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A Place on the Team: The Triumph and Tragedy of Title IX, A Review Essay

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REVIEW ESSAY

A Place on the Team: The Triumph and Tragedy of Title IX

Welch Suggs

[Princeton, NJ: Princeton University Press]

vii + 283 pages

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Since the enactment of Title IX in 1972, women have seen significant gains in their participation in sports at all levels. These gains have been most pronounced at the intercollegiate level. For example, in their report *Women in Intercollegiate Sport: A Longitudinal, National Study: Twenty Seven Year Update 1977-2006*, Linda Jean Carpenter and R. Vivian Acosta note that before the law's passage, approximately 16,000 college female athletes participated on varsity teams. By 2006, there were 8,702 women's collegiate teams. In addition, the United States General Accounting Office's (GAO) 2001 report *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, showed that from 1981-1982 to 1998-1999 women's sports participation at NCAA and National Association of Intercollegiate Athletics (NAIA) schools increased 977%. Still, the nature of these increases continues to be debated.

Many authors have written about Title IX's impact on college sports. Most acknowledge the law's benefit to female athletes, although they recognize that there is still much to be done to achieve equal participation with men. In his book *A Place on the Team: The Triumph and Tragedy of Title IX*, Welch Suggs, senior editor for athletics at the *Chronicle of Higher Education*, presents a mainly balanced historical look at the impact of Title IX on collegiate athletics. However, within this balanced book, one cannot help but see his perspective.

While discussing the many positive ways that the law has impacted female participation in sports, Suggs does not believe that this participation is always a good thing. He presents college sports as maintaining two distinct systems: male commercialized sport with problems of illegal payments, recruiting, and NCAA rules violations; and female sport with the presumed ideal of participation for its educational value alone. According to Suggs, "the law encouraged women's sports to develop in the hypercompetitive, highly commercialized model that evolved in men's sports" (p.3), moving away from

the ideal of women's sports he presents. Suggs also blames the NCAA. Although he believes that the NCAA has used the law to bolster female participation, he argues that it has taken control of female sports from female administrators, thus subsuming female sport into the commercialized male model.

Suggs's ideal of women's participation in college sports has a long history dating back to the 1800s. Women did not participate on the level that men did, instead they played in intramural sports between classes under the supervision of female administrators devoted to the educational value of sports participation. On the other hand, high profile collegiate men's sports have always been commercial and demonstrated the problems that plague them today. The NCAA was created in part to regulate violence in collegiate football and quickly attempted to regulate recruiting and illegal payments to athletes.

Within this backdrop, administrators of women's sports were careful to avoid mirroring the growth demonstrated in men's sports. As Suggs explains, they wanted to preserve the modesty of female participants while also saving them from the perceived problems found in men's sports. However, this educational model of women's sports was bound to conflict with the commercial model of men's sports.

The legislative impetus for Title IX came from the Civil Rights Act of 1964. Its framework, forcing schools and employers to honor the civil rights of students and employees, primarily minorities, also forced them to recognize the rights of women. According to Suggs, the federal agencies charged with enforcement of these laws "were designed to cajole citizens and organizations into abiding by the law, with punishment as a last resort" (p.37). Punishment can include a loss of federal funding.

Perhaps it is this backdrop that has led to many of the problems with Title IX. Although critics and advocates alike agree that many schools do not meet the requirements of the law, no school has ever faced a loss of federal funds as a result of a violation. Instead, the Office of Civil Rights (OCR) allows schools to follow whichever part of the law that they choose and gives schools the time to develop plans that will bring them into compliance.

Title IX of the Education Amendments of 1972 was enacted at the same time that women's sport administrators formed the Association of Intercollegiate Athletics for Women (AIAW), a national organization committed to maintaining the educational model of women's sports. By 1975 the NCAA moved to control women's athletics within NCAA universities. Suggs calls this the NCAA's plan B because he believes that the NCAA really wanted to get rid of Title IX. When this did not happen, the NCAA moved to control women's college sports. This characterization is not surprising given

Suggs's apparent distrust of the NCAA and its motives. The implication is that the NCAA wanted to take over women's college sports in order to manipulate these sports to circumvent Title IX. This reality has not come to pass. Since the NCAA took over the administration of women's college athletics, according to the GAO report women's sports participation opportunities have exploded by 977% as of 1999.

The law itself is not as controversial as the regulations and policy interpretation implemented by the federal agencies charged with enforcing Title IX. Although controversial, the regulations are rather simple. They begin with a prohibition against discrimination that is virtually identical to that found in Title IX. Perhaps most importantly, the regulations call for "equal opportunity" for members of both sexes in their athletics participation and list ten factors that will be considered in this analysis. Although meant to explain in more depth the requirements and enforcement of Title IX, the regulations have not accomplished this goal. They do not provide any way for a school to assess whether it is in compliance; instead, they must come to their own analysis as to what is "equal opportunity." As Suggs explains, the regulations were immediately criticized by both the NCAA and AIWA, who each complained that they were too vague and would hurt, rather than help, collegiate athletics.

In 1979, the government developed *A Policy Interpretation: Title IX and Intercollegiate Athletics*. The interpretation explains the regulations to provide a framework to resolve Title IX complaints and provides additional guidance for institutions on the requirements for compliance in intercollegiate athletic programs. As Suggs explains, the interpretation "is, from a legal standpoint, the most influential document issued to explain how gender equity should work in college sports" (p.78). It is divided into three parts - financial assistance, overall program components, and accommodation of the interests and abilities of male and female students. It is this initial three part structure that is most confusing. Perhaps due to this initial structure, many commentators believe that the interpretation puts forth only the three-part accommodation test and nothing else. In reality, the three-part test is only one way to evaluate accommodation under part three of the interpretation.

From 1980 until the 1990s, universities struggled with determining how they could come into compliance with the law. This culminated in the *Cohen v. Brown University* case in 1996, where the court made clear that the policy interpretation and regulations should be used in assessing whether a university is in compliance. However, the line of cases leading up to *Cohen* also leads to the confusion with the three-part test. The cases set out prong one - whether the intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective

enrollment – as a “safe harbor.” Following these cases, in efforts to comply with Title IX, schools focused only on proportionate numbers of athletic participants to enrollment. This became known as a “quota” system and has been criticized because it relegates the law to a numbers game regardless of the actual student interest in participating in athletics.

OCR attempted to clarify this confusion in 1996 with its *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*. Although Suggs argues that the clarification simply adopted the safe harbor language the courts had used, deeper analysis shows that OCR specifically noted that each part of the test is a safe harbor, in other words a university can seek to comply with Title IX under any part of the test. Perhaps if OCR had simply stopped calling this a three-part test, and designated three separate tests available to accommodate the interests and abilities of students, the matter would have been clarified even further. Still, for the first time since the 1979 policy interpretation, OCR provided limited guidance on how to comply with each part of the test. Similar to the interpretation, the clarification is not law, but courts have used it in coming to their decisions in Title IX cases.

As is always the case with gender equity law, the clarification was not enough, and the cases continued. The focus of the debate in the later half of the 1990s and into the 2000s has been on the impact of Title IX on men’s sports at the collegiate level. GAO’s 2001 report found that woman’s participation increases were not at the expense of men’s teams. Advocates for men’s sports disagree, blaming the law and particularly the three-part test for the cuts in their sports. They have sued the government arguing that the test and 1979 policy interpretation should be struck down. These cases have never succeeded, but they have continued. Recently, the College Sports Council, an advocacy group that has supported men’s wrestling teams, recently sued the Department of Education claiming that the 2001 GAO report should be thrown out because it does not acknowledge that Title IX has caused men’s sports opportunities to be cut.

Overall, as long as females are the underrepresented sex in collegiate sports, claims by male student athletes whose teams have been cut will not succeed. While advocates and colleges blame the law for tough decisions leading to these cuts, the real problem is that colleges have not found creative ways to finance their sports in order to provide opportunities for all. They also will not cut the excess in the primary revenue-producing men’s sports, football and basketball, in an effort to save opportunities in less lucrative men’s sports. The argument is that revenue producing sports should somehow be treated differently due to the revenues they create. However, Title IX has nothing to do with revenue; its focus is on equal opportunity for men and women. Until colleges rethink the way in which they finance sports and provide equal

opportunities to women, this situation will continue.

In 2002, the Department of Education appointed a Commission on Opportunity in Athletics to focus on Title IX. Although Suggs and many other advocates assumed that the Commission was formed to find a way to lessen the impact of Title IX, its stated purpose was to collect and report on information and public input directed at improving the application of current federal standards for measuring equal opportunity for men and women in athletics. The Commission published a report *Open to All: Title IX at Thirty*, which mainly focused on asking the government for further clarification of the three-part test and stronger and more consistent enforcement of the law.

Suggs implies that the government adopted the Commission report. However, it did not endorse or adopt the report; it merely made it available to the public, and in 2003, OCR put out a *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*. The 2003 clarification reiterated the importance of the three-part test but also made clear that no prong was favored. In addition, it made clear that cutting men's teams was a disfavored practice and should not be relied upon as a way to come into compliance with Title IX. Although this is a *Further Clarification*, nothing further was clarified; instead, OCR reiterated the importance of the test established in 1979 and reemphasized that the law will not force schools to cut men's teams to come in to compliance.

After this extensive history of gender equity law, Suggs ends with his overall analysis of collegiate sports. To him, the tragedy of Title IX is simple, "in adapting to the highly competitive, often ethically questionable world of men's scholastic sports, women face certain challenges that they did not during the era when women's sports were controlled by physical-education departments" (p.187). This perceived tragedy is difficult to understand. While female administrators may have held to some ideal of non-competitive and non-commercialized sport in the past, female athletes of today do not. They want to be given every opportunity to succeed in their sport and to reach the professional opportunities open to men. Following Suggs's perspective, it would seem that women should be kept in the old ideal model where sport is merely an educational diversion separate from large crowds and the potential for future professional development. In addition, Suggs never makes the problems with men's collegiate sport (which he never really identifies or explores) into anything but a possible perversion of women's sports. He does not seem to see a need for men to be saved from these problems or for men to turn toward the female model of sports he so idealizes.

It is a shame that Suggs and others do not see sport as gender neutral. This view does not avoid the problems with commercialized sports at the collegiate level. These problems are inherent in sport they are not problems

associated with one gender. They need to be corrected because of the dangers they cause to athletes, both male and female.

In the end, Suggs recognizes that Title IX “has created opportunities for thousands of female athletes and it has forced the American public to recognize the value of women’s sports” (p.188). However, even this triumph is not absolute, as female athletes still do not receive the financial and other support that male athletes receive. Suggs advocates for the federal government to issue a new interpretation of Title IX to solve the frequent problems associated with its interpretation and application. In this, Suggs has proved somewhat prophetic, as on March 17, 2005, OCR issued its *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three*.

According to this 2005 clarification, and contrary to most gender equity litigation and the presumption by Suggs and others that most schools attempt to comply with Title IX under prong one of the three-part tests, of 130 institutions OCR investigated from 1992-2002 two-thirds complied with prong three. Therefore, the purported purpose of the clarification is to better explain how a school can come into compliance under prong three.

Schools have always been able to survey students in order to determine whether the school was meeting the third prong by fully and effectively accommodating the interests and abilities of the underrepresented sex. The clarification provides a web-based prototype survey schools can use, based on surveys schools have used in the past, and an attached *Users Guide to Developing Student Interest Surveys Under Title IX* developed by the National Center for Educational Statistics. If the survey is followed, a school can be found to be in compliance with prong three unless there exists a sport for the underrepresented sex (women) that has unmet interest sufficient to sustain a team, sufficient ability, and a reasonable expectation of competition in the sport within the school’s normal region.

While the clarification allows a school to interpret a non-response as a lack of interest, it also makes clear that a school must receive a high level of responses, that the survey must be conducted on a periodic basis, and that schools cannot use the survey results to eliminate teams. Most importantly, if a school finds that it has sufficient unmet interest and ability to sustain a team and reasonable expectations of intercollegiate competition in that sport within the school’s competitive region, the school is under an obligation to create a varsity team or elevate a club or intramural sport.

Although not a rewrite of the interpretation, many feel that this clarification changes the way in which schools can and will comply with the three-part test. For example, in April, the NCAA’s Executive Committee passed a resolution urging the Department of Education to rescind the clarification as inconsistent with the 1996 and 2003 clarifications and the

“basic principles of Title IX.” Others claim that counting non-responses as lack of interest and limiting the survey to enrolled and admitted students violates gender equity law. The Department responded quickly, stating that the third prong remained the same and did not change a school’s obligation to comply with the law.

The actual impact of the 2005 clarification is still unclear. What is clear is that this clarification follows directly from the 2003 clarification wherein OCR promised to provide more guidance to schools in their efforts to comply with Title IX. In addition, in this age of technology where most college students communicate using email, palm pilots, and instant messaging, it seems that the survey method provided in the 2005 clarification will lead schools to involve more students in the process, potentially uncovering the interests of more female students. In fact, it is surprising that schools have not been worried that this clarification has put them on notice because it mandates that the results of these surveys may create a legal obligation to create new teams for female students.

As the legal and collegiate sports community reacts to this latest clarification, those attempting to understand the historical and legal development of gender equity law would be well served to read *A Place on the Team: The Triumph and Tragedy of Title IX*. This easy to read and well researched book presents all of the important developments in gender equity law and its impact on women’s sports. While all readers will not agree with Suggs’s overall conclusions about Title IX’s triumphs and tragedies, the book is a well-reasoned analysis of these issues. In an area where advocates line up on either side, often with no common ground and with questionable motives, Suggs should be commended for presenting the issues in a reasoned way while also providing the reader with the actual documentation that has defined this area of law.

Perhaps in the future, when women are no longer the underrepresented sex in collegiate athletics and men and women can equally enjoy the benefits of athletics participation, the lawsuits over Title IX, and the criticisms of the NCAA, government, male sports, and women’s sports, will end. Until that time, lawyers and advocates should expect to continue to debate the full impact of this thirty-four-year-old law on the athletic landscape.

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