institutions at the elementary and secondary levels are generally treated on a district-by-district basis while higher education systems may be treated on a statewide basis.¹⁵² Interpretations of Title VI imply that an entire school district should be considered a "program" at the elementary and secondary levels for purposes of Title IX. Similarly, an entire state might be considered a "program" where higher education systems are involved.

Both a "benefit" theory and an "infection" theory support an institutional approach to the definition of "program". A "benefit" theory postulates that federal assistance received for a specific purpose benefits the entire institution by releasing funds which would otherwise be used for that specific purpose for use in other areas within the institution.¹⁵³ An "infection" theory looks to the effect of discrimination in one area of an institution as it affects the total environment of the institution.¹⁵⁴ In the context of regulation of employment, discrimination against employees could be considered to have an adverse effect on the environment of the institution, resulting in adverse effects on the students as well as on the employees.

Voluntary compliance is the primary means of eliminating gender discrimination under Title IX.¹⁵⁵ If ED determines that a school has violated Title IX, it can order the school to take corrective actions.¹⁵⁶ If the school does not comply voluntarily, ED can initiate proceedings to

150 See Note, *Administrative Cutoff of Federal Funding Under Title VI: A Proposed Interpretation of "Program"*, 52 IND. L.J. 651, 656 (1977).

151 *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979) (recognized private right of action under Title IX).

152 See, e.g., *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (D.S.C. 1974) (upheld Veterans Administration order terminating right of eligible veterans to receive benefits while attending school following racially discriminatory admissions policy), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

153 See generally Comment, *supra* note 39, at 182.

154 See generally Foley, *Title IX Coverage of Gender Discrimination in Employment Practices of Educational Institutions*, 15 SUFFOLK U.L. REV. 261, 283 (1981).

155 20 U.S.C. § 1682 (1976). See *supra* note 37.

156 *Id.*

232 NORTH CAROLINA CENTRAL LAW JOURNAL

terminate funding.¹⁵⁷ A school faced with possible funding termination is more likely to implement corrective actions than a school faced with requests for voluntary compliance. Since Title IX was enacted, ED has not terminated funding to any recipient institution.¹⁵⁸ This may be an indication of the strong incentive for voluntary compliance that funding termination provides. This incentive would be strongest under an institutional definition of program. Under an institutional definition, a school could lose more funding, and so would be more likely to comply voluntarily.

Use of funding termination as an ultimate sanction for Title IX violations is an indication of the importance Congress has given to elimination of gender discrimination in educational institutions. Termination of funding is concededly a harsh remedy, though it is this harshness that leads to its effectiveness. Opponents of an institutional approach to the definition of program argue that since funding termination is detrimental to the intended beneficiaries of Title IX, it should be applied to only specific areas within an institution.¹⁵⁹ The potential harm resulting from continued federal funding of an activity in which there is some form of gender discrimination, however, outweighs the potential detrimental effects of funding termination.¹⁶⁰

Initial interpretations of the *North Haven* decision by the lower courts show conflicting definitions of program. The Third Circuit¹⁶¹ and the Fifth Circuit¹⁶² adopted an institutional approach, but the Sixth Circuit¹⁶³ and one federal district court¹⁶⁴ employed a pin-point approach. Both *Grove City College v. Bell*¹⁶⁵ and *Hillsdale College v. HEW*¹⁶⁶ involved ED's attempt to terminate grant and loan funds to students at private colleges not in compliance with provisions of Title IX. Neither college received federal financial aid, though loans and grants were made to individual students at both schools.¹⁶⁷ Since no specific activity at either school received federal funding, termination of funding was inappropriate in either case unless an institutional approach to the definition of program was adopted.

157 *Id.*

158 See PROJECT ON EQUAL EDUCATION RIGHTS, TITLE IX BECAUSE IT'S ONLY FAIR (1982).

159 See Brief for Petitioners North Haven Board of Education and Trumbull Board of Education at 15, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982).

160 See Comment, *infra* note 200, at 445.

161. *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S., Feb. 22, 1983) (No. 82-792).

162. *Iron Arrow Honor Soc'y v. Heckler*, 702 F.2d 549 (5th Cir. 1983).

163. *Hillsdale College v. HEW*, 696 F.2d 418 (6th Cir. 1982).

164. *University of Richmond v. Bell*, 543 F. Supp. 321 (E.D. Va. 1982).

165. 687 F.2d at 688.

166. 696 F.2d 418, 420 (6th Cir. 1982).

167. *Id.* at 420; 687 F.2d at 688.

EMPLOYMENT DISCRIMINATION

233

The *Grove City College* court interpreted *North Haven* as an implicit adoption of an institutional approach to defining program.¹⁶⁸ The court ruled funding termination was mandated if the college did not comply voluntarily. The court discussed a "benefit" theory, determining that federal loans and grants made to individual students benefited the entire college.¹⁶⁹ The court observed:

We cannot agree, however, that Congress intended to limit the purpose and operation of Title IX by a narrow and illogical interpretation of its program-specific provisions. Rather, we believe that Congress intended that full scope be given to the non-discriminatory purpose that Title IX was enacted to achieve, and that the program-specific terms of Title IX must therefore be construed realistically and flexibly.¹⁷⁰

The *Hillsdale College* court refused to follow the decision in *Grove City College* and refused to terminate funding to the college. Rather than concentrating on Title IX's overall purposes, the Sixth Circuit stressed the strict program-specific language of Title IX and adopted a pin-point definition of program.¹⁷¹ In so doing, the Sixth Circuit followed its earlier decisions limiting the application of Title IX.¹⁷²

In *Hoffer v. Temple University*,¹⁷³ another decision by the Third Circuit, the court determined that intercollegiate athletic programs¹⁷⁴ benefited from receipt of federal funds by other parts of the University, and so were subject to the mandates of Title IX. The Third Circuit relied on its decision in *Grove City* though the athletic programs themselves received no direct federal financial assistance.¹⁷⁵ *University of Richmond v. Bell*¹⁷⁶ also involved a challenge to ED's authority to regulate athletic programs that received no direct federal financial assistance. The District Court for the Eastern District of Virginia interpreted *North Haven* as not requiring that Title IX be applied to the athletic programs.¹⁷⁷

*Iron Arrow Honor Society v. Heckler*¹⁷⁸ involved ED's action to terminate funding to the University of Miami, a private school. The Iron

168. 687 F.2d at 691.

169. *Id.* at 705.

170. *Id.* at 697.

171. *Hillsdale College v. HEW*, 696 F.2d 418, 424 (6th Cir. 1982).

172. *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.) (school refused to alter maternity leave policy to conform to ED's regulations), *cert. denied*, 444 U.S. 972 (1979).

173. 688 F.2d 14, 17 (3d Cir. 1982).

174. No scholastic athletic activity receives direct financial aid, so ED's authority to regulate athletics is thus dependent on the definition of program adopted. See, e.g., Note, *Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines*, 66 MINN. L. REV. 1115, 1128 (1982).

175. *Hoffer v. Temple Univ.*, 688 F.2d 14, 15 (3d Cir. 1982).

176. 543 F. Supp. 321 (E.D. Va. 1982).

177. *Id.* at 326.

178. 702 F.2d 549 (5th Cir. 1983).

234 NORTH CAROLINA CENTRAL LAW JOURNAL

Arrow Society was the most prestigious honorary recognition society at the university.¹⁷⁹ Iron Arrow admitted only males.¹⁸⁰ The society itself received no federal funds, but the university received substantial financial assistance.¹⁸¹ Though the university prohibited Iron Arrow from using campus facilities for its initiation ceremony, the university had not severed all connections between it and Iron Arrow.¹⁸² Iron Arrow continued to hold a university charter and "sponsorship" from the office of the president as well as continuing to use the university's name.¹⁸³

The *Iron Arrow* court interpreted *North Haven* to support termination of funding to the university because of its relationship with Iron Arrow. The court observed:

[T]he existence of the all-male Iron Arrow Honor Society as the most prestigious honorary-recognition society at the University has a pervasive discriminatory effect upon women in all of the University's academic programs, federally funded or not. All federal programs at the University of Miami are necessarily infected by what amounts to a general and overriding policy of the University.¹⁸⁴

The court thus denied Iron Arrow's request for an injunction against funding termination.

The definition of program for purposes of Title IX has been addressed by only a few federal courts since the *North Haven* decision. The disparity among decisions shows the need for clarification of the intended definition of program. The Court recently granted certiorari to resolve this issue.¹⁸⁵

ED has adopted an institutional approach in its enforcement efforts.¹⁸⁶ Title IX will be most effective if ED continues to pursue this approach. Vigorous enforcement policies are necessary to insure the effectiveness of Title IX as a tool for eliminating gender-based employment discrimination. The current secretary of ED has not supported ED's employment regulations¹⁸⁷ and may not pursue their enforcement vigorously. President Ronald Reagan has suggested that ED be disbanded. If this proposal¹⁸⁸ is adopted, enforcement policies might be affected.

179. *Id.* at 551.

180. *Id.*

181. *Id.* n.2.

182. *Id.* at 551.

183. *Id.* at 552.

184. *Id.* at 561.

185. *Grove City College v. Bell*, 687 F.2d 684 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3611 (U.S. Feb. 22, 1983) (No. 82-792).

186. *See, e.g., Hillsdale College v. HEW*, 696 F.2d 418 (6th Cir. 1982).

187. *See supra* text accompanying notes 112-14.

188. A bill introduced in the current Congress would disband the Department of Education H.R. 714, 98th Cong., 1st Sess. (1983). *But cf.* Wall Street J., June 9, 1983, at 1, col. 3. (Reagan

EMPLOYMENT DISCRIMINATION

235

ED's employment regulations would seem to apply to all employees within an educational institution.¹⁸⁹ Those cases decided thus far have involved only professional staff persons. An institution faced with Title IX sanctions because of discriminatory practices involving nonprofessional staff, *i.e.*, clerical staff, teacher aides, janitorial staff, might argue that ED's regulations should be applied only to professional staff persons.¹⁹⁰ The institutions might attempt to distinguish between professional and nonprofessional staff because students are less directly affected by nonprofessional staff. This argument would fail under an analysis that concentrated on effecting the overall purpose of Title IX, *i.e.*, eliminating all federally supported gender discrimination at educational institutions.

A case decided shortly after *North Haven, Mississippi University for Women v. Hogan*,¹⁹¹ raises the issue of the validity of the specific exemptions to the application of Title IX. In *Hogan*, the male plaintiff was denied admission to a state-supported university that had traditionally limited its enrollment to women. The Supreme Court found the school's admission policy invalid under the Equal Protection Clause.¹⁹² The school argued that Title IX's exemption for institutions traditionally admitting only students of one sex¹⁹³ was evidence of congressional intent to permit such institutions to continue to exist as they had in the past. The Court determined that even if Congress had so intended, such an application of the Title IX exemption would conflict with the Constitution.¹⁹⁴ *Hogan* raises the question of whether the Court would consider other exemptions to the application of Title IX valid if challenged. For example, could an employee at a military school, currently exempt under Title IX,¹⁹⁵ argue that this exemption is not valid and that she/he is protected under ED's employment regulations.

Victims of gender-based employment discrimination at federally

spokesperson Larry Speaks gave "legislative realities" as the reason Reagan probably won't achieve goal of disbanding Department of Education).

189 34 C.F.R. § 106.51 (1982). See *supra* note 6.

190. The dissenting opinion in *North Haven* raised this argument. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 543 n.6 (1982).

191. 102 S. Ct. 3331 (1982).

192. *Id.* at 3340. The Court stated that a statute classifying on the basis of gender could be upheld only by showing that the classification serves important governmental objectives and that the means employed are substantially related to those objectives. See, *e.g.*, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (statute denying benefits to widower in absence of proof of dependence on wife's earnings but granting benefits to widow without proof of dependence on husband's earnings invalid under Equal Protection Clause); *Personnel Adm'r. v. Feeney*, 442 U.S. 256, 273 (1979) (statute granting preference to veterans valid under Equal Protection Clause).

193 20 U.S.C. § 1681(a)(5) (1976).

194 *Mississippi Univ. for Women v. Hogan*, 102 S. Ct. 3331, 3340 (1982).

195 20 U.S.C. § 1681(a)(4) (1976).

236 NORTH CAROLINA CENTRAL LAW JOURNAL

funded educational institutions may seek relief under Title IX, Title VII of the Civil Rights Act,¹⁹⁶ or the Equal Pay Act.¹⁹⁷ The remedy provided under Title IX, funding termination, is potentially more effective than remedies available under Title VII and the Equal Pay Act. The Equal Employment Opportunity Commission (EEOC) enforces both Title VII and the Equal Pay Act.¹⁹⁸ The EEOC has authority to seek voluntary compliance if a violation has occurred, but it has no authority to initiate funding termination.¹⁹⁹ Title IX, because of its funding termination provision, may provide more incentive for voluntary compliance than Title VII or the Equal Pay Act.²⁰⁰ Voluntary compliance is desirable for victims of discrimination because it may provide quicker and less costly relief than judicial action.²⁰¹

Title IX and Title VII apply to any type of discrimination in employment whereas the Equal Pay Act is limited to wage discrimination. To recover under the Equal Pay Act, an employee must prove disparate wages between substantially equal, although not identical, positions.²⁰² An employee could not recover under the Equal Pay Act if there were no equivalent positions within the institution.²⁰³

The *North Haven* decision could potentially affect a large number of women. During the 1980-81 school year, 985,300 women were employed as teachers in public elementary schools nationwide.²⁰⁴ During the same period, 487,900 women were employed as teachers in public secondary schools²⁰⁵ and 104,663 women held full-time faculty positions in the nation's public and private colleges and universities.²⁰⁶

196. "It shall be an unlawful employment practice . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ." 42 *id.* § 2000e-2(a)(1) (1976).

197. No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions 29 *id.* § 206(d)(1) (1976).

198. 42 *id.* § 2000e-5(b) (1976) (Title VII); Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), reprinted in 5 U.S.C. app. at 1155 (1982) (Equal Pay Act).

199. 42 U.S.C. § 2000e-5(b) (1976); 29 *id.* §§ 211, 216(b) (1976).

200. See Comment, *Eliminating Sex Discrimination in Educational Institutions: Does Title IX Reach Employment?*, 129 U. Pa. L. Rev. 417 (1980).

201. To recover under a Title VII claim, an aggrieved employee must comply with procedures of the Equal Employment Opportunity Commission (EEOC). Failure to file a complaint with the EEOC within 180 days of the alleged discrimination bars recovery. *Orahood v. Board of Trustees*, 645 F.2d 651, 658 (8th Cir. 1981).

202. *Horner v. Mary Inst.*, 613 F.2d 706, 713 (8th Cir. 1980).

203. *Gunther v. County of Washington*, 602 F.2d 882, 887-89 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

204. See National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS (1982).

205. *Id.*

206. See National Center for Education Statistics, FACULTY SALARY, TENURE, AND BENEFITS (1980-81).

EMPLOYMENT DISCRIMINATION

237

Since almost all of the nation's schools received some type of federal financial aid during the 1980-81 school year,²⁰⁷ each of these women would have been protected by ED's employment regulations under an institutional definition of program. Many other women working in nonprofessional positions in the nation's schools could also be protected.

Elimination of gender-based employment discrimination in the schools is important in eliminating sex-stereotyping and in encouraging female students to seek academic achievements. Women comprise an overwhelming majority, 83%, of public elementary school teachers.²⁰⁸ The percentage of women in public secondary faculties declines to 49%,²⁰⁹ and the percentage in full-time college and university positions declines further to 26%.²¹⁰ These statistics illustrate that elementary education is traditionally a female field, and also illustrate the lack of female role models for women in higher education.

Though a Title IX claim may be based on a theory of disparate treatment, a case recently decided by the Supreme Court²¹¹ suggests that a theory of disparate impact may be employed in a Title IX case only under limited circumstances. In *Guardians Association v. Civil Service Commission of New York*,²¹² a badly-divided Court held that a private plaintiff in a Title VI action was entitled to only declaratory and limited injunctive relief unless discriminatory intent was shown. Since Title IX remedies are to be interpreted as analogous to those under Title VI,²¹³ the standards of *Guardians Association* will probably be applied to private actions under Title IX.²¹⁴

Recognition of a disparate impact theory under Title IX could facilitate recovery in those cases coming within the limitations of *Guardians Association*. A private Title IX plaintiff who could not meet the burden of proving discriminatory intent²¹⁵ would nonetheless be entitled to prospective relief on a showing of disparate impact. A theory of disparate impact is consistent with, and essential to achievement of, the

207 See National Center for Education Statistics, *DICTIONARY OF EDUCATION STATISTICS* (1982).

208 *Id.*

209 *Id.*

210 See National Center for Education Statistics, *FACULTY SALARY, TENURE, AND BENEFITS* (1980-81).

211 *Guardians Ass'n v. Civil Serv. Comm'n*, 51 U.S.L.W. 5105 (July 1, 1983).

212 *Id.* at 5106.

213 *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979) (recognized private right of action under Title IX).

214 The Seventh Circuit denied recognition to a disparate impact claim in a private action under Title IX. *Cannon v. University of Chicago*, 648 F.2d 1104, 1106 (7th Cir. 1981) (denied plaintiff's claim that medical school admission policy excluded more women than men and so violated Title IX), *cert. denied*, 51 U.S.L.W. 3633 (U.S. Feb. 28, 1983) (No. 82-1179).

215 See Friedman, *Congress, The Courts, and Sex-Based Employment Discrimination in Higher Education: A Tale of Two Titles*, 37 VAND. L. REV. 37 (1981).

238 *NORTH CAROLINA CENTRAL LAW JOURNAL*

overall purpose of Title IX, *i.e.*, eliminating federal support of gender-based discrimination.²¹⁶ A disparate impact theory may be an important tool in eliminating traditional sex-stereotyping in educational employment.²¹⁷ ED's employment regulations recognize disparate impact in prohibiting an institution from recruiting primarily at entities which furnish primarily members of one sex if the recruiting has the effect of discriminating on the basis of sex.²¹⁸

Since a private right of action is recognized under Title IX,²¹⁹ an effect of the *North Haven* decision may be an increase in private actions to enforce ED's employment regulations. A Title IX plaintiff in a private suit may be entitled to attorneys' fees.²²⁰ Availability of attorneys' fees may encourage private suits as a supplement to ED's enforcement efforts.

VII. CONCLUSION

The *North Haven* determination that ED has authority to regulate employment under Title IX is supported by several relevant factors. These factors include the statutory language of Title IX, its legislative history, its overall purpose, and other Supreme Court interpretations of Title IX. Title IX's funding termination provisions make it a potentially effective tool for eliminating gender-based employment discrimination at educational institutions. Title IX will be most effective in the area of employment if an institutional approach to the definition of program is adopted and if a vigorous enforcement policy is adopted. Though questions remain as to the scope of effect of the *North Haven* decision, it is clear that the decision may be a tool for bringing the nation's schools closer to the goal of eliminating all forms of gender-based discrimination in education.

ALICE R. SENECHAL*

216 *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (recognized private right of action under Title IX).

217 *See supra* text accompanying notes 204-10.

218 34 C.F.R. § 106.53 (1982).

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

220 42 U.S.C. § 1988 (1976).

* Class of 1984, University of Minnesota Law School.