

# WOMEN AND SPORTS

in the United States

A DOCUMENTARY READER

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SPORT IN SOCIETY

settlement. "We are delighted that women at Brown are finally going to get the intercollegiate athletic opportunities and treatment that they deserve."

Under the terms of the agreement, as long as Brown continues to offer the full array of women's university-funded and donor-funded sports currently in its intercollegiate athletic program and does not change the balance between men and women by adding or upgrading men's teams, Brown must ensure that women's intercollegiate athletic participation rate is within 3.5 percentage points of women's undergraduate enrollment rate at the school. If Brown eliminates or downgrades a current women's team, or adds or upgrades a men's team without adding or upgrading a corresponding women's team, then Brown must ensure that women's intercollegiate athletic participation rate is within 2.25 percentage points of women's undergraduate enrollment rate at the school.

In addition, Brown agreed to upgrade women's water polo from club to donor-funded varsity status and to guarantee funding for the four women's teams that now-retired U.S. District Court Judge Raymond S. Pettine found Brown had not adequately supported—gymnastics, fencing, skiing, and water polo. While calling the teams "donor-funded," Brown will fund the teams at significantly increased levels for the next three (or, in gymnastics' case, four) years, whether or not sufficient funds can be raised from donors. For the next four years, Brown will also provide gymnastics with the same benefits and treatment it received last year, when it was treated as a "university-funded" team under Court order.

"We are especially pleased that we obtained increased opportunities and funding for women without sacrificing opportunities or funding for men," said TLPJ lead counsel Lynette Labinger of Providence's Roney and Labinger. "That was one of our goals from the start. We applaud all of the parties and newly-appointed Brown President E. Gordon Gee for finding a constructive way to resolve this litigation and enhance women's opportunities at Brown."

The *Cohen* class action lawsuit was filed in April 1992, after Brown terminated funding for its women's gymnastics and volleyball teams. The suit charged Brown with violating Title IX of the Education Amendments of 1972, the federal law that prohibits sex discrimination by all educational institutions receiving federal funds.

In December 1992, TLPJ won a preliminary injunction requiring Brown to reinstate the women's teams. In April 1993, the U.S. Court of Appeals for the First Circuit unanimously affirmed the preliminary injunction pending trial. In March 1995, after a three-month trial, Judge Pettine found Brown in violation of Title IX and ordered it to submit a proposed plan to come into compliance. In July 1995, Judge Pettine found Brown's proposal unacceptable and ordered it to upgrade four women's teams—gymnastics, fencing, water polo, and skiing—to university-funded varsity

status. In November 1996, the First Circuit affirmed the decision finding Brown in violation of Title IX, but said that the school should be given another chance to develop its own plan for compliance. On April 21, 1996, the U.S. Supreme Court denied Brown's petition for review.

Brown subsequently proposed a new compliance plan and plaintiffs objected that it, too, was insufficient. An evidentiary hearing on whether Brown's proposal would, in fact, bring the school into compliance with Title IX was scheduled to begin before Judge Torres on Monday, June 22, but the settlement eliminated the need for the hearing.

Brown University originally announced that it was eliminating funding for women's volleyball and gymnastics in 1991 in order to save \$64,000 annually. The school reinstated women's volleyball on the eve of trial in 1994. Under the settlement agreement preliminarily approved today, Brown will spend \$64,400 on women's gymnastics in 1998–99.

Formal notice of the settlement will be distributed to the class members in September, shortly after classes start. A final hearing on the proposed settlement is scheduled for October 8 before Judge Torres. If the settlement is approved, all issues in the case will be resolved, except for costs and attorneys' fees.

In addition to Labinger and Bryant, TLPJ's litigation team in *Cohen* includes Amato DeLuca of DeLuca and Weizenbaum and Ray Marcaccio of Blish and Cavanaugh, both of Providence, Sandra Duggan of Philadelphia, and TLPJ's Leslie Brueckner.

## TITLE IX AT 30

### *Report Card on Gender Equity—Athletics, C+*

#### National Coalition for Women and Girls in Education

For many people, Title IX is synonymous with expanded opportunities in athletics. Women's and girls' increased participation in sports, the impressive achievements of the nation's female athletes, their stunning advances in summer and winter Olympic Games, and the creation of nationally televised

Excerpted from *The National Coalition of Women and Girls in Education, Title IX at 30: Report Card on Gender Equity*. Washington, D.C.: NCWGE, June 2002. Full text downloadable from [www.ncwge.org](http://www.ncwge.org). Reprinted with permission from National Coalition for Women and Girls in Education ([www.ncwge.org](http://www.ncwge.org)).

professional women's basketball and soccer leagues demonstrate Title IX's success. It takes a large and vibrant base of general sports participants and 15 to 20 years of elite athlete support to create an Olympic gold medalist or professional athlete—years in which an athlete is given access to quality coaching, sports facilities, weight rooms, athletic scholarships, and competition. Before Title IX, women and girls were precluded from taking advantage of most athletic opportunities in school, but the outcome of equal opportunity on the playing fields is becoming more apparent.

Still, Olympic medals and professional sports contracts are not what Title IX is all about. Rather, the quest for equal opportunity in sports has always been about the physiological, sociological, and psychological benefits of sports and physical activity participation. Research studies commissioned by the Women's Sports Foundation in 1998 and 2000 found that girls who play sports enjoy greater physical and emotional health and are less likely to engage in a host of risky health behaviors (i.e., drug use, smoking and drinking) than nonparticipants. Other studies have linked sports participation to reduced incidences of breast cancer and osteoporosis later in life. Yet compared to boys, girls enjoy 30 percent fewer opportunities to participate in high school and college sports and are twice as likely to be inactive. Much distance remains between the current status of women and girls in sports and the ultimate goal of gender equity.

#### Participation Rates and Resource Allocation

Prior to 1972, women and girls looking for opportunities for athletic competition were more likely to try out for cheerleading or secure places in the bleachers as spectators. In 1971 fewer than 295,000 girls participated in high school varsity athletics, accounting for just 7 percent of all high school varsity athletes. The outlook for college women was equally grim. Fewer than 30,000 females competed in intercollegiate athletics. Low participation rates reflected the lack of institutional commitment to providing athletics programming for women. Before Title IX, female college athletes received only 2 percent of overall athletic budgets, and athletic scholarships for women were virtually nonexistent.

Title IX has changed the playing field significantly. By 2001 nearly 2.8 million girls participated in athletics, representing 41.5 percent of varsity athletes in U.S. high schools—an increase of more than 847 percent from 1971. Progress on college campuses also has been impressive. Today, 150,916 women compete in intercollegiate sports, accounting for 43 percent of college varsity athletes—an increase of more than 403 percent from 1971. Contrary to media reports, men's participation levels at both the high school and college level have been increased. See Figure 1, Figure 2, and Table 1.

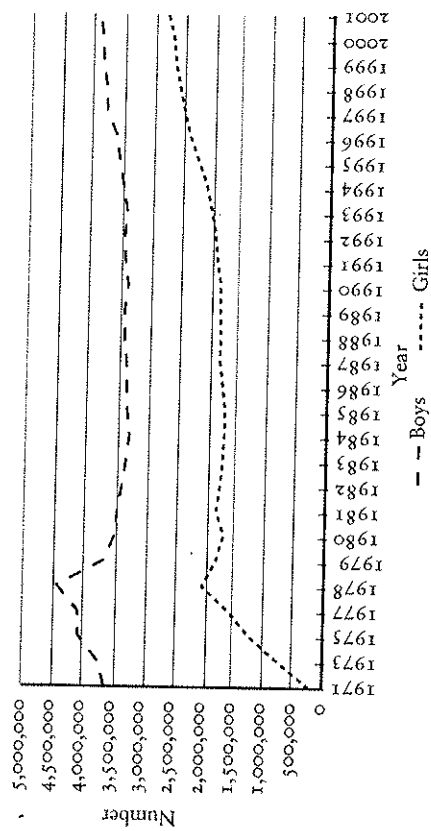


Figure 1  
National Federation of State High School Associations, 2001

While significant, these gains still stop short of providing girls and women with their fair share of opportunities to compete. In 1999–2000 female students represented about 54 percent of the student body at four-year colleges, yet only 23 percent of all NCAA Division I colleges provided women with athletic opportunities within five percentage points of

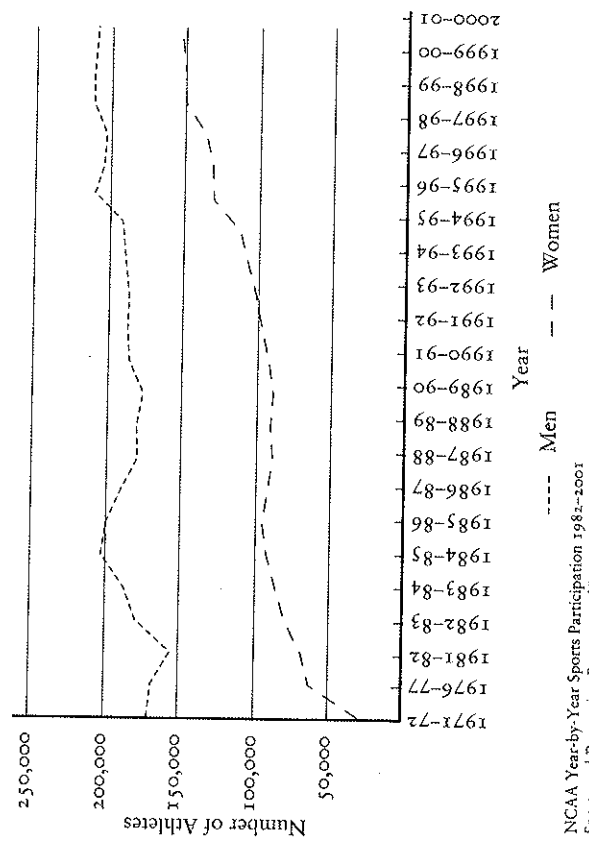


Figure 2  
NCAA Year-by-Year Sports Participation 1982–2001  
Sports and Recreation Programs of Universities and Colleges 1957–1982 (NCAA)

Table 1  
Female High School and Collegiate Participation

Year	1971-72	2000-01	Increase
<i>High School Varsity Athletes</i>			
Female	294,015	2,784,154	847%
Male	3,666,917	3,921,069	6.9%
<i>Collegiate Varsity Athletes</i>			
Female	29,972	150,916	403%
Male	170,384	208,866	23%

NCAA Year-By-Year Sports Participation 1982-2001; Sports and Recreation Programs of Universities and Colleges 1957-82 (NCAA); National Federation of State High School Associations in 2001

female student enrollment. The percentage increased from 9 percent in 1995-96.

Although the resources and benefits allocated to female athletes also have improved significantly since Title IX's passage, they also fall short of what equity requires. After 30 years the gap is still significant and closing much too slowly. Institutions are not exercising restraint on men's sports expenditures while women's sports catch up. See Table 2.

- In the past four years, for every new dollar going into athletics at the Division I and Division II levels, male sports received 58 cents while female sports received 42 cents.
- Each year male athletes receive \$133 million or 36 percent more than female athletes in college athletic scholarships at NCAA member institutions.
- In Division I, colleges spent an average of \$2,983 per female athlete compared to \$3,786 for male athletes.

No national data on expenditures exist for girls' and boys' interscholastic sports, but anecdotal evidence suggests that similar financial disparities also exist at the elementary and secondary levels.

#### Coaches, Administrators, and Other Athletic Personnel

Women in coaching, athletic administration, and other sports positions lack the improved opportunities enjoyed by female students and athletes since Title IX's enactment. In the early 1970s women head coaches led 90 percent of women's collegiate teams. By the 2001-02 school year, female

head coaches led only 44 percent of women's intercollegiate athletic teams, the lowest total since the passage of Title IX. This number is down from 47.7 percent in 1995-96. Since 2000, 90 percent of the available head coaching positions in women's athletics have gone to men. A similar decline in the percentage of women coaching girls' teams can be witnessed at the high school level.

To make matters worse, the loss of coaching opportunities in women's sports has not been offset by a corresponding increase in opportunities for women to coach men's teams. To the contrary, women are virtually shut out of these jobs, holding only 2 percent of the coaching positions in men's collegiate sports, a percentage that has remained constant over the last 30 years. No signs indicate a slowing in the downward trend.

Women's college basketball, considered by most to be the greatest economic success among all women's collegiate sports, is one of the few exceptions to diminishing coaching opportunities for women. The number of women intercollegiate basketball coaches has remained relatively constant over the past 10 years with women currently holding 62.8 percent of these head coaching jobs. Among 24 women's NCAA championship sports, however, female coaches rank in the majority in only seven. See Table 3.

The impact of such sex discrimination on coaching opportunities for women is exacerbated by the striking disparity in the salaries paid to coaches of men's and women's teams. At the Division I level, men's basketball head coaches average \$149,700. By contrast, women's basketball head coaches average just \$91,300: 61 cents to every dollar paid to men. This trend continues at the assistant coach level, where men's basketball assistant coaches average \$44,000 while women's basketball assistant coaches average \$34,000. Only in fencing, volleyball, and tennis, the sports paying the lowest salaries to coaches of male teams, do coaches of women's sports receive equal or greater pay than coaches of the equivalent male sports.

Table 2  
Disparities in Funding Intercollegiate Athletics for 1999

	Division I		Division II		Division III	
	Men	Women	Men	Women	Men	Women
Scholarships	\$1,411,400	\$1,055,500	\$92,100	\$268,000	N/A	N/A
Recruiting	184,200	85,900	18,900	20,100	13,200	7,100
Head Coach Salaries	484,900	330,500	136,700	114,500	127,000	102,600
Operating Expense	882,100	486,200	225,600	115,100	137,000	94,700

NCAA 1999-2000 Gender-Equity Report

Table 3  
Coaches of Women's Sports by Gender for 2002

Sport	Female	Male	Sport	Female	Male
Archery	33.3%	66.7%	Riflery	27.3%	72.7%
Basketball	62.8%	37.2%	Sailing	11.1%	88.9%
Bowling	33.3%	66.7%	Skating	6.9%	93.1%
Crew/Rowing	37.9%	62.1%	Soccer	30.7%	69.3%
Cross Country	21.3%	78.3%	Softball	65.1%	34.9%
Fencing	26.5%	73.5%	Squash	33.3%	66.7%
Field Hockey	96.8%	3.2%	Swimming/Diving	23.0%	77.0%
Golf	39.2%	60.8%	Synchronized Swimming	100.0%	0.0%
Gymnastics	44.3%	55.7%	Tennis	34.5%	65.5%
Ice Hockey	40.0%	60.0%	Track	19.0%	81.0%
Lacrosse	85.9%	14.1%	Volleyball	57.3%	42.7%
Ride/Equestrian	81.0%	19.0%	Water Polo	25.7%	74.3%

Acosta and Carpenter, *Women in Intercollegiate Sport, 2002*

Athletic directors at the college level are also predominantly male (83.1 percent). As the status and salary of these positions increase, female representation decreases (8.4 percent in Division I versus 25.5 percent in Division III). Males also dominate the positions of sports information director (87.7 percent) and athletic trainer (72.2 percent). As the competitiveness of a division and average salary increases, women's representation in these athletics positions also decreases. This trend remains true for every position except for head coaching jobs, for which gender representation in Division I and Division III is equal, although average salaries are not. See Table 4.

### Title IX Enforcement

The record of Title IX enforcement in interscholastic and intercollegiate athletics over the past 30 years is fair at best, as evidenced by the persistent disparities highlighted above. In 1975 the then Department of Health, Education, and Welfare (HEW) issued federal Title IX regulations, which included sweeping requirements for equal athletic participation opportunities, proportional athletic scholarship funding, and equality in the treatment of and benefits provided to male and female athletes. The regulations allowed colleges and high schools a three-year phase-in period and elementary schools a one-year phase-in period. HEW explained the regulations in greater detail through a Policy Interpretation issued in 1979.

Table 4  
*Women in College Sports Positions 2000-02*

All Divisions	Men		Women	
	83.1%	16.9%	91.6%	8.4%
Athletic Directors	83.1%	16.9%	91.6%	8.4%
Head Coaches of Sports Women's Teams	56.0%	44.0%	54.9%	45.1%
Head Coaches of Sports Men's Teams	98.0%	2.0%	—	—
Full-Time Athletic Sports Trainers	72.2%	27.8%	84.6%	15.4%
Full-Time Information Directors	87.7%	12.3%	89.1%	10.9%

Division II	Men		Women	
	74.5%	25.5%	86.1%	13.9%
Athletic Directors	74.5%	25.5%	86.1%	13.9%
Head Coaches of Sports Women's Teams	54.4%	45.6%	61.1%	38.9%
Head Coaches of Sports Men's Teams	—	—	—	—
Full-Time Athletic Sports Trainers	61.2%	38.8%	70.9%	29.1%
Full-Time Information Directors	86.2%	13.8%	87.6%	12.4%

Division III	Men		Women	
	38.8%	61.2%	87.6%	12.4%
Athletic Directors	38.8%	61.2%	87.6%	12.4%
Head Coaches of Sports Women's Teams	—	—	—	—
Head Coaches of Sports Men's Teams	—	—	—	—
Full-Time Athletic Sports Trainers	61.2%	38.8%	70.9%	29.1%
Full-Time Information Directors	86.2%	13.8%	87.6%	12.4%

Acosta and Carpenter, *Women in Intercollegiate Sport, 2002*

Enforcement in intercollegiate athletics, however, was largely nonexistent throughout the 1980s, in part because of the Supreme Court's 1984 decision in *Grove City College v. Bell*. In that case, the court limited Title IX's application to the specific programs within colleges and universities that actually received federal funds (usually not the case for athletic programs), rather than applying Title IX to entire institutions should any of their programs receive federal funds. Congress overturned this decision in 1988 through the passage of the Civil Rights Restoration Act.

Even with the full scope of Title IX restored, few enforcement actions were brought by OCR. When colleges responded to budget constraints by cutting already beleaguered women's teams, parents and female athletes responded by taking their Title IX complaints to court. Numerous lawsuits in the 1990s resulted in the creation of a uniform body of law protecting the right to equal athletic opportunity regardless of sex, despite defendants' strenuous objections that men purportedly are more interested in playing sports than women and therefore deserve disproportionate participation opportunities. Progress has been made largely on a case-by-case basis, with gains gradual and piecemeal. Most notably, in the case of *Cohen v. Brown University*, the First Circuit rejected the university's argument that women are less interested than men in playing sports because the argument rests on stereotypical notions about women and only perpetuates the discrimination that women face in athletics.

Other cases have helped root out discrimination by athletic associations, which control college and high school athletic programs but claim they have no responsibilities to comply with civil rights laws. The Supreme Court decided otherwise in *Brentwood Academy v. Tennessee Secondary School Athletic Association*. The court held that the high school athletic association is subject to the Constitution, which governs the conduct of government entities only, because the association is essentially an arm of the state. In *National Collegiate Athletic Association v. Smith*, the Supreme Court held that the NCAA is not subject to Title IX just because it receives dues from its federally funded member schools, but the court specifically left open other legal arguments for coverage of athletic associations. The court adopted one of these arguments in *Commutities for Equity v. Michigan High School Athletic Association*, in which a federal district court in Michigan held that the association is subject to Title IX, the Constitution, and Michigan state law. Accordingly, the court found that the association discriminated against girls by scheduling six girls' sports, but no boys' sports, in nontraditional or disadvantageous seasons.

Women's progress, albeit limited, has sparked a backlash by Title IX opponents who claim that Title IX has gone "too far" and has "hurt" men's sports. After holding hearings on this issue in May 1995, some

members of Congress asked OCR to revisit its 1979 Policy Interpretation and consider weakening its enforcement standards, particularly the equal participation requirement. In response, OCR strongly affirmed its longstanding interpretation through a 1996 Policy Clarification, which explains how institutions can and must comply with the equal participation opportunities requirements. Courts have also rejected suits brought by male athletes claiming schools have discriminated against them by either cutting or capping men's teams, holding that Title IX does not require these actions but gives schools flexibility in structuring their athletics programs as long as they treat men and women equally. Nonetheless, the challenges continue. In January 2002 the National Wrestling Coaches Association and other Title IX opponents filed a federal lawsuit against the Department of Education challenging the Title IX regulations and policy guidance regarding athletics opportunities. The government's response fails to indicate whether it will vigorously defend the longstanding athletics policies.

Given the absence of equal opportunity after 30 years, OCR is not providing adequate leadership in enforcement efforts. In 2001 OCR initiated only two Title IX athletics reviews of institutions. Since Title IX's inception, not one institution has had its federal funding withdrawn because it is in violation of Title IX. OCR's lack of enforcement coupled with an increase in Title IX lawsuits suggests aggrieved parties are required to seek relief through the court system. Parties filing lawsuits incur considerable costs and risk retribution. In light of the number of schools still not in compliance, OCR needs to step up its enforcement activities.

### Recommendations

- Congress should mandate data collection on the participation of high school students in physical education and high school athletics programs as part of the administration's proposal for the reauthorization of the Office for Educational Research and Improvement.
- The Department of Education should support the continuation of existing strong compliance standards and increase OCR enforcement of these standards.
- To encourage the filing of actionable complaints, OCR should develop a standard complaint form with a checklist of alleged Title IX violations.
- School athletic administrations should use the Equal Employment Opportunity Commission guidelines ([www.eeoc.gov/regs/index.html](http://www.eeoc.gov/regs/index.html)) to make sure coaches of male and female sports receive equal treatment.

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## A TRAIN WRECK CALLED TITLE IX

George F. Will

On this 30th anniversary of the enactment of Title IX, the law prohibiting sexual discrimination in education, consider this: has even more nonsense been written about Title IX than has been committed in its name?

Title IX, as adumbrated by ideology-besotted Education Department regulation writers has produced this lunacy:

Colleges have killed more than 400 men's athletic teams in order to produce precise proportionality between men's and women's enrollments and men's and women's rates of participation in athletics. And Title IX

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has given rise to a huge "gender equity" industry of lawyers, sensitivity-trainers and consciousness-raisers.

The industry prefers the word "gender" to "sex" because "sex" suggests immutable differences, while "gender" suggests differences that are "socially constructed" and can be erased by sufficiently determined social engineers. The story of the policy train wreck that Title IX has become in the hands of such engineers, and of further misadventures that may be coming, is told in a timely book, "Tilting the Playing Field: Schools, Sports, Sex, and Title IX" by Jessica Gavora, a senior policy adviser at the Justice Department.

The U.S. soccer players who won the 1999 Women's World Cup were called "daughters of Title IX," and when the WNBA began playing in 1997, arenas displayed THANKS TITLE IX! banners. This propaganda pleased people who believe all progress comes from government. But throughout the 1970s, the years of the most rapid growth of participation of girls in high-school sports, which presaged the growth of women's college sports, Title IX was, Gavora says, unenforced and unenforceable because no athletics regulations had been written.

The first Title IX implementing regulations for athletics were written in 1979, and through most of the 1980s athletics were exempted from Title IX coverage. By which time, the women of the 1999 soccer triumph and of the WNBA were already excelling in their sports. By 1979, one in four high-school girls was participating. Since then, the Title IX "revolution" has made the number one in three. Clearly, autonomous cultural change, not Congress, produced the increase in female participation, which carried over into college athletics, where the real Title IX revolution has been perverse.

Gavora says the "ever-mutating" Title IX has been construed on the basis of a non sequitur: if there is unequal participation when there is discrimination, there must be discrimination when there is unequal participation. Title IX fanatics start from the dogma—they ignore all that pesky evidence about different male and female patterns of cognitive abilities, and brain structure and function—that men and women are identical in abilities and inclinations.

Confronted with evidence of what Gavora calls "the sportsmania gap"—men care more about playing sports—the fanatics say: This is the result of historical conditioning, which colleges must combat. Colleges must not just satisfy women's demands for sports, they must create demands. Until it is created, statistical proportionality often can be achieved only by cutting men's teams. Leo Kocher, University of Chicago wrestling coach, explains the Alice in Wonderland logic:

"Say there's a school that has equal numbers of boys and girls and it decides to offer 200 athletic opportunities. If they have 100 girls who

want to play sports and they have 1,000 boys who want to play sports, the law says you must give 100 opportunities to those 100 girls and you must give 100 opportunities to those 1,000 boys. In the end, 100 percent of the girls are fully accommodated but only 10 percent of the boys are taken care of."

Between 1992 and 1997, 3-4 men's positions on college teams were cut for every woman's spot created. UCLA's swimming and diving team, which has produced winners of 22 Olympic medals? Gone. University of Miami's? Going. As are hundreds of men's gymnastics, wrestling, baseball, track and other teams.

Under what Gavora calls Title IX's "affirmative androgyny," it is illegal to accept the fact that men and women have different interests, abilities and zeal regarding competition, or that young men have distinctive needs for hierarchy and organized team activities. As Gavora says, Title IX feminists seem to think "young girls aren't worthy of respect and admiration unless and until they act like young boys." And until women have their consciousness "raised" by social engineering, they need not be thought of as individuals, but merely as malleable raw material.

And now some Title IX imperialists want to extend it from locker rooms to classrooms: If participation in sports must mirror the sexual composition of the student body, why not participation in the engineering department? And why not in extracurricular activities other than sports—debating, orchestra, choir, cheerleading?

Title IX has become, Gavora says, the "codification of feminism," and "the story of this law is in many ways the story of the women's movement." A depressing story.



## IN THE SPIRIT OF TITLE IX

Emily Badger

Emily Pieplow spent every Saturday last fall on the sidelines of the University of Maryland football games, she spent New Year's Eve at the Peach Bowl in Atlanta and late March at the NCAA basketball tournament in

From *The Washington Post*, 26 September 2003. © 2003, *The Washington Post*. Reprinted with permission.  
 Researcher Julie Tate contributed to this report.

San Antonio, cheering for the Terrapins in the one pair of Nike gym shoes that the athletic department gave her every year.

This year Pieplow won't get a free ticket or a ride in the back of the bus to any of those games. In fact, she won't lead a single "Go Terps!" cheer. But she'll travel to 10 cheerleading competitions and in exchange get her little piece of an athletic scholarship to help pay for her final semester of school.

Along with women's water polo, Maryland promoted part of its cheerleading squad to varsity status this year to create more scholarships and playing opportunities for female athletes on campus. The move was designed to keep Maryland in compliance with Title IX while returning some scholarships to the school's eight underfunded men's programs.

But Maryland is charting new territory with an activity that many—including the NCAA—aren't even sure is a sport. And whether it succeeds in silencing its critics may determine if Maryland has found a new model for approaching the contentious gender-equity legislation.

Cheerleading isn't recognized as a sport by the NCAA, and since 1975, the Department of Education's Office for Civil Rights, which enforces Title IX, has advised schools that "drill teams, cheerleaders and the like" cannot be considered athletic programs for the purpose of complying with Title IX.

Some colleges offer partial financial aid to their cheerleaders, but both Maryland and the OCR say this is the first instance of a school seeking to use cheerleading scholarships toward Title IX compliance. Susan Aspey, a spokeswoman for the Department of Education, said no other college has requested help from the OCR in applying any sport not recognized by the NCAA toward its compliance.

"Our expectation is that we're the first, but the first of many," said Michael Lipitz, Maryland's associate athletics director for administration. "At Maryland we always try to be on the cutting edge with what we're doing, and this is just another example of that. We try to think not only creatively, but innovatively."

## Sincerity Questioned

Critics see Maryland's plan as a way to skirt the original intent of Title IX, and even Pieplow is under no illusions as to why Maryland recently offered to help foot her tuition bill.

"We knew that when we got this it was because the boys needed more scholarships as well," she said, sitting in the bleachers of Comcast Center's auxiliary gym during the team's fall tryouts. "But if they want to fund us, that's fantastic."



On a recent September evening, the gym was a jumble of red lipstick and black jogging shorts—the women who make up one half of this latest Title IX balancing act. The 1972 legislation mandated equal opportunity for women in all federally funded education programs, although it has become shorthanded for gender equity in college sports.

Schools must offer women the same athletic opportunities as men in the form of scholarship dollars, pure participation numbers and program funding, relative to the makeup of the student-body enrollment.

According to Charles Wellford, the chairman of Maryland's Athletic Council, the Terrapins have been in compliance since the early '90s, in part at the expense of their men's programs. Now that it has evened the playing field, Maryland is in position to give back to the men by beefing up the women's rosters even more.

The plan is that by creating 12 cheerleading scholarships—four this year as the program is phased in over three seasons—and eight water polo scholarships, the men's programs will be given 20 as well, as the funding becomes available.

Maryland's plan would seem to satisfy everyone at a time when many are wailing that Title IX has cost men just as many opportunities as it has granted women.

But still some women's sports advocates are questioning the school's sincerity.

"With other conferences obviously not engaging in bona fide competition in cheerleading—that's not to say one school can't—but it seems like they're looking for the easiest way out, that their intent is to conform to the letter of the law, but not necessarily the spirit," said Donna Lopiano, the CEO of the Women's Sports Foundation. "If they had club teams that wanted varsity status, why go and manufacture one out of cheerleaders?"

Lipitz said water polo and cheerleading were the only teams that presented themselves to the Athletic Council this past year in a bid for promotion. But the women's ice hockey, crew and equestrian clubs have all sought the status in the past.

"When I read it the first time, I couldn't believe they were considering [cheerleading] as an actual sport," said Erika Hyrowski, the president of Maryland's ice hockey club team. "I thought that they could probably have picked another team. I always thought that ice hockey should become one. But our day will come."

### Is It or Isn't It?

At the heart of the debate is a simple question that has flouted easy answers: "What is a sport?"

It sounds like a silly barroom debate—is the answer measured in miles, minutes or pounds bench-pressed?—but for the purpose of Title IX, it is a serious exercise with scholarship dollars and lawyer hours in the balance.

The OCR has created a list of 10 criteria to evaluate whether an activity is a sport, questioning the participants' athletic ability, the length of the season and the governing body that determines competition rules.

One criterion reads as if it were drafted with an eyebrow raised specifically toward cheerleading: whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes.

That stipulation helps explain why the OCR sent a letter in September 1975 to the country's high school superintendents and college presidents informing them that cheerleading could not be considered "part of the institution's 'athletic programs' within the meaning of the [Title IX] regulation."

The OCR, however, evaluates each school on a case-by-case basis. It offers guidelines to aid schools in making their own decisions and then returns to the case only if a complaint is filed against the institution, meaning Maryland's decision will not be evaluated unless someone outside the school challenges it.

"There's been no change in policy," said Aspey, the Department of Education spokeswoman. "The University of Maryland requested assistance, and it's nothing more, nothing less."

The OCR's last communication with Maryland was in a May 8 letter to Director of Athletics Deborah Yow responding to the school's proposal. The letter suggested that the team would satisfy many of the factors but raised questions about one: Who would govern the practice and competition season?

Cheerleading has no such organization, and this has been Maryland's biggest stumbling block, one that the school's cheerleading coach Laura Fleece believed would prevent the squad from ever becoming varsity.

Competitions are produced by the National Cheerleaders Association, but even that organization considers itself more of a company—the competitions and camps are the products—than an oversight body.

The NCAA, on the other hand, provides instant legitimacy to a sport simply by recognizing it, as it does with bowling, equestrian and synchronized swimming.

Like the OCR, the NCAA offers no final pronouncements on what is a sport and who can play it but instead reacts to the concerns of individual institutions.

"Who's making the definition?" said Laronica Conway, a spokeswoman for the NCAA. "If you ask anybody is cheerleading a sport, you don't know if the answer is yes or no. It's not our decision. It's the membership's decision, and we're doing what the membership wants."

## A Split Decision

In seeking to clearly differentiate competitive cheer from its sideline counterpart—a distinction likely necessary to satisfy the OCR—Maryland divided its cheerleading squad in two. Starting on Oct. 15 one will cheer at games, and the other will only attend competitions in which gymnastics are emphasized and cheering eliminated.

The latter will receive the scholarships, new uniforms and priority registration for classes; the former will continue riding around in the back of other teams' buses, with each woman carrying her one pair of shoes in tow.

Prior to this school year, Maryland offered each of its 30 cheerleaders the choice to join either the competitive cheer team or spirit squad, and the decision divided the group almost equally.

"They're splitting us only so they can convince whoever the head of Title IX is that cheerleading can be considered a sport," said senior Erin Valenti, who opted to stay with the spirit squad. "To make it a sport, you're taking out the whole reason to do cheering to begin with."

In the past, the single cheerleading unit went to football and basketball games while simultaneously preparing for one competition, the NCAA's national championship. That model made sense at the time—it led to a championship in 1999—and the spirit squad will continue to follow it.

That group will send a small contingent to the championships this year to compete in the coed division, but unlike the competitive cheer team, the spirit squad will have to fundraise to cover much of the \$17,000 cost.

The disparity between the two groups may be at its greatest then, but Fleece—who has been coaching Maryland's cheerleaders, and lobbying for varsity status, since 1991—maintains the perks of cheering at games nearly equal the more tangible benefits of varsity status.

"This is what I've been dying for so long, and now that I've got it, it's like wow, I'm not going to be at the football games anymore," said Fleece, who said she received an increase in salary to \$22,000 annually to work only with the competitive team.

"It has been very hard for them. It's been hard to decide if I even want to coach. There's a part of you that says I love what goes along with the games, being a part of that win, the smell of the football field—I'm really going to miss those things."

Lopiano, on the other hand, looks at the situation and wonders if it wouldn't have made more sense to promote another intact club team from outside the department, like crew—as opposed to going through all the contortions and uncertainty of being "the first of many."

Fleece doesn't see the notion of cheerleaders as varsity athletes as such a stretch.

"People are going to follow suit," she said. "This will happen just because it makes sense."



## TITLE IX—THE GOOD NEWS, THE BAD NEWS

## California Women's Law Center

Title IX of the Education Amendments of 1972 is a federal law prohibiting gender discrimination in any school receiving federal funds.<sup>1</sup> Although the law prohibits sex discrimination of any kind, it is best known for its role in promoting athletic opportunities for women. While female athletic programs have made great strides since 1972, there is still much to be done to level the playing fields. Here is the latest news on Title IX:

## The Good News

In March 2005, the Supreme Court of the United States decided a landmark case involving Title IX, *Jackson v. Birmingham Board of Education*.<sup>2</sup> Roderick Jackson, head coach of the girls' basketball team at Ensley High School in Birmingham, Alabama, knew that it was unfair that the girls' basketball team had to practice in an old, unheated gymnasium, travel to games by carpool, and give up revenue from ticket sales while the boys' team practiced in a new, regulation sized gym, rode to games in school buses, and kept their ticket proceeds.<sup>3</sup> Jackson notified school administrators that this discrimination against girls violated Title IX.<sup>4</sup> Instead of responding to his concerns, the school board punished him by giving him negative work evaluations and eventually dismissing him from his position as head coach.<sup>5</sup> Jackson sued the Birmingham school board, alleging that the board had retaliated against him because he had complained about sex discrimination in the high school's athletic program, and that such retaliation violated Title IX. The Supreme Court agreed.

From the Web site of The California Women's Law Center, [www.cslc.org](http://www.cslc.org), 2005.

- The court held that retaliation against a person for complaining about sex discrimination was a form of *intentional discrimination* encompassed by Title IX's private right of action.<sup>6</sup>
- The court interpreted Title IX broadly, to protect not only those who are personally the victims of gender bias (in this case, the girls' basketball team), but also those who seek to vindicate the rights of girls. Without this protection, Title IX would be meaningless because schools could retaliate against adults who stand up for minors' rights.

### The Bad News

Although the Jackson case is a victory for Title IX, the Bush Administration has stealthily attempted to undermine more than thirty years of progress. In 2003, the Department of Education promised to "respect and enforce the long-standing policies mandating equal opportunity in athletics"<sup>7</sup> and not to make any changes to Title IX without opportunity for public comment.<sup>8</sup> However, in March 2005 the Department of Education issued a new "policy clarification" on its website, without any notice or public input. Previous Title IX policies established a three-part test for schools to prove they provided equal opportunities to play sports.<sup>9</sup> The new policy substantially modifies the third prong of the test, making it easier for schools to continue to offer fewer athletic opportunities for female athletes. Specifically, the "clarification" allows schools to determine female students' athletic interests and abilities solely from the results of an email survey.

- **Under the new policy, schools may show they are in "compliance" with the law based solely on the results of an email survey sent to female students.**<sup>10</sup> Previously, surveys were only one of the many factors in a school's determination of unmet athletic interest or ability; other factors included requests to add new teams, existence of club or intramural teams on campus, and looking to feeder schools or community athletic programs to determine what sports were being played in the area. Now, the government says a survey alone is enough.
- **A non-response may be counted as lack of interest.** Under the new policy, non-responses to the survey may be counted as lack of interest or ability to play sports. This method is flawed because the non-response rate is extremely high for email surveys; students may delete the survey, not realize its significance, or be too busy to respond.
- **The survey depends on girls' self-assessment of ability.** The survey requires girls to determine whether they have the ability to compete on a varsity team. Because many girls may significantly underestimate their

own ability, they may falsely indicate that they do not have the skill to compete on a varsity team. Furthermore, if the school does not currently offer a varsity team, girls may never have had the chance to compete and therefore do not know whether they have the requisite ability.

- **The new policy shifts the burden to female athletes to prove discrimination.** Under long-standing policies, schools have had the burden of proof to show that they are not in violation of Title IX, but the new law requires students to prove that the school does not provide equal opportunities. Furthermore, only "direct and very persuasive evidence of unmet interest to sustain a varsity team" can overcome a strong "presumption of compliance."<sup>11</sup>
- **Unless there are already enough girls to form a varsity team for a particular sport, a school is under no obligation to add any further female teams.** Essentially the new policy creates a huge loophole for schools to avoid the equal opportunities component of Title IX. Unless there are enough *enrolled* girls who are interested and able to form a varsity team, the school does not have to add any more female teams, ever. Since it is unlikely that girls who are skilled at a particular sport would attend a school that does not offer that sport, the policy allows the situation to remain at status quo or even move backwards if any further female teams are cut. Interest cannot be judged apart from opportunity, yet this new policy would discourage the creation of further opportunities.<sup>12</sup>

The NCAA Executive Committee has adopted a resolution that urges the U.S. Department of Education to rescind its March 17 "Additional Clarification" and has also urged NCAA members to follow the long-standing policies of Title IX instead of the new procedures set forth in the clarification.<sup>13</sup>

### NOTES

1. 20 U.S.C. § et. seq.
2. *Jackson v. Birmingham Board of Education* \_\_\_ U.S. \_\_\_, \_\_\_ [125 S. Ct. 1497, 161 L. Ed.2d 361] (2005).
3. Lipka, *U.S. Supreme Court Hears Arguments on Interpretation of Title IX* (Dec. 1, 2004) *The Chronicle for Higher Education*.
4. *Jackson, supra*. 125 S. Ct. 1497, 1502.
5. *Id.*
6. *Id.*
7. National Women's Law Center, E-Update, "Bush Administration Covertly Attacks Title IX by Weakening Athletic Policies." 5 April 2005. 29 July 2005. <http://www.nwlc.org/details.cfm?id=2211&section=infocenter>.

8. Hosick, Michelle Brutiag. "Title IX Clarification Again Reveals Fault Line." *The NCAA News Online*. 11 April 2005. [http://www2ncaa.org/media\\_and\\_events/association\\_news\\_online/2005/04\\_11\\_05/front\\_page\\_news/4208not.html](http://www2ncaa.org/media_and_events/association_news_online/2005/04_11_05/front_page_news/4208not.html)

9. United States Department of Education. "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test." 16 January 1996. 3 August 2005. <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>

10. United States Department of Education. "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three." 17 March 2005. 29 July 2005. <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html>

11. *Id.*

12. National Women's Law Center, E-Update, "Bush Administration Covertly Attacks Title IX by Weakening Athletic Policies." 5 April 2005. 29 July 2005. <http://www.nwlc.org/details.cfm?id=2211&section=infocenter>

13. Brown, Gary T. "Executive Committee Urges Against Title IX Compliance Option." *The NCAA News*. 9 May 2005. 2 August 2005. [http://www2ncaa.org/media\\_and\\_events/association\\_news/ncaa\\_news\\_online/2005/05\\_09\\_05/association\\_wide/4210no8.html](http://www2ncaa.org/media_and_events/association_news/ncaa_news_online/2005/05_09_05/association_wide/4210no8.html)

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