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A TITLE IX RETROSPECTIVE: FROM INFORMATION & ADVOCACY TO ACTION & OUTCOMES...

CYNTHIA PEMBERTON*

In preparing to draft this retrospective, I spent time reading through my past writings on Title IX. While it should not have been surprising, it gave me pause to note that I have been reading, writing, presenting, educating, and advocating about, and for, Title IX and school sport for thirty years. I have written information-based nuts-and-bolts pieces outlining what operationalizing the Rules and Regulations and Policy Interpretations mean specific to intercollegiate athletics. I have explored the legacy of women's sport experiences and advocated for competitive dance/cheer as sport – based on the premise that determining what is and is not considered sport need not be delimited by historically-rooted masculine norms.

I have co-authored pieces on promoting women in sport, how-to guides on ways to celebrate National Girls and Women in Sports Day, and chronicled the live-experience of being a Title IX whistleblower in my book, *More Than a Game: One Woman's Fight for Gender Equity in Sport*.¹ I have penned a couple invited, albeit feisty, pieces appearing in earlier editions of this Review, *Wrestling with Title IX*² and *More of the Same – Enough Already!*³ I have been a successful collegiate athlete, coach, athletic administrator, teacher/professor, college/university dean, provost, vice president, and now have the privilege to serve as a college president. These roles and responsibilities have, and continue

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1. CYNTHIA LEE A. PEMBERTON, *MORE THAN A GAME: ONE WOMAN'S FIGHT FOR GENDER EQUITY IN SPORT* (Ne. Univ. Press 2002).

2. Cynthia Lee A. Pemberton, *Wrestling with Title IX*, 14 MARQ. SPORTS L. REV. 163 (2003).

3. Cynthia Lee A. Pemberton, *More of the Same – Enough Already!*, 22 MARQ. SPORTS L. REV. 597 (2012).

to inform my understanding and evolving perspective regarding the value and role of school sport, and ultimately Title IX—perhaps the single most impactful sport equity tool (some might say weapon) ever wielded. All of which leads me to this retrospective.

As a noun, a retrospective shows the development of a body of work over a period of time. As an adjective a retrospective focuses on looking back, dealing with past events or situations. This writing reflects a bit of both the noun and adjective, and perhaps most importantly, concludes not with a call to action, but exemplars of actions in play and outcomes being realized.

As recently as June 21, 2022, in an *Associated Press* article, I found myself once again correcting information pertaining to Title IX compliance and school sport; attempting to dispel misperceptions about what equity means (i.e., that it doesn't necessarily mean "the same"); the importance of the "or" in the three-prong test; the difference between revenue and profit – as if either do or should matter in this instance (spoiler alert – it shouldn't and doesn't); and persistent incomprehension (a.k.a. denial) associated with booster groups and fundraising (it is the value-proposition the money provides and the equivalent effect experienced that matter, not the funding source). And so, it is not only fitting but apparently still necessary to start with a Title IX primer.

Title IX states: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."⁴ Originally, it wasn't clear that school sport was part of Title IX. Athletics were considered more as an afterthought, spearheaded by Congresswomen Edith Green from Oregon and Patsy Matsu Mink from Hawaii. According to Indiana Senator Birch Bayh, the principal Senate sponsor of Title IX, the legislation was put forth as: "a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which [was] serving to perpetuate second-class citizenship for American women."⁵

The legislative, legal history, and evolution of Title IX includes rules and regulations,⁶ policy interpretations;⁷ an Office of Civil Rights (OCR)

4. 20 U.S.C. § 1681(a) (2022).

5. ELLEN J. VARGYAS, *BREAKING DOWN BARRIERS: A LEGAL GUIDE TO TITLE IX* 6 (Nat'l Women's L. Ctr. 1994) (quoting 118 CONG. REC. 5,804 (1972) (remarks of Sen. Bayh)).

6. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 Fed. Reg. 30,955, 30,955-65 (May 9, 1980).

7. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,413-23 (Dec. 11, 1979).

Investigator's Manual;⁸ clarifications and interpretations by the OCR;⁹ Dear Colleague Letters and updates;¹⁰ a congressional equity act (the Equity in Athletics Disclosure Act);¹¹ and a nationwide listening tour, the *Secretary's Commission on Opportunities in Athletics*;¹² as well as a barrage of court cases spanning decades.¹³ The OCR is responsible for enforcing Title IX.¹⁴ The ultimate consequence for noncompliance is the loss of all federal funds.¹⁵ This includes federal student financial aid, which if lost would effectively shut down a college or university. To date, the OCR has never levied this ultimate consequence.

Title IX compliance covers three broad areas: athletic-related financial aid, interest and abilities, and other program areas. Relative to athletic financial aid, scholarship dollars must be allocated in amounts that mirror athletic participation numbers, which is actually not terribly progressive. With regard to the accommodation of interest and abilities, Title IX prescribes compliance with one of three prongs. These prongs require: (a) demonstrating that athletic participation opportunities for females and males are substantially proportionate to enrollment; or (b) showing a history and continuing practice of program expansion responsive to the developing interests of the underrepresented sex (typically women); or (c) demonstrating that the programming offered, fully and effectively meets the expressed interest and abilities of the underrepresented sex (again, typically women).¹⁶ The "or" is important and frequently not recognized or understood. While certainly the first prong is the most direct to calculate and serves as *safe-harbor*, despite the persistent misperceptions that proportionality is required (too often wrongly espoused as equal numbers of male and female student-athletes, and/or the same number of sports available to women and men) meeting any one of the three prongs suffices. And, as we have moved through

8. Valerie M. Bonnette & Lamar Daniel, *Title IX Athletics Investigator's Manual*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (1990).

9. Norma V. Cantú, Assistant Sec'y for Civ. Rts., *Dear Colleague Letter, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>.

10. *Id.*

11. Equity in Athletics Disclosure Act, H.R. 921, 103d Cong. (1993).

12. Deborah Price, Secretary of Education's Commission for Opportunity in Athletics, "*Open to All*," *Title IX at Thirty (Archived)*, U.S. DEP'T OF EDUC. (Feb. 28, 2003), <https://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf>.

13. See Catherine Pieronek, *A Clash of Titans: College Football v. Title IX*, 20 J. COLL. & U.L. 351 (1994).

14. VARGYAS, *supra* at note 5, at 6.

15. *Id.*

16. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

time, prongs two and three have become increasingly relevant and important because of the near seismic shift in undergraduate enrollment that has occurred over the past half century.¹⁷

Historically, the genesis of the three-prong test originated with the National Collegiate Athletic Association (NCAA) and the American Football Coaches Association (AFCA). In the early 1970s men made up the majority of college students (about sixty percent)¹⁸ and so, from the perspective of minimizing disruption the proportionality prong was viewed as a way to passively ensure the persistence of the status quo. Prong two, a history and continuing practice of program expansion was vague, flexible, and subject to interpretation; and at the time, the prevailing school of thought was that females weren't as interested in sports as males, so prong three, full and effective accommodation of expressed interest and abilities was not anticipated to pose much of a threat. With the three-prong test in place, disruption would have been minimal if it weren't for the fact that over the past fifty years females have been enrolling in colleges and universities in ever increasing numbers. In fact, current undergraduate enrollment trends represent a complete reverse of what existed at the time Title IX originated; that is, about sixty percent of undergraduate enrollees today are female.¹⁹

Finally, Title IX requires that all other opportunities and treatments afforded to sport participants be equivalent. It is important to note that equivalent does not mean exactly the same, nor does it imply equal monetary spending. This is key and came about as a result of congressional action involving Republicans John Tower from Texas and Jacob Javits from New York.

Historically, during the time that the Department of Health, Education, and Welfare (HEW) was working to develop rules and regulations and policy interpretations to operationalize Title IX, Congressman John Tower proposed an amendment to exempt revenue producing sports (e.g., football) from Title IX's purview.²⁰ In effect, given Title IX's clear and direct wording prohibiting discrimination based on sex, designating revenue sports as a third sex. Congress did not act on the Tower Amendment and instead passed the Javits Amendment.²¹

17. See *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d13/tables/dt13_303.10.asp (last visited Dec. 30, 2022) (Total fall enrollment in degree-granting postsecondary institutions, by attendance status, sex of student, and control of institution: Selected years, 1947 through 2023).

18. *Id.*

19. *Id.*

20. U.S. COMM'N ON CIV. RTS., MORE HURDLES TO CLEAR: WOMEN AND GIRLS IN COMPETITIVE ATHLETICS 7 (1980).

21. *Id.*

The Javits Amendment instructed HEW to make reasonable regulatory provisions considering the nature of particular sports. This language made clear that Congress was not willing to accept an amendment exempting revenue producing sports; but did understand that treating sports equitably did not necessitate equal spending.²² So to be clear, contrary to popular myth, not only does Title IX *not* require equal numbers of male and female sports or participants, it does *not* require equal spending. What it requires is the provision of an equitable value-proposition in terms of the school sport experience; which is addressed and expressed through the third area of Title IX compliance, sometimes referred to as the laundry list.

This catch-all category of other program areas focuses on creating and ensuring equity in terms of the sport participation experience. It includes: equipment and supplies, scheduling of games and practice, travel and per diem allowances, opportunities to receive academic tutoring, opportunities to receive coaching as well as coaching compensation, locker room, practice, and competitive facilities, medical and training room services and facilities, housing and dining services and facilities, publicity, support services, and recruitment.²³ Of note is that nowhere in Title IX's language, rules, regulations, policy interpretations, or compliance-specific directives are definitions of what can and cannot be considered sport defined or dictated.

The legal history of Title IX reflects the ways that laws serve to regulate relationships; attempting to prevent the worst in us, while typically falling short of compelling the best in us. Interpretation and even laws themselves reflect societal notions of right and wrong, ebbing and flowing over time in response to pressure, power, norms and values—evolving as a context-specific relationship, a dance of sorts, between society and the executive, legislative, and legal branches of government. Laws tell us how bad we can be before we get into trouble, not how good we could or should be. The history and ongoing evolution of Title IX exemplifies this interplay.

Historically, sport for women and girls originated to “address the expressed need for healthful exercise for women . . .”²⁴ and, unlike the competitive warrior model characteristic of men's sports, women's sports were rooted in philosophies of participation, cooperation, and play.²⁵ The female sport culture

22. *Id.*

23. *Id.* at 8.

24. Robert B. Everhart & Cynthia Lee A. Pemberton, *Gender Biases in School Sports: The Institutionalization of a Gender Biased Sport Value System*, FEMINIST EZINE, <http://www.feministezine.com/feminist/sports/Gender-Biased-Sports-in-School.html> (last visited Dec. 30, 2022).

25. Karen L. Hill, *Women in Sport: Backlash or Megatrend?*, 64 J. PHYSICAL EDUC., RECREATION, & DANCE 49, 51 (1993).

emphasized enjoyment and social competition with the ultimate contest goals being those of self-development and teamwork, as opposed to winning and individual elitism.²⁶ For women and girls, school sport competition evolved from a tradition of play and sport days, as opposed to head-to-head competition and professional sport opportunities which were virtually nonexistent.²⁷

From these modest beginnings, scaffolded by Title IX, the quantity and quality of school sport opportunities for girls and women grew.²⁸ Pre-Title IX, just under 30,000 women participated in college sports, compared to over 170,000 men.²⁹ By 2021, over 215,000 women were participating in college sports, as were nearly 280,000 men.³⁰

Early on, as sport programs for women and girls expanded and began to receive increased financial support, the NCAA launched a series of efforts to limit the applicability of Title IX. In 1974, they unsuccessfully lobbied the HEW to exclude athletics from Title IX.³¹ Later that same year the NCAA supported the Tower Amendment which, as mentioned, sought to exclude revenue producing sports from Title IX.³² The NCAA then turned to the courts and attempted, unsuccessfully, to argue that the application of Title IX to athletics was unconstitutional.³³ Failing in their efforts to limit the athletic application of Title IX, the NCAA embarked on a mission to gain control of women's sport; and in 1980 offered its first women's national championships. Up to this point the Association for Intercollegiate Athletics for Women (AIAW), a non-profit women's sport governance organization, had oversight responsibility for intercollegiate sport for women.³⁴ The AIAW was smaller and financially, as well as politically, weaker than the NCAA.³⁵ It could not compete, and by June of 1982 ceased to exist.³⁶ This resulted in folding control of women's sports

26. Elaine M. Blinde, *Female Intercollegiate Athletics: Changes and Implications*, 60 J. PHYSICAL EDUC., RECREATION, & DANCE 33, 35-36 (1989); MARY JO FESTLE, *PLAYING NICE: POLITICS AND APOLOGIES IN WOMEN'S SPORTS* 15-17 (Colum. Univ. Press 1996); Hill, *supra* note 25, at 51.

27. Everhart & Pemberton, *supra* note 24.

28. *50 Years of Title IX*, WOMEN'S SPORTS FOUND. (2022), https://www.womenssportsfoundation.org/wp-content/uploads/2022/04/FINAL6_WSF-Title-IX-Infographic-2022.pdf.

29. *Id.*

30. *Id.*

31. Linda Jean Carpenter & R. Vivian Acosta, *Back to the Future: Reform with a Woman's Voice*, 77 ACADEME 23, 24 (1991).

32. *Id.*

33. *Id.*; NCAA v. Califano, 622 F.2d 1382, 1382-85 (10th Cir. 1980).

34. Everhart & Pemberton, *supra* note 24; FESTLE, *supra* note 26, at 110.

35. Everhart & Pemberton, *supra* note 24.

36. *Id.*

under the purview of men's sport governance (e.g., the NCAA). A classic example of merger and acquisition, a hostile takeover in action.

In 1972 more than ninety percent of women's programs were administered and directed by women.³⁷ Today not quite twenty-two percent of all athletic directors are female.³⁸ Likewise, while historically ninety percent of women's collegiate teams were coached by women, today just over forty percent of women's NCAA teams have a female head coach at the helm; and only 2 to 3.5% of men's teams have a female head coach.³⁹

From its inception, the impact of Title IX on women's sport has been both positive and problematic. And, as history reveals, not only has school sport for men/boys had a significant head-start, but the socio-cultural value systems from which they emerged were very different. Historically and traditionally sport has been defined, to virtual exclusion, by male dominated norms and values. As women and girls have gotten to play, they have had to adapt to and within the established male model; with the price to play being the virtual elimination of female sport administrative leadership, and a drastic reduction in the number of women coaching women. Because of this, it isn't surprising that women and girls have not, and do not yet participate in school sport in the same numbers men and boys do. *What is surprising is that they play as much and well as they do.*

Broadening the definition, recognition, and designation of what is and is not considered sport is not an either/or proposition. Including competitive dance and cheerleading as part of an emerging sport menu allows women and girls (and for that matter individuals across the gender spectrum) who have chosen to express their athleticism through dance and cheerleading the status, recognition, and benefits of their athletic peers. Which brings us to the notions of athleticism, fitness, and what makes a sport a sport.

37. *Id.*; R. VIVIAN ACOSTA & LINDA JEAN CARPENTER, WOMEN IN INTERCOLLEGIATE SPORT: A LONGITUDINAL STUDY - FIFTEEN YEAR UPDATE, 1977-1992, at 6 (Brook. Coll. 1992); R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study Thirty-Seven Year Update*, ACOSTA/CARPENTER 19, 37 (2014), <http://www.acostacarpenter.org/2014%20Status%20of%20Women%20in%20Intercollegiate%20Sport%20-37%20Year%20Update%20-%201977-2014%20.pdf>.

38. Acosta & Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study Thirty-Seven Year Update*, *supra* note 37, at 37 *Athletic Director Demographics and Statistics in the US*, ZIPPPIA, <https://www.zippia.com/athletic-director-jobs/demographics/> (last visited Dec. 30, 2022).

39. Acosta & Carpenter, *Women in Intercollegiate Sport: A Longitudinal, National Study Thirty-Seven Year Update*, *supra* note 37, at A, 18; *Athletic Director Demographics and Statistics in the US*, *supra* note 38.

Athleticism is defined by fitness elements related to speed, strength, endurance, flexibility, and agility.⁴⁰ According to the NCAA emerging sport guidelines, a sport is defined as

an institutional activity, sponsored at the varsity or club level, involving physical exertion for the purpose of competition against teams or individuals within an intercollegiate competition structure . . . [that operates] . . . under standardized rules with rating/scoring systems ratified by at least one official regulatory agency and/or governing body.⁴¹

The NCAA guidelines go on to identify a varsity intercollegiate sport as one “that has been *accorded that status by the institution’s president or chancellor or committee responsible for intercollegiate athletics policy*” providing that: (a) “[it] is administered by the department of intercollegiate athletics[;]” (b) it requires student-athlete eligibility review and certification; and (c) eligible participants can “receive the institution’s official varsity awards.”⁴²

Over the course of these decades and writings I have occupied a variety of educational roles. I have had opportunities to educate and advocate, urge, insist, demand, and even litigate regarding Title IX, school sport, and equity. Without doubt at times, I have been more or less patient, diplomatic, and/or exasperated. Fast forward to today, where I find myself having the honor and responsibility of serving in the role of college president, and being, in the words of George W. Bush, “the decider.”

I was hired at Lewis-Clark State College in July of 2018 and specifically charged by the Board to address Title IX issues in athletics. I remember thinking, “really?” I have been down that road before and know first-hand how popular that course of action is likely to be. I was looking forward to this leadership opportunity, what I consider to be the pinnacle of my higher education career and hoping it could last a while. I did not think kicking a hornet’s nest was my best first move. That said, over the course of the first year-plus, working with the director of athletics, we redrafted our annual all-student fall survey to include queries associated with collegiate sport participation interest and abilities, and crafted a two-part Title IX plan, premised on growing sport participation. The plan’s Executive Summary states:

40. See generally W. LARRY KENNEY ET AL., *PHYSIOLOGY OF SPORT AND EXERCISE* (Karla Walsh et. al. eds., 6th. ed. 2015).

41. *NCAA Emerging Sports for Women Program Process Guide*, NCAA 1-2, https://ncaaorg.s3.amazonaws.com/inclusion/emports/INC_EmergingSportsForWomen-ProcessGuide.pdf (last visited Dec. 30, 2022).

42. *Id.* at 2 (emphasis added).

Lewis-Clark State College [(LC State)] is affiliated with the National Association for Intercollegiate Athletics (NAIA) and a member of the Cascade Collegiate Conference (CCC). The role and mission of the NAIA is to “[] position member institutions to maximize ‘return on athletics’ (e.g., enrollment, retention, student-athlete success, etc.) and optimize the student-athlete experience.” LC State’s athletic affiliations (NAIA and Conference) align with and support its educational mission, emphasizing opportunity, success and partnerships to “[] prepare students to become successful leaders, engaged citizens, and lifelong learners.”

Ongoing review of EADA data and reports reveals that while progress is being made, Lewis-Clark State College needs to continue its efforts to address issues of equity associated with athletic participation/Title IX compliance This proposal updates LC State’s 2-part plan and outlines the funding [as well as timeline estimates] needed to implement it.⁴³

Part 1 of the plan focuses on maximizing existing women’s sport roster capacities. Part 2 involves the addition of a women’s sport. Part 3, if and as necessary, will be developed and considered once outcomes derived from Parts 1 and 2 are in play.

At this point you are thinking, okay great, like every other school over the past decades, develop a plan, map-out the strategy and costs, and then when you realize you can’t afford it, drag your feet by revising the plan. Well, maybe . . . but maybe not.

In fairness, to say that I and we (higher education) have been distracted by two-plus years of the pandemic and the global mayhem that has resulted would be an understatement. Not to mention feeling mentally, emotionally, and physically exhausted by the realities of having to engage in high-stakes decision making, with inadequate and inconsistent information, within unreasonably short timeframes—over, and over, and over again. That said, while it would be less than genuine to say all have been holding hands and singing kumbaya as we have put strategies in place and moved the plan forward; strategic scaffolding has been operationalized and we are making tangible, measurable

43. *LC State Athletics Title IX Plan Fall 2021 Update 2* (2021) (on file with author) (quoting *Vision & Mission*, LEWIS-CLARK STATE COLL., <https://www.lcsc.edu/president/vision-mission-strategic-plan#:~:text=Mission%20Statement,engaged%20citizens%2C%20and%20lifelong%20learners> (last visited Dec. 30, 2022)).

progress. In fact, in the midst of the nationwide college enrollment challenges associated with these pandemic years, LC State athletics has been singular among our campus units/divisions/departments, in terms of consistently growing enrollment (i.e., increasing sport roster numbers).

While in the main the NAIA operates as a close cousin to the NCAA, in terms of finances, NAIA athletics are considerably more manageable than what typifies NCAA Division I sports. Without doubt this smaller scale has been key to the immediacy of the impact even modest resource allocations and reallocations have made. What follows is a brief review of key steps taken and actions engaged to implement our plan.

Allocating & Reallocating Existing Funds: To advance Part 1 of the plan, appropriated/institutional funds were reallocated to support coaching positions. This was accomplished through internal institution personnel reorganizations and salary savings. The basic premise being that to have a reasonable expectation of recruiting and retaining student-athletes and growing sport rosters, we needed to have fully funded head and assistant coach positions across all our sports (something that was not universally the case in 2018).

Generating New Funding Sources & Resources: Drawing on a fee assessment paradigm not uncommon in college advancement/foundation fundraising, a self-taxing model was imposed to earmark a percentage (five percent) of athletics fundraising dollars to support operational costs and scholarships associated with advancing the plan. This includes sport-specific as well as athletic booster fundraising. As one might imagine, the latter took a bit of convincing. In addition, auxiliary/local funds generated by athletics operations previously used to support assistant coach salaries were largely redirected to support the plan.

Beyond using funds generated via self-taxing and auxiliary operations, a further incentive was instituted by the making post-season bonus structures for coaches (something fairly typical in college athletics) contractually contingent upon meeting roster goals. The contract reads: “Supplemental Compensation. Each year Coach shall be eligible to receive supplemental compensation in an amount up to [insert amount or computation] contingent upon meeting and maintaining established sport participation roster goals” In essence, regardless of whether or not a team advances to the national playoffs or even wins a title, a coach that doesn’t meet and maintain roster goals is not eligible for the supplemental compensation bonus. (Additionally, true to the student-athlete model, the contract contingencies also include links to team GPA minimums). Has this contract incentive been acted upon? Yes. And, while there have been instances when roster goals have not been met and supplemental compensation denied, almost without exception sport roster growth has been achieved.

Part 2 involves the addition of a women's sport. For LC State that sport will be competitive dance. LC State has demonstrated interest and ability in spirit-squad/dance performance (currently it is an active club team), existing facilities that can accommodate practice and performances, as well as readily available coaching expertise and potential for somewhat regional competition opportunities. This fall (2022) we will announce the addition of competitive dance as a varsity intercollegiate sport. We will use the 2022-2023 year to establish the necessary personnel/coaching and operational foundation, and launch the inaugural season, inclusive of student-athlete eligibility certification, scholarships, and competitive scheduling, beginning in fall 2023.

I have spent a professional lifetime caring about Title IX and school sport; and served in a variety of increasingly elevated higher education leadership roles. While the steps we are taking may not be particularly earth-shattering, measurable progress is being made; and finally, in this time, in this place, in this role, I and we have been able to move beyond information and advocacy, to actions and outcomes.