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TITLE IX - TWO FOR ONE: A STARTER KIT OF THE LAW AND A SNAPSHOT OF TITLE IX'S IMPACT

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I. STARTER KIT OF THE LAW

In the beginning there was the Law . . . and the Law was good.

The thirty-seven words of Title IX provided great promise when they were enacted in 1972.¹ “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. . . .”²

There are three elements which are required in order to establish jurisdiction under Title IX. The elements are: (1) allegations of discrimination based on sex, (2) within an education program, (3) which “receiv[ed] Federal financial assistance.”³ The meanings of the second and third of these elements have been the focus of

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¹Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681(a) (1972)).

²Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2000).

³*Id.* Title IX does not cover race, age or disability discrimination. *See id.* § 1681. Title IX does apply to both students and employees. *See id.* However, its application to employees is often overshadowed by the greater efficiency of Title VII. *See generally* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -3 (2000).

discussion over the years. Does “within an education program”⁴ include athletics programs? Does “[recipient of] Federal financial assistance”⁵ mean that the presence of a dollar of Federal money anywhere on campus is sufficient to trigger Title IX jurisdiction in a sub-unit not benefitting from that dollar? The answer to both questions is yes.

The life of Title IX provides the perfect scenario for a civics lesson on the relationship and duties of each of the three branches of government: legislative, executive, and judiciary. Enacting law is the proper domain of the legislative branch and Congress did its job on June 23, 1972. But the thirty-seven words of the Law cannot tell the entire story.

The task of the executive branch is the enforcement of the law and in Title IX’s case, that task went to the Department of Health, Education and Welfare (“HEW”)⁶—now the Department of Education—and specifically, the Office for Civil Rights (“OCR”). But in order to enforce the law, more than thirty-seven words were needed. Thus, after over ten thousand comments, lengthy and diverse discussions, drafts, and lots of time, Regulations⁷ were created which attempted to spell out the details. Once reviewed by Congress, the Regulations⁸ had the force of law.

But the Regulations were not enough. Help was needed to know how to *measure* compliance, especially in the area of athletics. When more help is needed than found in a statute’s regulations, the executive branch has the right and obligation to provide more help, and in the case of Title IX it did so with the 1979 Policy Interpretations.⁹ Policy interpretations are not intended to change a statute’s regulations but rather to clarify them. In some ways, policy interpretations can be likened to a teacher who realizes that the students are confused. Instead of simply repeating word for word the previous explanation, the good teacher tries to find new words and methods of description which bring about a better understanding of the original concepts. Policy interpretations do not have the force of law but do have the right to great deference by the courts.

So now we had the Law, the Regulations, and the Policy Interpretations, but there were still questions and misunderstandings about what Title IX requires. When there is an apparent need to increase understanding of a particular point, the enforcement agency—in Title IX’s case the OCR of the Department of Education—has the right to issue Letters of Clarification. Letters of Clarification are not changing the law or regulations; they are intended only to clarify a specific area of confusion. For instance, Title IX’s much-discussed three-part test¹⁰ first appeared in the Policy

⁴20 U.S.C. § 1681(a).

⁵*Id.*

⁶HEW was reorganized and the relevant part relating to Title IX enforcement became housed in the new Department of Education with the sub unit called the Office for Civil Rights.

⁷*See generally* Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (setting forth the Policy Interpretations).

⁸45 C.F.R. § 86.1 (2007).

⁹Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979)

¹⁰In brief, the three-part test provides a selection of three methods by which an institution may demonstrate compliance with the requirement to provide equal access to opportunities to

Interpretations as a measure of compliance for the requirement found in the Regulations relating to athletic participation opportunities. Judging by the decibel level of the debate regarding the three-part test, there was a need to clarify it. In 1996, a Letter of Clarification was issued regarding the three-part test, focusing mainly on the “proportionality prong” of the test.¹¹ The Letter did not invent the three-part test, nor did it change it. Its goal was simply to state the test yet again using different language with the hope of increasing understanding of the concept.

There are other aids to determining the requirements of Title IX, but they don't carry the weight of the ones discussed above. For instance, in 1990, an investigator's manual was issued for use by OCR investigators as they reviewed complaints. The Title IX Investigator's Manual is not law nor does it earn any particular deference in the courts. However, it gives an insight into the mind of the OCR as it conducts investigations following Title IX complaints.

Case law, and there is lots of it, adds understanding about Title IX issues. For instance, it is through case law that we learned that Title IX includes a private right of action and coverage for employees.¹² Case law has told us that monetary damages are available for the successful Title IX plaintiff.¹³ Case law has told us that budgetary constraints are not an excuse for noncompliance and that a private right of action exists for the victim of retaliation even if the victim has no other Title IX claim.¹⁴ In sum, Title IX case law has almost universally been in favor of increasing participation opportunities for women and providing equitable treatment.

There are three mechanisms for enforcing Title IX. The victim of discrimination is not required to select any of the three first before proceeding to another. The least effective method is the in-house complaint. In-house complaints are reviewed by the campus Title IX Designated Officer,¹⁵ but because that person often works in the back office of the president and at the pleasure of the president, that person has strong motivation to avoid finding the presence of discrimination.

A second method of enforcement is the OCR complaint. No legal standing is required to file an OCR complaint and thus this method of enforcement provides a

participate. In very brief form, the three options include: demonstrating a history and continuing pattern of upgrading the program and opportunities for the historically underrepresented sex; demonstrating that the interests and abilities of that sex have been met by, among other means, appropriate surveys; and having a ratio of male to female athletes that mirrors the ratio of males to females in the student body at large. Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979)

¹¹Letter from Office of Civil Rights (Jan. 16, 1996), *available at* <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>.

¹²North Haven Bd. of ed. v. Bell, 456 U.S. 512, 535 (1982).

¹³Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992).

¹⁴Favia v. Ind. Univ. of Penn., 7 F.3d 332 (3d. Cir. 1993); Haffer v. Temple Univ., 678 F. Supp. 517, 530 (E.D. Pa. 1987); Jackson v. Birmingham Bd. Of Educ., 544 U.S. 167, 183-84 (2005).

¹⁵Title IX requires each institution within its jurisdiction to have a Title IX Designated Employee. That person generally has many other responsibilities with Title IX being one among many items in their portfolio. However, the Title IX officer is supposed to take time to educate the campus community about the rights and responsibilities of Title IX as well as to receive and investigate in house complaints.

bit of safety for employees who may be centrally involved with the filing but who are able to find an outsider to sign the complaint. The strength of enforcement by OCR complaint is found in the ability of the OCR to remove federal money from campus as a penalty for noncompliance. On most college campuses there are tens of millions of dollars of federal support. However, the strength of this method of enforcement is illusory; not one dollar of federal money has ever been withdrawn from a campus due to a Title IX violation. The knowledgeable but unrighteous campus administrator realizes that delay and postponement are effective tools to resist an OCR complaint.

A lawsuit, although expensive, carries with it reasonably sharp enforcement teeth. Monetary damages are available to the successful Title IX plaintiff.¹⁶

If you are not on the team (or if there is no team) you do not need a uniform. Thus, much of the debate and angst about Title IX has focused on the provision for equitable participation opportunities. Much of that debate has focused on the proportionality prong of the three-part test which says in effect that one of the three ways a school can demonstrate that it is providing equitable participation opportunities is if the ratio of male to female athletes tracks the ratio of male to female students at the institution. The term “safe harbor” has been used by the OCR to reflect what successful employment of the proportionality prong brings to the institution; however, the term has been frequently misconstrued. The term “safe harbor” correctly means that a school that can use the proportionality prong successfully will not be investigated further considering its provision of participation opportunities even if large numbers of female athletes are not being provided with teams on which to participate.

As the population of female students has risen, compounded with the typically out-of-proportion recruitment funding available for females, the “proportionality prong” has been more challenging to meet. But schools still have two other prongs of the three-part test from which to select. Only one need be met.

A second possibility for demonstrating compliance in the participation arena is by demonstrating a historical and continuing practice of upgrading the program for the underrepresented sex (generally females when we are talking about athletics; generally males when we are talking about nursing programs). Institutions which have put off complying with Title IX have found this second prong impossible to use.

The third possibility from the three-part test for demonstrating compliance is the “interests and abilities prong.” Are the interests and abilities being met for the historically underrepresented sex? It is difficult to use this prong if a team exists full of female students who are both skilled and interested in a particular sport for which there is appropriate competition and feeder systems available in the geographic region reached by other sports on campus. The “interest” prong has become the focus of recent debate.

A couple of years ago, the OCR, without apparent input, issued what it called a Letter of Clarification regarding the use of surveys to determine the interests and

¹⁶ The plaintiff must prove intent for damages to be allowed, but in athletics cases, intent is extraordinarily easy to prove.

abilities of athletes on campus.¹⁷ The OCR even drafted its own electronic survey instrument, again without any professional input. The survey is justifiably criticized for characterizing a “non-response” as a demonstration of disinterest. It is also justifiably criticized for the tone of its introductory remarks which seem to encourage *disinterest* on the part of the potential respondent. Perhaps the most significant failing of the OCR Survey—and what makes it a very bad idea—relates to what an institution needs to do *after* the survey has been administered. The answer is: nothing. Even in the face of results overwhelmingly indicating the presence of interest and ability there is no obligation for a school to add a team, even if the school cannot show compliance by meeting either of the other two prongs. The simple act of administering the electronic survey, regardless of its results, gives the school a “get out of jail free” card regarding the requirement to provide equitable participation opportunities.

The National Collegiate Athletic Association (“NCAA”) has recommended strongly to its members that they abstain from employing the OCR Survey as a means of meeting the three-part test. Only a few institutions have ignored that recommendation.

Let’s turn our attention to the quality, not just the quantity of participation. Title IX provides for equitable treatment within the program in such areas as: equipment, recruitment, medical, schedule, travel, facilities, housing, publicity, locker rooms, support services, coaching, and financial aid.

The only area above in which dollars are the measure is financial aid. For all other areas, the quality and quantity of the *benefit* being provided is the measure. The distinction between *dollars* and *benefit* as a measure of equity is a logical one. For instance, it costs a great many more dollars to equip a football player than a track athlete but because the measure is *benefit*, not *dollars*, if each athlete receives the same quality of uniform and personal equipment and each athlete’s gear is replaced at the same appropriateness of schedule, equity has been well served.

What is the nature of equity in the spirit, not merely the letter of the law? When you were young and there was only one piece of cake left for you and a sibling, how did you divide it? For many of us, Mom would ask one of us to cut it and the other to select which piece to take. We became exceedingly good at cutting the cake into two equal pieces. The motivation was as strong as our sweet tooth. Put in more formal wording, the definition of gender equity in the context of athletics might be what was adopted by the NCAA long ago at the urging of the National Association of Collegiate Women Athletic Administrators (“NACWAA”).

Gender equity is an atmosphere and a reality where fair distribution of overall athletic opportunity and resources, proportionate to enrollment, are available to women and men, and where no student athlete, coach, or athletic administrator is discriminated against in any way in the athletic program on the basis of gender.

That is to say, an athletics program is gender equitable when the men’s sports program would be pleased to accept as its own, the overall

¹⁷On St. Patrick’s Day, 2005 the OCR issued a further clarification which included a model survey instrument for determining levels of student interest and abilities. A careful reading of the materials which support the survey illustrates the flaws found within.

participation, opportunities, and resources currently allocated to the women's sports program and vice versa.¹⁸

II. A SNAPSHOT OF TITLE IX'S IMPACT

Seasons were short and coaches were paid with thank you notes before Title IX—but women played, and they played with skill and intensity.

In the late sixties, female athletes could play several varsity sports due to short seasons. The seasons were short for several reasons, including a fear that intense practice and competition might be harmful to the female physiology, and the fact that the coaches were often full-time physical educators volunteering their time or, at best, being paid minimal amounts above and beyond heavy teaching loads. The short seasons provided mediocre athletes with the opportunity to participate all year long because their mediocrity was not clearly revealed before the season ended. Other, more highly skilled athletes were denied the opportunity to test themselves to their fullest before the season ended. Certainly there were pluses and minuses, but for all, the choice was denied.

Female varsity intercollegiate athletes of the 1960s often supplied their own three-dollar shoes, wore their own white shorts and shirts as uniforms, packed their own sack lunches for long road trips, rode drafty converted school buses on overnight trips, and, upon arriving, slept five or six in a room paid for by themselves. Refreshments were served at the end of competitions by the host school and often were the only food available for the homeward-bound trip. The absence of photos in the yearbook of any female athlete illustrated the lack of value placed on the efforts of female student athletes, but the lack of external valuation did not diminish the value of participation for the participants themselves. True value is internal to the individual. It would be nice if the individual's view of value and society's view coincided now and then.

In the years before Title IX, intercollegiate athletics existed for women, even if that existence is often forgotten. However, the massive growth in participation as a result of Title IX is proof of the adage, "If you build it, they will come." Indeed, there were about 16,000 female intercollegiate varsity athletes prior to Title IX; today there are over 180,000 athletes on over 9,101 teams.¹⁹

Two years before the thirty-seven words of Title IX became law, there was an average of 2.5 women's teams per school. In 2008, that number has grown more than four-fold to an average of 8.65 per school (all divisions combined).²⁰ Division I leads the way with 9.54 per school with a growth over the past twelve years of 1.21 teams per school.²¹

Basketball, volleyball, soccer, cross country and softball are the five most frequently offered sports in women's intercollegiate programs followed by tennis,

¹⁸National Association of Collegiate Women Athletics Administrators, http://www.nacwaa.org/rc/rc_titleix_main.php (last visited Oct. 18, 2007) (emphasis added).

¹⁹R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, *WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY: THIRTY-ONE YEAR UPDATE 1977-2008*, participation 10 (2008), available at www.acostacarpenter.org.

²⁰*Id.* at 1.

²¹*Id.* at 2.

track and field, golf, swimming, and lacrosse.²² This 2008 “top ten” list is different than it would have appeared in the early days of Title IX. For instance, in 1977 soccer was found in less than three out of one hundred women’s programs; today it is found in more than nine out of ten.²³ Other sports, such as gymnastics, have waned in popularity. Once found in over a quarter of schools, women’s gymnastics teams now are found in less than one out of ten.²⁴

The reasons for the change in specific sport offerings are multidimensional. Some changes are due to the preferences or lack of understanding of a specific sport by the male athletic director (78.7% of athletics directors are male).²⁵ Some changes are due to the expensive nature of a specific sport, the changing demographics of feeder systems, society’s interest in a sport (beyond the intense interest of the participants), and the increasing acceptance by society of females as participants in sweaty, “grunty” sports. Female athletes of a couple decades ago needed to leave their assertiveness and athleticism in the gymnasium in order to be considered “feminine” by society. What a joy it is today to see young girls dressed in their sport clothes in the market or mall without a shred of self-consciousness. If we ever need to be reminded of the positive changes that Title IX has wrought, the image of these young athletes does it.

While feeder systems are not always the high school programs, in most cases a look at the popularity of sports in high schools gives a good idea of where the interests and abilities of college athletes will be found. Based on the number of high school programs, the top ten sports for young women in high school in 2007 were:²⁶

1. Basketball
2. Track and field
3. Softball
4. Volleyball
5. Cross Country
6. Soccer
7. Tennis
8. Golf
9. Swimming and Diving
10. Spirit Squads

More female high school students participated in varsity sports in 2007 than ever before.²⁷ They did so without reducing the participation numbers of their male

²²*Id.* at 3.

²³*Id.*

²⁴*Id.*

²⁵ R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, *WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY: THIRTY-ONE YEAR UPDATE 1977-2008*, administration 6 (2008), available at www.acostacarpenter.org.

²⁶ NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, *HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY (2007)*, available at http://www.nfhs.org/core/contentmanager/uploads/2006-07_Participation_Survey.pdf.

²⁷ *Id.*

counterparts.²⁸ Indeed, 2007 represents the highest participation rate for male high school students in the past twenty-nine years.²⁹ Participation for both males and females is increasing.

Some specific sports on the college level, such as men's wrestling, have become easy targets for administrators who elect to create a no-budget-cut zone for favored sports and therefore must cut others. Let it be clearly understood: the authors believe that cutting any sport participation opportunities for males or females in order to maintain a full budget for a privileged team is contrary to the educational mission of the institution and, not to mince words, is a cowardly administrative decision. Remember the cake? Whatever the size of the solitary piece, sharing equitably is the honorable thing to do.

Who is coaching women's intercollegiate teams? In 1972, "over 90% of [head coaches of] women's teams" were female.³⁰ Today only 42.8 % are female.³¹ Less than 3% of head coaches of men's teams are females, a figure that hasn't changed significantly since before Title IX was enacted.³² It is important, however, to look at the entire world of head coaching: "only 20.6% of all head coaches [of men's as well as women's intercollegiate teams] are females."³³

Although the percentage of female head coaches is near its all time low, the absolute number has increased by about 887 jobs in the last ten years.³⁴ In the same time period, though, there has been an increase of 1,868 male head coaches of women's teams.³⁵ Sixty-eight percent of the "new" head coaching jobs for women's teams have been taken by men.³⁶ Of the top five women's sports, the changes in percentages of female coaches from 1977 to 2008 are as follows:³⁷

	2008	1977
Basketball	59.1	79.4
Volleyball	55.0	86.6
Soccer	33.1	29.4
Cross Country	19.2	35.2
Softball	64.7	83.5

²⁸ *Id.*

²⁹ *Id.*

³⁰ R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, *WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY: THIRTY-ONE YEAR UPDATE 1977-2008*, coaching 1 (2008), available at www.acostacarpenter.org.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 2.

In 2008, “there [were] 11,058 paid assistant coaches” for women’s teams.³⁸ Of those 11,058 jobs, 6,308 (57.1%) were held by females.³⁹

Who is the boss? When Title IX was enacted, more than 90% of women’s programs were led by a female athletics director;⁴⁰ in 2008, that number has shrunk to nearly one in five.⁴¹ The greatest part of that change took place in the mid-1970s even before anyone was sure what the yet-to-be-written Regulations would say. Many departments were merged, with the typical result being that the female athletics director (“AD”) was demoted to assistant or associate AD, and many elected to return to full time teaching. Why it seemed necessary to have a male as the head when the pool of candidates included both an experienced male and an experienced female is a reflection of the biases of the time—some of which continue to this day. For instance, it is easier to find a female college president of a Division IA football school than it is to find a female AD at the same type of school.

In 2008, no female voice was found anywhere in the administrative structures of 11.6% of schools.⁴² In 1984, almost one-third lacked any female voice.⁴³ When all three competitive divisions are included, there are 3,941 administrative jobs and women hold about half (48.6%).⁴⁴ Yet one in nine programs hears no female voice.⁴⁵ Does it matter? Homologous reproduction, the apparent tendency to hire people like oneself, is alive and well in athletics. The coaching staffs of programs where the AD is a male are more likely to have fewer female coaches than when the AD is a female.⁴⁶

III. CONCLUSION

Let there be no mistake: Title IX has had a massive impact on America’s sport programs.⁴⁷ But the debate continues, and perhaps will always continue, as long as there is inadequate funding to make the achievement of equity easy; as long as powerful members of one sex view exclusive access to sport as their chromosomal birth right; as long as administrators favor one sport over providing the benefits of

³⁸R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY: THIRTY-ONE YEAR UPDATE 1977-2008, assistant coaching 2 (2008), available at www.acostacarpenter.org.

³⁹*Id.* at 1.

⁴⁰*Id.*

⁴¹R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY: THIRTY-ONE YEAR UPDATE 1977-2008, administration 2 (2008), available at www.acostacarpenter.org.

⁴² *Id.*

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.* at 4.

⁴⁶ *Id.* at 2.

⁴⁷R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL, NATIONAL STUDY: THIRTY-ONE YEAR UPDATE 1977-2008, coaching 8 (2008), available at www.acostacarpenter.org.

athletics participation to a broader proportion of the student body; as long as the cake is not cut evenly.

Some arguments in the debate have gained lives of their own, and some have remained despite clear data that have made them nothing more than irrelevant myths.

Proponents of the benefits of athletics participation as an appropriate support for the mission of educational institutions have sometimes focused more on battling each other for the crumbs left by the favored teams' unfettered budgets than on the goal of fuller access for all appropriate interested and skilled students. Whatever the cause or motivation, Title IX continues to be a topic of interest and impact.