

Title IX in the Balance

By Kay Hawes
The NCAA News

While many issues dominated the NCAA calendar in 2002, one of the most riveting and divisive was Title IX, which celebrated its 30th birthday and also came under fire by those who would like to see it changed. While the jury - actually a commission - is still out on what Title IX implementation may look like in the future, 2002 was the year Title IX received more attention than perhaps any time since the 1970s.

While Divisions I and II examined academic reform and Division III began to ponder its future, the membership from all three divisions came to town hall meetings across the country and offered opinions on Title IX and Title IX implementation. Many institutions also celebrated Title IX by sponsoring National Girls and Women in Sport Day, which this year focused on the Title IX anniversary.

"Title IX has been both celebrated and criticized this year," said Judy Sweet, NCAA vice-president for championships and senior woman administrator. "As this landmark legislation has celebrated its 30th birthday, it has come under fire by those who blame Title IX for the decline in spon-

sorship of certain men's teams and would like to see the law weakened.

"Title IX also has been supported by many who believe that it is important civil rights legislation that has not yet fully realized its potential. As opportunities for girls and women have increased in the past 30 years, female participation has increased significantly, but overall opportunities for girls and women still remain far less than those for males."

Title IX prohibits sex discrimination in education by institutions that receive federal funding. Federal regulations say that schools can comply with Title IX in athletics by: providing participation opportunities for women and men that are substantially proportionate to their respective rates of enrollment as full time undergraduates; or demonstrating a history and continuing practice of program expansion for the

under represented gender; or fully and effectively accommodating the interests and abilities of the under represented gender.

The Secretary's Commission on Opportunity in Athletics, which has been examining Title IX implementation since August, will meet one more time before sending its recommendations on Title IX implementation to Rod Paige, secretary of the U.S. Department of Education. Paige is not bound to the commission's recommendations, but it's likely that he would give them significant weight.

And if any of the many recommendations that have been considered thus far by the commission are adopted, big changes could be on the way for Title IX.

A lawsuit and a nominee

In February, the National Wrestling Coaches Association (NWCA) filed a lawsuit against the Department of Education challenging the proportionality prong of Title IX.

The lawsuit, filed in U.S. District Court in Washington, D.C., blames a 1996 rule, which clarifies the federal statute, with prompting colleges and universities to discriminate against men's teams. Also at issue is part of the 1996 clarification that said actual student-athletes would be counted rather

After year of scrutiny, law's longtime interpretation faces uncertain future.



Senior World Team Trials.
121 lb. Jenny Wong, deci-
sioned K. Kunimoto, 6-1.
Photo by G. Wyatt Schultz.

103 pound Tallan Cerna, Connell, (purple and gold), trying to pull out of half nelson applied by Jay L'Homme of Deer Park. Cerna won this semifinal match 7-6 and placed second at the Grizzly Den Classic, Newport, Washington. Photo by Bill France.



than simply the number of spots allotted to teams.

"Many universities feel the only way to avoid a sure lawsuit is to use this proportionality interpretation," said Mike Moyer, the NWCA's executive director. "We would like to see decisions made truly on accommodating the interests of the students."

The suit against the Education Department contended that these federal regulations, and the subsequent court decisions interpreting them, have led some universities to cut men's sports rather than add women's sports in an effort to seek gender equity.

The College Gymnastics Association and the United States Track Coaches Association later joined the lawsuit.

Also in February, seven months after President Bush nominated Gerald Reynolds as assistant secretary for the Office for Civil Rights (OCR) at the Department of Education, a US Senate committee held a hearing on Reynolds' candidacy. The OCR is the entity charged with enforcing Title IX and many other civil rights laws.

Reynolds, formerly a regulatory attorney for the Kansas City Power and Light Co., appeared before the Senate Health, Education, Labor and Pensions Committee February 26, where he took questions from several senators. Reynolds had not previously stated a position on Title IX, but several senators had read his writings in opposition to affirmative action.

Reynolds said that if confirmed he would uphold and enforce civil-rights laws, including Title IX, which he called the "most successful" of those laws. He also said he was an "enthusiastic supporter" of Title IX.

Sen. Ted Kennedy, D-Massachusetts, chaired the committee, and he questioned Reynolds' qualifications.


"After reviewing Mr. Reynolds' record, I was struck by his lack of education policy experience and his long standing hostility to basic civil-rights laws, which together raise legitimate questions about Mr. Reynolds' qualifications for the job and his commitment to enforcing basic civil rights

protections," Kennedy said.


"These concerns are shared by a broad-coalition of civil-rights, women's, education and disability groups who oppose his nomination."

The Senate committee never had the chance to vote Reynolds' nomination up or

down. On March 29, President Bush bypassed the Senate confirmation hearing process and used what is known as a "recess appointment" to appoint Reynolds and four other nominees to their posts. Bush made the appointments while the Senate was on break for Easter and



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Passover. Reynolds must receive Senate confirmation early in 2003 to continue as assistant secretary.

Celebrating 30 years

The first round of celebrations for Title IX this year was National Girls and Women in Sport Day, which focused on the 30-year anniversary of Title IX.

The NCAA Title IX Seminar, held this year in May in Washington, D.C., also celebrated the anniversary. The conference featured many who have supported Title IX since its inception, including Congresswoman Patsy Mink, D-Hawaii, the keynote speaker; Donna Lopiano, executive director of the Women's Sports Foundation; and Marcia Greenberger, founder and co-president of the National Women's Law Center.

Mink, who served in the U.S. House of Representatives from 1965 to 1976 and again from 1990 until her death in September after a bout with pneumonia, was among those who drafted and supported the original 1972 legislation.

Mink told attendees at the NCAA Title IX Seminar that she was inspired to push for the legislation because she had found the doors to medical schools closed when she applied in the 1950s.

"It was something I had worked my entire life to achieve," she said of her desire

to study medicine after graduating from the University of Hawaii, Manoa, with a bachelor's degree in zoology and chemistry. "You can imagine the shock I experienced when a dozen or more medical schools across the country told me after I got my bachelor's degree that I was not acceptable, my undergraduate grades not with-standing, because I was female. I was stunned."

Summer heats up Title IX debate

Though the statute actually celebrated its birthday in June, there wasn't much of a party. Beginning with the government's May 2 response to the NWCA lawsuit, the summer was a hot time for Title IX debate.

The U.S. Department of Justice, answering on behalf of the Department of Education filed a motion in District Court in Washington, D.C., to dismiss what has become known as the "wrestlers' suit," though by now it involved other men's Olympic sports organizations - now under the umbrella of the College Sports Council as well. The Department of Justice's response, however, did not address the underlying merits of the lawsuit. Instead, the department made three procedural arguments: that the plaintiffs' claims against the Department of Education were

barred because the institutions that plaintiffs allege to have improperly eliminated men's athletics programs, not the Department of Education, are the proper targets of the lawsuit; and that the statute of limitations had expired with respect to the plaintiffs' challenges to the Department of Education's 1980 Title IX regulations and its 1979 policy interpretation.

For several weeks in May as the date drew near for the Department of Justice to respond to the lawsuit, a flurry of e-mails from the Women's Sports Foundation, the National Women's Law Center and other group encouraged many in athletics to send e-mail to Congress supporting Title IX and its continued enforcement through existing regulations. Many of those e-mails indicated that prominent supporters of women's athletics have heard a revision was imminent.

Another flurry of e-mails from those affiliated with the NWCA urged opponents of proportionality to contact members of Congress.

Concurrent with those efforts were columns in several national magazines and newspapers highlighting a new book, Tilting the playing field: School, sports, sex and Title IX. The book's author, Jessica Gavora, is the chief speechwriter for U.S. Attorney General John Ashcroft and also is described on the book jacket as a "senior policy advisor at the Department of Justice." Gavora's book criticized Title IX and asserted that it promotes quotas and the destruction of men's sports.

Gavora's now well-publicized views and also her position in the Department of Justice led many to believe a change in the enforcement of Title IX was underway. In actuality, however, the Department of Justice answered the suit itself; not the merits of Title IX.

"What is revealing is what the government didn't say," said Marcia Greenberger, co-president of the National Women's Law Center. "It made absolutely no defense of the underlying policies that were challenged by the wrestlers, and it sets off alarm bells as to what the future plans of the administration might be, whether they are keeping their options open to roll back and weaken Title IX enforcement."

On June 17, attorneys for the NWCA and the College Sports Council filed a cross-motion for summary judgment in their lawsuit against the Department of Education, asking that a court in Washington, D.C., order the Department of Education to publish a notice in the Federal Register announcing withdrawal of the 1979 regulations (the three-part test) and the 1996 clarification.

"It's time to restore basic fairness to Title IX," said the NWCA's Moyer.

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The 58-page NWCA filing addressed the procedural arguments made by the Department of Justice and also asserted that the Department of Education adopted the regulations unlawfully. It also asserted that "at schools where the athletics interest of men currently is greater than that of women, each-part of the three-part test discriminates against men."

Lawrence Joseph, one of the attorneys for the plaintiffs, said the removal of the tests based on enrollment would return Title IX to its original intent.

"What we're trying to go back to is equal opportunity based on interest," he said. "The measuring stick has been changed (by the 1979 regulations and 1996 clarification) and changed illegally."

Under this type of test, schools would assess the athletic interests of students and provide opportunities according to the results of that assessment, not according to enrollment.

"If one group is twice as interested as the other, than you would expect that group to have twice as many opportunities. And it wouldn't matter which gender was more interested," he said, noting that at some schools more men might be interested, while at other schools more women might be interested.

On June 18, the National Women's Law Center identified 30 universities and colleges in 24 states that it said had failed to give female student-athletes "their fair share" of athletics scholarship dollars as required by Title IX.

The NWLC reported that the gap amounted to nearly \$6.5 million annually at those 30 institutions combined.

"Thirty years after Title IX, our young women are still being short changed," said Greenberger. "Sex discrimination in athletics scholarships has a harmful and practical impact on female students and their families who are trying to make ends meet while also paying for college tuition."

The NWLC sent letters to the 30 institutions, warning them of their possible Title IX violation and asking that they change their practices.

The NWLC's analysis was based on public information made available by each school under the Equity in Athletics Disclosure (EADA). The EADA information is available online at www.ope.ed.gov/athletics.

The athletics scholarship gaps at the 30 institutions ranged from 4 percent to 17 percent. The average male student-athlete athletics scholarship was \$7,875 at those schools, while the average female student-

athlete scholarship was \$5,744.

"As our investigation shows, we still need continued and greater enforcement of Title IX," Greenberger said. "It takes a long time to root out this kind of persistent discrimination. Now is not the time to weaken policies that have greatly expanded opportunities for female student-athletes."

Commission takes over debate

At the end of June while appearing before the same Senate committee that reviewed Reynolds' nomination, U.S. Department of Education Secretary Paige announced the formation of the commission to study Title IX.

"Without a doubt, Title IX has opened the doors of opportunity for generations of women and girls to compete, to achieve and to pursue their American dreams," Paige said. "This administration is committed to building on those successes. I am confident that, with the help of this commission, we will learn how we can do a better job of enforcing a law that represents hope to so many Americans."


Paige noted during the hearing that the commission would gather information on Title IX and provide advice to the Department of Education, but that the

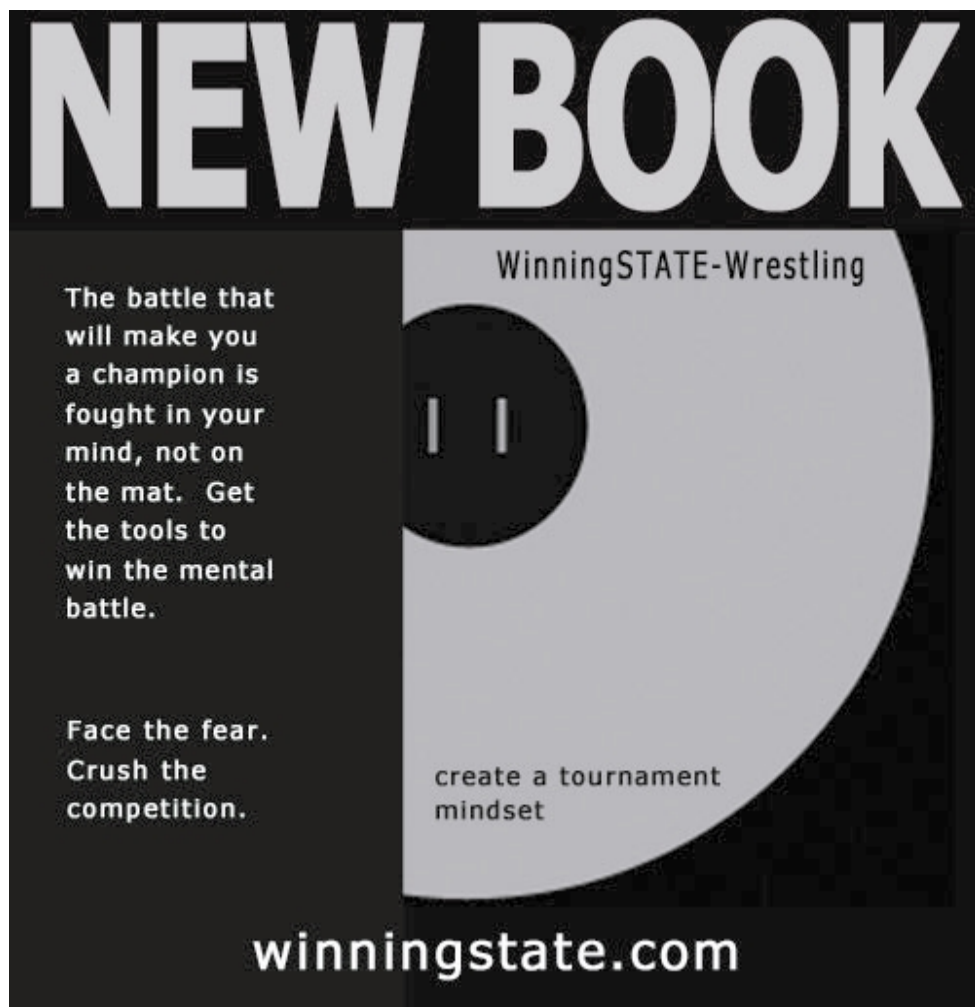
Department would not automatically adopt any recommendations.

The commission, co-chaired by Ted Leland, athletics director at Stanford University and Cynthia Cooper, a former WNBA standout, held four town hall meetings in which it heard comment from the public and from invited panelists on everything from the original intent of Title IX to Title IX implementation at the high school, junior college and college level.

Panelists appearing before the commission included those who advocated no changes and those who advocated sweeping changes to Title IX regulations. Current and former student-athletes, athletics administrators and the leaders of all kinds of athletics related organizations appeared before the commission to present information and argue their own perspectives.

In late November, the commission ended its public comment period and turned its attention to discussing the issues and any proposed recommendations.

"I think we may be headed toward sweeping changes in the enforcement of Title IX," Leland told *USA Today* recently. "This could potentially change the way ... universities do business." 



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