



**Statement of Nancy M. Solomon
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Good afternoon. Thank you for the opportunity to address the Secretary's Commission on Opportunity in Athletics. I am Nancy M. Solomon, the Senior Staff Attorney at the California Women's Law Center (CWLC). Founded in 1989, CWLC is a statewide non-profit policy, advocacy, and legal services support center working to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic, and political constraints. We work in six priority issue areas: sex discrimination, violence against women, race and gender, women's health, exploitation of women, and women's economic security. The focus of my work is on sex discrimination.

As the Commission has heard repeatedly throughout these Town Hall meetings, Title IX has resulted in a tremendous increase in female athletic participation. I will not focus my testimony on the well-established success of Title IX. Instead, I will address some of the legal questions that the Commission has been asked to consider in drafting its January 2003 report.

The Commission has been asked whether current Title IX standards for assessing equal opportunity in athletics are working to promote opportunities for both male and female athletes. This question is irrelevant and misleading because Title IX is an anti-discrimination statute, geared to promote opportunities for the underrepresented sex. Accordingly, as to athletics, Title IX's implementing regulations and policies seek to ensure that the underrepresented sex has an equal and non-discriminatory opportunity to play sports. Given the historical discrimination against females in educational

institutions, the underrepresented sex was, and continues to be, female students. Thus, the question of whether Title IX is working to promote opportunities for male athletes is nonsensical, as they have had and continue to have more athletic opportunities than female athletes. Instead, the Commission should determine if Title IX standards are working to end sex discrimination in the provision of athletic opportunities.

Unfortunately, sex discrimination at our educational institutions continues to exist. Schools often schedule girls' teams to play in the off-season, thus restricting their ability to compete, or they schedule girls' games when potential attendees are unlikely to attend, such as weekday afternoons. Schools also provide female athletes less participation opportunities, less scholarships, and a relatively smaller share of athletic budgets. For example, in March 2000, CWLC filed and successfully settled a Title IX lawsuit against four Northern California school districts because they continued to force the girls' soccer team to play in the winter months, despite having moved the boys' season to the spring because extreme weather made the fields unplayable. Consequently, the girls had been playing on flooded fields, in pelting rain, and 40-degree weather. Moreover, the schools paid for the coaching, uniforms, and transportation for the boys teams but not the girls. Additionally, just this year, a Los Angeles University High School softball player filed a Title IX complaint because the softball field had a broken pitching rubber, no dugouts, and was considered a health hazard. The school has improved the field, but it still lacks an electronic scoreboard as provided for at the baseball field. These examples reveal that more vigorous enforcement of Title IX is needed, not a scaling back of its protections. Parity has not yet arrived.

The current regulations and policy interpretations provide clear and detailed guidance, as well as flexibility, to allow schools to comply with Title IX. In addition, over the past two decades, the courts have explained specifically how schools can comply with Title IX in response to a variety of challenges to the law's implementing regulations and policies. In fact, I am aware of no educational institution that currently maintains that it cannot understand Title IX's implementing regulations and policies.

Rather, the current attack on Title IX focuses on the claim that Title IX requires cuts in male sports teams and the creation of opportunities for female athletes incommensurate with their interest in sports and their abilities. In particular, the assault on Title IX has focused primarily on the 1979 Policy Interpretation's three-part test for analyzing the implementing regulation's "effective accommodation" requirement. Nothing in this test or any other portion of the Title IX compliance scheme, however, requires schools to cut male athletic opportunities. In fact, as others have testified, schools themselves sought in litigation the flexibility to reduce the number of male athletes in order to comply with Title IX due to their limited athletic budgets.

Underlying the arguments made by Title IX's detractors is the stereotype that women and girls are not interested in sports and that, consequently, schools are being required to create athletic opportunities for females who will not take advantage of them. It is astounding that this argument, which was advanced during the enactment of Title IX in 1972, maintains its vitality today in the face of overwhelming evidence to the contrary. As the Commission has heard from numerous speakers, since Congress enacted Title IX, girls and women's involvement in sports has increased exponentially. According to the National Federation of High School Associations, in 1972 girls were only 7.4% of high school athletes, but by 2001, they were 41.5%. Additionally, the federal General Accounting Office reports that colleges have added nearly 3,800 more women's teams since 1972. This increase in sports participation by females demonstrates that discrimination, and not lack of interest, accounted for the historically low female athletic participation rates.

A recent lawsuit successfully litigated by CWLC further demonstrates that girls' lower participation rates are not a result of lack of interest but are due instead to a lack of opportunity. In 1998, CWLC, along with the ACLU of Southern California, brought a class action lawsuit against the City of Los Angeles and its Department of Recreation and Parks (Department) for sex discrimination in the provision of athletic opportunities. Baca, et al. v. City of Los Angeles, Department of Recreation and Parks, CV 98-2865 R (C.D. Cal. 1998). As part of the settlement of this matter, the defendants implemented

the “Raise the Bar” program, a city-wide plan requiring individual recreation centers to develop programs geared towards increasing girls participation in sports. During pre-trial discovery, however, City and Department officials testified that low female participation rates in the Department’s programs were due to girls’ lack of interest in sports. Yet, since implementation of the Raise the Bar program, participation rates for girls in the Department’s sports leagues has increased by 115% in three years. In 1998, 11,161 girls played sports compared to 44,091 boys. In 2001, girls participation had increased to 24,007, although opportunities for boys still far exceeded those for girls, with 50,336 boys playing that year.

A companion argument to the “girls are not interested in sports” claim, is the assertion that Title IX has resulted in quotas for female students and “reverse discrimination” against male students. This attempt to inject legal theories developed in other areas of discrimination jurisprudence into the Title IX debate has been properly rejected by every court considering these arguments. Unlike in the employment or school admissions arena, sex is a relevant characteristic in allocating athletic participation opportunities. In an attempt to allow schools maximum flexibility to comply with Title IX, the regulations do not require schools to create duplicate athletic opportunities for males and females. However, because sports teams are usually sex-segregated, any analysis of sex discrimination in school sports must compare the number of athletic opportunities provided to males with that of females. Accordingly, schools are not precluded from instituting gender-conscious remedies or programs to increase female athletic opportunities. Further, courts have allowed schools to reduce athletic opportunities for the overrepresented sex in order to comply with Title IX. Such flexibility has allowed Title IX to be a dynamic influence in promoting educational equity. The loss of long-standing preferential treatment in the apportionment of athletic opportunities for male students, however, is not reverse discrimination; it is justice for women and girls. Moreover, studies reveal that both male and female athletic opportunities have increased in the past 30 years. The fact that opportunities for females have increased at a greater rate than those for males is not evidence that Title IX results in reverse discrimination,

but is rather an enduring example of the historical disparity in athletic opportunities provided to females.

We have also heard the argument that revenue-producing sports should be exempted in some manner from the reach of Title IX's sex equity requirements. I would emphasize to the Commission that "revenue-producing" does not mean "profit-producing." In fact, 64% of Division I and II NCAA football programs do not generate enough revenue to pay for themselves, let alone support other sports programs. Revenue and Expenses of Division I and II Intercollegiate Athletics Programs: Financial Trends and Relationships (NCAA 2000). Regardless, CWLC opposes any change to Title IX that would take into account a sport's ability to raise revenue or to generate a profit as a basis for exempting it from consideration in the analysis of a school's compliance with Title IX. The opportunities provided to male athletes on a football or basketball team should not be ignored simply because such sports currently have the ability to generate revenue. What makes this argument even more ironic in the Title IX debate is that discriminatory policies largely account for the ability of male-dominated sports to draw such financial support. I look forward to the day when schools provide women's teams large publicity budgets and schedule their games at times to encourage attendance, as is now done with male teams. Athletic opportunities are part of our students' overall educational resources, and monies spent on sports should not be divied up as if our schools were private businesses allocating resources to only revenue-producing programs.

It has been suggested that detractors of Title IX may seek to replace the three-part test with a mechanism that would rely on "interest surveys" to determine how schools should apportion athletic opportunities. This approach would be wholly inconsistent with Title IX and would complicate, rather than ease, its enforcement. First, the claim that females should be required to "prove" their interest in sports rather than simply be allowed to participate in a non-discriminatory manner is buttressed by archaic and overbroad gender stereotypes about women and girls. I know of no school that required males to answer surveys when they allocated a majority of the athletic budget to male teams. Further, an "interest surveys" program would not likely fulfill Title IX's anti-discrimination

objectives. For example, would a high school survey the current student population or the incoming students? What about surveying the elementary students whose athletic interests will undoubtedly directly correlate to the opportunities they anticipate will be provided to them as well as the examples set by their upper classmates? Interests do not develop in a vacuum. Further, what will these surveys seek to determine? Students' professed interest in sport does not necessarily dictate their participation rates. Moreover, Title IX did not simply seek to create opportunities for students allegedly interested in sports, but also to create opportunities in order to foster interest among underrepresented students. Ultimately, interest surveys are an inequitable and unworkable attempt to respond to Title IX's anti-discrimination requirements.

Title IX was meant to be aspirational. A scheme under which athletic opportunities are provided based upon relative interest would freeze in place programs and opportunities limited by long-standing discriminatory policies. If Title IX's drafters sought to provide athletic opportunities based upon the status quo of relative interest between the sexes, they had no need to pass Title IX, as a historical lack of opportunity certainly would have manifested itself in male and female students' expressed relative interest in sports. Rather, interest surveys will often measure the very discrimination Title IX was meant to combat.

It is important for the Commission to remember that nothing in Title IX or its implementing regulations and policies requires schools to cut athletic budgets or male teams. However, the fact that schools choose to cut male's teams and male athletic opportunities because of limited athletic budgets is not a reason to change the current Title IX policies. Schools have the flexibility under Title IX to allocate their resources in any manner they choose, except in a way that discriminates against female athletes. Imagine a corporation sued for paying similarly situated male employees more than female employees. Now suppose this corporation refuses to end the discrimination on the grounds that it has a limited budget and cannot achieve pay equity without reducing the salary of its male employees. Would anyone honestly suggest that this is a viable argument or that the female employees should "wait it out" in the hopes that the

corporation increases its revenue to end the pay disparity? Of course such argument is ludicrous, yet schools and individuals have not hesitated to suggest that the historical discrimination against female athletes should continue because, in some instances, limited athletic budgets will result in cuts in athletic opportunities provided to the overrepresented sex.

CWLC urges this Commission to maintain the current regulations and policies promulgated by the Department of Education to ensure non-discrimination in athletics. These guidelines are clear. Moreover, two decades of case law have provided additional guidance and flexibility to schools so that they know what is required for compliance. CWLC also urges the Department of Education's Office of Civil Rights (OCR) to more vigorously enforce Title IX. Some estimates find that in California approximately 80% of schools are out of compliance, yet no educational institution has ever lost federal funding for violating Title IX's athletic equity requirements. Particularly for females who, because of socio-economic status, have difficulty navigating a costly and complicated legal system, OCR's enforcement of this important anti-discrimination law is crucial. In addition to more vigorous enforcement, the extent of schools currently in violation of Title IX must be determined. California is taking the lead in this regard. Effective this year, California Assembly Bill 2295 authorizes a study of grades 7-12 and all of California's state colleges to determine the rate of compliance with Title IX in athletic programs. Understanding a problem is the first step in fixing it.

As the Commission examines Title IX and its implementing regulations and policies, it should not allow gender-stereotypes and those who would perpetuate them to justify continued discrimination in the provision of athletic opportunities. Title IX has begun to level the playing field for women and girls. Let us not stop it in mid-play.