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WHO OWNS SPORTS? THE POLITICS OF TITLE IX

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Title IX has been a part of our body of law for thirty-one years, and it has been contested –legally and politically– almost continuously since it was enacted. Although it applies to all educational programs receiving federal financial assistance, sports programs have drawn the bulk of the political fire. Opponents say that it is a quota system, pitting women's sports against men's sports, and that it is responsible for the elimination of many men's athletic teams.

Arguments against Title IX are based on two premises that are in turn grounded in cultural tradition: 1) men and boys are the rightful "owners" of sports, and 2) males are superior to females in athletic ability. It is interesting to note that arguments against Title IX closely track those against affirmative action, with the built-in assumption that white men own the pool of jobs, and that any portion gained by other groups takes something from its rightful owner. This thinking is also the basis of claims that both programs have resulted in "reverse discrimination" against males.

WHAT DOES TITLE IX SAY AND DO?

Title IX, part of the Education Amendments of 1972,[1] states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."[2] This includes not only public schools, but also private

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1. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (1994) (Title 20 - Education, Chapter 38 - Discrimination Based on Sex or Blindness).

2. *Id.* § 1681(a).

schools that receive Federal financial aid. The U.S. Department of Education has adopted a three-pronged test for compliance with the law. A school can be in compliance if (1) the opportunities and participation of male and female students at the institution are "substantially proportionate" to their respective full-time undergraduate enrollments; (2) the institution has a "history and continuing practice of program expansion" for the underrepresented sex; or (3) the institution is "fully and effectively" accommodating the interests and abilities of the underrepresented sex.[3] Schools have only to meet one of these three tests in order to be in compliance with Title IX. Title IX applies to more than participation rates. It also encompasses practice and competitive facilities, equipment, supplies, game and practice schedules, travel and daily allowances, coaching, tutoring, housing, publicity and promotions, scholarships, locker rooms, medical and training facilities and services, recruitment, and support services.[4]

In addition, Title IX requires recipients of Federal education aid to evaluate current policies and practices in order to ensure compliance. Recipients must also adopt and publish grievance procedures and policies against sex discrimination, and designate at least one employee who coordinates compliance efforts with Title IX.[5]

POLITICAL OPPOSITION TO TITLE IX

In keeping with the cultural norm that men own sports, political opposition has centered on the notion that Title IX benefits women's sports at the cost of men's sports, objective evidence to the contrary. Men still have statistically higher participation rates in sports than women,[6] and both men's participation rates and the amount of money spent on men's sports continues to rise.[7] Men's participation from the 1971-1972 school year to the 2000-2001 school

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3. Title IX of the Education Amendments of 1972, A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

4. *Title IX*, (Am. Ass'n of Univ. Women (AAUW), Wash., D.C.), Aug. 1, 2003, *available at* http://www.aauw.org/takeaction/policyissues/pdfs/titleIX.pdf (last visited Sept. 22, 2003); *Title IX: Myths and Commonly Asked Questions and Answers* (Women's Sports Found., Nassau County, N.Y.), July 27, 2003, at 6, *available at* http://www.womenssportsfoundation.org/binary-data/WSF_Article/pdf_file/898.pdf (last visited Sept. 22, 2003) [hereinafter *Women's Sports Found.*].

5. *Women's Sports Found.*, *supra* note 4, at 1.

6. *Equity in School Athletics* (AAUW, Wash., D.C.), Aug. 1, 2003, at 2, *available at* http://www.aauw.org/takeaction/policyissues/pdfs/titleIXathletics.pdf (last visited Sept. 23, 2003).

7. *Id.*; *Victory in Wrestling Lawsuit,* ACTION ALERT (AAUW, Wash., D.C.), July 2003, at 2 [hereinafter *Action Alert*]; *Women's Sports Found.*, *supra* note 4, at 5 (citing *Quick Reference: Title IX Factoids* (Nat'l Women's L.Ctr. (NWLC), Wash., D.C.), July 27, 2003 [hereinafter *NWLC Data*]).

year has risen from 3,666,917 to 3,921,069 in high schools and from 170,384 to 208,866 in the NCAA, while women's has risen from 294,015 to 2,784,154 in high school and 29,977 to 150,916 in the NCAA.[8] This means that after thirty years of experience with Title IX, men still receive 28% more participation opportunities than women do. This increase can be seen in football programs increasing by 14%, baseball by 22%, lacrosse by 48%, and basketball by 9%.[9] Women are now approximately 53% of the student body in Division I colleges, yet receive only 36% of the athletic budget.[10]

Although some men's sports have been eliminated at some schools, it can be shown that compliance with Title IX is not the primary reason that schools eliminate men's teams. Indeed, two-thirds of the schools that have added women's sports have not eliminated men's sports, and 72% of schools that added women's teams between the years 1992-1993 and 1999-2000 did so without eliminating any men's sports.[11] Sometimes, men's sports are eliminated because schools want to replace them with more popular sports. Some schools have eliminated men's wrestling, tennis, and gymnastics, but soccer, baseball, and basketball have been added. Women's sports have been similarly rearranged. Women's gymnastics, fencing, and field hockey have been cut and replaced many times with track, lacrosse, and swimming.[12] Probably the predominant reason for cutting men's sports is that expensive men's teams such as football and basketball command a disproportionate share of resources.[13] Title IX is often blamed when smaller sports are sacrificed for football and basketball budgets because it is a more politically palatable argument for school officials who do not want to own up to fiscal reality.

The "football first" culture of men's sports has prompted Title IX opponents to argue that football should be excluded from the calculus altogether, because revenue from football funds other sports.[14] In fact, among NCAA competitive football programs, 81% spend more than they contribute.

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8. *Women's Sports Found.*, *supra* note 4, at 8 (citing Nat'l Collegiate Athletic Ass'n (NCAA) and Nat'l Fed'n of St. High Sch. Ass'ns (NFHS) data collected in 2000).

9. *Id.* at 10 (citing U.S. GEN. ACCT. OFF., NO. 01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS (2001).

[hereinafter GAO No. 01-297]).

10. *Id.* at 5 (citing *NWLC Data*, *supra* note 7).

11. *Id.*

12. *Id.* at 2 (citing GAO No. 01-297, *supra* note 9).

13. *Women's Sports Found.*, *supra* note 4, at 5 (citing *NWLC Data*, *supra* note 7); Sally Jenkins, *Title IX Opponents a Bunch of Sad Sacks*, WASH. POST, June 24, 2002, at D1, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A32977-2002Jun23.

14. *Women's Sports Found.*, *supra* note 4, at 8.

This shortfall can reach up to $1 million for Division I teams. Under these "fiscal arguments," the case could be made that it is *fiscally irresponsible* to retain football (or any other sport). Finally, football programs have continued to grow since the enactment of Title IX.[15]

Another allegation against Title IX, under the February 2002 case brought by the National Wrestling Coaches Association and several other groups representing male athletes and alumni from Bucknell, Marquette, and Yale, against the Department of Education, is that Title IX is unconstitutional.[16] The case was dismissed by the district court on procedural grounds, but the court also made the point that "every federal appellate court that has considered the issues has upheld Title IX and its enforcement mechanisms."[17]

While it is a fact that wrestling programs are in decline, Title IX is not the culprit. Title IX was not enforced during the years 1984-1988 because the Supreme Court ruled in *Grove City College v. Bell* that only the school programs receiving direct funding were bound by Title IX. Even so, wrestling teams were still being cut. The rate was actually three times higher than the previous years when Title IX was in effect, causing wrestling teams to decline from 342 to 289.[18] Title IX was reinstated under the Civil Rights Restoration Act of 1987.[19] Therefore,

> Women haven't cut men's wrestling –predominately male athletic directors have because they didn't want to make far more painful and unpopular decisions. Seventy percent of Division I athletic budgets are devoted to football and men's basketball. But in 1999, only 41 percent of football teams and 51 percent of basketball teams broke even. The rest were in the red.[20]

Another claim, this one based on the premise that males are better athletes, is that girls are not as interested in sports as boys are. There is no evidence to back this claim.[21] In fact, from the ages of six to nine, boys and girls are equally interested in sports, and participation opportunities begin to decline sharply after age nine.[22] There are currently 2.8 million girls participating in

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15. *Id.*; Jenkins, *supra* note 13.

16. *Equity in School Athletics, supra* note 6, at 2-3.

17. *Action Alert, supra* note 6, at 2; *Title IX, supra* note 4.

18. *Equity in School Athletics, supra* note 6, at 2; *Title IX, supra* note 4; *Women's Sports Found., supra* note 4, at 9.

19. *Equity in School Athletics, supra* note 6, at 2; *Title IX, supra* note 4.

20. Jenkins, *supra* note 13.

21. *Equity in School Athletics, supra* note 6, at 2; *Women's Sports Found., supra* note 4, at 12.

22. *Women's Sports Found., supra* note 4, at 12.

scholastic activities, and fewer than 170,000 athletic opportunities are made available to them. In 1972, high school participation was 10% female; currently it is 42%.[23] This means that fewer than 30,000 women participated in sports before Title IX, and currently, more than 150,000 participate. This increase in participation is more than fivefold.[24] Rather than lack of interest, it is likely that a lack of accessibility contributes to the drop-off of women's participation because boys have twice as many participation opportunities when compared to girls. Greater opportunity goes hand-in-hand with better training facilities and practice fields, better game and practice times, and more coaching and support staff. This lack of encouragement through limiting accessibility results in a probability six times greater for girls dropping out of sports than boys by the age of fourteen.[25]

The most politically charged rhetoric used by opponents of Title IX asserts that it is a "quota system" for women's sports. Title IX is indeed not a quota system; only one of the three possible methods of compliance involves proportionality: stating that opportunities and participation of male and female students at the institution are to be "substantially proportionate" to their respective full-time undergraduate. The majority of schools cannot pass this test and, in fact, do not use it to demonstrate compliance with Title IX. Of seventy-four cases reviewed from 1994-1998, only twenty-one schools, fewer than one-third, chose to comply based on this first prong.[26] The rest chose to comply under prong two or three. Finally, one could just as easily make the argument that Title IX was enacted to overcome a quota system that afforded males more opportunities than could be justified by their school participation rates overall (e.g. males in 1972 were 51.5% of the student population and were granted 84.4% of athletic opportunities).[27]

Perhaps the most disingenuous claim by opponents is that women are no longer subject to the discrimination they endured before Title IX was enacted, so Title IX is no longer needed. Despite the gains made under Title IX, women's sports are still lagging behind men's sports, and about 80% of colleges and universities are still not in compliance with Title IX.[28] The only way to bring these schools into compliance in sports (and not incidentally

23. *Equity in School Athletics*, *supra* note 6, at 2.

24. *Women's Sports Found.*, *supra* note 4, at 5 (citing *NWLC Data*, *supra* note 7).

25. *Id.* at 12.

26. *Id.* at 5.

27. *Empowering Women in Sports* (Feminist Majority Found., Arlington, Va.), Aug. 5, 2003, *available at* http://feminist.org/research/sports2.html (last visited Sept. 23, 2003).

28. *Equity in School Athletics*, *supra* note 6, at 2; *Women's Sports Found.*, *supra* note 4, at 11 (citing NCAA Gender-Equity Rep. (1999-2000)).

achieve parity for women) is for stronger enforcement and resistance to efforts to weaken the law based on rhetoric grounded in the "twin premises" of men's ownership and ability, outlined earlier. While loss of Federal funding is theoretically the outcome for schools that do not comply, in reality this does not happen. If loss of funds was a true possibility and not just an unenforced threat, more schools would step up their efforts at compliance. Until then, the facts are that under Title IX:

- Although 53% of the students at Division I schools are women, they still receive only 43% of the opportunities to participate, and women's sports are allocated 32% of recruiting budgets.[29]
- Men receive 1.1 million more participation opportunities than women.[30]
- According to a 2000 Government Accounting Office report, women's teams receive 32% of recruiting dollars, 36% of athletic operating dollars, and 42% of college athletic scholarship dollars.[31]
- Annually, men receive approximately 133 million more athletic dollars than women.[32]
- There is still a gender discrepancy in compensation for coaches, and jobs in athletics are still disproportionately male.[33] The numbers are far from even.

CONCLUSION

Even though Title IX has been under attack since its inception, political realities may be changing the debate. We have now had a generation of female athletes spawned by Title IX, which in turn made the WNBA, Women's Professional Volleyball League, and Women's United Soccer Association possible. Parents do not want to lose these opportunities for their daughters. When the Bush Administration created the Commission on Opportunity in Athletics in 2002, with an anti-Title IX majority, advocates for

29. *Women's Sports Found.*, *supra* note 4, at 5 (citing *NWLC Data, supra* note 7).

30. *Id.* at 1 (citing NFHS Participation Statistics (2001)).

31. *Equity in School Athletics*, *supra* note 6, at 2; *Women's Sports Found.*, *supra* note 4, at 2 (citing NCAA Gender-Equity Rep. (1999-2000)).

32. *Women's Sports Found.*, *supra* note 4, at 1 (citing NCAA Gender-Equity Rep. (1999-2000)).

33. *Id.* at 1, 11 (citing R. VIVIAN ACOSTA & LINDA J. CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT (2002) (unpublished manuscript, on file with the Marquette Sports Law Review)).

women and girls expected a weakening of Title IX and mobilized accordingly. There is no question that grass-roots input from constituents around the country resulted in a "no change" policy from the Secretary of Education, and a renewed commitment to appropriate opportunities for male and female athletes while bringing schools into compliance with Title IX:

> In order to ensure that schools have a clear understanding of their options for compliance with Title IX, OCR will undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX.... OCR hereby clarifies that nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and that the elimination of teams is a disfavored practice. Because the elimination of teams diminishes opportunities for students who are interested in participating in athletics instead of enhancing opportunities for students who have suffered from discrimination, it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams.[34]

For Title IX to truly fulfill its promise, we must not only strengthen enforcement and guard against weakening amendments and rule-changes, but we must also change the paradigm of sports participation. Instead of thinking of the pool of athletic opportunities as belonging to males, who must "give up" a valuable commodity that they own to accommodate outsiders (females), we must think of the pool as belonging to all students, who are equally entitled to the benefits of participation. Viewed in this way, males have traditionally commanded a disproportionate share, and Title IX is one way to guarantee that in expanding overall opportunities, women's share grows until it reaches parity.

34. Letter from the U.S. Department of Education, Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003). The complete text is also included in this publication.