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Current Title IX Policies are Essential to Implement Title IX's Guarantee of Equal Opportunity

By

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Title IX of the Education Amendments of 1972 is the federal law that prohibits sex discrimination in education. Title IX says: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Title IX is a critical part of our country's civil rights enforcement scheme.

Title IX applies to sports, among other educational activities. The law requires schools and colleges receiving federal funds to give women and girls an equal chance to play sports. It also requires schools to treat men and women equally when it comes to athletic scholarships and other benefits like equipment, coaching and facilities.

Title IX regulations and policies provide a fair and flexible "three-part test" for evaluating compliance with the law's sports participation requirements. The three-part test states that a school will be in compliance with Title IX's participation requirements if it shows any *one* of the following: that (a) the percentages of male and female athletes are about the same as the percentages of full-time male and female students; *or* (b) the school has a history and continuing practice of expanding opportunities for women; *or* (c) the school is fully and effectively meeting its female students' interests and abilities, even if it does not provide equal sports opportunities.

While the three-part test produces enormous gains for women and girls in athletics, the playing field is not yet level. Although male and female participation in athletics has steadily grown since Title IX's passage, women still lag behind men in all aspects of athletics. At Division I colleges, for example, women are 53% of the student body but are only 41% of the athletes and receive only 32% of recruiting dollars and 36% of overall athletic operating budgets. At the high school level, the inequitable treatment, budgets and equipment girls receive can be far worse. Stronger enforcement of the three-part test is necessary to close these gaps.

The three-part test is a crucial tool to continue to move toward equal opportunity in athletics. Each prong of the test is critical to achieve the appropriate balance between protecting civil rights, ensuring adherence to fundamental principles of equality and preserving school flexibility to structure athletics programs. A school can comply by meeting any *one* of the three prongs.

- **The first prong preserves women's right to equal opportunity and avoids freezing discrimination into place.** The first prong recognizes that women are entitled to equal opportunity, and adopts the common-sense principle that schools can comply with Title IX when they provide their female students with the same

level of athletics opportunities they provide their male students. To eliminate or modify the first prong would, contrary to basic civil rights principles, force women to *prove* their right to equal treatment, freeze women's sports participation at current levels, which are artificially depressed by still-pervasive discrimination, and enshrine stereotypes as the basis for government decisionmaking.

- **The second prong provides flexibility unprecedented in civil rights laws.** Under the second prong, schools that do not provide equal opportunity can show instead that they have made, and are still making, *progress* toward equality. This prong offers a flexibility that is unprecedented in the history of civil rights law. We would never, for example, allow an employer to continue paying women less than men on the basis that it was *moving* toward equality.
- **The third prong permits schools to customize equal opportunity requirements for their own campuses.** Under the third prong, schools can show that they are fully meeting the actual interests and abilities of women on their campuses – even if they are not giving women the same opportunities to play as their male students. This prong enables schools to adjust the requirements of equal opportunity where their female students are shown to be, in fact, less interested than men in participating in sports.

Schools have successfully used each of the three prongs of the test to comply with Title IX. From 1994 through 1998, in more than two-thirds of the cases in which the Office for Civil Rights reviewed compliance with Title IX's participation requirements, schools were found to have complied under Prongs Two and Three of the test. Prong One, clearly, is not the only way to prove compliance.

Courts have uniformly upheld the three-part test as a valid and fair way to measure equality of opportunity. Eight of the nation's federal courts of appeals have considered the three-part test; eight have upheld it.

Attacks on the three-part test are without merit and are harmful.

- **The three-part test does not impose quotas.** Quotas are irrelevant in the sex-segregated world of athletics. The first prong of the test simply determines whether slots on teams -- which are, in the first instance, set aside by schools *based on* gender -- are being awarded on an equal basis to men and women; it does not mandate that schools create a certain number of places for women. In fact, every court to consider the question has said that the three-part test does not impose quotas.
- **Men's opportunities have increased, not decreased.** An authoritative study by the General Accounting Office shows that the number of male athletes has increased by about 5% since 1981-82, with men's baseball and soccer teams, among others, registering big gains. In addition, spending for men's sports still vastly outstrips spending for women's teams, with women receiving less than 1/3 of the dollars spent by schools to recruit new athletes and only slightly more than 1/3 of athletic operating budgets. In fact, schools spend \$2 on men's sports for every \$1 they spend on women's sports.

- **Where men's opportunities have been cut, Title IX is not the reason.** Where there have been reductions in certain men's teams, such as wrestling, those reductions have been made for reasons unrelated to Title IX – including declining interest in specific sports, liability considerations, and the poor performance of specific teams. Notably, it is bloated expenses for football and men's basketball, and the athletics arms race in general, that are the biggest culprits for losses to men's minor sports opportunities. Men and women need not be pitted against each other; sensible budgeting can enhance opportunities for all.
- **Women are not less interested in sports than men.** The quota claim presumes that giving women equal opportunity discriminates against men because men are more interested in sports. This stereotyping is unlawful, contrary to fundamental principles of civil rights law, and contradicted by the facts, which show that women's participation in sports has grown astronomically as the doors have been opened to them since Title IX was passed. Their lower rate of participation reflects the persistence of discriminatory barriers, not a lack of interest.

For all of these reasons, the current Title IX athletics policies must be preserved and more strongly enforced.