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Gender and Sex: Title IX in the 1990's

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GENDER AND SEX: TITLE IX IN THE 1990'S

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GENDER AND SEX: TITLE IX IN THE 1990s

Speakers:

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I. Introduction

A. Title IX is patterned on Title VI

Nowhere in Title VI:

Text

Legislative History

Implementing Regulations on subsequent case law

Is there a requirement for Affirmative Action, quotas or the meeting of specified percentages to be found in compliance with the Act?

To the extent that revenue producing sports cannot off-set from University's contribution, the revenues generated leads to a University providing greater funding for women's programs than men's.

To the extent Universities eliminate men's sports - to achieve compliance with Title IX solely because of sex of the participants - this appears to be both discriminatory and unconstitutional.

TITLE IX IS A DISCRIMINATORY STATUTE

True beneficiaries are middle class white women from suburban high schools.

Participation rates requires in excess of high school rates or University internal interest discriminates against male programs.

African-American males are directly hurt in disproportionate numbers by elimination of scholarships in football and basketball.

Proponents of Title IX have argued that there are not three sexes -"Men, Women & Football Players"

While others have argued that Congress never intended to base gender equity on student body ratios.

B. Javits Amendment to Title IX

1. "The Secretary of HEW shall prepare and publish . . . proposed regulations . . . which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports." (Emphasis added)

2. Nowhere in Title IX is there a requirement of parity with student body ratios.

C. The Regulations prohibit discrimination on the basis of athletics.

"Athletics.

(A) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. §106.41(a) (1992)

D. No requirement for Affirmative Action pursuant to Title IX even though it is authorized. §106.3(b)

E. Unequal funding is recognized where explained by non-discriminatory reasons in regulations.

"Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams . . . will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds

for teams for one sex in assessing equality of opportunity for members of each sex." 34 C.F.R. §106.41(c) (1992)

II. OCR's interpretation of the intercollegiate athletic provisions of Title IX

- A. Policy interpretation and manual divided into 3 sections:
 - 1. athletic financial assistance
 - 2. other program areas
 - 3. accommodating the interest and abilities of both sexes.
- B. OCR investigates all 13 component parts in their totality
 - 1. disparities may off-set each other
 - 2. disparities should be substantial
- C. Athletic financial assistance
 - 1. 106.37(c) requires universities to award scholarships to each sex in proportion to their relative participation in intercollegiate athletics.
 - 2. No requirement to compare with student body
 - 3. Must be substantially equal
 - 4. OCR "Z" and "T" test
 - 5. Should use binomial standard deviation component
 - 6. Disparities may be explained by non-discriminatory reasons
- D. Equivalence in other athletic benefits and opportunities
 - 1. Look at an overall basis
 - 2. Not sport by sport basis
 - 3. Identical program components not required

4. Don't have to spend identical amounts
5. Difference may be justified by non-discriminatory factors
6. Examples of non-discriminatory factors
 - a. Differences as a result of factors that are inherent to the basis operation of specific sports:
 - (i) rules of play
 - (ii) nature/replacement of equipment
 - (iii) rates of injury
 - (iv) nature of facilities
 - (v) maintenance and upkeep requirements of facilities
 - b. Event management
7. Do not look at overall cost

E. Effectively accommodating the interest and abilities of both sexes

1. The effective accommodation test

- a. Are participation rates "substantially proportionate" to respective enrollments?
- b. Is there a history and continuing practice of program expansion?
- c. Whether the interest and abilities of the members of that sex have been fully and effectively accommodated by the present program?

F. The first prong (substantially proportionate to the enrollment)

1. Manual states:

"There is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation. All factors for this program component, and

any justifications for differences offered by the institution must be considered before a finding is made."

2. Should apply binomial 2-3 standard deviation test
3. This standard of proportionality to enrollment is not supported by the Act or common sense.

G The second prong (history of program expansion)

1. Manual looks at participation rates and:
 - a. Date each men's and women's sport began
 - b. Percentage of loss of each program of each program and reason for elimination
 - c. Percentage of gain to each program due to addition of sports
 - d. Unsuccessful attempts to add sports
2. Should show program expansion in all components

H The third prong [are interests and abilities fully and effectively met?]

1. "Fully" should not mean parity with student body ratios - makes prong one redundant.
2. "Fully" should not mean equal to the total number of women interested in playing sports up to the student body ratio.
3. University has obligation to identify student interest in a non-discriminatory way by looking at:
 - a. Nationally increasing levels of women's interest
 - b. Methods do not disadvantage the members of an under-represented sex.
 - c. The methods of determining ability take into account team per finance records.

- d. Methods are responsive to expressed interest of student's capable of intercollegiate competition.

4. Methods to determine interest

- a. Surveys
- b. Percentage in intramural sports
- c. Percentage in club sports
- d. Physical ed classes
- e. Feeder schools
- f. Title IX complaint procedure

1. The levels of competition test

- 1. Whether the competitive schedules for men's and women's teams on a program-wide basis offered proportionately similar numbers of male/female athletes equivalently advanced competitive opportunities.
- 2. History and continuing practice of upgrading.

III. Judicial Analysis of Title IX

A. The effective accommodation test

Cohen vs. Brown University

1. The Facts:

- a. Disparity existed between men and women's programs [11.6%]
- b. 16 men's teams and 15 women's teams in 1991/92 - prior to change in status
- c. Changed status of 2 women's teams and 2 men's

- d. Change effected funding for teams differently.
 - e. Student body ratio before change = 52/48
 - f. Participation ratio before change = 62/38
 - g. Brown's program expansion occurred in the 1970's
 - h. Female athletic participation ratio essentially level for last decade
 - i. Men's programs received over 70% of total funding
 - j. Men's programs raised lion's share of athletic donations
2. Court's decision (Preliminary Injunction) in Brown
- a. Used enrollment percent for purposes of comparison
 - b. Court found unmet needs by members of the disadvantaged gender [as compared to enrollment]
 - c. Rejected argument about improvements in other program components
 - d. Rejected argument relative to proportionality based on interest.
 - e. Failed to recognize history of downsizing of men's teams
 - f. Held that "full" must be read literally
 - g. Court of Appeals stated:
 - " . . . a court assessing Title IX compliance may not find a violation solely because there is a disparity between the gender composition of an educational institution's student constituency, on the one hand, and its athletic programs, on the other hand."
 - h. Court went on to say "'unmet need' amongst the members of the disadvantaged gender may suffice."

- i. Found interest was present on the dropped team
- j. Plaintiff's have burden of proving third prong re: fully and effectively accommodating interest and abilities of its women
- k. University can violate Title IX even if it meets the financial assistance and athletic equivalence standards
- l. Standard for measuring "effective accommodation:"
 - (i.) substantially proportionate to enrollment
 - (ii) history & continuing practice of program expansion
 - (iii) interest and abilities fully and effectively accommodated
- m. Court stated as to benchmark two:

" . . . so long as a university is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender, and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise, bench mark two is satisfied and Title IX does not require that the university leap to complete gender parity in a single bound."

- n. As to benchmark three, the court stated:

" . . . if a school has a student body in which one sex is demonstrably less interested in athletics, Title IX does not require that the school create teams."

Note: This case has not been heard on the merits. The decision of the District Court, which was affirmed by the Court of Appeals, was with respect to a preliminary injunction.

- B. Roberts vs. Colorado State and the substantially proportionate standard

1. The Facts:

- a. 10.5% disparity not substantially proportionate
- b. Dropped women's softball team in June 1992
- c. CSU's traditional rivals do not field softball team - but team played a competitive schedule
- d. Disparity decreased with the elimination of the men and women's teams
- e. The number of athletic opportunities for women had decreased steadily over the past 12 years.
- f. University failed to satisfy a compliance program entered into with OCR 10 years earlier

2. Court decision

- a. University has a more difficult position when dropping a team versus adding a team
- b. Plaintiff's have burden of proving prong three
- c. Plaintiff has the burden to prove lack of gender balance
- d. Court of Appeals stated:

"We reject Defendant's argument that the District Court's decision implicitly requires CSU to maintain parity between women's athletic participation & women's enrollment."
- e. Don't have to create a team if there is no reasonable expectation of competition for that team within the institution's normal competitive region - (applies only to a university that sponsors a team in a non-contact sport for one sex but not the other).'
- f. Title IX violation easier to prove when issue involves reinstatement of an established team rather than creation of a new one.

- g. Plaintiffs must either prove intentional discrimination or disparate impact.
- h. After all Plaintiffs have graduated, Defendant university can return to court to have injunction lifted.
- i. Did not require offering scholarships

C Favia vs. IUP

1. The facts:

- a. Disparity of 18% raised to 19%
- b. University had cut disparity in recent years but not when it eliminated 4 teams (2 male/2 female)
- c. Eliminated gymnastics and field hockey
- d. Female 55.6% - 44.4% male enrollment
- e. Prior to 1991 cut-back 503 athletes
(313 male/190 female [37.77% female])
- f. After cut-backs
(248 males/149 females [36.51%])
- g. 18 teams - 9 male/9 female
Now 7 male/7 female
- h. Intended to add women's soccer team
- i. No women on the committee evaluating athletes
- j. Substantial factual disparities were introduced into evidence
- k. 79% of scholarships to men, 21% to women

2. Court's decision

- a. Statistics speak for themselves

b. Court stated:

"We are also sympathetic with the fact that the football team represents a large portion of the dominance of men's teams over female teams at IUP. Football is a high profile sport; it generates money through ticket sales and undoubtedly heightens the interest of students, alumni and potential students in the university. As a dangerous sport, it is also expensive."

- c. Erroneously held Defendant's bear the burden of proving 2nd and 3rd prong.
- d. "Can't replace programs with promises."
- e. "Financial concerns cannot justify gender discrimination."

D. Haffer vs. Temple

1. FACTS

- a. There are equal protection claims in terms of participation and program components.
- b. Title IX claim in terms of scholarship funds
- c. 50/50 enrollment
- d. 200/650 women athletes (30.8%)
- e. \$2100 for each male student athlete over women
- f. Disparities recruiting, coaching, travel expenses, uniforms, equipment, supplies & publicity
- g. Scholarship funding was proportionate to participation rates for past 3 years.

2. Court Decision

- a. Denied summary judgment on both claims

- b. Court considered using high school participation rates but rejected in context of summary judgment
- c. Denied on participation rates versus scholarships
- d. Suggest it is ok to exclude revenues generated from certain programs

Court stated:

". . . it is not inappropriate to consider net expenditures when evaluating whether the women's teams are discriminated against in the allocation of funds. Blair"

D. Cook vs. Colgate - Lower Court

1. Facts:

- a. University refused to upgrade women's club hockey team to varsity status
- b. 6000 women played in high school
- c. 53/47 ratio
- d. Women's club team applied for varsity status 4 times
- e. Rejected by Colgate because:
 - (i) Rarely played on secondary level
 - (ii) No NCAA Championship
 - (iii) Only at 15 schools in the East
 - (iv) Expensive
 - (v) Lack of interest
 - (vi) Lack of ability
- f. 12 male sports/11 female
- g. Excluding football
\$381,000 for men/\$219,000 for women

2. Court Decision

- a. Rejected all six university arguments
- b. Lower court held there was interest as evidenced by the fact that women were already playing on the club sports team
- c. Don't have to show intentional discrimination
- d. Compared male hockey team versus women's hockey team (although OCR would not have)
 - (i) Query does NCAA rule limiting basketball scholarships to 13 for men and 15 to women discriminative?
 - (ii) Looked at \$ expenditures and found discrimination between men and women's programs
- e. Not a mixed motive case
- f. Applies modified burdine standard

Plaintiff's Burden

- (i) Athletic Department subject to Title IX
- (ii) Plaintiff's entitled to protection of Title IX
- (iii) Plaintiff's not provided "Equal Athletic Opportunities"

Defendant's Burden

- (i) Articulate legitimate non-discriminatory reasons for decision

Plaintiff's Rebuttal - Prove Pretext

- g. Rejected Surveys
- h. Court of Appeals - found case moot

IV. A University response to a Title IX Audit and Private Actions

- A. Paucity of case law

- B. Show all program component in compliance
- C. Irrelevant data is used for comparison purposes
 - 1. Nowhere does regulation require athletic opportunities to be proportionate to enrollment.
 - 2. Should look at high school feeder groups (36%)
 - 3. Look at student body interest
 - 4. Population statistics rejected by courts in employment cases
- D. Failure to apply appropriate statistical techniques
- E. Flawed analysis of courts
 - 1. Brown - Court misinterprets concept of "fully" accommodating
 - 2. Cook vs. Colgate - Rejected OCR's pronouncement that there should be no sport-by-sport analysis

V. The Use and Misuse of Statistics in a Title IX Analysis

- A. OCR's misapplication of statistical approaches
 - 1. Incorrectly uses "Z" Test
 - 2. "T" Test is slightly wrong
 - 3. OCR correctly compares scholarships versus participation rates
- B. The courts misuse of statistics and misapplication of the substantially proportionate standard
 - 1. Courts incorrectly compare enrollment percentage with participation rates
 - 2. Third prong to have any meaning requires substantial proportionality.

- C. Courts use simply math in comparing student body ratios versus participation rates. [Brown, IUP, Colorado State]
- D. Two Basic Mistakes
1. Erroneous look at student body percentage
 2. Don't apply standard deviation test
- E. The Third Prong and Statistics
1. Compare participation rates versus scholarships
 2. Compare scholarships versus both internal interest percentages and external availability in high schools (36%)
- F. The Proper Use of Statistics
1. Use binomial 2-3 standard deviation test
 2. Comparison group of qualified candidates
 3. Look at recent past [relevant time frame]
 4. Hypothetical #1
 - a. Facts: 60/40 ratio in student body, 100 scholarships worth \$10,000 each
 - b. Two SD - 51 to 69 male scholarships
 - c. 3 SD would be approximately 46 to 74
 5. Percentage disparity decreases as numbers increase
- Hypothetical #2 - student body versus participation rates
- a. 55%/45% ratio
 - b. 700 varsity sports

- c. 39% to 51% should go to women when comparing with the student body using 3 SD
 - d. Six percent differential allowed
6. Hypothetical #3 [high school rates versus participation rates]

FACTS

- a. 50/50%
- b. 700 Athletes
- c. 66% of those interested are male, 34% female
- d. SD 28.6% to 39.4%

V. The Football Exception

A. OCR recognizes program differences in sports

1. Unique for many reasons

- a. rates of injury
- b. cost of equipment [game and practice]
- c. training and medical care
- d. facilities

B. OCR recognizes that "unequal aggregate expenditures" will not constitute "non-compliance"

C. Other realistic issues that are non-discriminatory

- 1. 50/60 student athletes play each game
- 2. Career ending injuries
- 3. Transfers/quits
- 4. Professional sports

5. Many not ready to play
 6. Marketplace requires higher pay for coaching staffs because of competition from other universities and professional leagues
- D. Revenues generated should be deducted from overall football expenditures
1. Blair vs. Washington State University
 2. Only bottom line contribution should be part of analysis
 3. By not allocating revenues properly, it will ignore the fact that a women's program will cost more to run than men's at a point in time parity is reached.
 4. See also Haffer vs. Temple

E. Miscellaneous Issues

1. No requirement to integrate contact sports
 2. Women don't play contact sports in large numbers and OCR recognizes differences in contact versus other sports
 3. Universities should not be driven into compliance by reducing men's programs to off-set against the large numbers of participants in football
- unnecessarily trammels on the interest of males

VI. Future Litigation

A. Dropping Female Teams

1. Don't exacerbate disparity - reduce it
2. Also drop men's teams
3. Ensure budget cuts distributed fairly among sexes

4. Continue scholarships

B. Dropping Male Teams

Don't base decision on the sex of participants

C. Forcing University to create new varsity sports

1. Look at overall programs

2. Analyze all component parts

VII. The United States Constitution and Men's and Women's Sports

A. Plaintiff's must prove

1. That a state actor

2. Made a decision along gender lines

3. Intended to result in disparate impact

VIII. How a University can best comply with Title IX and win a lawsuit

A. Strive at the very least for scholarship rates equivalent to participation rates

B. If differences exist, apply standard deviation analysis and show non-discriminatory reasons for disparity

C. Show equivalency of program components

D. Prove a history of program expansion in both participation rates and all program components

E. Develop a policy manual that deals with all program components

F. Develop a game plan for the future

G. Identify all non-discriminatory factors that show "unique aspects of particular sports"

- H. Analyze net university contribution to male programs by subtracting out revenues
- I. Identify interest and abilities of female athletes internally and externally
- J. Establish men's programs as friends and benefactors of women's programs
- K. Use appropriate statistical test and comparison groups for analyzing participation rates. Also statistically analyze program components.
- L. Don't eliminate women's athletic teams except as a last resort.
- M. Don't eliminate men's teams solely based on the sex of participants.
- N. Regularly survey interest of student body and establish a Title IX Coordinator to receive complaints and suggestions relative to women's programs.
- O. Consider inviting OCR in for technical assistance
- P. Hire outside consultant to audit athletic department's total programs

IX. Conclusion

- A. Remember good, caring, sensitive universities will win Title IX cases.
- B. Work at increasing participation rates and numbers for women.
- C. Work at providing equality of benefits and opportunities for all women's programs.

