

Sex discrimination in athletics separate but equal



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Sports received minimal attention during congressional discussions of sex discrimination in education; the advocates for women were concerned primarily about the barriers women faced in seeking admission to undergraduate, graduate, and professional programs and employment in colleges and universities. The importance of Title IX to fundamental change in college sports necessitates a careful examination of its eventful history. The genesis of Title IX was a series of hearings held in 1970 and conducted by the Special Subcommittee on Education of the House of Representatives, which Representative Edith Green (D-OR) chaired. These hearings revealed that discrimination against girls and women was pervasive in elementary, secondary, and post-secondary education.

Today, Title IX is probably best known for its impact on high school and college sports, but sports were not the principal concern of the legislators who drafted or debated it in the early 1970s. The comments of Birch Bayh (D-IN), who was the prime mover behind Title IX in the Senate, illustrate this point. Senator Bayh, speaking on the Senate floor, asked his colleagues: How can we possibly justify an arbitrary and compulsory ratio of two and one-half men to every woman at a State university? How can we tolerate discrimination by a land-grant college that refuses all women admission to regular academic sessions unless they are related to employees or students and are pursuing a course of study otherwise un-available? He then observed that discrimination not only prevented women from obtaining access to higher education as students but also denied women who had run the academic obstacle course and earned graduate degrees access to employment as professors and college administrators. Senator Bayh

observed, " Today women seeking employment in higher education face an array of obstacles almost as insuperable as those that used to face blacks. [Statistics indicate that] Columbia University annually awards 24 percent of its doctorates to women, but that it has awarded 2 percent of its tenured faculty positions to females; and the last time the Department of Psychology at [the University of California at] Berkeley hired a woman was in 1924.

In other words, just as in other professions, an old axiom applies: the higher the rank, the fewer the women. " Discrimination against women in higher education frustrated the late Representative Patsy Mink (D-HI), who was a member of the House when Title IX was under consideration, but her frustration had nothing to do with sports. Several months before her death in September 2002, Representative Mink said of Title IX:" When it was proposed, we had no idea that its most visible impact would be in athletics. Also may be interesting to read aboutI had been paying attention to the academic issue.

I had been excluded from medical school because I was a female. " The legislators' lack of attention to the ramifications of Title IX for sports is one reason why courts, colleges, and commentators have struggled ever since its enactment to determine its intended scope in the sports world. The current debate about the substantial proportionality standard, which is front and center in the lawsuit filed by the National Wrestling Coaches' Association, is the most recent incarnation of this struggle. The other reason why courts, colleges, and commentators have puzzled over the reach of Title IX with respect to sports is that the Congress enacted it as a floor amendment, which means that there is almost no " legislative history" (i. e.

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, witness testimony at hearings, committee deliberations, committee reports) with which to divine its intent. This lack of legislative history helps to explain why it took sixteen years just to determine that Title IX applied to college athletic departments. The question of applicability to college athletic departments arose early in the history of Title IX. It required a determination of who was a “ recipient” of federal funds pursuant to Title IX, which commanded only such recipients to refrain from engaging in sex discrimination.

One answer, the “ institution-wide” interpretation, held that if any part of a college received federal funds, then every part of that college was a recipient and was obligated to follow Title IX. The underlying rationale for this interpretation, known as the release theory, argued that when one program at a college received federal funds, that program was able to “ release” money to other programs at the college. Consequently, the “ receiving” program, which could be the athletic department, benefited indirectly from federal funds; therefore, it should be bound by Title IX. The alternative answer, the “ program-specific” interpretation, countered that Title IX required only those parts of a college that received federal funds directly to obey its prohibition against sex discrimination. It would be difficult to exaggerate the implications of this debate for the cause of gender equity in college sports. College athletic departments received little or no federal financial assistance directly.

Therefore, if the institution-wide interpretation triumphed, Title IX would bind athletic departments; but if the program-specific interpretation prevailed, Title IX would not, by and large, bind athletic departments. Ultimately, the <https://assignbuster.com/sex-discrimination-in-athletics-separate-but-equal/>

institution-wide interpretation won the day, but not until 1988. In that year Congress enacted amendments to the Civil Rights Restoration Act that wrote this interpretation of Title IX into federal law, thereby applying Title IX to college athletic departments. While the debate raged about whether Title IX applied to college athletic departments, regulations designed to put the new law into effect began to take shape. In 1974, Congress authorized the Department of Health, Education, and Welfare (HEW) to promulgate regulations to enforce Title IX. The final regulations, which took effect on July 21, 1975, mandated that colleges comply by July 21, 1978, or risk losing federal financial assistance.

When HEW proposed these regulations, the NCAA opposed them and lobbied against them because it feared that a federal mandate in favor of equal athletic opportunities for women would diminish the funds available to operate men's sports, thereby reducing their quality, popularity, and profitability. It even filed a lawsuit in hopes that a federal court would invalidate the proposed regulations, but the lawsuit failed to achieve this objective. The NCAA also supported an amendment offered by Senator John Tower (R-TX) that would have made revenue-producing college sports – namely, football and men's basketball – exempt from coverage by Title IX. The Tower Amendment passed the Senate, but it died in a House-Senate conference committee. Thus, no sport would be exempt from the Title IX regulations. The regulations raised more questions than they answered in the higher-education community about what constituted compliance with Title IX with respect to sports.

After the regulations became law in 1978, many athletic directors complained that they were vague and that they offered scant guidance regarding compliance. On December 11, 1979, HEW responded to these complaints by issuing a “ Policy Interpretation” designed to clarify the regulations, particularly their requirement that colleges “ provide equal athletic opportunity for members of both sexes. ” The Policy Interpretation focused its attention on just one of the ten factors that the Title IX regulations had indicated were relevant to a determination of whether a college satisfied the “ equal opportunity” requirement. This factor was the only one in the regulations that was broadly evaluative; it required colleges to offer sports and levels of competition that “ effectively accommodate [d] the interests and abilities” of both male and female students. During the 1990s this “ effective accommodation” test became the most important measure of compliance that the Title IX regulations identified because the federal courts based their decisions in Title IX cases on whether or not the defendant college had accommodated the athletic interests and abilities of its women students effectively.

It is the eye of the storm of controversy that continues to swirl around Title IX enforcement in college sports today. The Policy Interpretation stated that a college accommodated its students’ athletic interests and abilities effectively, thereby complying with Title IX, when it satisfied one part of a three-part effective-accommodation test. The college could pass this test by satisfying part one, the substantial-proportionality standard, which required it to show that the percentages of its male and female students who were athletes were substantially proportional to the percentages of men and

women in its student body. Failing that, a college could comply with Title IX by demonstrating a “ history and continuing practice” of expanding athletic opportunities for the underrepresented sex – which usually meant women – in its sports programs. A college that could not satisfy either part one or part two could still comply by showing that its sports offerings, even though they might be limited, accommodated the interests and abilities of its student body fully and effectively. Today, the Policy Interpretation’s three-part effective-accommodation test is the legal standard that determines whether a college is in compliance with Title IX.

During the 1990s the three-part test produced a series of courtroom victories for female college athletes and prompted the settlement of other cases on terms that were favorable to female athletes. In the early 1980s, though, the three-part test was not the eye of the Title IX storm; that distinction belonged instead to the question of whether Title IX applied to college athletic departments. The federal courts’ preoccupation with this question, the Reagan administration’s support for the program-specific interpretation of Title IX, and weak enforcement by the OCR, which took over Title IX enforcement from HEW in 1980, combined to make the 1980s a stagnant decade for the cause of gender equity in college sports. Colleges had expanded athletic opportunities for women significantly in the 1970s, but instead of building on that progress in the 1980s, colleges added only a few sports, typically cross-country, golf, and tennis, which attracted few participants, and gave them minimal financial support. As if stagnation were not bad enough, the cause of gender equity in college sports nearly slipped

into a coma after the United States Supreme Court's decision in *Grove City College v. Bell*.

In *Grove City*, the Court, siding with the Reagan administration, interpreted Title IX to apply only to programs or departments within a college that received federal funds directly. In so doing, the justices placed college athletics beyond the reach of Title IX because athletic departments hardly ever received federal funds. The consequences of their decision were swift and severe. OCR discontinued approximately forty pending Title IX sports investigations, and it refused to act on new complaints unless the athletic departments named in those complaints received federal funds. One of these investigations was of the University of Maryland, where OCR had found violations of six of the ten factors by which Title IX measured equal opportunity in college sports. *Grove City* forced OCR to abandon this investigation because Maryland's athletic department did not receive federal funds directly.

OCR also reduced the scope of an investigation at Auburn after *Grove City*, despite having found violations of seven of the ten factors. As a result of *Grove City*, OCR informed Auburn that it would investigate only discrimination in the awarding of athletic scholarships, to see if the university had misused federal funds. *Grove City* remained in force until March 22, 1988, when Congress overrode President Reagan's veto and amended the Civil Rights Restoration Act of 1987, thereby reversing *Grove City* and making the institution-wide interpretation of Title IX the law of the land. The new language defined an educational "program or activity" as "all of the operations of a college...", which brought athletic departments within

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the reach of Title IX. Henceforth, if any office, department, or program within a college received federal funds directly, then every office, department, and program within that college had to obey Title IX.

The reversal of Grove City in 1988 was as consequential as its announcement had been four years earlier. It triggered the filing of forty-five complaints to OCR that alleged violations of Title IX by college athletic departments, and it facilitated the settlement of a long-standing lawsuit against Temple University on terms that favored the plaintiffs, who were women athletes at Temple. Most importantly, the reversal of Grove City shifted the focus of debate from whether college athletic departments had to comply with Title IX to how they could comply with Title IX, and it substantially relocated this debate from Congress and the Department of Education to the federal courts, where women college athletes would be extraordinarily successful plaintiffs during the 1990s. The debate about the reach of Title IX was important, but it was not the only debate that raged within the college-sports community during the 1970s and the 1980s. A less visible, but equally significant, debate occurred among the small cadre of women who taught and coached female college students.

At issue in this debate was whether women ought to adopt the male model of college sports, with its emphases on winning games and earning money, or whether they ought to create an alternative model that sought primarily to benefit the women who played the games instead of the institutions they represented. Older women physical educators typically rejected the male model, which was contrary to the philosophy to which they had adhered for decades. This philosophy held that(1) cooperation was preferable to

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competition;(2) sports should be secondary to a student's academic life, and they should not encourage cheating;(3) sports should not become so important that players had to worry about retaining scholarships and that coaches had to win games and earn profits in order to remain employed; and(4) women of average athletic ability should not be made to believe that their colleges regarded them as less important than teammates who were " stars. It led women physical educators to favor intramural competition, which they believed promoted physical and mental health, while avoiding public displays of athletic prowess. Public displays of athletic prowess had triggered corruption in men's college sports, and they were contrary to traditional ideas about proper female behavior, which the usually conservative women physical educators did not wish to challenge.

Thus, according to Allen Sack and Ellen Staurowsky: " The refined and restrained nature of women's sport, so intimately connected to women's education models, replicated the standards of womanly behavior. Traditional standards of womanly behavior began to change during the 1960s, though, and this change brought an acceptance of, even an appreciation for, female athleticism. In the new environment the traditional opposition by women physical educators to varsity competition among female collegians gradually fell away, setting the stage for the tremendous expansion of athletic opportunities for college women that occurred in the 1970s. Indeed, in 1966 women physical educators founded the Commission on Intercollegiate Athletics for Women (CIAW) for the purpose of providing the intercollegiate athletic competition that women students increasingly desired, but without the " rampant commercialism" and the " almost insane compulsion to win at

any cost" that plagued men's college sports. The CIAW sponsored championships for women in several sports. The CIAW was short-lived because it evolved into a new organization, the Association for Intercollegiate Athletics for Women (AIAW), in 1970.

Unlike the CIAW, which was an organization of women physical educators to which colleges did not belong, the AIAW was a national membership organization to which colleges belonged if they wished to participate in intercollegiate athletic championships for women. Still, the same women who had been leaders in the CIAW were leaders in the AIAW. The AIAW was unique among college-sports governing bodies in that it emerged from, and was affiliated with, an educational association, the Division of Girls' and Women's Sport (DGWS), which, in turn, was a part of the American Association of Health, Physical Education, and Recreation (AAHPER). Conducting championships was the most visible function that the AIAW performed, but like its male counterparts, the NCAA and the National Association for Intercollegiate Athletics (NAIA), it also published rules for the sports it sponsored, disseminated information, including athletic schedules, and represented its members on matters that related to college sports.

In 1972-73, the first year of fall-scale operations for the AIAW, 386 colleges held memberships, and their female athletes could participate in AIAW-sanctioned national championships in 8 sports. In 1981-82, the last year of fall-scale operations for the AIAW, it conducted forty-one national championship events, which served three divisions and 19 sports. Moreover, between 1973 and 1981, which nearly paralleled the lifetime of the AIAW, the amount of money that colleges spent on women's sports as a portion of <https://assignbuster.com/sex-discrimination-in-athletics-separate-but-equal/>

their total sports budgets increased by an average of 43.59 percent per college and the number of women's sports increased by an average of 2.73 per college. Women's sports budgets were negligible before 1973, though, so a 43.

9 percent average increase still left them much lower than men's sports budgets in 1981. The AIAW ceased to exist on June 30, 1982, despite having played a pivotal role in the development of college sports for women. Ironically, Title IX was partially responsible for the demise of the AIAW. Title IX surely helped to expand athletic opportunities for college women, but it failed to offer the physical educators and coaches who ran women's college sports what Mary Jo Festle has called "self-determination," that is, a chance to operate the games according to a different model than the men used. Indeed, coaches, athletic administrators, and lawyers generally interpreted Title IX to require "sameness" between men's and women's athletic programs - which pushed women's programs to emulate men's programs, as the latter were the accepted way of doing business in college sports and their patriarchs in the NCAA were unwilling to trade commerce for participation.

The implications of this orientation toward sameness became evident early in 1973, when eleven students and three instructors from two Florida colleges filed a lawsuit charging that the AIAW rule that prohibited member colleges from awarding athletic scholarships discriminated on the basis of sex, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Instead of defending itself in court, the AIAW dropped its scholarship ban. It feared that retaining the ban would

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result in a loss of member colleges that offered athletic scholarships to men because these colleges would or might think that Title IX required them to offer athletic scholarships to women, too. The lawsuit was a harbinger of things to come within the AIAW itself. By the mid-1970s one faction continued to favor a participatory model of college sports, which Festle has called “ a somewhat more competitive version of the old PE programs, ” while another faction “ wanted to jump whole-heartedly into big-business sports.

By the early 1980s it was clear that the big-business faction had won. It won as early as 1980, when the NCAA membership voted to offer five national championships for women in Divisions II and III during the 1981-82 academic year. The NCAA sought to gain control of women’s college sports because Title IX, and the pressure on colleges to fund women’s sports that followed its enactment, convinced the association that it had to govern women’s sports in order to protect the profitability of men’s college sports, and its own economic well-being, in the future. When the NCAA gained control of women’s college sports, it eliminated the AIAW as an organizational rival and extended the reach of the commercial model from the men’s games to the women’s games. The NCAA’s announcement that it would offer championships for women devastated the AIAW.

The NCAA, not the AIAW, would receive the revenue to be derived from telecasts of women’s college championships. Women’s teams would opt to participate in NCAA-sponsored championships because the NCAA, unlike the AIAW, could afford to pay their expenses for travel to and from the championship sites. In June of 1981 two hundred colleges, or 20 percent of <https://assignbuster.com/sex-discrimination-in-athletics-separate-but-equal/>

the AIAW's members, declined to renew their memberships and another 12 percent renewed but indicated that they would not participate in any AIAW championships. The NCAA's superior financial resources—namely, an annual operating budget of more than \$20 million, as compared to the AIAW's operating budget of less than \$1 million - enabled it to supplant the AIAW quickly as a sponsor of college sports for women. The AIAW filed suit against the NCAA on antitrust grounds, but lost both at trial and on appeal, as the courts concluded that the NCAA's takeover of women's college sports was not the product of a monopolistic intent.

Thus, by 1988, when Congress finally ended the long-standing debate about the applicability of Title IX to college athletic departments, the debate about the wisdom of intercollegiate athletics for women was over, too. It was clear that the NCAA would govern women's college sports according to the established male model. It was equally clear that Title IX was a double-edged sword for women in sports. Title IX had helped to increase budgets, opportunities to compete, and the visibility of women's college sports, but at the price of adopting a commercial orientation that was fundamentally incompatible with higher education. In short, Title IX promised women equality in college sports, but it denied them self-determination. During the 1990s women would pursue equality in the federal courts with so much success that a backlash would occur among supporters of men's non-revenue sports, who would charge that colleges sacrificed these sports routinely on the altar of Title IX compliance.