



Fact Sheet

TITLE IX “CLARIFICATION”: WHAT’S AT STAKE

TITLE IX AND SPORTS

Title IX is a federal law passed in 1972 that prohibits sex discrimination in any federally funded education program. It applies to all aspects of education, but is especially well known for its success in opening the door to athletics for women and girls. Because public elementary and secondary schools and most colleges and universities receive some sort of federal funding, their athletics programs are covered by Title IX.

Title IX requires schools to:

- Offer male and female students equal opportunities to play sports;
- Give male and female athletes their fair shares of athletic scholarship money; and
- Treat male and female athletes equally in all other respects, such as equipment, facilities, and coaching.

TITLE IX HAS OPENED THE DOOR FOR MILLIONS OF WOMEN AND GIRLS TO PARTICIPATE IN SPORTS.

Fewer than 32,000 women participated in college sports prior to the enactment of Title IX, and today that number has expanded to more than 160,000 women. Female participation in high school athletics has increased from fewer than 300,000 to over 2.8 million.¹

These opportunities have provided huge benefits to a new generation of female athletes. Playing sports promotes responsible social behavior, greater academic success, and increased personal skills. Compared to their non-athletic peers, athletes are less likely to smoke or use drugs; have lower rates of sexual activity and teen pregnancy; have higher grades; and learn how to work with a team, perform under pressure, set goals, and take criticism.²

Despite these important benefits, critics continue to attack Title IX’s requirement that women be provided equal participation opportunities and claim instead that women are inherently less interested in sports than are men. Claims like these, as well as wide spread non-compliance with Title IX in schools across the country, have resulted in women being treated like second-class citizens on the playing field. For example, although women in Division I colleges are on average 54% of the students, they receive only 43% of the sports participation opportunities, 38% of athletic operating dollars, and 33% of the money spent on recruitment.³ At the high school level, girls represent only 42% of varsity athletes.⁴

THE CURRENT CRISIS

In March 2005, without any notice or public input, the Department of Education issued a Title IX “Clarification” that lowers the bar for what schools have to do to provide equal sports opportunities for women and girls. This new policy allows schools to show compliance with the law simply by sending an email survey to all female students and then claiming that a failure to respond indicates a lack of interest in playing sports. It eliminates schools’ obligations to look broadly and proactively at whether they are satisfying women’s interests and threatens to reverse the enormous progress women and girls have made in sports since the enactment of Title IX.

TITLE IX REQUIRES SCHOOLS TO PROVIDE WOMEN WITH EQUAL SPORTS PARTICIPATION OPPORTUNITIES.

Department of Education policies that have been on the books for decades provide three independent ways for schools to show that they are providing equal participation opportunities:

- Prong 1: The percentages of male and female athletes are about the same as the percentages of male and female students enrolled in the school (the “proportionality” prong); **or**
- Prong 2: The school has a history and continuing practice of expanding opportunities for the underrepresented sex—usually women; **or**
- Prong 3: The school is fully and effectively meeting the athletic interests and abilities of the underrepresented sex.⁵

THE NEW CLARIFICATION WEAKENS THE LAW AND IS NOT FAIR.

The Department's Clarification allows schools not meeting prongs one or two to show compliance with Title IX by doing nothing more than sending an email survey to female students asking about their interest in additional sports opportunities. Schools are presumed to comply with the law if the survey does not show enough interest or response, unless female students can provide "direct and very persuasive evidence" to the contrary. This new policy weakens the law in several ways, as explained below.

The new Clarification allows schools to use surveys alone to show compliance with the law. Under prior law, schools had to consider many other factors besides surveys to show that they were providing enough opportunities for women, but the new policy allows schools to ignore these other important factors:

- requests by students to add a particular sport
- participation rates in club or intramural sports
- participation rates in sports in high schools, amateur athletic associations, and community sports leagues in areas from which schools draws their students
- interviews with students, coaches, and administrators.⁶

Surveys usually show only that sports opportunities for women and girls have been limited in the past. As courts have consistently recognized, "Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience."⁷ So even if surveys reveal a lack of interest by women in particular sports, that is most likely because they have not had the chance to play those sports. To limit their future opportunities based on such surveys would be doubly unfair. Instead, schools should follow the motto of the movie *Field of Dreams*: "If you build it, they will come."

Allowing schools to rely on surveys ignores the reality of how teams are created. Schools typically create teams by encouraging or recruiting athletes to come to their campuses, and students interested in a sport not offered by a school are unlikely to attend that school. But the new Clarification ignores this reality by allowing schools to claim that they are providing enough opportunities for women based only on a survey of current students' interests.

The Clarification's "model survey" is flawed. For example:

- Schools are allowed to interpret a lack of response as evidence of lack of interest. Given the notoriously low response rates to surveys in general, let alone to anything sent via email, allowing a lack of response to be interpreted as anything more is plainly unfair. But under the new Clarification, schools can avoid adding new opportunities for women even where interest does in fact exist on campus.
- Schools are allowed to presume that young women who think they cannot play a certain sport actually cannot play. Women and girls may not know or say that they have the ability to compete in certain sports. There are many examples of successful female athletes who were recruited to play a sport they never thought they could. But under the new "Clarification," schools are allowed to decide what sports to provide for women based solely on responses (or lack of responses) to an email survey.

The new "Clarification" shifts the burden to female students to show that they are entitled to equal opportunity. Prior law put the burden on schools that are providing women with less than their fair share of sports opportunities to show that they are nevertheless fully meeting the interests and abilities of their female students. But the new "Clarification" shifts the burden to women, forcing them to prove that their schools are not satisfying their interests and that they are entitled to more opportunities.

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This is not the first time that the Bush Administration has tried to weaken Title IX. It attempted to do so through its 2002 Commission on Opportunity in Athletics and was stalled by a massive public defense of Title IX. Unable to achieve its goals in the light of day, the Administration has resorted to stealth tactics by adopting this new policy without public input. **The Department should withdraw this dangerous and illegal "Clarification" and honor its promise to keep Title IX strong.**

¹ National Collegiate Athletic Association (NCAA), 1982-2002 Sponsorship and Participation Report 65, available at http://ncaa.org/library/research/participation_rates/1982-2002/participation.pdf; National Federation of State High School Associations (NFHS), 2002 High School Athletics Participation Survey, available at http://www.nfhs.org/nf_survey_resources.asp.

² See, e.g., Carnegie Corporation, *The Role of Sports in Youth Development* 9 (March 1996); NFHS, *The Case for High School Activities* (2002) at 3, 9; The National Campaign to Prevent Teen Pregnancy, *Fact Sheet: Not Just Another Single Issue: Teen Pregnancy and Athletic Involvement* (July 2003); The Women's Sports Foundation Report: *Sport and Teen Pregnancy* (1998) at 5-7; The President's Council on Physical Fitness and Sports, *Physical Activity & Sports in the Lives of Girls* (Spring 1997); and *Black Female Athletes Show Grad-Rate Gains*, *The NCAA News* (June 28, 1995).

³ NCAA, 2002-03 Gender Equity Report (2004).

⁴ NFHS, 2002 High School Athletics Participation Survey.

⁵ United States Department of Health, Education, and Welfare, Office for Civil Rights, *Title IX of the Education Amendments of 1972: a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979).

⁶ United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996).

⁷ *Cohen v. Brown University*, 101 F.3d 155, 179 (1st Cir. 1996).