No. 81-835 filed 1/4/82

In the Supreme Court of the United States

OCTOBER TERM, 1981

IRON ARROW HONOR SOCIETY, PETITIONER

v.

T.H. BELL, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

WALTER W. BARNETT
IRVING GORNSTEIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the courts below correctly concluded that Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, authorized the Department of Health, Education, and Welfare to prohibit a university that receives federal financial assistance for its education programs and activities from providing "significant assistance," other than direct funding, to an honor society that discriminates on the basis of sex.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-835

IRON ARROW HONOR SOCIETY, PETITIONER

v.

T.H. BELL, SECRETARY OF EDUCATION, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 652 F. 2d 445. The opinion of the district court (Pet. App. 11-38) is reported at 499 F. Supp. 496.

[1]The court of appeals miscaptioned this case and petitioner has repeated this error. When petitioner filed its complaint, the Department of Health, Education, and Welfare (HEW) was responsible for enforcing Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. 1681 *et seq.*, and the regulations promulgated under that title. That responsibility was transferred to the Department of Education (ED) by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. ED then recodified HEW's regulations at 34 C.F.R. 106 *et seq.* without significant change. Petitioner challenges the enforcement of one of these regulations. Accordingly, Secretary Bell, rather than Secretary Schweiker, is the proper respondent.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1981. The petition for a writ of certiorari was filed on October 31, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATEMENT

1. Petitioner Iron Arrow is an honor organization for men (Pet. App. 3). It was founded in 1926 by the University of Miami's first President for the purpose of honoring the University's most distinguished men (*id.* at 7-8). Because of its long association with the University, Iron Arrow has been regarded as the most prestigious organization on campus and its members have enjoyed a particular advantage in securing jobs (*id.* at 37, 43).

In the past decade, there has been increasing opposition to Iron Arrow's male-only membership policy (Pet. App. 16). However, "the organization has steadfastly refused to admit women" (*id.* at 16-17).

In 1973, the Department of Health, Education, and Welfare (HEW) received a complaint concerning Iron Arrow's exclusive membership policy (Pet. App. 18). Upon finding that the University of Miami received federal financial assistance in the form of student aid, HEW launched an investigation to determine whether the University had engaged in discrimination in violation of Title IX of the Education Amendments of 1972 (*id.* at 19). That statute provides, with certain exceptions, that "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." 20 U.S.C. 1681(a).

Because HEW had not yet formulated regulations to enforce Title IX, it decided to suspend its investigation of the University until it had completed that process (Pet.

App. 19-20). The regulations finally became effective in 1975. One of the regulations directly addressed the obligation of a university to avoid assisting honor societies and other campus organizations that discriminate on the basis of sex. It provided that "a recipient shall not * * * [a]id or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex." 45 C.F.R. 86.31(b)(7) (1975), now codified at 34 C.F.R. 106.31(b)(7).

In 1976, HEW completed its investigation and informed the University of its conclusion that the University had violated Section 86.31(b)(7) by providing "significant assistance" to Iron Arrow (Pet. App. 20). HEW explained that the prohibited assistance took two forms (*id.* at 41):

> First, Iron Arrow benefits from recognition and identification with the University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial service, alumni mailings and the use of meeting rooms.

HEW instructed the University that in order to fulfill its obligation under Title IX, it "must either require the Iron Arrow Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society" (*id.* at 44).

The University immediately informed HEW that it intended to comply with Title IX (Pet. App. 21; PX2). However, it asked HEW to consider a memorandum prepared by Iron Arrow which questioned whether the University was actually providing significant assistance to Iron Arrow (*ibid.*). After HEW responded that the memorandum did not affect its original conclusion, the University told Iron Arrow that it could no longer perform its functions on campus (Pet. App. 21-22).

2. Iron Arrow then filed suit against the University and the Secretary of HEW (Pet. App. 17, 22). It sought to enjoin the Secretary from interpreting HEW regulations in a way that would deter the University from permitting Iron Arrow to conduct its activities on campus (*id.* at 17). On cross-motions for summary judgment, the district court denied Iron Arrow's request for relief (Pet. App. 11-38).

The court held that HEW could prohibit a university receiving "general grants of federal support" (Pet. App. 28 n.1) from providing significant assistance to an honor society that discriminates on the basis of sex, even though the honor society does not itself receive federal funding (*id.* at 26-30). The court explained that such a regulation is "useful and necessary to the effectuation of [Title IX]" (*id.* at 29).

The court also sustained HEW's conclusion that the University of Miami had provided "significant assistance" to Iron Arrow within the meaning of the regulation. The court relied upon "a long list of tangible and intangible support" including (1) the use of campus property outside the student union for Iron Arrow activities; (2) a monument on that property describing Iron Arrow as the University's highest honor; (3) other plaques and monuments throughout the campus recognizing Iron Arrow; (4) special recognition of Iron Arrow at Homecoming; (5) a University charter; (6) formal sponsorship of Iron Arrow by every University president; (7) the provision of secretarial services, mail boxes, mailing labels and special meeting rooms; (8) a faculty screening committee to propose new members; and (9) recognition in the University catalogue as the University's highest honor for men (*id.* at 34-35).

3. The court of appeals affirmed. The court concluded that HEW's regulation clearly effectuates the provisions of Title IX and is consistent with the achievement of the objectives of that statute (Pet. App. 6).

The court of appeals also held that HEW had properly concluded that the University had provided "significant assistance" to Iron Arrow (Pet. App. 9-10). The court acknowledged that certain physical assistance extended by the University (*e.g.*, mailing services and secretarial support) had been terminated (*ibid.*); but it emphasized that the University had "created the honorary society as an activity of great importance in the building of student morale and leadership" and that without its continued support "Iron Arrow could not exist" (*id.* at 10). Iron Arrow's argument that the University had not provided it with significant assistance, the court concluded "simply falls of its own weight" (*ibid.*).

ARGUMENT

The decision of the court of appeals is narrow; it conflicts with no decision of this Court or of any other court of appeals; and it represents a reasonable construction of the statute as applied to the unique facts of this case. Further review is, accordingly, unwarranted.

1. Section 901(a) of the Education Amendments of 1972, 20 U.S.C. 1681(a), prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance." The district court assumed (Pet. App. 28 n.1) that the University was the recipient of "general grants of federal support" and petitioner makes no issue of the breadth of that federal financial support except to assert that petitioner itself receives no direct funding from either the federal government or the University (Pet. 13-14, 30).[2]

---

[2]The district court noted that it was required to assure itself that a federally assisted education program or programs were involved because of the Fifth Circuit's holding in *Dougherty County School System* v. *Harris*, 622 F. 2d 735 (1980), petition for cert. pending, No. 80-1023 (filed Dec. 22, 1980), that Title IX does not prohibit discrimination in education programs or activities that do not receive federal financial assistance.

Because petitioner also appears not to challenge the view that regulations under Title IX may, in some instances, properly reach "significant assistance from a federal [aid] recipient" to a university organization (Pet. 30), the case is essentially limited to the question whether 34 C.F.R. 106.31(b)(7) properly prohibits a university comprising federally assisted education programs and activities from throwing its weight behind the discriminatory practices of a university-chartered organization by providing "significant assistance," other than direct funding or material support, to that organization.

2. The courts below did not err in concluding that a regulation imposing such a prohibition is within the express grant of regulation-promulgating authority in 20 U.S.C. 1682, that it is reasonably related to the purposes of Title IX, and that it is therefore valid under settled legal principles. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 280-281 (1969).

The premise of HEW's "significant assistance" regulation is that there may be instances in which even non-financial assistance given to an organization by a university may be so significant that the activities of the organization are fairly imputable to the university itself. The regulation has served to prevent schools from attempting to circumvent the statutory ban on the direct operation of educational activities such as honor societies that strongly affect future employment opportunities and that discriminate on the basis of sex.[3] Had HEW merely prohibited a university from directly employing its federal assistance to operate its own

[3]This Court has previously upheld efforts by agencies to counteract attempts to evade the purposes of a statute. *Mourning* v. *Family Publications Service, Inc., supra*, 411 U.S. at 370-371; *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1945).

exclusive honor societies, the university would have been free to charter an independent honor society, involve the university's faculty in the society's activities, and promote membership as one of the university's highest honors. The university would thereby be enabled to accomplish indirectly, what it could not do directly—extend the benefits of its federal funding to an organization that offers valuable career assistance to the members of one sex.[4]

These are the circumstances that both courts below found in this case. They found that the identities of petitioner and the University were so closely intertwined by tradition, practice, and reputation—in such forms as memorial plaques and mounds, statements in the University catalogue according special recognition to petitioner, and student-faculty "screening committees" to select petitioner's members—that petitioner virtually had no existence separate from the University (Pet. App. 7-10, 32-36, 37). A finding based on such special facts does not, as petitioner suggests (Pet. 13), "threaten[] the existence of all single-gender collegiate honor societies."

[4]The fact that membership in Iron Arrow could significantly affect a student's employment prospects was critical to this case; for in amending Title IX in 1974, Congress clearly expressed an intent that the statute reach organizations serving such functions, as opposed to predominantly social organizations. Thus the 1974 amendment provided an exemption for the membership practices of social fraternities and sororities from the proscriptions of Section 901 (see 20 U.S.C. 1681(a)(6)), but when Senator Bayh introduced the amendment, he emphasized (120 Cong. Rec. 39992 (1974)):

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

As the district court noted (Pet. App. 28; footnote omitted), the 1974 amendment is not inconsistent with "a Congressional intent to reach sexually discriminatory honor societies in close association" with federally assisted education programs and activities.

3. There is no merit to petitioner's suggestion (Pet. 26) that the decisions of the courts below conflict with decisions of other courts of appeals under Title IX. The decisions petitioner cites from the First, Eighth, and Ninth Circuits (Pet. 26) concern the scope of employment coverage in Section 901. With respect to the separate question of the limitation of coverage to any federally assisted "education program or activity," those decisions are consistent with the former Fifth Circuit's decision in *Dougherty County School System* v. *Harris*, 622 F. 2d 735 (1980), petition for cert. pending, No. 80-1023 (filed Dec. 22, 1980)—a case the district court expressly noted (Pet. App. 28 n.1) as controlling. We believe that, on the record here, the decisions of the courts below are entirely consistent with *Dougherty County* and with *Board of Public Instruction of Taylor County* v. *Finch*, 414 F. 2d 1068 (5th Cir. 1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

WALTER W. BARNETT
IRVING GORNSTEIN
Attorneys

JANUARY 1982

DOJ-1982-01