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No. 80-986

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION, PETITIONER

v.

TERREL H. BELL, ET AL.

THE TRUMBULL BOARD OF EDUCATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether Section 901 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, prohibits sex discrimination in employment in the federally assisted education programs of school districts and educational institutions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20A-48A-2) is reported at 629 F.2d 773. The opinions of the district court in *North Haven* (Pet. App. 51A-75A) and *Trumbull* (Pet. App. 76A-93A) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. A petition for rehearing was denied on October 24, 1980 (Pet. App. 49A-50A). The petition for a writ of certiorari was filed on December 16, 1980, and was granted on February 23, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, are set forth at pages 1A-8A of the appendix to the petition.

2. Two pertinent regulations of the Department of Education, 34 C.F.R. 106.51 and 106.57, are set forth, respectively, at pages 8A-11A and 15A-17A of the appendix to the petition. A third pertinent regulation, 34 C.F.R. 106.11, provides:

> Except as provided in this subpart [Subpart B-Coverage], this Part [106] applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.[1]

STATEMENT

Petitioners are two Connecticut school districts which brought suits to challenge the authority of the Department of Health, Education, and Welfare (HEW)[2] to issue regulations prohibiting sex discrimination in the employment practices of educational institutions operating federally assisted education programs and activities (Pet. App. 22A-25A).

1.a. The North Haven Board of Education (North Haven) receives federal financial assistance in support of its education programs and activities and, since the 1975-1976 school year, has used a substantial portion of that assistance to pay salaries of its employees (Pet. App. 23A). As a recipient of federal financial assistance, North Haven is subject to the provisions of Title IX and to authorized implementing regulations promulgated by the federal departments and agencies through which it receives such assistance (*ibid.*).

Section 901 of Title IX, 20 U.S.C. 1681, provides in pertinent part that, with certain enumerated exceptions, "[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." Section 902 of Title IX, 20 U.S.C. 1682, provides that each federal department or agency empowered to grant federal financial assistance by way of grant, loan, or contract is authorized to promulgate regulations to effectuate Section 901. It also provides that compliance with "any requirement" thereby adopted may be enforced by termination of financial assistance or the refusal to grant it in the first instance. Such action can be taken, however, only after a finding of noncompliance is made on the record after opportunity for a hearing, and the termination or refusal to grant aid must, *inter alia*, be "limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found." *Ibid.*

To implement Section 901, HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federally assisted education programs and activities. 45 C.F.R. 86.11 and 86.51 *et seq.* (1977) (now codified at 34 C.F.R. 106.11 and 106.51 *et seq.*).

On January 10, 1978, HEW notified North Haven that it had received a complaint alleging that the school district was in violation of Title IX in its hiring policies and in the terms and conditions of employment and re-

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[1] At the time these suits were brought, these regulations appeared at 45 C.F.R. 86.11, 86.51 and 86.57 (1977), respectively. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30958, 30962-30964 (1980) (see note 2, *infra*). In both codifications, the employment practices regulations (45 C.F.R. 86.51 *et seq.* (1977) and 34 C.F.R. 106.51 *et seq.*) are designated as "Subpart E" of the Title IX regulations, and they are sometimes referred to by that designation.

[2] The functions of HEW 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. In the court of appeals, the Department of Education and the Secretary of Education were substituted as appellants in place of the Department and the Secretary of HEW. Because all of the relevant actions in this case were taken by HEW prior to the reorganization, it will be necessary to refer to that agency as well as the Department of Education in this brief.

questing that North Haven provide information concerning its policies on hiring, leaves of absence, seniority, and tenure (Pet. App. 52A-53A; A. 9-11).[3] North Haven refused to supply the requested information, asserting, among other things, that HEW had no authority to regulate employment practices under Title IX (A. 5, 14). HEW then notified North Haven that, because of its refusal to provide information, the matter had been referred to the appropriate office for possible enforcement proceedings (Pet. App. 53A-54A; A. 16).[4]

North Haven thereupon instituted the present action against the Secretary of HEW and certain regional HEW officials seeking a declaratory judgment that HEW's Title IX employment practices regulations exceeded the authority conferred on the department by the statute (A. 2-8). It also sought to enjoin HEW from attempting to terminate any federal financial assistance to the school district on the grounds of alleged noncompliance with the employment regulations (A. 8). The parties filed cross-motions for summary judgment, and on April 24, 1979, the court granted North Haven's motion. Adopting the reasoning of several district courts and of the court of appeals in *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979), the court held that the prohibitions of Title IX do not apply to employment practices (Pet. App. 51A-72A).

Summarizing the conclusions and quoting from the opinion of the district court in *Romeo Community Schools* v. *HEW*, 438 F.Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), the court concluded (Pet. App. 64A) that the language

[3] "A." refers to the Appendix accompanying respondents' briefs, which is filed in lieu of a joint appendix in accordance with this Court's order of June 30, 1981.

[4] Financial assistance cannot be terminated, however, without affording the opportunity for a hearing before an Administrative Law Judge, who makes a recommended decision that is subject to several levels of review, including, ultimately, judicial review. See 34 C.F.R. 106.71, 34 C.F.R. 100.6-100.11, and 34 C.F.R. Part 101.

of Section 901 of Title IX prohibits sex discrimination only against students and that "[t]eachers * * * are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face." The court recognized that while Title IX is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (prohibiting racial discrimination in federally assisted programs), it included no counterpart to Section 604 of Title VI, which excludes employment generally from the coverage of that title. The court reasoned, however, that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package rather than because Congress intended that employment be covered under Section 901 (Pet. App. 61A-62A).

The court found further support for its reading of Section 901 in its conclusion that Congress could not have intended to provide for termination of federal financial assistance to a school district where there was discrimination against teachers but not direct discrimination against students (Pet. App. 65A-66A). Finally, it concluded that the Section 902 provision limiting the effect of termination of assistance to "the particular program, or part thereof, in which * * * noncompliance has been * * * found" is inconsistent with agency regulation of employment practices, because such practices are not "program-specific" (Pet. App. 66A-67A).

The court's judgment declared the Title IX employment practices regulations invalid in their entirety and enjoined HEW and its employees from terminating or attempting to terminate federal financial assistance "for any alleged noncompliance with said regulations" (Pet. App. 71A-72A).

b. Like North Haven, the Trumbull Board of Education (Trumbull) receives federal financial assistance in support of its education programs and activities and is, therefore, subject to the provisions of Title IX and its implementing regulations (Pet. App. 24A; A. 29-30). HEW

investigated a complaint, filed under Title IX by respondent Linda Potz, a former guidance counselor in the Trumbull school district, alleging that Trumbull had discriminated against her on the basis of sex in job assignments, working conditions, and the non-renewal of her contract (Pet. App. 24A). On September 20, 1978, HEW notified Trumbull that it had concluded that the school district was in violation of Title IX and requested that corrective action be taken (Pet. App. 25A; A. 33-42).[5]

Trumbull declined to take the corrective action requested by HEW and instead, on October 18, 1978, filed this action seeking a declaration that HEW's Title IX employment regulations are invalid and an injunction forbidding HEW from attempting to enforce those regulations against the school district (Pet. App. 25A). The district court granted Trumbull's motion for summary judgment on May 24, 1979, for the reasons set forth in its decision in *North Haven* (Pet. App. 76A).[6]

[5] Specifically, HEW found that Potz was required to perform tasks such as typing and running errands, which were not part of her duties as a guidance counselor and which male counselors were not required to perform, that her office was moved to a smaller, poorly heated and less comfortable space, in the gymnasium, away from other counselors, and that she was asked to change a report showing that she had seen some 150 students in a given week because the number was much higher than the number seen by her male colleagues. Finally, HEW found that Potz's sex was the motivating factor in the school district's decision not to renew her contract (Pet. App. 24A-25A; A. 37-42).

[6] Because the court granted summary judgment before respondent Potz had an opportunity to respond to Trumbull's motion, Potz filed a motion to set aside the judgment and a cross-motion for summary judgment (Pet. App. 79A; A. 50-51). On September 13, 1979, the district court denied both of Potz's motions and granted Trumbull's motion to conform the final judgment to the relief portion of the judgment granted in *North Haven* (page 5, *supra*).

The court had also denied an earlier motion by Potz to compel Trumbull to answer interrogatories regarding the amounts and types of federal financial assistance its school district received (A. 49). Trumbull had objected to the interrogatories on the ground that the decision in *North Haven* declaring the employment

2. On respondents' appeals, the court of appeals consolidated the cases and reversed the judgments of the district court (Pet. App. 20A-48A-2). The court concluded that the legislative history and the purpose of the statute supported HEW's interpretation of its language as prohibiting employment discrimination (Pet. App. 32A). The court noted that the remarks of the sponsor of the portion of the bill that became what is now known as Title IX indicated an intention to prohibit employment discrimination through Section 901 of Title IX, as well as through amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, 29 U.S.C. 206(d) (Pet. App. 33A-41A). The court also relied upon conference committee action deleting a provision of the House bill similar to that contained in Section 604 of Title VI of the Civil Rights Act of 1964, which would have excluded most employment practices from the operation of the statute; it disagreed with the view of other courts of appeals that the deletion was made simply to avoid an internal inconsistency in the bill (Pet. App. 42A-43A).

The court found it "not without significance" (Pet. App. 43A) that Congress undertook a statutorily mandated review of the regulations and failed "to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides" (Pet. App. 46A; emphasis in original). The court further concluded that the fact that there is some overlap of jurisdiction in employment discrimination means only that Congress intended both to give HEW the termination remedy and to provide additional remedies for individual employees under Title VII and the Equal Pay Act (Pet. App. 46A-47A).

The court of appeals rejected the argument that Congress could not have intended to penalize students because

practices regulations invalid was dispositive of the case and that the questions regarding federal financial assistance were "irrelevant" (A. 43-44).

of discrimination against faculty members, observing (Pet. App. 47A) that the termination sanction would have this broad reach even if employment practices were not covered, since it can be used to terminate funds for a program benefiting many students even where the discrimination affects only a few. Given the "grave congressional concern" over sex discrimination in educational employment, the court concluded (*ibid.*) that Congress intended HEW to have the same authority to combat that kind of discrimination as it has to combat sex discrimination involving students.

Finally, the court concluded that Section 902, limiting the effect of HEW's power to terminate funds to "the particular program or part thereof, in which * * * noncompliance [with the regulations] has been * * * found," is not a limitation on the power to prohibit employment discrimination by broad regulations (Pet. App. 48A-1 to 48A-2).[7]

SUMMARY OF ARGUMENT

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides in pertinent part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance * * *." This broad language, on its face, encompasses employment discrimination, as well as discrimination against students or recipients of research grants. Discriminatory hiring practices maintained by a university or school system, for example, may exclude job applicants from "participation" in education programs that receive federal financial assistance; and

[7] Because of its conclusion that the statute covers employment, the court did not reach the question whether, absent such independent employment coverage, HEW would have authority to issue regulations prohibiting sex discrimination against employees to the extent that such discrimination also constitutes discrimination against students (Pet. App. 48A-2).

employees in federally assisted education programs who are discriminated against in pay or working conditions are "subjected to discrimination under" the programs in which they work.

Congress created certain exceptions to that broad language, but the exemption that petitioners read into the statute—an exemption for employment practices except where a primary objective of the federal financial assistance is to provide employment—was not one of them. Where Congress has specified exceptions to a broad basic provision, it is inappropriate to read other, unspecified exceptions into the statute.

2. The legislative history of Title IX confirms a reading of the statute that encompasses employment discrimination without the "employment objective" limitation. Sections 901 and 902 of Title IX are generally patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, aimed at discrimination on the basis of race, color, or national origin in federally assisted programs. In that statute, Congress employed language like that in Section 901 of Title IX, but it added a provision (Section 604, 42 U.S.C. 2000d-3) excluding from its coverage "employment practice[s] * * * except where a primary objective of the Federal financial assistance is to provide employment."

A provision like Section 604 was included in the House version of the bill that went to the conference committee from which the final legislation emerged. It was not included in the Senate version, an amendment sponsored by Senator Bayh. Senator Bayh's description of his amendment makes it clear that he intended to give to HEW, as an agency that granted assistance to education programs, jurisdiction over employment discrimination in any program that it assisted. While his amendment, like the House bill, also contained provisions for amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act, 29 U.S.C. 206(d), so as to extend their coverage to all educational employees, Senator Bayh carefully distinguished between the portions of his amendment that related to those two stat-

utes and the portion that prohibited discrimination on the basis of sex in education programs or activities receiving federal financial assistance. The latter portion, he stated unequivocally, would cover, *inter alia*, "employment practices for faculty and administrators" (118 Cong. Rec. 5807 (1972)). In other statements and in colloquies with Senator Pell, he reiterated the point.

Against this background, the description in the conference report of the employment coverage limitation in the House bill, followed by the simple statement that the House receded from that provision, is properly construed as a statement that the broader coverage of Senator Bayh's amendment was the final congressional choice.

Contrary to petitioners' contentions, the legislative history of Title VI does not suggest that Section 901 itself includes the employment coverage limitation described in the omitted provision. Whether Section 604 was added to Title VI to clarify the basic prohibition or to carve out an exception, it was clear that any future Congress wishing to enact a statute barring a different kind of discrimination but having essentially the same scope as Title VI could assure parallel coverage only by enacting counterparts to both the basic prohibition and the provision limiting employment coverage.

3. In the three years following the enactment of Title IX, HEW, acting pursuant to Section 902 of the statute, 20 U.S.C. 1682, engaged in notice and comment rulemaking to develop regulations effectuating Section 901 of Title IX. As required by statute, the regulations were submitted to President Ford for his signature and then transmitted to the House and Senate for review. The regulations became effective 45 days thereafter by virtue of the failure of Congress to pass a concurrent resolution of disapproval.

Although Congress provided in a subsequent statute that the failure to pass such a resolution may not be relied upon as evidence that Congress approved the regulations, the fact remains that through that review process,

the regulations were brought to the attention of Congress. That history gives special significance to the fact that Congress thereafter amended Section 901 of Title IX, but did not act upon proposals of two Senators to amend that same section so as to foreclose HEW's construction of its employment practices coverage. 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." *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979), quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-489 (1940).

4. Title IX is a "program-specific" statute in two respects. Section 901 prohibits discrimination on the basis of sex only in education programs and activities receiving federal financial assistance, and Section 902 requires that any termination of such assistance under the title be limited to the "particular program, or part thereof" in which noncompliance with the implementing regulations is found. Coverage of employment practices is as consistent with the program-specific character of the statute as coverage of student admissions. Both employment policies and admissions policies may, for example, apply broadly throughout a university or may be limited to a particular graduate school or department of that graduate school, and fund termination could be limited to the part of any federally assisted education program in which discrimination is found.

Complex questions may arise concerning the definition of education program in a particular case. Such questions are not presented here, however. In *North Haven* the complaint that HEW sought to investigate concerned leave and seniority policies applied to teachers, and the Board of Education conceded that federal funds were used to pay teachers' salaries. In *Trumbull*, the Board refused to answer interrogatories concerning the amounts

and uses of its federal financial assistance, asserting that the questions were irrelevant because the district court's decision in *North Haven*, barring the termination of assistance for *any* noncompliance with the HEW regulations, was dispositive of the case. On these records, the authority of the Department of Education under Title IX to investigate or remedy discrimination that exists only in programs not receiving federal financial assistance is not at issue.

ARGUMENT

SECTION 901 OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 PROHIBITS SEX DISCRIMINATION IN EMPLOYMENT IN THE FEDERALLY ASSISTED EDUCATION PROGRAMS OF SCHOOL DISTRICTS AND EDUCATIONAL INSTITUTIONS

The two basic objectives of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, are to assure that federal funds do not support education programs and activities marked by discrimination on the basis of sex, and to provide individual citizens effective protection against such discriminatory practices. *Cannon* v. *University of Chicago*, 441 U.S. 677, 704 (1979). Congress sought to address comprehensively the "persistent patterns of discrimination against women in the academic world" (118 Cong. Rec. 5804 (1972) (remarks of Senator Bayh)) and, in particular, to eliminate discrimination against "those women who choose to make education their life work." *Id.* at 5804-5805.

Petitioners assert that Congress addressed this problem of discrimination in educational institutions *solely* through an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000-e *et seq.* (hereinafter "Title VII"), and an extension of the Equal Pay Act, 29 U.S.C. 206(d), to those employed in an executive, administrative, or professional capacity. They accordingly contend (Pet. Br. 22) that the prohibition against discrimination on the basis of sex embodied in Section 901 of Title

IX, as finally enacted, reaches only "beneficiaries of federal financial assistance," narrowly defined so as to exclude "employees per se." Under this reading, school districts and universities are free to discriminate, on the basis of sex, against persons employed in their federally assisted education programs and activities, so long as the federal assistance was not specifically intended to benefit those employees. Thus an employee who was the direct recipient of a federal research grant or contract would be protected by Section 901 against discrimination on the basis of sex, but the faculty and staff of a federally assisted education program or activity would not be within the statute's coverage even if their salaries are paid from federal funds, unless they were direct recipients of such grants or contracts.

While that reading has been adopted by four appellate courts,[8] we believe that the court of appeals in this case, which carefully considered the views of the panels in those circuits, has correctly determined (Pet. App. 46A-48A-1) that Congress intended to cover employment practices through Section 901. Congress thereby supplemented the employment discrimination remedies of Title VII and the Equal Pay Act with a federal administrative remedy, including fund termination, where employment discrimi-

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[8] *Seattle University* v. *HEW*, 621 F.2d 992 (9th Cir. 1980), cert. granted, No. 80-493 (Dec. 1, 1980); *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); *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979).

The Fifth Circuit, in *Dougherty County School System* v. *Harris*, 622 F.2d 735 (1980), petition for cert. pending, No. 80-1023, held that the employment practices regulations exceeded the Secretary of HEW's authority under Title IX, but it rejected the decisions of those four courts as resting on "a rationale so broad that they would inhibit a narrower, yet to us apparently valid, exercise of the Secretary's authority" with respect to employment discrimination in federally assisted education programs. 622 F.2d at 737. See note 36, *infra*.

nation on the basis of sex in federally assisted education programs is concerned. This reading of the statute is well grounded in the broad language of Section 901 and is confirmed by the legislative history of Title IX.

A. The Statutory Language Expressly Applies to All Victims of Sex Discrimination in Education Programs and Activities Receiving Federal Financial Assistance

Section 901(a) of Title IX, 20 U.S.C. 1681(a), provides, in pertinent part:

> 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 words "[n]o person" do not alone suggest any limitation. Facially included within this unqualified phrase are students, teachers, staff personnel and, presumably, other employees. The four courts of appeals that have concluded otherwise have construed the language as applying only to direct beneficiaries of particular grants, loans, or contracts, taking comfort in the fact that the quoted language does not expressly refer to employees.[9]

It is, however, not just those "denied the benefits" of an educational program who are protected under the Act. The Act also protects those "excluded from participation." No undue strain is required to apply this latter language to discriminatory hiring practices of school systems and educational institutions, since such practices may exclude applicants from participation in the education programs that benefit from federal financial assistance. Similarly, those "subjected to discrimination under" the education programs or activities in which they work appear to fit within the statutory language, whether that discrimination pertains to pay, promotions, or other conditions of employment.

No language in Title IX states either expressly or by implication that employees are to be excluded from the coverage of the nondiscrimination provision. Indeed, while Title IX is generally modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (see *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-696 (1979)), it conspicuously omits any provision analogous to Section 604 of Title VI, 42 U.S.C. 2000d-3, which expressly excludes coverage of employment practices "except where a primary objective of the Federal financial assistance is to provide employment" (see discussion pages 16-33, *infra*). There are nine specific exemptions from the broad coverage of Section 901. Two of these (20 U.S.C. 1681(a)(3), exempting "[e]ducational institutions of religious organizations with contrary religious tenets," and 20 U.S.C. 1681(a)(4), exempting "[e]ducational institutions training individuals for military services or merchant marine"), exempt an entire class of institutions, presumably including their employment practices; but none of the exemptions otherwise suggests that employees working in federally assisted education programs are to be excluded from the protections of the statute. Where Congress has taken pains specifically to exempt certain areas from the basic coverage of a statute, courts should be especially hesitant to read unexpressed exemptions into the statute.

In sum, although it may be prudent—or even, as the court below concluded (Pet. App. 30A), necessary—to look beyond the statutory language at issue here, that language is entirely consistent with the view that the statute prohibits sex discrimination in employment in the federally assisted education programs of school districts and educational institutions, regardless of whether that

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[9] See, *e.g.*, *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 426; *Junior College District of St. Louis* v. *Califano*, *supra*, 597 F.2d at 121. The Fifth Circuit, by contrast, found the language broad enough to reach "at least some employment practices." *Dougherty County School System* v. *Harris*, *supra*, 622 F.2d at 737-738.

employment is a primary objective of the federal assistance.

B. The Legislative History of Title IX Shows that Congress Intended, through Section 901, to Prohibit Sex Discrimination in Employment in Federally Assisted Education Programs

Petitioners and the Equal Employment Advisory Council, as amicus curiae, strongly rely on the argument (Pet. Br. 26-46; EEAC Br. 8-11) that the exclusion of employment coverage from Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* (hereinafter "Title VI"), was carried over into Title IX, notwithstanding the deletion from the final Title IX bill of what we, like the EEAC (EEAC Br. 7), shall refer to as "the Section 604 language." (See pages 33-34, note 24, *infra*, for the text of Sections 601 and 604 of Title VI, 42 U.S.C. 2000d and 2000d-3, the basic discrimination provision and the employment coverage limitation respectively.)

We agree with petitioners and the EEAC (1) that Title VI, which prohibits discrimination on the basis of race, color, or national origin in federally assisted programs, does not generally apply to employment practices "except where a primary objective of the Federal financial assistance is to provide employment";[10] (2) that the House versions of Title IX incorporated this limitation; and (3) that the statute as finally enacted was generally patterned on Title VI. We disagree with them, however, that these considerations warrant the conclusion that Section 901, as enacted, incorporates the employment coverage limitation. As we show in our discussion of the pertinent legislative history of Title VI (pages 33-36, *infra*), any Congress that thereafter desired to enact an

[10] Even Title VI, however, covers discrimination against members of school faculties where that discrimination affects students. See *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 881-886 (5th Cir. 1966), adopted en banc per curiam, 380 F.2d 385, cert. denied, 389 U.S. 840 (1967); 34 C.F.R. 100.3(c)(3).

antidiscrimination provision having the same scope as Title VI with respect to employment would be able to assure parallel coverage only by enacting counterparts to *both* Section 601 and Section 604. Moreover, the legislative history of Title IX itself indicates that the House was in no way insistent on maintaining the employment limitation. There was, accordingly, no obstacle to dropping it in conference, without elaborate explanation, in favor of the Senate version that contained no such limitation and that was described by its sponsor as encompassing such "aspects" of education programs as "faculty employment." 118 Cong. Rec. 5803 (1972) (remarks of Sen. Bayh).

1. *Origins of Title IX in the House of Representatives*

Title IX as finally enacted was part of a Senate bill, S. 659, 92d Cong., 2d Sess. (1972), added through an amendment sponsored by Senator Bayh (Amendment No. 874). 118 Cong. Rec. 5802, 5815 (1972). (See discussion, pages 21-28, *infra.*)

The first movement toward what became Title IX, however, came in 1970, when a special House subcommittee on education chaired by Representative Edith Green conducted hearings on discrimination against women in the field of education. *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) (hereinafter "*1970 Hearings*"). The bill up for consideration during these hearings, Section 805 of H.R. 16098, 91st Cong., 2d Sess. (1970), would have, *inter alia*, (1) amended Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, so as to extend its prohibitions to discrimination on the ground of sex, (2) amended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* so as to make it applicable to public school employees and educational employees generally and (3) amended Section 13(a) of the Fair Labor Standards Act, 29 U.S.C.

213(a), so as to make the Equal Pay Act (29 U.S.C. 206(d)) applicable to executive, administrative, and professional employees. *1970 Hearings* (Pt. 1) at 1, 8-9.

In the hearings on this bill, which never emerged from the House (see *Cannon* v. *University of Chicago, supra,* 441 U.S. at 695 n.16), discrimination against women employed in, or seeking employment in, the field of education was a prominent focus of much of the testimony. See, *e.g., 1970 Hearings* (Pt. 1) at 19, 128, 336; *1970 Hearings* (Pt. 2) at 657, 739, 742, 763-789. Because, as noted above, Title VI did not extend to employment practices except where employment was an objective of the federal financial assistance in question, the bill's fund termination remedy was of quite limited usefulness as a remedy for employment discrimination.

This was true also of H.R. 7248, 92d Cong., 1st Sess. (1971), introduced in the 92d Congress by Representative Green, among others, which contained, as part of its Title X, a separate prohibition against sex discrimination in federally assisted education programs and activities (Section 1001), together with a provision (Section 1004), virtually identical to the limitation of employment coverage in Section 604 of Title VI. 117 Cong. Rec. 9829 (1971); H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 108 (1971).[11]

[11] Section 1004 of Title X of H.R. 7248 provided:

> Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

As Representative O'Hara later explained in the hearings on the regulations drawn up by HEW to implement Title IX, he and others decided to draft a separate title rather than amend Title VI because of their fears that other, undesirable changes might be made to Title VI if it were opened up to amendment. *Sex Discrimination Regulations: Hearings before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., 1st Sess. 409 (1975). He also explained (*id.* at 408-409), by reference to minutes of the committee that drafted the bill (*Minutes of the House Comm. on Education and Labor,* 92d Cong., 1st Sess. 9 (Sept. 30, 1971)), that H.R. 7248 was basically a mark-up of Title VI. Although he termed the inclusion of Section 1004 a "drafting error" (because it made no sense thus to limit employment coverage in a bill containing provisions that amended Title VII and the Equal Pay Act), it is evident that if the committee's intent was to retain the employment practices limitation on the fund termination remedy, its error was merely its failure to revise the section slightly so as to restrict its application to Section 1001, the basic discrimination prohibition governing federally assisted education programs and activities.

None of those participating in the debate on H.R. 7248 in this session of Congress commented on Section 1004. Most of the opposition to the bill focused on constraints on undergraduate admissions (117 Cong. Rec. 39248-39261 (1971)) and, in particular, on an amendment proposed by Representative Erlenborn which, he explained, "would allow the effects of nondiscrimination in this title to apply to faculty, to employees, and to admission practices in the graduate schools * * * [but] would not apply the provision against sex discrimination in the case of undergraduate admissions" (*id.* at 39260). While this reference, and references by other representatives to sex discrimination in faculty employment (see, *e.g., id.* at 39252 (remarks of Rep. Peyser, quoting from letter of Dartmouth president); *id.* at 39253 (remarks of Rep. Sullivan)) were probably directed to the provisions of the bill amending Title VII and the Equal Pay Act,[12] they suggest a general readiness to enact remedies for discrimination on the basis of sex in employment. This

[12] We note, however, that Representative Smith, speaking in support of the Erlenborn amendment, quoted Section 1001 of Title X, the general prohibition against sex discrimination in federally assisted education programs and activities, described it as "the effective provision of Title X," and then stated that, as he understood the Erlenborn amendment, it would "exempt out of this title all undergraduate schools and then leave the prohibition against sex discrimination to apply to graduate education and faculty employment and salaries." 117 Cong. Rec. 39255 (1971).

would explain why the House conferees would feel free, in the 1972 conference with the Senate on S. 659, to forgo any insistence on the employment coverage limitation.[13]

Although H.R. 7248 was passed by the House, and the Senate had passed S. 659, its own version of the higher education bill, no legislation was agreed on by both houses in that session of Congress.[14] As we shall explain, an

[13] As petitioners and the EEAC note (Pet. Br. 58-63; EEAC Br. 13), in the 1970 sex discrimination hearings before Representative Green's committee, the Department of Justice had proposed its own bill to combat sex discrimination in federally assisted education programs. It opposed the idea of merely adding the word "sex" to Title VI, and proposed, instead, a separate bill that, as Assistant Attorney General Jerris Leonard explained, "would not contain an exemption for employment practices." *1970 Hearings* at 678. See also *id.* at 686. While the Department's proposed bill expressly provided for employment coverage (*id.* at 690-691), Assistant Attorney General Leonard did not suggest in his testimony (*id.* at 677-690) that only through the use of such language could employment practices be covered. Hence it is inaccurate to state that "the Justice Department recognized that Section 601 [without the Section 604 language] did not include coverage of employees except with respect to federally subsidized jobs programs" (EEAC Br. 13) or that "the Justice Department opposed the present language of § 901" as not extending to employment discrimination (Pet. Br. 58).

What the House had originally rejected was the entire Justice Department approach, which would have covered employment discrimination on the basis of sex in federally assisted education programs but would have left untouched such discrimination in any educational institutions that received no federal funds, since the Department recommended against amending Title VII (*1970 Hearings* at 679). The House rejection of that approach cannot reasonably be viewed as evidencing an insistence on *retaining* the employment practices limitation in what later became Title IX.

[14] H.R. 7248 was amended in respects not here pertinent, passed by the House (117 Cong. Rec. 39354, 39374 (1971)), and laid on the table when S. 659, amended by substitution of the House language, was passed in lieu. 117 Cong. Rec. 39374 (1971). This bill was sent back to the Senate, referred to its Committee on Labor and Public Welfare, and reported back to the Senate with recommendations for further amendments. S. Rep. No. 92-604, 92d Cong., 2d Sess. 1-2 (1972).

amended version of S. 659, including what is now Title IX, was enacted in 1972, after the House agreed to accept Senate language that omitted any limitation on coverage of employment practices.

2. *The Senate Amendments*

S. 659, as reported out of the Senate Committee on Labor and Public Welfare on February 7, 1972, (now titled "The Education Amendments of 1972") did not contain any provision covering sex discrimination. S. Rep. No. 92-604, 92d Cong., 2d Sess. (1972). In the previous session, Senator Bayh had sought to add a sex discrimination provision to S. 659, designed to close the gap left by existing civil rights legislation, which allowed educational institutions to discriminate on the basis of sex. 117 Cong. Rec. 30156-30157 (1971). That amendment had been ruled nongermane, however, and thus did not come to a vote on the merits. 117 Cong. Rec. 30411-30415 (1971).

a. Senator Bayh's 1971 proposal had consisted of three parts: first "provisions * * * identical to those provided under title VI of the 1964 Civil Rights Act—forbidding discrimination in federally assisted programs—which does not presently include a prohibition on sex discrimination"; second, amendment of Titles IV and IX of the Civil Rights Act of 1964 to allow the Attorney General to bring, and to intervene in, suits against public schools which deny admission or equal protection of the laws on account of sex; and third, a study and recommendations for legislation by the Commissioner of Education on "equality of opportunity in higher education between the sexes." 117 Cong. Rec. 30156 (1971).[15]

[15] Senator Bayh's amendment was first introduced on August 5, 1971; it was immediately laid on the table. 117 Cong. Rec. 30155 (1971). The amendment was reintroduced and debated the next day, when the Chair's ruling that it was nongermane was sustained. 117 Cong. Rec. 30403-30415 (1975).

Senator Bayh's amendment did not, however, contain any counterpart to the limitation on employment practices coverage in Title VI; and his suggestions that his amendment respecting sex discrimination in federally assisted education programs and activities was identical to the Title VI prohibition respecting discrimination on other grounds (*e.g.*, 117 Cong. Rec. 30156, 30408 (1971)) do not appear to reflect a view that his amendment would not cover employment discrimination. For in introducing the amendment, he stated (*id.* at 30155-30156):

> While over 50 percent of our population is female, there is no effective protection for them as they seek admission and employment in educational facilities. The antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning. * * *
>
> * * * * *
>
> Today, women seeking employment in higher education face an array of obstacles almost as insuperable as those which used to face blacks. WEAL has compiled statistics indicating that Columbia University annually awards 24 percent of its doctorates to women, but that it has awarded 2 percent of its tenured faculty positions to females; and the last time the Department of Psychology at Berkeley hired a woman was in 1924. In short, just as in other professions an old axiom applies, the higher the rank, the fewer the women.

As petitioners and the EEAC have noted (Pet. Br. 63-64 n.14; EEAC Br. 16), immediately after Senator Bayh made his remarks, Senator McGovern introduced his own sex discrimination amendment, which expressly covered employment. 117 Cong. Rec. 30158, 30411 (1975). Senator McGovern did not, however, call his amendment up for action. Instead, he observed that he would support the "similar amendment" introduced by Senator Bayh. *Id.* at 30411. In making this announcement, Senator McGovern also observed the necessity for

such an amendment, in light of such disturbing statistics as, *inter alia*, "the fact that only 9 percent of America's college professors are women * * *." *Ibid.*[16]

b. On February 28, 1972, Senator Bayh introduced an expanded version of his 1971 amendment (now designated Amendment No. 874 and proposed as an additional "Title X" in S. 659). 118 Cong. Rec. 5802-5803. In introducing this amendment, he made plain his concern about employment discrimination on the basis of sex in the field of education, observing (*id.* at 5803) that "sex discrimination reaches into all facets of education—admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales." He inserted into the record statistical tables showing, *inter alia*, the percentage of women in the various faculty ranks, from lecturer to professor, in institutions of higher learning (*id.* at 5804), and he expressed dismay at "the double standard the academic community has applied to those women who choose to make education their life work" (*id.* at 5804-5805).

In explaining the scope of his amendment, he stated (118 Cong. Rec. 5803 (1972)) (emphasis added):

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. * * * More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such

[16] As this Court has observed (*Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 693 n.14), Senator McGovern's amendment was "phrased quite differently," since, *inter alia*, it did not broadly prohibit discrimination on the basis of sex but gave "a simple directive to the Secretary of HEW" with respect to the award of government grants, contracts, loan guarantees and the like. Notwithstanding the significance of *that* difference in phrasing, however, Senator McGovern's emphasis on the small percentage of female college professors and his willingness to support Senator Bayh's amendment, suggest that he did not construe the Bayh amendment as excluding employment coverage.

> crucial aspects as admissions procedures, scholarships, and *faculty employment*, with limited exceptions. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in Title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of Title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

Contrary to the conclusion of the First Circuit in *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 428, on which petitioners rely (Pet. Br. 68-69), Senator Bayh's references to employment discrimination cannot be dismissed as simply references to those provisions of his amendment that would expand Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. First, as the court of appeals below observed (Pet. App. 35A; emphasis in original): "Senator Bayh in his quoted remarks quite clearly referred to 'faculty employment' in conjunction with the basic prohibition of his amendment and *then* referred to the '[o]ther important provisions' dealing with Title VII and the Equal Pay Act." Second, as we have noted (pages 21-22, *supra*), Senator Bayh had evidently contemplated employment discrimination coverage when he had introduced his 1971 amendment—before he added the provisions amending Title VII and the Equal Pay Act.[17]

Perhaps an even clearer expression of the intended employment practices coverage of Senator Bayh's 1972

[17] The EEAC thus draws the wrong conclusion (EEAC Br. 17-18) from Senator Bayh's statement (118 Cong. Rec. 5808 (1972)) that his 1972 amendment represented a "comprehensive approach which incorporates not only the key provisions of my earlier amendment, but the strongest points of the antidiscrimination amendments approved by the House." He had originally contemplated employment coverage in a bill based on Title VI, without its employment practices limitation, and he added to this the House amendments of Title VII and the Equal Pay Act.

amendment came in his summary of what his amendment was designed to accomplish and by what means. 118 Cong. Rec. 5806-5808 (1972). The Senator divided his summary into separate commentaries on what he termed different "portion[s] of the amendment." His explanations of the first two portions appear in the Congressional Record under the headings "A. Prohibition of Sex Discrimination in Federally Funded Education Programs" and "B. Prohibition of Education-Related Employment Discrimination." *Id.* at 5807. In the first part of his summary he describes the basic "prohibition and enforcement provisions which generally parallel the provisions of Title VI [of the Civil Rights Act of 1964]" (*ibid.*); and in the second part he describes the amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Despite the contrary inference that might be drawn from the headings alone, Senator Bayh's description of the first portion of his amendment shows that Section 901 of Title IX was intended to cover employment discrimination in education programs that benefit from federal financial assistance.[18] There, after describing the mechanics of the amendment (the authority conferred on HEW to issue regulations, to permit cer-

[18] Part "A" of the summary begins with the statement, "Central to my amendment are sections 1001-1005, which would prohibit discrimination on the basis of sex in federally funded education programs." *Id.* at 5807. The reference to "sections 1001-1005" is evidently a misprint for "sections 1001-1004," since Section 1005 is the amendment to Title VII, which is not limited to "federally funded education programs" and which, as noted, is discussed in Part B of the summary, along with the Equal Pay Act amendment. As the court of appeals below observed (Pet. App. 38A n.11), this "was simply an oversight" on Senator Bayh's part. And as a commentator has explained, there are three reasons for reaching this conclusion: Senator Bayh's failure to refer to the numbered section amending the Equal Pay Act (Section 1009) as well; his failure to discuss Title VII in his discussion of the coverage of this "[c]entral" portion of his amendment; and his lengthy discussion of Title VII in Part B. Simpson, *Sex Discrimination in Employment under Title IX*, 48 U. Chi. L. Rev. 462, 468 n.38 (1981).

tain types of "differential treatment" of students based on sex, and to penalize violations of regulations by fund termination), the Senator defines the types of sex discrimination subject to these procedures (*ibid.*; emphasis added):

> *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. The provisions have been tested under Title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

Because that description of the scope of the amendment is part of a prepared statement rather than off-the-cuff remarks uttered in the heat of debate, it cannot be dismissed—in the words of the *Islesboro* court (593 F.2d at 428)—as "occasional lapses" reflecting "the imprecision of oral discussion." Rather, as the explanatory remarks of the sponsor of language ultimately enacted, this statement is an authoritative guide to the statute's construction. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).[19]

Remarks of the sponsor also undermine the conclusion of several courts on whose opinions the district court

[19] The court in *Islesboro*, commenting on a very brief summary Senator Bayh asked to have printed in the record (118 Cong. Rec. 5808 (1972)), concluded (593 F.2d at 428) that the section titles "Basic Prohibition," for what became Section 901 of Title IX, and "Employment Discrimination," for the section that would amend Title VII, indicated that Section 901 was not intended to cover employment discrimination. This is not a necessary inference, and it is an incorrect one since, as we have demonstrated, and as the court of appeals below correctly concluded (Pet. App. 34A-38A), Senator Bayh's own formal description of his amendment is to the contrary. See also *Dougherty County School System* v. *Harris*, *supra*, 622 F.2d at 738.

below relied (see page 4, *supra*) that the inclusion of exemptions that make no reference to employment somehow indicates that employment practices do not come within the basic Section 901 prohibition. During the debate on Senator Bayh's amendment, and just before its passage by the Senate, Senator Pell, the floor manager of the entire education bill, addressed several questions to Senator Bayh concerning the scope of Sections 1001(a) and (b) of his amendment, the predecessors of Section 901(a) and (c) of Title IX (118 Cong. Rec. 5812-5813 (1972) (emphasis added)):

> MR. PELL. * * * Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
>
> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of [sic] available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.
>
> * * * * *
>
> MR. PELL. * * * [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

* * * * *

MR. PELL. Would this apply to a parochial school where they have nuns *as teachers?*

MR. BAYH. No. *There is an explicit exception for educational institutions controlled by a religious organization.* * * * * *.

MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

* * * * *

MR. BAYH. *All military schools are excluded.*

As the court below reasoned (Pet. App. 39A, 41A), the "colloquy leaves little doubt that Senator Bayh intended employment practices to be covered under what is now § 901," if only because "Senator Bayh's responses to Senator Pell that the employment practices of religious and military schools were covered by the exclusions in § 901(a) would make no sense if employment practices were not included within the scope of § 901(a) to begin with."

Senator Bayh's amendment was passed by the Senate on the same day it was introduced (118 Cong. Rec. 5815 (1972)), and differences between its provisions and those of the corresponding title of the House-passed version of S. 659 were considered by the conference committee to which the bill was referred before final passage.[20]

[20] Section 1009 of Senator Bayh's amendment, amending the Equal Pay Act, became Section 906(b)(1) of Title IX, Pub. L. No. 92-318, 86 Stat. 375. The amendment of Title VII of the Civil Rights Act of 1964 was ultimately deleted because, just before final passage of S. 659, a similar amendment was enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending 42 U.S.C. 2000e(a).

3. *Conference committee action*

Among the disparities to be resolved by the conference committee was the House version's inclusion of the provision modeled after Section 604 of Title VI, excluding direct coverage of employment practices, and the Senate version's omission of such a provision. The Senate approach won the day. The Conference Report explained simply (H.R. Conf. Rep. No. 92-1085, 92d Cong., 2d Sess. 221 (1972)), that "[b]oth the Senate amendment and the House amendment provided that no person in the United States may, 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" but that "[both] versions * * * contained a number of exceptions which are discussed below." In its discussion of the Section 604 language in the House bill, the report stated (*ibid.*):

> [T]he House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Because the omission of the Section 604 language was, therefore, the result of a conscious choice, following committee consideration, it is strong evidence that Section 901 coverage of employment practices was intended. Two principal arguments have been made against this view, but each has serious shortcomings.

First, petitioners and the EEAC suggest (Pet. Br. 32-39, 52; EEAC Br. 8-11, 19) that the history of Title VI had indicated that the Section 604 language was only a clarification of the scope of Section 601 and that, in recognition of this fact, the conference committee would attach no substantive significance to dropping

the counterpart language in the House version of Title IX. But, as we show (pages 33-36, *infra*), the legislative history of Title VI indicates that Congress found it advisable to add Section 604 in order to foreclose a construction to which the broad language of Section 601 was susceptible. And, in the course of passage of the Senate version of Title IX, its sponsor attributed that very construction to it (pages 23-28, *supra*), in the absence of a counterpart to Section 604. Against that background, the deletion of a provision foreclosing that same construction cannot reasonably be treated as having no significance.

Second, petitioners and the EEAC argue (Pet. Br. 52-55; EEAC Br. 19) that the Section 604 language must have been dropped merely in order to avoid an inconsistency, *i.e.*, an exclusion of employment coverage in a title which included amendments to two statutes (Title VII and the Equal Pay Act) that concerned *only* employment. As the court below has pointed out, however (Pet. App. 43A):

> Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act. For example, Congress could readily have said: "Nothing in § 901 shall apply to any employee of any educational institution subject to this title except where a primary objective of the Federal financial assistance is to provide employment."

Moreover, it would have been equally simple for the conference committee to have noted in its report that the deletion was made "to avoid an inconsistency" with the sections of Title IX amending Title VII and the Equal Pay Act, if, in fact, this was the sole significance of the deletion. Instead, as noted, the conferees simply explained the substance of the House provision and noted that the House receded.[21]

[21] The Court in *Cannon* v. *University of Chicago*, *supra*, while recognizing that the language of Section 601 of Title VI was substantially identical to Section 901(a) of Title IX (441 U.S. at 694-695) and that the "genesis of Title IX also bears out its kinship with Title VI" (*id.* at 694 n.16), also acknowledged that the bill that passed the House was "modified, and then passed, by the Senate in a form that was adopted by the Conference Committee" (*id.* at 695 n.16). In *Cannon*, however, the Court had no occasion to consider the Senate "modification" of the House bill through its omission of the Section 604 language. Thus, petitioners' suggestion (Pet. Br. 30) that this Court in *Cannon* resolved *sub silentio* the question in this case is unsound.

What finally emerged from the conference committee was a statute that attacked, from several directions, something Congress had perceived as a serious evil—sex discrimination in employment in the field of education. Employers who discriminated on the basis of sex were to be induced to reform their practices, or required to remedy them, through the availability of lawsuits, public and private; and when these discriminatory employment practices extended to federally assisted education programs and activities, federal funding was to be terminated in the absence of reform. Thus, the fact that discrimination on the basis of sex against those employed in education programs and activities was to be prohibited by Title VII and the Equal Pay Act is evidence, *not* that Congress intended to exclude employment coverage from Section 901, but rather that, as the court of appeals noted in this case (Pet. App. 46A-47A) and as this Court has repeatedly recognized, Congress has made available a variety of remedies, administered through various agencies, to eradicate employment discrimination. *Int'l Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers, Inc.*, 429 U.S. 229 (1976); *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). See Comment, *Eliminating Sex Discrimination in Educational Institutions: Does Title IX Reach Employment?*, 129 U. Pa. L. Rev. 417, 442-446 (1980). It was entirely consistent with that pattern for Congress simultaneously to provide several means for securing relief from sex discrimination in employment and a

mechanism to cut off further federal funding of programs marked by such discrimination.[22] Indeed, another part of the Title IX legislative package (Pub. L. No. 92-318, Section 906(a), 86 Stat. 375) amended a provision of Title IV of the Civil Rights Act of 1964, 42 U.S.C. (1970 ed.) 2000c-6, to permit the Attorney General, under certain circumstances, to bring suits on behalf of individuals denied admission at a public college "by reason of * * * sex"—a remedy that supplements the Title IX fund termination remedy for such individuals. Furthermore, Title VI of the Civil Rights Act of 1964, on which petitioners rest much of their argument, itself provided a remedy for race discrimination that supplemented other race discrimination remedies in Title III (Public Facilities), Title IV (Public Education), and Section 902 of Title IX (intervention by the Attorney General in private Equal Protection Clause suits), 42 U.S.C. (1964 ed.) 2000b, 2000c-6, and 2000h-2. And Section 604 itself did not reflect

[22] Reorganization Plan No. 1 of 1978, which became law on May 5, 1978, pursuant to the operation of 5 U.S.C. 906(a), consolidated responsibility for enforcement of employment discrimination statutes, but it left the responsibility for enforcing grant-related equal employment provisions such as Title IX with the agencies administering the grant programs, subject to coordination by the Equal Employment Opportunity Commission. See the President's transmittal message to Congress, H.R. Doc. No. 95-295, 95th Cong., 2d Sess. 1, 5-6 (1978).

In Exec. Order No. 12250, issued on November 2, 1980, the President delegated to the Attorney General his authority under Section 902, 20 U.S.C. 1682, to approve Title IX regulations. 45 Fed. Reg. 72995 (1980). On April 17, 1981, the Department of Justice and the EEOC published a proposed rule for coordination of the investigation of complaints of employment discrimination that are filed with federal fund-granting agencies under, *inter alia*, Title IX, but that also come within Title VII of the Civil Rights Act of 1964 or other statutes under EEOC's jurisdiction. 46 Fed. Reg. 22395 *et seq.* (1981). The rule contemplates that fund-granting agencies such as the Department of Education will refer most complaints of *individual* acts of discrimination to the EEOC for investigation and conciliation but that the fund-granting agencies will retain any complaints of *systemic* discrimination. *Ibid.*

a congressional aversion to overlapping remedies, but served to reconcile Title VI with the nonapplicability of Title VII at that time to large segments of employment in federally assisted programs—including public employment and educational employment. See 42 U.S.C. (1964 ed.) 2000e(b) and 2000e-1.

4. *The Employment Practices Limitation in Title VI*

Because, as we have shown above, the Title IX bill that emerged from the conference committee generally followed the lines of the amendment sponsored by Senator Bayh, which omitted the Section 604 language and which Senator Bayh described as encompassing employment discrimination in federally assisted education programs, we do not see in the legislative history of Title VI the significance that petitioners and the EEAC ascribe to it. Because of their extensive treatment of that subject, however, we present the following brief analysis of Title VI with respect to employment coverage.

As petitioners and the EEAC correctly state (Pet. Br. 32; EEAC Br. 8), an early House version of the bill that, with various amendments, was ultimately enacted as Title VI,[23] contained substantially the same language now found in Section 601 of that title, but did not contain the employment practices limitation now found in Section 604.[24]

[23] H.R. 7152, 88th Cong., 1st Sess. (1963). Employment discrimination generally (not limited to employers receiving federal assistance) was covered in Title VII of H.R. 7152.

[24] Section 601 of Title VI, 42 U.S.C. 2000d, provides:

> 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.

Section 604 of Title VI, 42 U.S.C. 2000d-3, provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any em-

As they note (Pet. Br. 32-36; EEAC Br. 8-9), Attorney General Robert Kennedy and some members of Congress described the proposed predecessor of Section 601 as covering only beneficiaries of federal assistance and not covering employment unless the employees were themselves direct benficiaries of the aid. The legislative record was not, however, entirely unambiguous on this point. For example, although Senator Humphrey stated that the application of Title VI in that early version to "employment in activities receiving Federal assistance" would "depend on the nature and purposes of the particular Federal assistance program" (110 Cong. Rec. 6545 (1964)), he noted in his discussion of its effect on education programs that the Commissioner of Education might "be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of students" and that Title VI would confer authority on him "to adopt, with the approval of the President, a *general* requirement that the local school authority refrain from racial discrimination in treatment of pupils and teachers, and authority to achieve compliance with that requirement by cutoff of funds or by other means authorized by law" (*ibid.*; emphasis added). Similarly, although Representative Celler, in hearings on H.R. 7152, was at times insistent on the exclusion of employment from Section 601 (see, *e.g.*, *Civil Rights: Hearings on H.R. 7152 Before the House Comm. on Rules* (Pt. I), 88th Cong., 2d Sess. 141, 198, 200 (1964)), he also used, as an example, the case of a federally funded hospital guilty of discrimination "in the employment of its help by separate beds [sic]," in making the point that funds need not be terminated immediately if it would take the hospital "a period of time" to make the adjustment. *Id.* at 143.

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ployer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

In any event, some members of Congress considered the language of Section 601 far from a clear description of a limited class of beneficiaries. *Id.* at 227-228 (colloquy of Rep. Avery and Rep. McCulloch); 110 Cong. Rec. 2484 (1964) (Rep. Poff). Section 604 was thereafter added in the Senate, as part of the Mansfield-Dirksen substitute, introduced on May 26, 1964. 110 Cong. Rec. 11926 (1964). Although, as petitioners and the EEAC state (Pet. Br. 37-38; EEAC Br. 10), Senator Humphrey explained that this addition was merely a clarification rather than a substantive change (110 Cong. Rec. 12714 (1964)), another member of the Senate—Senator Holland—took a different view. He advised his colleagues that the Senate had made "substantial changes in the House-passed bill" and he proceeded to describe "65 of such changes made by the Senate." 110 Cong. Rec. 14219 (1964). Among the changes he described was the addition of Section 604 to Title VI through the Mansfield-Dirksen substitute. *Id.* at 14220. (Senator Holland also noted that the substitute made "a number of clarifying changes," but he described only the three "substantive" changes, in Sections 602, 604, and 605.) For this reason, among others, a recent commentator plausibly concluded that "[t]he employment exemption in title VI was amended onto the statute as part of a substitute written during informal bargaining between the Senate's Democratic and Republican leadership with the intention of providing a compromise that would garner enough votes to end the ongoing [Senate] filibuster." Comment, *Eliminating Sex Discrimination in Educational Institutions*, *supra*, 129 U. Pa. L. Rev. at 447 (footnote omitted).

Whether Section 604 merely clarified the meaning of Section 601 or actually represented a substantive change, however, the fact remains that Section 601, standing alone, was evidently judged an inadequate description of a class limited in the manner now proposed by petitioners. Thus any future Congress that wished to enact a

statute barring a different kind of discrimination but having essentially the same scope as Title VI could assure parallel coverage only by enacting counterparts to both Section 601 and Section 604. The Congress that enacted Section 901 of Title IX of the Education Amendments of 1972 chose not to limit coverage in the manner described in the Section 604 language, by deleting that language in conference.[25]

C. The Failure of Congress to Amend the Statute with Respect to Employment Discrimination Supports the Contemporaneous Administrative Construction, Because That Construction Has Been Called to The Attention of Congress

Acting under the authorization and direction of Section 902 of Title IX, 20 U.S.C. 1682, HEW, within

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[25] Petitioners and the EEAC (Pet. Br. 41-43; EEAC Br. 11, 26) rely on a series of cases holding that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (the operative language of which is also modelled on Section 601 of Title VI) does not prohibit discrimination based upon handicap against employees in federally assisted programs and activities. Most of those cases follow the reasoning of *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979), which concluded that the addition to the Act in 1978 of a provision making available to persons aggrieved under Section 504, "[t]he remedies, procedures, and rights set forth in title VI" was meant to import into the Act the employment coverage limitation in Section 604 of Title VI. 590 F.2d at 88-89. But see *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980). Whatever the validity of that construction of the Rehabilitation Act, however, the issue in this case is not affected. Title IX does not contain a provision like the 1978 addition to Section 504, and the legislative history of Title IX is different from that of the Rehabilitation Act. Thus even were employment coverage deemed excluded from the Rehabilitation Act, that conclusion would not govern the question under Title IX.

months of the passage of Title IX, began the process of formal rulemaking, which culminated in the promulgation of regulations to effectuate the Section 901 prohibition against sex discrimination. Relying upon the plain language of the statute and its legislative history, HEW included in the regulations a number of provisions prohibiting discriminatory employment practices in the education programs of federal aid recipients. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 436-438, 465-466, 477-480 (1975) (testimony of Secretary Weinberger) (hereinafter *"Regulations Review Hearings I"*).[26]

Pursuant to Section 902 of Title IX, 20 U.S.C. 1682, the regulations were submitted to the President for his

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[26] Our argument in this case is that Section 901 of Title IX covers employment practices in all education programs and activities that receive federal financial assistance and that regulations effectuating the statute, issued under Section 902, thus necessarily cover employment practices whether or not employment is a primary objective of the federal assistance. We do not contend that the regulations at issue here are valid simply because of some reasonable relationship to general objectives of the statute, liberally construed. See *Lau* v. *Nichols*, 414 U.S. 563, 571 (1974) (Stewart, J., joined by Burger, C.J., and Blackmun, J., concurring).

If the statute were to allow any discretion in the matter, the Secretary of Education would prefer to replace the present employment practices regulations with regulations covering employment only where there is a clear nexus between the alleged employment discrimination and discrimination against students (see note 7, *supra*), or where the complainant is a beneficiary of a program in which a primary objective of the federal financial assistance is to provide employment. The Department of Education has only limited expertise in employment matters. Its view is that employment cases are better resolved under Title VII of the Civil Rights Act of 1964, which provides more appropriate remedies for such cases.

approval; and after President Ford signed the regulations, they were transmitted to the Speaker of the House and the President of the Senate, pursuant to Section 431 (d) of the General Education Provisions Act, 20 U.S.C. (1970 ed., Supp. IV) 1232(d)(1).[27] Under the terms of that section, the regulations would become effective 45 days after transmittal unless Congress, by concurrent resolution, found that they were inconsistent with the authorizing statute and disapproved them.

As we explain below, the House held hearings on the regulations, but neither it nor the Senate passed a resolution of disapproval in the prescribed period, and the regulations accordingly went into effect. Approximately four months later, Congress amended 20 U.S.C. (1970 ed., Supp. IV) 1232(d)(1), to provide that failure to adopt a concurrent resolution disapproving a final regulation should not "be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding." Pub. L. No. 94-142, Section 7(b), 89 Stat. 796.[28] We accordingly do not rely on the failure of Congress to disapprove the regulations during that review process as evidence that it considered them valid. Nevertheless, the question whether the regulations were brought to the attention of Congress is relevant to the

[27] This section was made applicable to Title IX regulations by Section 431(f) of the same statute, 20 U.S.C. (1970 ed., Supp. IV) 1232(f).

[28] Apparently Congress had originally contemplated making the regulation review process a test of the consistency of regulations with the statute in question. This, at any rate, was the view expressed by Representative O'Hara, Chairman of the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, in a letter to Secretary Weinberger concerning the subcommittee's proposed hearings on the Title IX regulations. *Regulations Review Hearings I* at 7. Secretary Weinberger had expressed the administration's doubt concerning the constitutional validity of this review process. *Id.* at 6-7.

determination of what weight to accord the fact that Congress later amended Section 901 of Title IX without amending it so as to foreclose the enforcement of the employment practices regulations. *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). For that reason, and because petitioner and the EEAC have relied on remarks of Representative O'Hara, made during his subcommittee's hearings on the regulations (Pet. Br. 28-29, 53-55; EEAC Br. 14 n.23), we shall briefly describe the 1975 congressional hearings on the Title IX regulations.

Votes on resolutions to disapprove the regulations were taken by two House subcommittees; no vote was taken in the Senate. Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. Rev. 133, 156 (1976) (hereinafter *"Ultra Vires Challenges"*)[29] In the six-day hear-

[29] In the Senate, Senator Helms introduced a resolution disapproving the regulations in their entirety (S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17300 (1975)), and Senator Laxalt introduced a resolution disapproving the regulations pertaining to athletic programs (S. Con. Res. 52, 94th Cong., 1st Sess., 121 Cong. Rec. 22940 (1975)). The Senate took no action on the resolutions, however. *Ultra Vires Challenges, supra*, 1976 B.Y.U. L. Rev. at 147 n.66.

In the House, Representative O'Hara's Subcommittee on Postsecondary Education held six days of hearings beginning June 17, 1975, and he and members of his subcommittee thereafter introduced resolutions disapproving certain portions of the regulations. 121 Cong. Rec. 21687 (1975). One of those resolutions, H.R. Con. Res. 330, which did not express disapproval of the employment practices regulations, was thereafter referred by the House Committee on Education and Labor to its Subcommittee on Equal Opportunities, which held a one-day hearing at which Representative O'Hara testified. *Hearing on House Concurrent Resolution 330 (Title IX Regulation) before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 1, 2-21 (1975) (hereinafter *"Regulations Review Hearings II"*). (There is no record of the content of H.R. Con. Res. 329, introduced the same day as H.R. Con. Res. 330. 121 Cong. Rec. 21687 (1975); but it apparently did not concern the employment

ings before Representative O'Hara's Subcommittee on Postsecondary Education, one witness, Janet L. Kuhn, testified against the employment practices regulations, making a legislative history argument similar to that made by petitioners and the EEAC in this case. *Regulations Review Hearings I* at 401, 406-408.[30] Senator Bayh, the sponsor of the Senate version of Title IX that was substantially adopted by the conference committee (see pages 23-28, *supra*), testified that the regulations, "as the Congress mandated, call for equality in admissions * * * and in the case of teachers and other educational personnel, employment, pay, and promotions." *Id.* at 169.[31] Secretary Weinberger, in response to a question about the Department's construction of Section 901, stated that he did not see "any way you can find that employees do not participate in education programs and activities receiving Federal assistance, and, therefore, they are within the protected class * * *." *Id.* at 478. He added (*ibid.*): "If the Congress wants to exclude employment,

practices regulations at issue in this case. See *Ultra Vires Challenges*, B.Y.U. L. Rev. at 147. In any event, Representative O'Hara did not challenge those regulations in his testimony before the Equal Opportunities Subcommittee.) The Equal Opportunities Committee voted to recommend against passage of H.R. Con. Res. 330 by the full committee. *Regulations Review Hearings II* at 39-40. No further action was taken in the House on either this resolution or on two resolutions introduced by Representative Martin (H.R. Con. Res. 310 and 311), neither of which concerned the employment practices regulations. 121 Cong. Rec. 19209 (1975); *Ultra Vires Challenges, supra*, 1976 B.Y.U. L. Rev. at 148.

[30] See also Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49 (1976).

[31] In his testimony on the question of defining "program or activity," Senator Bayh stressed the similarities of the statute with Title VI. *Id.* at 169-171. Since he had also, as noted above, unequivocally expressed the view that the statute reached employment discrimination, his testimony is further evidence that his references to Title VI parallels during the debates on his amendment were not indications that employment coverage was omitted.

it is the simplest thing in the world, but when you say 'no person,' there is no room for us to argue any other intent."

An HEW representative who accompanied Secretary Weinberger to the hearing testified that members of Congress and their staffs had been consulted by the Department in connection with the drafting of the regulations (*id.* at 479, testimony of Stephen Kurzman), and two other HEW representatives stated that employment practices coverage had not been a particular subject of controversy during their broad consultations on proposals for regulations (*id.* at 479-480, testimony of Peter E. Holmes and Gwen Gregory).

Notwithstanding Representative O'Hara's enthusiastic reception of Ms. Kuhn's testimony and his remarks about the genesis of the House version of Title IX (*id.* at 408-409), he did not, in his testimony on H.R. Con. Res. 330, before the Equal Opportunities Subcommittee—the body to which the resolution had been referred by the Committee on Education and Labor (see note 29, *supra*)—challenge the validity of the employment practices regulations. *Regulations Review Hearings II* at 2-21, 33-34, 38. A representative of HEW, in answer to a question from Subcommittee Chairman Hawkins, stated the Department's view that both the language and the legislative history of Title IX indicated that the statute covered employees as well as students and that the employment practices regulations were accordingly valid implementations of the statute. *Regulations Review Hearings II* at 31 (testimony of Gwen Gregory).

In spite of the fact that they did not come to a full vote in the House and Senate, it is apparent that the Title IX regulations were more pointedly brought to the attention of Congress, and, in particular, to the attention of the committees responsible for legislation in that area, than is the case with most agency regulations. While one cannot rely on the failure of Congress to pass a concurrent resolution of disapproval as evidence of its view of the validity of the regulations (see page 38,

supra), the airing of those regulations at the hearings gives special significance to the fact that in the following year, Congress amended Section 901 of Title IX by adding three new exemptions (Pub. L. No. 94-482, Section 412, 90 Stat. 2234, codified at 20 U.S.C. 1681(a)(7)-(a)(9)), but left untouched the provision at issue here, which is contained in the same section.[32]

At the same time, as the court below properly noted (Pet. App. 45A), efforts to amend Section 901 so as to limit its coverage of employment discrimination have failed. Senator Helms sponsored a bill—never passed—which would have added a provision to Title IX stating that "Nothing in [Section 901 of Title IX] shall apply to any employees of any educational institution subject to this title." S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23845-23847 (1975). Similarly, Senator McClure sponsored an amendment to restrict the coverage of Section 901 to the "curriculum or graduation requirements of the institutions" receiving federal assistance. 122 Cong. Rec. 28136 (1976). Senator Bayh successfully opposed it, in part on the ground that it would exempt "those areas of traditional discrimination[,]" including "employment and employment benefits[,]" that were "the reason for the congressional enactment of Title IX." *Id.* at 28144, 28147.

To be sure these post-enactment developments cannot be accorded "the weight of contemporary legislative history," but the court below would have been "remiss if [it had] ignored" such evidence. *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 687 n.7. Where "an agency's

[32] Congress had also previously amended that section by adding an exemption pertaining to social fraternities or sororities and voluntary youth service organizations. Pub. L. No. 93-568, Section 3(a), 88 Stat. 1862. That amendment was enacted in 1974, before the period of regulation review, but after HEW had published for comment the Title IX regulations, including the employment practices regulations at issue here. 39 Fed. Reg. 22228, 22236-22238 (1974).

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." *United States* v. *Rutherford*, *supra*, 442 U.S. at 554 n. 10, quoting *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 487-489 (1940). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

D. The Employment Practices Regulations Are Not Inconsistent with the Program-Specific Character of the Statute

As the district court properly noted (Pet. App. 66A), Title IX is a "program-specific" statute. It is specific in two different ways: first, under the terms of Section 901, discrimination on the basis of sex is prohibited only in any "education program or activity receiving Federal financial assistance"; second, under the terms of Section 902, the effect of any termination of federal assistance (or of any refusal to grant such assistance) must be limited to the "particular program, or part thereof" in which noncompliance with implementing regulations has been found. Both of these limitations are relevant to the basic statutory goal of ensuring that federal funds do not assist any programs in which discrimination on the basis of sex occurs, while avoiding the unnecessary hardship of terminating funds to programs that in no way involve the federal government in such discrimination. See *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969).[33]

[33] *Taylor County* concerned the termination of federal funds to a county public school system pursuant to Title VI of the Civil Rights Act of 1964. Although Title VI, as we have argued, differs from Title IX with regard to the coverage of employment practices, there is no basis for any difference between the two with respect either to the program-specific limitations noted above or to the definition of program for the purpose of administering the regula-

The EEAC argues (EEAC Br. 23) that any regulation of employment practices is inherently "non-program specific because employment practices cut across programs receiving federal assistance and those which do not." As we show below, however, employment practices are no less program specific than other types of educational policies that are indisputably covered by Section 901. Petitioners and the EEAC contend (Pet. Br. 85-103; EEAC Br. 21-28) that the employment practices *regulations* at issue here are invalid under Title IX because they are not program specific and, in particular, because *they* permit the Department of Education to "subject all programs of an institution, whether federally funded or not, educational or not, to [the Title IX] regulations if any one program receives federal financial assistance" (Pet. Br. 91). We submit that the employment practices regulations, read together with the general Title IX coverage regulations, may be construed more narrowly than petitioners assert and that neither the record in *North Haven* nor that in *Trumbull* presents to this Court the question whether the Department is free to construe and apply the regulations more broadly.

The court of appeals below correctly rejected the contention that employment practices are by their very nature not program specific and hence are inconsistent with both Section 901 and Section 902 of Title IX. As it explained (Pet. App. 48A-1), "[E]mployment discrimination is no less 'program specific' than other practices recognized as subject to the provisions of Title VI and Title IX." Since student admissions policies—indisputably an important target of Title IX—may, like employment practices, either apply broadly throughout an entire university or apply only in a particular graduate school or department, there is no reason to believe that regulation of employment practices is inherently inconsistent with

tions implementing the two statutes. Petitioners appear to concede (Pet. Br. 90-93) that Title VI and Title IX are comparable in this respect.

the statute (*ibid.*). If discrimination in either admissions or employment is limited to a single department or "part" of an education program that is insulated from other parts, the fund termination sanction could be limited to funds assisting that department or program part. In sum, regulation of employment practices—in effectuation of the congressional intent we have recounted—presents no unique difficulties making it inconsistent with either Section 901 or Section 902 of Title IX.

Petitioners' contention that the regulations are impermissibly broad because they are not limited to programs receiving federal financial assistance is not ripe for consideration on the present record. While the regulations are not models of clarity on this point, they do not necessarily mandate such broad coverage. One provision, 34 C.F.R. 106.51 (the counterpart of 45 C.F.R. 86.51 (1977), considered by the district court), prohibits sex discrimination in employment "under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance." But the scope of the regulation may plausibly be limited by another section, 34 C.F.R. 106.11 (formerly 45 C.F.R. 86.11), the basic coverage provision of the Title IX regulations, which states:

> Except as provided in this subpart, this Part [106] applies to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance.[34]

By thus indicating that the application of Title IX to a federal aid recipient is limited to that recipient's education programs or activities that receive or benefit from Federal financial assistance, the regulation implicitly pro-

[34] The exceptions set forth in that subpart (Subpart B) do not affect the employment practices regulations except to the extent that regulations implementing the religious and military schools exemptions would bar any regulation of employment practices in institutions exempted under those provisions.

vides that the mere receipt of some federal assistance by an educational institution does not necessarily subject all of its employment practices to the prohibition of Section 901 of Title IX and the implementing regulations. Thus, while the federal respondents have, in this and other related litigation, described the regulations as having a broader scope, that was not a necessary construction of the language. Any ruling on the validity of the regulations as more broadly construed, however, should be made only in a case in which it is clear that agency enforcement was not directed against education programs or activities receiving federal financial assistance.

Questions may arise in particular cases concerning how to define "education program" with respect to the practices that the Department seeks to regulate and whether particular practices are confined to programs that do not benefit from federal assistance and in no way affect programs that do.[35] In order to make this determination, the Department must be able initially to conduct a reasonably broad investigation concerning allegedly discriminatory practices, even though its investigation may finally reveal that the discrimination is limited to a program or part of a program that receives no federal funding and does not affect others that do. See Pet. App. 48A-1 to 48A-2; *United States* v. *El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980). See also *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943). Where that finding is made, Section 902 of Title IX bars any termination of funds. *Board of Public Instruction of Taylor County* v. *Finch, supra.*

[35] Determining the scope of an "education program" is not a simple question. As commentators have suggested, the legislative histories of both Title VI and Title IX are unclear as to the definition of the term "program." See, *e.g.*, Comment, *Board of Public Instruction* v. *Finch; Unwarranted Compromise of Title VI's Termination Sanction*, 118 U. Pa. L. Rev. 1113, 1116-1124 (1970); *Ultra Vires Challenges, supra*, 1976 B.Y.U. L. Rev. at 170-172.

Such issues do not arise in the present consolidated cases, however. In *North Haven*, HEW, acting on the complaint of a North Haven teacher concerning North Haven's maternity leave and rehiring policies, sought information concerning North Haven's hiring, leave, and seniority policies respecting teachers (A. 9-11). Referral of the case for enforcement action was threatened only when North Haven refused to cooperate in the investigation (A. 14-17), and it was after that communication that North Haven filed suit contending HEW had no jurisdiction to regulate employment practices (A. 2-8). North Haven conceded in its complaint, in its responses to requests for admissions, in its answers to interrogatories, and in the "Statement of Material Facts" filed with its summary judgment motion that it received substantial federal assistance and that it used a fair proportion of that to pay employees' salaries, including the salaries of teachers (A. 6, 18-20, 21-22, 24). Since, on the basis of North Haven's own admissions, it could reasonably be concluded that North Haven's hiring, leave, and seniority policies could affect programs funded in part by federal assistance (because the payment of teacher salaries with federal assistance indicated that teachers were working in a federally assisted program or programs), the investigation was entirely proper, taking even a narrow view of "program and activity."[36] The

[36] We do not mean to suggest that a school district or institution of higher education may necessarily escape regulation of any of its employment practices by the simple expedient of allocating funds it receives to expenses other than employee salaries. If an employee works in an education program that is supported by federal assistance, the Department of Education's Title IX jurisdiction should attach without the necessity of tracing the funds to employee remuneration. Thus, the Fifth Circuit in *Dougherty County School System* v. *Harris*, 622 F.2d 735 (1980), petition for cert. pending, No. 80-1023, erred in holding that, although the language and legislative history of Title IX indicate that it "reaches at least some employment practices," the employment practices regulations were invalid in their application to discrimination

district court did not find that no North Haven teachers worked in federally assisted education programs; instead it agreed with another district court (Pet. App. 63A-64A) that Section 901 of Title IX protected only program beneficiaries and that students, not teachers, are program beneficiaries. Its judgment prevented HEW from "terminating or refusing to grant, or attempting to terminate or refuse to grant, federal financial assistance to [North Haven] for *any* alleged noncompliance with [the employment practices] regulations" (Pet. App. 71A-72A; emphasis added).

In *Trumbull*, HEW investigated the complaint of a guidance counselor, Linda Potz, and concluded from its administrative investigation that Trumbull had discriminated on the basis of sex against Potz in job assignments, working conditions, and nonrenewal of her contract (A. 33-42). In its law suit to enjoin HEW from taking any further action in the matter, Trumbull did not allege that Potz worked in an education program which received no federal assistance or that the discrimination against her affected no other federally assisted program. Indeed, in response to Potz's interrogatories concerning the amounts of federal financial assistance Trumbull received, the types of that assistance, and the programs or functions to which the assistance was allocated, Trumbull refused to answer on the grounds that the district court's decision in *North Haven*—holding that the regulations under which HEW acted were invalid because HEW had no authority to regulate employment practices—was dispositive of the case (A. 43-44). Trumbull thus took the position that the question of what education program or programs received federal financial assistance was irrelevant to its basic claim; and the district court approved this position by denying Potz's motion to compel answers to her interrogatories (A. 49) and declining to set aside its order granting Trumbull's motion for summary judgment.

against a school district's home economics teachers absent a showing that the school district had used federal funds to defray their salaries (622 F.2d at 738). This conclusion suggests that Title IX protections may be defeated by bookkeeping maneuvers, and it bears some kinship to the theory, which we have shown is erroneous, that employment must be an "objective" of federal assistance in order to trigger Title IX coverage.

In sum, if we are correct in our basic submission that Section 901 prohibits employment discrimination in any education program or activity that receives federal financial assistance, even if employment is not a primary objective of the assistance, and that, accordingly, employment practice regulations applying to such programs are valid, then the court of appeals was correct in reversing the decision of the district court and vacating its judgment.[37]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[37] To the extent that the opinion of the court of appeals may suggest that HEW had the power to prohibit discrimination on the basis of sex in education programs or activities that do not receive federal financial assistance and are unaffected by those that do, those suggestions are dicta, in light of the records in these cases.

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