No. 10-3595

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMBER PARKER, ET AL.,
Plaintiffs-Appellants,

v.

FRANKLIN COUNTY COMMUNITY SCHOOL CORPORATION, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Civil Action No. 1:09-cv-00885
The Honorable William T. Lawrence

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INTRODUCTION

Defendants-Appellees' ("Districts") Response Brief ("RB") entirely fails to rebut Plaintiffs-Appellants' (referred to collectively as "Parker") showing that the scheduling of almost all boys' varsity basketball games, but only about half of the girls' games, in "primetime" violates Title IX and the Equal Protection Clause. The Districts' arguments are based solely on their own unsupported version of Title IX athletics law, and ignore or misinterpret the language of the applicable policy, case law, and a letter from the federal enforcement agency warning them about the disparate scheduling. They also ignore the basic point that the school districts work together to establish the athletic schedules that discriminate against girls.

With regard to the constitutional violation, the Districts have not shown that they are entitled to Eleventh Amendment immunity, and they fail to demonstrate that the gender-based disparity in scheduling primetime basketball games meets the heightened scrutiny standard. Therefore, this Court should reverse the district court and remedy the discrimination in scheduling.

ARGUMENT

I. THE DISTRICTS' DISPARATE SCHEDULING OF GIRLS' AND BOYS' BASKETBALL GAMES VIOLATES TITLE IX.

The Districts' Response Brief is filled with arguments about their alleged compliance with Title IX based on actions in areas not related to basketball scheduling. However, these arguments rely on either a fundamental misunderstanding or a distortion of the relevant legal standards in Title IX athletics cases. Once the irrelevant assertions are stripped from the Response Brief, it becomes clear that the Districts cannot rebut Parker's claim that the scheduling of varsity basketball games discriminates against girls. In fact, the Districts essentially admit the discrimination at issue in this case when they acknowledge that "during the 2008-09 school year, boys played 95% of their games in 'primetime' and girls played 47%," and that they are "actively working to remedy this" disparity. (RB 18).

A. The Districts' Application of the Title IX Athletics Requirements to This Case Is Fundamentally Flawed.

The parties agree that the 1979 Policy Interpretation establishes the framework for examining an athletic program's compliance with Title IX and is entitled to deference. (*See* RB 23 relying on *Title IX of*

the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics ["Policy Interpretation"], 44 Fed. Reg. 71,413 (Dec. 11, 1979) (App. A-4)). However, the Districts misapply the Policy Interpretation in three ways. First, the Districts fail to recognize that the Policy Interpretation establishes three separate and independent areas of compliance with respect to athletics. Accordingly, a violation in any one of these areas is sufficient to violate Title IX, and a violation in one area cannot be offset by compliance in another area. Second, contrary to the Districts' argument, the Policy Interpretation and case law make clear that in equal treatment cases like this one, a Title IX violation can be based on discrimination in a single component of an athletic program, such as the scheduling of games. Third, the Districts repeatedly use the term "safe harbor" incorrectly to claim that they are not liable for the discriminatory scheduling challenged by Parker. However, that phrase is a legal term of art limited to one Title IX area—equal participation—that is not at issue here.

1. The Districts' arguments related to equal participation opportunities are wholly irrelevant to Parker's equal treatment claim.

The three separate and independent sections of the Policy Interpretation require schools to provide: (1) a fair share of athletic scholarship dollars to male and female athletes, (2) equal benefits, treatment, and opportunities to male and female athletes, referred to as the "equal treatment" requirement, and (3) effective accommodation of the interests and abilities of students in the selection of sports, referred to as the "equal participation" or "effective accommodation" requirement.[1] 44 Fed. Reg. at 71,415-71,417, App. A-4 at 71,415-71,417. The Districts distort the Policy Interpretation by improperly conflating the equal treatment and equal participation requirements, an error that permeates all of their arguments. (RB 24-25). Thus, they try to rebut Parker's equal treatment claim by asserting compliance with the participation requirement. *See id.* at 71,417-71,418. However, the Policy Interpretation makes clear, and the district court here recognized (App. A-1 at 5-7), that equal treatment claims and equal

[1] Within the participation section, there is a "three-part test" to measure compliance. The three parts are also commonly referred to as "prongs."

participation claims are governed by different legal standards and must be treated separately.

Courts, including this Court, have uniformly held that a violation of any one of these three major requirements set forth in the Policy Interpretation is sufficient to violate Title IX. *See Kelley v. Bd. of Tr.*, 35 F.3d 265, 268 (7th Cir. 1994) ("[A]n institution may violate Title IX solely by failing to accommodate effectively the interests and abilities of student athletes of both sexes."); *see also*, *e.g.*, *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Roberts v. Colo. State Univ.*, 998 F.2d 824, 828 (10th Cir. 1993). And a violation in any one of these three sections cannot be offset by compliance in another.[2] *See*, *e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 897 (1st Cir. 1993) ("[A]n institution that offers women a smaller number of athletic opportunities than the statute requires may not rectify that violation simply by lavishing more resources on those women or achieving equivalence in other respects.").

[2] Within the *equal treatment* section, disparities in one component may be offset by advantages in another. But, as the district court here recognized, the Districts provided no evidence that girls receive more favorable treatment with respect to other "equal treatment" components. (*See* App. A-3 at 7-8).

The Districts present tables of male and female student enrollment and "participation positions" for each school (RB 3-18) in an effort to show compliance with the first prong of the three-part participation test. This prong provides that a school is in compliance if the percentage of athletes who are girls is roughly equal to the percentage of students who are girls. *See* 44 Fed. Reg. at 71,418; App. A-4 at 71,418). But that presentation is completely irrelevant to the equal treatment issue in this case.[3]

Similarly, the Districts' claims that schools can show an expansion of girls' participation opportunities or full accommodation of girls' interests in playing sports (prongs two and three of the participation test, respectively), as well as the Districts' attempt to apply prong two of the participation test to an equal treatment claim (RB 27-30), are not applicable to this case. If anything, the Districts' misapplication of prong two of the participation test to the equal treatment issue here—by claiming that Franklin is not violating Title IX because it has increased girls' primetime play by five percent over the last three

[3] The Districts do not even properly calculate the participation statistics that they use to try to avoid liability here. *See*, *e.g.*, *Cohen v. Brown Univ.*, 869 F. Supp. 185, 211 (D.R.I. 1995).

years—is an acknowledgment of the very discrimination that Parker seeks to remedy.

The Districts cite to this Court's decisions in *Kelley*, 35 F.3d 265, and *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), as if those cases support their contention that an equal treatment violation can be offset by their alleged compliance with the equal participation requirement. But *Kelley* and *Boulahanis* address only equal participation claims and say nothing about excusing non-compliance with any of the three Policy Interpretation sections through compliance with another.[4]

2. The harmful treatment of girls in one segment of the Districts' athletic program is sufficient to violate Title IX.

The Districts claim that the legal standard advanced by Parker and applied by the district court to the scheduling claim is inconsistent with Title IX's athletic policies and is an exception crafted only by the Second Circuit in *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 299-300 (2d Cir. 2004). (RB 20). But the Districts' argument

[4] Plaintiffs in *Kelley* and *Boulahanis* were male athletes who claimed that the termination of their teams violated Title IX and the Equal Protection Clause. This Court held that the defendant universities acted lawfully to provide equal participation opportunities to male and female students in accord with the three-part test. *Kelley*, 35 F.3d at 271-72; *Boulahanis*, 198 F.3d at 634-35. There is no Seventh Circuit precedent addressing Title IX's equal treatment requirements.

is belied by the plain language of the Policy Interpretation, which states that discrimination in a single equal treatment component, such as the scheduling of game times at issue here, is sufficient to violate Title IX. The Policy Interpretation explicitly provides that an institution can be out of compliance with the Title IX equal treatment regulations if "disparities in benefits, treatment, services, or opportunities *in individual segments of the program* are substantial enough in and of themselves to deny equality of athletic opportunity" or if "disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole." 44 Fed. Reg. at 71,417 (emphasis added) (App. A-4 at 71,417). Furthermore, the Department of Education's Office for Civil Rights ("OCR"), which has primary responsibility for enforcing Title IX, sent a letter in 1997 to the Indiana High School Athletic Association, which the Districts completely ignore in their Response Brief. This letter specifically warned, without any mention of other aspects of the schools' athletic programs, that the scheduling practices at issue here could violate Title IX. (*See* OCR Letter of Feb. 13, 1997, at 2-4 [Doc. 96-7]).

In addition, nothing in the Policy Interpretation or case law requires that girls be completely excluded from an activity for a disparity in one aspect of an athletic program to constitute a violation of Title IX. Rather, an institution is not in compliance if it treats female and male athletes in a substantially different manner and the effect of those differences is more than negligible. 44 Fed. Reg. at 71,415, App. A-4 at 71,415. (OB 12-13). Complete exclusion is not necessary for the effect of a difference to be more than negligible, a point that is clear not only from the OCR letter discussed above, but also from a case not acknowledged in the Response Brief, *Communities for Equity v. Michigan High School Athletic Association*. 178 F. Supp. 2d 805, 817-39 (W.D. Mich. 2001) ("*Cmtys. for Equity I*") (holding that the disadvantageous scheduling of seasons for girls' sports violated Title IX without any finding of complete exclusion from an activity), *aff'd*, 377 F.3d 504 (6th Cir. 2004), *cert. granted and judgment vacated on other grounds*, 544 U.S. 1012 (2005), *on remand*, 459 F.3d 676 (6th Cir. 2006) ("*Cmtys. for Equity II*").

Parker has more than met her burden by showing how the disparate scheduling of girls' games in non-primetime slots is harmful.

The harm to girls, which is certainly more than negligible, includes the negative impact on academic studies of having to play weekday games; the lack of opportunity to play before a large audience, with the band, cheerleaders, and dance teams; and the psychological harm to girls caused by the Districts' message that they are less important and inferior to the boys. (*See* OB 16-21 (citing evidence)).[5] These harms are easily sufficient to violate Title IX. "If the schools think that [playing in primetime] is not important, . . . try to move the boys' [games to weeknights] and see what they do." *McCormick*, 370 F.3d at 298 n.22 (quoting an affidavit).

3. The Districts' use of the term "safe harbor" is misplaced.

The Districts repeatedly and incorrectly use the term "safe harbor" to attempt to shield themselves from liability for their discriminatory scheduling of girls' basketball games. But in the Title IX context, "safe harbor" is a term of art used only in the equal participation context, which is not at issue here. *See Boulahanis*, 198 F.3d at 639; *Kelley*, 35 F.3d at 271. OCR uses the term only to describe

[5] The fact that the girls on one school's basketball team "indicated a preference to play weeknight games" (RB 13) does not minimize the harm to Parker. *See*, *e.g.*, *McCormick*, 370 F. 3d at 295 n.18 ("The statements of some female players . . . that the chance to make it to the State Championship is not important to them does not convince us that the denial of this opportunity is insubstantial.").

the first, or proportionality, prong of Title IX's three-part participation test because it is easily measurable. *See* OCR, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), *available at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html; OCR, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (June 11, 2003), *available at* http://www.ed.gov/about/offices/list/ocr/title9guidanceFinal.html.[6] The term has not been used by OCR or by the courts in any other Title IX context. *See*, *e.g.*, *McCormick*, 370 F.3d 275, 299-300 (2d Cir. 2004) (describing "safe harbor" as pertaining only to Title IX's equal participation requirement).[7]

The Districts, without any support, try to extend the term "safe harbor" to the equal treatment context to advocate a standard short of full compliance. *See infra* Section I.B. But the idea of a safe harbor separate from a particular measure of compliance does not make any sense. In the participation context, even if prongs 2 and 3 were

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[6] The Districts' attempt to bolster their argument by citing OCR's 2003 Further Clarification (RB 25) is equally irrelevant because the 2003 Clarification addresses only the equal participation requirement.

[7] Contrary to the Districts' argument (RB 26), the district court did not grant summary judgment to them based on "regulatory 'safe harbor' provisions." (*See* App. A-2 at 8-10).

described as safe harbors, it would be because they also represent measures of compliance. Here, the Districts are simply trying to dilute the equal treatment compliance requirements, and their arguments should be rejected.

B. The Districts' Arguments Concerning Individual Games Cannot Excuse the Overall Disparity in the Scheduling of Girls' Basketball Games.

The Districts attempt to dodge the overall disparity in the scheduling of basketball games by arguing that "eight of the thirteen non-Franklin County schools actually played Franklin County on so-called 'primetime' nights," and so could not have violated Title IX. (RB 26). This argument fails for two reasons.[8]

First, the core legal question is whether the Franklin girls' team as compared to the boys' team is disproportionately scheduled in non-primetime slots. (*See* OB 15 n.14). The Districts admit that the answer is "yes" by acknowledging the share of girls' and boys' games played in primetime. (RB 18).

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[8] Defendants' discussion of *Everroad v. Schott Truck Systems, Inc.*, 604 F.3d 471 (7th Cir. 2010), is puzzling. (RB 31-32). Here, Parker introduced basketball schedules, in addition to affidavits and deposition testimony, which form the basis for the discussion of disparities and the harm to girls in her briefs. (*See*, *e.g.*, OB 3-7).

Significantly, Franklin cannot unilaterally schedule its basketball games. (OB 6-7). Indeed, when Franklin's athletic director tried to increase the number of primetime girls' basketball games, the other athletic directors in the conference, the Eastern Indiana Athletic Conference (EIAC), refused her request. (Deposition of Beth Foster ("Foster Dep.") at 77-81, 101-02 [Doc. No. 96-1]); Affidavit of Amber Parker ¶¶ 5-6 [Doc. No. 96-4]). Moreover, once the Districts establish the scheduling contracts, they enter the schedules into an automated system that reproduces the same schedule year after year. (Foster Dep. at 87-88). Thus, remedying the discriminatory scheduling will require an affirmative effort on the part of all the Districts.

Second, even using the Districts' approach and looking beyond the aggregate disparity, all of the EIAC Districts and nearly all of the non-conference Districts contributed to the disparity of which Parker complains.[9] Since the EIAC agrees by majority vote to the entire

[9] In their Statement of Facts, the Districts state, without citation, that the non-Franklin schools should be dismissed because Parker is not a "direct beneficiar[y]" of the federal funds those schools receive and has not been injured by any official policy they have. (RB 3 n.2). But a legal argument must be "raise[d] . . . in the argument section of [a party's] brief" and "support[ed] . . . with pertinent authority"; otherwise, as in this case, it is waived. *Ajayi v. Aramark Bus. Servs., Inc.*, 336 F.3d 520, 529 (7th Cir. 2003). In any event, as the district court held, all the schools can be sued because they are recipients of federal funds. (Modified Order Den. Defs.'

conference schedule (*id.*), each EIAC member is responsible for and adheres to that schedule.

The Districts argue that four of the EIAC members could not have violated Title IX because they played the Franklin girls *once* on a Friday or Saturday night in 2008-2009. (RB 27). But each of the EIAC teams play the Franklin girls' and boys' teams *twice* each season (Foster Dep. at 73), so the Districts' discussion of only one game is misleading. And as Table 1 (p. 15) indicates, the other six girls' games were not in primetime. In contrast, only one of the Franklin boys' conference games was not in primetime.

Similarly, six of the eight non-conference Districts contributed to the aggregate disparity that existed for Franklin's girls' and boys' basketball teams. As Table 1 indicates, Decatur, Rush, and Union played Franklin boys *exclusively during primetime*, but they played the Franklin girls *exclusively during non-primetime*. Jennings, Muncie, and Richmond also contributed to the overall disparity for Franklin's

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Mot. to Dismiss at 5-7 [Doc. No. 77]). And, as described above, the contracts that set the schedules contribute to Parker's injury. (*See also* OB 36-27 (arguing that contracts constitute official policies)).

girls' and boys' basketball teams by playing the Franklin girls exclusively during non-primetime.

TABLE 1
Share of 2008-2009 Games Against Franklin Basketball Teams That Were Played During Primetime

	School District	Boys' Games	Girls' Games
Eastern Indiana Athletic Conference (EIAC) Districts	Batesville	100%	0%
	Greensburg	50%	50%
	Lawrenceburg	100%*	50%
	South Dearborn	100%	50%
	Sunman-Dearborn	100%	0%
	EIAC Conference	90%*	30%
Non-EIAC Districts	Decatur	100%	0%
	Fayette	100%	100%
	Jennings	**	0%
	Muncie	**	0%
	Richmond	**	0%
	Rush	100%	0%
	Union	100%	0%
	Switzerland	**	**

* Denotes that data is based only on Parker's evidence.
** The parties' Franklin schedules do not indicate game dates or times for these teams.

Source: Franklin County boys' and girls' varsity basketball schedules (2008-2009) introduced by Parker (Doc. No. 97-5 at 3, 4) and the Districts (Doc. No. 97-2 at 36, 41). (*See also* RB 3-14 (identifying the name of each District's high school)). This table uses Parker's definition of "primetime": Friday and Saturday nights and the Tuesday before Thanksgiving, but not Saturday matinees or other weekday games. (*See* OB 3).

In any event, regardless of the details of each game in past seasons, the Districts must all cooperate in setting future schedules to ensure that the girls' team receives equal treatment.

II. THE DISTRICTS FAIL TO ESTABLISH THEY ARE ARMS OF THE STATE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY.

The Districts have not carried their burden of persuasion to demonstrate that they are entitled to Eleventh Amendment immunity. *See Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 735 n.5 (7th Cir. 1994), *superseded by statute on other grounds as recognized by Holmes v. Marion County Office of Family & Children*, 349 F.3d 914, 918 (7th Cir. 2003). While Public Law 146-2008, House Enrolled Act 1001, §§ 450-529 (2008), changed certain facets of school funding and taxes,[10] contrary to the Districts' argument, it did not transform the Districts into arms of the state.[11]

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[10] The full text of Public Law 146-2008, an omnibus bill that amended various titles of the Indiana Code, including Titles 6 (Taxation) and 20 (Education), is available at http://www.in.gov/legislative/bills/2008/HE/HE1001.1.html. For a general discussion of this law, see, for example, Stephen C. Hiller & Terry E. Spradlin, School Referenda (Summer 2010), *available at* http://www.ceep.indiana.edu/projects/PDF/PB_V8N2_Summer_2010_EPB.pdf, and Stephen C. Hiller & Terry E. Spradlin, Update on School Referenda (Winter 2010), *available at* http://ceep.indiana.edu/projects/PDF/PB_V8N5_Winter_2010_EPB.pdf.

[11] The brief for Amicus Indiana School Boards Association ("ISBA"), authored in part by the Districts' counsel (ISBA Brief 1), echoes the arguments made by the

A. The Districts Erroneously Disregard Relevant Case Law.

The Districts seek to ignore two cases holding that Indiana school districts are not arms of the state. However, these two cases, *Board of Trustees v. Landry*, 638 N.E.2d 1261 (Ind. Ct. App. 1994), and *EEOC v. North Gibson School Corp.*, 266 F.3d 607 (7th Cir. 2001), which bear directly on the question of the Districts' Eleventh Amendment immunity, did not become "simply irrelevant" (RB 39) because of the passage of Public Law 146. "[T]his Court gives "considerable weight to [its] own decisions unless and until they have been overruled or undermined by . . . supervening developments, such as a statutory overruling." *Debs v. Ne. Ill. Univ.*, 153 F.3d 390, 394 (7th Cir. 1998) (internal quotation marks omitted).

Landry, the state case, provides a comprehensive examination of Indiana law, much of which was not changed by Public Law 146. While immunity is ultimately a question of federal law, "that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 430 n.5 (1997). A state court's interpretation of state law is,

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Districts. Thus, Parker's discussion in Section III, although explicitly identifying only the Districts' arguments for rebuttal, also responds to ISBA's assertions.

therefore, due some deference in the Eleventh Amendment inquiry. *See*, *e.g.*, *Duke v. Grady Mun. Sch.*, 127 F.3d 972, 977-78 (10th Cir. 1997) (granting deference to a state court's interpretation of state law to conclude that New Mexico school districts were not entitled to Eleventh Amendment immunity and stating that such deference is most appropriate when a state court has deemed an entity not to be an arm of the state).

B. The Districts Are Financially Autonomous from the State.

The Districts seem to urge this Court to adopt the Fourth Circuit's standard in *Kitchen v. Upshaw*, 286 F.3d 179 (4th Cir. 2002), for Eleventh Amendment immunity. (RB 40, 50). But the Fourth Circuit's test, which makes financial autonomy a potentially *dispositive* factor, is plainly inconsistent with Seventh Circuit law. Although this Court has identified financial autonomy as more important than general legal status, it has made plain that both factors must be considered, even when financial autonomy strongly favors immunity. *See*, *e.g.*, *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 695-96 (7th Cir. 2007). Therefore, the Fourth Circuit's test cannot be adopted without overruling circuit precedent.

1. A judgment against the Districts would not affect state coffers.

The key question with respect to a judgment's impact on state coffers is whether Indiana is "in fact obligated to bear and pay the resulting indebtedness of the [Districts]." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 51 (1994). "When the answer is 'No'—both legally and practically—then the Eleventh Amendment's core concern is not implicated." *Id.* Here, the answer is "no." The Districts have not cited evidence, and there simply is none, that Indiana would be responsible, either legally or practically, for any judgment against the Districts.[12]

The Districts dismiss this Court's holding in *Gary A. v. New Trier High School District*, 796 F.2d 940 (7th Cir. 1986), (RB 49), and mischaracterize Parker's reliance thereon. *Gary A.*, 796 F.2d at 945, along with *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 280 (1977), stands for the proposition that it "is

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[12] Parker presented evidence that the Districts had purchased liability insurance, (OB 33 (citing Doc. No. 58-1 at 1)), which indicates that they—not the state—are ultimately responsible for judgments against them. The Districts contend that Parker's argument is foreclosed by the Supreme Court's decision in *Doe*, 519 U.S. 425. (RB 48-49). But *Doe* actually supports Parker's argument: "It is the entity's potential legal liability, rather than its ability or inability to require a third party to reimburse it . . . that is relevant." 519 U.S. at 431.

irrelevant" that state money given to a local entity is fungible and may be used to pay judgments. *Gary A.*, 796 F.2d at 945.

The Districts also argue that while they can create Self-Insurance Funds, they may not use them to pay judgments like the one contemplated here. (RB 48). In doing so, the Districts mistakenly equate a "Self-Insurance Fund," addressed in Indiana Code section 20-40-12-5 and relevant to this case, with a "Self-Insurance Program," addressed in section 20-40-12-3 and utterly irrelevant. Indiana law *explicitly* authorizes a Self Insurance Fund to be used to "provide money for" a "claim . . . or settlement for which the school corporation is liable under a federal . . . statute." *Id.* § 20-40-12-5(3) (cross-referenced by *id.* § 20-40-12-4(1)(A)).

2. The Districts dramatically overstate the extent of state oversight and control.

The Districts claim that review by the Indiana Department of Local Government Finance (DLGF) of district budgets indicates that the Districts are not financially autonomous. The DLGF does have the power to review, reduce, or increase the portion of school budgets provided by state funds. Ind. Code § 6-1.1-17-16(j). But it held this same power before Public Law 146 was passed, *see id.* § 6-1.1-17-6

(2007), when this Court in *North Gibson School Corporation*, 266 F.3d 607, and an Indiana state appeals court in *Landry*, 638 N.E.2d 1261, determined that Indiana school districts are not arms of the state.

Moreover, the DLGF has review power beyond school districts, reaching all "political subdivisions." Ind. Code § 6-1.1-17-16(a)-(c). Thus, at the most, the DLGF's review power is a neutral consideration, as it extends to quintessential political subdivisions like cities and towns.

Regardless of the DLGF's review power, Indiana law is clear that each school corporation may fix its own budget, tax rate, and levy. *Id.* § 6-1.1-17-5(a). Thus, even assuming Indiana confers upon the DLGF some oversight powers, the Districts maintain substantial power over their budgets. The fact that these powers are subject to "certain restrictions of state law," *Mt. Healthy*, 429 U.S. at 280, does not immunize the Districts from suit.

3. The districts are able to raise funds to pay a judgment.

The Districts claim that they cannot raise funds to pay judgments for several reasons, but their assertions are unsupported by the record or irrelevant as a matter of law.

First, the Districts reiterate the district court's conclusion that a judgment must be paid from their state-funded General Funds. (RB 42, 48). But neither the Districts nor the district court ever marshaled any evidence for this unfounded proposition. (*See* RB 40-43, 48-49, App. A-1 at 10-11).

Second, the Districts claim that all levies outside of the General Fund, except for Debt Service Levies, are subject to state caps. (RB 45). Even assuming state caps apply, the Districts concede that they continue to rely on local levies after Public Law 146. (*See* RB 42). Nor is there any record evidence that any of the Districts have reached any state caps, or that they cannot use existing levies to pay judgments.

Similarly, while the Districts also admit that the uncapped Debt Service Levy can be used to issue bonds to pay an adverse judgment, they emphasize that the state will pay their bond obligations in the event of default. (RB 46-47). Thus, the Districts in effect concede that *they*, not the state, are the entities legally responsible for judgments against them. Otherwise, they would have no reason to issue bonds to pay judgments. Moreover, Indiana law is exceedingly clear that if a school corporation defaults upon bond obligations, the obligations "do

not become a debt of the state." Ind. Code § 20-48-1-11(c), (d). So, just as the Districts are responsible for initial adverse judgments against them, they are responsible for paying bond obligations incurred to pay those judgments.

Furthermore, the Districts fail to address the explicit self-help option that Public Law 146 makes available to Indiana school corporations. Districts have the ability to place General Fund referenda before voters for approval of tax levies that exceed statewide caps. *See* Ind. Code § 20-46-1-8; *see also* SCHOOL REFERENDA 2. A school corporation may seek such a referendum for two purposes: if it determines that it needs funds to carry on its mission and public education duty, or if it needs funds to replace those lost because of tax caps. Ind. Code §§ 20-46-1-8(a)(1), (2); *see also* SCHOOL REFERENDA 2. Since the passage of Public Law 146, school districts have placed twenty-eight General Fund referenda on local ballots, of which 46.4 percent have passed. *See* UPDATE ON SCHOOL REFERENDA 1.

4. The state taxation factor is neutral.

The Districts state that "Parker concedes that the District Court properly found in the Schools' favor" on the issue of state taxation (RB

47). But Parker conceded only "that Defendants, as Indiana school corporations, are exempt from taxation." (OB 31). Moreover, the district court held that "th[e] [state taxation] factor is neutral because Indiana has exempted political subdivisions from taxation, and political subdivisions (as well as counties and cities) are indisputably not arms of the state." (App. A-1 at 9-10 (internal citation and quotation marks omitted)). That is *not* a holding in the Districts' favor on an issue for which the Districts have the burden of persuasion to show entitlement to immunity. *See Baxter*, 26 F.3d at 735 n.5.

5. The Districts' reliance on non-record and dubious data regarding the extent of state funding does not entitle them to immunity.

In the Response Brief, the Districts identified, for the first time, data that they claim support their contention that they "receive a vast majority of their funding directly from the State of Indiana, somewhere between 2/3rds and 3/4ths." (RB 41). The Districts failed to put any such evidence in the record, and now fail to even argue that it is appropriate for judicial notice (*see id.* at 41 n.11), which it is not. The proffered data is neither "'generally known'" within the Southern District of Indiana nor capable of "'accurate and ready determination'"

by resort to any source. *Gen. Elec. Capital v. Lease Resolution*, 128 F.3d 1074, 1081 (7th Cir. 1997) (quoting Fed. R. of Evid. 201). A review of the website to which the Districts cite (RB 42) provides nothing that even resembles the data they now offer.

Even assuming the data are accurate, they do not, on their own, establish the Districts' entitlement to immunity. Substantial state funding can be outweighed by other factors. *See Gary A.*, 796 F.2d at 945; *see also Univ. of R.I. v. AW Chesterton*, 2 F.3d 1200, 1215 (1st Cir. 1993) (holding that "mere receipt" of state appropriations is not conclusive evidence of state identity and citing, *inter alia*, this Court's decision in *Gary A.*). Indeed, the *Landry* court concluded that although Indiana districts received "a significant amount of state funding," they were nonetheless financially autonomous. 638 N.E.2d at 1265. And other courts have concluded that school districts are not arms of the state, despite similar or greater levels of state funding than those asserted by the Districts. *See Duke*, 127 F.3d at 980, 981 (holding that a New Mexico school district receiving 98 percent of its funding from the state was not entitled to immunity); *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 996-97 (10th Cir. 1993) (en banc) (holding that a Utah school

district receiving 62 percent of its funding from state grants was not an arm of the state).

C. The Districts' General Legal Status Confirms That They Are Not Arms of the State.

The Districts incorrectly contend that Parker relies upon only a "single statutory definition" of school corporations in the Indiana Tort Claims Act. (RB 51). However, Parker relied on multiple sources of local government law (OB 34-35), all of which consistently treat school corporations as political subdivisions. *See* Ind. Code §§ 4-12-1-2(d), 36-1-2-10, 36-1-2-13.

Finally, the Districts' invocation of *Nagy v. Evansville-Vanderburgh School Corporation*, 844 N.E.2d 481 (Ind. 2006), and *Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009), is a red herring. *Nagy* merely held that a mandatory student fee "imposed generally on all students, whether the student avails herself of a service or participates in a program or activity or not, becomes a charge for attending a public school" and therefore violates the Indiana Constitution's requirement that public education be free. 844 N.E.2d at 493. *Bonner* dealt with the adequacy of Indiana's school funding scheme, holding that the Indiana Constitution does not require a public education of a particular quality.

907 N.E.2d at 521-22. Neither stands for the proposition claimed by the Districts that "Indiana's Schools have little autonomy from the State of Indiana." (RB 52).

For all of the foregoing reasons, the Districts are political subdivisions according to Indiana state law and possess broad autonomy to conduct their own affairs and raise funds to pay judgments. They are not arms of the state and are, therefore, not entitled to Eleventh Amendment immunity.

III. THE DISTRICTS' DISPARATE SCHEDULING OF GIRLS' BASKETBALL GAMES VIOLATES THE EQUAL PROTECTION CLAUSE.

Parker has established that (1) the Districts have a policy, practice, or custom of discrimination, such that municipal liability is appropriate under 42 U.S.C. section 1983; (2) the Districts treat similarly situated male and female athletes differently on the basis of sex;[13] and (3) the Districts' gender-based scheduling does not pass constitutional muster under the applicable heightened scrutiny

[13] Amicus Eagle Forum Education & Legal Defense Fund ("Eagle Forum") asserts that "girls' basketball is not similar to boys' basketball" and so "the Equal Protection Clause does not require equal treatment." (*See* Eagle Forum Brief 27). However, this point was expressly—and wisely—conceded by the Districts before the district court. (*See* Doc. No. 83 at 31). Since this argument was waived by the Districts, it should not be considered by this Court. *See Charles v. Daley*, 846 F.2d 1057, 1059 n.1 (7th Cir. 1988).

standard. (OB 36-40). The Districts make no attempt to refute municipal liability pursuant to *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). Instead of making any effort to show that their disparate scheduling survives heightened scrutiny, the Districts rely on their erroneous Title IX arguments and make the meritless claims that there is no discriminatory intent or effect. (*See* RB 52-53).[14]

A. The Districts Waived Any Argument Refuting Municipal Liability under *Monell*.

The Districts do not contest Parker's contention that the Districts' scheduling constitutes a custom, policy, or practice that justifies municipal liability. *See Monell*, 436 U.S. at 694; *McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 511 (7th Cir. 1993). They state only that "Plaintiffs not only must satisfy Monell's custom, policy, and practice requirement, but they must prove" discriminatory effect and intent. (RB 52-53). Because the Districts did "not present any argument or cite any legal authority in [their] own brief" on the issue of *Monell* liability, "[they] ha[ve] waived appellate review of [it]." *United States v. Powell*, 576 F.3d 482, 497 n.6 (7th Cir. 2009).

[14] The Districts do not dispute that the record is sufficient for this Court to rule on the equal protection claim, even though the district court did not reach this issue.

B. A Plaintiff Need Not Prove Discriminatory Intent with Respect to a Facially Gender-Based Classification.

The Districts assert that Parker failed to show discriminatory intent, relying solely on *Chavez v. Illinois State Police*, 251 F.3d 612 (7th Cir. 2001). However, *Chavez* involved a facially neutral policy with respect to a protected class, and so is not applicable here. (OB 38-39 n.22). "[*F*]*acially neutral* [policies] which have a discriminatory impact do not violate the Equal Protection Clause unless discriminatory intent can be demonstrated, [but] discriminatory intent need not be established independently when the classification is explicit . . . ." *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995) (internal citations omitted).

The Districts' scheduling of girls' and boys' basketball games is an explicit classification on the basis of sex that is by definition purposeful and triggers the application of heightened scrutiny. *See Cmtys. for Equity II*, 459 F.3d at 692-95; *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 188 (1991) (noting, in a Title VII case, that "the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect"). Therefore, Parker need

not show discriminatory intent to establish a violation of the Equal Protection Clause.

C. The Districts' Argument That the Scheduling Has No Discriminatory Effect Is Belied by the Districts' Own Submissions.

The Districts argue that there "is no evidence of discriminatory effect" and that "[t]he statistics demonstrate the Schools' overall success in their scheduling efforts." (RB 53). But the statistics do no such thing. Rather, the Districts acknowledge that the Franklin boys played 95 percent of their 2008-2009 basketball games in primetime, compared to 47 percent played by the girls. (RB 18 (relying on OB 5)).

To the extent that the Districts are arguing that a slight increase in primetime girls' games in the 2009-2010 season immunizes them from suit, this assertion is irrelevant to an equal protection claim. It would lead to absurd results, permitting a defendant to avoid liability by making a facially discriminatory policy slightly less discriminatory, but not equal. If anything, the Districts' argument constitutes an admission that the scheduling is unequal.

D. The Districts Have Failed to Meet Their Burden under the Heightened Scrutiny Standard.

Because the disparities in the Districts' scheduling policy are gender-based, heightened scrutiny applies, and the Districts bear the burden of "demonstrat[ing] an 'exceedingly persuasive justification' for th[eir] action.'" *Varner v. Ill. State Univ.*, 226 F.3d 927, 934 (7th Cir. 2000) (quoting *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("*VMI*")).[15] They have failed to do so, offering in their Response Brief no reason at all for the disparities.[16] Therefore, Parker is entitled to summary judgment on her claim that the Districts' scheduling of basketball games violates the Equal Protection Clause.

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[15] Amicus Eagle Forum seeks to add new, entirely unsupported arguments that only rational basis review applies here. Since the Districts have never raised these arguments, they have been waived and cannot be raised by amicus. *See Charles*, 846 F.2d at 1059 n.1. In any event, Eagle Forum's arguments concerning the Equal Protection Clause are completely at odds with the law. *See VMI*, 518 U.S. at 531; *Cmtys. for Equity*, 459 F.3d at 694.

[16] Amicus Eagle Forum asserts—without any citation to evidence—that the Districts acted not "because of sex but because boys' basketball draws bigger crowds than girls' basketball" and because the Districts were trying to "schedul[e] sporting events . . . within the available resources." (Eagle Forum Brief at 29, 30). But the Districts never made these arguments in the district court or on appeal, so they are waived. *Charles*, 846 F.2d at 1059 n.1.

IV. THERE IS NO JURISDICTIONAL OR PROCEDURAL BASIS FOR DISMISSING PARKER'S CLAIMS.

The Districts argue that Parker's claims on behalf of her daughter J.L.P. are moot because the Parkers have relocated to Massachusetts.[17] (RB 2). However, since Amber Parker and J.L.P. have consistently sought compensatory damages for all claims based on past Title IX and constitutional violations (Redacted Complaint at 9 [Doc. No. 50]), their claims are not moot. *See Ortiz v. Downey*, 561 F.3d 664, 668 (7th Cir. 2009) (concluding that a prisoner's claim for injunctive relief but not monetary relief was mooted by his transfer to another facility); *see also Pederson*, 213 F.3d at 874-75 (holding that a female athlete's graduation did not moot her Title IX claim seeking compensatory damages).

Amicus Eagle Forum raises numerous other procedural issues that were not raised by the Districts, some of which it tries to characterize as jurisdictional, in an effort to prevent this Court from reaching the merits of the case. If reached, those arguments have no merit. For example, its administrative exhaustion argument ignores

[17] The Districts concede that Hurley's claims on behalf of C.H. for injunctive and monetary relief "remain[ ] alive." (RB 2).

well-established Title IX law. *See Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 795 (2009) (stating that "Title IX has no administrative exhaustion requirement and no notice provisions," so "[u]nder [Title IX's] implied private right of action, plaintiffs can file directly in court"). Nor does *Alexander v. Sandoval*, 532 U.S. 275 (2001), preclude this case. *Sandoval*, which holds that there is no private right of action to enforce the disparate impact regulations issued under Title VI of the Civil Rights Act of 1964, has nothing to do with Parker's Title IX disparate treatment claims.[18]

CONCLUSION

For the reasons set forth above and in Parker's Opening Brief, this Court should reverse the district court's grant of summary judgment to the Districts on the Title IX and equal protection claims, reverse the denial of Parker's motion for summary judgment on these claims, and remand to the district court to formulate an appropriate remedy.

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[18] Eagle Forum makes several other procedural arguments that have not been advanced by the Districts and are therefore waived. *See Charles*, 846 F.2d at 1059 n.1. Moreover, other athletics cases, litigated by counsel for amicus, disposed of many of the arguments made here. *See Equity in Athletics v. Dep't of Educ.*, __ F.3d ___, 2011 WL 790055, at *1-*2 (4th Cir. 2011); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 934, 946 (D.C. Cir. 2004), *reh'g denied*, 383 F.3d 1047 (D.C. Cir. 2004).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitations set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, because this brief contains 6896 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6), because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2007 in Century 14-point for the main text and Century 12-point for footnotes.

Dated: April 29, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been served, via UPS Overnite mail, upon:

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