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The Future of Title IX, The Federal Statute Concerning Gender Equality In Athletics: Can It Survive the Secretary of Education's Planned Revisions?

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The Commission on Opportunity in Athletics - a group created last summer by President Bush's Secretary of Education, Rod Paige - just published its report "Open to All: Title IX at Thirty."

Title IX is a 1972 federal law that prohibits sex discrimination in educational programs receiving federal financial assistance. In [a prior column](#), I've described the statute, its achievements, and why it remains controversial.

One result of that controversy has been to spark the creation of the 15-member Commission. Co-chaired by Stanford's Athletic Director and a former female professional basketball player, its role is to advise the Secretary with respect to how to interpret and enforce Title IX in the athletics context.

The Commission's report pays lip service to the continuing need for Title IX, to ensure sex equality in athletics. But it also supports revisions to the statute that could substantially hinder its usefulness as a tool to accomplish this very goal.

A Brief Background on Title IX and Athletics

In 1975, the Department of Health, Education, and Welfare - the predecessor to today's Department of Education (DOE) - issued regulations making clear that Title IX requires covered educational institutions to provide "equal athletic opportunity for members of both sexes."

A few years later, a Policy Guidance further interpreted that general requirement. It said that an institution has satisfied Title IX's requirements when it comes to athletics if it can make any one of three showings:

First, the school can show that it provides athletic opportunities to men and women substantially proportionate to their overall enrollment. Second, it can show either that it is engaged in a continuing practice of program expansion with respect to the underrepresented sex. Or, third, it can show that it has fully and effectively accommodated the interests and abilities of the members of the underrepresented sex.

A 1995 clarification made clear that one way schools can comply is to eliminate teams, or cap their size. In other words, if a school has a history of having a men's lacrosse team and no women's team, then, rather than adding a women's team, it can instead decide simply to eliminate lacrosse. Similarly, if a school has a men's football team, a men's lacrosse team, and a women's lacrosse team, then rather than adding an additional women's team, it may choose to eliminate the men's lacrosse team.

Certain schools ostensibly responded to these statements by eliminating men's teams in certain sports - typically, wrestling, gymnastics, diving, and other men's "minor" sports. And subsequently, the National Wrestling Coaches' Association (NWCA) sued DOE, alleging that the Policy Guidance and 1995 clarification are unlawful. The NWCA argued that they authorize intentional discrimination against male athletes.

The suit appears to have been what convinced the Secretary of Education to convene the Commission that issued the recent report. Meanwhile, the Bush Administration has sent a clear message - of which the Commission doubtless is aware - that it is not inclined to fight for Title IX in its current form. In the suit brought by NWCA, the Bush Administration filed a brief focusing on a technical aspect of the case, without actually defending the statute

and its agency interpretation.

A Summary of the Commission's Proposals

With the NWCA lawsuit and the Administration's position in mind, the Commission undertook to evaluate Title IX's impact on athletics. In so doing, it considered both statistics and testimony from a variety of witnesses.

In its final report, the Commission made a series of proposals. Unfortunately, virtually all of them will have the effect of - and indeed, at times seem designed to - roll back or undercut Title IX's guarantee of sex equality when it comes to athletics.

The Commission's unanimous recommendations (some of which did not actually end up being unanimous, as I will explain) are troublesome.

With respect to the initial Policy Guidance, the Commission recommends that DOE explore "additional ways of demonstrating equity beyond the existing three-part test." This invites DOE to change the three-part test-- affirmed by Republican and Democratic Administrations and time-tested--without any input from the Commission about the specifics.

In addition, the Commission recommends that two of the three options for compliance should be watered down, so they are less demanding.

First, it recommends that the substantial proportionality option, "if [it] is retained as a way of complying with Title IX," should be interpreted to allow a "reasonable variance" in the relative ratio of women's to men's athletic opportunities.

In other words, such opportunities wouldn't really have to be proportional anymore. The result could be a substantial loss of playing opportunities, scholarships, and other resources for female athletes.

Second, it recommends that the "full accommodation for the underrepresented sex" option should be able to be satisfied by comparing the ratio of male/female participation at the institution with "demonstrated interests and abilities" shown by regional, state, national youth or high school participation rates or results of interest surveys.

In other words, evidence that women are less interested in, or good at, sports in high school could be used to deny them the right to equal opportunities to play sports in college. That's dangerous, since survey evidence can easily be manipulated, based on the questions asked. Moreover, interest surveys may simply measure the impact of past discrimination rather than the interest that might exist had participation opportunities been truly equal. Courts have unequivocally rejected the use of interest surveys in this context.

Even if surveys accurately recorded lower interest in sports on the part of women, responding by denying women the opportunity to be athletes would only compound past discrimination. A high school cheerleader may not respond to a survey by saying she wants to be a college soccer player, but when she looks through a college brochure, the opportunity might interest her. Schools create interest by funding teams, hiring top-notch coaches, providing scholarships, and promoting their sports programs--and dampen it by failing to undertake these efforts.

The Commission also had a unanimous recommendation with respect to the 1995 Clarification - a recommendation that seems geared towards responding to the concerns in the NWCA suit. The recommendation is that the Office for Civil Rights (OCR) should make clear that cutting teams in order to demonstrate compliance with Title IX is a "disfavored practice."

But why? It is easy to be sympathetic to the male athletes whose teams are cut, but what of the female athletes who never had teams at all? Historically, resources have been disproportionately allotted to men's and boys' sports, not women's and girls' - as a result of intentional, unjustifiable discrimination. Why shouldn't some of these resources be taken away, and redistributed to the group unfairly denied them?

In addition to these unanimous recommendations, the Commission made a series of non-unanimous recommendations - which provide some insight into the direction in which some of the more conservative members of the commission wanted to go. These recommendations suggest even greater incursions into Title IX.

Directly contrary to prior DOE policy, they would allow schools to count unfilled "slots" in assessing athletic opportunities available to women. They would also allow schools to exclude all unrecruited walk-ons from their count of athletes. Finally, they would exclude all students over the age of 24, and students of any age who are parents, from the count of total students.

The "Minority Report"

Although Secretary Paige has refused to enter it into the official record of the Commission's proceedings, two members - Julie Foudy and Donna DeVarona, both former Olympic Gold Medalists - also issued a "Minority Report."

Their Minority Report critiqued both the process by which the Commission reached its conclusions, and the substance of its ultimate report. It argued that the Commission's recommendations might weaken Title IX's protections. And it suggested that instead, Title IX's promise of equal athletic opportunity continue to be enforced essentially without change.

The Minority Report also took the Commission to task for its failure to deal with the budgetary causes underlying the elimination of men's minor sports. (Title IX is often a good scapegoat when a school has to cut a team: "The lawyers made us do it!") It suggested, in addition, that the elimination of men's minor sports be addressed in other ways (such as encouraging schools to place some limits on their out-of-control football programs).

In addition to issuing their "Minority Report," Foudy and DeVarona also withdrew their agreement to two of the fifteen unanimous recommendations. One dealt with the greater utilization of student interest surveys. The other recommended that the Secretary explore "additional" but unspecified ways for institutions to demonstrate equity in athletics.

Foudy and DeVarona were right to be nervous about both these recommendations. As noted above, the former seems to invite schools to deny women athletic opportunities based on slanted surveys that show they supposedly don't want them. And the latter is much too vague; it sound like an invitation for a loophole or two under which schools wouldn't really have to comply with Title IX at all.

The Meaning and Impact of the Commission's Report

The Commission's report could have been worse. It did not adopt some of the proposals that would have been most devastating to Title IX.

For example, the Commission did not endorse a proposal that would have permitted teams to be funded without question by private donors, even if the result was sex discriminatory. With many more male alumni (and male ex-athlete alumni) at many schools, and far more male-targeted fundraising, the impact of such an allowance would have been devastating.

Further good news is that Secretary Paige has said he will only move to implement the unanimous recommendations. Unfortunately, though, his interpretation of "unanimous" appears to encompass even the two recommendations from which Foudy and DeVarona ultimately specifically withdrew their consent.

The upshot of this is that Title IX is still vulnerable--both to the recommendations the Commission did take unanimously, and to other changes the Secretary may consider on his own.

Why It's Other Civil Rights Statutes that Truly Deserve Scrutiny

Title IX is arguably the most successful civil rights statute in history. Re-evaluating it, through the Commission, and then revising it, is a mistake. Rather than trying to curtail the reach of a successful civil rights statute, the Administration's time would be better spent addressing the ways in which less successful ones still don't work.

For instance, why is it that the same number of women are sexually harassed in the workplace today as twenty years ago, despite Title VII's apparently strict prohibition against it? And why are women and minorities still not adequately represented in top positions in American companies?

Pressing questions like these should be the Administration's focus; if more commissions are created to answer anti-discrimination questions, they should be more like these.

Joanna Grossman, a FindLaw columnist, is an associate professor of law at Hofstra University, where she teaches Sex Discrimination, among other subjects. Her other columns on anti-discrimination law may be found in the archive of her columns on this site.

