

# TITLE IX: HOW WE GOT IT AND WHAT A DIFFERENCE IT MADE\*

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## I. HISTORICAL BACKGROUND

At the end of the 1960s, the women’s movement is only a few years old. There is little awareness of sex discrimination throughout the nation. The words “sexism” and “sexist” have not yet been invented, nor the words “sexual harassment” or “date rape.” Even the words “sex discrimination” have only just entered the lexicon with the passage of the Civil Rights Act of 1964. There is not much interest in women’s issues except from a few women, a few small women’s groups, and a few men of good will, and some negative members of the press. Many of the people who do notice what we would today call “sex discrimination” often do not even realize that it is even wrong. When I applied to college it was openly known that women needed higher grades and test scores in order to be accepted. No one complained—it was just the way things were.

This is before the web, before e-mail. There are no newsletters dealing with women’s rights and discrimination. There are no conferences on women’s rights and discrimination. I remember talking to someone, saying “Wouldn’t it be great if there was a conference that was just about women.” Thus, it is difficult for women both to gather and to share information. Campus discrimination is rampant, but often not noticed. Here are a few examples:

- A letter sent to me by a woman who applied for a position at one of our prestigious small New England colleges and received this answer: “Your qualifications are excellent, but we already have a woman in this department.” Another school wrote to another woman that the

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department did not hire women at all. Some departments in a number of schools refused to hire married women.

- Many undergraduate schools limited the number of women who would be admitted. During a time period in the early 1960s, 21,000 women were rejected for admission to Virginia state colleges and universities. How many men were rejected for admission during the same time? Not one.
- The School of Veterinary Medicine at Cornell University, like most professional schools, had a fixed quota for women students. It would admit two women per year, no matter how many applied nor how brilliant the women were.
- In some colleges women could not major and sometimes not even take courses in some departments such as chemistry.
- My daughter could not take a course in auto mechanics, because the boys used “bad language.”
- As a child, I was not allowed to operate the class slide projector, fill the class inkwells with ink, nor be a crossing guard. Only boys were allowed to do these activities.

In 1969, I had just finished my doctorate at the University of Maryland and was teaching there as a part-time lecturer. There were seven openings in my department, and I asked a male faculty member why I was not even considered for any of these positions. He explained it, stating “Let’s face it, you come on too strong for a woman.” I did not know it at the time but those five words, “too strong for a woman,” would not only change my life but would also change the lives of millions of women and girls because they would ultimately lead to the passage of Title IX.

Instead, I went home that night and I cried. I blamed myself for speaking up a few times at staff meetings. I blamed myself for discussing professional issues with faculty members. I regretted my participation in classes as a graduate student. In short, I accepted the assessment that I was, indeed, “too strong for a woman.”

It was my then husband who helped me understand what those words really meant. He asked me, “Are there any strong men in the department?” I answered that all the men in the department were strong. He then stated, “Then it is not you. It is sex discrimination.” Yet the label of “sex discrimination” was a new one for me, and initially I was not ready to apply it to my not getting the position at Maryland. Like many women at that time, I was somewhat ambivalent about the women’s movement and halfway believed the press descriptions of its supporters as “abrasive,” “man-hating,” “radical,” and “unfeminine.” Surely, I was not like that.

In the next few months, I had a second and third job rejection. A researcher spent nearly an hour of his interview with me explaining why he wouldn’t hire women because they stayed home from work when their children were sick. (That my children were in high school was deemed irrelevant.) Subsequently, an employment agency counselor looked at my résumé and told me that I was “not really a professional,” but “just a housewife who went back to school.”

Here were three incidents within a short period of time which I could not rationalize away. Instead, I began to think more about sex discrimination and the burgeoning women’s movement.

When things go wrong in my life, I start to read about the problem. I am a great believer in “bibliotherapy,” so I began to read about the law and sex discrimination,

although I had never had the slightest interest in law other than considering a career as a legal secretary for a short time when I was in high school.

I naïvely assumed that because sex discrimination was wrong, it must be, therefore, illegal. It was not.

The Equal Pay Act of 1963<sup>1</sup> exempted professional and executive women, so that women teachers, faculty and administrators at all levels of education were not covered.

Title VII of the Civil Rights Act of 1964,<sup>2</sup> which prohibited discrimination in employment on the basis of race, color, national origin, religion and sex at that time, specifically excluded employees of educational institutions “in their educational activities,” so that again, women teachers, faculty and administrators at all levels of education were not covered.

Title VI of the Civil Rights Act of 1964<sup>3</sup> protected individuals from discrimination based on race, color and national origin in federally assisted programs, but girls and women, including minority females, were not protected on the basis of their sex. Thus, for example, Princeton University was able to use federal funding to develop a program to encourage minority students to enter engineering, but no females were allowed to enroll.

Although the Fourteenth Amendment assured all persons “equal protection of the law,” at that time it had never been deemed applicable to sex discrimination.

I also began reading how African-Americans had ended desegregation in public schools and how new laws had been enacted. I was reading a report evaluating the enforcement of civil rights legislation prepared by the U.S. Commission on Civil Rights and when I came across a little known Presidential Executive Order, which prohibited federal contractors from discriminating in employment on the basis of race, color, religion, and national origin. There was a footnote, and being an academic, I read footnotes, so I turned to the back of the book to read it. The footnote stated that Executive Order 11246<sup>4</sup> had recently been amended to cover sex discrimination by Executive Order 11375.<sup>5</sup> I was alone at home and it was a genuine “Eureka” moment. I actually shrieked aloud for I immediately realized that many universities and colleges had federal contracts, were therefore subject to the sex discrimination provisions of the Executive Order, and that the Order could be used to fight sex discrimination on American campuses.

I had recently joined a small women’s rights organization, the Women’s Equity Action League (WEAL) which was started by an Ohio attorney, Elizabeth Boyer, and I became chair of its Federal Action Contract Compliance Committee. (Actually, I was the only member of the Committee.) With some secret and very substantial help from Vincent Macaluso, then Director of the Office for Federal Contract Compliance at the Department of Labor, WEAL filed the first administrative class action complaint in January 1970 against every university and college that received federal contracts. Under the Executive Order at that time,

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<sup>1</sup> 29 U.S.C. § 206(d) (2006).

<sup>2</sup> 42 U.S.C. § 2000e (2006).

<sup>3</sup> *Id.* at § 2000d.

<sup>4</sup> Exec. Order No. 11,246 30 Fed. Reg. 12,319 (Sept. 24, 1965).

<sup>5</sup> Exec. Order No. 11,375 32 Fed. Reg. 14,303 (Oct. 17, 1967).

anyone could file an administrative charge with the federal government; you did not need to name a specific person who had been harmed by discrimination; you did not need to be part of the group that experienced discrimination; and you could file on the basis of statistical disparities. I subsequently filed administrative charges of sex discrimination under the Executive Order against about 250 universities and colleges. Other women's organizations also began filing charges.

Women would write or call me about their institution, and I would ask them to compile some data about the number and percentage of women faculty at each rank in several departments. I would compare this data with the percentage of doctorates awarded to women in each of these fields and use the results as the basis for my administrative complaints filed with the U.S. Department of Labor. (For example, women received about twenty-two percent of the doctorates in psychology in the late 1960s, yet in 1970, the last woman hired by the Department of Psychology at the University of California at Berkeley had been in 1924, and of the forty-two members of the 1970 department not one was female. Similarly, of the 411 tenured professors at the Graduate School of Arts and Sciences at Harvard University, not one was female, although twenty-two percent of the students were female.)

Macaluso also advised me to tell these people who contacted me to write their two Senators and their Representative in Congress (and get other people to do the same), requesting their Senators and Representative to write the Secretary of Labor and the Secretary of the then Department of Health, Education and Welfare,<sup>6</sup> which also had jurisdiction over the complaints, and ask them to enforce Executive Order 11246<sup>7</sup> as amended and to keep the Member informed of the progress in resolving the complaint. Macaluso's strategy was brilliant because it helped make Congressional staffs aware of sex discrimination in education. It also helped federal agency staff learn more about sex discrimination because when Congressional letters are addressed to a Secretary of a Federal department, they are directed to a special Congressional liaison who then forwards it to the proper agency for a response. The head of the agency refers the letter downward, and eventually, some person drafts a first response which then makes its way up through the bureaucracy, with each reader giving approval or changing the response, until it reaches the Secretary's office again for the final response. We generated so much Congressional mail that the Departments of Labor, and Health, Education and Welfare had to assign several full-time personnel to handle the letters.

Within four months, in April 1970, the first federal investigations of sex discrimination of American universities began, one at Harvard and one at the University of Michigan. Despite the fact that most of the formal complaints that I filed were subsequently "lost" by the government, and despite the fact that the initial investigation of Harvard for *sex* discrimination only included racial data and had to be redone to include sex discrimination after women's groups protested, the United States government was now directly involved in investigating and remedying sex discrimination in colleges and universities. Pandora's Box had finally been opened.

The group that I had joined, WEAL, had been organized so that several women members of the U.S. House of Representatives sat on WEAL's Advisory Board. I

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<sup>6</sup> The Department of Health, Education and Welfare later split into the Department of Health and Human Services and the Education Department.

<sup>7</sup> Exec. Order No. 11,246 30 Fed. Reg. 12,319 (Sept. 24, 1965).

sent copies of the complaints I was filing to them. One of them, Representative Edith Green, a Democrat from Oregon, had long been interested in sex discrimination in education and had wanted to amend the various anti-discrimination laws to cover women and girls in education, but there was no constituency which had the data and could press for passage of such laws. I provided her the constituency (the newly developing advocacy groups and active individuals) and the data she needed (often data collected by women about their campuses or professions). I had not initially realized that Rep. Green was the chair of the Special Sub-committee on Education of the Committee on Education and Labor, so that she had the power to initiate such legislation, the legislation that eventually became Title IX of a larger bill, the Education Amendments of 1972.<sup>8</sup>

Representative Green introduced the bill, and decided to hold hearings on it, the first hearing ever conducted specifically concerning discrimination against women in education. I suggested most of the people who testified, other than those from government and some national organizations. I also gave the overview testimony myself when I testified before the committee. The witnesses provided horror stories, mainly about women employed on campus such as departments refusing to hire women, or refusing to promote them or give them tenure; or women who received many thousands of dollars less salary than their male counterparts; or women working full-time as faculty, with no benefits, no office, no salary, because their husbands also taught at the same university.

Now whenever legislation is introduced and a hearing is held, organizations which have a stake in the legislation are asked if they want to testify, so they can make their views known and to point out their support or opposition or concerns. The American Council on Education is the main player in the world of higher education. Just about every college president is a member. The Council monitors all legislation that would have an impact on colleges and universities. The lobbyist for the American Council on Education was contacted about the hearings, and he declined to testify, stating "There is no sex discrimination in higher education," and "even if there was, it wasn't a problem."

His disinterest in the bill was major stroke of good luck and explains, in part, why no one recognized the power that was in Title IX. Apparently, Representative Green's bill was not seen as being of much interest to, or having any major implications for, educational institutions.

Eventually some institutions (Dartmouth, Princeton, Yale and Harvard) as well as some women's colleges, recognized the Title IX implications for admission to their institutions and were able to get a narrowly-worded exemption for private undergraduate admissions, so if Harvard or any other private institution wanted to have no women students, they could do so today, legally. (In fact, because many more women currently apply to college, some small private four-year institutions deliberately keep their enrollment "balanced" between men and women, so that some of the women rejected are brighter and better qualified than some of the men accepted.)

Most of higher education, however, knew nothing about the bill in the House of Representatives. Those few who did know about the bill did not believe it would have any meaningful impact.

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<sup>8</sup> Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

Because the word “sports” appears nowhere in the bill, and because the American Council on Education had never really analyzed the bill, the college athletic establishment simply had no idea that Title IX existed and would affect them at their very core. In other words, Title IX was seen as a very minor bill. Hardly anyone outside the Congress was following it except for some women’s organizations.

Most of the testimony presented at the hearings dealt with faculty and professional employment because these were the first groups to organize and the first to gather extensive data – data which filled approximately 1,200 pages about sex discrimination in education. Nothing like it had ever been assembled or published. It was an eye opener for anyone who saw it. Additionally, several women of color documented the status of minority women and the impact of sex discrimination.

After the hearings, Rep. Green hired me to put the written record of the hearings together. Thus, I became the first person ever appointed to the staff of a Congressional Committee to work specifically on women’s issues.

When Senator Birch Bayh, a Democrat from Indiana and also a member of WEAL’s Advisory Board, later introduced the bill in the Senate, some people in higher education noticed the impact that Title IX might have on fraternities and sororities, and college beauty pageants. A few other exemptions were added to the bill. One member of the Senate needed reassurance that women would not be allowed to play football, but that was it. There was no follow-up then or later in terms of the impact of Title IX on athletics.

Because the awareness of the extent of sex discrimination in education was limited at the time, there really was little understanding of what Title IX might do. Even those of us intimately involved in Title IX, such as myself, did not fully understand its impact at the time. I recently checked my original testimony for Title IX in 1970, and there is no mention whatsoever of sports, simply because we did not know at the time that there was any discrimination in sports. No studies had been done, and the few women coaches at colleges and those of us in Washington had not yet touched base with each other. A year later, in 1971, I testified about discrimination in education in a Congressional hearing on the Equal Rights Amendment, and there is one short sentence in my testimony noting that there was discrimination against girls and women in athletics. Again, no one from the official world of higher education was watching.

By 1972, when Title IX was close to passage, there were about five or six of us (plus Rep. Green) who realized that Title IX would cover sports and athletics, but again, we had no idea of how bad the sex discrimination was in the world of college sports or in K-12. No study of sex discrimination in athletics at either the college or K-12 level had been conducted. My understanding of Title IX’s impact on sports was something like this: “Isn’t this nice! Because of Title IX, at the annual Field Day Events in schools, there will be more activities for girls.” If those of us close to Title IX did not fully realize its impact, especially on sports, how could others have known what it would be?

Shortly before the passage of Title IX in June 1972, a small group of women from various women’s groups met with Rep. Green. We offered to lobby for the bill and do whatever she wanted us to do. She was adamant that we not do any lobbying whatsoever. She said that if we started to lobby, people would ask questions and realize what Title IX would do. We were very skeptical of her reasoning but had to listen to her, and of course, she was right.

By the time Title IX was enacted, Title VII of the Civil Rights Act of 1964 had already been amended to cover employment discrimination (including sex discrimination) in educational institutions. Title IX itself included an unnoticed amendment to the Equal Pay Act so that executive, professional and administrative women were covered. (The Department of Labor was unhappily shocked to find out after Title IX was passed that it's jurisdiction under the Equal Pay Act had been expanded significantly.<sup>9</sup>)

Still untouched was Title VI of the Civil Rights Act of 1964 which prohibited discrimination on the basis of race, color and national origin in all federally funded programs. It still excluded sex discrimination. Rep. Green's first attempt at drafting legislation was to simply amend Title VI by adding "sex" to the statute. It was rejected by the National Association for the Advancement of Colored People (NAACP) and other civil rights groups who were rightly concerned that if Title VI was opened up for amendment for any reason, there might be harmful amendments also added to it. Rep. Green agreed. She then took the enabling language from Title VI and used it as the basis of the new statute, which eventually became Title IX.

Thus, the language of Title IX closely follows that of Title VI of the Civil Rights Act. However, Title VI which prohibits discrimination on the basis of race, color and national origin, is broader because it covers *all* federal funding. Title IX only covers sex discrimination in federal *educational* funding. Title VI has no exemptions; Title IX has several exemptions, some of which are mentioned earlier in this article. However, because the enabling clause of Title VI and Title IX are identical, court decisions under one law typically affect how the other law will be interpreted, i.e., court decisions under one law can set precedents for the interpretation of the other.

The enabling clause of Title IX reads as follows:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program receiving Federal financial assistance.<sup>10</sup>

These words cover everything, including sports. They cover every activity in an institution *unless there is a specific exemption* such as the exemption for private undergraduate admissions, the social activities of fraternities and sororities, single sex dormitories, and certain youth organizations such as the Boy Scouts and Girl Scouts.

In June, 1972, thirty-five years ago, the Education Amendments of 1972, including Title IX, were passed when President Nixon signed the bill into law.<sup>11</sup>

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<sup>9</sup> Morag Simchak, a senior employee who worked with the Equal Pay Act had been assigned by the Department of Labor to help draft the change in the law to include coverage of executive, professional and administrative women. This is common practice when laws are being drafted, even if the Department opposes the change. She drafted the amendment in such a way that it looked like a technical amendment so that no one reading it would easily understand what it actually did unless they read it very carefully, and knew the inner workings of the Equal Pay Act. Having informed her superiors once about her work on drafting the amendment, she did not feel any great need to inform them again and did not do so.

<sup>10</sup> 20 U.S.C. § 1681(a) (2006).

<sup>11</sup> *Id.* at §§ 1681-1688.

There was a one-sentence summary of Title IX in the Washington newspapers, squeezed in between larger summaries of Titles VIII and X. A new era had begun, but few realized that this was a landmark bill which would affect millions of girls and women and change our schools and colleges forever.

When a bill becomes law, the federal department that will enforce it often has to develop a regulation to explain in more detail just what the act will cover. For the next three years, until 1975, the Office for Civil Rights (OCR) at the then U.S. Department of Health, Education and Labor struggled to figure out just how Title IX applied to educational institutions. Some of it was easy to do simply by following cases, principles and regulations already laid down concerning race desegregation and racial discrimination. For example, if women were excluded from a class, such as a juvenile justice course at the University of Michigan because it involved working with young male offenders, the class would have to be opened to women. Quota systems in admissions to graduate and professional schools, and public undergraduate institutions could no longer exist. Essentially, with a very few exceptions, such as sex education, “separate but equal” would not be acceptable; integration would be required. Essentially, Title IX implies that in most educational instances you can’t categorize people by sex, just as you cannot do so by race. You can categorize by other means but not by sex. More about this later.

There is, of course, one major exception to this—where strict integration will not work—and that of course, is sports. Sports are clearly covered by Title IX – there is no exemption. The National Collegiate Athletic Association (NCAA) at that point only handled men’s athletics. A separate organization, the Association for Intercollegiate Athletics for Women (AIAW), controlled women’s athletics. Shortly after the passage of Title IX, NCAA realized that Title IX, as passed, would have an enormous impact on athletics.

At this point, the male athletic establishment was close to hysteria. We’re talking big money—where would the money come from to fund athletics for women? We’re talking power, we’re talking the “masculine mystique.” All hell broke loose as the athletic establishment tried to undo Title IX’s coverage of athletics. Legislation was introduced to weaken Title IX, to exempt athletics from Title IX, to exempt football and even to exempt football profits, even though many major collegiate teams lose millions of dollars every year. All of these attempts failed and Title IX remained intact.

The discrimination against women in collegiate athletics was pervasive and substantial. In 1974, Margaret Dunkel, under the auspices of the Project on the Status and Education of Women, (which I directed at the Association of American Colleges) conducted the first national study<sup>12</sup> describing the kinds of inequities that women were then facing in sport and athletics in our colleges, as well as discussing the legal mandate for equity and what areas needed to be assessed and changed. Here are a few examples of what college sports looked like before Title IX:

- In the early 1970s the budget for men’s varsity sports at the University of Michigan was about \$1.1 million dollars. The budget for women’s

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<sup>12</sup> WHAT CONSTITUTES EQUALITY FOR WOMEN IN SPORT? FEDERAL LAW PUTS WOMEN IN THE RUNNING (1974).

varsity athletics was *zero*. Women athletes sold apples at football games to pay for their own travel and other expenses.

- At some schools, male athletes flew first class at their university's expense, while women athletes had to pay for their own transportation and meals.
- Many of the coaches for women's teams were unpaid volunteers, unlike men coaches who were typically salaried.
- At the University of Minnesota, there was no budget for women gymnasts for athletic tape to wrap their wrists or other joints to prevent injury. The male gymnasts were very gallant; they would give their used, sweaty, grungy athletic tape to the women.
- There were no athletic scholarships for women athletes except in a few historically Black institutions.
- Men athletes typically had access to trainers; women did not.
- Male athletes often were provided with insurance to pay for treatment of athletic injuries; women had no insurance and often had to pay for their own treatment of athletic injuries. University health services often provided team doctors for varsity male athletes, but not for women's teams. One woman coach, who was denied medical care for her injured athlete, recalled how she was told to treat the student: "Tell her to put her foot in the toilet and keep flushing it."
- New equipment typically went to men's teams who then often gave their old equipment, and in some instances, their old uniforms, to women athletes. Often, if new uniforms were provided to both women and men, the men's were more elaborate and expensive.
- Facilities such as gyms, locker rooms and playing fields for men were often greatly superior to those provided women. For some sports, there were no locker rooms; women would have to dress in their dormitory rooms.
- In a number of schools women reporters from school papers, local papers or even national papers were not allowed in the press box for athletic events, nor were they allowed in the men's locker rooms for interviews with players.
- At a large mid-western university, the intramural pool was specifically reserved for approximately two hours per day for "Faculty, Administrative Staff and Male Students." This was a time for men only. There was no comparable time reserved just for women.
- In some schools, women could not take coaching courses even though they were majoring in physical education. In some instances, a coaching course would only be available to those who had participated in sports such as flag football so that women could not take these courses, which had a lingering effect on their future occupational options.
- At some schools, men received academic credit for participation in intercollegiate athletics. Women who participated in intercollegiate athletics did not receive academic credit. Male varsity athletes were exempted from required physical education courses, while women varsity athletes were not.

It became very clear that the impact of Title IX in athletics was going to be huge, and it was up to the federal government to figure out just how Title IX should cover athletics.

Some of the ways to develop equity in sports are easy to figure out, again following the principals set down in racial discrimination and racial segregation cases. If there are scholarships for men, a school will also have to have them for women. If a school provides uniforms for men's teams, it will also have to provide uniforms for women's teams. If a school provides salaries for coaches of men's teams, it will also have to provide salaries for coaches of women's teams. If a school pays for men's coaches to do recruiting, it will also have to pay for women's coaches to do so. If a school provides locker rooms for male athletes, it will also have to provide them for female athletes.

The most difficult problem in athletics is what criteria to use to assess whether the men's and women's programs are equitable. This is difficult because some sex segregation is necessary. If all teams were integrated by sex, few women would have access to sports. Additionally, although men and women often engage in the same sports, some sports are preferred more by men or by women, such as football and field hockey, so that having *equal* and *identical* programs is often not possible nor desirable.

If a men's athletic program consists of football, basketball, ice hockey, wrestling, swimming and golf, and women's program consists of basketball, soccer, swimming, softball, fencing, golf and archery, how can we evaluate the two programs to determine that they are indeed equitable?

It is like having two bowls of fruit each with some similar and some different fruits – one with cherries, grapes, watermelon, oranges and mangos, and the other containing oranges, tangerines, grapefruit, kiwis, watermelon, papaya and cantaloupe. Would you use the weight, the number of servings, the price, the nutritional value? All of above? Some of the above? The problem is not easily solved when it comes to assessing two different athletic programs for men and women in order to determine if they are equitable. Fairness may not be necessarily mean having the same programs for men and women.

During the development of the regulation and subsequent guidelines for athletics, I and others spent endless hours with brilliant attorneys, policy wonks, athletic personnel, civil rights advocates, federal civil rights personnel, women's rights activists – all trying to devise some sort of a practical solution to the problem, and yet every so-called "solution" had some grievous flaws within it.

The government finally adopted a three-part standard, with schools choosing which one of the three criteria they want to use to develop equitable programs for men and women. These are the three options, sometimes known as the three-part test or the three-pronged test.

1. The abilities and interests of the discriminated group are accommodated, *or*
2. The institution has a continuing pattern of increasing the athletic opportunities of the discriminated against group, *or*
3. The number of opportunities for participation for each gender in sports is roughly proportional to that of the percentage of each group in the school's population.<sup>13</sup>

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<sup>13</sup> See Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

If a school chose the third option, and had sixty percent male students and forty percent female students, approximately sixty percent of the opportunities to participate in sports could be for men, and roughly forty percent of women.

For many years, wrestling and football coaches and others have complained about these guidelines, especially the third one requiring proportionality, calling it a quota system. The courts, have consistently ruled that the third option, proportionality, is not a quota system, noting that schools make the final decisions as to what sports they want to support, as long as they follow the federal guidelines.

The myth about the three-part test is that almost everyone thinks that these guidelines were devised by women. Often those who oppose the guidelines state that women's groups "rammed them down the throats of the feds." In fact, when these guidelines came out, women's groups unanimously opposed them and fought against them, albeit unsuccessfully, although now they strongly support them, knowing that this is probably the best that they are going to get.

So where did these guidelines come from? They were proposed by the NCAA and the Football Coaches Association who drew them up and suggested them to the Office for Civil Rights at the Department of Health, Education and Welfare. In the mid-1970s when they were proposed, it made sense for the men's athletic establishment to support these guidelines for the following reasons:

The first part is: *The abilities and interests of the discriminated group are accommodated.*

Most women and girls at that time had little opportunity or encouragement to participate in sports and therefore their interest in sports was limited. Additionally, women's abilities were thought to be way below that of men. I remember reading a "shocking" article in *Parade Magazine* about how some women were actually lifting free weights!

With women's interests and abilities thought to be "naturally" low and certainly not believed likely to change, the first of the three options seemed quite harmless and not likely to seriously challenge the status quo.

The second part is: *The institution has a continuing pattern of increasing the athletic opportunities of the discriminated against group.*

This too seemed like a reasonably safe option, particularly since it contained no standards and because there is no time frame, the improvements could go at a very small pace, *forever*.

The third part is: *The number of opportunities for participation for each gender in sports is roughly proportional to that of the percentage of each group in the school's population.*

Proportionality did not seem to pose a threat because the number of women in colleges at that time was far less than it is today because of the discrimination against women that kept their numbers low. Since many people did not know about the severe restrictions that many institutions placed on the admission of women nor how Title IX and the women's movement would open the doors of colleges, the assumption was that the lower proportion of women in college would remain steady. Therefore, the use of proportionality seemed to pose no threat.

Sports is still a major issue in Title IX. Although much progress has been made, we have only gone from "horrendous" to "very bad." There is still a lot of sex discrimination in athletics at all levels.

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For example, there has been only limited enforcement at all levels and worst at the K-12 level. I get a few calls almost every month from a parent who tells me that the girls' soccer field or softball field or whatever has no locker room, no bleachers, no scoreboards, no night lights, no bathrooms, the field is not regulation, etc., and all of which the boys' team usually has. In one school, the girl's soccer team used the football playing field after the football season was over. However, the football field was not put into shape after football season was finished. The women had to play on a field damaged by football. Each year after the girls' season was over, the football field was renovated to be ready for football season.

Although women are more the half of undergraduates, they are only 40% of all college athletes. Few women coach men's teams, although men increasingly coach women's teams. Men's athletic operating budgets have been increasing at a faster rate than that of women's so that the gap between men's and women's athletic funding has gotten wider since Title IX was enacted.

Furthermore, the recent change in the Title IX regulation to allow an e-mail survey of women students to be a valid measure of women's interest in sports is troubling because it specifically allows an institution to count a "no response" to the survey as a valid measure of *no interest in women's sports*.

## II. OTHER TITLE IX ISSUES

Like many laws, it is up to the courts to determine what the law actually means concerning a variety of issues. Some of the issues the courts have been asked to decide are as follows:

*Can someone sue in court to enforce their rights under Title IX, or are they limited to waiting for the federal government to enforce Title IX?* The Supreme Court ruled in 1979 that there is a right to sue and that individuals may go to court to enforce Title IX, even though the statute does not explicitly provide for such action.<sup>14</sup>

*Does Title IX only cover students, or are employees covered too?* The Supreme Court said yes, employees are covered by Title IX.<sup>15</sup>

*Does Title IX provide protection against sexual harassment?* When Title IX was passed, the words "sexual harassment" did not exist (the words appear at the end of 1974 or early in 1975). The Supreme Court was asked whether Title IX covered sexual harassment of students by school personnel. The Supreme Court said yes, sexual harassment was indeed prohibited by Title IX.<sup>16</sup>

*Does Title IX cover student-on-student sexual harassment?* The issue of peer sexual harassment was a more complex issue for the courts because it is the students who are doing the harassment but it is the school that receives the federal funding.<sup>17</sup> Student-on-student sexual harassment is one of the newer emerging issues under Title IX.

I want to talk about the student-on-student sexual harassment case that went to the Supreme Court, not just because some of my work was cited in the amicus briefs

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<sup>14</sup> Cannon v. University of Chicago, 441 U.S. 677 (1979).

<sup>15</sup> North Haven v. Bell, 456 U.S. 512 (1982).

<sup>16</sup> Franklin v. Gwinnett County Schools, 503 U.S. 60 (1992).

<sup>17</sup> Davis v. Monroe County Schools, 526 U.S. 629 (1999).

of *Davis*, but also because I was an expert witness in the case after it was remanded back to the lower courts.

A ten year old girl (*Davis*) in the fifth grade sat next to an eleven year old boy in a double desk. This is what he did to her several times. He grabbed her breast, pressed her to the wall and leaned against her. He chased her and other girls in the school yard and told her and the others what he would like to do them sexually. He put a doorstop in his pants and pretended it was his penis, again telling the ten year old plaintiff and the other girls what he would like to do. Although he targeted other girls, most of his attention was focused on *Davis*.

*Davis* told her mother the very first time the boy harassed her. Her mother called the teacher who promised to stop it but refused to change the child's seat away from the boy. The next time, the mother visited the teacher, and again the harassment continued. The mother went up the bureaucratic ladder, next to the principal, and it did not stop, then to the School Superintendent and again it did not stop. It took three months of numerous calls and visits just to get the child's seat assignment moved away from the boy. The mother also insinuated herself into a School Board meeting, and again, nothing happened. She contacted a state accrediting agency and a local social service agency and again nothing happened. Finally after many months, she contacted the local sheriff who arrested the child who was later adjudicated as a delinquent and temporarily removed from school. Eventually the mother sued the school and the case went to the Supreme Court with the question: Does Title IX prohibit student-on-student sexual harassment? The vote was narrowly split, but the majority ruled that Title IX does cover student-on-student harassment, but defined a different and more stringent standard than the one that has been used in other forms of harassment.<sup>18</sup>

Under Title VII, part of the standard is that if the employer knew or should have known about the harassment, the employer can be held liable for the harassment even if the person had not filed a complaint.

Under Title IX and the Court's decision, there must be actual notice given to someone with the authority to stop the harassment, and the school system or the college can then be held liable if it shows "deliberate indifference" after notice has been given.<sup>19</sup> The decision means that it is easier for a teacher or other school employees to prove sexual harassment from a co-worker or supervisor than it is for children who are sexually harassed by another child; i.e., a child has less protection against sexual harassment than an employee. Yet student-on-student sexual harassment is far more prevalent than harassment of employees, and indeed, the worst sexual harassment may well be that of student-on-student sexual harassment in middle school.<sup>20</sup> From kindergarten through high school, some seventy to ninety percent of students (male and female) report that they have experienced behaviors that fall well within the definition of sexual harassment. In contrast, thirty percent of students experience the traditional forms of bullying from other students. Student-

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<sup>18</sup> *Davis*, 526 U.S. 629.

<sup>19</sup> *Id.* at 633.

<sup>20</sup> See generally BERNICE RESNICK SANDLER & HARRIET M. STONEHILL, STUDENT-TO-STUDENT SEXUAL HARASSMENT, K-12: STRATEGIES AND SOLUTIONS FOR EDUCATORS TO USE IN THE CLASSROOM, SCHOOL AND COMMUNITY (2005).

on-student harassment is also an important issue in athletics where it is not uncommon for some male athletes to sexually harass female athletes.

The *Davis* case is also troubling because it is not clear as to what constitutes “notice” and what constitutes “deliberate indifference.” We can expect more cases on these issues to come before the courts.

### III. WHAT TITLE IX HAS ACCOMPLISHED

Title IX did far more than end most of the overt practices and policies that limited or prohibited women’s and girls participation in the educational enterprise at all levels. Along with the women’s movement, it acted like a shock wave on the educational establishment, especially in higher education, in the following manner:

1. *There was increased awareness by both women and men about sex discrimination in education.* Many people, prior to the passage and implementation of Title IX, had little or no idea of the extent, pervasiveness and unfairness of sex discrimination, even if they themselves had observed or experienced some form of sex discrimination.

2. *As a result of the increased awareness, women became a new advocacy group.* Title IX gave hope and courage to women to organize for change, to gather data, and to fight against sex discrimination. They organized on and off campus; they organized state-wide; they organized nationally in new organizations and also in committees and caucuses of existing organizations. They learned the politics of change and the politics of power.

Sometimes this was dangerous. Many women were labeled as “crazy feminists” or “women’s libbers.” Many did not receive promotions or tenure and some were fired. I knew women who had to go on welfare. Some women even went to law school and became sex discrimination attorneys.

3. *Most, but not all, of the overt policies, programs and practices that excluded girls and women or treated them differently were abolished.* The number of women in undergraduate and graduate programs increased and continues to do so. Thousands of women faculty members received so-called “equity raises,” although they did not receive back pay or back benefits for the years they were underpaid. I knew of one woman who received a raise of over \$20,000.

It was not only major changes that occurred. There were thousands of smaller inequities that changed, such as the University of Maryland providing maid service for men’s dormitories but none in women’s; or many colleges requiring women to live on campus while men could live in cheaper off-campus housing; or having careers days for high school boys while girls were given a fashion show instead.

Most changes occurred not just because there was a law or because someone filed a charge or a lawsuit. Most of the changes occurred because women, parents, a group of women and some men of good will began to recognize that a particular policy or practice was unfair and illegal. They made the people with decision-making power aware that what they were doing was a violation of Title IX. Often there was an initial denial, followed up by a call to the school’s attorney, and then eventually, a statement would be issued that noting that the time had come to change the policy.

4. *Title IX increased the confidence and self-esteem and ambitions of millions of women and girls.* Discrimination takes a terrible toll on the confidence and self-esteem of the people who experience it. Now that there a lot less of it – still some, but less than before – the academic and vocational aspirations of women and girls

expanded greatly. Young women and girls want to be lawyers, doctors, accountants, professors, police officers, fire fighters, etc – occupations which were largely seen as “unsuitable” or “unfeminine” prior to Title IX.

5. *Women’s issues have been institutionalized.* There are women’s centers, campus commissions or committees on women, and Title IX officers and others who deal with women’s issues. Programs have been developed to prevent and deal with sexual harassment, campus rape, including campus gang rape. Women’s concerns have increased and are now visible in the institutional structure. Every campus by law must state in its catalogue and elsewhere that it does not discriminate on the basis of sex. Hiring and recruiting committees may make special efforts to recruit women and people of color as well as open advertising, in contrast to the days when many jobs were filled informally by simply calling a colleague and asking if he (not she) knew “a good man for the job.”

6. *Research and data about women and girls and also about discrimination is now legitimate knowledge* – knowledge that was virtually absent prior to Title IX. Old knowledge is being re-evaluated through the lens of women’s studies, and new areas of knowledge are constantly being developed. When I was getting my doctorate in the late 1960’s, I thought it would be interesting to do my thesis on how young women made vocational decisions. When I told this to my advisor, he was shocked and horrified. He replied, “Research on women! That’s not *real* research.” Needless to say, I changed my topic.

7. *The awareness and interest in diverse groups of women has become not only a legitimate area of concern but one which is an important area on its own.* The hearings on Title IX in 1970 examined some of the problems of women of color, and the attention to diverse groups of women has grown to include not only women of color but poor girls and women, disabled women and girls, lesbian women and girls, immigrant women and girls, and others.

8. *Women’s and girls’ participation and interest in sports has skyrocketed.* Female athletes are no longer seen as “freaks.” The number of girls participating in sports in high school has increased by more than 800%, and college women are now approximately forty percent of varsity athletes. Despite these increases, the ending of some discriminatory practices, we still have a very long way to go to reach equity in athletics. Of all the areas that Title IX covers, sports and athletics is the area where most (not “many” but “most”) schools at all levels are still out of compliance, even thirty-five years after Title IX was passed.

#### IV. WHAT STILL NEEDS TO BE DONE

There isn’t space to list all that still needs to be done, but here are some major issues, randomly listed:

1. *Lower Education:* Almost all of the accomplishments listed earlier in this paper are greater in college than in elementary, middle and high schools. Lower education lags well behind higher education. These changes are weaker, less frequent, less extensive and less well done in lower education.

One of the reasons for this is that the Office for Civil Rights at the Education Department has been less vigorous in its enforcement in lower education. Additionally, college students may be more likely to be aware of sex discrimination, to raise awareness, and complain. Another reason is that typically Schools of Education in our colleges and universities have not done nearly as much as they need to do in acknowledging the role of gender in our educational system. Although

information about Title IX is typically included in courses involving law and education, it is usually not included in teaching methodology or other relevant courses. Thus some teachers still line up boys and girls separately and segregate students by gender in other ways. Would we line up students of color and white students separately? Girls are still discouraged from entering certain fields. Just a few months ago I was told of a teacher who refused to distribute some information about an outside school program to encourage girls to participate in science. Her reason: "Girls don't need this; they are just going to get married. Another school wants to have separate classes for boys and girls and I quote "because we need to teach our boys to be heroes and our girls to be feminine."

2. *Enforcement of Title IX by the Office for Civil Rights at the Education Department is spotty, typically delayed and backlogged.* Budgets need to be increased but this is not likely in this administration. The OCR needs to do a lot more training about a number of issues with schools at all levels.

3. *Sports is still a major issue.* There are still many remaining inequities whether in terms of participation, scholarship funds, equipment and facilities, and as noted earlier, the inequities are greatest at the K-12 level. The number of lawsuits against school systems about inadequate facilities, scheduling, etc. is increasing, and schools almost always lose in the courts.

4. *More training is needed about Title IX for attorneys and judges, many of whom have little knowledge of this law and its implications.*

5. *More training and programs about sexual harassment in general, and about student-on-student sexual harassment are needed, especially in school systems.* Some of these cases have involved six-figure settlements.

6. *Last, it is important to monitor the recent changes in the Title IX regulation by this administration allowing single-sex classes and programs.* Several hundred single-sex programs are already developed or being planned for, with no end in sight. This is the most dangerous attack on Title IX especially since Title IX was developed, in part, to abolish most single-sex programs and classes not only because these programs typically reinforce stereotypes about males and females, but also because, with very rare exceptions, single-sex programs and classes in public schools almost always shortchange girls.

When Title IX was passed I was quite naïve. I thought all the problems of sex discrimination in education would be solved in one or two years at most. When two years passed, I increased my estimate to five years, then later to ten, then to fifty, and now I realize it will take many generations to solve all the problems. We began with "simple" goals such as ending quotas for women in medical and law schools, and ending overt policies which kept women out of college either as students or as professors. We had only limited information about the extent of sex discrimination at that time, and we did not fully understand how comprehensive sex discrimination is, how complex the dynamics are, and the many subtle forms of sex discrimination. We did not realize what major changes would be involved and how difficult some of the changes would be.

It will take many generations because what we are now talking about is not just increased opportunities for girls and women, but about a social revolution with an impact as large as the Industrial Revolution, for we are changing the roles of women and men, so that they are far closer to equal than they have ever been in the history of the world, and that is not easy to do. We have only taken the very *first steps* of what will be a very long journey.

I want to close with a so-called Biblical revelation, supposedly “discovered” recently by a woman archeologist, accompanied by an all-female team of assistants, but in reality, written by Mary Chagnon. It reflects the new mood of women and men of good will, and you will recognize the paraphrase:

*And they shall beat their pots and pans into printing presses,  
And weave their cloth into protest banners.  
Nations of women shall lift up their voices with other women;  
Neither shall they suffer discrimination anymore.*

This may be apocryphal but I suspect it may yet prove to come from the Book of Prophets for what women—and men of good will—are learning is the politics of power and the politics of change, and the campus, and the nation, and the world, will never again be the same.