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TITLE IX: BENEFIT OR BURDEN TO FEMALE HIGH SCHOOL ATHLETES

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INTRODUCTION

Can two (2) varsity athletes who choose not to participate in a high school sport dictate the scheduling of that sport to their school districts and the fellow athletes who actually play that sport? Thanks to Title IX, the answer is yes. To add insult to injury, the girls' attorney can recover his fees and costs for prosecuting the matter under Title IX as well.

This is precisely the factual scenario of a Federal court case brought by two female soccer players against two Westchester school districts that will be decided by the Second Circuit Court of Appeals in 2004. In the case, two girls who had made the school's varsity soccer teams but elected not to play last year, challenged their schools' longstanding practice of playing soccer in the Spring. Title IX has been recently criticized by male athletes for eliminating some of their programs.[1] However, in this case, it is actually hurting other female athletes because girls who play soccer will have to give up their Fall sport (swimming, field hockey, volleyball, tennis or cross-country) if soccer is moved to the Fall. This article will not only attempt to summarize the soccer scheduling dispute currently before the Appellate Court, but also attempt to explain Title IX and the ramifications for school districts if this decision is affirmed by the Second Circuit Court of Appeals.

TITLE IX REGULATIONS

For Title IX purposes, there are three (3) basic claims: (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of

[1] See Miami University Wrestling Club v. Miami University, 302 F.3d 608 (6th Cir. 2002).

members of both sexes, 45 CFR 86.41(c)(1); (2)that there be equal opportunities for both sexes, 45 CFR 86.41(c)(1-10); and (3) equal athletic financial assistance. The soccer-plaintiffs couch their case as an equal opportunity/treatment violation only. Whether equal opportunity or effective accommodation, the factors that courts have looked to in determining compliance are set forth in the identical DED (Department of Education) and the HEW (Health Education & Welfare) regulations and policy interpretations, which are entitled to deference.[2]

The factors used by the Courts to evaluate equal opportunity and effective accommodation claims are as follows:

Equal Opportunity. (1) a recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

> (i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (ii) The provision of equipment and supplies;
>
> (iii) Scheduling of games and practice time;
>
> (iv) Travel and per diem allowance;
>
> (v) Opportunity to receive coaching and academic tutoring;
>
> (vi) Assignment and compensation of coaches and tutors;
>
> (vii) Provision of locker rooms, practice, and competitive facilities;
>
> (viii) Provision of medical and training facilities and services;

[2] See Chevron v. NRDC, 467 U.S. 837 (1984).

(ix) Provision of housing and dining facilities and services;

(x) Publicity [3]

In other words, the Title IX Regulations seek to mandate equal athletic opportunities for both sexes in the aforementioned areas. While the regulations do not require identical benefits, opportunities or treatments, the overall effect of any differences must be negligible to avoid a violation.

In this regard, there have also been so called safe harbors that have been gleaned from the regulations to supposedly protect school districts and universities. Specifically, there are three (3) tests that will excuse absolute compliance as follows:

(1) Whether the policies of an institution are discriminatory in language or effect; or

(2) Whether disparities of a substantial and unjustified nature in the benefits, treatment, services or opportunities afforded male and female athletes exist in the institution's program as a whole; or

(3) Whether the disparities in individual segments of the program with respect to benefits, treatment, services or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.[4]

MCCORMICK AND GELDWERT V. MAMARONECK AND PELHAM

In the Westchester case on appeal to the Second Circuit, the soccer players challenge only the scheduling criteria. They assert that playing girls soccer in the Spring rather than in the traditional Fall season violates Title IX on its face. They point to the fact that the New York State Championships for the girls and boys are held in the Fall, meaning that girls at Mamaroneck and Pelham do not get to compete for the state soccer

[3] 45 CFR 86.41(c) 1-10

[4] Cohen v. Brown University, 809 F.Supp. 978 (D.R.I. 1992) aff'd 101 F.3d 155 (1st Cir. 1996); see also 44 Fed. Reg. 71413, 71416-18 (1979); Boucher v. Syracuse University, 164 F.3d, 113 (2nd Cir. 1999).

championships while the boys do. That undisputed fact alone led U.S. District Judge Brieant to rule against the school districts, finding that Title IX had to be construed strictly in terms of equality between the sexes. It is worthy of note that the State body that schedules the championships supports the School's position, and that the New York State School Boards Association also is in favor of the individual District's discretionary scheduling of soccer in the Spring. The Court based its decision solely on its view that "any inequality" with men's soccer is discriminatory, relying on the listing of the scheduling criteria in the aforesaid Federal Regulations as sufficient proof that it was an important consideration.

The fundamental problem with this type of absolutist construction of a broad statute such as Title IX is that it opens the door to the statute being applied to every criteria listed above without limitation. For example, any difference in providing equipment would be deemed a violation under the Court's logic. This could not have been Congress' intent since it also provided for the substantiality exception listed above for disparities that are so substantial as to deny equality of athletic opportunity. The Court's decision recognizes this exception, but did not discuss its application to the soccer situation. As set forth below, the Court did reject other, more fact-sensitive arguments, but this did not affect his absolutist interpretation. [5]

[5] The Court had applied the exception in a prior 2002 opinion in the case, where he denied the soccer-plaintiffs' application for a preliminary injunction changing the schedule, yet the Court granted the permanent injunction in 2003 on the same set of facts. See McCormick and Geldwert v. The School District of Mamaroneck and Pelham, 02 Civ. 3041. (S.D.N.Y. July 1, 2002) The 2003 decision currently on appeal was rendered on July 8, 2003. Interestingly, neither decision is on Westlaw or in the Federal Case Reporting System.

For example, the girls had also argued that they suffered disadvantages by virtue of being recruited less since they were not seen in the championship game; and that their bodies had too much wear and tear from playing so much soccer in the Spring.

Both of those arguments were dismissed as meritless by trial Judge Brieant. In terms of recruiting, Westchester girls are actually recruited as much, if not more than other parts of New York State. Nor is the recruiting done at the high school varsity level; the recruiters actually attend private club tournaments. It also appears that the girls are recruited more than the boys.

The wear and tear argument is interesting because it demonstrates the actual focus of plaintiff's claims. The wear and tear relates to the fact that these elite players play on private club teams as well as the Olympic Development Program (ODP) in the Spring season. The private club team often schedules practices after the varsity practices, and thus these girls must shuttle from one team to another, creating more wear and tear on their parents' minivans than anything else. In fact, competing demands by club coaches (who are not subject to Title IX) and high school coaches spurred the filing of this suit. As such, influences beyond the public school schedule are at play here. These girls voluntarily choose to play private club and ODP because they believe that it will enhance their chances of getting into better colleges. Their voluntary participation in these additional programs has nothing to do with Title IX or high school soccer. In point of fact, these girls' testimony made clear that the high school athletic experience for them is more comraderie than competition.

As such, Title IX is being used by elite players to satisfy scheduling concerns at the club level- -all to the school districts' detriment.

Moreover, the views of these elite players are eclipsing the views of the vast majority of the female student-athlete population of both schools. In this regard, the motivating reason behind scheduling girls soccer in the Spring rather than the Fall[6] was because of the overwhelming interest in girls' field hockey in the Westchester area. Girls' field hockey has always been played in the Fall and soccer was thus played in the Spring so that girls could play both. In actuality, this still remains the case as numerous field hockey players submitted affidavits in support of the Districts' position in the McCormick case. So too, surveys of all female athletes were taken before the case was filed, which supported keeping soccer in the Spring. Another problem according to the surveys, was that the remaining Spring sports (if soccer were moved) would not draw much interest and participation. These views did not sway the trial judge, much to the dismay of the field hockey players.

The trial judge's decision was stayed by his own ruling since he recognized the novel and disruptive nature of these claims. Research has only disclosed one other case that involves scheduling issues creating Title IX violations.[7] That Michigan case is coincidently on appeal to the Sixth Circuit Court of Appeals and is due to be argued in early 2004, as is the McCormick case.

RAMIFICATIONS

The problem with this decision, if upheld, will be to expand Title IX liability to matters over which the individual school district should have discretion. It also will

[6] In actuality, girls' soccer is played in the Spring in 22 states. It is also played in the Spring in the Public Schools Athletic League of New York City (PSAL). The World Cup is also played in the Spring.

[7] See Communities for Equity v. Michigan School Districts, 178 F.Supp. 805 (W.D. Mich. 2001).

allow individuals to dictate to the school districts at the distinct expense of the districts vis-à-vis additional coaches, field maintenance, and referee costs. It also may have the immediate ramification of allowing field hockey players who now must give up their sport to file a Title IX claim because they have been denied an opportunity to participate. After all, Title IX was enacted to provide maximum athletic opportunities for women. While boys have not been forced to give up any sport, girls now cannot play both of their favorite sports, i.e. soccer and field hockey. In short, the only sex that will suffer are women.

Lastly, although damages were not sought in the McCormick case, compensatory and punitive damages can also be sought for a Title IX violation. The attorneys fees of plaintiff's attorneys though, if successful, are always recoverable under Title IX.

In view of the foregoing, what probably began as an inconvenience for certain families has now evolved into a federal Title IX violation which at present subjects school districts to liability and costs, that Title IX, in this author's[8] opinion, did not intend to create.

[8] The author represents the Pelham and Mamaroneck School Districts.