

TITLE IX AND MEN'S "MINOR"¹ SPORTS: A FALSE CONFLICT

I. Title IX Should Not be a Scapegoat for Men's "Minor" Sports' Problems

A. Female Athletes Still Get the Short End of the Stick

Women's athletic programs continue to lag behind men's programs on every measurable criteria, including participation opportunities, athletic scholarships, operating budgets, and recruiting expenditures. Women have 41% of the opportunities to play intercollegiate sports, 43% of athletic scholarships, 36% of athletic operating budgets and 32% of the dollars spent to recruit new athletes.²

Disparities also persist at the high school level, where female athletes have only 42% of the school-sponsored opportunities to play varsity sports.³ Although national data on the expenditures on boys' and girls' sports programs does not exist at the high school level, anecdotal evidence and court cases strongly suggest that they are not treated equally.

B. The Problem is Not that Title IX Takes Resources Away from Men's Sports, but that Resources are Misallocated Among Men's Sports

Men's sports still get the lion's share of athletic resources:

- In 2000, in Division I, for every dollar being spent on women's sports, almost two dollars are being spent on men's sports.⁴

The problem is not that Title IX has deprived men of athletic resources, but that the resources male athletes receive are inequitably distributed among men's sports.

- Football and men's basketball consume 72% of the total men's athletic operating budget at Division I-A institutions, leaving other men's sports to compete for remaining funds.⁵
- Of the \$3.57 million average increase in expenditures for men's Division I-A sports programs from 1998-2000, sixty-eight percent of this increase, \$2.46 million, went to football. This exceeds the entire operating budget for women's Division I sports in 2000 by over 1.69 million.⁶

The male athletes whose sports have been cut should turn their attention to the athletic directors who subsidize bloated football and men's basketball budgets, and stop blaming female

athletes, who account for a little more than one third of total athletic operating budgets.⁷ If men's sports are being cut, it is because a disproportionate share of athletic dollars continues to be spent on one or two teams -- football and men's basketball -- and are not being spent to add new teams for women or to support existing men's "minor" sport teams. The fact that football and men's basketball may bring in revenue does not justify their bloated expenditures, which take funds away from both men's "minor" sports and women's sports.

First, it is simply a myth that these sports provide the bread and butter for women's sports and other men's teams.

- The vast majority of NCAA football and men's basketball programs spend much more money than they bring in. In fact, 58% of Division I-A and I-AA football programs don't generate enough revenue to pay for themselves, much less any other sports. In 1999, These programs reported **annual deficits** averaging \$1 million and \$630,000 respectively.⁸

Second, at the vast majority of universities, and NCAA Division I institutions in particular, cost-cutting can be accomplished without hurting the competitiveness or revenue production of these programs.

- Universities could stop funding hotel rooms for football players on nights before home games, order new uniforms less frequently, reduce the distance traveled for non-conference competition by selecting opponents closer to home, among other possibilities too numerous to list.
- Athletic conferences also could adopt cost reductions to assist schools in saving funds while ensuring a level playing field by, for example, limiting travel squad size, and adding sports for the underrepresented gender at the same time to ensure geographic proximity of opponents.
- The NCAA could play a leadership role by imposing across-the-board cost reductions, such as capping the ridiculously high dollars spent to recruit new athletes or reducing the 85 football scholarships to a more reasonable number.

None of these measures would hurt the competitiveness of these programs or restrict their ability to generate revenue.

C. Empirical Data Show that Efforts to Blame Title IX Are Misplaced⁹

Male wrestlers whose schools have chosen to cut their teams have been one of the most vocal groups to attack Title IX, claiming that the law forces schools to cut their teams. While the federal courts of appeals uniformly have rejected these athletes' legal challenges against Title IX -- holding that Title IX in no way requires schools to cut men's teams, but that schools may choose to structure their athletics programs however they wish as long as they treat men and women equally--they

continue to blame Title IX for their losses. Most recently, in January 2002, the National Wrestling Coaches Association and others filed a lawsuit against the Department of Education claiming that Title IX's athletic policies discriminate against men by forcing schools to cut men's teams and asking the court to invalidate these longstanding policies.

Not only are the wrestlers' arguments wrong as a matter of law, but data on the decline of men's wrestling teams also demonstrate the fallacy of their arguments.

- The rate of decline of men's wrestling teams during the four years from 1984-1988--a time when Title IX was not being enforced due to the Supreme Court's decision in Grove City College v. Bell,¹⁰ which effectively took intercollegiate athletics out of the reach of Title IX--was almost 3 times as high as the rate of decline during the 12 years since 1988 (1988-2000), when Title IX's application to intercollegiate athletic programs was firmly reestablished through the Civil Rights Restoration Act of 1987, which reversed the Grove City holding.¹¹
- From 1984 to 1988, the number of NCAA institutions sponsoring men's wrestling teams dropped by 53, from 342 to 289. During the years 1988 to 2000, the number dropped by 55, from 289 to 234.¹²

Moreover, participation in wrestling at the high school level has grown.

- There were 226,861 participants in 1971 and 244,984 participants in 2001; also, the number of schools that sponsor wrestling has increased from 7,587 in 1971 to 9,404 in 2001.¹³

The simple truth is that while Title IX is the preferred scapegoat for some advocates of men's "minor" sports--who are loathe to take on the bloated budgets subsidizing football and men's basketball--the reality is that institutions add and drop sports for many reasons unrelated to Title IX. Indeed, a number of women's sports have declined since Title IX was enacted; yet, it can hardly be said that Title IX, which has resulted in tremendous growth overall in women's athletics, is the cause of the decline of these women's teams.

- Women's field hockey has declined since 1982, with the number of women's field hockey teams sponsored by NCAA member institutions dropping from 268 in 1982, to 239 in 2000. While 34% of NCAA member schools sponsored women's field hockey in 1982, only 23% of them sponsored the sport in 2000
- Women's gymnastics is another sport that has experienced a significant decline in recent years. The number of NCAA member schools sponsoring women's gymnastics dropped from 179 in 1982 to 90 in 2000 -- a decline of about 50%. On the plus side of the ledger, many sports -- both men's and women's -- have grown significantly since Title IX's enactment. Among increases in women's sports:

- Women's crew, which had 43 teams at NCAA member institutions in 1982, dropped to a record low of 12 teams in 1991, but skyrocketed to 129 teams in 2000.
- Softball has been another big winner in the past 15 years, increasing from 416 teams in 1982 to 857 teams in 2000.
- Women's soccer has fared particularly well since 1982, when only 80 NCAA member institutions sponsored the sport. In 2000, 811 NCAA schools sponsored women's soccer.

Similarly, while some men's sports may have declined in recent years, others have increased.

- Baseball, which was sponsored by 642 NCAA member schools in 1982, is now sponsored by 857.
- Men's basketball, sponsored by 741 NCAA member schools in 1982, is now sponsored by 989.
- Since 1981-82, men's participation in NCAA and NAIA sports has increased in baseball, crew, football, lacrosse, squash, track and volleyball.¹⁴ At NCAA institutions, men's cross-country, indoor and outdoor track, football, golf, lacrosse, rowing, squash, tennis, volleyball and soccer have all sustained increases in the number of NCAA member institutions sponsoring these sports since 1982.

Rather than draw unfounded inferences based on any one sport's expansion or decline in recent years, and risk missing the forest for the trees, it is important to look at the overall picture for both women's and men's athletics.

- Men's overall intercollegiate athletic participation has risen since 1981, from 169,800 in 1981-82, to 208,866 in 2000-01, although it dropped some during the years that Title IX was not being enforced, declining from 201,063 in 1984-85 to 178,941 in 1987-88.¹⁵ Thus, it can hardly be said that men's athletic programs have suffered because of Title IX.

- Female participation remains below pre-Title IX male participation: there were 170,384 men competing in college sports in 1971-72, and there are 150,916 women competing in college sports in 2000-01.
- In fact, despite Title IX, women's sports have never caught up with men's sports, much less taken more than their fair share of resources. In Division I, in 2000, for every dollar being spent on women's sports, almost two dollars are being spent on men's sports.¹⁶

While it may make for good rhetoric to conclude that Title IX is responsible for cuts in any particular men's sport during the past twenty-five years, it is simplistic and irresponsible. The factors that affect an institution's decision to add, retain or drop a particular sport are much more complex, and include, among other considerations, changes in student interest, alumnae support, liability, risk of injury, and resources.¹⁷ Title IX simply ensures that it can no longer be only the women who suffer cuts, second-class treatment, and the brunt of limited resources.

II. Changes to Title IX Would Be Unwarranted and Unfair

Thanks to Title IX, about 150,916 college women¹⁸ and 2.78 million high school girls¹⁹ now compete in intercollegiate and interscholastic sports. Despite this progress, the playing fields for female and male athletes are far from level. At this critical juncture, efforts to turn back the tide of Title IX enforcement would deprive women and girls of the opportunities that Title IX was enacted to secure.

Moreover, while Title IX may seem an easy scapegoat for some men's sport advocates, it is not the cause of their complaints. Title IX provides institutions with the flexibility to determine how to provide equity to their male and female athletes. While the law requires schools to allocate athletic opportunities and resources on an equitable basis, it does not determine the size of the athletic "pie" to be divided or what sport programs to offer.

Institutions can comply with Title IX's requirements in the area of athletic participation opportunities in any one of three ways: (1) by providing opportunities substantially proportionate to each gender's enrollment; (2) by expanding opportunities for the underrepresented sex; **or** (3) by accommodating the existing athletic interests and abilities of the underrepresented sex. Meeting any one of these three tests will bring an institution into compliance in this area. Significantly, none of these three standards requires schools to cut teams for the over represented sex; each of these measures can be achieved by expanding opportunities for the underrepresented sex.

Indeed, parts two and three can be met only by expanding opportunities for the underrepresented sex, and not by cutting opportunities for the other sex. Most institutions choose to work toward Title IX compliance by adding opportunities for women.

- Of the 74 intercollegiate athletics complaints that OCR has investigated and resolved between 1994 and 1998, 49 institutions have chosen to comply under prongs two or three of the three-part test, and 21 institutions have chosen to comply under prong one.²⁰
- No court has ever ordered a school to reach proportionality to comply with Title IX. Where a Title IX violation has been found and courts have decided on the remedy, they have required schools to add teams in which there is a demonstrated interest and ability for the underrepresented sex.

Where an institution discriminates against women in its athletic offerings, it is generally preferable to remedy the discrimination by adding opportunities for women rather than cutting them for men. Title IX, however, does not bar institutions from cutting men's sports programs, nor should it. Otherwise, schools that are not in compliance with Title IX and that are unwilling to add new opportunities for women would be prohibited from cutting men's programs even in the face of waning student interest. Schools could then argue that such a prohibition entitles them to freeze in place discriminatory opportunities for women and to justify sex discrimination based on resource constraints and their own budgetary decisions. Budgetary constraints have never been recognized as a defense in sex discrimination law or civil rights law generally, and should not be now.

III. Real Solutions to the Problems Faced by Some "Minor" Men's Sports

Rather than cutting back on Title IX enforcement at a time when more, not less, enforcement is desperately needed, a number of responsible alternatives can be taken to preserve existing sport opportunities while increasing opportunities for women, including:

1. Reduce bloated athletic budgets by calling on the NCAA to play a leadership role in adopting cost-cutting measures. NCAA leadership is essential to ensure that individual universities do not suffer a competitive disadvantage from cost-cutting, and to help institutions that lack the political will to confront budgetary excesses in their athletic programs. Effective cost-cutting reduces excesses in some existing teams without eliminating athletic opportunities for students.
2. Require the U.S. Olympic Commission (USOC) to submit an annual report to Congress, prepared in conjunction with the National Governing Body for every Olympic sport, analyzing participation in each Olympic sport at all levels, including youth sports, community sports, and interscholastic and intercollegiate sports. Although the Amateur Sports Act of 1978 currently requires the USOC to submit an annual report to Congress, the report does not break down participation data by sport or provide a thorough analysis of sport participation at all levels. A more thorough report could then be used to guide the USOC to channel funds into endangered Olympic sports.
3. Promote expanded athletic opportunities for women to increase compliance with

Title IX. At the state level, one way to assist financially-strapped institutions to increase opportunities for women is to provide tuition waivers for female athletes, thus enabling schools to free up scholarship dollars to fund new programs for women. The state of Washington has enacted such legislation, with great results.

4. Promote women's opportunities in traditionally male sports. Intercollegiate wrestling, for example, is a sport played increasingly by women.²¹ Efforts to expand opportunities for women to participate in traditionally male sports, as part of a broader strategy to increase women's athletic opportunities, can assist universities in complying with Title IX and strengthening the existing men's program at the same time.

The National Women's Law Center is a non-profit organization that has been working since 1972 to advance and protect women's legal rights. The Center focuses on major areas of importance to women and their families, including education, employment, health and reproductive rights, and family support and income security, with special attention given to the needs of low-income women.

Notes

1. Men's "minor" sports refer to the lower profile men's sports -- i.e., those other than football and basketball.
2. National Collegiate Athletic Association (NCAA), Gender-Equity Study (2000).
3. National Federation of State High School Associations (NFHS), 2001 High School Athletics Participation Survey (2001).
4. NCAA Gender-Equity Study (2000).
5. Daniel Fulks, Revenues and Expenses of Division I and II Intercollegiate Athletics Programs: Financial Trends and Relationships -- 1999 (NCAA 2000).
6. NCAA Gender-Equity Study (2000).
7. Id. (Women's sports account for only 33% of the overall operating expenses at Division I-A schools.)
8. Fulks, *supra* note 6.
9. Except as noted, all of the data discussed in this section are taken from NCAA, Participation Statistics Report 1982-1997 and 1997-98 Participation Rates.
10. 465 U.S. 555 (1984).
11. Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988).
12. Id.
13. NFHS 2001 High School Athletics Participation Survey (2001).
14. These data reflect changes in the combined participation of NAIA and NCAA member institutions.
15. Data compiled by the U.S. Department of Education's Office for Civil Rights from both the NAIA (National Association of Intercollegiate Athletics) and the NCAA, based on the NAIA's 5-Year Varsity Participation Surveys and the NCAA's Participation Statistics Report. 1981-82 is the earliest year for which both men's and women's participation data are available from the NAIA and the NCAA.
16. NCAA, Gender-Equity Study (2000).
17. Id.

18. NCAA, Participation Statistics Report: 1982-00 and NCAA, 2000-01 Participation Rates.
19. 2001 High School Athletics Participation Survey, *supra* note 2.
20. U.S. General Accounting Office, Gender Equity: Men's and Women's Participation in Higher Education (December 1999)
21. Opportunities for female athletes on high school wrestling teams also have increased markedly since the passage of Title IX. During the 2000-2001 school year, 3,032 girls participated on high school wrestling teams. NFHSA, *supra* note 2.