

2022

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Paul M. Anderson

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Paul M. Anderson, *Title IX at Fifty: An Introduction*, 33 Marq. Sports L. Rev. 1 (2023)
Available at: <https://scholarship.law.marquette.edu/sportslaw/vol33/iss1/2>

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SYMPOSIUM: TITLE IX AT 50

TITLE IX AT FIFTY: AN INTRODUCTION

PAUL M. ANDERSON*

June 23, 2022, marked the fiftieth anniversary of the passage of Title IX, a law that has impacted youth, high school and college sports in myriad ways over the past fifty years.¹ While the Sports Law Program at Marquette University Law School has only existed for the better part of the past twenty two years, and the National Sports Law Institute is in the midst of its thirty third year, our interest in Title IX and its impact on sports has been clear from the beginning as the first issue of the formerly named *Marquette Sports Law Journal*, in 1990, featured an article on the Civil Rights Restoration Act, passed in 1987 (the fifteenth anniversary of the passage of Title IX), the law that reasserted the reach of Title IX to all parts of any federally funded entity.² Throughout the past thirty three years, the *Marquette Sports Law Journal* and now *Marquette Sports Law Review* has featured numerous interesting articles focused on different aspects of Title IX.

Graduating from Law School in 1995, I moved to California and my interest in gender equity was peaked working in game productions in the athletic department at the University of San Francisco and particularly working women's basketball and volleyball games and realizing the incredible skill of these young women, something I had not seen in my own sports experience. Moving to San Jose State university's athletic department for another externship experience, I immersed myself in the NCAA's old athletic certification process where I was heavily involved in the gender equity review and started to get a first-hand

* J.D., B.A. Economics and Philosophy, Marquette University, Director, Sports Law Program and National Sports Law Institute, Marquette University Law School, Adjunct Professor, Marquette University Law School, Supervisor and Faculty Advisor, Marquette Sports Law Review, and Editor-in-Chief, Marquette Sports Law Journal, 1994-1995.

1. 20 U.S.C. §1681 (2022).

2. P. Michael Villalobos, *The Civil Rights Restoration Act of 1987: Revitalization of Title IX*, 1 MARQ. SPORTS L.J. 149 (1990).

understanding of the disparities between genders within college athletics. This interest continued as I returned to Marquette and began teaching an Amateur Athletics focused course in 1998, with much of the focus on different aspects of Title IX and gender equity. This focus has continued in my research and writing and culminated in a workshop titled “The Impact of Gender Equity on Sport,” that I now teach every fall semester at Marquette University Law School. This course grew out of my interest in expanding the coverage of the many interesting ways gender equity is entwined with the law and finding that my other courses focused more generally on amateur athletics did not allow the space for through analysis of these important issues. As students now know, this course could better be called “An Analysis of Title IX’s Impact on Sport.”

Along with this personal development, the *Marquette Sports Law Review*’s commitment to publishing scholarship related to Title IX has been a feature. This focus culminated first in a Symposium issue surrounding the thirtieth anniversary of Title IX,³ and another surrounding the fortieth anniversary of Title IX.⁴ I am proud to now provide this short introduction to the fall 2022 issue of the *Marquette Sports Law Review*, Volume 33, Number 1, our Symposium issue focused on Title IX at fifty.

This Symposium begins with an article by Professor and Title IX scholar R. Shep Melnick, from Boston College, who provides an interesting look at Title IX’s impact on athletics and how that comports with its original educational focus.⁵ Next is an article from Dr. Cynthia Pemberton, President of Lewis-Clark State College, noted expert on educational equity and school sport, and a participant in our thirtieth and fortieth anniversary Symposiums, who provides a retrospective piece noting the measurable progress that has been made.⁶ Professor Dionne Koller, Director of the Center for Sport and the Law at the University of Baltimore School of Law then provides a focus on youth sport and its impact on Title IX’s ability make meaningful change in education-based sport.⁷

The next set of contributions to the Symposium focuses on a divisive issue that once again came to the forefront during the Covid 19 pandemic, cutting athletic opportunities and how this practice should be analyzed under Title IX. These contributions start with an article from Attorney Wyatt Honse, Law Clerk to the U.S. District Court for the Western District of Wisconsin and Attorney

3. *Symposium: Title IX at Thirty*, 14 MARQ. SPORTS L. REV. 3 (2003).

4. *Symposium: Title IX at Forty*, 22 MARQ. SPORTS L. REV. 2 (2012).

5. R. Shep Melnick, *Whose Educational Opportunity?*, 33 MARQ. SPORTS L. REV. 7 (2022).

6. Cynthia Pemberton, *A Title IX Retrospective: From Information & Advocacy to Action & Outcomes...*, 33 MARQ. SPORTS L. REV. 39 (2022).

7. Dionne Koller, *The Pipeline to Title IX*, 33 MARQ. SPORTS L. REV. 51 (2022).

and Professor Jayma Meyer, counsel, Simpson Thacher & Bartlett LLP and Visiting Clinical Professor of Sports Law and Public Policy at Indiana University, who provide an in-depth analysis of prong one, the substantial proportionality prong of Title IX's three part test of whether schools are providing equal opportunities for men and women to participate in sport.⁸ Professor Erica Zonder, Associate Professor of Sport Management and Undergraduate Program Coordinator, Co-Chair of Title IX Education, Prevention, & Advocacy Committee at Eastern Michigan University shifts her analysis to the lack of utility of the three part tests prong two.⁹ Next is an article from Dr. Genevieve Birren, Sports Management Professor at SUNY Cortland, a Marquette University Law School graduate and alum of our Sports Law Program, Dr. Robyn Lubisco, Sports Management Professor at Fairleigh Dickinson University, and Dr. Kerry Fischer, Sports Management Professor at SUNY Fredonia, who collectively provide an analysis of schools cutting women's opportunities presumably due to the impact of the Covid-19 pandemic.¹⁰

Unrelated to cutting opportunities, Professor Adam Epstein from Central Michigan University, then provides an analysis of the contact sports exception and the opportunity for girls to play football.¹¹ Finally, two articles focus on the opportunity to participate from a few different perspective, focusing on an issue that has come to the forefront of athletics in the past few years, participation on "the basis of sex" and specifically participation of transgender athletes. This set of articles begins with an article from Dr. Mollie McQuillan, Professor in Educational Leadership and Policy Analysis at the University of Wisconsin – Madison, Dr. Suzanne Eckes, Susan S. Engeleiter Professor of Education Law, Policy and Practice at the University of Wisconsin-Madison School of Education, and Dr. Maria Lewis, professor in Education Policy Studies and an affiliate law faculty at Pennsylvania State University, provide a legal, theoretical, and policy perspective on the rights of transgender athletes as state's pass laws to limit their ability to participate in sport.¹² Finally, Professor J. Brad

8. Wyatt Honse & Jayma Meyer, *Title IX's "Substantial Proportionality" Test: Old Challenges and New Debates in Assessing Whether a School Provides Equal Opportunity to Participate in Athletics*, 33 MARQ. SPORTS L. REV. 83 (2022).

9. Erica J. Zonder, *Title IX's Three-Part Test: The (Lack of) Utility of Prong 2*, 33 MARQ. SPORTS L. REV. 131 (2022).

10. Genevieve F.E. Birren et al., *Title IX and COVID-19: Losing Millions of Dollars During a Pandemic is No Excuse for Cutting Women's Teams*, 33 MARQ. SPORTS L. REV. 151 (2022).

11. Adam Epstein, *Sarah and Sam Make Contact: Thoughts on the Contact Sports Exception and Title at 50*, 33 MARQ. SPORTS L. REV. 173 (2022).

12. Mollie McQuillan et al., *A Solution in Search of Problem: Justice Demands More for Trans Student-Athletes to Fulfill the Promise of Title IX*, 33 MARQ. SPORTS L. REV. 195 (2022).

Reich, Professor of Law and Ethics, University of Puget Sound, provides an interesting analysis of transgender participation in sport specifically looking at whether transgender based discrimination should be prohibited under Title IX.¹³

The next group of articles focus on Title IX issues specifically within college athletics. Professor Brian Porto, from Vermont Law School, who was also a participant in our fortieth anniversary Symposium issue, starts this group with an article discussing how Title IX litigation has impacted college sports.¹⁴ Professor Nellie Drew, the Director of the University at Buffalo Center for the Advancement of Sport, and Professor of Practice in Sports Law, then focuses on Title IX's unintended impact on collegiate coaching.¹⁵ Professor Lauren McCoy Coffey, Graduate Director, Sport and Fitness Administration, at Winthrop University, and also a Marquette University Law School graduate and alum of our Sports Law Program, discusses the impact of NCAA governance on Title IX compliance and whether the NCAA should be subject to Title IX.¹⁶ Finally, Attorney Maci Edwards, and Professor Walter Champion, from Texas Southern University School of Law, provide an interesting perspective on how the burgeoning NIL compensation for athletes can provide a means for universities to increase equity for female athletes.¹⁷

The next contributions focus on different aspects of Title IX and sexual harassment. First is an article from Attorney Rex Sheild, Conflicts Attorneys at Dentons US LLP, and also a Marquette University Law School graduate and alum of our Sports Law Program, calls for greater emphasis on combatting sexual misconduct on college campuses.¹⁸ Next, Attorney Ilona Turner, mediator, arbitrator, and Lecturer at Stanford Law School and U.C. Berkeley, provides an interesting analysis of verbal bullying and whether courts should find it to violate Title IX.¹⁹

The next group of articles could perhaps be loosely categorized as providing perspectives for changes, enhancements of how Title IX has worked so far.

13. J. Brad Reich, "Can" Versus "Should": Title IX, Transgender, and Athletic Opportunities, 33 MARQ. SPORTS L. REV. 229 (2022).

14. Brian L. Porto, *Checking the Scorecard: Title IX, College Sports, and the Limits of Litigation*, 33 MARQ. SPORTS L. REV. 273 (2022).

15. Helen A. "Nellie" Drew, *Title IX's Impact Upon Collegiate Coaching: The Unfortunate Unintended Consequences of Title IX*, 33 MARQ. SPORTS L. REV. 319 (2022).

16. Lauren McCoy Coffey, *Improving Gender Equity Through the Controlling Authority of the NCAA*, 33 MARQ. SPORTS L. REV. 357 (2022).

17. Maci Edwards & Walter Champion, *Title IX Hypocrisy Continues After NCAA v. Alston*, 33 MARQ. SPORTS L. REV. 373 (2022).

18. Rexford Sheild, *Why Title IX is at a Crossroads*, 33 MARQ. SPORTS L. REV. 391 (2022).

19. Ilona M. Turner, *Gendered Slurs on the Schoolyard: Unlawful Harassment or "Simple Teasing"?* 33 MARQ. SPORTS L. REV. 445 (2022).

Professor Sarah Fields from the University of Colorado Denver, advocates for courts to impose punitive damages for violations of Title IX to further encourage schools to comply with the law.²⁰ Professor Elizabeth Kaufer Busch, Graduate Director, Sport and Fitness Administration, and Co-Director of the Center for American Studies, at Christopher Newport University, and William Thro, general counsel at the University of Kentucky, provide a thorough historical and constitutional analysis of Title IX and the way it has developed through agency guidance and regulation.²¹ Professor Jacquelyn Bridgeman, University of Wyoming College of Law, adjunct faculty in African American and Diaspora Studies, and Director of the School of Culture, Gender & Social Justice, at the University of Wyoming, provides an interesting perspective on the shortcomings of Title IX and using what she names a positive equality approach to further assist toward achieving Title IX's purpose.²² In addition, Dr. Matthew Madden, SUNY Cortland, Dr. Mark Dodds, Sports Management Professor, SUNY Cortland, and also a Marquette University Law School graduate and alum of our Sports Law Program, Dr. Katherine Polasek, Professor and Chair of the Kinesiology Department at SUNY Cortland, and Professor Anne DeMartini, Kennesaw State University, contribute an interesting analysis of Title IX's impact on physical education curriculum.²³

The last article included in this Symposium, from Professor Stephen Ross, Pennsylvania State University, and Professor Maria Josefa García Cirac, Faculty of Law, University of Salamanca, contribute a fascinating article describing the promotion of female opportunities in sports in Spain, without Title IX.²⁴

The Symposium ends with two student comments from Marquette University Law School third year students who are members of our Sports Law Certificate class of 2023 both contributing articles analyzing deliberate indifference standards under Title IX. The first comment is from Paul Kekich, the *Marquette Sports Law Review's* Survey & Index Editor, who analyzes the sexual harassment deliberate indifference standard focusing on violations at

20. Sarah Fields, *Putting Teeth in the Tiger: Why Title IX Needs the Threat of Punitive Damages*, 33 MARQ. SPORTS L. REV. 467 (2022).

21. Elizabeth Kaufer Busch & William E. Thro, *Restoring Title IX's Constitutional Integrity*, MARQ. SPORTS L. REV. 507 (2022).

22. Jacquelyn Bridgeman, *Crossing the Finish Line: Positive Equality as a Tool to Fully Achieve Title IX's Purpose*, 33 MARQ. SPORTS L. REV. 561 (2022).

23. Matthew Madden et al., *Celebrating 50 Years: Title IX and Physical Education Curriculum*, 33 MARQ. SPORTS L. REV. 591 (2022).

24. Stephen F. Ross & Maria Josefa García Cirac, *Promoting Female Sporting Opportunities Without Title IX: The Spanish Experience*, 33 MARQ. SPORTS L. REV. 607 (2022).

Louisiana State University.²⁵ Finally, Peyton Phillips, contributes a comment that has won numerous Sports Law Program writing awards, focusing on sexual harassment claims in collegiate Esports.²⁶

This Title IX at 50 Symposium, includes articles on many of the most important issues surrounding the application, enforcement and understanding of Title IX, in one of the longest Symposiums ever published in the *Marquette Sports Law Review*. Readers looking to understand this area of law, and gender equity in general, will benefit from the work of the thirty-three authors who contributed to this incredible issue. On behalf of the Sports Law Program and National Sports Law Institute at Marquette University Law School, thank you to all of these contributors for their impressive efforts. We will continue to feature excellent Title IX scholarship in this *Sports Law Review* for years to come.

25. Paul D. Kekich, *Sleaux Tigers: An Analysis of Title IX Deliberate Indifference Standard and its Application to Title IX Violations at Louisiana State University*, 33 Marq. Sports L. Rev. 637 (2022).

26. Peyton Phillips, *Deliberately Indifferent: An Analysis of Sexual Harassment Claims in University Sponsored Esports Activities Using Simpson v. University of Colorado*, 33 MARQ. SPORTS L. REV. 659 (2022).