

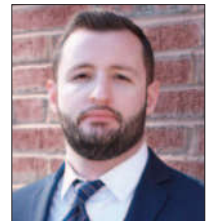


Title IX and The Continuing Fight for Gender Equity in Athletics

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The right of every girl to have an equal opportunity to participate in sports—one of the many guarantees of Title IX of the Education Amendments of 1972—remains unfulfilled even as we enter 2021. The fight for this right has been taken up over the past decades by numerous brave individuals and social justice organizations. Yet the law’s promise of equality remains out of reach for far too many talented and deserving girls, especially girls of color, including in New Jersey.

One of the first cases giving girls more opportunities in sports was *Nat’l Organization for Women v Little League Baseball, Inc.*¹ It held that girls, ages 8–12, must be permitted to play in Little League. Little League’s arguments, including that it was reasonable for it to spend resources only on children who would use baseball skills later in life, were rejected as embedded in “stereotyped conceptions” as to the “needs, capabilities and aspirations for the female, child or woman.” There was a gigantic backlash against the ruling—most Little League teams suspended play altogether and some disbanded.

This case occurred about the same time as Title IX was passed by the U.S. Congress. Title IX, a 37-word law which prohibits discrimination on the basis of sex in federally-funded programs, was passed in 1972 but did not become effective until later that decade. And those 37 words did not mention sports. It was not until 1975, when the Title IX regulations were issued, that the law was applied to sports. After lawsuits and public debates, the regulations became effective, requiring that opportunities to play sports, athletic scholarship dollars, and benefits and services afforded athletes be equitable for females and males.

We have come a long way since Title IX was passed almost 50 years ago; however, girls in sports are still not treated equally at either the interscholastic or the intercollegiate levels.² Girls of color, in particular, are provided fewer opportunities to participate in sports than white girls, white boys, and boys of color.³ While the Department of Education’s Office for Civil Rights enforces Title IX at the federal level, states have Title IX enforcement obligations, and numerous private lawsuits since the early 1980s have been brought to force schools to comply with the law, there is insufficient attention paid to and widespread non-compliance with the law.

Most lawsuits have focused on the intercollegiate level. But dedicated sports devotees and women social justice advocates, along with their respective organizations, are fighting hard to make fundamental changes at the high school level, starting in New Jersey. They are engaged in this fight because they know the fundamental, life-long skills that sports teach girls, such as hard work, self-confidence, and leadership, as



Maria Pepe pitched three games in Little League, until due to her gender, was kicked off her baseball team. The National Organization for Women (NOW) filed a civil rights complaint on her behalf, claiming sexual discrimination. The case went to New Jersey Superior Court, where it was ruled that Little League would allow both boys and girls to play.

well as the health and academic benefits that they provide. They form the core of a team seeking to bring about change at the middle and high school levels—a time when girls are especially impressionable.

This team of (mostly) women lawyers who have played sports and have a passion for gender equity have embarked on a mission to make changes first in New Jersey. More specifically, they seek compliance with Title IX on a voluntary basis from certain high schools in New Jersey with large inequalities in participation opportunities for girls, school by school. The team is also encouraging the State of New Jersey to focus on enforcement of Title IX, with an emphasis on girls of color who “finish last” when it comes to sports opportunities. Focusing on the intersectionality of race and gender, they hope to apply their New Jersey accomplishments on a national scale.

The women and their respective organizations—a non-profit organization, a global law firm, and a dedicated Fund—have accomplished so much already in New Jersey. One member of the team, Jan L. Bernstein, explains her first encounter with Title IX:

My “relationship” with Title IX began at its inception in 1972. At that time, I was playing high school tennis on the boys’ team at my public high school in New Jersey because there were no girls sports teams. Dissatisfied with this unequal treatment for the girls, the following year my parents started a campaign to demand equal opportunity for girls in athletics at the high school, citing the passage of Title IX

and demanding the formation of girls' sports teams. There was significant opposition to the addition of athletic teams for girls. While speaking at a Board of Education meeting on behalf of girls' athletics, my father recalled opposition from one Board member, who informed my father that, "tennis balls are expensive." My father assured the Board member that tennis balls were equally expensive for boys as they were for girls. My parents succeeded, and the first ever girls' sports teams were created at my high school. I played on the first girls' tennis team. This was my introduction to advocating for equal opportunity for girls and women in athletics, which I continued in college and to this day. In honor of my parents' dedication to gender equality in athletics, a Fund was begun in their name at the National Women's Law Center to advocate for equal opportunity for New Jersey high school girls in athletics, focusing on girls of color and at-risk girls.

Another critical member of the team is the formidable National Women's Law Center, the premier nonprofit legal advocacy organization in the U.S. involved in Title IX compliance from the time Title IX was passed.⁴ The NWLC has entered into many agreements with cities and schools and has litigated Title IX cases all the way to the U.S. Supreme Court. The NWLC team is led by Neena Chaudhry, General Counsel and Senior Advisor for Education, who has worked on Title IX compliance for over 20 years. Chaudhry recalls the genesis of her personal connection to Title IX:

I didn't grow up in a particularly athletic family, but I did have strong female role models (a grandmother in India who defied gender norms to become a physician before marrying and made sure her daughter did too) and a feminist father. And thanks to Title IX, I had the opportunity to play basketball in middle and high

school. That experience not only made me stronger physically, but it gave me a new kind of confidence and taught me about patience (I spent a good amount of time on the bench), how to lose but keep going, and teamwork. I didn't know about Title IX back then, but when I had the chance to help enforce the law at NWLC years later, I knew how important it was to make sure that all women and girls had equal opportunities to reap the many benefits of playing sports.

Just a few examples of the landmark work done by the NWLC on Title IX, led by its co-founders Marcia D. Greenberger and Nancy Duff Campbell (the trailblazing women who are among the "founding mothers" of the women's movement), include the following:

- In 1977, NWLC sued to force the government to enforce Title IX.⁵
- In 1980, the NWLC brought the first major Title IX case challenging an entire intercollegiate athletic program, *Haffer v. Temple University*,⁶ leading to a precedent-setting court-ordered settlement expanding the entire women's sports program.
- In 1988, with the NWLC leading the Title IX coalition, Congress passed the Civil Rights Restoration Act, establishing that all parts of schools, including athletics, are covered by Title IX if any part receives federal funds.
- In 2010, the NWLC filed administrative complaints against multiple high school districts across the country to enforce Title IX, including the Chicago Public Schools and the New York City Department of Education.⁷

A summary of the above Title IX cases and other litigation and legislative work done by the NWLC is available online.⁸

The third important component of the team working to provide equal

opportunity in sports for girls of color in New Jersey high schools is Simpson Thacher & Bartlett LLP, a leading global law firm with a strong pro bono program and a longstanding commitment to civil rights, which has taken the matter on *pro bono*. Significantly, Simpson Thacher has developed a deep commitment to seeking Title IX compliance at the interscholastic level. Its focus has mostly been in California where it, along with other key Title IX advocates, has reached numerous agreements with schools at the K-12 level. When schools do not agree to make changes voluntarily, the firm does not hesitate to sue under Title IX. Indeed, it has a pending case in federal court in Honolulu.⁹ A key member of the Simpson Thacher team is Counsel Jayma Meyer. Like Bernstein, Meyer is especially motivated by her personal experience. As an elite athlete prior to the passage of Title IX, Meyer recalls:

I am a former swimmer who was ranked in the top 10 in the world in the butterfly at a time when I had to train by myself because at my high school there was no girls' swim team and the boys' high school team refused to let me train with them. My only option was to swim alone at the YMCA, with my mother as my "lifeguard," at 5 a.m. every morning before the facility was open to the public. With periodic trips to Fort Lauderdale to train under an Olympic level coach, I had a shot at making the 1972 Olympics. But, not being one of the top two in the country in my event—the butterfly—at the Olympic Trials, I did not make the Olympic team, and found myself instead starting college at a school with the best collegiate team in the country, but with no women's team. Aiming for the 1976 Olympics was not a realistic option. Needless to say, I was greatly disappointed.

The importance of participation opportunities and access to athletic

activities for girls simply cannot be overstated. Girls are empowered when they play sports. Yet when opportunities and treatment are inequitable, girls feel degraded and marginalized. Expanding access to sports unquestionably is powerful and an effective form of social justice, for all girls and particularly for girls from disadvantaged backgrounds where much of our efforts are focused.

In New Jersey, the group's project started with an analysis of the Civil Rights Data Collection—publicly available data provided by schools and compiled by the U.S. Department of Education—that shows the number of boys and girls participating in sports per high school and also provides demographic information about each school. After analyzing these data and other publicly available data to determine whether there might be inequitable treatment and benefits on the basis of gender, the group sent letters seeking information from those schools that appeared to be most out of compliance. While not all schools were receptive to the group's efforts, there have been many New Jersey schools that as a result of the group's advocacy, have made voluntary changes, including entering into agreements to move toward Title IX compli-

ance. For example, Union City High School now offers additional teams for girls, has made some of its formerly male-only facilities available to females, and provided additional equipment and locker room facilities for girls. It serves as a model, setting a positive example for other schools on how to improve opportunities for girls.

With varying backgrounds and reasons for engaging in the fight for equal opportunity in sports for women and girls, this team remains confident in the power of equality and will continue to unrelentingly push forward for the benefit of New Jersey girls. It is their big hope that the 50th anniversary of Title IX will be a watershed moment and girls in New Jersey and nationally finally will be treated equally as required under the law. ♀

Endnotes

1. *Nat'l Organization for Women v Little League Baseball, Inc.*, 318, A. 2d 33 (N.J. Super. Ct. App. Div., 1874), *summarily aff'd without opinion*, 67 N.J. 320 (1974).
2. See NWLC Fact Sheets at nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Elementary-and-Secondary-Schools.pdf and nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Colleges-and-Universities.pdf
3. "Finishing Last—Girls of Color and School Sports Opportunities"—A 2015 Report co-authored by the National Women's Law Center reveals the more significant opportunity gaps for girls of color in athletics. nwlc.org/wp-content/uploads/2015/08/final_nwlc_girlsfinishinglast_report.pdf
4. See NWLC Education and Title IX resources at nwlc.org/issue/education-title-ix/
5. See *WEAL v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990), required timely government enforcement of Title IX.
6. *Haffer v. Temple University*, 688 F.2d 14 (3d Cir. 1982).
7. See nwlc.org/press-releases/center-files-title-ix-complaints-against-12-school-districts/
8. See dev.devurl.info/nwlc2.org/about/history/
9. *A.B., et al v. Hawaii State Dep't of Ed. and Oahu Interscholastic Assoc.*, Civ. No. 18-00477 (District of Hawaii)

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