



**EQUAL OPPORTUNITY FOR WOMEN IN ATHLETICS:
A PROMISE YET TO BE FULFILLED**

A Report to the Commission on Opportunity in Athletics

Prepared By the

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August, 2002

SUMMARY

Title IX of the Education Amendments of 1972 is the primary federal law barring sex discrimination in all facets of education, including sports programs. Title IX requires that members of both sexes have equal opportunities to participate in sports and receive the benefits of competitive athletics. It also requires that athletic scholarships be allocated equitably and that men and women be treated fairly in all aspects of sports programming.

Since its passage thirty years ago, Title IX has led to greater opportunities for girls and women to play sports, receive scholarships, and obtain other important benefits that flow from sports participation. In 1972, fewer than 32,000 women competed in intercollegiate athletics. Women received only 2% of schools' athletic budgets, and athletic scholarships for women were nonexistent. Today, the number of college women participating in competitive athletics is nearly five times the pre-Title IX rate. Title IX has had tremendous impact on female athletic opportunities at the high school level as well. Before Title IX, fewer than 300,000 high school girls played competitive sports. By 2001, the number had climbed to 2.78 million.

These advances in athletic opportunities have created significant health, emotional, and academic benefits for women and girls. Title IX -- the law responsible for these advances -- has been widely heralded, and its implementing policies have been consistently supported by Congress and uniformly upheld by the nation's federal appellate courts.

But more remains to be done. While the doors to competitive athletics have been opening to American women and girls, Title IX's goal of equal opportunity in sports has yet to be realized. Although women are over half the undergraduates in our colleges and universities, female athletes are still just 42% of college varsity athletes nationwide. In fact, female participation in intercollegiate sports remains *below* pre-Title IX male participation: Furthermore, women in Division I colleges, while representing 41% of the athletes, receive only 32% of recruiting dollars and 36% of operating budgets.

These facts make clear the continued importance of vigorous enforcement of Title IX and its implementing policies. The Department of Education's three-part test -- which provides three wholly independent ways for schools to show that students of both genders have equal opportunities to participate in sports—is a critical and necessary tool to achieve Title IX compliance. The first prong rightly recognizes the obvious: that schools can comply with Title IX when they provide their female students with the same athletics opportunities they provide to their male students. This prong is essential to guard against freezing still-pervasive discrimination into place, and to ensure that women's opportunities are not constrained by the unlawful -- and factually insupportable -- stereotype that women are inherently less interested than men in playing sports. The second and third prongs of the test offer schools the flexibility to move toward gender equity while structuring their athletics programs to meet specific needs on their campuses.

Unfortunately, there is a long history of opposition to Title IX that has only mounted in recent months. Opponents of Title IX would prohibit schools from complying with Title IX by offering

proportional participation opportunities, and base their arguments on three interrelated claims: (a) that Title IX requires quotas; (b) that these quotas are premised on inflated opportunities for women that they do not want because of a purported inherent lack of interest in athletics and (c) that these quotas force cuts in men's teams. As explained in this report, these claims are factually insupportable and have been resoundingly rejected by the courts.

This report demonstrates that it is critical to preserve Title IX athletics policies because of their effectiveness in dismantling pervasive discrimination against women in athletics, as well as the continuing need to remove remaining barriers that prevent young women from receiving their fair share of the benefits accruing from sports participation. To modify Title IX athletics policies would inject inappropriate uncertainty to the detriment of Title IX enforcement – and to do so in the ways proposed would unlawfully weaken Title IX; freeze into place still-pervasive discrimination in athletics; enshrine the unlawful and inaccurate stereotype that women are less interested in athletics than men; and convert the government from an entity charged with enforcement of the civil rights of all to a protector of special interests. Like every past Administration, and like every federal appeals court that has considered the issue, the Commission should reaffirm that the three-part test is a lawful and necessary means to ensure adequate enforcement of Title IX.

I. A BASIC GUIDE TO TITLE IX AND ATHLETICS

Title IX prohibits federally funded education programs and activities from engaging in sex discrimination. It says simply:

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.
20 U.S.C. § 1681.

Title IX's prohibition against sex discrimination is very broad, applying to most elementary and secondary schools, colleges and universities. As Congress has repeatedly made clear, the law applies to every aspect of a federally funded education program or activity, including athletics.

Title IX requires institutions to offer male and female students equal opportunities to participate in sports, to allocate scholarship dollars equitably, and to treat male and female students fairly in all aspects of athletics.

A. Schools Must Provide Women and Men Equal Opportunities To Participate in Athletics

There are three wholly independent ways schools can show that students of both genders have equal opportunities to participate in sports. Schools can show that:

- the percentages of male and female athletes are about the same as the percentages of male and female students enrolled in the school, **OR**;

- the school has a history and a continuing practice of expanding opportunities for the underrepresented gender – which, in most cases, is women, **OR**;
- the school is fully and effectively meeting its female students’ interests and abilities to participate in sports.

If a school can meet any *one* of these tests, it will be found to be in compliance with Title IX’s participation requirements. This three-part test has been in effect for more than two decades and has been upheld by every one of the eight federal appeals courts that has considered it.¹

As a general matter, institutions do not have to offer any particular sport; neither men nor women have a right to play on particular teams. As long as a school provides equal participation opportunities to men and women overall, it has the flexibility to decide how those opportunities should be allocated among sports or teams.²

B. Schools Must Equitably Allocate Athletic Scholarships

Colleges and universities also must ensure that the overall share of athletic financial aid going to female athletes is about the same as the percentage of female athletes participating in the athletic program. Specifically, the percentage of total athletic aid awarded to female athletes must be within 1%, or one scholarship (whichever is greater), of the percentage of female athletes, unless there are legitimate nondiscriminatory reasons to justify a larger disparity. For example, if 42% of a school’s athletes are women, the school will be in compliance with Title IX if it provides between 41% and 43% of its total athletic scholarship dollars to those athletes.

C. Schools Must Treat Men and Women Equally in All Aspects of Sports Programming

Educational institutions must also ensure that male and female athletes are treated equally throughout their athletic programs, including with regard to equipment and supplies; scheduling of games and practices; financial support for travel and expenses; assignment and compensation of coaches; opportunities to get tutoring, where necessary; and locker rooms, playing fields, and practice areas. Schools need not provide the exact same benefits and opportunities to men’s and women’s teams, as long as their treatment of male and female athletes is equal overall.

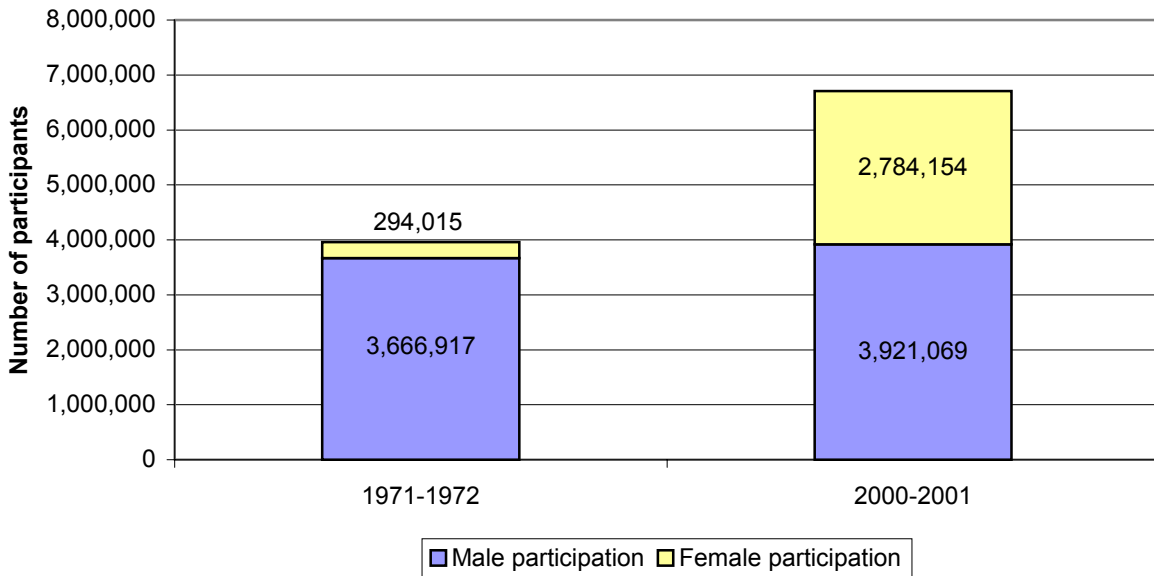
II. TITLE IX HAS PROMOTED GREAT ADVANCES IN ATHLETIC OPPORTUNITIES FOR WOMEN AND GIRLS, BUT THE PLAYING FIELD IS NOT YET LEVEL

A. Participation Has Grown, Particularly at the High School Level

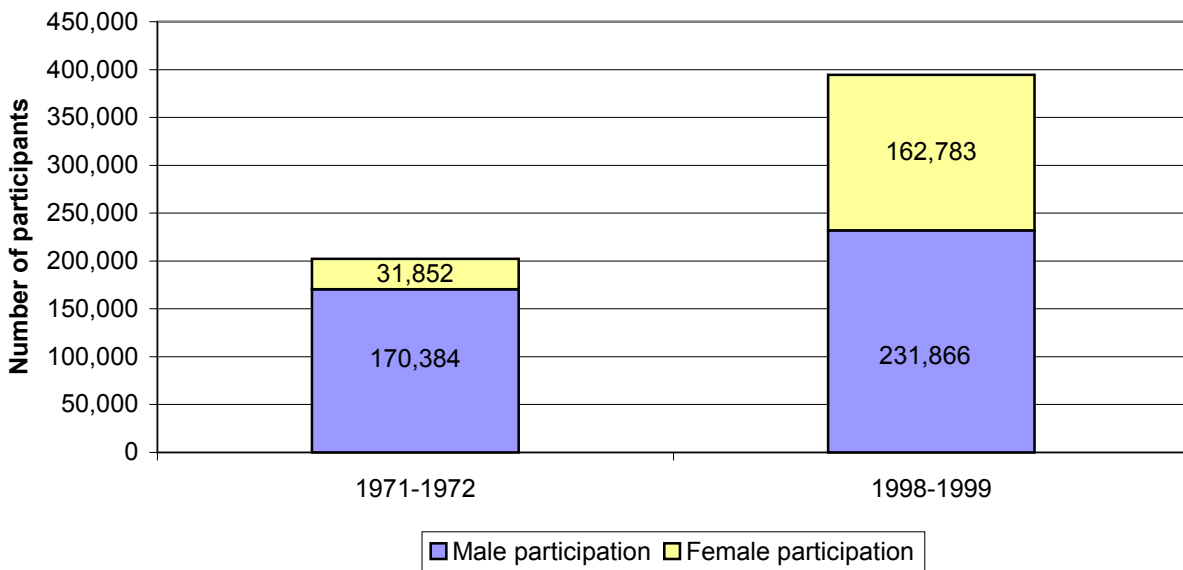
Title IX has opened the door for millions of women and girls to participate in sports. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX,³ today that number has expanded nearly five-fold -- or more than 400% -- to approximately 163,000 women.⁴ Moreover, there is no shortage of interest by women and girls in improving these

numbers. Since 1972, when Title IX first opened opportunities for female athletes, female participation in high school athletics has skyrocketed by more than 800%.⁵

Female Participation in High School Athletics Has Increased by 800% Over the Past 30 Years



Female Participation in Intercollegiate Athletics Has Increased by More Than 400% Over the Past 30 Years



These overall increases in participation by female athletes have been accompanied by increases in particular women's sports. For example, the number of women's crew teams increased from

43 teams in 1981-82 to 122 teams in 1998-99, while women's soccer teams increased from 80 teams to 926 teams in the same time period.⁶ Moreover, a recent study by the Soccer Industry Council of America found that 1/3 of the 18 million soccer players in America are girls under age 18.⁷ As was recognized in an article in 1999, "U.S. women's soccer owes its pre-eminence to the gender-equity reforms visited upon colleges by Congress [30]-odd years ago."⁸

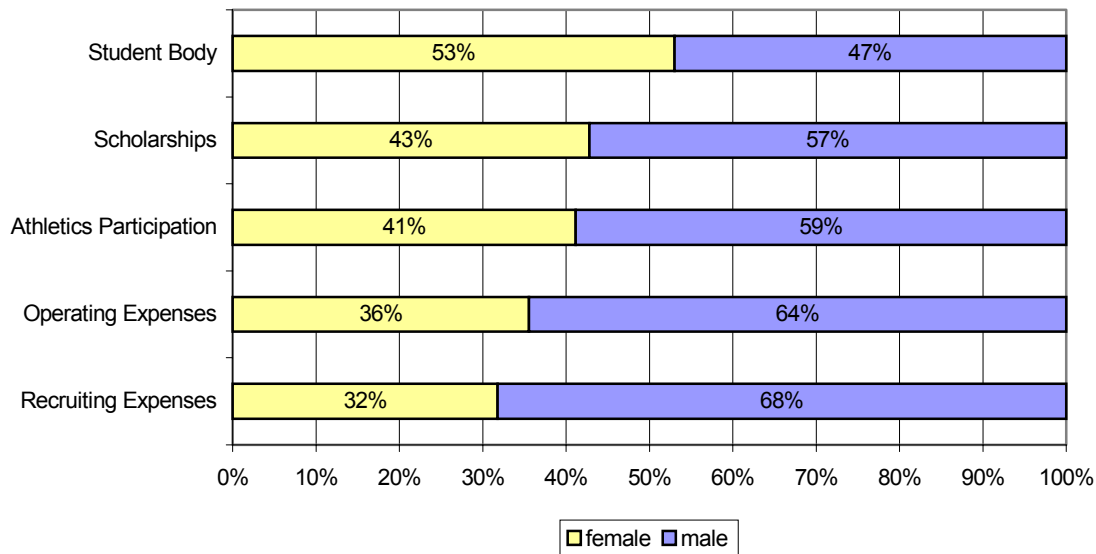
These advances in athletic opportunities have created significant benefits for women and girls. Competitive athletics promotes physical and psychological health;⁹ responsible social behaviors;¹⁰ greater academic success;¹¹ and increased personal skills. Title IX's mandate of equality in sports is especially important for minority women and girls, who experience higher levels of self-esteem, get better grades, and are more likely to graduate from college when they participate in athletics.¹²

B. But Discrimination Still Persists At Both the High School and College Levels

Despite Title IX's considerable successes, women are still second-class citizens on the playing field. For example, although women in Division I colleges comprise 53% of the student body, they receive only:

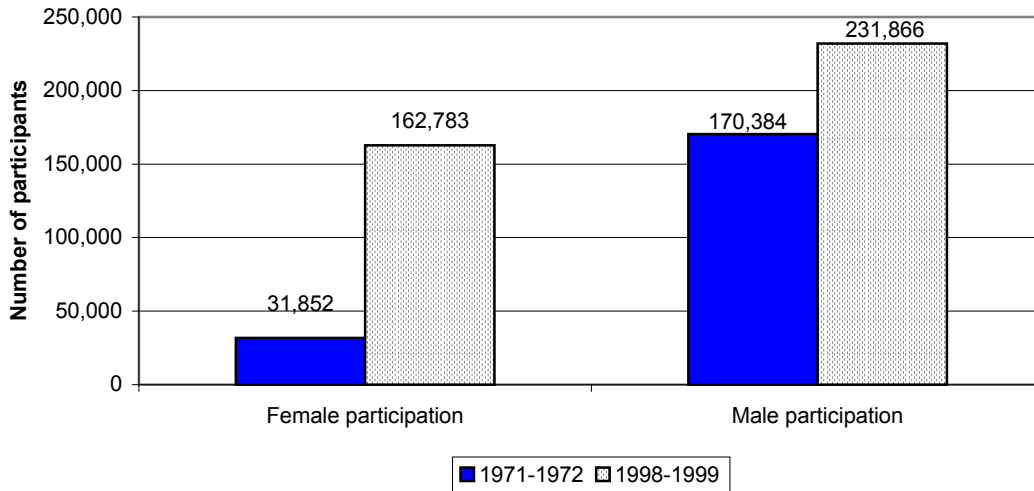
- 41% of the opportunities to play intercollegiate sports;
- 43% of athletic scholarship dollars;
- 36% of athletic operating budgets; and
- 32% of the dollars spent to recruit new athletes.¹³

Women Are Still Second-Class Citizens on the Playing Field (1999-00, Average per Institution for Division I Schools)



In fact, female participation in intercollegiate sports remains *below pre-Title IX male participation*. While 170,384 men played college sports in 1971-72 (the year Title IX was enacted), only approximately 163,000 women played college sports in 1998-99.¹⁴ Men's participation, meanwhile, increased over this period, with approximately 232,000 men participating during the 1998-99 season.¹⁵

Female Participation in Intercollegiate Sports Remains Below Pre-Title IX Male Participation



Disparities also persist at the high school level, where female athletes comprise only 42% of the students involved in school-sponsored sports.¹⁶ Although national data on expenditures on boys' and girls' sports do not exist at the high school level, anecdotal evidence and court cases strongly suggest that male and female athletes are not treated equally.¹⁷ In fact, in far too many cases, girls and women still have had to seek vindication of their rights in court.¹⁸

These inequalities extend to the scholarship arena as well. The availability of athletic scholarships dramatically increases young women's ability to pursue a college education and to choose from a wider range of schools. However, in 2000, male athletes received the access and opportunities that athletic scholarships provide nearly *one and a half times as often* as their female counterparts. The difference amounted to \$133 million dollars more per year in athletic scholarships for male athletes than female athletes.¹⁹ In fact, on the 30th anniversary of Title IX, the National Women's Law Center identified 30 of the hundreds of colleges and universities that remain out of compliance with Title IX requirements for fair allocation of athletic scholarships, and is taking steps to secure these schools' prompt remedy of their scholarship inequalities.

From limited opportunities to participate and fewer scholarship dollars, to inferior athletic equipment and facilities, the playing field for female athletes is far from level. Title IX is just as important now as ever to remove the barriers to young women's participation in sports.

III. THE THREE-PART TEST IS A CRITICAL AND NECESSARY TOOL TO ACHIEVE TITLE IX COMPLIANCE

The focus of the Commission's inquiry is on the three-part test, adopted by the Department of Education to assess whether schools are allocating sex-segregated athletics participation opportunities in a non-discriminatory manner. The test offers schools tremendous flexibility in structuring their athletics programs while at the same time guarding against freezing discrimination into place and ensuring that women's opportunities will not be restricted by unlawful stereotypes.

A. The Three-Part Test Offers Schools Tremendous Flexibility

The three-part test is extremely flexible, and maximizes schools' discretion to structure their athletics programs. Operation of the test in practice has underscored the vitality of each of its three prongs and disproves any claim that schools are only able to comply under prong one. From 1994 through 1998, for example, the Office for Civil Rights of the Department of Education reviewed 74 cases that involved Title IX's participation requirements. In these, only 21 schools -- or less than one-third -- were held in compliance under prong one of the three-part test; the rest of the schools complied under prongs two or three.²⁰

Indeed, the three-part test provides a flexibility to schools that is unprecedented in civil rights law. The first prong rightly recognizes the obvious: that schools can comply with Title IX when they provide their female students with the same athletics opportunities they offer to their male students. Yet under the second prong, schools need not actually provide equal opportunity. They may show simply that they have made, and are still making, *progress* toward equality -- even if, 30 years after enactment of the law, they have not yet reached it. Of course, we would never accept an employer claiming it is providing equal pay for women because the employer is making progress in steadily raising women's pay toward equality with their male counterparts!

Moreover, the third prong of the test enables schools to show that they are fully meeting the actual interests of women on their campuses -- even if they are not giving women the same opportunity to play as male students. The three-part test thus already contains a mechanism for compliance by those schools that claim that the women on their campuses are, in fact, less interested than the men in participating in sports. No modification to the test is necessary to enable schools to make this showing in appropriate cases.

B. The Three-Part Test Is Necessary to Ensure True Equality of Opportunity

At the same time, the proportionality prong, as the courts have recognized, is essential to guard against freezing discrimination into place. As is set forth above, despite Title IX's considerable successes in promoting opportunities for female athletes, there is still substantial discrimination

against women, at both the intercollegiate and high school levels. This persistent discrimination artificially depresses women's participation opportunities.

Were schools to be prohibited from complying with Title IX by offering proportional participation opportunities – the position advocated by opponents of the three-part test -- women's opportunities would be frozen at their current, artificially limited, levels. To prohibit schools from using prong one would both reduce schools' options and distort Title IX by accepting the stereotyped notion that women are inherently not as interested as men in playing sports – a particularly unconvincing claim given that only 32% of college athletics recruiting budgets goes to women. This argument violates fundamental principles of civil rights laws, as well as the Constitution's equal protection requirements, and has long been rejected in court decisions that invalidate gender-based stereotypes used to justify limits on women's opportunities.²¹ The proportionality prong is thus *required* to ensure that women's opportunities are not constrained by unlawful stereotypes.

IV. ARGUMENTS MADE BY OPPONENTS OF TITLE IX HAVE NO BASIS IN EITHER LAW OR FACT

Since the enactment of Title IX 30 years ago, critics of enhanced opportunities for women and girls have argued that the law's non-discrimination mandate is unnecessary for women and unfair to men. In particular, opponents argue that Title IX's implementing policies have caused schools to drop certain men's teams, such as wrestling, based on three interconnected -- but fundamentally indefensible -- links: (1) that the three-part test amounts to a "quota;" (2) that this quota is premised upon the provision of inflated opportunities for women that they do not want because of a purported inherent lack of interest in participating in athletics; and (3) that to achieve this supposed quota, schools must cut men's teams. As explained below, each of these claims is factually insupportable, and all have been categorically rejected by the courts.

A. The Three-Part Participation Test Does Not Create Quotas or Preferential Treatment

Opponents first allege that the three-part participation test constitutes a gender-based "quota" system in violation of Title IX and the Equal Protection Clause of the United States Constitution. This claim is palpably incorrect.

No prong of the three-part test imposes a numerical requirement even remotely analogous to quotas. In fact, the quota charge is particularly inapplicable in the athletics context. Athletic teams are gender-segregated, and individual educational institutions decide how many athletic opportunities they will allocate to each sex and how they will do so. As a result, "determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons."²² Because women are barred by schools from participating on men's teams and vice-versa, schools make a gender conscious allocation of opportunities in the first instance. Far

from imposing quotas, therefore, the three-part test merely determines whether schools are setting the already sex-segregated limits they place on athletic participation opportunities in a non-discriminatory way. For these reasons, courts have repeatedly recognized that the three-part test in no way creates quotas.²³

B. The Notion that Women Are Inherently Less Interested Than Men in Participating in Athletics Is Stereotypical and Flawed

The quota claim rests on the stereotyped notion that women are inherently less interested in athletics than men, and that therefore the three-part test requires schools to provide inflated opportunities for women. However, as Congress and the courts have consistently recognized, this stereotype is belied by the lessons taught by Title IX and by its very purpose.

As the principal Senate sponsor of Title IX, Senator Birch Bayh, explained, Title IX was intended to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."²⁴ At the heart of the debate over how best to combat sex discrimination in intercollegiate athletics was Congress' understanding that when athletic opportunities for women are opened, their athletic interests will be demonstrated.²⁵ Congress has, in fact, repeatedly rejected attempts to limit Title IX's application to athletics.²⁶

The courts too have emphatically rejected arguments premised on women's lack of interest in athletics. In Pederson v. Louisiana State University, for example, the United States Court of Appeals for the Fifth Circuit recognized the connection between the quota argument and the purported lack of women's interest in athletics, stating:

[The University's] hubris in advancing [the argument that women are less interested in sports than men] is remarkable, since of course fewer women participate in sports, given the voluminous evidence that [the University] has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students.²⁷

In Cohen v. Brown University, after a thorough analysis of the policies challenged by opponents of Title IX, the United States Court of Appeals for the First Circuit stated:

To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than men, is . . . to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities. Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. . . . [W]omen's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports.²⁸

Moreover, the “tremendous growth in women’s participation in sports since Title IX was enacted disproves [the] argument that women are less interested in sports for reasons unrelated to lack of opportunity.”²⁹ The dramatic increases in the number of female athletes over the last 30 years – with close to three million girls playing sports in high school today – is alone sufficient to demonstrate that the argument that women are not interested in athletics is simply an attempt to continue an outmoded stereotype. Thus, claims that women are less interested in sports than their male counterparts are both fundamentally unlawful and factually incorrect – and particularly callous given the enhanced educational and health benefits women enjoy as a result of participating in athletics.³⁰

C. Title IX Has Not Caused Cuts in Men’s Opportunities

Opponents are simply wrong in asserting that Title IX’s three-part test forces schools to cut men’s lower profile teams. Courts have consistently recognized that Title IX in no way requires schools to limit men’s opportunities, through cutting teams or otherwise. Moreover, the overwhelming evidence shows that schools can -- and do -- comply with the three-part test by adding women’s opportunities rather than cutting men’s opportunities.

1. Opportunities for women and men have improved over the last 30 years

The operation of the three-part test has demonstrated that the great majority of schools have expanded opportunities for men as well as women in complying with its requirements. While the rate of increase for women has been greater, given the low point from which they began, recent studies show that men’s athletic opportunities have in fact increased, both in terms of the absolute number of male athletes and the number of men’s teams. The facts show, for example, that:

- Men’s intercollegiate athletic participation rose from approximately 220,000 in 1981-82 to approximately 232,000 in 1998-99.³¹
- The number of men’s teams increased from 1981-82 to 1998-99.³²
- Of the 948 schools that added one or more women’s teams between 1992 and 2000, 72% did so without discontinuing any men’s or other women’s teams.³³

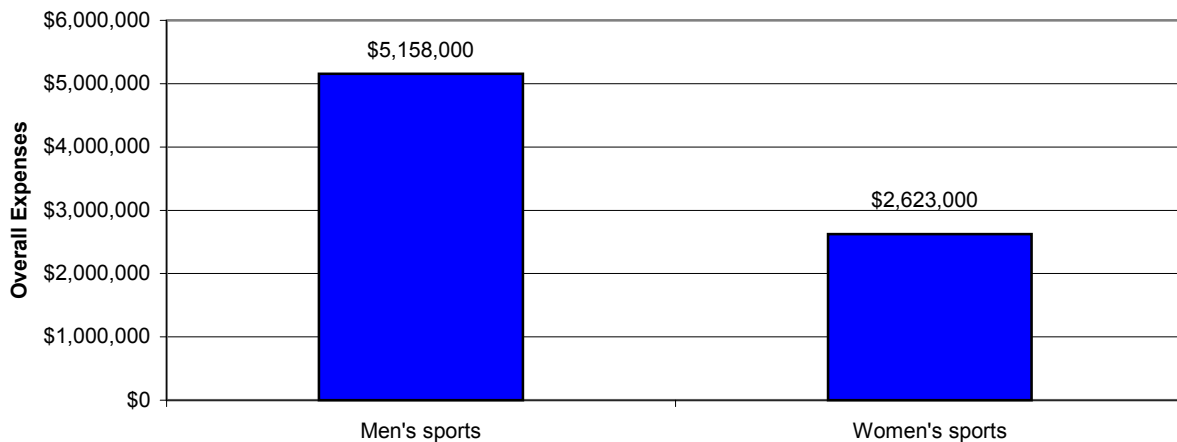
While certain men’s sports may have declined in recent years, other men’s teams have increased. For example:

- Since 1981-82, men’s participation has increased in soccer, baseball, crew, football, lacrosse, track and volleyball, among other sports.
- Baseball, which was sponsored by 926 NCAA and NAIA schools in 1982, was sponsored by 1,011 in 1998-99.

- Men's soccer, sponsored by 744 NCAA and NAIA schools in 1982, was sponsored by 879 in 1998-99.
- The number of NCAA and NAIA member institutions sponsoring men's cross-country, golf, lacrosse, rowing, and volleyball has also increased since 1982.³⁴

Spending for male sports has also consistently dominated spending for women's sports. In Division I, in 2000, for every dollar spent on women's sports, almost two dollars were spent on men's sports.³⁵ Similarly, women received less than one-third of the dollars spent by these schools to recruit new athletes, and only slightly more than one-third of athletic operating budgets. The record thus shows that far from being victims of the increases in women's participation in athletics over three decades, men's sports have more than kept pace and have increased over the same time period.

**Schools Spend \$2 on Men's Sports for Every \$1
They Spend on Women's Sports
(1999-00, Overall Expenses for Division I Schools)**

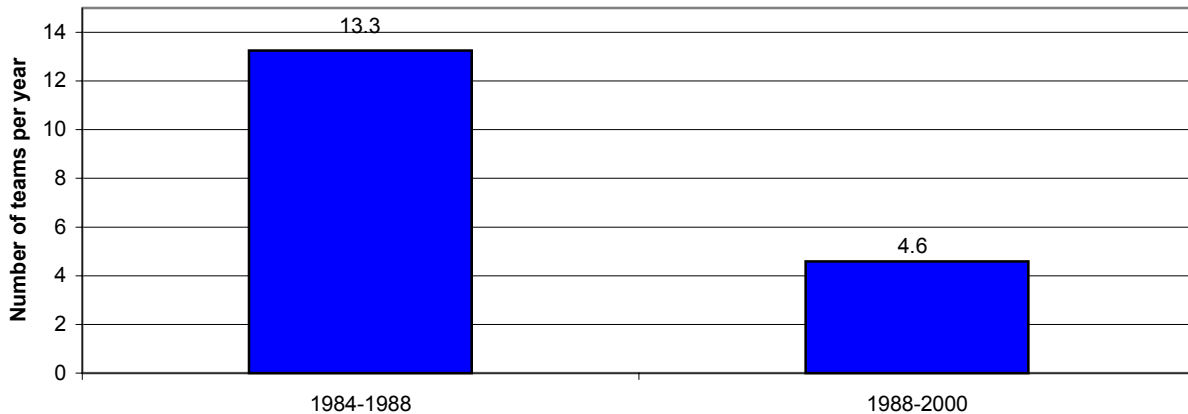


2. Certain male sports have declined for reasons unrelated to Title IX

There are numerous reasons that schools choose to eliminate or reduce particular sports opportunities. Assertions that Title IX is the reason for cuts to particular teams may be a way of simplifying complicated decisions, which can be based on declining interest in specific sports; liability considerations; the poor performance of specific teams; the absence of competitors within a school's conference or region; and/or choices about how to allocate budget resources among the sports teams the school wishes to sponsor. By identifying Title IX as the cause, the implication is that the other competing priorities are valid and appropriate, but Title IX considerations to expand women's limited sports opportunities are not. Any attempt to blame Title IX for a decline in some men's lower-profile teams at certain schools must be rejected.

The claim that the decline in men’s wrestling teams is due to Title IX’s policies is especially unfounded. During the period from 1984-1988, Title IX’s application to intercollegiate athletics was suspended due to the Supreme Court’s decision in *Grove City College v. Bell*, which held that only parts of schools directly receiving earmarked federal funds (which intercollegiate athletics do not) were covered by Title IX.³⁶ In that four-year period, when the three-part test was not in effect, colleges and universities cut wrestling teams at a rate *almost three times as high* as the rate of decline during the 12 years after Title IX’s application to intercollegiate athletic programs was firmly reestablished through the Civil Rights Restoration Act of 1987. From 1984 to 1988, the number of NCAA institutions sponsoring men’s wrestling teams dropped by 53, from 342 to 289. During the 12 years from 1988 to 2000, the number dropped by 55, from 289 to 234.³⁷ In short, the suspension of Title IX enforcement did not save wrestling.

When Title IX Was Not Enforced (1984-88), Schools Cut Wrestling Teams at a Rate Almost Three Times Higher Than During the Subsequent 12 Years When Title IX Was Enforced (1988-2000)



Furthermore, a number of women’s sports have declined since Title IX was enacted. For example, the number of women’s field hockey teams sponsored by NCAA member institutions dropped from 268 in 1981-82 to 240 in 1998-99, while the number of schools sponsoring women’s gymnastics dropped from 190 in 1981-82 to 90 in 1998-99 -- a decline of more than 50%.³⁸ 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.

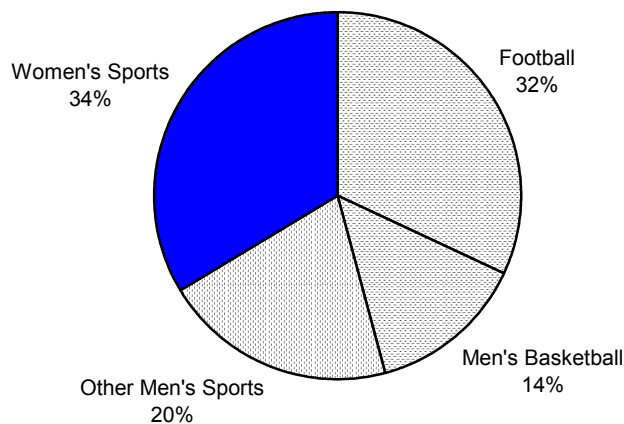
V. CONTINUED EXPANSION OF BOTH MEN’S AND WOMEN’S ATHLETIC OPPORTUNITIES IS BOTH POSSIBLE AND PRACTICAL

Despite the overheated rhetoric of Title IX’s opponents, there are ways that schools can increase, and have increased, women’s and men’s opportunities – even without finding additional

resources to devote to athletics. Schools can find savings by cutting needless expenditures, particularly for football and men's basketball.

The resources male athletes receive are unevenly distributed, with football and men's basketball consuming 72% of the total men's athletic operating budget at Division I-A institutions.³⁹ Of the \$3.57 million average increase in expenditures for men's Division I-A sports programs from 1998-2000, 68% percent of this increase, \$2.46 million, went to football. This increase exceeds the entire operating budget for women's Division I sports in 2000 by over \$1.69 million.⁴⁰

Women's Sports Receive Only One-Third of the Overall Athletics Budgets in Division I Schools

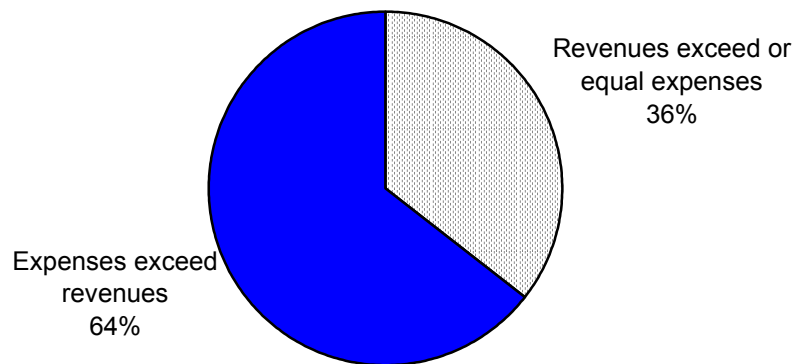


At the vast majority of universities, and at NCAA Division I institutions in particular, cost-cutting can be accomplished without hurting the competitiveness or revenue production of the football programs. Schools could stop funding hotel rooms for football players on nights before home games or order new uniforms less frequently. Universities could also control spiraling coaching salaries and decline to pay for luxuries unrelated to a team's ability to compete – such as mahogany paneling in coaches' offices. Athletic conferences also could adopt cost reductions to assist schools in saving funds and ensuring a level playing field by, for example, limiting travel squad size. None of these measures would reduce the quality of the experience for students, hurt the competitiveness of the programs, or restrict their ability to generate revenue.

The ability to generate revenue does not, of course, mean that sports programs are profitable. To the extent that the substantial funds devoted to football in particular are claimed to be justified by the revenue the sport produces, the facts do not support this assertion – 64% of Division I and II

football programs do not generate enough revenue to pay for themselves, much less any other sports. In 1999, these programs reported annual deficits averaging \$1 million (Division I-A), \$630,000 (Division I-AA), and \$300,000 (Division II).⁴¹ It is thus simply incorrect to suggest that the great majority of schools actually fund intercollegiate athletic programs from any profits generated by football.

Almost Two-Thirds of Division I and II Football Teams Run Deficits



CONCLUSION

Congress enacted Title IX in 1972 to address widespread sex discrimination against women in athletics and all other aspects of their education. After 30 years of Title IX, women and girls now have greater opportunities to play sports, receive scholarships, and obtain other important benefits that flow from sports participation. But much work remains to achieve gender equity in athletics programs. The evidence shows that women still lag in participation opportunities, scholarships, budgets, and other aspects of sports programming. The playing field is not yet level.

The facts laid out in this report show that those who claim to support Title IX but seek to change the three-part test are, in reality, seeking to weaken the Act so that fewer resources will go to women's sports opportunities. Rather than challenge their schools' budgetary or administrative decisions, opponents would have the government enshrine their "right" to play the sport they choose – at the expense of women's rights to play. This is not only unlawful under Title IX; it

also fundamentally misconceives the role of government, which, in the civil rights arena, is to protect equality of opportunity. This Commission should recommend to the Department of Education that the three-part test be maintained and vigorously enforced.

ENDNOTES

¹ See Chalenor v. University of North Dakota, 2002 U.S. App. LEXIS 14404 (8th Cir. May 30, 2002); Pederson v. Louisiana State University, 213 F.3d 858, 879 (5th Cir. 2000); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763, 770 (9th Cir. 1999); Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 274-75 (6th Cir. 1994); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); Cohen v. Brown University, 991 F. 2d 888 (1st Cir. 1993) (Cohen I), and 101 F.3d 155, 170 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) (this case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court (Cohen I), and the second time after a trial on the merits (Cohen II)); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 828 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993); Williams v. School District of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993).

² Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 275 (6th Cir. 1994); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 829 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993).

³ See Department of Health, Education, and Welfare, Policy Interpretation, 44 Fed. Reg. at 71419 (1979).

⁴ U.S. General Accounting Office, No. 01-297, Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams, March 2001 at 7 (hereinafter "GAO Report").

⁵ National Federation of State High School Associations (NFHS), 2001 High School Athletics Participation Survey.

⁶ GAO Report at 12.

⁷ Steven Goff, "Its Popularity Growing, Women's Game is Ready to Shine," Washington Post, June 18, 1999, p. D11.

⁸ Frederick C. Klein, "Goals for Women's Soccer," The Wall Street Journal, April, 16, 1999, p. W7. See also Amy Shipley, "Bearing Down, Catching Up," Washington Post, June 13, 1999, p. D1.

⁹ Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, breast cancer, and other health problems, as well as contributing to better posture, the reduction of back pain, and the development of adequate strength and flexibility. See, e.g., Teegarden, Proulx, et. al., Medicine and Science in Sports and Exercise, Vol. 28 (1996) pp. 105-13; Leslie Bernstein, et al., "Physical Exercise and Reduced Risk of Breast Cancer in Young Women," Journal of the National Cancer Institute, Vol. 86, No. 18 (Sept. 21, 1994); Menopause, Vol. 3, No. 3 (1996) pp. 172-80.

¹⁰ Athletes are less likely to smoke or use drugs. See, e.g., Wyoming High School Activities Association, Student Activities Survey (25% of high school students involved in athletics or activities—versus 40% of non-athletic, non-active high school students—smoke cigarettes); NFHS, The Case for High School Activities (visited May 26, 1999)

<http://www.nfhs.org/case.html> (92% of high school athletes do not use drugs). Adolescent female athletes also have lower rates of both sexual activity and pregnancy. D. Sabo, et al., The Women's Sports Foundation Report: Sport and Teen Pregnancy (1998). See also The President's Council on Physical Fitness and Sports Report, Physical Activity and Sports in the Lives of Girls (Spring 1997).

¹¹ Female student-athletes have higher grades, are less likely to drop out, and have higher graduation rates than their non-athletic peers. See The Case for High School Activities, supra. See also The Women's Sports Foundation, "Table 8," Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students 27 (Aug. 15, 1989); "NCAA Study on Graduation Rates," NCAA News (June 28, 1995).

¹² Minorities in Sports, supra, at 4; Steve Wieberg, "NCAA Graduation-Rate Study: Women First," USA Today, June 30, 1995, p. 3C.

¹³ NCAA, Gender-Equity Report (2000), p. 20.

¹⁴ GAO Report at 7. The estimate for men's participation in 1970-71 is drawn from NCAA, 1982-2001 Sports Sponsorship and Participation Statistics Report, p. 165.

¹⁵ GAO Report at 7, 11.

¹⁶ National Federation of State High School Associations (NFHS), 2001 High School Athletics Participation Survey (2001).

¹⁷ See, e.g., Communities for Equity v. Michigan High School Athletic Association, 178 F. Supp. 2d 805 (W.D. Mich. Dec. 17, 2001) (holding that association's scheduling of six girls' sports, but no boys' sports, in nontraditional or disadvantageous seasons discriminates against girls in violation of Title IX, the Fourteenth Amendment, and state law); Nanette Asimov, "Washington Girls: Softball Diamonds in the Rough," The San Francisco Chronicle, May 26, 2000, at 2 (of 62 girls' softball diamonds in San Francisco, not one has a regulation dirt infield, staked bases and lined field).

¹⁸ See, e.g., Communities for Equity v. Michigan High School Athletic Association, 178 F. Supp. 2d 805 (W.D. Mich. Dec. 17, 2001); Landow v. School Board of Brevard County, 132 F. Supp. 2d 958 (M.D. Fla. 2000).

¹⁹ NCAA, Gender-Equity Report (2000).

²⁰ U.S. General Accounting Office, No. 01-128 Gender Equity: Men's and Women's Participation in Higher Education, December 2000, at 40.

²¹ See, e.g., United States v. Virginia, 518 U.S. 515 (1996); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

²² Neal v. Board of Trustees of The California State Universities, 198 F.3d 763, 770 (9th Cir. 1999) (emphasis added).

²³ See e.g., Cohen v. Brown University, 101 F.3d 155, 170 (1st Cir. 1996) (“No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency document – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals....”), cert. denied, 520 U.S. 1186 (1997).

²⁴ 118 Cong. Rec. 5804 (February 28, 1972).

²⁵ See, e.g., Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. 63 (1975) (remarks of Rep. Esch) (“The question I would ask is how and to what degree, can you encourage or open up the participation? If women have more encouragement to participate, more of them will participate.”); id. at 66 (remarks of Rep. Chisholm) (“The fact of the matter is that women never have really had an opportunity. When you think of the Olympic gold medalist, Donna DeVarona, and the fact that there was no school that would offer her a scholarship, it is tragic. I could go into case after case. The universities have never made a serious attempt, whether under Federal control or not, to really reach out to would-be female athletes and there are hundreds of them in this country.”).

²⁶ In 1974, for example, Congress rejected the Tower Amendment, which would have exempted revenue-producing sports from Title IX coverage. See S. 1539, 93d Cong., 2d Sess., § 536, 120 Cong. Rec. 15477 (1974). Congress also refused to pass resolutions disapproving Title IX’s implementing regulations, which made clear the application of the law to competitive athletics. Moreover, in enacting the Civil Rights Restoration Act in 1988, Congress affirmed Title IX’s coverage of athletics. See 20 U.S.C. § 1687 (1988).

²⁷ Pederson v. Louisiana State University, 213 F.3d, 858, 878 (5th Cir. 2000).

²⁸ Cohen v. Brown University, 101 F.3d 155, 178-79 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997).

²⁹ Id. at 180-81.

³⁰ See notes 9-12, supra.

³¹ GAO Report at 7, 11.

³² Id. at 4.

³³ Id. at 14.

³⁴ Id. at 10-13.

³⁵ NCAA, Gender-Equity Report (2000).

³⁶ Grove City College v. Bell, 465 U.S. 555 (1984).

³⁷ NCAA, 1982-2001 Sports Sponsorship and Participation Statistics Report, p. 119.

³⁸ GAO Report at 12.

³⁹ Daniel Fulks, Revenues and Expenses of Division I and II Intercollegiate Athletics Programs: Financial Trends and Relationships -- 1999 (NCAA 2000), p. 23.

⁴⁰ NCAA, Gender-Equity Report (2000); NCAA Gender-Equity Study (1997).

⁴¹ Fulks Study, supra note 39, pp. 30, 48, 83.