



# Title IX at 50:



## Exploring the impact of the law on cases of sexual misconduct and participation equity in athletics

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### Introduction

June 23, 2022 will mark the 50th anniversary of Title IX; during that time frame there has been a drastic increase in girl's and women's participation in sport. There has also been significant political debate and push back to Title IX which has threatened to undermine the impact of the law. Over the last 10 years, Title IX has been synonymous with litigation related to sexual harassment and transgender athlete participation in sport. Additionally, universities have continually sought to cut women's sports under the guise of budgetary constraints.

The purpose of this poster presentation is three-fold: 1) Review recent case developments in terms of cutting women's sports; 2) emphasize that procedurally, sexual harassment and misconduct claims are in flux across campuses; and 3) discuss the current state of transgender athlete participation policies in sports.

### Cutting Women's Sports

Women's sports are still being cut, or it's being attempted, usually under the guise of budgetary concerns (and/or COVID), despite recent court decisions, settlements, and a possible shift in public opinion. In 2021, five Stanford women athletes filed a Title IX lawsuit to prevent the cutting of their respective sports, part of a larger purge of 11 men's, women's, and coed sports in all. According to the women, Stanford failed the three-part test: Female athletes are substantially underrepresented in the athletic program, Stanford did not have a history and continuing practice of program expansion, and there is a discontinuation of several women's teams when there are female athletes who are "able and willing to continue to compete at a varsity level in their sports" (*Keesing v. Stanford*, 2021, \*73). This case was ultimately settled, as Stanford reinstated the sports as well as agreed to create a Title IX compliance plan going forward.

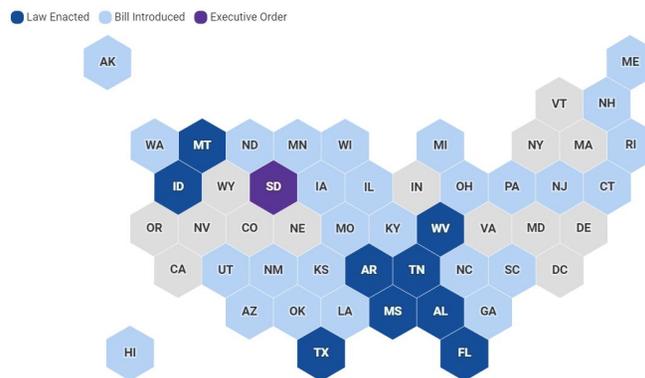
There have been several other recent cases, with varying results. In 2021, University of Iowa attempted to cut women's swimming and diving ("in light of pandemic budget losses"). Expert witnesses testified of a prong 1 violation since 2003, exacerbated by this new cut. As part of the settlement, Iowa must keep women's swimming and diving for at least seven years, add women's wrestling, maintain a three-year rolling cap for rowing (roster had allegedly been inflated to meet Title IX requirements), and appoint an independent Title IX compliance monitor (Miller, 2021). Also in 2021, a continuing lawsuit by members of the women's lacrosse team at Fresno State yielded mixed results – the school was not required to reinstate the sport (i.e. a request for preliminary injunction to prevent the cutting of the sport was not issued), but the court found sufficient evidence to allow the effective accommodation/equal treatment claim to move forward. The players alleged that they were kicked out of their locker room, didn't receive uniforms in a timely manner, were forced to use old equipment, had to clean their own field, and more (Jukam, 2021). William & Mary settled a lawsuit in 2020 after attempting to eliminate three women's sports – gymnastics, swimming, and volleyball. Prong 1, scholarship inequity, and equal treatment were all at issue. As part of the settlement, the school will create a gender equity plan, and separately, the female athletic director stepped down due to "public outcry" (Byrum, 2020).

### Transgender Athlete Participation

Presently 37 states have introduced laws that attempt to ban transgender students from participating in high school sports (Rezal, 2021). Nine states have passed those bills, while the policy in South Dakota is enforced through an executive order (Rezal, 2021). State High School Association policies regarding transgender athletes vary by state and in some states may conflict with state legislation. Legislators have argued that these laws are needed to maintain a level playing field because transgender girls have a biological/physical advantage and are bigger, faster and stronger than cis-gender women (Rivera, 2021). In *Soule vs. Connecticut Association of Schools* (2021), three cisgender female track athletes sued to prevent the participation of transgender female athletes in girl's sports. The case was dismissed because the transgender student athletes had graduated high school at that point. The decision noted, however, that courts have held that under Title IX schools should treat transgender students consistent with their gender identity and that also applies to sport participation.

In January 2022, the NCAA released new guidelines on the participation of transgender athletes on intercollegiate teams. The guidelines essentially leave it up to individual sports to refer to the policies of their national governing bodies to determine eligibility but for the 2022 seasons will have to "document sport specific testosterone levels four weeks before the sport championship selections" (NCAA, 2022). Then in 2022-2023, athletes will have to document testosterone levels at the beginning of the season and again six months later (NCAA, 2022). The new NCAA guidelines follow the IOC's stance in November 2021, that eligibility should be determined by the governing body of each sport. This IOC policy change creates problems in that currently some governing bodies lack formal policies regarding transgender athletes (Bromberg, 2022). *Hecox vs. Little* (2021) seeks to challenge SB 500 in Idaho which restricts participation to the biological sex of athletes at the interscholastic and intercollegiate levels. Hecox is a student at Boise State University who wants to join the track team. As written, HB 500 conflicts with NCAA policy described above and some argue that it conflicts and stands in opposition to Title IX which protects students from discrimination based on gender identity.

Figure 1. States That Restrict How Transgender Students Participate in School Sports (Rezal, 2021)



Sources: State governments, USAFacts, ESPN

### Sexual Misconduct

In 2020, the U.S. Department of Education rescinded the 2011 Dear Colleague Letter, and released new Title IX guidance. Changes included mandating live hearings, cross examinations, narrowing the definition of sexual harassment, and allowing for choice to use a higher "clear and convincing" standard. On March 8, 2021, President Biden developed an executive order seeking to reassess these controversial 2020 Title IX changes. Specifically in Section 2(iii): "The Secretary of Education shall consider suspending, revising, or rescinding — or publishing for notice and comment proposed rules suspending, revising, or rescinding — those agency actions that are inconsistent with the policy set forth in section 1 (the policy itself) of this order as soon as practicable and as appropriate and consistent with applicable law, and may issue such requests for information as would facilitate doing so" (Exec. Order No. 14021, 2021). Critics argue that the executive order suggests taking more enforcement actions if discrimination takes place but stops short of saying how or what those actions would look like, which may create more confusion about how universities and their athletic departments should respond to Title IX violations surrounding sexual misconduct. In December 2021, the Biden administration announced plans to release proposed new rules in April 2022 (Stratford, 2021).

### Conclusion

As Title IX turns 50, the battle is ongoing. Schools are still cutting women's sports, but hopefully, the tide is turning - public outcry and student pushback is leading to reinstatement of women's programs through court decisions and other settlements requiring the same. Transgender rights seem to be going in the other direction, as more and more states seek to exclude transgender athletes from participating. Sexual misconduct proceedings, greatly impacted by the DeVos changes, are set to potentially be rolled back in 2022.

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