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Do Esports Classify as Intercollegiate Sport? Legal Analysis of Title IX

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Collegiate esports teams are becoming institutionalized as university officials increasingly see the potential esports programs have to grow student interest, drive enrollment, and raise revenue (Funk, Pizzo, & Baker, 2018; Jenny, Manning, Keiper, & Olich, 2016; Keiper, Manning, Jenny, Olich, & Croft, 2017; Schaeperkoetter, et al., 2017). However, there is not yet clarity as to whether or not esports is defined as “sport” according to law, creating confusion around Title IX athletic policy implications as it pertains to collegiate esports (i.e. scholarship, benefits, and opportunities). Therefore, the researchers conducted a legal analysis of what constitutes intercollegiate “sport”. The results provide deference to the 2008 Dear Colleague Letter which evaluates sport based upon: 1) activity’s governing body, 2) activity’s structure and administration, and 3) activity’s team preparation and competition. The legal analysis results were applied to three prominent collegiate esports programs, with implications that collegiate esports are beginning to fit the legal criterion of an intercollegiate sport according to the law, creating plausible grounds for a Title IX discrimination lawsuit impacting athletic administration.

Electronic sports (esports) is an emerging hot topic in the world of intercollegiate sports. Robert Morris University in Illinois (RMUI) implemented the first varsity esports program in 2014 (Reames, 2018; Robert Morris University, n.d.a). Since then, there are now approximately 127 official varsity esports programs within the United States (U.S.) that compete nationwide (Morrison, 2018). A varsity esports program, according to The National Association of Collegiate eSports (NACE), refers to the principal esports teams representing a college or university, that compete against similar teams at peer educational institutions, and receive significant support in the form of financial support, facilities, equipment, and scholarships from college and university departments (NACE, n.d.a).

As the development of collegiate esports is uncharted territory for many institutions, colleges and universities have taken different approaches to administering esports programs. Today, there is debate as to whether esports should be offered alongside other institutionalized varsity athletic programs within athletic departments, or elsewhere within the academy. This polarizing debate has resulted in institutions housing their esports program in the athletic department, the division of student affairs, or academic departments (Bauer-Wolf, 2019).

Scholarship demonstrates collegiate esports consists of primarily male participants though both male and female students are eligible to join (Bauer-Wolf, 2019; Yee, 2018). This gender discrepancy could give rise to Title IX violations that may result in future litigation. For example, an obvious area of concern is equity in scholarship dollars. Several colleges and universities actively market esports scholarship opportunities to recruit talent. These scholarships can range from \$4,000 dollars a player to upwards of 50% of room and board (Collins, 2019). Although Title IX mandates equity in scholarship dollars within athletics departments, students participating in collegiate esports programs outside of athletics are awarded merit-based scholarships, which leaves them omitted from federal Title IX gender protections that oversee traditional intercollegiate athletics programs (Collins, 2019). This is due in part to the ambivalence that surrounds the current debate over whether esports should, or should not, count as an institutionalized intercollegiate sport. In light of recent population estimates suggesting collegiate esports are male dominated (Bauer-Wolf, 2019; Yee, 2018), there lies a potential for gender discrimination litigation under Title IX athletics policy if esports are deemed as intercollegiate sport by federal Title IX policy. Although, scholarship dollars are just one area of equity, the opportunities and benefits provided athletics departments need also be considered when assessing compliance with Title IX athletics policy.

The intercollegiate sport status of esports is important to decipher in order to accurately interpret and implement Title IX intercollegiate sport policy implications influencing student provisions and athletic administration (i.e., scholarships, benefits, and participation opportunities). The intercollegiate sport status of esports will inform where and how the program can be operated, which will result in more leeway or accountability under Title IX scrutiny, as institutionalized intercollegiate varsity athletics can be subject to more specified regulation than other educational opportunities offered within the university (e.g., sport clubs; Title IX of the Education Amendments of 1972, 1979).

If esports continues to expand as predicted at the collegiate level (NewZoo, 2018) - without a change in its intercollegiate “sport” status - collegiate esports programs may be administered similar to intercollegiate athletic teams while evading associated legal requirements pertaining to gender equity. That is, esports programs may be awarded scholarships, supplied

academic amenities, and awarded participation opportunities all without respect to Title IX consideration in the areas of equal athletic financial assistance, equal treatment and benefits for athletic teams, and effectively accommodating student interests and abilities. Due to the fact that there is no consensus on the intercollegiate sport status of collegiate esports, and in part to raise awareness of future potential litigation surrounding issues of gender discrimination, the researchers sought to investigate the legal issue of what constitutes intercollegiate sport and apply the legal analysis to collegiate esports to extend the debate on the status of esports.

Unlike previous literature that has debated whether esports are an intercollegiate sport for the sake of definition (Cunningham et al., 2018; Jenney et al., 2017), the researchers in this study expound upon the work of Holden, Kaburakis, and Rodenburg (2017) to deliberate whether esports are an intercollegiate sport for the sake of legal ramification. Furthermore, there is little scholarship examining esports at the collegiate level specifically, limiting our understanding of the Title IX athletic policy implications surrounding collegiate esports. Therefore, in order to fill this gap in the literature, the primary purpose of the paper is to conduct a legal analysis of what constitutes intercollegiate sport, with a secondary purpose of applying the legal analysis to prominent collegiate esports programs to draw implications regarding the Title IX status of collegiate esports.

What are Esports?

Esports consist of high-level competition through videogames. Esports have been around for decades, since at least 1972 when the first esports competition was held at the Stanford Artificial Intelligence Laboratory (Brand, 1972). With the development of the World Wide Web and other technologies that enabled multiplayer functions, esports became increasingly popular in the early 1990's (Jonasson & Thiborg, 2010). The internet connected gamers online, allowing for competitive gaming amongst players not in the same physical location (Bountie Gaming, 2018). The beginning of the 21st century saw the development of successful esports tournaments such as the World Cyber Games and the Electronic Sports World Cup, which continue to be held annually. The introduction of games such as *Halo*, *Star Craft*, and *League of Legends* set the foundation for competitive gaming going forward (Edwards, 2013). The growth of competitive gaming led to the formation of esports leagues, such as Major League Gaming which was founded in 2002 (Edwards, 2013).

Presently, esports are widely predicted to expand, with the 2018 Global Esports Market Report by NewZoo (2018) projecting 557 million viewers and a total projected revenue of \$1.65 billion in the year 2021. Streaming platforms such as Twitch and YouTube are driving this growth further. In 2014, Amazon bought Twitch for \$970 million; it has approximately 55 million users, accounts for 43% of all live-video streaming traffic, and 1.8% of total traffic, behind only Google, Netflix, and Apple (Tech Startups, 2019).

Esports encompass a plethora of video games, but the most commonly played games in competitive esports fall into four main categories: First Person Shooter (e.g., *Counter Strike: Global Offensive*), Multiplayer Online Battle Arena (e.g., *League of Legends*), Real Time Strategy (e.g., *Star Craft*) and Player vs. Player (which consists of sport games like *FIFA* and *Rocket League*; Tech Startups, 2019; Techopedia, n.d.). Some of the most popular games in 2018, according to prize pool money, included (in ascending order): *Call of Duty*; *Star Craft II*; *Hearthstone*; *Heroes of the Storm*; *Overwatch*; *Player Unknown's*

Battleground; League of Legends; Fortnite; Counter Strike: Global Offensive; and Dota 2, which had a single event prize of \$25.5 million dollars (Hayward, 2018).

Collegiate Esports

Esports teams have spread widely on American campuses, with some teams becoming officially institutionalized (Funk, Pizzo, & Baker, 2018). University officials increasingly believe esports programs have the potential to grow student interest, drive enrollment, and raise revenue (Jenny, Manning, Keiper, & Olrich, 2016; Keiper, Manning, Jenny, Olrich, & Croft, 2017; Schaeperkoetter, et al., 2017). Many esports teams are structured similarly to college athletic teams. They feature coaching staffs, training facilities, follow a regular practice/competition schedule, and recruit their players (See University of Akron, n.d.a; Winters, 2018). However, while esports are clearly on the rise on campus, it is unclear whether colleges and universities will classify them as ‘intercollegiate athletics’ and position them within their existing athletic departments. Therefore, the institutional home of esports teams currently varies by school, with some teams housed within athletic departments, some within the division of student affairs, and some within academic departments (Bauer-Wolf, 2019).

Esports competitions are organized by game title, and it is up to each university to determine which games they will contend in. For example, as of 2019 RMUI competed in six different games (Robert Morris University, n.d.b;), the University of Akron (Akron) in five (University of Akron, n.d.a), and Boise State University (BSU) in four (Boise State University, n.d.). Generally, esports team consists of multiple players, with some schools maintaining “A” and “B” teams (Winters, 2018). Most players tend to specialize in one game due to the amount of effort it takes to be proficient at the game, and to then remain competitive (Winters, 2018). Teams uphold a regular practice schedule, and some schools even model their practices off of National Collegiate Athletic Association (NCAA) practice standards (The University of Akron, n.d.f). Recruitment of esports athletes occurs in the form of questionnaires on the teams’ website, scouting high school tournaments, and online recruiting platforms such as BeRecruited (Winters, 2018).

At present, the governance of collegiate esports is not uniform. Neither the NCAA nor any of its constituent conferences currently regard esports as intercollegiate athletic competition (NCAA, n.d.a). In their places, a variety of other organizations – some corporate, some collegiate, some independent – organize a variety of competitions on a variety of levels, and it is up to individual institutions to decide with which, if any, of these organizations they wish to affiliate. For instance, a number of prominent collegiate esports competitions are organized in whole or in part by video game publishers. Riot Games, publisher of the popular game *League of Legends*, organizes competition through its subsidiary the Riot Scholastic Association of America (RSAA; RSAA, n.d.). Blizzard Entertainment, creators of important titles such as *Overwatch*, *Hearthstone*, *Heroes of the Storm*, and *StarCraft II*, organizes competition through subsidiary organizations such as Tespa, formerly the Texas eSports Association (Tespa, n.d.a). Tespa claims to be one of the leaders in the space of collegiate esports, claiming 270 plus chapters (e.g., officially recognized student gaming clubs), 120,000 members and alumni, and has awarded \$3.3 million dollars in scholarships (Tespa, n.d.b).

In addition to game publishers, independent organizations have also emerged such as the Electronic Gaming Federation, established in 2015, and the National Association of Collegiate eSports (NACE), established in 2016. NACE claims to be unique in their focus on the

educational development of the students they organize, with a stated mission of promoting the positive development of esports programs at the collegiate level with an eye toward varsity-level programs and scholarships (NACE, n.d.b; NACE, n.d.d). NACE is currently affiliated with the National Association of Intercollegiate Athletics (NACE, 2016, pg. 2); one study of NACE's institutional members found that 40% of the esports teams are administered by athletic departments and 40% are administered by student affairs or some other student services department (Smith, 2017).

Schools may also forego membership in a national governing body to compete in independently organized collegiate leagues organized around individual game titles. For example, some of the largest esports programs such as Akron (2019 spring Collegiate Rocket League Champions; University of Akron, n.d.b), University of California Irvine (2018 College League of Legends Champion; University of California Irvine, 2018), and University of Utah (runner-up in the inaugural 2019 ESPN Collegiate Esports Championship; Hoyt, 2019) are not members of the popular governing body NACE (NACE, n.d.c). Similar to the reasons mentioned prior, this is because esports game publishers own the intellectual property rights to the games being played, and increasingly prefer to organize tournaments under their own auspices. Additionally, esports game publishers can control who is permitted to hold tournaments and leagues using their particular games. Many of the most popular esports game publishers such as Riot Games (creator of *League of Legends*) and Blizzard (creator of *Overwatch* and *World of Warcraft*) host their own collegiate leagues and sometimes even restrict aspiring regulatory associations from hosting their own leagues utilizing their game (Blizzard, n.d.a; Blizzard, n.d.b, Reames, 2018; Riot Games Inc., n.d.). For example, Riot revoked Tespa's rights to *League of Legends* tournaments and decided to manage the LoL tournaments internally (Reames, 2018). Third party leagues who partner with publishers, such as the Collegiate Star League and Tespa, also host tournaments of many different genres of games (Reames, 2018).

That being said, the format for tournament play varies from one game title to the next, and also depends on the regulatory association/organization who is hosting the championship. A typical tournament season starts with registration for the event, which proceeds into conference play by region (i.e., North, South, East, & West). Teams advance to a conference playoff or finals round, which is then followed by a national championship. Some tournaments contain prize pools which yield a cash prize amount for the players and staff contingent upon placement. For example, the 2018 College League of Legends Championship distributed \$8,000 per player and \$4,000 per staff member for first place, \$4,000 per player and \$2,000 per staff member for second place, \$2,000 per player and \$1,000 per staff member for third and fourth place finishers, and finally \$1,000 per player and \$500 per staff member for fifth place or lower (Riot Games Inc., 2018). How the winnings are spent are up to the school and regulatory associations. Some schools, like the University of Utah (Utah), require the prize money be placed in a university scholarship fund (Volk, 2017). Similarly, some tournaments hosted Tespa mandate the tournament winnings be put towards school tuition (Tespa, n.d.c).

The current state of collegiate esports consists of hundreds of colleges and universities with esports programs and official varsity esports teams (Micron, n.d.; Morrison, 2018). Collegiate esports players have been awarded more than \$3,000,000 from Tespa tournaments, and \$15,000,000 in scholarships per year from around 200 universities, with NACE approximating the average scholarship per player is \$4,800 (Heilweil, 2019). As universities see academic, financial, and student interest potential in esports (Jenny et al., 2016; Keiper et al., 2017; Schaeperkoetter, et al., 2017), collegiate esports programs are likely to continue

expanding. With The Ohio State University being the latest Power Five conference school to implement an esports “arena” and curricular program (Smith, 2018), one can only assume more Power Five schools will follow suit.

Legal Implications of Collegiate Esports

Due to the rapid growth of esports, many regulatory and legal concerns are beginning to emerge. Research has begun to identify possible litigation resulting from the emergence of esports, including a breadth of legal issues, such as gambling, corruption, doping, anti-trust, Title IX, sports agency, intellectual property, contract law, tort law, disability law, labor law, constitutional law, etc. (Holden et al., 2017). A legal issue specific to collegiate esports that requires consideration in light of the possible institutionalization of esports is Title IX.

To illustrate this, a majority of popular esports titles fall into a handful of video game genres: First-person shooters (FPS), MOBAs (Multiplayer Online Battle Arenas), and player vs player (PVP) which includes sport genres. An investigation of esports game genres found only 7% of First-Person Shooter (FPS) players, 10% of Multiplayer Online Battle Arena (MOBA) players, and 2% of Sport players were female (Yee, 2018). These genres are competitively played at the collegiate level and represented as popular collegiate game titles, such as Counter Strike Global Offensive (i.e., FPS), Rocket League (i.e., Player vs. Player or Sport), and League of Legends (i.e., MOBA). Although there is little data on the actual percentage of female “gamers” at the collegiate level, further data suggests collegiate esports rosters are male dominated, with Bauer-Wolf (2019) estimating NACE’s student esports population as 90% men. Similarly, some institutions struggle to find female participants to join the collegiate esports team (Seiner, 2019)

While issues of gender equity may prompt Title IX scrutiny, there is confusion around Title IX policy implications as collegiate esports teams can be housed within the athletic department, division of student affairs, or specific academic departments depending on the institution. This current state leaves two questions of particular concern to athletic administrators implementing esports programs: Should universities consider esports a collegiate sport, house esports in the athletic department, and regulate esports according to Title IX athletic guidelines similar to the school’s other intercollegiate sports? Or, should universities house esports outside of the athletic department (i.e., student affairs; academic department), operate the activity like a sport team, but limit Title IX scrutiny to outside the athletic context? If esports teams are officially sanctioned as institutional collegiate athletic activities according to federal law, Title IX athletic guidelines will require gender equity in the areas of scholarships, benefits, and participation, with implications for athletic programs maintaining Title IX compliance.

Legal Analysis

The legal research process was employed as the research method to explore the issue of whether esports may be considered an intercollegiate sport according to Title IX, and thus subject to Title IX athletic guidelines. The researchers adhered to Barkan, Mersky and Dunn’s (2002) four-step legal research process: 1) identify and analyze the significant facts; 2) formulate the legal issues to be researched; 3) research the issues presented; and 4) update. Through a scoping review of the literature, the researchers identified and synthesized critical facts pertaining to the current landscape of collegiate esports, which informed the potential legal

issues to be researched (see Introduction). The gap in the literature warranted investigation into the legal issue of whether esports may be considered an intercollegiate sport according to Title IX.

To research the legal issue, the researchers first classified the legal issue by the relevant substantive law (Barkan et al., 2002), which consisted of federal statutory law and case law. Next the researchers consulted secondary sources (i.e., legal treatises, law reviews, journal articles) pertaining to the legal issue to identify relevant primary sources of law to analyze. The primary sources of law included: Title IX, ancillary federal statutes pertaining to sport regulation (i.e., Sports Agency and Responsibility and Trust Act, Sports Bribery Act, United States Anti-Doping Agency Act), the Department of Education Dear Colleague Letters, and *Biediger v. Quinnipiac University* (2009, 2010, 2013) - the foundational case that established deference to Title IX policy interpretation guidelines. To complete the legal research process, the researchers shepardized¹ the *Biediger v. Quinnipiac University* (2009, 2010, 2013) case to validate the legal guidelines established. The researchers employed doctrinal analysis, which is concerned with how law was developed and applied (Ali, Yusoff, & Ayub (2017). The aim of this type of analysis is to gain in-depth understanding of legal doctrine in order to answer a legal issue or question. To achieve this aim, all primary sources of law were read thoroughly, annotated, and synthesized to provide a legal interpretation of “intercollegiate sport” to be applied to the context of collegiate esports. The following legal analysis represents the results of the legal research process, establishing the legal guidelines pertaining to what constitutes intercollegiate sport.

History of Title IX in Athletics

Congress brought forth and modeled Title IX after Title VI of the Civil Rights Act (1964), which prohibits discrimination based on race, color, or national origin in programs or activities that receive federal funds. President Nixon signed Title IX of the Education Amendments Act into law in 1972 with the intent of breaking down gender barriers that prohibited equal participation in educational opportunities (U.S. Department of Justice, 2015). Title IX states, “No 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” (20 U.S.C. § 1681–1688, 2013). Title IX guarantees equal educational opportunities in federally funded programs and applies to all aspects of education programs including, but not limited to, activities, admissions, treatment of participants, and employment.

In 1974, the Javits Amendment was enacted which “instructed the [Department of Health, Education, and Welfare (HEW)] to make reasonable (regulatory) provisions considering the nature of particular sports in intercollegiate athletics” (Title IX of the Education Amendments of 1972, 1979, p. 71415). Shortly after, the HEW proposed regulations prohibiting gender discrimination in interscholastic, intercollegiate, club, or intramural athletic activities (34 C.F.R. § 106.41, 1975; 45 C.F.R. § 86.41, 1975). HEW listed additional factors to be measured to determine if a school is providing equal opportunity to each sex, including, but not limited to, the provision of equipment, scheduling of games and practice time, travel and per diem allowances, assignment and compensation of coaches, provision of locker rooms, provision of medical and

¹ Shepardize: the process of verifying whether cases have been reversed, overruled, reaffirmed, questioned, disregarded, or cited by later cases (Moorman, 2017).

training facilities, provision of housing and dining facilities, and publicity (34 C.F.R. § 106.41, 1975; 45 C.F.R. § 86.41, 1975).

Soon after the enactment of Title IX regulations in 1975, there grew concern surrounding the ambiguity of Title IX's application to sport. In response, HEW created a Policy Interpretation for Title IX's athletics policy that provided higher education institutions with a framework on how to address Title IX complaints and further guidance on compliance requirements in regard to Title IX's application to athletic programs (20 U.S.C. § 1681–1688, 2013). The Policy Interpretation was created to clarify the meaning of “equal opportunity” in sport and explain the criteria for assessing an athletics program's Title IX compliance. In order to be compliant with Title IX, a school must prove three areas of regulatory compliance established by the Office of Civil Rights (OCR): equal athletic financial assistance (e.g., scholarship dollars); equal treatment and benefits for athletic teams (e.g., all the criteria listed in 34 C.F.R. § 106.41(c)(2–10), this criteria is also listed above in the subsequent paragraph); and effective accommodation of student interests and abilities (20 U.S.C. § 1681–1688, 2013). If a school is found non-compliant with one of the above three guidelines, a school is in violation of Title IX.

In order for a university to demonstrate compliance for the third factor above, that is, effectively accommodating students' interests and abilities, three additional areas are assessed: 1) the athletic interests and abilities of students; 2) the selection of sports offered; and 3) the levels of competition available - including the opportunity for team competition (Title IX of the Education Amendments of 1972, 45 C.F.R part 86, 1979). Levels of competition available is measured by two additional factors that must be demonstrated: 1) equity in athletic opportunities; and 2) equity in competition. Under equity in athletic opportunities, a school must demonstrate one of the following prongs, also known as the “three-part test” (Title IX of the Education Amendments of 1972, 45 C.F.R part 86, 1979):

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Equity in competition is assessed using the “levels of competition” test, which examines the following (Title IX of the Education Amendments of 1972, 45 C.F.R part 86, 1979):

1. Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities

2. Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex, as warranted by developing abilities among the athletes of that sex.

It is important to note that these policies apply to “any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance...”, including, “...educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs” (Title IX of the Education Amendments of 1972, p. 71414, 1979). As almost all private colleges and universities receive federal funding through federal financial aid programs utilized by students, such institutions must also abide by Title IX regulations (NCAA, n.d.c; Title IX of the Education Amendments of 1972, 1979).

Legal Interpretation of Intercollegiate Sport

Collegiate esports is subject to Title IX regardless of its intercollegiate sport status. However, whether or not esports is defined as an intercollegiate sport has Title IX policy implications for collegiate athletics. Given the growth of collegiate esports, and the organizational ambiguity under which they are currently conducted, it is possible the federal courts, not colleges or administrative agencies, will eventually determine the status of esports as it pertains to Title IX’s athletics policy. If so, federal courts will most likely look to federal statutes, OCR Dear Colleague Letters, and precedent – in addition to Title IX - to guide their decision (Holden et al., 2017).

Federal Statutes. Scholarship has identified relevant statutory law pertaining to the classification of sports (Holden et al., 2017). The Sports Agency and Responsibility and Trust Act defines intercollegiate sport as “a sport played at the collegiate level for which eligibility requirements for participation by a student athlete are established by a national association for the promotion or regulation of college athletics” (15 U.S.C. § 7801). Further, the Sports Bribery Act and United States Anti-Doping Agency Act suggest sport involves the meeting of competitors who meet eligibility standards set by a national governing body (as cited in Holden et al., 2017). However, these federal statutes, which focus on the preservation and regulation of sport, may not be instructional enough to serve as a guide for federal courts to define intercollegiate activities in regard to Title IX.

Dear Colleague Letters. The Department of Education’s OCR issues “Dear Colleague Letters” to help explain and interpret existing laws and regulations. The OCR has released several Dear Colleague Letters and clarification letters to provide guidance on the original 1979 Title IX Policy Interpretation’s athletic guidelines. These letters potentially pertain the most legal significance and proper guidance for defining intercollegiate sport.

The January 16, 1996 Dear Colleague letter written by Norma V. Cantú, Assistant Secretary for Civil Rights, was issued to clarify Title IX’s “three-part test” (Cantú, 1996). This letter provided additional examples to illustrate how to meet part one of the three-part test, defined the term “developing interests” under part two, rationalized why Title IX does not require an institution to accommodate the interests and abilities of potential students under part three, explained how Title IX requires OCR to count participation opportunities, and clarified that an institution can choose which part of the test it plans to meet (Cantú, 1996).

Although the above letter explains how to count participation opportunities, it lacks explanation of what constitutes a “participation opportunity.” Therefore, the September 17, 2008 Dear Colleague Letter written by Stephanie Monroe, Assistant Secretary for Civil Rights, was issued to clarify which intercollegiate or interscholastic athletic activities can be counted for the purpose of Title IX compliance (Monroe, 2008). In the 2008 letter, the OCR explained they do not have a formal definition for what constitutes a college “sport,” but would instead evaluate an activity’s governing body, program structure and administration, as well as its team preparation and competition to determine its intercollegiate or interscholastic “sport” status under Title IX (Monroe, 2008).

OCR’s intercollegiate athletic activity guidelines. As laid out in the 2008 Dear Colleague letter, when determining whether or not an institution is providing equal athletic opportunity, the OCR will evaluate the opportunities provided by the institution’s intercollegiate or interscholastic “sports” programs (Monroe, 2008). The OCR determines what does or does not count as a “sport” for these purposes on a case-by-case basis. In order to make this determination, the OCR evaluates an activity in three areas: 1) activity’s governing body, 2) activity’s structure and administration, and 3) activity’s team preparation and competition (Monroe, 2008).

The first step involves determining if the activity is associated with an established governing body, such as the NCAA, as the governing body may already have organizational requirements which address the factors characterizing intercollegiate “sport” as identified by the OCR. However, if an activity is not governed by such a body, the activity’s structure and administration, as well as its team preparation and competition, must be evaluated to determine whether the activity should be deemed an intercollegiate “sport” (Monroe 2008).

When considering program structure and administration, the OCR will examine the inherent nature and basic operation of the specific activity to determine whether the activity is structured and administered in a manner consistent with established intercollegiate sports in the institution’s athletics program. Several factors will be considered, including the activity’s operating budget, support services, coaching staff, athletic scholarships, athletic awards, and recruitment (Monroe, 2008).

Regarding team preparation and competition, the OCR will consider whether the activity’s team prepares for and engages in competition in a manner consistent with established varsity sports in the institution’s intercollegiate athletics program. To evaluate team preparation and competition, the following factors will be examined: the quality of the team’s practice opportunities, whether the regular season differs quantitatively or qualitatively from the regular seasons of other varsity sports, whether the pre- and post-seasons are consistent with other varsity sports, and whether the team is organized primarily for the purpose of engaging in athletic competition (Monroe, 2008).

It should be noted that when making these evaluations, the OCR’s policy was intended to “encourage compliance with the Title IX athletics regulations in a flexible manner that expands, rather than limits, student athletic opportunities” for the benefit of stimulating student interest and providing an array of competitive activities (Monroe, 2008). As such, the Dear Colleague Letter policy interpretations are to be used as a guide when evaluating the intercollegiate “sport” status of an activity, for the purpose of promoting athletic opportunities for students.

Biediger v. Quinnipiac University. The courts have also addressed the question of what constitutes a sport for Title IX purposes, and its efforts have relied heavily on the 2008 Dear Colleague letter guidelines. The foundational case which established precedent for the legal issue

of what activities constitute intercollegiate sport is *Biediger v. Quinnipiac University* (2009, 2010, 2013). In this case the court was tasked with examining multiple intercollegiate activities, most notably cheerleading, in order to determine if they would constitute an intercollegiate “sport” for the purposes of Title IX (Hefferan, 2016).

In March 2009, the defendant, Quinnipiac University, announced plans to cut the women's volleyball team, men's golf team, and men's outdoor track team. Knowing this could impact the school's Title IX compliance under the three-part test, the university also proposed the addition of a new varsity sport - competitive cheerleading - for the 2009-10 season. In response, five Quinnipiac women's varsity volleyball players and their coach filed a lawsuit against the university alleging Quinnipiac's decision to eliminate its volleyball team violated Title IX of the Education Amendments of 1972.

2010 District Court decision. The U.S. District Court for the District of Connecticut was tasked with determining whether or not Quinnipiac's cheer team constituted an intercollegiate “sport” under Title IX. As outlined in the 2008 Dear Colleague letter, the court first examined whether Quinnipiac was a member of a recognized intercollegiate athletic association (Monroe, 2008). Although the institution was a Division I member of the NCAA, competitive cheerleading was not recognized as either a sport or an emerging sport by the NCAA at that time. Therefore, the court proceeded to examine if the cheer team met the proper program structure and administration, as well as team competition and preparation guidelines outlined in the 2008 Dear Colleague Letter (*Biediger v. Quinnipiac*, 2010).

Regarding the cheer team's program structure and administration, the court found the cheer team's operating budget, coaching staff, benefits/service including equipment, medical treatment, strength and conditioning coaching, study halls, community service opportunities, publicity, eligibility to receive awards, and recognition for their participation were administered and structured similarly to the school's other recognized intercollegiate sports. However, the court also noted significant differences pertaining to the locker room space, team insurance coverage, and recruiting when compared to the school's recognized sports.

Next the court assessed the cheer team's preparation and competition. The court viewed Quinnipiac's cheer team favorably in two factors: the team's practice opportunities closely followed NCAA principles, and the team intended to engage in athletic competition under the auspices of the National Competitive Stunt and Tumbling Association (NCSTA). However, the court found this governing body to be a “loosely defined, unincorporated association with no board of directors, subcommittees, voting or petition systems for its members, or other hallmarks of a governing national athletics organization” (*Biediger v. Quinnipiac*, 2010, p. 17). This lack of regulation allowed for a “motley assortment of competitors ... [with] quality of competition... variant across the competitive cheer season [in comparison to] seasons of the University's other varsity teams” (*Biediger v. Quinnipiac*, 2010, p. 31). Additionally, there was no “progressive playoff system or entrance qualification, such as a ranking system or minimum win tally over the course of the season” (*Biediger v. Quinnipiac*, 2010, p. 31).

In view of these governing body deficiencies, the court decided Quinnipiac's cheer team did not count as an intercollegiate “sport” under Title IX. As such, cheer could not count as a genuine participation opportunity. The court found Quinnipiac University in violation of Title IX and enjoined them from eliminating women's volleyball as a varsity sport.

2013 District Court decision. Quinnipiac shortly thereafter implemented additional changes to their athletic program and moved to have the injunction lifted. The changes included the introduction of women's golf and rugby teams as well as further cultivation of competitive

cheerleading as a developing sport. The court again deliberated over whether competitive cheerleading counted as genuine participation opportunities for purposes of Title IX compliance (*Biediger v. Quinnipiac*, 2013). In doing so, the court adopted the same procedure as the previous court by using the guidelines set forth in the 2008 Dear Colleague letter to assess the activities' Title IX status.

Quinnipiac's re-named acro team, now under the National Collegiate Acrobatics and Tumbling Association (NCATA), formerly the NCSTA, and now partnered with USA Gymnastics, had forwarded a proposal to the NCAA Committee for Women's Athletics (CWA) to become an NCAA emerging sport (*Biediger v. Quinnipiac*, 2013). Due to conflicting formats between NCATA's "acro" and USA Cheer's "STUNT", the CWA did not admit acro as an emerging sport. Without the backing of a governing body that withstood the OCR's regulations, Quinnipiac had the burden of proving its acro team met the program structure and administration, and team preparation and competition guidelines.

When examining the program structure and administration and team's preparation and competition, the court found Quinnipiac's acro team had implemented more consistency in rules, competed against college level opponents, and now recruited off campus (*Biediger v. Quinnipiac*, 2013). However, the court ruled that this recruiting was still not equivalent to other recognized sports due to the fact that no high school in the nation had an acro team, hence making recruiting "guesswork" by the coaching staff (*Biediger v. Quinnipiac*, 2013). In addition, although Quinnipiac's acro team now competed solely against collegiate teams, 40% of competitions were against teams below their division, highlighting disparity in providing similar genuine intercollegiate competition. In summary, based on "the lack of recognition by the NCAA, the ongoing rivalry with STUNT [(USA Cheer)], the sport's unconventional recruiting difficulties, and the team's inadequate regular-season and post-season competition," Quinnipiac's acro team still did not count as a varsity sport for purposes of Title IX. The case eventually settled on April 26, 2013, with Quinnipiac required to develop a Title IX nondiscrimination policy and grievance procedure (*Biediger v. Quinnipiac*, 2013, p. 42).

Shepard's citations. There is no subsequent appellate history after the 2013 district court decision in the *Biediger v. Quinnipiac University* case, therefore, the court decision outlined above serves as precedent for future cases deliberating what constitutes intercollegiate sport according to Title IX. It is important to consider the precedent set by *Biediger v. Quinnipiac University* (2009, 2010, 2013) for several reasons. First, the court judgments make a considerable contribution to Title IX interpretation, as they provide comprehensive guidance on what constitutes an intercollegiate "sport" under Title IX (Hefferan, 2016). Second, through the *Biediger v. Quinnipiac University* (2009, 2010, 2013) case, the federal court established deference to the 2008 Dear Colleague letter, using its guidelines to define what an intercollegiate "sport" is in regard to Title IX. Third, the court also refined the levels-of-competition test, previously ambiguous in both the OCR's policy guidance and in the case law, to determine compliance with Title IX (Hefferan, 2016).

Shepardizing the *Biediger v. Quinnipiac University* (2009, 2010, 2013) case revealed 11 citing decisions, in which 11 subsequent cases used *Biediger v. Quinnipiac University* (2009, 2010, 2013) as precedent to interpret and apply the law. In order to determine if the legal guidelines established in *Biediger v. Quinnipiac University* (2009, 2010, 2013) were treated positively, negatively, neutrally, or with caution in these 11 subsequent cases, the Shepard's signals (indicating treatment) were identified and the cases reviewed in entirety. Of the cases reviewed, nine did not pertain to the legal issue of what constitutes intercollegiate sport, rather

using *Biediger v. Quinnipiac University* (2010, 2013) as precedent for issues pertaining to preliminary injunctions, irreparable harm, and counting athletic participation opportunities. The two cases pertaining to this legal analysis include *National Association of the Deaf v. Harvard University* (2016) and *Nalwa v. Cedar Fair, L.P.* (2011).

In *National Association of the Deaf v. Harvard University* (2016), the plaintiffs claimed Harvard University failed to provide equal opportunity for the deaf and hard of hearing to online video content, violating Section 504 of Title III of the ADA. The court relied upon the Department of Education's 2010 Dear Colleague Letter, addressing postsecondary institutions' use of electronic book readers, to guide their interpretation and application of Section 504 of Title III of the ADA to the case. Moreover, the court granted Auer deference (appreciable deference) to the Department of Education's policy interpretation outlined in the Dear Colleague Letter, which gives controlling weight to the agency's interpretation of its regulations. The court recognized "DOE [Department of Education] was required to follow certain procedures to ensure that the documents were developed with appropriate review and public participation and were high quality" (*National Association of the Deaf v. Harvard University*, 2016). This case cited *Biediger v. Quinnipiac University* (2010) as precedent when deferring to the Department of Education's interpretation, further establishing the weight of the 2008 Dear Colleague Letter policy interpretation and guidelines pertaining to Title IX.

In *Nalwa v. Cedar Fair, L. P.* (2011), the plaintiff claimed that Cedar Fair, L. P. (owner and operator of Great America amusement park) was liable (negligent) for personal injuries sustained while riding a bumper car at Great America. The court had to examine the nature of the activity to determine if the state's doctrine of primary assumption of risk applied. In examining the nature of the activity, the court distinguished "sport" from other forms of activity. Sport was defined as:

An activity done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury ... [and] some pitting of physical prowess ... or skill based ... against another competitor or against some venue." (*Nalwa v. Cedar Fair, L. P.*, 2011)

This case cited *Biediger v. Quinnipiac University* (2010) as precedent when illustrating that appellate courts have found certain activities (i.e., cheerleading) are not true sport. While the definition of "sport" in *Nalwa v. Cedar Fair, L. P.* (2011) is not binding within a Title IX claim, it could be persuasive, and thus provides more context for how the law defines "sport".

Legal Analysis Applied to Collegiate Esports

At present, athletic directors and administrators have expressed their concerns over Title IX's application to esports, calling for full consideration of legal and compliance issues before progressing forward with institutionalizing collegiate esports (Moore, 2018). This has warranted schools to proceed cautiously with how to organize their intercollegiate esports programs due to varying Title IX ramifications associated with an esports teams' respective housing (Bauer-Wolf, 2019). For example, The Ohio State University, The University of Utah, Miami University of Ohio, and the University of California have intentionally placed their esports team outside of the athletics department due in part to athletics policy implications (Smith, 2018).

While some esports programs are not housed in athletics departments, some are conceivably administered similarly to intercollegiate athletic programs at the same institutions. Esports programs that meet several of the OCR's guidelines might plausibly find themselves subject to Title IX athletic guidelines regardless of their placement in student affairs or academic departments (Bauer-Wolf, 2019). As Title IX athletic compliance is evaluated on a case-by-case basis, application of the legal analysis to three significant esports programs –RMUI, Akron, and Utah – may present a clearer picture of the present status of esports. These programs represent three different approaches to the question of how to position esports within the academy. RMUI places esports within an athletic department; Akron places esports within the academy proper; and Utah, as a member of the PAC-12, considered conducting esports under the auspices of an existing athletic conference before housing its program within an academic department.

Robert Morris University (Illinois)

Governing body. According to the 2008 Dear Colleague Letter, if an activity is sponsored by a national governing body that adopts the OCR guidelines, it can be assumed the activity is held to Title IX standards and is therefore deemed an intercollegiate “sport” according to law (Monroe, 2008). RMUI is a member of the NAIA, and as it stands currently the NAIA does not sponsor esports, though its subsidiary, NACE, does (NACE, 2016). As such, even though RMUI's esports program resides in the athletic department, RMUI is not currently a member of a national governing body that upholds the OCR's regulations (Monroe, 2008).

Program structure and administration. The OCR guidelines consider if an activity is structured and administered in a manner consistent with established intercollegiate varsity sports within the institution's athletics department in the areas of operating budget, support services, coaching staff, scholarships, and awards (Monroe, 2008). RMUI's esports team is currently housed within the school's athletic department, making it structured similarly to the school's other varsity sports (Robert Morris University, n.d.a). It is worth highlighting that few institutions position esports within the existing athletic department. In 2014, RMUI's esports operating budget was roughly \$450,000, which is larger than the operational expenses of RMUI's men's football team three years later in 2017 at \$406,963 (Keilman, 2014; United States Department of Education, 2017). According to RMUI's esports director (Melcher, 2017), RMUI's esports programs replicate NAIA academic standards in regard to coursework and GPA. Furthermore, RMUI's esports program possesses a coaching staff, which entails four assistant coaches, one assistant director and coordinator, one director, and one executive director (Robert Morris University, n.d.c). Next, the OCR considers if the activity provides recruitment, scholarships, and awards similarly to its other collegiate sports. RMUI provides 30 plus renewed scholarships annually, with some valued at \$19,000 - half the cost of RMUI's tuition and room and board (Keilman, 2014). As far as recruiting, RMUI coaches scout potential recruits through recruiting websites that keep statistical data about players and their ranks. RMUI coaches have communicated recruits should be of certain ranks in order to be considered for RMUI's esports program (Zazulia, 2015).

Team preparation and competition. The OCR considers whether the team prepares for and engages in competition in a manner consistent with the school's other recognized intercollegiate sports teams in the following areas: practice/competitive opportunities, post

season competition, championships, and intent to provide intercollegiate athletic competition. RMUI's program exhibits several similarities in the preparation and competition aspect of esports as compared to traditional varsity sports. For example, RMUI practices 20 hours a week, focusing on personal/team improvement, team scrimmages, and team workshops (Sherraden, n.d.). With respect to competition and post season play, RMUI's 2018-19 season consisted of play against other universities from October of 2018 through June of 2019 where they would compete in tournaments held by Collegiate Star League, Tespa Collegiate Varsity Series, and Midwest Esports Collegiate Series (Robert Morris University, n.d.d). In terms of post season play, RMUI claimed the 2019 Collegiate Star League of Legends Championship title (Robert Morris University, n.d.e). Finally, the OCR considers whether the institution's intent is to provide intercollegiate athletic competition (Monroe, 2008). RMUI's esports program inherently provides intercollegiate competition for its players through engaging in esports competitions - associated with specific video games - against multiple universities across the country, as discussed previously.

The University of Akron

Governing body. Akron is a member of the Mid-American Conference (MAC) and the NCAA. However, at present neither the MAC nor the NCAA sponsors esports. Therefore, the esports program structure and administration and team preparation and competition must be considered.

Program structure and administration. Akron's esports program is not housed in the athletic department, but rather in the William's Honors College (The University of Akron, n.d.f). However, one can postulate Akron's esports program structure aligns with, and in some instances even "mirror[s]", the university's other traditional collegiate athletic teams in regard to, and not limited to, the program's budget, support, staff, scholarships, awards, and elsewhere based off the information below (University of Akron, n.d.f). In 2019, the operating budget of Akron's esports program was almost \$500,000 (Hennen, 2019). This amount is larger than the 2017 men's and women's soccer programs' combined operating expenses of \$379,859, according to the latest data released from Equity in Athletics Data Analysis database (United States Department of Education, 2017). In terms of support services, Akron provides academic oversight, eligibility for early registration for classes (i.e., priority class scheduling), group study tables, and tutoring (University of Akron, n.d.a). Akron's coaching staff entails a director and head coach, assistant director, as well as a club coordinator, in addition to advisory consultations related to esports nutrition, fitness, training, and psychology with a sports medicine physician (University of Akron, n.d.c; University of Akron, n.d.d). Akron's scholarships for esports players are as follows: Student-Coach - \$5,000 scholarship, Student-Manager - \$2,500 scholarship, and Student-Player - minimum \$1,000 scholarship (University of Akron, n.d.a). Akron actively recruits esports players via website applications (University of Akron, n.d.b; University of Akron, n.d.e). A select pool of participants are hosted by the university and paired together for online competition while recording their gameplay and audio (University of Akron, n.d.e).

Team preparation and competition. Akron models their practice and competition structure according to their NCAA traditional sports standards (University of Akron, n.d.f), implementing up to 15 hours a week of practices and competitions (Prescott, 2019). Practice

includes training with the game itself, physical fitness training, video on demand (VOD) review, practice, and competition (Prescott, 2019). Depending on the tournament, Akron's competitive season may consist of qualifying play, league play, conference play by region (i.e., East, & West), post season playoffs, and a national championship, all of which in total runs the length of roughly 3-4 months depending on the game (Rocket League, 2020). Some tournaments contain a prize pool which yields a cash prize amount for the players and staff contingent upon placement. In 2019, Akron participated in post season and was crowned a two-time national champion after winning the 2019 spring and fall season Collegiate Rocket League 2019 National Championships (Knisely, 2019; Liquidpedia, 2020).

University of Utah

Governing body. Utah is a member of the PAC-12 and the NCAA, neither of which currently sponsor esports. However, the PAC-12 recently considered adding esports, only to reverse course due, in part, to concerns over Title IX athletic compliance. In 2016, the presidents and chancellors of the PAC-12 approved the PAC-12 Network to begin head-to-head esports competition and tournament play leading to a PAC-12 championship (PAC-12 Conference, 2016). Sponsorship was in place from major developers in the industry, including Electronic Sports League, DMG Entertainment, Intel, Riot, and Electronic Arts (Moore, 2018). However, a letter from the University of Arizona President Ann Weaver Hart expressed concern over Title IX in the area of athletic compliance and gender equity, resulting in the PAC-12 esports league being halted (Moore, 2018). This suggests that some current athletic administrators already suspect that esports, if given the imprimatur of an existing governing body, might well fall subject to Title IX athletic guidelines.

Program structure and administration. Similar to Akron, Utah's esports program is not housed in the athletic department; it resides instead within the Entertainment Arts & Engineering department (University of Utah, 2017). Utah's esports operating budget is not publicized. However, Utah's esports support, staff, scholarships and awards corresponds with Akron, RMUI, and many other programs. In terms of support services, Utah provides coaches, trainers, sports psychologists, nutrition and wellness coaches, and cognitive and behavioral trainers for its esports program (Andra, 2019; University of Utah, n.d.a). Scholarships start from \$500 to \$1,000, with the school expressing hope of expanding to full scholarships for up to 35 players, managers, and coaches (Falk, 2017). This scholarship amount does not include the dollars won by the team in competition, which are placed into the scholarship fund (Volk, 2017). Esports players are recruited through the university's website; player data/statistics, roles, strengths, weaknesses, year, competitive rank, and GPA are assessed (University of Utah, n.d.b).

Team preparation and competition. Utah's esports team practices 20 hours a week where they focus on gameplay and study film (Andra, 2019). Utah competes against many institutions across the U.S. Moreover, they compete against 50 other scholarship esports programs in one or two tournaments per season, inevitably providing intercollegiate competition for its esports team members (Horiuchi, 2018; Markosian, 2017). Moreover, Utah was runner up in ESPN's inaugural Collegiate Esports Championship (Hoyt, 2019).

Discussion

The precedent set by *Biediger v Quinnipiac University* (2009, 2010, 2013) is of importance to collegiate esports given the current trend towards institutionalizing competitive esports teams in different institutional locations around the academy. Collegiate esports could potentially face the same scrutiny as cheerleading did in the *Biediger v. Quinnipiac University* (2009, 2010, 2013) case if universities move for esports participants to count as genuine athletic participation opportunities and/or if gamers do so. This precedent therefore gives us greater insight into what specific factors could hypothetically be considered in a legal analysis of whether or not esports constitutes an intercollegiate “sport”. However, the Biediger litigation differs from the present esports situation in one significant way. Quinnipiac University was trying to establish cheerleading as an intercollegiate “sport” for the purpose of counting its participants toward their total athletic opportunities for women. Many esports programs appear to be organized partially out of fear that their participants will be counted against their total athletic opportunities for women. To exemplify this, if a university were to add esports as an intercollegiate participation opportunity, in light of recent population estimates suggesting greater male esports participation than female (Bauer-Wolf, 2019), the esports program might push the athletics department out of Title IX compliance.

The legal analysis applied to collegiate esports suggest that esports programs of the scale and scope of RMUI, Akron, and Utah are beginning to fulfill many of the program structure and administration requirements (i.e., coaches, scholarships, recruitment, academic amenities, budgets) as well as the team preparation and competition requirements (i.e., practice standards, competition, championships) set forth by the federal government in the 2008 Dear Colleague letter and applied in the *Biediger vs. Quinnipiac University* (2009; 2010; 2013) case. It is less clear how the courts might rule regarding whether collegiate esports is associated with an established governing body — and this is precisely where the current state of esports is most ambiguous. At present, the major intercollegiate athletic governing bodies — the NCAA and its constituent athletic conferences — do not organize or recognize esports (NCAA, n.d.a). As previously outlined, the PAC-12 gave thought to doing so before reconsidering (Moore, 2018). While some esports programs have actively modeled themselves on intercollegiate athletic precedent, even when located elsewhere within the academy, as of yet, there seems to be little to no uniformity concerning institutional governance. More specifically, there is no consensus on how to govern practice opportunities, competition opportunities, scholarships, benefits, and recruitment — precisely the accommodations an over-arching governing body would regulate. This was a strong factor that influenced the courts’ decision in *Biediger vs. Quinnipiac University* (2009; 2010; 2013) not to classify cheer as an intercollegiate sport.

One new national governing body to come forward is the National Junior College Athletic Association (NJCAA), which plans to implement a regular season and championship event for collegiate esports (Fitch, 2019). Like the NAIA, however, this organization represents member institutions well below the top tier of intercollegiate sport. The major players remain reticent, for which the application of this legal analysis suggests may be on purpose. The NCAA recently launched an investigation into the possibility of hosting esports championships, in fact, examining why it should govern esports, how it might do so, and where such programs should be housed on campus (Smith & Fischer, 2018). NCAA imprimatur would be the heaviest possible thumb on the scale in favor of esports as intercollegiate “sport,” as it would decisively satisfy the governing body test. However, as did the PAC-12, the NCAA’s board of governors voted the

idea down due to the challenges Title IX would create in the areas of athletic participation and scholarship (Hayward, 2019).

Larger cultural and/or economic factors may gradually come into play as well. Esports are quickly gaining acceptance as a “sport” in the nation at large, both as culture and commerce. The establishment of collegiate esports arenas, leagues, and teams with competitions broadcast via traditional sport platforms such as the Big Ten Network and ESPN, speak to this trend, as do the millions in corporate advertising and sponsorship dollars flowing into the sector (Gamedesign, n.d.). Furthermore, although it is evident that esports in their present form do not require the same degree of physicality required in other traditional “athletic” sports, current research has demonstrated that esports players display movements, pulse, cortisol levels, cognitive, and reflexive movements similar to traditional athletes (Schütz, 2016). Thus, esports would fit the definition of “sport” outlined in *Nalwa v. Cedar Fair, L. P.* (2011). Pressure may grow on intercollegiate governing bodies to bring order to esports in such a way as to increase the likelihood they might be classified as “sport” for Title IX purposes.

Implications

Esports are not exempt from potential Title IX scrutiny by virtue of potentially being located outside athletic departments. The distinction nevertheless presents significant implications for sport administrators (and college administrators more broadly) in terms of what other interests and programs an esports team might need to be balanced against, and who would be responsible for doing the balancing. As illustrated by the legal analysis applied to three collegiate esports programs, some schools are beginning to develop the program structure, administration, team preparation, and competition requirements the federal government looks for. Furthermore, the scholarships and benefits increasingly offered to students signify the resources some schools are willing to put forward to develop and maintain a competitive intercollegiate esports presence. Such programs may well yield the benefits to the academy that have been identified and established in prior literature (i.e., student enrollment, student interest, student opportunities, and revenue; Funk et al., 2018; Jenny et al., 2016; Keiper et al., 2017; Schaeperkoetter, et al., 2017). These are exactly the kinds of resources and benefits most likely to draw federal scrutiny and/or become targets of litigation.

Another implication of our legal analysis applied to collegiate esports is that the opportunities, benefits, and scholarships currently offered in these programs are being offered without due consideration toward gender equity. If a school’s esports program was investigated by the federal government, it might well be found in non-compliance for not achieving the three areas of regulatory compliance established by the Office of Civil Rights: equal athletic financial assistance (e.g., scholarship dollars); equal treatment and benefits for athletic teams (e.g., all the criteria listed in 34 C.F.R. § 106.41(c)(2–10); and effective accommodation of student interests and abilities (20 U.S.C. § 1681–1688, 2013). This a major issue that collegiate administrators are grappling with currently, or possibly will be in the near future, when it comes to administering their esports program judiciously.

Finally, the last implication of this legal analysis applied to collegiate esports is that it may provoke institutions to begin thinking about employable steps to achieve gender equity if esports are determined an intercollegiate “sport” according to Title IX and thus subject to the OCR’s intercollegiate athletic activity guidelines. As in the *Biediger vs. Quinnipiac University* (2009; 2010; 2013) case, an institution may be required to create a compliance plan and submit

yearly progress reports showing strives to equity. One way an institution might achieve such progress is by recruiting female gamers to balance and achieve equitable proportionality in the three areas of compliance - scholarships, opportunities, and benefits.

Regardless of whether or not esports is a “sport”, the bigger issue at hand is the gender disparity within this specific activity. With that in mind, a more important question for administrators may be how to get more females involved. There are currently some trailblazers, like Stephens College in Missouri, who was the first ever women’s college to host a varsity esports team (Collins, 2019). Other efforts to increase female participation in collegiate esports include proactively mitigating the behaviors that induce a toxic environment for female esports participants, diversifying tournaments to include or require teams of both male and female players, creating support communities for female participants, hosting female only esports camps, and simply marketing esports to all demographics at the grassroots level to create awareness (Schmidt, 2016). These strategies are feasible steps university administrators can take to increase female participation and help close the gender gap that is ever so present in the world of esports.

Conclusion

A legal analysis was conducted to examine what constitutes intercollegiate “sport” according to the law. The *Biediger v. Quinnipiac University* (2009, 2010, 2013) case established deference to the OCR’s intercollegiate athletic activity guidelines defining sport, as outlined within the 2008 Dear Colleague letter. According to the guidelines, the intercollegiate sport status of an activity is evaluated based upon: 1) activity’s governing body, 2) activity’s structure and administration, and 3) activity’s team preparation and competition. When applying these legal guidelines to three collegiate esports programs, the implications suggest that some collegiate esports programs are beginning to fit a majority of the requirements of an intercollegiate “sport” according to Title IX athletic activity guidelines. At the same time, collegiate esports programs lack established governance, primarily as a result of governing bodies seeking to bypass Title IX scrutiny, which has left esports’ intercollegiate “sport” status up to individual universities.

The current state of collegiate esports has left colleges and universities perplexed as to how college esports should be operated and regulated with respect to Title IX. Given Title IX’s application to athletic programs requires equal athletic financial assistance; equal treatment and benefits for athletic teams; and effective accommodation of student interests and abilities (20 U.S.C. § 1681–1688, 2013), clarity regarding whether these specific requirements apply to collegiate esports will enable institutions to proactively mitigate potential liability. Ultimately, it appears collegiate esports is moving in the direction of intercollegiate sport status. As such, athletic administrators may consider how to accommodate collegiate esports in the future and subsequently maintain Title IX compliance.

Limitations & Future Research

There is a need to address the limitations of this study. First and foremost, due to such little scholarly work available on the topic of collegiate esports specifically, the researchers relied heavily upon publicly available sources of information to contextualize the current state of collegiate esports and present three examples of esports programs for application of the legal

analysis. More so, as the world of esports is developing at a very fast pace, the collegiate esports context presented is prone to be outdated in the near future. Finally, this legal analysis applied the law to only three university esports programs. Although the researchers wished to utilize more schools, information of other prominent university esports programs was either not publicly available, or simply insufficient to complete a full assessment with the guidelines set forth by the federal government. The researchers did attempt to account for this limitation by choosing diverse schools with esports programs from varying athletic governing bodies, differing program structures, diverse conferences, and varying public/private institutional statuses.

This is a fruitful and fast-moving area for further research. Esports programs are growing with a scope and rapidity difficult to capture in traditional academic media. The current legal analysis was limited to Title IX and applied to a few examples of collegiate esports programs; additional data collection, analysis, and investigation by scholars is certainly warranted. For instance, even if not ultimately located within traditional intercollegiate athletic programs, esports are nevertheless subject to Title IX scrutiny. What are the potential consequences of, say, significant ongoing gender imbalance within esports programs if administered by student affairs offices or academic departments as opposed to athletic departments? Further investigation into the structure of governance, and not just the scope and scale, of esports programs is also warranted. Finally, with confusion over what constitutes “real” competitive collegiate esports in comparison to casual gaming, a conceptual model illustrating what classifies competitive collegiate esports, and what classifies as recreational gaming, may help institutions further develop and structure their esports program appropriately, either within an institution’s athletic department, or outside of it, to address such Title IX concerns.

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