

STATEMENT OF
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BEFORE THE
U.S. SENATE COMMITTEE ON HEALTH,
EDUCATION, LABOR, AND PENSIONS

Hearing in Celebration of the 40th Anniversary of Title IX

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Mr. Chairman and Members of the Committee:

Thank you for providing me with the opportunity to testify today regarding Title IX of the Education Amendments of 1972, a landmark civil rights law passed 40 years ago to eliminate sex discrimination in American education.

Title IX of the Education Amendments of 1972 expresses our nation's collective aspirational belief that girls and boys, women and men, deserve equality in educational experiences and opportunities. Our country has been shaped by principles of equality, tolerance, freedom and the rule of law. By contemporary standards, it seems peculiar that equality for males and females in federally-supported education was ever considered to be a radical idea. Yet here we are, in a world almost unrecognizable through 1972 lens, except for the trailblazers like Billie Jean King.

Title IX applies to every aspect of federally funded education programs, including access to higher education, athletics, career education, pregnant and parenting students, employment, science technology, engineering and math (STEM) classrooms and sexual harassment and assault, to name a few. Women now make up more than 50% of college graduates. In 1972, women earned about 7% of law degrees. In 2011, women earned about 50% of medical and law degrees.

Other than the constitutional right to vote, possibly no other piece of legislation has had a greater effect on women's lives than Title IX. Education has been this country's ticket to improve income potential and social class mobility. When women were formally excluded or limited in higher education opportunities, it prevented them from advancing themselves economically and socially. Title IX is cracking the barriers to women's ability to have equal opportunity to pursue education.

During my testimony today I speak with three voices: one as a female athlete who was a direct beneficiary of Title IX; as a lawyer and professor of law in the field, and as a parent of a son and twin daughters.

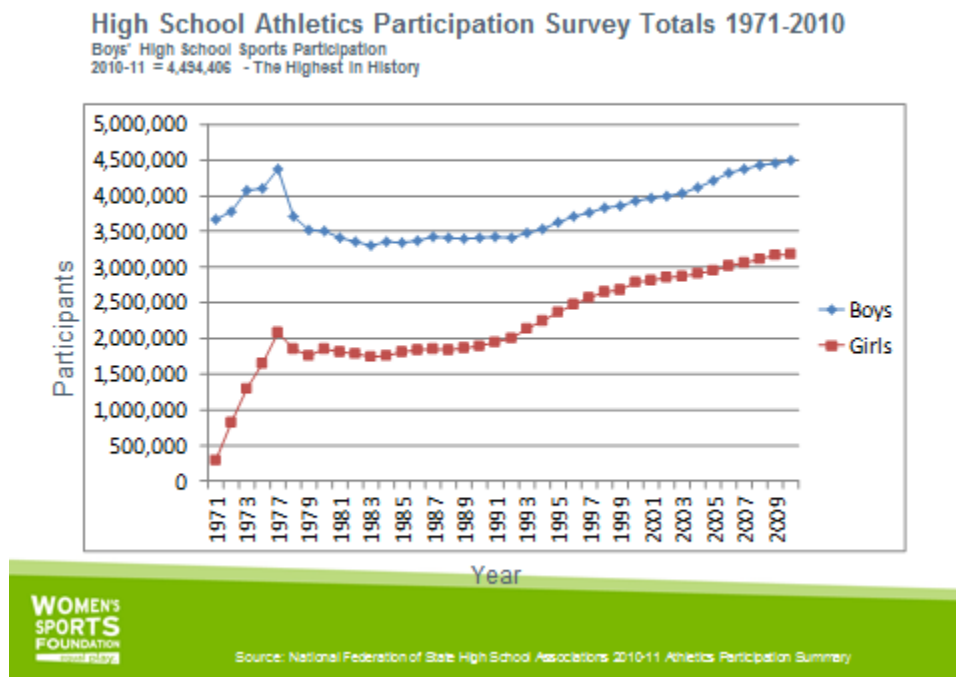
To this day, I'm most proud of representing my country as part of the 1984 Olympic Team, and of earning a full athletic scholarship to Duke University. If I had been a few years older, world records, swimming four hours a day, lifting weights and running, for 50 weeks a year would not have been enough to earn an athletic scholarship, and my career would have been truncated by four years, ending after the 1980 boycott of the Olympics.

If you ever question whether your public service in passing a law makes a difference in the individual lives of citizens, look no further than the impact Title IX has had on my life.

As a lawyer and professor of law, and as a long-time advocate for women in sports, I have been in the trenches defending the law from numerous attacks from all three branches of government. Today, 40 years after the passage of Title IX, the challenges have made the law stronger. The legislature has passed Title IX twice, in 1972 and again in 1987 with the Civil Rights Restoration Act, affirming the bedrock principles of equality in education. Case law and the administrative regulations interpreting the law are uniquely consistent throughout the country.

Title IX is overwhelmingly supported by public opinion. I'm aware of three major polls between 2000 and 2011¹ that tell a consistent story of the public approval of Title IX. Approximately 80% of men, women, Democrats, Republicans, Independents, and people with and without children all support Title IX. Unlike the law's critics claim that the law is "controversial", Title IX has stood the test of time and is widely embraced.

In addition, concerns that girls and women's gains would come at the expense of boys and men has not materialized. The slide below demonstrates three major points. First, the gap between male and female sports participation rate is enormous. Girls in high school are provided with 1,300,000 fewer sports opportunities than boys. Second, at no point in the history of the law do the two lines curve together. In other words, female gains have not come at the expense of males. Instead, when girls' sports are increasing, boys are also gaining. And finally, since 2000, while overall sports for boys and girls are growing, the gaps between males and females have actually grown.



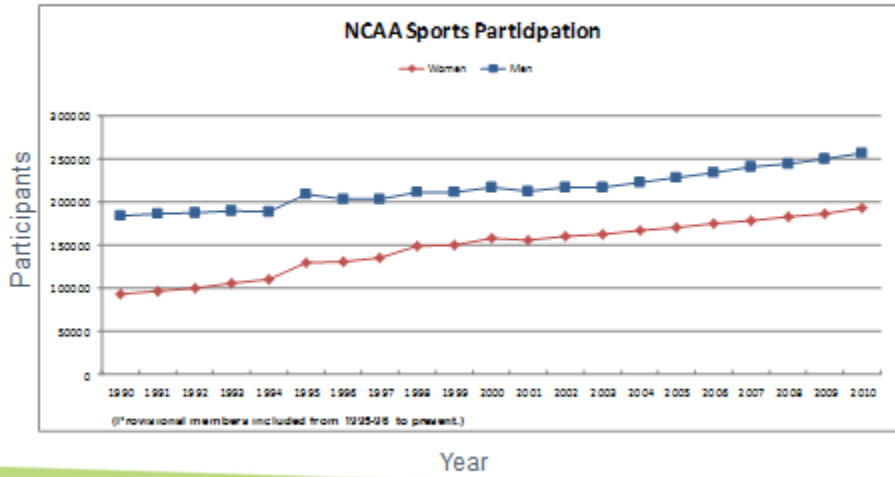
¹ NBC – Wall Street Journal, 2000; Mellman Poll, 2007, available at: www.fairplaynow.org/TitleIXpollresults.pdf; New York Times/CBS News Poll: Title IX, 2011. <http://www.nytimes.com/interactive/2011/04/26/sports/26-poll-titleIX.html>

The slide below tells much the same story for NCAA collegiate athletics. There are still significant gaps, the lines never curve together, and since 2000 the gaps differences between men and women have actually grown.


Sponsorship Levels – Total Participants

1990-91 – 2010-11

(Figures include emerging sports & non-championship sports)



Year



Source: NCAA Sponsorship & Participation Rates Report 1991-92 – 2010-11

To compare high school and college sports participation in a snapshot, see the graphs below that highlight the widening pace of male sports growth.

High School Participation

	<u>Male</u>	<u>Female</u>
1971-72	3,666,917	294,015
2010-11	4,494,406	3,173,549
	+ 22.6%	+ 979.4%

Girls in High School

= 41% of student athletes

= 49% of students

Between 2009-10 and 2010-11, increases were:

Girls = +912 Boys = +38,666



Source: National Federation of State High School Associations 2010-11 Athletic Participation Summary

NCAA College Participation

(Figures include emerging sports & non-championship sports)

	<u>Male</u>	<u>Female</u>
1971-72	170,384	29,977
2010-11	256,344	193,232
	+ 50%	+ 545%

Women in College

= 43% of student-athletes

= 56% of students

Between 2009-10 and 2010-11, increases were:

Females = + 6,772 Males = + 7,037



Source: NCAA Sponsorship & Participation Rates Report 1981-82 - 2010-11

Lessons From Title IX in Athletics

Title IX has given scholars an opportunity to study the effect of athletics on the lives of children. The girls following the passage of the law make an ideal research

group, because of the lack of opportunities followed by significant participation. A large body of research confirms what we intuitively knew: that – despite the “dumb jock” myth – interscholastic sports participation provides boys and girls from diverse socioeconomic, racial, and ethnic backgrounds measurable positive educational impacts, including higher educational aspirations in their senior year, improved school attendance, increased math and science enrollment, more time spent on homework, and higher enrollment in honors courses.² A sports experience provides a positive health trajectory for girls, including reducing the risk for obesity, heart disease, breast cancer, osteoporosis, tobacco and drug use, unwanted teen pregnancy, sexually transmitted diseases, depression, and suicide.³

Similarly, research by Professor Betsey Stevenson from Wharton found that Title IX was responsible for one-fifth of the rise of female educational attainment for the generation that followed the new policy, as well as a 10% increase in women working full time and a 12% spike in women in traditionally male-dominated occupations, such as accounting, law and veterinary medicine. While her research focused on girls, there is no reason to think that these benefits would not be just as applicable for boys. In short, sports are an excellent investment in our public tax dollars, making both boys and girls healthier and more productive members of society.

Despite this body of research, schools that are dropping sports altogether are increasing.

² Ellen Staurowsky et al., Women’s Sports Found., *Her Life Depends On It II: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women* 48 (2009). See id. at 13–15, 28, 32–33, 37.) Available at: <http://www.womenssportsfoundation.org/home/research/articles-and-reports/mental-and-physical-health/her-life-depends-on-it>

³ Id.

Pie Graph 1: The Percentage of All U.S. High Schools That Never Offered Sports, Started To Offer Sports, Offered But Lost Sports, and Continually Offered Sports, 1999-2000 and 2009-2010

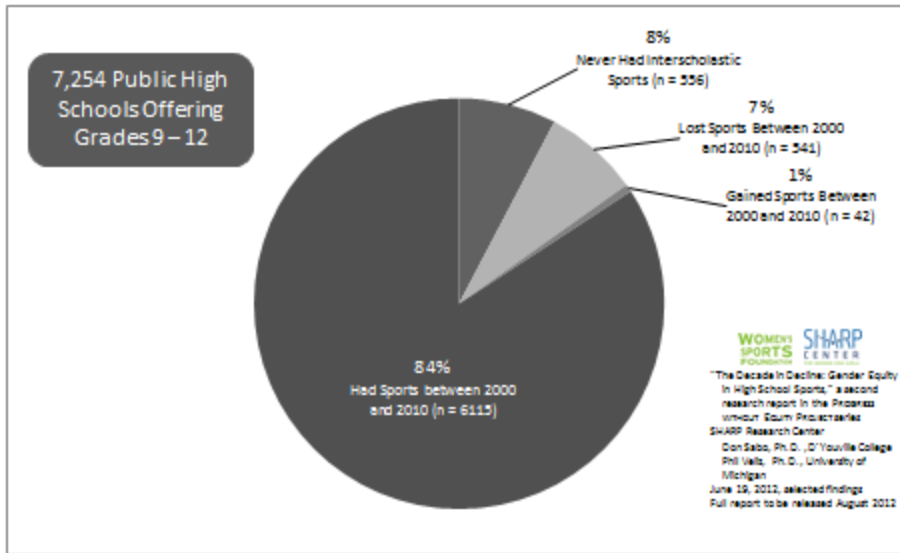
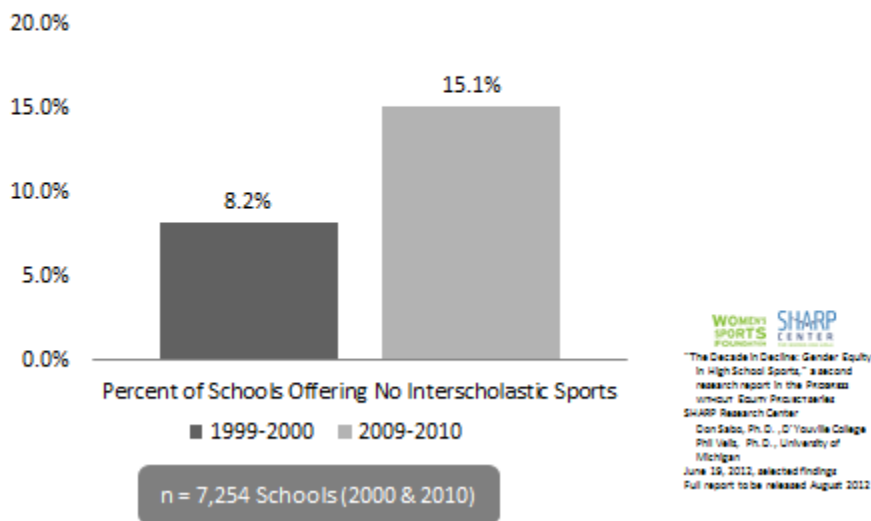


Table 13: The Percentage of High Schools That Did Not Offer Interscholastic Sports, 1999-2000 and 2009-2010



This strong connection between athletics and academic engagement, workforce participation, obesity and pregnancy prevention is not trickling down as it should.

Pregnancy and Parenting Students

Pregnancy and parenting are significant barriers to education for both males and females. The Title IX Regulations set forth a general ban on pregnancy discrimination, stating that schools must treat pregnancy and all related conditions in the same way they treat any other temporary disability.⁴ In other words, pregnant students are to be treated the same as students with a knee injury or mononucleosis. In addition, the Regulations provide special protection for pregnant students by requiring an institution to provide them with necessary medical leave, and to reinstate them to the same status as they held when the leave began, even if the school does not have a leave policy or if the students do not qualify under its policy.⁵ In this way, Title IX's protections for pregnancy are similar to those barring pregnancy discrimination in the workplace.⁶ While employees have a general expectation that they will not be forced to stop working arbitrarily, they will not lose their jobs due to pregnancy, and they will be able to return to work when it is medically safe to do so.⁷ Because of Title IX, students should have the same expectations regarding their educational pursuits.

Athletics remains an excellent tool for preventing pregnancy. While there are some signs of improvement in graduation rates for pregnant and parenting students,⁸ the problems lie with enforcement and an unsophisticated, vulnerable group that may not know of these protections for them.

⁴ 34 C.F.R. §106.40(b)(4). Throughout this memo, the term “pregnancy” encompasses “pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, as set forth in the regulations.

⁵ 34 C.F.R. §106.40(b)(5); *see also*, Deborah L. Brake, *The Invisible Pregnant Athlete and the Promise of Title IX*, 31 HARV. J. L. & GENDER 323 (Summer 2008), available at: <http://www.law.harvard.edu/students/orgs/jlg/vol312/323-366.pdf>

⁶ The Pregnancy Discrimination Act of 1978, (“PDA”) (P.L. 95-555, 92 Stat. 2076) amended Title VII of the Civil Rights Act of 1964, which bars employment discrimination, to make it clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy. The PDA was passed to reverse the Supreme Court's decision in *General Electric Company v. Gilbert*. 429 U.S. 125 (1976), which had reached the opposite conclusion. Title IX actually created stronger protections for students than Title VII does for employees because of its absolute guarantee of a medical leave and reinstatement right to the same status. 34 C.F.R. §106.40(b)(5).

⁷ *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (school district policies that forced pregnant teachers to leave work early in their pregnancies, regardless of whether or not they were able to work, and permitted them to return only three months after childbirth, were unconstitutional.) [The Title IX regulations are actually stronger than the PDA because of their absolute guarantee of a medical leave and right to reinstatement to the same status. 34 C.F.R. §106.40(b)(5).

⁸ The Pregnant and Parenting Students Access to Education Act, introduced in the House of Representatives in July 2011, authorizes the U.S. Secretary of Education to make state and local grants to promote education for pregnant and parenting students. Also, the Pregnancy Assistance Fund, a component of the Affordable Care Act, provides \$25 million annually for fiscal years 2010 through 2019 for the purpose of awarding competitive grants to states and Native American tribes or reservations. The law provides for up to 25 grants of \$500,000 to \$2 million a year. *See*, NCWGE, “Working to Ensure Gender Equity in Education” 2012. Available at: <http://ncwge.org/>

Sexual Harassment and Assault

Sexual harassment affects student's ability to succeed academically. More than half of girls and 40% of boys in grades 7 through 12 reported being sexually harassed during the 2010-2011 school year. Nearly two-thirds of college students aged 18–24 experience some form of sexual harassment. The numbers for men and women are similar, although women report greater emotional and educational disruption from harassment. Among lesbian, gay, bisexual and transgender students (LGBT) harassment is even more prevalent; 85% report being verbally harassed and 19% report being physically attacked. In addition, being called gay or lesbian in a negative way is a common form of harassment in middle and high schools.⁹

Sexual harassment is another form of sex discrimination and is prohibited by Title IX. Schools must prevent the harassment, remediate it and prevent its recurrence.¹⁰ The permissive culture of academics and athletics in particular have not protected students from sexual harassment in the way employees are protected from similar conduct. The boundaries of workplace harassment has normalized the impermissibility of quid-pro-quo sexual harassment and hostile environment harassment, but many still view sexual and romantic relationships as permissible, so long as both parties are above the legal age of consent, and there is no overt coercion. In recognition of this permissible culture, many educational and sporting organizations have developed ethical policies that explicitly prohibit romantic and sexual relationships between professor and student, coaches and athletes, regardless of the age of the victim or whether there is consent.¹¹ In other professional settings, like attorneys and clients, physicians and patients, clergy and parishioners that are marked by an imbalance in power and a duty of care, the ethical standards governing professors and coaches should be designed to safeguard the well-being of persons for whom they are responsible, rather than for the benefit of those in power.

Again, the problem lies in enforcement, and an unsophisticated, vulnerable group that may not know of these protections for them.

Finally, I speak as a parent of three young children and it disturbs me how gender equity is communicated. For example, our son was born five years ahead of our daughters. When they were born, his standard of living declined, particularly the standard of time that we were previously able to devote to him. Rather than being discriminated

⁹ See NCWGE, "Working to Ensure Gender Equity in Education" 2012. Available at: <http://ncwge.org/>

¹⁰ Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and 28 C.F.R. § 54.135(b) (requiring schools to "adopt and publish" policies and procedures "providing for prompt and equitable resolution" of student complaints).

¹¹ Deborah Brake and Mariah Burton Nelson, "NCAA; Staying in Bounds: A Model Policy to Prevent Inappropriate Relationships Between Student-Athletes and Athletic Department Personnel" (2012); "Recognizing, Reducing and Responding to Misconduct in Sport: Creating Your Strategy" USOC, 2012. Available at: <http://pressbox.teamusa.org/Article%20Documents/USOC-Safe-Sport-Handbook6289729f-d229-47be-a627-1390d20a6ced.pdf>

See also, Safe4athletes, an organization dedicated to preventing athlete abuse in all its forms, particularly in club sports. www.safe4athletes.org

against, he had to share family resources with a larger group. Conversely, it would not be fair or equitable to deny our daughters educational opportunities just because our son was born first.

I could easily make my son resent his sisters if, when he asked for more than our family resources can accommodate, I said, “you deserve it, but because of the law, you cannot have it. Sorry, it isn’t my fault.” Yet schools regularly blame the law when denying a male group’s request for resources. Title IX is invoked as an excuse for an administrator’s decision to allocate resources fairly.

I am also concerned about the inequitable resources and opportunities for all my children. When boys experience more and better funded sports, it's hypocritical for adults to then tell males that they should respect females. Males are being taught that they are more important. Because sports are one of the rare areas in education that are sex-segregated, how adults value girls' and women's sports speaks louder than any lesson. When children see flagrant disparities in resources and attention between the boys’ and girls’ sports programming, the school sends a visible message to everyone, on-campus and off-campus, that formal discrimination is acceptable.

Just a short while ago, girls heard that professions like science and the law were for our boys, yet today women account for 50% of medical school students and law school students. The stereotype that boys are innately better than girls at math and science is also widespread. But recent trends in achievement and scientific studies demonstrate that this notion is simply incorrect. Scientific research has not demonstrated that innate differences exist between boys and girls in terms of mathematical or scientific abilities.¹² Spatial reasoning abilities and math performance are not biologically “programmed” by gender. In fields like biology, psychology, and chemistry, girls now make up close to, or more than, half of those receiving bachelors or postgraduate degrees. However, participation rates of women in technical fields, particularly engineering and computer science, are still very low.¹³ To accept the notion that women are less interested in sports or science or technology than men would simply maintain existing discrimination and curtail opportunities at artificially limited levels.

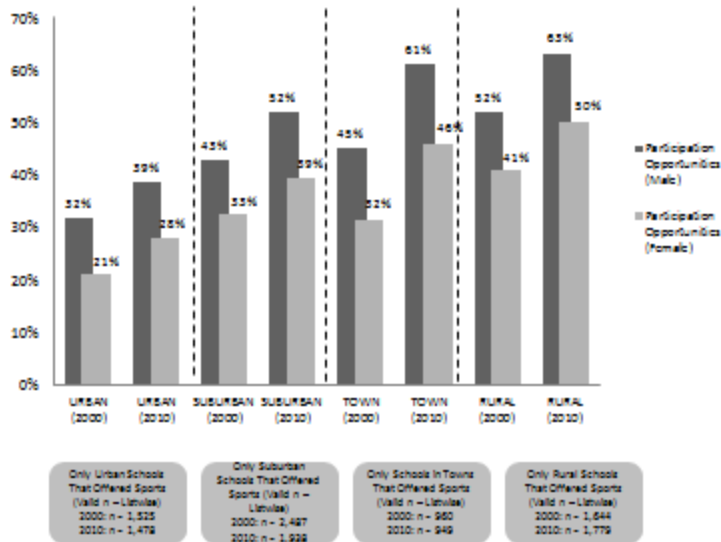
Many vocational degrees still remain divided by gender. For example, programs in cosmetology, child care, and health services have large majorities of female students, while programs in fields like auto mechanics and construction remain high in male enrollment. Women in the highest-paying sector of women-dominated fields make less than men in the lowest-paying sector.

In athletics, the stereotyped notion that girls are less interested in sports translates into fewer opportunities in every type of school, in wealthier schools and schools serving a higher percentage of students receiving federally subsidized lunches, as the two tables below demonstrate.

¹² See, NCWGE, “Working to Ensure Gender Equity in Education” 2012. Available at: <http://newge.org/>

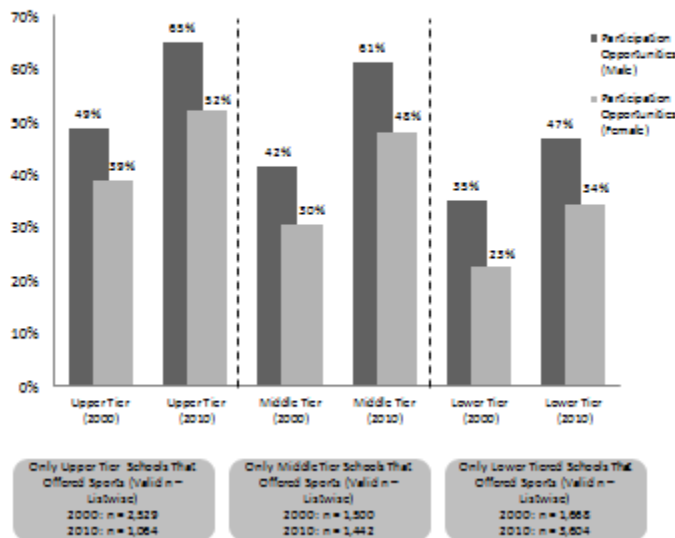
¹³ Id.

Table 2: The Percentage of Athletic Participation Opportunities that U.S. High Schools Provided to Girls and Boys, by the Type of Community Where the School Is Located, 1999-2000 through 2009-2010



WOMEN'S SPORTS FOUNDATION SHARP CENTER
 "The Decade in Decline: Gender Equity in High School Sports," a second research report in the Program without Boundaries series
 SHARP Research Center
 Don Sabo, Ph.D., O'Youville College
 Phil Veltz, Ph.D., University of Michigan
 June 19, 2012, selected findings
 Full report to be released August 2012

Table 3: The Percentage of Athletic Participation Opportunities that U.S. High Schools Provided to Girls and Boys, by Extent of Economic Resources, 1999-2000 through 2009-2010



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Put another way, interest in athletics, for both boys and girls, is dictated by opportunities that our schools provide to participate in athletics. At the Women’s Sports Foundation, we know that kids will participate in sports if they are offered. As the chart below demonstrates, high school girls in Iowa and Maine have twice as many sports opportunities as boys in Arkansas, Arizona, Utah, Florida and DC. It is not that boys in these states are uninterested in sports; it is that they do not have the opportunity provided to them. This comports with most people’s experience. Ask just about anyone why they became interested in their career or a hobby, and they’ll tell you they were given an opportunity to try it and it stuck with them.

“Interest” in Sport is Dictated by Opportunities

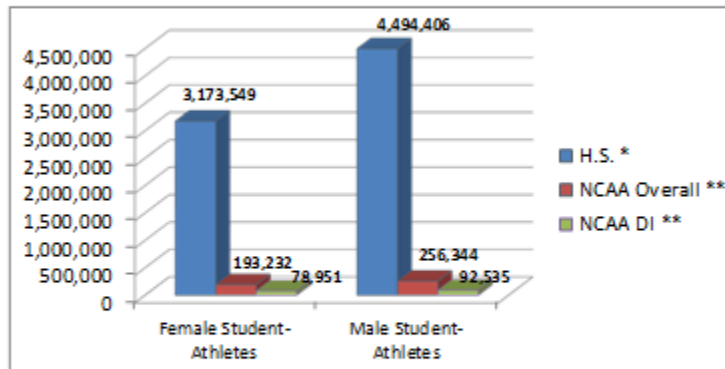


While fewer than 30,000 women participated in college sports before Title IX, today that number is almost 200,000 — over six times the pre-Title IX rate. Girls in high school now are participating at a rate of 3.1 million per year – a 1000% increase from pre-Title IX participation rates.

Demand for sports participation by *both* boys and girls far exceed our schools’ resources. There are more than six million boys and girls playing high school sports today who are vying for fewer than 450,000 college athletic participation slots. With 3.1

million girls playing high school sports, it is inconceivable that schools cannot find women to play on the teams they create.

Demand - H.S. v. NCAA Participation



*2010-2011 National Federation High School Athletic Association (www.nfhs.org) athlete data

**2010-2011 NCAA® Sports Sponsorship and Participation Rates Report (Figures include emerging and non-championship sports)

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Although athletic gains have been sweeping, women continue to lag behind men by every measurable criterion, including participation opportunities, scholarships, budgets, facilities, and recruiting. As a parent, I am concerned about the overt messages these discrepancies send to both my son and my daughters.

Conclusion

Mr. Chairman, we have many reasons to celebrate this 40th Anniversary of Title IX. It is enabling girls and women access to education, and is a tool to make the educational experience more valuable, by addressing pregnancy and parenting students and sexual harassment and assault.

While the statute, case law and regulations interpreting Title IX may seem daunting, but they all arise from the simple principle that is relevant to every question raised today: whether girls and boys, men and women, are receiving equal educational opportunities.

As it relates to athletics the NCAA put it this way when it adopted Operating Principle 3.1:

“An athletics program can be considered gender equitable when the participants in both the men’s and the women’s programs would accept as fair and equitable the overall program of the other gender.”

It is imperative that we continue to work together around the shared goals embodied in Title IX to ensure that our daughters and our sons will have as many educational opportunities, and as meaningful opportunities open to them in the future.

Thank you.