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Joanna L. Grossman

*Maurice A. Deane School of Law at Hofstra University*

Deborah L. Brake

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# Verdict

June 26, 2012

Joanna L. Grossman and Deborah L. Brake

## **The Big 4-0: Title IX Puts a Fourth Decade Under Its Belt**



June 23, 2012 marked the 40<sup>th</sup> Anniversary of one of the most significant American civil rights statutes, Title IX of the Education Amendments of 1972, which bans sex discrimination in federally funded education programs. Title IX has had such an impact on the lives of women and girls, and has worked its way into the popular culture to such an extent, that every major anniversary of the statute prompts a plethora of celebrations by journalists and pundits. These tributes to Title IX wax fondly about the changes in American life that the law has produced, but are tempered by lamentations by some about the continuing gender gaps that still exist, reflecting the distance yet to go—and by lamentations from others about the statute’s supposed harmful impact on men’s sports. Thus, Title IX anniversaries feel like Bill Murray’s character’s experience in the movie “Groundhog Day,” of waking up to the very same day, repeated over and over.

The uniqueness of Title IX is evident in these anniversary media frenzies. It is hard to think of another law whose enactment date prompts this kind of public attention. Why does Title IX hold such a special place in American popular culture, as a veritable “super statute”—the kind that shifts cultural norms and has a transformative impact on society? In this column, we will consider that question.

### **The Area in Which Title IX Has Had Its Biggest Impact: Athletics**

Title IX broadly bans all forms of sex discrimination in all aspects of educational programming within institutions that receive any federal funding. Its prohibition on sex discrimination encompasses a wide range of practices, including sexual harassment, the treatment of pregnant and parenting students, single-sex education, and access to fields from which women have traditionally been excluded, such as math and science. However, Title IX is by far the most well known and widely appreciated for its impact on sports, the topic on which we will focus in this column.

Title IX’s application to sports remains the source of continuing controversy, despite the overwhelming popularity of the law, as reflected in public opinion polls. Title IX’s impact on sports is also the law’s most visible and measurable legacy. Title IX truly sparked a revolution in girls’ and women’s sports. As with most revolutions, though, the transformative change Title IX wrought has been tempered by disappointments and

limitations. But the general success of the statute is undeniable.

## **Title IX's Theoretical Approach to Ensuring Gender Equity in Sports**

Title IX proceeds from the default baseline of sex-separation: Schools are generally allowed to maintain separate teams for boys and girls in any sport that involves contact, or for which selection is based on competitive skill. By taking this approach, Title IX was able to forge an unusually creative measure of nondiscrimination, one that is more concerned about substantive equality—whether boys and girls end up with equal opportunities for meaningful participation in sports—than about mere formal access.

While the agency charged with enforcement of Title IX (originally the former Department of Health, Education and Welfare; now the Office for Civil Rights In the Department of Education) considered a wide range of legal standards within this sex-separate structure (including briefly, but never seriously, a requirement of equal funding for boys' and girls' sports), it settled on a three-part test for participation opportunities.

Under this test, a school or program can satisfy the criterion of nondiscrimination in participation opportunities by fulfilling any one of three criteria: (1) providing athletic opportunities substantially proportionate to each gender's enrollment (e.g., if the school is 50% female, women should be about half of the varsity athletes); (2) showing a continuing history of program expansion for the under-represented sex (which is tough to do, now that such a history would have to span four decades); or (3) showing that the existing athletic program already fully and effectively accommodates the interests and abilities of the under-represented sex. Noncompliance remains widespread, but this three-part test has pressured educational institutions to greatly expand athletic opportunities for women.

In addition to the three-part test designed to equalize participation opportunities, Title IX regulations also impose an "equal treatment" standard upon many other aspects of athletic programs, such as facilities, locker rooms, scheduling, coaching, uniforms, equipment, academic support/tutoring, and recruitment. Moreover, a separate regulation requires non-discrimination in athletic scholarship awards—tying women's percentage of athletic scholarship dollars to their percentage of athletic participation. The law requires compliance in each area: Extra benefits for women in one area cannot offset deficits in another.

## **The Impact of Title IX on Women in Sports**

Title IX—with its combination of the three-part test and equal treatment guarantees—has produced a veritable revolution on the playing field. In 1971, the year before Title IX's passage, only 1 in every 27 high school girls played varsity school sports. Today, that number is about 1 in 2.3—nearly half. That is a stunning change, with broad ramifications for gender relations outside of sports.

Women's college sports participation also grew exponentially during that time period, from fewer than 30,000 female intercollegiate athletes in 1971 to about 165,000 today. Scholars who have studied these changes have concluded, unequivocally, that Title IX was instrumental in facilitating this kind of mass female participation in sports.

And despite repeated efforts to vilify Title IX as responsible for cuts to boys' and men's sports, the evidence also shows that this growth has not, in fact, come at the expense of male athletic participation. Since Title IX was enacted, male sports participation has increased too, both at the high school and intercollegiate levels. Although particular sports have periodically declined over time, such declines are attributable to a number of factors, including fluctuating interest levels, cost, and liability concerns, and not to Title IX. These other factors explain, for example, diminishing numbers of intercollegiate wrestling teams and diminishing numbers of both men's and women's intercollegiate gymnastic teams.

## **The Secrets of Title IX's Success**

There are several reasons why Title IX has been so successful. Chief among them is the law's refusal to take current, status quo levels of female athletic interest as fixed or "natural," and then use those expressed interest levels to cap women's sports opportunities. This approach is in stark contrast to the approach that is often taken

by courts in other areas of sex discrimination law, including Title VII law, where evidence of women's lower relative interest levels (compared to men's) in nontraditional fields is commonly accepted as a nondiscriminatory reason for women's underrepresentation.

In a notorious Title VII case, *EEOC v. Sears*, the Seventh Circuit held that women's under-representation in higher-paying and more competitive commission sales jobs stemmed from their relative lack of interest in taking such jobs, and not from any gender discrimination by Sears. The "lack of interest" defense prevailed despite evidence that Sears shaped applicants' job desires with a questionnaire designed to help find the jobs they were best suited for with questions like "Do you like football?" the answers to which were unrelated to job requirements, but correlated with the applicant's having a certain gender

Contrast with that decision's approach the more structural account of interest that was evident in the landmark Title IX case, *Cohen v. Brown University*, where the First Circuit observed: "Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience," explaining that the university's evidence of women's lower athletic interest "provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."

That reasoning has been endorsed by every Circuit court to consider the issue. It is also reflected in OCR's interpretations of Title IX. As a result, Title IX litigation has produced a uniform body of case law that takes a substantive approach to equality that is rarely seen in sex discrimination law, with a focus on expanding women's actual participation. That body of law clearly rejects arguments that women are inherently less interested in playing sports.

### **Fighting Back Against Title IX's Detractors**

Perhaps the biggest cause for celebration on this 40<sup>th</sup> Anniversary is that Title IX has survived, robustly, against long odds. Ever since the law's passage, detractors of women's sports have sought to derail the law's application to athletics, so as to allow schools and universities to continue structuring athletic programs around an implicit assumption that only men, and not women, are the legitimate beneficiaries of the opportunity to play sports.

Title IX was on the chopping block for much of the George W. Bush administration. President Bush and his Secretary of Education set up a "Blue Ribbon" commission to reexamine Title IX and stacked it with officials from Division I-A powerhouses and some vocal critics of the law. At the time, John Dennis "Denny" Hastert—a former wrestling coach who has long been on a mission to roll back the clock on Title IX—served as Speaker of the U.S. House of Representatives, and the Republican-controlled Congress appeared ready to accept as true trumped-up charges of "reverse discrimination" and "quotas" linked to a civil rights law.

Despite this bleak outlook, Title IX advocates succeeded in beating back the assault, and preserved the law substantially intact. The Bush Administration's Office for Civil Rights did manage to release a 2005 Guidance that substantially weakened the law by allowing questionable survey practices to demonstrate that women's athletic interests were already being met by existing programs, so as to satisfy part three of the three-part test (even going so far as to count women's non-responses to emailed surveys as expressions of non-interest).

However, even this setback was short-lived. From the beginning, school and university administrators who were sensitive to gender-equity concerns treated the 2005 Guidance with skepticism. The NCAA took the unprecedented step of urging its members not to rely on it. And the Obama Administration put the nail in the coffin when it rescinded the 2005 OCR guidance in 2010, and expressly rejected that cynical, self-serving approach to interest surveys.

The Obama Administration's Office for Civil Rights (OCR) has also protected Title IX against attacks on its application to high school sports, rejecting requests by anti-Title IX groups to block the use of the three-part test at the high school level. That decision by the Obama OCR is especially important because in recent years, there has been a spate of OCR complaints and lawsuits challenging discrimination in participation opportunities and treatment of girls' sports at the elementary and secondary level. Enforcement at this level is especially critical, since college opportunities typically require prior sport experience, and if women aren't getting it before they

come to college, they will have slim chances of gaining it there.

## **There's Much More Work to be Done When It Comes to Title IX Enforcement at the High School Level—But the Forces of Backlash Have Been Unsuccessful**

Much work remains to be done at the high-school level, and examples of the ongoing second-class status of girls and women in sport are all too easy to find. To give just one example, a recent Indiana decision correctly concluded that the common practice of always scheduling boys' high school basketball games in the prime-time slots of Friday and Saturday nights, while relegating the girls' games to school nights, reinforced the second class status of the female players. Despite that court victory, however, such discrimination in scheduling remains common—creating academic conflicts for girls who have to balance homework with games, and suppressing spectatorship at girls' games. Most importantly of all, the court noted, scheduling discrimination sends the message of second-class status: the message that the girls' games are not as important as the boys' games.

Forty years after Title IX's passage, there are still countless complaints of discrimination against girls in school sports programs. An increasingly common form of complaint involves inferior playing and practice facilities. Due to such facilities, girls are often put at risk of sprained ankles from playing on poorly-maintained, non-regulation fields, while boys play in brand new state-of-the-art facilities. The issue of unequal levels of coaching and support for boys' and girls' teams also continues. Such instances of blatant inequality show the continuing relevance of Title IX and the need for stepped-up enforcement efforts, even as we celebrate and remember the law's gains.

Nevertheless, the biggest news of the decade is that the anti-Title IX forces were not able to accomplish more during this period. That is mostly thanks to the very success of the law itself in changing cultural norms by building strong public support for girls and women to participate in sports. The strong, powerful, hard-hitting, competitive female athlete has gone from being a "tomboy" (a term that once was understood to be seriously derisive) to being an iconic ideal. Athletic success is now a path to popularity and leadership for girls as well as boys.

The benefits of athletics reverberate well beyond the playing field. For example, research has shown a link between women's sports participation and later job success, and even their higher pay. Sports participation has important health benefits, too, that extend into adulthood. Most importantly, through sports, women learn important lessons about competition, teamwork, and leadership—lessons that are as important for girls as they are for boys.

### **Title IX's Limitations: Despite Great Progress, There Are Still Stumbling Blocks**

To be sure, like all civil rights laws, Title IX too has its limitations, and the gains of the past 40 years have come alongside numerous disappointments.

First, like other single-axis laws that reach a discrete type of bias in isolation from others, the law has benefited the most privileged members of the beneficiary group the most. Thus, the most concentrated gains for girls and women have been at wealthier, suburban schools and at well-endowed colleges, where matching male athletic opportunities has required the addition of significantly more opportunities for female athletes, who have been disproportionately wealthier and white. Women of color have gained from Title IX, but not as much as white women have.

Another limitation is that Title IX's substantive approach to equality has not extended to the law's approach to remedies. As with other nondiscrimination laws, a Title IX violation can be fixed by either leveling down or leveling up. Some colleges and universities have thus cut male sports opportunities instead of adding female sports—a decision that drains public support for the law and serves as a kind of retaliation for bringing Title IX complaints.

Although male sports participation overall has increased throughout the Title IX era, including in recent years, the threat to cut men's sports rather than add women's sports can be an effective deterrent to bringing a

complaint under Title IX.

This deterrent effect is not unique to Title IX. Remember, for example, Jackson, Mississippi's decision to close its swimming pools, rather than integrate them, which the Supreme Court upheld against an equal protection challenge in *Palmer v. Thompson*. But that is not a limitation special to Title IX, but rather simply part of the formal equality approach to remedies taken throughout U.S. nondiscrimination law.

Finally, Title IX's substantive approach is not immune from strategic "gaming." For instance, roster manipulation as a compliance strategy appears to be on the rise. Some administrators inflate women's numbers by encouraging "fake" walk-ons before the roster sheets are submitted, with subsequent encouragement to drop off of teams that cannot really support their participation once the rosters are handed in.

Likewise, cheating administrators do the reverse for the men's side, encouraging walk-ons to wait until after rosters are submitted, and then to play off the books.

While these practices clearly cross the line and will be deemed to violate Title IX if caught, other practices are more subtle and within the realm of argument. One example is the triple-counting of women's indoor track, outdoor track, and cross-country, even they operate on a practical level as only one sport.

Through roster manipulation, programs that should be ruled out of compliance, with insufficient opportunities for women to participate, can skate under the line and appear to be compliant.

These and other concerns complicate Title IX's success story and reveal the limitations of using a law like Title IX as a vehicle for social change. Nevertheless, Title IX's history is largely a success story, and the law's 40<sup>th</sup> birthday is one worth observing.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

Follow @JoannaGrossman



Deborah Brake is a professor of law and Distinguished Faculty Scholar at the University of Pittsburgh. Her research focuses on sex discrimination in employment, education, and athletics. Her book, [Getting in the Game: Title IX and the Women's Sports Revolution](#) (NYU Press 2010), was recently released in paperback.

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