Saving Title IX: Recent Developments Spell Good News For The Federal Statute Prohibiting Sex Discrimination in High School and College Athletics

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Title IX's future—heavily contemplated during its 30th anniversary celebration last June—seemed in doubt. The statute—which, among other things, prohibits sex discrimination in high school and collegiate athletics—was under heavy assault despite its long and successful history of opening the door for women and girls to compete in scholastic and collegiate sports. But today, Title IX seems stronger than ever.

The assault on Title IX came on two fronts. First, the National Wrestling Coaches' Association (NWCA) brought a suit challenging the validity of the Department of Education's (DOE) interpretation of Title IX—embodied in its regulations, policy interpretations, and its individual administrative enforcement actions and investigations. Then, spurred in part by the suit, the Secretary of Education convened a commission to explore whether Title IX's protections for gender equity should be rolled back.

As I discussed in another column, that commission issued a report recommending numerous changes to the Title IX regulations. Several of these, if adopted, would have had a devastating impact on athletic participation opportunities and access to athletic resources for women and girls across the country.

Recently, however, a federal district court dismissed the NWCA suit. (The NWCA has stated plans to appeal, but it is unlikely to prevail.) Meanwhile, on July 11, the Department of Education's Office for Civil Rights issued a "Dear Colleague" letter to educational institutions across the country, stating its intent to leave the Title IX agency interpretations alone.

In this column, I will discuss the substance and significance of these two developments.

The NWCA Lawsuit's Claims

In National Wrestling Coaches Association v. United States Department of Education, NWCA and four other associations representing student-athletes, coaches, and alumni sued the Department of Education in D.C. federal court. They sought two remedies.

First, they sought a declaratory judgment that DOE's Title IX enforcement scheme discriminated against male athletes. Second, they sought an injunction that would forbid DOE from further enforcement under the existing regulations.

The regulations at issue relate to a crucial question: When has an institution fully complied with Title IX's mandate of sex equality in athletics? DOE applies a three-pronged test, which derives from a 1979 Policy Interpretation and a 1996 Clarification. Under the test, schools may show compliance using any one of the three prongs.

First, an institution may show that athletic participation is substantially proportional to enrollment—so that if a school's student body is 50/50 male/female, athletic program enrollment is too. In a cover letter sent with the 1996 Clarification, then-Director of the Office for Civil Rights Norma Cantu described this prong as a "safe harbor" that could insulate institutions from lawsuits.

Second, an institution may show that it is making a good-faith effort to expand opportunities for the underrepresented sex (usually women).
Third, and finally, an institution may show that it has fully accommodated the interests and abilities of the underrepresented sex.

The NWCA suit took issue with the test. In so doing, it invoked both Title IX itself - which, of course, protects men as well as women - and the Constitution.

The NWCA argued that the first prong violated Title IX because it constituted sex discrimination against men. It pointed out that while institutions can achieve proportionality by expanding women's teams, they can also achieve it by either cutting men's teams or capping their size. And it argued that this kind of gender-conscious cutting or capping is a kind of intentional sex discrimination. As such, it argued, it violates, not only Title IX, but also constitutional Equal Protection principles.

**Why the NWCA Lawsuit Was Dismissed: Lack of Standing**

Similar arguments had been raised - and rejected - earlier, by eight federal courts of appeals. Sometimes, schools facing a Title IX suit by a female athlete have raised these arguments as a defense. More often, male athletes whose teams were capped or eliminated have employed these arguments to challenge the capping or cutting. In each case, the challenges were raised by a federally funded institution subject to Title IX's prohibitions.

But neither the NWCA, nor a similar organization, had previously raised these arguments. The NWCA represents the interests of collegiate and scholastic wrestling coaches; three of its co-plaintiffs represent groups of student-athletes attending three particular universities; and the fourth is a non-profit group representing the interests of collegiate coaches and athletes in general.

Associations can sue on behalf of their members. But they can only do so if the members would have standing to sue in their own right. (There are also other requirements for associational standing that are not implicated here.)

"Standing" is the legal term for the right of a particular person to sue. Under Article III of the Constitution, a party may sue in federal court only if it has a sufficient stake in the case's outcome. (Otherwise, there is a fear that issues will not be fully and fairly litigated, for parties will not have enough incentive to advocate zealously for the position they defend.)

To have standing, a plaintiff must be able to show, among other things, that he has suffered an injury-in-fact, that the injury is caused by the action being challenged, and that the relief requested will redress the injuries claimed.

Here, the alleged injuries were the cutting and capping, which the Court held were sufficient to satisfy the injury requirement of standing. But the second two requirements--causation and redressability--could not be satisfied.

The court held that even if the NWCA won, the result would not necessarily be the reversal of the cutting or capping of particular teams. The court might invalidate DOE's administrative scheme, but the plaintiffs would still be left to plead their case with educational institutions, who, in turn, "would continue to make discretionary determinations with respect to capping, cutting and adding teams based on a number of factors," including many unrelated to Title IX.

Accordingly, the court dismissed the suit. Neither the Equal Protection claims nor the Title IX claim could proceed in federal court unless the Constitution's minimal requirements for standing were satisfied - and the court held that they were not.

Because of the lack of standing, the court dismissed the case, noting that its decision does not mean the administrative scheme is beyond judicial review. Regulated entities can challenge the regulations and other agency actions if they meet the "case or controversy" requirement of Article III of the Constitution, which many of them have done in appropriate cases (to no avail on the merits, however). Even the NWCA, representing its members could sue a funded entity's conduct under the regulations. It just can't sue the Department of Education directly.

Likewise, Title IX itself expressly provides a cause of action for any institution denied funding in an administrative enforcement action brought under the statute, enabling the institution to seek judicial review of the termination. Ironically, this avenue of review has never been used to challenge the agency's authority because the agency, to my knowledge, has never terminated funding of a recipient, regardless of the severity of its Title IX violations.

While this decision was strictly based on the lawsuit's procedural defects, the court reinforced the importance of Title IX, noting that the standing requirement had to be strictly policed precisely because the protections offered by the statute are so important and well-studied. It also counters the assumption that team cuts are directly
attributable to Title IX, noting the multiplicity of factors that affect institutional decisions about resource allocation.

**The Title IX Commission's Surprising Change of Heart**

Meanwhile, as noted above, in the July 11 "Clarification" letter by the Director of the Office for Civil Rights, Gerald Reynolds, DOE declined to push or adopt most of the changes recommended by the Commission.

The damaging proposals made by the Commission--and implicitly rejected by Reynolds' Clarification--had included adoption of a "reasonable variance" standard for evaluating substantial proportionality, greater use of interest surveys and youth participation data to determine the proper allocation of playing opportunities between the sexes, and an open invitation to vary, amend, or eliminate the three-prong test for compliance.

The rejection of these proposals was quite surprising since Reynolds, a Bush appointee, had made remarks in his nomination hearings--which were unusually hostile for a lower-level executive position--that might lead one to think he would have agreed with the Commission's report. For instance, Reynolds said that he thought schools were relying on quotas to comply with Title IX, even if Title IX did not require that quotas be used. Both those who supported, and those who opposed, Reynolds believed he would likely roll back Title IX's protections for women's equality in athletics.

He did not do so, however. Indeed, he said, to the contrary, that OCR would continue to "aggressively enforce" Title IX's standards regarding athletics, and sanction schools in violation.

What change in Title IX, if any, did the letter make? There are a few, but they are very subtle - and do not represent much, if any, change from the status quo.

First, Reynolds reiterated what has always been the case: A school can prove compliance through any one of the three prongs, and each presents an equally valid method for doing so. The letter thus softened the impact of the prior "clarification" indicating the first prong was a special "safe harbor." He also promised OCR would work with schools to help them achieve compliance.

What about the issue of cutting or capping of teams? Again, the letter basically reiterated prior law, going only a tiny bit further.

It said that Title IX does not require the cutting or reduction of men's teams - a point that had always been clear. More significantly, it also said that the "elimination of teams is a disfavored practice." But it is not entirely clear how this statement will change matters.

If a school chooses to comply with the first prong, and can only do so by cutting or capping teams, why should it care if OCR views this solution with "disfavor"? As long as a school can achieve rough proportionality between enrollment and athletics, it has plainly satisfied the first prong, regardless of whether OCR favors or disfavors its method of doing so.

Finally, the letter also permits private sponsorship of teams to continue - a practice that typically benefits men's sports disproportionately. Men's teams enjoy more support from alumni who, due to a history of discrimination, are often mostly male; women's teams find it harder, accordingly, to draw on private funding for their support.

In the end, the yearlong effort by the Commission to see whether the most successful civil rights statute in history needed to be "fixed" was a waste of taxpayer time and money. That money would certainly have been better spent enforcing Title IX, rather than trying to undercut it.

Title IX's future looks bright, but areas for progress yet remain. Women still receive disproportionately fewer playing opportunities, fewer scholarships, less highly paid coaches, and lower budgets, despite a decade of active Title IX enforcement and litigation. Perhaps OCR should use its power to deny funding to institutions in violation of the law.

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