

## **CWEALF Publications:**

### **Claiming Your Rights: Connecticut's Title IX Mandate for Gender Equity in Athletics**

#### **Preface**

**Claiming Your Rights: Connecticut's Title IX Mandate for Gender Equity in Athletics** is a companion to the research report **Keeping Score: A Report Regarding Connecticut Secondary Schools and Connecticut's Title IX Mandate for Gender Equity in Athletics**, produced by the Connecticut Women's Education and Legal Fund (CWEALF) 1997. **Title IX** is the federal law that mandates gender equity in educational programs, including athletics.

CWEALF, founded in 1973, a year after the passage of Title IX – is at the forefront of promoting equity for Connecticut women. CWEALF is one of the oldest and most experienced state-based women's rights organizations in the country. In addition to legal publications, its role as an advocate for women's and girls' sports equity extends to direct outreach through training and technical assistance to school districts.

**Keeping Score** was based on studies of high school policy and practice in Title IX compliance in Connecticut. A complex picture emerged from this study. Since the passage of Title IX 25 years ago mandating gender equity in schools, girls' opportunities for athletic competition has increased significantly. Yet, those responsible for school policy are often unaware of their legal obligation to ensure equal treatment for girls' and boys' teams.

For example, contrary to major requirements of the law, CWEALF's study showed that facilities, schedules and post-season opportunities for girls were not equal to those reserved for boys; women were greatly under-represented in coaching and athletic director posts; and large numbers of students could not identify their Title IX coordinator. Overall, the study emphasized that young women are less satisfied with their sports programs than are their male counterparts.

CWEALF extends its Title IX research and advocacy in **Claiming Your Rights**, to include:

- A comprehensive overview of Title IX and how its standards are used to measure compliance
- Information about how to bring a discrimination complaint under Title IX
- Relevant court cases involving both intercollegiate and interscholastic athletics

**Title IX**, as it relates to athletics, is a highly complex and often confusing assortment of federal guidelines, policy interpretations and clarifications, and court cases at both the state and federal levels. This booklet is intended to give the reader a complete overview of the law and thus involves a great deal of legal terminology and explanations. For a condensed version of the law and its requirements, turn to the "Title IX Recap" on page 19 as well as the "Frequently Asked Questions" section on page 21.

## **Introduction**

When the modern history of American women's sports is written, Title IX, the federal law which prohibits sex discrimination in educational settings and opened the door for millions of girls to participate in school sports, will be credited with prompting this transformation.

This amendment, passed by Congress in 1972, was intended to prohibit sex discrimination in all aspects of education. From the beginning, however, it has been known primarily for the enormous impact it has had on interscholastic (high school level) and intercollegiate athletics.

While it may be difficult for many girls and young women to envision a time when they were not allowed to play sports, the playing opportunities for girls are relatively new compared to those of their male peers. For example, in 1971--before Title IX--a Hamden, Connecticut high school girl sued her school board to be allowed to compete with the boys' cross-country team because her school lacked a girl's team. A justice of the New Haven Superior Court ruled against her using a familiar stereotype: **“Athletic competition builds character in our boys. We do not need that kind of character in our girls.”**

Athletic competition builds more than just character. Research findings from the President's Council on Physical Activity and Sports report “Physical Activity and Sport in the Lives of Girls,” (Spring, 1997), concluded that exercise and sport participation for girls reduces their risk of obesity and osteoporosis. It enhances mental health by offering positive feelings about body image, self-esteem, competency and self-confidence; and reduces stress and depression. High school female athletes are more likely to have higher grades, better test scores, lower drop-out rates, and lower rates of pregnancy than their non-athletic counterparts. They are also more likely to go to college. In spite of these concrete benefits, negative stereotypes about female athletes persist. Sports opportunities for girls are still not equal to opportunities for boys.

The women who pioneered the way for the female athletes of today often went unrecognized or were devalued by sports writers and historians. Yet their stories are ones of vision, determination and courage. Sports writer J.E. Vader wrote about the first woman to run the Boston Marathon in her article “Pioneers”(reprinted in *A Kind of Grace*, 1994, Ron Rapoport, Editor). The article detailed how in 1966, Roberta Gibbs had to hide in the bushes to enter undetected into the Boston Marathon. When she had mailed in her application she was denied entry into the race on the basis that **“women were not physiologically able to run such distances.”** However, Roberta proved race officials wrong by running the 26 miles and finishing 135<sup>th</sup> out of more than 600 runners. In spite of her achievement, women did not have an Olympic long-distance race until 1984, 18 years later.

Other female pioneers are more readily recognized. In 1973, a year after Congress passed Title IX, tennis great Billy Jean King was insulted and challenged to a match by a self-proclaimed male chauvinist tennis player twenty years her senior. King trounced her “competition” with a straight-set victory, drawing a live audience of over 30,000, and creating new visibility for women’s competitive athletics. That same year, the United States Lawn Tennis Association agreed to equalize awards in men’s and women’s singles.

Capping a career including 20 Wimbledon titles, King was inducted into the International Tennis Hall of Fame in 1987. The respect she commanded was part of a shift in society’s willingness to accept women athletes as professional competitors.

1966, when Gibbs ran the Boston Marathon, may seem like a long time ago. But female athletes are still breaking barriers. In 1997, the nation watched as the United State’s Women’s Ice Hockey Team brought home the Olympic Gold after women’s ice hockey became an Olympic sport for the first time. Over the past few years, two women became the first female officials in the National Basketball Association and two women’s professional basketball leagues were established. In 1998, female athletes are continuing to break new ground.

Much of this shift was the result of Title IX. In enacting Title IX over 25 years ago, Congress was motivated by the historically low rate of women participating in school sports. The year before Title IX became law, there were 294,000 high school girls participating in sports, fewer than *1 percent* of enrolled female students. According to the Women’s Sports Foundation, by the mid-1990’s, that figure had grown to almost 2.5 million or 39 percent. While boys still participate in high school sports at a higher rate than girls do, these figures suggest a permanent change in the attitudes of young women and their mentors. By 1996, the United States sent the largest contingent of female athletes to the Olympic Summer Games. These women collectively took home 19 medals, and international audiences applauded the first generation of women to grow up under the mandate of Title IX.

It was also around this time that the television sports network ESPN discovered the potential of women’s basketball and the popularity of UConn’s Women Huskies to draw substantial viewers. The 1995 national championship game between UConn and Tennessee was the first women’s championship game to draw a television audience of over 15% of regular viewers. In 1996 ESPN began to televise the women’s collegiate basketball championships, proving that professional women’s sports have a growing fan base and can be a viable revenue source.

The status of women’s sports is a compilation of good and bad news scenarios. Clearly, women have made great strides over the past few years but there is much progress to be made. The following section details the status of female athletes in Connecticut’s schools.

## **A Report Card on Connecticut's High Schools and Colleges**

Despite progress for women in high-visibility sports opportunities, Connecticut's high schools and colleges report a lack of equitable sports opportunities. A lack of success in encouraging women and girls to participate in proportion to their enrolled numbers seems to be prevalent.

The goal of Title IX was not only to increase girls and women's participation in sports, but also to have them participate at comparable rates as male students. According to the Connecticut Interscholastic Athletic Conference (CIAC), athletic participation for high school girls in the state has increased. In 1987-88, 36% of high school girls participated in 10 sports, increasing to 49% participating in 11 sports in 1996-97 (excluding the handful of girls participating on boys' team). This compares to 63% of boys participating in 13 sports.

Percentages of participation for female athletes drop at Connecticut's largest state universities. At Central Connecticut State University, where 50% of the students are women, 41% of the athletes are women. Seventy percent of the athletic budget, and 72% of the recruiting budget, is spent on men. At the University of Connecticut, where 51% of the students are women, 41% of the athletes are women. Sixty-three percent of the athletic budget and 72% of the recruiting budget is spent on men.

These imbalances are also reflected in opportunities for women coaches and officials in Connecticut. For example, out of 954 high school basketball coaches registered with the CIAC, 32 are female. In volleyball, the number of registered official's totals 174, of which 43 are female.

It is clear that despite the advances female athletes have made since 1972, there is a long road for us to walk before full Title IX compliance is achieved. Girls and women continue to play on underfunded teams, receive sub-standard equipment, and less support and publicity generated by the school than their male counterparts.

Despite 25 years of progress, women and girls have not yet achieved full athletic equity with their male peers.

## **An Overview of Title IX**

Title IX is a civil rights law that was passed as part of the Education Amendments of 1972 and applies to **educational institutions** that receive any **federal funding**. Title IX prohibits these institutions from discriminating against students and employees because of their **sex**. The law states that:

**“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”**

20 U.S.C. § 1681 (a).

Educational programs or activities that receive federal funding are covered. In 1988, Congress passed the Civil Rights Restoration Act, making it clear that even if only one program or activity within an educational institution receives federal funding, then all of the programs within the entire school -- or school district -- must comply with Title IX. Since federal funds come into a school in many ways (e.g. financial aid, teacher training, lunch programs, and equipment for vocational instruction), Title IX's reach is broad. OCR, also known as The Office for Civil Rights of the federal Department of Education, enforces Title IX in schools

The law applies to public, private and parochial schools, from elementary levels up to and including institutions of higher education. There are certain groups that are exempted from Title IX. These include the military, school-sponsored religious programs, Girl Scouts and Boy Scouts, the YWCA and similar organizations, sororities and fraternities, and beauty pageants.

In 1992, the impact of Title IX was broadened by the landmark United States Supreme Court case Franklin v. Gwinnet County Public Schools, 503 U.S. 60 (1992). In Franklin, the Court ruled that a plaintiff that brought a suit under Title IX is entitled to monetary damages. There is no upper limit placed on the amount allowed. Thus the remedies under Title IX include "injunctive relief" (i.e., requiring the school to take action to correct or improve the discriminatory situation), monetary damages, and attorneys fees. These remedies have made it easier for plaintiffs to bring these types of cases. Thus schools are more concerned about the consequences of violating the law.

Athletic programs are considered "educational programs or activities" subject to the non-discrimination provisions of Title IX. Thus, if the educational institution receives any federal funds and is not otherwise exempt from the law, Title IX requires equity in its athletics programs. Title IX is perhaps best known for this role in promoting gender equity in athletics and that is the focus of this booklet. However, Title IX applies to a broad range of educational programs and activities and prohibits sex discrimination in all aspects of education including sexual harassment. CWEALF publishes another booklet, entitled *Sexual Harassment in Schools*, which addresses the issue of sexual harassment in education.

We now turn to Title IX's application to athletics.

### **Title IX and Athletics**

The language of Title IX (which is quoted on the previous page) does not specifically mention athletics. Therefore the Department of Health, Education and Welfare, (the original agency responsible for enforcing Title IX which is now simply the Department of Education), promulgated a series of regulations and issued a Policy Guidance about athletics. In order to help students and schools interpret Title IX and its effect on athletics, these regulations state that:

**“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any athletics separately on such basis.”**

34 C.F.R. § 106.41(a).

The word recipient refers to a “recipient of federal funds” which, as we described earlier, is very inclusive and is further defined by the Regulations. 34 C.F.R. § 106.2(h). The Regulations and Policy Guidance [which can be found at 44 Fed. Reg. 71,413 (1979)], discuss in depth the requirements of complying with Title IX in athletics.

### **What Does It Mean For a School To Be “In Compliance with Title IX In Athletics?”**

The Regulations, the Policy Guidance and various court decisions set out the three different measures to Title IX compliance:

1. Providing Equitable Athletic Financial Assistance
2. Providing Effective Accommodation of Athletes’ Interests and Abilities
3. Providing Equal Opportunity and Treatment

A school can be in compliance on any one or two of these aspects yet still violate Title IX. **Simply complying in one area does not exempt a school from compliance in the other areas.** For example, a school may provide equitable athletic financial aid and it might treat all female and male athletes equally; however, it may not sufficiently be accommodating female athletes’ interests and abilities. The following methods will help you determine whether your school is in compliance with Title IX or not:

#### **1. Athletic Financial Assistance**

Title IX requires that if a school is providing athletic financial assistance (such as scholarships), the amount of aid available to male and female athletes must be substantially proportionate to their participation rates. When OCR examines a school for compliance in this area, it will take the amount of aid available to the members of each sex and divide it by the numbers of male and female participants in the athletic program.

For example, if a school has 50 scholarships available to men and 25 scholarships available to women, but there are 75 male participants and 85 female participants playing sports, only 33% of the women will receive a scholarship, whereas 66 % of the men will receive a scholarship. More men are eligible for athletic financial aid than women, despite the fact that more women participate in sports. This result does not meet the requirement that the aid distributed be substantially proportionate.

In considering whether a school has provided aid on a substantially proportionate basis, the Policy Guidance does recognize that certain factors, such as different tuition rates for in-state versus out-of state students at some public universities, may affect scholarship

distribution. Policy Guidance gives athletic programs the flexibility to make “reasonable professional decisions concerning program development and awards.” The Policy Guidance however, does not permit any of these factors to be applied in a discriminatory way.

## **2. Effective Accommodation of Interest and Abilities**

Title IX requires that schools provide members of both sexes equal opportunity in the selection of sports and in the levels of competition. There is a three-part test that courts and OCR use to determine whether a school has effectively accommodated the interests and abilities of its students. In this aspect of a school’s athletic program, a school has to meet only one of the three parts to be considered in compliance with the “Effective Accommodation” measure of Title IX. The three parts are as follows:

a. Substantial Proportionality: Are the opportunities for male and female athletic participation substantially proportionate to the enrollment of male and female students? In other words, based on the overall ratio of girls to boys at the school, are there equitable opportunities for girls to play sports? This is measured by evaluating “participation opportunities.” A “participation opportunity” is essentially a position or slot on a team that is filled by an actual student. The number of participation opportunities that a school has is determined by looking at the number of students on a particular athletic team.

Cohen v. Brown University, 879 F. Supp. 185, 203 (D. R.I. 1995), aff’d 101 F. 3d 155 (1<sup>st</sup> Cir. 1996); cert. denied, 117 S. Ct. 1469 (1997), is the most definitive case on the issue of participation opportunities. In Cohen, the Title IX violations stemmed from Brown University’s decision to lower the status and funding of some of its women’s varsity sports teams; the issue of “participation opportunities” was crucial to the case.

When a group of women students challenged Brown’s actions under Title IX, the University offered various arguments about how to analyze “participation opportunities.” The University believed that counting unfilled slots, looking at the teams’ “peak” numbers, making assumptions about slots on women’s teams based on the equivalent men’s team and also making assumptions about student interests determined “participation opportunities.”

In the end, the court rejected all of Brown’s arguments as creating theoretical opportunities. It was stated that the best way to determine the number of “participation opportunities” is to count the number of students actually listed on a team roster.

Here is an example to help you understand what it means to be substantially proportionate:

A school has 2000 students; 1000 boys (50%) and 1000 (50%) girls. Given this 50/50 ratio, the law expects that 50% of the “participation opportunities” in athletics be for boys and 50% for girls. Therefore, if this school has 1000 athletic opportunities for students,

500 should be for boys and 500 for girls. However, if 750 of those opportunities are for boys and only 250 are for girls, then boys have 75 % of the athletic opportunities available and girls have only 25 % of the athletic opportunities. By looking at the difference in the percentage of the enrollment and the percentage of the athletic opportunity available to girls, you can determine if your school is in compliance. In this case, girls comprise 50% of the enrollment, but have 25% of the opportunities, creating a difference of 25%. Courts have held that schools having programs with a differential of 10% are not “substantially proportionate,” so a school with a 25% difference would not be in compliance.

OCR does not set a specific threshold for compliance. Instead it makes a determination regarding proportionate participation on a case by case basis because its findings rely on the institution’s specific circumstances and the size of its athletic program (Letter of Norma Cantu, Clarification of the Intercollegiate Athletics Policy Guidance: The Three-Part Test). OCR considers natural fluctuations in athletic participation numbers. They also consider whether the actual number of women represented by the percentage differential is enough to field a viable team.

For example, a school that needs to add 6 women to its rosters to make up the difference in enrollment and participation percentages (i.e. if the sports program is very small) is likely to be in compliance with this test since 6 participants are unlikely to support a viable team. However, if the school needed to add 62 athletes to its female sports program to make the percentage proportional, the school would likely be able to field a viable team and would not meet part one of the test.

A school can generally decide to allocate its participation opportunities as it sees fit, provided that it does not deny members of the “under-represented sex” -- generally girls - the opportunity to participate. A school with a large football team, for example, could decide to offer only football for its male students (if they are not “underrepresented”) and still be in compliance with Title IX. Remember, Title IX focuses on whether the **underrepresented sex** is provided sufficient athletic opportunities; in most cases, the underrepresented sex is the female athlete.

**Title IX does not mandate that a school cut a certain sports program or cut boys programs to provide more opportunities for girls. Courts have consistently left such decisions for the individual school district.** Certain schools, when faced with budgetary restrictions, have opted to cut certain sports in order to provide more equitable sports programs. However, OCR’s most recent clarification makes it clear that cutting boys’ programs alone does not guarantee compliance. Schools must demonstrate a “good faith effort,” through actual program expansion, to improve opportunities for its female students.

It is up to you, as a student, to demonstrate that your school is not providing opportunities that are substantially proportionate with your enrollment. However, even if you successfully prove that your school is not providing such opportunities, your school may

still avoid violating Title IX if it can show a history and continuing practice of program expansion in its girls' sports programs.

b. History and Continuing Practice of Program Expansion - The second aspect of this three-part test is to look at whether your school can show a history and continuing commitment to expanding its programs for the underrepresented sex (usually female athletes). If your school can demonstrate that it has been committed to developing such a program, then, despite the fact that it does not currently provide a substantially proportionate number of participation opportunities, Title IX has not been violated.

For example, if your school has created three new girls' teams in the past three years and plans to add two more in the near future, it will likely be able to show a commitment to continued program expansion. The school must be able to demonstrate this commitment to the court, and courts have examined a school's commitment thoroughly. Even if your school does not provide enough athletic opportunities for girls, if it can demonstrate a history of expanding its girls' program and a commitment to continuing expansion, this may be enough to be in compliance.

In 1996, OCR issued a letter entitled "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" which addressed this issue. The letter explained that in addition to counting the number of new sports teams, a court should also look at:

- (1) The school's history of upgrading existing teams
  - (2) The school's history of increasing the overall number of participants from the underrepresented sex
  - (3) The school's "affirmative" response to students' requests to elevate sports levels.
- Recent case law has also interpreted this Guidance to allow consideration of whether a school has shown a commitment to improving the treatment of existing girls' sports programs in order to satisfy this part of the test.

c. Full and Effective Accommodation: If your school does not offer substantially proportionate participation opportunities and cannot demonstrate a continuing commitment to program expansion, it still may be in compliance with Title IX if it can meet the third part of this three-part test, [i.e., that it has fully and effectively accommodated the interests and abilities of its female (underrepresented sex) athletes]. Again, it is up to you to show that a need or interest exists that the school has not met.

For example, there is a group of girls in your school that wish to play soccer and there is no soccer team. The number of participation opportunities for girls is thus not substantially proportionate to the number of girls in the school. It is also clear to you that the school has no plans to create any more girls' teams. At this point you must demonstrate that there are enough girls with the ability to play soccer for your school to create a team. A school does not necessarily have to create a team for one student. You also must be able to show that there are other schools that you can compete against. A school does not have to create a team if its closest competition is six hours away. The

bottom line is that if you want the school to create a team, you must demonstrate that you have the ability to field a team and the competition to play against.

If the school has met any one part of this three-part test, it has met the “Effective Accommodation of Interests and Abilities” measure of Title IX.

### **IMPORTANT NOTE ON SEPARATE TEAM SPORTS AND CONTACT SPORTS:**

Title IX does not apply to certain “contact” sports, which are defined in the Regulations as football, rugby, boxing, wrestling, ice hockey, basketball, and any other sport in which the main purpose involves bodily contact. 34 C.F.R. § 106.41(b). If a school does not have a girl’s team for these sports, it is because the school is not legally required to allow a girl to try out for the team, although your school can choose to do so. In Connecticut there are a number of schools that permit girls to play on boys’ teams, including contact sport teams such as football. Title IX, however, does not mandate that a girl be allowed to play on such a team.

If the sport is not considered a contact sport, and there is only one team for a particular sport, then the analysis is different. For example, if your school offers boys’ swimming, girls must be allowed to try out for the boys team unless there are enough girls who can compete against other girls’ teams and who want their own team. 34 C.F.R. § 106.41(b).

### **3. Equal Opportunity And Treatment**

This is the final measure that a school must meet in order to be in compliance with Title IX. Title IX requires that all benefits, opportunities and treatments of athletic teams be equivalent, although they do not necessarily have to be identical. In addition to taking into account all the factors in the previous two measures (i.e., financial assistance and effective accommodation of the interests and abilities of female athletes), Title IX specifically looks at the following aspects of a school’s athletic program:

1. Equipment and supplies
2. Scheduling practice/games
3. Travel/per diem allowance
4. Coaching/tutoring
5. Coaching compensation
6. Locker rooms and facilities
7. Medical/training
8. Housing/dining
9. Publicity

34 C.F.R. §106.14(c).

General questions to determine equity:

In considering your school's athletic program, here are some general questions you can ask to determine whether your program is being treated equitably:

*Equipment and Supplies:* Are equipment and supplies equally provided and maintained? The school cannot purchase new uniforms for the boys' teams yearly and ask that girls wear old ones. A school cannot buy new bats and gloves for the boys' baseball team and try to save money by making the girls' softball team use old and outdated equipment. **However, this rule does not require that the same amount of money be spent on each team, only that the quality of the equipment be equal.**

A school cannot attempt to justify the new equipment by claiming that a "booster club" helped provide it. By accepting money from a booster club, be it for new jackets, uniforms, or trophies, the school has given that sport an added benefit that it has not provided for the other sports in its program. A school must either provide similar benefits to the girls, or the booster club must support both boys' and girls' teams.

*Scheduling of Games and Practice Times:* Are games and practice times scheduled so that both boys' and girls' teams get an equal share of "prime" playing time? A school cannot schedule boys games on Friday nights and Saturday afternoons, while giving girls less desirable playing times when there is less likely to be parental or school support or media coverage.

*Travel/per diem allowance:* Are the boys provided transportation to away games while the girls have to find their own transportation? Are the boy's teams provided meal money but the girls expected to bring their own food? A school cannot provide transportation and food allowances to its male athletes without providing similar benefits to its female athletes.

*Coaching/Tutoring and Coaching Compensation:* Are the members of the football and boys' basketball teams provided with special tutoring if they are having problems with a particular class, but the members of the girls' basketball team do not have access to tutoring? Does the coach of the boys' basketball team have a degree in coaching, 10 years of experience and three assistant coaches but the coach of the girls' team has no experience, no degree in coaching and no assistants? Does the coach of the boys' basketball team receive a salary, but the coach of the girls' team is a volunteer? A school cannot provide a benefit, such as tutoring, to the members of the football and boys' basketball teams and not provide a similar benefit to the members of the girls' basketball team. In addition, schools should search for qualified coaches for both its girls' and boys' programs.

A school can compensate coaches differently and even require different qualifications. However, if the girls' team can show that the different compensation or qualifications has affected their success as a team, there could be a Title IX violation.

*Locker rooms and facilities:* Is the girls' athletic locker room too small, and provides only limited locker space, but the boys' locker room is large and each team member has his

own full-size locker? As girls have become more involved in sports, complaints about this type of unequal treatment have been the subject of recent publicity in certain Connecticut towns where older high schools were not designed to accommodate large numbers of female athletes. Such different treatment can be a violation of Title IX.

*Publicity:* Does the school provide cheerleaders and bands for the boys' basketball games but not the girls'? Does the school publicize the results of the boy's games on the P.A. system but not the girls'? Under Title IX, these are signs of unequal treatment.

**You should remember that these are examples. Simply providing one unequal benefit may not violate Title IX, but consistent unequal treatment that disadvantages female athletes will. If you feel that you are not being treated equally you should complain to your coach, your athletic director, your principal, your superintendent or your Title IX coordinator.**

### **How Has the Law Been Applied?**

The following section briefly describes some of the recent cases and concerns surrounding Title IX and offers further explanation for the above discussion.

As discussed earlier, Title IX received increased attention with the court's ruling in Cohen v. Brown University, 879 F. Supp. 185, 203 (D. R.I. 1995), aff'd 101 F. 3d 155 (1<sup>st</sup> Cir. 1996); cert. denied, 117 S. Ct. 1469 (1997) which we discussed in the context of participation opportunities. This was the first high-level court decision to thoroughly analyze Title IX in athletics. Prior to this case, Brown University was considered a leader in women's sports and had one of the largest women's athletics programs in the country. Brown University, however, was ultimately found to be out of compliance with Title IX.

The Cohen case stemmed from Brown University's decision to demote the women's gymnastics and volleyball teams from varsity to club status in order to cut its athletic budget. Brown also cut varsity funding for two men's teams, water polo and golf. These cuts resulted in a loss of funding, coaching and facilities for each of these teams. Members of the women's teams claimed that these cuts violated Title IX by denying them opportunities to participate in collegiate athletics. As a result, they sought an injunction to restore these two teams. The district court granted their injunction and the appeals court upheld that order, mandating that Brown restore varsity status to the women's teams.

After a trial on the merits of the case, the District Court determined that Brown had violated Title IX by failing to effectively accommodate the interests and abilities of its female athletes. The Court held that the participation opportunities at Brown were not substantially proportionate to Brown's enrollment, that Brown had not shown a commitment to increasing the number of participation opportunities for women, and that it had not effectively accommodated the interests of its female students. Furthermore, the

Court determined that the men's and women's teams within Brown's intercollegiate varsity program were not treated equally.

In this case, judges who took seriously the right of women athletes to equal participation, scrutinized Brown's entire athletic program. When measured against each part of the three-part test, Brown's program was found to be out of compliance with Title IX. This case has received national attention for its emphatic stand in enforcing Title IX and its mandate of equal treatment for women's school-sponsored sports. It is now considered the standard for Title IX compliance.

Another important development in Title IX, particularly within Connecticut's federal circuit, was the decision in Boucher v. Syracuse University, 1998 WL 167296 (N.D.N.Y. 1998). In Boucher, seven members of the women's lacrosse team and one member of the women's club softball team alleged that Syracuse discriminated against them. The women stated that Syracuse had denied them proportionate participation opportunities, provided unequal athletic benefits to its female athletes as compared to its male athletes, and failed to provide athletic scholarships to its female athletes in proportion to their athletic participation.

A crucial issue for the court was whether Syracuse could demonstrate a history and continuing program expansion. The plaintiffs argued that, because Syracuse had not added any new women's teams between 1982 and 1995, it could not meet this part of the test. However, the court looked at Syracuse's overall treatment of its female athletes, including the fact that Syracuse increased women's scholarships and enhanced its sports programs with better coaching and increased support services. The court also looked at the school's plans to add more teams in the next year and found that Syracuse met the "history and continuing program expansion" portion of the Effective Accommodation of Interests and Abilities measure and was therefore in compliance in this area.

There are a few other cases worth mentioning here:

In Daniels v. School Board of Brevard County, 1997 WL 755039 (M.D. Fla. 1997), members of a girls' high school varsity softball team sued the school board, alleging unequal treatment between the boys' baseball team and the girls' softball team. The baseball field had lights for night play, electronic scoreboard, batting cage, bathroom facilities and concession stand/announcer's booth; the girls' field was old and had none of these amenities. Although the school tried to avoid liability by arguing that the benefits were provided as a result of booster club donations, the court did not accept this argument. The court determined that the girls' softball team was being harmed because the school was not sending a clear message that the girls' team was as important as the boys' team. The court agreed to a temporary injunction, which prevented the boys' team from using their lights or holding night games until the situation was resolved.

Even state and national athletic associations have been held to the rules and regulations of Title IX. This includes the standard setting National Collegiate Athletic Association (NCAA). NCAA's rules govern college sports including how sports' scholarships are

awarded. The recent court decision may result in NCAA-member colleges raising scholarship limits for women athletes to equal the higher limits set for men. See, **Smith v. NCAA**, 139 F.3d 180 (3<sup>rd</sup> Cir. 1998).

In Horner v. Kentucky High Sch. Athletic Ass'n., 43 F.3d 265 (6th Cir. 1994), a case brought by Kentucky's female softball players, the court similarly ruled that a state athletic association was subject to Title IX mandate to provide equal opportunity. The players sued, claiming that the state high school athletic association provided unequal athletic opportunity by not sanctioning a sufficient number of girls' sports. They also claimed that the lack of fast-pitch softball put them at a disadvantage in competing for college athletic scholarships. The court agreed, stating that under Title IX, the association was legally obligated to meet the girls' needs equally.

In addition to Title IX complaints, challenges have also been brought under state and federal equal protection laws and have met with varying degrees of success. Typically, male athletes who want to play on girls' teams such as field hockey have brought them.

In a very recent United State Supreme Court case about Title IX, Gebser v. Lago Vista Independent School Dist., 118 S.Ct. 1989 (1998), the Court imposed a higher standard of proof on students seeking damages from a school district for sexual harassment under Title IX. As of this writing, it is unclear whether that standard applies to sex discrimination claims in athletics. Furthermore, there is a move to have Congress enact a law overruling this decision because it thoroughly disadvantages students who are victims of sexual harassment.

### **How Can a Student Enforce Her Title IX Rights?**

What does the enforcement of Title IX in athletics mean to you as a student?

Under the law, you can file a complaint with your school, make a complaint through the federal office of the Department of Education's Office for Civil Rights (OCR), or file a lawsuit.

#### **1. In-House Grievance Procedures**

The Title IX regulations require that all school district appoints a "Title IX Coordinator." This is a person within the school district who is responsible for the district's compliance, including taking Title IX complaints and publicizing grievance procedures. According to regulations interpreting Title IX, students must be notified about the name, office and phone number of the district Title IX Coordinator (34 C.F.R. § 106.8 (B)).

Can you identify your school Coordinator? Unfortunately, very few students can identify their Coordinator, and some districts have not even appointed one. You should find out who your district's Title IX Coordinator is. If there is not one, call CWEALF and we will assist you in getting your district to appoint one. **It is your right to know whom your**

## **Title IX Coordinator is, how Title IX applies to your school, and what your school has done to comply with Title IX in its programs and activities.**

The regulations also require that your school adopt and publish a grievance procedure (34 C.F.R. § 106.8 (B)). This is a procedure by which a student can complain internally about a discriminatory act, including about inequity in athletics. Again, if your district does not have a grievance procedure, contact CWEALF.

### **2. Pursuing a Grievance through the Office for Civil Rights (OCR)**

If you are unable to resolve the matter within your school system, you can contact OCR, which, as we have mentioned, is part of the Federal Department of Education and is the office responsible for enforcing Title IX. The office covering Connecticut is located in Boston. (OCR's address and phone number is located at the back of this booklet.) When a student has first attempted resolution by filing a complaint through an internal grievance procedure, OCR allows up to 60 days after the resolution process for the complainant to contact OCR.

You do not have to try to resolve the issue yourself; you can contact OCR without trying to resolve the situation in your school. You must file a "Discrimination Complaint Form," with OCR within **180 days** after the discriminatory act took place. Under some circumstances, this time period can be extended an additional 60 days. **Please note** that 180 days does not constitute six months. In some cases, it is slightly less than six months.

OCR will send you a form, which asks for the school and persons or groups involved, a description of the discrimination, and whether an internal grievance procedure was followed. You have to agree in writing to have your identity released to your school, and you have the right to refuse personal identification. OCR will investigate all valid complaints and try to resolve any violations by obtaining a voluntary compliance agreement with the school.

A complaint can be filed with OCR by a parent, a student, or even a person with no direct connection to the discriminatory event. **Title IX prohibits retaliation for filing a complaint.** Thus, you should not suffer any negative action – such as being cut from a team or given less playing time – just because you filed a Title IX complaint.

If a school agrees to undertake voluntary corrective actions, it will not be cited for a Title IX violation. OCR will monitor implementation of the corrective actions. They will close the complaint upon completion of the corrections. They are also able to close the complaint but have the option of re-opening the investigation if the school fails to achieve its corrective plan.

When a school refuses to take voluntary actions, OCR can conduct an administrative hearing and ultimately suspend, terminate or refuse to grant Federal financial assistance.

**However, it is important to note that no school has ever lost its Federal funding as a result of a Title IX violation!**

### **OCR Complaints in Connecticut**

A review of recent OCR complaints filed against Connecticut schools shows that the majority were resolved with some type of voluntary compliance agreement between the particular school district and OCR. The complaints generally relate to participation opportunities and inequities in treatment, such as inadequate locker room facilities or game times and practices.

Since 1980, OCR has issued 13 “letters of findings” or “letters of closure” in regards to complaints brought against Connecticut high schools and universities. Since 1981, only seven have addressed issues within a public high school. In almost all of these cases, OCR worked with the school to reach a voluntary compliance agreement. The complaints cover a wide range of issues, from the separation of students in physical education classes, to complaints over unequal treatment of sports teams in areas such as uniforms, fields, budget, locker rooms and support services (such as cheerleaders), to complaints over unequal participation opportunities. OCR’s findings and closure letters are public information. If you would like to see how OCR has addressed certain issues in other schools, you can contact OCR to get copies of these decisions. (OCR’s address is located at the back of the booklet.)

### **3. Bringing A Private Lawsuit**

You can bring a lawsuit against your school by filing your claim in court. You can file a lawsuit if you have used the school grievance procedures and are unsatisfied with the result or if you simply believe that filing in court is necessary to achieve results. However, you cannot bring a private lawsuit if you have utilized the OCR procedure.

### **4. Which Option is Best for You? The Pros and Cons of OCR and a Lawsuit.**

When you are considering which option best suits your goals, there are some important points to consider:

1. To succeed in court, you will most likely need to hire an attorney to represent you in your lawsuit. At OCR, it may be possible to proceed without an attorney.
2. While an attorney might agree to do the work without requiring you to pay a fee (pro-bono or on a contingency basis), there are still associated court costs which do not apply to a complaint filed with OCR.

3. If you file your claim in court, you may be entitled to temporary relief while your lawsuit is pending. For example, if your complaint is that you cannot try out for the golf team because of your sex, the court could halt all tryouts until the issue is resolved. OCR does not have this ability.
4. If you go to court and win your case, you are entitled to have your attorneys fees paid by your school district. Additionally, you can receive compensation for monetary damages. OCR cannot award such damages.
5. A private lawsuit can be filed only by the student affected (or her parents/legal guardians on her behalf). An OCR complaint can be filed by anyone concerned about the discrimination.
6. The statute of limitations for filing an action in court is considered to be three years; the time limit for filing an OCR complaint is much shorter: within 180 days of the discriminatory act.
7. If a case involves a student or students who have graduated from school, a court may have to declare the case moot, i.e., no longer presenting a legal dispute. OCR can and must continue its investigation.

## **Title IX Recap**

As discussed earlier in this booklet, Title IX was passed by Congress in 1972 and was written to prohibit sex discrimination in all aspects of education. Athletic programs are considered educational programs and therefore must comply with Title IX. Any school receiving any type of federal funding for *any* program must ensure that *all* of its programs comply with Title IX.

There are several steps that should be taken to determine whether your school is in compliance with Title IX. The first step is to compare the percentage of enrolled female students and the percentage of the enrolled male students to athletic participation rates. For example, if half of the student body is female and half is male, you would expect that roughly half of the athletes would be female and half would be male. If this is not the case, your school may be out of compliance.

However, there are other measures of compliance to consider. A school can be in compliance if it can demonstrate that it has a history of expanding athletic programs for girls and that it is continuing to do so. Using the previous example, if only 40% of the athletes are girls, a school can still be in compliance if they can show that they are consistently adding teams for girls and expanding the program to accommodate more female athletes and girls teams.

If the school cannot meet either of these criteria, it can still be found in compliance by demonstrating that it has met the interests and abilities of its female students. For example, if there is no additional interest in sports, or if there are not enough girls to field an entire team, the school may be in compliance.

Schools that have a high number of girls participating in sports still may not treat their female and male athletes equally. For example, boys' teams may receive better equipment and uniforms, have more assistant coaches or have bigger locker rooms. Boys may have games scheduled during "prime" playing times, have cheerleader and band support and get booster club support while girls do not receive these same benefits. These are all areas of "athletic treatment and benefits" that should be considered when determining compliance.

If you feel that your school does not treat its female and male athletes equally, you can talk to your school's Title IX Coordinator, file a complaint with the Office for Civil Rights (OCR) or bring a private lawsuit against the school. You can also call CWEALF's Information and Referral Program at 800-479-2949 (toll-free) or 860-524-0601 (Greater Hartford). It is illegal for you to receive disciplinary measures, be cut from a team or lose playing time because you have filed a complaint.

CWEALF hopes that this booklet will help facilitate discussion on gender equity in sports and serve as a starting point for individuals who want to work towards Title IX compliance in schools.

## Frequently Asked Questions

### **Is football “counted” when looking at the number of teams a school supports for boys and for girls, or does it have “special status”?**

Football does not have special status! It is counted as part of the regular athletic program in all measures of Title IX compliance. Not only must the football team be counted, but the numbers of players on the football team also are included when counting the number of males and females accommodated by athletics. When a school chooses to have a football team and as a result has an imbalance in the number of athletic opportunities available for men and for women, the school must solve its problem by creating more opportunities for women or by reducing the number of other opportunities for men. How this is accomplished is up to the school. However, nowhere does Title IX mandate cutting men’s sports.

### **Since football generates revenue, are their players entitled to better treatment?**

Absolutely not! At over 80% of National Collegiate Athletic Association (NCAA) colleges, football does not generate enough revenue to pay for itself. Title IX does not mandate equal expenditures for boys’ and girls’ teams (i.e. football players need more equipment than cross-country runners). Title IX also does not shield a school from its obligation to provide uniforms equipment and supplies for the women’s teams that are of equal quality and are replaced on a similar schedule. Allowing special consideration to football, or any other sport, because it may earn money would clearly be justifying discrimination for economic reasons.

### **Must girls have the same sports programs as boys?**

Title IX does not require that girls and boys have identical athletic programs. The requirement is that the athletic ability and interests of girls must be similarly accommodated. OCR will look at the total program for boys and compare that to the girls’ program, looking at whether standards for equal treatment are met.

### **At awards night, can players on the boys’ basketball team get letter jackets from the booster club while members of the girls’ team receive certificates from the school?**

According to OCR, this unequal treatment is a violation of Title IX. If the school permits a booster club to raise money for certain sports teams and not others, the school is violating the section of the law covering “Provision of Equipment and Supplies.” In such cases the schools must provide benefits and services to all athletic programs equally or require that the Booster Club do so.

### **Can cheerleaders and school bands be provided for boys’ teams and not for the girls’?**

Definitely not! OCR regards all spirit-boosting activities as “publicity services.” They must be available for girls’ and boys’ teams equally.

### **Is cheerleading considered a varsity sport?**

Generally, no. However, if the team has a coach, and competes against other cheerleading teams more often than it cheers for other teams, then it may meet the standard of “varsity” team.

### **What if the boys’ team plays in a newly equipped gym while girls are still playing in an old and poorly equipped facility?**

Title IX is violated when a school fails to provide equivalent facilities for boys and girls.

### **Is Title X violated when a large percentage of the school’s athletic budget is spent on boys’ sports?**

Title IX does not require that schools spend the same amount of money on boys’ and girls’ sports. Instead, schools must show the reasons for this imbalance. Extra money may be needed, for example, if the costs of a certain team’s equipment and supplies are more expensive. But if a coach is unable to supply a girl’s team with needed equipment, uniforms and travel costs, any unequal treatment and benefits should be questioned.

### **Does Title IX require that boys’ athletics be cut in order to provide equal opportunity for girls?**

No. Title IX allows each school to determine how it will fulfill its obligation to provide equivalent quality and opportunity for female athletes. Girls’ sports are not to blame if a school decides that the only way it can move toward equality is to eliminate some sports teams for boys.

### **Can a coach be fired for filing a Title IX complaint?**

No. Laws protect people against retribution for speaking out and for filing complaints. But if a coach or anyone would rather not speak out directly, a complaint can be filed confidentially or filed by another person. An OCR complaint can be filed by anyone with knowledge of the discrimination, not just those directly affected.

### **Are town recreation programs covered under Title IX?**

Title IX has not been interpreted to cover town recreation programs. If you feel that your town program is treating its boys’ and girls’ teams unequally, you should speak with your coach and your parents. You may be able to file a lawsuit under your state and federal constitution or your state laws providing equal access to public accommodations.

### **Can girls play on boys’ teams? What about “contact sports?”**

If there is no girls’ team for a specific sport but there is a boys’ team, that girl must be allowed to try out for the boys’ teams. If there are a sufficient number of girls to create an entire girls’ team and they have the ability and opportunity to compete (and the school has not met the interests and the abilities of its female students), the school must support the team. However, if that sport is classified as a “contact sport,” (for example, football, ice hockey) the school does not have to allow the girl to compete with the

boys. In other words, schools may allow girls to compete on contact sports but are not required to do so under Title IX. For further discussion and a complete list of contact sports, see page 9.

**Can boys play on girls' teams?**

While individual school policies may vary, Title IX is directed at equalizing athletic opportunities for members of the underrepresented sex – traditionally girls. There is currently debate over whether boys can be considered “underrepresented” in specific sports such as field hockey and volleyball and therefore be allowed to compete.

## **Title IX Compliance Tests**

### **Abstract**

Athletic programs are considered “educational programs or activities” subject to the non-discrimination provisions of Title IX. The law applies to public, private and parochial schools, from the elementary level up to and including institutions of higher education. Title IX has three “measures” that schools must pass to demonstrate compliance:

### **Measure I. Athletic Financial Assistance**

Institutions must provide reasonable opportunities for athletic scholarship awards for members of each sex in proportion to the number of students of each sex that are participating in the athletic program.

### **Measure II. Effective Accommodation of Students' Interests and Abilities**

#### ***Three-Part Test***

Test one: Substantial proportionality

The first test compares the ratio of male to female participants in the athletic program with the ratio of male to female students. If the ratios are close, the school is probably in compliance in this area and does not have to address the following two components of Measure II.

Test two: History and continuing practice of program expansion

If the school has not met the proportional representation requirement, it can still show compliance by meeting the second test of showing a history and continuing pattern of program expansion for girls. The institution must demonstrate that it has expanded the athletic opportunities for girls over recent years.

Test three: Full and effective accommodation of interests

If the first and second tests are not met, schools can still show compliance by demonstrating that the interest and abilities of girls are “fully and effectively accommodated” and therefore there is no need for further expansion of existing athletic programs. It is difficult to comply with Title IX by arguing insufficient interest. However, the burden of proof that an existing interest has not been met is on the individual making the complaint.

### **Measure III. Equal Treatment and Benefits**

A school that passes the Effective Accommodation test can still be out of compliance in the area of Treatment and Benefits. This area of compliance requires that schools satisfy a list of more specific requirements that concern the administration and management of sports. There are several areas in which students must receive equal treatment:

1. Equipment and supplies
2. Scheduling practice/game
3. Travel/per diem allowance
4. Coaching/tutoring
5. Coaching compensation
6. Locker rooms and facilities
7. Medical/training
8. Housing/dining
9. Publicity

**We hope that this booklet has been able to guide you through the different aspects of Title IX. The following is a list of resources that you may want to look through before taking your first step:**

## **Resources**

### **Where to learn about your legal rights or to locate an attorney:**

#### **CWEALF's Information and Referral Service**

(800) 479-2949 (Toll-free)

(860) 524-0601 (Greater Hartford)

Monday through Friday

*For information on your legal rights and referrals to attorneys.*

#### **Connecticut Women's Education and Legal Fund (CWEALF)**

135 Broad Street

Hartford, CT 06105-3701

(860) 247-6090 / Fax (860) 524-0804

*To schedule a workshop or to request technical assistance.*

#### **Permanent Commission on the Status of Women (PCSW)**

18-20 Trinity Street

Hartford, CT 06106

(860) 240-8300

### **Where to file a complaint:**

#### **Office for Civil Rights Regional Office**

Regional Civil Rights Director

Office for Civil Rights, Region I

U.S. Department of Education

J.W. McCormack Post Office

and Courthouse Building, Room 222

Boston, MA 02109-4557

(617) 223-9667

### **Other**

#### **Women's Sports Foundation**

Eisenhower Park

East Meadows, NY 11554

1-800-227-3988

e-mail: [wosport@aol.com](mailto:wosport@aol.com)

<http://www.lifetimetv.com/wosport>

#### **National Association for Girls and Women in Sports**

1900 Association Drive

Reston, VA 22091  
(703) 476-3400

**National Women's Law Center**

11 Du Pont Circle NW  
Suite 800  
Washington, DC 20036  
(202) 588-5180

**NOW Legal Defense and Education Fund**

99 Hudson Street  
New York, NY 10013  
(212) 925-6635