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COMMENTS ON TITLE IX

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Title IX is a civil rights law.¹ It was passed as part of the Education Laws in 1972 after a thorough investigation showed a distinct pattern of sex discrimination in the allocation of academic and athletic opportunity throughout American education.² This law applies to all departments, academic and athletic, in all educational institutions that receive Federal money.³ This measure includes essentially every school, secondary and collegiate, in the country.⁴ Scholarships for women, which at one time did not exist, have increased dramatically since Title IX became law.⁵ The sex-based inequality was so tilted that before the law changed, swimmer Donna de Varona, who won two gold medals in the 1964 Olympics, could not find a college scholarship for swimming, as such scholarships did not exist for women.⁶ Two years after Title IX became law, less than fifty athletic scholarships were awarded to women, fifteen of those at the University of Miami (Florida).⁷ Today, women receive over 1/3 of the scholarships granted and there are over 200,000 participation opportunities.⁸

Title IX is a fairly simple law to understand.

“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 educational program or activity receiving Federal financial assistance”⁹

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1. U.S. Dep't of Educ., *Title IX: A Sea of Change in Gender Equity In Education*, at <http://www.ed.gov/pubs/TitleIX/part3.html> (last modified July 10, 1997) [hereinafter *A Sea of Change*].

2. *Id.*

3. 20 U.S.C. §§ 1681-1688 (2000).

4. *A Sea of Change*, *supra* note 1.

5. U.S. Dep't of Educ., *Achieving Success Under Title IX*, at <http://www.ed.gov/pubs/TitleIX/part5.html> (last modified Nov. 9 2003) [hereinafter *Achieving Success*].

6. *Id.*

7. *Id.*

8. *Id.*

9. 20 U.S.C. § 1681(a).

Compliance with Title IX is accomplished by meeting any of three standards.¹⁰ First is the Proportionality Test, which says that participation by the underrepresented group is approximately the same as the proportion of the student body represented by that group.¹¹ Second, compliance is achieved if steady progress towards proportionality can be shown,¹² and third, the needs of the members of the underrepresented group are being met.¹³

Sport is not mentioned in the law, except as a subset of “programs or activities.”¹⁴ The law is designed to eliminate structural discrimination based on sex in all areas of education and the effects have been dramatic. In 1972, women received 9% of medical degrees, but received 38% in 1994; 7% of law degrees in 1972 and 43% in 1994; and where women received 25% of doctoral degrees going to U.S. citizens in 1972, women received 44% in 1994.¹⁵ These numbers are increasing.¹⁶

The statistics show a beneficial result of Title IX that cannot be disputed. So too are the statistics that show male athletes receive a disproportionate share of the college athletic money pie. Yet, even in the face of a continuing pattern of discrimination, in 2002, Secretary of Education Rod Paige established the Commission on Opportunity in Athletics to “collect information, analyze issues, and obtain broad public input directed at improving the application of current federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX.”¹⁷ Secretary Paige was intent, it seems, to change Title IX so that compliance is accomplished by allowing 55% of athletic department spending to be on men’s sports and 45% on women’s sports. Secretary Paige was contemplating a structure that placed a higher value on males than on females, although females constituted a majority of college students. This proposal was an attempt to freeze in place current ratios where 53% of Division I students are female,¹⁸ but who receive only 41% of participation

10. *Achieving Success*, *supra* note 5.

11. See generally *id.*

12. *Id.*

13. See generally *id.*

14. See generally 20 U.S.C. § 1681(a).

15. U.S. Dep’t of Educ., *Indicators of Progress Toward Equal Educational Opportunity Since Title IX*, at <http://www.ed.gov/pubs/TitleIX/part2.html> (last modified July 10, 1997).

16. See *Achieving Success*, *supra* note 5.

17. Nat’l Coalition for Women & Girls in Educ., *Title IX Athletics Policies: Issues and Data for Education Decision Makers*, (Aug. 27, 2003), available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=914>.

18. Ben Feller, *Title IX Panel Members Plan Minority Report*, CINCINNATI ENQUIRER, (Feb. 25, 2003), available at http://www.enquirer.com/editions/2003/02/25/spt_wwwspttitleix25.html.

opportunities, 43% of scholarships, 36% of athletic department funding, and 32% of recruiting dollars.¹⁹

It is fairly obvious that the Commission's work was inspired by *National Wrestling Coaches Ass'n v. Department of Education*,²⁰ (more below) which claimed that Title IX was forcing colleges to cut men's sports to comply with the Proportionality Test.²¹ The wrestling coaches claimed that the Proportionality Test mandated quotas,²² the favorite fulcrum for civil rights law opponents when they attack the various civil rights laws. The wrestling coaches wanted no less than to allow college athletic directors to allocate money disproportionately so that their teams could be protected. The basic flaw in this argument is that men's opportunities have expanded since Title IX for both men's teams and participants. The facts show that 170,384 men participated in collegiate varsity sports in 1972, and 208,866 in 2001.²³ The demise of wrestling programs is due to the reduction in high school wrestling and interest in wrestling generally. Here, the facts are that wrestling at the high school level decreased from 355,160 participants in 1977, to 235,973 participants in 1999.²⁴ The wrestling coaches' problem is a lack of interest in wrestling, not Title IX.

The preliminary reports that came out of this commission were disturbing to Title IX advocates as it seemed the Secretary was about to recommend that the application of Title IX be altered to give males a distinct advantage over female athletes. It is most curious that this occurred at a time when the Supreme Court allowed colleges and graduate schools to grant advantages in admission to underrepresented groups based on race, while the administration was attempting to grant an advantage to the most represented group in sports, males, based on sex.

The political fallout from such an action would have been catastrophic. After careful consideration of the full case, the administration has decided to leave Title IX alone. A wise move, but is there a continuing problem there? Title IX compliance is still lagging and there are things that must be done to

19. Welch Suggs, *More Women Participate In Intercollegiate Athletics*, CHRON. HIGHER EDUC., (May 21, 1999), available at <http://chronicle.com/free/v45/i37/37a00101.htm>.

20. 263 F. Supp. 2d 82 (D.C. 2003).

21. See generally *id.* at 85.

22. See generally *id.*

23. *The Battle for Gender Equity in Athletics: Title IX at Thirty* (Nat'l Women's L.Ctr. (NWLC), Wash., D.C.), June, 2002 at 8, available at <http://www.nwlc.org/pdf/Battle%20for%20Gender%20Equity%20in%20Athletics%20Report.pdf>.

24. *Participation Study 1971-01* (Nat'l Fed'n State High School Ass'ns, Indianapolis, Ind.) at 17, available at http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf (last visited Nov. 8, 2003).

continue the fine work done so far. At the heart of the problem is the financial pressure that college athletic directors come under to balance budgets and comply with federal law.

The solution to the athletic directors' problem and the issues raised in *National Wrestling Coaches Ass'n* can be solved by the National Collegiate Athletic Association (NCAA), which oversees college sports in America and the 210,989 men and 150,185 women competing under its auspices.²⁵ The NCAA controls scholarships, sets academic standards for athletes, and determines team structure. Basically, a student-athlete cannot receive benefits, salary, expense payments, etc. not available to regular students, but a scholarship can be granted for athletic performance. The cost of the scholarship is paid by the athletic department, just as if the student athlete were a fee-paying student. There are no discounts for punting well. The penalties assessed against teams that violate this rule are severe in order to preserve institutional control over competition. The NCAA is smart, powerful, successful, and is without significant challenge. But the wrestling coaches' lawsuit followed by Secretary Paige's inquiry, point to its biggest problem: compliance by its members with Title IX.

The lawsuit, *National Wrestling Coaches Ass'n*, which was dismissed on June 11, 2003 by Judge Emmett Sullivan of the District Court for the District of Columbia,²⁶ indicated the level of misinformation circulating about the impact of Title IX.²⁷ This case, which was brought by the coaches' association, joined by the Marquette Wrestling Club,²⁸ the Committee to Save Bucknell Wrestling,²⁹ the Yale Wrestling Association,³⁰ and the National Coalition for Athletics Equity, claimed that Title IX calls for quotas and that men's wrestling programs are injured by this law.³¹ The suit claimed that the reason wrestling programs are being eliminated is that Title IX forces colleges to reduce spending or eliminate wrestling to comply with the gender proportionality the law requires.³² The coaches' association wanted the law changed. This is a law that says that 50% of the country shall have the same rights as the other 50%. Former Senator Paul Wellstone of Minnesota told me

25. NCAA, *Wrestling Coaches Wage Legal Challenge on Title IX*, NCAA.ORG, at <http://www.ncaa.org/news/2002/20020204/active/3903n02.html> (last visited Nov. 9, 2003).

26. *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 85.

27. *See id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Nat'l Wrestling Coaches Ass'n*, 263 F. Supp. 2d at 85.

32. *Id.*

that Title IX has the “aura of permanence.” Senators Ted Stevens of Alaska and Joseph Biden of Delaware said the same thing at a Women’s Sports Foundation conference in 2001. The coaches are simply barking up the wrong tree because the problem lies elsewhere. The problem that the wrestlers are trying to solve is caused by growing spending in men’s programs and is unrelated to the women’s programs. Expenses for football at NCAA schools are soaring, and the money to pay the football tab has to come from somewhere, hence, the cut in the wrestling programs (and gymnastics, for example).

Football and basketball generate the largest amount of revenue for the NCAA and its most successful member institutions.³³ Consequently, the basketball and football programs in Division I are allowed the largest number of scholarships by the NCAA: eighty-five full scholarships for football players and thirteen for basketball players.³⁴ The basketball number is reasonable since most teams dress twelve to fifteen players, which compares to NBA rosters. But the allotment of football scholarships makes no sense. National Football League teams are restricted to forty-five players who “suit up,” eight on injured reserve, and five on a “taxi” squad.³⁵ If the NFL, with its longer season and very rigorous competition, can make do with fifty-eight players under control, I propose that the NCAA allow only sixty full football scholarships. The benefits of this would be significant. For one thing, providing scholarships to sixty rather than eighty-five players would cut expenses by requiring fewer trainers, coaches, facilities, and related support staff. A reduction in roster size would also result in a redistribution of talent throughout collegiate football. This would make conferences more competitive and, thus, have the effect of generating more money for additional schools. Furthermore, the twenty-five scholarships eliminated from the football program could then be allocated to other sports, even allowing perhaps fifty to a hundred partial scholarships to be granted for the same cost to the athletic department. If Division I football teams were restricted to sixty full scholarships, men’s athletic departments would not need to cut wrestling or other sports.

What is most important here is that competitive balance in football would be increased by allocating players more equally among the teams. In states

33. Rick Maloney, *UB Athletics Scrambles to Repair Image*, at <http://beta1.bizjournals.com/buffalo/stories/1999/12/13/story1.html?page=2> (last visited Nov. 9, 2003).

34. Bill Brill, *The Real Issues Are Silenced In Title IX Talks*, NCAA NEWS, July 22, 2003, available at <http://www.ncaa.org/news/2002/20020722/editorial/3915n21.html>.

35. Scout Camp Pro Football Reg'l Combines, *League Summary*, at <http://www.combines.com/leagues/nfl.asp> (last visited Nov. 9, 2003).

like Florida, Pennsylvania, Michigan, and California, local coaches do not recruit players, they select them. With the large "under control" limits each team has, the better players are locked up by the major colleges. Penalties assessed against players for transferring from one college to another make it even more difficult for a proper allocation to occur as happens in professional sports, where player drafts and limited roster sizes compels more equitable distribution. If only sixty players could be controlled, that means that twenty-five from each major school would go elsewhere, with no diminution in the quality of that team's performance and the enhancement of other teams' performances. In short, this proposed rule makes a lot of sense and should be adopted soon.

The NCAA has in its power the ability to increase competitive balance in Division I football, improve the financial performance of athletic departments, keep wrestling, and maintain compliance with Title IX. Reducing scholarships would allow the benefits described above. Most significantly, most football teams and 100% of the conferences would benefit. Just as professional leagues limit roster size to promote competition, collegiate conferences would enjoy enhanced competitive balance.

The NCAA reaches into virtually every corner of the nation and controls nearly a half-million athletes. It also is a great supporter of Title IX and pushes compliance as a central canon of its operation. By taking the simple step of reducing scholarships for football, the NCAA can improve its business and satisfy those wrestling coaches who have taken on the U.S. government in a futile effort to gain what the NCAA has in its hands to grant them: continuity of operation.

Having solved the wrestling coaches' problem, let's take a look at Title IX's impact on our lives. Because of this law, we live in a world where sex distinctions are being blurred. I remember an old lawyer telling me that he admitted that "girls" make great law students, but doubted that they would be great lawyers. He was right on the first point, but sadly wrong on the second. From my experience, some of the greatest lawyers I deal with on a daily basis are women, and their sex is a non-issue. The same is true in medicine and business, where women are running major companies at an ever-increasing number.

There is, however, continuing criticism of female sports as being less attractive than male games. The WNBA is cited as an example. However, we must remember that the game is evolving. I saw early WNBA games and recently watched another. That game is evolving very well and the WNBA game is much improved in a few short years. I also watched an archived NBA game from the 1970's on cable TV and noted that the game as played then is dismal compared to the game today.

The point that we should be looking for here is that Title IX changed the way society deals with sex in just the same way that it changed the way we deal with race, national origin, and other immutable human characteristics. We can see the benefits to society from this law and now a generation of female athletes is coming to the front rank that has lived its entire life with the entitlement. Women have played on the male Professional Golf Association tour, and some are now hitting the ball off the tee as well as men. The coming Athens Olympic Games may have more female athletes than male. After thirty years of learning how to train, play, and coach females, the physical limits are diminishing. I have a female colleague who bench presses 210 pounds, and that is just for exercise. In short, the false images of females as athletes are being erased as conspicuous performances by stellar athletes becomes normal.

Title IX was passed at the end of the civil rights legislating period of the 1960's. It is part of the movement that recently celebrated the fortieth anniversary of Martin Luther King's "I Have A Dream" speech. To paraphrase Dr. King, we have a world where people are not known for their sex, but are known for their ability to run, shoot, lift, and hit. Title IX has moved America to a more balanced, equitable, and just society that benefits greatly from now being able to fully enjoy the considerable talents of all of its citizens without reference to sex. The very thought put forward by the Secretary of Education that this movement should be altered, so that one sex be favored over another, is anathema to all who consider the merits of this matter. It is good that the clearer thinkers in Washington have stopped the insanity and moved to protect Title IX in all of its magnificence.

Statistics continue to show that colleges continue to spend lavishly on football and basketball programs and continue to cut other men's teams. Of course, they also add men's teams in other sports. The facts show that such lavish spending, which does not improve either the basketball or football teams, may itself be a problem. The solution here is clear. A more reasoned allocation of resources among men's sports will allow the continuing improvement in Title IX compliance and allow for retention of wrestling programs as well as the continuing expansion of men's teams.

