

4-2014

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Recommended Citation

Stader, David and Surface, Jeanne L., "Not Second-Class: Title IX, Equity, and Girls' High School Sports" (2014). *Educational Leadership Faculty Publications*. 28.

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Not Second-Class: Title IX, Equity, and Girls' High School Sports

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Abstract

Title IX is designed to protect students from discrimination based on sex in any educational institution that receives financial assistance. This article focuses on Title IX as it applies to high school athletic programs by considering the trial of a high school district in California. A federal court found considerable inequalities between boys and girls athletic teams in the district. While this case may not be representative of a majority of school districts, it does provide guidance to ensure compliance.

Key Words: Title IX, athletic administration, equity

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Title IX is part of the Educational Amendments of 1972 (34 C.F.R. Part 106). The Act is designed to protect students from discrimination based on sex in any educational institution-- both public and private-- that receives financial assistance (U. S. Department of Education, 2012). It states, in part, that “no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance” (Section 106.31a). Since passage in 1972, one of the most visible impacts of Title IX has been a significant increase in female interscholastic athletic teams in secondary schools. The increased opportunity has resulted in a corresponding increase in female participation in sports. In 1971-72, approximately 290,000 girls participated in high school athletics. In 2005-06, over 2,900,000 girls (almost 41%) participated in high school athletics (Dear Colleague, 2007).

The Office of Civil Rights (OCR) is responsible for enforcing Title IX in K-12 schools and institutions of higher education (Dear Colleague, 2010). The law defines equal athletic opportunity as equality in: (1) The selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes; (2) The provision of

equipment and supplies; (3) Scheduling of games and practice time; (4) Opportunity to receive coaching and academic tutoring; (5) Provision of locker rooms, practice and competitive facilities; (6) Publicity; and (7) Recruiting (Section 106.141c). At no point does Title IX require preferential treatment for girls and women in these areas, simply equality of opportunity (U. S. Department of Education, 2012).

There is little doubt that Title IX has significantly increased opportunities for high school girls' athletic participation; however, girls remain under-represented when compared to their male counterparts in high school sports participation (Koller, 2010). Part of the reason may be that there can be "little doubt that discrimination in the form of second-class treatment for female athletes is still a fact of life" (Koller, 2010, p. 405). Koller also argues that this second-class treatment is at least part of the reason that high school girls do not join or continue in school sponsored athletic teams at the same rate as boys.

Several federal courts have considered incidents of second-class treatment of female athletes by school districts, athletic conference rules, and state activity associations. For example, a Michigan federal district court found the Michigan High School Athletic Association policy of scheduling girls' basketball games in nontraditional seasons to violate Title IX (*Communities for Equity v. Michigan HSAA*, 2001). Similarly, the 2nd Circuit Court of Appeals affirmed a trial court ruling that a New York athletic conference practice of scheduling girls' basketball and other sports during nontraditional seasons violated Title IX (*McCormick v. School District*, 2004). The court stated that "(a) disparity in one program component (such as) scheduling of games and practice times can alone constitute a Title IX violation if it is substantial enough to deny equality ... of opportunity." In a somewhat similar case, the 7th Circuit Court of Appeals recently found the Franklin County (Indiana) High School practice of scheduling girls'

basketball games in “non-prime time” to be in violation of Title IX (*Parker v. Franklin County Community School Corporation*, 2012). In this case, the girls’ basketball team started competition two weeks before the boys’ team. During this two week period the girls’ games were scheduled on Friday nights replete with bands, cheerleaders, pep squads, and other traditions associated with Friday night sports in Mid-America. This resulted in packed gymnasiums, raucous fans, and school day excitement. Once the boys’ games started the girls’ teams were relegated to week nights, with no cheerleaders or pep squads, and sparse crowds.

While these cases are examples of second-class treatment of certain girls’ sports, particularly basketball, the case of *Ollier v. Sweetwater Union High School District* (2012) provides an example of a more systemic and insidious form of second-class discrimination.

Systemic Second-Class Discrimination at Sweetwater

In March 2009, Veronica Ollier, along with several other female high school athletes, alleged that the Sweetwater School District unlawfully discriminated against female athletes with respect to, among other things, practice, training and competitive facilities, travel, coaches, scheduling of games, practice times, and funding. The U. S. District Court for the Southern District of California found that the district had allowed significant gender-based disparity and failed to show a history of expanded athletic opportunities for female students. The court granted summary judgment to the students (*Veronica Ollier v. Sweetwater Union High School District*, 2009). The Southern District Court returned to this case in 2012 to consider two questions: 1) has the district continued to “fail to provide female students with equal athletic opportunities?” and 2) is the case moot? The court also considered whether or not softball coach Chris Martinez was retaliated against for voicing concerns about Title IX violations concerning the softball team (*Veronica Ollier, et al. v. Sweetwater Union School District*, 2012).

In a ten-day bench trial, the court first considered equal athletic opportunities. Plaintiffs alleged that the district continued to discriminate in 1) recruiting benefits, 2) locker rooms, practice and competition facilities, 3) equipment, uniforms and storage, 4) scheduling benefits, 5) equal access to coaching, 6) medical and training services, 7) publicity and promotional support, 8) fundraising benefits, and 9) administrative activity. Based on testimony from an expert witness, the Athletic Director, and others the court reached the following conclusions:

Recruiting benefits: Each athletic coach was responsible for recruiting eligible players from the student population. This is common practice in most if not all secondary schools. However, unlike the boys' teams, coaches for girls' sports teams were often hired shortly before the start of the season and therefore had little time to recruit players. The Athletic Director regularly went to feeder middle schools to talk about boys' athletic programs, but not girls' teams. The district presented no evidence that the recruitment practices had changed since 2009. The court found significant disparities in female athletic recruitment, stating "female athletes ... are denied opportunities and benefits that male athletes have and these opportunities are not negligible."

Locker rooms, practice and competition facilities: After reviewing the evidence, the court concluded that "the locker room, practice and competition facilities provided to female athletes ... are unequal compared to ... facilities provided to male athletes." For example, the baseball field used for competition has well-maintained cinderblock dugouts, a dedicated and protected bullpen area for pitchers to warm-up, a concession stand, an even infield and outfield, and a regulation backstop. The baseball field was restricted to baseball while the softball field, where the girls played, was used for physical education class and soccer. The softball infield was hard and uneven resulting in several injuries, the outfield grass was uneven also resulting in injuries to

players, the pitcher's mound was incorrectly lined up to home plate, and there were no fixed bases or fixed base plugs, thereby increasing the risk of injury to players running the bases. The field did not have a protected bullpen area. Rather, pitchers were required to warm-up in an area where neither the catcher nor the pitcher could see balls hit from the player at home plate.

Equipment, uniforms and storage: Considerable evidence was presented at trial that girls' teams had less access to equipment and storage facilities. In addition, there was no oversight for gender equity in equipment, uniforms, and supplies.

Scheduling benefits: The court found ample evidence that boys' practices were scheduled immediately after school at more advantageous times while girls' practices were scheduled at less desirable times. The district did correct the boys' and girls' basketball scheduling to demonstrate more equitable game times, but no evidence was presented of practice or game scheduling in other sports.

Equal access to coaching: Access to coaching by girls' teams was problematic. First, girls' coaches were often hired immediately before the season began putting them at a recruiting disadvantage. Coaching vacancies were first offered to on-campus teachers. If no response, the coaching opportunity was posted district-wide. No other efforts were made to recruit and hire girls' coaches. If a coach was not hired the sport was discontinued for that season. This practice resulted in multiple problems for girls' teams. The court concluded that the "lack of efforts to consistently and timely obtain coaches for girls' teams severely impacts girls' opportunities for competitive athletics."

Medical and training services: The weight training facility was available to both boys and girls; however, the weights and equipment were designed for boys. Some efforts were made by the district to make the weight and conditioning facility more equitable. Nonetheless, no

evidence was presented that the renovated facility was being used by girls' and boys' teams in an equitable manner. The Athletic Director did not monitor the facility usage for gender equity.

Publicity and promotional support: Plaintiffs presented evidence that the high school daily bulletin featured almost twice as many announcements for boys' athletic teams than girls' teams. Many students and parents depend on the school bulletin to stay informed of games, changes in practice times, and tryout opportunities. In addition, the high school cheerleaders would cheer for football and boys' basketball but not girls' teams. Evidence presented at trial indicated some improvement in this area, but coverage in the yearbook, signage, announcements, and cheerleader participation at girls' athletic events remained inferior to the boys' teams.

Fundraising benefits: Sports teams were allowed to fund-raise at the high school. The baseball team raised money by selling concessions. The money was used for the team. In contrast, the Athletic Director allowed the softball coach to prohibit fund-raising. In addition, a grant-making body supported athletic teams. The Athletic Director failed to inform girls' coaches about funding sources. In addition, monitoring for gender equity in fund-raising was lacking.

Administrative activity: Evidence indicated that the district failed to adequately monitor athletic programs for equity.

Mootness

The district court next considered the question of whether or not the case was moot since the district had made improvements in athletic equality since the 2009 court case. Mootness can be found when, for example, a district voluntarily changes policy and practice to provide equality in girls' athletics. The burden of proof falls to the district to demonstrate evidence that the practice of second-class treatment of girls' athletic programs has been eliminated and that the

inequality is unlikely to occur again. In this case the evidence indicated that many violations of Title IX continued after the 2009 summary judgment and that many of these violations had not been “remedied or even addressed.” Therefore, “this action is not moot.”

Retaliation

The U. S. Supreme Court has held that retaliation against individuals for complaining about sex discrimination is a violation of Title IX (*Jackson v. Birmingham Board of Education*, 2005). In 2006, girls’ softball coach Chris Martinez and the father of one of the softball players met with the Athletic Director to discuss the upcoming season and survey the softball field. During the meeting the parent pointed out the discrepancies between the softball and baseball fields. Coach Martinez was not a member of the district faculty and had served as an at-will coach for the past seven years. The Athletic Director acknowledged that he told Martinez, in the presence of the parent, that he (Martinez) could be released at anytime. Both Martinez and the parent perceived the statement as a threat to terminate Martinez as coach of the team. Approximately six weeks after this conversation, Martinez was terminated by the high school principal. Chris Martinez claimed that the district retaliated against him for complaining about Title IX violations.

According to the District Court, Title VII standards for defining hostile environment claims serve as a guide to Title IX retaliation cases. In this case, Coach Martinez would need to show that he engaged in protected speech, was subsequently subjected to an adverse employment decision, and a link existed between the protected speech and his termination from employment. Once Martinez met these criteria, the burden of proof would shift to the district to demonstrate a legitimate non-retaliatory reason for its action. The district claimed a) the school wanted to replace part-time coaches with certified teachers; b) Martinez improperly played an ineligible

player and was required to forfeit games; and c) Martinez improperly provided late paperwork seeking approval for a tournament in Las Vegas. The court has little trouble finding these reasons as pretextual. Martinez was replaced by a far less experienced coach, resulting in significant disruption to the softball program, including the withholding of the team's Las Vegas tournament trip. By district policy, the Athletic Director was responsible for determining eligibility, not the coaches. Finally, the circumstantial evidence provided by the proximity in time between the parent complaint regarding Title IX violations, the perceived threat of termination, and the actual termination was enough to convince the court that the district had improperly terminated Martinez as softball coach.

Discussion

Title IX requires that school districts make an affirmative effort to provide girls an equal opportunity to gain from the positive influence of interscholastic sports as has been traditionally available to boys. This is an important point. In fact, "participation in athletics may have several benefits for women and girls including a more positive body image, better mental and physical health, the development of responsible social behaviors and greater educational success" (Koller, 2010). Relegating girls' athletic programs to second-class status is not only a violation of Title IX, but a violation of this affirmative duty to provide equality to all athletes.

In this case, Judge James Lorenz found ample evidence of systemic second-class treatment in girls' athletic programs. In Judge Lorenz's opinion, the district did not provide equal facilities, equipment, weight-training equipment, coaches, and funding for girls' athletic teams. The district did point out that some improvements had been made since 2009. However, a reading of Judge Lorenz's opinion leaves little doubt that the district continued to engage in

systemic second-class treatment of girls' athletic programs. Much of this treatment seems blatant and almost defiant of the summary judgment order in 2009. As Judge Lorenz stated:

The balance of hardships weighs firmly in plaintiffs' favor. The inequalities demonstrated at trial should have been rectified years ago by the District. Female students consistently have been denied athletic opportunity equal to male students. This inequity is highlighted and most apparent between the boys' baseball team and the girls' softball team at CPHS. The girls' softball team has been treated as vastly inferior to the boys' baseball team, which it is not.

With the passage of Title IX, the vast majority of school districts, including Sweetwater, recognized the need to increase athletic opportunities for girls. This increase in opportunity, however, did not always translate into equality of opportunity. This inequality is especially true for the quality, maintenance, and availability of facilities. In some sports--basketball, soccer, and swimming for example--both boys and girls share practice and competition facilities. All that is required is equitable scheduling. Baseball and softball are exceptions. While similar, these sports require separate facilities. It is in this particular case where the differences between the baseball and softball facilities are significant. A lack of equity in baseball and softball facilities may be the one area in which many school districts are the most vulnerable to claims of inequality. For example, when a parent of a softball player brought suit against a high school district in Florida the court "identified specific inequalities with respect to the following matters: electronic scoreboard, batting cage, bleachers, signs, bathroom facilities, concession stand/press box/announcer's booth, and field lighting" (*Daniels v. School Board*, 1997).

Lessons from Sweetwater

Judge Lorenz ordered the district to develop an improvement plan within 45 days. It is reported that the Sweetwater District plans on appealing the court's decision rather than comply with the order. While Sweetwater may be an example of almost blatant discrimination, second-class treatment in at least some school districts is much more subtle and can be viewed as

“micro-discrimination.” It is this kind of discrimination that is the most insidious and also the most difficult to identify. However, several lessons can be taken from this case, including these:

- Conduct regular equity audits of facilities, dressing rooms, practice times, equipment, uniforms, and so forth. The district Athletic Director and representatives of both boys’ and girls’ coaches and players, as well as booster club representatives, should be included in the audit. If inequalities are found it is important to develop a plan to address the problem. The plan should be reviewed at least twice per year to make sure the plan stays on track.
- Particular attention should be given to baseball and softball facilities. Title IX does not require that girls’ facilities be better or “collegiate,” just equal. Downgrading the baseball field is not a viable option. As the court in *Daniels* (1997) pointed out, imposing a "separate disadvantage," (i.e., punishing both the girls and the boys), rather than improving the girls' facilities to the level the boys' facility is not in the spirit of Title IX.
- Audit announcements, signage, advertisements, cheerleader participation, scheduling of games in advantageous times (i.e., Friday nights) in various sports for equity.
- Every effort should be made to recruit, hire, and retain quality coaches for all girls’ athletic teams.
- Survey of student interests in various sports should be conducted at least every other year. Title IX does not require that all individual interest is met. However, when a critical mass of traditionally under-represented groups is evident the district has an affirmative duty to provide the opportunity for participation.

- Take Title IX complaints and concerns seriously. Address any concerns in a timely and professional manner. Do not retaliate against employees or others for voicing Title IX equity in athletic programs.
- Regularly train coaches to review practice times, facilities and other factors impacting the athletic program for equity. Coaches should be regularly informed of district policies related to eligibility, travel, fundraising and such factors.

Such measures will help school districts promote first-class status for girls' athletic teams in public schools, consistent with the intent of Title IX.

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