

BRIEFING PAPER NO. 3

Proposals Being Considered by the Commission on Opportunity in Athletics Would Further Disadvantage Female Athletes and Dismantle Title IX Protections

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SECTION I: VARIANCES FROM EQUAL OPPORTUNITY

COMMISSIONER PROPOSALS:

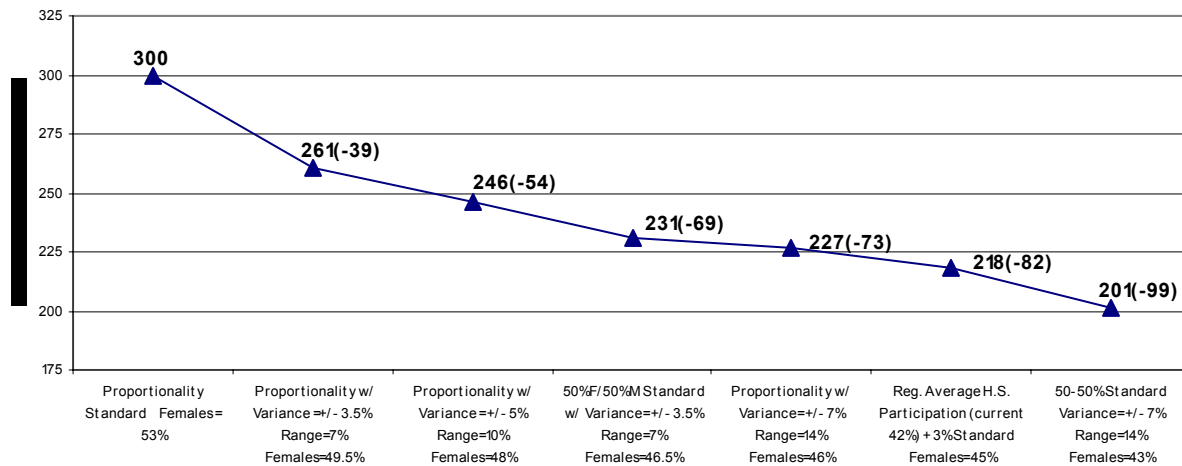
- Establish permissible variances ranging from 3.5% to 7% below the proportionality figure in Prong One.
- Replace the proportionality standard with a 50%-50% standard (disregarding the actual proportion of males and females in the undergraduate population), and allow permissible variances ranging from 3.5% to 7% from this new standard.

NCWGE RESPONSES:

- Under these proposals, women at a school that is 53% female would lose between 3.5% and 10% of their opportunities to play sports. This translates to 578,000 to 1.4 million fewer high school, and 31,000 to 78,000 fewer college, opportunities overall. In a typical college with 566 athletes, females would lose 39 to 99 opportunities under the various proposals.

IMPACT OF PROPOSED REVISIONS ON FEMALE ATHLETIC PARTICIPATION

Example assumes: (1) institution with 53% female enrollment, (2) no loss in opportunities for men and (3) illustrates lowest permissible number of female participants under Prong One



- These proposals would worsen the imbalance that already exists on the playing field.
 - Females currently receive 1.1 million less (41% fewer) opportunities at the high school level, and 58,000 less (38% fewer) opportunities at the college level, than do their male counterparts.
- These proposals would also deny women their fair share of athletic scholarship dollars. Because scholarships are awarded in direct relation to participation opportunities, if participation opportunities were decreased by 3.5% to 10%, women would lose from \$75 to \$189 million annually.
 - This only worsens current disparities since, at the present time, men receive \$133 million or 36% more than women in athletic scholarships.
- These proposals further contradict the spirit and approach of the three-part test. The first prong of the three-part test recognizes the fundamental principle that a school that provides equal opportunities to its students will be found to be in compliance with the law without further inquiry. If a school does not provide these equal opportunities, it can show that it is nonetheless in compliance with Title IX's participation requirements through the second and third prongs of the test.
 - These proposals would modify that understanding by finding that a school provides equal opportunity – and declining to undertake the further inquiry currently required under the second and third prongs -- even where the school falls far short of equally accommodating its male and female students.

COMMISSIONER PROPOSAL:

- Find schools in compliance with the proportionality standard if they provide participation opportunities that match the regional high school participation percentage + 3%.

NCWGE RESPONSES:

- Since girls are subject to continued and pervasive discrimination in athletics at the high school level, and receive only approximately 42% of the participation opportunities, this proposal would establish a collegiate standard based on a discriminatory high school standard and freeze participation at its current, artificially depressed, levels.
- There are over 6 million boys and girls vying for 400,000 college participation opportunities. Colleges cannot fill the interest or demand of male or female athletes. The issue is whether they are going to provide equal access/treatment to college participation opportunities.
- This proposal assumes that colleges and universities recruit only on a regional basis, which is not the case. Almost all Division I institutions and most Division II institutions recruit on a national basis, but the standard for evaluating their participation opportunities would be regionally determined.
- This approach would exacerbate problems with consistent Title IX enforcement. There should be a consistent standard, not one that varies greatly by region.

SECTION II: INTEREST SURVEYS

COMMISSIONER PROPOSAL:

- Develop an interest survey and tie the percentage of opportunities that must be offered for women under Prong One to the results of that survey, in lieu of proportionality as the basic standard.

NCWGE RESPONSES:

- The use of the results of interest surveys to reduce the basic obligations of educational institutions to provide equal opportunity is invalid and has been unequivocally rejected by the courts. To require interest surveys is to force girls and women to *prove* their right to receive equal opportunities before they will be awarded those rights. This contradicts Title IX and fundamental principles of civil rights law.
- Interest surveys are biased attitude assessments that reflect the cultural differences of encouragement of boys and girls to participate in sports, and the basic lack of opportunity that has limited girls' expression of their interest now and in the past. There is no evidence that, given equal opportunity, women and girls will participate in sports in lower numbers than men and boys. In fact, It has been proven that when women and girls are given the opportunity, they participate in numbers that no one previously thought possible.
 - For example, girls' participation in sports at the high school level has increased by more than 800% since enactment of Title IX. Girls received only 8% of participation opportunities in 1972, but are approximately 42 percent of high school athletes now. (*National Federation of State High School Associations*). It is not lack of interest but lack of opportunity that has limited their participation levels.
- Given the economic and other benefits that stem from participation in athletics, it is not logical to say that women are less interested in athletics than men. There are 2.8 million girls participating in high school athletics now and there are fewer than 170,000 opportunities for them in college. For the chosen few, over \$300 million in athletic scholarships is available, and for many there is also preferred admission status to the nation's finest academic institutions. It is ludicrous to suggest that the most talented high school female athletes would not want the same economic opportunities and benefits as male athletes from participation in sports in college.
- Courts have upheld the use of surveys, in conjunction with other important considerations, to evaluate a school's compliance under Prong Three. It would inappropriate to extend the use of surveys beyond this to govern assessments of compliance under Prong One as well.

SECTION III: OTHER COMMISSIONER RECOMMENDATIONS

COMMISSIONER PROPOSAL:

- Ghost slots: Maintain current proportionality standard but count slots rather than actual participants (i.e., if a school has a tennis team, count male participants as 10 and female participants as 10 even if 14 males and 8 females participate on the team).

NCWGE RESPONSES:

- The courts have rejected this proposal. Rejecting the university’s arguments that opportunities should be measured by counting each team’s “unfilled but available” slots, the court in Brown held that the participation opportunities offered by an institution must be measured by counting the actual participants on intercollegiate teams. The court found NCAA squad lists to be the most accurate representation of varsity participants because the lists identify the names of individual athletes, thereby permitting verification of team participation numbers.
- This proposal would count unfilled participation slots in some sports and not count actual participants in others, thereby providing no actual information on participation.
- The number of women who participate in intercollegiate athletics, particularly on the Division I level, is a direct result of recruiting efforts and resources. NCAA Division I-A institutions spend an average of 71 percent of their recruiting dollars on men’s sports (*NCAA 1999-00 Gender Equity Study*). According to another recent NCAA report, the average Division I-A institution spends \$373,000 each year recruiting male student-athletes and \$153,000 recruiting female student-athletes (*2001 NCAA Revenues and Expenses of Divisions I and II Intercollegiate Athletics Programs*). As long as there are disparities in recruiting expenditures and efforts, there will be disparities in the numbers of women and men who seek athletic opportunities. It is unfair and illogical to penalize women for these disparities by counting as “participation opportunities” slots that they have not, in fact, been recruited to fill.

COMMISSIONER PROPOSAL:

- Eliminate “non-traditional students,” including older undergraduates, when determining the percentage of males and females in the student body for purposes of calculating proportionality.

NCWGE RESPONSES:

- Appropriate adjustments for non-traditional student populations may currently be made under Prong Three, if there is no interest in participation by this group. There is no reason to exclude non-traditional students from the entirely separate inquiry made under Prong One, which stands for something different: the proposition that schools will be in compliance if they offer equal opportunities to men and women on their campuses.
- Non-traditional students can and do participate in athletics, particularly in Division II, Division III and junior colleges. It is unfair, and contrary to basic principles of civil rights law, to exclude them when calculating what will constitute equal opportunity under Prong One.

COMMISSIONER PROPOSAL:

- Repeal the Equity In Athletics Disclosure Act (EADA), which requires public disclosure of financial and participation information by institutions of higher education.

NCWGE RESPONSES:

- The EADA is a valuable resource that allows anyone — parents, students, coaches, guidance counselors — to go to their local library and find out what institutions offer and what their commitment to gender equity is. Without the EADA, consumers would know far less about athletics offerings for women.

- The EADA reports hold institutions publicly accountable for their decisions regarding gender equity. No other tool provides this kind of information, and it is unlikely that institutions would provide it of their own accord.
- Far from being repealed, the EADA should be extended to require high schools to undertake systematic collection of information. Without such information, it has been, and remains, impossible to comprehensively evaluate the state of gender equity in athletics at the high school level.

COMMISSIONER PROPOSAL:

- Eliminate Prong Two of the three-part test.

NCWGE RESPONSES:

- The current three-prong test provides for maximum flexibility for institutions in adapting to new circumstances and structuring their athletics programs. To eliminate Prong Two – which allows schools to demonstrate a history and continuing practice of program expansion for the underrepresented gender – would limit institutions’ ability to comply by gradually expanding their programs.
- Removing this prong may freeze women’s opportunities in place and also result in fewer opportunities for men. If Prong Two no longer exists, institutions might have additional incentives to refrain from adding women’s sports and instead cut men’s sports in seeking compliance.