

# Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX

Intercollegiate athletics<sup>1</sup> have been and continue to be a male domain that is particularly vulnerable to charges of sex discrimination.<sup>2</sup> Congress addressed the general problem of sex discrimination in education by enacting Title IX of the Education Amendments of 1972.<sup>3</sup> Title IX prohibits discrimination on the basis of sex in any educational program receiving federal aid.<sup>4</sup> Although the statute will alter the manner in which women are treated in education, the changes anticipated in intercollegiate athletics have received the most public attention and caused the greatest controversy.<sup>5</sup>

The task of enforcing Title IX fell primarily to the Department of Health, Education, and Welfare (HEW).<sup>6</sup> Because of the broad language of the statute, HEW has considerable leeway in formulating regulations. After prolonged debate, HEW issued final regulations covering intercollegiate athletics in 1975;<sup>7</sup> they took effect in 1978.<sup>8</sup> As a result of the numerous complaints filed against institutions since the compliance date,<sup>9</sup> HEW has issued a proposed policy interpretation

1. Intercollegiate athletics are different from intramural athletics. Intramural athletics focus on encouraging the greatest number of persons to participate, whereas intercollegiate teams are highly competitive and represent the college or university in contests with other schools.

2. See Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 34 (1977); Gilbert & Williamson, *Sport Is Unfair to Women* (pt. 1), SPORTS ILLUSTRATED, May 28, 1973, at 88-92. Although differential treatment of the two sexes exists in intramural programs, it is particularly notable in intercollegiate sports. The women's share of college athletic funding in 1977 was estimated at four to eight percent. Hogan, *From Here to Equality: Title IX*, WOMENSPORTS, Sept. 1977, at 16. The average share of the budget allocated for women's athletics at seven schools was 7.14%. *Id.* at 24. Women's participation rate has also been much lower than men's; for example, in 1976-77, 395,000 students participated in intercollegiate athletics and only 105,000 (26%) were women. 43 Fed. Reg. 58,071 (1978). Furthermore, universities and colleges offer approximately six sports for women as compared with 10 sports for men. *Id.*

3. Pub. L. No. 92-318, § 901, 86 Stat. 373 (codified primarily at 20 U.S.C. §§ 1681-1686 (1976)). For a discussion of the forces motivating passage of Title IX, see Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 457-58 (1975).

4. 20 U.S.C. § 1681 (1976).

5. Roach, *Is Title IX Scoring Many Points In Field of Women's School Sports?* N.Y. Times, Sept. 27, 1977, at 51, col. 1; see *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 206 (1975) (Rep. Schroeder) [hereinafter cited as *Hearings*].

6. 20 U.S.C. § 1682 (1976).

7. 45 C.F.R. §§ 86.1-.71 (1977).

8. *Id.* § 86.41(d) (intercollegiate athletics at secondary or postsecondary level should comply as expeditiously as possible but no later than three years from July 21, 1975).

9. As of November 1978, HEW had received 93 complaints concerning more than 62 higher-educational institutions. 43 Fed. Reg. 58,071 (1978).

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of the regulations.<sup>10</sup> This Note argues that the general language of the statute, together with certain specific features of it, strongly suggest that HEW should develop more stringent and demanding regulations. It further suggests that in developing these regulations HEW should look to social policy considerations concerning sex discrimination in intercollegiate sports.

### I. The Title IX Guidelines and the Existing Regulations

Title IX was passed without much debate about its effect on sports and intercollegiate athletics.<sup>11</sup> The statute's general language simply prohibits sex discrimination in educational programs receiving federal aid.<sup>12</sup> With respect to athletics, there is little to guide HEW in the form of legislative history, and this absence of legislative guidance was only slightly alleviated by the 1974 Javits Amendment to the statute<sup>13</sup> requiring HEW to publish within thirty days Title IX regulations "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."<sup>14</sup> Yet it is at least clear that the athletic programs of virtually every major college and university lie within the scope of Title IX.<sup>15</sup>

10. *Id.* at 58,070.

11. Title IX was adopted in conference without formal hearings or a committee report, *see* S. REP. NO. 798, 92d Cong., 2d Sess. 221-22 (1972); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1388-89 (1977); sports were only mentioned twice in the congressional debate, 118 CONG. REC. 5807 (1972) (Sen. Bayh) (personal privacy to be respected in sports facilities); 117 CONG. REC. 30,407 (1971) (Sen. Bayh) (intercollegiate football and men's locker rooms).

12. *See* p. 1261 *infra* (quoting 20 U.S.C. § 1681(a) (1976)).

13. Following the issuance of the proposed regulations, *see* p. 1257 *infra*, Senator Tower proposed an amendment that would have exempted revenue-producing sports. 120 CONG. REC. 15,322 (1974); *see* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 GEO. L.J. 49, 75-76 (1976). The Tower Amendment did not, however, survive in a Senate-House conference committee. S. CONF. REP. NO. 1026, 93d Cong., 1st Sess. (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 4206, 4271; *see* Note, *supra* note 3, at 473. Instead the amendment proposed by Senator Javits was adopted. Pub. L. NO. 93-380, § 844, 88 Stat. 612 (1974); *see* 20 U.S.C. § 1681 app. (1976).

14. Pub. L. NO. 93-380, § 844, 88 Stat. 612 (1974); *see* 20 U.S.C. § 1681 app. (1976).

15. *See* Cox, *supra* note 2, at 36-40 (chronology of congressional activities indicates that intercollegiate sports were intended to be covered by Title IX). *But see* Kuhn, *supra* note 13, at 62. It can hardly be disputed that the statute includes athletics by its terms, and the subsequent legislative history leaves no doubt that this interpretation was intended. In spite of this intended coverage, there is also a controversy as to whether intercollegiate sports may be excluded from Title IX because they do not receive direct federal funding. HEW's interpretation is that any program will be covered by Title IX if it "receives or benefits from" federal funds. 45 C.F.R. § 86.11 (1977); *see* 40 Fed. Reg. 24,128, ¶ 86.11 (1975). The agency regards intercollegiate athletics as such an integral part of higher education that sex discrimination in athletic programs "would necessarily infect" the general educational experience at an institution and therefore must comply with Title IX regardless of whether the activities receive direct federal funding. *See* 43 Fed. Reg. 58,076 (1978). Commentators remain divided over the validity of this interpretation. *Com-*

The statute permits HEW and other federal agencies authorized to fund educational programs<sup>16</sup> to withdraw that funding if an educational institution fails to comply with the Title IX regulations.<sup>17</sup> However, several controls were imposed on HEW's power to issue regulations. First, any regulations proposed by HEW must receive presidential approval.<sup>18</sup> Second, the statute provides for congressional review and potential veto of all proposed regulations.<sup>19</sup> Finally, Congress retains the right to disapprove any termination of funds ordered by HEW.<sup>20</sup>

HEW's 1974 proposed regulations<sup>21</sup> appear to have been guided by Title VI of The Civil Rights Act of 1964,<sup>22</sup> as well as by developing doctrines of equal protection as applied to women.<sup>23</sup> In addition to a general prohibition of sex discrimination in athletics, educational institutions were ordered to refrain from providing separate athletic programs on the basis of sex unless the selection of teams for that sport or athletic program was based on competitive skill.<sup>24</sup> The proposed regula-

*pare Cox, supra note 2, at 37-39 (courts should adopt HEW's interpretation) and Todd, Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools, 53 Tex. L. Rev. 103, 107-12 (1974) (although case law not firmly established, "benefiting" approach is reasonable and desirable interpretation of Title IX and is consistent with tax-exemption cases under Title VI) with Kuhn, supra note 13 ("benefiting" approach is incorrect interpretation and is inconsistent with congressional intent) and Note, supra note 3, at 463-66 (narrow interpretation of fund-termination remedy would parallel Title VI). In addition, the National Collegiate Athletic Association (NCAA) filed suit challenging HEW's interpretation. See NCAA v. Califano, 444 F. Supp. 425 (D. Kan. 1978) (dismissing NCAA claims for lack of standing and ripeness). Despite these challenges, it seems likely that HEW's interpretations will be upheld, since its approach to Title IX parallels its interpretation of a similar provision in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (1976). See Board of Pub. Instruction v. Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969) (discrimination must be found in each individual program but program should not be considered in isolation because it may be "so affected by discriminatory practices elsewhere in the school system that it thereby becomes discriminatory").*

16. 20 U.S.C. § 1682 (1976).

17. *Id.*

18. *Id.*

19. *Id.* § 1232(d), (f) (veto provisions made applicable to Title IX in 1974). The procedure is the equivalent of a veto because the proposed regulations are submitted to Congress as a matter of course. Congress then has a specified time period, 45 days, in which to set them aside; if the time lapses, the regulations become effective. This procedure represents a departure from the more usual practice in which regulations become effective automatically and can be changed only by a new statute, passed by both houses of Congress and signed by the President. See generally Bruff & Gellhorn, *supra* note 11.

20. 20 U.S.C. § 1682 (1976) (no such termination "shall become effective until thirty days have elapsed after the filing of such report" with committees of House and Senate). A fund termination is also subject to judicial review. *Id.* § 1683.

21. 39 Fed. Reg. 22,228 (1974). Two sections of these regulations dealt with athletics: a general section regarding athletics, *id.* at 22,236, and a subsidiary section concerning athletic scholarships. *Id.*

22. 40 U.S.C. § 2000d (1976); see Comment, *Title IX's Promise of Equality of Opportunity in Athletics: Does It Cover the Bases?* 64 Ky. L.J. 432, 453 (1975).

23. Comment, *supra* note 22, at 435-36.

24. 39 Fed. Reg. 22,236 (1974).

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tions also required an annual student-interest survey<sup>25</sup> and “affirmative efforts”<sup>26</sup> by each recipient institution to increase women’s participation in sports. Equal aggregate expenditures for athletic programs for each sex were specifically not required.<sup>27</sup> Impassioned commentary and lobbying<sup>28</sup> by the National Collegiate Athletic Association (NCAA) and others,<sup>29</sup> however, led HEW<sup>30</sup> to issue significantly narrower final regulations in 1975.<sup>31</sup>

The final regulations still contain a general prohibition of sex discrimination in any athletic program,<sup>32</sup> a provision that follows naturally from the broad language of the statute. Further, schools are generally forbidden to provide separate teams in the same sport on the basis of sex.<sup>33</sup> There are now, however, two major exceptions to this rule: in

25. The survey was to determine “in what sports members of each sex would desire to compete.” *Id.* at 22,236, § 86.38(b). If adequate interest was demonstrated in a certain sport, then the school could offer that sport and comply with the affirmative-efforts requirement.

26. *Id.* § 86.38(c). “Affirmative efforts” were required in the provision of equal athletic opportunities, information, support, and training in order to expand the capabilities and interests of women.

27. *Id.* § 86.38(f).

28. During the public-comment period, the agency received over 9700 comments. 40 Fed. Reg. 24,128 (1975). A disproportionate number of these related to athletics. *See Cox, supra* note 2, at 40; N.Y. Times, Apr. 5, 1975, at 17, col. 5.

29. *Hearings, supra* note 5, at 165 (Rep. Mink). The NCAA argued that the interpretation of the statute should, if not exclude the coverage of athletics, then at least exempt revenue-producing sports. 40 Fed. Reg. 24,134 (1975); *see Cox, supra* note 2, at 40. *But see Hearings, supra* note 5, at 103 (John A. Fuzak, President, NCAA) (“The NCAA does not now advocate, and has never advocated, that revenue-producing sports be exempted from Title IX. What we have advocated . . . is that the gross revenues from a revenue-producing [sport] . . . be permitted to apply, first, to covering the expenses of maintaining that sport.”)

30. *See Cox, supra* note 2, at 41 (“[C]omments clearly had an impact on HEW because the final athletics regulation differs in some significant respects from the proposed regulation.”); Note, *supra* note 3, at 474 (“[C]ertain express requirements . . . contained in . . . proposed Title IX regulations . . . have either been severely diluted or totally removed from the final draft.”)

31. 45 C.F.R. § 86.41 (1977); *see Cox, supra* note 2, at 63 (final regulation “retreated from the proposed regulation”); Note, *supra* note 3, at 474 (“overall impact of Title IX . . . appears to be less than was previously anticipated”).

32. *See* 45 C.F.R. § 86.41(a) (1977):

(a) *General.* 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 such athletics separately on such basis.

33. *Id.* § 86.41(b) (emphasis added):

(b) *Separate Teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex

addition to the competitive skill exception<sup>34</sup> of the proposed regulations, HEW added an additional exemption for contact sports.<sup>35</sup> By virtue of the joint operation of these two exceptions, major intercollegiate sports, such as football and basketball, are exempted from the general prohibition of sex discrimination and separate teams. Under the competitive-skill exception, members of an excluded sex are allowed to compete for a place on a team if only one team is provided in a particular sport and if opportunities to participate in that sport have been previously limited for the excluded sex.<sup>36</sup> The addition of the contact-sports exception means that, in such sports, members of one sex do not have the right to try out for teams restricted to the other sex even if they have no team of their own.<sup>37</sup>

In addition, the regulations affirmatively state that schools shall provide "equal opportunity" and effectively accommodate the abilities of members of both sexes.<sup>38</sup> HEW has set forth a list of factors that it will consider, though not require, to determine whether a school has provided equal opportunity to women.<sup>39</sup> Among "other fac-

have previously been limited, members of the excluded sex must be allowed to try-out for the team offered *unless the sport is a contact sport*. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of [sic] major activity of which involves bodily contact.

34. By virtue of this competitive-skill exception, all intercollegiate sports were exempted from the prohibition of separate teams. This exception is crucial for the existence of intercollegiate sports, which are based upon the competitive skill of its teams and team members. Presumably, a school could not merely open teams to either sex without providing equal opportunity for women to participate. Thus the competitive-skill exception is balanced by the equal-opportunity provision, *id.* § 86.41(c), *quoted* in note 39 *infra*. However, it is unclear whether a qualified woman would be permitted to play on an all-male team if no women's team were provided.

35. 45 C.F.R. § 86.41(b) (1977).

36. *Id.*

37. *Id.*

38. *Id.* § 86.41(c)(1), *quoted* in note 39 *infra*.

39. *See id.*:

(c) *Equal Opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not

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tors”<sup>40</sup> this “laundry list”<sup>41</sup> includes: selection of sports, levels of competition, equipment, academic tutoring, locker rooms, facilities, medical services, housing, and publicity.<sup>42</sup> Equal aggregate expenditures for members of each sex or for teams of each sex are specifically not required, but may be considered.<sup>43</sup> Although this regulation requires all expenditures “necessary” to achieve equal opportunity,<sup>44</sup> it makes no provision for “affirmative efforts” or an annual student-interest survey.<sup>45</sup>

The team structure that would result from these regulations is difficult to discern. Separate teams are forbidden under the general prohibition of sex discrimination but are permitted under its exceptions. On the other hand, even in cases in which these exceptions operate, a requirement of separate teams might be derived from the equal-opportunity provisions.<sup>46</sup> Thus, it is unclear to what extent mixed and separate teams are required.<sup>47</sup>

constitute non-compliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

40. *Id.*

41. See M. DUNKLE, COMPETITIVE ATHLETICS: IN SEARCH OF EQUAL OPPORTUNITY 41 (1976) (“Key Elements Of The Equal Opportunity ‘Laundry List’”).

42. See note 39 *supra* (quoting “laundry list”).

43. See *id.*

44. *Id.* There is no indication of the intended meaning of “necessary” expenditures. Perhaps this refers to expenditures made for necessary items of the laundry list. “Necessary” might well refer to equal expenditures per participant as opposed to equal overall per capita expenditures. See pp. 1276-78 *infra*. Originally, HEW indicated that there must not be disparate impact on opportunity because of unequal patterns of expenditures. See Office for Civil Rights, U.S. Dep’t of HEW, Elimination of Sex Discrimination in Athletic Programs 8 (Sept. 1975) [hereinafter cited as HEW Memorandum]. However, HEW’s new policy interpretation is designed to supersede any inconsistent position in the Memorandum, see 43 Fed. Reg. 58,071 n.4 (1978), and it merely requires substantially equal, average per capita expenditures per participant unless discrepancies are based on either differences in costs of particular sports or their scope of competition, *id.* at 58,072.

45. Compare 39 Fed. Reg. 22,236, § 86.38(b), (c) (1974) with 45 C.F.R. § 86.41 (1977).

46. Thus, even though separate teams are not required under the team provision, the equal-opportunity section would not be satisfied if separate teams were not provided. HEW Memorandum, *supra* note 44, at 6-7 (HEW does not consider provision of teams opened for men and women with only few women able to qualify to constitute equal opportunity; school must provide separate teams to accommodate both sexes effectively). However, it appears that the regulations do not require that women of exceptional athletic ability be allowed to try out for the men’s team or that the women’s team be closed to men.

47. After issuing these regulations, HEW attempted to offer further guidance by commissioning a manual interpreting the regulations. See M. DUNKLE, *supra* note 41. Under Ms. Dunkle’s interpretation, equal opportunity between the two sexes is to be expected in each of the factors of the “‘laundry list.’” *Id.* at 41-94. Furthermore, she discusses “‘other factors,’” *id.* at 124-35, which will also be considered in assessing a school’s compliance. Suggested “other factors” include awards and recognition, support services, “free or reduced admission to athletic events, priority use of campus recreational facilities, the availability of bands and/or cheerleaders, . . . preferential or different employment opportunities, opportunities to purchase ‘varsity’ items . . . , eligibility for membership in

In order to clarify some of these ambiguities, HEW has recently proposed a policy interpretation of the regulations.<sup>48</sup> Although this interpretation is stringent in certain respects, it discovers additional exceptions that essentially preserve the status quo.<sup>49</sup> Further, the legitimacy and constitutionality of the policy interpretation is uncertain.<sup>50</sup>

## II. The Relationship of the Regulations to the Statute

The basic problem in formulating satisfactory Title IX regulations is translating the generalities of the statutory language into specific

varsity clubs, laundry or maid services." *Id.* at 127-28. Ms. Dunkle also makes no exception to the laundry list or to the scholarship provisions for men's basketball and football, the major revenue-producing sports. *Id.* at 16. The athletic regulations are interpreted in conjunction with other parts of the regulations in order to broaden their scope. For example, the recruitment of students in general is interpreted as applicable to collegiate athletics. *Id.* at 120.

This interpretation is relatively aggressive; it would establish fairly stringent standards under the equal-opportunity provision. However, the report has little authority compared to the actual regulations, so its effect is uncertain. Various universities, prompted by the NCAA, have resisted this expansive interpretation and have urged a narrower reading of the regulations. Hogan, *The Rumormongers*, WOMENSPORTS, Nov. 1977, at 42 ("[T]he NCAA was eager to find a way to discredit [Dunkle's report] . . . NCAA officials are still informally, but actively encouraging other schools to disregard the manual.")

48. 43 Fed. Reg. 58,070 (1978).

49. The policy interpretation is based upon the agency's recognition of what it considers to be five "fundamental facts," Office for Civil Rights, Dep't of HEW, Title IX of the Education Amendments of 1972, at 4 (Oct. 27, 1978) [hereinafter cited as HEW Draft], concerning intercollegiate athletics:

(1) there has been a historical emphasis on male sports; (2) disproportionately more financial aid, funds, and resources go to male athletes; (3) there has been a recent increase in women's participation despite past discrimination; (4) equalization of opportunities for men and women will not necessarily require identical treatment; and (5) intercollegiate football (and basketball) are often unique in size, cost, and revenue produced as compared with other sports. 43 Fed. Reg. 58,071-72 (1978). The agency attempts to integrate these "facts" into a two-stage approach to enforcement and compliance.

Part I aims to eliminate discrimination in existing programs. First, it provides for equal, average per capita funds for scholarships, recruitment, and "other readily financially measurable benefits" (Fact 2). Per capita expenditures are based upon men and women who are currently participating in intercollegiate programs. Differences in average per capita expenditures may be allowed if they are based upon nondiscriminatory factors such as differences in the costs, scope, and level of competition of a particular sport (Fact 5). Second, comparable benefits which are not readily financially measurable must be provided for participating members of both sexes (Fact 4). Such benefits include practice times, locker rooms, facilities, medical services, housing, and dining services. *Id.* at 58,072-73.

Part II is designed to eliminate the effects of the historic emphasis on male sports (Fact 1) and to require procedures to facilitate the continued expansion and growth of women's athletics (Fact 3). *Id.* at 58,074. The goals of Part II are expected to be achieved over a "reasonable time" as compared to the immediate results expected to be achieved under Part I. *Id.* at 58,072; see note 124 *infra*.

50. The policy interpretation may be regarded as an attempt by the agency to rewrite the regulations and to bypass the legislative-veto procedure. See p. 1256 *supra*.

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requirements for equality in collegiate sports. In the absence of specific language and legislative history, HEW must look elsewhere for guidance. An examination of the form and context of the statute suggests that there are two sources of congressional intent that should be considered by HEW. First, the broadness of the statute is itself a type of guideline. Second, the social policy factors that motivated Congress are well known,<sup>51</sup> even if they are not reported in the legislative history in the context of athletics. Both these factors would suggest the promulgation of more exacting regulations.

### A. *Breadth of the Statute*

Title IX states that “[n]o person . . . 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.”<sup>52</sup> Congress has thus mandated nothing less than a general policy against sex discrimination in education.<sup>53</sup> HEW was left to apply this general antidiscrimination principle to the many diverse and specific programs of education.

With regard to sports there is no restriction, aside from a generalized requirement of reasonableness,<sup>54</sup> on how this statutory goal is to be achieved. One commentator has suggested that the reasonableness standard manifests Congress’s intent to restrict remedies in inter-

51. See Report of the Commissioner’s Task Force, A Look at Women in Education: Issues and Answers for HEW, in *The Women’s Educational Equality Act: Hearings on H.R. 208 Before the Subcomm. on Equal Opportunities of the House Comm. on Education and Labor*, 93d Cong., 1st Sess., pt. 1, at 57-61 (1973) [hereinafter cited as *Hearings on H.R. 208*]; Sex Role Stereotypes Project, Final Report, in *Hearings on H.R. 208, supra*, at 183-87. These studies document sex discrimination in athletics and education.

52. 20 U.S.C. § 1681(a) (1976).

53. The Title IX general-prohibition language is virtually identical with the language of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976), which prohibits racial discrimination in federally assisted programs. Initially, Title IX was to be an amendment to Title VI involving simply the addition of the word “sex” to Title VI. 117 CONG. REC. 9822, 9829 (1971) (Rep. Green); see H.R. 916, 92d Cong., 1st Sess. (1971); *Discrimination Against Women: Hearings on Section 805 of H.R. 16,098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) [hereinafter cited as *1970 Hearings*]. Further, Title VI was being interpreted broadly by HEW when Title IX was passed. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 568 (1974) (sustaining HEW regulation under Title VI prohibiting discriminatory effect, even in absence of intent); *Board of Pub. Instruction v. Finch*, 414 F.2d 1068, 1077-78 (5th Cir. 1969) (establishing broad definition of “program”); *Hearings, supra* note 5, at 164 (Rep. Mink) (at time of Title IX debate, it was established that HEW and courts were interpreting Title VI broadly). The indication is that Congress intended such a broad interpretation of Title IX. See *id.* at 169-70 (statement of Sen. Bayh); *id.* at 163 (Rep. Mink); 118 CONG. REC. 5807 (1972) (Sen. Bayh) (“The provisions have been tested under Title VI . . . for the last 8 years so that we have evidence of their effectiveness . . . .”)

54. Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); see 20 U.S.C. § 1681 app. (1976) (Javits Amendment).



collegiate sports as opposed to admissions, hiring, and other areas covered by the statute.<sup>55</sup> There is, however, no indication that Congress intended unreasonable provisions or remedies for any of the statute's areas. Because reasonable regulations are expected in any event, the standard is an empty and ambiguous one. If reasonableness is to have any content, it should be viewed as Congress's understanding that remedies may have to be different, not necessarily narrower, when the physical differences of the sexes are significant.<sup>56</sup> The reasonableness standard suggests that Congress contemplated flexible, broad regulations;<sup>57</sup> were the intent to restrict agency authority, Congress would have made its guidelines more precise.

A second important indication of congressional intent is Congress's retention of what is in effect a veto over any proposed regulations.<sup>58</sup> The purpose of the veto was to provide a check on Congress's delegation of power to the agency.<sup>59</sup> Self-restriction by the agency due to a fear of usurpation of congressional power<sup>60</sup> is, therefore, not necessary, because the veto provides Congress with the ability to restrict agency actions in such circumstances. The fact that Congress so structured its power of review implies that it wishes HEW to take a creative and aggressive role in formulating regulations and to implement the broadest possible interpretation of the statute. If the regulations are too broad, Congress retains the power to veto them.

Moreover, the contrary argument that Congress intended the veto to overturn narrow regulation is unpersuasive. If the regulations were too narrow, Congress could not reject them without leaving intended beneficiaries remediless for a considerable period of time.<sup>61</sup> In addi-

55. See Kuhn, *supra* note 13, at 75-76 (Javits amendment and reasonableness standard manifest congressional intent to limit remedy for intercollegiate sports because these sports were not intended to be covered).

56. "Reasonableness" is also an appropriate standard in light of privacy concerns. Although this is supported by Senator Bayh's remarks during the debate, 118 CONG. REC. 5807 (1972), legislative intent regarding reasonableness is far from clear.

57. *Hearings, supra* note 5, at 164 (Rep. Mink) (legislative history and debate demonstrate that Title IX was to be applied broadly through regulations).

58. 20 U.S.C. § 1232(d)-(g) (1976); see note 19 *supra*. In addition to the veto over the proposed regulations, Congress also retained a veto over the actual application of the regulations—the cutoff of funds. 20 U.S.C. § 1682 (1976). This is thus a further reason to interpret the statute broadly; if a special case arose under strict regulations, Congress would still have the power to intervene.

59. H.R. REP. NO. 805, 93d Cong., 2d Sess. 73 (1974).

60. Part of the uneasiness with the administrative process—to which the veto is addressed—has been the concern over the constitutionality of the delegation of power to agencies. See Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041 (1975).

61. This in fact was suggested as a reason not to veto the 1975 regulations; the need for more specificity was desirable but outweighed by the need to fulfill reasonable ex-

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tion, the significant constitutional questions raised by the legislative veto<sup>62</sup> would be exacerbated by a provision designed not to curb agency excess, but rather to override enforcement decisions by the executive branch. Because a power to veto narrow regulations would permit Congress to circumvent the constitutional requirement that the President approve all laws not passed by two-thirds of the members of each house,<sup>63</sup> it is likely that Congress could only disapprove narrow regulations by passing a new, broader statute.<sup>64</sup>

Finally, the specific nature of the problem of sex discrimination in athletics suggests the need for explicit guidelines; if these guidelines are not provided in the statute, they must be provided by regulations. Congress passed Title IX in the face of longstanding sexual stereotypes that led educational institutions to make arbitrary distinctions. Thus, an overriding purpose of the statute was to determine the nature of equality for men and women in contexts in which their differences are particularly relevant;<sup>65</sup> regulations designed to implement this purpose must necessarily be clear and comprehensive. Otherwise, arbitrary stereotypes will ensure that existing patterns of sex discrimination continue.<sup>66</sup>

pectations of a timely remedy. *See, e.g.*, Letter from Caspar W. Weinberger, Secretary of HEW to Carl B. Albert, Speaker of the House of Representatives (June 4, 1975), *reprinted in Hearings, supra* note 5, at 6.

62. The major constitutional objections are that the veto power allows the legislative branch to invade the powers and functions of the executive and violates the general separation-of-powers doctrine. *See id.* (agency regards review procedure as "questionable on practical as well as constitutional grounds"). *See generally* Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 *FORDHAM L. REV.* 638, 651-61 (1956-57); Stewart, *Constitutionality of the Legislative Veto*, 13 *HARV. J. LEGIS.* 593 (1976).

63. *See* Bruff & Gellhorn, *supra* note 11, at 1373-75.

64. From this perspective, it seems clear that HEW was obligated to tailor its regulatory scheme to the maximum permissible scope of Title IX. As indicated above, the fact that none of the resolutions of disapproval passed, *see* Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 *B.Y.U. L. REV.* 133, 146-47 & n.64, should not be taken as an indication that the regulations do in fact fulfill the requirements of Title IX. For, as this Note argues, the regulations desired by HEW fail to accommodate the broad social policy objectives underlying Title IX.

65. *See generally* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 *YALE L.J.* 871, 893-96 (1971) (discussion of equality when physical differences exist).

66. *See, e.g.*, *Hearings, supra* note 5, at 287-92 (statement of Margaret Dunkle for Women's Equity Action League (WEAL)) (10 myths and stereotypical assumptions that limit sports opportunities for women); Interview with Frank Ryan, Director of Athletics, Yale University (Apr. 21, 1978) (wrestling is inappropriate for women and mixed wrestling is certainly undesirable; it is incomprehensible why women would want to play football) (transcript on file with *Yale Law Journal*). *But see* note 149 *infra* (Yale University's support under Dr. Ryan of women's ice hockey and crew).

## B. *Social Policy*

The second major source of congressional intent that HEW should consider in promulgating regulations is the social policies that motivated Title IX.<sup>67</sup> In a very real sense, they constitute the legislative history of the statute.<sup>68</sup> Although these policies cannot be known with certainty, they can be identified with reasonable accuracy by reference to the legislative history of other antidiscrimination statutes.<sup>69</sup> The social-policy orientation thus revealed is, in fact, within the precise field of HEW's expertise.<sup>70</sup> It is proper that HEW look to these policies in issuing regulations. Indeed, it is arguable that the statute's broad language authorizes HEW to consider social policy.

The stated goal of Title IX is the elimination of sex discrimination in education.<sup>71</sup> The legislative policy underlying Title IX is relatively clear, and consists of two principal elements. The first is a desire to ensure all Americans, regardless of sex, equal access to educational opportunities so that they can develop their full potential.<sup>72</sup> The second is to eliminate sex stereotyping that results from channelling men into one group of activities and women into another.<sup>73</sup> These elements are closely related since limitations on opportunities create stereotypes and stereotypes limit opportunities.

Both of these general policies apply to collegiate athletics. Sex discrimination in athletics is particularly painful to the individual woman athlete.<sup>74</sup> Denial of the opportunity to participate in school programs may halt a young woman's athletic development and may limit her ability to pursue an athletic career. She is denied not only the physical

67. See Note, *supra* note 3, at 457-84 (discussing social problems of sex discrimination and Title IX as Congress's response to those problems).

68. Cf. *id.* at 457, 458 (Title IX is Congress's attempt to eliminate sex discrimination in education); Comment, *supra* note 64, at 137-42 (same).

69. E.g., 42 U.S.C. § 2000d (1976) (forbidding race discrimination in federally aided educational programs and activities); see note 53 *supra*. The social policy of eliminating any form of race discrimination was clearly identified as being the basis for the passage of Title VI. See *Joy v. Daniels*, 479 F.2d 1236 (4th Cir. 1973) (purpose of statute was to eliminate race discrimination); [1964] U.S. CODE CONG. & AD. NEWS 2355-519. Certainly, the basic purpose and policy of Title IX was to eliminate sex discrimination and sex stereotyping in education.

70. HEW was directed by the Office of Management and Budget to "coordinate the efforts of the several agencies that fund education programs" and "to provide leadership by drafting a regulation that would be suitable both for its own use and . . . the other agencies involved." Comment, *supra* note 64, at 145.

71. 20 U.S.C. § 1681(a) (1976).

72. See *Hearings, supra* note 5, at 168-72 (statement of Sen. Bayh); *id.* at 172 (Title IX is to provide American women "something that is rightfully theirs—an equal chance" in education).

73. 118 CONG. REC. 5804 (1972) (Sen. Bayh) (need for strong measure to end stereotypes).

74. See D. BUTT, *PSYCHOLOGY OF SPORT* 68 (1976) (psychological and cultural problems of role conflict for female athletes).

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benefits of participation but also the generally acknowledged psychological benefits.<sup>75</sup> Even when participation is grudgingly allowed, a young woman may suffer from psychological role conflicts or more subtle discrimination.<sup>76</sup> The cumulative effect is the dampening of women's interest in sport, often to the extent that they do not even consider the possibility of participation.<sup>77</sup>

The development of the woman athlete thus requires equality of participation in group athletics. Although equality on an individual basis might simply demand sex-blind sports teams, equality on a group basis demands more.<sup>78</sup> Whether for biological or cultural reasons, differences do exist in the performance levels of sportswomen and sportsmen.<sup>79</sup> These differences must be realistically dealt with so that the sportsmen's superior performance is not made the basis for inequality, but is simply accepted as a performance dissimilarity.<sup>80</sup> Certainly, Congress did not intend merely to give women an equal opportunity to compete with men and thus, as a practical matter, foreclose them from participation in intercollegiate sports.<sup>81</sup> HEW must, therefore, balance the goals of equal opportunity and equal participation.

Even more important than the athletic development of women is the symbolic role of intercollegiate sports, and its consequent ability to generate and reinforce sex stereotypes.<sup>82</sup> Title IX looks as much to group equalization as it does to individual potential. Congress has

75. See *Hearings, supra* note 5, at 197 (Rep. McKinney); Gilbert & Williamson, *supra* note 2, at 90. But see Schafer, *Sport and Youth Counterculture: Contrasting Socialization Themes*, in D. LANDERS, *SOCIAL PROBLEMS IN ATHLETICS* 183 (1976) (questioning social value of personality traits developed through participation in highly competitive athletics).

76. See p. 1268 *infra*.

77. Gilbert & Williamson, *Are You Being Two-Faced?* (pt. 2), *SPORTS ILLUSTRATED*, June 4, 1973, at 47 (female apathy regarding sports results from discrimination).

78. The response that if women desire equality in athletics, they must compete against men is "preposterous," see E. GERBER, J. FELSHIN, P. BERLIN & W. WYRICK, *THE AMERICAN WOMAN IN SPORT* 406 (1974) [hereinafter cited as E. GERBER], in light of analysis of statistical and objective studies of performance comparisons, see *id.* at 406-515.

79. Although the differences in performances are partly due to cultural expectations, many are traceable to actual physical differences. *Id.* at 429-30, 484. The superior size and strength of sportsmen account for many of the performance differences and are due in part to physiological differences: men have larger hearts, greater stroke volume, cardiac output, lung capacity, hemoglobin content, and thus higher aerobic capacity. *Id.* at 484. Even when the sizes are the same, women are only about 80% as strong as men because women have only about half the muscle mass of men. *Id.* at 427-29.

80. *Id.* at 429-30. After all, although the heavyweight boxer would out-box the lightweight, both must be respected within their own discipline. *Id.* at 430.

81. See Cox, *supra* note 2, at 44 (overall decrease in women's participation would result if equality only meant opportunity to compete).

82. See E. GERBER, *supra* note 78, at 182 (sport reflects and perpetuates cultural norms of sex stereotypes); J. TALAMINI & C. PAGE, *SPORT AND SOCIETY* 271-72 (1973) (sexual oneness of sport and sociological stereotypes).

recognized the fundamental impact that education has on the development of sex roles.<sup>83</sup>

The introduction of Title IX was accompanied by repeated references to the 1970 hearings<sup>84</sup> that documented the "massive, persistent patterns" of sex discrimination in education.<sup>85</sup> The hearings stressed the socialization of women into stereotypical roles<sup>86</sup> and the need to create viable opportunities for women to produce "ideas, art, literature, leadership, inventions, and healthier social relationships" instead of only producing children.<sup>87</sup> These hearings, together with the recommendations of a presidential task force, began a legislative process that culminated in Title IX<sup>88</sup> and thus form an integral part of the relevant legislative history. In 1970, Congress intended the eradication of sex discrimination in education to reduce sex-role stereotyping in the rest of society,<sup>89</sup> and subsequent sex-discrimination hearings further demonstrated this intent.<sup>90</sup>

This focus on group equalization and the elimination of sex stereotypes is particularly relevant to sport, in which the symbolic role clearly outweighs the practical effect. The symbolic importance of sports in American society is undoubted,<sup>91</sup> but is often ignored or discounted.<sup>92</sup> Even after the rise of concern for women's rights and congressional

83. See 118 CONG. REC. 5804 (1972) (Sen. Bayh) ("The field of education is just one of many areas where differential treatment has been documented; but because education provides access to jobs and financial security, discrimination here is doubly destructive for women."); *id.* ("We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again.")

84. See *id.* at 5804 (discussing 1970 Hearings, *supra* note 53). For a summary of the evidence of the 1970 Hearings, see Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. U.L. REV. 237, 247-70 (1971).

85. 118 CONG. REC. 5804, 5805 (1972) (Sen. Bayh).

86. See, e.g., 1970 Hearings, *supra* note 53, at 122 (Wilma Heide, Commissioner of Pennsylvania Human Relations Commission) (need to challenge mythologies about sex caste divisions of labor and stereotypes); Bem & Bem, *Case Study of a Nonconscious Ideology: Training the Woman to Know Her Place*, in D. BEM, BELIEFS, ATTITUDES AND HUMAN AFFAIRS 89 (1970), reprinted in 1970 Hearings, *supra* note 53, at 1042-49 (non-conscious ideology of sex stereotypes).

87. 1970 Hearings, *supra* note 53, at 122; see *id.* at 611, 1042-49; 118 CONG. REC. 5804 (1972) (Sen. Bayh).

88. 118 CONG. REC. 5804 (1972) (Sen. Bayh); see Women's Equality Act of 1971, H.R. 916, 92d Cong., 1st Sess. (1971).

89. Congress was particularly concerned with sex stereotyping in the job market. See 1970 Hearings, *supra* note 53, at 122-23; cf. 20 U.S.C. §§ 2304, 2330, 2356 (1976) (vocational-education amendments that specifically require programs to reduce sex stereotyping and to assist women in entering fields traditionally occupied by men).

90. See Hearings on H.R. 208, *supra* note 51, at 141, 186-87 (occupational channelling according to sex stereotypes and crucial role of education in fostering these stereotypes).

91. See H. EDWARDS, SOCIOLOGY OF SPORT 90 (1973) (sport is quasi-religious institution).

92. D. LANDERS, *supra* note 75, at 3 (sport is "mirror of societal values," but detailed analyses of competitive sports have been neglected).

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passage of the Equal Rights Amendment, sport has been viewed as a socially unimportant area<sup>93</sup> to be integrated only as a part of more general efforts.<sup>94</sup>

This viewpoint ignores the underlying power of sport as a social institution<sup>95</sup> in perpetuating sex stereotypes throughout society.<sup>96</sup> As a socializing agent, sport requires "conformity to certain normative values and behaviors."<sup>97</sup> These values, themselves based on stereotypes, are internalized by individuals.<sup>98</sup> The process is particularly notable in educational institutions, which have such a strong effect on role models and self-images.<sup>99</sup>

The role models thus fostered have long been based on traditional images of masculinity and femininity.<sup>100</sup> The traditional concept of masculinity asserts that the route to excellence is through aggression, discipline, and competition.<sup>101</sup> The traditional concept of femininity presents women as weak, passive, submissive, and nurturant, their destiny fulfilled by marriage and general subservience.<sup>102</sup> According to these constructs, sport as an abstraction is masculine; it institutionalizes a behavioral mode that conforms to the masculine image.<sup>103</sup> Participa-

93. See Hogan, *supra* note 2, at 18 (feminists "have skipped over the plight of women athletes"). In fact, sport is virtually absent from the works of leading feminists. See generally *SISTERHOOD IS POWERFUL* (R. Morgan ed. 1970) (anthology of feminist writing).

94. See, e.g., *Hearings, supra* note 5, at 280 (Ms. Polowy, Associate Counsel of American Association of University Professors) (athletics is one of many educational programs that should be available to both sexes).

95. See H. EDWARDS, *supra* note 91, at 84; E. GERBER, *supra* note 78, at 182.

96. See H. EDWARDS, *supra* note 91, at 90 ("[S]port is a social institution which has primary functions in disseminating and reinforcing the values regulating behavior. . . . This channelling affects not only perspectives on sport, but . . . affects and aids in regulating perceptions of life in general. And herein lies the primary significance of sport as an institution."); E. GERBER, *supra* note 78, at 182-88.

97. E. GERBER, *supra* note 78, at 185.

98. *Id.* at 187; see H. EDWARDS, *supra* note 91, at 84 (institutional norms are internalized by individual personalities).

99. *Hearings, supra* note 5, at 169 (statement of Sen. Bayh) (education is primary vehicle for socialization and "[t]o the extent that the school system treats women as second-class citizens, inferior to their male classmates . . . women will continue to occupy the lower economic strata of the society"); Note, *supra* note 3, at 423.

100. See Gilbert & Williamson, *supra* note 2, at 92-98 (stereotypes in collegiate athletics); Note, *supra* note 3, at 423-24 (sport channels individuals into "proper" and traditional sex roles).

101. *Hearings, supra* note 5, at 197 (Rep. McKinney) ("Competitive sports require discipline, leadership, aggressiveness, all traditionally considered male characteristics."); E. GERBER, *supra* note 78, at 184 ("Sport represents . . . the opportunities to aggress and prove self, believed to be inherent male instincts; and the demand for perseverance and comparison, elements of male assertiveness.")

102. *Hearings, supra* note 5, at 197 (Rep. McKinney) ("Women are encouraged to be weak and passive."); D. BURR, *supra* note 74, at 63 (females traditionally assigned socio-emotional role to satisfy needs of others).

103. Athletics emphasize aggressiveness, competitiveness, and strength, as does the traditional male role. E. GERBER, *supra* note 78, at 182, 184; see *Hearings, supra* note 5, at 197 (Rep. McKinney).

tion by women is thus a social anomaly;<sup>104</sup> they must be "different" if they "break the social taboo against" their participation.<sup>105</sup>

As a result, women have developed "apologetics"<sup>106</sup> to explain their participation in sports. This has naturally evolved into the idea that sport for women should not be highly competitive or aggressive, and should not be taken as seriously as sport for men.<sup>107</sup> Although the apologetics minimize the social anomaly of women's participation, they also serve to reinforce the underlying assumption that men's sports are more important.<sup>108</sup>

Sex stereotyping of this sort tends both to deter the development of alternative, socially desirable characteristics in both men and women<sup>109</sup> and to perpetuate the traditional images that Congress desired to eliminate. Continued sex stereotyping means that society and male athletes are likely to retain traditional attitudes evincing a lack of respect for women,<sup>110</sup> while women athletes persist in regarding them-

104. See D. BUTT, *supra* note 74, at 63 (female athlete is study of role conflict); H. EDWARDS, *supra* note 91, at 232.

105. Weber, *The Long March*, WOMENSPORTS, Sept. 1974, at 75, *reprinted in Hearings*, *supra* note 5.

106. E. GERBER, *supra* note 78, at 203-08. Women tend to defend their athletic participation as still conforming to the feminine image. "While most young female athletes today know that these traditional attitudes are nonsense, many of them still feel a need to defend their positions." Weber, *supra* note 105, at 75. This need to defend participation arises from the fact that most female athletes are "forced by cultural definitions to choose between an athlete (thereby facing barely hidden suspicions as to the degree of their heterosexuality) and their womanhood." H. EDWARDS, *supra* note 91, at 232.

107. H. EDWARDS, *supra* note 91, at 232; E. GERBER, *supra* note 78, at 205-06. This is manifested by a tendency for women to limit their athletic pursuits to "feminine" sports, to stress the importance of intramural rather than intercollegiate sports, and to avoid exhibition and expenditure of money for equipment. *Id.*

108. E. GERBER, *supra* note 78 at 206; Weber, *supra* note 105, at 75 (circular argument that "[w]omen are poorer athletes—even if inferior treatment has made them this way—and they don't deserve the kind of training or equipment given men. Women don't draw spectators—even if limited media coverage has stifled interest—so there's no reason to give them publicity or to let them run expensive programs . . .")

109. See, e.g., D. BUTT, *supra* note 74, at 63-64, 68 (harmful psychological effects of sexism on men and women). Greater maturity would be achieved "through a merging of the major social traits of both sexes." *Id.* at 64. See generally E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* (1974) (exploring sex differences and concluding that development may be impeded by extreme sex-role stereotyping); Lever, *Sex Differences in the Complexity of Children's Play and Games*, 43 AM. SOC. REV. 471 (1978) (importance of sports participation for cognitive development and resulting harmful effect on girls due to sex-role differentiation).

110. See generally Schafer, *supra* note 75, at 192-93, 196 (athletics, as social institution, promote participants' acceptance of status quo). The depth and seriousness of the problem is particularly evident when the judicial system imposes these norms on individuals. See *Hollander v. Connecticut Interscholastic Athletic Conference, Inc.*, Civ. No. 12-49-27 (Conn. Super. Ct., New Haven County Mar. 29, 1971), *appeal dismissed mem.*, 295 A.2d 671 (1972) (dismissing equal protection challenge to enforcement of discriminatory track-event rules) ("The present generation of our male population has not become so decadent that boys will experience a thrill in defeating girls in running contests . . . , whether the girls be members of their own teams or an adversary team . . . . Athletic competition builds character in our boys. We do not need that kind of character in our girls . . . .")

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selves as less important, less competitive, and less effectual than men. The elimination of these sports-related stereotypes and their detrimental effect on society in general constitutes the basic social policy underlying Title IX.

### III. Assessment of the Existing Regulations and Possible Alternatives

Evaluation of the 1975 regulations in terms of the relevant criteria—the broad language of the statute and underlying social policy concerns—suggests that the regulations are inadequate. HEW should utilize its expertise and independence to develop alternative regulations that fulfill Title IX's mandate. Alternative regulations should be based on a liberal interpretation of the statute in light of underlying social policies. These social policies indicate the specific goal that regulation should address, while the principle of broad interpretation can generate reasonable regulations of an appropriately stringent nature.

#### A. *The 1975 Regulations*

The 1975 regulations have a number of serious weaknesses. First, the required team structure is not altogether clear. It appears that the equal-opportunity section prevails over the separate-team provisions so that a college cannot comply merely by allowing women to compete for places on men's teams.<sup>111</sup> However, the requirement of separate teams for women if there is adequate interest in a particular sport does not address equality for exceptional women athletes. The regulations do not require that men's teams be mixed in order to allow exceptional women to compete at a sufficiently high level.<sup>112</sup> Although this failure may not violate the equal protection rights of the exceptional woman athlete, the regulations do not meet the group-equalization requirements of Title IX.<sup>113</sup> Further, the regulations are silent concerning the problem of men who may desire to compete on women's teams in a sport not offered for men. Finally, the most egregious aspect of the required team structure is that if only a minority of women are inter-

111. See pp. 1257-58 *supra*.

112. See 45 C.F.R. § 86.41(b) (1977).

113. See pp. 1265-66 *supra*. The results of equal protection challenges to men-only teams sometimes turn on whether or not a women's team is provided. Compare *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1972) (rejecting bid of exceptional women athletes to play on male team when female team existed) with *Haas v. South Bend Community School Corp.*, 259 Ind. 515, 289 N.E.2d 495 (1972) (upholding challenge to rule prohibiting participation of girls on boys' team when no team provided for girls). Thus HEW's reliance on ambiguous equal protection standards appears misplaced, since sex is not yet a "suspect" classification demanding strict review and Title IX does mandate such review.



ested in a contact sport—a likely result until effects of past discrimination are eliminated—the regulations do not require that these women be allowed to compete.<sup>114</sup> Thus, although the overall team-structure requirements might appear to encompass neutral standards that disregard distinctions between sexes, in fact they result in continued discrimination.<sup>115</sup>

The laundry list of the equal-opportunity section<sup>116</sup> is an incomplete and inadequate basis for assessing equal treatment in collegiate athletics, since its application is limited. More importantly, although institutions must achieve overall equal opportunity, equality is not required in each area on the list;<sup>117</sup> the regulations only require HEW to “consider” each area.<sup>118</sup> Such consideration may involve a balancing process that permits equality or even mere improvement in one area to compensate for inequality in another.<sup>119</sup> Although the flexibility of the regulations has been praised,<sup>120</sup> this much flexibility may lead not only to unequal enforcement, but also to no enforcement at all. Without equality in each area, elimination of sex stereotypes is impossible.

The most serious defect of the laundry list is its funding provision.<sup>121</sup> The disparity between men’s and women’s sports is most noticeable in their respective budgets.<sup>122</sup> Yet the regulations not only do not provide for, but do not even differentiate between, equal aggregate expenditures, per capita expenditures, or per-participant expenditures. Thus, the provision fails to provide the necessary practical basis for equality and symbolically furthers an idea of group equalization based on in-

114. 45 C.F.R. § 86.41(b) (1977); see HEW Memorandum, *supra* note 44, at 6-7.

115. Facially neutral standards that have a discriminatory impact on one sex may violate the equal protection clause. See *Lau v. Nichols*, 414 U.S. 563 (1974); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

116. 45 C.F.R. § 86.41(c) (1977); see pp. 1258-59 *supra*.

117. See *Cox*, *supra* note 2, at 50 (“each factor need not be present equally in all circumstances”).

118. See 45 C.F.R. § 86.41(c) (1977).

119. It would be reasonable to assume, however, that HEW would not find equal opportunity to exist without equality in a majority of the factors. See 43 Fed. Reg. 58,072 (1978) (policy interpretation measures compliance in overall terms to allow maximum institutional flexibility); HEW Memorandum, *supra* note 44, at 7-8 (HEW will not require identical treatment in all matters but will use laundry list to assess equality of total athletic program).

120. See, e.g., *Hearings*, *supra* note 5, at 197 (Rep. McKinney); *Cox*, *supra* note 2, at 63-64.

121. See Comments of the American Civil Liberties Union to HEW on the Proposed Regulations Under Title IX of the Educational Amendments of 1972, at 14 (Sept. 27, 1974), reprinted in AMERICAN CIVIL LIBERTIES UNION WOMEN’S RIGHTS PROJECT, SEX DISCRIMINATION IN ATHLETICS AND PHYSICAL EDUCATION (1975) (implementation of Title IX “cannot be assured unless equal per capita expenditures for each sex are required”) [hereinafter cited as *ACLU Comments*].

122. See note 2 *supra*.

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equality. The weakness of the expenditure provision is also evident in its lack of clarity. The failure of a school to provide “necessary funds” may be considered in assessing the equality of its program,<sup>123</sup> but “necessary funds” not only is not explicitly defined, there is little indication of what it refers to.<sup>124</sup>

A related weakness is the lack of a provision regarding intercollegiate revenue-producing sports, primarily men’s basketball and football,<sup>125</sup> even though these sports are at the core of the controversy involving Title IX and intercollegiate athletics.<sup>126</sup> HEW has exempted these sports from the requirement of integration through the contact-sports exception,<sup>127</sup> but there is no exemption from the equal-opportunity requirement. Therefore, the “laundry list” should still be “considered” with respect to these two sports.<sup>128</sup> HEW may, however, interpret the two requirements interdependently so that an exemption from one will

123. 45 C.F.R. § 86.41(c) (1977).

124. HEW has recently indicated that the funding provision will be interpreted as requiring equal per capita expenditures per participant. *See* note 49 *supra*. However, several interpretative and substantive problems remain. Immediate problems are raised regarding the definition of “participant”; is it the number of persons before or after tryouts for a particular sport? Moreover, the requirement is subject to substantial exceptions, *see id.*, that render the meaning of the proposal unclear. “Non-discriminatory” factors—nature of the sport, level and scope of competition, and costs of a particular sport—are not defined. *See White, Colleges Mystified by Title IX Fund Rules*, N.Y. Times, Dec. 15, 1978, § A, at 27, col. 1.

The exceptions are, of course, aimed at recognizing the “unique” characteristics of football and major revenue-producing sports, 43 Fed. Reg. 58,070, 58,072 (1978), and at allowing these sports to continue to operate at high expenditure levels. However, the unique characteristics of football, essentially its size and cost, are a likely result of past discrimination. Thus the beneficial effect of the per capita requirement is substantially lessened by excluding the costs of these sports from an estimation of equal expenditures. In addition, any beneficial results from the enforcement of the policy interpretation may be subject to attack because it does not have the force and legitimacy of the regulations. *See* note 50 *supra*.

125. Basketball and football are most frequently cited as the major revenue-producing sports. *See, e.g., Hearings, supra* note 5, at 47 (Darrell Royal, President, American Football Coaches Association); *id.* at 167 (Rep. Mink).

126. *See, e.g., id.* at 46-66, 98-121 (testimony disapproving regulations focuses on revenue-producing sports).

HEW has refused to adopt an NCAA proposal to exempt revenues or revenue-producing sports. 40 Fed. Reg. 24,128, at ¶¶ 73, 74 (1975). But this is a far cry from a positive step to include them. *See generally* Note, *supra* note 3, at 476 n.328 (“[b]y negative implication therefore, a college or university, may well be able to initially channel revenues back to these sports”). As a result, the NCAA now takes the position that Title IX does not require elimination of differences that are due to something other than sex discrimination, *i.e.*, production of revenue. *See* Comments of the NCAA to HEW on the Proposed Regulations on Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance (Oct. 15, 1974), *quoted in* Note, *supra* note 3, at 477. Without adopting an outright exemption for revenue sports, HEW has accepted the concept of “sex-neutral” factors to allow differential funding. HEW Draft, *supra* note 49, at 7.

127. 45 C.F.R. § 86.41(b) (1977).

128. *Id.* § 86.41(c).

be considered an exemption from the other. Moreover, even within the equal-opportunity requirement, exceptions for these two sports may be tolerated in some areas if they are balanced in other areas.<sup>129</sup> Since the disparity between men's and women's athletics is particularly notable when these revenue-producing sports are concerned,<sup>130</sup> any exceptions for them appear to be based on a flagrant disregard of the breadth and underlying social policies of Title IX. It is these male revenue-producing sports that are the strongest reinforcement of the traditional social constructs of masculinity and femininity.

The treatment of athletic scholarships in the regulations is also seriously inadequate.<sup>131</sup> An institution is permitted to distribute scholarships among both sexes as it chooses as long as it provides "reasonable opportunities" to members of both sexes.<sup>132</sup> Awards are to be in proportion to the number of students of each sex participating in intercollegiate athletics.<sup>133</sup> Nonetheless, additional scholarships may be provided to members of separate athletic teams that are permitted under the competitive-skill and contact-sports exceptions.<sup>134</sup> This rule is especially unacceptable because most revenue-producing sports will fall within these two exceptions.<sup>135</sup> Since revenue-producing sports are

129. See p. 1270 & note 119 *supra*. Under HEW's proposed policy interpretation, financially measurable benefits, such as equipment, supplies, travel expenses, and publicity, must be substantially equal because of the equal per capita expenditure requirement. However, differences in expenditures may be justified if they are caused by "differences in costs, levels of competition, and other non-discriminatory factors." 43 Fed. Reg. 58,073 (1978). Such factors are aimed at allowing differential treatment of football. See notes 49 & 124 *supra*. Benefits that are not financially measurable need only be "comparable." Further discrepancies in the ratio of coaches to male and female athletes will be accepted if they are a "result of non-discriminatory factors required by the nature of a particular sport." 43 Fed. Reg. 58,073 (1978). Housing and dining facilities must be comparable; but a separate dormitory may be provided for male athletes and not for female athletes if no additional services are provided to men as a consequence of their separate housing facilities. *Id.* at 58,074.

130. See Hogan, *supra* note 2, at 24 (examples of disparities between overall men and women's budgets and disparities between women's overall budgets and men's football).

131. See 45 C.F.R. § 86.37(c) (1977):

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 86.41.

132. *Id.* § 86.37(c)(1).

133. *Id.*

134. *Id.* § 86.37(c)(2). Contact sports and competitive skill are the only exceptions to the requirement of mixed teams. However it is most probable that more men will be participating in sports because of these two exceptions and thus will be eligible for a greater proportion of the scholarships.

135. *Hearings, supra* note 5, at 167 (Rep. Mink) ("The regulation promulgated by HEW in fact exempts the so-called revenue sports under the 'contact sports' provision.

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characterized by recruitment techniques<sup>136</sup> that involve an unusually high number of financially attractive scholarships the exception will tend to vitiate the rule.

Finally, the regulations fail to deal with athletic associations such as the NCAA. Often, it is the athletic association to which a school belongs that has fought against the implementation of Title IX.<sup>137</sup> Such influential opposition should be regulated under the statute. Admittedly, the regulations provide that the rules of any organization limiting participation on the basis of sex do not obviate the school's obligation to comply with the regulations.<sup>138</sup> Furthermore, under the regulations' general-education section, a school is forbidden to support any organization that discriminates on the basis of sex.<sup>139</sup> There is no such provision in the athletic sections of the regulations, however, and the question whether this provision will be enforced in athletics remains unanswered.<sup>140</sup>

### B. *Suggestions for Alternative Regulations*

There are several changes that should be made in the regulations in order to implement the statute's overall social-policy goal of eliminating sex discrimination and sex stereotyping. These proposals would not only comport with social needs, but also with the statute's "reasonableness" standard.<sup>141</sup>

#### 1. *The Structure of the Athletic System: Mixed and Separate-Sex Teams*

The structure of intercollegiate teams should reflect a balance of individual equality and group equality. The competitive-skill exception must therefore remain a part of the regulations, since this is the

Football and basketball are exempt, scholarships in those sports are exempt to the same degree, and there is no requirement of comparability for women.") The proposed policy interpretation does not remedy the situation. Scholarships and recruiting are classified as financially measurable benefits and thus are subject to the per capita expenditure requirement and its exceptions for nondiscriminatory programmatic decisions. 43 Fed. Reg. 58,073 (1978); see notes 49 & 124 *supra*.

136. See PROJECT ON THE STATUS AND EDUCATION OF WOMEN, WHAT CONSTITUTES EQUALITY FOR WOMEN IN SPORTS? 9 (1975) [hereinafter cited as PROJECT]; N.Y. Times, Mar. 10, 1974, § 1, at 52, col. 3.

137. The NCAA is, of course, a major opponent of Title IX. Hogan, *supra* note 47, at 41.

138. See 45 C.F.R. § 86.6(c) (1977).

139. *Id.* § 86.31(b)(7).

140. *But see* M. DUNKLE, *supra* note 41, at 144 (§ 86.31(b)(7) is applicable to athletics).

141. See pp. 1261-62 *supra*.

basis of all intercollegiate sports.<sup>142</sup> As a result of the differences in performance by male and female athletes, the first team (Team A) would be primarily composed of men. Exceptional women should, however, be allowed to compete for this team whether or not the same sport is offered for women. Such equal opportunity to compete should exist regardless of whether the sport is a contact sport. There is no justification, physical or otherwise, for the contact-sports exception.<sup>143</sup> A school should also be required to offer a separate team for women only (Team B) in either the same sport as Team A, if there is sufficient interest by women, or in another highly competitive sport in which there is greater interest.

For example, if adequate interest exists in a women's intercollegiate football team, a Team B should be offered.<sup>144</sup> In order to fulfill the social needs of group equalization, Team B should be restricted to women only.<sup>145</sup> Otherwise, male athletes, although not the most highly qualified of their sex, might take away the places of the most highly qualified female athletes.<sup>146</sup> Group equalization requires equal opportunity for the most qualified athletes of either sex to participate at the most competitive level. As even the current regulations recognize, athletic opportunities for women have historically been limited. Reparation to women as a group is therefore a reasonable remedy.

## 2. *Affirmative Efforts and Student-Interest Surveys*

The "affirmative efforts" and annual student-interest surveys required by HEW's initial proposed regulations<sup>147</sup> should be reinstated.

142. See pp. 1256, 1268 *supra*.

143. Cox, *supra* note 2, at 44-45 (exception does not further statutory purpose and is not justified by differences between sexes; statistics regarding relative size, weight, and likelihood of injury are irrelevant because neither average woman nor man could compete, for example, in intercollegiate football); PROJECT, *supra* note 136, at 6 (describes myths regarding "damage" to women from vigorous or contact athletic activity).

144. If only a few women were interested in football, but there was much interest in soccer or field hockey, then these would be viable alternatives. Of course, even with this approach, there may be few women who are able to make the male football team, and too few interested in football to justify a separate women's team. In this case, women will have to forego the opportunity to play competitive football; a school, restricted by limited funds, can only be required to achieve group equalization by satisfying the interests of the majority of women.

145. Such a proposal is further supported by the cases that find discrimination if there is enough of a discriminatory impact on one group, regardless of the apparent neutrality of the regulations. See note 115 *supra*.

146. If the proposal is implemented, two teams would exist in intercollegiate sports—one composed primarily of men and the other composed solely of women. In addition, there may be any number of junior varsity teams; their structure could be more flexible because the differences in the levels of performance may not be as notable. The basic premise of equal opportunity to participate, however, should be followed.

147. 39 Fed. Reg. 22,236, ¶ 86.38(b), (c) (1974).

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“Affirmative efforts” would help overcome the effects of past discrimination and generate women’s interest in sports.<sup>148</sup> Also annual surveys would prevent an institution from “tracking” women into traditional women’s sports despite interest to the contrary.<sup>149</sup> Further, such surveys encourage the development of equal opportunities in the selection of sports and levels of competition.<sup>150</sup> Both requirements would be more important in the early stages of implementing equal opportunity than in later stages when tracking would not be as likely to occur.

### 3. *Equal Opportunity and Athletic Scholarships*

The regulations should also require equality in all factors of the equal-opportunity “laundry list.”<sup>151</sup> Moreover, additional factors should be added, namely awards and recognition, recruitment, support services, priority use of recreational facilities, free or reduced admission to athletic events, employment opportunities, and the organizational structure of women’s and men’s programs.<sup>152</sup> Most importantly, athletic scholarships and recruitment, for both mixed and separate teams, should be included.<sup>153</sup> These changes would create a minimum re-

148. The “affirmative efforts” section was deleted by HEW as possibly inconsistent with the overall remedial and affirmative action provisions, 45 C.F.R. § 86.3 (1977), which require affirmative action only if past discrimination has been found at a particular school. *See* 40 Fed. Reg. 24,134, ¶ 75 (1975). However, in light of the depth of sex discrimination in sports, it seems unreasonable to require only those schools with a clear record of discrimination to make affirmative efforts. All schools should be required to generate interest and increase women’s ability to achieve the goal of group equalization. Further, the anti-preferential treatment provision of the statute, 20 U.S.C. § 1681(b) (1976), cannot be viewed as a limitation on affirmative efforts addressed to women who are already enrolled in a university. This provision appears to be directed to original admissions. Moreover, evidence of an imbalance in participation may be used to show discrimination. Affirmative efforts are similar to recruitment, and lack the pernicious effects of fixed quota provisions. This distinction has been discussed by the Supreme Court in the context of Title VI. *See Regents of Univ. of Cal. v. Bakke*, 98 S. Ct. 2733, 2763-64 (1978).

149. *See Education: Sports Sex Tracking in Loco Parentis Dress Codes*, WOMEN’S RIGHTS L. REP., Spring 1972, at 4. An institution might be inclined to offer only traditional feminine sports for women at the intercollegiate level, rather than to promote or respond to interest in nontraditional women’s sports. However, some institutions have already tried to combat this tendency. For example, an interest survey of freshmen was conducted at Yale University. Because interest existed in nontraditional women’s sports, Yale supports a women’s varsity ice-hockey and crew team. Interview with Louise O’Neal, Assistant Athletic Director, Yale University (Apr. 4, 1978) (transcript on file with *Yale Law Journal*). *But see* note 66 *supra*.

150. *See* 45 C.F.R. § 86.41(c)(1) (1977).

151. *See id.* § 86.41(c)(1)-(10).

152. Other factors might include availability of bands and cheerleaders, opportunities to purchase varsity “items,” eligibility for membership in varsity clubs, and laundry or maid service. *See* note 47 *supra*; M. DUNKLE, *supra* note 41, at 127-28.

153. Athletic scholarships and recruitment are currently in separate provisions of the regulations. *See* 45 C.F.R. §§ 86.23, 37(c) (1977). Although scholarships and recruitment are subject to the proposed equal per capita expenditure requirement, disparate funding will be permissible if it results from nondiscriminatory criteria. 43 Fed. Reg. 58,073 (1978).

quirement of equality in each major aspect of athletic programs, equalize the opportunity to participate in intercollegiate sports, and promote women's participation in the overall educational experience.

#### 4. *Athletic Associations*

The regulations should clearly state that an institution violates Title IX by aiding or supporting an athletic association that discriminates on the basis of sex. Such associations are often major obstacles to equalization efforts, not only by virtue of their political activity, but also because they publicize and support men's sports to the exclusion of women's sports. Membership in an athletic association should not be permitted to defeat a program designed to prohibit discriminatory behavior and sex stereotyping.

#### 5. *Equal Expenditures and Revenue-Producing Sports*

Finally, the "necessary" expenditures provision of the current regulations is inadequate.<sup>154</sup> The regulations should require equal per capita expenditures based on the total population of each sex in a college or university.<sup>155</sup> In addition, there should be a specific section complementing the expenditure provision clearly stating that revenue-producing sports are to be treated like all other sports, whether or not they are profitmaking.<sup>156</sup>

154. The current regulations do not specifically require equal per capita or aggregate expenditures, although they do require "necessary" expenditures. 45 C.F.R. § 86.41(c) (1977). The proposed policy interpretation requires per capita, per participant expenditures, but is unclear in definition and scope. See note 124 *supra*.

155. One commentator suggests that the regulations should not require equal aggregate expenditures for men's and women's programs because it would involve HEW too deeply in college finances, and suggests instead that equal funding per participant in the same sport might be feasible. Cox, *supra* note 2, at 50. But isolating each sport for funding purposes is inappropriate because different sports may be emphasized for each sex particularly at the intercollegiate level. The ACLU has made a similar proposal of equal per capita expenditures but its proposal is based on participating populations of each sex. *ACLU Comments, supra* note 121, at 13, 14; see notes 49 & 124 *supra* (HEW's proposed interpretation requires equal per capita expenditures per participant). Per capita expenditures should not be based on the participating population of both sexes, but should be based on the total population of that sex in the college or university. This would prevent an institution from covertly deterring the interest and participation of women in order to eliminate athletic expenditures for them. Moreover, a per capita figure based on the college's total population, rather than on participation in athletic programs, has the advantage of increasing when the college population of women increases as a result of Title IX. Given initial populations of the same size, the aggregate expenditures for men's and women's programs should be equal even if the interest level is not as extensive for women as for men due to past discrimination. The additional funds may be used for special programs to generate more interest and to improve the sports ability of women whose previous opportunities have been limited. Moreover, gradual implementation over a four-year period, see p. 1278 *infra*, will allow time for an increase in interest levels that would justify equal per capita expenditures.

156. There is no justification for financing deficits incurred by revenue-producing sports, to the exclusion of women's sports. For example, if a sport produces revenues of

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As a result, a college or university with equal male and female populations would either have to invest large sums in programs for both sexes or be forced to pare the excessive benefits for men's basketball and football or other large-scale, revenue-producing sports.<sup>157</sup> Major opponents of Title IX fear that such a reduction or alteration will signal the end of college sports.<sup>158</sup> This is clearly hyperbole, since all that such budget-cutting would require is the end of sports as a male institution<sup>159</sup>—the precise goal of Title IX.

Three major arguments are posed in response to this funding suggestion. It is argued that the revenues from these sports help support other sports programs, including women's sports, and this justifies their huge costs.<sup>160</sup> In the final accounting, however, many of the so-called revenue-producing programs do not even pay for their own cost.<sup>161</sup>

Another argument is that the interest in women's sports does not justify their expense.<sup>162</sup> A related point is that there is not sufficient public or media interest in women's intercollegiate sports to generate revenues justifying this increased cost.<sup>163</sup> Not only is this untrue in

\$100,000 and the cost of the sport is \$175,000, the \$75,000 deficit should not be the basis for estimating equal expenditures; instead the full \$175,000 should be included in the assessment. See PROJECT, *supra* note 136, at 14.

157. Given finite funds available for intercollegiate athletics, an institution may be unable to afford the expenditures for these two sports for both sexes. *Id.* at 12; see 43 Fed. Reg. 58,072 (1978) ("very real financial problems facing institutions of higher education").

158. See *Hearings, supra* note 5, at 167 (Rep. Mink) ("NCAA claims that the Title IX regulation will be the death knell for men's intercollegiate athletics"); *id.* at 103 (John A. Fuzak, President, NCAA) (equal expenditures might well cause "disaster in this time of economic crunch to the entire intercollegiate program at most colleges"); Hogan, *supra* note 2, at 18 (describing opponents' fear of ruination of intercollegiate athletics).

159. Cf. *Hearings, supra* note 5, at 185 (Rep. Blouin) (fact that regulations might hurt collegiate football or basketball "is an indication there has been discrimination for years").

160. *Id.* at 103 (John A. Fuzak, President, NCAA).

161. See *id.* at 286 (statement of Norma Raffel, WEAL) ("[O]nly one athletic department in ten makes a profit. The other nine run at a deficit. According to the NCAA, the annual deficit of its members in conducting intercollegiate athletic programs in 1974 was \$49.5 million dollars [*sic*]."); *id.* at 166 (Rep. Mink) ("If the mandatory student fees that finance most big-time college sports programs [mainly revenue-producing sports] were subtracted out and the numerous hidden costs—such as bond issue on the stadium, field maintenance, training equipment, et cetera—were added in, the deficit might well be twice [the NCAA figure of \$50 million]."); Hogan, *Football Is Hardly Sugar Daddy*, N.Y. Times, Dec. 10, 1978, § 5, at 2 (81% of NCAA members' varsity football programs operated at loss, even when student fees and state and federal aid were included in program revenue). It is estimated that 95% of intercollegiate sports operate at a deficit. See *Hearings, supra* note 5, at 185 (Sen. Bayh). Moreover, the operation of semiprofessional teams by a college or university is questionable, see *id.* at 166 (Rep. Mink), as is the propriety of educational institutions serving as a minor league for professional football and basketball, see *id.* at 186 (Rep. Blouin).

162. See generally *Hearings, supra* note 5, at 101 (John A. Fuzak, President, NCAA).

163. See, e.g., *id.* ("[W]omen's sports, . . . at least as far as current indications of spectator interest are concerned, cannot be expected to generate any revenue.")



certain instances,<sup>164</sup> but the failure to produce a sufficient revenue has not stopped institutions from investing large sums in men's sports.<sup>165</sup> Moreover, differential levels of interest are a poor reason for present discrimination, since they are probably a direct result of past discrimination.<sup>166</sup> The fact that there still remains so much interest on campuses in women's athletic programs, despite the tremendous dampening effects of sex discrimination, is evidence of the potential interest of women.<sup>167</sup> Equal expenditures would clearly increase the interest in and desirability of participation.<sup>168</sup>

Finally, it is argued that the remedy is drastic because it will punish men by depriving them of sports opportunities. This problem can be solved, however, by implementing the provision under a timetable.<sup>169</sup> The requirement should be met gradually over a four-year period in order to accommodate the expectations of current students.<sup>170</sup>

## Conclusion

Regulations such as these, unlike the present Title IX regulations, would address the basic problem of sex discrimination in collegiate athletics. Their general effect would be to increase women's interest and participation in intercollegiate sports. Increased participation by women would lead to the development of greater skill and to broader social acceptance of women's competitive participation. Greater skill and broader acceptance would probably result in increased media coverage and public interest.<sup>171</sup>

164. An example is the success of Iowa's women's basketball teams, which often draw more paying spectators than men's basketball teams. Gilbert & Williamson, *supra* note 77, at 50.

165. See notes 161, 163 *supra*.

166. See note 108 *supra*.

167. Gilbert & Williamson, *supra* note 77, at 48; see note 168 *infra*.

168. See Roach, *supra* note 5. Despite the limitations due to discrimination, there has been a tremendous increase in women's participation and interest at both the intercollegiate level (460% increase from 1971 to 1977) and the intercollegiate level (Association for Intercollegiate Athletics for Women (AIAW) has grown from 301 member schools in 1971 to 843 in 1975-76). Hogan, *supra* note 2, at 16, 22; see 43 Fed. Reg. 58,071 (1978) (women's participation in intercollegiate sports increased 100% from 1970 to 1978).

169. Such a timetable also makes the equal-expenditure provisions even more reasonable in light of the Javits Amendment standard. See pp. 1261-62 & note 54 *supra*.

170. There would be almost a 100% turnover of students during a four-year period and thus almost all preexisting expectations would be satisfied. Moreover, schools and universities have already had a three-year grace period. See 45 C.F.R. § 86.41(d) (1977) (adjustment period of three years).

171. See note 164 *supra* (Iowa women's basketball). In addition, the growth of women's professional sports is a likely long-range effect. See Harvin, *Female Pros Make History*, N.Y. Times, Dec. 10, 1978, § 5, at 7, col. 3.

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Such changes in the sports world would in time create equal participation and respect for both sexes in sport and, by definition, eliminate reliance on traditional sex-role stereotypes. The elimination of traditional sex roles in sports would demonstrate societal rejection of these roles and would reduce their desirability in the rest of society. The socializing effect of education would thereby be to foster individual development in sports rather than to promote sex discrimination in athletics and in society as a whole.