

**TESTIMONY OF MARCIA D. GREENBERGER
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**BEFORE THE SUBCOMMITTEE ON HIGHER EDUCATION, LIFELONG
LEARNING, AND COMPETITIVENESS OF THE HOUSE COMMITTEE ON
EDUCATION AND LABOR
ON
BUILDING ON THE SUCCESS OF 35 YEARS OF TITLE IX**

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I am Marcia Greenberger, Co-President of the National Women's Law Center. Thank you for the invitation to appear before you today to mark the 35th anniversary of enactment of Title IX of the Education Amendments of 1972 (Title IX), the bedrock federal law that bans sex discrimination in federally funded education programs and activities. On this anniversary, there is much to celebrate; women have made significant progress in education in the last three and one half decades. But the job is not yet finished and the playing field is not yet level; much remains to be done to ensure that women have truly equal access and opportunities in all areas of education.

The Center is a non-profit organization that has worked since 1972 to advance and protect the legal rights of women and girls across the country. The Center focuses on major policy areas of importance to women and their families, including education, employment, health and reproductive rights, and economic security – with particular attention paid to the concerns of low-income women. Founded in the year that Title IX was passed, the Center has devoted much of its resources to ensuring that the promise of Title IX becomes a reality in all aspects of education.

In recognition of this year's anniversary, the Center is today releasing a variety of informational and enforcement materials which I will discuss in my testimony. These include a national survey of 1,000 likely voters that measures support for and understanding of Title IX; an analysis of the athletics complaints filed with, and compliance reviews conducted by, the Department of Education's Office for Civil Rights over the last five years; a legal manual that provides a step-by-step approach to educate those subject to discrimination in athletics, as well as their advocates and attorneys, on how to assert a Title IX claim; and a website designed to enable the public to hold their schools accountable for compliance with the law. These resources are intended to help to realize Title IX's as yet unfulfilled promise of true gender equity in the classrooms and on the playing fields.

Title IX was enacted in 1972 as a broad proscription against discrimination in any federally funded education program or activity. It states simply:

*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 education program or activity receiving Federal financial assistance.*¹

Title IX applies to all public elementary and secondary schools and to virtually every college and university. It was intended to ensure equal opportunity for women and girls in all aspects of education – from access to higher education, to equal opportunities and fair treatment in elementary and secondary classrooms, to equal chances to participate in athletics programs. In passing Title IX, Congress recognized the critical role that education plays in promoting economic security for women and their families and mandated the broadest scope of protection against sex discrimination in school.

Congress' vision has borne fruit. Thirty-five years after enactment of the law, we have more female doctors and lawyers. The number of girls going to college has exploded; young women today comprise over half of the undergraduate students in the country, an increase of more than 160% from their representation in 1972.² The explicit exclusions of, and quotas for, women in education that were so prevalent 35 years ago have long since disappeared – or at least been driven underground.

In athletics as well, the progress of women and girls has been transformative. When Congress passed Title IX in 1972, fewer than 32,000 women competed in intercollegiate athletics.³ Women received only 2 percent of schools' athletics budgets, and athletic scholarships for women were nonexistent.⁴ Today, the number of college women participating in competitive athletics is now five times the pre-Title IX rate. In 2004-05, a record number of 166,728 women competed at the college level, representing 42% of college athletes nationwide.⁵

Title IX has also had a tremendous impact on female athletic opportunities at the high school level. Before Title IX, fewer than 300,000 high school girls played competitive sports.⁶ By 2005, the number had climbed to 2.95 million, an increase of almost 900%.⁷

And Title IX has garnered overwhelming public support. The national survey the Center is releasing today confirms that more than eight in ten voters – or 82% of adults - support Title IX.⁸ In fact, support for the law is intense, with nearly two-thirds (65%) strongly supporting the law and fewer than one in ten (9%) strongly opposing it. This support crosses the political spectrum; 86% of Democratic voters and 78% of Republican and independent voters favor the law.⁹

Moreover, Americans are nearly unanimous in backing those who take action to redress discrimination. Eighty-eight percent of respondents to the survey support girls or their parents taking action to address situations in which girls' high school teams are being treated worse than the boys' teams. This support is consistent across genders and political affiliation.¹⁰

But despite this progress, significant problems remain. Girls, like their male peers, are dropping out of high school at dangerously high rates. In fact, one in four girls overall, and nearly one in two African American, Hispanic, and Native American female students, fail to

graduate with a diploma each year.^{11,12} While girls in each racial and ethnic group fare better than boys of the same race or ethnicity, moreover, Black, Hispanic, and American Indian/Alaskan Native female students graduate at significantly lower rates than White and Asian-American males. And tellingly, the consequences for girls who fail to graduate from high school are profound and deeply disturbing. Female dropouts are at much greater risk than their male peers of being unemployed. They make significantly lower wages and are more likely to rely on public support programs to provide for their families.

Another example of the pervasive barriers that remain can be found in career and technical education (CTE). The divide between boys and girls in CTE has barely narrowed since Congress passed Title IX 35 years ago. Just as in the 1970s, high school girls are the vast majority of those who enroll in traditionally female courses, such as cosmetology and child care, while boys make up all but a tiny percentage of the students in traditionally male fields such as auto mechanics and construction and repair. This sex segregation in the nation's vocational classrooms - and the relegation of girls to traditionally female programs - has deep impact on the earning power and job prospects of the young women who graduate from these programs. Girls who take up traditionally female occupations can expect to earn half - or less - what they could make if they went into traditionally male fields like auto repair, welding, or engineering.¹³

As my colleagues on the panel today will discuss, similar problems plague women in science, technology, engineering and math – the STEM disciplines. And as you will also hear, sexual harassment remains all too widespread, creating hostile educational environments for far too many young women at every level of education. All of these are areas in which Congress must act – to ensure that the strongest possible legal standards exist to protect the civil rights of young women; to mandate that the Department of Education and other Title IX enforcement agencies take the proactive and comprehensive steps necessary to enforce the law; and to ensure that Title IX's promise of true gender equity becomes a reality.

For my testimony today, I would like to focus on Title IX's impact on athletics and the steps that still must be taken to create a level playing field for our nation's daughters.

I. Women and Girls Still Face Persistent Discrimination in Athletics.

Notwithstanding the extraordinary gains that women have made, female participation in intercollegiate sports remains below pre-Title IX male participation: while 170,384 men played college sports in 1971-1972, only 166,728 women played college sports in 2004-05.¹⁴ In addition, participation opportunities as well as resources for women's athletic programs continue to lag behind men's. Women receive only 43% of the opportunities to participate in college sports,¹⁵ even though they comprise 55% of today's undergraduates.¹⁶ In Division I, they receive only 45% of athletics scholarships, 37% of athletics operating expenses, and 32% of the dollars spent on recruiting.¹⁷

The persistence of discrimination is further illustrated by recent research. The survey being released by the Center today shows that 22% of respondents – a sample that represents more than 50 million adults -- were aware of recent situations in which girls' sports teams in

high school or college were being treated worse than boys' teams.¹⁸ Moreover, the Center has just concluded a new examination of the athletics complaints filed with, and compliance reviews conducted by, the Department of Education's Office for Civil Rights over the last five years. This review reveals that 35 years after the enactment of Title IX, women are still given fewer opportunities than males to participate in sports, and, when they do play, are treated like second-class citizens in the facilities, equipment, coaching, publicity and other support services that they receive. Here are some of the key findings of the Center's report, *Barriers to Fair Play*:¹⁹

- **Discrimination against girls and women in sports remains widespread.** There were 416 athletics complaints filed with OCR between January 1, 2002 and December 31, 2006 – likely just a fraction of the number of complaints that were raised informally with schools during that period. The OCR complaints challenged discrimination against girls or women 11 times more frequently than they claimed discrimination against males, demonstrating concretely that the playing field is still far from level for female athletes.
- **Schools' second-class treatment of female athletes, even when they are given a chance to play, is a particular concern.** While more than one-quarter of the complaints overall challenged schools' failures to provide sufficient participation opportunities for girls and women, more than half – 54% - challenged inequitable treatment of girls' or women's teams once female athletes were allowed to play. Among complaints filed by or on behalf of girls, moreover, fully 60% of the allegations concerned inequities in treatment of female teams. And many of the treatment complaints – particularly those concerning disparities between girls' softball and boys' baseball teams, such as in the quality of softball versus baseball fields – identified blatant and egregious inequities that had persisted for many years.
- **Coaches fear retaliation if they complain, so the burden typically falls on students and their parents to protest discrimination.** Although coaches have greater access to information and are often in the best position to perceive and challenge discrimination, coaches filed only just shy of 8% of the 416 complaints made during the relevant period. Tellingly, a full 50% of those complaints alleged retaliation in addition to other forms of discrimination against the coaches and their female athletes.
- **Discrimination complaints filed by or on behalf of female athletes were far more likely to be meritorious enough to secure changes than complaints filed by or on behalf of male athletes.** Schools made changes to their athletics programs in response to complaints filed by or on behalf of female athletes at close to five times the rate at which they made changes in response to complaints filed by or on behalf of male athletes. As a corollary, OCR found no violation in almost double the number of complaints filed by men as in complaints filed by women.

In addition to, and reinforcing, the report and survey the National Women's Law Center is issuing today, the Women's Sports Foundation last week released a new report, "Who's Playing College Sports," which includes an analysis revealing the disparities that still exist between men's and women's participation opportunities in intercollegiate sports. These

resources all confirm the persistence of discrimination against women and girls on the playing field.

II. OCR Enforcement Efforts Have Fallen Short.

Significantly, *Barriers to Fair Play* also reveals that OCR has failed to take the proactive steps necessary to combat discrimination in athletics. In some cases, moreover, the agency delayed justice or placed unreasonable burdens on complainants.

In addition to responding to complaints, OCR is responsible for initiating assessments of Title IX compliance by federally funded educational institutions across the country. During the five year period covered by the Center's review, however, OCR initiated only *one* compliance review of a school's athletics program – a record substantially below that of the preceding Administration. Not only has the number of compliance reviews noticeably decreased over the past 6 to 7 years; the focus of those reviews has narrowed considerably. Between 1995 and 2000, OCR annual reports either listed equal opportunity in athletics as a focus of enforcement efforts or provided examples of compliance reviews that addressed athletics. But between 2001 and 2005, no annual reports mentioned athletics as a focus for compliance reviews, and none cited examples of athletics as evidence of successful reviews. Instead, OCR reports for 2003 through 2005 all focus on ensuring that state agencies have designated Title IX coordinators, developed and disseminated antidiscrimination procedures, and implemented grievance procedures. In fact, 50 of 59 compliance reviews between 2002 and 2006 dealt exclusively with these procedural violations.²⁰

Strong internal procedures and policies are, of course, essential for schools to adequately address substantive Title IX violations. But the existence of such policies should represent only the beginning of an inquiry about a school's compliance with Title IX's substantive requirements. A school's designation of a Title IX coordinator and the establishment of procedures are necessary but insufficient steps to ensure that real action is being taken to end sex discrimination. OCR's failure to go beyond this superficial examination of a school's policies and practices represents a damaging reduction in its enforcement efforts.

In addition, the resolution of some of the complaints filed in this period was unreasonably delayed in a number of instances; in one case, a complaint languished in the Kansas City regional office for nearly 4 1/2 years. Moreover, OCR sometimes put onerous evidentiary burdens on female athletes filing complaints, for example by refusing to investigate a complaint alleging disparities between a school's softball and baseball teams unless the complainant could produce evidence of overall program violations for all teams.²¹ This represents an abdication of OCR's enforcement responsibilities, given that complainants often lack access to the information necessary to evaluate an athletics program overall, and demonstrates the need for strong oversight over OCR's enforcement efforts.

III. Private Enforcement is Necessary to Ensure Effective Protection of Title IX Rights.

The inadequacies of OCR's enforcement point up the importance of educating people about their rights under the law and ensuring that they have the tools and the representation they need to effectively challenge violations of Title IX. In fact, the Center's own experience confirms that individuals can make an enormous difference in leveling the playing field. Here are just a few examples of individuals we have worked with and supported over the past five years:

- As you will later hear from Mr. Jack Mowatt, in 2006 the Prince George's County Public Schools Board of Education approved a county-wide Title IX settlement with the Center to ensure that girls in each of the county's middle and high schools are given equal treatment of their teams and equal opportunities to participate in sports. The settlement resulted after Mr. Mowatt brought attention to the unsafe conditions at county softball fields; as a Washington Post article, *Title IX Deal Transforms Dreams to Fields*, demonstrated during the spring, female athletes in Prince George's County were elated with the improvements the County has already begun to make.
- In 2003, Washington-Lee High School in Arlington, Virginia agreed to take significant steps toward correcting inequities that pervaded the girls' sports program. The settlement resulted after Christine Boehm, a senior and four-year member of the field hockey team, realized there were serious disparities between the treatment of male and female athletes, including the absence of a locker room for female athletes, poorly maintained field hockey fields, and fewer amenities such as permanent scoreboards and covered dugout areas. Ms. Boehm first brought the problems to the school's attention in 2002. The Center, along with the law firm of DLA Piper, negotiated the settlement to remedy the inequalities.
- In 2005, the United States Supreme Court held that Title IX provides protection from retaliation to those who challenge discrimination. In Jackson v. Birmingham Board of Education, Roderick Jackson sued the Birmingham Board of Education for firing him as the girls' high school basketball coach after he complained about the inequalities his team endured, including inferior facilities, travel arrangements to games, amenities, and financial support from the city. Following the Supreme Court ruling, the Board reached an agreement with Coach Jackson in November 2006. He returned to coaching at Jackson-Olin High School and was compensated for his financial losses. Significantly, the Board also agreed to district-wide modifications to their athletics programs to ensure that all of its schools were in compliance with Title IX.
- Earlier this year, the United States Supreme Court denied review in Communities for Equity v. MHSAA, in which the lower courts consistently found that the Michigan High School Athletics Association had violated the U.S. Constitution, Title IX and Michigan state law by scheduling six girls' sports, and no boys' sports, in nontraditional and disadvantageous seasons. A group spearheaded by two local parents, Communities for Equity, brought suit to challenge MHSAA's scheduling decisions, which meant that girls

across the state had limited opportunities to be seen by college recruiters, to compete for athletic scholarships, and to play club sports. The Supreme Court's denial of review means that justice for Michigan girls should finally be around the corner, when the Association implements a plan that will equalize the seasons in which boys and girls play in the state.

IV. More Must Be Done to Ensure that Students, Parents, Coaches and Advocates Have the Tools They Need to Enforce the Law.

As the examples above illustrate, individuals, including students, parents, coaches and other advocates, have a tremendous ability to make a difference in leveling the playing field for female athletes. But the poll the Center is releasing today shows that they need information and guidance. In the national survey, only 40% of respondents said they knew what steps to take to enforce Title IX.²² Similarly, *Barriers to Fair Play* reveals that more must be done to educate high school students and parents about their rights. Although female high school athletes file a greater absolute number of complaints than their college-aged counterparts, female college athletes file complaints at significantly higher *rates* than high school students. This trend, which likely reflects high school students' lack of knowledge about Title IX or their rights under the law, is particularly troubling because it is most often through participation in sports in their teenage years that girls not only learn life skills but become prepared to play in college and to maintain healthy lifestyles into the future.

In order to provide this education – and in the absence of adequate government enforcement of the law – the Center is today unveiling two new resources designed to enable individuals to effectively assert their rights under Title IX. The first is *Breaking Down Barriers*, a comprehensive manual that takes a step-by-step approach to educate those subject to discrimination in athletics, as well as their advocates and attorneys, on how to assert a Title IX claim. The second is a new website, FairPlayNow.org, which the Center is maintaining with the Women's Sports Foundation and regional partners from around the country including the Women's Law Project in Philadelphia, the California Women's Law Center and the Northwest Women's Law Center. FairPlayNow is designed to provide one-stop shopping for students, parents, coaches, advocates, and attorneys to learn about Title IX, find tools to evaluate their schools' compliance with the law, and use materials that can help them hold their schools accountable for remedying discrimination.

VI. Congress Must Do More to Ensure Effective Protection From Sex Discrimination.

My colleagues today will address some of the ways in which Congressional action is necessary to address the barriers that persist in STEM disciplines and the sexual harassment that continues to limit educational opportunities for far too many young women. With regard to athletics, there are three specific and concrete actions that Congress can, and must, take to ensure effective protection of the law.

First, given the rampant discrimination that still exists, Congress must exercise more oversight over OCR. With its enforcement powers, OCR can effect great changes, but this

requires a targeting of resources and a greater commitment to enforce Title IX in all areas of education. Congressional oversight can help to ensure that OCR uses all of the enforcement tools available to it, including compliance reviews and proactive measures like the provision of technical assistance, as well as that OCR applies strong legal standards and seeks effective remedies for discrimination.

Second, Congress can vastly improve the ability to address discrimination at the high school level by passing the High School Athletics Accountability Act. This bipartisan bill, which was introduced in the House by Representatives Louise Slaughter and Shelley Moore Capito, would amend the Elementary and Secondary Education Act of 1965 to direct coeducational elementary and secondary schools to make publicly available information on equality in school athletic programs. The bill would require schools to provide information about the gender breakdown of students who participate in athletics, as well the expenditures the schools make for each team. This information is already required at the college level, and is largely collected, but not disclosed, by high schools. The bill would thus fill a gaping hole in access to information that is necessary to evaluate whether schools are fulfilling their obligations under Title IX and would thereby improve the ability of students, parents and others to ensure enforcement of the law.

Third, Congress must take steps to overturn and limit the Additional Clarification that the Department of Education issued in March 2005 without notice or opportunity for public comment. This new policy is dangerous because it allows schools to show compliance with Title IX's participation requirements simply by sending an email survey to female students and then claiming that a failure to respond indicates a lack of interest in playing sports. The Clarification weakens the law by eliminating schools' obligations to look broadly and proactively at whether they are satisfying women's interest, and threatens to reverse enormous progress women and girls have made in sports since the enactment of Title IX.

Conclusion

While much progress has been made over the last 35 years under Title IX, many battles still must be fought to eradicate sex discrimination in education and enable women and girls to realize their full potential. Women and girls still face unacceptable and unlawful barriers to athletic opportunity, which continue to contribute to the "corrosive and unjustified discrimination against women" that Title IX was intended to eliminate.²³ We must use this anniversary to recommit ourselves to making the letter and the spirit of the Title IX law a reality across all areas of education.

¹ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

² U.S. Department of Education, National Center for Education Statistics (NCES), *The Condition of Education*, table 8-1, available at <http://nces.ed.gov/programs/coe/2007/section1/table.asp?tableID=672>.

³ See Department of Health, Education, and Welfare, Policy Interpretation, 44 Fed. Reg. at 71419 (1979).

⁴ Remarks of Senator Stevens (R-AL), 130 Cong. Rec. S 4601 (daily ed. April 12, 1984).

5. National Collegiate Athletic Association (NCAA), *1981-82—2004-05 NCAA Sports Sponsorship and Participation Rates Report* 72 (2006).
6. National Federation of State High School Associations (NFHS), *1971 Sports Participation Survey* (1971).
7. National Federation of State High School Associations (NFHS), *2005 High School Athletics Participation Survey* 2 (2005).
- ⁸ Memorandum from The Mellman Group, Inc. on Title IX to the National Women's Law Center, 1 (June 8, 2007) (on file with the National Women's Law Center.)
- ⁹ *Id.*
- ¹⁰ *Id.* at 2.
- ¹¹ Greene, J. and Winters, M., *Leaving Boys Behind: Public High School Graduation Rates*, Manhattan Institute Civic Report 48 (2006).
- ¹² Orfield, G., et al., *Losing Our Future: How Minority Youth are Being Left Behind by the Graduation Rate Crisis*, Cambridge, MA: The Civil Rights Project at Harvard University. Contributors: Urban Institute, Advocates for Children of New York, and The Civil Society Institute (2004).
- ¹³ See National Women's Law Center, *Tools of the Trade: Using the Law To Address Sex Segregation In High School Career and Technical Education* (2005), available at <http://www.nwlc.org/pdf/NWLCToolsoftheTrade05.pdf>.
14. See Department of Health, Education, and Welfare, Policy Interpretation, 44 Fed. Reg. at 71419 (1979).
- ¹⁵ National Collegiate Athletic Association (NCAA), *1981-82—2004-05 NCAA Sports Sponsorship and Participation Rates Report* 72 (2006).
- ¹⁶ National Collegiate Athletic Association (NCAA) *2003-04 Gender-Equity Report* 12 (2007).
- ¹⁷ *Id.* at 25.
- ¹⁸ The Mellman Group, Inc., Title IX Survey, Conducted May 22-24, 2007 1 (on file with the National Women's Law Center).
- ¹⁹ Each of the following points is drawn from the National Women's Law Center's report *Barriers to Fair Play*, available at <http://www.nwlc.org>.
- ²⁰ National Women's Law Center, *Barriers to Fair Play* (2007).
- ²¹ *Id.*
- ²² Memorandum from The Mellman Group, Inc. on Title IX to the National Women's Law Center, 2 (June 8, 2007) (on file with the National Women's Law Center.)
- ²³ 118 Cong. Rec.5803 (1972) (remarks of Sen. Bayh).