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WRESTLING WITH TITLE IX

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President Nixon signed Title IX of the Education Amendments into law in June 1972. Title IX states: “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”¹ Following that 1972 date, the then Department of Health Education and Welfare was charged with developing guidelines for implementing Title IX. The result of that process was the 1975 Title IX Regulations, followed in 1979 by the Policy Interpretations; both of which have served to describe and operationalize Title IX compliance.

Relative to educational institutions and school sports, enacting Title IX meant that schools could no longer discriminate on the basis of sex in any educational program or activity receiving federal funds, including athletics. This link to federal funds (i.e., federal money funneled directly to schools and/or indirectly via student support funds, such as student loans, etc.) is what ties Title IX to virtually all public and most private educational institutions.

According to Indiana Senator Birch Bayh, the principal Senate sponsor of Title IX, Title IX was put forth as “a strong and comprehensive measure to provide women with solid legal protection from the persistent, pernicious discrimination . . . serving to perpetuate second-class citizenship”² In essence, Title IX was designed to proactively address the historical inequities associated with culturally embedded sex discrimination, and thereby ensure gender equity in educational opportunities, including school sports. However, as the history and evolving reality of Title IX illustrate, law only sets general policy, and in as much as the consequences for non-compliance can be avoided and/or tolerated, laws cannot, and do not, compel action.³ And so it is that over thirty years later, many, if not most, schools are still “wrestling” with Title IX compliance. It should be a simple matter really; inattention and resistance to gender equity is morally, ethically, and at least for now, still

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1. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2000).

2. ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* 6 (1994).

3. Jay D. Scribner, *The Politics of Education: 76th Yearbook of the National Society for the Study of Education, Part II* (1977).

legally wrong.

On June 27, 2002, U.S. Secretary of Education Rod Paige created the Secretary of Education's Commission on Opportunity in Athletics ("the Commission"). The Commission was comprised of fifteen members (eight women and seven men), of which thirteen to fifteen (depending on criteria considerations) either came from, had experience with, or worked in NCAA Division I settings. Following a series of "Town-Hall" meetings and testimony held in Atlanta, Chicago, Colorado Springs, and San Diego, and four days of Commission meetings and deliberations, on February 28, 2003, Secretary Paige was presented with the Commission's findings and recommendations in a report titled *Open to All: Title IX at Thirty*.⁴ Simultaneously, Donna de Varona and Julie Foudy (both Commission members) submitted a report titled *Minority Views on the Report of the Commission on Opportunity in Athletics*.⁵ It stated: "After careful review and deliberation and unsuccessful efforts to include adequate discussion of our minority views within the majority report, we have reached the conclusion that we cannot join the report of the Commission."⁶ After receiving the reports, the Secretary stated that he would consider only the "unanimous" recommendations; although in reality, he was pretty much free to act, or not act, as he saw fit. The ball had officially been put in play.

Now, before I go on, a little personal perspective might be helpful. I was a successful athlete at the community, high school, and collegiate levels. In college, I was a four-year All American, competing in AIAW, NAIA, and NCAA Division III national collegiate swimming championships. I was also an Academic All American. During and after college, I coached (*men* and *women*) at the club, high school, and collegiate levels (NCAA Division I, NAIA, and NCAA Division III). I have had the great pleasure of coaching ninety-eight All Americans & Honorable Mention All Americans, nineteen Academic All Americans, and nine different athletes to thirteen individual collegiate national titles. I have also worked in athletic administration as an assistant athletic director at the NAIA and NCAA Division III levels, and since 1992 have committed considerable personal and professional time to studying Title IX. I have been involved in a Title IX related lawsuit, and have written, presented, and consulted fairly extensively on gender equity in

4. The Secretary of Education's Commission on Opportunity in Athletics, "*Open to All, Title IX at Thirty*" (Feb. 28, 2003) [hereinafter *Open to All*]. The complete text of *Open to All* is included within this publication.

5. Donna de Varona & Julie Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, Feb. 2003, at 19 [hereinafter "*Minority Report*"]. The complete text of *Minority Report* is included within this publication.

6. *Id.* at 1.

athletics and Title IX compliance (my recently released book, *More than a Game: One Woman's Fight for Gender Equity in Sport*,⁷ addresses Title IX from both personal and professional perspectives). I am currently a tenured associate professor and chair of the Idaho State University – College of Education, Department of Educational Leadership. My area of academic expertise focuses on educational equity and social justice. Finally, and most recently, I have read all 3,338 pages of the public transcripts of the Commission meetings and participated along side Ted Leland (co-chair of the Commission) in a Graduate Symposium titled: *Title IX: The Past, Present & Future*. With all that in mind, I have a few thoughts to share.

THE COMMISSION

My take is that the Commission was intentionally composed primarily of a select group of individuals with an NCAA Division I agenda to alleviate Title IX compliance pressure. Any attempt to claim otherwise (i.e., “*Open to All*”) is, in my view, simply and unequivocally a pretext.

The Commission membership overwhelmingly represented an NCAA Division I perspective to the virtual exclusion of other stakeholder groups (NCAA Division II, NCAA Division III, NAIA, Junior College, High School, etc.). A Division I perspective is not, in and of itself, a bad thing. It is, however, a limited thing, and the inability of commissioners to relate effectively to Title IX issues from a perspective other than their own was repeatedly made clear by the commissioners’ testimony and comments.

Commission testimony, contrary to the notion of “*Open to All*,” was predetermined and scripted. Individuals wishing to speak during the various town hall meetings (invited speakers) applied to, and were screened by, the Opportunity in Athletics Commission Office, which is operated through the U.S. Department of Education. Interestingly, the “change Title IX testimony” dominated by a ratio of two to one. Finally, despite repeated requests by some of the commissioners, expert testimony from the U.S. General Accounting Office (GAO) regarding up-to-date sport participation trends—trends that would have attached concrete numbers to the reality of men’s sport opportunity gains—was not allowed.

The final report, *Open to All: Title IX at Thirty*,⁸ relates a series of findings and recommendations, which although generally responsive to most of the questions posed by U.S. Secretary Paige, with all its wiggly words and

7. CYNTHIA LEE A. PEMBERTON & DONNA DE VARONA, *MORE THAN A GAME: ONE WOMAN'S FIGHT FOR GENDER EQUITY IN SPORT* (2002).

8. *Open to All*, *supra* note 4.

incomplete "truths," gives short shrift to the ongoing discrimination perpetrated against women and girls, while lamenting losses to men's minor sports and glossing over the *fact* that men's major sports (*read*: football and basketball) have experienced greater gains (in numbers and dollars) than the combined losses experienced by men's minor sports (*read*: wrestling, swimming, gymnastics, etc.). Not to mention that: (a) the legitimacy of the questions posed to the Commission were and are at issue. For example, "Are Title IX standards for assessing equal opportunity in athletics working to promote opportunities for male and female athletes?" has little relation to Title IX. Title IX, as quoted above, simply requires the absence of discrimination, which is not the same thing as promoting athletic opportunities; and (b) none of the recommendations explicitly or implicitly do anything to "bring back" sport losses. What is gone is gone, and sticking it to the girls will not bring it back.

TITLE IX COMPLIANCE

At the risk of redundancy, here is the gist of what Title IX compliance means. Compliance is assessed in three broad areas: interest and abilities, athletic financial aid, and other program areas.

The first area, interest and abilities, has three prongs: (a) substantial proportionality, which asks whether or not the athletic participation numbers are substantially proportionate to enrollment numbers; (b) history and continuing practice of program expansion for the under-represented sex; and (c) full and effective accommodation of the expressed interest and abilities of the under-represented sex. A school need comply with any, and only, *one* of the three prongs.

The first prong can be readily calculated. Title IX proponents cite women's sport growth as evidence that indeed, "if you build it; they will come." Title IX opponents claim that despite the tremendous growth of women's sport interest and abilities since Title IX, women and girls simply are not as interested in sports as men and boys and, therefore, tying compliance to mirroring enrollment percentages is not fair to males. History is rife with examples of myths grounded in the maintenance of a discriminatory status quo, not the least of which dealt with the notion that education was simply too much for the delicate female constitution. Today, despite the fact that women were not even allowed to attend colleges and universities until the latter half of the 1800s, females outnumber males among the undergraduate student population.⁹ Hence, the problem with substantial proportionality, an idea born

9. U.S. Department of Education, *Getting There: A Report for National College Week* (1999),

of the College Football Coaches Association and grounded in the notion that women would never attend colleges in numbers “substantially” close to men. Oops!

History and continuing practice (the second prong) is designed to allow institutions to demonstrate a track record and ongoing practice of program expansion for the under-represented sex. It is less concrete than substantial proportionality, and schools often have trouble demonstrating the continuing practice aspect. Creating a school/sport chronology is an interesting and enlightening student assignment – one my students have engaged a number of times. In general, what typically becomes clear is that schools can show a history from around 1972 to 1978 of program development for women and girls, and then have a gap in program expansion until the late 1980s–early 1990s. Interestingly, this gap typically corresponds to the time period during which Title IX enforcement was lax or non-existent in response to the Supreme Court’s *Grove City* decision.¹⁰ The *Grove City* decision effectively removed athletics from Title IX’s purview from 1980 to about 1988. Around 1992 forward (the time of another Supreme Court Case – *Franklin v. Gwinnett*,¹¹ through which it became clear that damages could be awarded for failure to comply with Title IX), school/sport chronologies often show renewed program expansion efforts. As a result, instead of a history and continuing practice, school/sport chronologies typically reveal a history of program expansion for the under-represented sex followed by a somewhat recent growth trend, with striking correlation to the “loaded gun” time-line of Title IX compliance.

Full and effective accommodation of expressed interest and abilities (the third prong) is, like Prong Two, somewhat fuzzy to define. In general, the idea is that if the expressed sport interest and abilities of the under-represented sex are fully accommodated, then it is okay if participation numbers are disparate. In this area there are three things to consider: (a) is there sufficient interest to form a team; (b) is there sufficient ability; and (c) is there sufficient competition in the school’s “normal” competitive region.

The question that arises is how to assess interest and ability. The courts have been pretty clear, and have disallowed efforts to limit surveys to school-based interest and ability on the grounds that responses would naturally mirror school sport offerings and recruiting efforts, as well as ongoing socio-cultural bias and sex-based stereotypes, which would act to freeze in place the status quo. With this in mind, interest and ability considerations need to include

available at <http://www.ed.gov/PDFDocs/collegeweek.pdf> (last visited July 14, 2003).

10. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

11. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

community sport groups (like local swim teams), pre-kindergarten through high school sport offerings, college and university intramural and club sports, as well as the interest and abilities as expressed by incoming freshmen and transfer students.

Prongs One, Two, and Three are all given equal weight in the eyes of the Office for Civil Rights. *Schools need not comply with all three, any one will do.* Compliance with Prongs Two and/or Three requires more work to prove on the part of the school, but is doable and is acceptable under Title IX. In fact, among the seventy-four cases reviewed by the U.S. Department of Education from 1994 through 1998, over seventy percent were found to be in compliance using Prongs Two or Three.¹²

Area two, athletic financial aid, pretty much applies only to colleges and universities. It is a simple numerical calculation that requires athletic financial aid to be allocated within 1% of athletic participation numbers. Now think about that for a minute: awarding money in proportion to existing athletic participation. That means if 60% of your athletes are male and 40% female, then males can get 60% of the athletic scholarship dollars (actually 61%). Not terribly progressive is it?

Finally, the third area, other program areas, often termed the “laundry list,” is one rarely talked about and fairly blatant (particularly at the high school level) when it comes to disparate treatment. The laundry list includes equipment and supplies, scheduling of games and practice,

travel and per diem allowance, tutors, coaches, locker rooms, practice and competition facilities, medical and training facilities, housing and dining facilities, publicity, recruitment of student-athletes, and support services. This is the compliance area that often comes up when the myth of equal spending is touted. *Title IX does not require equal spending, what it requires is equitable accommodation.* This means it is perfectly fine to follow common sense and good judgment and spend more to outfit a male football player than a female soccer player or swimmer. What is not okay is outfitting the latter to a lesser degree (e.g., uniform, shoes, pads, etc. for football, while the female soccer players have to buy their own sport shoes). It is perfectly fine to accept booster money and provide an end of the season banquet for the state champion football team, but it is not okay to tell the state champion women’s soccer team that they don’t get a similar banquet unless there is a booster willing to

12. U.S. GEN. ACCT. OFF., NO. 01-128, GENDER EQUITY: MEN’S AND WOMEN’S PARTICIPATION IN HIGHER EDUCATION (2000), available at <http://www.gao.gov/new.items/d01128.pdf> (last visited Oct. 23, 2003); *Title IX Athletics Policies: Issues and Data for Decision Makers* (Am. Ass’n of Univ. Women (AAUW)/Nat’l Coalition for Women and Girls in Educ., Wash., D.C.), Aug. 2002.

come forward and foot-the-bill. The list of examples could go on and on, but suffice it to say that relative to each of the program areas identified in the laundry list, the accommodation must be substantially equitable regardless of the source of funding (equity does not however mean identical). A good way to test whether or not this area of Title IX compliance is being met is simply to review the scenario by trading places and asking if everybody would still be as happy.

MYTHS & ISSUES

There are lots of myths and issues surrounding Title IX, many of which have been addressed above, but a few key points remain to be made. Title IX does not protect women and girls, it protects the under-represented sex, which happens, given our cultural context and history, to be women and girls when it comes to school sport.

There is a *big* difference between revenue producing and profit making. At the collegiate level, the NCAA's own data shows that most school athletic departments do *not* make a profit and that in the overwhelming majority of cases, football does not even pay for itself, let alone carry the financial weight of an entire athletic department.¹³ At the high school level, revenue and profit typically are not even part of the conversation; and even if they were, even if men's high profile sports did make money, and *lots* of it, why would that matter? *Since when is money a legitimate reason to discriminate? If it were, then certainly we'd be a different nation, having never fought the Civil War.*

Schools can engage in fundraising, and booster money *can* be accepted, as can sport specific donations. What has to happen, however, is that spending oversight of that money must be carefully monitored to ensure that just because the cultural context is more supportive of sport for males than females, women and girls are not penalized. In other words, if the local sports store wants to fund baseball shoes for the boys' team, but not the girls' softball team, the school needs to come up with the money to buy shoes for the girls, which given the budget savings achieved because of the generous donation from the local business, should now be a lot easier!

WHAT'S THE BOTTOM LINE AND WHAT DO WE KNOW?

We know that Title IX does not mandate or encourage dropping men's minor sports. *Those decisions, when made, are institutional choices*—choices

13. Daniel L. Fulks, *Revenues and Expenses of Divisions I and II Intercollegiate Athletics Programs: Financial Trends and Relationships—2001*, at http://www.ncaa.org/library/research/i_ii_rev_exp/2002/d1_d2_revenues_expenses.pdf (last visited July 15, 2003).

typically driven by the realities of limited resources, and valuing priorities that place the twenty worst football players above the twenty best wrestlers.

We know that *walk-ons do cost money*, and that *roster management* – capping sport participation size– *does save resources*.

We know that despite all the negative hoopla and headlines of bad behavior and abuses, sport can and does provide participants with the opportunity to gain much more than physical fitness. *Through sport, males and females gain valued life-skills*, skills and abilities that facilitate socio-cultural access and success.¹⁴

We know that *historically and traditionally females have been discriminated against in educational opportunities and access, including sport*.¹⁵ We also know that despite the facts that (a) the historical roots of physical fitness and sport for females are very different than for males; (b) the female sport culture has been all but consumed, defined and delimited in male terms; and (c) our broader socio-cultural norms, values and beliefs have, and continue to, dissuade females from sport participation; women and girls are participating in sports in ever increasing numbers. In fact, I sometimes think when people claim that girls do not want to play sports as much as boys, they are right. Given everything women and girls have had to (and still do) go through, prove and endure, *perhaps they want to play more!*

And finally, we know that *the only thing wrong with Title IX is that it is not adequately understood and enforced*; and as a result, over half of the population continues to be shortchanged. In testimony to the Commission,

14. See generally, DOROTHY W. CANTOR & TONI BERNAY, *WOMEN IN POWER: THE SECRETS OF LEADERSHIP* (1992); MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* (1996); MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS* (1994); JEAN ZIMMERMAN & GIL REAVILL, *RAISING OUR ATHLETIC DAUGHTERS: HOW SPORTS CAN BUILD SELF-ESTEEM AND SAVE GIRLS LIVES* (1998); Susan L. Greendorfer, *Gender Bias in Theoretical Perspectives: The Case of Female Socialization into Sport*, 11 PSYCHOL. WOMEN Q. 327-340 (Sept. 1987); Susan L. Greendorfer, *Psycho-social Correlates of Organized Physical Activity*, 58 J. PHYSICAL EDUC., RECREATION & DANCE 59-64 (Sept. 1987); Donna A. Lopiano, *Equity in Women's Sports: A Health and Fairness Perspective*, 13 ATHLETIC WOMAN 281-296 (1994); Don Sabo, *Psychosocial Impacts of Athletic Participation on American Women: Facts and Fables*, in *SPORT IN CONTEMPORARY SOCIETY: AN ANTHOLOGY* 374-387 (D. Stanley Eitzen ed., 1993); Maureen R. Weiss & Susan D. Glenn, *Psychological Development and Females' Sport Participation: An Interactional Perspective*, 44 QUEST 138-157 (Aug. 1992).

15. U.S. GEN. ACCT. OFF., NO. 01-297, *INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS* (2001), available at <http://www.gao.gov/new.items/d01297.pdf> (last visited Oct. 27, 2003); National Collegiate Athletic Ass'n, *1982-2002 NCAA Sponsorship and Participation Rate Report* (2003), available at http://www.ncaa.com/library/research/participation_rates/1982-2002/participation.pdf (last visited Oct. 27, 2003); SADKER, *supra* note 14; Women's Sports Found., *Women's Sports & Fitness Facts & Statistics*, at http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE /pdf _file/54.pdf (last visited July 14, 2003).

Valerie Bonnette, Equity Specialist (and co-author of the OCR's 1990 *Title IX Athletics Investigator's Manual*) stated: "When people are ignorant of the law, you change their level of knowledge, you don't change the law."¹⁶ At least for now, the OCR seems to agree, and the threat to Title IX has at least temporarily subsided. In July 2003, Assistant Secretary for Civil Rights, Gerald Reynolds, released a letter titled *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*.¹⁷

This latest "clarification" (the OCR, under the direction of Norma Cantu, released a Title IX clarification document in 1996), reaffirms the OCR's commitment to Title IX education and enforcement, dispels the "safe harbor" language previously associated only with Prong One compliance, and disparages the elimination of men's teams to achieve compliance as a "disfavored practice." In reality, although these subtleties are likely to have little real world impact on Title IX compliance efforts, the support for Title IX and the three-prong test reiterated in the letter, was, in a word, surprising.

I used to care about motives. I wanted what was right and good, fair and just, and wanted people to want those things because they were right and good, fair and just. Today, although motives are nice, I am frankly more concerned about outcomes. And, although I cannot help but wonder how, after all the town hall meetings, public testimony, pending lawsuits, and tax dollars spent, we came to be, over a year later, pretty much in the place we started, I am both relieved and glad. Game on girls, game on!

16. Report by Lynne E. Woodward, Secretary's Commission on Opportunity in Athletics 253 (Nov. 20, 2002) (on file with the Marquette Sports Law Review), available at <http://www.ed.gov/about/bdscomm/list/athletics/transcript-112002.pdf> (last visited Oct. 14, 2003).

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

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