

## TITLE IX STILL APPLIES: GENDER EQUITY IN ATHLETICS DURING DIFFICULT ECONOMIC TIMES

In difficult economic times, educational institutions at all levels face tight budgets. As a result, some schools may make grueling decisions to cut athletic opportunities or benefits, ranging from delaying the purchase of new uniforms to reducing the number of scheduled games to totally eliminating certain teams. When making these hard choices, it is important for schools to remember that if they cut any athletic opportunities or benefits, they must do so in a way that does not discriminate on the basis of sex in violation of Title IX of the Education Amendments of 1972—that is, any cuts must not exacerbate existing gender inequities or create new ones.

### **Some Institutions Are Making Girls Bear More of the Burden of Smaller Budgets.**

Recent media reports suggest that some educational institutions may not understand their obligations under Title IX and are imposing a greater burden on girls when cutting athletic opportunities or benefits. For example:

- ◆ In an effort to save money, state high school athletic associations in Delaware, Florida and Nevada have implemented cuts in the numbers of games scheduled for most teams. But these associations have specifically spared football from any cuts, thus imposing more of the burden of the economic crisis on girls.<sup>1</sup>
- ◆ While the Florida High School Athletic Association reversed its scheduled cuts after parents sued, claiming the Association's decision violated Title IX, among other laws, individual school districts have publicly stated that they will nonetheless limit their games in the same manner, thereby disproportionately disadvantaging female students.<sup>2</sup>

### **Compliance with Title IX Is Essential to Ensure that Girls and Women Are Treated Fairly in Sports.**

Under Title IX, institutions cannot discriminate on the basis of sex in the provision of participation opportunities or athletic benefits and services.<sup>3</sup> Nevertheless, female students at both the high school and college levels nationwide have fewer opportunities to play sports than do male students, and they are often not treated equally in terms of the benefits and services that they receive when they do play. Women and girls of color are especially likely to face barriers to play.

- ◆ Women in Division I colleges, while representing 53% of the student body, receive only 45% of the participation opportunities, 34% of the total money spent on athletics, 45% of the total athletic scholarship dollars, and 32% of recruiting dollars.<sup>4</sup>
- ◆ Females of color comprise 27% of the female student population at NCAA schools, yet they receive only 17% of the total female athletic opportunities. Comparatively, white females comprise 66% of the female student population and receive 74% of the total female athletic opportunities.<sup>5</sup>

- ◆ At the high school level, girls represent half of the student body but only about 42% of all athletes,<sup>6</sup> and they often face inequitable treatment in areas such as equipment, facilities, coaching, and publicity.<sup>7</sup>
- ◆ Less than two-thirds of African-American and Hispanic girls play sports, while more than three quarters of Caucasian girls do. Three quarters of boys from immigrant families are involved in athletics, while less than half of girls from immigrant families are.<sup>8</sup>

**Title IX requires that male and female students be provided with equal opportunities to play sports.**

The Department of Education has established a three-part test for determining whether male and female students are provided with equal opportunities to play sports, and this test applies to both high school and college athletics programs:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.<sup>9</sup>

**Title IX requires that male and female athletes receive their fair shares of athletic scholarship money.**

Title IX requires that the percentages of athletic scholarship money awarded to male and female athletes should be within one percent of their respective participation rates, unless an institution can show why a bigger gap is justified and not discriminatory.

**Title IX requires that male and female athletes receive equal athletic benefits and services.**

Under Title IX, male and female athletes must be treated equally overall in the benefits and services they receive, including, but not limited to: equipment and supplies; scheduling of games and practice times; travel; coaching; locker rooms, practice and competitive facilities; and publicity.<sup>10</sup> Equal treatment in these and other areas must be provided regardless of the source of funding. In other words, schools cannot provide better facilities or uniforms for boys' or men's teams because outside, private sources pay for the better treatment. All the funds and in-kind contributions that a team receives, regardless of their source, are subject to Title IX's requirements.<sup>11</sup>

## **Institutions Must Comply with Title IX if They Choose to Make Cuts in Their Athletics Programs.**

If a school decides to reduce athletic participation opportunities or benefits for its students, it must ensure that any such cuts do not discriminate against girls and women in violation of Title IX.

The first step is for a school to assess whether it currently provides equal athletic opportunities and benefits to its male and female students. If members of one sex are not treated equally, then any cuts to their opportunities or benefits are likely to aggravate the existing inequality and violate Title IX. If members of both sexes are currently treated equally, then disproportionate cuts to one group's opportunities or benefits could create an inequality and violate Title IX. The following examples help illustrate this point:

- ◆ High School A has a student body that is 50% male and 50% female, 60% of the participants in the athletics program are male and 40% are female, and it has not added any girls' teams in the last 10 years. In order to save money, High School A elects to cut the girls' and boys' lacrosse teams. Because High School A is not in compliance with Title IX's three-part participation test before any cuts are implemented, instituting the proposed cuts will only add to the existing inequality, even though the cuts may appear to treat girls and boys equally. Therefore, High School A's cuts would violate Title IX.
- ◆ College B decides that it cannot afford to provide as many benefits and services to its athletes as it has in previous years, so it chooses to cut back on benefits in the areas of travel, equipment, and publicity for all teams except football, whose players constitute 30% of all male athletes. This decision disadvantages a greater percentage of women (100% of female athletes) than men (70% of male athletes) and would violate Title IX.
- ◆ High School C, which provides equal benefits and services to its girls' and boys' teams, decides that because of budget woes, it will not install lights and batting cages for its softball and baseball fields as it had planned. An outside donor informs the school that it will contribute these amenities for the baseball field. If High School C allows the donor to do this without finding a way to provide the same benefits to the softball team, it would be in violation of Title IX. While schools may accept gifts and other outside funding or support for their athletics programs, they are responsible for treating their male and female athletes equally and may not evade this responsibility by pointing to outside sources as the cause of unequal treatment.

*Are you concerned about sports inequities at your school? Call NWLC @ 1.855.HERGAME*

## Notes

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<sup>1</sup> Katie Thomas, "Florida Drops Budget Plan That Favored Prep Football," *The New York Times*, July 16, 2009.

<sup>2</sup> See Eduardo Encina, "Hillsborough County to Retain Number of Sponsored Contests," *Tampabay.com Blogs*, Jul. 29, 2009 (quoting officials saying they will follow FHSAA's proposed cuts); Buddy Collings, "FHSAA Votes To Rescind Cuts in High School Game Schedules," *Orlando Sentinel*, July 15, 2009 (citing four counties that independently decided to lower schedule limits without touching football).

<sup>3</sup> 34 C.F.R. §106.41.

<sup>4</sup> NCAA, 2005-06 Gender-Equity Report 9, 22 (Sept. 2007).

<sup>5</sup> Cheslock, John, "Who's Playing College Sports? Money, Race and Gender." 29 (East Meadow, NY, Women's Sports Foundation 2008)

<sup>6</sup> National Federation of High School Athletes, NFHS, 2009-10 High School Athletics Participation Survey (2010).

<sup>7</sup> See National Women's Law Center, "The Battle for Gender Equity in Athletics in Elementary and Secondary Schools," August 2008.

<sup>8</sup> Sabo, D. and Veliz, P. Go Out and Play: Youth Sports in America, 14-15, 161 (East Meadow, NY: Women's Sports Foundation, 2008).

<sup>9</sup> United States Department of Education, Office for Civil Rights, Title IX of the Education Amendments of 1972: a Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (December 11, 1979) [hereinafter Policy Interpretation].

<sup>10</sup> Policy Interpretation at 71,415.

<sup>11</sup> *Chalenor v. University of North Dakota*, 291 F.3d 1042, 1048 (8<sup>th</sup> Cir. 2002).