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Worth Fighting For: Thirty-Five Years of Title IX Advocacy in the Courts, Congress and the Federal Agencies

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WORTH FIGHTING FOR: THIRTY-FIVE YEARS OF TITLE IX ADVOCACY IN THE COURTS, CONGRESS AND THE FEDERAL AGENCIES

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Title IX of the Education Amendments of 1972¹ turned thirty-five on June 23, 2007. This landmark civil rights law has had a tremendous impact in opening up the doors of opportunity to women and girls in numerous areas, including higher education, employment, and perhaps the most well-known of all, athletics. But the law’s job is far from finished. This article focuses on Title IX and women’s continuing struggle to secure equal opportunity on the playing fields. But athletics is not unique. Indeed, the lessons of Title IX in athletics, its importance to women and girls, and how the law has been shaped over the years by advocacy in each branch of government, apply to all the fields of endeavor that still remain only partially available to the young women of this nation. Women and girls continue to lag behind in the STEM (science, technology, engineering and math) fields, remain clustered in “traditionally female” programs such as cosmetology that prepare them for low-wage careers, and are still treated like second-class citizens on the playing fields.

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¹20 U.S.C. §§ 1681-1688 (2006).

Title IX's application to athletics has been controversial from the beginning, and attacks on the law continue today. Opponents have long claimed that young women have only limited interest in athletics and that to provide equal opportunities to them would inevitably be too difficult to achieve. But, in fact, Title IX has made a huge difference in female athletic participation, and the lesson of Title IX is that young women have flocked to play sports when given the chance. The number of college women participating in competitive athletics has gone from fewer than 32,000 women nationwide in 1972² to 170,526 in 2005-06.³ However, even though women are over half of the undergraduates in our colleges and universities, *female participation in intercollegiate sports has just now caught up to pre-Title IX male participation* (170,384 men played college sports in 1971-1972).⁴ Moreover, while the number of high school girls participating has increased from fewer than 300,000 in 1972 to 2.95 million in 2005-06, the number of boys playing is 4.2 million.⁵ Resources for women's athletic programs also continue to lag behind men's. While women are 53% of the student body at Division I colleges, they are only 44% of the athletes and therefore receive only about 45% of the scholarship monies, but also only 32% of recruiting dollars and 37% of the overall amounts that colleges spend to support their teams.⁶ At the high school level, the limited data available tends to indicate that the disparity between resources spent on men's and women's athletics is even worse than at the collegiate level. Strong enforcement of Title IX is needed to ensure that the promise of the law becomes a reality.

I. THE IMPORTANCE OF SPORTS FOR WOMEN AND GIRLS

Title IX's mandate of equal opportunities in sports is critical for women and girls. Females who participate in athletics benefit from greater academic success, responsible social behaviors, a multitude of health benefits, and increased personal skills.⁷

Female student-athletes have higher grades, are less likely to drop out, and have higher graduation rates than their non-athletic peers.⁸ The availability of athletic

²Title IX Policy Interpretation, 44 Fed. Reg. 71413, 71419 (Dec. 11, 1979) (from 1971 to 1976 the number of women in intercollegiate sports increased from 31,852 to 64,375).

³NCAA, PARTICIPATION 1981-82—2005-06: NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 76, 224 (2007).

⁴*Id.*

⁵Nat'l Fed'n of State High Sch. Ass'ns, 2005-06 High School Athletics Participation Survey 2 (2006).

⁶NCAA, 2003-04 NCAA GENDER-EQUITY REPORT 25 (2006).

⁷See Alex Poinsett, Carnegie Corp. of New York, THE ROLE OF SPORTS IN YOUTH DEVELOPMENT 9 (1996).

⁸See NCAA, 2001 NCAA GRADUATION RATES REPORT (2001), available at http://www.ncaa.org/grad_rates/2001/d1/aggregate/d1.html; see also NAT'L FED'N OF STATE HIGH SCH. ASS'NS, THE CASE FOR HIGH SCHOOL ACTIVITIES 12 (2004) (explaining that a state-wide, three year study by the North Carolina High School Athletic Association found that athletes had higher grade point averages (by almost a full grade point), lower dropout rates, and higher high school graduation rates, than their non-athletic peers); RICHARD E. LAPCHICK, KEEPING SCORE WHEN IT COUNTS: THE 2004 WOMEN'S SWEET 16 TEAMS, GRADUATION

scholarships dramatically increases a young woman's ability to pursue a college education and to choose from a wider range of colleges and universities. Unfortunately, women still do not receive their fair share of athletic scholarship dollars. In 2004, women received only 45% of the total available athletic scholarship dollars—that difference amounts to an average of over 136 million dollars more per year in athletic scholarships for male athletes than female athletes.⁹

Athletes are also less likely to engage in risky behaviors, such as smoking or using drugs.¹⁰ In addition, adolescent female athletes have lower rates of both sexual activity and pregnancy than their non-athletic peers.¹¹

The health benefits of regular and rigorous physical exercise provided by sports are extensive. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems.¹² Women who participate in sports significantly reduce their risk of developing breast cancer.¹³ Studies have shown that "increased fitness levels can contribute to better posture, the reduction of back pain and the development of adequate strength and flexibility, qualities which allow girls to participate fully in their daily activities, both vocational and recreational."¹⁴ Women and girls also benefit psychologically. Young women who play sports have a higher level of self-esteem, a lower incidence of depression, and a more positive body image.¹⁵

RATES, TRANSFERS AND RACIAL BREAKDOWN OF ROSTER PLAYERS (2004) (study showing that female athletes in the national basketball tournament had exceedingly high graduation rates), available at <http://www.bus.ucf.edu/sport/cgi-bin/site/sitew.cgi?page=/ides/media.htm> (click "Table: 2004 Women's Sweet 16 Graduation Rates, Transfers").

⁹NCAA, GENDER-EQUITY REPORT, *supra* note 6, at 20, 76.

¹⁰*See, e.g.*, CASE FOR HIGH SCHOOL ACTIVITIES, *supra* note 8 at 3, 9 (92% of high school athletes do not use drugs; 25% of high school athletes, versus 40% of non-athletic high school students, smoke cigarettes).

¹¹*See, e.g.*, Tonya Dodge & James Jaccard, *Participation in Athletics and Female Sexual Risk Behavior: The Evaluation of Four Causal Structures*, 17 J. ADOLESCENT RES. 42, 46-47 (2002); *see also* D. SABO ET AL., THE WOMEN'S SPORTS FOUNDATION REPORT: SPORT AND TEEN PREGNANCY 5-7 (1998); *accord* THE PRESIDENT'S COUNCIL ON PHYSICAL FITNESS AND SPORTS, PHYSICAL ACTIVITY & SPORTS IN THE LIVES OF GIRLS 26-27 (1997).

¹²DON SABO ET AL., THE WOMEN'S SPORTS FOUND., HER LIFE DEPENDS ON IT: SPORT, PHYSICAL ACTIVITY, AND THE HEALTH AND WELL-BEING OF AMERICAN GIRLS 8-12 (2004), available at http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/990.pdf; *see also* Dorothy Teegarden et al., *Previous Physical Activity Relates to Bone Mineral Measures in Young Women*, 28 MED. & SCI. SPORTS & EXERCISE 105, 105 (1996).

¹³Leslie Bernstein et al., *Physical Exercise and Reduced Risk of Breast Cancer in Young Women*, 86 J. NAT'L CANCER INST. 1403, paras. 2, 23, 30 (1994); *see also* Marilie D. Gammon et al., *Abstract, Does Physical Activity Reduce the Risk of Breast Cancer?: A Review of the Epidemiologic Literature*, 3 MENOPAUSE 172 (1996), available at <http://www.menopause.org/abstracts/33172.pdf>.

¹⁴THE PRESIDENT'S COUNCIL ON PHYSICAL FITNESS, *supra* note 11, at 45.

¹⁵*See, e.g.*, Don Sabo et al., *High School Athletic Participation and Adolescent Suicide: A Nationwide US Study*, 40 INT'L REV. FOR SOC. SPORT 5, 8 (2005); George Nicoloff & Thomas L. Schwenk, *Using Exercise to Ward Off Depression*, 23 PHYSICIAN & SPORTSMEDICINE, Sept. 1995, at 44, 44; Randy M. Page & Larry A. Tucker, *Psychosocial Discomfort and Exercise*

In addition, female athletes develop increased personal skills from playing sports, including the ability to work with a team, to perform under pressure, to set goals, and to take criticism. In addition, playing sports helps young women develop self-confidence, perseverance, dedication, and the “competitive edge.”¹⁶

Title IX’s mandate of equality in sports is especially important for women and girls of color, particularly because girls of color are more likely to participate in sports through their schools than through private organizations.¹⁷ Female athletes of color get better grades than their non-athletic peers—in particular, black female athletes are 15% more likely to graduate from college.¹⁸ They also experience higher levels of self-esteem, are more likely to be involved in other extracurricular activities, and are more likely to become leaders in their communities than minority women who do not play sports.¹⁹

II. THE IMPORTANCE OF TITLE IX ADVOCACY IN EACH OF THE THREE BRANCHES OF GOVERNMENT

Throughout Title IX’s history, determined, consistent, and broad-based advocacy has been needed at all levels of government to implement the intent and scope of the law and fight attacks against it.

A. Courts, including the Supreme Court

The Supreme Court and the lower courts have played a major role in defining the scope of the law and the protections that individuals have under it. So far, every court of appeals to consider the issue has upheld the Title IX regulations and policy clarifications that have led to the expansion of young women’s athletics opportunities under Title IX, so the Supreme Court has not ruled on the regulations and clarifications. But the Supreme Court has issued other rulings essential for enforcement of Title IX in all areas including athletics.

In 1979, the Supreme Court held that Title IX includes an implied private right of action without any requirement that administrative remedies be exhausted, meaning that individuals can go to court directly to vindicate their rights under Title IX.²⁰ The Court has also held that monetary damages are available under Title IX in cases of intentional discrimination.²¹

Frequency: An Epidemiological Study of Adolescents, 29 ADOLESCENCE 183, para. 17 (1994) (suggesting that physically active adolescents “tend to feel less lonely, shy, and hopeless” as compared to “their less physically active peers”).

¹⁶See Herbert W. Marsh, *The Effects of Participation in Sport During the Last Two Years of High School*, 10 SOC. SPORT J. 18, 30-31, 37 (1993).

¹⁷See THE WOMEN’S SPORTS FOUND., *THE WILSON REPORT: MOMS, DADS, DAUGHTERS AND SPORTS* 5 (1988), available at http://www.womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/1049.pdf.

¹⁸Jerry Crowe, *Graduation Rates Fall for Most Players*, L.A. TIMES, Nov. 21, 2000, at D6.

¹⁹THE WOMEN’S SPORTS FOUND., *MINORITIES IN SPORTS: THE EFFECT OF VARSITY SPORTS PARTICIPATION ON THE SOCIAL, EDUCATIONAL, AND CAREER MOBILITY OF MINORITY STUDENTS* 7 (1989).

²⁰*Cannon v. Univ. of Chi.*, 441 U.S. 677, 688-89, 706 n.41, 717 (1979).

²¹*Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

Regarding the types of discrimination prohibited, the Supreme Court held that Title IX encompasses employment discrimination, and therefore protects employees, such as coaches, as well as students of covered institutions.²² It also held that Title IX prohibits teacher-student harassment²³ and student-student sexual harassment.²⁴ In addition, most recently, the Court held that individuals who protest sex discrimination may sue to challenge retaliation if their schools punish them as a result.²⁵

With respect to when an entity is deemed a recipient, the Supreme Court held in *Grove City College v. Bell*²⁶ that indirect funding—namely, federal financial aid to students—subjects a college to Title IX, thereby ensuring that almost all colleges and universities are covered by Title IX. The Court, however, limited coverage of the institution only to the program that indirectly receives federal funding, effectively eviscerating coverage of athletic programs and many other programs within colleges and universities across the country. The Court's decision was later overturned by Congress through the Civil Rights Restoration Act of 1987.²⁷ In *NCAA v. Smith*,²⁸ the Court again considered the definition of recipient and held that the NCAA is not subject to Title IX simply by virtue of dues it receives from its member institutions. But the Court explicitly left open the possibility that the NCAA might be covered under alternate theories, including that member institutions that are covered by Title IX ceded controlling authority over covered athletic programs to the NCAA and that the NCAA received a federal grant for its National Youth Sports Program.

B. Congress

1. "If you build it, they will come."²⁹

As the principal Senate sponsor of Title IX, Senator Birch Bayh, explained that 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."³⁰ At the heart of the debate over how best to combat sex discrimination in intercollegiate athletics under the Title IX regulations was Congress' understanding

²²North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530 (1982).

²³Gebser v. Lago Vista Indep. Sch. Dist. 524 U.S. 274 (1998).

²⁴Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

²⁵Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005).

²⁶465 U.S. 555, 563-64 (1984).

²⁷Pub. L. No. 100-259, 102 Stat. 28 (codified as amended at 20 U.S.C. §§ 1681-1688 (2006)).

²⁸525 U.S. 459, 470 (1999).

²⁹FIELD OF DREAMS (Universal Studios 1989).

³⁰118 CONG. REC. 5804 (1972).

that when athletic opportunities for women are expanded, their athletic interests will be demonstrated.³¹

Despite Congress' understanding that interest cannot be determined without opportunity, advocates such as the Independent Women's Forum and the National Wrestling Coaches Association have consistently propounded the stereotypical and consistently rejected assumption that women are inherently less interested in athletics than men, and that therefore Title IX's three-part participation test requires schools to provide "inflated" opportunities for women and discriminate against men.³²

However, as the courts have recognized, this premise is belied by the legislative history and purpose behind Title IX and is not legally permissible. In *Pederson v. Louisiana State University*, for example, the Fifth Circuit recognized the connection between the quota argument and the purported lack of women's interest in athletics advanced by the plaintiffs, and rejected them both, stating:

[The University] argue[s] that it is improper to consider proportionality, because to do so would be to impose quotas, and that the evidence shows that female students are less interested in participating in sports than male students. The law suggests otherwise. Title IX provides that [courts] may consider disproportionality when finding a Title IX violation [The University's] hubris in advancing this argument 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.³³

In *Cohen v. Brown University*, after a thorough analysis of the policies challenged by the student plaintiffs, 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 are 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.

³¹See, e.g., *Sex Discrimination Regulations: Hearings on Title IX of Pub. L. No. 92-318 Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. and Labor*, 94th Cong. 63 (1975) (statement 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 (statement 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.").

³²See, e.g., Erik Brady, *Proposals Assume Sports Interest Men More*, USA TODAY, Jan. 28, 2003, at 1C (quoting IWF spokesperson as saying, "[W]omen are less interested. That's not politically correct to say, but it's the truth.") (emphasis in original); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 936 (D.C. Cir. 2004).

³³213 F.3d 858, 878 (5th Cir. 2000).

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports.³⁴

The court went on to state that:

[T]he tremendous growth in women's participation in sports since Title IX was enacted disproves Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity. . . .

. . . .

. . . Had Congress intended to entrench, rather than change, the status quo—with its historical emphasis on men's participation opportunities to the detriment of women's opportunities—it need not have gone to all the trouble of enacting Title IX.³⁵

Moreover, the facts demonstrate that there is no shortage of interest on the part of girls and women in participating in athletics. The number of female athletes rose dramatically after the passage of Title IX and continues to grow. Women have gone from being almost totally excluded from intercollegiate athletics to having a disproportionately smaller but important share of athletic opportunities. Title IX has had a tremendous impact on female athletic opportunities at the high school level as well.³⁶ To suggest that with close to three million girls playing sports in high school there is not enough interest to maintain women's athletic participation in proportion to their enrollment in college is obviously nothing more than an attempt to continue an outmoded and entirely discredited stereotype. And there is every reason to believe that the number of female high school athletes should and will continue to grow with more opportunity.

2. Efforts to Limit Title IX's Application to Athletics

In 1974, Congress rejected a proposal that would have exempted from Title IX the revenue from revenue-producing intercollegiate athletic programs. This proposal, the "Tower Amendment,"³⁷ was deleted by the conference committee and replaced with the "Javits Amendment," which directed the Secretary of then Health, Education and Welfare ("HEW") to prepare regulations implementing Title IX which included "with respect to intercollegiate athletic[s] reasonable provisions considering the nature of particular sports."³⁸ Opponents of the Tower Amendment

³⁴101 F.3d 155, 178-79 (1st Cir. 1996).

³⁵*Id.* at 180-81 (citations omitted); *accord* Neal v. Bd. of Trs. of the Cal. State Univs., 198 F.3d 763, 768 (9th Cir. 1999) ("[A] central aspect of Title IX's purpose was to *encourage* women to [play] sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships.") (emphasis in original).

³⁶*See supra* note 5 and accompanying text.

³⁷S. 1539, 93rd Cong. § 536 (1974).

³⁸Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974); *see also Sex Discrimination Regulations: Hearings on Title IX of Pub. L. No. 92-318 Before*

had argued that it improperly "focused on the ability of certain intercollegiate sports to withstand the financial burdens imposed by the equal opportunity requirements of Title IX," rather than on discrimination against women.³⁹ Subsequent efforts to restrict Title IX's coverage of intercollegiate athletics has also failed.⁴⁰

HEW issued its final regulations in 1975, and Congress held extensive hearings ("Hearings") on the regulations, focusing particular attention on the need to address the pervasive sex discrimination in intercollegiate athletic programs. The Hearings produced a voluminous record documenting discrimination against women in intercollegiate athletic programs.⁴¹ As Senator Bayh aptly summarized the situation:

Oddly, Mr. Chairman, let me say I have heard of no one making the argument that athletics should not be covered by title IX who does so on the premise that there is no discrimination. No one is suggesting that there is not discrimination, because, unfortunately, there is.⁴²

Resolutions were introduced in both Houses disapproving the regulations insofar as they applied to athletics,⁴³ and in their entirety.⁴⁴ None of the resolutions passed.⁴⁵ The regulations thus went into effect on July 21, 1975,⁴⁶ based on a legislative record characterized by Congress' repeated rejection of attempts to weaken Title IX's application to intercollegiate athletics and its recognition of the need to remedy sex discrimination in intercollegiate athletics.

*the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. and Labor, 94th Cong. 8-9 (1975) (hereinafter *Sex Discrimination Regulations*) (describing the relevant history).*

³⁹*Sex Discrimination Regulations, supra* note 38, at 46-47 (statement of Sen. Bayh).

⁴⁰*See* H.R. 8394, 94th Cong., (1974) (bill amending Title IX to protect revenue produced by an athletic team from use by any other team unless the first team did not need the funds for itself); S. 2106, 94th Cong., (1975) (bill amending Title IX to exempt revenue-producing sports).

⁴¹*See Sex Discrimination Regulations, supra* note 38.

⁴²*Sex Discrimination Regulations, supra* note 38, at 175; *see also* 121 CONG. REC. 20714 (1975) (statement of Sen. Javits) ("Sex discrimination in education takes many forms. . . . [A]thletic programs are restricted and financial aid distributed in a biased manner."); 121 CONG. REC. 24636 (1975) (statement of Sen. Clark) ("A look at present spending figures reveals an unbelievable inequity—of the \$300 million spent annually on collegiate athletic programs, only 2 percent is spent on women's athletics."); *Sex Discrimination Regulations, supra* note 38, at 58 (statement of Sen. Simon) ("I think we have to recognize that we have had some failures here in the past in not encouraging female sports."); 120 CONG. REC. 20668 (1974) (statement of Rep. Hanrahan) ("Mr. Speaker, there has always been sex discrimination involved in athletics.").

⁴³*See* S. Con. Res. 52, 121 CONG. REC. 22940 (daily ed. July 16, 1975); H. Con. Res. 311, 121 CONG. REC. 19209 (daily ed. June 17, 1975).

⁴⁴*See* S. Con. Res. 46, 121 CONG. REC. 17300 (daily ed. June 5, 1975); H. Con. Res. 310, 121 CONG. REC. 19209 (daily ed. June 17, 1975).

⁴⁵*See* Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71413 (Dec. 11, 1979) (summarizing relevant history).

⁴⁶*Id.*

Congressional debates surrounding the enactment of the Civil Rights Restoration Act ("Restoration Act") in 1988, after the attacks in the courts succeeded temporarily, further demonstrate that Title IX has the specific remedial purpose of eliminating widespread sex discrimination against girls and women in education, including intercollegiate athletics. Because Title IX's application to intercollegiate athletics today is principally based on the authority of the Restoration Act,⁴⁷ the debates accompanying passage of that act are properly viewed as contemporaneous legislative history. Even if considered as post-enactment history, the Supreme Court has stated that it would be "remiss if [it] ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within the 'civil rights enforcement scheme'"⁴⁸

C. Federal Agencies

Over the years, advocates have had to push the Office for Civil Rights ("OCR") for enforcement of the law as well as strict interpretation of agency standards.

In 1974, a coalition of womens groups represented by the National Women's Law Center sought agency enforcement of Title IX.⁴⁹ This case eventually led to the issuance of the 1975 regulations interpreting Title IX and court-imposed timeframes on HEW's processing and reviewing of complaints and compliance reviews, as well as to the issuance of the 1979 Policy Interpretation addressing intercollegiate athletics programs after a contempt of court hearing. In 1996, in response to an onslaught of pressure by those seeking to weaken the 1979 Policy Interpretation, OCR issued a clarification reiterating the principles of the 1979 policy guidance.⁵⁰ This clarification focused specifically on the obligations of schools to provide female students opportunities to participate in athletics.

In 1997, the National Women's Law Center filed twenty-five administrative complaints with the Department of Education's Office for Civil Rights alleging discrimination by colleges across the country in their awarding of athletic scholarships to women. These complaints eventually led to the clarification of the athletic scholarship standard in 1998.⁵¹

In 2000, the Center worked with many coalition partners and secured new Title IX enforcement protections for twenty federal agencies and a strong Executive Order

⁴⁷See *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993).

⁴⁸*Cannon v. Univ. of Chicago*, 441 U.S. 677, 686 n.7 (1979); *accord N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982).

⁴⁹*Women's Equity Action League v. Califano*, No. 74-1720 (D.D.C. 1977) (compliance with Title IX ordered in *Adams v. Califano*, 430 F. Supp. 118 (D.D.C. 1977)).

⁵⁰U.S. Dep't of Educ., Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16.1996), available at <http://www.ed.gov/print/about/offices/list/ocr/docs/clarific.html#two>.

⁵¹Letter from Mary F. O'Shea, Nat'l Coord. Title IX Athletics, U.S. Dep't of Educ., Office for Civil Rights, to Nancy S. Footer, Gen. Counsel, Bowling Green State Univ. (July 23, 1998), available at <http://www.ed.gov/about/offices/list/ocr/docs/bowlgrn.html> (explaining that there is a "strong presumption that an unexplained disparity of more than 1%" between the female participation rate and the percentage of total scholarship dollars those female athletes receive violates Title IX).

that prohibits sex discrimination in any federally-run government education program, not just those that are federally funded.⁵²

Most recently, in 2003, after establishing a Commission to review the clarifications dealing with participation opportunities—which was formed in response to Title IX opponents and actually released a torrent of support for Title IX at hearings, in newspaper editorials and at dorms and kitchen tables around the country—OCR reaffirmed the policies yet again.⁵³ But in 2005, a new policy was enunciated that seriously weakened the longstanding requirements to ensure nondiscriminatory participation opportunities for female students.⁵⁴ Without any notice or public input, the Department of Education issued this new Title IX policy, thereby threatening to reverse the decades of progress women and girls have made in sports. Under this new Clarification, schools can claim they provide women and girls with equal opportunities to play sports based only on responses (or lack thereof) from an e-mail survey of female students' interests in sports. (Under prior policy, schools had to make a serious effort to gauge interest, which included talking to coaches and students and surveying women's sports offered by high schools or other colleges in the region). If for any reason the student does not reply, the school may interpret this as lack of interest.⁵⁵ Given the notoriously low response rates to surveys in general and this era of excessive e-mail spam, many have criticized the appropriateness and legality of the Department's Clarification as undermining and being inconsistent with Title IX and its intent to provide more opportunities for women and girls.

III. CURRENT BATTLES

There are many current battles that advocates are waging to promote and protect Title IX and other gender equity principles. Below are a few key fights.

Advocates and Members of Congress have urged the Department of Education to rescind the most recent Clarification it issued, described above, that lowers the bar for what schools have to do to show that they are providing male and female students with equal opportunities to play sports.⁵⁶

At the secondary school level, an effort is underway to pass federal legislation requiring high schools to publicly disclose gender equity information about their

⁵²Exec. Order No. 13,160, 65 Fed. Reg. 39,775 (June 23, 2000), available at <http://www.archives.gov/federal-register/executive-orders/2000.html>.

⁵³U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE REGARDING TITLE IX COMPLIANCE (2003), available at <http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html>.

⁵⁴See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, ADDITIONAL CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY: THREE-PART TEST — PART THREE (2005), available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html>.

⁵⁵*Id.* at 12 (the e-mail "includes a disclaimer that states that if a student does not respond to the survey, the institution will understand that the student is not interested in additional athletic participation.").

⁵⁶See *id.* for discussion of a university's ability to comply with Title IX by sending e-mail surveys.

athletics programs.⁵⁷ A similar law already applies to colleges and shines a spotlight on whether schools are treating their male and female students equally with respect to athletic opportunities and benefits.⁵⁸

On a broader level, a diverse coalition is fighting to overturn certain Supreme Court decisions that limit the reach of civil rights laws or impose less protective standards, including under Title IX.⁵⁹

IV. CONCLUSION

Title IX is a powerful civil rights law that has led to major improvements in the opportunities that women and girls now have in all areas of education. But thirty-five years after the law's enactment, significant barriers to equal opportunities persist, perhaps most visibly on the playing fields. Advocacy by parents, students, coaches and others, as well as strong enforcement of and support for Title IX by our courts, Congress, and federal agencies are essential if the law's true promise is to be fulfilled. We owe our nation's daughters no less.

⁵⁷See High School Sports Information Collection Act of 2007, S. 518, 110th Cong. (2007); High School Athletics Accountability Act of 2007, H.R. 901, 110th Cong. (2007).

⁵⁸Equity in Athletics Disclosure Act, Pub. L. No. 103-382, § 360B, 108 Stat. 3518, 3969-71 (1994) (codified as amended at 20 U.S.C. § 1092(g) (2007)) (enacted on October 20, 1994 as part of the Improving America's Schools Act of 1994, which amended the Higher Education Act of 1965).

⁵⁹See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (imposing higher burden on students to prove sexual harassment under Title IX than is imposed on employees in workplace); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that there is no cause of action to enforce Title VI regulations prohibiting disparate impact discrimination, which could have an impact on Title IX).