

Sex Discrimination in Vocational Education: Title IX and Other Remedies

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Why should we admit women to vocational education courses on a whim, even if it is a strong whim, when it will deny admittance to an employable male? The unions won't admit women and they can't get jobs.¹

* * *

We would love to admit a woman to the union, but we can't find any qualified or trained in our field.²

A job has no sex. While this fact seems self-evident, a circular pattern of sex-based discrimination in vocational training and employment, as exemplified by the above quotations, has resulted in the confinement of greatly disproportionate numbers of women to low-paying, low-security "feminine" jobs.

Job training through vocational education, particularly at the secondary school level, is crucial for a large proportion of the population since it is the only training available to many people before they enter the labor force. Of the total number of girls who complete high school each year, only about 40 percent will enter college, and many of these will not finish.³ Approximately eight percent of the women and 11 percent of the men in the population have college degrees.⁴ For the

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1. Interview with Donald Fowler, Assistant to the State Director of Vocational Education, in Sacramento, Cal., Oct. 17, 1973 [hereinafter cited as interview with Donald Fowler].

2. Statement of union official, who wished to remain anonymous, June 17, 1974.

3. Of the high school class of 1972, 39 percent of the women graduates were enrolled in college in October of that year, compared to 53 percent of the male graduates. U.S. Dep't of Labor, Women & Work, July, 1973, at 18. There are 4.3 million women who have some college education but no degree. Women's Bureau, Employment Standards Administration, U.S. Dep't of Labor, Highlights of Women's Employment and Education, March, 1972 [hereinafter cited as Highlights of Women's Employment and Education].

4. Women's Bureau, Wage and Labor Standards Administration, U.S. Dep't of Labor, Background Facts on Women Workers in the United States, 1970. The average female worker is as well educated as the average male worker. Each has completed a

rest, secondary or post-secondary vocational education provides the main preparation for a trade or business. This entry opportunity is at least as vital for women as for men: women represent nearly 40 percent of the total labor force,⁵ and nine out of ten women will work at some time in their lives.⁶

Contrary to popular belief, most women are working chiefly out of economic need. Nearly two-thirds of all women workers are single, divorced, widowed, or separated, or have husbands whose earnings are less than \$7,000 per year.⁷ In husband-wife families, 13 percent have incomes below \$4,000 if the wife does not work, while the figure drops to four percent when she does work.⁸

The concentration of women in low-paying jobs is reflected in the fact that the median income for fully employed women was \$5,593 in 1971, only 59.5 percent of the \$9,399 median earnings of fully employed men.⁹ In fact, the average fully employed woman who graduated from high school receives less income than the fully employed man who has not completed elementary school.¹⁰ Women sometimes do not receive equal pay for equal work, but far more frequently women are not given equal work; instead, they are employed in the lower skilled, lower paying jobs. In 1972, 76 percent of all clerical workers were female, and one in three employed women were clerical workers.¹¹

median of 12.4 years of schooling. Women's Bureau, Employment Standards Administration, U.S. Dep't of Labor, *Twenty Facts On Women Workers*, February, 1973 [hereinafter cited as *Twenty Facts*].

5. The labor force figure for 1972 was 37.4 percent. Women in the labor force are 43.8 percent of all women 16 years of age and over. WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, *THE ECONOMIC ROLE OF WOMEN* 92 (1973).

6. *Twenty Facts*, *supra* note 4.

7. *Id.*

8. *Id.*

9. *Highlights of Women's Employment and Education*, *supra* note 3.

This gap in wages is widening. In 1957 the median wage paid women was 64 percent of that received by men. WOMEN'S BUREAU, WORKPLACE STANDARDS ADMINISTRATION, U.S. DEP'T OF LABOR, *UNDERUTILIZATION OF WOMEN WORKERS* 5 (rev. ed. 1971) [hereinafter cited as *UNDERUTILIZATION OF WOMEN WORKERS*].

10. *Twenty Facts*, *supra* note 4. Seven percent of employed women with five years or more of college were working as service workers, operators, salesworkers, or clerical workers in 1969, as were some two-thirds of those with one to three years of college. *UNDERUTILIZATION OF WOMEN WORKERS*, *supra* note 9, at 17. Further, while women's representation in the work force has grown from 26 percent in 1940 to 38.5 percent in 1969, the proportion of women workers compared to total workers in professional and technical fields declined from 45 to 37 percent during the same period. *Id.* at 9.

11. Women's Bureau, Wage and Labor Standards Administration, U.S. Dep't of Labor, *Background Facts on Women Workers in the United States*, 1970, at 13 [hereinafter cited as *Background Facts*]. Channeling is not limited to the nonprofessional workers; two-thirds of the 4.3 million professionally employed women are found in five professions—teaching, nursing, social work, library work, and dietetics. Women's Bureau, Employment Standards Administration, U.S. Dep't of Labor, *Plans for Widening*

Vocational education reflects and perpetuates the confinement of women to such lower paying, sex-typed jobs: approximately one-third of the women and girls in public vocational programs are studying office practices, while more than half are in home economics.¹²

This Article will examine the current situation in vocational education in the United States and explore the changes which may be required to comply with the nondiscrimination provision (Title IX) of the Education Amendments of 1972.¹³ It will then discuss other remedies which might be used to end sex-based discrimination in vocational education.

I

PRESENT STRUCTURE OF VOCATIONAL EDUCATION

Public vocational education programs are found primarily in local or specialized high schools and in community or junior colleges. The federal government began funding these programs in 1917 with passage of the Smith-Hughes Act.¹⁴ More recently, a vocational education

Women's Educational Opportunities 5 (paper prepared for the Wingspread Conference on Women's Higher Education: Some Unanswered Questions, held March 13, 1972, in Racine, Wisconsin). Moreover, 1.6 million women are teachers below the college level. Background Facts, *supra*, at 3.

12. Citizens' Advisory Council on the Status of Women, Dep't of Labor, Need for Studies of Sex Discrimination in Public Schools, Revised, Sept., 1972, at 1. The figures for federally supported programs are nearly identical. See Bureau of Adult, Vocational, and Technical Education, Office of Education, U.S. Dep't of HEW, Summary Data, Vocational Education, Fiscal Year 1972, at 2, May, 1973 [hereinafter cited as HEW Summary Data].

The United States and other countries which include figures for home economics in their statistics on vocational education have been criticized for doing so. An International Labour Organisation study points out that home economics "in most cases does not prepare those receiving such education for a work career but merely serves as a complement to their general education for the purpose of taking better care of their own homes and families." Int'l Labour Org., Vocational Guidance and Training of Girls and Women, at 64-65, U.N. Doc. E/CN6/429 (1964). In particular, this study states:

Information concerning the United States exemplifies the wide margin of error that may result from inclusion of home economics courses in vocational training statistics. The number of women pupils registered for public vocational courses subsidized by the Federal Government in 1958/59 amounted to 1,831,058 Of the above total, 1,542,512, or 84 percent, were following home economics training which, according to the description of the syllabuses, is primarily of family interest only, professional home economics workers being trained in other institutions

Id. at 65 n.1.

13. 20 U.S.C. §§ 1681-86 (Supp. II, 1970). Title IX also amended section 401 (b) of Title IV of the 1964 Civil Rights Act, adding the word "sex" after the word "religion." See Act of June 23, 1972, Pub. L. No. 92-318, § 906(a), 86 Stat. 375, *amending* 42 U.S.C. §§ 2000c(b), 2000c-6(a)(2), 2000c-9 (1964). For a discussion of Title IV as an additional remedy to sex-based discrimination in vocational education, see note 252 *infra* and accompanying text.

14. Act of Feb. 23, 1917, ch. 114, 39 Stat. 929, *as amended*, 20 U.S.C. §§ 11-16, 18-28 (1970). This act established a Federal Board of Vocational Education to allocate

measure was passed in 1963 and amended in 1968.¹⁵

Vocational education is now defined to cover instruction in all recognized occupations except those considered to be professions or those requiring a baccalaureate or higher degree.¹⁶ Four categories of persons are eligible to receive vocational education: persons attending high school; persons who have completed or left high school but are free to study in preparation for a job; persons who have already entered the labor market but need training or retraining to hold their jobs or get ahead and are not receiving certain other types of federal assistance; and handicapped persons.¹⁷

The 1968 Amendments to the 1963 Vocational Education Act¹⁸ created a National Advisory Council on Vocational Education appointed by the President;¹⁹ its function is to advise the Commissioner of Education and to report annually to Congress. Each state receiving federal funds must establish a counterpart advisory council.²⁰ In addition, the state must submit annually a program plan describing the activities, programs, and services to be provided in the upcoming year, plus an annual revision and extension of a longer range three- to five-year program plan that sets forth the state's vocational education objectives and procedures.²¹

The state's plan must be the subject of at least one public hearing, conducted by its board for vocational education, before it is submitted to the Commissioner of Education for review and approval.²² The state must give the public access to approved plans and statements of policies, regulations, and procedures applicable to the administration of vocational education.²³ As part of the state's application for funds, it will have to sign a "Statement of Assurances" that it is in compliance with Title IX.²⁴

Federal assistance has expanded to the point where federal funds now account for approximately one of every five dollars spent annually

federal funds to assist states in establishing or expanding programs of vocational education. Each state was to submit a plan to the Board outlining the method by which it proposed to conduct its vocational education activities in the areas of agriculture, trade and industry, and home economics. Every state submitted a plan.

15. Vocational Education Amendments of 1968, 20 U.S.C. §§ 1241 *et seq.* (1970), *as amended* (Supp. II, 1970), *amending* Vocational Education Act of 1963, 20 U.S.C. §§ 1241 *et seq.* (1970).

16. 20 U.S.C. § 1248(1) (Supp. II, 1970).

17. *Id.* § 1262(a)(1)-(4) (1970).

18. Act of Dec. 18, 1963, Pub. L. No. 88-210, 77 Stat. 403.

19. 20 U.S.C. § 1244(a) (1970), *as amended* (Supp. II, 1970).

20. *Id.* § 1244(b) (1970).

21. *Id.* § 1263 (1970).

22. *Id.* § 1263(a)(3)(A) (1970).

23. *Id.* § 1263(a)(3)(B) (1970).

24. Proposed HEW Reg. § 86.4, 39 Fed. Reg. 22,233 (1974).

on vocational education.²⁵ Few vocational education programs in the country remain untouched by federal assistance. Total state and federal expenditures in 1972 exceeded \$2.6 billion.²⁶ This money is used for everything from construction of educational facilities to testing and counselor training, including, as of 1973, the funding of high school shop classes.²⁷

II

DISCRIMINATION IN VOCATIONAL EDUCATION

States receiving federal funds for vocational education must report the courses given, including enrollment figures classified by sex.²⁸ These figures reveal the continued existence of single-sex courses and unequal training throughout the country. The statistics show that there are seven times more males than females enrolled in trade and industrial programs.²⁹ In 1972, for example, 37,277 men and 34 women were being trained as plumbers.³⁰ In the area of office occupations, women outnumber men three to one as a whole, but men outnumber women in two areas: the higher paying fields of business data processing and "supervisory and administrative management."³¹ In all other areas of office training—typing, filing, stenography—women dominate by a vast margin.³² Similar statistics are found in training programs lumped under the heading "distribution." While the totals are not greatly disparate (290,000 women, 350,403 men), women have a two-to-one margin in "apparel and accessories," while men outnumber women more than seven to one in "automotive" and 20 to one in "petroleum."³³

25. HEW Summary Data, *supra* note 12, at 5.

26. *Id.*

27. U.S. OFFICE OF EDUCATION, U.S. DEP'T OF HEW, REPORT OF THE COMMISSIONER'S TASK FORCE ON THE IMPACT OF OFFICE OF EDUCATION PROGRAMS ON WOMEN, A LOOK AT WOMEN IN EDUCATION: ISSUES AND ANSWERS FOR HEW 27 (1972) [hereinafter cited as A LOOK AT WOMEN IN EDUCATION].

28. Interview with Donald Folwer, *supra* note 1.

29. In 1972, there were some 2.1 million enrolled males and less than 280,000 enrolled females. HEW Summary Data, *supra* note 12, at 2.

30. *Id.* at 16.

31. *Id.* at 14-15.

32. *Id.*

33. *Id.* at 12-13. HEW has projected enrollment to 1977 and predicts virtually no change in the percentage distribution of enrollment by sex over the next four years, as shown here:

Agriculture	1972	1977 (projected)
Male	94.6	92.0
Female	5.4	8.0
Distribution		
Male	54.7	54.0
Female	45.3	46.0

The channeling of women into certain occupations no doubt has its roots in a socialization process which begins early in childhood. However, overt restrictions on enrollment in occupational training in secondary schools and community colleges remain common and, until recently, have been virtually unchallenged. Even where these enrollment restrictions are removed, discrimination in counseling and testing results in continued single-sex courses.³⁴

A. *Blatant Exclusions*

Studies of educational systems throughout the country have shown that vocational education is not open to men and women on an equal basis.³⁵ For example, a prestigious state educational commission found

Health		
Male	15.3	17.0
Female	84.7	83.0
Home Economics		
Male	8.4	10.0
Female	91.6	90.0
Office		
Male	23.6	25.0
Female	76.4	75.0
Technical		
Male	90.2	91.0
Female	9.8	9.0
Trade and Industry		
Male	88.3	87.0
Female	11.7	13.0

Center for Adult, Vocational, Technical, and Manpower Education, Division of Vocational and Technical Education, Office of Education, U.S. Dep't of HEW, Trends in Vocational Education, Fiscal Year 1972, June, 1973, at 7. As the above figures indicate, HEW apparently does not foresee Title IX as having any impact on vocational education.

34. This phenomenon is not confined to the United States. A 1968 UNESCO comparative study on the access of girls to vocational education concluded that few if any statutory provisions excluded women from such education, but that in practice their opportunities were far from equal to those enjoyed by boys. Far more girls than boys were training for less highly skilled jobs and trades. Few girls were in training for the industrial sector and large numbers were in training for the services sector. Girls' enrollment was concentrated in courses leading to work which was classified as typically "women's work" or in family oriented or home economics courses. Int'l Labour Org., *Women Workers in a Changing World*, at 17, U.N. Doc. E/0148/1A:8 (1973) [hereinafter cited as *Women Workers in a Changing World*].

35. See, e.g., PENNSYLVANIA DEP'T OF EDUCATION, *SEXISM IN EDUCATION: JOINT TASK FORCE REPORT* (1972); G. Bryan, *Discrimination on the Basis of Sex in Occupational Education in the Boston Public Schools, 1972* (part of an investigation by the Boston Comm'n to Improve the Status of Women); Committee to Eliminate Sexual Discrimination in the Public Schools, *Let Them Aspire: A Plea and Proposal for Equality of Opportunity for Males and Females in the Ann Arbor Public Schools*, 3rd ed. 1973 (available from Marcia Federbush, 1000 Cedar Bend Drive, Ann Arbor, Mich. 48105); Report of the Comm. to Study Sex Discrimination in the Kalamazoo Public Schools, April, 1973; Report of the Women's Rights Task Force on Career Education: An Overview of the Dual Problems of Sexism and Sex Discrimination in Vocational Education in New Jersey, 1973 (available from the Women's Rights Task Force on Career Education, 549 Lennox Avenue, Westfield, N.J. 07090).

that discrimination on the basis of sex was blatant in New York City vocational high schools.³⁶ Although the situation is changing, only eight of the 27 vocational high schools in New York City were coeducational in 1970.³⁷ Thirteen of the schools were for boys only, including certain highly specialized schools such as Automotive, Aviation, Food and Maritime Trades, and the New York School of Printing.³⁸ The remaining six vocational high schools were for girls only.³⁹ In 1970, the girls' schools had approximately 7,600 students, while the boys' schools enrolled 19,800—that is, more than twice as many boys as girls were given places in vocational education programs.⁴⁰ Furthermore, the opportunities for career training were far greater for boys. Girls were offered a choice of 36 technical courses in stereotypically female occupations: typing, stenography, cosmetology, fashion industries, floristry, and nursing; boys had a choice of 77 courses which could lead to far greater opportunity for entry and advancement in major New York industries.⁴¹ The New York commission found discrimination even within coeducational schools. For example, the High School of Fashion Industries was found to limit its courses, with only one exception, to either boys or girls. Some of the courses, such as “garment machine operation,” were offered separately to each sex, but others were offered exclusively to one sex or the other.⁴² Although this discrimination could work to the disadvantage of individuals of either sex, in general the restrictions were more harmful to girls, for there were more options from which boys could choose and more places available to them.⁴³ Open enrollment in all secondary schools became state policy in New York after a well-publicized lawsuit—brought by a girl excluded from a high-ranking academic high school in New York City—was settled out of court.⁴⁴ Two years later, however, the State Board of Education's official catalog still listed the school as “boys only.”⁴⁵ A 1972 state statute now forbids excluding any person from a public high school course of instruction on the basis of his or her sex.⁴⁶

36. II NEW YORK STATE COMM'N ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION, THE FLEISCHMANN REPORT ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE 81-83 (1972).

37. *Id.* at 81.

38. *Id.*

39. *Id.* at 82.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 83.

44. This case is discussed in N. FRAZIER & M. SADLER, *SEXISM IN SCHOOL AND SOCIETY* 135 (1973).

45. *Id.* at 136.

46. N.Y. EDUC. LAW § 3201-a (McKinney Supp. 1973).

In Massachusetts, a law passed in 1971 forbids sex discrimination in educational programs.⁴⁷ Nevertheless, a subsequent study of the school system by the Governor's Commission on the Status of Women found that in high school or post-high school vocational education there were few places for women.⁴⁸ Overall, there were almost three times more places for men than there were for women.⁴⁹ In Massachusetts business courses, women predominated by a four-to-one ratio,⁵⁰ but were enrolled in secretarial courses;⁵¹ the men were studying "administration and management."⁵²

A sample of current curriculum offerings in California's public secondary schools indicates that course restrictions by sex are common throughout the state. For example, high school graduation requirements for 1973 for the Hayward Unified School District included a semester of homemaking for girls and a semester of industrial arts for boys.⁵³ Many schools, in California and elsewhere, do not explicitly

47. The pertinent section states:

No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion or national origin.

MASS. G.L.A. ch. 76, § 5 (Supp. 1974).

48. GOVERNOR'S COMM'N ON THE STATUS OF WOMEN, REPORT OF TASK FORCE ON EDUCATION 1 (1973) [hereinafter cited as GOVERNOR'S COMM'N].

49. *Id.* at 4.

50. *Id.*

51. *Id.*

52. *Id.*

53. Department of Secondary Education, Hayward Unified School District, Course of Study, Course Catalogue and Minimum Academic Standards for a Diploma 2, May, 1972.

Among other secondary schools a sample of course descriptions finds:

HOMEMAKING: CLOTHING 10A: An advanced course for girls in sewing and fabrics.

Dep't of Secondary Education, Napa Valley unified School District, Senior High Courses of Study (Revised), Fall, 1971.

CHARM AND POISE: To deal with the appearance and behavior of girls as an extension of their self-image.

Id.

FAMILY LIVING: This course is intended as an aid in meeting the needs of our young women who take on the responsibilities of family life shortly after graduation.

Id.

HOMEMAKING: A course open to girls only which prepares them for their roles as family members now and in the future. They will cook some meals and entertain. . . .

Willard Junior High School, Berkeley Unified School District, 1972-73.

BOYS COOKING: . . . How eating contributes to physical fitness will be discussed.

Id.

Another California junior high school listed Mechanical Drawing I, Wood Shop, and Welding as "open to all boys," and it offered separate classes in "crafts and ceramics" for boys and girls. Tehachapi Unified School District, Course Listings for Jacobsen

state "boys only" or "girls only" but rather use either a masculine or feminine pronoun in course descriptions to indicate the sex of the students to be enrolled in the course.⁵⁴ Furthermore, it is an admitted practice in California to give priority to the sex traditionally associated with a course before admitting any students of the opposite sex.⁵⁵

B. Discretion

Often course listings state that enrollment is by consent of the instructor. Such a delegation can lead to restrictions on admission because the instructors may be biased, a particularly common problem in trade and industrial courses. Secondary schools in California often select instructors from a list prepared by labor unions of persons available to teach trade and industrial courses.⁵⁶ These persons are then given the training necessary to obtain a teaching certificate for vocational education, after which they are placed in the schools. Drawing upon unions, many of which discriminate against women,⁵⁷ as the source of teachers for trade and industrial courses and giving the teachers discretionary power over enrollment in their courses increases the likelihood of perpetuating the exclusion of women.⁵⁸

Junior High School, first semester, 1973-74.

Fresno also included in its listings a coeducational course entitled Sociology for Living. One of the headings in the course outline was "Tasks of Youth," a subheading of which promised to teach "understand[ing] and accept[ance of] the sex role." Fresno City Unified School District, Guide to Course Offerings—Secondary, B-57, 1970-71.

54. For example:

SECRETARIAL WORK EXPERIENCE: To assess the student's strengths and weaknesses in regard to office employability, and to help her capitalize on the former and strengthen the latter.

Dep't of Secondary Education, Napa Valley Unified School District, Senior High Courses of Study (revised), Fall, 1971.

55. Interview with Donald Fowler, *supra* note 1.

56. Interview with Paul Sciranka, Supervisor Trade and Technical Teacher, Education Division of Vocational Education, University of California, in Berkeley, Cal., Oct. 24, 1973.

57. In 1968, 25 percent of the national and international labor unions had no women on their rolls and over half had fewer than 10 percent. Dewey, *Women in Labor Unions*, MONTHLY LABOR REV. Feb., 1971, at 42, 44. Three-quarters of all women members belonged to 21 unions. *Id.* at 42. These figures have remained nearly unchanged since 1958. *Id.* at 42, 44. The unions with little or no women membership represent primarily "workers in industries and occupations considered male domains, such as railroad, construction, mining, fire fighting and so on." *Id.* at 42. Women fared no better in unaffiliated local unions. Although women represented 34 percent of the total membership of these unions in 1967, nearly half of the unions reported no women members. *Id.* at 44.

58. Unions may also have a role in developing the operational policies of vocational schools. For example, in the John O'Connell Vocational School, a Trade Advisory Committee made up of industry representatives advises the school regarding the purpose and content of its vocational programs. Interview with Berle McGrath, attendance clerk, John O'Connell Vocational School, in San Francisco, California, Oct. 25, 1973.

C. Admissions and Recruitment

Restrictive entrance policies in vocational high schools may also result from the biases of those responsible for admissions. There are long waiting lists for admission to many of the best vocational high schools. Many vocational schools interview and recruit at area junior high schools each spring; admission to vocational programs is then based largely on the results of such interviews. Interviewers are said to seek students who "really want" vocational training. It has been implied that interviewers believe women do not really have this ambition; they assume women have lower aspirations and marginal commitment to vocational training.⁵⁹ The problem is compounded when biased interviewers for vocational high schools also counsel students interested in applying for vocational training. The counselor's advice may discourage women from even applying.

Advertisements or recruiting circulars which imply that the school is for males or females only also tend to limit enrollment to one sex or the other. This is particularly true for privately owned vocational schools.⁶⁰ Perhaps because of the image reinforced by the advertising media, it is still newsworthy when a woman enters programs traditionally reserved for training males.⁶¹

D. Testing

Even if a student is not barred by an express "boys only" or "girls only" policy or by discriminatory use of discretion by teachers or administrators in admission, other types of discrimination are frequent in vocational programs. One of the means by which traditional career

59. *Id.*

60. The San Francisco Telephone Directory contains the following advertisements: "Train to be a receptionist: A rewarding career for women and girls;" "Charm-er's School for Cocktail Waitresses." SAN FRANCISCO TELEPHONE DIRECTORY 898-99 (1972). In *Pittsburgh Press Co. v. Commission on Human Relations*, 413 U.S. 376, 381 n.7 (1973) the Supreme Court recognized the relationship between sex designation in employment advertisements and sex discrimination in hiring. The Court there upheld an order forbidding a newspaper to publish want ads in columns headed "Jobs—Male Interest" and "Jobs—Female Interest." The order was made pursuant to a municipal human relations ordinance.

61. A U.S. Department of Labor newsletter contained the following item:

Four women in Baton Rouge, La., have become the first to enter the Exxon Corporation's instrument technician apprentice program, while the Boeing Company in Seattle, Wash., has signed its first woman apprentice machinist

Other 'firsts' for women in apprenticeship include:

- Maryland, the first woman drywall mechanic.
- North Carolina, the first female apprentice electrician.
- New Hampshire, the first woman apprentice dental lab technician.
- Boulder, Colo., the first female plumber apprentice.
- Spokane, Wash., the first woman roofer apprentice.

U.S. Dep't of Labor, Women & Work, Oct., 1973, at 6.

goals for male and female students are perpetuated is the use of interest and personality tests.

Some of these tests are based upon the assumption that each personality type requires a certain career for fulfillment. One social scientist has devised five categories of personality, including "realistic" ("masculine, physically strong, unsociable, aggressive . . . lacks verbal and interpersonal skills . . .") and "social" ("responsible, feminine, humanistic, religious").⁶² Once students have been tested and labeled, counselors can channel them into occupations corresponding to their personality needs. Occupations and careers are also categorized and stereotyped: "intellectual" includes the fields of anthropology, chemistry, and physical therapy, while "conventional" includes business administration and accounting.⁶³ The assumptions underlying such tests are certainly open to question; the "categories" of personality and occupation are not objective but reflect the biases of the testmaker.⁶⁴ Furthermore, the personality traits revealed, even if objectively ascertainable, are not job qualifications.⁶⁵

The discriminatory factors described above are clearly apparent in the Kuder Preference Record and the Strong Vocational Interest Blanks, the tests used most often for counseling and research. Both construct separate scales for men and women and report scores separately by sex. Furthermore, until 1972, Strong had separate tests for each sex. Although the men's and women's forms had 256 items in common, each had about 140 unique items. The implication is obvious:

62. See Holland, *Exploration of a Theory of Vocational Choice: Vocational Images and Choices*, 11 *VOCATIONAL GUIDANCE Q.* 232-239 (1963).

63. See Rose and Elton, *Sex and Occupational Choice*, 18 *J. COUNSELING PSYCHOLOGY* 456 (1971).

64. An interesting study was made of adolescents to determine if their views correlated with the stereotypes predicted by the tests. For example, they were asked if they saw an auto mechanic as "realistic." When it was found that they did not, the researchers concluded that adolescents have not had sufficient contact with auto mechanics to have strong perceptions of those who pursue this occupation. However, the composite stereotype of the teacher did not fare much better: students' views of teachers agreed with only one of the supposedly characteristic personality traits. Hollander & Parker, *Occupational Stereotypes and Needs: Their Relationships to Vocational Choice*, 17 *VOCATIONAL GUIDANCE Q.* 91 (1969) [hereinafter cited as Hollander & Parker].

65. A report to the International Labour Conference stated:

In the United States, where the use of tests was already fairly generalised in 1949 and much of the development work in this field took place, confidence in the reliability of test results as predictors of success in certain occupations seems to be diminishing. One of the reasons for this attitude is that psychological research has shown that among successful workers in the same field there may be a substantial spread in the scores relating to intelligence, aptitude and achievement and that many common occupations do not require particular psychological or physiological qualities.

VIII(1) INT'L LABOUR CONF., HUMAN RESOURCES DEVELOPMENT: VOCATIONAL GUIDANCE AND VOCATIONAL TRAINING 18 (1973).

When items like astronomer, auto salesman, building contractor, and carpenter appear only on the men's form and items like dental assistant, artists' model, beauty specialist, bookkeeper, and caterer appear only on the women's form, the impression is created that some occupations should be considered by only one sex.⁶⁶

The American Personnel and Guidance Association sought in 1970 to have the Strong test revised to eliminate its extreme bias and discriminatory effects.⁶⁷ Since that effort, a new Strong test has been developed. It uses one questionnaire for both men and women, but it still uses separate norms and scoring for men and women. Since women will be competing for work against men as well as women, there seems to be no justification for using separate scores for job prediction.⁶⁸ One reason given by sociologists for continuing to use separate norms and scores for men and women is to "increase our understanding of the sexes"⁶⁹—slender justification indeed considering the discriminatory effects. Furthermore, this could be done by identifying the student as male or female on the test form while giving counselors and students a single score sheet.

Vocational testing has received much recent criticism from educators.⁷⁰ One study concluded: "The use of traditional women's occupa-

66. Harmon, *Sexual Bias in Interest Measurement*, 5 MEASUREMENT AND EVALUATION IN GUIDANCE 496, 497 (1973) [hereinafter cited as Harmon]. The fact that prospective applicants may be deterred from seeking positions classified as suitable for the opposite sex is illustrated by the results of a study, conducted by psychologists Sandra L. Bem and Daryl J. Bem, of the impact of sex-segregated want ads presented before the Pittsburgh Human Relations Commission in February, 1970. In the study 52 women were asked to rate each of 32 advertised jobs on a scale reflecting their interest in and willingness to apply for each job. Half of the women were given advertisements segregated into "Male Interest" and "Female Interest" categories (as they appeared in editions of the Pittsburgh Press); the other half were given the identical want ads integrated in an alphabetical listing and not classified by sex. Results showed that only 41 percent of the group given segregated want ads were as likely to apply for "Male Interest" as "Female Interest" jobs. However, 81 percent of the women given integrated listings preferred the "Male Interest" jobs. Moreover, the disparity revealed here probably underestimates the effects of sex classification of jobs and training programs, since it is easier for a woman to say she would be willing to apply for a "male" job or vocational program than to expose herself to the risk of discrimination by actually applying. The study is reproduced in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2nd Sess., pt. 2, at 892-94 (1970). Cf. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973).

67. See Schlossberg and Pietrofesa, *Perspectives on Counselor Bias: Implications for Counselor Education*, 4 THE COUNSELING PSYCHOLOGIST 44, 50 (1973) [hereinafter cited as *Perspectives on Counselor Bias*].

68. See Harmon, *supra* note 66, at 500.

69. Campbell, *Women Deserve Better*, 51 PERSONNEL & GUIDANCE J. 545, 548 (1973).

70. See, e.g., Harmon, *supra* note 66; Huth, *Measuring Women's Interest: How Useful?*, 51 PERSONNEL & GUIDANCE J. 539 (1973) [hereinafter cited as Huth]; *Perspectives on Counselor Bias*; *supra* note 67, and sources cited therein.

tional scales may have a severe limiting effect on the careers women consider."⁷¹ Especially open to criticism are tests said to be constructed to maximize sex differences, with norms drawn to reflect stereotypes of "normal" men and women.⁷² The validity of the women's form for the Strong test has been particularly questioned, because many items on the test "are not directly oriented to vocations; rather they are concerned with homemaking and the feminine role."⁷³ It is easy to see that a test which includes a disproportionate number of items concerning homemaking will yield high scores in this area and lower scores in career fields.

In short, the use of discriminatory tests has the effect of aiding and abetting illegal sex discrimination in education and employment by discouraging female job- and training-seekers from applying in areas classified as "male."

E. Counseling

Despite growing documentation of vocational testing bias and its limiting effects on career choice, evidence indicates that many counselors are unaware of the problem.⁷⁴ In fact, counselors often reinforce the discriminatory effect of the test by recommending further vocational guidance or psychological counseling to students with nontraditional career goals.⁷⁵ The potential for misuse of vocational tests by biased counselors is one of the strongest arguments for eliminating their use.

The importance of counseling is revealed in a study which observed the careers chosen by high school seniors following graduation. More than half of the students stated that they consulted a school counselor in making their employment decisions; in many cases the counselor was the first to suggest the chosen field.⁷⁶ Another study sought to test the hypothesis that counselors are biased against women entering a "masculine" occupation.⁷⁷ Sixteen male and 13 female counselor

71. Cole, *On Measuring the Vocational Interest of Women*, THE AMERICAN COLLEGE TESTING PROGRAM, March, 1972, at 8, quoted in *Perspectives on Counselor Bias*, *supra* note 67, at 49.

72. Harmon, *supra* note 66, at 497.

73. Huth, *supra* note 70, at 540.

74. *Perspectives on Counselor Bias*, *supra* note 67, at 49.

75. Thomas & Stewart, *Counselor Response to Female Clients with Deviate and Conforming Career Goals*, 18 J. COUNSELING PSYCHOLOGY 352 (1971).

76. R. Roy, *Youth Employment Opportunities for Schools in Glenn County, 1971*, at 38-39 (Report for Resources Dev. Internship Program, Western Interstate Comm'n for Higher Educ.).

77. Pietrofesa & Schlossberg, *Counselor Bias and the Female Occupational Role*, 1970 (reprinted as Educational Resources Information Center Doc. CG006-056, Office of Education, U.S. Dep't of HEW) [hereinafter cited as *Counselor Bias and the Female Occupational Role*].

trainees were observed in sessions with a coached female "student" who said she was having difficulty deciding between teaching and engineering. The sessions were taped. The results indicated that counselor bias exists equally among female and male counselors.⁷⁸ A content analysis of the statements made by the counselors showed that the major objection to a career in engineering was the "masculinity" of the occupation.⁷⁹

Counseling materials, like interest inventories and personality tests, may encourage counselors to recommend that women forego "masculine" jobs. Career brochures, college catalogs, and biased statements in recruiting materials may all involve discrimination. An American College Testing brochure describing 54 career planning programs has a special note addressed to counselors:

"When a student is unlike other students entering an educational program, predictions for that program should be used with caution. For example, care should be used in interpreting prediction for a student of one sex in a program in which the other sex predominates."⁸⁰

Along similar lines, the Strong test counselor's manual states:

"Many young women do not appear to have strong occupational interests, and they may score high only in certain 'premarital' occupations: elementary school teacher, office worker, stenographer-secretary.

Such a finding is disappointing to many college women, since they are likely to consider themselves career-oriented. In such cases, the selection of an area of training or an occupation should probably be based upon practical considerations—fields that can be pursued part-time, are easily resumed after periods of non-employment, are readily available in different locales."⁸¹

Some counselors seem to view their work as fulfilling a function similar to "protective legislation." A Berkeley counselor, for example, was interested in giving her students examples of women in traditionally male-dominated professions, but she professed concern that girls not be counseled into "inhospitable" careers involving battles to break sex-role barriers.⁸² The attitude is described as one of "realism"—counseling women about the discrimination they will face if they pursue

78. *Id.* at 4.

79. *Id.*

80. American College Testing Career Planning Program, 1971, cited in *Perspectives on Counselor Bias*, *supra* note 67, at 50.

81. Strong Vocational Interest Blanks, Test Counselor's Manual, cited in *Perspectives on Counselor Bias*, *supra* note 67, at 50.

82. Women's Task Force, Berkeley Unified School District, In-Progress Report to the Board of Education, 1972, at 18.

a nontraditional goal. Yet according to one international study, precisely the opposite type of counseling is needed:

[E]xperience suggests that guidance can help girls—but only if the guidance provided runs counter, in many respects, to the myths concerning women's role and potential in society and work life and helps to overcome the heavy weight and crippling effect of prejudice and tradition. Vocational guidance should have the aim of correcting the rigid and unduly romantic image girls have of their future work lives.⁸³

F. Placement

Many vocational institutions allow their facilities to be used for job placement and apprenticeship recruitment by employers who have less-than-equal hiring policies and by unions which discriminate in their admissions. While this is an indirect form of discrimination by a vocational school, it may have the most profound impact upon the future working lives of those discriminated against. Thus, like explicit and covert entrance and course restrictions and discriminatory counseling practices, the school's involvement in this form of discrimination exacerbates the denial of equal employment opportunities for women.⁸⁴

III

THE RÔLE OF TITLE IX IN ENDING DISCRIMINATION

Title IX of the Education Amendments of 1972 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 subjected to discrimination under any education program or activity receiving Federal financial assistance⁸⁵

Title IX became effective on July 1, 1972. The responsibility for interpreting and implementing the act has been delegated to HEW. The Office of General Counsel, HEW, has announced proposed regulations and plans to release final regulations prescribing the policies and procedures for effecting compliance in the fall of 1974.⁸⁶

83. WOMEN WORKERS IN A CHANGING WORLD, *supra* note 34, at 15.

84. Even this indirect involvement of schools is within the scope of Title IX's non-discrimination mandate. See Proposed HEW Reg. § 86.35(b)(2), 39 Fed. Reg. 22,236 (1974).

85. 20 U.S.C. § 1681(a) (Supp. II, 1970).

86. Interview with Rosa Weiner, Office for Civil Rights, U.S. Dep't of HEW, in Washington, D.C., Nov. 19, 1973, [hereinafter cited as interview with Rosa Weiner]; telephone interview with Jeffrey Orleans, Office of General Counsel, U.S. Dep't of HEW, in Washington, D.C., Dec. 5, 1973 [hereinafter cited as interview with Jeffrey Orleans].

Proposed regulations were announced on June 18, 1974, and appeared in the Federal Register on June 20, 1974. The comment period extended to October 15, 1974. 39 Fed. Reg. 22,222 (1974).

A. Title IX and Vocational Education

Although there are several exceptions to the requirements of Title IX,⁸⁷ all institutions of vocational education—private and public, secondary and post-secondary—are fully within the section's prohibition of sex discrimination. Those persons implicitly protected by Title IX and explicitly covered by the proposed HEW regulations include students,⁸⁸ applicants for admission,⁸⁹ and employees, including the administrative staff and faculty of vocational institutions.⁹⁰

The admissions provision of Title IX is especially significant for vocational education because of the large number of existing single-sex vocational schools and courses.⁹¹ There are two exceptions to the requirement that all federally-funded vocational schools immediately admit students on an equal basis without regard to sex: (1) Schools which admitted only students of one sex as of June 23, 1972;⁹² and (2) schools which admitted students of one sex as of June 23, 1965, but thereafter admitted as full time students applicants of both sexes.⁹³ For these schools the general admissions requirements do not become effective until one year from the date of enactment of Title IX, and they have six years from the date of enactment or seven years from the beginning of the change in their admissions program, whichever is later, to comply with Title IX's requirements.⁹⁴

87. The statute limits application of the prohibition on discrimination in admissions to vocational institutions, graduate and professional institutions, and public undergraduate coeducational institutions. 20 U.S.C. § 1681(a)(1), (a)(5) (Supp. II, 1970). Thus, primary and secondary schools (other than vocational schools), as well as private undergraduate schools, may discriminate on the basis of sex in their admissions policies without loss of federal funds. Additionally, military academies and certain religious institutions are completely exempt from coverage. *Id.* §§ 1681(a)(3)-(4) (Supp. II, 1970).

88. Proposed HEW Reg. §§ 86.31-38, 39 Fed. Reg. 22,235 (1974).

89. *Id.* § 86.21, 39 Fed. Reg. 22,234 (1974).

90. *Id.* § 86.41-51, 39 Fed. Reg. 22,236-38 (1974). These sections, contained in Subpart E of the Regulations, cover staff and faculty of vocational schools; the requirements are patterned after those of the Equal Employment Opportunities Commission regarding discrimination prohibited by Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.* (1970), as amended (Supp. II, 1970). Regarding those entities also covered by Executive Order 11246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970) (discrimination in employment by the federal government, by government contractors, and by those with federally assisted construction contracts), the regulations are, insofar as possible, consistent with those promulgated for Executive Order 11246 by HEW and the Department of Labor. See Proposed HEW Reg., Summary of Subpart E, 39 Fed. Reg. 22,230 (1974).

91. HEW estimates that there are between 25 and 30 single-sex vocational education schools in Massachusetts alone. Telephone interviews with David Gerrard, Vocational Education Compliance Officer, Office for Civil Rights, U.S. Dep't of HEW, on Dec. 5, 1973, and Feb. 1, 1974 [hereinafter cited as interviews with David Gerrard].

92. Proposed HEW Reg. § 86.15(a)(1), 39 Fed. Reg. 22,234 (1974).

93. *Id.* § 86.15(a)(2), 39 Fed. Reg. 22,234 (1974).

94. 20 U.S.C. § 1681(a)(2) (Supp. II, 1970).

Even these schools, however, are prohibited from sex discrimination in admissions unless they are carrying out an approved plan for eliminating discrimination by no later than June 23, 1979.⁹⁵ These "transition plans" must include an explanation of the specific obstacles to immediate cessation of discriminatory practices and a schedule for eliminating such obstacles.⁹⁶ In order to overcome the effects of past exclusion, each institution filing a "transition plan" must initiate a recruitment program encouraging application from and emphasizing a commitment to enroll students of the sex previously excluded.⁹⁷ Those eligible schools which fail to file transition plans with the Commissioner of Education lose the right to operate under such a plan and must immediately cease using a sex-based admissions policy.⁹⁸

In February, 1973, HEW's Office of Civil Rights (OCR) requested that state school officers and local school superintendants in each state instruct all vocational schools in the area—especially those believed to be single sex—as to the basic requirements of Title IX and ask the schools to contact HEW regarding plans to end discrimination.⁹⁹ OCR and the Office of Education sent additional memoranda to vocational schools, stating that these schools are covered by the prohibition against sex discrimination, explaining the application of the admissions provisions, and requesting that the necessary transition plans be filed by the June, 1973, deadline.¹⁰⁰ There has been virtually no response to these communications.¹⁰¹ As of December, 1973, Massachusetts was the only state which had answered the OCR inquiry and initiated a program to join its implementation efforts to those of OCR.¹⁰² As a result, most other single-sex vocational schools have lost the benefit of the transition period. Schools hoping to avoid OCR attention by ignoring

95. Proposed HEW Reg. § 86.15(b), 39 Fed. Reg. 22,234 (1974).

96. *Id.* § 86.16, 39 Fed. Reg. 22,234 (1974).

97. *Id.* § 86.16(d), 39 Fed. Reg. 22,234 (1974).

98. *Id.* § 86.15(b), 39 Fed. Reg. 22,234 (1974).

99. Interviews with David Gerrard, *supra* note 91.

100. U.S. Dep't of HEW, Memorandum for Presidents of Selected Institutions of Higher Educ. Participating in Federal Assistance Programs, May 4, 1973, at 3 [hereinafter cited as HEW Memorandum for Presidents of Selected Institutions]. Examples of other memoranda include: U.S. Dep't of HEW, Memorandum to Presidents of Institutions of Higher Education Participating in Federal Assistance Programs, August, 1972; Memorandum sent from the Bureau of Adult, Vocational and Technical Education to recipients of Office of Education grants, January, 1972, cited in *A LOOK AT WOMEN IN EDUCATION*, *supra* note 27, at 33. *See also* U.S. Dep't of HEW, Summary Statement, Proposed HEW Regulations to Effectuate Title IX of the Education Amendments of 1972, Oct. 9, 1972, at 9. It is assumed that vocational institutions received additional notice of Title IX's applicability through communications with HEW regional consultants and state vocational planners.

101. Interviews with David Gerrard, *supra* note 91.

102. *Id.* At the time of the HEW inquiry, Massachusetts had already begun efforts to desegregate its single-sex vocational education schools. *Id.*

the memoranda will be required to initiate nondiscriminatory policies as soon as they come to the attention of HEW.¹⁰³

B. Enforcement of Title IX

Title IX prohibitions may be enforced in several ways. One is review prior to funding. The administration of all "career education" programs receiving federal funds is handled by the Bureau of Occupational and Adult Education, part of HEW's Office of Education.¹⁰⁴ Each state applies annually to this Bureau for funding of its vocational education schools and programs by submitting a plan detailing how the funds will be used.¹⁰⁵ The amount of funds a state may receive is determined by a formula based on the state's population within certain age groups.¹⁰⁶ The application must include a pledge, signed by the state's vocational education director, that the funds will not be used in any programs which discriminate on the basis of race, sex, religion, or national origin. The Bureau reviews the state plan to see whether it is in compliance with all pertinent regulations, including federal civil rights legislation.¹⁰⁷

Few state plans are found to comply with all federal regulations on first review. An unacceptable plan is returned to the State with comments and recommendations; it must be rewritten until all requirements are met. In each of the 10 HEW regions a group of consultants from the Office of Education works with state vocational education personnel to develop acceptable plans.¹⁰⁸

103. *Id.* The first of a series of annual surveys of vocational schools, designed to determine the degree of compliance with Title IX, was made in February, 1974. The vocational schools surveyed do not include general high schools—only "area" schools, which are those schools used exclusively to provide vocational training, as well as junior colleges and high schools with special vocational education programs. 20 U.S.C. § 1248(2) (1971). Results will reveal the race, ethnic origin, and sex of the students, faculty, and staff of approximately 1900 area vocational schools, as well as the representation of women in each of the major vocational education subject areas and in-service programs, such as apprenticeships. *Id.*

General high schools offering shop and other vocational courses are the subject of a separate OCR survey which will list those schools and courses in which the enrollment of one sex exceeds 80 percent. Interview with Rosa Weiner, *supra* note 86.

104. Interview with Dr. Sidney High, Director of the Bureau of Occupational and Adult Education, Office of Education, U.S. Dep't of HEW, in Washington, D.C., Nov. 19, 1973 [hereinafter cited as interview with Dr. Sidney High].

105. See text accompanying notes 21-22 *supra*.

106. Interview with Dr. Sidney High, *supra* note 104.

107. *Id.*

108. Dr. High sees these consultants as fulfilling two distinct functions in their work with state vocational education personnel. The first is a regulatory function: assisting state planners to bring vocational programs into compliance with all relevant laws. The second is leadership: suggesting affirmative steps not specifically required by existing regulations to improve vocational programs. For example, although Title IX regulations have not yet been promulgated, consultants may suggest that affirmative ac-

While this prefunding review is an important aid in eliminating discrimination in vocational education, it is inadequate for several reasons. One problem is that there is no review of the practices and policies of individual institutions prior to funding.¹⁰⁹ Office of Education consultants work only with state planners—not with the school personnel and program directors who are responsible for the policies behind present inequalities. An HEW official indicates that a thorough prefunding review of individual schools is not likely to be instituted by the Office of Education because of the administrative and evidentiary problems involved in requiring schools to prove they do not discriminate. Such a requirement would mean that funding would be delayed interminably for virtually every school in the country.¹¹⁰

The effectiveness of the present system of review prior to funding is further reduced by limited commitment to eliminating discrimination on the part of the Office of Education regional consultants and state administrators who handle vocational education in the planning stages.¹¹¹ The review could perhaps be made a more effective tool in guarding against the use of federal funds in programs which discriminate if representatives of the Office for Civil Rights assisted in developing and reviewing state plans, rather than becoming involved only after charges of discrimination have been made. At the very least, OCR should undertake an extensive program of educating Office of Education and state personnel, who administer federally assisted vocational training and who have considerable influence over the way local school districts spend their funds, as to Title IX's mandate for nondiscriminatory vocational education.

Another problem is that Title IX regulations and enforcement procedures are not yet final; thus there is presently no prefunding review for possible Title IX violations.¹¹² Accordingly, even those Office of Education consultants who are concerned about sex discrimination

tion recruitment programs be instituted in anticipation of future compliance requirements. *Id.*

109. Some states, including California, require that each institution receiving a part of the federal funds allocated to that state sign a pledge of nondiscrimination similar to that required of the states by the Office of Education. Interview with Donald Fowler, *supra* note 1.

110. Interview with Rosa Weiner, *supra* note 86.

111. Interview with David Gerrard, *supra* note 91. Gerrard indicated that HEW regional consultants "are not interested in enforcing Title IV, much less Title IX," and that they appear more preoccupied with the success of their vocational programs than with civil rights. As a means of remedying this lack of concern at the state level, it has been suggested that OCR have the investigation of sex discrimination within state agencies as a priority for Title IX enforcement. A LOOK AT WOMEN IN EDUCATION, *supra* note 27, at 45.

112. Interview with Dr. Sidney High, *supra* note 104.

may only encourage state planners to adopt compliance measures voluntarily.

Additional enforcement procedures are explicitly provided in Title IX itself. They include (1) termination of or refusal to grant or continue "Federal financial assistance to any education program or activity, by way of grant, loan, or contract . . .";¹¹³ (2) judicial enforcement by the Attorney General at the request of a student, parents, or a group of parents;¹¹⁴ and (3) "any other means authorized by law."¹¹⁵

Title IX and the proposed regulations interpreting and implementing it heavily emphasize that compliance is to be achieved whenever possible on a voluntary, negotiated basis.¹¹⁶ HEW Regional Offices will be responsible for investigating complaints and negotiating with the school or district involved. Once it is determined that voluntary compliance cannot be achieved, the HEW Office of General Counsel is empowered to initiate enforcement proceedings.¹¹⁷

It is clear that the strongest sanction provided by the statute, and the one Congress intended as the primary vehicle for its enforcement, is the cutoff of federal funding. While Title IX vests enforcement powers in the federal departments and agencies empowered to extend financial aid to educational programs and activities,¹¹⁸ primary responsibility for implementation rests with HEW.¹¹⁹ The procedures for ad-

113. 20 U.S.C. § 1682 (Supp. II, 1970).

114. 42 U.S.C. § 2000c-6 (1970), *as amended*, (Supp. II, 1970).

115. 20 U.S.C. § 1682 (Supp. II, 1970). The proposed regulations provide:

Such other means may include, but are not limited to, (1) a referral to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States, or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

Proposed HEW Reg. § 86.63(a), 39 Fed. Reg. 22,238 (1974).

No action to effect compliance by any other means authorized by law will be taken until (1) the Director has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person and the complainant, if any, has been notified of the recipient's failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts will be made to persuade the recipient or other person to comply with this part and to take such corrective action as may be appropriate.

Id. § 86.63(d), 39 Fed. Reg. 22,239 (1974). See section IV *infra*.

116. 20 U.S.C. § 1682 (Supp. II, 1970). Proposed HEW Reg. § 86.63, 39 Fed. Reg. 22,238-39 (1974).

117. Proposed HEW Reg. § 86.63, 39 Fed. Reg. 22,238-39 (1974); interview with Rosa Weiner, *supra* note 86.

118. Section 1682 provides:

Each Federal department and agency . . . is authorized and directed to effectuate the provisions of section 1681 . . . by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance . . .

20 U.S.C. § 1682 (Supp. II, 1970).

119. Federal agencies which extend aid to educational institutions have delegated

ministering and enforcing Title IX will be virtually identical to those for Title VI of the Civil Rights Act of 1964,¹²⁰ on which Title IX is based.¹²¹ Enforcement can be initiated in two ways: by complaint¹²² and by HEW's periodic review of educational institutions.¹²³ Employment-related complaints in the nature of class actions will be handled by OCR; individual complaints will be investigated by the Equal Employment Opportunity Commission (EEOC).¹²⁴ Full enforcement is being delayed, however, pending completion of Title IX regulations.¹²⁵ Until that time only those complaints which in HEW's judgment reveal *prima facie* violations of Title IX are being investigated.¹²⁶

Before final action is taken to terminate federal funding, several requirements must be met: (1) the school must be informed that it is in violation of Title IX; (2) HEW must determine that it is impossible to obtain voluntary compliance; (3) there must be a finding of non-compliance after adequate opportunity for hearing and review; and (4) a full written report of the decision to cut off funds must be submitted to the appropriate House and Senate committees.¹²⁷ No decision can

their enforcement powers under Title VI of the 1964 Civil Rights Act to HEW. A similar procedure is being followed in regard to Title IX. Interview with Jeffrey Orleans, *supra* note 86.

120. 42 U.S.C. §§ 2000d *et seq.* (1970).

121. *See* Proposed HEW Reg. Summary, 39 Fed. Reg. 22,228 (1974).

122. A letter of complaint may be filed with Regional OCR personnel or with the Director of HEW, by any individual or organization on his own or another's behalf within 180 days of the alleged discrimination. The time for filing may be extended by the Director of HEW. Proposed HEW Reg. § 86.62(b), 39 Fed. Reg. 22,238 (1974). As of March 31, 1974, approximately 250 Title IX complaints were on file with Office for Civil Rights in Washington, D.C. Telephone interview with Rosa Weiner, Office for Civil Rights, U.S. Dep't of HEW, May 10, 1974. Approximately 90 of the complaints dealt with higher education; the remainder involved primary and secondary schools. The vast majority concerned alleged school and course exclusionary policies and sex-role stereotyping in materials.

123. These "reviews" will take two forms: annual surveys are to be made of vocational education schools to determine their degree of compliance with Title IX; in addition, "suspect" schools will be continuously observed by regional OCR personnel. Interview with David Gerrard, *supra* note 91.

124. Interview with Rosa Weiner, *supra* note 86.

125. *See* text accompanying note 86 *supra*.

126. Interview with Rosa Weiner, *supra* note 86. For example, because vocational schools are specifically included in the nondiscriminatory admissions mandate of Title IX, a vocational school with a stated policy of refusing to admit women would be automatically in violation of the statute and would be investigated as soon as HEW learned of such a policy.

127. 20 U.S.C. § 1682 (Supp. II, 1970). If enforcement proceedings are commenced, the educational institution will receive notice of its right to a hearing or to submit written information and argument prior to HEW imposition of sanctions. Proposed HEW Reg. § 86.64(a), 39 Fed. Reg. 22,239 (1974). The hearing, before an administrative law judge selected in accordance with sections 3105 and 3344 of title 5 of the U.S. Code, 5 U.S.C. §§ 3105, 3344 (1970), is to be conducted according to sections 5-8 and 11 of the Administrative Procedure Act, 5 U.S.C. §§ 554-57 (1970). Proposed HEW Reg. §§ 86.64(b), (e)(1), 39 Fed. Reg. 22,239 (1974).

be effective until 30 days after the report is filed.¹²⁸ Thereafter, an order to terminate funding may issue at the discretion of HEW. Any action taken under Title IX is subject to judicial review.¹²⁹ If compliance is achieved "voluntarily" at any point prior to the cutoff order, the case can terminate with no mandatory interruption of funding.¹³⁰ HEW estimates that it could take from six months—if a school complies voluntarily with regional HEW recommendations—to a year and a half to achieve compliance or, alternatively, to have sanctions imposed.¹³¹ Given the number of opportunities for delay and the institution's right to administrative appeal at almost every procedural step, the estimate is probably an optimistic forecast.

While the procedures outlined above describe formal complaint proceedings under proposed regulations, additional measures are contemplated by OCR as potentially effective in bringing about at least partial compliance with Title IX. HEW recognizes that its best enforcement weapon is the breadth of Title IX coverage and the severity of available sanctions. Taking advantage of this broad coverage, HEW intends to achieve compliance with the requirement of nondiscriminatory school and course enrollment practices as its first priority in implementation of Title IX.¹³² As HEW sees it, a vocational school whose policies and programs are vulnerable to many Title IX and Title VI actions will be willing to comply with admissions requirements to avoid a general investigation by OCR.¹³³ This indirect method of coercing

Within 30 days a decision or a recommendation for further review is to be handed down by the hearing examiner. *Id.* § 86.65(a), 39 Fed. Reg. 22,239 (1974). One appeal of an adverse decision to a reviewing authority is granted by right. *Id.* Thereafter, the Secretary of HEW may further review the case if requested to do so and if he or she "determines there are special and important reasons therefor." *Id.* § 86.65(e), 39 Fed. Reg. 22,240 (1974).

128. 20 U.S.C. § 1682 (Supp. II, 1970). The purpose of this additional waiting period is to afford the institution one last opportunity to comply voluntarily, consistent with HEW's policy of not using its sanction powers until all other methods of securing compliance have failed. The Congressional Committee may intervene and object to the termination of funds, but such intervention is said to be extremely rare. Interview with David Gerrard, *supra* note 91.

129. 20 U.S.C. § 1683 (Supp. II, 1970). The institution may at any time request restoration of its eligibility to receive funds. Upon sufficient showing to the Director of the institution's compliance with Title IX, payment of funds may be reinstated; should the request for reinstatement be denied, the applicant is guaranteed a hearing. Proposed HEW Reg. §§ 86.65(h)(2), (3), 39 Fed. Reg. 22,240 (1974).

130. Proposed HEW Reg. § 86.63(c), 39 Fed. Reg. 22,239 (1974). During the pendency of an administrative action HEW will continue any funding "due and payable pursuant to an application therefor approved prior to the effective date" of the regulations; thereafter, HEW may continue funding but will not be required to do so. *Id.* § 86.63(b), 39 Fed. Reg. 22,239 (1974).

131. Interview with Rosa Weiner, *supra* note 86; interviews with David Gerrard, *supra* note 91.

132. See text accompanying note 151 *infra*.

133. Interviews with David Gerrard, *supra* note 91. One example would be a pre-

“voluntary” compliance by threat of a general review is regarded as an efficient use of the limited funds and personnel available to implement the regulations.¹³⁴

C. *Limitations on HEW Enforcement of Title IX*

There are serious limitations on HEW's effectiveness in combating sex discrimination in vocational education pursuant to Title IX. In part the limitations stem from the act itself. There are many exceptions to the statute's coverage, and the narrow definition Congress gave “educational institution” for sanction purposes¹³⁵ restricts the instances of educational discrimination HEW may remedy under Title IX. While most of these limitations were adopted for “practical political reasons,”¹³⁶ the result is that, as one commentator concluded, “Whenever the bill could be weakened, it was weakened.”¹³⁷

The act also explicitly limits HEW's power to require affirmative action. Section 1681(b) states that nothing contained in the enacting portion of Title IX “shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance” between the percentage of women (or men) in the general population and the percentage of women (or men) “participating in or receiving the benefit of” the federally supported activity.¹³⁸ The section adds, however, that statistical evidence of such imbalance may be used as evidence in a Title IX administrative hearing.¹³⁹

OCR has interpreted this provision in its proposed regulations by drawing a distinction between “a recipient which has previously *discriminated* against persons on the basis of sex”¹⁴⁰ and a recipient whose education programs contain “conditions which *resulted* in limited par-

dominantly white male vocational school which recruits teachers from unions that discriminate on the basis of sex as well as race, which allows those unions to use its facilities to interview prospective employees, and which offers apprenticeships in traditionally male-dominated fields only to male students.

134. *Id.*

135. See note 87 *supra*.

136. Interview with Sally Kirkgasler, Assistant to Congresswoman Edith Green, author of the House version of Title IX, in Washington, D.C., Nov. 19, 1973. Ms. Kirkgasler stated, for example, that the House Special Subcommittee on Education exempted private undergraduate schools from admissions requirements partly in response to the large number of calls from concerned alumni of Harvard, Yale, and Princeton. *Id.*

137. A. Trebilcock, Women's Admission to Graduate and Professional Schools under Title IX of the Higher Education Amendments of 1972, June, 1973, at 3 (unpublished thesis, Boalt Hall, University of California, Berkeley).

138. 20 U.S.C. § 1681(b) (Supp. II, 1970).

139. *Id.*

140. Proposed HEW Reg. § 86.3(a), 39 Fed. Reg. 22,233 (1974) (emphasis added).

participation therein by persons of a particular sex."¹⁴¹ Affirmative action is mandatory for the first institution as a remedy "to overcome the effects of such previous discrimination."¹⁴² The second institution, however, which has not been found to have discriminated against women previously, but which may have no women in any but the traditional feminine fields, is not required to have an affirmative action program; instead, "permissive" affirmative action steps "may" be taken by the institution involved.¹⁴³ Under this interpretation, it would be insufficient to show that there were virtually no women enrolled in traditionally male-dominated vocational programs. In order to require a vigorous recruitment program or other affirmative action measures, HEW would have to find an intentional policy and practice of sex discrimination.

The problems inherent in so limited an affirmative action interpretation are clear. First, whether a vocational institution has an overt policy of sex discrimination in admissions or merely overemphasizes the difficulties of pursuing a nontraditional career, the result is the same: the discouraged students never apply. The adverse effects of being denied the training necessary to earn a living wage and to fulfill one's aspirations are also the same. Second, unless affirmative action requirements are applied to all institutions with significantly disproportionate enrollment and course participation statistics, the pattern of unequal opportunities for men and women in vocational education, and consequently in employment, will change very slowly. As the New York and Massachusetts experience indicate,¹⁴⁴ abandoning only the blatant trappings of sex discrimination, such as a "boys only" requirement in a metal shop class, cannot be expected to affect significantly the training and employment outlook for vocational students. It is the psychological and sociological conditioning manifested in subtle forms of discrimination—resulting in the limited participation by women in "male" fields—that needs an affirmative action remedy.

It is possible that, even within the present parameters of the "mandatory" and "permissive" categories, comprehensive and effective recruitment remedies could be required of schools with no express policy of discrimination. For instance, if a vocational school had been informed of Title IX and one year later still had no women in the training areas leading to high-paying union jobs, HEW could, in the absence of a well-documented showing of nondiscrimination, presume the existence of more subtle forms of discrimination and require that an affirmative recruitment policy be instituted. Such a presumption would be

141. *Id.* § 86.3(b), 39 Fed. Reg. 22,233 (1974) (emphasis added).

142. *Id.* § 86.3(a), 39 Fed. Reg. 22,233 (1974).

143. *Id.* § 86.3(b), 39 Fed. Reg. 22,233 (1974).

144. See text accompanying notes 36-51 *supra*.

based upon the fact that the pool of qualified women to fill training spots is as large as the number of women in high school—not the number of high school women who have applied. It would thus take account of and provide a remedy for subtle discrimination both in discouraging applications and in indirectly restricting admissions.

HEW could further ensure effective compliance and full utilization of the affirmative action measures by coordinating a Title IX action with proceedings under Title VII of the Civil Rights Act of 1964¹⁴⁵ in problems dealing with discrimination in placement. In addition, the investigation of a vocational school under Title IX might be combined with an investigation of the school's employment practices pursuant to Title VII and Executive Order 11246.¹⁴⁶ Then, evidence of overt discrimination in the employment area could perhaps be used to convert findings of "conditions which resulted in limited participation" in the educational program into sufficient findings of "discrimination" to require affirmative action.¹⁴⁷

The effectiveness of such strategies and of Title IX as a whole, will depend upon active HEW commitment on three points: aggressiveness and creativity in approaching the problem of sex discrimination and its solution; adequate funding and personnel assigned to finding and documenting violations of the statute; and an expansive interpretation of "discrimination" to trigger affirmative action and other sanctions.

All three factors are inevitably intertwined. For example, the reason OCR is compelled to rely heavily upon privately-initiated individual complaints is that funding and manpower limitations prevent the development of a comprehensive system for monitoring compliance at the local level. The result of this somewhat passive enforcement position is that many instances of discrimination will go unobserved and unremedied. Much sex discrimination is subtle, taking the form of discretionary decisions by interviewers, omissions by guidance counselors, or the use of biased testing materials. Often the student does not realize that he or she has been discriminated against; the roles suggested seem normal or at least not outrageous enough to warrant filing a complaint. Given human inertia and the insecurity generally suffered by adolescents, it is unlikely that many victims of sex discrimination in this

145. 42 U.S.C. § 2000e *et seq.* (1970), *as amended*, (Supp. II, 1970).

146. Exec. Order No. 11246, 3 C.F.R. 169 (1974), 42 U.S.C. § 2000e (1970).

147. In *Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189 (1973), the Court indicated that for the purpose of fashioning a remedy, a finding of *de jure* racial segregation practiced by a school board in a "substantial portion" of its district created a presumption of discrimination in other parts of the district where discriminatory effects (*de facto* segregation) but not intentional segregation could be demonstrated. Similarly, intentional sex discrimination by a vocational school in its employment practices with clear effect in its other programs should create a presumption of discrimination.

field will be aware of the violation and willing to initiate a Title IX complaint and see the complicated procedure through to resolution.¹⁴⁸

To date HEW has failed to act aggressively to eliminate sex discrimination. Although Title IX has been law since 1972, the agency has not yet even completed its regulations, although the demand has been strong both inside and outside HEW.¹⁴⁹ Part of the problem involves the agency's lack of adequate staffing. While OCR has indicated that approximately 18 people are assigned to drafting Title IX regulations, only two or three work on a regular basis and no one devotes full time to the project.¹⁵⁰

As a result of the delay in completing the regulations, the compliance to be achieved when enforcement begins will be quite limited. The paucity of staffing, of course, will also affect enforcement. Initially, HEW will focus on regulations dealing with course exclusion and admissions and their implementation in large urban and suburban public schools, because this will affect the greatest number of persons.¹⁵¹ Other Title IX problems pose difficult policy and enforcement problems because of their controversial nature or legal complexity. Given the lack of consensus within OCR on questions such as how vigorously enforcement should proceed against unions violating Title IX, and resolution of the first amendment difficulties inherent in any content analysis of educational materials, these areas of potential discrimination are not likely to be the subject of formal regulations for quite some time.¹⁵²

Another important factor in the delay is competing agency commitments that are given a higher priority than is enforcement of Title IX and other measures concerning sex discrimination. OCR staff members, at both the national and regional level, candidly admit that for HEW and OCR sex discrimination is "not the burning issue" of the

148. The importance of the provision allowing complaints to be submitted by a third party on behalf of a person discriminated against, see note 122 *supra*, is illustrated by the fact that of the approximately 250 complaints submitted from the entire country by March 31, 1974, 45 were submitted by the New Jersey chapter of the National Organization for Women. Telephone interview with Rosa Weiner, *supra* note 122.

149. Interview with Rosa Weiner, *supra* note 86.

150. *Id.* A planning group within OCR was to begin work early in 1974, with staff from the 10 HEW regions, coordinating efforts on interpretation of the regulations and determining methods of uniformly implementing them. *Id.* An additional factor in the delay of the regulations may be inexperience, since many of the persons assigned to draft them are relatively new to OCR and have never drafted regulations before. *Id.*

151. While this policy is not committed to writing in the proposed regulations, it seems to be the consensus among OCR staff members. Interview with Rosa Weiner, *supra* note 86; interview with Jeffrey Orleans, *supra* note 86; interviews with David Gerard, *supra* note 91.

152. However, should a test case concerning such problems arise through the complaint procedure, HEW would have to investigate and resolve the issue. Interview with Rosa Weiner, *supra* note 86; interview with Jeffrey Orleans, *supra* note 86.

day.¹⁵³ This may be explained by the fact that many key figures in civil rights implementation positions came in during and because of the pressing concern with racial discrimination; for them sex discrimination seems to be a second-level issue lacking the socioeconomic justification of the race problem.¹⁵⁴ This perception of the importance of eliminating sex discrimination neglects several considerations. First, both minority and white women, not minority men, occupy the lowest rungs of the employment scale in terms of earnings.¹⁵⁵ Second, more than half of the persons experiencing race discrimination are women who are doubly discriminated against because of their sex. Moreover, relegating the problem of sex discrimination in education and the need for its elimination to a secondary position adversely affects everyone. It permits the continued channeling of both men and women into occupations on the basis of an immutable characteristic that has nothing to do with individual abilities and interests. Related to and overlapping the problem of race discrimination, sex discrimination is one more facet of the broad problem of exploitation and exclusion that OCR was formed to eliminate.

A second reason for the low priority given Title IX implementation is sex discrimination within HEW itself. An analysis by sex of Office of Education staff and management positions in 1972 pointed out the problem: "While the average grade for women in the Office of Education is GS-7, the average for men is a whopping GS-14."¹⁵⁶ Women in the Office of Education are 54 percent of the employees, 18.8 percent of those in GS-13 to GS-15, and 5.7 percent of those in GS-16 to GS-18.¹⁵⁷ Nor was the situation improving: affirmative action goals were set too low to account for normal levels of attrition; accordingly, the number of women in high-level positions within the Office of Education decreased from July, 1971, to September, 1972.¹⁵⁸ The agency continued to hire men from the outside while women

153. Interview with Rosa Weiner, *supra* note 86; interview with John Palomino, Regional Education Branch Chief, Office for Civil Rights, U.S. Dep't of HEW, Region IX, in San Francisco, Cal., Oct. 17, 1973 [hereinafter cited as interview with John Palomino].

A 1972 Task Force studying HEW, the Office of Education, the National Institute of Education, and the Office for Civil Rights found throughout the agencies little understanding of the educational inequities women face and only limited concern with the priority of equal educational opportunity for women. A LOOK AT WOMEN IN EDUCATION, *supra* note 27, at 66.

154. Interview with John Palomino, *supra* note 153.

155. In 1966, the median income of white men was \$6,390; of nonwhite men, \$3,665; of white women, \$1,988; and of nonwhite women, \$1,561. WOMEN'S BUREAU, WAGE AND LABOR STANDARDS ADM'N, U.S. DEP'T OF LABOR, HANDBOOK ON WOMEN WORKERS 141 (1969).

156. A LOOK AT WOMEN IN EDUCATION, *supra* note 27, at 69.

157. *Id.*

158. *Id.*

within the Office of Education remained frozen in low-level jobs.¹⁵⁹ "The affirmative action system has no teeth—supervisors are not held accountable for progress in equal employment. Most selecting officers go through the motions of the merit promotion procedures: women are frequently candidates for senior-level jobs, but rarely the final choice."¹⁶⁰ In special policy positions—advisory counsels, task forces, and review panels (including Title IX investigation forces)—the record is in some ways worse. Here, selection is by appointment, based largely upon the "widespread use of personal contacts among the predominantly male staff and informal advice from male-dominated professional associations [which] precludes an even chance for women."¹⁶¹ Another problem is that a consultant's compensation is often set according to past salary and title, not strictly according to the work performed, thus perpetuating the effects of past discrimination.¹⁶² While one need not be female to appreciate sex discrimination and the urgent need for its elimination in vocational education, it is clear that an agency whose decisionmaking process is dominated by men who regard sex discrimination as a "back burner" issue cannot be expected to give Title IX the vigorous enforcement required for its effective and immediate implementation.

While changes in personnel and priorities might increase HEW commitment to enforcing Title IX, the problem of bureaucratic inertia and red tape is equally difficult to overcome; any administrative remedy is by its nature a lengthy and cumbersome procedure. Moreover, the fact that the statutory remedy—elimination of federal financial assistance—is so drastic, having the effect of punishing those intended to be beneficiaries of the act as well as wrongdoers, further limits Title IX's effectiveness. With no official intermediate remedy,¹⁶³ OCR is compelled to go to great lengths to avoid imposing the sanction. The resulting necessity of affording an allegedly discriminatory institution full procedural rights prior to suspending financial assistance means that, while administrative enforcement of the act gradually may effectuate changes in school policies and practices, Title IX's utility as a remedy for an individual complainant is severely curtailed.

IV

ALTERNATIVE REMEDIES FOR ENDING DISCRIMINATION

Given the problems involved in obtaining prompt, effective relief through HEW initiation of Title IX enforcement procedures, the need

159. *Id.*

160. *Id.*

161. *Id.* at 70.

162. *Id.* at 71.

163. *But cf.* text accompanying note 134 *supra*.

for alternative remedies is apparent. For individuals who have been discriminated against, such remedies include private court actions based on Title IX, on the equal protection clause, or on civil rights statutes such as Title IV¹⁶⁴ and Title VII.¹⁶⁵ In addition, a petition could be filed for violations of international human rights treaties.¹⁶⁶

A. Private Rights of Action Under Title IX

1. Statutory Construction and the Doctrine of Implication

Title IX does not expressly provide a private right of action. In order to decide whether courts can imply such a right, one must consider: the applicability of the theoretical grounds courts have used to imply private causes of action in other situations; congressional intent regarding private actions under Title IX; and the effect of statutory delegation of enforcement responsibility to HEW. Questions also arise concerning the likely scope of private suits. The doctrine of implication is founded upon what has been labeled the statutory tort theory¹⁶⁷—a court may create a new cause of action if a statute declares wrongful certain behavior, since disregard of the command of a statute is itself a wrongful act resulting in liability to the intended beneficiary of the statutory duty.¹⁶⁸

Without limitations or further considerations, however, the statutory tort doctrine would result in implication of private rights in all cases where the statute in question declared wrongful certain conduct for the purpose of protecting a class of persons. That such implication is not automatic is shown by the fact that courts look to other factors, primar-

164. 42 U.S.C. § 2000c *et seq.* (1974). See text accompanying note 205 *infra*.

165. *Id.* § 2000e *et seq.* (1974). See text accompanying notes 256-58 *infra*.

166. See notes 259-62 *infra* and accompanying text.

167. 5 L. LOSS, SECURITIES REGULATION 2283 (Supp. 1969) [hereinafter cited as Loss]; Note, *Private Remedies Under the Consumer Fraud Act: The Judicial Approaches of Statutory Interpretation and Implication*, 67 NW. U.L. REV. 413, 429-30 (1972) [hereinafter cited as *Consumer Fraud*].

168. This doctrine was articulated in *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916), and amplified in *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). This latter case relied on section 286 of the *Restatement of Torts*, which provides:

The violation of a legislative enactment by doing a prohibited act, or failing to do a required act, makes the actor liable for an invasion of an interest of another if:

(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and,

(b) the interest invaded is one which the enactment is intended to protect; and,

(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interest results from hazard; and,

(d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action.

RESTATEMENT OF TORTS (§ 286) (1934).

ily matters of policy and broadly interpreted legislative intent, in deciding whether to imply a private right of action.

Traditionally, courts have used various statutory construction techniques to imply private rights of action. The primary concern is legislative intent, but courts are not agreed on how legislative intent is to be determined. The more restrictive view is that the courts are limited to a literal construction of a statute to determine whether Congress intended to allow a private right of action under that particular statute.¹⁶⁹ The broader view is that courts may seek the "legislative purpose," permitting them to investigate the needs intended to be served by the statute and then determine whether a private right of action furthers this broader legislative "intent."¹⁷⁰ This method of statutory construction has been called the "doctrine of statutory implication."¹⁷¹ In some cases, it has been used in conjunction with the more restrictive type of statutory construction.¹⁷² The result of these techniques of statutory construction has been a long series of decisions allowing private rights of action under statutes not specifically providing therefor.¹⁷³

169. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963); *Botany Worsted Mills v. United States*, 278 U.S. 282 (1929); *Jordan v. Montgomery Ward*, 442 F.2d 78 (8th Cir. 1971).

170. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

171. Though not so named, this doctrine was first enunciated in *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1916); the label was applied in *Holloway v. Bristol-Myers Corp.*, 327 F. Supp. 17, 21 (D.D.C. 1971). For a discussion of the doctrine of implication, see 2 Loss, *supra* note 167, at 932-46 (1961); *Consumer Fraud*, *supra* note 167.

Some commentators find two separate theories in the doctrine of implication. One author speaks of the "pre-existing duty" and "statutory tort" theories. The pre-existing duty theory assumes that the statute is not creating a new cause of action, but is merely defining the standard of conduct required within the context of a duty already owed to the plaintiff. This analysis is most frequently used in tort cases where plaintiff's claim rests upon negligence codified by statutes such as the Federal railroad safety standards. The statutory tort theory, to be discussed in greater detail *infra*, is derived from section 286 of the *Restatement of Torts* and allows creation of a new cause of action based on the statutory declaration that certain behavior, although perhaps previously legal, is now wrongful. See Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 HARV. L. REV. 285, 286 (1963) [hereinafter cited as CIVIL REMEDIES].

Another author distinguishes the statutory tort theory from the "enforcement theory," considering the latter as involving primarily questions of policy rather than law. Comment, *Private Rights from Federal Statutes: Toward a Rational Use of Borak*, 63 NW. U.L. REV. 454, 463 n.45 (1968) [hereinafter cited as *Private Rights*]; see *Consumer Fraud*, *supra* note 167, at 430-31 n.85.

172. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

173. *Rosado v. Wynman*, 397 U.S. 397 (1970) (Social Security Amendments of 1967); *Allen v. Board of Elections*, 393 U.S. 544 (1969) (1965 Voting Rights Act); *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967) (River and Harbors Act); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964); *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944) (Railway Labor Act); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916) (Federal Safety Appliance Act); *Fitzgerald v. Pan Am. World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956) (Civil Aeronautics Act); *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953) (Securities Exchange Act of 1934); *Lemon v.*

The narrower techniques of statutory construction include the obvious considerations of statutory language and legislative history and purpose. In addition, courts may use different—and sometimes conflicting—legal maxims or presumptions to arrive at their decisions. In cases where the particular statute is part of a broader legislative enactment, the maxim *expressio unius est exclusio alterius* is sometimes relied upon as an interpretative argument against implication.¹⁷⁴ This doctrine states that the express authorization of a particular remedy in one section of an act but not others indicates that the legislature intended to omit the remedy from the other sections.¹⁷⁵ It has also been interpreted to mean that express provision of one remedy in a statute is evidence that no other remedy was to be available under that same section.¹⁷⁶

On the other hand, some courts have applied a presumption in favor of implication. These courts have required clear evidence of legislative intent to withhold from injured parties the right to recover damages arising by reason of violation of a statute.¹⁷⁷

The most frequent and most successful policy argument favoring implication has been that a private right of action is necessary to full enforcement of the statute. For example, in *Allen v. Board of Education*¹⁷⁸ the Court noted that the 1965 Voting Rights Act¹⁷⁹ “implemented Congress’ firm intention to rid the country of racial discrimination in voting.”¹⁸⁰ The Court analyzed the language of the statute “in light of the major purpose of the Act,”¹⁸¹ and found that unless private suits could be maintained, the Act “might well prove an empty promise”¹⁸² to those for whose protection it was passed.¹⁸³ Other cases set

Bossier Parish School Bd., 240 F. Supp. 709 (W.D. La. 1965) (Title VI, 1964 Civil Rights Act); *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961) (Federal Aviation Act of 1958); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946) (section 10(b), Securities Exchange Act of 1934).

174. *E.g.*, *National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 94 S. Ct. 690 (1974). *See generally* 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, §§ 47.23-25 (4th ed. 1973).

175. *Jordan v. Montgomery Ward & Co.*, 442 F.2d 78, 80-82 (8th Cir. 1971).

176. *National R.R. Passenger Corp. v. National Ass’n of R.R. Passengers*, 94 S. Ct. 690, 693 (1974); *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929).

177. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). In *Kardon*, it was held that the mere omission of an express provision for the private rights in the securities law was “not sufficient to negative what the general law implies.” *Id.* at 514.

178. 393 U.S. 544 (1968).

179. 42 U.S.C. § 1973 *et seq.* (Supp. I, 1964).

180. 393 U.S. at 548.

181. *Id.* at 555. “The Act was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens.” *Id.* at 556.

182. *Id.* at 557.

183. For similar arguments resulting in implication of private rights under other statutes, see *Allen v. Board of Elections*, 393 U.S. 544 (1969); *Fratt v. Robinson*, 203

out additional grounds for implication. Some courts have seen a necessity to compensate persons injured as a result of violation of a statute which provided inadequate relief.¹⁸⁴ Others have focused on the additional deterrence which results from increasing the potential liability for those violating the statute.¹⁸⁵

The overlap between narrow techniques of statutory construction and the broader concerns of the doctrine of implication may be seen in a recent United States Supreme Court decision, *National Railroad Passenger Corp. (Amtrak) v. National Association of Railroad Passengers*.¹⁸⁶ The Court noted that it would adhere to the "frequently stated principle of statutory construction,"¹⁸⁷ *expressio unius est exclusio alterius*. However, the decision not to imply a private right of action under the Amtrak Act was clearly based on its finding that to do so would be contrary to both the evident legislative intent and the "effectuation of the purposes intended to be served by the Act."¹⁸⁸ Thus, although the Court in *Amtrak* based its decision on statutory interpretation, much of the language and many of the tests the court used suggest that it was really applying the doctrine of implication; especially noteworthy are the Court's concern with legislative purpose¹⁸⁹ and its finding that there was no need for implying a private right in order to ensure full enforcement of the statute.¹⁹⁰ Although substantial evidence

F.2d 627 (9th Cir. 1953); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946). In *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964), the Court found that private enforcement of SEC proxy rules "provides a necessary supplement to Commission action" because an overburdened Commission could not fully examine all proxy statements. "[The] holding in *Borak* is a policy premise, rather than a rigid rule of implication of private rights of action. Whether or not a private right will be created now depends on its desirability within the framework of *Borak's* policy, rather than upon a rule of law. . . ." *Private Rights*, *supra* note 171, at 463 n.45.

Mr. Justice Harlan has described the Court as implying a right for damages "where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 402 (1971) (concurring opinion). He noted:

The exercise of judicial power involved in *Borak* simply cannot be justified in terms of statutory construction, nor did the *Borak* court purport to do so. The notion of "implying" a remedy, therefore, as applied to cases like *Borak*, can only refer to a process whereby the federal judiciary exercises a choice among *traditionally available* judicial remedies according to reasons related to the substantive social policy embodied in an act of positive law.

Id. at 402-03 n.4 (citations omitted).

184. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Fitzgerald v. Pan Am. World Airways, Inc.*, 229 F.2d 499 (2d Cir. 1956); *cf. Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

185. *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961).

186. 94 S. Ct. 690 (1974).

187. *Id.* at 693.

188. *Id.*

189. *Compare id. with J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

190. *Compare* 94 S. Ct. at 696 *with Allen v. Board of Elections*, 393 U.S. 544 (1969).

was brought out to indicate Congress' deliberate exclusion of private suits from the Amtrak Act,¹⁹¹ the Court also found that to allow the suits would subvert the purposes for which the Act was passed¹⁹² and hinder its enforcement.¹⁹³

The major argument made against the doctrine of statutory implication is that it constitutes judicial legislation.¹⁹⁴ The extent to which this criticism is valid, however, depends in large part on the particular statute from which the action is implied. A statute clearly defining the standard of conduct required thereunder minimizes objections to judicial legislation by narrowly limiting the issues which the judiciary must decide. Moreover, courts may be in a better position to evaluate the need for a supplemental remedy once a statute is in operation than was Congress at the time the act was passed.¹⁹⁵

An additional objection to implication of a private remedy may arise where Congress has delegated authority to an administrative agency to enforce the statute in question. The doctrine of "primary jurisdiction" generally provides that when Congress has placed certain issues within the special competence of an administrative agency, courts have no jurisdiction to accept cases requiring resolution of questions within the agency's field of expertise.¹⁹⁶ This doctrine is especially applicable in instances where the agency has the power to grant relief, but has either refused to act or has ruled against the claimant; in such cases a judicial remedy arguably would undermine the agency's authority. Delegation of enforcement powers to an agency, however, may arguably militate in favor of implication where the agency has shown itself to be overburdened or otherwise incapable of pursuing adequate enforcement measures.¹⁹⁷

191. A provision which would have allowed private suits was voted down in the House Committee. 94 S. Ct. at 693-94.

192. The Court discussed at length the purposes of the Amtrak Act, one of which was to provide an efficient means for eliminating economically unfeasible routes. *Id.* at 695.

193. The Court found that private actions would continue the very "deficits and dislocations" which Congress was attempting to remedy with passage of the Act. *Id.*

194. For a discussion of this argument, see *Civil Remedies*, *supra* note 171, at 291.

195. Regarding Title IX suits, for example, Congress had no way of anticipating the backlog of cases which would accrue during the two and a half years it has taken HEW to draft Title IX regulations. See text accompanying note 149 *supra*.

196. See, e.g., *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371 (2d Cir. 1968).

197. This argument has in fact led the Supreme Court to imply a private remedy on several occasions. See *Rosado v. Wyman*, 397 U.S. 397 (1970); *Allen v. Board of Elections*, 393 U.S. 544 (1969); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). See also *Adams v. Richards*, 356 F. Supp. 92 (D.D.C.), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973).

In *Allen v. Board of Elections*, the Court noted:

[T]he achievement of the [Voting Rights] Act's laudable goal could be severely

A possible solution to this jurisdictional problem lies in a compromise court-agency procedure: the court decides whether to grant the right of action and, if it does so, retains jurisdiction while the agency resolves the particular issues over which it has primary jurisdiction.¹⁹⁸ This procedure is facilitated in cases where administrative regulations resolve in advance many of the policy questions on which the court would need to defer.¹⁹⁹

2. *Applicability to Title IX*

Application of the foregoing theories, doctrines, and policies to the question of Title IX enforcement on the whole favors implication of a private right of action. Applying narrow techniques of statutory construction to Title IX in an attempt to determine Congressional intent is not very helpful,²⁰⁰ for there is no evidence that Congress considered the question of a private right of action. Thus, a court faced with the issue could apply a presumption in favor of implication since Congress did not deliberately exclude private rights of action.²⁰¹ On the other hand, a court might apply the maxim *expressio unius est exclusio alterius* to exclude private actions on the ground that express authorization of another remedy, enforcement by HEW, is provided.²⁰² In addition, a court might look to Title VI, on which Title IX is based, and find that the provision for private actions in other sections of the Civil Rights Act²⁰³ evidences an intent that such a right not be granted for Title VI and, by analogy, Title IX.

hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney General. . . . The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government.

393 U.S. at 556. In a footnote to this passage, the Court added that between 1965 and 1968 the Attorney General had brought only one action to force compliance with the relevant section of the Act. *Id.* n.22.

198. *Civil Remedies*, *supra* note 171, at 295-96. *Cf.* *Hewitt-Robins v. Freight-Ways*, 371 U.S. 84 (1962), where the Court granted a private remedy after the ICC had determined that the defendant's routing practice was unreasonable.

199. For example, Title VII regulations define what fact situations constitute illegal employment practices for purposes of the Act. *See, e.g.*, 29 C.F.R. 1604 *et seq.* (1973) (guidelines regarding specific employment practices which discriminate against women).

200. Title IX is couched in declaratory terms which prohibit certain behavior; violation of its command may thus be considered a statutory tort. In one sense, however, it may be argued that the wording of Title IX militates against an interpretation of Congressional intent that would favor implication of a private right of action. The declaratory nature of the statutory language arguably brings these acts within the category of statutes that merely define "conduct [which] results in disqualification for certain benefits but [which] is in no way declared 'unlawful.'" *Spirit v. Bechtel*, 232 F.2d 241, 250 (2d Cir. 1956).

201. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946).

202. *See* text accompanying note 176 *supra*.

203. Title IV, 42 U.S.C. § 2000c-8 (1974); Title VII, 42 U.S.C. § 2000e-5(f) (1974).

There are several compelling arguments against this negative interpretation of Titles VI and IX. First, it is not unlikely that in both statutes Congress intended to *supplement* existing private rights to sue for violation of civil rights rather than limit the ability of the individual to vindicate such rights in court. This has certainly been the experience with other civil rights legislation.²⁰⁴ Also, Title IV, which expressly retains private suits under the equal protection clause as a method of bringing about racial desegregation of public schools, was amended by Title IX. It now defines desegregation to mean assignment of students without regard to sex as well as race. The desirability of private actions to attack sex-based discrimination in public schools has thus been expressly recognized.²⁰⁵ This seems to indicate that a private right of action should be generally implied in construing Title IX. Finally, it must be remembered that Title IX is not part of the 1964 Civil Rights Act. Therefore, the fact that some sections of the 1964 Act specifically provide for a private right of action, while others do not, should not settle the issue in regard to Title IX. The *expressio unius* doctrine, which looks to available remedies within the boundaries of the statute itself, cannot properly be applied to the 1964 civil rights legislation in interpreting Title IX.²⁰⁶

While the 1964 Civil Rights Act should not be determinative of the proper construction of Title IX, it is clearly relevant to a broader

204. In *Allen v. Board of Elections* the Court recognized:

The [Voting Rights Act of 1964] was drafted to make the guarantees of the Fifteenth Amendment finally a reality for all citizens. Congress realized that existing remedies were inadequate to accomplish this purpose and drafted an unusual, and in some aspects a severe, procedure for insuring that States would not discriminate on the basis of race in the enforcement of their voting laws.

393 U.S. 544, 556 (1968) (citation omitted). The Court also noted: "Of course the private litigant could always bring suit under the Fifteenth Amendment. But it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the Voting Rights Act." *Id.* n.21.

205. Act of June 23, 1972, Pub. L. No. 92-318, Title IX, § 906(a), 86 Stat. 375, amending 42 U.S.C. §§ 2000c(b), 2000c-6(a)(2), 2000c-9 (1964). The Department of Labor has interpreted the amendment of Title VII to mean that "the Attorney General is empowered to intervene, on behalf of the United States, in litigation already begun by others claiming denial of equal protection of the laws under the 14th Amendment on account of sex, in addition to race, color, religion or national origin." U.S. Dep't of Labor, Employment Standards Administration, Education Act Extends Sex Discrimination and Minimum Wage Provisions, June, 1973.

It should be noted that Title IV only provides the means to attack school segregation which has been held to be illegal under the equal protection clause. It does not, of its own force, outlaw sex discrimination in public schools. Title IX, on the other hand, does outlaw sex-based discrimination, at least in schools which receive federal funds.

206. The doctrine should be strictly construed since, as a mechanical method of statutory construction, it does not take into consideration the broader policy aspects of legislative intent and effective statutory enforcement. See *Civil Remedies*, *supra* note 171, at 290-91.

inquiry into legislative intent. Title VI is especially pertinent, since it served as the model for Title IX. In addition, because so little legislative history exists in regard to Title IX, the Title VI experience and background is most useful.

Title VI provides that no person shall be subject to discrimination on the ground of race, color, or national origin in any program or activity receiving federal financial assistance.²⁰⁷ Like Title IX, it does not specifically provide for a private right of action. Looking at Title VI in the context of the Civil Rights Act of 1964, it seems clear that the overall Congressional purpose was to supplement existing equal protection remedies available through private court action by adding federal enforcement in all areas subject to federal regulation. Thus, procedures for effectuating desegregation in public accommodations (Title II)²⁰⁸ and employment (Title VII)²⁰⁹ were passed, founded upon the power of the government to regulate interstate commerce. Moreover, Congress authorized the government to aid in desegregating public schools by bringing suit on behalf of those whose equal protection rights had been violated (Title IV).²¹⁰ Exercising its power under the spending clause, Congress reinforced its commitment to desegregation by including Title VI, which conditions receipt of federal funds on non-discrimination.

Since an adequate remedy already existed in the area of racial discrimination, it is likely that Congress felt no need to include private remedies pursuant to Title VI. Moreover, Congress may have modeled Title IX on Title VI on the assumption that judicial protection against sex discrimination would continue to expand; thus private equal protection suits together with those provided by Title IX would ensure an adequate remedy for those discriminated against in educational programs. However, the Supreme Court's unwillingness to treat sex as a suspect classification,²¹¹ coupled with the difficulty of obtaining effective administrative relief,²¹² means that adequate protection is not available unless a private right of action is implied under Title IX.²¹³

Additional support for a private right of action under Title IX is the fact that private remedies have been implied under Title VI. In *Lemon v. Bossier Parish School Board*,²¹⁴ where the issue of standing

207. 42 U.S.C. § 2000d (1974).

208. *Id.* § 2000a (1974).

209. *Id.* § 2000e (1974).

210. *Id.* § 2000c (1974).

211. See note 247 *infra*.

212. See notes 135-55 *supra* and accompanying text.

213. The gap between judicial and legislative action was not a problem in early Title VI cases because its standards were coextensive with equal protection demands in the area of racial discrimination. *But cf.* *Lau v. Nichols*, 94 S. Ct. 786 (1974).

214. 240 F. Supp. 709 (W.D. La. 1965).

was discussed at length, parents of black children at an air force base in Louisiana sued the parish school board and the superintendent of schools, alleging racial discrimination in violation of Title VI. By the terms of an agreement between the federal government and the Louisiana parish, the parish provided schooling for all children from the base, in exchange receiving federal funds for construction of school facilities. As a condition of receiving the funds, the parish gave contractual assurances that it would provide desegregated education for all pupils—promises that the parents alleged it had failed to keep. The district court held that the plaintiffs had standing under Title VI. It wrote:

Plaintiffs, as pupils attending schools operated and maintained by these funds, are recipients of the rights conferred by Section 601, and as such are entitled to bring this suit. Section 601 gives plaintiffs standing to maintain this action as representatives of the class comprised of all children attending schools maintained and operated with federal financial assistance.²¹⁵

Alternatively, the court noted the contractual assurances of nondiscrimination and stated that plaintiffs were entitled to bring the action as third-party beneficiaries of the contract.²¹⁶

Lau v. Nichols,²¹⁷ the first private action under Title VI to reach the Supreme Court, was a class action brought on behalf of Chinese-speaking students against the San Francisco school district, alleging violations of Title VI and of the equal protection clause. While the Court did not address itself directly to the issues of standing or implication of the right to sue, it appears that the plaintiffs' standing rested upon their rights as beneficiaries of a federal contract. The relief granted was based solely upon a violation of the assurances required by Title VI; the court did not reach the equal protection argument. Noting that the school district "contractually agreed to comply with Title VI" and with HEW regulations issued pursuant to the right of Congress to condition receipt of federal funds upon nondiscrimination,²¹⁸ the Court held that violation of the contractual assurances justified the granting of relief under Title VI.

Thus the *Lemon* decision allowing a private right of action under Title VI, especially as supported by *Lau*, lends strong support to the implication of a similar private remedy under Title IX. It is certainly

215. *Id.* at 715.

216. *Id.* at 713 & n.4 (alternative holding). This argument would also be available to Title IX plaintiffs; under Title IX, as under Title VI, federal funds are allocated to state agencies pursuant to contracts which must contain assurances of compliance with applicable civil rights statutes. See text accompanying note 24 *supra*.

217. 94 S. Ct. 786 (1974).

218. *Id.* at 789.

plausible to assume that Congress did not find it necessary to provide a specific private right of action under Title IX because the absence of such a provision in Title VI had not barred private suits. Given the *Lemon* precedent, which was before Congress when it enacted Title IX, the presumption in favor of implication is strengthened by the absence of a clear intent to deny a private remedy.²¹⁹ Moreover, since private suits are permitted under Title VI, the failure to imply a private right for Title IX may itself violate the equal protection rights of potential Title IX plaintiffs. Given that Congress has provided identical sanctions against recipients of federal funding who discriminate on the basis of sex or race in the use of those funds, it would seem irrational to implement the two statutory remedies differently.

In addition to the strong argument based on statutory interpretation, there are weighty policies favoring implication of a private right using the "doctrine of statutory implication," particularly in light of the dominant purpose of the statute, which is to eliminate sex discrimination in educational programs. Undoubtedly this fundamental goal would be furthered by the additional incentive to comply that would be afforded by the threat of private lawsuits against noncomplying school districts or states.²²⁰ Moreover, many of the same considerations that underscore the need for judicial assistance in ensuring school desegregation are present in the area of sex discrimination.²²¹ HEW is chronically understaffed²²² and unable to devote special attention to individual school districts. Courts, on the other hand, are decentralized and better able to deal with individual and local problems while enforcing the congressional mandate to end sex discrimination.²²³ Private court actions would be especially important if, as indicated earlier, OCR chooses to maximize its enforcement impact by concentrating on larger class complaints rather than individual complaints. Furthermore, HEW is subject to political pressures and to the delaying tactics of unwilling school boards. It is especially vulnerable because of the drastic nature of the Title IX remedy and its policy favoring negotiated settlements.²²⁴ Courts are arguably better able to withstand these pressures

219. See *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946).

220. Deterrence of wrongdoers was recognized as a grounds for implication in *Wills v. Trans World Airlines, Inc.*, 200 F. Supp. 360 (S.D. Cal. 1961) (allowing punitive damages); see *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 41-42 (1916).

221. See *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 40-41 (1970).

222. See text accompanying note 150 *supra*.

223. *The Supreme Court, 1969 Term, supra* note 221, at 40.

224. See text accompanying note 163 *supra*. It might be argued that a private remedy under Title IX defeats the intention of Congress as well as of HEW that regulatory enforcement be tempered by administrative discretion. It must be assumed, however, that a court would defer to the HEW regulations, including their emphasis upon voluntary compliance, because of the severity of the funding cutoff remedy, and would be sen-

and tactics than is HEW in this particular instance.²²⁵

3. *Judicial Remedies*

Given the persuasive arguments for implying a private remedy based on Title IX, perhaps the most difficult issue remaining is the problem of determining the range of remedies which a court may appropriately grant.²²⁶ Traditionally the selection of a proper remedy is within the discretion of the court,²²⁷ but the remedies question becomes more difficult when the implication of a private right is involved.

According to most authorities,²²⁸ the power of the courts to grant any remedy not expressly provided for in the pertinent statute—whether it be compensatory or punitive damages or injunctive relief—follows from the initial recognition of the right to sue: it is deemed that the existence of a statutory right implies the existence of all necessary and appropriate remedies.

In the case of a private action based on Title IX, however, it should be noted that traditional legal and equitable remedies may conflict to some degree with the overall congressional scheme. For example, it is likely that an award of compensatory damages will impose a penalty in excess of that contemplated by Congress, since compensatory damages are measured by the magnitude of the harm suffered rather than by the degree of fault of the defendant.²²⁹ Under a statute

sitive to the need for selecting a remedy which would adequately protect the best interests of all students affected thereby. Moreover, total reliance upon agency action might cripple rather than temper enforcement because of the backlog of complaints, understaffing, and other limitations of administrative proceedings. In the area of securities law, it was just this type of handicap suffered by the SEC, as well as a strong public policy in favor of full and effective protection of investors, which necessitated implication of a private right of action. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). In the civil rights arena, the supposed need for courts to yield completely to HEW enforcement expertise regarding discrimination has been challenged. "Although HEW undoubtedly provided important assistance to the judiciary by using the fund cutoff device to enforce its desegregation guidelines, its institutional competence vis-à-vis the courts has probably been exaggerated." *The Supreme Court, 1969 Term, supra* note 221, at 40; see also *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969), regarding the falling out between the judiciary and HEW on civil rights implementation.

225. See *The Supreme Court, 1969 Term, supra* note 221, at 40-41.

226. In addition, the courts must determine the restrictions on any implied remedy, such as the applicable statute of limitations, available defenses, and venue requirements. *Civil Remedies, supra* note 171, at 296.

227. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1971), *citing* *Bell v. Hood*, 327 U.S. 678, 684 (1946).

228. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 396 (1972); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40 (1969); *Texas & N.O.R.R. v. Railway Clerks*, 281 U.S. 548, 569-70 (1930).

229. The scope of compensatory damages for deprivation of a federal right is governed by federal standards but may include remedies furnished by state law, provided by Congress. 42 U.S.C. § 1988 (1974); see *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239-40 (1969).

delegating enforcement powers to an agency which is empowered to grant only prospective relief, it may be argued that it is an unwarranted extension of the statutory purpose for a court to grant retrospective relief to a particular plaintiff through an award of damages.²³⁰ In most cases, however, the existence of a restricted, prospective remedy in the statute in question has been seen to militate in favor of implying both a private cause of action and a damages remedy,²³¹ since otherwise there might be no effective redress for the injured plaintiff.

Given the likelihood that the value of the vocational opportunity denied to plaintiffs who have been discriminated against would be substantial, allowing full compensatory damages would expose defendants to heavy liability; under Title IX this might pose an especially serious problem if the defendant were in a poor school district or otherwise lacked funds. Congress, however, approved a much more drastic financial sanction: the complete withdrawal of federal funds from districts which discriminate.²³² The argument against compensatory damages also seems to be based upon a notion that it is inequitable to expose a recipient of federal funds to liability not contemplated in the original contract. However, the fact that these recipients or their state representatives signed a pledge of nondiscrimination deprives the argument of much of its strength when liability is imposed for subsequent discriminatory acts.

Punitive damages, which reflect the defendant's culpability rather than the damage done to the plaintiff, are an alternative remedy. In *Wills v. Trans World Airlines Inc.*,²³³ the district court reasoned that since the purpose of granting a private remedy was to supplement inadequate prospective remedies available under the statute, exemplary damages would fulfill this purpose by deterring defendants from future wrongdoing while at the same time providing the necessary incentive to encourage plaintiffs to vindicate their rights. In that case, however, the plaintiff's actual damages were very small.²³⁴ Thus, punitive dam-

230. See *Civil Remedies*, *supra* note 171, at 291.

231. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967); *Wills v. Trans World Airlines*, 200 F. Supp. 360 (S.D. Cal. 1961); see *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946); *Texas & Pac. R. Co. v. Rigsby*, 241 U.S. 874 (1916) (compensatory damages).

232. Of course, insofar as the school may avoid enforcement through delay or the negotiation process, the private lawsuit may in fact be the more severe remedy from the school's point of view.

233. 200 F. Supp. 360 (S.D. Cal. 1961).

234. Plaintiff sued for damages based on the airline's want of care in overselling a flight on which he had a reserved seat. As a result of this wrongful act, he was delayed four and one-half hours. His actual damages were \$1.54, the cost of a telephone call to his wife. *Id.* at 366-67. The court awarded punitive damages of \$5,000, although the criminal provisions of the relevant act provided for a maximum fine of \$2,000. *Id.* at 368.

ages, which must be arbitrarily determined, might not be the most satisfactory remedy when the plaintiff has suffered substantial financial harm by being denied entry to vocational training.

Injunctive relief may be most consistent with the remedy actually provided for in Title IX. A court might order the school district involved to comply with HEW regulations, to admit the plaintiff, or risk the loss of federal funds through subsequent court order.²³⁵ All of these results could be achieved alternatively through informal and formal agency enforcement procedures; thus, a private action where such relief is granted does not impose any additional burden on the defendant.

Injunctive relief, however, is the remedy most likely to interfere with the administrative agency's general scheme of regulation. Indeed, this consideration is at the core of the doctrine of primary jurisdiction. It may be argued that private suits for injunctive relief may undermine a consistent, nationally uniform implementation of federal educational policies. In addition, HEW might have specific enforcement or negotiation plans for a particular school district; these plans could be jeopardized by a court's imposition of injunctive remedies usually reserved to the agency. However, providing an opportunity for HEW to intervene as a party or through the amicus procedure, plus close attention to HEW regulations, should minimize this conflict,²³⁶ as should the wise use of the traditional discretion of a court sitting in equity.

While a court may be willing to grant monetary as well as injunctive relief, it might be argued that Title IX does not provide the requisite jurisdiction for any remedy other than injunctive relief, backed up by a threat to terminate federal funds. If Title IX is based upon the authority of Congress to condition receipt of federal funds as a recognized function of its spending power,²³⁷ it is not clear from what constitutional base a court would be justified in awarding money damages in an action implied under the statute.²³⁸ It could be argued that for

235. *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970).

236. *Id.* at 406-07.

237. *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937).

238. A similar question arose in *Bell v. Hood*, 327 U.S. 678 (1946), where the defendant challenged the jurisdiction of a federal court to award damages for violation of plaintiffs' fourth amendment rights. The Supreme Court held only that the district court had jurisdiction to decide the issue, but remarked in dictum that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 684.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1942), the Court held that money damages could be recovered in such a case. However, the problem is different from that of providing damages under Title IX, since defendants' actions in *Bivens* and *Bell* were a fortiori illegal. A private suit under Title IX raises the very issue of whether defendant's actions were illegal independent of the prohibitions contained in Title IX itself.

Congress to have provided an express damages remedy—and by extension, for the courts to imply such a remedy—the basis for Title IX would have to lie not in the limited right of Congress to regulate federal spending, but within the enabling section of the equal protection clause or upon a power to regulate public schools under the general welfare provision of the Constitution. This argument assumes that the only authority Congress has under the spending clause is to cut off federal funds for failure to comply with conditions of the grant.

On the other hand, it can be argued that Congress could have expressly provided a private right of action as part of its regulation of public spending. To ensure adequate enforcement, Congress might have considered it necessary and proper to grant individuals a right of action for damages resulting from the misuse of federal funds. If such a remedy would be constitutionally permissible under the spending clause, there does not seem to be any reason why courts should not use the full range of remedies normally available in suits where a right of action has been implied from statute.

However, were it found that Congress needed a separate constitutional basis for providing a damages remedy, it might be difficult to find one. While Title IX absolutely prohibits sex discrimination, the equal protection clause has not been clearly interpreted as doing so. Title IX regulations in several places label discriminatory and thus prohibit actions which might be upheld under the equal protection clause using a “rational basis” test.²³⁹ For example, the proposed regulations prohibit exclusion of women from educational programs solely because of pregnancy.²⁴⁰ Similar exclusions might be upheld as rational under the equal protection clause.²⁴¹

This problem would probably arise only rarely. Even under the “rational basis” test, many sex-based classifications have been struck

239. A situation such as this arose under Title VII in *Richards v. Griffith Rubber Mills*, 300 F. Supp. 338 (D. Ore. 1969), a suit brought against an employer who refused to hire a woman, relying on a state law restricting weightlifting by women. In denying effect to the statute, the court stated:

Griffith argues that under the Equal Protection Clause, the state may constitutionally enforce Order No. 8. This is correct, but is not the issue. Except in rare and justifiable circumstances, the law no longer permits either employers or the states to deal with women as a class in relation to employment to their disadvantage. The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act.

Id. at 340 (citations omitted).

In *Lau v. Nichols*, 94 S. Ct. 786 (1974), the Supreme Court did not reach the equal protection argument raised by plaintiffs, leaving open the possibility that Title VI standards may also be more stringent than the equal protection clause.

240. Proposed HEW Reg. § 86.21(c)(2), 39 Fed. Reg. 22,235 (1974).

241. *But cf.* *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); *see also* *Cleveland Bd. of Educ. v. LaFleur*, 94 S. Ct. 791 (1974) (mandatory leave for pregnant teachers).

down, including disparate sentencing treatment,²⁴² jury exclusion,²⁴³ and exclusion from public schools or classes.²⁴⁴ Thus, most vocational education "discrimination" as defined in the proposed regulations could not be upheld even under a rational basis test. Furthermore, one state supreme court, using a state constitutional provision, has labeled sex a suspect classification,²⁴⁵ and other states have statutory prohibitions on sex discrimination. Finally, there probably will be few cases seeking damages as the only remedy; in many cases, injunctive relief will be available and appropriate. Should a case arise in which the plaintiff sought damages to remedy "discriminatory" action prohibited by Title IX but justifiable as "rational," the question of congressional and judicial power to grant a compensatory remedy for sex discrimination, and in effect to expand the equal protection clause, would be presented most clearly.²⁴⁶ Although sex is not yet considered by the Supreme Court to be a suspect classification which may be justified only by a compelling state interest, strong arguments have been made for such a holding.²⁴⁷ If these arguments should convince a majority of the Court, there would then be a clear constitutional basis for granting compensatory damages in a private cause of action under Title IX.²⁴⁸

In the absence of such a decision by the Supreme Court, a court

242. *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968).

243. *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966).

244. *Brenden v. Independent School Dist.*, 477 F.2d 1292 (8th Cir. 1973) (interscholastic athletics); *Kirstein v. Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (public university).

245. *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

246. See *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Oregon v. Mitchell*, 400 U.S. 112 (1970). It would seem that congressional expansion of protection against sex-based discrimination is analogous to the situation in *Katzenbach*, where the court upheld congressional outlawing of all literacy tests for voting, even though it had previously been held by the Court that such tests did not violate equal protection. Congress could well have decided that most sex-based classifications are in fact used to deny women equal opportunities, even though they have been upheld by the courts in certain instances.

247. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), four justices viewed sex as a suspect classification subject to strict scrutiny. Three other justices concurred in the decision but felt it inappropriate and unnecessary to determine whether sex was a suspect classification, since the Equal Rights Amendment had been submitted for ratification by the states and if passed would resolve the question. Cf. *Cleveland Bd. of Educ. v. La-Fleur*, 94 S. Ct. 791 (1974). But cf. *Geduldig v. Giello*, 94 S. Ct. 2485 (1974); *Kahn v. Shevin*, 94 S. Ct. 1734 (1974).

A court would also require a showing that a compelling state interest justified the challenged sex-based discrimination if it could be argued that a fundamental right is at stake in the controversy. In 1973, however, the Supreme Court in *San Antonio Indep. School Dist. v. Rodriguez*, 410 U.S. 1 (1973) indicated that equal educational opportunity is not a "fundamental right" for purposes of the fourteenth amendment.

248. The equal protection clause, of course, now provides a basis for private individuals to sue without regard to Title IX. However, if sex is declared to be a suspect classification, this would deprive the defendant of the argument that its discriminatory practice is rational.

which felt it necessary to ground congressional power on something other than the spending clause could find that Congress intended Title IX to conform to present equal protection standards and strike down the more stringent HEW regulations. There is, however, some evidence to indicate that Congress in fact wished to broaden the Court's prohibition of sex discrimination rather than narrow HEW's. The amendments to Title IV of the 1964 Act placed sex alongside other criteria classified as suspect and authorized government-initiated suits or intervention in private actions based on equal protection grounds. Thus it would seem improper to restrict the remedial effect of Title IX to the present requirements of equal protection unless, of course, it were held that Congress had no power to go beyond current judicial holdings on the scope of equal protection.²⁴⁹

On the other hand, a court could justify a damages remedy in a private Title IX action by relying on the general power of Congress to regulate public education. However, while Congress clearly has power to condition receipt of federal funds, this does not mean that it would have power to control local educational policy by providing for private remedies in cases where schools exercise legitimate prerogatives. Given a tradition of local control over education, this is not likely and perhaps not desirable—although it must be noted that sex discrimination in vocational education is hardly a state's legitimate prerogative.

In summary, the most promising resolution of the dilemma, if it should arise, would be a holding that under the spending clause Congress may grant to an individual a right to sue for damages when the conditions of funding have been violated as a necessary and proper means of controlling federal spending. This would allow Congress to set standards which are more stringent than those presently imposed by courts under the equal protection clause and would further the congressional purpose of ending discrimination in public education.

Besides suing a school or state for failure to comply with its contractual assurances, an individual could bring suit against HEW if the agency failed to enforce Title IX fully.²⁵⁰ A suit against HEW to com-

249. See note 245 *supra* and accompanying text.

250. An action asking for appropriate injunctive and declaratory relief for HEW's failure to enforce Title VI was successfully undertaken in *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified and aff'd*, 480 F.2d 1159 (D.C. Cir. 1973). In that case, the court concluded that the continuation of HEW financial assistance to segregated systems of higher education administered or operated by 10 states violates the rights of plaintiffs and others similarly situated protected by Title VI of the Civil Rights Act of 1964. Having once determined that a state system of higher education is in violation of Title VI, and having failed during a substantial period of time to achieve voluntary compliance, defendants have a duty to commence enforcement proceedings.

Id. at 94. To remedy the situation, HEW was required to begin enforcement proceed-

pel effective use of its enforcement powers would combine the benefits of agency expertise, extensive investigatory techniques, and uniform policy implementation with the flexibility and enforcement incentive offered by private suits. If it is determined that HEW's characterization of sex discrimination as a "back burner" issue substantially interferes with its duty to enforce Title IX, this type of action could be instrumental in assuring that "the agency properly construes its statutory obligations, and that the policies it adopts and implements are consistent with those duties and not a negation of them."²⁵¹

B. Other Statutory Remedies

In addition to the broad coverage afforded by Title IX and equal protection guarantees, other more limited remedies could be available to students who are discriminated against. For example, Title IV of the Civil Rights Act of 1964 allows the Attorney General to bring suit on receipt of a complaint from parents or students showing that they are being deprived by a school board of the equal protection of the laws or that an individual has been denied admission to a public college on the basis of race or sex.²⁵² However, because the Attorney General must make a preliminary finding that the complaint is meritorious and then allow the school "a reasonable time" to adjust its policies,²⁵³ this may not be an effective alternative in many cases.

Another possible remedy for students discriminated against while seeking training in health services fields is the amended Public Health Service Act, which now prohibits HEW from granting or loaning federal funds to or for the benefit of any health training institution, including medical or dental schools, which discriminates in admissions on the basis of sex.²⁵⁴ Although no method of enforcement is explicitly pro-

ings within 120 days of the date of the order. In addition, HEW was ordered to proceed within 60 days against specific school districts which had violated their pledges of nondiscrimination. *Id.* at 95-96. Finally, as to state departments of education which administered numerous vocational and other schools, defendants were ordered to implement "without unreasonable delay" an enforcement program adequate to secure Title VI compliance. *Id.* at 98.

251. *Adams v. Richardson*, 480 F.2d 1159, 1164 (D.C. Cir. 1973).

252. 42 U.S.C. § 2000c(6) (Supp. II, 1973).

253. *Id.*

254. 42 U.S.C. § 295h-9 (Supp. II, 1973), amending 42 U.S.C. § 295h-9 (1971).

Regulations issued in June 1972, by the Secretary of HEW specify that all entities applying for awards under Title VII are subject to nondiscrimination requirements:

Nondiscrimination in admission to a training program includes nondiscrimination in all practices relating to applicants to and students in the program; nondiscrimination in every right, privilege and opportunity secured by admission to the program; and nondiscrimination in all employment practices relating to employees working directly with applicants to or students in the program.

"Federal Laws and Regulations Concerning Sex Discrimination in Educational Institutions," Reproduced by the Office of Civil Rights, U.S. Dep't of HEW, from the Chroni-

vided by the public health services statute, it appears that HEW will utilize procedures similar to those of Title IX.

Students discriminated against in apprenticeship or placement programs are further protected by Title VII of the Civil Rights Act.²⁵⁵ Title VII makes sex discrimination in employment unlawful, including in its prohibition discriminatory conditions or privileges of employment and the payment of disparate wages. It also prohibits labor organizations from excluding or expelling any individual from membership on the basis of sex. Although educational institutions were originally exempt from coverage, Title VII was amended in 1972 to include employees of educational institutions and of state and local governments.²⁵⁶ Vocational schools may be vulnerable to a Title VII suit, not only as a result of their own employment practices, but also because of discriminatory hiring policies of employers or unions who use school placement facilities for recruitment of apprentices and regular employees.²⁵⁷

C. *International Action*

In addition to domestic remedies, the possibility exists of pursuing international action. Failure by the federal government to insure equality of treatment of men and women in education and employment training violates international human rights standards. Both the Charter of the United Nations and the International Declaration of Human Rights obligate states to guarantee equality of rights to all persons regardless of sex.²⁵⁸ In order to promote and protect the rights of women, the United Nations has concluded more than 30 treaties either wholly or in part concerned with the status of women.²⁵⁹

cle of Higher Education, Oct. 24, 1972 (available from Public Information Office, OCR, U.S. Dep't of HEW, Washington, D.C. 20207).

255. 42 U.S.C. § 2000e (Supp. II, 1973).

256. Act of 1972, P.L. 92-261, § 2(1), 86 Stat. §§ 1-14, amending 42 U.S.C. § 2000e(a) (1969) (codified at 42 U.S.C. § 2000e(a) (Supp. II, 1973)).

257. The definition of "employment agency" in Title VII, 42 U.S.C. § 2000e(c) (Supp. II, 1973) covers most vocational schools.

258. The Preamble of the United Nations Charter "reaffirms faith . . . in the equal rights of men and women." The Universal Declaration (1948) speaks to equality of rights in articles 2, 7, and 16. For other documents setting out nondiscrimination standards, see *International Instruments and National Standards Relating to the Status of Women*, U.N. Doc. E/CN. 6/552 (1971).

259. Many of the treaties have been concluded by the International Labour Office, which has been particularly concerned with the issue of equality in employment and in employment training. Convention 111 (Employment and Occupation), passed in 1958 and ratified by 80 nations, obliges each signatory nation "to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy" of nondiscrimination and "to repeal any statutory provisions and modify any administrative instruction practices which are inconsistent with the policy" Art. I(4).

Most recently, the International Labour Conference, convened each year by the International Labour Organisation, passed a "Recommendation Concerning Vocational Training."²⁶⁰ This recommendation, while it does not have the legal effect of a treaty, states as a general principle that "training should be free from any form of discrimination on the basis of race, color, sex, religion, political opinion, national extraction or social origin."²⁶¹

CONCLUSION

The evidence of sex discrimination in vocational education is overwhelming. Among the results of this discrimination are the current underemployment of women and the increasing gap in the relative earning abilities of the two sexes. Title IX offers a potentially effective weapon for altering this pattern of discrimination by clearly stating that the price of continued discrimination in vocational schools is the loss of all federal financial support. But the potential of Title IX will be fulfilled only if HEW broadly interprets the mandate it has been granted and vigorously proceeds with full enforcement. Such an enforcement policy would require a reordering of agency priorities, as well as serious inspection of the commitment to ending sex discrimination of those responsible for Title IX's enforcement.

Given the certain resistance to enforcement of Title IX from state and local vocational school officials, it is important to note that there are alternative remedies available for those persons subjected to sex discrimination in vocational education. These include Titles IV and VII of the 1964 Civil Rights Act, the Public Health Services Act, state statutory and constitutional provisions, and international law. While these are significant measures for protecting civil rights, they lack the broad coverage and potent sanctions that are the most valuable assets of Title IX. Therefore, individuals must be given the additional remedy of a private right of action under Title IX. This right to sue is clearly justified by the precedents of Title VI actions and by the strong public

The term "employment and occupation" is deemed to include "access to vocational training" . . . Art. I(3).

The definition of discrimination in the Convention—at least as broad as any currently applied under the 1964 Civil Rights Act—includes:

"(a) any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; . . ."

A Compilation of Human Rights Instruments, U.N. Doc., E/68.XIC.6, Item 9. For a general discussion of this subject, see Bruce, *Work of the United Nations Relating to the Status of Women*, 4 HUMAN RIGHTS J. 365 (1971).

260. Recommendation No. 117 of June 6, 1972.

261. *Id.* § 12.(4) at 2.

policies underlying implication of private rights. Clearly, the most far-reaching and effective remedy for those discriminated against on the basis of sex will be that afforded by the Equal Rights Amendment, if ratified.²⁶² The ERA, in addition to rendering moot the question of judicial power to remedy sex discrimination by means of compensatory damages granted in private suits implied from Title IX, would supersede Title IX as a basis for private actions in this area. It would thus provide a powerful supplement to the congressional policy that sex discrimination in federally funded vocational education must end.

All possible remedies are sorely needed in the area of vocational education. The availability of training on a nondiscriminatory basis will determine to a large extent the career choices available to approximately 12 million students each year—students who, up to now, have been largely ignored in the civil rights movement.

262. Proposed Amendment to the Constitution, H.R. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8 & 9, 92d Cong., 1st Sess. (1971).