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SYMPOSIUM

INTRODUCTION: THE FORTIETH ANNIVERSARY OF TITLE IX

ERIN E. BUZUVIS^{*}

This issue of the *Western New England Law Review* celebrates the fortieth anniversary of Title IX. On June 23, 1972, President Richard Nixon signed into law the Education Amendments Acts of 1972.¹ This omnibus legislation contained many provisions of political and social significance related to education, including a major appropriation for higher education and student loans, money to improve education for Native Americans, and most controversially, a provision postponing the implementation of court orders related to racial desegregation.² Buried in the statute was a short, practically unnoticed³ provision banning sex discrimination in educational institutions that receive federal funds. Few would have guessed forty years ago that this

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1. Pub. L. No. 92-318, 86 Stat. 235 (1972).

2. *Id.*

3. For example, the *New York Times*' coverage of the Education Amendments Act of 1972 mentions Title IX in a brief paragraph near the end. *Major Provisions of the Measure on Aid to Education and Limits on Pupil Busing*, N.Y. TIMES, June 9, 1972, at 17.

Of course, by characterizing Title IX as flying largely under the radar, I by no means wish to suggest that its inclusion was accidental. The addition of Title IX to the omnibus law was a carefully coordinated political move spearheaded by activists seeking primarily to challenge the admissions quotas and sex discrimination in faculty hires. These activists included the Women's Equity Action League and their allies in Congress such as Representatives Edith Green (D-OR) and Patsy Mink (D-HA) and Senator Birch Bayh (D-IN). For a first-hand account of Title IX's passage by a leading activist in this coalition, see Bernice R. Sandler, "Too Strong for a Woman"—*The Five Words That Created Title IX* (1997), available at <http://www.bernicesandler.com/id44.htm>.

provision, the one numbered Title IX,⁴ would be the one with the most enduring effect on American education.⁵

To its credit, Title IX quietly ended restrictive quotas for admission of women to graduate schools and public undergraduate programs.⁶ It has opened up jobs on college faculties and administrations to women.⁷ It ensures the rights of students of both sexes to participate in vocational programs of their choosing, regardless of gender stereotypes.⁸ Its application to athletics has increased opportunities exponentially for girls and women to play sports in high school and college.⁹ It requires schools and colleges to protect students from sexual harassment and sexual violence, and to take seriously reports of instances that occur.¹⁰ Thanks to Title IX, it is now illegal to exclude students because of pregnancy from mainstream education.¹¹

But in many of these areas, advocates, courts, and regulatory agencies are still working on ways to maximize the law's potential to address sex discrimination in education. One still-emerging area of Title IX law relates to peer harassment and bullying. This timely issue is one of great urgency, both nationally and here in western Massachusetts,¹²

4. Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (2006).

5. The Act's most controversial provision at the time of enactment, the one delaying desegregation orders, was effectively overturned in court later that year. *See Drummond v. Acree*, 409 U.S. 1228, 1228 (1972).

6. *See* 34 C.F.R. § 106.21 (2012).

7. *See Id.* § 106.51.

8. *See Id.* § 106.35.

9. *See* Amy Wilson, THE STATUS OF WOMEN IN INTERCOLLEGIATE ATHLETICS AS TITLE IX TURNS 40, NCAA Publications 5-6 (June 2012), <http://ncaapublications.com/p-4289-the-status-of-women-in-intercollegiate-athletics-as-title-ix-turns-40-june-2012.aspx>

(reporting that girls' participation in high school athletics has increased nearly 1000% since Title IX was enacted, and that NCAA-sponsored athletic opportunities for women have tripled).

10. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 629 (1999); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 60 (1992); Dear Colleague Letter from Russlynn Ali, Assistant Secretary of Education for Civil Rights, (Apr. 4, 2011) *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> (clarifying schools' responsibilities under Title IX to address sexual violence); Dear Colleague Letter from Russlynn Ali, Assistant Secretary of Education for Civil Rights, (Oct. 26, 2010) *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> (clarifying schools' responsibilities under Title IX and other civil rights laws to address bullying and peer harassment).

11. *See* 34 C.F.R. § 106.40 (2012).

12. *See, e.g.*, Kevin Cullen, *Wound Festers in S. Hadley*, BOSTON GLOBE, Dec. 2, 2012, at A1 (describing "linger[ing]" effects three years later on town where fifteen-year-old Phoebe Prince committed suicide in response to bullying by classmates); Sarah Plantanitis, *International Women's Day Sirdeaner Walker: Tragedy Turned into Activism*, Mar. 6, 2012, *available at* http://www.masslive.com/living/index.ssf/2012/03/international_womens_day_

and we are pleased that this issue contains three articles on this topic. Professor Daniel Weddle criticizes judicial decisions under Title IX that have interpreted the statute to exclude protection from harassment for students who are lesbian, gay, bisexual, or transgender.¹³ In challenging the view that Congress intended to exclude such discrimination from Title IX's scope, he argues that courts should read sex discrimination to cover harassment that is motivated by a student's gender nonconformity, both with regard to a student's expression and appearance, as well as a student's nonconforming relational orientation to others of the same sex.

Professor Susan Stuart explores Title IX's potential as a weapon to combat hazing within boys' athletic teams.¹⁴ Contemporary media accounts and social science research support the theory that hazing operates to sustain hegemonic masculinity within a team by feminizing new members, often through sodomy and other sexualized acts. As a result, she opines, many instances of athletic team hazing satisfy the required sex-based animus to be actionable under Title IX.

Professor John Culhane considers the limitations of Title IX and other laws to change the culture of bullying in U.S. schools, and proposes instead to treat bullying in the comprehensive manner that we use to address other public health problem.¹⁵ Specifically, he argues that legislators and other policymakers should adopt broad, programmatic reform aimed not just at punishing and deterring bullies, but creating a cultural change through training, intervention, and curricular change.

All three of these articles were selected from responses to a call for papers for inclusion in a program at the Association of American Law Schools 2012 Annual Meeting, which was convened jointly by the Section on Education Law and Section on Sports and Law to examine contemporary Title IX issues in the law's fortieth anniversary year.

In addition, this issue contains Professor Curt Hamakawa's narrative account of one coach's advocacy for equal treatment for his high school girls' basketball team.¹⁶ Because of his advocacy, that

[sirdeaner_walker_tragedy_turned_into_activism.html](#) (describing local and national activism responding to the 2009 bully-suicide of eleven-year-old Carl Joseph Walker-Hoover, of Springfield).

13. Daniel B. Weddle, *You'd Be Okay If You Weren't So Gay: Ending the Special Treatment of LGBT Students Under Title IX*, 35 W. NEW ENG. L. REV. 425 (2013)

14. Susan P. Stuart, *Warriors, Machismo, and Jockstraps: Sexually Exploitative Athletic Hazing and Title IX in the Public School Locker Room*, 35 W. NEW ENG. L. REV. 377 (2013).

15. John G. Culhane, *Bullying, Litigation, and Populations: The Limited Effect of Title IX*, 35 W. NEW ENG. L. REV. 323 (2013).

16. Curt Hamakawa, *Uncommon Courage—Roderick Jackson as Sine Qua Non for the*

coach, Roderick Jackson, was relieved of his coaching duties. The resulting litigation, which included an intermediate appeal that Coach Jackson navigated pro se, made its way to the U.S. Supreme Court, where a five-Justice majority confirmed Title IX's application to retaliation, even against those who, like Coach Jackson, are not the direct victim of sex discrimination.¹⁷ It is particularly fitting that Coach Jackson's story appear in the *Western New England Law Review*, given his special relationship with our University, having visited twice to share his inspirational message about advocating for equality through adversity.¹⁸

Finally, this issue also includes essential pathfinder by research librarian Christine Hepler.¹⁹ This annotated bibliography provides references to historical sources, law review articles, and Internet resources regarding Title IX. These resources ensure that as the law moves toward its next milestone, researchers and commentators can easily use and find existing Title IX literature in support of new ideas and analysis made necessary by contemporary challenges and applications of Title IX.

All together, this issue of the *Western New England Law Review* reflects on Title IX's past and present. While we cannot predict the influence the law will have in the next forty years, we are pleased that this issue helps lay the foundation for its future as well.

Right to Sue for Retaliation Under Title IX, 35 W. NEW ENG. L. REV. 353 (2013).

18. In 2006, Coach Jackson was awarded the Western New England University President's Medallion, a public service award that "recognizes men and women in a variety of fields who are role models worthy of emulation by all, particularly by our students at Western New England University." Western New England University President's Medallion, <http://www1.wne.edu/aboutus/index.cfm?selection=doc.6571> (last visited May 28, 2013).

19. Christine I. Hepler, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441 (2013).