



Introduction

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Title IX of the Educational Amendments of 1972 reflects the nation's collective aspirational belief that girls and boys, women and men, deserve equality in educational experiences and opportunities. Given that American society is governed by principles of equality, tolerance, freedom, and the rule of law, it seems curious by contemporary standards that equality for males and females in federally supported education was ever considered to be a radical idea. Title IX's declaration that "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" resonates positively with most Americans, many of whom view the law's underlying premise of equality as an unspoken truism. As Birch Bayh, the former United States Senator and one of the drafters of the Title IX legislation, stated: "What we were really looking for was . . . equal opportunity for young women and for girls in the educational system of the United States of America. Equality of opportunity. Equality. That shouldn't really be a controversial subject in a nation [that] now for 200 years has prided itself in equal justice."¹

Despite the law's promise, athletic departments remain one area of resistance to equity for men and women in higher education. The irony of the battle for gender equality in athletics is apparent in a fundamental way. Athletics on the field is exalted for its embodiment of concepts like fair play, teamwork, sportsmanship, and abiding by the rules. Yet these same concepts could not

¹Senator Birch Bayh, Address at the Secretary's Commission on Opportunity in Athletics 24, August 27, 2002; transcript available at the Department of Education's website <http://www.ed.gov/about/bdscomm/list/athletics/transcript-082702.pdf>; cited by Ellen J. Staurowsky, *Marquette Sports Law Review* (Fall 2003), 95.

be said to have been widely embraced when women have sought parity of athletic opportunities in their schools. As their efforts at equality were thwarted, women began relying on various strategies via the legislature, executive, and judicial branches of government to assert the right to equality on the playing fields of America.

These efforts paid off in many ways. The effect of Title IX on female participation in interscholastic and intercollegiate athletics over the last thirty-five years has been remarkable. In 1971, only 294,015 girls participated in high-school sports, and 31,852 participated on intercollegiate teams. Today, approximately 3.06 million girls participate in high-school sports, and 166,800 on intercollegiate teams.

Although progress has been extraordinary, it is clear that equality is still an elusive and distant goal. Women continue to lag behind men by every measurable criterion, including participation opportunities, scholarships, budgets, facilities, and recruiting. More disturbingly, the trend toward equality, which accelerated during the 1990s, has essentially come to a standstill since 2000. Much work remains to be done, and some of that work is intellectual.

One mission of this book is to explore the governmental processes that form and continue to shape all public policy, including Title IX. By developing a discussion on the history of women in sports, by analyzing Title IX and the meaning of "equal opportunity" for girls and women to participate in sports, the authors hope to demonstrate how government actions can shape and support the goal of gender equity. The importance of the interconnectedness of the three branches of government and of strategic initiatives in each branch to form public policy is thereby revealed.

Many public policy issues arise under the rubric of Title IX and athletics. Among them are equal scholarship dollars,² sexual harassment by coaches or peers in the athletic department,³ the amount and quality of media coverage,⁴

²In 2002, the National Women's Law Center (NWLC) filed grievances against thirty colleges and universities to remedy scholarship inequities. NWLC found the annual gap to amount to nearly \$6.5 million in lost athletic scholarships to young women at these schools, many of whom depend on scholarships to attend college (<http://www.nwlc.org/details.cfm?id=1143§ion=newsroom>; accessed June 15, 2007).

³Nancy Hogshead-Makar and Shelden E. Steinbach, "Intercollegiate Athletics' Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims," 13 *Marquette Sports Law Review* 173 (2003). Deborah Brake, "The Struggle for Sex Equality in Sport and the Theory Behind Title IX," 34 *U. Mich. J. L.* 13 (2000); see also *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (1997; available at <http://www.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (accessed July 9, 2007)).

⁴See, e.g., Margaret Carlisle Duncan and Michael Messner, "Gender in Televised Sports: News and Highlights Shows, 1989–2004," *The Amateur Athletic Foundation of Los Angeles* (2005).

girls playing on boys' teams and vice versa,⁵ pay equity in coaching,⁶ retaliation for championing the rights of female athletes,⁷ pregnancy discrimination in athletics,⁸ and equal treatment as participants (such as access to equal coaching, training, facilities, equipment, locker rooms, and travel and recruiting budgets),⁹ to name just a few. Because having a place on the team is a central issue for most women in athletics, this text focuses on the efforts to increase participation opportunities and on the meaning of "equal opportunity." Without a team, there can be no unequal treatment of that team, no problems with sexual harassment issues, and so on. Furthermore, it is the effort to increase opportunities for women that has encountered the most resistance and is therefore a focus of the material included in this text.

The general principles of governmental policy formation, whether learned in high-school civics or law school, apply to Title IX just as they do to other topics such as workplace safety, protecting the environment, integrating the mentally or physically challenged into society, providing affordable housing, and access to health care or quality education. Major policy initiatives are rarely accomplished with the passage of a single piece of legislation, via a single favorable court decision, or by support from one administration. Instead, achieving a desired result is a continuous process, shaped by ongoing public debate about the policy; about the role of government in forming and implementing policy; and about the outcomes that flow from a policy, including the need to reassess legislation supporting the policy. The interplay among the three branches of

⁵See, e.g., "Co-Ed Participation—Girls Playing on Boys' Teams and Male Versus Female Competition: The Foundation Position" (2002; available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=569>).

⁶See, e.g., The U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions* (2002; available at <http://www.eeoc.gov/policy/docs/coaches.html>). (The guidance clarifies how the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964 apply to sex-based differences in the compensation of sports coaches.) Diane Heckman, "The Glass Sneaker: Thirty Years of Victories and Defeats Involving Title IX and Sex Discrimination in Athletics," 13 *Fordham Intell. Prop. Media & Ent. L. J.* 551 (2003).

⁷Diane Heckman, "Jackson v. Birmingham Board of Education: Supreme Court to Review Whether There Is a Title IX Cause of Action by an Athletic Department Employee for Retaliation," 194 *Ed. Law Rep.* 1 (2005).

⁸See *Issues Related to Pregnancy & Athletic Participation: The Foundation Position* (2006; available at <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=1145>); Deborah Brake, "Legal Challenges to the Educational Barriers Facing Pregnant and Parenting Adolescents," 1994 *Clearinghouse Rev.* 141; OCR, "Dear Colleague Letter Regarding Pregnancy, Athletics, and Scholarships," issued June 25, 2007. Available at <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html> (accessed July 9, 2007).

⁹See, e.g., *Daniels v. Sch. Bd. of Brevard County*, 985 F. Supp. 1458, 1460–1463 (M.D. Fla. 1997); Diane Heckman, "The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992–93: Defining the 'Equal Opportunity' Standard," *Det. C. L. Rev.* (1994).

government—the legislative, executive, and branches—oftentimes results in outcomes that are unpredictable. Each branch has its own process by which change is sought or implemented, and each can conflict or concur with the other.

Many times the process starts in the legislative branch with efforts to pass a law. At the federal level, the Senate and the House of Representatives may jointly consider, adopt, or repeal laws that a majority of their members deem appropriate. To do this, Congress typically holds many open hearings to debate the merits or deficiencies in the proposed legislation. The executive branch, via the President of the United States, may approve or disapprove of the proposed legislation passed by the House and Senate either by signing it into law or vetoing it (directly or indirectly, the latter by a “pocket veto”). If signed into law (or if a veto is overridden by Congress), the executive branch then carries out laws through its administrative agencies and other departments under the President’s purview. The judicial branch consists of the country’s court system, which resolves disputes in individual court cases. Courts resolve factual disputes and explain or interpret laws passed by Congress. In some cases, the courts may find that the executive or legislative branch has failed to comply with the Constitution or that an executive branch agency has failed to conform its actions to congressional intent.

Title IX, as applied to athletics, provides many examples of these governmental dynamics, which have shaped athletic departments and women’s participation rates and experience. For example, during the early 1970s and the 1990s, the three branches of government worked in concert to produce a surge in participation opportunities for women. During the 1980s and again after the turn of the century, however, an antagonistic executive branch thwarted new gains for women in sports, resulting in stagnation or a possible backslide of opportunities. Amidst these governmental dynamics are other influences on gender equity and public policy, such as the antitrust laws, the debate over the increased commercialization of collegiate sports, and the controversy over the proper role of the federal government in schools.

As *Equal Play* will show, thus far, the road for women to attain equality in athletics has been far from smooth and effortless. It has been an extremely difficult battle, from the conception of Title IX decades ago, to the current debates on the Department of Education’s policy statements. Sport was and often still is seen by some as a masculine activity, thereby posing extraordinary challenges for those who seek a place of equality for girls and women in athletics. Gender-equity advocates have had to shift tactics since Title IX’s enactment in 1972, continuously formulating new strategies for achieving the same goals.

As the materials in this text show, Title IX’s history consists of episodic legislative, judicial, and administrative gains and set backs. Gender-equity initia-

tives have required multifaceted approaches and coordination among many organizations, each competing for the same outcome. These initiatives have included gaining access to powerful government representatives; seeking representation on committees responsible for legislation or implementing regulations; and exposing inequities in athletics to government committees, courts, administrative decision-makers, and the public.¹⁰ Title IX's successes also have depended on public-information campaigns that highlight the value of women's sports participation. An informed public debate has helped Title IX by gaining media coverage for women's sports and highlighting academic research on both the health and career benefits of sports participation and the barriers that continue to limit girls' and women's sports participation. This same research has been instrumental in bolstering legislative, administrative, and litigation strategies.¹¹

In particular, tireless efforts have been required to demonstrate that sports participation is not a "zero-sum" game; that is, increases in women's sports participation do not have to come at the expense of opportunities for men. Academic research and advocacy positions that directly confront the myth of male-athletic losses have been essential to the overall Title IX strategy.

Unlike a sporting contest, the clock does not run out on public-policy advocacy with one side being able to declare victory. No winner's name is ever chiseled in stone, and no champion returns home victorious to adoring fans. Instead, the materials presented in this book show that the process by which Title IX came into being and continues to exist is a hardscrabble one. The history of Title IX's quest for equality of opportunity for women is marked by many milestones, including: (a) marathon efforts to pass the legislation itself, (b) the writing and adoption of administrative regulations applying to athletic departments, (c) defending the laws and regulations repeatedly in sometimes hostile court battles, (d) legislatively overturning a United States Supreme Court case after four years of hard work, and (e) challenging new administrative regulations that threaten to weaken the law.

These cycles of public-policy formation underlying Title IX both outline and inform the challenges that lie ahead. In the final analysis, the struggle for gender equity in athletics is best understood as an ongoing process whose successes

¹⁰Lopiano, Donna A., *Advocating for Gender Equality in Sport: The Experience of the Women's Sports Foundation in the United States* (2002), <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/history/article.html?record=908> (accessed June 15, 2007).

¹¹*Ibid.* See also Donald Sabo, K. E. Miller, Michael J. Melnick, Leslie Heywood, *Women's Sports Foundation Report: Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls* (2004). (A comprehensive survey of scientific research on girl's health and physical activity.) Available at: http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/990.pdf (accessed July 9, 2007).

and stumbling blocks have empowered society generally, and women specifically, in turning back and transforming stereotypes and biases. The successes of Title IX to date, although far from complete, suggest that other social movements can benefit from Title IX's history. It is a story—much like sport itself—that is a testament to our country's enduring and resilient ethic of competition on the field and its passion for fairness and justice.