80-5663

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IRON ARROW HONOR SOCIETY, ETC., ET AL.,

Plaintiffs-Appellants

v.

SHIRLEY M. HUFSTEDLER, ETC., ET AL.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE FEDERAL APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not required in this case. The district court decided the case on cross-motions for summary judgment founded upon documentary evidence in the record, as supplemented by testimony and documentary exhibits introduced at an earlier hearing on plaintiffs-appellants' motion for a preliminary injunction. The court, having properly found that there existed no genuine dispute of material fact, and applying settled legal principles, fully set forth its reasoning for ruling in favor of the facial validity of the challenged regulation and its application in this case. Accordingly, the record on appeal and the contentions of law advanced in the briefs of the parties adequately address the issues and are sufficient for their resolution.

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QUESTIONS PRESENTED

Whether the district court correctly declined a request by a male-only recognition society to enjoin the Secretary from applying a federal statute (20 U.S.C. 1681 et seq.) prohibiting sex discrimination by educational institutions receiving federal financial assistance and its implementing regulation (45 C.F.R. 86.31(b)(7)) prohibiting such institutions from providing "significant assistance" to university-related organizations.

A. Whether the federal statute (20 U.S.C. 1681 et seq.) prohibiting sex discrimination by educational institutions receiving federal financial assistance was properly interpreted by the federal agency primarily responsible for its enforcement as prohibiting affected educational institutions from giving "signifi-

cant assistance" to organizations which have sexually discriminatory membership policies.

B. Whether the regulation (45 C.F.R. 86.31(b)(7)) adopted to interpret the statute provides adequate guidance to affected educational institutions and organizations.

C. Whether the district court correctly concluded, on the undisputed record before it, that the plaintiff, a male-only honor society founded by the University of Miami, receives "significant assistance" from the University.

STATEMENT OF THE CASE

A. Procedural History

On October 21, 1976, Iron Arrow Honor Society (Iron Arrow or the Society), a male-only "recognition" society, and John T. Benedict, Chief or president of the Society, instituted this action in the United States District Court for the Southern District of Florida seeking declaratory and injunctive relief against the University of Miami (the University), a private institution of higher education and a recipient of federal funds, and the Secretary of Health, Education, and Welfare and HEW's Regional Director of the Office for Civil Rights[1/] (R. Vol. I, 1).[2/]

1/ The federal appellees will be referred to in this brief jointly as the Secretary. HEW's functions under Title IX of the Education Amendments of 1972 were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. The Secretary of Education was substituted for the Secretary of HEW as the proper party defendant.

2/ Citations in this brief are to the certified record on appeal. Citations to the two volume record will be to the Record Volume

(continued)

Iron Arrow filed the action after the University notified it that, pursuant to a determination of the Secretary, the University, in order to comply with Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq.,[3] would disassociate itself from the Society, unless the Society altered its sexually exclusive membership policy (R. Vol. I, 8). Specifically, the University prohibited the Society from conducting a fall "tapping."[4] Iron Arrow requested the district court to "enjoin the Defendants to permit the Plaintiff to engage in its traditional ritual and procedures of tapping and initiation, especially in November, 1976" (R. Vol. I, 11). As further relief, Iron Arrow asked the district court to "declare the rights of Iron Arrow to continue as an all male recognition society" (ibid.).

On November 2, 1976, after an evidentiary hearing, the district court denied Iron Arrow's motion for a preliminary injunction (R. Vol. I, 35). Iron Arrow appealed (R. Vol. I, 32), but dismissed its appeal voluntarily (R. Vol. I, 47), after a panel of this Court denied its request for a stay (R. Vol I, 46).

2/ (continued)

and page, e.g., R. Vol. I, 1. Citations to exhibits introduced at the preliminary injunction hearing will be designated by the party introducing the exhibit and the exhibit number, e.g., Pl. Exh. 1.

3/ The pertinent sections of the statute are set forth at pages 6-7, n. 10, infra.

4/ "Tapping" is the ritual surrounding member selection (R. Vol. I, 3).

Thereafter, all defendants answered the complaint (R. Vol. I, 50,56); the University moved for judgment on the pleadings (R. Vol. I, 48); and the Secretary (R. Vol. I, 99) and Iron Arrow (R. Vol. I, 64) filed motions for summary judgment.

On May 24, 1977, the district court, after a hearing on all pending motions and after the University amended its Answer (R. Vol. I, 113),[5/] entered an Order of Dismissal (R. Vol. I, 120). The

5/ The University's Amended Answer materially altered the nature of the proceedings. Initially, the University took the position that it had "an absolute right . . . to refuse to recognize [Iron Arrow], and to prohibit it from conducting any of its activities on the University's private campus" (R. Vol I, 51). The Amended Answer (R. Vol. I, 113) asserted that the University would "reinstate the charter of Iron Arrow and allow Iron Arrow to resume the conduct of its functions on the University campus, even though Iron Arrow continues to refuse to admit women, providing it is legally determined that such action by the University is permissible under the law, including HEW regulation." The University explained that the amendment to its Answer "eliminates one of the variables that makes a decision in this case difficult" (R. Vol. I, 114). As Iron Arrow points out (Br. 9), this Court apparently relied on the University's amendment in holding that Iron Arrow had standing to challenge the regulation and the Secretary's application of it in this case (R. Vol. I, 122, 125).

In that connection Appendix A to this brief is a September 19, 1980, letter from counsel for the University to counsel of record. The University Board of Trustees has deferred action on a recommendation by the Board's Executive Committee "to permit Iron Arrow on campus as a 'registered student organization'" (App. A-2), provided "the University of Miami is satisfied that its recognition of Iron Arrow will not be in violation of any law or of valid HEW regulations" (ibid.).

Iron Arrow does not suggest that the Executive Committee's recommendation or the Board's deferral of action thereon alters the posture of the case. In any event, the record demonstrates that Iron Arrow does not meet the requirements of a "registered student organization," since under University policy "officer positions and a majority of voting members [must] be restricted to full-time undergraduate, graduate or professional students who have paid the activity fee" (R. Vol. I, 192-193). At the time this action was instituted about eighty percent of Iron Arrow membership consisted of alumni (R. Vol. II, 28), and apparently only about fifteen members were full-time students (R. Vol. II, 28). See Iron Arrow Br. at 31.

court held that Iron Arrow lacked standing to assert a cause of action against the Secretary and that the district court lacked jurisdiction of any claim of the Society against the University (R. Vol. I, 115). On appeal, this Court reversed the ruling as to the Society's standing (R. Vol. I, 122, 125).[6] The dismissal of the claim against the University was not challenged (R. Vol. I, 129).[7]

On remand, the parties restated their pending motions for summary judgment (R. Vol. I, 130, 132, 142). After a hearing, the district court entered its Corrected Order and Memorandum Opinion on August 12, 1980, effectively granting summary judgment in favor of the Secretary and denying Iron Arrow's motion for summary judgment.[8] Iron Arrow timely noted an appeal from the district court's Order on August 29, 1980 (R. Vol. I, 174).

B. Facts[9]

Iron Arrow Honor Society was founded in 1926 "less than a month after the opening of classes at the University" (R. Vol. II, 25), by the then president (and founder) of the University as a

6/ This Court's per curiam opinion is reported at 597 F.2d 590 (1979).

7/ The district court on remand joined the University as a defendant sua sponte under Fed. R. Civ. P. 19. The University is not a party to this appeal (App. A-1).

8/ No separate judgment was entered. However, the district court's Order denying Iron Arrow's request for a permanent injunction (R. Vol. I, 11) is appealable under 28 U.S.C. 1292(a)(1).

9/ We do not understand Iron Arrow to assert that there are disputed factual "findings" or that the district court was "plainly erroneous" within the meaning of Fed. R. Civ. P. 52(a).

(continued)

recognition society to honor outstanding students, faculty, and alumni of the University (R. Vol. I, 1). Only males are eligible for membership (ibid.). The membership policy is based on Iron Arrow's "Constitution, Bylaws and the traditions" of the Society (R. Vol. II, 27).

In April 1973 the Secretary's Office for Civil Rights received a complaint alleging that Iron Arrow's male-only membership policy violated Title IX.[10] The Office for Civil Rights postponed

9/ (continued)

The district court found only that there is no dispute of material fact (R. Vol. I, 175), the only finding required in ruling on motions for summary judgment. See Rachal v. Hill, 435 F.2d 59, 65 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971).

Iron Arrow has focused throughout on the undisputed fact that much if not all of the direct tangible assistance (e.g., mailings, secretarial aid, financial services) from the University to it had ended at the time this action was instituted (R. Vol. I, 4-5, 146-A; Br. 34). The Secretary has contended and contends here that such tangible assistance is in many cases a sufficient but not a necessary type of assistance, provision of which triggers the application of Title IX.

In this light, we set forth our statement of the undisputed material and relevant facts in the record on which we rely in support of the district court's conclusion that the Secretary's determination was appropriate.

10/ Title IX provides in pertinent part (20 U.S.C. 1681):

> (a) 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 . . .

The Secretary's rulemaking and enforcement authority is set forth as follows (20 U.S.C. 1682):

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education

(continued)

its investigation of the sex discrimination claim pending the Secretary's issuance of guidelines for implementing the statute. Such guidelines were published for comment on June 20, 1974,[11] and became effective on July 21, 1975. See 45 C.F.R. Part 86 et seq.[12] At issue in the instant case is 45 C.F.R. 86.31(b)(7), which provides in pertinent part:

> (b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> * * *

10/ (continued)

> program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders 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 . . . . 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 opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the . . . 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 . . . Provided, however, 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.

11/ 39 Fed. Reg. 22229.

12/ The Secretary of Education has recodified the regulation. See 34 C.F.R. 106.31(b)(7)(1980).

> (7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.

On May 24, 1976, after an investigation of the sex discrimination complaint, the Regional Director of HEW's Office for Civil Rights wrote to the University stating its conclusion that, under Section 86.31(b)(7), the University provided "significant assistance" to Iron Arrow and that therefore the Society's sexually exclusive membership policy was attributed to the University (R. Vol. I, 76).

The Regional Director stated that Iron Arrow receives two types of assistance (ibid.): tangible and intangible. Among the items of tangible assistance were (id. at 77):

(1) Mailings (including the costs for postage but not the printing costs) handled by the University's alumni association;

(2) Secretarial support from the Student Activities Office;

(3) Bank accounts handled by the University's finance office;

(4) An "Iron Arrow Room" in the student union; and

(5) A projection room in the athletic building containing Iron Arrow objects or symbols.

The Regional Director cited the following items of intangible assistance (ibid.):

(1) The Society's founding by the University's first President;

(2) The Society's status as the only University-chartered organization;

(3) A reference in the University catalogue to Iron Arrow as "the highest recognition society for men;" and

(4) Faculty participation on the screening committees for new members.

The Regional Director also noted that "[t]he prestigious position of Iron Arrow is further seen in the location of a monument which stands on a knoll outside the student union building" [the "tapping mound"], and that "[n]early all of the faculty and students interviewed by the investigators confirmed the fact that Iron Arrow is looked upon as the most prestigious organization on campus, and, as such, is particularly advantageous in employment opportunities" (ibid.).

The University was afforded thirty days in which to inform the Office of Civil Rights of the actions it would take to bring itself into compliance with Title IX.[13/]

On June 21, 1976, the University President wrote to the Office for Civil Rights stating that "the University intends to comply with the requirements of Title IX."[14/] The letter inquired whether certain "changes and proposed changes" in University support to the Society would alter the findings of the Office for

13/ Under the Secretary's interpretation of the regulation, the Regional Director wrote that to comply with the statute as implemented, the University "must either require the Iron Arrow Honor Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society" (Pl. exh. 2 at 4).

14/ Pl. Exh. 4.

Civil Rights,[15] and requested an extension of time for "consultations with the members" of Iron Arrow (ibid.).

On July 30, 1976, the Office for Civil Rights responded, stating that the supplemental information supplied did not alter the earlier findings, and granting the requested extension.[16]

In the ensuing weeks the President attempted unsuccessfully to persuade the membership of Iron Arrow to open its doors to females.[17] By the time this suit was instituted, it was the President's opinion that the "university community ha[d] come to a consensus . . . that irrespective of HEW's order," Iron Arrow ought to admit women (R. Vol. II, 83).

Testimony presented by Iron Arrow in support of its motion for a preliminary injunction established that Iron Arrow's male-only policy was at the center of a campus-wide controversy (R. Vol. II, 7-13; 73-79). For example, the Dean of the Law School had banned "tappings" at the Law School because of the male-only policy. It is undisputed that at least in Florida, membership in Iron Arrow provides "a little bit extra" to a University of Miami law graduate's employability (R. Vol. II, 8-9, 11).

The focal point of each fall at the University is the Homecoming football game and it is undisputed that "all activities of Iron Arrow . . . culminat[ing] in their tapping is an important

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15/ Ibid.

16/ Pl. Exh. 4, HEW letter dated July 30, 1976.

17/ See, e.g., Pl. Exh. 5.

part" of Homecoming Week (R. Vol. II, 18). Included among such activities is a traditional reception for Iron Arrow members and guests at the home of the University's president (R. Vol. II, 53).[18/]

As a result of the University's withdrawal of permission for Iron Arrow to conduct its activities, the Society stood to lose from $10,000 to $15,000 over the 1976-77 year (R. Vol. I, 9; Vol. II, 36-38), funds which would normally be solicited from members returning to the campus. In short, it was undisputed that the very existence of Iron Arrow as a campus organization is dependent upon the University's "permission" and "sponsorship" (R. Vol. II, 56-57). This action sought to forestall the perceived losses through an injunction prohibiting the University from refusing to permit the Fall "tapping" on campus and prohibiting the Secretary from requiring the University to withhold its permission.

The district court issued an Order and Memorandum Opinion denying all relief to Iron Arrow (R. Vol. I, 174). The court recounted the undisputed facts (R. Vol. I, 175-77). The district court read the complaint broadly as attacking on several non-constitutional grounds (1) the facial validity of the regulation; and (2) the Secretary's application of the regulation to the facts in this case (id. at 178-79). Upon review of the "facts and circumstances surrounding this case," the court concluded:

(1) Its scope of review was narrow (id. at 177-79);

18/ The President had advised the Society that its persistence in the male-only policy would result in a loss of its "special status with reference to the office of the President" (R. Vol. I, 82).

(2) The Secretary did not exceed the scope of the Department's statutory jurisdiction in issuing the regulation (id. at 179-82);

(3) The regulation was not vague, unreasonable or arbitrary (id. at 182-83);

(4) The regulation was properly applied in this case (id. at 183-86), and

(5) There was no abuse of discretion or discriminatory enforcement (id. at 186-87).

SUMMARY OF ARGUMENT

Iron Arrow raises three contentions on this appeal. It contends that: (1) the Secretary lacked authority under the statute to promulgate a regulation reaching the discriminatory practices of university-related honor or recognition societies not directly receiving federal financial assistance; (2) the alleged imprecision with which the regulation was drafted (a) gives inadequate notice of its scope to those affected and (b) will lead inevitably to uneven and, indeed, discriminatory application by those charged with its enforcement; and (3) the instant undisputed record does not support the district court's conclusion that Iron Arrow receives "significant assistance" and that therefore the regulation does not apply to its relationship with the University of Miami.

First, as we argue at pages 15-22, infra, the legislative history of the statute demonstrates that Congress intended when it enacted Title IX to encompass the practices of honor or recognition societies in close association with a recipient of federal financial assistance. Congress amended the statute two years after its enactment to exempt from the statute a discrete class of organizations, notably social fraternities and sororities. The legislative history of that amendment shows that Congress specifically did not intend to exclude from the statute's reach organizations such as Iron Arrow. Further, a proposed amendment to subsequent legislation would have accomplished exactly the relief sought by Iron Arrow: invalidation of the regulation prohibiting educational institutions from providing "significant assistance" to organizations such as Iron Arrow. Congress' rejection of that proposed amendment demonstrates that it fully acquiesced in the Secretary's interpretation of the statute challenged here.

Second, as we argue at pages 23-28, infra, Iron Arrow's contention that the regulation prohibiting "significant assistance" to recognition or honor societies is too vague to afford adequate notice to those affected and too lacking in standards for rational and even-handed enforcement should be rejected because the regulation itself and the Secretary's official explanations of it adequately inform government officials and affected university officials and organizations as to its proper application. The Secretary has explained and has consistently contended that either

tangible or intangible assistance, if significant, is sufficient to trigger the application of the regulation. Iron Arrow has made no showing of irrationality sufficient to invalidate the regulation. On the contrary, the state action doctrine under the Fourteenth Amendment (see Norwood v. Harrison, 413 U.S. 455 (1973); Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961)) is an apt analogue to the concept of "significant assisttance." That concept is a legal criterion ideally suited for case-by-case determinations.

Finally, as we argue at pages 28-31, infra, the district court correctly rejected Iron Arrow's contention that the undisputed record before it does not support the conclusion that the University provides "significant assistance" to Iron Arrow. The record discloses that from its founding by the first University president to the day this action was instituted during its fiftieth anniversary, Iron Arrow was substantially benefitted by the tangible and intangible support supplied by the University of Miami. This very action was instituted in an effort to avoid the imminent loss of thousands of dollars in donations the Society reasonably anticipated it would obtain through its campus activities, including the "tapping" ritual. Although the Society and the University took actions to terminate the tangible assistance the Society received historically, the remaining assistance, in the form of the University's "sponsorship" and "permission", mate-

rially contributes to the success and prestige of the Society and thereby enables the Society to benefit its members and the University community. That such benefits to members include enhanced career development--a concern of high priority to Congress in its enactment of Title IX--makes plain the correctness of the district court's ruling.

ARGUMENT

THE DISTRICT COURT CORRECTLY DECLINED A REQUEST BY A MALE-ONLY RECOGNITION SOCIETY TO ENJOIN THE SECRETARY FROM APPLYING A FEDERAL STATUTE (20 U.S.C. 1681 ET SEQ.) PROHIBITING SEX DISCRIMINATION BY EDUCATIONAL INSTITUTIONS RECEIVING FEDERAL FINANCIAL ASSISTANCE AND ITS IMPLEMENTING REGULATION (45 C.F.R. 86.31(b)(7)) PROHIBITING SUCH INSTITUTIONS FROM PROVIDING "SIGNIFICANT ASSISTANCE" TO UNIVERSITY-RELATED ORGANIZATIONS

A. The federal statute (20 U.S.C. 1681 et seq.) prohibiting sex discrimination by educational institutions receiving federal financial assistance was properly interpreted by the federal agency primarily responsible for its enforcement as prohibiting affected educational institutions from giving "significant assistance" to organizations which have sexually discriminatory membership policies

The district court held that the regulation prohibiting "significant assistance" to organizations such as Iron Arrow (45 C.F.R. 86.31(b)(7)) was a proper means to effectuate the statute,[19/] rejecting Iron Arrow's contention that the regulation exceeded the scope of the Secretary's rulemaking authority under the statute. This Court should do likewise.

19/ The regulation is set forth at pages 7-8, supra.

The regulation is fully consistent with the purposes of the statute. Title IX generally prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. One important purpose of the statute is "to avoid the use of federal resources to support discriminatory practices." Cannon v. University of Chicago, 441 U.S. 677, 704 (1979).

In seeking to achieve the indisputably "broad" purposes of the Title, id. at 718 (White, J., dissenting), Congress expressly granted to the Secretary broad discretion to "effectuate the provisions of section 1681." 20 U.S.C. 1682. The district court properly accorded Title IX a scope in keeping with both Congress' intent that the statute be viewed as "strong and comprehensive," 118 Cong. Rec. 5806 (1972)(Sen. Bayh),[20/] and with the admonition of the Supreme Court, see e.g., Batterton v. Francis, 432 U.S. 416, 426-429 (1977); Mourning v. Family Publications Service, 411 U.S. 356, 369 (1973), and of this Court, see e.g., Coca-Cola Co. v. Atchison, T. & S.F. Ry., 608 F.2d 213, 222 (1979), that where "Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting" statutory terms, 432 U.S. at 425, then the challenged regulation is "entitled to

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20/ Sen. Bayh stated (118 Cong. Rec. 5806-5807):

> The amendment [Title IX] we are debating 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, and as they seek employment commensurate to their education.

more than mere deference or weight." Id. at 426. See Dougherty County School System v. Harris, 622 F.2d 735, 737 (5th Cir. 1980) (Secretary entitled to "great latitude" in effectuating Title IX); Coca-Cola Co. v. Atchison, T. & S.F. Ry., 608 F.2d at 222 ("[c]ourts generally grant 'great deference' to an agency's interpretation of its enabling statute") (collecting cases).

Iron Arrow contends (Br. 24-29) that Congress did not intend to encompass within the scope of Title IX's prohibitions discriminatory "outside" organizations such as honor or recognition societies in intimate association with recipients of federal financial assistance. However, both the text of the statute and the evident understanding of the statute's chief sponsor establish that organizations such as Iron Arrow are covered by Title IX.

When Senator Bayh introduced the legislation that became Title IX he included with his statement explaining the purpose of the provision a paper that had been presented to the annual meeting of the Association of American Colleges. 118 Cong. Rec. 5809 (1972). That paper included the following observation:

> * * * Honorary societies are often segregated by sex with the men's honoraries being far more prestigious than the women's. On at least one campus, the women need to be better qualified for admission to the women's honorary than the men need to be for admission to the men's honorary. [21/]

Hence, Congress was well aware at the time the legislation was first presented to it that the practices and policies of "outside" honor societies were within the concerns contemplated by Title IX.

21/ 118 Cong. Rec. 5811 (1972).

More important, a 1974 amendment to Title IX exempts a narrowly circumscribed category of "outside" organizations. Subsection (6) of 20 U.S.C. 1681(a) provides:

> (6) this section shall not apply to membership practices -
>
> (A) of a social fraternity or social sorority which is exempt from taxation under section 501 (a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or
>
> (B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

In introducing this amendment, Senator Bayh stated (120 Cong. Rec. 39992 (1974)):

> [T]his exemption covers only social Greek organizations; it does not apply to professional fraternities or societies whose admissions practices might have a discriminatory effect upon the future career opportunities of a woman.

In short, if Congress intended Title IX regulations not to reach organizations such as "independent" honor societies, no purpose whatsoever would be served by carving out an exception applicable to but a small class of such organizations.

To be sure, Congressional debate over the applicability of the law to "outside" organizations did not end with the enactment in December 1974 of the limited social organization exemption. Representative Casey, among others, was dissatisfied with the limited nature of the 1974 Bayh amendment. Accordingly,

he introduced on the floor of the House an amendment to H.R. 5901, 94th Cong., 1st Sess. (1975), 121 Cong. Rec. 10378-10379 (1975), and the House agreed to it by a substantial margin. 121 Cong. Rec. 10380-10381(1975). The amendment to that appropriations measure would have accomplished in a more limited way exactly the relief sought by Iron Arrow in the instant suit: invalidation of the regulation at issue here. The Casey amendment provided in pertinent part:

> (a) No funds appropriated under this Act shall be used by the Department of Health, Education, and Welfare to draft, publish, promulgate or enforce regulations requiring any . . . institution . . . to integrate by sex . . . sororities and fraternities, whether honorary, service or social.
>
> (b) No funds appropriated under this Act shall be withheld, nor shall any funds appropriated under this Act be used to effect the withholding of funds by the Department of Health, Education, and Welfare from any . . . institution . . . to compel the integration by sex of . . . fraternities and sororities, whether honorary, service or social, or any similar organization. (emphases added)

This amendment was proposed after the Secretary had originally issued for comment Title IX guidelines. The Senate Committee considering H.R. 5901 promptly deleted the Casey amendment (121 Cong. Rec. 21261 (1975)). On the floor of the House upon reconsideration, the amendment was described as a "perversion of Congressional intent." Id. at 23126 (Rep. Burke). Nevertheless, the House again passed the amendment by a one-vote margin. Id. at 23127. After extensive debate in the Senate, e.g., id. at 23340

(Sen. Brooke); ibid. (Sen. Helms); id. at 23341 (Sen. Bayh); and after House and Senate conferees reached a temporary stalemate, id. at 23504 (Rep. Flood), the House receded on the amendment on July 18, 1975, id. at 23602, just three days prior to the effective date of the final regulations.[22/]

Thus, Congress fully acquiesced in the Secretary's intention to implement Title IX in part by attributing to the recipient of federal funds the discriminatory practices of "outside" honor societies such as Iron Arrow to which the recipient extends "significant assistance." As stated by one supporter of Title IX and of the regulations promulgated thereunder:

> A number of those people who oppose the regulation actually oppose the law itself. For example . . . those who maintain that single-sex honorary societies should be allowed to receive "significant assistance" from recipient institutions are asking for a legislative change: under the law that was passed, such honorary societies are prohibited from operation on campus and receiving significant assistance from the institution . . . . [23/]

Iron Arrow's heavy reliance on cases invalidating employment regulations issued by the Secretary (Br. 25-28) misses the mark. Seattle University v. United States Department of HEW, 621 F.2d 992 (9th Cir.), cert. granted sub nom. United States

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22/ The regulations became effective on July 21, 1975.

23/ Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 165 (1975) (Rep. Mink).

Dept. of Education v. Seattle University, 49 U.S.L.W. 3409 (U.S. Dec. 1, 1980), and other similar cases[24/] are all distinguishable from this case since the regulation at issue here relates directly to discrimination practiced against the beneficiaries--students--of federal financial assistance.[25/]

Iron Arrow's reliance (Br. 33) on its own non-receipt of federal financial assistance is unavailing. It is undisputed that the University receives funds for student aid. The underlying premise for the Secretary's action in this case, amply supported by the undisputed facts, is that participation in Iron Arrow, i.e., membership, constitutes an educational activity available to students of the University, itself an educational program receiving federal financial assistance for students (R. Vol. I, 181 n.1). Female students, but not male students, are "excluded from participation in" and are "denied the benefits of," e.g., enhanced career opportunities, that activity in clear contravention of Title IX's mandate that the students benefitted by federal financial assistance be treated in a nondiscriminatory manner. Although the Secretary has never contended that the University makes membership decisions on Iron Arrow's behalf, under the regulation, the University's provision of "significant

24/ See Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979), and Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979).

25/ Cf. Dougherty County School System v. Harris, 622 F.2d at 737.

assistance" to the Society unlawfully "aids" and "perpetuates" the Society's discriminatory practices.

Iron Arrow suggests (Br. 26) that difficulties might arise in reconciling application of the ultimate sanction--fund cutoff--with the limitation in 20 U.S.C. 1682 that any fund cutoff "be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." Ibid. However, we submit that the unambiguous legislative history relied on above shows that as to alleged "outside" organizations such as Iron Arrow, Congress understood that such organizations would seldom directly receive federal financial assistance. Rather, the Secretary has permissibly interpreted the broad Congressional mandate to mean that the activities of such organizations receiving significant assistance "fairly should be considered as activities of the recipient itself." 39 Fed. Reg. 22229 (1974). See page 24, infra. Accordingly, neither Iron Arrow nor any similarly situated organization need receive federal financial assistance so long as the actual recipient of federal financial assistance provides "significant assistance" to such organizations.

In any event, this Court need not reach that issue in this case since the University's decision to comply voluntarily with the Secretary's determination, as contemplated by the statute, see page 7, n. 10, supra, pretermitted any need to determine how and to what extent a fund cutoff might be effectuated.

In sum, in the face of the language of the statute, the narrow exemptions mandated by Congress for certain "outside" organizations, and the expressions of Congress' intent to reach the discriminatory policies of other such organizations, this Court should hold that Section 86.31(b)(7) is within the scope of the Secretary's rulemaking power under Title IX.

B. The regulation (45 C.F.R. 86.31(b)(7)) adopted to interpret the statute provides adequate guidance to affected educational institutions and organizations

Iron Arrow contends (Br. 29-30, 39) that assuming arguendo the statute authorized the Secretary to prohibit the provision of "significant assistance" to "outside" organizations by federal aid recipients, the regulation at issue is so vague and standardless that those possibly subject to it are left without adequate notice as to the regulation's scope. Its related contention in this regard (Br. 30,35,38,40) is that the regulation's vagueness will inevitably result in mistaken, arbitrary, or indeed, intentionally discriminatory enforcement. Iron Arrow's contentions are without merit.

When the Secretary first issued Title IX guidelines for comment, the relevant provision prohibiting significant assistance from recipients to "outside" organizations provided:

> (b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student a recipient shall not, on the basis of sex:
>
> * * *

> (7) Aid or perpetuate discrimination against any person by assisting any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees. [26/]

The Secretary explained the import of the regulation thus:

> Section 86.31(b)(7) prohibits a recipient from assisting another party which discriminates on the basis of sex in serving students or employees of that recipient. This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself. (Under §86.6(c), a recipient's obligations are not changed by membership in any league or other organization whose rules require or permit discrimination on the basis of sex.) [27/]

The regulation proposed in 1974 generated much comment, particularly from social and other fraternities and similar organizations. [28/]

26/ 39 Fed. Reg. 22235 (1974).

27/ 39 Fed. Reg. 22229 (1974).

28/ See e.g., Sex Discrimination Regulations: Hearings Before the House Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 643-664 (1975).

The comments of such organizations played a significant role in Congress' enactment of the Bayh amendment, Pub. L. No. 93-568, Section 3(a), 88 Stat. 1862, exempting certain of those organizations from Title IX's, and thus the regulation's, reach.[29/]

When the Secretary promulgated the regulation in final form on July 21, 1975, the word "significant" had been added to the word "assistance," which brought "outside" organizations within the scope of the regulation as finally issued. The Secretary explained the clarification as follows:

> The language in subparagraph 86.31(b)(7) has been amended in response to comments in order to clarify the Department's position when agencies, organizations or person not part of the recipient would be subject to the requirements of the regulation. Some of these "outside" organizations have been exempted from title IX with respect to their membership policies by a recent amendment to the Statute which was enacted in late 1974. This amendment is reflected, as already noted, in §86.14 which exempts social fraternities and sororities, certain named groups such as the Girl Scouts and certain voluntary youth service organizations. Other groups, however, such as business and professional fraternities and sororities and honor societies continue to be covered. The regulation provides that if the recipient furnishes the "outside" agency or organization with "significant assistance," the "outside" agency or organization becomes so connected with the education program or activity of the recipient that any discriminatory policies or practices for which it is responsible become attributable to the recipient. Thus, such forms of assistance as faculty sponsors, facilities,

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29/ 120 Cong. Rec. 39991-39994 (1974) (Exchange of correspondence between Senator Bayh and the Secretary); see page 18, supra.

> administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations. [30/]

These official pronouncements of the agency's contemporaneous interpretation of its own legislative regulation,[31/] together with the language and context of the regulation as a whole adequately inform persons subject to the regulation of its scope and meaning. Indeed, the district court so concluded (R. Vol. I, 183), having considered only the explanatory note accompanying the regulation as issued in its final form (ibid.). It follows, a fortiori that the meaning of the regulation--its scope and proper application--is enhanced beyond the point of complaint upon consideration of the Secretary's complete rationale. It is beyond dispute that courts may assess the reasoning supporting an agency's policy choice in such circumstances. Randolph-Sheppard Vendors of America, Inc. v. Harris, 628 F.2d 1364, 1368 (D.C. Cir. 1980).

30/ 40 Fed. Reg. 24132 (1975).

31/ See Coca-Cola Co. v. Atchison, T. & S.F. Ry., 608 F.2d 213, 222 (1979). The Secretary promulgated substantially identical regulations in exercising her authority pursuant to the Rehabilitation Act of 1973, 29 U.S.C. 701 et seq. (see 45 C.F.R. 84.4(b)(1)(v) (1979)); and Exec. Order 11914, 3 C.F.R. 117(1977)(see 45 C.F.R. 85.51(b)(1)(v)(1979) reprinted in 29 U.S.C. note (1976) ed.)).

As the district court observed (R. Vol. I, 186), the concept of "significant assistance" within the meaning of regulation 86.31(b)(7) is closely analogous to the concept of "state action" under the Fourteenth Amendment. See Norwood v. Harrison, 413 U.S. 455, 466, 467 (1973) ("[T]he constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which . . . may discriminate . . . ."); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172, 173 (1972) (where "impetus for the discrimination" originates with the state, there is state action) (by implication); Reitman v. Mulkey, 387 U.S. 369, 380 (1967) (significant involvement). In much the same way that the Constitution forbids culpable state activity in respect of private invidious discrimination, Title IX's statutory prohibition extends to, and only to,[32/] a recipient's provision of that level of assistance, intangible as well as tangible, amounting to a substantial cause for the well-being and continued "success" of discriminatory "outside" organizations.

32/ "One final area of thought, as far as the whys and wherefore's, as to the business organizations, fraternities and sororities:

> I think it is important to recognize that we are only talking about business and honorary fraternities and sororities where there is a significant contribution from the university. It does not automatically apply across the board to all."

121 Cong. Rec. 23341 (1975) (Sen. Bayh).

We do not understand Iron Arrow to contend that the Secretary's decision to assess such cases as this one on a case-by-case basis invalidates the implementing regulation. On the contrary, to paraphrase the Supreme Court, "Only by sifting facts and weighing circumstances can the nonobvious involvement of the [recipient of federal funds] in ["outside" discrimination] be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).[33/]

C. The district court correctly concluded, on the undisputed record before it, that the plaintiff, a male-only honor society founded by the University of Miami, receives "significant assistance" from the University

The district court found, as the parties had agreed, that there were no disputed factual issues and that the case was ripe for summary judgment. The court surveyed the record, including the testimony and exhibits adduced at the hearing on Iron Arrow's motion for a preliminary injunction[34/] and correctly determined on the basis of the undisputed facts that Iron Arrow received "significant assistance" from the University.

33/ Iron Arrow's fears (Br. 35) of discriminatory application of the regulation are without merit. In any event, as this Court has held on an earlier appeal of this case, organizations have standing to challenge action taken by institutions at the instance of the Secretary under the regulations. Abuses in the interpretation and application of the regulation in discrete instances may be promptly corrected.

34/ Cf. Arrington v. City of Fairfield, Ala., 414 F.2d 687, 692 (5th Cir. 1969).

Iron Arrow and the University of Miami are as one. The founder of University founded the Society soon after the University began operations. The intimate relationship between the two was formalized in 1950 when Iron Arrow became the only University of Miami organization holding a University charter and it remained so at the time this action was instituted.

The male-only membership policy is a function primarily of the joint "traditions" of the two.[35/] To a student the "honor" of the Iron Arrow is in membership itself, because both the Secretary's investigation and the testimony at the preliminary injunction hearing demonstrate that "as the most prestigious organization on campus [Iron Arrow membership] is particularly advantageous in [obtaining] employment opportunities" (R. Vol. I, 77).

Despite Iron Arrow's efforts to eliminate direct tangible assistance from the University, the benefits which accrue to the Society transcend such considerations. Because of the nature and extent of the University's earlier support and endorsement of the Society, even the more limited forms of assistance presently provided are of substantial benefit to the Society in demonstrating the University's continuing sponsorship. By virtue of this "permission" and "sponsorship" the Society is able to solicit substantial donations, particularly at Homecoming, to

35/ The Constitution and Bylaws were amended in 1971, inter alia, to delete the reference to the male-only policy (Pl. Exh. 1).

keep the Society funded and thus enabling it to continue its good work in behalf of and substantial contributions to the continued vitality of the University and the University community, a fact disputed by none. As we argue at page 27, supra, tangible assistance in the form of direct financial assistance or support provided by University staff is not the only type of assistance which might trigger the application of the regulation. We urge this Court to reject, as did the district court, the narrow interpretation of "significant assistance" advanced by Iron Arrow since acceptance of that interpretation (1) constitutes an unwarranted infringement upon the Secretary's express statutory mandate to "effectuate the purpose" of the enabling statute,[36/] and (2) disserves the broad remedial purpose Congress sought to achieve by enacting Title IX.[37/]

Iron Arrow has misapprehended (Br. 34) the district court's solicitude for its predicament. Although Iron Arrow's perception of itself as an "independent, outside" organization is understandable, nonetheless, this view must yield to the objective realities evidenced by this record in the context of Congress' efforts to eliminate barriers to women in their pursuit of equal educational opportunities and resultant career enhancement. The reality is that the Society is effectively an

36/ See pages 16-17, supra.

37/ Ibid.

adjunct of the University, a unique honor that became and remains so through the invaluable assistance, in the nature of "permission" and "sponsorship" accorded by the University. In short, Iron Arrow's contention that it might "move all activities off campus yet retain identical prestige in the community" (Pl. Exh. 3 at 3), is belied by the institution of this lawsuit. Whatever route the Society chooses--admission of women to membership or reconstitution of itself as an off-campus organization and continuation of its activities, including "tapping," in such form--the district court was correct in concluding that the combination of continuing intangible and earlier tangible support provided by the University as demonstrated by this record amounts to "significant assistance."

CONCLUSION

For the foregoing reasons, the Order of the District Court should be affirmed.

Respecfully submitted,

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APPENDIX

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Re: Iron Arrow Honor Society, et al.
v. Hufstedler, Case No. 80-5663

Dear Colleagues:

Enclosed herewith is a copy of a certified extract of the Minutes of a meeting of the University's Board of Trustees held on September 10, 1980. Since the final judgment of the trial court in the above-referenced matter granted no relief as against the University, the University does not find it necessary to become a party to the appeal. We therefore have not filed a copy of the extract of Minutes with either the trial or appellate court. We are transmitting the extract to you for such use as may be appropriate.

Sincerely,

Robert B. Cole
For the Firm

RBC:ava
Enclosure

C RTIFIED EXTRACT OF MINUTES

I, the undersigned, Secretary of the UNIVERSITY OF MIAMI, a non-profit corporation duly organized and existing under the laws of the State of Florida, hereby CERTIFY that the folowing is a true copy of a certain resolution adopted by the Board of Trustees of the University of Miami of the said corporation in accordance with the Bylaws at, and recorded in the minutes of a meeting of the said Board of Trustees duly held on September 10, 1980 and not subsequently rescinded or modified:

ACTION: The University of Miami Board of Trustees, in considering the following July 15, 1980 Executive Committee recommendation, resolved this day, to defer action which would accept or reject the recommendation:

"Following considerable discussion of a proposed resolution recommended by President Stanford and upon a motion duly made, seconded and passed, the Committee approved the following statement of the University of Miami's position with respect to admitting Iron Arrow and referred this action to the Board of Trustees with a recommendation for approval, with the condition that no implementation of the resolution be taken until the Board of Trustees meet on September 10, 1980 and accepts or rejects the resolution:

STATEMENT OF UNIVERSITY OF MIAMI'S POSITION WITH RESPECT TO ADMITTING IRON ARROW

POSITION:

If and when the University of Miami is satisfied that its recognition of Iron Arrow will not be in violation of any law or of valid HEW regulations, the University is willing to permit Iron Arrow on campus as a 'registered student organization'. In that event, Iron Arrow must meet all the requirements of registered student organizations at the University as they exist from time to time."

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Corporation this 19th day of September, 1980, at Coral Gables, Dade County, Florida.

Charles M. Capps
Secretary of the University

(Corporate Seal)

CERTIFICATE OF SERVICE

I hereby certify that I have served this brief by mailing two copies to all counsel, postage prepaid, addressed as follows:

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This 19th day of December, 1980.