

Title IX in its Third Decade: The Commission on Opportunity in Athletics

ELLEN STAUROWSKY

Since its passage in 1972, Title IX of the Education Amendments (44 Fed. Reg. at 71413) has, at times, provoked intense public interest and scrutiny when applied to federally funded, school-sponsored athletic programmes in the United States. In the year 2002, which marked the thirtieth anniversary of Title IX, the level and pace of the national debate on equity issues in athletics was again quite high. Within a contentious climate created by men's sports advocates alleging that Title IX had been used to curtail or deny boys and young men equitable access to athletics, President George W. Bush charged the US Department of Education to appoint a commission to revisit longstanding and well-established enforcement guidelines, subjecting them to mass public comment and speculation. The purpose of this article is to examine the impact the appointment of the Commission on Opportunity on Athletics had on the national dialogue surrounding Title IX and its application to athletic programmes. The article concludes with an analysis of the political agenda behind the Commission's work which was revealed in the tone and tenor of the Commission's process and the final action taken by the Department of Education after the report of the Commission was issued.

Since its passage in 1972, Title IX of the United States' Education Amendments (44 Fed. Reg. at 71413) has provoked intense public interest and scrutiny when applied to federally funded, school-sponsored athletic programmes. On the surface, the compelling moral imperative at the core of Title IX, which resonates with the shared democratic ideals of equality, fairness and justice, would suggest there would be little disagreement about

Ellen Staurowsky is a Professor in the Department of Sport Management and Media at Ithaca College, Ithaca, NY. She is also President of the North American Society for the Sociology of Sport and an executive board member of The Drake Group. She can be reached at 607-274-1730 (office) or via email at Staurows@ithaca.edu.

the necessity of adhering to Title IX. However, compelling though Title IX's imperative is, the appropriate steps to be taken in achieving non-sex discriminatory school environments and athletic programmes has been the subject of much discussion and review.

Over the years, answers to the array of questions regarding sex discrimination in athletic programmes and proposed methods of resolution have been pursued throughout American society. Debates both spontaneous and orchestrated have been enacted across family dining room tables and school classrooms, heard on local talk shows and national television broadcasts, read in the pages of popular publications and obscure academic journals, and argued in court rooms and in the halls of power. In the year 2002, which marked the thirtieth anniversary of Title IX, the level and pace of the national debate on equity issues in athletics was again quite high. Some experts contended that educational institutions around the country had made progress in complying with the dictates of Title IX but argued more work needed to be done to insure that all children were receiving the benefits of equitable treatment and access to athletic programmes.¹ In contrast, others asserted that Title IX had become a misguided attempt at social engineering that was denying opportunities for male students while overstating the imperative for schools to respond to the needs of girls and women.²

It was within this contentious climate that President George W. Bush charged the US Department of Education (DOE) to appoint a Commission to revisit longstanding and well-established enforcement guidelines, subjecting them once again to mass public comment and speculation.³ The purpose of this article is to examine the impact the appointment of the Commission on Opportunity on Athletics had on the national dialogue surrounding Title IX and its application to athletic programmes. Because an analysis of the Commission requires a basic understanding of how Title IX emerged and the forces that shaped its regulations and interpretations, this article begins with a brief introduction to Title IX and continues with an overview of the resistance to its application to athletics. It will examine the state of Title IX enforcement and resistance during the 1990s and the events leading up to the appointment of the Commission on Opportunity in Athletics. The article concludes with an analysis of the political agenda behind the Commission's work – which was revealed in the tone and tenor of the Commission's process and the final action taken by the Department of Education after the report of the Commission was issued.

An Introduction to Title IX of the Education Amendments

In 1972, Title IX of the Education Amendments was enacted in the United States Congress. The law's prohibition against sex discrimination applies to

every aspect of a programme or activity that exists within federally funded elementary and secondary schools, colleges and universities.⁴ At the time the legislation was proposed, the principal sponsor in the United States Senate, Birch Bayh, explained that Title IX was intended to be a 'strong and comprehensive measure [that would] provide women with legal protection from the persistent, pernicious discrimination' that had relegated women to second class status as citizens.⁵

The impact of Title IX radically altered the experience of female and male students in educational systems throughout the country. As a measure of the depths of routine discrimination that occurred prior to the passage of Title IX, it was not unusual for school administrators to designate classes, courses of study and academic majors specifically for females or males.⁶ At the college level, housing regulations often required female students to live on-campus while their male counterparts were permitted to live in off-campus apartments. Student codes of conduct outlined different dress requirements and behavioral standards for females and males. Male students were regularly given preference in the awarding of financial aid.⁷ In the area of athletics, females had access to fewer teams, less equipment, poorer quality equipment (often second-hand) and old uniforms. Female athletes were also routinely assigned the least desirable playing and practice schedules.⁸

One measure of the profound impact Title IX has had on the society in general and student educational opportunities in particular is comparative data regarding women's attainment of educational degrees.⁹ Between 1972 and 2000, the proportion of women earning bachelor's degrees rose from 44 per cent to 57 per cent. In the medical field, the proportion of women earning degrees rose from nine to 43 per cent.¹⁰

In the area of school sports programmes, it is nearly impossible to imagine 'that our nation's high schools and colleges have not always provided athletic opportunities to their female students'.¹¹ So significant has the impact been that many young people are not even aware of the legislation that created the widespread acceptance for female athletes in the United States today.¹² Since the passage of Title IX in 1972, the number of girls who participated in sports during the high school year has risen by roughly 850 per cent, from 294,015 to over 2.8 million in the year 2002. For women enrolled in four-year colleges and universities, the numbers participating in college sports teams rose from 90,000 students to 163,000.¹³

Title IX emerged among the wave of landmark civil rights laws passed during the 1960s and 1970s, a time of significant social change in the United States.¹⁴ The early beginnings of Title IX can be traced to hearings held by the Special House Subcommittee on Education, chaired by Representative Edith Green. It was in those hearings that witnesses offered compelling testimony confirming the pattern of significant sex discrimination that existed

in educational settings. The testimony Representative Green heard prompted her to remark that ‘our educational institutions have proven to be no bastions of democracy’.¹⁵

Originally, sex discrimination in schools was to be included in Title VI of the Civil Rights Act of 1964, thus the reason why the language of Title IX reflects that of the prohibitions against race and national origin discrimination found in Title VI. The original plan was changed, however, in favour of a ‘more narrowly tailored bill’ aimed directly at education programmes because of the evidence of pervasive levels of sex discrimination in schools.¹⁶

Resistance to Title IX’s Application to Athletic Programmes

Despite the documented sex discrimination that existed in the nation’s schools, the then all-male National Collegiate Athletic Association (NCAA) responded with alarm to the idea that Title IX applied to athletic programmes because of a belief that Title IX would contribute to the demise of men’s college sport.¹⁷ Lobbying members of Congress, the NCAA developed and implemented a sustained campaign to limit the applicability of Title IX to athletics departments.¹⁸ They first sought to have intercollegiate athletics removed entirely from the jurisdictional scope of the legislation. In May 1974, Senator John Tower (R-TX) proposed an amendment to exempt athletics.¹⁹ When that failed, a modified Tower Amendment creating an exemption for revenue-producing sports (which were the sports of American football and men’s basketball) was initially passed in the US Senate.

Meeting opposition in the conference committee on the Education Amendments Act of 1974, the Tower Amendment was eventually deleted, and after several other amendments were put forward in efforts to limit the impact of Title IX on athletics, it was replaced with the Javits Amendment. The Javits Amendment instructed the Secretary of Health, Education, and Welfare (HEW) (the agency responsible for Title IX enforcement before the present-day Department of Education) to prepare regulations that included ‘reasonable provisions’ to account for the nature of particular sports in the analysis.²⁰ The Javits Amendment helped shape the definition of equal access and treatment under the law by recognising the inherent resource and personnel differences that existed from sport to sport (the classic explanation compared the amount of money needed to outfit and operate a viable American football team compared to a field hockey team).²¹

The palpable resistance to Title IX manifested itself during the window of public comment that occurred following the promulgation of the proposed Title IX regulations in June 1974.²² Of the 9,700 responses shared with HEW in response to the draft regulations, 90 per cent concerned athletics.

Testifying before the Subcommittee on Postsecondary of the Commission on Education and Labor, a bemused Secretary of HEW, Caspar Weinberger remarked, '[w]ith regard to athletics, I have to say, Mr. Chairman and members of the committee, I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them'.²³

HEW issued the final Title IX regulations in the summer of 1975. During the 45 day time period given to Congress to disapprove the final regulations by concurrent resolution, a number of bills reflecting the desire on the part of the NCAA to prevent or limit Title IX's scope of application were again sponsored. All were defeated and the regulations went into effect in July 1975.²⁴

At the time the regulations went into effect, educational institutions were expected to comply immediately.²⁵ However, in recognition of the vast disparities that existed in the area of athletics, schools were given a three-year period in which to transition their athletic programmes. By 1978, as the three-year transition period came to a close, over 100 complaints had been filed with the Office for Civil Rights (OCR), the office within HEW designated to handle Title IX enforcement.²⁶ The task of reviewing complaints to determine compliance highlighted the fact that OCR did not have sufficient internal guidelines to properly investigate.²⁷ This led to the development of a policy document to address the vagueness of the existing regulations. The Office for Civil Rights employed several strategies to gather information to guide the development of the policy. These included a public comment period which produced 700 replies, visitation by OCR staffers to eight universities, and consultation with interested parties around the nation. In December 1978, the final Intercollegiate Athletics Policy Interpretation was issued.²⁸

The Policy Interpretation sets forth the criteria and tests used to determine institutional compliance with the three major areas of intercollegiate athletics governed by the regulations: financial assistance (in the form of athletic scholarships), other programme areas (defined as 'treatment, benefits and opportunities'), and equal opportunity (equally effective accommodation of the interests and abilities of male and female athletes). Contained in the policy pertaining to equal opportunity is something that has come to be known as the three-part test.²⁹

The three-part test was designed to provide flexibility with regard to institutional accountability for the fair and equitable provision of athletic opportunity to female and male athletes. Title IX consultants Valerie Bonnette and Mary von Euler explain, 'Civil rights laws have two basic provisions: equal access to the program, and equal treatment once in the program. The three-part test analyzes equal access to athletics'.³⁰ Consistent

with standard civil rights analyses, the three-part test includes the following: a proportionality standard that considers the athlete population in relationship to the undergraduate population; a history and continuing practice of programme expansion; and accommodation of interests and abilities.³¹ An institution can achieve compliance by successfully addressing, meeting or passing one or more of the three parts of the test. 'Although the Policy Statement does not have the force of law, it is the clearest statement of the enforcing agency's interpretation of the regulatory criteria for statutory compliance and there is accorded substantial deference by the courts'.³²

With the law passed, regulations in place and a policy interpretation complete by the end of the 1970s, the decade of the 1980s could have been a time of regular and consistent enforcement of Title IX. This, however, was not the case. Resistance from male sports interests led by the NCAA to the application of Title IX to athletics departments persisted. Having failed to generate support for an amendment exempting athletic departments, several institutions pursued the question of whether athletic departments were vulnerable to Title IX analysis, as a jurisdictional matter, if athletic departments were not direct recipients of federal funding. Those cases yielded ambivalent rulings.³³

At issue was the federal funding precondition for Title IX compliance. Did Title IX apply to athletic programmes because they were located in educational institutions that received federal funding; or did Title IX apply only to specific educational programmes that received direct federal funding? Because athletic departments rarely receive direct federal funding, they would be exempt if the latter were the case – that is, if a programmatic, rather than institutional, application of the standards prevailed.³⁴

In February 1984, the United States Supreme Court ruled in *Grove City College v. Bell* 465 US 555, that Title IX was enforceable only when a specific programme received direct federal funding, in this case, the college's financial aid programme. Although this case did not involve athletics, the NCAA worked behind the scenes to assist Grove City in the litigation of this case.³⁵ The impact of the ruling in Grove City on Title IX enforcement was immediate.

Within the Office for Civil Rights, the 40 pending Title IX athletics investigations were either dropped or narrowed while cases where sex discrimination had been found to exist were suspended.³⁶ At the same time, a bipartisan group of Congressional leaders introduced bills to counter the effects of the Grove City decision by expanding the scope of Title IX to include those programmes sponsored within educational institutions that received federal financial assistance. The cessation and reversal of progress represented by Grove City came to an end with the passage of the Civil Rights Restoration Act of 1988.³⁷

Title IX in the 1990s: More Enforcement, More Resistance

As the 1990s began and the second decade of Title IX came to a close, the enforcement of Title IX had been scattered and sporadic, reflecting the degree to which the regulations and policy statement had been subjected to public scrutiny and the applicability of Title IX to programmes had been contested in the courts. With the enforcement mechanism once again backed by the force of law, the Office for Civil Rights made overtures to move forward with the enforcement of Title IX.

The renewed impetus for Title IX enforcement was given additional force as a result of the US Supreme Court's ruling in *Franklin v. Gwinnett* [1992] 503 US 60, which established the right of plaintiffs to monetary damages in circumstances where an intentional violation of Title IX occurred. Given that the United States government had never used its authority to penalise institutions for failing to comply with Title IX by removing their federal financial assistance, coupled with the resistance efforts to the enforcement of Title IX, the threat of institutions being obligated to pay punitive damages for perpetrating sex discrimination on students forced many of them to take Title IX seriously for the first time.³⁸

This revitalised interest in Title IX compliance in the late 1980s and early 1990s coincided with an economic downturn in the American economy which resulted in cutbacks and downsizing for many institutions around the country. As financial resources on college campuses became tighter, athletic departments started to consider ways to contain costs. Some of those deliberations led to the cutting of athletic teams. Despite a growing awareness regarding the necessity of complying with Title IX, athletics administrators trimmed budgets by cutting both men's and women's teams, or justified their failure to provide equitably for female athletes by citing limited access to resources. These decisions led to a surge in Title IX litigation. In Title IX cases involving access to participation opportunities, federal courts in the First, Third, Sixth and Tenth Circuits ruled favourably on behalf of female students.³⁹ In summary, these cases concluded, upon applying the three-part test, that the challenged schools violated Title IX by failing to provide adequate athletic opportunities for their female students.

One of the most significant cases to be litigated during this time was *Cohen v. Brown* [1996] 101 F.3d 155. In May 1991, the athletics director at Brown University sought to resolve a budget crisis by demoting four athletic teams from university-funded varsity teams to donor-funded varsity teams. The shift in designation not only shifted the burden for financing teams to participants rather than the institution but also eliminated the support and privileges that come along with full university-funded status. Superficially, the cuts

appeared to be equitable because two men's teams (golf, water polo) and two women's teams (gymnastics and volleyball) were selected for demotion.

However, in applying the three-part test of Title IX compliance, the court determined that the cuts were made under circumstances where there had already been existing inequities between the men's and women's programmes. Due to those pre-existing inequities, the demotion of the women's teams at the time they were made in 1991 had a far more damaging impact on the women's programme than the demotion of men's teams to the men's athletic programme overall. In the final analysis, Brown failed all three parts of the test of compliance – the proportionality standard because there was a 13 per cent disparity between the number of female athletes compared to females in the undergraduate population; the history and continuing practice of programme expansion standard because, by limiting opportunities for female athletes, Brown could not successfully contend that they had continued to expand opportunities for the underrepresented sex; and the accommodation of interests and abilities standard could not be satisfied in a circumstance where existing university-funded varsity teams were demoted while other women's club teams had not been elevated.

In their appeal, Brown asserted that the district court had reached an erroneous conclusion because it misconstrued and misapplied the three-part test. They alleged that the ruling from the district court rendered Title IX an 'affirmative action statute' that mandates preferential treatment of women by imposing quotas in excess of women's relative interests and abilities. In addressing Brown's defence, Senior Circuit Judge Bownes wrote, 'Brown's talismanic incantation of "affirmative" action has no legal application to this case ...' (p.171).

As female plaintiffs were pursuing their rights to have access to athletic opportunities, male plaintiffs from athletic programmes eliminated during this time period filed a number of reverse discrimination suits, alleging that Title IX had created a preferential system of treatment for female athletes because, when programme downsizing occurred, men's programmes were cut.

As stated in *Kelley v. Board of Trustees of the University of Illinois* [1993] 832 F. Supp. 237 (N.D. IL), 'Title IX as interpreted by the Court, is designed to remedy gender discrimination against underrepresented athletes – either men or women. In this case, the underrepresented athletes are women' (p.243). In effect, although the men's swimming team in Kelley was cut and the women's swimming team was not, the institution had a previous history of sex discrimination that had not been addressed at the time the cuts to the men's swimming team occurred. If the institution had chosen to cut the women's team, it would have compounded an already sex discriminatory situation that it had been warned to correct a decade earlier and had not. To date, reverse discrimination cases brought forward by male athletes have not succeeded.

These cases also signalled the start of an era of disputation over the application of the three-part test, led primarily by those representing major college football interests and men's non-revenue or minor sports. As disputes over the standards institutions needed to address in order to achieve Title IX compliance, the matter surfaced once again in Congress. With the sympathetic support of individuals such as Representative Dennis Hastert (R-IL), a former wrestling coach and president of the Illinois Wrestling Coaches Association, and increasing attention in the press to claims that Title IX was hurting men's sports, the House Subcommittee on Postsecondary Education conducted a hearing on Title IX in May 1995.⁴⁰ As a result of the hearing, OCR was instructed to clarify the three-part test. In the drafting process, OCR distributed the draft clarification to 4,500 educational administrators and others before issuing its 'Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test' in 1996.⁴¹

The Commission on Opportunity in Athletics: Its Origins

Despite repeated efforts to communicate the meaning of the three-part test to higher education decision makers and athletic administrators in colleges and universities, adherence to the three-part test remained an issue at the start of the twenty-first century. In June 2002, the year marking Title IX's thirtieth anniversary, US Secretary of Education Roderick Paige created the Commission on Opportunity in Athletics. According to the Commission's charter, the purpose of the Commission was to 'collect information, analyze issues, and obtain broad public input directed at improving the application of current Federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX'.⁴² The politically neutral and apparent even-handed language of the charter belies the undercurrents that led to the Commission's creation.

The roots of the Commission can be traced back to the 2000 Republican Party Platform. Under the section devoted to education issues, entitled 'A Responsibility Era – Education and Opportunity: Leave No American Behind', the future Bush Administration had already codified an oft-repeated but erroneous belief that the application of Title IX to school sport programmes had a deleterious effect on the educational interests of male students. As noted in the Platform, the Bush Administration professed support for 'a reasonable approach to Title IX that seeks to expand opportunities for women without adversely affecting men's teams'.⁴³ The connection to Title IX harming men's athletics is more fully revealed in statements made by Bush during the 2000 American Presidential Campaign. In February 2000, he was quoted in the *Chronicle of Higher Education* as supporting Title IX but not supporting 'a system of quotas or strict

proportionality that pits one group against another. We should support a reasonable approach to Title IX that seeks to expand opportunities for women rather than destroying existing men's teams'.⁴⁴

With the shift in power to a Republican executive branch and significant Republican leaders in the legislative branch – like Speaker of the House Dennis Hastert (R-IL), who had pursued this issue in Congress in 1995 – the stage was set for those favouring changes in Title IX policy to advance their cause.⁴⁵ Speculation regarding the success of those anticipated attempts were further fuelled by President Bush's recess appointment of Gerald Reynolds to the key position of Assistant Secretary Office for Civil Rights within the Department of Education. By opting for a recess appointment, President Bush averted Senate confirmation hearings that raised questions about Reynolds's lack of education policy background, his stated opposition to affirmative action and his commitment to existing civil rights legislation and policy.⁴⁶ About Reynolds's appointment, Senator Edward Kennedy (D-MA), chair of the Senate Health, Education, Labor and Pensions Committee, commented, 'This is one more example of the administration's lack of commitment to the enforcement of our nation's civil rights laws'.⁴⁷

The receptivity of the American public and government agencies under the direction of the Bush Administration to a major inquiry regarding Title IX was heightened by an increasing amount of press devoted to Title IX enforcement and the perceived elimination of men's minor sports during the 1990s and the first years of the twenty-first century.⁴⁸ The centrepiece of this coverage was the three-part test, which proponents for changes in Title IX policy alleged had been converted into an illegal and unconstitutional quota system that targeted male students for sex discrimination.⁴⁹

Locating blame for this transformation with previous OCR secretary Norma Cantu, columnist George Will charged:

Under her, OCR, one of the government's largest civil rights units, promoted quotas and other dubious remedies for assorted supposed victims of racism, sexism, etc. . . . She turned Title IX's ban on sex discrimination in federally funded education into a quota system to produce strict proportionality between the percentage of women enrolled in institutions and the percentage of female athletes in the institutions' sports programs.⁵⁰

In a report entitled *Time Out for Fairness*, the Independent Women's Forum (IWF) concluded that Title IX was in need of reform because of the imposition of gender quotas by the Office for Civil Rights on college athletic programmes. According to the IWF, 'Gender quotas have led to an alarming reduction in opportunities for male athletes, demeaned the genuine

achievements of female athletes, and created nightmares for coaches and college athletic departments across the country'.⁵¹

By the time President Bush assumed office in 2001, the dual message of male athlete victimhood and Title IX as a quota system, packaged in the dramatic rhetoric of 'war', 'terror' and 'destruction', was taken up by writers and headline composers around the country with increasing frequency.⁵² Significantly, momentum surrounding the assertion that Title IX was being enforced as a quota system escalated despite the outcomes of several highly publicised federal court cases that found the quota assertion to be legally and factually incorrect.

Excerpts from two of these cases illustrate the point. In *Cohen v. Brown* [1996] 101 F.3d 155 (1st Cir.), Senior Circuit Judge Bownes wrote: 'Title IX is not an affirmative action statute; it is an anti-discrimination statute, modeled explicitly after another anti-discrimination statute, Title VI ... No aspect of the Title IX regime ... mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals ...'. Bownes went on to summarise, 'In short, the substantial proportionality test is but one aspect of the inquiry into whether an institution's athletics program complies with Title IX'. In writing the opinion for the US Court of Appeals for the Ninth Circuit, Judge Holcomb Hall, in *Neal v. Board of Trustees of California State Universities* [1999] 198 F. 3rd 763, noted, 'Because the OCR's three-part test gives universities two avenues other than substantial proportionality for bringing themselves into Title IX compliance, it does not conflict with [the Title IX statute]'.

Coincident to the initiation of these court cases, public awareness campaigns were being launched by organisations such as Iowans Against Quotas, the Independent Women's Forum, the National Wrestling Coaches Association, and others who drew a cause and effect relationship between Title IX and the cutting of men's sports. Scholar Theresa Walton points out that, contrary to the messages conveyed by wrestling advocates that Title IX has led to the elimination of teams and potentially the extinction of their sport, the link between Title IX and the destruction of men's wrestling was a recent development in professional considerations about the future of the sport of wrestling by wrestling insiders. Through an analysis of wrestling publications from the 1980s, she found that discussions regarding declines in the sport of men's wrestling were not linked to Title IX but to other factors. Walton reported that wrestling coaches and participants themselves identified 'everything from mat wrestling being boring with not enough emphasis on pins to no charismatic heroes and a lack of media coverage' and the need to construct a more positive, less violent public image for the sport itself as contributors to the decline in the sport's popularity.⁵³

By the time President Bush had settled into office, the quota argument had taken on a resiliency much like that of Teflon – little factual information seemed to stick to it. The deployment of words such as gender preferences and quotas, coupled as they were with an image of male athletes being harmed and enduring suspicions that women were not as interested in sport, inspired the attention, and at times incited the passions, of average Americans wary of political correctness and too much government intrusiveness. By the spring of 2002, chief speechwriter for Republican Attorney General John Ashcroft and a senior policy advisor at the United States Department of Justice, Jessica Gavora, published a book entitled *Tilting the Playing Field: Schools, Sports, Sex and Title IX*. Depicting Title IX as a ‘law designed to end discrimination against women’ as one ‘now causing discrimination against men’, Gavora characterised women’s education and sport advocacy groups as misguided and overzealous feminists intent on ‘pushing for preferences for women under Title IX because the law’s interpretation has been shaped by the movement for affirmative action’.⁵⁴

Challenges to Title IX on the grounds that it had been effectively transformed into a quota system that harmed men’s sports came to a head in February 2002, when the National Wrestling Coaches Association, along with several other groups, sued the US Department of Education over enforcement of Title IX. Explaining the reason for the suit, Mike Moyer, executive director of the NWCA, commented, ‘The language of Title IX was intended to eliminate discrimination against women’s athletics programs, but the interpretation has created roster capping, which is harming men’s programs’.⁵⁵ About the intent of the suit, the Independent Women’s Forum, who filed an amicus brief in the case in support of the National Wrestling Coaches Association, wrote, ‘Plaintiffs do not ask this Court to undo the protections that Title IX and the implementing regulations provide to student-athletes of both genders . . . Plaintiffs ask this Court only to vacate the 1979 Three-Part Test and 1996 Clarification to eliminate the unlawful (and unintended in 1979) discriminatory consequences’.⁵⁶

Whereas the Department of Education was defended in this case by the United States Department of Justice, the direct response of the DOE to the suit filed by the National Wrestling Coaches Association, a suit that sought only to ‘vacate’ the existing compliance regulations, was the appointment of the Commission on Opportunity in Athletics. The Independent Women’s Forum reported playing an ‘instrumental’ role in ‘bringing about the creation of the commission’.⁵⁷ About the transparency of the intent behind the appointment of the Commission, Bonnette and von Euler opined:

The Commission on Opportunity in Athletics is yet another chapter in an old debate. The Commission had heard from the same groups (and in

some cases the same individuals) who have repeatedly lost in the courts and who have found no relief from Congress in their declarations that Title IX discriminates against men. Having lost in the judicial and legislative branches of our government, they have now turned to the executive branch and the political appointees in the Office for Civil Rights.⁵⁸

The Working Commission: Deliberations, Disputes and Membership

About the political climate surrounding Title IX and athletics in the United States, Dan Covell has observed that ‘since the debate over Title IX is polarized, politicized, and tinged with distrust, it is nearly impossible to enter into a discussion concerning gender equity in American school-based sport without having to choose sides’.⁵⁹ In order for the Commission on Opportunity in Athletics to gain credibility, it needed to show itself able to consider the issues from a fully advised and informed starting point. However, a review of the Commission’s charter reveals that the Bush Administration, Secretary Paige, and the Department of Education staffers had not only chosen a side; they essentially embroidered flawed assumptions into the framework of the Commission itself.

Consider the content and substance of the first of the seven questions Secretary Paige assigned the Commission to address, which asked commissioners to determine whether Title IX standards for assessing equal opportunity in athletics were ‘working to promote opportunities for male and female athletes’.⁶⁰ The premise of the question is fundamentally problematic and at odds with the core logic of civil rights law. As Bonnette and von Euler pointed out, ‘It is not the purpose of any of our civil rights laws to “promote” opportunities. An education institution may choose not to provide any athletics program at all’.⁶¹ Similarly, in a report submitted to the Commission by the National Coalition for Girls and Women in Education, the question was deemed ‘incorrect in that it implies that Title IX, a law designed to remedy lack of athletic opportunities for females, the underrepresented gender, must also promote opportunities for males, the overrepresented gender. Federal legislation cannot dictate institutional choices with regard to academic or extracurricular programs’.⁶²

The problems associated with the Commission extended beyond the questions posed by Secretary Paige. An analysis of the membership composition and conduct of the Commission provide evidence that the process of Title IX review undertaken was seriously compromised, rendering its recommendations suspect at best.

In a press release issued by the Commission’s co-chairs, Edward Leland, athletics director from Stanford University, and Cynthia Cooper-Dyke, a well-

known professional women's basketball player and head of a sports marketing firm, on 28 January 2003, they expressed a belief that 'any reasonable person who attended the commission meetings knows that our process was open, fair, and inclusive'.⁶³ However, an exchange between Commissioner Tom Griffiths, counsel at Brigham Young University, and one of the invited panelists, Donna Lopiano, executive director of the Women's Sports Foundation, during a November 2002 hearing in San Diego reveals some of the tensions that surfaced around the openness, fairness and inclusiveness of the proceedings. Griffiths queried Lopiano about an interview she had given to the *Baltimore Sun* the previous day, in which she had said about the Commission, 'This is a fiasco. I think the Commission is a setup. If I were on the Commission, I would quit. I would worry about my integrity'. When asked by Griffiths if she would disavow her comments, Lopiano replied 'no', to the applause of some in the audience. She explained that her comments regarding integrity had not been directed at any of the Commissioners individually but at the integrity of the Commission's process.⁶⁴

Lopiano went on to observe that, in her view, two-thirds of those appointed to the Commission had a conflict of interest, that the Commission had asked the staff at the Department of Education to speak with specific experts and had been denied the opportunity to do so by the White House, and that the DOE staff was obstructing the efforts of the Commissioners to conduct an impartial review.⁶⁵

This exchange represented one of several open confrontations over issues of integrity entertained by the Commission itself. Journalists and researchers studying the Commission reached similar conclusions. About the composition of the 15-member commission, journalist Sally Jenkins pointed out, 'The biggest problem with the commission is potential bias: ten members come from Division 1-A football schools, which have a financial interest in weakening the law'.⁶⁶ The skewed power dynamics evidenced in the membership composition of the Commission were discussed in February 2003 by the author, who wrote, 'They [the Commissioners] all work for, or were educated at, institutions with the greatest financial investment in the National Collegiate Athletic Association, the Division I institutions that have been most visible and vocal with regard to the difficulties they face in complying with Title IX'.⁶⁷

Could the staffers putting the Commission together really not have known, or not been in tune enough to consider, the implications of placing so many representatives from the conference superpowers that make up the Bowl Championship Series and have the greatest amount of power within the NCAA, including the PAC-10, the Big 10, the Southeast Conference, the Big East and the ACC, while representatives from the lesser athletic divisions and from high schools (the overwhelming majority of schools impacted by the

law) had virtually no real representation on the Commission? In Washington, a town where an understanding of power dynamics is key not only to success but survival, could this have been a mistake or simple oversight?

Not only was the balance of the Commission weighted heavily in favour of those with large, corporate, big-time athletics programmes, Bonnette and von Euler more importantly pointed out that the Commission was bereft of members who had a professional understanding of civil rights legislation. The significance of this becomes clearer when one considers that as of January 2003, during the time the Commission was finalising its report, 'the Commissioners had still been denied the opportunity to ask questions of career civil rights professionals at OCR specializing in Title IX athletics who might explain the nuances and reasoning behind the three-part test and other Title IX athletics policy'.⁶⁸

Given the Commission's charge of drafting recommendations that would potentially alter existing regulations and enforcement guidelines, the information vacuum on the Commission was evident to those who followed the proceedings. Reflecting a reaction common among witnesses to the hearings, a junior field hockey player from American University offered this assessment, 'They don't know what they are talking about'.⁶⁹

Episodes like the one occurring in Philadelphia during the December 2002 meeting of the Commission contributed to the belief that commissioners, including the OCR staffers serving as *ex officio* members of the Commission, were not well-versed in Title IX. During a discussion regarding the three-part test, Assistant Secretary Reynolds wrongly reported that the OCR did not have written guidance about the meaning of substantial proportionality. This led to several commissioners in turn revealing their own vague familiarity with the three-part test while other commissioners suggested that the answer to their impasse could be found in the OCR's 1996 clarification of the three-part test. While OCR staffers passively allowed the commissioners to struggle with a question that could have been answered with a reference to existing documents, no intervention occurred.⁷⁰

The Commission got back on track only after Athena Yiamouyiannis, executive director of the National Association for Girls and Women in Sports, rose from her seat in the audience and handed the 1996 clarification to Commissioner Cary Groth, athletics director from Northern Illinois University. Notably, Groth remarked at the beginning of the meeting the next day that 'it was clear that many of us weren't very clear on the three-prong test'. Because of her own unease with the lack of basic knowledge shown by commissioners, Groth, not members of the OCR staff, copied off materials on the three-part test and distributed it to the commissioners.⁷¹

The fact that this incident, which dealt with the most basic of Title IX enforcement guidelines, occurred seven months after the Commission had

been appointed, after four town hall meetings wherein over 50 expert witnesses had testified, and after thousands of pages of documents had been submitted to the Commission, did not inspire confidence that the commissioners were prepared to make advised recommendations. Compounding the public missteps of commissioners that revealed significant knowledge gaps regarding the history and current state of existing Title IX legislation, co-chair Leland told the commissioners in their final two meetings that, 'We are not here to adjudicate past disputes. We are not here to unravel conflicting sets of data and statistics. We are not here to assemble a lengthy research document'.⁷²

This lack of discernment about the quality of information shared with the Commission is exemplified in a discussion that eventually led to the inclusion of information from a report purportedly assessing the participation rates of female athletes at all-women's colleges. Arguing for its inclusion in the Commission's final report, Dr Rita Simon, a professor in public policy and law at American University, stated, 'I was delighted to see these data here. I think it is interesting. I think it gives you a fuller picture of what's happening'. In turn, Commissioner Keegan, chief executive officer of the Education Leaders Council agreed 'that's a very interesting statistic'. Despite other commissioners expressing concerns that they did not know what the report was actually measuring and how the report determined the interest of female participation in sport, findings from the study were included in the report of the Commission.

What is most interesting about the consideration of this study, which goes unnamed in the transcripts, is that it is no real study at all. The data referred to by Dr Simon derive from a document written by Kimberly Schuld, then employed at the Independent Women's Forum. In an attempt to 'find some evidence that the presence of men in the athletic department impacts women', she examined 'athletic departments where there are no men'.⁷³ The so-called examination of women's participation in athletics in women's colleges extended to all of four schools: Bryn Mawr, Mt Holyoke, Smith, and Wellesley.⁷⁴ The data from this inquiry were presented in the Commission's report as follows:

An independent survey indicates that at schools with an all-female student body, the 1999 percentage of the student body participating in varsity athletics ranged from 9.2 percent (Smith College) to 16.7 percent (Mt Holyoke). By comparison, among a number of coeducational liberal arts colleges, the range is 22 percent student participation in varsity athletics with 12 percent of the female students participating (Swarthmore College), and 16 percent student participation with 6 percent of female students participating (Whittier College).⁷⁵

On the basis of these percentages alone, and in the absence of demanding clarification regarding what these percentages meant, the Commission proceeded to include them in the final report as possible indicators of lower interest levels on the part of females in sport. Although several commissioners asked for more clarification regarding the meaning of these statistics, none was provided in the report, reflecting the absence of rigour applied in assessing the value of information shared with the Commission.

Rather than being proof that females are less interested in sport, as the writer of the original report concluded and some commissioners were willing to accept, the sample size was too narrow to yield any results that could have been generalised in any significant way. Further, if the actual number of participants had been examined rather than the percentages as shown, one might reach an altogether different conclusion regarding the meaning of the data and the integrity of the thesis underlying the study itself. For example, at Mt Holyoke, 334 females participated in intercollegiate athletics in 1999, a figure representing 16.7 per cent of the student population. In that same year, at Pennsylvania State University (University Park), 524 males participated in intercollegiate athletics, a figure representing three per cent of the male student population. The essential methodological and statistical errors in Schuld's analysis are exposed here. Just as it would be wholly incorrect to conclude that males are less interested in sports than females because only three per cent of the male students at Penn State participate in varsity athletics while almost 17 per cent of the female student population at Mt Holyoke do, so too is it incorrect to use superficial percentages from four institutions to suggest that females are less interested in sport. Despite these obvious problems, information from Schuld's study was legitimised by being referenced in the report without comment or critique.

The Final Report: 'Open to All'

It is little wonder that the final report issued by the Commission, entitled *Open to All: Title IX at Thirty*, offered a menu of 23 recommendations that had not been researched adequately, were approved without consideration to potential impacts and implications, and, in some instances, conflicted with existing law.⁷⁶ Former Senator Birch Bayh, who served from 1962 to 1980 and authored Title IX legislation while in the Senate, described the proposals put forward by the Commission as 'undemocratic' and 'unlawful'.⁷⁷ *Newsday* sportswriter, Michael Dobie, who had witnessed the meetings in Philadelphia and Washington, characterised the report as:

biased from start to finish – in the way it presents history, in the way it selects certain statistics and ignores others, in the way it reflects the

tenor of debate among the commissioners, in the way it makes assumptions that have no basis in fact, in the way it seems written to support views held by the Bush administration before the Secretary's Commission on Opportunity in Athletics was ever convened.⁷⁸

The Commission's mode of operating was not lost on members of the United States Congress. Just a few days prior to the Commission's last meeting to finalise its recommendations, Senator Harry Reid (D-NV) addressed the Senate on the Commission's activities. Noting that the Commission ought to have been named more accurately as 'the President's Commission to Prevent Opportunity in Athletics', Senator Reid stated:

It would have been great if he [the Secretary of Education] called for a review of how better to enforce the law, but he did not. Although no one in the administration dares to criticize Title IX, and Secretary Paige praised it, they are poised to gut it.⁷⁹

So deep were the disagreements on the Commission regarding their process and outcome that two members, women's professional soccer star and Women's Sports Foundation president Julie Foudy, along with acclaimed Olympian and sports broadcaster, Donna DeVarona, refused to sign the report. They elected instead to submit a minority report for three reasons: they disagreed with the tenor, structure and content of the Commission's report, they believed that the recommendations contained in the majority report would seriously weaken Title IX, and they identified the real causes for cuts in men's minor sports, which rested with the financial practices of athletic programmes, had not been adequately considered or addressed.⁸⁰

When Secretary Paige refused to accept the minority report, Senator Hillary Clinton (D-NY) took the matter to the United States Senate. She moved for the report to be published in the *Congressional Record*,

because I believe it is important that on this issue we hear from the people who have the most to lose: women athletes, women students. Julie and Donna were invited to join the Commission to represent that point of view, and their voices should be heard.⁸¹

Echoing the concerns of those around the country who worried that Secretary Paige would take advantage of the ambiguous language and wide latitude afforded by the report, Senator Clinton went on to remark that she, along with other senators, including Senators Tom Daschle (D-SD), Edward Kennedy (D-MA), Patty Murray (D-WA), Olympia Snowe (R-ME) and Ted Stevens (R-AR), would maintain a 'watchful eye on the Department of Education

because the truth is, they do not need permission from the Commission or anyone else to adopt the changes the Commission has proposed'.⁸²

In the intervening months between the submission of the report and Secretary Paige's final determination of what he was going to do with the recommendations delivered to him in the report, resolutions were drafted in the House of Representatives and in the Senate cautioning that, 'if the Department of Education changes Title IX athletics policies, Congress should restore the intent of Title IX through policies that preserve the right to equal opportunities in athletics'.⁸³

As it turned out, no support for changes in Title IX would be forthcoming as a result of the National Wrestling Coaches Association suit against the Department of Education. On 11 June 2003, United States District Judge Emmet E. Sullivan dismissed the case, concluding:

Before entertaining claims which contemplate taking the dramatic step of striking down a landmark civil rights statute's regulatory enforcement scheme, the Court must take pains to ensure that the parties and allegations before it are such that the issues will be fully and fairly litigated. This is particularly true where the challenged enforcement scheme is one which has benefited from more than twenty years of study, critical examination, and judicial review, and for which a demonstrated need continues to be recognized by the nation's legislators.⁸⁴

The Commission on Opportunity in Athletics: The Aftermath

Quietly and with little fanfare, the year long process of Title IX review initiated in June 2002 came to the end with a letter issued by Assistant Secretary Office for Civil Rights, Gerald Reynolds, wherein 'Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance' was given.⁸⁵ At a micro-level, perhaps success was achieved, if success is defined narrowly as victory for advocates from various women's interest groups who argued for maintaining and aggressively enforcing Title IX standards.⁸⁶

There is a certain misleading quality even to that assessment of the outcome when considered from the standpoint that a contentious and controversial 12-month government investigation costing taxpayers a reported \$700,000 resulted in the 'clarification' of policy that had been in place for 30 years. Furthermore,

this most recent review slowed enforcement once again, resulting in lost time and opportunity for girls and women who have yet to realize

the promise of equal treatment in schools. The Department of Education's clarification does nothing to compensate for those losses and provides only modest momentary relief from the challenges that have been regularly launched against Title IX due to the ambivalence of those charged with enforcement from its inception.⁸⁷

Based on the reactions of those in the wrestling community, there is evidence to suggest that the cycle will begin anew, as the National Wrestling Coaches Association explores avenues for appeal in their case against the Department of Education.⁸⁸

In retrospect, the Bush Administration lost a prime opportunity to demonstrate leadership on the issue of gender equity in athletic programmes by failing to educate the American public about what the Title IX enforcement guidelines actually require. By legitimising the erroneous position that Title IX was being enforced as an illegal quota system, the nation's leaders effectively subverted the gains that had been made over 30 years. The fact that the guidelines remained intact after such a public assault may suggest that Title IX will finally be enforced as it was intended, to the undoubted chagrin of the Bush Administration and the Commission's members.

NOTES

The author would like to thank the reviewers of this manuscript for their valuable feedback.

1. W. Suggs, 'Title IX at 30: In the Arena of Women's College Sports, The 1972 Law Created A Legacy of Debate', *Chronicle of Higher Education*, 21 June 2002, 41a.
2. *Ibid.*
3. Title IX states, '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 program or activity receiving Federal financial assistance', 20 USC Section 1681. The reference to the enforcement guidelines being subjected *once again* to public comment stems from the amount of interest the application of Title IX has historically inspired. See V.M. Bonnette and M.S. von Euler, 'Submission to the U. S. Secretary of Education's Commission on Opportunity in Athletics', *Commission on Opportunity in Athletics Briefing Book* (Good Sports Inc., 2002–03), 1–6, <http://www.aahperd.org/magws/template.cfm?template=title9/bush.html>; Secretary of Education's Commission on Opportunity in Athletics, '*Open to All*': *Title IX at Thirty* (Jessup, MD: US Department of Education Publications Center, 2003), 14–20.
4. N. Hogshead-Makar, 'The Ongoing Battle Over Title IX', *USA Today*, July 2003, 3.
5. 117 Cong. Record 30,403 (1971) (statement of Sen. Bayh in which he reported that women seeking admission to universities are often held to a higher standard); 118 Cong. Record 5804 (1972) (statement of Sen. Bayh outlining the sex discriminatory barriers women encountered in higher education)
6. *Ibid.*
7. 34 C.F.R. Section 106.21 (admission), 106.22 (preference in admission), 106.31 (education programs and activities), 106.32 (housing), 106.34 (access to course offerings), 106.37 (financial assistance) (2003).
8. S. Durrant, 'Title IX: Its Power and Its Limitations', *Journal of Physical Education, Recreation, and Dance* (March 1992), 60. *Communities for Equity v. Michigan State High*

- School Athletic Association* [2003] Case No.1-98-CV-479; and *Pederson v. Louisiana State University* [2000] 213 F.3d 858; are cases that demonstrate these issues continue to arise in high schools and universities in the United States.
9. Discussions like those found in S. Cole, 'Sex Discrimination and Admission to Medical School, 1929–1984', *American Journal of Sociology* (November 1986), 549–67; and L.A. Barber, 'U.S. Women in Science and Engineering, 1960–1990: Progress Toward Equality?', *Journal of Higher Education* (March–April 1995), 213–34; provide nuanced overviews of this topic.
 10. National Coalition for Women and Girls in Education, *Title IX at Thirty: Report Card on Gender Equity* (2002), 10.
 11. D. Brake and E. Catlin, 'Gender & Sports: Setting a Course for College Athletics: The Path of Most Resistance: The Long Road toward Gender Equity in Intercollegiate Athletics', 3 *Duke J. Gender L. & Pol'y* 51, 52.
 12. Associated Press, 'Title IX Question Leaves Capriati Without Answer', *St Petersburg Times*, 30 August 2002, 6C. When asked her opinion about the town hall meetings President Bush has set up around the country as part of a study of Title IX, professional women's tennis player Jennifer Capriati replied, 'I have no idea what Title IX is'.
 13. United States Government Accounting Office, *Intercollegiate Athletics: Four Year College's Experiences Adding and Discontinuing Teams* (March 2001), 4; National Federation of State High School Associations, *NFHS Participation Survey* (NFHS, 2001–02).
 14. Durrant (note 8), 60; A. Fishel and J. Pottker, *National Politics and Sex Discrimination in Education* (1977), ch.5; J. Gelb and M.L. Palley, 'Women and Interest Group Politics: A Comparative Analysis of Federal Decision-Making', *Journal of Politics* (May 1979), 362–92.
 15. Discrimination Against Women Hearings on Section 805 of HR 16,098 Before the Special Subcomm. of the House Comm. on Education and Labor, 91st Cong., 2d Sess. (1970). As reported in Brake and Caitlin (note 11), 54, Senator Bayh noted, 'over 1,200 pages of testimony document the massive persistent patterns of discrimination in the academic world'. This can be found at 118 Cong. Rec. 5804 (1972).
 16. Brake and Catlin (note 11), 54.
 17. W. Byers, with C. Hammer, *Unsportsmanlike Conduct: Exploiting College Athletes* (1995), 240.
 18. Gelb and Palley (note 14), 381.
 19. 120 Cong. Rec. 15,322-23 (1974) (statements by Sen. John Tower). See R.W. Jurewitz, 'Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics', 8 *Am. U.J. Gender Soc. Pol'y & L.* 283 (2000); and B. L. Porto, 'Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports', *Seton Hall Journal of Sport Law* 8 (1998), 351; for alternative perspectives on the meaning of the Tower Amendment.
 20. Hogshead-Makar (note 4), 3. About attempts to amend the legislation, she writes, 'When Congress passed the current regulations in 1975, no fewer than nine amendments were introduced that would have weakened the law'; S. Conf. Re No. 1026, 93d Cong., 2d Sess. 427 (1974); Ellen J. Vargas, *Breaking Down Barriers: A Guide to Title IX* (1994), 7. Also see Gelb and Palley (note 14), 380–5.
 21. Durrant (note 8), 60.
 22. NOW Legal Defense and Education Fund, Project on Equal Education Rights, *Stalled at the Start* (1978), 26. The report documented the Office of Civil Rights poor Title IX enforcement record. It documented delays in reviewing complaint, superficial investigations of complaints and unmonitored remedies under Title IX.
 23. Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 436–42 (1975). This comment has been noted in Bonnette and von Euler (note 3); Brake and Catlin (note 11), 56; and Vargas (note 20), 7.
 24. Brake and Catlin (note 11), 56.
 25. Bonnette and von Euler (note 3), 3.
 26. Vargas (note 20), 7.
 27. Bonnette and von Euler (note 3), 3.

28. *Ibid.*
29. J. Johnson, *Title IX and Intercollegiate Athletics: Current Judicial Interpretation for Standards of Compliance*, 74 B.U.L. Rev., 559 (1994).
30. Bonnette and von Euler (note 3), 6.
31. Title IX Regulation 34 C.F.R. Section 106.41(c)(1). See V. Bonnette and L. Daniel, *Title IX Athletics Investigators Manual* (Washington, DC: Office for Civil Rights, United States Department of Education, 1990), 21–8; N. Cantu, *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (Washington, DC: Office for Civil Rights, United States Department of Education, 16 January 1996).
32. Brake and Catlin (note 11), 54
33. *Ibid.*, 59. See this section for a discussion of those cases.
34. Durrant (note 8), 62. This article explains the distinction between a programmatic approach to Title IX compliance and an institutional approach.
35. A. Sack and E.J. Staurowsky, *College Athletes for Hire: The Evolution & Legacy of the NCAA Amateur Myth* (Westport, CT: Praeger Press, 1998).
36. Brake and Catlin (note 11), 59.
37. 20 U.S.C. Section 1687 (1988), as discussed in Vargas (note 22), 10.
38. Brake and Catlin (note 11), 61.
39. *Ibid.*
40. E.J. Staurowsky, 'Critiquing the Language of the Gender Equity Debate', *Journal of Sport and Social Issues* 22/1 (February 1998), 7–22.
41. Brake and Catlin (note 11), 71.
42. Secretary's Commission on Opportunity in Athletics, *Charter* (Washington, DC: US Department of Education, 2002), <http://www.ed.gov/inits/commissionsboards/athletics/charter.html>.
43. Republican National Committee, *Republican Platform 2000: Renewing America's Purpose Together* (Washington, DC: Republican National Committee, 2003), <http://www.rnc.org/GOPInfo/Platform/2000platform3.htm>.
44. Staff, 'Q&A: The Candidates on College Issues', *Chronicle of Higher Education* (24 February 2000), Issues in Depth: Election 2000, <http://chronicle.com/indepth/election2000/>.
45. K. Hawes, 'New View of Title IX?: Proponents of Change See a Window of Opportunity', *NCAA News*, 12 February 2001, <http://www.ncaa.org/news/2001/20010212/active/3804n01.html>; Staurowsky (note 40), 7–22; and Bonnette and von Euler (note 3), 55–68.
46. A. Gardiner, 'Title IX Key Issue for Appointee', *USA Today*, 17 April 2002, 9C; S. Jaschik, 'Bush Picks Foe of Affirmative Action for Top Education Civil-Rights Post', *Chronicle of Higher Education*, 26 June 2001, <http://chronicle.com/daily/2001/06/2001062601n.htm>; and K. Whiteside, 'Potential Bush Nominee Under Fire: Title IX, Civil Rights Concerns Rouse Reynolds' Opponents', *USA Today*, 18 July 2001, 1A.
47. Staff, 'Reynolds Assumes OCR Role Through Recess Appointment', *NCAA News*, 15 April 2002, <http://www.ncaa.org/news/2002/20020415/active/3908n04.html>.
48. E.J. Staurowsky, 'The Political Economy of Gender Equity: Analyzing Conservative Rhetoric About Title IX and the Fate of Men's Sports', paper presented at the North American Society for the Sociology of Sport Annual Conference, San Antonio, TX, 3 November 2001; and T. Walton, 'Title IX: Forced to Wrestle Up the Backside', *Women in Sport and Physical Activity Journal*, forthcoming.
49. *Ibid.*
50. G. Will, 'Civil Rights Chief a Welcome Change', *Chicago Sun-Times*, 26 May 2002, 37.
51. IWF Staff. 'Time Out for Fairness: Women for Title IX Reform', report issued by the Independent Women's Forum, Washington, DC, 30 April 2003, 4. For a full exploration of the IWF's claims regarding Title IX as a quota system, see <http://www.iwf.org/issues/titleix/index.shtml>.
52. Staurowsky (note 48). Headlines, as the hook for readers, revealed persistent and continuing use of traumatic terms to describe what was allegedly happening to male athletes. Here are a few examples: A. Coulter, 'Title IX Defeats Male Athletes', *USA Today*, 25 July 2001, p.13A; J. Gavora, 'The War on Football: Some Feminists Say It's Killing Off Less Popular Men's Sports on College Campuses. But the Real Culprit is Title IX', *Los Angeles Times*, 16

- June 2002; K.J. Lopez, 'Eliminating Opportunity', *National Review Online*, 23 May 2002; M. Lynch, 'Weapons Modernization (Changes to Title IX)', *Reason* 31/10 (March 2000), 54–9; and M. Lynch, 'Title IX's Pyrrhic Victory: How the Quest for Gender Equity is Killing Men's Athletic Program', *Reason Online* (April 2001). Theresa Walton (note 48) reports similar findings, relating the thoughts of former Speaker of the House Dennis Hastert, who wrote in 2001, 'First off, the organization which (sic) is terrorizing the male athlete community and college administrators is the Office for Civil Rights. The Bin Laden of that organization is you-know-who [Norma Cantu]'.
53. Walton (note 48).
 54. J. Gavora, *Tilting the Playing Field: Schools, Sports, Sex and Title IX* (San Francisco, CA: Encounter Books, 2002), 4, 6.
 55. C. Flores, 'Wrestling Coaches Sue Education Department Over Title IX Enforcement', *Chronicle of Higher Education* 48/21 (1 February 2002), 21A, <http://chronicle.com/weekly/v48/i21/21a03901.htm>. Roster capping is a way of setting a limit on squad numbers and thus facilitates the redistribution of resources within an athletics department. If new financial resources cannot be identified, or if the university does not wish to spend more on its athletic programme, the number of squad members for a men's team sport is reduced. This allows either for the addition of a women's team or an increase in the resources available for women's sport generally.
 56. Memorandum of Independent Women's Forum in Support of *National Wrestling Coaches et al. v. United States Department of Education*, Submitted to the United States District Court for the District of Columbia, 17 June 2002, 6.
 57. IWF Staff (note 51), 4.
 58. Bonnette and von Euler (note 3), 23.
 59. D. Covell, 'Book Review of *Tilting the Playing Field: Schools, Sports, Sex and Title IX*', *Journal of Sport Management* 17/2 (April 2003), 187f.
 60. Secretary's Commission on Opportunity in Athletics (see note 3). A leading college sport official, who witnessed the Commission's meeting in Philadelphia in December 2002, characterised the questions posed to the Commission 'garbage in, garbage out' (author notes from that meeting).
 61. Bonnette and von Euler (note 3), 19.
 62. National Coalition for Girls and Women in Education, *Title IX Athletics Policies: Issues and Data for Education Decision Makers* (Washington, DC: National Coalition for Girls and Women in Education, 27 August 2002), 33.
 63. S. Aspey, *Commission on Opportunity in Athletics Co-Chairs Issue Statement on Title IX Commission* (Washington, DC: United States Department of Education, 28 January 2003).
 64. See pages 162–7 of the transcript from the Secretary of Education's Commission on Opportunity in Athletics San Diego Town Hall Meeting, Wyndham Emerald Plaza Hotel, Wednesday 20 November 2002. This can be found at <http://www.ed.gov/inits/commissionsboards/athletics/transcripts.html>.
 65. *Ibid.* Lopiano specifically mentioned the exclusion of Marty Shaw, a researcher for the United States General Accounting Office, who had been involved in the creation of a report, entitled *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Team*, which had been issued on 8 March 2001. This report can be obtained at www.gao.gov (search by the report date). Data from this report contrasted with that of one of the Department of Education's preferred experts, Jerome Kravitz, who submitted an alternative analysis of the data. Given the vigorousness of the dispute regarding Title IX's relationship to cutting men's teams, the exclusion of someone who could speak to the GAO data raised questions about the impartiality of the process.
 66. S. Jenkins, 'With Panel, A Number of Concerns', *Washington Post*, 30 January 2003, D01.
 67. E.J. Staurowsky, 'The Title IX Commission's Flawed Lineup', *Chronicle of Higher Education*, 14 February 2003, B20.
 68. Bonnette and von Euler (note 3), 26. It should be noted that current members of the Department of Education staff, including Assistant Secretary Gerald Reynolds, served in an *ex officio* capacity. However, as will be clear in the following paragraphs, the DOE staff did not convey a strong understanding of Title IX and enforcement guidelines in the

- Commission's public hearings. Thus, Bonnette and von Euler's point is still worth considering. One observation, however, about Bonnette and von Euler: Bonnette helped draft the *Title IX Investigator's Manual*. Both worked at the Department of Education at one time.
69. Author's notes from an interview with this young woman who had attended the Commission's meeting in January 2003 in Washington, DC.
 70. Staurowsky (note 67).
 71. See pages 295–302 of the transcript from the Secretary of Education's Commission on Opportunity in Athletics Philadelphia Marriott Hotel, Tuesday 3 December 2002; and pages 4–5 from the transcript for Wednesday 4 December 2002. These can be found at <http://www.ed.gov/units/commissionsboards/athletics/transcripts.html>.
 72. Transcript from the Secretary of Education's Commission on Opportunity in Athletics Philadelphia Marriott Hotel, Wednesday 4 December 2002, pp.4–5, <http://www.ed.gov/units/commissionsboards/athletics/transcripts.html>.
 73. K. Schuld, *Title IX Athletics* (Washington, DC: Independent Women's Forum, June 2000), 18.
 74. *Ibid.*, 32–3.
 75. Secretary of Education's Commission on Opportunity in Athletics (note 3), 18.
 76. *Ibid.*
 77. B. Bayh, 'Don't Tamper With Title IX', *Baltimore Sun*, 3 February 2003, 15A.
 78. M. Dobie, 'Title IX Reports Skews the Facts', *Newsday*, 21 February 2003.
 79. H. Reid, 'Title IX', *Congressional Record*, 29 January 2003, ss.1692–1694.
 80. D. deVarona and J. Foudy, *Minority Views on the Report of the Commission on Opportunity in Athletics*, submitted to Secretary Roderick Paige, 26 February 2003. A copy of the report can be found at <http://www.aahperd.org/nagws/template.cfm?template=title9/bush.html>.
 81. H. Clinton, 'Inclusion of the Minority Report', *Congressional Record*, 27 February 2003.
 82. *Ibid.*
 83. See House Resolution 137 (lead sponsor Representative Louis Slaughter, D-NY); and Senate Resolution 153 (lead sponsor Patty Murray, D-WA).
 84. *National Wrestling Coaches Association et al. v. United States Department of Education* [2003] US District 9677.
 85. G. Reynolds, 'Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance', 11 July 2003, <http://www.ed.gov/offices/OCR/title9guidanceFinal.html>.
 86. M. Greenberger, 'A Huge Win for American Girls and Women', press release, National Women's Law Center, Washington, DC, 11 July 2003, <http://www.nwlc.org>; L. Maatz, 'AAUW Pleased to Celebrate Another 31 Years of Title IX', press release, American Association for University Women, Washington, DC, 11 July 2003, <http://www.aauw.org>.
 87. E.J. Staurowsky, 'Title IX Does Not Need Clarification, It Needs To Be Enforced', *Street & Smith Sports Business Journal* (28 July 2003).
 88. W. Suggs, 'Education Department Clarifies, but Does Not Change, Title IX Compliance Guidelines', *Chronicle of Higher Education*, 14 July 2003; W. Suggs, 'Wrestling Complaints Denied in Title IX Ruling', *Chronicle of Higher Education*, 20 June 2003.