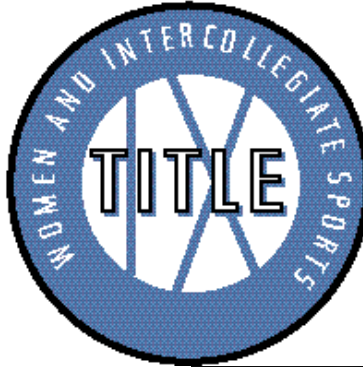


Equal

Title IX and Intercollegiate Sport

Opportunity?

BY JOHN WEISTART



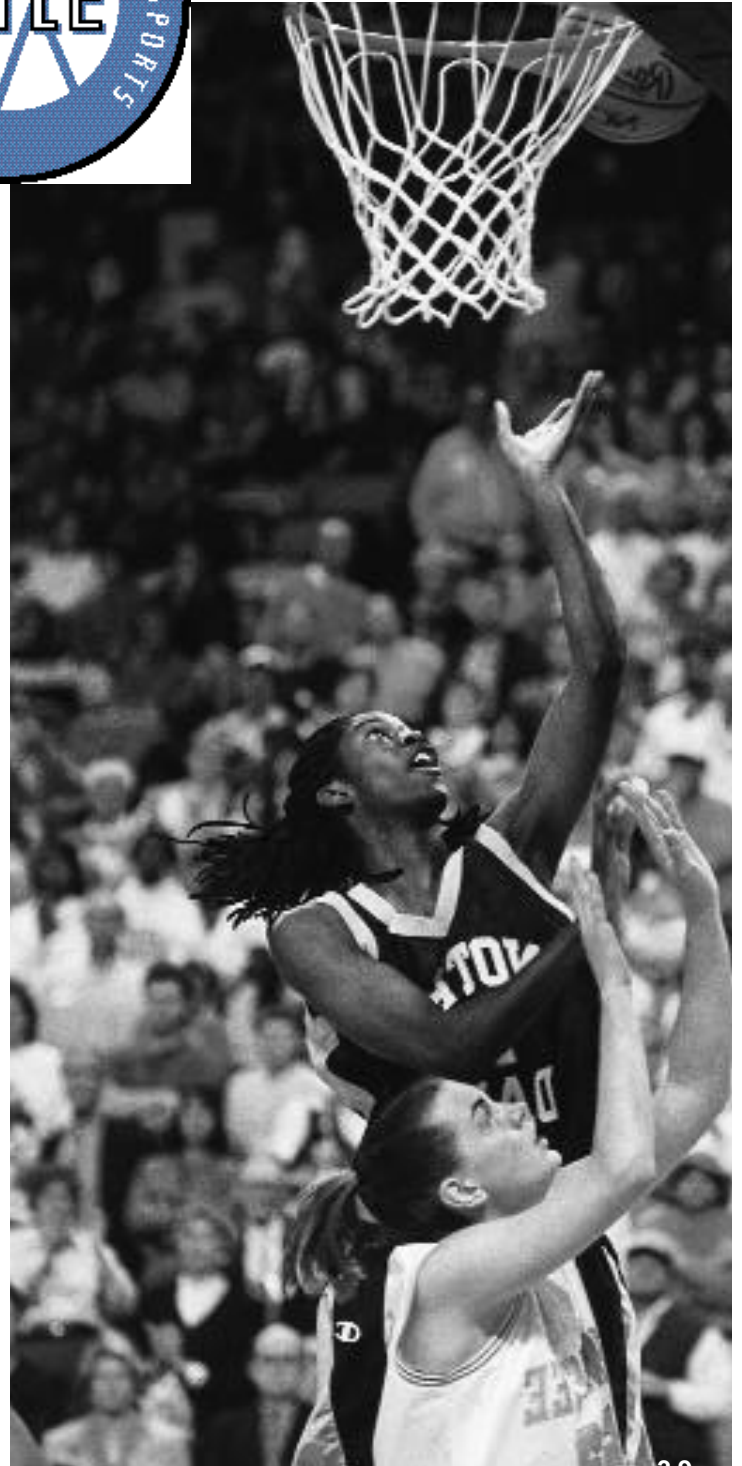
The subtext of Title IX of the Education Amendments of 1972 as it applies to intercollegiate sports could easily be “Bear Bryant in the age of postmodernism.” Bear Bryant, the legendary coach of the powerful University of Alabama football teams of the 1960s, 1970s, and early 1980s, is remembered in faculty circles for his quick assessment of how athletics and academics should be ordered in higher education. In response to questions about how the athletic department could justify its independence from the usual regime of academic deliberations, Mr. Bryant offered that it was unlikely that 50,000 people would show up to watch an English professor give a final exam.

A central tenet of postmodern philosophy is that few immutable canons or absolutes exist. What becomes the controlling norm is greatly affected by who is given a place at the table where the norm is discussed. Title IX presents a stellar example of that perspective as it applies generally to federal law and regulation.

For virtually all the history of college sports, all the seats at the table have been occupied by men—and not a particularly broad cross section at that. For the first one hundred or more years of college sports, there were no women’s sports. “College sports” meant men’s sports.

Moreover, at schools where football is the important sport, to be invited to the table one had to be a believer in the primacy of football and in the unimportance of virtually everything else. At some schools, the sport that defined the athletic department’s mission was basketball, but the ordering of the world was comparable.

John Weistart is a frequent commentator on policy issues in sports. He is professor of law at the Duke University Law School.



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While Title IX and its mandate of increased opportunities for women has been around for 25 years, the group at the table has not changed much. Even today, one does not become an athletic director in a substantial program without understanding that the revenue sports, which means one or both of the two dominant men's sports, come

than 30 men's and women's sports. But in a recent year, 42 percent of its budget went to three men's sports—football, basketball, and ice hockey.

A Chilly Reception

As an example of the prospects of change through regulation, the reception of Title IX in college sports is notable. After 25



first. While this reality of football and basketball as the defining influence is most apt for the 40 or so largest programs in each sport, it is also relevant for smaller programs. Both culturally and economically, the two men's revenue sports cast a long shadow. For example, Brown University, not a traditional sports power house, admirably sponsors more

years, only three dozen of the top 300 programs are in compliance. Women receive less than 40 percent of athletic scholarships. Certainly athletic opportunities for women are greater than they were in 1970, when they were virtually nonexistent. But the lack of compliance with Title IX is remarkable, especially given the relatively swift embrace of

gender integration in college enrollment and the slower, but substantial, integration of many faculties. Today 55 percent of undergraduate students are women, for example. In the next decade, the number is slated to rise to 60 percent.

Who is at the table does seem to make a difference. Imagine, for example, that instead of a group dedicated to preserving and protecting the football or basketball program, budgetary allocations were made by a body that included former women athletes, tuition-paying parents of young women athletes, and a representative from the Women's Studies faculty. Would women athletes traveling to away games sleep two to a bed, four to a room, while their male counterparts are given separate beds in double rooms, as has been common? Whether the 100 students on the football team should be consuming more than half of a \$20 million athletic budget, which is typical in big-time programs, would not go unquestioned. Nor would we likely see a continuation of the pattern at smaller schools where the amount spent per player on football exceeds the amount spent per team for most women's sports.

The history of the nonimplementation of the statute has been interesting. As one early indication that change would not be easy, the National Collegiate Athletic Association, the body that serves as the universities' surrogate in making sports policy, financed a major legal challenge to the regulations adopted under the statute. Again, that strategic decision was not made at a table where women participated freely.

Present-day resistance to

Title IX is notable for its rhetorical intemperance. The head of the American Football Coaches Association has described the advocates of increased opportunities for women as "the enemy" and suggested that they are "out to get" football. A common refrain from coaches in men's wrestling, swimming, and gymnastic teams, all sports that have experienced waning fortunes in recent years, is that Title IX is "promoting discrimination." From their perspective, money is being taken from the less visible men's sports to expand women's programs. The particular rhetorical flourish that rallies these groups is the declaration that present policies under Title IX are "affirmative action"—a not-so-subtle attempt to push the claims of women for recognition of their athletic aspirations into the swirl of anger that makes racial preferences such a political hot spot.

While the affirmative action characterization has gotten wide play in the sports press, it is not a particularly accurate or thoughtful one. It seems odd that a regulatory effort intended to move away from a regime that funded only men's sports would be seen as affirmative action. One wonders what "nondiscrimination" means in this male-dominated, once male-exclusive environment.

A more plausible view is the perhaps too obvious point that if the number of people laying claims to athletic department funds grows significantly and if the total amount of money spent on athletics does not also grow—as it should not in a world of higher education in which legislatures have been cutting support for libraries, salaries, and educational facilities—then even under the

most nondiscriminatory allocation of funds, traditional men's sports will not be as lavishly supported as they were when they were the only sports to support. Thus, the rhetoric of the complaint seems much stronger than its substance.

The Best Teams Money Can Buy?

To see how college sports are locked into a budgetary structure that favors the two dominant men's sports and almost certainly ensures excess in their funding, let's again focus on the 40 or so big-time programs. Such athletic departments really run two distinct sports operations, one that is nonprofit and non-profitable, the other a highly commercialized venture thrown into the rough-and-tumble world of broadcasting, Nielson ratings, and sponsorships. The former concerns itself with nonrevenue sports, the latter, top-echelon football and basketball.

The key insight into the economic structure of college sports at this level is that the potential spending for the two commercialized men's sports has no predefined restraint. These sports will consume whatever funds are available. Moreover, many of those at the football-promoting table doubt their ultimate control over costs. Spending levels are often seen as what competitors are willing to spend to claw out a position near the top of the sports pyramid.

Big-time athletic programs find themselves in a position that is quite unusual and quite isolating in the general non-commercial thinking that drives the best of higher education. The economic reality for the athletic department is that if it wants to be competi-

tive in the commercialized college sports scene, it must join what Berkeley sociologist Harry Edwards calls the athletics arms race.

In football and basketball, but not in lacrosse or crew, the school that spends the most wins the most, and the school that wins the most has the most to spend. If a competitor builds a lavish state-of-the-art weight room and hires an array of strength coaches, the home team is instantaneously at a disadvantage. It has lost an edge in its ability to recruit the most exquisite talent, the talent that will ensure lucrative television contracts and ample post-season receipts.

For those at the budgetary table, then, the trick is to spend as little money as possible on the nonrevenue sports to ensure maximum resources for the large and competitor-driven appetites of the football and basketball programs. One recent study found that for every new dollar spent on sports at big-time schools, only 5 to 7 cents went to nonrevenue sports.

Hence the problem. Title IX supports further expenditures on non-revenue-producing sports—exactly the sort of expenditures that athletic departments do not seek out and do not want to make. And heaven forbid that a program moves willingly and generously toward the goal of equitable opportunities for women. Such a move is economic suicide.

Thus the rhetorical lashes delivered at Title IX and the courts that enforce it are, in essence, a plea that the traditional ways of doing business cannot be upset.

As an exercise in regulation, Title IX is thus quite a challenge. Given who is at the table

and given the raw economics of the structure they have chosen to embrace, it is naive to assume that increased athletic opportunities for women will quietly and enthusiastically be added to the larger goals of the athletic department. Today's low level of compliance with Title IX underscores the point. The desire for greater gender equity is the classic case in which regulation, and perhaps regulation that is more than gentle nudging, is necessary if a larger objective is to be achieved.

Getting It Right

The rather mean-spirited rhetoric that frames much of the criticism of Title IX is usually followed by the suggestion that the U.S. Department of Education has done a bad job in translating the general goal of the statute into workable regulatory rules. There is, though, another view. And this is that while change might not be welcome, as a vehicle for turning the ship of college sports, the present Title IX regulations may have gotten it just about right.

The first issue undertaken by the regulations is the matter of "how do we tell?" How do we tell whether a school is providing enough athletic opportunities for women? The regulations, in effect, specify three alternatives through which a school can show that it is being fair in allocating chances to compete between men and women.

The first test is a safe harbor. If the school can show that the percentage of its athletes who are women is substantially proportionate to the percentage of women in its student body, it is in compliance. (There is a separate

question as to whether the women's endeavors are being adequately funded, but that is secondary to the issue of providing sufficient opportunities.)

If there is not substantial proportionality, then the school is allowed to show, under the second alternative, that it has engaged in adequately planning and, in a meaningful sense, is on its way to providing sufficient opportunities for women. The third path to compliance is a showing that the school is meeting the actual level of athletic interest among its women. Thus, even if the level of participation by women is less than "substantially proportionate" to their presence in the student body, such a result is acceptable if all of the potential for women's sports is satisfied.

The common litany from the football table is that the seeming flexibility of the three-part approach is phony: there is really only one test—the government simply counts noses to see if there is "substantial proportionality." It is alleged that planning under the second test is accepted only if it is planning for substantial proportionality. And the third test evaporates because there is no recognized mechanism for establishing that actual interest is less than a proportionate interest.

There is, though, a great deal more sensitivity in the regulations than critics are willing to credit.

In fact, the existing regulations are quite deferential to self-determination by college athletic departments. Note what the regulations do not do. They do not, for example,

order that the occupants of the chairs around the table be deposed. If one wanted a timely and temperate response to Title IX, changing the guest list probably would have been the quickest route to that end. But the regulations defer; the decisionmakers aren't changed.

Nor do the regulations order an equal expenditure of dollars; not all sports need be funded equally. Nor is there a regulatory standard that second guesses individual decisions that a school's coaches and athletic administrators make. There is no general test of "reasonableness" or "consistent good-faith compliance," both plausible measures, but standards that would interject the government deep into the conference room at the field house.

Rather, the approach of the regulations is that schools will be judged by their results. How a school gets to those results, how it adjusts the gender-antagonistic incentives in the historical budgetary structure is up to the school. Again, among regulatory options, this is hardly heavy-handed, picky, or oppressive.

Properly interpreted, "substantial proportionality" is simply the guideline that ensures that a football-protecting school does not begin from a position of naysaying and false pessimism. A healthy premise of the substantial proportionality test is that as a society, we really have very little idea how women's sports will evolve, which will be popular, and by what measure.

Locker rooms are now populated with many men who are highly confident that they know otherwise. As one observer in the *Los Angeles Times* reported, "It is unrealis-

tic to believe that under any circumstances the number of women interested in participating in a sports program in high school or college will ever approach the percentage of males that are doing so."

To their drafters' credit, the existing regulations do not try to answer what women's sports will look like in 40 years. Rather, they reflect the significant insight that the potential for women's sports is so unexplored that there can be no hard and fast game plan for reform.

What would have been the response in the locker room in 1965 if someone had asserted, "In the future, at some major schools—Stanford, Colorado, perhaps—women's basketball will attract more fans than men's basketball"? Or, "There will be women playing competitive ice hockey in college." Or, "The number of women playing collegiate soccer will go from virtually zero to 8,000 in less than 25 years." These statements would have been met with moans, hoots, and towel-snaps. But all the predictions have proven true. It seems quite correct that the Title IX regulations not anoint a "conventional wisdom" with legal status.

But what if, when much more is said and done, it turns out that the degree of interest in women's sports on a particular campus is less than "substantially proportionate" to the representation of women in the general student body? The current regulations accept that possibility and fully authorize that the number of women's offerings be limited. The third test for compliance clearly contemplates that there can be downward adjust-

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ments in offerings based on a lack of interest.

What the regulations properly do not allow is for an athletic department to announce that “women aren’t interested.” Nor should the regulations be taken to authorize a school to survey its women students to establish a lack of interest. On that point, a magnificent insight emerged from the initial opinion of the federal Court of Appeals in the 1993 Brown University case: such a survey does little more than measure the effects of prior discrimination against women. Showing whether women “want” more athletic opportunities is going to require a slower and more nurturing process.

Yes, there may be women’s offerings that are less than substantially proportionate, but the justification for that outcome must be based on experience, including long-term trial and error. What is not given weight is surmise, especially a surmise offered by decisionmakers who are under great pressure to prefer an unfavorable forecast.

A Spending Ceiling on Big-Time Sports

The divisive rhetoric and rear-guard actions against Title IX have delayed a more balanced discussion of how to move college sports toward gender equity. The problem that athletic decisionmakers confront is fairly obvious: the unrestrained appetites of football and basketball leave precious little money for other sports. The question that needs to be most thoughtfully pursued is how to devise an alternative to the present model that causes the least disruption to men’s offerings. One choice rather obviously presents itself.

Big-time college sports now operate under a number of NCAA-mandated partial caps on expenses, the most important of which is that no wages can be paid to the players. A plausible next step is a comprehensive cap, a prescribed ceiling on expenditures in football and basketball.

The benefits of such a control are both literally and figuratively untold. A cap frees up money that can be used for other purposes. Not only will Title IX compliance now be easy at most schools, but athletics may actually come to support the school’s education venture rather than detract from it.

And because of the curious twists in sports economics, the final athletic product might actually be improved. With the top restrained, as it is in many professional sports leagues, the number of teams that are “competitive” would increase. The contest for who is best would greatly intensify, resulting in more consumer interest.

At the bottom line, the regulations under Title IX

require that the interest in women’s sports should not be declared weak before it is fully born. We truly don’t know what we have in women’s sports; we are only now starting to find out. Title IX says no more than that women’s sports should be allowed a period of adequately funded experimentation and exploration. The topic very squarely on the table is whether the athletic department’s response will continue to be resistance and litigation or a more productive rethinking of what lies ahead for college sports in the 21st century. Perhaps a change in the guest list is warranted. ■