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Panel 2 - Unreported Shortcomings of Title IX

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TRANSCRIPT OF VIDEO FILE:

PANEL 2 - UNREPORTED SHORTCOMINGS OF TITLE IX

BEGIN TRANSCRIPT:

MODERATOR: Hello, everyone, and welcome to our second panel, Unreported Shortcomings of Title IX. I'm going to start off with a quick introduction of our moderator. Today we have Dean Lisa Taylor who is our Dean for Diversity, Inclusion and Affinity Relations at WCL. She is much beloved by students of the *Journal* and students of WCL in general. And I know she is going to kick off a great panel. Dean Taylor, it's all yours.

LISA TAYLOR: Thank you very much, and I definitely love working with the students on the journal as well. And with that said, I want to thank the National Institute for Workers' Rights and the *Journal* for organizing this excellent symposium and for allowing us *The American* blog to be a part of this effort. As we said earlier, this panel focuses on Title IX. [00:01:00]. And we indicated in the chat earlier that it may contain discussions around topics of sexual assault and identity-based discrimination and harassments. And we recognize that this may be difficult for some of our participants today. So, we encourage you to take care of yourself, your safety and your wellbeing.

With that said, I'm going to jump right in. And our first panelist is Leslie Annexstein. Leslie is the inaugural Assistant Vice President for Equity and Title IX Coordinator at American University. Prior to joining us, Leslie served as the Title IX Director at Howard University and the Deputy Director of the Office of Civil Rights and Sexual Misconduct at the University of Maryland. [00:01:58]. Before transitioning to higher education, she held several leadership positions including Senior Attorney Advisor to the General Counsel at the EEOC, Director of Legal Advocacy Fund at the American Association of University Women and Senior Counsel for the National Women's Law Center.

So, Leslie, can we start first, if you can start by briefly describing what you do in your role as the Vice President for Equity and Title IX?

LESLIE ANNEXSTEIN: Sorry about that. I had to get my mute off.

[00:03:01]. Thank you so much, Lisa, for the introduction, and hello to my fellow panelists. And thank you to all of you for joining us. And thank you to the organizers of this symposium. I really appreciate you inviting me to participate.

So, as Lisa said, I'm the first Assistant Vice President for Equity and Title IX Coordinator, which is really two titles wrapped up in one person here at American University. The role of my office is to provide leadership on matters involving discrimination, harassment and sexual misconduct. And I'm using the broad phrase sexual misconduct purposely—a broad phrase that includes sexual harassment, which has a very particular meaning under Title IX in light of the regulations put out by the prior administration in 2020. [00:04:08].

Our office is intended to provide that leadership by implementing two policies here at American University. One policy is called the Title IX Sexual Harassment Policy, which very specifically complies with those 2020 regulations. And then, the second policy is called the Discrimination and Non-Title IX Sexual Misconduct Policy, sometimes otherwise known as the "Everything Else" Policy in our office, which covers all forms of discrimination including sexual harassment matters that are not currently considered to be Title IX sexual harassment. [00:04:58].

We receive complaints from individuals that we respond to. We receive third-party reports from employees because we have a duty to report provision in both of our policies, that employees must report matters to our office. And then we go about the business of attempting to resolve the matter. Sometimes that's through informal resolution of the matter. Sometimes that is through formal resolution, which most people, I think, focus on. And that involves conducting a formal investigation. But many times, we are providing what we call supportive measures to individuals who are alleging harm, because the ultimate goal is to ensure that they are able to continue their educational experience, be the best worker they can be, if you are a worker in our environment, free from any form of discrimination. [00:06:00].

So, that's roughly our office. It's obviously not just me, although it may have started that way. There is staff in our office to assist with all of that work. And I will just say that although we are talking about Title IX today, I don't want to lose sight of the fact that our office is handling other types of discrimination as well.

LISA TAYLOR: Thank you. And that's very helpful to us. So, I'm going to start with you. And I was wondering if you can do some level setting for us. Talk about Title IX, why it is important in higher education and how is it implemented?

LESLIE ANNEXSTEIN: I'm happy to talk about that. And as you've

heard from Lisa, I am currently a Title IX coordinator, but in a life prior to higher education, I was an advocate and would put myself in the advocacy category. [00:07:00]. I was a litigator in both the employment arena, mostly around the Title VII law, as well as participating in litigation involving Title IX. So, I just want to be very transparent about my own background and how I come to this work in higher education.

So, as I reflected on the title of this particular panel, which is called Unreported Shortcomings of Title IX, given my background, I have to say I had to stop and think about whether it was really a reference to the Title IX law itself or to our implementation and enforcement of the promise of Title IX. I also had to wonder, because my work has been in Title IX, as well as other areas of discrimination, whether the Title IX law in and of itself has failed more than any other civil rights law that makes up the civil rights enforcement scheme of our country. [00:08:09]. And so, I come to this with thinking about that.

So, in terms of level setting, I want to start with just the basics of the Civil Rights Act of 1964. Title VII of the Civil Rights Act of 1964 prohibited discrimination in employment based on a variety of categories including sex. And then, Title VI of that act prohibits discrimination in federally-assisted programs, meaning programs that receive federal money, including education programs that receive federal money, on the basis of race, color and national origin, but not on the basis of sex. So, that's 1964. [00:08:56].

So, enter the 1970s, and Congress begins having hearings on sex discrimination in higher education, which were the original hearings. And we get to Title IX of the Education Amendments of 1972, which was passed in order to ensure equal opportunity in education for all individuals regardless of sex throughout all levels of education, from elementary and secondary through postgraduate programs that receive federal monies. It's a pretty short law. Don't discriminate in federally-assisted education programs or activities.

In 1975 the final Title IX regulations were promulgated which put a little bit more flesh on what that means. And I will say, in 1975, those regulations stated that schools are required to adopt and disseminate policies prohibiting sex discrimination, develop grievance procedures and designate a Title IX coordinator. [00:10:06]. That was in 1975.

So, starting in the 1970s, I think it's important to acknowledge as we think about where we still need to go, that there has been some progress. Some of the progress that we know about, for example, is access to higher education. In the 1970s, where college enrollments of female students in undergraduate programs was less than 50%, we know that today it's more than 50%. So, that is progress that we need to acknowledge. We may not be where we want

to be in terms of opportunities in certain fields, STEM fields in particular, but we certainly have made progress. [00:10:58].

Female students also have greater opportunities in athletics program, which was so much of the conversation in the 1980s around Title IX, opening up athletic opportunities at the K through 12 level and in higher ed.

It's important to acknowledge that we have had progress in terms of opening up opportunities. But, obviously, we still have remaining challenges. And I think that today, when most people are thinking about those challenges, they are thinking about the area of sexual harassment and sexual violence on campuses. There are many other areas you could talk about. But that is what is in our social media today. That is what's in the media in general beyond even higher education. And that is how many educational institutions are thinking about Title IX today when they are working on remaining issues. [00:12:00].

So, what's important to know about this is that, beginning maybe in the late 80s, the Department of Education's Office for Civil Rights started putting out some guidances for schools to provide them with assistance around their obligation to establish a complaint procedure, ensure they have a Title IX coordinator who receives those complaints. And then, in the late 90s, we see guidances and we see court cases that begin to more specifically define sexual harassment and obligations that schools have to address sexual harassment and to respond to sexual harassment, both at the K through 12 level and on college campuses. [00:13:01].

Jump forward a little bit from the 90s to 2011, and you get pretty fulsome guidance put out by the administration that also talks about schools' obligations with respect to sexual assault and sexual harassment on campuses. And it was really in that guidance, I think, that it became clear that sexual assault is something, if it hadn't been clear before, that should be addressed by institutions as a Title IX matter. So, if there was, perhaps, some doubt about whether sexual violence was covered by Title IX, those doubts were erased in 2011 with that guidance. [00:13:55]. And it was reiterated that there must be a Title IX coordinator and grievance procedures that address sexual harassment including sexual violence.

So, fast forward to today, we have new Title IX regulations, the first new regulations issued in all those years by the former administration. And what I want to say about those new regulations is that they primarily, in large part, really address sexual harassment and how schools are required to address sexual harassment. They're very prescriptive in what schools must do, and they also provide a new definition of sexual harassment.

And that new definition of sexual harassment departs from the definition of sexual harassment under employment law. [00:14:56]. So, if you are a

Title IX coordinator sitting in a position that I am sitting in, you are in both an education program, right, students are there to be educated, but you are also a workplace . . . I'm a worker, and there are many workers at college campuses. Then you are navigating the fact that there are different definitions now of sexual harassment depending on whether you're looking at Title IX or you're looking at the employment discrimination law definition. And so, that is certainly one of many challenges that we sit with as we navigate this law.

The other thing that I want to highlight as a Title IX coordinator is that while we must absolutely attend to individual complaints that are presented to us and respond to those complaints, remedy them as best we can and try to prevent harm from occurring again, it is also . . . [00:16:07]. The name "Title IX Coordinator" indicates some coordination role which would be to identify and discern patterns of discrimination that might be lurking in the institutions knowingly or unknowingly, and policies that also might inhibit the promise of equal opportunity, and work with our campus partners and our administrators to address those things in order to have the kind of policies that get us to that promise of equal opportunity and stamp out those practices that may still exist that are preventing us from getting to that promise.

So, when I think about whether it's the Title IX law that has failed, I don't think it's the law itself that has failed. [00:17:04]. It's that the promise of the law hasn't yet been actualized. And I think that what we need is strong enforcement of that law. And there are many partners who engage in that enforcement. That includes the educational institutions who have obligations under the law, the Department of Education, which is intended to be the leader in helping us towards that promise of equal opportunity, and then the courts as they help us interpret what that means.

LISA TAYLOR: Thank you so much, Leslie. So, I'm going to turn to Elizabeth Kristen, and I'm going to briefly introduce you. So, Elizabeth, you are an attorney. . . . Well, Elizabeth is an attorney for Legal Aid at Work and serves as the Director of the Gender Equity and LGBTQ Rights Program. [00:18:05]. Elizabeth also serves as the Director of the Fair Play for Girls in Sports project where she works on behalf of students who have not been afforded equal athletic opportunities under Title IX. So, Elizabeth, same question to you in terms of giving us a little background of work that you do, particularly in the area of Title IX. And I was wondering, because you look at K through 12 issues and in athletics, I'm wondering if you can do some level setting for us also from that framework?

ELIZABETH KRISTEN: Absolutely. Well, thank you so much for including me on this panel. I am delighted to be here today to talk a little bit about Title IX athletics. [00:19:01]. And I am personally a beneficiary of

Title IX. When I was in grade school, I went to my third-grade class, and I got a flyer for boys' basketball. And I said, "Wait a second, I thought I was supposed to get to play." So, it never occurred to me that all these years later my legal practice would still be devoted to trying to achieve equity for girls in athletics in the K through 12 years.

And so, I wanted to talk a little bit about where we are, what are the claims under the athletics framework, and why does it matter? Why do we talk about athletics when we're talking about sex discrimination and education? How does this all fit in? So, to start off, it's so interesting that there's been this changeover time in terms of how people see Title IX. For such a long time it was seen as only an athletics statute, which, of course, was never true. But you all probably even know there's this sports apparel company for women that's called Title IX because it was that synonymous with athletics. [00:20:04].

And we've also seen just a tremendous culture change around female participation in athletics. So, every time the Olympics comes around, women are really highlighted, and women's athletic achievements are highlighted. And I think more so than ever that the US women's national soccer team has gotten incredible national attention. And even with the NCAA women's basketball tournament, the issues of women's athletic participation are finally getting that cultural elevation that they didn't have for so many years.

So, it seems like we've had this incredible culture change. And yet, we have had this progress without equity. And so, if you just look at the high school years, in 2017-2018 statistics, we had 3.4 million girls playing sports. [00:20:58]. But that's fewer than boys. Boys had 4.5 million opportunities to play high school sports. And girls are about half of the students in high school. But girls only get about 42% of the athletic opportunities.

And the number of opportunities that girls have now is basically almost the same as what boys had in 1972, when Title IX was passed. And so, even though it seems like we've made so much progress, there still is this really strong lag in terms of participation. And we know that this is not because girls don't want to play sports. This is really because schools have not yet still adapted to providing equal athletic opportunity for girls.

Title IX is a highly under-litigated area of law. And as someone who practices in the area of Title VII as well, I mentally thought this would be true. But I actually did the research in Westlaw. So, I just did a really basic search for Title VII of the Civil Rights Act of 1964. [00:21:58]. And there were more than 10,000 cases that showed up. But when I did the same search for Title IX of the Educational Amendments of 1972, there were only 2,500 cases. And an even smaller fraction of those, about 300, mentioned the word "athletics." And I know, just from practicing in this area, that an even tinier

number of those are addressed to the K through 12 athletics sphere. So, this is a highly under-litigated area of law, and I have some thoughts about that that I can talk about later.

It is also a really under-enforced area. And I know we're going to talk too about some of the barriers to enforcement and reporting, and what can we do better. But I know that this is an area where we just haven't had as much activity in enforcement as we should have had.

So, that's my view of where we are. I wanted to talk a little bit about what are the basic claims under the athletics statutes. And I'm going to focus on the K through 12 timeframe. Now, certainly, in college there are similar claims. [00:23:00]. The main additional one is the scholarship claim that I'm not going to talk very much about.

But with respect to Title IX athletics, what I look at in the K through 12 level, is first of all, are there equal athletic participation opportunities for girls? Although this is a more complicated three-part test, the main thing that we start at looking at is what is the percentage of girls enrolled in the school? And what is the percentage of girls in the athletics program? And we almost always see a gap there. And at the high school level the gaps are often quite large. The percentage alone isn't dispositive, you also have to look and see how many girls does that actually represent. I guess, certainly, you could have a small school with a 10% gap, and maybe that's only a few athletic participation slots.

But what we're seeing is huge gaps in athletic participation. So, girls are 50% of the school students, but they only get 42% of the athletic opportunities. [00:23:58]. And that usually translates into, for example, 100 more girls who could play sports if there was parity. There are some defenses that a school can have to that disparity. They can say, "Hey, we've added so many athletic opportunities for girls steadily over time since 1972." That's almost never an effective defense, especially at the high school level. Schools have not done that, certainly not steadily since 1972.

And then, the final thing is the school can say, "Well, girls just don't want to play anymore. We're accommodating all the interest." Again, mostly what we find at the high school level is the high schools don't even know what the interest is because they've never surveyed the girls. They've never taken any measure of their interest in athletic participation.

So, the unequal athletic participation claims are often, in my view, proved based on that first part of the test, which is, what is the percentage of girls in this school? What is the percentage of girls playing? The second part of the Title IX framework is for those girls who are playing, what does it look like for them? This is sometimes called the laundry list. [00:25:00]. What do their locker rooms look like? What are their facilities like? Are they being given

uniforms and equipment and publicity, all of the things that you need to play sports?

And, again, we find across-the-board disparities. Usually, if I'm trying to just get a glimpse of a school's athletic program, I'll look at their softball and baseball facilities, because that's a really quick way of seeing whether boys and girls are being treated fairly and equally. Now, a softball-baseball comparison isn't an across-the-board athletic program comparison. So, in theory, a school could be treating one girls' team really incredibly well, and not be violating Title IX even if they're treating boys' team generally better. But what we find for the most part is that because schools have a football program that's 99% male athletes, and they have a baseball program that's 99% male athletes, if they're treating even one girls' team poorly, usually there's going to be a Title IX violation with respect to the laundry list. [00:25:58].

And then, finally, retaliation is the third claim I wanted to mention. Because Title IX really rests its enforcement scheme, kind of like a lot of our civil rights laws, on the individuals coming forward and speaking up about discrimination. And this is hard enough for employees who are adults or for students who are in college, who are not minors. But we're asking minor school children to come forward and bring a claim against their schools.

And we have seen this is hugely difficult for these parents and students. And we have seen genuine and real retaliation. In a case that I litigated, as soon as the parents started complaining about Title IX, the school went after the coach, and they fired him, and they treated the team poorly. And the Ninth Circuit affirmed the District Court's ruling that this was retaliation against the class. So, this is a very common claim that is made.

And then the final level setting comment I wanted to make is, why does this matter? Why do we care about this? [00:26:59]. Of course, we care about equity more generally. But female participation in high school sports has obvious health benefits, has educational benefits for the girls who participate, leads to higher graduation rates and better grades, girls who play sports also are more likely to go to college. But athletic participation for girls also has really tangible employment benefits. So, girls who participate in high school sports make 7% higher wages later in life. So, that's why an organization like mine, Legal Aid at Work, is involved in this sphere, because this athletics participation directly connects to achievement later in life, including in the employment sphere. Thanks, Lisa.

LISA TAYLOR: Thank you, Elizabeth. We really appreciate you and Leslie setting the ground, doing the groundwork for us. So, now, I want to turn to our final panelist, Professor Martin. [00:27:56]. Professor Martin teaches Employment Discrimination Law including advanced topics in

employment discrimination law and Professional Responsibility at Seattle University School of Law. Her research focuses on employment discrimination law, organizational culture and behavior and critical race theory. Professor Martin is also the inaugural Vice President for Diversity and Inclusion at Seattle University where she co-chaired the university-wide Task Force on Diversity and Inclusive Excellence. That was a mouthful.

So, Professor Martin, I want to turn to you, and same question, if you can describe your role as the chief diversity officer for a university. And then talk a little bit about how you work with your Title IX office to create a safe and welcoming and inclusive community at your school. [00:29:08].

NATASHA MARTIN: So, thank you, Professor Taylor and to my co-panelists and the student organizers of this really important symposium and conversation today. I'm honored to be a part of it.

And so, as a university executive, I currently serve as the university's Vice President for Diversity and Inclusion. And in that role, I am responsible for diversity, equity and inclusion strategy for the entire university. I work in partnership across the university to embed and infuse diversity, equity and inclusion, not only as institutional value, but also as institutional practice. [00:29:50]. And so, I view the work of Title IX and the Title IX office, certainly, here on my campus and other campuses, part of this larger work around institutional equity and part of the overall institutional accountability system to create an inclusively excellent university community, for all who live, learn, and work at the institution.

It's really broad in scope, as Leslie mentioned in her level setting comments. And so, the focus really of my work, when I think about creating a safe learning environment for our students, is thinking about the atmospheric conditions for them to experience a strong sense of belonging, and to do that for thriving, not just surviving at an institution. [00:30:50]. And this is important for all students, and particularly impactful for students who are from historically under or unrepresented groups within institutions and/or who reside at various intersections of marginalized identities whether that be racial and ethnic, gender identity expression-based, etc.

Diversity, equity and inclusion work, I believe, is about considering the entire inclusion ecosystem of a university community because we are a microcosm of the broader society, and thus, we all bring the world with us to campus, into our various institutions. And that means that collisions will happen. And when they do, we must have mechanisms for understanding what has occurred and addressing those matters in a student-centered way, focusing on the whole person. And for those matters that do not rise to a policy violation, for example, under Title IX or Title VII, the reality is there still has been an impact on those involved. [00:32:01].

And so, the Title IX office, institutional equity work, as I call it, must be work that is coordinative and collaborative in working towards the broader goals of a culture of inclusion, belonging, and justice. And so, that work, for me, in partnership with the Title IX office, really involves identifying gaps in things that can inform the broader strategic work of bias prevention. And when I think about that, I will say that in preparation for today, I engaged with our internal Title IX officer, and our shared efforts at collaborating to really harness the power of difference in service of student learning, engagement, and development. [00:32:55].

And so, I'll just share a few of the ways that the broader DEI work is connected to Title IX work and can be integrated based on high impact practices and, as I said, whole person, student-centered approaches. And these are merely examples. And I know they range at different campuses. But some of that work involves education. So, developing programs and education that will speak to the intersectionality of race and class, sex, disability, etc. These are aspects of students' experiences that are often entangled in Title IX cases, making the need for a broader understanding of these constructs and their impact on each other really necessary.

I will often say that this is about how we are "in relationship" with one another. And how can we develop better skills and habits for productive engagement across differences? [00:34:00]. For example, we know that sexual violence occurs more frequently and is under-reported at higher rates in communities of color. So, we can interrogate questions and raise awareness and understanding around, why is that? What social constructs can be contributing to this disproportionality? And so, I think these are important questions and frameworks through which to connect the dots between diversity, equity and inclusion and Title IX work.

These inequities exist in Title IX as well. And so, the work that is being done on diversity, equity, and inclusion on the whole campus is going to have an impact on Title IX and the way it addresses cases that are impacted by race, disability, culture, class in addition to sex and sexual harassment. [00:34:58].

And so, being intentional, I think, is really what is important, about coupling Title IX and diversity, equity, and inclusion work. Restorative justice programs that are centered on naming harms and making repairs to heal communities are really important. Having clear policies and forms and procedures that students can access and understand, right? So, having a student-centered, written policy.

So, students know that if they feel unsafe that they have a place to report it and to seek options. Offering various learning communities, for example, with students, faculty and staff that address the historical, the cultural and

the social contingencies of the dynamics of difference. And this would include critical race theory. I know there is a lot of contention in the public sphere about critical race theory. [00:36:00]. And it would also include current events, and the ways that race impacts Title IX, and the way that Title IX impacts race.

It's also about getting buy-in from staff and faculty to be more student-centered in their decision making. And this can look different for students from various backgrounds, various racial and ethnic backgrounds, various cultural backgrounds. And this is also true for those that are impacted by sexual violence. Their needs are different, also, based on these factors and the trauma that they are navigating.

So, equity mindedness and culturally-relevant decision making are important in, as I said before, connecting the dots between Title IX and the broader work. And I would be remiss if I didn't also note that professional development for faculty and staff on an ongoing basis to support students to live and learn at their best is really important. [00:37:07].

So, in summary, I would just say, having a holistic and integrative approach to diversity, equity, and inclusion work in Title IX work is really integral. In the diversity, equity, and inclusion space institutional equity work is an important dimension, not as a matter of compliance, but as a matter of climate, of a campus community. And that is inside and outside of the classroom. It is about creating a culture of belonging and inclusion.

And so, I would ask us to remember that diversity is a fact, inclusion is a practice and equity is a goal, and equity is not the same as equality. I will just end there. Thank you, Dean Taylor, for allowing me to offer these introductory remarks. [00:38:02].

LISA TAYLOR: Thank you, Professor Martin, and making those distinctions is really important to me as a diversity, equity, and inclusion officer here at the school. So, I really appreciate that. I wanted to turn to you, Elizabeth, for a moment. And I know the concept of equity as it relates to Title IX is important to you. And you mentioned in your opening remarks about why is this important. So, I wanted to give you an opportunity to talk about moving beyond this framework of compliance and expand a little bit on why this is important.

ELIZABETH KRISTEN: Thank you so much for those remarks, Professor Martin. [00:38:56]. And it reminds me of this really important report that the National Women's Law Center did called "Finishing Last" that really talked about the experiences of girls of color within the Title IX athletics and general lack of compliance, certainly girls of color are also getting the worst treatment and the fewest opportunities to receive equity in athletics.

And that's certainly what we have seen in our efforts to enforce Title IX,

that what we will hear in school districts where there are significant percentages of girls of color, is often, well, the school doesn't have money to support athletics, or there is inequality all around, why is this important? And what we have seen is that even schools that are strapped for resources, certainly they have made choices over the last 50 or so years to prioritize certain athletics, usually boys' athletics to the disadvantage of girls. [00:40:02]. And girls get that message, and it's a really corrosive, problematic message for girls and young women that they are not as important, that they don't matter.

And schools can, even schools without a lot of resources, can have a reset with respect to athletics equity. And one of my hopes, that I think has not been realized, was that the COVID pandemic and the shutdown of athletics would allow schools to have a reset and literally say, "Let's take a look as we're restarting sports as what we have done and what we can do."

And many of the things that they can do really don't cost any money. I was talking to someone the other day about publicity and promotion at school. These are things that are within the school's control. What do they have on their websites? What do they put out on their social media? What do they put in their yearbooks? [00:41:00]. And so, these are things that the schools can do and should do to make sure that they provide equity and fairness for girls in their schools.

I wanted to give just one more example from our practice. There was some publicity in the local newspaper, this is pre-pandemic, about the Oakland Unified School District. They are predominantly a low-income district, a district with a lot of students of color. And they were saying, "Because of budgetary reasons, we have to cut down on athletics." But the letter they sent home to parents that talked about the cuts in athletics, just on its face showed that girls were going to be disadvantaged with respect to these cuts. And this was a school in the Bay Area, a district in the Bay Area, that one would hope would have used the gender lens as well when they were looking at these cuts. Now, happily, we were able to talk to them. We are working with them to try to make sure that the conditions for girls in that district improve. [00:42:02]. And we're really working hand in hand with them, which is a nice change. I've certainly had the opposite experience sometimes with school districts. But just, those are a few of my thoughts after hearing Professor Martin talk.

LISA TAYLOR: Thank you, Elizabeth. We really appreciate that. So, Elizabeth and Leslie, I think in both of your remarks you alluded to some challenges with regards to Title IX. So, I'm going to ask each of you, Elizabeth, Leslie, and Natasha, to talk about some of the challenges you have faced or you have seen. And with an eye towards, what can we do as we

move forward to address these challenges and create the . . . Looking forward, creating an environment that is inclusive, that is safe and welcoming for all students. [00:43:10]. And I'm going to start with Leslie.

LESLIE ANNEXSTEIN: So, I'll start where, maybe, Elizabeth left off a little bit, and that's with the beyond compliance piece. And I think everyone's touched on that. So, I think one of the challenges, particularly if you are a Title IX coordinator at an institution, is the beyond compliance piece. Because the amount of energy and effort that needs to go into ensuring compliance almost saps everything out of you. [00:43:56]. And in particular the necessity to really respond and remedy individual complaints that come forward, right? Which means that you are managing and responding to individuals, as you should, as we must, on a daily basis, leaving little time to do that broader thinking to work with people like you, Lisa, on campuses who are doing the broader inclusion and equity work.

We need help from our leaders to get the space to really contribute in the way that we can to those conversations as the individuals who are expected to be the Title IX experts. And the truth of the matter is we do sit with a lot of information about the types of challenges that students continue to face as they're navigating their educational careers on our campuses. [00:45:06].

So, I would put that out there as a big challenge for Title IX coordinators. Because the word coordinator implies a certain, sort of, overview role, oversight role, which is absolutely true. But the actual job itself requires a coordinator to be moving back and forth all day long between having that broad view and then delving down into the details of an individual complaint. And that is a challenge for any one position to do, which is why there are other people in the office. But it still rests on the person holding that title of Title IX coordinator to be accountable for all of it. [00:45:53].

I would also say that the more the Title IX coordinators in institutions can be working with those broader efforts and be provided with the space and the time and the ability to do so, the better that moves everything in the right direction.

LISA TAYLOR: Thank you, Leslie. And I'll go to Elizabeth next.

ELIZABETH KRISTEN: Yes, I've been giving a lot of thought to why are we still here 50 years later. Why hasn't it gone better? And granted, we have challenges in the area of civil rights enforcement all across the board. So, I don't mean to minimize those additional challenges. But I've been thinking a lot specifically about this K through 12 Title IX athletics problem because it does seem just a very achievable point. And one of the things about athletics and trying to achieve equity in the sphere of athletics is there are these almost objective standards of equity that should be in theory really easy for schools to measure and schools to comply with. [00:47:08]. And I

don't think it's mostly subtle, at least at the high school K through 12 level, we're not really seeing subtle differences. That's not where the cases are at.

I've been thinking about, and not to make it too cute, but I thought about nine ways we can improve compliance under Title IX for athletics. And a lot of them really do focus on education and training. I think the school community needs to be educated, and that's the school community writ large, the coaches, the athletic directors, the parents, other community members. And then there needs to be better education for the lawyers that are interfacing with the schools, the school district lawyers.

But one of my hopes is that the Title VII plaintiffs' employment bar will take an interest in some of these Title IX athletics cases. Because I think there's going to be greater capacity there to bring some of these cases. [00:48:02]. We do need better access to data and information because at the high school level there's not national data collection with respect to inequity. There are certain states that have adopted those kinds of data reporting bills, California being one of them, but we don't have a national database of gathering this information about gender equity for athletics.

We need more engagement at the state level, even in a state like California where we do have state level equity in athletics laws. They are highly under-enforced. And we need more engagement at the federal level. OCR does not have, in my view, a strong enough role to play in athletics. I know all our federal enforcement agencies have been under-resourced. But I do see that they don't have a lot of resources being devoted to Title IX athletics issues. [00:48:58]. I think there needs to be more funding for Title IX athletics enforcement. There really are a lot of barriers to bringing these cases, one of which is that I think they need to be brought as class actions. And I think that really requires lawyers to take these on, in some ways in a very complicated and expensive way for just your average practitioner.

I think we need more representation in the media. There are going to be some interesting opportunities with these name, image and likeness rules to see whether women and female athletes are going to benefit from those. Certainly, we need more college and professional opportunities for women in the field of sports, making sure that women and girls see a future for themselves in professional sports, either coaching or professional leagues.

And finally, is one of these culture points. I think we really need to end acceptance of the status quo at most levels. What do we see in our local schools? [00:50:01]. But also, broadly, nationally, that we do not accept the kind of conditions that we saw at the NCAA women's basketball tournament that seemed to have been created without anybody thinking twice about it. Luckily, brave athletes came forward and talked about it and brought attention to it, and it was so obvious and outrageous. But there is a sort of

acceptance of the status quo that, I think, we need to work on ending. So, those are my nine thoughts for how to improve enforcement of Title IX athletics.

LISA TAYLOR: Great. Thank you, Elizabeth. And Professor Martin.

NATASHA MARTIN: So, thank you for the question around challenges. And I'm going to try and combine that with, as you noted, some possibilities. I shared some earlier, and I would certainly reinforce those. [00:50:56]. And I would just say that at the core, Title IX as a process is an educational one. So, it is not the sex police or put the adjective in there. These offices really do provide a host of options and accommodations for members of the community who have been impacted by sexual violence or discrimination and harassment on other bases.

And so, the work is most productive when it is trauma-informed. And those of us who are engaged in the work are stewards of due process. And some of the challenge is getting people to understand this work as educational and its impact when supported institutionally and across the colleges and various units within an institution on the total campus experience for all students. [00:52:01].

And so, the work of diversity, equity and inclusion, for example, I believe is paramount to that end. We cannot make all students feel safe, even those that are impacted by sexual violence or racial discrimination. If we cannot create the kind of brave spaces for the varied identities that we serve, they are really entangled. And it's in that entanglement that I believe there's opportunity for enhancement and growth of our various processes and our work together.

Additionally, I would offer that the work of Title IX and diversity, equity and inclusion, as I said before, really exists in this ecosystem, part of a broader ecosystem of an institution. [00:52:56]. And sometimes, as Leslie mentioned, her comments really resonated with me, sometimes a Title IX office, for example, or a Title IX coordinator, at least in my experience, can be isolated or siloed in its work or seen as narrowly focused only on gender dynamics, as have been raised and mentioned by both of my panelists.

But we must remember, particularly at this precarious time in our country's history, that these offices exist to address harassment and discrimination based on gender, and certainly including sexual violence, but based on other protected identity categories, as you've heard earlier in the presentation. And I believe to support the broader work of inclusivity, we must make the work of diversity, equity and inclusion everyone's work. [00:53:55]. So, we are all climate ambassadors and Title IX offices are important ambassadors to this work as well. But the entire campus is and should be activated as a part of the work.

So, I will often say about my role as the university's Vice President for Diversity and Inclusion. While this work is led by me, it must be owned by others and in a way that facilitates implementation and action that are collaborative, coordinated and cohesive. And that is action on behalf of faculty staff, administrators and even our students themselves.

I want to add some comments around one of the questions that I know the journal readers are interested in, and we talked about this in preparation for today, is thinking about . . . And we've all been ruminating on this, right, together, is how does Title IX fail students? [00:55:02]. That was the way, one of the questions from the journal readers was framed. And I think it requires a process that mirrors too closely the role of law enforcement in courts. So, particularly with the new rules that Leslie offered a review of earlier.

Title IX is educational, in purpose, in scope and outcome. And when we turn that into a quasi-legal court proceeding, we fail complainants because we make it more difficult for them to seek accountability and resolutions that they deserve. And the process can, as currently structured, under the new rules, in particular, increase feelings of shame, anxiety, and anger. And this impacts students' academic and social lives in college at a very important time in their lives. [00:56:04]. It may fail respondents, because rather than incorporating the best of restorative justice practices that do keep respondents accountable through robust sanctioning, it can be seen to provide theoretical loopholes for respondents to never have to own their behaviors and make any resolve to change them, right? Or to learn from them.

So, as an educational process aimed at advancing equity, which requires understanding of wrongdoing, self-reflection, and change, Title IX may fall short on its goals in these realms. And again, this idea of realizing the promise that Leslie spoke eloquently of earlier, in its implementation and enforcement, also includes, in my view, cramped [00:57:00] definitions of how bias and discrimination actually occur in contemporary settings today.

And then, finally, I just want to speak to some structural challenges. I want students to understand that their efforts to make us better are welcome. And that happens in many ways. And sometimes that is through protests, right? All of our campuses and many campuses have experienced that approach. And that is an approach that can be fruitful, right? We certainly saw it on a mass scale in the social movements of last summer. But I also want to have our students understand that it's not the only tool in their toolbox. And really encourage our students to bring their engagement, to the extent they are comfortable doing so, their engagement and their leadership into the shared governance mechanisms of the institution. [00:58:07].

I certainly welcome that in my role at my own institution. And to the extent those opportunities are available to them, I think that is a real contribution that they can add in enlightening leadership and others who are working and wanting to work in partnership with them.

And there are competing concerns that Title IX offices and DEI offices and leaders on campuses must navigate. And sometimes that may be confusing or misunderstood by our students. And there's some of the day-to-day work of responding to matters, as Leslie mentioned, and then there's this broader strategic work, to advance, enhance policies and procedures, engage in collaborations that we know will be fruitful. [00:59:01]. And that is often limited by time and resources, whether those are people resources or monetary resources, for example.

And so, it's really important to address some of these challenges to understand what a Title IX office is and can offer, and what it is not, and what are the limitations, and where there are gaps. And then, how do we fill those gaps for the good of our students outside of the Title IX space, but in partnership with our Title IX coordinators, whether that is through education, restorative justice, professional development, (inaudible), growing our skills, and engaging in discourse, which really is at the heart of every educational enterprise. So, I'll end there, but thank you for this opportunity to reflect on some of the challenges and opportunities.

LISA TAYLOR: Thank you, Professor Martin, and thank you to all our panelists. [01:00:00]. It was really a pleasure working with you. I wanted to see whether any of our panelists had any final comments that you wanted to make before we take some of the questions. If not, we can jump right . . .

LESLIE ANNEXSTEIN: I'd like to say one thing.

LISA TAYLOR: Sure.

LESLIE ANNEXSTEIN: I just want to encourage anyone out there who might be on a college campus to find out who your Title IX coordinator is. I know that when I speak with friends who have kids in college, they rarely know who that person is on their college campus, even if those individuals are interested in this topic. They haven't figured out who is responsible for this work on their campus and what the policies look like. So, I want to encourage everyone to do that. [01:01:00].

LISA TAYLOR: Thanks, Leslie. So, I'm going to go to a question, and I think this is for Elizabeth. And I'm going to condense it a little bit. In *Bostock*, the Supreme Court reiterated the principle that analysis of Title VII requires looking at fairness to individuals and not classes. Does *Bostock* create a problem with the Title IX equal access athletic cases going forward?

ELIZABETH KRISTEN: Such an interesting question that I have not seen come up yet in Title IX athletics. One thing that I think is a little bit

different about Title IX athletics [edited for clarity] and why I think it requires this class-wide look, is that this is one of the only areas of society where we have said sex segregation is A-OK.¹

[01:02:07]. We are going to accept sex segregation in athletics.

And Deborah Brake has written a really interesting book, I think it's called "Getting in the Game", about should we even accept the idea of sex segregation in athletics, and are we undermining our broader goals of gender equity to even accept this concept? And I think those are really reasonable questions that we should all be looking at and asking ourselves. And I think especially now with some of the questions about making sure that trans and non-binary athletes are included in athletics. The fact that we've created this binary sex segregated athletics world creates additional problems there as well. But because we have said, we're accepting sex segregation, the unequal treatment of female athletes is basically, de facto, sex segregation and sex discrimination because you're disadvantaging this whole group of women and girls that you've put into this separate system. [01:03:11].

So, I think that makes it a little bit different than the Title VII individual plaintiff analysis. But I do think that part of what it also reflects is that Title IX has been under-litigated in the athletics field. And a lot of the standards that were set up under Title IX under the regulations and the interpretation and the policy guidance were set up in an era where people looked at civil rights in a different way. And I think some of the standards that were set up in the athletics world, if they were being set up today, I don't know that they would be set up in this manner because it's just not really, I think, how we think about harm anymore. I think harm has been thought of much more individually these days than probably in the 70s where there was this understanding of collective and group harm. [01:04:04].

So, I do think that there are almost some anachronisms built into the Title IX athletics world that really reflect this different era and different thinking about Title IX and athletics and group harm. But I haven't seen the actual argument that you're talking about being made yet in the athletics context. And I do think there are some reasons to push back against it because I do think that you're really talking about, for the most part, athletes competing on teams, being part of a group, being part of, sort of, a collective athletic program, as opposed to just individual athletes. And there's definitely some

¹ For example, Title IX has a "contact sports" rule that allows schools to restrict "contact sports" to single sex teams. 34 C.F.R. §106.41(b). However, if, for example, a female student is allowed to try out for and make the football team, she must be treated equally. *See Mercer v. Duke Univ.*, 181 F. Supp. 2d 525, 530 (M.D.N.C. 2001), vacated in part, 50 F. App'x 643 (4th Cir. 2002).

guidance out there that talks about, like, you don't look at the individual level. You really look at the group and the collective harm under Title IX.

So, I think there's going to be some ways in which we can draw those distinctions even though Title IX and Title VII are often interpreted in parallel. And I do think that they influence each other. [01:05:02]. So, we may be seeing more of those Title VII arguments coming into the Title IX athletics sphere.

LISA TAYLOR: Thanks, Elizabeth. We have another question here that deals with athletics, but maybe in the higher education setting. So, as we saw with the Olympic gymnasts, girls and women in athletics can be very vulnerable to sexual harassment and sexual assault by coaches. What can be done to better prevent this abuse? Anyone wants to take that?

LESLIE ANNEXSTEIN: I'm happy to start off with a few general suggestions. One, education and training around what is expected, accepted conduct by coaches, and then holding them accountable. [01:06:07]. Two, having clear policies and then procedures that individuals can avail themselves of when they need to complain. And then, three, having someone on the backend of receiving the complaints who is responsible for immediately looking into it. We know from so many of these cases that things went on for years and years and years and that it is not the case that individuals didn't step forward to complain at different points along the way.

ELIZABETH KRISTEN: I'd just add that I think there's been, in this athletics context, I think there's just been a way of looking at women and girls and their bodies that has really almost disassociated them from their own agency. [01:07:05]. That they've, in a way, because of their athleticism they're almost seen as their bodies not belonging to them anymore. And I think that could be part of what we're seeing here. Not only are these women and girls really vulnerable because of their age and the context in which these abuses arose, like, with an athletic trainer or coach, where there's really an intimate relationship. But, I think, also, there is, maybe in athletics more generally, just this idea of how we see athletes and how we see their bodies and their agency, that it could be, in fact, undermining to that idea that they have the same rights as everyone else had to not have abuse directed at them. [01:07:55].

NATASHA MARTIN: I would agree with what my colleagues on the panel have shared, and I would . . . Building on what has already been said and where Elizabeth left off, I think, it's, kind of, self-actualization for our women and girls in this context, in addition to, certainly, the education and accountability piece, right. And that piece is only going to work if it is seen as trustworthy and transparent. And so, I think there is work to be done on that score.

And just our conceptions of women and girls, their agency around their own bodies and self-actualization on that score. [01:09:01]. And I think it's also about how do we create the kind of conditions where people feel that they can raise the issues that they are experiencing. I know many of us have been attuned to what occurred over the last several months where we've had several young female athletes come out to share their experience, and over the last couple of years from the Larry Nassar situation, but also more recently around just the internal desperation that women and girls have been experiencing with respect to their mental health. And we know that mental health impacts physical health in a real and vibrant way.

So, I've certainly been inspired by these brave young women who have been willing to speak about their experiences. [01:10:04]. And we need to support them when they do and create the kind of conditions where their voices are welcomed and amplified and affirmed when they come forward. And the hope is that we will begin to build more trust so that the authenticity of women and girls' voices can be normalized.

LISA TAYLOR: Great. Thank you. I got the five-minute warning. So, I think, maybe, we have time for just one more question. And there's a question here, and it's for Elizabeth, about girls playing contact sports. [01:11:04]. Have you dealt with girls who want to play contact sports? I know there is a Title IX contact sports exemption, but it appears to me that there are guidelines created around contact sports that are incredibly problematic.

ELIZABETH KRISTEN: Yes, I have dealt a little bit with this question of contact sports. And Title IX basically carved out certain sports and said that there are ways in which you can have separate teams for women and men, for girls and boys because of the nature of the sports. Now, one of the issues that has come up a lot has been that there are girls, for example, who want to play baseball, and baseball and softball are not the same sport. But Title IX treats softball as an equivalent sport to baseball. And so, it means that girls do not necessarily have the right to play on the baseball team, even if baseball is the sport that they want to play. [01:12:02]. So, that, I think, is, right there, problematic.

We also see girls who want to play football, and they don't have an opportunity to play football on a girls' team. There was a case in Utah where girls came forward and were trying to get their school district to start a girls' football league. That case has so far been unsuccessful. I believe it's still pending on appeal in the Tenth Circuit.

But there also just are girls, one off, here and there, girls who get on to football teams. And we're working with a girl right now who's on a JV football team at her local high school. And her treatment and her experience

have been pretty terrible. And so, I think, again, this also goes back to this whole idea of our concept of sport and sex segregation, and what is sport, and what is appropriate for girls and women, and what's appropriate for men and boys. [01:12:56].

And so, I don't know, if I was reinventing the sports world, if I would agree to this binary sex-segregated sports world. But I do think the contact sports exception relates to that. And that's probably all we have time for. But I'm happy to talk more with you individually if you want to reach out to me.

LISA TAYLOR: Thank you. And, actually, we have two more minutes. So, I'm going to claim some privilege here and ask one more question. And I think this is probably best for Professor Martin. And it's written from a student perspective where the whole purpose of the panel is to talk about where Title IX may lead to offenses being unreported. And it asks, what can students, particularly students from historically marginalized community, build solidarity among themselves to wield collective power? [01:14:01]. And think, Professor Martin, you address this a little bit in your remarks. You are muted.

NATASHA MARTIN: Sorry, my apologies. Yeah, so, I do think it's important that students have the opportunity, and the atmospheric conditions will support these opportunities for them to come together in affinity ways and to do that across identity populations, right? And because I do think it is important to have the safety of those spaces, to share experiences, to collaborate, and it's really important that those networks of support are broader. [01:15:02].

And one of the ways I feel that it is helpful to do that is to really build that collective with others on campus. And so, allies for solidarity come in all stripes and sizes and shapes and forms, right? And so, I think having an open mind in that approach is really important. And remembering that the goal of the process, a Title IX process, a bias prevention process, is designed to make sure that students who are impacted and who need support during a very difficult time, because they've experienced something, because they have observed others experiencing really difficult circumstances. [01:16:05]. They need that support so that they can continue their education and complete it. That is the goal, right?

And so, I think that students coming together as collective, leveraging their collective resources to be in conversation, as I said before, with the shared governance mechanisms that are available to you, seek out officers like myself and officers like Leslie on your campuses. But also, there are faculty and staff who are all part of this network, or, as I call it, an ecosystem, an inclusion ecosystem of support, that we get better as an institution when our students are engaged and are a part of the process as well. [01:17:08]. This

is about learning together, at least from my vantage point.

And so, I would encourage you to do that, and, as I said, to expand the toolkit. Not to suggest that there isn't a really valuable place for protests, but there are other ways, and particularly students that are here, the law students—your skillset is broad and your voices are needed in these various spaces desperately. So, I would encourage you to use them.

LISA TAYLOR: Thank you very much, Professor Martin. Thank you, Elizabeth Kristen, and thank you, Leslie Annexstein. I really enjoyed this discussion today. And I hope to have a conversation with you all again pretty soon. [01:18:00]. So, I'm going to turn it over to the journal now.

MODERATOR: Yes, thank you so much. This was a great conversation. And I know that a couple of you mentioned that you'd be willing to share your contact information, so, any participants or students can feel free to e-mail me at the symposium editor e-mail address, which I will put in this chat shortly. But thank you, again, so much. This was great. And our keynote address will be beginning at 1:30 Eastern. So, everyone, take a moment to stretch, get some lunch, and have a good rest of your day to our panelists. [01:18:32].

END TRANSCRIPT