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NOTE

TITLE IX SEX DISCRIMINATION REGULATIONS: IMPACT ON PRIVATE EDUCATION

I. INTRODUCTION

Title IX of the Education Amendments of 1972\(^1\) was designed to "eliminate discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. . . ."\(^2\) Senator Birch Bayh, the author of Title IX, stated that it is:

[A]n important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply these skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.\(^3\)

The responsibility for enforcing Title IX was assigned to the Department of Health, Education, and Welfare (HEW) and on June 4, 1975, HEW issued its regulations.\(^4\) These regulations have been the subject of great controversy, with much of the discussion centering around the provisions on athletics.\(^5\) But

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\(^1\) 20 U.S.C. §§ 1681 (1972) \textit{et seq}. Title IX provides: "No 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," with certain exceptions.


\(^2\) 45 C.F.R. § 86.1 (1976).

\(^3\) 118 Cong. Rec. S5808 (1972).

\(^4\) 45 C.F.R. § 86 (1976).

criticism has come from all sectors of society concerning nearly every provision of the regulations. As Congressman John O'Hara stated in opening the congressional hearings on the Title IX regulations: "Some have suggested they do not carry out the law in its full vigor. Others have suggested they go beyond the limits of the law. Almost no one has written in so far to endorse the regulations as developed by HEW." The private sector of higher education has been particularly disturbed by the Title IX regulations. This paper will analyze the actual and potential effect of the Title IX regulations on private educational institutions.

A. Federal Regulation of Education

The impact of the Title IX regulations on private higher education can only be seen in proper perspective against a background of the entire scope of federal regulations concerning education. The Title IX regulations compose only a small number of the vast quantity of bureaucratic orders which affect educational institutions. The main concern has been over the affirmative action programs which are designed to eliminate discrimination through the use of goals and timetables. Enforcement of these programs is achieved by terminating all federal funds to noncomplying parties.

Affirmative action was instituted in the 1960's under the

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6 1975 Hearings, supra note 5, at 2.

7 The following is a brief sampling of the federal acts which directly affect educational institutions. It does not include regulations directed only at educational institutions, such as the Title IX regulations.


A proposed regulation which may never be issued, but which poses a serious threat, is a regulation that would permit a government agency to judge accreditation of an institution on the basis of compliance with federal mandates. This is a potential invasion of education by the government. See EXECUTIVES' CLUB NEWS, Oct. 15, 1976, at 6.

8 The present day affirmative action programs have evolved from the days of John Kennedy, when the term was merely a political slogan, through Exec. Order No. 11,246
assumption that minorities and women had been discriminated against in the past. As one supporter of affirmative action stated: "I start from the position that blacks and women have in the past been excluded by discrimination from university faculties [and] that the few that have been hired have been unfairly treated in the matter of promotion and pay." While this assumption is valid, the next step taken by the federal bureaucracy in implementing affirmative action programs was to obligate educational institutions to meet goals and timetables in the hiring of minorities and women. The problem with this system is that the same basic program which was devised for hiring construction workers in the 1960's is used today in educational institutions for hiring faculty. "[T]hey do not make allowance for quality judgments, appearing to regard the Ph.D. simply as being in the same category as a machinist's union card." While it may be valid to expect certain quotas on a construction job, it seems absurd to expect the same in education where faculty hiring and firing should be on the basis of merit. Unfortunately, "goals" have replaced merit as the criteria for selection of faculty members. As might be

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signed by President Johnson pursuant to the 1964 Civil Rights Act, through Revised Order No. 4 issued by the Department of Labor to implement President Johnson's executive order with regard to the construction industry. The Revised Order No. 4 required an analysis of areas where the contractor with the federal government was deficient in hiring minorities and women, and then required that goals and timetables be set up to correct the deficiencies. By 1971, enforcement of Revised Order No. 4 became the responsibility of HEW whenever colleges and universities were involved. For a concise history of affirmative action programs, see G. C. Roche III, THE BALANCING ACT 7-9 (1974).


10 121 Cong. Rec., supra note 9, at E6945.

11 HEW has carefully avoided setting "quotas" since quotas per se are a violation of the Civil Rights Act. However, colleges have been setting their own quotas to be sure they are in compliance with affirmative action programs. See G. C. Roche III, supra note 8, at 5.

12 Letter from Carleton Whitehead, Affirmative Action compliance officer at Reed College, Portland, Ore., to the author (October 19, 1976).

13 This is particularly significant for this paper because the authors of Title IX, which covers sex discrimination, have expressed their opinion that merit should be the basis for hiring faculty. Rep. Edith Green, who originally authored Title IX in the House, stated: "It seems to me that individuals, . . . whether they are male or female,
expected, educators forced to comply with these federal programs often object to being told whom to hire, fire and admit. President John R. Hubbard of the University of Southern California has expressed his objection to this infiltration of federal control:

ought to be considered on their individual merit and individual talent and whether or not they can do the work at that university.” 117 CONG. REC. H39259 (1971). With regard to quotas, she declared: “I am opposed to it even in terms of attempting to end discrimination on the basis of sex.” Id. at H39282.

Birch Bayh, author of the Senate version of Title IX, agrees that merit is the only proper way to hire faculty, but he has also expressed agreement with the same faulty assumptions made in the affirmative action programs. He stated:

The language of my amendment does not require reverse discrimination. It only requires that each individual be judged on merit, without regard to sex.

Of course, my amendment does not preclude a decision by enforcing agencies to use comparisons between female and male admissions or hiring rates as one indication of the presence or absence of sex discrimination.

118 CONG. REC. S18437 (1972). Senator Bayh seems to speak from both sides of his mouth. He favors hiring on “merit, without regard to sex” but also says that the absence of women in a job is an indication of discrimination. This logic assumes that because no women work in a department, sex discrimination is the cause. This approach views discrimination in terms of results, not opportunities. Rather than policing whether women are being given an opportunity to apply for a particular job, affirmative action programs focus on whether women are currently in a particular job. This view ignores the possibility that women may not be applying for the job. As a Carnegie Commission study reported: “Much of what is loosely called sex discrimination in employment is, at least partly, the consequence of choices made by women,” in particular a choice made to pursue domestic responsibilities. [1975] 2 WOMEN’S RIGHTS LAW REPORTER 3, quoting from R. A. LESTER, ANTIBIAS REGULATION OF UNIVERSITIES: FACULTY PROBLEMS AND THEIR SOLUTIONS (1974).

" Kingman Brewster, Jr., President of Yale, has stated in connection with the Title IX regulations specifically, and affirmative action, generally:

We have been insistent that criminal and administrative regulations should not go beyond what is rationally required by their stated purpose. We must be no less vigilant about the use of spending power as a lever to extend regulation beyond the accountability reasonably related to purposes for which the support is given.

Address by Dallin H. Oaks, President, Brigham Young University, to National Assoc. of College and University Attorneys (June 18, 1976), quoting from THE REPORT OF THE PRESIDENT 22, (Yale University, 1974-75). William McGill, President of Columbia University, stated that the bureaucracy “must be served with a continuing diet of reports and data about our progress in areas subject to regulatory review.” Address by Dallin H. Oaks, supra, quoting from Address by William McGill, 14 (Feb. 8, 1975). The Presidents of the American University, Catholic University of Am., George Washington University and Georgetown University have stated: “This declaration we make in the full and deliberate conviction that only by being strong and independent can our universities fulfill their obligations to a free society.” 122 CONG. REC. S8142-43 (daily ed. May 27, 1976) (1976 Declaration of Independence).
Do not tell me that there is some all-pervading omniscience in Washington or Sacramento that knows better than I how to run this University, that can perceive more clearly than I what its standards and contributions ought to be, or whose sense of the fitness of things is more enlightened and humane than mine.\footnote{Address by Dallin H. Oaks, supra note 14, quoting from TROJAN FAMILY, June-July, 1976, at 1.}

Educators insist that the Washington bureaucracy is suffocating American education. In particular, they are being smothered by the sheer weight of the paperwork involved in complying with all federal regulations. Energies once devoted to educational purposes are now expended on paperwork. One group of educators state their concern:

In the past few years we have been overwhelmed by federal regulations and federal requirements for paperwork on a wide range of programs.

It is not that we object to the goals. . . . It does us no good . . . however, for the federal government to overwhelm us with . . . demands for paperwork. . . .

. . . [This could] have a serious adverse impact on the ability of our institutions to survive.\footnote{122 CONG. REC. E1927 (daily ed. April 9, 1976) (letter from Oregon Independent Colleges Assoc., Jim Sullivan, Exec. Dir., to Rep. Les AuCoin (March 19, 1976)).}

This concern is well-founded. Harvard University reports that compliance in 1974-75 required 60,000 hours of faculty time.\footnote{Address by Dallin H. Oaks, supra note 14, quoting from D.C. BOX, THE PRESIDENT’S REPORT, 1974-75 (Harvard University, 1975).}

Administrators at smaller institutions report that twenty to twenty-five percent of their time is spent on affirmative action responsibilities,\footnote{Berea College President Willis Weatherford estimates 25% of his time is so spent. CHRISTIANITY TODAY, November 5, 1976, at 16. Dr. Weatherford also expressed concern about “the diversion of human energy of faculty and administration away from the central educational task to paper shuffling.” Letter from Dr. Weatherford to author (Nov. 9, 1976). Mr. Carleton Whitehead of Reed College estimates 20% of his time is spent on affirmative action compliance. Letter from Carleton Whitehead to author (Oct. 19, 1976).} and “unfortunately, nearly all of this is busy-work, without any real merit.”\footnote{Letter from Carleton Whitehead, supra note 18.} Even the Secretary of HEW, David Matthews, a former educator, stated before assuming
his position that the bureaucracy was "threatening to bind the body of higher education in a Lilliputian nightmare of forms and formulas."20

Added paperwork is naturally accompanied by added financial costs.21 The high cost of complying with federal programs is driving many institutions to the brink of financial collapse. Indeed, it has been estimated that the total cost of compliance has been $2 billion, which equals "the total of all voluntary giving to institutions of higher learning."22 Add to

20 Address by Charles B. Saunders, Jr., Director of Governmental Relations, American Council of Education, to Southern Regional Meeting of the College Entrance Examination Board (Feb. 19, 1976), quoting from comments by David Matthews.

21 Costs of complying with federal programs place an additional burden on already laboring educational institutions. A recent study of six colleges and universities by the American Council on Education proves this. THE COSTS OF IMPLEMENTING FEDERALLY MANDATED SOCIAL PROGRAMS AT COLLEGES AND UNIVERSITIES, AMERICAN COUNCIL ON EDUCATION (1976) [hereinafter cited as AMERICAN COUNCIL ON EDUCATION]. Some of the conclusions included:

In the 1974-1975 academic year, the combined cost of implementing the federally mandated social programs at the six institutions was $9-10 million . . .

. . . The costs of implementing the federally mandated social programs at these six institutional have doubled over the last five years — considerably faster than increases in overall costs of instruction.

The social program costs represented from 5% to 18% of net tuition revenues at the six institutions . . .

Increased costs . . . on a per-student basis . . . ranged in 1974-75 from $21 to $39 at the two large public institutions and from $129 to $164 at the two small private institutions . . .

[The] programs have contributed substantially to the instability of costs at colleges and universities from year to year and thus compounded the difficulties of financial management and budget balancing.

Id. at 14. The most alarming feature of the study is that proportionately the most serious financial burden of these federal programs has fallen on small, private institutions. This tends to further erode the financial stability of such schools, which are already "walking a tightrope between extinction or distinction." Address by Eugene B. Habecker, J. D., George Fox College, to National Assoc. of Evangelicals (April 8, 1975). It is also noted by the American Council on Education that they are "committed to the objectives of the federally mandated social programs." AMERICAN COUNCIL ON EDUCATION Study, supra, at iii. However, President Roger W. Heyns states that the study "provides a basis for suggesting that improvements are needed—based on fuller consultation between Congress, the federal agencies, and the higher education community—in drafting the legislation and in designing the implementation activities to achieve those objectives." Id.

Most educators take the view that while there is nothing wrong with social programs, there is something wrong with the method of implementation.

this the fact that affirmative action is not accomplishing its goals, and educators have good reason to complain. When the cost of implementing affirmative action programs is enormous in terms of both energy and time, and the effectiveness of the program is suspect, it is not surprising that U.S. NEWS AND WORLD REPORT recently reported: "A mood of rebellion is spreading among college educators who are finding themselves increasingly under the thumb of a benevolent despot—the federal bureaucracy."24

B. Effect on Private Education

Federal regulations have had an enormous effect on all educational institutions, but the sector most profoundly and adversely affected by the Title IX regulations is the nation's private colleges and universities.25 These private institutions, many of which accept no direct federal aid,26 fear that the

24 Thomas Sowell, professor of economics at UCLA, has thoroughly studied the issue of the effectiveness of affirmative action programs. He concluded that they are generally ineffective. THE PUBLIC INTEREST, Winter, 1976, at 47. By determining the amount of discrimination in 1968-69 before affirmative action, and the amount in 1972-73 after affirmative action was begun, he was able to compare the impact of these programs on the elimination of discrimination. He found only a marginal increase in participation of minorities and women "as far as the pay, employment, or promotions of women and minorities are concerned. The American Council on Education data show that blacks were 2.1% of academics in 1968-69 and 2.9% in 1972-73, while women were 19.1% in 1968-69 and 20% in 1972-73." Id. at 57. Perhaps more significant was his conclusion that while minorities and women are underrepresented statistically in relation to their proportion of the general population, they are both "overrepresented when measured as a percentage of the qualified supply." Id. at 55. So the problem is not demand but supply, and it is here that the federal government ought to direct its attention. They should support the training of minorities and women so that the qualified supply of minorities and women will equal their proportion of the population. Hiring minorities and women on the basis of the general population percentage when the qualified supply is a smaller percentage can only lead to a lowering of educational standards, since it means prima facie that some people are being hired even though they are not qualified. Admittedly, it will be years before the supply of qualified minorities and women equals their percentage of the population, but the quality of our educational system should not be risked by instituting a system that tries to achieve too much, too soon.

25 U.S. NEWS AND WORLD REPORT, July 5, 1976, at 91. This article contains a complete review of the education establishment's objections to the federal intrusion into American education.

26 A recent study has shown that proportionately the most serious financial burden of federally mandated social programs at colleges and universities has fallen on small, private institutions. AMERICAN COUNCIL ON EDUCATION, supra note 21.
independence and diversity of thought which they foster will be lost if they are forced to comply with federal regulations. They fear that the regulations "would impose a straitjacket that would deprive private education of the diversity and flexibility it must enjoy in order to make its distinctive contribution to American higher education."27

To realize the importance of the issue, one must first realize the importance of private higher education in America28 and that the success of private education29 has been based in part on its independence from the government.30 This independence, first established in Trustees of Dartmouth College v. Woodward,31 permits the private institution to serve a function different from that of a public university.32 In short, "private universities . . . have a right to be different."33 One educator has stated:

For the [private] institution, freedom includes the freedom to be different, to be self-motivated, to be true to its own heritage, to be controlled from within and not from without. Freedom of individual institutions leads to diversity among institutions, whereas centralized control means uniformity, monotony, mediocrity, and ultimately the loss of freedom . . . .34

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27 1975 Hearings, supra note 5, at 228 (statement of Dallin H. Oaks, President of Brigham Young University and a Director and Secretary of the Amer. Assoc. of Pres. of Independent Colleges and Univ.).

28 See Reader's Digest, Nov. 1976, at 91-96. The article lists four major reasons why private institutions are important, including: 1) independent colleges are a major national resource; 2) independent colleges promote diversity; 3) the colleges are independent of political pressure; and 4) independent colleges promote human values.

29 A national poll concluded that the top seven medical schools, five of the top six business schools, and four of the best six law schools are private. The National Observer, Feb. 1, 1975, at 9, col. 1.

30 See supra note 25.


32 "The public university serves the function of producing an educated citizenry, fostering the state's concept of academic goals, and providing an opportunity for betterment of all." Forum, Private Universities: The Right to be Different, 11 Tulsa L.J. 58, 67 (1975).

33 Id.

Indeed, the most notable contribution private education offers is diversity. Unlike public universities, they answer to no one but themselves. This freedom from government influence allows private institutions to experiment and to apply a higher standard of academic excellence and moral character than the government would require or even allow.35 “Private universities . . . can welcome the controversial with impunity,”36 and this makes them an ideal educational setting. This ideal setting is fostered by “the very possibility of doing something different than government can do, of creating an institution free to make choices government cannot—even seemingly arbitrary ones—without having to provide a justification. . . .”37

This raises a point which should not be missed—the right to be different includes the right to be wrong. The freedom of private education is not limited to situations in which the institution can prove the rightness of its policy; for even when their policy is arguably wrong, private institutions provide higher education with a healthy diversity of thought. Indeed, many private colleges presently exist with rules that may be arbitrary, anachronistic and even discriminatory. But the evils of a private institution’s failures cannot begin to equal the problems created by having a homogeneous educational community. The American educational system may not suffer if one private college makes an error, but, “if the federal government makes a mistake in its regulations, all 3000 colleges make the same mistake. There is not one that remains outside the net to give an example of an institution which took a better route. The nation is deprived of diversity. . . .”38

35 The Heald Committee report stated that private schools “give American education a diversity and scope not possible in tax-supported institutions alone, and they have an opportunity to emphasize, if they wish, individualistic patterns of thought, courses of social action, or political or religious activity.” O’Neil, Private Universities and Public Law, 19 BUFF. L. REV. 155, 161 n.24 (1970), quoting from Meeting the Increasing Demand for Higher Education in New York State: A Report to the Governor and the Board of Regents 24 (1960).
36 Forum; Private Universities: The Right to be Different, 11 TULSA L.J. 58, 59 (1975).
38 122 CONG. REC. E3498 (daily ed. June 21, 1976) (memorandum from Dr. Willis D. Weatherford, Berea College, introduced into the Congressional Record by Rep. Tim Lee Carter (Ky.).)
C. Constitutional Rights of Private Education

The importance of the educational pluralism offered by private institutions has been recognized by the courts beginning with Trustees of Dartmouth College v. Woodward. In that landmark case, the United States Supreme Court said that private institutions "do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant." The case established the right of private education to remain independent of judicial and governmental restraints. Academic freedom as a constitutional right has seldom been discussed by the courts because historically it has seldom been intruded upon. The Title IX regulations, however, could force private colleges and universities to stand firmly on their academic freedoms which are a "constitutionally protected domain." Private schools are guaranteed the right to exist without government interference as one of the constitutional liberties guaranteed by the due process clauses of the fifth and fourteenth amendments, which have been interpreted to include "the right . . . to acquire useful knowledge. . . ." This interpretation reflects that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."

In Farrington v. Tokushige, a 1927 decision, the Supreme Court seemed to anticipate the present controversy over affirmative action and the Title IX regulations. At issue was an Hawaiian statute which gave the Department of Public Instruction power to regulate and control private schools which taught the Japanese language. The statute gave the Depart-

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40 Id. at 647.
41 The principal cases since Dartmouth College which have discussed academic freedom include: Barenblatt v. United States, 360 U.S. 109 (1959); Farrington v. Tokushige, 273 U.S. 284 (1927); Pierce v. Society of Sisters, 268 U.S. 510 (1925); and Meyer v. Nebraska, 262 U.S. 390 (1923).
45 Id. at 400.
46 273 U.S. 284 (1927).
47 It should be noted that the Department of Public Instruction set up under the
ment control over who could teach and what could be taught. The Supreme Court decided that this government intrusion into private schools went too far.

[T]he school Act and the measures adopted thereunder go far beyond mere regulation . . . . They give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and textbooks. Enforced enforcement of the Act probably would destroy most, if not all, of them.

The Court went on to say that the Act was "[part] of a deliberate plan to bring . . . schools under a strict governmental control for which the record discloses no adequate reason."

It is almost prophetic that the Court in 1927 used the words "affirmative direction" to explain the defect in the Act. Private schools are to be free from governmental intrusion in the form of "affirmative direction concerning the intimate and essential details of such schools." This same truth is no less valid today. Schools which lose the freedom to choose their own teachers and make their own regulations lose the freedom to provide a unique education. As stated in Griswold v. Connecticut, "The [first amendment] right of freedom of speech and press includes . . . the freedom of the entire university community." This freedom includes the right to create a particular atmosphere on campus which is consistent with the school's philosophical and moral views. The Supreme Court has observed that:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and cre-
ation. It is an atmosphere in which there prevail the ‘four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. The “four essential freedoms of a university” are precisely the freedoms which affirmative action programs deny to all educational institutions.

Only HEW can answer whether the Title IX regulations are “[part] of a deliberate plan to bring . . . schools under a strict governmental control.” But whether deliberate or not, the result is the same; HEW has eroded by indirect means that which the constitution will not permit by direct means: the constitutional right of liberty guaranteed to private education. The Supreme Court has made it clear that:

[A]cademic freedom . . . [is an area] in which government should be extremely reticent to tread.

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait-jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.

It may be argued that the Title IX regulations have not given HEW full control over institutions—that this is really an insignificant intrusion which should be overlooked because of the importance of eliminating sex discrimination in higher education. The Supreme Court, however, is well aware that any unconstitutional encroachment on academic freedom must be halted at its inception.

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56 Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (quoting from The Open Universities in South Africa 10-12). The Court noted that this approach to education was poignant because the “plea on behalf of continuing the free spirit of the open universities of South Africa has gone unheeded.” Id. at 262.

57 Id.


60 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957). See also Barenblatt v. United States, 360 U.S. 109, 112 (1959) where the Court stated that academic freedom is so crucial that “this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain.”

61 See note 202, infra for a list of commentators who might take such a position.
In these matters of the spirit inroads on legitimacy must be resisted at their incipiency. This kind of evil grows by what it is allowed to feed on. . . . 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.'

Quietly, but surely, HEW has eroded the decision making powers of educators and their constitutional right to academic freedom. It may be a small step, but HEW has its foot in the door of academic freedom and it ought not to be there.

II. Assumptions of the Title IX Regulations

The fundamental problem with the HEW regulations is that they are based on faulty assumptions, both legal and social. Legally, HEW has assumed that court cases construing the Title VI racial discrimination regulations can be used to justify certain provisions of the Title IX regulations. Socially, HEW has assumed that no differences exist between men and women. Both assumptions are wrong.

A. Title VI As a Guideline

Title VI of the Civil Rights Act of 1964 was unquestionably used by HEW as a guideline in the drafting of the Title IX regulations.

Furthermore, court decisions dealing with racial discrimination have consistently been cited by HEW as authority for provisions in the Title IX regulations. In particular...

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42 The prelude to the regulations issued at 40 Fed. Reg. 24128 (1975) states: "Title IX is similar to Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) except that Title IX applies to discrimination based on sex, is limited to education programs and activities, and includes employment."

43 See 1975 Hearings, supra note 5, at 486-87. A representative of HEW has stated: "Since the language of Title IX so closely parallels that of Title VI (relative to racial discrimination) I believe it to be legally sound that interpretations as to the scope of coverage with respect to Title IX should also parallel interpretations of Title VI in similar areas." 121 Cong. Rec. S127007 (1975) (letter from Theodore A. Miles, HEW, to Senator Jesse Helms (Oct. 25, 1975)). See also 1975 Hearings, supra note 5, at 485, where Secretary of HEW Weinberger stated: "We tried to find guidance in the most similar language that we could find in Title VI, which is on the basis of race and not sex, but it does have, we believe, compelling similarities that required this interpretation."
lar, HEW has relied on *Board of Public Instruction v. Finch*, a racial discrimination case, to support its contention that the government can cut off all federal funds for an institution when one program is guilty of discrimination. And *Bob Jones University v. Johnson* is cited as conclusive authority for the proposition that an institution is a recipient of federal funds when the payee of the federal check is a student. These two cases are significant not only because of these issues, but also because HEW has used these racial discrimination cases to justify the Title IX regulations. The legitimacy of this legal maneuver requires closer scrutiny.

The issue is whether, under the equal protection clause of the fourteenth amendment, the same standard can be applied to invalidate classifications based on gender that has been applied to invalidate classifications based on race. The traditional standard under the equal protection clause is that laws which treat one group of people differently from another group are valid only if there is a rational basis for the differential treatment. Classifications which are not arbitrary will generally be upheld since the standard includes a presumption in favor of the reasonableness of the classification. "When the classification . . . is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts . . . must be assumed." This traditional standard does not apply with regard to classifications based on race, however. When the classification is based on a suspect criterion or when a fundamental right

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41 F.2d 1068 (5th Cir. 1969).
45 See generally *Ultra Vires Challenges*, supra note 66.
47 Id. at 78.
is encroached upon, a stricter test is applied, and the legislature must show that a compelling state interest is being served by such a classification. This stricter standard has consistently been applied to cases of racial discrimination, since race as a method of classification is identified as a suspect criterion.

Thus two standards exist for reviewing whether a classification of persons violates the fourteenth amendment. The rational basis standard is normally applied, while the compelling state interest or strict scrutiny standard is applied whenever a suspect criterion was used. The crucial issue, therefore, is whether gender is a suspect criterion. If not, then HEW’s use of the Title VI cases to justify the Title IX regulations is on shaky constitutional ground.

It is clear that the United States Supreme Court has never held gender to be a suspect criterion. This does not mean that gender-based classifications are not susceptible to attack under the fourteenth amendment. The Supreme Court has not been reluctant to strike down gender-based classifications, but they have done so on the rational basis standard rather than the compelling state interest standard.

The most recent case in which the Supreme Court could have declared gender to be a suspect criterion but did not, was Craig v. Boren, where an Oklahoma statute prohibited the sale of 3.2% beer to males under twenty-one and females under eighteen. The statute was held to violate the equal protection clause, but the Court refused to base its holding on the notion that gender is a suspect classification. Instead, the Court relied on Stanton v. Stanton and a host of other cases that have

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75 Reed v. Reed, 404 U.S. 71 (1971).


77 Id. at 8-9.

78 421 U.S. 7 (1975).
refused to make gender a suspect classification.\textsuperscript{79}

\textit{Stanton v. Stanton}\textsuperscript{80} involved a Utah statute which made twenty-one the age of majority for males and eighteen the age of majority for females. The statute was challenged as violating the equal protection clause, and the Court stated: "We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect . . . . Reed, we feel, is controlling here."\textsuperscript{81}

\textit{Reed v. Reed},\textsuperscript{82} the case referred to, involved a provision of the Idaho probate code which gave an automatic preference to men over women in applying to be an administrator. For the first time, a gender based classification was struck down on the basis of the equal protection clause,\textsuperscript{83} but nowhere was a compelling state interest or strict scrutiny test mentioned.\textsuperscript{84} The issue was whether a rational relationship existed between the law's preferential treatment of men and the purpose of the law.\textsuperscript{85} After stating the traditional concept that different classes of persons may be treated differently under the fourteenth amendment, the Court went on to declare:

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\textsuperscript{80} 421 U.S. 7 (1975).
\textsuperscript{81} Id. at 13.
\textsuperscript{82} 404 U.S. 71 (1971).
\textsuperscript{84} Lower courts also continue to recognize that \textit{Stanton} and \textit{Reed} are controlling cases on the question of whether gender is a suspect criterion. Moss v. Secretary of Health, Education and Welfare, 408 F. Supp. 403, 409 (M.D. Fla. 1976) directly confronted the question of which standard was proper and held that:

The only Supreme Court authority for Plaintiff's conclusion [that "compelling state interest" is the proper standard] is a four-justice plurality opinion in \textit{Frontiero v. Richardson}, 411 U.S. 677, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973); and in a later decision [\textit{Stanton v. Stanton}] a majority of the Court indicated that they have not as yet found sex to be a 'suspect' basis for legislative classification.

The court went on to say they were "persuaded that [the rational basis standard] is the proper standard." \textit{Id.} at 410. The most incredible aspect of the \textit{Moss} case, however, is that the Secretary of HEW argued strenuously "that the traditional 'rational basis' test should be employed." \textit{Id.} at 409. In light of the Title IX regulations, this is a strange position for the Secretary to take. It amounts to an admission that the constitutional standard used to determine violation of the equal protection clause is different for gender and race.

\textsuperscript{85} 404 U.S. at 76.
The Equal Protection Clause of [the fourteenth] amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants . . . bears a rational relationship to a state objective.85

Because *Reed* is the controlling case on this issue, a brief review of the important cases since *Reed* is helpful. The only time that the Supreme Court approached treating sex as an inherently suspect classification was in *Frontiero v. Richardson*.87 Justice Brennan, joined by three other justices,88 concluded that gender-based classifications are "inherently suspect and must therefore be subjected to close judicial scrutiny."89 The concurring justices, however, made an effort to prevent sex from becoming a suspect classification, relying instead on *Reed*. "It is unnecessary . . . in this case to characterize sex as a suspect classification, with all the far-reaching implications of such a holding. *Reed v. Reed*, . . . which abundantly supports our decision today, did not add sex to the narrowly limited group of classifications which are inherently suspect."90

"Subsequent to *Frontiero*, the Court has declined to hold that sex is a suspect class."91 *Kahn v. Shevin*92 involved a Florida statute which allowed a $500 property tax exemption to widows, but refused the same exemption to widowers. The Court relied on *Reed* to validate the law, stating that the sex-

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85 *Id.* at 75-76.
87 Douglas, J., White, J., Marshall, J.
88 411 U.S. at 682.
89 *Id.* at 691-92. (Powell, J., Blackman, J., Burger, J., concurring).
based classification had a “fair and substantial relation to the object of the legislation.”\textsuperscript{93} No mention was made of sex as a suspect criterion.\textsuperscript{94} In Geduldig \textit{v. Aiello},\textsuperscript{95} a California temporary disability insurance program which excluded normal pregnancies from its coverage, was challenged on equal protection grounds. In a landmark decision, the Court stated clearly that pregnancy classifications do not violate the equal protection clause.

While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . . Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis.\textsuperscript{96}

Thus the Court again refused the compelling state interest test while affirming the legitimacy of normal pregnancy classifications.\textsuperscript{97}

Immediately preceding \textit{Stanton} in the line of Supreme Court cases was \textit{Schlesinger v. Ballard},\textsuperscript{98} in which a naval officer challenged a law requiring mandatory discharge of male officers for failure to receive certain promotions within ten years. Similarly situated female officers were discharged only after thirteen years. In holding for the defendant, the Court used the rational basis test.\textsuperscript{99}

It is significant that the Court has realized that gender-

\textsuperscript{93} \textit{Id.} at 352.
\textsuperscript{94} Dissenters in the case did, however, note the continuing belief of a plurality of the Court that “gender-based classifications are suspect.” \textit{Kahn v. Shevin}, 416 U.S. at 361 (White, J., dissenting) and 357 (Brennan, J., dissenting).
\textsuperscript{95} \textit{417 U.S. 484} (1974).
\textsuperscript{96} \textit{Id.} at 498.
\textsuperscript{97} Brennan, J., again dissent, claiming that \textit{Reed} and \textit{Frontiero} “mandate a stricter standard of scrutiny which the State’s classification fails to satisfy.” \textit{Id.} at 498 (dissenting opinion).
\textsuperscript{98} \textit{419 U.S. 498} (1975).
\textsuperscript{99} Again, Brennan, J., dissent. He has been consistent in the gender-based cases in holding that gender is a “suspect classification [that] can be sustained only if the Government demonstrates that the classification serves compelling interests that cannot be otherwise achieved.” \textit{Schlesinger v. Ballard}, 419 U.S. 498, 511 (1975) (dissenting opinion).
based classifications can violate the equal protection clause. But it is equally significant, for purposes of analyzing the Title IX regulations, that such classifications were analyzed in terms of the rational basis test, not the strict scrutiny test which applies to racial classifications. The different constitutional standards for race and gender make HEW's use of the Title VI cases to explain Title IX regulations highly questionable.

HEW explains its positions with an argument that seems logical at first glance. Secretary Weinberger states that HEW did give the sex discrimination cases serious consideration when drafting the regulations. The position of HEW is that those cases "deal with sex discrimination under the [fourteenth] Amendment and not sex discrimination under a

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100 For an explanation of HEW's position, see 1975 Hearings, supra note 5 at 486-87 (letter from Secretary Weinberger to Sub-committee Chairman O'Hara (July 2, 1975)).

101 Id. at 477. This is particularly odd in view of the fact that on June 26, 1975, during the sex discrimination regulations hearings, the Secretary expressed his opinion that the question of whether sex is a suspect criterion had never been presented to the Supreme Court. Obviously, he was mistaken. The following dialogue indicates the confusion that existed at HEW during those days:

**Rep. Quié:** I gather, Mr. Secretary, from your testimony, and it has been suggested by other witnesses that have appeared before us, that title IX should be administered in a manner identical to the enforcement procedures under title VI of the Civil Rights Act.

The Supreme Court, however, has not yet identified sex as a suspect class under the equal protection clause of the 14th amendment. Wouldn't this indicate to you that legally title IX cannot be enforced by the same full force and effect as title VI of the Civil Rights Act?

**Secretary Weinberger:** I don't quite get the import of your question, Congressman. Are you asking me to predict what the Supreme Court would say?

**Rep. Quié:** No, no . . . I imagine when you enforce the law you also take into consideration the law as it has been interpreted in light of court decisions. The court has defined race as a suspect class, but they have not done that with sex. Evidently, the court feels that under the Constitution there is a difference between individuals on the basis of sex and not a difference on the basis of race.

**Secretary Weinberger:** I suggest the only reason they have not is the question has not been presented to them yet. I am not aware of any specific holding by the court that sex is not a basis for protecting or for special categorization by Congress. I am not aware of any adverse ruling.

I suspect that the reason that there has not been a ruling is it simply has not yet been presented . . .

**Rep. Quié:** Well, I will send you some of the cases like Reed v. Reed

1975 Hearings, supra note 5, at 477.
specific act of Congress. When Congress specifically prohibits certain discrimination by statute, a higher standard may well apply than under the [fourteenth] Amendment.\textsuperscript{102} In particular, HEW cites cases\textsuperscript{103} which were decided under Title VII of the Civil Rights Acts of 1964\textsuperscript{104} concerning sex discrimination in employment. The cases under Title VII consistently held that a higher standard applies in reviewing sex classifications under Title VII than under Reed, Geduldig, and the fourteenth amendment.\textsuperscript{105} The two standards were explained in Satty v. Nashville Gas Co.:\textsuperscript{106} "Under the Equal Protection Clause there need be only a 'reasonable basis' for the legislative determination. However, under the Civil Rights Act of 1964, there must be an actual business necessity for employment policies that discriminate on the basis of sex."\textsuperscript{107} So HEW has argued that under Title IX, a higher standard comparable to the Title VII standard should be applicable, and that this somehow justifies their use of Title VI cases to explain their regulations. They reasoned that: "Although there are no cases specifically dealing with the effect of Geduldig or any of the other Supreme Court decisions cited above on Title IX, the reasoning involved in the Title VII cases is equally applicable to Title IX."\textsuperscript{108}

HEW's argument, however, has been damaged by the recent Supreme Court case of General Electric Co. v. Gilbert,\textsuperscript{109} which has in effect overruled every case relied on by HEW.\textsuperscript{110}

\textsuperscript{102} Id. at 487.

\textsuperscript{103} Cases cited by HEW were Wetzel v. Liberty Mut. Ins. Co., 508 F.2d 239 (3rd Cir. 1975); Communication Workers of Am., AFL-CIO v. American Tel. & Tel. Co., 513 F.2d 1024 (2nd Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Satty v. Nashville Gas Co., 10 FEP Cases 73 (6th Cir. 1975); Vineyard v. Hollister School Dist., 8 FEP Cases 1009 (N.D. Cal. 1974).


\textsuperscript{105} See Communication Workers of Am., AFL-CIO v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975); Tyler v Vickery, 517 F.2d 1089 (5th Cir. 1975); Gilbert v. General Elec. Co., 519 F.2d 661 (4th Cir. 1975); Hutchison v. Lake Oswego School Dist., 519 F.2d 961 (9th Cir. 1975); Satty v. Nashville Gas Co., 522 F.2d 850 (6th Cir. 1975); Berg v. Richmond Unified School Dist., 528 F.2d 1208 (9th Cir. 1975). See Section IIA supra for a discussion of Reed and Geduldig.


\textsuperscript{107} 384 F. Supp. at 770.

\textsuperscript{108} 1975 Hearings, supra note 5, at 487.


\textsuperscript{110} See note 88 supra for the cases relied upon by HEW.
The facts of *Gilbert* are similar to *Geduldig*: the issue was whether the General Electric Company must include normal pregnancies within the coverage of its temporary disability insurance program. The Fourth Circuit Court of Appeals decided that *Geduldig* was not controlling since there is a "difference of approach in applying constitutional standards under the Equal Protection Clause, as in [*Geduldig*], and in the statutory construction of the 'sex-blind' mandate of Title VII."\(^{111}\) In effect, the lower court applied a higher standard to Title VII discrimination than would be applied under the fourteenth amendment. The Supreme Court, in a six to three decision, reversed the lower court and held that equal protection cases such as *Geduldig*\(^{112}\) are relevant in interpreting acts of Congress, including Title IX.

[T]he similarities between the congressional language and some of [the equal protection] decisions surely indicates [sic] that the latter are a useful starting point in interpreting the former. . . . We think, therefore, that our decision in *Geduldig v. Aiello*, dealing with a strikingly similar disability plan, is quite relevant in determining whether or not the pregnancy exclusion did discriminate on the basis of sex.

. . . . The Court of Appeals was therefore wrong in concluding that the reasoning of *Geduldig* was not applicable to an action under Title VII.\(^{113}\)

The Court noted that "*Geduldig* is precisely in point,"\(^{114}\) and held that the insurance program which excluded pregnancy from its coverage was valid.

The Supreme Court has therefore put to rest the idea that classifications under acts of Congress are judged under a higher standard than those under the equal protection clause. In light of the *Gilbert* case, HEW's use of the Title VII cases to argue that Title VI provides a proper framework for viewing Title IX is unsupported.

The position of the *Gilbert* Court is fully consistent with

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\(^{114}\) *Id.* at 10.
another factor in the analysis, which is that the legislation involving race and sex is not identical and therefore cannot be applied identically. The express language of Title VI (racial discrimination), Title VII (sex and race discrimination in employment), and Title IX (sex discrimination in education) indicates clearly that Congress did not intend for each act to be enforced with equal standards.

Title VI contains no exceptions. Title VII contains several exceptions, including employment of aliens, employment for religious and educational activities, and employment where sex is a "bona fide occupational qualification." Title IX also lists numerous exceptions, including private undergraduate school admissions, religious schools, military schools, traditionally one-sex schools, maintenance of separate living facilities for men and women, and other exceptions added by the HEW regulations. The statutes seem to follow the Supreme Court in recognizing that claims of sex discrimination will be more narrowly defined than claims of racial discrimination.

HEW's argument, therefore, misses the point. Just as race and gender are on different constitutional footings, they are also on different statutory footings, as evidenced by the exemptions in Title IX and the conspicuous absence of exemptions in Title VI. Would HEW permit exceptions within racial discrimination regulations for religious schools, military schools, traditionally one-race schools, the Boy Scouts, or for separate toilet facilities for blacks and whites? They would not, and they do

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117 Id.
120 Id. at (a)(3).
121 Id. at (a)(4).
122 Id. at (5).
123 Id. at § 1686.
124 These include bona fide occupational qualifications (45 C.F.R. § 86.61) (1976); membership practices of sororities, fraternities, Boy Scouts, YMCA, etc. (45 C.F.R. § 86.14) (1976) and access to course offerings (45 C.F.R. § 86.34) (1976).
125 45 C.F.R. § 86.33 (1976). This inconsistency was also noted by Dr. Dallin H. Oaks in testimony before the House Subcommittee: "[W]hile Congress prohibits any segregation on the basis of race, it extended to institutions the right to have separate
not, because Congress did not write such exceptions into Title VI. If Congress had wanted Title IX to be enforced under the same standards as Title VI or even Title VII, then the language of Title IX would have so indicated. Therefore, HEW's use of Title VI cases as a rationale for the Title IX regulations should be carefully reviewed.

B. **Inherent Differences**

A second faulty assumption of the Title IX regulations is that no differences exist between men and women. This was acknowledged by the HEW bureaucrats when they noted the premise on which Title VI and Title IX are based: "The premise of both Title VI and Title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes, and therefore, there should be no differential treatment in the administration of federal programs..." While it is true there are no inherent inequalities between the general public (men) and the persons protected (women), there are some natural differences between men and women that might require different rules. Identical treatment of men and women in the context of protective measures at dormitories would constitute unequal treatment for women. Protective measures such as police surveillance and curfew hours for women, who are more vulnerable to criminal attack, may have to be abandoned under the Title IX regulations which prohibit "separate treatment." But, the Supreme Court has recognized that different treatment may be required for different sexes; Congress has realized it through their

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126 41 Fed. Reg. 20,296 (1976). This statement is found in proposed regulations for handicapped persons issued by HEW. The statement was made in the context of comparing race or gender discrimination with discrimination against the handicapped. While HEW noted that handicapped persons might require different treatment to be equal, they assume that equality for women and men means identical treatment.


128 45 C.F.R. § 86.31(b)(4) (1976). HEW has indicated that they may not enforce this section of the regulations, so that in fact, schools may not need to change their security measures. See note 255 infra.

Title IX exemptions; and even HEW has indirectly admitted it through their exemptions.

However, the original assumption of HEW, that there are "no inherent differences between [men] and [women]," has led to the incorrect notion that separate treatment always equals discrimination. Representative John O'Hara discussed this point in the subcommittee hearings: "[HEW] . . . fell into the notion, it seems to me, which is appropriate for Title VI regulations . . . that separate is inherently unequal . . . . There are in some cases [however], fairly legitimate reasons why you might want to provide separate but equal facilities and classes based on sex. . . ." The regulations would be more practical and effective in preventing sex discrimination if HEW had recognized from the outset that differences do exist between men and women and had worked accordingly.

An illustration of the potential for bureaucratic misinterpretation existent in the separate treatment provisions of the Title IX regulations is the recent ruling of HEW concerning father-son and mother-daughter banquets. On June 25, 1976, the San Francisco office of HEW sent a letter informing the Scottsdale, Arizona school district that such school-sponsored events "would be subjecting students to separate treatment and would not be permitted by the Title IX regulations."

This ruling was met with virtually unanimous outrage in the press and Congress. Senator Hubert Humphrey called the ruling "distorted at best and, in fact, irresponsible" and stated that rulings such as this one "bring discredit to serious efforts to affirm civil rights." Senator Birch Bayh, the original spon-

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Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). See also Vercheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3rd Cir. 1976), which permitted separate schools for boys and girls where no inequality of opportunity was disclosed by the record.

120 20 U.S.C. §§ 1681(a), 1686 (1972).


123 1975 Hearings, supra note 5, at 150.


sor of Title IX, was irate: "I tell you, . . . , there was no intention whatsoever to do away with the traditional father-son, mother-daughter festivities that exist in most of our schools." Apparently, Congress was displeased with the bureaucracy they had intrusted with the responsibility of implementing and enforcing Title IX.

President Ford was also displeased and "directed [HEW] to undertake further legal review to determine whether such application is mandated under the statute." As a result of the President's directive, HEW suspended all enforcement action during the review period, leaving open the possibility that such events could be found to violate the Title IX regulations. Congress was so disgusted with HEW, however, that they acted on the matter themselves. Senator Paul Fannin offered an amendment to Title IX which stated in part: "[T]his section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex." The bill passed on the floor of the Senate by an 88-0 vote.

Besides the father-son controversy, there are other complaints about HEW's interpretations of Title IX and the separate treatment regulations. Senator Wendell Ford (Ky.) complained that HEW had informed the "educational people in my State that the teachers cannot go into the classrooms in the morning and say, 'Good morning, boys and girls.' This has gone as far as I think it ought to go." Senator Barry Goldwater was upset because HEW ruled that schools could not sponsor a boys' choir, since Arizona has one of the most famous boys' choirs in the world in Tuscon. The full amendment also provided an exemption for the Boy's State and Girl's State programs of the American Legion. Several senators felt this exemption was unnecessary because HEW had already ruled that Boy's State and Girl's State programs fall within the term "voluntary youth service organization" and are thus exempt from Title IX coverage.

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134 Id. at S14647.
135 Besides the father-son controversy, there are other complaints about HEW's interpretations of Title IX and the separate treatment regulations. Senator Wendell Ford (Ky.) complained that HEW had informed the "educational people in my State that the teachers cannot go into the classrooms in the morning and say, 'Good morning, boys and girls.' This has gone as far as I think it ought to go." 122 Cong. Rec. S14650 (daily ed. Aug. 26, 1976). Senator Barry Goldwater was upset because HEW ruled that schools could not sponsor a boys' choir, since Arizona has one of the most famous boys' choirs in the world in Tuscon. Id. at S14649. These situations indicate the potential for abuse of Title IX by over-zealous bureaucrats.
137 Id.
138 Amendment No. 2155, 122 Cong. Rec. S14650 (daily ed. Aug. 26, 1976). The full amendment also provided an exemption for the Boy's State and Girl's State programs of the American Legion. Several senators felt this exemption was unnecessary because HEW had already ruled that Boy's State and Girl's State programs fall within the term "voluntary youth service organization" and are thus exempt from Title IX coverage. 122 Cong. Rec. S14645 (daily ed. Aug. 26, 1976) (letter from Martin H. Gerry to Senator Strom Thurmond (Feb. 17, 1976)).
139 Id.
III. Scope of the Title IX Regulations

A. Recipient Institutions

1. The New Definition

Federal regulations, such as those issued for Title IX, apply only to "recipient institutions," which simply refers to those institutions which receive federal financial assistance. Since termination of federal funds is the only effective method of enforcement available to the government, the easiest way for an institution to avoid federal regulation has been to refuse federal aid. Many educational institutions have traditionally refused federal financial assistance simply to avoid being classified as a recipient institution. Naturally, the decision to refuse federal aid has placed a severe financial burden on these independent schools, but they based their refusal on the belief that the benefits of educational autonomy outweigh the financial hardships.

Apparently HEW has been frustrated by its inability to control these autonomous institutions. The Title IX regulations, therefore, contain a revised definition of a recipient institution so that practically every institution in the United States now must comply with the regulations, including those schools which have always refused federal aid. The sacrifices many private institutions made for decades to avoid federal control become meaningless now as HEW has in effect changed the rules of the game while the game is in progress.

Sections 86.2(g) and (h) contain the controversial definition of recipient. As enforced by HEW, they state that an

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\[13\] The American Assoc. of Presidents of Independent Colleges and Universities, whose membership is representative of all private institutions, has reported the following figures on their members:

- Receive no federal aid directly: 26%.
- Receive assistance amounting to less than 2% of their annual budget: 29%.
- Receive assistance amounting to more than 2% but less than 10% of their annual budget: 29%.
- Receive assistance amounting to more than 10% of their annual budget: 15%.


\[14\] Id. The AAPICU Report states that two members of AAPICU will neither receive federal aid nor enroll students who are receiving any kind of federal assistance. These two would be the only schools in the United States that would not be classified as "recipients." Id.

\[14\] The pertinent sections state:
institution is a recipient of federal aid when a student at the institution accepts financial assistance from the government, such as veteran's educational benefits or a federally issued loan.\textsuperscript{145} If a school enrolls one student who receives any financial aid from the federal government, that school is a recipient just as a school which receives millions of dollars in direct federal grants is a recipient. This is a new approach for HEW. As recently as 1974, HEW stated that: "[T]he statute does not apply to an educational institution solely because the students attending the institution receive benefits under a federal program. The test is whether the institution itself is receiving the funds."	extsuperscript{146} This is the position which federal agencies have traditionally taken until the Title IX regulations.

The response of private institutions which have traditionally refused federal aid has been outrage. The charge has been led by Hillsdale College in Hillsdale, Michigan, but the criticism over this new definition of recipient has also been widespread among legislators\textsuperscript{147} and the news media.\textsuperscript{148} Hillsdale

\begin{enumerate}
  \item \textsuperscript{(g)} "Federal financial assistance" means any of the following, when authorized or extended under a law administered by the Department:

  \begin{enumerate}
    \item A grant or loan of Federal financial assistance, including funds made available for:
      \begin{enumerate}
        \item Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.
      \end{enumerate}

    \item \textsuperscript{(h)} "Recipient" means any State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, \textit{to whom Federal financial assistance is extended directly or through another recipient} and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.
  \end{enumerate}

\end{enumerate}

\begin{footnotes}
\textsuperscript{145} This is clearly HEW's interpretation of §§ 86.2(g) and (h) (1975) (emphasis added).
\textsuperscript{146} Letters from Arlena Renders, Assistant Regional Attorney for HEW to Dr. Gene Habecker, Dean of Students, George Fox College (March 16, 1976), reprinted in 122 Cong. Rec. 14,678 (daily ed. Aug. 26, 1976). (The statute referred to was the Family Educational and Privacy Rights Act of 1974, popularly known as the Buckley Amendment.)
College is one of the minority of private institutions which has traditionally refused all federal aid. When it became obvious that the new definition of recipient included Hillsdale, the Board of Trustees responded with a resolution which affirmed their intention to maintain independence, even if it meant a direct confrontation with HEW:

WHEREAS, by the [Title IX] regulations, the Federal government now seeks to impose its control over [our] freedom and independence through the subterfuge that a few of the students at Hillsdale College receive federal aid through the medium of such programs as Veterans Benefits and the National Direct Student Loan Fund; . . .

. . . RESOLVED, that Hillsdale College will, to the extent of its meager resources and with the help of God, resist by all legal means this and all other encroachments on its freedom and independence.\textsuperscript{149}

Opposition to this new definition has seldom been based on the reluctance of institutions to treat women equally. For this reason, Hillsdale College is particularly well-qualified to lead the fight, since it has maintained an active antidiscriminatory policy since before the Civil War.\textsuperscript{150} As President George Roche of Hillsdale has stated: "The issue at stake is not equal assistance received means assistance received by the institution directly from the federal government." The amendment was rejected by a 50-30 vote; S.382 94th Cong., 2nd Sess., 122 CONG. REC. S14,680-81 (daily ed. Aug. 26, 1976) (Amendment no. 382, submitted by Sen. Hatfield, which was similar to amendment no. 390, never reached the floor for a vote. A revised amendment to study the problem was passed, but later died in a conference committee.)

\textsuperscript{149} Editorials and other sympathetic articles have appeared in the following: READERS' DIGEST, May, 1976, at 126; NEWSWEEK, Dec. 29, 1975, at 47; HUMAN EVENTS, Nov. 22, 1975; Honolulu Star Bulletin, Nov. 5, 1975 at 6, col. A; NATIONAL REVIEW, Dec. 19, 1975 at 1458; Capital City Press, Oct. 30, 1975, at 2, col. a; Wall St. J., Dec. 4, 1975 at 2, col. 1; Chicago Tribune, Nov. 18, 1975, § 2, at 2, col. 1; Von Hoffman, A Spunky College Won't Back Down, Chicago Tribune, Nov. 22, 1975, § 1, at 12, col. 5 (syndicated column appeared nationwide). These are a few examples of the almost unanimous support among the media for the stand of Hillsdale College on the issue of who a "recipient" should be.

\textsuperscript{150} Resolution, Board of Trustees, Hillsdale College (adopted Oct. 10, 1975).

\textsuperscript{149} In 1851, Hillsdale granted the first B.A. degree ever awarded to a woman in Michigan, and the 39th ever awarded to a woman anywhere. Their present student body is equally divided between males and females, and 3.5% of the student body is black, which is a larger black proportion than is found in at least three large, state universities in Michigan. See Maeroff, Conservative College Fights U.S. Controls, N.Y. Times, March 19, 1976, at 30, col. 1.
treatment for minority groups or women. Hillsdale College had already pioneered in nondiscriminatory treatment for over a century before the first federal legislation on the subject."

The fear is rather that the "entire weight of federal guidelines . . . would potentially dominate our campus if we once accept the premise that aid to an individual student makes Hillsdale College a recipient of federal funds." Perhaps the proper question is whether there is any validity for these fears. In light of the situation at other private institutions, where dependence on federal funds has become so strong that noncompliance would never be considered, the apprehensions appear valid. The fears of federal domination have become realities in many institutions which are now "hooked on the Federal dollar." This explains why few of the larger private institutions with serious objections to affirmative action programs have vocalized their objections to HEW. Knowing that "he who pays the piper calls the tune," schools like Hillsdale simply do not want the federal government calling the tunes on their campus.

2. Legality of The New Definition

To determine the legal propriety of the new definition of recipient, one must look at the language of Title IX and its regulations, and the intent of its authors when Congress passed Title IX.

The relevant language of Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity

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151 Letter from President George Roche to "Friends of Hillsdale" (Oct., 1975).
152 Id.
153 Readers' Digest, May, 1976, at 128.
154 The major disappointment is that few of the larger prestigious private universities have joined in condemnation of the bureaucratic power play. The reason apparently is that many are already so heavily dependent on various forms of government aid that they are in no position to complain. Unfortunately, that is exactly the point critics of federal aid tried to make all during those years when a benevolent Washington opened its pocketbook to swarms of educators and administrators.
receiving Federal financial assistance . . . .”156 Apparently HEW was not satisfied with the language of Title IX, and so implemented its own language which defines a recipient as one “to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . . .”157 Including the term “benefits from” in the regulations was a deliberate attempt to expand the scope which the language of Title IX expresses. “By superadding the broader, more inclusive term benefits to the language of the statute, thus permitting inclusion of direct federal aid to students in the definition of federal financial assistance, HEW undoubtedly extended the scope of the statute . . . .”158

By ignoring the language of Title IX, HEW has also ignored the plain meaning of the word “recipient.”159 When a student receives federal aid, it is the student who receives the aid, not the college. The student is free to use his loan or grant at the institution of his choice. The institution chosen by the student receives money from the student, not the federal government, but HEW insists that such an institution is a recipient. Dr. Milton Friedman has stated: “[B]y this line of reasoning, the corner grocer and the A&P are ‘recipient institutions’ because some of their customers receive social security checks. The New York Times and the Chicago Tribune are Federal contractors because welfare recipients buy papers.”160

Where has HEW derived its authority to make this drastic change in the definition of recipient? Legally, they have relied on Bob Jones University v. Johnson,161 in which a federal district court held that a university was a recipient under Title VI because “payment is made directly to the eligible veteran under the educational institution.”162 HEW Secretary Weinberger stated its reliance on Bob Jones:

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157 45 C.F.R. § 86.2(h) (1976) (emphasis added).
158 Ultra Vires Challenges, supra note 66, at 159; see also 1975 Hearings, supra note 5, at 507-08 (memorandum of Sen. Jesse Helms).
159 See 1975 Hearings, supra note 5, at 508 (memorandum of Sen. Jesse Helms).
160 Newsweek, Dec. 29, 1975 at 47.
162 Id. at 602.
As we read *Bob Jones*, it is not the question of who is the payee, but it is the question of whether or not there is Federal assistance furnished. And Federal assistance furnished to a student who in turn uses it at an institution brings with it the same results as if you put the money directly to the institution.\(^{163}\)

In *Bob Jones*, the test set out by the district court was whether the aid “to veterans assists the educational program of the approved school.”\(^{164}\) The court then found the required assistance in the fact that “payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing institutional funds which would, in the absence of federal assistance, be spent on the student.”\(^{165}\) This is the so-called “benefit theory” under which HEW contends that money given to one entity within the university frees money to be used elsewhere, and thus benefits accrue to more than the payee of the federal aid. This theory is questionable within the context of the several university programs.\(^{166}\) It is even less tenable in the student aid situation where often the institution does not release institutional funds to spend on the student.\(^{167}\)

The main problem with HEW’s reliance on *Bob Jones* is that the decision was based upon a gross violation of Title VI,\(^{168}\) and sex discrimination regulations cannot rely on such cases as authority.\(^{169}\) This has been discussed already; the law is that sex and race discrimination are judged on different constitu-

\(^{163}\) 1975 Hearings, supra note 5, at 481.

\(^{164}\) 396 F. Supp. at 603 n.22.

\(^{165}\) Id. at 602.

\(^{166}\) See section IIIB supra.

\(^{167}\) It should be noted that just as it is the student who receives aid, not the institution, it is also the student whose federal aid will be cut off if he attends a school not in compliance with the federal regulations. The prospective student who is refused aid is then left with the choice of attending a complying school or not attending school at all. The practical effect of the new definition therefore is to deprive students of an education at the institution of their choice. This cut-off of funds to the student will only occur at private institutions which do not receive federal aid directly since the federal government has no other method for forcing those institutions to comply with regulations. Students attending institutions which receive federal money will not face this threat of losing their money since the federal government can force compliance by cutting off the institution’s funds directly.

\(^{168}\) Bob Jones University refused to admit unmarried black students.

\(^{169}\) See section IIIB supra.
tional and statutory grounds. Since race is a suspect criterion, federal financial assistance has been interpreted broadly under Title VI to include aid to students. However, where the alleged sex discrimination does not violate the constitution, the rationale for a broad interpretation of federal financial assistance no longer exists.\textsuperscript{170}

The disparity between the Congressional authors' intent concerning Title VI and Title IX reiterate the impropriety of using \textit{Bob Jones} to rationalize the new definition of recipient. The court there stated that student aid, such as veterans benefits, was intended to be covered by Title VI.\textsuperscript{171} Title IX's legislative history, on the other hand, clearly indicates that federal aid paid directly to students was not intended to be included as federal financial assistance. Senator Birch Bayh, the author of Title IX, stated this clearly: "[I]t is unquestionable, in my judgment, that [termination] would not be directed at specific assistance that was being received by individual students, but would be directed at the institution . . . ."\textsuperscript{172} The Senator's assurance that student aid would not be terminated has been ignored by the authors of the HEW regulations.\textsuperscript{173}

Indeed, a student who wants to attend a noncomplying school risks almost certain termination of his federal loan or grant. The new definition could force schools which value their freedom either to turn away students whose only source of financial help is the government or raise millions of dollars to finance the student loans and grants themselves.\textsuperscript{174} It is not the institution which suffers from the system but the student. As in the grocery store example, Senator Mark O. Hatfield comments that: "In order to maintain the grocer's independence, the food stamp recipient suffers. Now, we know that this is not the case in the administration of the food stamp program. Such a concept is absurd. But . . . this is precisely what happens in

\textsuperscript{170} See \textit{Ultra Vires Challenges}, supra note 66, at 164.
\textsuperscript{171} 396 F. Supp. at 603.
\textsuperscript{172} 117 CONG. REC. S30408 (1971).
\textsuperscript{173} The \textit{Bob Jones} situation provides a good example since the student was refused federal money when he insisted on attending Bob Jones University.
\textsuperscript{174} Hillsdale College President George Roche has stated: "[I]f the federal government seeks to smash us by cutting off funds to those students who choose to go here, we'll try to raise the money to finance the students ourselves." \textit{Readers' Digest}, May, 1976 at 130.
higher education." HEW must recognize that it is the student who suffers under such a situation; yet no relief is in sight.

The most effective remedy to this problem would be an amendment to Title IX. Even HEW believes this is the proper step if they erred in the regulation. Secretary Weinberger told Congress: "Our view was that student assistance . . . that goes directly or indirectly to an institution is Government aid within the meaning of [T]itle IX. If it is not, there is an easy remedy. Simply tell us it is not. We believe it is." Congress could have precluded this problem had they told HEW after the 1975 Hearings on the regulations to take sections 86.2(g) and (h) back to the drawing board and try again. Since then, Con-

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At least part of the problem with this definition of a recipient is that HEW realizes the preposterous result of the definition, but rather than face this fact and amend the regulations, they persist in their interpretation. They realize that the end result of the definition is that individual students, not institutions, will have much-needed financial assistance terminated, but they are hesitant to admit it and amend the regulations accordingly. The comments of Secretary Weinberger in response to a question at the 1975 congressional hearings clearly indicate the attempt to justify the definition of a recipient without facing the reality of its result.

Rep. Que: Let me ask you then, if an institution comes under your jurisdiction, because of the fact that student assistance was made available to a student attending that institution and that institution discriminating, would you then have the authority to sanction the cutting off of student assistance aid to students in that institution?

Sec. Weinberger: I think you have to look at the particular statute involved. If you are talking about title IX and the conclusion is that student assistance brings the institution at which it is used under the general authority of the regulations, then I think the Federal financial assistance to that institution might well be cut off. I don't think you would take the . . . assistance away from the student who was denied admission, . . . but you would let him take it and use it somewhere where there was not a violation . . . . We would certainly not take enforcement action against an innocent student.

1975 Hearings, supra note 5, at 481-82 (emphasis added). The Secretary admits that innocent students should not be penalized, but in fact, this is precisely what happens. They must either take their grant to a school which they may not care to attend, or have the grant terminated.

171 1975 Hearings, supra note 5, at 484.

The authority for the hearings on HEW's sex discrimination regulations was established by § 431(d) of the General Education Provision Act, which requires all regulations published in the Federal Register to be transmitted to Congress, which then is given 45 days to review the regulations. By passage of a concurrent resolution, the Congress can refuse the regulations, and the drafting agency (HEW) must issue modified regulations. 20 U.S.C. § 1232(d) (Supp. 1974). Several members of Congress
gress again failed to act when in August 1976, the Senate re-
jected amendments by Senators Hatfield and McClure which
would have precluded HEW from defining school as a recipient
when only students received aid. The only action taken by
Congress has been an authorization for the General Accounting
Office to conduct a study of the problem, but even this fall-
back amendment was not retained in the conference commit-
tee. Only an amendment by Congress will fully correct the
problem.

B. Institutional Approach of HEW

Controversial issues abound in the Title IX regulations,
and one of the most controversial has been whether HEW sur-

introduced concurrent resolutions, including: Sen. Helms, S. Con. Res. 46, 94th Cong.,
17, 1975).

Senator Hatfield proposed that:
[T]he Federal government may not (1) withhold Federal funds, or (2) regu-
late the practices of educational institutions receiving Federal funds . . .
where such power to withhold or regulate is based upon the receipt of Federal
financial assistance when such assistance is limited to . . . funds extended
to an institution for payment to or on behalf of students or extended to
students for payment of education-related expenses . . . .
version of the amendment never made it to the floor for a vote, as Senator Pell and
McClure's amendment stated: "For purposes of this chapter, federal financial assis-
tance received means assistance received by the institution directly from the federal
government." S.390, 94th Cong., 2d Sess., 122 CONG. REC. S14,760 (daily ed. Aug. 27,
1976). The Senate rejected the amendment by a vote of 30-50.

Amendment No. 382 was proposed by Senator Hatfield in this form after its
original form was rejected:

The G.A.O. is herein directed to conduct a detailed analysis of the extent and
effects of the Federal government's regulations of educational institu-
tions where such regulation is based solely upon the presence at those institu-
tions of students participating in Federal student assistance programs . . . .
This study shall continue for a period of not more than nine months at the
end of which the G.A.O. shall file a complete report of its findings with the
Labor and Public Welfare Committee of the U.S. Senate and the Education
and Labor Committee of the U.S. House of Representatives.

Memorandum from Senator Mark Hatfield's staff to the author (Nov. 9, 1976).
Even though this amendment was killed in the conference committee, Sen. Hatfield
intends to initiate a joint request to the General Accounting Office to study the prob-
lem.
passed the intent of Congress in extending the scope of the regulations to an entire institution, even though only one program within the institution may be receiving federal funds. The language of Title IX expressly states that it applies only to an "education program or activity." Congress further directed HEW "to effectuate the provisions of Section 1681 of this title with respect to such program or activity." The scope of Title IX's coverage therefore has been expressly limited by Congress to programs or activities receiving federal financial aid. HEW's regulations, however, are not so limited. Rather than extending only to programs receiving federal aid, they extend to an entire educational institution. The regulations define their own scope, stating that they "[apply] to every recipient and to each education program or activity operated by such recipient which receives or benefits from federal financial assistance." HEW Secretary Weinberger interprets this to mean that "the final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives federal funds for any of those programs."

The regulations have unquestionably expanded the scope of Title IX by the inclusion of the words "benefits from," words not found in Title IX. How does HEW justify such an expansion? HEW's rationale is again based on the benefit theory—which presumes that "[f]ederal assistance received by one program benefits all other programs within the institution" by "releasing" institutional funds. HEW assumes that even programs receiving no federal aid are benefitting from aid given to another program. It is much the same rationale used to designate a school as a recipient when only students receive aid.

Curiously, HEW relies on Board of Public Instruction v. 

\[\text{Footnotes:}\]

182 45 C.F.R. § 86.11 (1976). The regulation was interpreted by Secretary Weinberger in the congressional hearings. See 1975 Hearings, supra note 5, at 438.
185 45 C.F.R. § 86.11 (1976).
186 1975 Hearings, supra note 5, at 438 (emphasis added).
187 Ultra Vires Challenges, supra note 66, at 182. This Comment discusses in detail the entire problem of institutional versus programmatic application of Title IX at 169-84.
 Finch\textsuperscript{188} to support its position, stating that the HEW “interpretation is consistent with the only case specifically ruling on the language contained in Title VI, which holds that Federal funds may be terminated under Title VI upon a finding that they ‘are infected by a discriminatory environment’ . . . .”\textsuperscript{188} While the reliance of HEW on Finch is questionable on many grounds,\textsuperscript{190} the most important problem is that HEW is relying on “a rank distortion of what the court in fact said.”\textsuperscript{191} It is strange that HEW would rely on Finch for its authority, since this case fully supports the position that only programs which receive federal assistance directly are subject to HEW guidelines. The court in Finch was interpreting section 602 of Title VI, which is practically identical to section 902 of Title IX. Section 602 establishes that “termination [of federal funds] . . . shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.”\textsuperscript{192} HEW attempted to terminate funds for an entire school district in Florida when only particular schools and programs had violated the HEW regulations. The court refused to give a broad interpretation to the statute, and held that under Title VI “[t]he [termination] action of HEW in the proceedings below was clearly disruptive of the legislative scheme.”\textsuperscript{193} Instead, “termination of funds under Title VI of the Civil Rights Act must be made on a program by program basis . . . .”\textsuperscript{194} The court stated that HEW could not, under Title VI, terminate funds to an entire institution because one program failed to comply. In light of the stricter standard applied to racial discrimination than sex discrimination,\textsuperscript{195} this holding has even more validity for the Title IX regulations.

\textsuperscript{188} 414 F.2d 1068 (5th Cir. 1969).
\textsuperscript{190} Ultra Vires Challenge, supra note 66, at 172-79, discusses Finch and HEW’s reliance on it more fully.
\textsuperscript{191} 1975 Hearings, supra note 5, at 99 (testimony of John A. Fussak, Pres., NCAA).
\textsuperscript{192} 42 U.S.C. § 2000d-1 (Section 602, Title VI) (1964), as quoted in Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1072 (5th Cir. 1969).
\textsuperscript{193} Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1075 (5th Cir. 1969).
\textsuperscript{194} Id. at 1078-79.
\textsuperscript{195} See section II supra.
Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association. The statute prescribes a policy of disassociation of programs in the fact finding process. Each must be considered on its own merits to determine whether or not it is in compliance with the Act. In this way the Act is shielded from a vindictive application. Schools and programs are not condemned en masse or in gross, with the good and the bad condemned together, but the termination power reaches only those programs which would utilize federal money for unconstitutional ends. Under this procedure each program receives its own "day in court."\(^{196}\)

In the preface to the Title IX regulations issued on June 4, 1975, HEW claimed that *Finch* "holds that federal funds may be terminated under Title VI upon a finding that they [the institutions] 'are infected by a discriminatory environment'."\(^{197}\) Either HEW's legal staff does not appreciate the difference between a holding and dictum, or HEW is being deliberately misleading, because the language referred to by the Department is purely dicta, not the holding. The court left open the possibility that HEW, in evaluating compliance on a "program by program basis," need not consider each program "in isolation from its context."\(^{198}\) Yet in the *Finch* case, it was decided that the programs in compliance had not been "infected by a discriminatory environment," even though some of the schools in the district were openly practicing racial segregation in violation of the Title VI regulations. One commentator noted during the 1975 congressional sex discrimination hearings that HEW had not really relied upon the holding of *Finch*, but instead ignored it.

The *Finch* "infection" dicta . . . have been used by HEW to obscure the holdings of that case. It is useful initially to note that HEW lost the Taylor County case, despite the fact that the plaintiff was a segregated school district. If HEW's present use of the infection dicta were in fact supported by the case, they would have won it.\(^{193}\)

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196 Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078 (5th Cir. 1969) (emphasis added).
199 1975 Hearings, supra note 5, at 404 (testimony of Janet L. Kuhn, Attorney).
One last point concerning the *Finch* case and the benefit theory deserves brief mention. The primary assumption behind HEW's benefit theory is that discrimination in one program automatically infects all other programs, or conversely, that federal funds sent to one program automatically benefit all other programs. *Finch* attacked this assumption:

In order to affirm HEW's action, we would have to assume, contrary to the express mandate of the statute that defects in one part of a school system automatically infect the whole. Such an assumption in disregard to [sic] statutory requirements is inconsistent with both fundamental justice and without judicial responsibility.  

If HEW is forbidden from presuming infection of an entire institution, it must also be prohibited from presuming that benefits are conferred upon an entire institution when one of its programs or students receives federal financial aid. As one commentator has stated: "If HEW cannot presume that discrimination in one program taints all programs . . ., it is difficult to imagine how the Department could be justified in using that presumption to expand the scope of its regulatory powers."  

What caused HEW to misinterpret the *Finch* case and neglect the plain language of Title IX?  

It is probable that HEW, in its belief that sex discrimination should be eliminated, felt constricted by the Title IX provisions which limited

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200 Id. at 406 (quoting from Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1074 (5th Cir. 1969)).

201 *Ultra Vires Challenges*, supra note 66, at 175.

202 It should be noted in fairness to HEW that their position on this question has been supported by some commentators. See Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 Texas L. Rev. 103 (1974), which stated that *Finch*, along with McLeod v. College of Artesia, 312 F. Supp. 498 (D.N.M. 1970) and Gautreaux v. Romney, 457 F.2d 124 (7th Cir. 1972), "appear to support the proposition that if a program is neither directly receiving federal money nor directly discriminating, it can escape the grasp of Title IX." *Id.* at 110. Despite this appraisal, the author used the benefit theory to agree with HEW's position. See also 1975 Hearings, supra note 5, at 171 (statement of Birch Bayh, U.S. Sen. from Indiana), 385-86 (statement of Dr. Bernice Sandler, Director, Project on the Status and Education of Women, and Executive Association of American Colleges, Wash., D.C.), 416, 420 (statements of Nellie M. Varner, Director, Affirmative Action, and Assis. Prof. of Political Science, U. of Mich., appearing on behalf of the National Assoc. of State Universities and Land-Grant Colleges, The American Council on Education, and the Assoc. of American Universities).
enforcement to "programs or activities" receiving federal assistance.\textsuperscript{203} HEW feared that, "if interpreted narrowly, the provisions could become a stumbling block on the path to full implementation of the policy underlying Title IX."\textsuperscript{204} Congress had deliberately limited the scope of Title IX,\textsuperscript{205} so HEW decided to circumvent the limitation. In desperate need of authority, HEW adopted the dictum in the \textit{Finch} case and interpreted it as a holding. In the absence of stronger authority, HEW cannot ignore the express language of Title IX, which applies to federally funded \textit{programs}, not institutions.

C. Religious Exemption

Many of the issues raised by the Title IX regulations have religious and moral significance because the questions concern sexual morality and the sexual role of individuals in society. HEW recognized that these questions are basically religious by including section 86.12 in the regulations. This section exempts all educational institutions which are controlled by a religious organization to the extent that provisions of the regulations conflict with a specific tenet of the religious organization.\textsuperscript{206}

\begin{itemize}
  \item \textsuperscript{203} 20 U.S.C. §§ 1681, 1682 (1972).
  \item \textsuperscript{204} Todd, \textit{Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools}, 53 Texas L. Rev. 103, 108 (1974). This statement is from a law review article which viewed the HEW interpretation of \textit{Finch} favorably.
  \item \textsuperscript{205} Three educational sex discrimination laws were introduced in Congress. Senator Birch Bayh’s original Title IX amendment, S.398-659, 92nd Cong., 1st Sess., 117 Cong. Rec. 30156-57 (1971) and President Nixon’s bill, H.R. 5191, 92nd Cong., 1st Sess., 117 Cong. Rec. 4371 (1971), would have given HEW enforcement powers over institutions, not programs. The bill adopted by Congress, sponsored by Rep. Edith Green, H.R. 7248, 92nd Cong., 1st Sess., 117 Cong. Rec. 39354-74 (1971), limited the prohibition on sex discrimination to "education program or activity." Congress could have made Title IX applicable to entire institutions, but they did not, as the plain language of the statute indicates. \textit{See Ultra Vires Challenge, supra} note 66, at 169-70.
  \item \textsuperscript{206} The section reads as follows:
    Educational institutions controlled by religious organizations
    a) \textit{Application}. This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.
    b) \textit{Exemption}. An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Director a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization.
\end{itemize}

45 C.F.R. § 86.12 (1976).
The exemption, therefore, applies only to schools which can meet a two-prong test. Section 86.12 requires that: 1) The institution must be controlled by a religious organization; and 2) some part of the regulations must conflict with a specific tenet of the religious organization, with HEW being the final arbiter of whether a conflict exists. The exemption then exists only for those parts of the regulations which are in conflict with the specific tenet.

While HEW should be lauded for including this religious exemption, two serious problems exist with the section. First, a constitutional question is presented by the portion of section 86.12 which requires the schools to submit a statement of their conflict, and then allows HEW to determine whether the conflict between the regulations and the specific tenet is genuine. The regulations place the burden of proving religious sincerity on the institution by requiring a statement in writing from the school president identifying the provisions of the regulations which "conflict with a specific tenet of the religious organization." HEW then decides whether the application for an exemption is valid. Brigham Young University's President, Dallin H. Oaks, stated the viewpoint of religious institutions:

[A] government agency reserves the right to judge the content and application of a religious tenet, and presumably, to deny an institution's assertion that its religious belief compels a certain action or teaching.

By this means government and not the church becomes the final arbiter of religious worship, practice, and belief. HEW says its responsibility is to assure that the institutions claiming exemptions have a full understanding of the provisions from which they believe themselves exempt. HEW therefore will not say explicitly that it is reviewing the contents

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207 Id. at (b).
208 It should be noted here that, according to HEW, only two or three schools have received the religious exemption. This is because HEW considers review of religious exemption applications to be a "low priority." Telephone conversation with Al Hamlin, HEW, Office of Civil Rights (Nov. 10, 1976).
209 1975 Hearings, supra note 5, at 228, 251 (testimony of Dallin H. Oaks, President of Brigham Young University, Director and Secretary of the American Association of Presidents of Independent Colleges and Universities).
210 Letter from Martin H. Gerry, Acting Director, Office for Civil Rights, to Pres. Dallin H. Oaks of Brigham Young University (March 17, 1976).
of a religious tenet, but it seems apparent from a straightforward reading of section 86.12(b) that HEW must do so in order to process a school's application for exemption.

In reserving the right to judge the sincerity of the school's beliefs, HEW has violated the first amendment rights of all schools making such an application. The courts have consistently stated that the federal government and its agencies are severely limited by the first amendment, and more importantly that no one shall ever have to prove the verity of his religious beliefs. In United States v. Ballard, the Supreme Court stated the law that is now "well settled":

Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be

\[211\] In this context, the first amendment freedoms are absolute. They can be properly restricted only when a sufficiently important governmental interest appears. United States v. O'Brien, 391 U.S. 367 (1967). The Supreme Court has stated this concept: "[T]he 1st Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-304 (1940). The Court then went on to say that "the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." Id. at 304 (emphasis added). In West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) the Court stated:

The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect.

Id. at 639 (emphasis added). See also Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969). In the present context, § 86.12 would be constitutionally permissible only if a "grave and immediate danger" existed within the religious schools in question.

\[212\] Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 501 (1st Cir. 1950) states that: the "[First] Amendment limits only the action of Congress or of agencies of the federal government . . . ." McIntire v. William Penn Broadcasting Co., 151 F.2d 597, 601 (3rd Cir. 1945) states that: "[T]he First Amendment was intended to operate as a limitation to the actions of Congress and of the federal government." See also United States v. Ballard, 322 U.S. 78 (1944); Fellowship of Humanity v. County of Alameda, 315 P.2d 394 (Cal. 1957); Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383 (Del. 1943); Zlotoxitz v. Jewish Hosp., 84 N.Y.S.2d 61 (1948).

\[213\] 322 U.S. 78 (1944).

\[214\] Fellowship of Humanity v. County of Alameda, 315 P.2d 394, 406 (Cal. 1957); see also Estate of Supple v. Hallihan, 55 Cal. Rptr. 542 (1967).
incomprehensible to others... The Fathers of the Constitution... fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.  

It is clear that HEW is not constitutionally permitted to force institutions to explain their religious views and then subject those views to governmental scrutiny. "[T]he State has no power to decide the validity of the beliefs held by the group involved." If the government does apply a test of some sort to determine whether the school's application for a religious exemption is valid, it must be an objective one, and "[o]nce the validity or content of the belief is considered, the test becomes subjective and invalid."  

The second problem with section 86.12 is more important for traditionally Christian schools which have no direct affiliation with a church or religious organization. The regulations make it clear that the exemption exists only for "an educational institution which is controlled by a religious organization." Thus Christian schools which have no affiliation with a larger organization or church automatically fail the test set forth by HEW. This narrow application of the religious ex-

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217 Id.
218 45 C.F.R. § 86.12(a) (1976) (emphasis added).
219 HEW has never really defined which institutions are "controlled by a religious organization." As a general rule however, only the schools which are actually within the organizational structure of the church will meet the definition. For example, Brigham Young University, which is an integral part of the Church of Jesus Christ of Latter-Day Saints, has been given an exemption. Letter from Martin H. Gerry, Acting Director, Office for Civil Rights to President Dallin H. Oaks of Brigham Young University (Aug. 12, 1976). On the other hand, Asbury College in Wilmore, Kentucky is unquestionably a religious institution, yet they have no direct affiliation with any church. They fail to meet the definition. Thus, affiliation with a larger church organization seems to be the key. Interview with Dr. Dennis F. Kinlaw, Pres. of Asbury College (Sept. 26, 1976).
220 It is interesting to note at this point that a direct conflict exists between the language of § 86.12 and the language of an HEW memorandum which was issued to explain the regulations. Senator Bellman put the memorandum, which was in question and answer form, into the Congressional Record at 121 Cong. Rec. S13460 (1975), because he believed that it "accurately answers the most frequently asked questions." It states in part:
emption forces many Christian schools to comply with parts of the regulations which violate moral standards of conduct and belief held by the schools. The exclusion of these schools from the religious exemption is unfair at best and a violation of their first amendment right to freedom of religion at worst.

A constitutional question is again raised by HEW's interpretation of who qualifies to be exempt. Under section 86.12(a), the sincerity of an institution's beliefs are judged by whether the institution is controlled by a religious organization. An institution not "controlled by a religious organization" is not religious enough to qualify, according to HEW. This criterion for judgment is not only severely limiting, but the criterion and the judgment itself violate the first amendment rights to freedom of religion which are guaranteed to the many Christian colleges in America which have no affiliation with a larger church or organization. The courts have upheld this right by stating that "even an unorganized religious body or sect . . . is guaranteed the same degree of freedom in religious worship as is assured the larger denominations." The first amendment was not intended to protect only religious groups associated with some large "organization," or even only "orthodox" religions. "If there is any fixed star in our constitutional con-

Q. Who is exempt from Title IX's provisions?
A. Religious schools to the extent that the provisions of Title IX would be inconsistent with the basic religious tenets of the school.

The question was not answered "accurately." Under this answer, all religious schools, including those without affiliation with a religious organization or church would seem to be included. Either HEW intended to include such institutions within the religious exemption and simply misworded § 86.12(a) so as to exclude them, or this memorandum is an example of deliberately inaccurate public relations, issued with the intent of giving the impression that the religious exemption is broad.

Letter from Dr. Dennis F. Kinlaw, President of Asbury College in Wilmore, Kentucky, to alumni (July 7, 1976), stating the position in which such schools have been left:

It is not legal to seek to present models of chastity and marital fidelity. We may not inquire about the marital status of prospective employees. We are to treat pregnancy out of marriage as any other "temporary disability". And abortion must be handled similarly. We can no longer claim to be non-discriminatory if we take cognizance in our social life that there are differences between men and women.

O'Neill v. Hubbard, 40 N.Y.S.2d 202, 204 (1943). This court was interpreting art. 1, § 3 of the New York State Constitution which is similar to the first amendment of the United States Constitution in that it guarantees religious freedom.

See Follett v. McCormick, 321 U.S. 573 (1944); West Virginia Bd. of Educ. v.
stellation, it is that no official high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion . . . ." These distinguished words from the Supreme Court convey the notion that the rights of a small, private religious college with no affiliation with a large organized church are just as strongly protected by the first amendment as are the rights of a school with a direct affiliation with some church. Therefore, the Department of HEW made an error of constitutional significance when it excluded such schools from the potential exemption available in section 86.12.

At a time when most Americans want a return to an education that teaches moral and ethical development as part of the curriculum, it is significant that the only schools remaining which attempt to do this are harassed by the federal government. The Title IX regulations are a serious step in the wrong direction.

The teaching of honesty, integrity and chastity must not become exclusively the province of religion. If our government not only abandons the advocacy of moral standards, but positively prohibits the practice of such values at teaching institutions, as these regulations appear to do, the destruction of America as a great nation will be both imminent and inevitable.

IV. Substantive Problems in the Title IX Regulations

A. Marital and Parental Status

For many private institutions, perhaps the most troublesome sections in the Title IX regulations are those concerning


See Wall St. J., Jan. 2, 1975, at 10, col. 1; Braden, What Was Wrong With Their Education, Washington Post, April 17, 1974, at 19, col. 1; and N.Y. Times, April 18, 1975, at 27, col. 1, which reported that a Gallup Poll "found that 79% of those interviewed supported instruction on morals and moral behavior, while 15% opposed it."

121 CONG. REC. S20,254 (daily ed. Nov. 18, 1975) (notification of Brigham Young University policy of non-discrimination on the basis of sex, placed in Congressional Record by Sen. Buckley).
marital and parental status.\textsuperscript{227} Educators have been outspoken in their opposition to these sections\textsuperscript{228} which in effect require schools to view sexual issues through amoral glasses even though many institutions have religious and moral principles which prevent such a view. One educator expressed the following concern:

[T]he government tries to force a private institution to treat childbirth as a simple biological fact, devoid of moral implications and outside the context of the Christian family. It denies the institution the right to exercise its judgment in

\textsuperscript{227} 45 C.F.R. § 86.21(c) (1976): Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;
2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or follow any rule or practice which so discriminates or excludes;
3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition. . . .

45 C.F.R. § 86.40 (1976) is substantially the same as § 86.21(c), but covers potential discrimination after the student has already been admitted, including requirement of a leave policy for students who are pregnant or having an abortion, even if the school has no such policy for other temporary disabilities. 45 C.F.R. § 86.57 (1976) is substantially the same as sections 86.21(c) and 86.40, but covers employment practices.

\textsuperscript{228} Letter from Dr. Dennis F. Kinlaw, Asbury College, to alumni (July 7, 1976), stating:

For four millenia the subjects of marriage, pregnancy, abortion, and the nature of human personhood have been acknowledged as of religious significance. These are crucially religious in character to those of us who stand in the Judeo-Christian tradition. Yet HEW has now provided us with a regulation . . . that forces colleges and universities to treat these in a non-moral, non-ethical manner.

personnel matters of seeking and retaining staff members who exercise Christian virtues as role models for students.229

This concern is typical of many schools which attempt to teach more than the three R's, especially those institutions which cannot receive the religious exemption under section 86.12.230

The regulations which prohibit institutions from suspending or refusing to admit a student or employee on the basis of pregnancy, childbirth, or termination of pregnancy,231 are particularly burdensome. An institution cannot refuse to hire a teacher or admit a student on the grounds that the applicant is pregnant or has had an abortion. Neither can the institution suspend or terminate the student or teacher who becomes pregnant or has an abortion after becoming part of the institution even though such a circumstance may be a violation of the institution's stated moral standards. The feeling was expressed from the floor of the U.S. Senate that this is an intrusion into the school's protected domain:

Under [§ 86.21(c)], an educational institution cannot refuse admission to unwed, pregnant students. It is not asserted herein whether educational institutions should, or should not, adopt such a policy. It is however contented [sic] that they have a perfect right to do so if they choose, and neither the United States Constitution [equal protection] . . . nor title IX prohibits them from doing so.232

This paper makes no attempt to determine what is moral, but in light of Geduldig, Gilbert and the religious and academic freedoms provided by the first amendment, it seems clear that institutions should be allowed to make their own decisions about questions such as pregnancy and abortion. Geduldig and Gilbert have already decided that pregnancy may be a valid criterion for treating one group differently from another group. Whether the issue is raised under the equal

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230 See section VA concerning these unfortunate institutions.

231 45 C.F.R. §§ 86.21, 86.40, 86.57 (1976).

protection clause\textsuperscript{233} or an act of Congress,\textsuperscript{234} these two Supreme Court decisions leave little doubt that a school can dismiss or refuse to admit or hire a student or employee on the basis of pregnancy. Yet the Title IX regulations maintain that pregnancy must be treated as any other temporary disability.\textsuperscript{235} HEW has relied on Title VII as the guide in making such a determination.\textsuperscript{236} Under Title VII, classifications based on pregnancy had been considered discriminatory,\textsuperscript{237} but the recently decided Gilbert case has eliminated that position and it is now clear that under Title VII pregnancy may be a valid criterion for classifying persons. The Title IX regulations are thus left with no legal basis for their requirement that pregnancies be treated as any other temporary disability.

However, the pregnancy and abortion questions raised by the Title IX regulations are apparently moot. Most institutions which would object to these provisions will be exempt from them under section 86.12.\textsuperscript{238} HEW has further stated that none of the provisions are violated as long as an institution's policy concerning pregnancy and abortion is evenly applied to members of both sexes.\textsuperscript{239} Those institutions without a religious exemption, therefore, are permitted to dismiss a woman who is pregnant outside of wedlock as long as they also dismiss the father-to-be. This position makes the legal problems in the pregnancy and abortion sections moot as long as HEW continues its present enforcement policies.\textsuperscript{240}

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\bibitem{235} See 45 C.F.R. §§ 86.21(c)(3), 86.40(b)(4), 86.57(c) (1976).
\bibitem{236} See 29 C.F.R. § 1604.10(b) (1972), where Title VII requires treatment of pregnancy as a temporary disability.
\bibitem{237} See cases cited in note 103 supra.
\bibitem{238} Such an example is Brigham Young University, which was granted exemptions from section 86.21(c), section 86.40(b)(1)(5) and section 86.57(b). Presently, however, HEW reports that only "two or three" such schools have been granted a religious exemption, since the religious exemption is a "low priority" for HEW. Telephone conversation with Al Hamlin, HEW, Office of Civil Rights (Nov. 10, 1976).
\bibitem{239} Letters from Martin H. Gerry, Director of Office of Civil Rights, to President Dallin H. Oaks, Brigham Young University (May 17, 1976, and Aug. 12, 1976).
\bibitem{240} It has been suggested that suspensions or dismissals based upon a student's pregnancy should be allowed in only limited circumstances in light of the serious emotional and social problems caused by such dismissals. Comment, Implementing Title IX: The HEW Regulations, 124 U. Pa. L. Rev. 806, 832-33 (1976); cf. Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971). One commentator on the issue of
\end{footnotesize}
Another problem concerns the general prohibition in the Title IX regulations of inquiring about a student's or employee's marital status. Institutions may inquire about the sex of an applicant, but not their marital status. Presumably HEW believes that such inquiries amount to discrimination. Yet marital status is often a legitimate area of inquiry where such information is needed not to discriminate but to properly evaluate the fitness of the teacher for the position at the religious institution. Inquiry about a pregnant applicant's marital status is proper for religious institutions that believe marriage to be a "God-ordained relationship." Yet this inquiry is forbidden under the Title IX regulations. This violates an institution's first amendment rights to religious and academic freedom. In the context of private institutions at least, the right of educators to make moral judgments should be a protected first amendment right. Educators should have the right to put before their students "examples of marital success and stability," but the Title IX regulations forbid them this right.

B. Institutional Rules

Rules of appearance and behavior are now forbidden at educational institutions if they differentiate between the sexes. The practical effect of these governmental intrusions onto the campus will be determined by the performance of

\[\text{supra} \text{ at 832 (1976).}\]

\[\text{241} \quad 45 \text{ C.F.R. § 86.21(c)(4) (1976) (pre-admission inquiries concerning marital status prohibited); id. at § 86.60(a) (pre-employment inquiries concerning marital status prohibited).}\]

\[\text{242} \quad 45 \text{ C.F.R. §§ 86.21(c)(4), 86.60(b) (1976).}\]

\[\text{243} \quad \text{CHRISTIANITY TODAY, Nov. 5, 1976, at 18.}\]

\[\text{244} \quad \text{Id.}\]

\[\text{245} \quad \text{Id.}\]

\[\text{246} \quad \text{Relevant sections of 45 C.F.R. § 86 (1976) include:}\]

\[\text{86.31(b) - . . . a recipient shall not, on the basis of sex:}\]

\[\begin{align*}
(4) & \quad \text{Subject any person to separate or different rules of behavior, sanctions, or other treatment;} \\
(5) & \quad \text{Discriminate against any person in the application of any rules of appearance.}\end{align*}\]

\[\text{86.32 Housing.}\]

\[\text{(a) Generally, a recipient shall not, on the basis of sex, apply different rules or regulations . . . related to housing . . . }\]
HEW in enforcing the regulations. Strict enforcement could force major changes at institutions which presently acknowledge differences between men and women in their rules.

The regulations deny schools the right to maintain differing "rules of appearance." This apparently means that a school could maintain appearance rules, such as hair length requirements, only if the school can obtain a religious exemption by showing that section 86.31(b)(5) conflicts with a religious tenet. Dress codes are also forbidden, but standards of dress can be imposed as long as they are based on general criteria of neatness and modesty which apply equally to both sexes.

The offensive thing about this section is not that women will now be allowed to wear pants or men will now be allowed to wear long hair. The odious aspect of this section is that HEW is attempting to push private colleges which still enforce such seemingly ancient rules into a mold. This prohibition of rules of appearance attacks the private colleges which are so important to American educational diversity. Since large, state-operated universities no longer have appearance requirements which violate the Title IX requirements, the only potential violators are private schools which attempt to maintain a unique atmosphere and character on their campus.

HEW bureaucrats assume that such rules are purely discriminatory relics of the past. But many private institutions, often Christian schools which have received no religious exemption from section 86.31(b)(5), see a valid purpose in such appearance rules as a part of their program to "educate men to be men and women to be women," recognizing that sexual roles are part of education and life.

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246 45 C.F.R. § 86.31(b)(5) (1976).
247 Brigham Young University has been granted such an exemption with regard to hair length requirements. Letter from Martin H. Gerry, Director of the Office of Civil Rights, to President Dallin H. Oaks, Brigham Young University (Aug. 12, 1976).
248 Id.
249 See sections IA and B, supra.
250 Letter from Dr. Dennis F. Kinlaw, President of Asbury College, Wilmore, Kentucky, to the school's alumni (July 7, 1976). Asbury is an example of such a Christian school.
251 See 121 CONG. REC. S20254 (daily ed. Nov. 18, 1975) (notification of Brigham Young University Policy of Non-Discrimination on the Basis of Sex), where Brigham Young University declared:
The regulations also forbid different "rules of behavior" based on sex. This general prohibition, when read together with the direct prohibition of different housing rules in section 86.32, operates to prohibit different curfews for men and women. This requirement that curfews and other dormitory rules be the same for men and women indicates again the erroneous assumption of HEW that equality means that institutions must ignore differences in the sexes. This section has led to numerous complaints because many schools attempt "to provide equal housing to students by providing housing programs that do indeed recognize sex differences." HEW, through their misconception that different rules are automatically discriminatory, could force colleges and universities to reduce the security measures taken at women's dormitories.

*Robinson v. Board of Regents of Eastern Kentucky University* held that differing curfews are not necessarily discriminatory. Freshman women at Eastern Kentucky University were subject to curfew requirements not imposed on other students. By use of the rational basis standard, the Sixth

HEW regulations the University will not follow are:

(4) Section 86.31(b)(5): B.Y.U. will continue to enforce rules of appearance which differ for men and women because we believe that differences in dress and grooming of men and women are proper expressions of God-given differences in the sexes. We will resist the imposition of a unisex standard of appearance.

Brigham Young University received a religious exemption for this section, thus making their resistance moot.

45 C.F.R. § 86.31(b)(4) (1976).

45 C.F.R. § 86.32 (1976) states: "A recipient shall not, on the basis of sex, apply different rules . . . related to housing."

1975 Hearings, supra note 5, at 159 (statement of Rep. Bill Nichols (Ala.), in which he pleaded that Auburn University be allowed to continue to provide greater security measures for women).

Fortunately, this is at least one area where HEW may never enforce the regulations, since they realize that to do so would indeed lead to unequal treatment. When Secretary Weinberger was questioned about the apparent adverse effect of the Title IX regulations on dormitory rules, he responded:

I would hope that there would not be any mechanistic interpretations [of Section 86.32] . . . [T]here would have to be a challenge raised by men [and] . . . I would certainly suggest that if any university wishes to provide additional security for the housing that they continue to do so for women's housing.

1975 Hearings, supra note 5, at 472.


See section II supra.
Circuit Court of Appeals upheld the curfew regulations, concluding that "safety is a legitimate concern of the Board of Regents and this court cannot say that the regulations in question are not rationally related to the effectuation of this reasonable goal." The HEW regulations have permitted government interference in an area that has been judicially recognized as the province of the schools.

Indeed, the Title IX regulations are overly broad in their coverage of all rules regarding behavior, treatment, and appearance. "The broad, sweeping nature of these . . . paragraphs deny any valid distinction relative to behavior, treatment, or appearance between the sexes. Such a view flies in the face of the position adopted by the Supreme Court . . . ." A wiser policy would be to conform the Title IX regulations to the Supreme Court's position under which HEW would review each situation on a case by case basis to determine whether the institutional rule has any rational relationship to the purpose of the institution, with a strong presumption in favor of the rationality of the rule since the institution is in a better position than HEW to know what its purposes are.

V. CONCLUSION

Resolution of the serious problems discussed herein can only be accomplished if those involved recognize the worthy goals and purposes of their alleged adversaries. Private institutions must be cognizant that the cause promoted by the Title IX regulations is a good one. HEW must likewise realize the importance of private education and its principles. Congress should not lose sight of its ability to settle these conflicts through enacting more specific legislation.

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258 475 F.2d at 711.
260 It should be noted that the fourteenth amendment applies only to a state action. The suggestion here is not that the Supreme Court currently requires HEW to use the rational basis test, but merely that the same standard applied by the Supreme Court in fourteenth amendment cases could be effectively used by HEW to evaluate institutional rules and regulations on behavior and appearance.
A. Private Education

Private education should recognize the good intentions of Congress and HEW in attempting to eliminate sex discrimination. And they should pay more than lip-service to the nobleness of the cause. They should develop their own procedures and plans to eliminate sex discrimination, and comply fully with the purposes of Title IX, even when the procedures devised by HEW to achieve those purposes are so objectionable that noncompliance may be required. Private education has too often been "a caboose on the train of equal rights, rather than an engine," and this is criminal when one considers the high professional and moral standards which most private institutions claim to uphold. While many provisions of Title IX are in obvious conflict with the beliefs of some schools, this should not deter private institutions from actively pursuing equal rights for women where no conflict exists. In the past, private education has "failed its own principles and impoverished its own performance by the neglect of large pools of potential academic competence." Private institutions should actively recruit women, provide fair procedures within the institution to deal with complaints, make an annual report on the status and progress of women at the institution, and in a sense, develop their own affirmative action programs that answer to their own conscience rather than HEW. The institution should then inform HEW of these voluntary efforts to erase sex discrimination and proceed to ignore the federal mandates which conflict with the moral and philosophic tenets of the institution.

If such voluntary measures do not satisfy HEW, the private institutions may have to undertake legal action to void the Title IX regulations. No federal agency can make laws. Their proper function is to enforce the laws passed by Congress, and when regulations exceed the scope of such legislation, the regu-

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261 Address by Eugene B. Habecker, J.D., Dean of Students, George Fox College, to National Conference of ACDAM/CADW (June, 1976).
262 SOCIETY, Jan. 1976, at 6, quoting from STUDY OF CARNEGIE COUNCIL ON EDUCATION.
lations are void. The powers of an agency like HEW were considered just last year by the Supreme Court: "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather it is 'the power to adopt regulations to carry out into effect the will of Congress as expressed by the statute'."264 The proper relationship between statutes and regulations has further been defined: "The statute defines the rights of the [persons involved] and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not, alter the statute."265 If the regulations exceed the statutory scope of the law passed by Congress, they are void, a "mere nullity."266 So the issue which a court would have to decide is whether HEW's sex discrimination regulations exceeded the scope and will of Congress.

As noted earlier, parts of the Title IX regulations appear to ignore the plain language of Title IX.267 The regulations seem to "bear little resemblance to Title IX at all . . . [HEW] has made vague that which was precise, and with the nebulous legal environment that it has intentionally created, the Department now has the latitude to arbitrarily dictate 'law' that will affect every schoolchild, and student in America."268 It certainly seems that the Title IX regulations are open to an ultra vires attack because they exceed the scope of Title IX.269 The Supreme Court has upheld the rights of private education on many past occasions, and private institutions should not now hesitate to use the courts in an attempt to void the regulations.

267 See section III supra.
269 See Ultra Vires Challenges, supra note 66, at 133 et seq. The term ultra vires refers to "acts beyond the lawful power of an administrative agency or department." Id. at 150. An in-depth discussion of this precise issue is contained therein.
B. Congress

Congress should make better use of the 45 day period granted by the General Education Provisions Act, during which time Congress has the right to disapprove regulations.\textsuperscript{270} Congress was given this right in order to act as a buffer between the unelected federal bureaucracy and the people, but it has failed to make proper use of it. By Congress' failure to utilize their watchdog powers, HEW has received the approval of Congress by default.

Senator James Buckley has explained the difficulty of controlling the bureaucracy:

The laws which we enact are distorted beyond recognition by Federal bureaucrats through their implementing regulations . . . [W]e cannot hope to undo every bit of regulatory mischief committed by the Federal bureaucracy. The Congress has neither the time nor the staff to oversee the day-to-day operations of the entire Federal bureaucracy. We are being overwhelmed by the sheer mass of Federal regulations. They confound us with their number; they confound us with their complexity; they infuriate us with their disregard for the rights of citizens and the expressed will of the Congress.\textsuperscript{271}

Because of these problems, Congress should amend the General Education Provisions Act to lengthen the 45 day waiting period and become more sensitive to potential abuses of the federal bureaucracy.

Congress also should not hesitate to enact amendments to Title IX. Amendments have already been enacted to exempt fraternities and sororities, groups like the Boy Scouts, and events like the father-son or mother-daughter banquets. Congress should now scrutinize the possible detrimental effects of the Title IX regulations on private education.

C. HEW

HEW should take three steps. First, it should "break down the wall of secrecy that has enveloped the whole process of
writing regulations . . . " Regulations affecting private education should be drafted in full consultation with the educational community because educators perceive the current process as unfair and weighted in favor of HEW:

[Proposed regulations appear in the Federal Register without warning, forcing harassed educators to drop other duties in the scramble to submit comments before the 30-day [comment] period ends. Their efforts too often turn out to be futile, for the Federal agency which has committed its honor to specific language it has developed in secret will naturally seek to affirm the validity of its judgments by publishing final regulations with as few changes as possible.]2

This is precisely what has happened with the sex discrimination regulations. The failure of HEW to consult and work with the educational community from the outset has led to problems that might have been avoided.

Second, HEW should voluntarily refrain from strict enforcement of the Title IX regulations. This suggestion is based on the assumption that HEW and the women's movement have alerted educators to the severe problems of sex discrimination. Private education now seems ready to take the initiative in promoting equality of opportunity for both sexes. The Carnegie Council on Education conducted a study which concluded that it is now time for the federal government to get out of the affirmative action business. Progress has begun and colleges can now "carry the initiative far better than the federal government and, in doing so, can reduce the burden of federal control before [it becomes] too overwhelming and too permanent."274 Unfortunately, the Title IX regulations do not "reduce the burden of federal control,"275 and indeed they have increased the burden and scope of federal regulatory power.

272 Address by Charles B. Saunders, Jr., Director of Governmental Relations, American Council on Education, to Southern Regional Meeting of the College Entrance Examination Board (Feb. 19, 1976).
273 Id.
274 This study further concluded that: "New forces have been set in motion. New directions have been identified. Attitudes have been changed, behavior modified, new habits introduced. The next stage calls for more action by higher education itself." Address by Saunders, supra note 272, quoting from Carnegie Commission on Education, Institutional Aid: Federal Support to Colleges and Universities (1972).
275 Id.
Third, HEW should appreciate and respect the importance of private education's constitutional right to set their own priorities. Perhaps the crux of this whole conflict is that the priorities of the federal government for higher education, which are social justice and equal opportunity differ from the priorities of academic excellence set by educators. One educator has stated that "[h]igher education should have no priority ahead of the search for truth and the perfection of learning," not even social justice.

HEW should review the Supreme Court cases which guarantee to private education the right to set its own educational priorities. Rep. Edith Green, original author of Title IX, echoed the position of the Supreme Court when she stated to her colleagues: "I think we ought to respect the autonomy of the institutions and let the institutions determine their own priorities and needs." Instead, the Title IX regulations issued by HEW threaten rather than respect the autonomy of private education. They should thus be resisted "by all legal means."

Tim Philpot

27 See section IC, supra.
27 Address by Dallin H. Oaks, supra note 14, quoting from Carnegie Commission on Education, Institutional Aid: Federal Support to Colleges and Universities (1972). This report stated that: "the highest single priority for federal funding in higher education in the 1970's is to help fulfill the two-century-old American dream of social justice." Id. at 2.
27 Address by Pres. Dallin H. Oaks, Brigham Young University, to The National Assoc. of College and University Attorneys (June 18, 1976).
27 See Hillsdale College Resolution, supra note 149.