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IN DEFENSE OF TITLE IX: WHY CURRENT POLICIES ARE REQUIRED TO ENSURE EQUALITY OF OPPORTUNITY

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&

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INTRODUCTION AND SUMMARY

On July 11, 2003, the Office for Civil Rights of the United States Department of Education ("Department") issued a Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance. The document represents the denouement of a year-long process set in motion by the Secretary of Education’s appointment of a Commission on Opportunity in Athletics (the "Title IX Commission" or "Commission") to re-evaluate the application of Title IX’s requirement that men and women be provided equal opportunity to participate in athletics. The 2003 Clarification reaffirms the validity and effectiveness of longstanding administrative regulations and policies governing this application.

This article outlines the long history of repeated, but failed, attacks on Title IX, including the Title IX Commission report itself. It also explains how the Department’s reaffirmation of existing Title IX athletic policies was the only legally appropriate conclusion to the year-long debate. These policies, which have been in effect for more than two decades, clearly reflect congressional intent in enacting Title IX and have been upheld by every federal court of appeals that has considered them. Moreover, they are fully

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consistent with, and necessary to, the goal of Title IX to remedy longstanding and continuing systematic discrimination against women and girls who want to participate in educational athletics. 4

Part I of this article describes the Title IX athletic policies and focuses in particular on the "three-part test" applied by the Department as the court to evaluate equality of participation opportunities. Part II explains why these policies are both necessary and appropriate implementations of basic Title IX requirements. In particular, Part II(A) demonstrates how the policies clearly reflect Congress' intent to remedy persistent discrimination against women. Indeed, Congress has repeatedly rejected attempts to weaken Title IX's application to athletics as set forth in the regulation and policies. Part II(B) explains the consistent judicial interpretation of Title IX, upholding the athletics policies against attack and rejecting claims that they impose unlawful quotas or result in discrimination against men. Part II(C) shows why the policies are still necessary to reach true equality of opportunity on the playing field. Finally, Part III addresses some of the policy changes recommended in the Title IX Commission's majority report and explains why those changes would have been unlawful as a matter of statutory interpretation and unwise as a matter of policy.

The goal of this article is to outline the flexibility of the Title IX athletic policies, to demonstrate how opponents of Title IX continue to recycle old arguments in new ways, and to provide defenders of Title IX with the information and arguments necessary to rebut future attacks.

I. THE TITLE IX ATHLETICS REGULATIONS AND POLICIES ARE FLEXIBLE AND FAIR.

Title IX of the Education Amendments of 1972 prohibits federally funded education programs and activities from engaging in sex discrimination. It says

(1st Cir. 1996) [hereinafter Cohen I], cert. denied, 520 U.S. 1186 (1997); Miami Univ. Wrestling Club v. Miami Univ. of Ohio, 302 F.3d 608 (6th Cir. 2002); Chalenor v. Univ. of N.D., 292 F.3d 1042 (8th Cir. 2002); Pederson v. La. State Univ., 213 F.3d 858 (5th Cir. 2000); Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999); Neal v. Bd. of Trs., 198 F.3d 763 (9th Cir. 1999); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); Kelley v. Bd. of Trs., 35 F.3d 265 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993), cert. denied, 510 U.S. 1043 (1994); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993); Favia v. Ind. Univ. of Pa., 812 F. Supp. 578 (W.D. Pa. 1993), aff'd, 7 F.3d 332 (3rd Cir. 1993).

4. The policies also, importantly, advance the goals and requirements of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. U.S. CONST. amend. XIV, § 1.
simply: "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 assistance . . ." Title IX’s prohibition against sex discrimination is very broad, applying to most elementary and secondary schools, colleges, and universities. The law applies to every aspect of a federally funded education program or activity, including athletics.

The U.S. Department of Health, Education, and Welfare ("HEW") promulgated final regulations to implement the statute in 1975. The athletics components of those regulations require that educational institutions (1) offer male and female students equal opportunities to participate in sports; (2) allocate athletic scholarship dollars equitably; and (3) treat male and female students equitably in all aspects of athletics, including with regard to equipment and supplies; locker rooms, facilities, and practice areas; scheduling of games and practices; medical and training services; publicity; and assignment and compensation of coaches. This article discusses only the first component—equal athletic participation opportunities.

The general Title IX athletics regulation mandates that:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

The specific regulation governing equal participation opportunities, unchanged since 1975, states:

A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors: . . .

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both

6. See N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982). "There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" Id. (citations omitted).
8. 34 C.F.R. § 106.41(a) (2002).
After receiving hundreds of discrimination complaints from student athletes, HEW issued a Policy Interpretation on Title IX and Intercollegiate Athletics on December 11, 1979, to clarify "the meaning of 'equal opportunity' in intercollegiate athletics. [The Policy Interpretation] explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations."

The Policy Interpretation established the "three-part test" as a means of measuring equal participation opportunities. The test provides three "valid, alternative way[s]" that schools can show that they provide students of both genders with equal opportunities to participate in sports. Under the three-part test, the Department evaluates:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

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9. 34 C.F.R. § 106.41(c) (emphasis added).
10. HEW published a draft policy on "Title IX and Intercollegiate Athletics" in the Federal Register. Title IX of the Education Amendments of 1972; A Proposed Policy Interpretation, 43 Fed. Reg. 58,070 (Dec. 11, 1978) (to be codified at 45 C.F.R. pt. 86). The Department received and reviewed more than 700 comments before issuing its final Policy Interpretation one year later. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,423 (Dec. 11, 1999) (to be codified at 45 C.F.R. pt. 86) [hereinafter Title IX: A Policy Interpretation].
12. 2003 Clarification Letter, supra note 1, para. 7.
13. Title IX: A Policy Interpretation, 44 Fed. Reg. at 71,418C(5)(a). Notably, the three-part test is not gender specific. It does not speak in terms of males and females but in terms of the "under-
If a school can meet any one of these three prongs, the Department will find it in compliance with Title IX's equal participation requirements. As the Department recognized in its 2003 Clarification Letter, this three-part test "has worked well" and provided substantial flexibility to schools. Indeed, in many ways, the three-part test quite generously favors schools.

The first prong of the test effectively provides that if every female student has the same chance of participating in athletics as every male student, then the school will be found to be providing equal athletic participation opportunities. For example, if a school has 1,000 students (500 males and 500 females), but offers only 500 athletic participation opportunities, that school will comply with Title IX's participation requirements if it offers 250 of those opportunities to males and 250 of those opportunities to females. Each male and each female will then have an equal 1 in 2 chance of playing sports. If the school instead creates 300 slots for males and only 200 slots for females, then each male student will have a 3 in 5 chance of playing sports while each female will have only a 2 in 5 chance of playing. The school would thus be giving male students preferential treatment by giving them a greater opportunity to participate in athletics.

In the sex-segregated world of athletics, where males and females do not compete for the same program slots, the law recognizes that where schools meet this first prong, they are offering truly equal opportunity. Yet, even if a school does not offer equal opportunity, the Department will still find it in compliance under the second prong of the three-part test if the school has a history and continuing practice of program expansion for members of the underrepresented sex. This prong represents an exceptionally and atypically generous standard for measuring civil rights compliance. In no other civil rights scheme of which the authors are aware are institutions deemed in compliance with a nondiscrimination mandate if they can demonstrate simply that they have made incremental progress toward equality. Nonetheless, if a school has an equity plan and regularly accounts for the growing interests and abilities of the underrepresented sex, then it will be deemed in compliance with Title IX under prong two.

Even if a school fails to offer equal opportunity and fails to make progress toward it, the school can comply under the third prong of the test if it meets the interests and abilities of the underrepresented gender (i.e., if female students are not interested in more opportunities to play sports). In practice, the third prong often constitutes a significant "chicken and egg" barrier for
female athletes. How can they develop their interests without exposure or opportunity? To prove their interests and abilities, female athletes often have to pay to develop their own opportunities in ways their male classmates and male predecessors never had to do. They must work to find other females who want to play, find coaches and facilities on their own, find competition to play, pay for their own uniforms and equipment, arrange their own schedules, and provide their own transportation. Only after years of taking such extraordinary actions and “paying to play” are they able to challenge schools under prong three. Thus, in practice, the three-part test often works to enforce a less-than-equitable status quo.

In 1996, the Department's Office for Civil Rights (“OCR”) issued a Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test to further explain the flexible nature of the three-part test.\footnote{Letter from the U.S. Department of Education, Office of Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), available at http://www.ed.gov/about/offices/list/ocr/docs/clarific.html (last visited Oct. 26, 2003) [hereinafter 1996 Clarification Letter].} That Clarification Letter “provided schools with a broad range of specific factors and illustrative examples to help schools understand the flexibility of the three-prong test.”\footnote{Id. para. 3.} Among other points, the 1996 Clarification Letter makes clear that:

- Schools may comply with the three-part test under any prong of the test;\footnote{Id. para. 10.}
- The “substantial” proportionality standard of the first prong of the test does not require “strict” proportionality, and evaluation of proportionality will be made on a case-by-case basis, not by use of a statistical test;\footnote{1996 Clarification Letter, supra note 15, para. 12.}
- In evaluating compliance with the substantial proportionality standard, schools must count “actual benefits provided to real students,” and cannot count for participation purposes slots that are
theoretically available but are unfilled;\textsuperscript{19}

- The focus of the second prong of the test is on “whether the program expansion was responsive to developing interests and abilities of the underrepresented sex” –not on setting “fixed intervals of time within which an institution must have added participation opportunities.”\textsuperscript{20}

- A school will be found to have failed to fully accommodate the interests and abilities of the underrepresented sex under the third prong of the test only where there is “(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team.”\textsuperscript{21}

The 1996 \textit{Clarification Letter} also makes clear that schools are permitted, but not encouraged, to meet proportionality standards by reducing the opportunities available to the over-represented gender.\textsuperscript{22} In its 2003 \textit{Clarification Letter}, the Department confirmed that “nothing in Title IX requires the cutting or reduction of teams in order to demonstrate compliance with Title IX, and . . . the elimination of teams is a disfavored practice.”\textsuperscript{23}

In the 2003 \textit{Clarification Letter}, the OCR “strongly reaffirm[ed] . . . its commitment to equal opportunity for girls and boys, women and men[;]”\textsuperscript{24} reiterated the terms of the three-part test; and incorporated the “broad range of specific factors, as well as illustrative examples,”\textsuperscript{25} of the 1996 \textit{Clarification Letter} to help schools understand the flexibility of the current law. The 2003 \textit{Clarification Letter} makes clear that:

- “[T]he three-prong test has provided, and will continue to provide, schools with the flexibility to provide greater athletic opportunities for students of both sexes[;]”\textsuperscript{26}

- Each prong of the three-part test is a “viable and separate means of compliance[;]”\textsuperscript{27}

- “[T]he elimination of teams is a disfavored practice,” and “OCR’s

\begin{itemize}
  \item \textsuperscript{19} \textit{Id.} para. 14.
  \item \textsuperscript{20} \textit{Id.} para. 19.
  \item \textsuperscript{21} \textit{Id.} para. 30.
  \item \textsuperscript{22} \textit{Id.} para. 15.
  \item \textsuperscript{23} 2003 \textit{Clarification Letter}, supra note 1, para. 11.
  \item \textsuperscript{24} \textit{Id.} para. 16.
  \item \textsuperscript{25} \textit{Id.} para. 10.
  \item \textsuperscript{26} \textit{Id.} para. 15.
  \item \textsuperscript{27} \textit{Id.} para. 9.
\end{itemize}
policy will be to seek remedies that do not involve the elimination of teams[;]" 28

- OCR will "aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply[;]" 29

- "[P]rivate sponsorship of . . . teams will continue to be allowed[,] [but] . . . does not in any way change or diminish a school’s obligations under Title IX[;]" 30 and

- "OCR will ensure that its enforcement practices do not vary from region to region." 31

In sum, the three-part test provides maximum flexibility for schools of all sizes and budgets. By civil rights standards, it quite generously favors schools. Accordingly, as set forth below, the test has survived numerous challenges over the years.

THE ATHLETICS REGULATIONS AND POLICIES ARE NECESSARY AND APPROPRIATE TO IMPLEMENT TITLE IX REQUIREMENTS.

A. The Legislative History of Title IX Shows that the Athletics Regulations and Policies Properly Implement Congressional Intent.

Title IX of the Education Amendments of 1972 was enacted to remedy persistent discrimination against women and girls and to throw open the doors of educational opportunity for them. Before Title IX, women and girls were routinely excluded from educational opportunities solely on the basis of sex. Some public schools and universities barred women and girls entirely. Others required them to meet higher admission standards than their male classmates or set quotas that limited the number of women admitted. Once admitted, many of these women and girls were segregated into "female" study areas and were excluded from certain "male" pursuits, like "shop."

The situation for girls and women in athletics was even worse. In 1971-1972, more than twelve times as many boys played high school sports than girls (294,015 girls compared to 3,666,917 boys). 32 Similarly, only 31,852

28. Id. para. 11.
29. 2003 Clarification Letter, supra note 1, para. 12.
30. Id. para. 13.
31. Id. para. 14.
women, compared to 172,447 men, played college sports.\textsuperscript{33} Women received only 2\% of schools’ athletic budgets and virtually no athletic scholarships.\textsuperscript{34} Before Title IX, many states did not sanction sports for high school girls at all. The National Collegiate Athletic Association (NCAA) also sponsored only men’s sports.\textsuperscript{35} Few structures existed for the promotion of athletics for girls or women. Females were simply not allowed in the gym or on the field.

These limitations had lasting effects on women’s lives. Former House Representative Patsy Mink told Congress that she was denied admission into medical school solely because she was female.\textsuperscript{36} Her daughter was similarly denied admission to Stanford University because it had already reached its low quota for women.\textsuperscript{37} These experiences led Representative Mink to law school and to Congress, where she vowed to pass a law that would open doors that had been closed to women and girls.\textsuperscript{38} Representative Mink joined Senator Birch Bayh and Representative Edith Green in championing the law that became Title IX.\textsuperscript{39}

Prior to the enactment of Title IX, Congress spent little time discussing application of the law to athletics.\textsuperscript{40} Starting almost immediately after its passage, however, Congress was besieged by proposals to restrict the reach of Title IX and to cabin athletics from equal opportunity requirements.\textsuperscript{41} In May 1974, for example, Senator John Tower (R-TX) introduced a bill to exclude from Title IX any sport that produced gross revenue or donations for a school.\textsuperscript{42} Congress rejected the amendment and instead passed an amendment introduced by Senator Jacob Javits (R-NY), which directed HEW to issue regulations that contained, “with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.”\textsuperscript{43} The amendment made it absolutely clear that Congress intended Title IX to cover

\begin{thebibliography}{1}
\bibitem{34} The Secretary of Education’s Commission on Opportunity in Athletics, "\textit{Open to All}," \textit{Title IX at Thirty} (Feb. 28, 2003) [hereinafter \textit{Open to All}]. The complete text of \textit{Open to All} is included within this publication.
\bibitem{37} Id.
\bibitem{38} Id.
\bibitem{39} Id
\bibitem{40} Cohen, 991 F.2d at 893.
\bibitem{41} Id.
\bibitem{42} 120 CONG. REC. 15,322-23 (May 20, 1974); S. CONF. REP. NO. 93-1026, at 4271 (1974).
\end{thebibliography}
In 1974 and 1975, HEW promulgated, proposed, and then finalized regulations to implement Title IX, including with regard to athletics. At that time, federal law required that HEW submit the regulations to Congress for review and comment before they could be implemented. Congress then had forty-five days to pass a joint resolution rejecting the regulations in whole or in part. More particularly, the regulations would go into effect "unless the Congress shall, by concurrent resolution, find that the standard, rule, regulation, or requirement is inconsistent with the act from which it derives its authority and disapprove such standard, rule, regulation, or requirement." The procedure was designed to determine "if the regulation writers have read [Title IX] and understood it the way the lawmakers intended it to be read and understood." Thus, unlike the regulatory process today, in 1975 Congress had the express opportunity to decide whether the proposed regulations properly reflected its intent in passing Title IX.

Congress took this review and comment opportunity seriously. It held extensive hearings on the regulations, for which many interest groups provided testimony and comment. The NCAA, the College Football Coaches Association, and other organizations that represented the interests of men's sports testified and fought to change the regulations or to amend the law itself. Their supporters in Congress offered no fewer than nine resolutions and bills to reject the athletic regulations, to exclude athletics from Title IX altogether,

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44. HEW published proposed regulations in 1974, 39 Fed. Reg. 22,228 (June 20, 1974), and received nearly 10,000 comments on them, most related to athletics. HEW issued its final regulations one year later. 40 Fed. Reg. 24,128 (June 4, 1975) (to be codified at C.F.R. pt. 86).

45. See N. Haven Bd. of Educ., 456 U.S. at 531-32. Section 431(d)(1) of the General Education Provisions Act, Pub. L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. § 1232(d)(1) (2000). This provision was intended "to afford Congress an opportunity to examine a regulation and, if it found the regulation 'inconsistent with the Act from which it derives its authority . . . .' to disapprove it in a concurrent resolution. If no such disapproval resolution was adopted within 45 days, the regulation would become effective." N. Haven Bd. of Educ., 456 U.S. at 531-32. Although a similar requirement for congressional approval was later invalidated by the Supreme Court, that holding does not undermine the weight of Congress' approval of the regulations at issue here. See I.N.S. v. Chadha, 462 U.S. 919, 921-22 (1983).


49. At that time, the NCAA governed only men's sports. Women's sports were run by a separate organization, the Association for Intercollegiate Athletics for Women (AIAW).
and/or to exempt "revenue producing" sports from the reach of the law.\textsuperscript{50}

Proponents of these bills and resolutions complained that complying with the athletic regulations would be unduly burdensome and would harm existing men's programs, especially revenue producing sports like football.\textsuperscript{51} Sponsors of the resolutions similarly claimed that the regulations were inconsistent with Title IX itself and would impose unlawful quotas for women's sports.

In response, the prime sponsors of Title IX and others made clear that the challenged regulations correctly interpreted Congress' intent with regard to athletics. As Representative Mink noted, the detractors were simply re-arguing their opposition to the law itself rather than to the substance of the regulations.\textsuperscript{52} She summarized her opponents' position as follows:

The implication is that sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from Title IX. In this argument, the NCAA is disagreeing with the law, not the regulation. Our purpose here is not to re-legislate. Rather, it is to determine if the regulation is

\textsuperscript{50} Both houses of Congress considered and rejected a number of resolutions, all calling for disapproval of the HEW regulations in whole or in part. Among those resolutions were: S. Con. Res. 46, 94th Cong., 121 CONG. REC. 17,300-301 (1975) (introduced by Senator Helms (R-NC), stating that the Title IX athletics regulations were inconsistent with the statute); S. Con. Res. 52, 94th Cong., 121 CONG. REC. 22,940 (1975) (introduced by Senator Laxalt (R-NV), stating that the regulatory requirement for proportionality in athletics scholarships imposed quotas in violation of the law); H. Con. Res. 310 & H. Con. Res. 311, 94th Cong., 121 CONG. REC. 19,209 (1975); H. Con. Res. 329 & H. Con. Res. 330, 94th Cong., 121 CONG. REC. 21,687 (1975). The House Subcommittee on Equal Opportunities unanimously recommended that the House reject House Report Concurrent Resolution 330. 1975 CONG. Q. ALMANAC 665.

Bills were also introduced simultaneously to amend Title IX itself. See H.R. 8394, 8395, 94th Cong., 121 CONG. REC. 21,685 (1974) (proposed amendment to Title IX to allow schools to use money from revenue-producing sports exclusively or initially on those sports, regardless of gender inequities in program as a whole); S. 2106, 94th Cong., 121 CONG. REC. 22,778 (1975) (Tower amendment seeking to exempt revenue-producing sports from Title IX altogether); S. 2146 (amendment introduced by Senators Bartlett, Hruska, and Helms to prohibit the application of Title IX to athletics).

\textsuperscript{51} Senator Hruska expressly noted his desire to protect college football and Title IX's perceived impact on men's sports. 121 CONG. REC. 22,169-71 (1975).

\textsuperscript{52} Congressional testimony on House Concurrent Resolution 330 demonstrated that opposition to the regulations was really opposition to the law itself and its demand for equity in athletics, because the very notion of sharing athletic resources with women was perceived as a loss by men.

Those of us who have worked directly with school administrators have often heard the same thought. "We can't take anything from the boys' program and there's no money to develop one for girls." Of course, when boys have had virtually all of the money and facilities, sharing will be difficult. Going from preferential treatment to equal treatment will be something of a shock.

consistent with the law we passed 3 years ago. Representative Mink acknowledged the tension between men’s major and minor sports and women’s sports, especially during tight budget conditions. Nonetheless, she rejected complaints that the regulations would harm men’s football or basketball, emphasizing instead that:

We cannot in good conscience continue to allow our educational institutions to deny women and girls the educational opportunities that have been the assumed right of their brothers. The Title IX regulation provides a start in the direction of providing equal educational opportunity regardless of sex. I urge the Congress to demonstrate its commitment to equal educational opportunity by allowing the Title IX regulation to take effect in its entirety on July 21, 1975.

The Executive Branch concurred with this interpretation. In his testimony, the then-Secretary of Health, Education, and Welfare, Caspar Weinberger, made clear that the plain language of the statute required that Title IX’s coverage be very broad and apply to athletics, noting that if Congress had intended athletics to be the only educational program excluded, it could have easily said so.

In rejecting attempts to limit the scope of Title IX or to weaken the provisions of the regulations, Congress expressly considered arguments that requiring equal opportunity in athletics would impose quotas, result in reverse discrimination against men, or conflict with the terms of the statute. Congress’ action makes clear that the drafters of the regulations had “read [Title IX] and understood it the way the lawmakers intended it to be read and understood.”

Despite this ratification of the regulations, opponents continued to mount challenges to implementing the law’s equal opportunity requirements for

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54. Id.

55. Id. at 167. Senator Birch Bayh, the original Senate sponsor of Title IX, also testified before the same House committee and before the Senate Subcommittee on Education, urging them to reject any resolutions to weaken the regulations. Id. at 168. See also Prohibition of Sex Discrimination: Hearings Before the Senate Subcomm. on Educ. of the Comm. on Labor & Pub. Welfare, 94th Cong. 46 (1975).


athletics. In 1976 and 1977, some lawmakers again tried to amend Title IX to alter or eliminate its application to athletics.\textsuperscript{58} Again, these attempts failed.\textsuperscript{59} Thus, while individual lawmakers may have supported the positions of Title IX's opponents, Congress as a whole repeatedly rejected them and upheld Title IX and the Title IX regulations as currently written.

Once the Department issued its Policy Interpretation in 1979,\textsuperscript{60} individuals began to file discrimination complaints in earnest. But before the Department could fully address those complaints, several schools mounted judicial challenges to Title IX's application to athletics. They argued that only those education programs or activities that directly received federal funds should be subject to Title IX's non-discrimination requirements, thereby opening the door for discrimination in all other areas.\textsuperscript{61} Four years later, the U.S. Supreme Court agreed in Grove City College v. Bell.\textsuperscript{62}

In 1987, Congress passed the Civil Rights Restoration Act to reverse Grove City and to make clear that it had always intended the civil rights statutes, including Title IX, to apply institution-wide.\textsuperscript{63} Under that Act, now incorporated into Title IX, if any part of an educational institution receives federal funds, then all of its programs and activities must comply with the law.\textsuperscript{64} In amending the statute, Congress reaffirmed its prior positions on Title IX and its goal of achieving equity in all educational programs and activities, including athletics.\textsuperscript{65} In fact, the debate on the Civil Rights Restoration Act expressly cited the need to apply Title IX to athletics to remedy discrimination against female athletes.\textsuperscript{66} Indeed, "the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes."\textsuperscript{67} Congress thus confirmed the strong message it had sent when the regulations were first promulgated—that those regulations and, by 1987, the 1979 Policy Interpretation explaining them—correctly

\textsuperscript{58} Senate Bill 2657, introduced by Senator McClure to limit the definition of "education program or activity" to "the curriculum or graduation requirements of the institutions," 122 CONG. REC. 28136 (1976), defeated on the Senate floor, 122 CONG. REC. 28,147 (1976); S. Res. 535, 95th Cong. (1977) (introduced by Senator Helms to prohibit the application of the Title IX regulations to athletics).

\textsuperscript{59} 122 CONG. REC. at 28,147.

\textsuperscript{60} Title IX: A Policy Interpretation, 44 Fed. Reg. at 71,413. See discussion in Section 1, supra.


\textsuperscript{62} Id.

\textsuperscript{63} 20 U.S.C. § 1687.

\textsuperscript{64} Id.

\textsuperscript{65} See S. REP. NO. 100-64.

\textsuperscript{66} Id. at 11. See also numerous legislative history cites referenced in Cohen, 991 F.2d at 894.

\textsuperscript{67} Cohen, 991 F.2d at 894.
reflected Congress’ intent with regard to Title IX’s application to athletics.

After nearly twenty years of noncompliance, female athletes finally started enforcing their rights through federal lawsuits in the early 1990s. They were resoundingly successful. Schools and interest groups responded by again trying to change the law. In the mid-1990s, the College Football Coaches Association, the National Wrestling Coaches Association, and many other groups representing men’s sports went to Congress to try to convince it, again, to amend Title IX and overturn the three-part test. As it did in the 1970s, Congress again listened carefully and held numerous hearings. Fully briefed on the terms of the three-part test, Congress asked OCR to issue “updated policy guidance to institutions of higher education, which includes specific criteria clarifying how such institutions” could demonstrate compliance with the second and third prongs of the test. The OCR did so, issuing the 1996 Clarification Letter, discussed in greater detail in Section I, supra. Even though by then Congress was well-aware of the Department’s position on equal athletic participation and the courts’ interpretation of Title IX—including universal approval of the three-part test— it refused to make any changes in the law.

The above discussion of the history of Title IX demonstrates that the same arguments have repeatedly been made to challenge Title IX’s application to athletics and that Congress has understood, adopted, and reaffirmed the statute, its regulations, and its athletics policies each and every time they have faced attack. The law, as it currently exists, clearly and unequivocally reflects congressional intent. For the Department of Education to have made any changes in those regulations or policies would have thwarted this democratic process and would have unilaterally changed longstanding policies that have repeatedly survived all legal and policy challenges.

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68. See Franklin, 503 U.S. 60; Cohen, 991 F. 2d 888; Roberts, 998 F.2d 824.


70. Id.


72. Similarly, Congress refused to require colleges and universities to report on any reductions in participation opportunities or budget cuts planned for their sports teams, recognizing that such a requirement would represent an unprecedented intrusion into the decision-making processes of institutions of higher education. See Amendment 608 to the Higher Education Amendments of 1998, H.R. 6, 105th Cong. (1998) (passed May 6, 1998, deleting reporting requirement).
B. Consistent Judicial Interpretation shows that the Title IX Athletics Regulation and Policies are Lawful, do not Impose Quotas, and do not Discriminate Against Men.

The lawfulness of the three-part test has been considered, to date, by eight of the twelve federal circuit courts of appeal. Every one of those courts has rejected challenges to the test and found it to be a lawful, and even "inevitable," interpretation of Title IX. The United States, on behalf of the Department, has also recognized the unanimity of opinion on this matter.

In upholding the three-part test against statutory and constitutional attack, courts have consistently rejected three of the most popular arguments of Title IX opponents: (1) that the three-part test amounts to "quotas" or "reverse discrimination" against men; (2) that men should have more athletic opportunities because they are inherently more interested in sports than women (the so-called "relative interests test"); and (3) that Title IX forces schools to cut men's teams. These case holdings demonstrate that the three-part test is not only consistent with Congress' intent in passing Title IX, but fully lawful as well.

1. The Three-Part Test Does Not Create Quotas or Reverse Discrimination.

Opponents of Title IX have repeatedly claimed that the three-part test constitutes a gender-based quota system that violates both Title IX and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Courts have consistently rejected this claim, recognizing that the three-part test imposes no numerical requirement remotely analogous to

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73. Cohen, 991 F.2d at 895, 899; Cohen II, 101 F.3d at 172-73; Williams, 998 F.2d at 170-71, 175; Favia, 812 F. Supp. at 584-85; Pederson, 213 F.3d at 877-79; Horner, 43 F.3d at 273-75; Miami Univ. Wrestling Club, 302 F.3d at 615; Kelley, 35 F.3d at 270-72; Boulahanis, 198 F.3d at 637-39; Chalenor, 292 F.3d at 1046-47; Neal, 198 F.3d at 770-72; Roberts, 998 F.2d at 828.

74. See cases cited supra note 73.

75. See Memorandum from Robert D. McCallum, Jr., Assistant Attorney General, Roscoe C. Howard, Jr., United States Department of Justice, in Support of United States' Motion to Dismiss at 15-16, Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 263 F. Supp. 2d 82 (D.D.C. 2003) (No. 1:02-CV-00072-EGS)(on file with authors). NWCA's "interpretation of Title IX [alleging reverse discrimination against men] has been rejected by every federal circuit court of appeals that has considered the questions plaintiffs raise." Id. The United States has also rejected the claim that the Department of Education's 1996 Clarification Letter changed the enforcement or interpretation of Title IX in any way. Id. at 28-30 ("As the text of the 1996 Clarification makes clear, [the Department of Education] did not 're-open' either the 1980 regulation or the 1979 Policy Interpretation when it published the Clarification.").

76. See Cohen II, 101 F.3d at 169.
quotas, particularly in the unique sex-segregated world of athletics.\textsuperscript{77}

These arguments are perhaps most fully discussed in the challenge brought by female athletes to Brown University’s decision, in the early 1990s, to cut its women’s volleyball, women’s gymnastics, men’s golf, and men’s water polo teams.\textsuperscript{78} The plaintiffs demonstrated that the reduction left men with 63.3% and women with only 36.7% of the athletic participation opportunities offered by the school – despite the fact that men represented only 52.4% of the student body while women comprised 47.6% of the university’s undergraduates.\textsuperscript{79} Confronting this huge disparity in athletics opportunities, two separate panels of the First Circuit Court of Appeals rejected Brown’s quota and reverse discrimination claims.\textsuperscript{80}

First, these panels recognized that the concept of a quota is inapposite in the context of athletics, where schools explicitly establish separate opportunities for male and female students, who do not compete for the same slots. Because schools create sex-segregated teams at the outset, they make a gender-conscious allocation of opportunities in the first instance. Far from imposing quotas, therefore, the three-part test creates an “unavoidably gender-conscious comparison [that] merely provides for the allocation of athletics resources and participation opportunities between the sexes in a non-discriminatory manner.”\textsuperscript{81}

The sex-segregated world of athletics and Title IX is thus entirely different from the Title VII world in which males and females compete for the same jobs or the Title VI world in which members of different racial groups compete for the same admission slots.\textsuperscript{82} Without Title IX’s three-part test,

\begin{itemize}
\item\textsuperscript{77} See, e.g., id. at 170 (“No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.”); Kelley, 35 F.3d at 271 (“[T]he [Title IX] policy interpretation does not . . . mandate statistical balancing.”).
\item\textsuperscript{78} See Cohen II, 101 F.3d at 161.
\item\textsuperscript{79} Id. at 163.
\item\textsuperscript{80} Cohen, 991 F.2d 888 (1st Cir. 1993); Cohen II, 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997).
\item\textsuperscript{81} Cohen II, 101 F.3d at 177; see also Neal, 198 F.3d at 772, n.8 (“determining whether discrimination exists in athletic programs requires gender-conscious, group-wide comparisons . . . .”).
\item\textsuperscript{82} Cohen II, 101 F.3d at 171, 176-77. The Cohen II court aptly stated,
\begin{quote}
It is imperative to recognize that athletics presents a distinctly different situation from admissions and employment and requires a different analysis in order to determine the existence vel non of discrimination . . . . [T]he Title VII concept of the “qualified pool” has no place in a Title IX analysis of equal opportunities for male and female athletes because women are not “qualified” to compete for positions on men’s teams, and vice versa . . . . because gender-segregated teams are the norm in intercollegiate athletics programs, athletics differs from admissions and employment in analytically material ways.
\end{quote}
\end{itemize}
there is a genuine risk that a school will only recruit enough women to fill the
athletic slots it chooses to create, rather than enough women to fill a truly
equitable athletic program.\textsuperscript{83}

Second, the three-part test is not a quota because "the substantial
proportionality test of prong one is only the starting point, and not the
conclusion of the analysis."\textsuperscript{84} Schools have three independent ways to comply
with the test — and while schools may, and some do, provide athletic
opportunities to male and female athletes in proportion to their representation
in the student body, the test in no way requires them to do so if they meet one
of the other prongs. The courts clearly recognize that the three-part test offers
three very distinctive options for compliance.\textsuperscript{85}

Additionally, a Title IX violation cannot be found based solely upon a
disparity in athletic opportunities. A violation will only occur if the plaintiffs
also have unmet interest and ability to play and if the school cannot show that
it has a history and continuing practice of program expansion. As the Cohen
(II) v. Brown University court recognized:

\[\text{T}he\ \text{fact}\ \text{that}\ [\text{Brown}]\ \text{is}\ \text{required}\ \text{to}\ \text{accommodate}\ \text{fully}\ \text{the}\ \text{interests}
\text{and}\ \text{abilities}\ \text{of}\ \text{the}\ \text{underrepresented}\ \text{gender}\ \text{[under}\ \text{prong}\ \text{three}\ \text{of}\ \text{the}
\text{test},\ \text{[is]\ \text{not}\ \because\ \text{the}\ \text{three-part}\ \text{test}\ \text{mandates}\ \text{preferential}
treatment\ for\ women\ \text{ab}\ \text{initio},\ \text{but}\ \because\ \text{Brown}\ \text{has}\ \text{been}\ \text{found}
(under\ \text{prong}\ \text{one})\ \text{to}\ \text{have}\ \text{allocated}\ \text{its}\ \text{athletics}\ \text{participation}
opportunities\ so\ \as\ \to\ \text{create}\ \text{a}\ \text{significant}\ \text{gender-based}\ \text{disparity}\ \text{with}
\text{respect}\ \to\ \text{these}\ \text{opportunities,\ \text{and}\ \\text{has}\ \text{failed}(under}\ \text{prong}\ \text{two})\ \text{to}
\text{show}\ \text{a}\ \text{history}\ \text{and}\ \text{continuing}\ \text{practice}\ \text{of}\ \text{expansion}\ \text{of}\ \text{opportunities}
\text{for}\ \text{the}\ \text{underrepresented}\ \text{gender}.\text{86}

\text{In}\ \text{sum,}\ \text{the}\ \text{three-part}\ \text{test}\ \text{provides}\ \text{a}\ \text{carefully}\ \text{structured,}\ \text{flexible}\ \text{and}\ \text{fair

\textit{Id.}\ \text{at}\ 177.}

83. \textit{Id.}\ \text{at}\ 177. \textit{See also Kelley, 35 F.3d at 270 ("Congress itself recognized that addressing
discrimination in athletics presented a unique set of problems not raised in areas such as employment
and academics," citing legislative history); Neal, 198 F.3d at 772, n.8 ("[U]nlke most employment
settings, athletic teams are gender-segregated, and universities must decide beforehand how many
athletic opportunities they will allocate to each sex.").

84. \textit{Cohen II, 101 F.3d at 184.}

85. Empirical data supports this analysis. More than 70% of colleges that the OCR found to be
in compliance with Title IX during 1994-1998 reached compliance even though they did not offer equal athletic opportunity
to their female students under prong one. \textit{U.S. GEN. ACCT. OFF., No. 01-128, GENDER EQUITY:
MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 40 (2000), available at
http://www.gao.gov/new.items/d01128.pdf (last visited Oct. 23, 2003). This fact disproves the oft-
repeated claims of Title IX opponents that the only way to comply with Title IX is to adhere to strict
proportionality.}

86. \textit{Cohen II, 101 F.3d at 175.}
way to evaluate whether schools are providing equality of opportunity. It in no way requires quotas or preferential treatment, and claims to the contrary have been squarely rejected.

2. The "Relative Interests Test" Contradicts the History and Purpose of Title IX and Constitutes Intentional Discrimination Based Upon Illegal and Archaic Gender Stereotypes.

Opponents of the three-part test further claim that women are inherently less interested in sports than men so that requiring equality of opportunity artificially inflates the number of women's opportunities. They thus assert that the benchmark for measuring allocation of participation opportunities should be students' expressions of interest in participating in sports, not the civil rights principle of equal opportunity. In other words, schools would be in compliance as long as they accommodated the relative levels of interest expressed by men and women—that is, if they "allocate[d] athletic opportunities to women in accordance with the ratio of interested and able women to interested and able men, regardless of the number of unserved women or the percentage of the student body that they comprise."87 Under this approach, if schools could measure levels of interest and "prove" that men were twice as interested in participating in sports as women, for example, the schools would be permitted to allocate available sports opportunities to men on a two-to-one basis.

Courts have resoundingly rejected this relative interests test, stating that it would read "the 'full' out of the duty to accommodate 'fully and effectively'" if a school chooses to comply under the third prong of the three-part test, and would freeze current discrimination and men's long term head start in sports in place.88 Moreover, the relative interests approach directly contradicts the first prong of the test, which requires athletic participation opportunities that are substantially proportionate to the levels of male and female enrollment, not expressed interest; it is only that ratio that offers every female student the same chance to participate in athletics as every male student.

Courts have held that the relative interests test "'cannot withstand scrutiny on either legal or policy grounds' . . . because it 'disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the under-represented sex to the status quo level of relative interests . . .'"89 To allow schools to provide fewer athletic opportunities to

87. Cohen, 991 F.2d at 899.
88. Id. at 899-900; Cohen II, 101 F.3d at 174.
89. Cohen II, 101 F.3d at 174 (citations omitted). See also Horner, 43 F.3d at 274.
females than males, "based upon the premise that women are less interested in sports than are men, is (among other things) to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities." 90

Fundamentally, the problem with an interest-based test for allocation of participation opportunities lies in the fact that "women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports"—not a lack of interest, which "evolve[s] as a function of opportunity and experience."91 As a result,

[S]tatistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports.... To allow a numbers-based lack-of-interest defense to become the instrument of further discrimination against the underrepresented gender would pervert the remedial purpose of Title IX. 92

"Had Congress intended to entrench, rather than change, the status quo - with its historical emphasis on men's participation opportunities to the detriment of women's opportunities - it need not have gone to all the trouble of enacting Title IX."93

This conclusion accords with basic principles of civil rights law. As the court in Cohen II noted, "[T]he Supreme Court has repeatedly condemned gender-based discrimination based upon 'archaic and overbroad generalizations' about women. The Court has been especially critical of the use of statistical evidence offered to prove generalized, stereotypical notions about men and women."94 Indeed, the Supreme Court has made this critique in the context of Title IX itself. In Cannon v. University of Chicago,95 in which the Court recognized an implied private right of action to enforce Title

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90. Cohen II, 101 F.3d at 178-79.
91. Id. at 179.
92. Id. at 179-80.
93. Id. at 180-81; see also Pederson, 213 F.3d at 878 ("of course fewer women participate in sports, given the voluminous evidence that [the school] has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students"). Indeed, the facts demonstrate that interest explodes when opportunities are made available on an equitable basis. To quote just a single statistic, since 1972, when Title IX first opened up opportunities for female athletes, female participation in high school athletics has skyrocketed by more than 800% while female participation in intercollegiate sports has soared more than 400%. See Open to All, supra note 34, at 14.
94. Cohen II, 101 F.3d at 179 (citations omitted).
IX, the University of Chicago tried to justify its low quota for the admission of women into its medical school by arguing that few women were interested in or applied to its medical school. The Court rejected that argument, recognizing “the dampening impact” of discriminatory conduct on interest.

In fact, “a central aspect of Title IX’s purpose was to encourage women to participate in sports: The increased number of roster spots and scholarships ... would gradually increase demand among women for those roster spots and scholarships.” The Neal v. Board of Trustees court feared that adopting a relative interests test “would hinder, and quite possibly reverse, the steady increases in women’s participation and interest in sports that have followed Title IX’s enactment.”

In sum, the “relative interests test,” advocated by Brown, the National Wrestling Coaches Association, and other men’s sports advocates, “is entirely contrary to ‘Congress’s unmistakably clear mandate that educational institutions not use federal monies to perpetuate gender-based discrimination,’ and makes it virtually impossible to effectuate Congress’s intent to eliminate sex discrimination in intercollegiate athletics.”

3. Title IX Does Not Result in Cuts to Men’s Teams, and Men Have Gained, Not Lost, Opportunities Under Title IX.

Title IX opponents also often claim that its policies have forced reductions in men’s participation opportunities. Courts, however, have consistently recognized that Title IX policies in no way require schools to limit men’s opportunities, through cutting teams or otherwise. Moreover, the evidence shows that men have actually gained, not lost, athletic opportunities since the enactment of Title IX.

Most recently, in National Wrestling Coaches Ass’n v. Department of Education, the U.S. District Court for the District of Columbia dismissed for lack of standing a lawsuit filed by a coalition of wrestlers alleging that the Title IX athletics policies had resulted in “reverse discrimination” against

96. Id.
97. Id.
98. Neal, 198 F.3d at 768 (emphasis added).
99. Id. at 769 (citing Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1994), rejecting claim that differing interests of sexes justified providing women prisoners with fewer educational opportunities than male prisoners).
100. Cohen II, 101 F.3d at 176 (citing Cohen, 991 F.2d at 907).
101. See, e.g., Neal, 198 F.3d at 770 (citing Horner, 43 F.3d at 375; Kelley, 35 F.3d at 269; Roberts, 998 F.2d at 830); Boulahanis, 198 F.3d at 638-39; Cohen, 991 F.2d at 898 n.15.
them. In dismissing the case, the court emphatically rejected twin contentions: that Title IX forces schools to cut men’s teams and, as a related matter, that invalidating or weakening the three-part test would result in restoration of those teams.\(^{103}\)

In particular, the court made clear that “[t]he Three Part Test cannot be singled out as a ‘substantial factor’ motivating the decisions of educational institutions”\(^{104}\) about their athletics programs and that “multiple considerations in addition to, and beyond compliance with, the [Three Part Test] inform the decisions of educational institutions... to cut men’s... teams,”\(^{105}\) including “the desire to achieve a particular competitive level, availability of athletes with high school competition experience, and spectator interest.”\(^{106}\) According to the court, moreover, the plaintiffs in the case could not establish “even a ‘mere likelihood’ that repeal of the Three Part Test” would result in reinstatement of their teams.\(^{107}\)

Other courts have recognized that budget reductions and constraints are a reality at many schools and that Title IX must be interpreted to reflect that reality. While everyone would prefer that schools remedy their past discrimination and reach equity by increasing female opportunities to the level males have long enjoyed (and most schools do so),\(^{108}\) schools with dwindling budgets cannot always do this. The law allows schools to decide their own level of commitment to athletics and to set their own budgets. As courts have reiterated, Title IX does not dictate these choices and is not the cause of these schools’ decision-making; it merely requires that they equitably allocate the opportunities and resources that they have.\(^{109}\)

The historical, factual record confirms that Title IX is simply not the

\(^{103}\) Id. at 115-16.

\(^{104}\) Id. at 119.

\(^{105}\) Id. at 116.

\(^{106}\) Id. at 113.

\(^{107}\) Nat’l Wrestling Coaches Ass’n, 263 F. Supp. 2d at 120.

\(^{108}\) The vast majority of schools have complied with the three-part test by adding opportunities for women rather than by cutting opportunities by men. U.S. GEN. ACCT. OFF., supra note 85, at 14. Even if shrinking budgets or other factors led schools to cut or reduce men’s programs in order to preserve women’s programs, moreover, it would not be reverse discrimination against men, but rather remedial action to end decades or even centuries of favoritism toward men. See, e.g., Cohen II, 101 F.3d at 184 (“Of course a remedy that requires an institution to cut, add, or elevate the status of athletes or entire teams may impact the genders differently, but this will be so only if there is a gender-based disparity with respect to athletics opportunities to begin with...”).

\(^{109}\) Cohen II, 101 F.3d at 272; Miami Univ., 302 F.3d at 613; Horner, 43 F.3d at 275; Kelley, 35 F.3d at 272; Boulahanis, 198 F.3d at 638. In hard budget times, few schools will be able to expand opportunities for women; since courts are not willing to mandate increased spending, they must allow schools the flexibility to address their budget constraints.
culprit for any cuts to men's teams that have occurred. Claims that the decline in wrestling teams is due to Title IX's policies are especially unfounded. During the period from 1984-1988, Title IX's application to intercollegiate athletics was suspended due to the Supreme Court's *Grove City* decision. In that four year period, when the three-part test was not in effect, colleges and universities cut wrestling teams at a rate almost three times as high as the rate of decline during the twelve years after Title IX's application to intercollegiate athletics was firmly reestablished by the Civil Rights Restoration Act. Specifically, from 1984 to 1988, the number of NCAA institutions sponsoring men's wrestling teams dropped by 53, from 342 to 289. During the twelve years from 1988 to 2000, the number dropped by 55, from 289 to 234.110

As the foregoing makes clear, there are numerous reasons that schools choose to eliminate or reduce particular sports opportunities, including declining interest in specific sports, liability considerations, financial constraints, and choices about how to allocate budget resources among the sports teams the school wishes to sponsor.111 Any attempt to blame Title IX for a decline in some men's lower profile teams at certain schools must be rejected.

Moreover, the evidence shows that men overall have gained, and not lost, opportunities since Title IX was enacted. The number of male high school athletes increased from 3,666,917 in 1972 to 3,960,517 in 2002, while the number of male college athletes increased from 170,384 in 1972 to 208,866 in 2001.112 Additionally, the number of men's teams has also increased under Title IX. While the Title IX Commission heard witness after witness complain about the reduction in the number of men's wrestling and gymnastics teams in

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111. In fact, there is plenty of room for schools to find ways to reallocate resources within their men's programs in order to preserve men's teams from cutting or capping. The resources male athletes receive are unevenly distributed, with football and men's basketball consuming 70% of the total men's athletic operating budget at Division I-A institutions, leaving other men's sports to compete for remaining funds. Daniel L. Fulks, *Revenues and Expenses of Divisions I and II Intercollegiate Athletics Programs: Financial Trends and Relationships—1999* (2000), available at http://www.ncaa.org/library/research/ii_rev_exp/2000/ (last visited Oct. 26, 2003). Of the $3.57 million average increase in expenditures for men's Division I-A sports programs from 1998-2000, 68% of this increase, or $2.46 million, went to football. This exceeds the entire operating budget for women's Division I sports in 2000 by over $1.69 million.

recent years, it did not hear testimony about the increased number of men's soccer (up 135), baseball (up 85) or basketball (up 82) teams. Indeed, the gains in men's football alone were sufficient to make up for the loss of wrestling, gymnastics, and swimming slots within the same period.

C. The Title IX Athletics Policies Are Necessary to Address the Persistent Sex Discrimination Against Women and Girls in Athletics.

Title IX has opened many doors, and promoted enormous growth in opportunities, for both girls and women. More than half of all college students now are women. Medical schools that used to bar or limit the admission of women are now nearly 43% female, while law schools that once limited women to 7% of enrollment are now nearly 46% female. In athletics, girls and women stormed the gym doors that finally opened for them after Title IX. Today, nearly 3 million girls play high school sports (2,806,998 girls in 2002 vs. 294,000 in 1971-1972), while more than 150,000 women play college sports (150,916 women in 2001 vs. 29,977 in 1972).

Yet, despite these gains, thirty-one years after the enactment of Title IX, girls and women still do not receive equal opportunity to participate in athletics—or receive equal treatment when they are allowed to play. Women's athletic programs continue to lag behind men's programs on every measurable criterion—including participation opportunities, athletic scholarships, operating budgets, and recruiting expenditures. In Division I colleges, for example, women represent 53% of the students, but are given only 41% of the opportunities to play intercollegiate sports, only 36% of athletic operating budgets, and only 32% of the dollars spent to recruit new athletes. In fact, female participation in intercollegiate sports remains below pre-Title IX male participation. And while the Title IX Commission heard many witnesses complain about lost opportunities in men's wrestling and gymnastics, it did

115. Open to All, supra note 34, at 21 (comparing figures for 1972 to 2000).
116. See NFHS, supra note 112. See also Open to All, supra note 34, at 13-14.
117. See generally Fulks, supra note 111.
119. Id. Women also remain underrepresented in collegiate athletic employment. Only 17.9% of college athletic directors of women's programs, 12.3% of sports information directors, and 27.8% of athletic trainers are women. Women are even underrepresented as head coaches of women's teams, holding only 44% of all college jobs. Linda J. Carpenter & Vivian R. Acosta, 2002 Annual Report of Women in Intercollegiate Sports, available at http://womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/806.pdf (last visited Oct. 5, 2003) (emphasis added).
not hear about the even greater losses suffered by women’s teams in some sports—that, for example, the number of women’s gymnastics teams cut (100) has been far higher than the number of men’s gymnastics teams cut (56). Moreover, while 2,648 male wrestlers have lost college opportunities since 1981, female athletes still receive nearly 58,000 fewer college opportunities than males. Thus, for every one wrestler who has lost an opportunity in these tight budgetary times, more than twenty female athletes have been denied opportunities.

In addition, spending on men’s sports continues to increase and dominate spending on women’s sports. In Division I in 2000, for every dollar spent on women’s sports, almost two dollars were spent on men’s sports. And in 2000, male athletes received the access and opportunities that athletic scholarships provide almost 1.5 times as often as female athletes. That difference amounts to at least $133 million more per year in athletic scholarships for male athletes than female athletes.

Similar disparities persist at the high school level, where female athletes have less than 42% of the school-sponsored opportunities to play varsity sports. Male high school students still receive more than 1.1 million (40.8%) more athletic opportunities than their female counterparts (3,960,517 boys vs. 2,806,998 girls in 2002). Although national data on expenditures on boys’ and girls’ sports programs do not exist at the high school level, moreover, anecdotal evidence and court cases strongly suggest that they are not treated equally.

These facts clearly show that females remain the underrepresented gender in high school and college sports, and that the playing field is still not level for them. Strong enforcement of Title IX’s current athletics regulation and policies is critical to continue to move toward true equality of athletic opportunity.

121. Id. at 11.
122. GENDER EQUITY REPORT, supra note 118, at 19.
123. Id. at 20.
124. See NFHS, supra note 112. See also Open to All, supra note 34, at 13-14.
III. PROPOSED CHANGES TO THE ATHLETICS REGULATIONS AND POLICIES WERE UNLAWFUL AND UNWISE.

Despite thirty years of Congress' steadfast refusal to weaken Title IX's coverage of athletics, the unanimity of views in the courts that Title IX's athletics regulation and policies are lawful and appropriate, and the substantial evidence that systematic discrimination continues to limit the opportunities of women and girls in athletics, the Secretary of Education created a fifteen-member commission in June 2002 to reevaluate, and make recommendations for changes to, those policies. That Commission delivered its final report to the Secretary on February 26, 2003.

The Commission's composition and process raised concerns from the outset about the agenda it planned to pursue. First, the Commission's charge failed to ask the critical question: whether discrimination against girls and women persists, and if so, how can it be remedied. Instead, the Commission focused on addressing losses to some men's teams, and thus made no inquiry into whether Title IX's original goals have been met and, if not, why.

Second, the Commission lacked representatives of important constituencies, including Division II and Division III schools, junior and community colleges, or high school athletics programs. In fact, ten of the fifteen commissioners were from NCAA Division I-A universities (i.e., those with the largest and most expensive athletic programs with football).126 Thus, even though nearly 7 million boys and girls played high school sports and fewer than 360,000 played college sports in 2001-2002, not one person representing the athletics programs of the nation's thousands of high schools was appointed to the panel.

This omission was not remedied by the testimony the commissioners received. Very few witnesses from smaller colleges, junior colleges, high schools, or elementary schools were invited to testify. In fact, only one of the public hearings addressed high school athletics at all.127 These omissions reflected the incompleteness of the testimony overall. Moreover, testimony repeatedly requested by commissioners, such as from the author of the authoritative report by the General Accounting Office showing that men's teams and opportunities have increased over time, was not provided.

Third, the Commission was not provided information on—and therefore was not able to consider—the impact of its recommendations. As a result, the Commission's final report contains no assessment of the effect of the recommendations on participation opportunities and scholarships for female

126. See generally Open to All, supra note 34, at 53-56.
127. See id. at 50-52.
Because the commissioners were not briefed on the terms of the Department's 1996 *Clarification Letter*, moreover, they were unable to analyze the guidance that was already available in current documents or the extent to which their recommendations would change existing law. Nor was the Commission provided any in-depth analysis of the case law that uniformly upholds current policies. Thus, commissioners, no matter how fair-minded and well-meaning, were denied the information required to analyze the issues or to make responsible recommendations.

Finally, the arrangements made by the Commission for the expression of minority views were insufficient and contrary to fundamental principles of free expression. Although the Commission authorized inclusion of short statements of minority views following the recommendations on which there was dissent, it denied the dissenters any opportunity to include fuller statements of their rationales or analyses or any statement of their concerns about the drafting of other sections of the report. As a result, the Commission's final report did not reflect a full statement of the views of each of the commissioners. In response to their inability to include their positions in the text of the Commission's report, two dissenting commissioners—Julie Foudy, Captain of the U.S. national soccer team, and Donna de Varona, an Olympic champion—were forced to file a separate Minority Report to explain their concerns. The Secretary of Education declined to accept that Minority Report as an official Commission submission.

These flaws and deficiencies in the process and the report resulted in a number of recommendations for radical, and very damaging, changes to Title IX athletics policies. As set forth below, had they been implemented, some of these changes would have undermined basic civil rights principles and violated Title IX and the U.S. Constitution.

For example, several recommendations (e.g., Recommendations 14-17, 20) would have enabled schools to substantially reduce the number of athletics opportunities they accorded to their female students by permitting them to count students and athletes in new ways under the first prong of the three-part test. One recommendation would have authorized schools not to count athletic

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128. See *Open to All*, supra note 34.
129. See id.
131. This refusal made a mockery of the Secretary's promise to consider only "unanimous" Commission recommendations in evaluating changes to Department policies, since by excluding the *Minority Report*, the Secretary effectively deprived himself of any means to evaluate which recommendations were, in fact, unanimous.
opportunities they provided to male athletes by enabling schools to exclude "walk-ons" from their count of athletes—even though those students receive the actual benefits of sports participation, including coaching, training, tutoring, equipment and uniforms. Conversely, another recommendation would have permitted schools to inflate the percentage of athletic opportunities they gave to women by adding athletics opportunities that were theoretically available but were not filled by any student. Still, a third would have excluded "nontraditional" students from the count of those entitled to equal opportunity, based on the inaccurate and unlawful stereotype that students over a certain age or students who are parents are not interested in participating in sports.\footnote{See Open to All, supra note 34, at 37-39 (Recommendations 14-17, 20); Minority Report, supra note 130, at 12-15.}

These recommendations would have fundamentally, and unlawfully, changed the analytical underpinnings of prong one of the three-part test. As set forth above, prong one is premised on the principle that a school will have met Title IX's participation requirements if every student, regardless of gender, has an equal chance to play sports. To have authorized schools to pretend that certain students were not playing sports—or to assume that other students would never be interested in playing sports—would have perverted the approach of the three-part test: that schools can either provide the equal opportunity required under prong one or can excuse their failure to do so in the ways set forth in prongs two and three. These recommendations would have authorized schools to comply with the proportionality standard without actually providing equal opportunity to their female students—and without satisfying any other prong of the three-part test, thus completely undermining Title IX's guarantee of equal rights.

A similar flaw infected two other recommendations that would have authorized schools or the Secretary of Education to set "variances" from proportionality—i.e., uniform percentages by which schools could fall short of equal opportunity but still be found in compliance with prong one of the three-part test.\footnote{See Open to All, supra note 34, at 37 (Recommendation 14).} By effectively allowing schools to set ceilings on the percentage of athletics opportunities they would have been required to allot to their female students, these recommendations would have permitted schools to comply with Title IX without providing equal opportunity or justifying their failure to do so.

Recommendation 12, which could have led to the exclusion of teams funded by private funds from the reach of Title IX,\footnote{Id. at 36 (Recommendation 12, recommending study of changes to Department rules on} would similarly have
violated the law. As courts have made clear in this and other contexts, there is no economic defense to discrimination.\textsuperscript{135} Nothing in a school's acceptance of private funds exempts it from its obligation to ensure that students are treated equally in athletics opportunities offered under its auspices. Once the school accepts the funds or the in-kind contributions, they become part of the school's program, thus making the discrimination the school's own. Moreover, excluding privately funded teams is inconsistent with the purpose of Title IX because it perpetuates past and continuing discrimination. Because schools offered only men's teams for so long, men have more of a donor base to fund teams. Decades of alumni male athletes are ready to donate, while comparatively few alumni female athletes exist. Allowing men to make unchecked donations without providing women with comparable teams and comparable benefits perpetuates this disparity—a disparity caused by the school's own prior sex discrimination.

Finally, the Commission's recommendations regarding "relative interests" and "interest surveys"\textsuperscript{136} were also flatly inconsistent with the law. As discussed in detail in Section II(B), supra, allocating athletic participation opportunities based upon the "relative interests" of the sexes in athletics would merely have perpetuated existing discrimination and "undermine[d] the remedial purposes of Title IX by limiting required program expansion for the under represented sex to the status quo level of relative interests."\textsuperscript{137} As the Cohen II court recognized, "Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience."\textsuperscript{138}

In addition, the use of interest surveys to "measure" the purportedly relative levels of interest suffers from fundamental flaws. Most colleges do not draw their athletes from their existing student populations. They actively recruit them for the purpose of playing sports. At the Division I and II levels, and often at the Division III level, this recruitment is national in scope so that athletes come from all over the nation and all over the world. Thus, men play college volleyball in states where high school boys do not, and women play college field hockey in states where high school girls do not. Because so many more high school athletes from this national talent pool play sports and because so few college opportunities are available, any college that starts a sport and recruits athletes will promptly find those with the interest and ability

\textsuperscript{135} Chalenor, 291 F.3d at 1048. "A school may not skirt the requirement of providing both sexes equal opportunity in athletic programs by providing one sex more than substantially proportionate opportunity through the guide of 'outside funding.'" \textit{Id.} (citation omitted).

\textsuperscript{136} See \textit{Open to All}, supra note 34, at 38-39 (Recommendations 18-19).

\textsuperscript{137} Cohen II, 101 F.3d at 174 (citation omitted).

\textsuperscript{138} \textit{Id.} at 179.
to fill a team. The current large disparity in recruiting dollars between men’s
and women’s college sports (68% of all recruiting dollars go to recruit male
athletes, while only 32% go to recruit female athletes\(^{139}\)) demonstrates how
much more attention colleges have paid to finding men with the interest and
ability to play sports and bringing them to campus. To assert that interest
surveys of students measure the extent of interest that would exist were
women to be recruited and offered opportunities non-discriminatorily simply
ignores this reality.

Moreover, use of interest surveys as a substitute for prong one of the
three-part test would have violated basic civil rights law by forcing women to
prove that they were entitled to (i.e., interested in) equal opportunity before
being able to receive it. Our nation’s civil rights regimen has never depended
—and should never depend—on the results of a popularity contest. In fact, as
history has shown time and time again, women have flocked to fill educational
and employment opportunities opened to them after centuries of belief that
they were either not interested in or “fit” for such roles. This history is the
same for sports, as women and girls overwhelmingly rushed through the doors
that Title IX finally opened for them. To use a sports metaphor from the
movie Field of Dreams, “If you build it, they will come.” If schools provide
the opportunities, women and girls will be there to fill them.

In sum, the Commission recommendations that would have modified or
weakened existing law would have imposed adverse consequences on the
women and girls whom Title IX was intended to protect, undermined
longstanding civil rights protections, and violated Title IX and basic equal
protection principles. The Department of Education was right to reject them.

CONCLUSION

Congress, the courts, and the Department of Education have all repeatedly
and uniformly upheld the Title IX athletics regulations and policies, including
the three-part test for measuring equal opportunity in athletic participation. As
set forth above, wrestlers, football coaches, and other advocates for men’s
sports have all repeatedly attacked Title IX over the years, tried to persuade
Congress to amend it, and tried to convince courts to invalidate it. Each
attempt has failed.

Congress has clearly and consistently expressed that Title IX’s current
regulations and policies—in place for over two decades—accurately reflect its
intent and the remedial purpose of the statute. The judiciary has consistently
affirmed that expression and has uniformly rejected challenges to the law as

\(^{139}\) GENDER EQUITY REPORT, supra note 118, at 20.
currently written and applied. Each Department of Education, through both Republican and Democratic administrations, has similarly defended and maintained the present law.

It is time to permanently end attacks on the Title IX athletics regulations and policies and to move forward with the unfinished work of the law: ensuring equal opportunity for women and girls throughout their education, including in athletics. We hope and expect that the Department will now focus on strong enforcement of the law—on educating schools about their legal obligations and on ensuring that those obligations are met, through imposition of sanctions, if necessary—so that women and girls can finally achieve the equal opportunity promised them more than thirty years ago.

### TITLE IX HISTORY

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
<th>Description</th>
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<tbody>
<tr>
<td>1972</td>
<td>Title IX enacted</td>
<td>President Richard Nixon signed Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.) into law on June 23, 1972</td>
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<tr>
<td>1974</td>
<td>Tower Amendment proposed and rejected</td>
<td>May 20, 1974. Senator Tower introduced an amendment to exempt sports that produced gross revenue or donations from Title IX compliance determinations. 120 Cong. Rec. 15,322-15,323 (1974). Amendment rejected in committee; Javits Amendment was approved instead. In supporting the Tower Amendment, Sen. Hruska cited a letter from University of Nebraska president D.B. Varner, which questioned women's interest in sports participation. 120 Cong. Rec. 15,340 (1974)</td>
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<td>1974</td>
<td>HEW issued draft Title IX regulations</td>
<td>June 20, 1974: HEW published proposed Title IX regulations in Federal Register for notice and comment. HEW received more than 10,000 comments (most on athletics)</td>
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<td>1974</td>
<td>Javits Amendment enacted</td>
<td>July 1, 1974: Senator Javits proposed an alternative to the Tower Amendment. It required that HEW issue Title IX regulations that included &quot;with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.&quot; Sen.Conf.Rep.No. 1026, 93rd Cong., 2nd Sess. 4271 (1974)</td>
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<td>1974</td>
<td>First Title IX complaints</td>
<td>First Title IX athletics complaints filed with OCR against University of Michigan, University of Wisconsin, and University of Minnesota-Twin Cities</td>
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<td>Year</td>
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| 1975 | HEW issued Title IX regulations | May 27, 1975: President Ford signed Title IX regulations.  
The Title IX regulations were set to become effective as law on July 21, 1975, unless the Senate and House adopted concurrent resolutions to disapprove them. Several attempts to disapprove the regulations – and even Title IX itself – failed.  
At the time, HEW's final education regulations were subject to congressional review under §431 of the General Education Provision Act. Congress could reject them within 45 days of their issuance by enacting a concurrent resolution. The act was later deemed unconstitutional in 1980.  
<table>
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<th>1975</th>
<th>Bills to change Title IX died in committee</th>
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<td></td>
<td>Title IX opponents used the debates over the Title IX regulations to try to change Title IX itself.</td>
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<td>July 8, 1975: Rep. O'Hara introduced H.R. 8394 &amp; 8395 regarding the use of sports revenues. Bills would have allowed schools to use money earned from revenue-producing sports only on that sport or first on that sport, regardless of inequities. Bills were reported to the full committee on 12-6 vote. Died in full committee. 121 Cong.Rec. 21,685 (1975)</td>
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<td>July 15, 1975: Sen. Tower reintroduced his &quot;Tower Amendment&quot; from 1974 as S.2106. (&quot;Tower II&quot;). The bill would have exempted revenue-producing sports from Title IX. Died in committee. 121 Cong.Rec. 22,777 (1975)</td>
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<td>July 21, 1975: Sens. Helms, Bartlett, &amp; Hruska introduced S. 2146 to prohibit the application of the Title IX regulations to athletics. Died/Defeated.</td>
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<td>1975 Congressional Almanac 661 et seq.</td>
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<td>1975</td>
<td>Title IX regulations became effective as law</td>
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<td>1976</td>
<td>Bill to limit Title IX to graduation requirement programs defeated</td>
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<td>1976</td>
<td>NCAA law suit</td>
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<td>Title IX compliance deadline</td>
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<td>1977</td>
<td>Bill to remove athletics from Title IX died</td>
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<td>1978</td>
<td>Title IX compliance deadline</td>
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<td>1978</td>
<td>HEW issued draft Title IX athletics policy interpretation</td>
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<td>1979</td>
<td>HEW issued final Title IX policy interpretation</td>
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<td>1979</td>
<td>Cannon v. University of Chicago, 441 U.S. 677 (1979)</td>
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<td>1982</td>
<td>OCR Guidance for Letters of Findings</td>
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<td>1984</td>
<td>Grove City v. Bell, 465 U.S. 555 (1984)</td>
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<td>1986</td>
<td>Civil Rights Remedies Equalization Act</td>
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<td>1987</td>
<td>Title IX Grievance Procedures Manual</td>
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<td>1992</td>
<td>NCAA Gender Equity Study</td>
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<td>1994</td>
<td>Equity in Athletics Disclosure Act, 20 USC</td>
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<td>1995</td>
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