

# IWF Policy Brief

*Cutting-edge analysis of the news of the day from the Independent Women's Forum*

March 31, 2009

## Proportionality is Not What High Schools Need

By Allison Kasic

*Brief #20*

### Executive Summary

The High School Sports Information Collection Act of 2009 has the potential to radically alter the state of high school athletics. The bill, introduced to Congress in late February, would require high schools to report a host of data on their athletic programs to the state government, as well as make such data available to the public. This data includes athletic participation figures broken down by gender, race, and ethnicity, budget information, and much more.

Such a requirement may seem harmless at first, but its impact will depend on how the collected data is used. Since the bill is modeled on the Equity in Athletics Disclosure Act, which requires similar reporting data from colleges, there is a clear model to predict the result of this data collection. In practice, such data is used for the purpose of Title IX enforcement to ensure that a school's athletic programming is "proportional," which means that the gender ratio of a school's athletics mirrors the gender ratio of the overall student body.

Proportionality's rigid standards have taken a toll on college athletics, resulting in widespread cuts to men's programming. There is no reason to believe that results would be any different at the high school level. In fact, proportionality's negative impacts are likely to be more pronounced, as many more students participate in high school athletics than collegiate athletics.

### Talking Points:

- The High School Sports Information Collection Act would leave high schools vulnerable to Title IX's rigid proportionality requirement.
- At the collegiate level, proportionality has resulted in widespread cuts to men's athletic programs. It would likely do the same at the high school level.
- Before expanding Title IX enforcement to other areas, policymakers should first address the underlying flaws in its existing enforcement mechanisms.

**MEDIA INQUIRES: 202-631-6704**

Current Title IX enforcement is fraught with flaws. Policymakers should address these major concerns first, before looking to expand the enforcement system to other arenas, including high school athletics.

## Introduction

Athletic participation is an important part of the American educational experience. While not everyone is an athlete themselves, few would deny the positive impact of sports on its participants. Athletics are known to help develop a wide variety of character traits, including leadership, teamwork, focus, and determination. Unfortunately, a bill recently introduced to Congress has the potential to limit athletic opportunities for millions of young Americans.

In late February, U.S. Senators Olympia Snowe of Maine and Patty Murray of Washington introduced the High School Sports Information Collection Act of 2009 (S.471) to Congress. The seemingly harmless bill would require high schools to report myriad data on their athletic programs to the state department of education (and the public), including athletic participation figures broken down by gender, race, and ethnicity. Additional reporting requirements are detailed in the next section.

**“Such a statement seems well intended, but fails to consider the many problems associated with Title IX enforcement.”**

The goal of the legislation is to ensure gender equity through Title IX enforcement. Snowe told *The Gazette* (a Maine paper) that the measure “will continue the tradition of giving women and girls an equal opportunity to participate in student athletic programs by allowing us to assess current opportunities for sports participation for young women and correct any deficiencies.”<sup>i</sup> Such a statement seems well intended, but fails to consider the many problems associated with Title IX enforcement. Similar efforts at the collegiate level provide a clear picture of what such enforcement would look like at the high school level, and the results aren’t pretty.

## Reporting Requirements

The High School Sports Information Collection Act would require every coeducational secondary school that receives federal financial assistance to report the following information annually to the state:

- The number of male and female students that attended the school, including race and ethnicity.
- A listing of the teams that competed in athletic competition including information on the number of participants and their gender, race, and ethnicity.
- The total budget and expenditures for each team.
- The number of coaches for each sport, broken down by gender and qualifications.
- Each sport’s schedule.
- Results of any postseason competitions.<sup>ii</sup>

In addition to reporting this information to the state, the bill would require schools to disclose the data to students and the public, upon request.

The legislation is modeled on the Equity in Athletics Disclosure Act, which requires colleges to report similar data to the federal government. The goal of both measures is increased Title IX enforcement.

**“Judging by proportionality’s impact on the collegiate athletics, anyone involved with high school athletics should be concerned with replicating such a model at the high school level.”**

While some may be concerned with the obvious administrative costs that such reporting create, the real danger lies in how the data could be used once it is collected, either by the government or by private interest groups who obtain the data through the bill’s disclosure policy. Title IX enforcement at the collegiate level offers an insight into how the data will be used. Specifically, the High School Sports Information Collection Act would open the flood gates for proportionality enforcement and lawsuits in high schools. Judging by proportionality’s impact on the collegiate athletics, anyone involved with high school athletics should be concerned with replicating such a model at the high school level.

### **Basics of Title IX Enforcement**

Passed in 1972 as an education amendment, Title IX states:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.<sup>iii</sup>

While most would agree with the sentiment of that statement, disagreements have arisen over how to best enforce it on a day-to-day basis. In 1979, the federal government released a key Policy Interpretation to guide Title IX enforcement. Schools rely upon that Policy Interpretation to this day. The Interpretation created Title IX’s “three-prong test” which is said to offer schools three avenues for demonstrating compliance in their athletic programs. These options are:

1. Showing that intercollegiate participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Showing a history and continuing practice of program expansion in response to the interest and abilities of the “underrepresented” sex; or
3. Demonstrating that the interests and abilities of members of the “underrepresented” sex have been fully and effectively accommodated by the school’s program.<sup>iv</sup>

Schools overwhelmingly gravitate toward the first prong, commonly called “proportionality.” In simple terms, proportionality demands that the gender ratio of athletes match the gender ratio of the overall student body. For example, if 57 percent of students are female, 57 percent of athletes must also be female. This compliance option is popular with schools because it offers a quantitative measure for their programs. The other two options presented in the test are more subjective in nature and could

still leave schools vulnerable to lawsuits and investigations. Therefore, proportionality is always the long-term goal, with the other measures acting as a holding pattern until proportionality can be met. In 1996, the federal government placed even more emphasis on proportionality, by declaring it a “safe harbor.”<sup>v</sup>

### **Problems with Proportionality**

Unfortunately, Title IX’s reliance on proportionality creates several problems. For starters, proportionality goes against the original intent of the law. The Congressional Record shows that the sponsoring members of Title IX assured both the House and the Senate that Title IX would not create quotas. Such assurances were critical to the bill’s passage. For example, Senate sponsor Birch Bayh stated that the gender quotas were “exactly what this amendment intends to prohibit,” and “[t]he thrust of the amendment is to do away with every quota.”<sup>vi</sup> House sponsor Rep. Albert Quie said that Title IX “would provide that there shall be no quotas in the sex anti-discrimination title.”<sup>vii</sup> Proportionality flies in the face of such statements.

A more practical concern about proportionality is its rigid, one-size-fits-all structure. Proportionality’s strict gender quota allows no flexibility for schools to take into account student interest. Instead schools are forced to find a way to make the numbers match up. In most circumstances a school is faced with the following scenario: the majority of students are female, but the majority of athletes are male (or, even if the majority of athletes are female, the ratio still falls short of the larger majority in the overall student population – i.e. 56 percent of athletes are female, but 60 percent of the student body is female). A school in such a situation then has two options to make the numbers match up: add programming for women or cut programming for men. In Title IX’s early days most schools went the route of adding women’s programs – which is a big part of why women’s sports are much more prominent now than they were in the past. But, unfortunately, recent trends show that schools are now choosing to cut back on men’s programs to achieve numerical equality – a move that hardly benefits women.

**“One needs only to pay attention to the local sports page to see proportionality in action: a wrestling team cut here, a baseball team cut there.”**

One needs only to pay attention to the local sports page to see proportionality in action: a wrestling team cut here, a baseball team cut there. A 2007 study by the College Sports Council confirmed the decline in men’s athletics under Title IX.

From 1981 to 2005, male athletes per school declined 6 percent, and men’s teams per school dropped 17 percent.<sup>viii</sup> During that same time, both female athletes per school rose and women’s teams per school rose 34 percent.<sup>ix</sup> The total number of women’s teams has exceeded the number of men’s teams since 1995.<sup>x</sup> Every male sport other than baseball has decreased or remained static. Non-revenue sports, such as wrestling, tennis, and gymnastics, have seen the largest declines.<sup>xi</sup>

Defenders of Title IX constantly say that Title IX does not require such cuts. But the data paints a clear picture—one of widespread damage to men’s athletics under Title IX. Such a result shouldn’t be surprising: It is a direct response to the incentive structure that Title IX enforcement, specifically proportionality, has created for schools. Schools make nearly all athletic decisions with Title IX compliance in mind, and when it comes to participation data, proportionality's demands are clear. Unfortunately, in trying to get to a proportional state, the path of least resistance is usually cutting men’s programs.

That is the dark side of Title IX’s legacy. And if the High School Sports Information Collection Act becomes law, one can expect to see a similar process take place at the high school level, with the most likely result that schools will reduce the number of male athletic teams and number of male athletes in an effort to make the numbers add up.

Another problem with Title IX is the great latitude in who can make a Title IX complaint. Unlike other sex discrimination policies, Title IX does not require that an injured party file a complaint with the government. Anyone can file a complaint and the government is required to investigate all complaints. This has created problems at the collegiate level which would likely be replicated at the high school level. The disclosure loophole of the High School Sports Information Collection Act ensures that anyone can access a school’s data. Political interest groups and lawyers would be free then to file a complaint with the government, or a private lawsuit, even if there are no student complaints. Such a situation creates a ripe market for abusive lawsuits and investigations.

**“Unlike other sex discrimination policies, Title IX does not require that an injured party file a complaint with the government.”**

## **Conclusion**

With so many flaws in the enforcement mechanisms at the collegiate level, it’s baffling why politicians would want to replicate that model on the high school level. The High School Sports Information Collection Act paves the way for proportionality enforcement and lawsuits at the high school level. Based on proportionality’s results at the collegiate level, supporters of high school sports should be very weary of such an approach to high school athletics. There is no reason to believe that results would be any different. In fact, they are likely to be more pronounced, as many more students participate in high school athletics than collegiate athletics.

The status quo of Title IX enforcement, which relies heavily on proportionality, is fundamentally flawed. Policymakers should first address these major concerns before looking to expand the enforcement system to other arenas, including high school athletics.

## **About the Author**

*Allison Kasic is the director of the R. Gaull Silberman Center for Collegiate Studies at the Independent Women’s Forum.*

## Endnotes

---

<sup>i</sup> Dyer, Dave. “Bill to ensure Title IX followed in high schools,” *The Gazette*, March 6, 2009, available at: <http://blog.inthegazette.com/2009/03/06/bill-to-ensure-title-ix-followed-in-high-schools-march-6-2009.aspx>.

<sup>ii</sup> S.471. Text available at: <http://www.govtrack.us/congress/billtext.xpd?bill=s111-471>.

<sup>iii</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, Title 20 – Education, Chapter 38 – Discrimination Based on Sex or Blindness. Available at: <http://www.usdoj.gov/crt/cor/coord/titleixstat.htm>.

<sup>iv</sup> U.S. Department of Health, Education and Welfare, Office for Civil Rights, Office of the Secretary, *A Policy Interpretation: Title IX and Intercollegiate Athletics*, Federal Register, Vol. 44, No. 239, Washington, DC, December 11, 1979. Available at: <http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html#skipnav2>.

<sup>v</sup> U.S. Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-part Test*, Washington, DC, January 16, 1996. Available at: <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html#two>.

<sup>vi</sup> 117 Cong. Rec. 30,409 (1971).

<sup>vii</sup> 117 Cong. Rec. 39,261-62 (1971).

<sup>viii</sup> The College Sports Council, *College Sports Council Longitudinal Study of NCAA Participation Data*, March 29, 2007. Available at: <http://savingsports.org/presentation/>.

<sup>ix</sup> *Ibid.*

<sup>x</sup> *Ibid.*

<sup>xi</sup> *Ibid.*