REVIEWING THE PLAY: HOW FAULTY PREMISES AFFECTED THE WORK OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS AND WHY TITLE IX PROTECTIONS ARE STILL NEEDED TO ENSURE EQUAL OPPORTUNITY IN ATHLETICS

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On July 11, 2003, the Office for Civil Rights of the U.S. Department of Education (Department or Department of Education) issued its "Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance" (Further Clarification).[1] The Further Clarification reaffirms the validity of longstanding administrative regulations and policies adopted to implement Title IX of the Education Amendments of 1972 (Title IX)[2] in the area of athletics.[3] As a result, these regulations and policies will remain in effect and will, according to the Further Clarification, be more strongly and consistently enforced by the Department of Education.[4]

The Department's reaffirmation of these regulations and policies is welcome and is, as discussed in this article, the only legally appropriate result the Department could have reached. The athletics regulations and policies reflect Congress' intent in passing Title IX. They have withstood two decades of legal challenges and changes in Administrations, and they have been crucial to efforts to provide equal athletic opportunity for women and girls. Nonetheless, the

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1. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., FURTHER CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY REGARDING TITLE IX COMPLIANCE (July 11, 2003) [hereinafter FURTHER CLARIFICATION] (transmitted by letter from Gerald Reynolds, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ.), *available at* http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html (last visited Nov. 26, 2003).

2. Pub. L. 93-318, §§ 901-05, 86 Stat. 373-75 (1972) (codified as amended at 20 U.S.C. §§ 1681-1688 (2000)). Title IX, passed in 1972, bars sex discrimination in federally funded education programs and activities. The law applies to every aspect of federally funded education programs, including classes, financial aid, employment and, significantly, athletics.

3. 34 C.F.R. § 106.41 (2002); Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter 1979 Policy Interpretation]; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST (Jan. 16, 1996) [hereinafter 1996 CLARIFICATION] (transmitted by letter from Norma V. Cantu, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ.), *available at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html (last visited Nov. 26, 2003).

4. FURTHER CLARIFICATION, *supra* note 1, at 3.

Department's decision to reaffirm existing standards surprised many advocates.

The Further Clarification was issued following a year-long reevaluation of Title IX's athletics regulations and policies launched when the Department established the Commission on Opportunity in Athletics (Commission) in June 2002. The creation of the Commission raised concerns that the Department would attempt to eliminate or weaken important Title IX protections for equal athletic opportunity. In fact, the Commission's work culminated in a report recommending radical changes to current law. These recommendations sprang from false premises that underlay much of the Commission's work, including the notions that: (1) discrimination against girls and women is a thing of the past; (2) women are inherently less interested in participating in sports than men; (3) the three-part test imposes quotas; and (4) Title IX has been responsible for the cuts to some men's teams. These premises are simply insupportable on the factual record and, in many cases, are violative of Title IX as well.[5]

Part I of this article rebuts these false premises and explains why acceptance of them - and consequent modifications of Title IX athletics policies - would have been so damaging for women in sports and for basic principles of civil rights. Part II proposes steps that the Department of Education should take to enhance its enforcement of Title IX. This article concludes that strengthened enforcement of the Title IX policies - as well as proactive steps to enhance schools' ability to comply with, and monitor the status of, gender equity standards - are critical to ensure that the playing field is truly level.

5. *See* discussion *infra* Part I.

I. THE WORK OF THE TITLE IX COMMISSION WAS INFORMED BY FALSE PREMISES, RESULTING IN RECOMMENDATIONS THAT WOULD HAVE UNDERMINED EQUAL OPPORTUNITY IN ATHLETICS

Title IX bars sex discrimination in all facets of education, including sports programs. Title IX's requirements for equal opportunity in athletics were set forth in regulations adopted in 1975[6] and in an administrative policy interpretation that has been in place since 1979.[7] In June, 2002, however, the Secretary of Education created the Commission to reevaluate and recommend changes to these long-standing Title IX policies.[8] The Commission delivered its final report to the Secretary in February 2003, with twenty-four recommendations for further Department action.[9]

The Department of Education created the Commission in response to arguments made by long-time critics of Title IX athletics policies who have repeatedly, and unsuccessfully, claimed that the three-part test set forth in those policies causes reverse discrimination against men.[10] Under the test, schools have three wholly independent ways to meet Title IX's mandate that students of both genders be provided equal opportunities to participate in sports. To assess compliance with this mandate, the Department of Education evaluates

> (1) [w]hether intercollegiate level participation opportunities for male and female students are provided

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6. 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 45 C.F.R. pt. 86 & 34 C.F.R. § 106.41).

7. 1979 Policy Interpretation, *supra* note 3. Additional guidance on the 1979 Policy Interpretation was provided in the Department of Education's "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test." 1996 CLARIFICATION, *supra* note 3.

8. The Commission's Charter identified its purpose as "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." THE SEC'Y OF EDUCATION'S COMM'N ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY 46 (Feb. 28, 2003) [hereinafter COMMISSION REPORT], *available at* http://www.ed.gov/about/bdscomm/list/athletics/index.html (last visited Nov. 26, 2003).

9. *Id.* at 1. Fifteen of the twenty-four recommendations were initially adopted by consensus vote of the Commissioners; one was included (as an unnumbered recommendation) despite its failure to win a majority of Commission votes. Following the initial vote, however, two of the Commissioners submitted to the Secretary of Education a Minority Report that explicitly disavowed three of the previously approved recommendations (Recommendations 14, 19 and 23) and made clear that the Commissioners' consent to others was dependent on their interpretation by the Secretary. DONNA DE VARONA & JULIE FOUDY, MINORITY VIEWS ON THE REPORT OF THE COMMISSION ON OPPORTUNITY IN ATHLETICS (Feb. 2003) [hereinafter MINORITY REPORT], *available at* http://www.womensportsfoundation.org/cgi-bin/iowa/issues/rights (last visited Nov. 26, 2003).

10. *See* cases cited *infra* note 13.

> in numbers substantially proportionate to their respective enrollments; or
> (2) [w]here the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
> (3) [w]here the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.[11]

A school can demonstrate compliance with Title IX's participation requirements if it meets any *one* of these prongs of the test.[12] The test has been in effect for more than two decades, through both Republican and Democratic Administrations. It has been upheld against legal challenge by each of the eight federal appeals courts that has examined it.[13] It has opened doors for girls and women to participate in sports in huge numbers,[14] and has provided substantial flexibility to schools to customize their means of compliance.[15]

Despite these facts, and despite repeated rejections of their claims over time, opponents of the three-part test made a series of interlinked and fallacious arguments to the Commission. The Commission, in turn, made recommendations premised on these arguments that weakened the operation of the three-part test. Had they been adopted by the Department of Education, the recommendations

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11. 1979 Policy Interpretation, *supra* note 3, at 71,418.

12. *See* discussion *infra* Part I.A.3 (discussing the requirements of each of the prongs of the three-part test).

13. *See* Chalenor v. Univ. of N.D., 291 F.3d 1042, 1046-1047 (8th Cir. 2002); Pederson v. La. State Univ., 213 F.3d 858, 879 (5th Cir. 2000); Neal v. Bd. of Trs. of the Cal. State Univs., 198 F.3d 763, 770 (9th Cir. 1999); Cohen v. Brown Univ., 101 F.3d 155, 173 (1st Cir. 1996) (*Cohen II*) (ruling on the merits); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 274-75 (6th Cir. 1994); Kelley v. Bd. of Trs., 35 F.3d 265, 270 (7th Cir. 1994); Cohen v. Brown Univ., 991 F.2d 888, 896 (1st Cir. 1993) (*Cohen I*) (ruling on Brown University's appeal of a preliminary injunction); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993).

14. *See* discussion *infra* Part I.A.2.

15. *See* discussion *infra* Part I.A.3; *see also* FURTHER CLARIFICATION, *supra* note 1, at 1-2.

would have substantially reduced women's opportunities to participate in sports and undermined basic principles of civil rights enforcement.

A. The Commission Relied on False Premises

1. False Premise #1: Discrimination Against Girls and Women in Sports Is a Thing of the Past

Title IX was intended to be "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women."[16] Despite this fundamental purpose, the Secretary of Education failed to ask the Commission to consider one critical question: does discrimination against girls and women persist in violation of Title IX and, if so, how can it be remedied? Instead, the Commission focused on addressing the impact of Title IX on men's teams,[17] and failed to consider in more than the most cursory fashion whether the original goal of Title IX - to remedy systemic discrimination against women and girls - has been met. As a result, the Commission paid scant attention to the persistence of gender inequities that disadvantage girls and women in sports, instead supporting recommendations to increase participation opportunities for men.[18]

While the Commission failed to fully evaluate this issue, the factual record shows that despite dramatic gains since the enactment of Title IX, the playing field is still far from level. Girls and women still do not receive equal opportunity to participate in athletics; nor do they receive equal treatment when they are allowed to play. Female athletes trail men in virtually every aspect of athletics, including opportunities to participate in sports, athletic scholarships, operating

16. 118 CONG. REC. 5804 (1972) (statement of Sen. Birch Bayh, primary Senate sponsor of Title IX).

17. The Commission was asked to address whether "Title IX standards for assessing equal opportunity in athletics [are] working to promote opportunities for male and female athletes[.]" COMMISSION REPORT, *supra* note 8, at 21 (Question 1, Finding 1). This question fundamentally misconceives the purposes underlying the enactment of Title IX, which focused on remedying the persistent under-representation of women and girls in athletics and other academic pursuits, *not* on promoting opportunities for men as the over-represented gender.

18. At least five of the Commission's recommendations - Recommendations 14, 15, 17, 20 and an unnumbered recommendation - proposed modifications to the first "proportionality" prong of the three-part test that would have reduced the opportunities schools are required to provide to women under that prong in favor of increased opportunities for men. COMMISSION REPORT, *supra* note 8, at 37-40. *See* discussion *infra* Part I.B.

budgets and recruiting expenditures.[19] In Division I colleges, for example, women represent 53% of the student population but are given only 41% of the opportunities to play intercollegiate sports[20] - a far cry from the proportional representation among athletes to which women are entitled under the first prong of the three-part test. Even those women who do get the chance to play are treated less generously than their male peers; at Division I colleges, female athletes receive only 36% of athletic operating budgets and only 32% of the dollars spent to recruit new athletes.[21] In fact, female participation in intercollegiate sports remains below pre-Title IX male participation.[22]

In addition, spending on men's sports continues to grow and to outstrip spending on women's sports. In Division I schools in 2000, for every dollar spent on women's sports, almost two dollars were spent on men's sports.[23] Furthermore, in part because of the under-representation of women among college athletes, male athletes receive approximately $133 million more per year in athletic scholarships than their female counterparts.[24]

Similar disparities persist at the high school level, where female athletes have less than 42% of school-sponsored opportunities to play sports.[25] Male high school students still receive at least 1.1 million more opportunities to play team sports than their female

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19. NAT'L COLLEGIATE ATHLETIC ASS'N, 1999-2000 NCAA GENDER EQUITY REPORT 20 [hereinafter NCAA GENDER EQUITY REPORT], *available at* http://www.ncaa.org/library/research.html (last visited Oct. 27, 2003).

20. *Id.* at 9.

21. *Id.*

22. While 170,384 men played college sports in 1971-1972, the year that Title IX was enacted, only approximately 163,000 women participated in intercollegiate athletics in 1998-1999. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA YEAR-BY-YEAR SPORTS PARTICIPATION 1982-2001 165 (2002) [hereinafter NCAA PARTICIPATION REPORT] (including estimate for men's participation in 1971-72); U.S. GEN. ACCOUNTING OFFICE, GAO-01-297, INTERCOLLEGIATE ATHLETICS: FOUR-YEAR COLLEGES' EXPERIENCES ADDING AND DISCONTINUING TEAMS 4, 7 (Mar. 2001) [hereinafter 2001 GAO REPORT] (giving data on women's sports participation 1998-1999).

23. NCAA GENDER EQUITY REPORT, *supra* note 19, at 19-20.

24. NAT'L COALITION FOR WOMEN & GIRLS IN EDUC., EXECUTIVE SUMMARY: TITLE IX ATHLETICS POLICIES: ISSUES AND DATA FOR EDUCATION DECISION MAKERS 9 (Question 18) (Aug. 27, 2002) (setting forth calculations based on information from NCAA 1999-2000 Gender Equity Report), *available at* http://www.ncwge.org/Title_IX_Commission_Exec_Summary_Final.pdf (last updated Nov. 6, 2003).

25. NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 2002-03 ATHLETICS PARTICIPATION SUMMARY 47 (2003) [hereinafter H.S. PARTICIPATION SUMMARY], http://www.nhfs.org/nf_survey_resources.org (last visited Oct. 27, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class).

peers.[26] Although there are no national data on sports programs' expenditures in secondary schools, available evidence and court cases demonstrate that girls who do get to play face persistent barriers to gender equity.[27]

These facts clearly show that females remain underrepresented in high school and college sports, and that other inequities plague their participation in school-based athletics. By largely ignoring and refusing to act on this evidence, the Commission was operating under the false premise that discrimination against women and girls is a thing of the past. But it is strong enforcement of Title IX's regulations and policies - not the types of changes to those policies recommended by the Commission - that is critical to create truly equal athletic opportunities.

2. False Premise #2: Women Are Inherently Less Interested in Playing Sports than Men

Opponents of Title IX claim that women's lower level of participation in school-based sports is not a product of continuing discrimination but instead reflects the alleged "fact" that women are inherently less interested in athletics than men.[28] They argue that the three-part test requires schools to provide more athletic opportunities for women than women want.[29] Responding to these flawed

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26. In 2003, 3,988,738 boys played high school sports; only 2,856,358 girls were given participation opportunities. *Id.* In other words, boys received 58% of the opportunities to play sports, whereas girls received 42%.

27. *See, e.g.*, Comtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805 (W.D. Mich. 2001) (holding that association's scheduling of six girls' sports, but no boys' sports, in nontraditional or disadvantageous seasons violates Title IX, the Equal Protection clause, and state law); Landow v. School Bd. of Brevard County, 132 F. Supp. 2d 958 (D. Fla. 2000) (determining that female high school students were not receiving the same provision of equipment and supplies or scheduling of games and practice times as male high school students); Nanette Asimov, *Washington Girls: Softball Diamonds in the Rough*, S.F. CHRON., May 26, 2000, at 2 (describing how none of the sixty-two girls' softball diamonds in San Francisco has a regulation dirt infield, staked bases, or lined field), http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2000/05/26/WB90001.DTL (last visited Oct. 27, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class); Tarik El-Bashir, *Arlington Responds to Title IX Charge*, WASH. POST, Jan. 11, 2003, at D1 (describing problems at Virginia high school, including absence of locker rooms for girls and inferior facilities).

28. *See, e.g.*, Pederson v. La. State Univ., 213 F.3d 858, 878 (5th Cir. 2000) ("[The university] argue[s] . . . that the evidence shows that female students are less interested in participating in sports than male students. The law suggests otherwise.").

29. *Id.*; *see also* Neal v. Bd. of Trs. of the Cal. State Univs., 198 F.3d 763, 768 (9th Cir. 1999) ("[The university's] interpretation of Title IX would have allowed universities to do little or nothing to equalize men's and women's opportunities if they could point to data showing that women were less interested in sports."); Cohen v. Brown Univ., 101 F.3d 155,

arguments, the Commission's final report included two recommendations calling for schools to allocate sports opportunities based on surveys of the relative levels of interest of their male and female students.[30] However, as Congress and the courts have consistently recognized, the stereotype that women are less interested in sports than men, as well as the use of interest surveys to bolster that assumption, is belied by the purpose of Title IX and contradicted by its history.

Congress enacted Title IX to redress the systematic discrimination to which women were - and continue to be - subjected in every aspect of education.[31] At the heart of the debate over how best to combat sex discrimination in intercollegiate athletics was Congress' understanding that when athletic opportunities for women are opened, their athletic interests will be demonstrated,[32] and that it is discrimination, not lack of interest, that limits their participation. Congress has repeatedly affirmed Title IX's application to athletics, confirming its intent that women be provided equal opportunities to develop their interests and participate in competitive sports.[33]

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174 (1st Cir. 1996) (*Cohen II*) ("Brown maintains that [the three-part test] imposes upon universities the obligation to engage in preferential treatment for women by requiring quotas in excess of women's relative interests and abilities."); *id.* at 178 ("Brown has contended throughout this litigation that the significant disparity in athletics opportunities for men and women . . . is the result of a gender-based differential in the level of interest in sports . . . .").

30. COMMISSION REPORT, *supra* note 8, at 38-39 (Recommendations 18 and 19); *see* discussion *infra* Part I.B.

31. *See generally* NAT'L COALITION FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 30 (June 2002) (detailing examples of continuing inequities in educational opportunities for girls and women), *available at* http://www.ncwge.org/pubs.htm (last visited Nov. 6, 2003).

32. *See, e.g., Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 94th Cong. 63 (1975) (remarks of Representative Marvin Esch) ("The question I would ask is how and to what degree, can you encourage or open up the participation? If women have more encouragement to participate, more of them will participate."); *id.* at 66 (remarks of Representative Shirley Chisholm).

> The fact of the matter is that women never have really had an opportunity. When you think of the Olympic gold medalist, Donna DeVarona, and the fact that there was no school that would offer her a scholarship, it is tragic. I could go into case after case. The universities have never made a serious attempt, whether under Federal control or not, to really reach out to would-be female athletes and there are hundreds of them in this country.

Id. See also Neal v. Bd.of Trs. of the Cal. State Univs., 198 F.3d at 768 ("[A] central aspect of Title IX's purpose was to *encourage* women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships.").

33. In 1974, for example, Congress rejected the Tower Amendment, which would have exempted revenue-producing sports from Title IX coverage. *See* 120 CONG. REC. 15,477 (1974). Congress also refused to pass resolutions disapproving Title IX's implementing regulations, which made clear the application of the law to competitive athletics. *See, e.g.*, S. Con. Res. 46, 94th Cong., 121 CONG. REC. 17,300-301 (1975); S. Con. Res. 52, 94th Cong.,

The courts, too, have resoundingly rejected arguments that Title IX's equal opportunity requirements should be weakened based on assertions of women's lack of interest in athletics. Courts have recognized that "women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports,"[34] *not* a lack of interest, which "evolves as a function of opportunity and experience."[35] As a result, "statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."[36] Indeed, one court characterized a university's

> hubris in advancing [the argument that women are less interested in sports than men as] remarkable, since of course fewer women participate in sports, given the voluminous evidence that [the university] has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students.[37]

Title IX was enacted to address, not enshrine, this historical discrimination. As the First Circuit explained in its seminal opinion rejecting Brown University's challenges to the three-part test,

> to assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are

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121 CONG. REC. 22,940 (1975); H. Con. Res. 310 & H. Con. Res. 311, 94th Cong., 121 CONG. REC. 19,209 (1975); H. Con. Res. 329 & H. Con. Res. 330, 94th Cong., 121 CONG. REC. 21,687 (1975). Moreover, in enacting the Civil Rights Restoration Act in 1988, Congress acted specifically to restore Title IX's coverage of athletics, which had been eliminated by the Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555 (1984). *See* S. REP. NO. 100-64, at 11 (1989). Indeed, "the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes." Cohen v. Brown Univ., 991 F.2d 888, 894 (1st Cir. 1993) (*Cohen I*). Congress has thus been fully aware - and supportive - of Title IX's application to require equality of opportunity for female athletes. *See* Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure a Quality of Opportunity*, 14 MARQ. SPORTS L.J. 11 (forthcoming Spring 2004) (discussing how the three-part test accurately reflects congressional intent on proper interpretation of Title IX).

34. Cohen v. Brown Univ., 101 F.3d 155, 179 (1st Cir. 1996) (*Cohen II*).

35. *Id.*

36. *Id.* at 179-80.

37. Pederson v. La. State Univ., 213 F.3d 858, 878 (5th Cir. 2000).

> less interested in sports than are men, is . . . to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.[38]

The factual record confirms that the notion that women are not interested in athletics is simply an outmoded stereotype. Indeed, the "tremendous growth in women's participation in sports since Title IX was enacted disproves [the] argument that women are less interested in sports for reasons unrelated to lack of opportunity."[39] Title IX has allowed millions of women and girls to participate in sports. Prior to the enactment of Title IX, fewer than 32,000 women participated in college sports.[40] Today, that number has expanded nearly five-fold, or more than 400%, to approximately 163,000 women.[41] Even more dramatically, female participation in high school athletics since 1972, when Title IX first opened opportunities for female athletes, has skyrocketed by more than 900%.[42]

The overall increase in participation by female athletes has been accompanied by increased participation in certain women's sports. For example, the number of women's crew teams increased from 43 teams in 1981-82 to 122 teams in 1998-99, while women's soccer teams increased from 80 teams to 926 teams in the same time period.[43] It is widely recognized that "U.S. women's soccer owes its pre-eminence to the gender-equity reforms visited upon colleges by Congress [thirty-one] years ago."[44]

These advances in athletic opportunities have created significant benefits for women and girls. Competitive sports promote physical and psychological health,[45] responsible social behaviors,[46] greater academic success,[47] and better personal skills.

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38. *Cohen II*, 101 F.3d at 178-79.

39. *Id.* at 180.

40. *See* 1979 Policy Interpretation, *supra* note 3, at 71,419 (noting that during the period between 1971 and1976, number of women participating in intercollegiate sports increased from 31,852 to 64,375).

41. 2001 GAO REPORT, *supra* note 22, at 7.

42. H.S. PARTICIPATION SUMMARY, *supra* note 25, at 47 (showing that 2,856,358 girls now participate in sports in high school, compared to 294,015 in 1971).

43. 2001 GAO REPORT, *supra* note 22, at 12.

44. Frederick C. Klein, *Goals for Women's Soccer*, WALL ST. J., Apr. 16, 1999, at W8; *see also* Amy Shipley, *Getting with the Program*, WASH. POST, June 13, 1999, at D1.

45. Playing sports decreases a young woman's chance of developing heart disease, osteoporosis, breast cancer and other health problems, as well as contributing to better posture, the reduction of back pain, and the development of adequate strength and flexibility. *See, e.g.*, Leslie Bernstein et al., *Physical Exercise and Reduced Risk of Breast Cancer in Young*

Given the enhanced educational and health benefits women enjoy as a result of participating in athletics, the claim that women are less interested in sports than their male counterparts is both fundamentally flawed and particularly callous. It should not have been countenanced by the Commission.

3. False Premise #3: The Three-Part Test Imposes Quotas

Another argument made by opponents of the three-part test is that it creates a gender-based "quota" system in violation of Title IX[48] and the Equal Protection Clause of the United States Constitution.[49] This claim is flatly incorrect and has been rejected by every court that has considered it.[50] Yet, the Commission gave new vitality to this

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Women, 86 J. NAT'L CANCER INST. 1403 (1994); Dorothy Teegarden et. al., *Previous Physical Activity Relates to Bone Mineral Measures in Young Women*, 28 MED. & SCI. SPORTS & EXERCISE 105 (1996).

46. Athletes are less likely to smoke or use drugs. *See, e.g.*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, THE CASE FOR HIGH SCHOOL ACTIVITIES 3-4 (discussing 1991 study which found that 92% of high school athletes do not use drugs), http://www.nfhs.org/case.htm (last visited Oct. 27, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class); *id.* at 9 (discussing Wyoming High School Activities Association Statewide Student Activities Survey, which found that 25% of high school students involved in athletics or activities – versus 40% of non-athletic, non-active high school students - smoke cigarettes). Adolescent female athletes also have lower rates of both sexual activity and pregnancy. NAT'L CAMPAIGN TO PREVENT TEEN PREGNANCY, FACT SHEET: NOT JUST ANOTHER SINGLE ISSUE: TEEN PREGNANCY AND ATHLETIC INVOLVEMENT (July 2003), http://www.teenpregnancy.org/resources/reading/fact_sheets/sports.asp (last visited Oct. 27, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class); D. SABO ET AL., THE WOMEN'S SPORTS FOUND., THE WOMEN'S SPORTS FOUNDATION REPORT: SPORT AND TEEN PREGNANCY 7 (1998); *see also* THE PRESIDENT'S COUNCIL ON PHYSICAL FITNESS AND SPORTS REPORT, PHYSICAL ACTIVITY AND SPORTS IN THE LIVES OF GIRLS 26 (1997).

47. Female student-athletes have higher grades, are less likely to drop out, and have higher graduation rates than their non-athletic peers. *See* H.S. PARTICIPATION SUMMARY, *supra* note 25; *see also* THE WOMEN'S SPORTS FOUND., THE WOMEN'S SPORTS FOUNDATION REPORT: TITLE IX AND RACE IN INTERCOLLEGIATE SPORT 17 (2003), http://www.womenssportsfoundation.org/cgi-bin/iowa/index.html (last visited Nov. 18, 2003) (on file with MARGINS: Maryland's Law Journal on Race, Religion, Gender and Class); *Graduation Rates*, NCAA NEWS, June 28, 1995, at 2.

48. *See, e.g.*, Cohen v. Brown Univ., 101 F.3d 155, 174 (1st Cir. 1996) (*Cohen II*) ("Brown argues that . . . the three-part test requires numerical proportionality, thus imposing a gender-based quota scheme in contravention of the statute.").

49. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

50. *See, e.g.*, *Cohen II*, 101 F.3d at 170 ("No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency documents – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals.").

claim by making recommendations designed to enable universities to avoid proportionality and provide enhanced opportunities to men.[51]

The three-part test imposes no numerical requirement that is even remotely analogous to quotas. In fact, the concept of quotas is particularly inapplicable in the athletics context. Athletic teams are typically segregated by gender, and individual schools decide both how many athletic opportunities they will allocate to each gender and through which teams those opportunities will be offered. Schools are the ones that make a gender-conscious allocation of opportunities in the first instance. As a result, "determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons."[52] The three-part test merely determines whether schools are setting the already gender-segregated limits they place on sports opportunities in a non-discriminatory manner.

Moreover, the primary focus of the quota claim, "the substantial proportionality test of prong one," is "only the starting point, and not the conclusion of the analysis."[53] Schools have three ways to comply with the test, and are free to choose the prong that fits best with the demands of their athletics programs.[54]

The first prong of the test correctly recognizes the commonsense principle that schools can comply with Title IX by providing female students with the same level of athletics opportunities that they offer to male students. This is measured by evaluating whether each male and female student has the same chance of participating in athletics – a standard that is premised, consistent with basic principles of civil rights, on the notion that each student is

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51. *See, e.g.,* COMMISSION REPORT, *supra* note 8, at 37-40 (Recommendations 14, 15, 17, and 20); *see also* discussion *infra* Part I.B.

52. Neal v. Bd. of Trs. of the Cal. State Univs., 198 F.3d 763, 770 (9th Cir. 1999) (emphasis added).

53. *Cohen II*, 101 F.3d at 184.

54. Although opponents of the three-part test have attacked statements in the 1996 Clarification describing the first prong as a "safe harbor" for compliance with Title IX's participation requirements, the term "safe harbor" is merely descriptive and adds no legal weight to the first prong of the test. In fact, the Department's Further Clarification confirms that "each of the three prongs of the test is an equally sufficient means of complying with Title IX, and no one prong is favored." FURTHER CLARIFICATION, *supra* note 1, at 2.

Moreover, application of the test has underscored the fact that each prong in fact offers a viable and separate means of compliance. For example, from 1994-1998 the Office for Civil Rights reviewed seventy-four cases involving Title IX's participation requirements. In these, only twenty-one schools - or less than one-third - were held in compliance under prong one of the three-part test; the rest of the schools complied under prongs two or three. U.S. GEN. ACCOUNTING OFFICE, GAO-01-128, GENDER EQUITY: MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUCATION 40 (Dec. 2000). This data definitively rebuts claims of Title IX opponents that the first prong offers the only means for effective compliance with the law.

entitled to equal treatment regardless of race, ethnicity or gender. Thus, if a school has equal numbers of male and female students, it will comply with Title IX if it divides its athletics opportunities equally between male and female teams.

However, schools are not required to meet the dictates of the first prong. Even if a school does not provide proportionately equal opportunities, it may still comply by showing *progress* toward equality - even if, thirty-one years after enactment of the law, the school has not yet succeeded.[55] This is an extremely generous standard for assessing civil rights compliance. In the employment context, by contrast, an employer cannot defend a sex discrimination claim by asserting that it is in the process of closing the gap between the wages of its male and female employees; an employer who unlawfully fails to provide equal wages must immediately rectify the disparity.[56] Thus, the second prong of the test provides a measure of flexibility for schools that is not found elsewhere in anti-discrimination law.

Moreover, the third prong of the test enables schools to comply with Title IX even if they fail to offer proportionately equal opportunities for their male and female students or to make progress toward that goal. A school will comply with the third prong if it fully and effectively accommodates the interests and abilities of its female students, even if this results in a less-than-proportionate allocation of participation opportunities. Thus, this prong allows a school to customize its compliance in those situations where it claims that the women on its campus are less interested than the men in participating in sports, or vice-versa. No modification of the test is necessary to enable schools to make this showing in appropriate cases.[57]

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55. Under the second prong, schools need show only that they have a "history and continuing practice of program expansion" for the underrepresented gender. 1979 Policy Interpretation, *supra* note 3, at 71,418. In fact, the premise of the second prong is that schools have *not* offered proportionately equal opportunities, and that the "members of one sex have been and are underrepresented among intercollegiate athletes." *Id.*

56. The Equal Pay Act, like other anti-discrimination laws, contemplates "make whole" relief that will put the victim in the same position in which he or she would have been absent the discrimination. *See* 29 U.S.C. § 216(b) (2000) (providing that employers who violate the law shall be liable for backpay and liquidated damages). There is no defense in the Equal Pay Act that authorizes employers to close discriminatory wage gaps by incremental stages. *See* 29 U.S.C. § 206(d) (2000) (barring sex-based wage differentials unless the employer can show that the disparity is "pursuant to (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex").

57. Nor can it be claimed that the third prong unfairly favors female athletes by requiring *full* accommodation of their interests (up to the level of proportionality). Courts have resoundingly upheld this requirement, recognizing that:

In sum, the three-part test offers schools maximum flexibility to adjust their compliance strategies to the needs of their athletics programs. It does not require quotas or preferential treatment, and claims to the contrary have been squarely rejected. In fact, it would be difficult to devise a civil rights compliance scheme that gives more discretion to members of the regulated community. The Commission's recommendations to expand that discretion responded to misplaced arguments and would have undermined implementation of Title IX's equal opportunity requirements.

4. False Premise #4: Title IX Has Caused Cuts in Men's Opportunities

One of the most pervasive and inaccurate allegations made by opponents of the three-part test is that the test has caused cuts to men's opportunities to participate in sports.[58] Title IX's policies do not require schools to limit men's opportunities.[59] In fact, the evidence demonstrates that schools can and do comply with the three-part test by adding women's opportunities rather than cutting men's opportunities, and that Title IX is not the culprit in those instances in which men's opportunities have declined. However, the Commission's recommendations to weaken the three-part test were premised on the notion that the test *was* responsible for losses to men's teams.

> the fact that [a school] is required to accommodate fully the interests and abilities of the underrepresented gender [under prong three of the test is] not because the three-part test mandates preferential treatment for women *ab initio*, but because [the school] has been found (under prong one) to have allocated its athletics participation opportunities so as to create a significant gender-based disparity with respect to these opportunities, and has failed (under prong two) to show a history and continuing practice of expansion of opportunities for the underrepresented gender.

Cohen v. Brown Univ., 101 F.3d 155, 175 (1st Cir. 1996) (*Cohen II*).

58. *See, e.g.*, COMMISSION REPORT, *supra* note 8, at 8 (testimony of Leo Kocher, head wrestling coach, University of Chicago) ("I will complain about Marquette University cutting their wrestling team . . . simply so it would not fall afoul of the proportionality standard, simply so they wouldn't get dragged into court and lose."); COMMISSION REPORT, *supra* note 8, at 22 ("The Commission heard a great deal of testimony about the troubling loss of athletic opportunities for male athletes at the collegiate level . . . ."); Jessica Gavora, *The Inequity of Gender Equity*, CHRON. HIGHER EDUC., May 3, 2002 (citing examples of losses to men's teams and asserting that "those are just a few of the institutions that have cut men's sports to comply with the proportionality test of Title IX").

59. *See* discussion *infra* Part I.A.4.b.

(a). Opportunities for Women and Men Have Improved Over the Last Thirty Years

As discussed earlier, female participation in sports has dramatically increased as a result of Title IX. Contrary to the claims of Title IX opponents, however, that increase has not come at the expense of men's sports. In fact, studies show that men's athletic opportunities have increased, in terms of both the absolute number of male athletes and the number of men's teams. For example, men's intercollegiate athletic participation rose from approximately 220,000 in 1981-82 to approximately 232,000 in 1998-99.[60] The number of men's teams also increased over the same time period.[61]

While participation in some men's sports has declined in recent years,[62] participation in other men's teams has increased to more than compensate for the losses. For example, since 1981-82, men's participation has increased in soccer, baseball, crew, football, lacrosse, track and volleyball, among other sports.[63] The gains in men's football alone are sufficient to make up for the loss of wrestling, gymnastics and swimming slots during the same period.[64]

(b). Title IX Is Not the Culprit for Any Lost Opportunities

Courts have consistently recognized that Title IX athletics policies are not the reason for reductions in certain men's sports.[65] Most recently, in *National Wrestling Coaches Association v. United States Department of Education*,[66] the U.S. District Court for the District of Columbia dismissed for lack of standing a lawsuit filed by a coalition of wrestlers alleging that Title IX athletics policies caused "reverse discrimination" against them.[67] In dismissing the case, the

60. 2001 GAO REPORT, *supra* note 22, at 7.

61. *Id.* at 7, 11.

62. Losses for men's teams have been particularly steep in the sports of gymnastics and wrestling. *Id.* at 11.

63. *Id.* at 10-11. Other sports in which men's participation has increased include basketball, rowing, sailing and golf. *Id.*

64. *Id.*

65. *See, e.g.*, Neal v. Bd. of Trs. of the Cal. State Univs., 198 F.3d 763, 769-70 (9th Cir. 1999) ("Every court, in construing the Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender . . . or by decreasing athletic opportunities for the overrepresented gender . . .") (citing Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 275 (6th Cir. 1994); Kelley v. Bd. of Trs., 25 F.3d 265, 269 (7th Cir. 1994); Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888, 898 n.15 (1st Cir. 1993) (*Cohen I*));*see also* Boulahanis v. Bd. of Regents, 198 F.3d 633, 638-39 (7th Cir. 1999).

66. 263 F. Supp. 2d 82 (D.D.C. 2003).

67. *Id.* at 129.

court emphatically rejected arguments that Title IX forces schools to cut men's teams and that invalidating or weakening the three-part test would result in restoration of those teams.

In particular, the court stated that "the Three Part Test cannot be singled out as a 'substantial factor' motivating the decisions of educational institutions,"[68] regarding their athletics programs. "[M]ultiple considerations in addition to, and beyond compliance with, the [Three Part Test], inform the decisions of educational institutions . . . to cut men's . . . teams,"[69] including "the desire to achieve a particular competitive level, availability of athletes with high school competition experience, and spectator interest."[70] According to the court, the plaintiffs could not establish "even a 'mere likelihood' that repeal of the Three Part Test" would result in reinstatement of their teams.[71]

The factual record confirms that Title IX is not responsible for the cuts that have occurred to certain men's teams. Claims that the decline in wrestling teams is due to Title IX's policies are especially unfounded. In 1984, Title IX's application to intercollegiate athletics was suspended due to the Supreme Court's decision in *Grove City College v. Bell*,[72] a decision that was overturned four years later by the enactment of the Civil Rights Restoration Act.[73] During this four-year period, when the three-part test was not enforced, colleges and universities cut wrestling teams at a rate almost three times as high as the rate of decline during the following twelve years, when Title IX's application to athletics was firmly reestablished. Specifically, from 1984 to 1988, the number of NCAA institutions sponsoring men's wrestling teams dropped from 342 to 289 - a rate of 13.3 teams per year.[74] During the twelve years from 1988 to 2000, the number dropped from 289 to 234 - or by 4.6 teams per year.[75]

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68. *Id.* at 119.

69. *Id.* at 116.

70. *Id.* at 113.

71. *Id.* at 120 (quoting Nat'l Wildlife Fed'n v. Hodel, 839 F.2d 694, 705 (D.C. Cir. 1988)).

72. 465 U.S. 555 (1984). In *Bell*, the Court held that Title IX governed only those school programs that directly received federal funds. *Id.* at 573-74. Since college sports programs typically do not receive direct funding, the three-part test was effectively rescinded for four years, until passage of the Civil Rights Restoration Act.

73. Pub. L. 100-259 § 3(a), 102 Stat. 28 (1988) (codified as amended in 20 U.S.C. § 1687 (2000)). Congress passed the Civil Rights Restoration Act to restore Title IX's application to all of the operations, including intercollegiate athletics, of a program that receives federal monies for any of its components. *See* S. REP. NO. 100-64, at 11 (1989).

74. NCAA PARTICIPATION REPORT, *supra* note 22, at 16, 24 (2002).

75. *Id.* at 24, 51.

There are many reasons that schools might choose to eliminate or reduce particular sports opportunities. These reasons can include declining interest in specific sports, liability considerations, financial constraints and choices about how to allocate budget resources among sports teams.[76] Therefore, Title IX cannot be blamed for a decline in some men's teams at certain schools, and the Commission's assumption to the contrary was fundamentally incorrect.

B. Accepting the Commission Recommendations That Were Based on These False Premises Would Have Reduced Athletics Opportunities for Women and Girls and Violated Civil Rights Principles

In February, 2003, the Commission issued its final report to the Secretary of Education. That report contained twenty-four recommendations, many of which called for substantial and radical changes to the three-part test.[77] If the Secretary had accepted these recommendations, their implementation would have dramatically decreased the opportunities available for girls and women to participate in sports and to receive athletic scholarships, and would have undermined fundamental principles of civil rights law.[78]

The Commission approved several recommendations (Recommendations 15, 17 and 20) that would have permitted schools to count students and athletes in new ways under the first prong of the three-part test, thereby authorizing schools to substantially reduce the number of athletics opportunities to which women are entitled under current Title IX policies. For example, the Commission recommended that schools be allowed to exclude "non-traditional" students from the

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76. *See* discussion *infra* Part II (suggesting ways in which schools could reallocate resources within their men's programs in order to avoid cutting or capping men's teams).

77. *See, e.g.,* COMMISSION REPORT, *supra* note 8, at 37 (Recommendation 14) (authorizing a "reasonable variance" from proportionality); *id.* (Recommendation 15) (allowing schools to count a "predetermined number of participants" for each team, regardless of the number of slots actually filled); *id.* at 38 (Recommendation 17) (authorizing exclusion of walk-ons from the count of athletes); *id.* at 38-39 (Recommendations 18, 19) (authorizing interest surveys as a means to allocate participation opportunities); *id.* at 39 (excluding "non-traditional" students from the count of students).

78. Although the Secretary of Education pledged, upon receipt of the Commission Report, to restrict his evaluation only to the recommendations he considered to have been adopted unanimously, he simultaneously refused to accept as an official Commission submission the Minority Report submitted by two dissenting Commissioners. *See* MINORITY REPORT, *supra* note 9, and accompanying text. Because the Minority Report, among other things, objected to a number of recommendations that had previously been adopted by consensus, the Secretary's refusal to accept the report meant that he continued to treat as unanimous recommendations that the two dissenting Commissioners had explicitly disavowed.

universe of those who must be counted in determining whether the school is providing proportionate participation opportunities.[79] This recommendation would have allowed every school to presume that students over the age of twenty-four, or students with children, are uninterested in playing sports. Such a standard would have disadvantaged women, who are more likely to be "non-traditional" students than are men,[80] and would have resulted in a loss of the participation opportunities to which women are legally entitled under the current regulatory policies.

Similar consequences would have ensued from the adoption of other recommendations to authorize deviations from current interpretations of the first prong of the three-part test. Recommendation 17, for example, would have authorized schools *not* to count athletic opportunities they provided to male athletes by enabling schools to exclude "walk-ons" from their count of athletes[81] – even though those students receive the actual benefits of sports participation, including coaching, training, tutoring and equipment. Conversely, Recommendation 15 would have permitted schools to inflate the percentage of athletic opportunities they gave to women by *adding* to their count athletics opportunities that were theoretically available, but which were not filled by any student.[82]

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79. Recommendation 20 states that "[i]n demonstrating compliance with the proportionality requirement of the first part of the three-part test, the male/female ratio of athletic participation should be measured against the male/female ratio of an institution's undergraduate population minus nontraditional students." COMMISSION REPORT, *supra* note 8, at 39. "Non-traditional students" are defined as "students who are older than the traditional, full-time undergraduate college athlete, graduate and professional students, students who have children, and students who work full-time." *Id.* at 41.

80. Available data show, for example, that among individuals older than twenty-four who were enrolled in degree-granting institutions in 2001, women outnumbered men by 37%. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2001, TOTAL FALL ENROLLMENT IN DEGREE-GRANTING INSTITUTIONS, BY ATTENDANCE STATUS, SEX, AND AGE: 1970 TO 2001 tbl. 174 (2001), *available at* http://nces.ed.gov/programs/digest/d01/dt174.asp (last visited Dec. 22, 2003). These statistics are cited in the Minority Report submitted by Commissioners Donna de Varona and Julie Foudy. *See* MINORITY REPORT, *supra* note 9, at 14 n.20.

81. Recommendation 17 states that "[f]or the purpose of calculating proportionality with the male/female ratio of enrollment in both scholarships and participation, these ratios will exclude walk on athletes as defined by the NCAA. Proportionality ratios will be calculated through a comparison of full or partial scholarship recipients and recruited walk-ons." COMMISSION REPORT, *supra* note 8, at 38.

82. In Recommendation 15, the Commission proposed that

> [t]he Office for Civil Rights should consider a different way of measuring participation opportunities for purposes of allowing an institution to demonstrate that it has complied with the first part of the three-part test. An institution could establish that it has complied with the first part of the test by showing that the available slots for men and women

In two other recommendations, the Commission proposed to allow the Secretary of Education to set "variances" from proportionality, uniform percentages by which schools could fall short of equal opportunity but still be found in compliance with the first part of the three-part test.[83] An unnumbered recommendation, which was submitted to the Secretary although not approved by a majority of Commissioners, proposed that women be allocated a maximum of fifty percent of participation opportunities, no matter what the ratio of men and women on campus, and that schools then be allowed to fall two to three percentage points short of this newly defined standard.[84] It was estimated that adoption of this proposal would have resulted in losses of between 43,000 and 50,000 opportunities for collegiate female athletes to play sports, causing an associated loss to them of between $103 million and $122 million in athletic scholarships.[85]

Moreover, two of the Commission's recommendations would have allowed schools to allocate participation opportunities based on the results of "interest surveys" of students on campus.[86] These

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> as demonstrated by the predetermined number of participants for each team offered by the institution, is proportional to the male/female ratio in enrollment.

Id. at 37.

83. *See* COMMISSION REPORT *supra* note 8, at 37 (Recommendation 14); *id.* at 40 (Recommendations Which the Commission Neither Approves nor Disapproves).

84. *See* COMMISSION REPORT, *supra* note 8, at 40 (Recommendations Which the Commission Neither Approves nor Disapproves) ("Institutions governed by Title IX standards, as one approach to meeting the standard of proportionality, should allot 50% of their participation opportunities for men and 50% for women. A variance of 2 to 3 percent in compliance with this standard would then be allowed.").

85. MINORITY REPORT, *supra* note 9, at 16. Recommendation 14 similarly called for the Secretary to set a "reasonable" variance from proportionality in measuring compliance. This recommendation could have opened the door to potentially unlimited losses for female athletes. *Id.* at 15.

86. Recommendation 18 states:

> The Office for Civil Rights should allow institutions to conduct continuous interest surveys on a regular basis as a way of (1) demonstrating compliance with the three-part test, (2) allowing schools to accurately predict and reflect men's and women's interest in athletics over time, and (3) stimulating student interest in varsity sports. The Office should specify the criteria necessary for conducting such a survey in a way that is clear and understandable.

COMMISSION REPORT, *supra* note 8, at 38.

Recommendation 19 states:

> The Office for Civil Rights should study the possibility of allowing institutions to demonstrate that they are in compliance with the third part of the three-part test by comparing the ratio of male/female participation at the institution with the demonstrated interests and abilities shown by regional, state or national youth or high school participation

recommendations directly flouted long-standing case law, discussed *supra*, which establishes that "statistical evidence purporting to reflect women's interest instead provides only a measure of the very discrimination that is and has been the basis for women's lack of opportunity to participate in sports."[87] To have allowed women's lower expression of interest in sports - a product of the barriers to which they have been subjected - to dictate the allocation of sports opportunities to them in the future would have enshrined prior discrimination.

Altogether, a significant number of the Commission's recommendations would have substantially weakened the first prong of the three-part test and would have allowed schools to deny women a proportionate share of opportunities to play sports. However, it is the first prong of the test that embodies the potential for true equality of opportunity by recognizing, consistent with basic principles of civil rights, that women and men are entitled to enjoy the benefits of sports participation without regard to gender. To have weakened the first prong would have denied women the legal right to press for equal opportunity, and allowed schools to restrict women's participation levels, thereby freezing current discrimination against female athletes into place.

Furthermore, weakening the first prong in ways proposed by the Commission would have distorted Title IX, and civil rights law in general, by perpetuating the stereotype that women are inherently less interested than men in playing sports and by refusing to allow schools to offer equal opportunity unless women could prove their interest in receiving it. Courts have consistently rejected the notion that government decision-making may be based on stereotypes about the abilities or interests of individuals.[88] The adoption of the Commission recommendations would have allowed schools to structure their decisions based on precisely the kinds of unlawful stereotypes that Title IX and the U.S. Constitution are intended to prohibit.

> rates or national governing bodies, or by the interest levels indicated in surveys of prospective or enrolled students at that institution.

Id. at 39.

87. Cohen v. Brown Univ., 101 F.3d 155, 179 (1st Cir. 1996) (*Cohen II*).

88. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 533 (1996) (invalidating exclusion of women from Virginia Military Institute and holding that gender-based classifications "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females"); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729 (1982) (striking down exclusion of males from nursing school and noting that "[r]ather than compensate for discriminatory barriers faced by women, [the school's] policy of excluding males . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job").

The consequences of accepting such stereotyping would have extended beyond the realm of athletics to taint civil rights principles in other contexts as well. The Commission's recommendations were premised on the notion that women's underrepresentation in athletics is merely evidence of their choices, not of the persistence of discriminatory barriers to female participation in school sports. However, in the context of civil rights law, statistical evidence of underrepresentation is probative of discrimination.[89] A rejection of that understanding would have been unprecedented and could have severely restricted the ability of women to challenge barriers in other areas in which they remain woefully underrepresented, including math, science, engineering and non-traditional trades.[90]

II. THE DEPARTMENT OF EDUCATION CAN NOW TAKE PRODUCTIVE STEPS TO ENHANCE EQUAL OPPORTUNITIES IN SPORTS

For all of the foregoing reasons, the Department of Education's decision to reaffirm current athletics policies and reject Commission recommendations for change was critical to ensuring continued respect for basic civil rights protections. Among other things, the Department "strongly reaffirm[ed] . . . its commitment to equal opportunity for girls and boys, women and men,"[91] reiterated the terms of the three-part test[92] and promised to "aggressively enforce Title IX standards, including implementing sanctions for institutions that do not comply."[93]

Enhanced enforcement is long overdue. Vigorous enforcement of the law, including imposing sanctions where warranted, will help to achieve truly equal opportunities. The Department's plans to

89. *See, e..g.*, Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 311 n.17 (1977) ("[A] fluctuation of more than two or three standard deviations [between the expected number of the protected class in a given pool and the actual number in the pool] would undercut the hypothesis that decisions were being made randomly with respect to race.").

90. For example, women receive only 18% of bachelor degrees in engineering; and while the number of women receiving bachelor degrees in computer and information sciences reached a high of 37% in 1984, it had dropped to 28% by 2001. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2002, EARNED DEGREES IN COMPUTER AND INFORMATION SCIENCES CONFERRED BY DEGREE-GRANTING INSTITUTIONS, BY LEVEL OF DEGREE AND SEX OF STUDENT: 1970-71 to 2000-01 tbl. 282 (2002), *available at* http://nces.ed.gov/programs/digest/d02/tables/dt282.asp (last visited Dec. 22, 2003).

91. FURTHER CLARIFICATION, *supra* note 1, at 3.

92. *Id.* at 1.

93. *Id.* at 3.

undertake an educational and technical assistance program[94] should also be used to educate schools about their responsibilities and about the flexibility and lawfulness of the three-part test. Through this technical assistance, the Department can help schools to identify means to expand opportunities for women while preserving opportunities for men.

There are additional steps the Department should initiate to promote gender equity in athletics. For example, the Department should facilitate a dialogue within the academic community on ways to reduce the escalating costs of college athletics programs, particularly in some parts of the men's athletics programs, and foster agreements on reforms. As the Commission recognized, the spiraling costs of intercollegiate athletic programs not only drain resources from other academic pursuits, but also impede university efforts to provide sports opportunities to all of their students.[95]

Resources for male athletes are unevenly distributed, with football and men's basketball consuming 72% of the total men's athletic operating budget at Division I-A institutions.[96] The elimination or reduction of some of the excessive expenditures for these sports could increase a university's ability to support both

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94. *Id.* at 2-3. The Office for Civil Rights has stated that it will "undertake an education campaign to help educational institutions appreciate the flexibility of the law, to explain that each prong of the test is a viable and separate means of compliance, to give practical examples of the ways in which schools can comply, and to provide schools with technical assistance as they try to comply with Title IX." *Id.* at 2.

95. COMMISSION REPORT, *supra* note 8, at 25 (Question 1, Finding 5). Numerous advocates and representatives of the academic community have concurred in this assessment. In June 2001, for example, a commission of college presidents called for "a concerted grass-roots effort by the broader academic community" to restore the balance between athletics and academics and to take steps to control the escalating costs of university sports programs. COMM'N ON INTERCOLLEGIATE ATHLETICS, KNIGHT FOUND., A CALL TO ACTION: RECONNECTING COLLEGE SPORTS AND HIGHER EDUCATION 4 (June 2001), *available at* http://www.knightfdn.org./default.asp (last visited Oct. 27, 2003). *See also, e.g.*, Suzanne Sangree, *The Secretary's Commission on Athletic Opportunity Squandered Its Opportunity to Understand Commercial Collegiate Sports: Why They Eliminate Minor Men's Sports and Prevent Title IX From Achieving Full Gender Equality*, 3 MARGINS 257 (2003).

96. DANIEL FULKS, NAT'L COLLEGIATE ATHLETIC ASS'N, REVENUES AND EXPENSES OF DIVISION I AND II INTERCOLLEGIATE ATHLETICS PROGRAMS: FINANCIAL TRENDS AND RELATIONSHIPS: 2001, at 22 (2002). These expenditures are not financially justified by the revenues produced by these teams; it has been estimated that, among NCAA programs in all competitive divisions, seventy-eight percent of all football programs and seventy-three percent of all basketball programs spend more than they bring in and contribute nothing to other sports' budgets. NAT'L COALITION FOR WOMEN & GIRLS IN EDUC., EXECUTIVE SUMMARY: TITLE IX ATHLETICS POLICIES: ISSUES AND DATA FOR EDUCATION DECISION MAKERS 16 (Question 31) (Aug. 27, 2002), *available at* http://www.ncwge.org/Title_IX_Commission_Exec_Summary_Final.pdf (last updated Nov. 6, 2003).

women's teams and men's lower profile sports. The Department should help to establish and facilitate high-level discussions within the academic community of appropriate cost-reduction measures. Among reforms that should be considered in such a dialogue are: identifying impermissible categories of expenditures, such as overnight stays in hotels the nights before home games; restricting the amount of off-campus recruiting that can be done; reducing the size of coaching staffs; limiting the size of non-coaching and administrative staffs; limiting the size of travel parties; and requiring approval of the Faculty Senate at each university for major renovation or construction of new athletic facilities.

In addition, as a way to systematically assess equality of opportunity, the Department should require secondary schools to compile and report data on participation rates for, and allocation of athletics resources to, their male and female teams. Under the Equity in Athletics Disclosure Act,[97] colleges and universities are required to compile and submit annual data on their athletics programs,[98] including information about the participation rates of their male and female students,[99] operating and recruiting budgets for all teams,[100] and coaches' salaries.[101] However, there is no similar statute mandating the collection of such data at the high school level.[102] The absence of such data makes it difficult to monitor high schools' compliance with Title IX, where serious enforcement of the law is critical.[103] Even absent a statutory mandate, the Department of Education has the requisite authority to collect such data[104] and should do so on an annual basis.

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97. 20 U.S.C. § 1092 (2000).
98. 20 U.S.C. § 1092(g) (2000).
99. 20 U.S.C. § 1092(g)(B) (2000).
100. 20 U.S.C. § 1092(g)(E) (2000).
101. 20 U.S.C. § 1092(g)(G), (H) (2000).
102. A bill has been introduced in Congress to remedy this omission. High School Sports Information Collection Act of 2003, S. 282, 108th Cong. (2003).
103. As noted previously, substantial evidence exists of widespread discrimination in secondary school athletic programs. *See supra* text accompanying notes 25-27. It is particularly important to redress this discrimination because participation in high school sports is the gateway to receipt of athletics scholarships in college and development of the skills necessary to compete in intercollegiate sports.
104. 20 U.S.C. § 1682 (2000) (authorizing and directing federal agencies that extend Federal financial assistance to "effectuate the [non-discrimination provisions of Title IX] . . . by issuing rules, regulations, or orders of general applicability, which shall be consistent with achievement of the objectives of the statute").

III. CONCLUSION

Today, thirty-one years after the enactment of Title IX, women and girls have greater opportunities to gain the benefits of athletic participation. However, the battle for gender equity in athletics is far from over and much work remains to achieve a truly level playing field. In reaffirming Title IX's long-standing athletics regulations and policies, the Department of Education recognized the fundamental fairness and lawfulness of legal standards calling for equal opportunity for women and girls, and properly rejected unfounded arguments that these standards result in discrimination against men. Strong enforcement of these standards is now crucial to ensure that Title IX's promise will be realized. The girls and women of this country, and the boys and men who care about them, deserve no less.