

Book Review: Getting in the Game: Title IX and the Women's Sports Revolution

Cassandra Jones

Follow this and additional works at: <http://scholarship.law.marquette.edu/sportslaw>



Part of the [Entertainment and Sports Law Commons](#)

Repository Citation

Cassandra Jones, *Book Review: Getting in the Game: Title IX and the Women's Sports Revolution*, 22 Marq. Sports L. Rev. 613 (2012)
Available at: <http://scholarship.law.marquette.edu/sportslaw/vol22/iss2/13>

This Book Review is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

BOOK REVIEW

GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS
REVOLUTION

Deborah Brake

[New York, NY: NYU Press, August 2010]

320 Pages

ISBN: 9780814799655

Most high school female athletes would not think twice about trying out for a school-sponsored sport. Schools offer many different sports for girls and boys, with participation amongst both sexes increasing annually.¹ In fact, during the 2009–2010 academic year, 3,172,637 girls participated in high school athletics, an increase of 58,546 participants from the year before.² This data represents a far cry from the landscape in 1972, the year the Patsy T. Mink Equal Opportunity in Education Act (Title IX) was passed. Girls' participation in high school sports has increased tenfold since the law passed.³ Although female athletic participation is encouraged today, Title IX was passed in a time when female athletes were looked down on for appearing masculine and lacking femininity.⁴

Despite the large increase in female participation, the sports world has a long-recognized principle that separate can be equal when filling rosters for gender-separated sports. Since Title IX was passed, the debate has raged whether the separate-but-equal principle can stand, especially in light of the decision in *Brown v. Board of Education*.⁵ In her new book, *Getting in the Game: Title IX and the Women's Sports Revolution*, author Deborah Brake examines both sides of the issue, ultimately concluding that separate can be equal in most circumstances; however, the principle is still not without its

1. National Federation of State High School Associations, *2009–10 High School Athletics Participation Survey*, available at <http://www.nfhs.org/content.aspx?id=3282>.

2. *Id.* at 52. Total participation for the 2009–2010 school year exceeded 7.6 million high-school students. *Id.* Outdoor track and field had the most total female participants. *Id.*

3. Press Release, United States Department of Education, U.S. Education Secretary Duncan Commemorates 38th Anniversary of Title IX (June 23, 2010), available at <http://www.ed.gov/news/press-releases/us-education-secretary-duncan-commemorates-38th-anniversary-title-ix>.

4. DEBORAH BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION* 45 (2010).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

faults.⁶

Brake begins her discussion with the rationale behind drafting Title IX, most notably the accomplishments stemming from the Civil Rights Act of 1964 (Title VII). She points out that the initial drafting of Title IX closely mirrored Title VII of the Civil Rights Act, which prohibited discrimination in the workplace on the basis of race, color, religion, sex, or national origin.⁷ The passage of Title VII prompted many women's groups to advocate for the same prohibition of discrimination in the education system.⁸

Brake continues by examining why separation of the sexes is a continued practice in sports today. Some advocates argue that male and female athletes should have integrated teams, while opponents argue that separate is equal, especially given the undisputable physiological differences between men and women. This debate is fueled by the notion that there are "men's sports"—notably baseball and tackle football—and "women's sports," such as softball and volleyball. Ultimately, Brake concludes that single-sex sports are more beneficial to female athletes, with some exceptions. Her examination of the disparities between the sexes does not end with the determination that separate can be equal, however.

After concluding that the current gender separation is the most beneficial, Brake continues by discussing the three-part test associated with Title IX and the landmark sports cases that have challenged the idea of gender separation. The three-part test is the standard used to determine a school's compliance with Title IX's mandate to effectively accommodate the interests and abilities of members of both sexes. The three-part test requires a showing of (1) substantial proportionality of sports opportunities, (2) a continuing practice of expansion of opportunities for the underrepresented sex, **or** (3) that the interests and abilities of the underrepresented sex have been fully accommodated.⁹ Brake points out that compliance has been an issue for many high schools and colleges since Title IX passed. However, over the years, many legal challenges brought apart from the three-part test have narrowed the requirements of Title IX and the remedies for violations.

The lawsuits relating to Title IX have varied in subject matter, such as challenges to the law's application to private schools that receive federal funding to those who sought monetary damages for violations of Title IX.¹⁰ The contact-sport exception has been challenged numerous times, most often

6. BRAKE, *supra* note 4, at 56.

7. *Id.* at 17.

8. *Id.*

9. *Id.* at 69.

10. *Id.* at 71–73.

by female athletes seeking an opportunity to participate in men's contact sports. However, one of the most controversial cases is *Cohen v. Brown University*, which involved a challenge to the demotion of men's sports to donor-funded status as a means of complying with Title IX.¹¹ The First Circuit Court of Appeals upheld the premise that cutting men's teams was not meaningful compliance, especially because the school was unable to show a practice of continued expansion for women's sports opportunities.¹²

The events that led to *Cohen* are often pointed to by opponents of Title IX as the main issue with the law: the contraction of men's sports opportunities to achieve substantial proportionality. Brake discusses leveling down for the purpose of complying with prong-one of the three-part test and points out that the female athletes who bring cases against schools want to avoid leveling down just as much as male athletes do. However, she notes that leveling down has been a means of complying with anti-discrimination laws since the beginning of anti-discrimination initiatives. Still, Brake believes that leveling down should have no place in discrimination law—especially Title IX—because oftentimes, it sends the message that women's sports are nonessential by limiting, rather than creating, opportunities.¹³ Moreover, it should come as no surprise that, as a proponent of Title IX, Brake is looking to expand sports opportunities for both sexes, rather than limiting opportunities merely for compliance with the law.

Despite her philosophy promoting the total equality of the sexes, Brake concedes that the physical differences between men and women cannot be ignored. However, the physical differences seem to hinder female athletes more than their male athlete counterparts. For example, pregnancy is often viewed as a problem for female athletes because many sports organizations refuse to allow a pregnant woman to compete. Not only does pregnancy remove an athlete from her respective sport for nine months, but there may also be biological changes after she has a baby that can change the way she competes. In other cases, female athletes with children are faced with a negative stigma.¹⁴

Furthermore, a female athlete may choose not to disclose her pregnancy initially, for fear of not being able to compete or of losing a scholarship. This fear of disclosure was the case for one college athlete, Fantasia Goodwin, who played basketball at Syracuse University. Goodwin hid her pregnancy for seven months to avoid the school's policy of prohibiting pregnant athletes

11. *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996)

12. *Id.* at 74–78.

13. *Id.* at 138.

14. *Id.* at 174–75.

from competing in contact sports.¹⁵ Although there are legitimate physical concerns prompting the limitation of athletic participation on the part of female athletes during pregnancy, the stigma and consequences faced by female athletes is something Title IX can help control, especially at the college level. While Title IX prohibits discrimination on the basis of pregnancy, the law provides little guidance for preventing and correcting discriminatory practices.¹⁶

While acknowledging the unavoidable consequences of pregnancy, Brake also seems concerned that female athletes—unlike their male counterparts—must choose between an athletic career and a family. Discrimination against female athletes who become pregnant needs to be better regulated, according to Brake, and the punishments for discrimination should be more tangible.

Although Brake spends much of the book discussing athletic opportunities, she also addresses controversial off-field issues, including retaliation and sexual harassment. In 2005, the Supreme Court expanded Title IX's reach to include retaliation claims after a high school basketball coach brought suit on behalf of the girl's team he coached. The coach was subsequently relieved of his coaching duties after challenging the school's practice of disparate treatment.¹⁷ The Supreme Court stated that the law would lose a large sense of purpose if there was no recourse for retaliation, which Title IX seeks to avoid.

Brake also scrutinized the uncomfortable subject of sexual harassment, most often faced by female athletes who play under male coaches, and the difficulties athletes face when accusing such authority figures of sexual harassment. Brake notes that the difficulties may arise from the high standards Title IX requires to prove sexual harassment. She supposes that the high standards for sexual harassment claims may be a product of the masculine nature of sports. The masculine nature of sports leads to the presumption that female athletes are better able to defend against unwanted advances. However, she believes that the empowerment that comes from involvement in sports should not lend itself to the idea that an athlete will not be traumatized by sexual harassment, no matter how minor the offense seems.¹⁸

Brake concludes by discussing the backlash that Title IX has been subject to over the years. Those who disagree with the purpose of the law see it as a hindrance to men's sports and often ignore the positive changes women's sports have seen. She notes that athletic expenditures are still twice as much

15. *Id.* at 169.

16. *Id.* at 172.

17. *Id.* at 192.

18. *Id.* at 216.

for men's sports as they are for women's sports. Brake also points out that, forty years after Title IX was passed, it is still too early to determine if full sex equality is possible, largely because spending disparities still exist in spite of the law's objectives.¹⁹

Getting in the Game is controversial, largely because it discusses subjects often considered taboo when discussing the practical effects of Title IX. However, in light of its controversial nature, the book provides a comprehensive overview of the challenges faced by female athletes, both when Title IX was passed and those issues still present today. While the book occasionally feels disjointed because of the numerous topics Brake covers in a short span, it remains a beneficial read not only for proponents of Title IX, but also for those who oppose the law, in hopes that they would gain a greater appreciation for the challenges faced by female athletes.

Cassandra Jones

19. *Id.* at 217.