

BREAKING DOWN BARRIERS

A Legal Guide To Title IX
and Athletic Opportunities

NATIONAL WOMEN'S LAW CENTER

The National Women's Law Center is a Washington-based nonprofit organization that has worked for 35 years to expand opportunities and eliminate barriers for women and their families, with a major emphasis on women's education and employment opportunities, health, and family economic security.

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Disclaimer

While the text of and citations for *Breaking Down Barriers* are, to the best of the authors' knowledge, current as of the date of release of this Manual, there may well be subsequent developments, including legislative or administrative action and court decisions, that could alter the information provided herein. This Manual does not constitute legal advice; individuals and organizations considering legal action should consult with their own counsel before deciding on a course of action.

Breaking Down Barriers is dedicated to the memory of Jeffrey F. Liss, formerly Co-Managing Partner of DLA Piper in the United States. His invaluable leadership, extraordinary legal skills, and passionate commitment to *pro bono* work and to social justice will be sorely missed but not forgotten.

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APPENDIX

The enclosed CD contains sample legal materials relevant to Title IX cases. These are the documents on the CD:

1. Letter from the National Women’s Law Center to Andrew W. Nussbaum, Esq. and Roger Thomas, Esq., Regarding Title IX Issues in Prince George’s County Public High Schools (November 22, 2004)
2. Complaint filed by Women’s Law Project against the University of Pennsylvania, United States Department of Education, Office for Civil Rights, Region III (May 25, 1994)
3. Class Action Complaint, *Choike v. Slippery Rock University*, United States District Court for the Western District of Pennsylvania (May 9, 2006)
4. Class Action Complaint, *Barrett v. West Chester University*, United States District Court for the Eastern District of Pennsylvania (September 4, 2003)

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5. Preliminary Statement of Complaint, *Daniels v. School Board of Brevard County*, Case No. 97-1463-CV-ORL-22A, United States District Court for the Middle District of Florida (December 8, 1997)
6. Brief of Amici Curiae in Support of Defendant's Motion to Dismiss, *National Wrestling Coaches Association v. United States Department of Education*, Civil Action No. 1:02CV00072 EGS, United States District Court for the District of Columbia (June 5, 2002)
7. Plaintiffs' Opposition to Defendants' Motion to Dismiss Pursuant to FRCP 12(b)(1) and (6), *Communities for Equity v. Michigan High School Athletics Association*, Case No. 1:98-CV-479, United States District Court for the Western District of Michigan (June 29, 2001)
8. Interrogatories, *Haffer v. Temple University*, Civil Action, No. 80-1362, United States District Court for the Eastern District of Pennsylvania (February 28, 1983)
9. Plaintiff's First Request for Production of Documents, *Sabel v. Danbury Public School District*, Case No. 3:97CV-02022 RNC, United States District Court for the District of Connecticut (March 2, 1998)
10. Motion for a Temporary Restraining Order and Rule to Show Cause Why a Preliminary Injunction Should Not Issue, *Choike v. Slippery Rock University*, Civil Action No. 2:06-cv-00622, United States District Court for the Western District of Pennsylvania (May 11, 2006)
11. Plaintiff's Proposed Findings of Fact and Conclusions of Law, *Choike v. Slippery Rock University*, Civil Action No. 2:06-cv-00622 United States District Court for the Western District of Pennsylvania (June 30, 2005)
12. Commitment to Resolve between Prince George's County Public Schools and the National Women's Law Center (September 2006)
13. Settlement Agreement and Mutual General Release, *Jackson v. Birmingham Board of Education*, CV-01-BE-1866-S, United States District Court for the Northern District of Alabama (November 28, 2006)
14. Consent Decree, *Jackson v Birmingham Board of Education*, CV-01-BE-1866-S, United States District Court for the Northern District of Alabama (November 30, 2006)

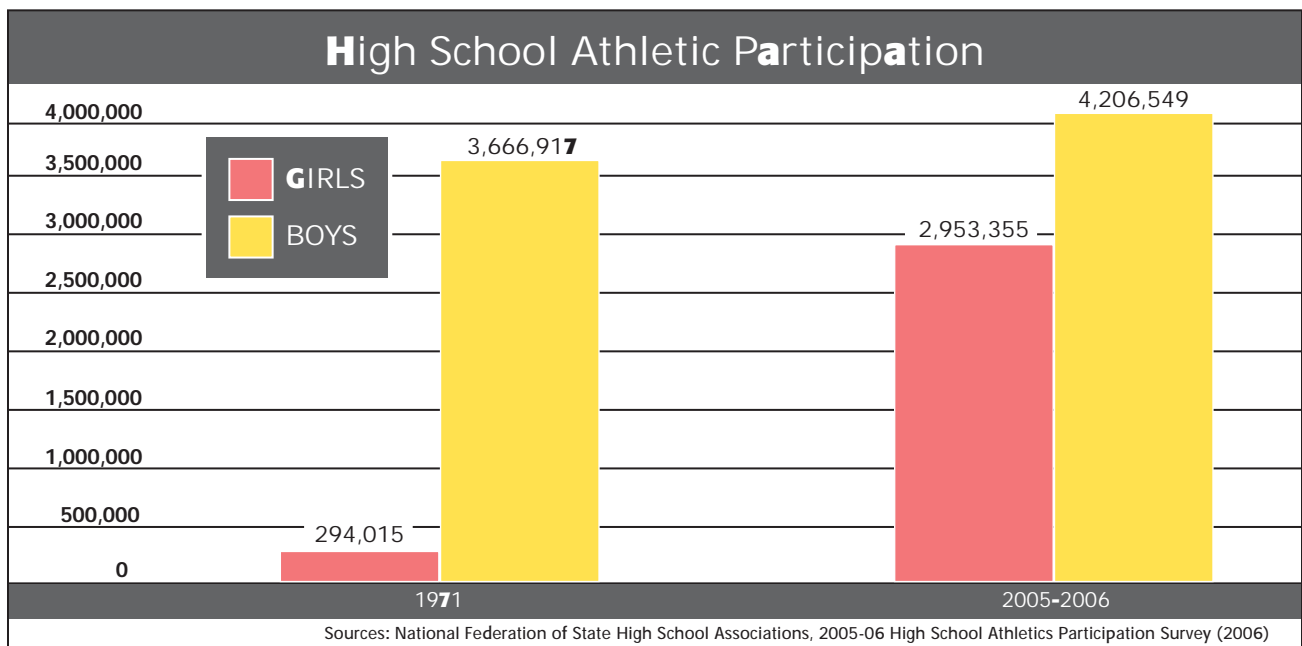
I. INTRODUCTION

BREAKING DOWN BARRIERS



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 the enactment of Title IX 35 years ago, women's participation in intercollegiate sports has skyrocketed. 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. When Congress passed Title IX in 1972, fewer than 32,000 women participated in college sports.¹ Women received only 2 percent of schools' athletic budgets, and athletic scholarships for women were nonexistent. Today, the number of college women participating in competitive athletics exceeds 166,000² – more than five times the pre-Title IX rate, proof that interest often reflects opportunity. Title IX also has had a significant impact on female athletic opportunities at the high school level. Before Title IX, fewer than 300,000 high school girls played competitive sports.³ By 2006, that number had climbed to 2.95 million.⁴



¹ National Women's Law Center, "Debunking the Myths about Title IX and Athletics" (2006), available at <http://www.nwlc.org/pdf/DebunkingMyths.pdf>.

² *Id.*

³ *Id.*

⁴ National Federation of State High School Associations, 2005-06 High School Athletics Participation Survey (2006).

These advances in athletic opportunities have created significant health, emotional, and academic benefits for women and girls and have promoted responsible social behaviors, greater success in school, and enhanced personal skills. 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.

Yet, despite Title IX’s considerable successes, the playing field is far from level for female athletes. Sex discrimination in athletics remains a serious nationwide problem, and women’s athletics programs still lag behind men’s programs. Young women are systematically denied an equal opportunity to participate in, and reap the many benefits of, athletics competition. Although women are over half the undergraduates in our colleges and universities, female athletes are still just 42 percent of college varsity athletes nationwide. In fact, female participation in intercollegiate sports remains *below* pre-Title IX male participation: while 170,384 men played college sports in 1971-72, only about 166,000 women play college sports today. Furthermore, while 53 percent of the students at Division I schools are women, female athletes in Division I receive only 32 percent of the dollars spent to recruit new athletes, 37 percent of total athletics expenditures, 45 percent of the total athletic scholarships, and 44 percent of the opportunities to play intercollegiate sports.⁵ These numbers plainly show that spending on men’s sports continues to far outweigh spending on women’s sports.

Limited opportunities to participate, fewer scholarship dollars, inferior athletic equipment and facilities: these enduring problems mean that Title IX remains as important as ever to removing the barriers women and girls face in sports. Moreover, while other avenues are available to pursue the equitable treatment of women and girls in athletics, efforts to enforce Title IX’s prohibition against sex discrimination, including through litigation brought by parents, students, and coaches, has developed into a particularly effective tool in the battle to secure gender equity in athletics.

This second edition of *Breaking Down Barriers* is a guide to asserting Title IX claims challenging athletics discrimination. It provides a concise introduction to the enforcement of Title IX by private parties, with a focus on the rights of student-athletes. It is an important resource primarily for plaintiffs and their attorneys, but also for university and other school counsel; university, middle, and high school administrators; women and girls in athletics; and others who are interested in familiarizing themselves with the governing legal principles.

⁵ “Debunking the Myths,” *supra* note 1.

In using *Breaking Down Barriers*, keep several points in mind:

- The law in this area continues to develop. While the text and citations are, to the best of our knowledge, current as of the date *Breaking Down Barriers* went to press in Spring 2007, there may well be subsequent developments that could alter the governing legal principles of Title IX.
- *Breaking Down Barriers* is a review of Title IX's prohibition against athletics discrimination and not a general federal law or practice manual. As a result, it does not address procedural, jurisdictional, or other substantive legal principles that are not particular to Title IX, although these principles may have important ramifications for Title IX cases. Examples include class action practice and the law prohibiting employment discrimination. Other resources should be consulted regarding these issues.
- While *Breaking Down Barriers* primarily addresses sex discrimination in intercollegiate athletics, Title IX also applies to elementary, middle, and secondary school competitive athletics programs (in addition to physical education, club, and intramural athletics). Many of the issues raised in connection with competitive athletics are the same at both the secondary and post-secondary levels. For example, the analysis of discrimination in the allocation of participation opportunities and the support and treatment of student-athletes applies to all educational levels. However, there are other issues of concern, principally in the elementary, middle, and secondary school context (such as the obligations of state athletic governing bodies and the rights of young women and men to play on opposite-sex teams), which are not addressed fully here.
- The courts are not the only avenue for pursuing the fight against sex discrimination in athletics, although they have been instrumental in opening up opportunities for many young women. Other options include working through an institution's internal processes, filing complaints with federal or state administrative agencies, or using media and public education strategies. In addition, lawsuits may not be necessary to achieve equality for female athletes who confront inequality in athletic programs at the high school level. School systems are often willing to correct inequalities through settlement agreements without the need for a lawsuit.
- Individuals and organizations considering legal action should consult with their own counsel before deciding on a course of action. *Breaking Down Barriers* is intended to provide information on legal developments related to Title IX. It should not be construed as legal advice or a legal opinion on specific facts.

Title IX

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 educational program or activity receiving federal financial assistance.

A Legislative History of Title IX

1972 Title IX enacted to provide “solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.” President Richard Nixon signed Title IX into law on June 23, 1972.

1974 Javits Amendment adopted, charging the Department of Health, Education, and Welfare with issuing Title IX regulations. The Department received approximately 10,000 comments in response to its proposed regulations.

1975 Title IX Regulations published, and Congress given 45 days to pass a concurrent resolution disapproving of them. During those 45 days, Congress held hearings focused on the athletics regulations, thoroughly establishing the pattern of discrimination against women in competitive athletics:

- “Ohio State spent 1,300 times more for their men’s athletics program than for women’s sports.” (Rep. McKinney);
- At the University of Minnesota, “men [on the swim team were] guaranteed their way paid to nationals if they [qualified] The women’s swim team sold ‘T’ shirts to raise \$450 to send [a female athlete who qualified] to the national event Three qualified women swimmers stayed home.” (Kathy Kelly, President, United States National Student Association); and
- “Women’s teams are still forced to sell cookies to pay for uniforms and travel funds, although they may have a more successful record than their male counterpart, which flies to their tournaments.” (Lynn Heather Mack, Executive Director, Intercollegiate Association of Women Students).

1979 Policy Interpretation published in the Federal Register by the Department of Health, Education, and Welfare's Office for Civil Rights. The Policy Interpretation detailed the factors to consider in assessing athletics programs' compliance with Title IX, including the three-part participation test.

1980 Investigator's Manual published by the Office for Civil Rights to provide guidance to its athletics investigators. The version currently in use was issued in 1990.

1986 Civil Rights Remedies Equalization Act enacted to expressly waive states' sovereign immunity under the Eleventh Amendment for actions under Title IX and similar statutes.

1987 Civil Rights Restoration Act enacted in response to the Supreme Court's ruling in *Grove City College v. Bell*. The Act broadly defined the terms "program" and "activity" as encompassing every part and program of any school, college, or university that receives federal assistance for any purpose. Remarks by senators and representatives in support of the Act highlighted Title IX's early successes in reducing sex discrimination:

- "I personally do not know of any Senator in the Senate – there may be a few, but very few – who does not want Title IX implemented so as to continue to encourage women through America to develop into Olympic athletes." (Sen. Hatch);
- "The participation of women in sports in high schools and colleges has soared since the enactment of Title IX But suddenly, on February 28, 1984, all of our progress against discrimination in each of these areas was placed at risk by the decision of the Supreme Court of the United States in the case known as *Grove City College v. Bell*." (Sen. Kennedy); and
- "Prior to the Grove City case, everyone – and I mean Republican, Democrat, conservative, liberal; Gerald Ford, Richard Nixon, Jimmy Carter, right up until the Reagan administration – thought that the Title IX regulations meant institution-wide coverage. And this, very frankly, is how we finally were able to get universities and other educational units, schools, high schools, to give equal treatment to women in athletics. This was the opening wedge." (Sen. Packwood).

1996 Policy Clarification issued by the Office for Civil Rights. The 1996 Clarification provided additional guidance and examples to educational institutions on how to comply with the three-part participation test outlined in the Policy Interpretation.

2003 Further Clarification issued by the Office for Civil Rights. The 2003 Clarification reaffirmed the Office's dedication to the three-part test and its enforcement, and it stated that cutting teams was disfavored as a method for complying with Title IX.

2005 Additional Clarification issued by the Office for Civil Rights. The 2005 Clarification addressed methods of surveying students to assess athletic interests and abilities under prong three of the three-part participation test.