

EXECUTIVE SUMMARY

We are today releasing a Minority Report to fully set forth our views on the issues posed by the Secretary of Education to the Commission on Opportunity in Athletics. We are compelled to issue this Report because we were not allowed to include within the Commission's own report a full discussion of the issues and our position on the recommendations that have been adopted. Our concerns are the following:

- **The findings and recommendations of the Commission's report fail to address key issues or to reflect an understanding of the discrimination women and girls still face in obtaining equal opportunity in athletics.**
- **Many of the recommendations approved by the Commission would seriously weaken Title IX's protections and substantially reduce the opportunities to which women and girls are entitled under current law.**
- **The omissions and weaknesses of the Commission's report are the result of a process that did not adequately focus on critical issues, did not compile evidence necessary to address the state of gender equity in our nation's schools, and did not allow sufficient time for Commissioners to review the record or provide sufficient information for them to assess the impact of their recommendations.**

The Commission's Report Fails to Include Crucial Findings and Recommendations

Our Minority Report sets forth numerous findings that are not included – or are discussed only cursorily and without a full presentation of the evidence or the issue-- in the Commission Report. Among them are the following:

- The Title IX athletics policies have been central in the effort to expand opportunities for women and girls and eliminate discrimination against them. The policies have been in place through Republican and Democratic Administrations, and have been upheld by every one of the eight federal appellate courts that has reviewed them.
- Discrimination against women and girls still exists, and the current athletics policies are still necessary to continue to make progress toward equal opportunity.
- Women are not less interested in playing sports than men. This unlawful stereotype is contradicted by the facts, which show huge increases in women's participation since Title IX was passed. Women's lower level of participation reflects persistent discrimination against them, not lack of interest.
- Advances for women and girls have not resulted in an overall decrease in opportunities for men.
- In the cases where men's teams have been cut, budgetary decisions and the athletics arms race are the true culprits.

The recommendations set forth in our Minority Report flow from these critical findings. In brief, we recommend that the Department of Education:

- Protect the current Title IX athletics policies without change – they are fair, flexible and have opened doors for millions of young women and girls in sports.
- Enforce Title IX to eliminate the continuing discrimination against women and girls in athletics.
- Educate schools and the public about the flexible way Title IX actually works, that there are three different ways to comply, and that cutting men’s teams is disfavored.
- Encourage schools and athletic organizations to rein in escalating athletics costs and agree on reforms so that more female and male athletes will have a chance to play.
- Review whether some rules, like athletic association scholarship limits, make it more difficult for schools to comply with Title IX.
- Require high schools to report data on the gender breakdown of sports teams and expenditures.

The Commission’s Recommendations Would Seriously Weaken Title IX and Substantially Reduce Opportunities for Women and Girls to Play Sports

We believe that the Commission’s key recommendations would seriously weaken Title IX standards and authorize schools to take steps that would further disadvantage women and girls on the playing field. ***As our report shows, these recommendations could result, in one year alone, in the loss of tens of thousands of participation opportunities, and millions of dollars in scholarships, from those to which women and girls are entitled under current law.*** They would also undermine fundamental civil rights principles by enshrining the stereotype that women are less interested in playing sports than men.

Among the problematic recommendations:

- Recommendations 15, 17 and 20 would undercut Prong One of Title IX’s three-part test and substantially reduce the number of athletic opportunities to which women and girls are entitled by permitting schools to count male and female students and athletes in new ways. These recommendations would:
 - Allow schools to count an open-ended number of “ghost slots” for athletes. This would enable schools to artificially inflate the percentage of athletic opportunities they give to women by counting opportunities they never actually fill or seek to fill. This is particularly problematic since women, on average, receive only 32% of athletic recruiting budgets.

- Allow schools to exclude all unrecruited walk-ons from their count of athletes, no matter how large the number, even though these players get the benefits of sports participation. This recommendation would enable schools to pretend that they are not giving athletics opportunities to men, and then to reduce their obligation to female athletes accordingly. ***In one school alone, excluding nonscholarship athletes from the count would result in 86 fewer slots for women – a reduction of 26% from the opportunities to which they are entitled under current law.***
- Exclude so-called “non-traditional” students – including students over the age of 24 and students of any age who are parents -- from the count of students, which would seriously hurt women. Under this proposal, schools would be authorized to assume, for purposes of Title IX, that no older student or student with children is interested in playing sports. This stereotype is both inaccurate and contrary to basic civil rights law.
- The Unnumbered Recommendation and Recommendation 14 would treat schools as having provided equal opportunity even where they do not actually provide it, by allowing “variances” from equal opportunity standards. This means that schools could be deemed to be in compliance with Title IX participation requirements without providing proportionate opportunities or satisfying any other prong of the three-prong test. ***Annual losses of 50,000 opportunities and \$122 million in scholarships for collegiate athletes, and 305,000 opportunities for female high school athletes – or more – could result from these recommendations alone.***
- Recommendations 18 and 19 would authorize improper use of “interest surveys” to limit opportunities for girls and women and to weaken Prong Three of the three-part test. These recommendations would allow schools to conduct interest surveys of the type rejected by courts – interest surveys that have been found to measure the persistence of discrimination against women and girls, not the interest that exists when girls are given unfettered participation opportunities. The recommendations would force women and girls to prove their right to equal opportunity before they are given a chance to play, something the courts have said is inconsistent with Title IX. ***For example, Brown University tried unsuccessfully to use the principles behind these recommendations to allow it to drop two entire women’s teams.***
- Recommendation 12 would authorize the Secretary of Education to create a loophole in discrimination law by allowing private donors to underwrite men’s teams without triggering any obligation that women’s teams be treated equally.
- Recommendation 23 offers the Secretary an open-ended invitation to add new ways to comply with Title IX that were not even considered by the Commission. This recommendation could authorize other radical changes to Title IX policies that would weaken protections for women and girls.

These Recommendations Result from a Flawed Process

The recommendations are the result of a process that prevented full consideration of the relevant issues. In particular:

- The Commission's charge failed to ask the critical question: whether discrimination against girls and women persists, and how it can be remedied.
- The Commission lacked representatives of important constituencies, including Division II and Division III colleges and high school athletes.
- Witnesses selected by the Department of Education testified two-to-one against current policies, and other expert testimony that was requested was not provided.
- The Commission had inadequate time for serious review of the record or the report.
- The Commission was not provided information on, nor therefore was able to consider, the impact of its recommendations.
- The arrangements made for expression of minority views were insufficient. Because the Commission authorized only short statements of minority views, but did not allow for any fuller statement of the dissenters' rationales, the report does not reflect a full statement of the views of each Commissioner.

Conclusion

Equal opportunity for women and girls in education is of the utmost importance to our nation. Although women and girls have made great strides toward equality in the 30 years since Title IX was passed, there is much more to be done before Title IX's goals are achieved. As a result, we urge the Secretary to reject Recommendations 12, 14, 15, 17, 18, 19, 20, 23 and the Unnumbered Recommendation and to keep current policies in place without change. Rather than changing these long-standing and vital policies, the Department should focus on using the policies to educate schools and the public about the importance and flexibility of the law. The goal of equal opportunity cannot be the subject of negotiation; Title IX's vision, and the important policies that serve it, must be preserved. Americans deserve no less.