CASE NO: 10-3595

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMBER PARKER, *et al.*,
Plaintiffs-Appellants,

v.

INDIANA HIGH SCHOOL
ATHLETIC ASSOCIATION, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Indiana, Indianapolis Division
Cause Below: No. 1:09-cv-885- WTL-WGH
The Honorable Judge William T. Lawrence

BRIEF OF APPELLANTS AND SHORT APPENDIX

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Attorneys for Plaintiffs-Appellants

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 7th Circuit

Short Caption: Amber Parker, et al., Plaintiffs v. Indiana High School Athletic Association et al., Defendants

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Fillenwarth Dennerline Groth & Towe, LLP, National Women's Law Center, Caplin Sniderman P.C.

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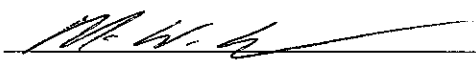
i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature:  Date: January 24, 2011

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New Information: National Women's Law Center (added as co-counsel)

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Attorney's Signature:  Date: 1/14/2011

Attorney's Printed Name: Fatima Goss Graves

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National Women's Law Center (Additional attorney listed below)

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: Dina R. Lassow Date: 1/24/2011

Attorney's Printed Name: Dina R. Lassow

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☒

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: Neena Chaudhry Date: 1/24/2011

Attorney's Printed Name: Neena Chaudhry

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Attorney's Signature: Julie A. Murray Date: 1/24/2011

Attorney's Printed Name: Julie A. Murray (Admitted only in New York; supervision by Fatima Goss Graves, member of the D.C. Bar.)

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Table of Contents

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Federal

State

Other Authorities

Regulations

Jurisdictional Statement

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. The district court's federal question jurisdiction was based on alleged violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) ("Title IX"), and of the Fourteenth Amendment to the United States Constitution.

The final judgment appealed from disposed of all issues in this case and was entered on October 6, 2010. (District Court Docket Number ("Doc. No.") 128; Short Appendix ["App."] A-3). No motion for a new trial or alteration of the judgment or any motion that would have tolled the time to appeal was filed. The Notice of Appeal was filed on November 5, 2010. (Doc. No. 129). The Court of Appeals has jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291.

Statement of Issues

The issues presented by this appeal are: (1) whether Defendants' discriminatory scheduling of basketball games violates Title IX; (2) whether Defendants, as local school districts, are arms of the state and entitled to Eleventh Amendment immunity; and (3) whether Defendants' discriminatory scheduling policy violates the Equal Protection Clause of the Fourteenth Amendment.

Statement of the Case

On July 20, 2009, Plaintiff-Appellant Amber Parker, on behalf of her minor daughter J.L.P., filed a complaint against fourteen Indiana public school corporations ("the Defendants") and the Indiana High School Athletic Association ("IHSAA").[1] (*See* Redacted Complaint, Doc. No. 50). She asserted claims under Title IX and 42 U.S.C. § 1983, seeking a jury trial, injunctive relief and

[1] Parker is not appealing the dismissal of her claims against the IHSAA. Therefore, the proceedings involving that defendant are not summarized. Parker is also not appealing the dismissal of another minor daughter for lack of standing. (Doc. No. 56, 77).

compensatory damages. *Id.*

On December 1, 2009, thirteen of the fourteen Defendants, i.e., the school corporations in which J.L.P. was not enrolled as a student, moved to dismiss all claims against them. (Doc. No. 36). All Defendants then moved for partial summary judgment on the Section 1983 claim on the ground that they were entitled to Eleventh Amendment immunity as arms of the state of Indiana. (*See* Doc. No. 48).

The district court issued an initial order granting in part and denying in part the Defendants' motion to dismiss. (Doc. No. 56). On March 11, 2010, it entered a modified order denying Defendants' motion to dismiss all claims against thirteen of the fourteen Defendants. (Doc. No. 77). The Defendants' partial summary judgment motion on Eleventh Amendment immunity remained undecided.

On June 21, 2010, the Defendants moved for summary judgment on Parker's Title IX claim. (Doc. No. 82). On the same day, Amber Parker filed a cross-motion for summary judgment on both her Title IX and Section 1983 claims against the Defendants. (Doc. No. 92). Before the district court ruled on any of the parties' motions for summary judgment, Tammy Hurley, on behalf of her minor daughter C.H., was added as a plaintiff and joined in all claims. (Doc. No. 117).

On September 27, 2010, the district court granted the Defendants' partial motion for summary judgment on Eleventh Amendment immunity, concluding that the Defendants were arms of the State of Indiana and so not subject to suit. (Doc. No. 126; App. A-1). On October 6, 2010, it granted the Defendants' motion for summary judgment on the Title IX claim and denied Parker's cross-motion for summary judgment on her Title IX and Section 1983 claims against all defendants. (Doc. No. 127; App. A-2). The district court entered judgment on October 6, 2010, having granted summary judgment to the Defendants on all of Parker's claims. (Doc. No. 128;

App. A-3).

Statement of the Facts

The Parties

Plaintiff-Appellant Amber Parker is the former coach of the girls' varsity basketball team at Franklin County High School ("FCHS"), part of Defendant Franklin County Community School Corporation. (Affidavit of Amber Parker ("Parker Aff't"), ¶ 5) (Doc. No. 96-4).[3] Amber Parker's daughter, J.L.P., was a member of that team during the 2008-2009 season. (Parker Aff't, ¶ 12). Plaintiff-Appellant Tammy Hurley is the mother of C.H., who is currently a member of the Franklin County girls' varsity basketball team.[4] (Doc. No. 116, 1).

Defendants include the Franklin County Community School Corporation and conference and non-conference school districts that agreed by contract to play the FCHS girls' basketball team during the 2009-2010 season. FCHS plays members of the Eastern Indiana Athletic Conference ("EIAC"), of which it is a part, twice in each season. (Deposition of athletic director Beth Foster ("Foster Dep.") at 71-73) [Doc. No. 96-1]). FCHS generally plays non-conference Defendants only once each season. (*Id.* at 72).

Defendants' Basketball Schedules And Their Impact On Female Basketball Players.

"Primetime" slots for high school basketball games are evenings that precede days without school, such as Friday or Saturday evenings and the Tuesday evening before the Thanksgiving holiday. (Deposition of Blake Ress ["Ress Dep."], 46, 93, 100 [Doc. No. 96-3]); (Deposition of FCHS Principal Kimber Simonson ["Simonson Dep."] at 43-44, 51-53 [Doc. No. 96-2]). During

[3] In February 2009, a newspaper ran a front page story in the sports section about Amber Parker's suit of equity for the FCHS girls' basketball team. (Parker Aff. ¶ 17). Two weeks later, the Franklin County athletic director recommended the non-renewal of Parker's coaching contract. (*Id.*). In June 2009, the Franklin County Board of Trustees voted on this recommendation, relieving Parker of her coaching duties without explanation. (*Id.* ¶ 19).

[4] Plaintiffs-Appellants will hereafter be referred to collectively as "Parker."

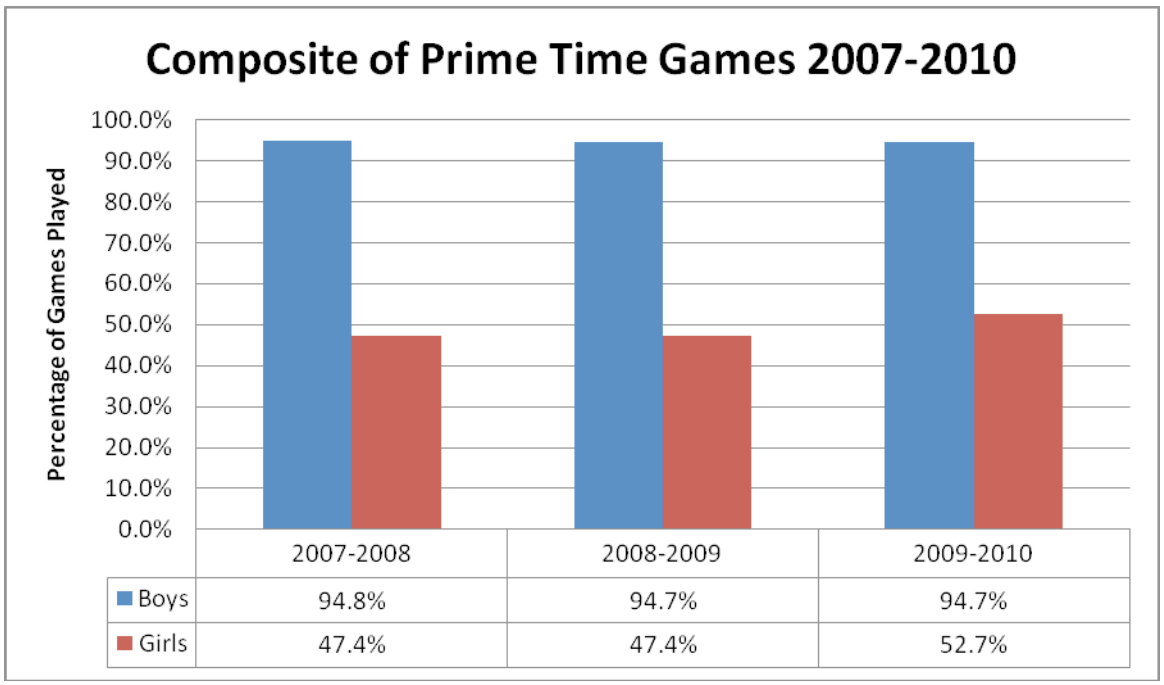
the first two weeks of the girls' season, during which there is no overlap with the boys' interscholastic basketball competition,[5] Defendants schedule girls' games in the primetime Friday and Saturday evenings. (*See, e.g.*, Doc. No. 97-2, at 36, 41 (basketball schedules introduced by Defendants); *see also* Doc. No. 97-5, at 3-4 (same introduced by Plaintiffs)). There is substantial student and community presence at these games, as well as cheerleaders, the pep band, and the dance team, creating an electric atmosphere. (Affidavit of Amber Parker ("Parker Aff.") ¶ 3) [Doc. No. 96-4]). After the boys' basketball season begins two weeks later, boys' games supplant the girls' games in primetime, and the girls are mostly relegated to playing games on weeknights. The girls lose their student and community presence during the weeknight games, and the pep band, cheerleaders, and dance team also stop attending the girls' games. Those resources are redirected to the boys' home and away games. (*Id.* ¶ 4).

When they play on weeknights, varsity girls' team players often must study and do homework in the stands during the junior varsity game and on the bus after playing an away game. (*Id.* ¶ 10). J.L.P. often had to stay up until 11:30 p.m. or 12:30 a.m. after games to complete her homework assignments due the next day or to study for a test. (Affidavit of J.L.P. ("J.L.P. Aff.") ¶¶ 2-4 [Doc. No. 96-6]). The scheduling policy affected J.L.P.'s grades during the grading periods overlapping the basketball season. (Parker Aff. ¶ 12). Defendants recognize that primetime games allow student-athletes more time to focus on academics without interfering with homework assignments or preparation for tests the following day. (Simonson Dep. at 55-56; Foster Dep. at 82).

The FCHS athletic director, Beth Foster, estimates that the girls' varsity basketball team plays approximately 50 percent of its games in primetime and that the boys' varsity basketball team

[5] Under the Indiana High School Athletic Association's By-Laws, Rules 50 and 100, girls' interscholastic basketball competition begins two weeks before the boys' basketball season.

plays approximately 75 percent of its games in primetime. (Foster Dep. at 76). She testified that these schedules have been fairly consistent over the past few years. (*Id.* at 76, 84-85). As illustrated by the chart below, FCHS's published schedules, which Foster and the FCHS principal agree are accurate (Foster Dep. at 67-68; Simonson Dep. at 61-62), show a much larger disparity. Those schedules, which are referenced in Parker's affidavit (at ¶ 15), reveal that during the most recent basketball season, 2009-2010, nearly 95 percent of the boys' varsity basketball games but less than 53 percent of the girls' games were played in primetime.[6] As Foster indicated, those shares have changed little from the earlier 2007-2008 and 2008-2009 seasons.



[6] These percentages are derived by adding the number of non-tournament games scheduled in "primetime," and dividing that number by the total number of non-tournament games played. For the purpose of her summary judgment motion, Parker counted Saturday afternoon games as "primetime," even though they are less desirable than Friday or Saturday evening slots. (Parker Aff. ¶ 16).

Defendants' practice of placing girls' games disproportionately in non-primetime slots makes J.L.P. feel like girls' accomplishments are less important than those of boys. (J.L.P. Aff. ¶ 7). There is indeed "[a] pervasive attitude in the local community that out of tradition the boys' basketball team gets scheduled to play on the preferred day of the week regardless of how this make the female athletes feel," (Parker Aff. ¶ 9), and "students often "mak[e] disparaging remarks to members of the girls' basketball team, (*id.* ¶ 8). A male student "who was touting how much better boys are than girls" told Amber Parker, "Coach, when [the girls] get really good, they will let them play on a Friday night and then I will come and watch them." (*Id.* ¶ 9). A cheerleader stated that the girls' team was not good and that "[i]f they were, they would schedule [the girls] to play on the weekend." (*Id.*). In fact, as of 2010, the FCHS girls' team had won eight straight conference championships, while the boys' team had posted a record better than .500 only once in school history. (*Id.*).

Parker asked other coaches and teachers why girls' games were generally placed on weeknights, but "the response was always the same—this is the way we have always done it." (*Id.* ¶ 4). Parker approached Foster, the FCHS athletic director, in April 2007 and inquired about allowing the girls' basketball team to play games in primetime on an equal basis with the boys' team. (Parker Aff. ¶¶ 5-6; Foster Dep. at 97). Foster told Parker that the dates, times, and locations of the basketball games were all governed by contracts for either a two- or four-year period, and that once Defendants' athletic directors agreed to a schedule and signed a contract, the schools generally would maintain those same game days and times in subsequent years. (Foster Dep. at 69-71).

Foster testified that she has attempted to increase the number of girls' basketball games played in the primetime slots, but athletic directors in the EIAC refused. (*Id.* at 80, 87-88, 101-02). The EIAC must approve by a majority vote all decisions regarding how to schedule

conference games and changes to when games are played. (*Id.* at 78). She also testified that she urged other athletic directors to schedule doubleheaders so that both the girls' and boys' basketball teams could play on weekend nights, but they refused to do so. (*Id.* at 77, 79, 102; Parker Aff. ¶¶ 5-6). Several years earlier, the previous FCHS athletic director had also attempted to get other schools to schedule additional girls' basketball games on weekend nights, but preexisting contracts prevented him from accomplishing this goal. (Simonson Dep. at 49-52).

The U.S. Department of Education's Office for Civil Rights Letter.

In 1997, the Department of Education's Office for Civil Rights ("OCR"), the primary federal agency charged with enforcing Title IX, wrote a letter to the Indiana High School Athletic Association, stating that it had received "a number of inquiries" relating to school districts that reserved Friday night play for boys' basketball teams and forced girls to play on "non-optimal weeknights, such as Tuesday." (Doc. No. 96-7 at 2, 4). It warned that "Association members could be found by OCR to be out of compliance with . . . Title IX if they reserve Friday nights for boys basketball games and schedule girls basketball games on other nights," and indicated considerations relevant to determining compliance. (*Id.* at 3). At OCR's request, the athletic association distributed this letter to superintendents of all member schools "encourag[ing] [them] to assess [their] programs." (Doc. No. 96-9).

Summary of Argument

This case involves the discriminatory scheduling of varsity basketball games, with the boys playing almost all their games on "primetime" weekend nights and the girls playing nearly half their games on less desirable weekday nights in violation of Title IX of the Education Amendments of 1972 and the Equal Protection Clause of the U.S. Constitution. The district court nevertheless granted summary judgment for Defendants and denied Parker's cross-motion for summary

judgment on both the Title IX and Equal Protection claims. Those holdings are erroneous for several reasons.

First, without any analysis of Parker's evidence of harm, the court below concluded that because the discriminatory scheduling of games did not create problems identical to those in two relevant cases cited by Parker, there was no violation of Title IX. This conclusion is simply wrong. Defendants have violated Title IX because the differences in the scheduling of girls' basketball games are substantial and Parker has provided evidence that these differences produce harmful effects for girls that are more than negligible. Girls bear greater academic burdens than boys because they have to both compete and do their schoolwork on the same night. Even though they are a championship team, they are denied school support at their games and the excitement of playing before large crowds. And the girls also suffer from the psychological harm of being treated like second-class athletes. These harms are the same as or analogous to the harms that girls were found to have suffered in the other two cases. Contrary to the district court's finding, therefore, the disparate scheduling of boys' and girls' varsity basketball games easily meets the more than "negligible" harm standard under Title IX. The court accordingly erred both in granting Defendants' motion for summary judgment and denying Parker's cross-motion for summary judgment.

Second, the district court concluded that Indiana local school districts are "arms of the state," and therefore immune from suit under the Eleventh Amendment. But decisions by this Court and the Indiana state courts have long held to the contrary. And nothing in the 2008 legislation that altered Indiana's educational financing structure transforms school districts into arms of the state. That legislation did not alter Indiana school districts' power to rely on local financing. Nor did it change the legal status of Indiana school districts. Instead, Indiana school districts remain political subdivisions that do not have Eleventh Amendment immunity. Since

Defendants failed to meet their burden of persuasion to demonstrate otherwise, Parker's constitutional claim under Section 1983 must be reinstated.

Third, the court erred in failing to hold that Defendants' discriminatory scheduling violates the Equal Protection Clause. The school districts did not meet their burden of showing that there is an "exceedingly persuasive justification" for the discriminatory scheduling, and that the disparate schedules are substantially related to the achievement of important governmental objectives. Indeed, Defendants have advanced no governmental objectives at all. They simply state that it is difficult to change the schedules and that they do not want to do so – far short of the rigorous heightened scrutiny standard.

Argument

I. Standard of Review

This Court reviews a ruling on a motion for summary judgment *de novo*, with all facts and reasonable inferences construed in favor of the non-moving party. *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 687 (7th Cir. 2007). Because Parker requests (1) the reversal of the grant of summary judgment to Defendants and (2) reversal of her cross-motion for summary judgment, she refers to evidence submitted at summary judgment by all parties.

II. Defendants' Disparate Scheduling of Basketball Games Violates Title IX.

The district court found and Defendants concede that Defendants schedule girls' and boys' basketball games disparately, such that almost 95 percent of boys' games are scheduled in the "primetime" weekend slots and only about half of the girls' games are. This disparity violates Title IX because it is substantial and Parker presented evidence that the harm it causes to the girls is more than negligible. The harms from this discriminatory scheduling include greater academic

burdens from having to play weeknight games, reduced crowd and school support for girls' games, and the message to "girls in general, that girls' sports are second-class, that boys take priority as to use of sports facilities and resources, and girls take the leavings." *Lambert v. W. Va. State Bd. of Educ.*, 447 S.E.2d 901, 908 (W.Va. 1994).

Without examining the evidence of harm, the district court erroneously concluded that the schools' disparate scheduling of girls' games did not violate Title IX. It decided that the instant case is not analogous to two other cases in which the scheduling of girls' sports in nontraditional and disadvantageous seasons was found to be unlawful. But under a proper understanding of Title IX and those two cases, Defendants have clearly violated Title IX, and Parker is entitled to summary judgment. (*See* Doc. No. 127 at 1; App. A-2 at 1); *Jones v. Wilhelm*, 425 F.3d 455, 457-58, 460 (7th Cir. 2005) (simultaneously reversing summary judgment to defendant and granting same to plaintiffs on cross-motion).[7] At a minimum, she has presented sufficient evidence to warrant the reversal of summary judgment to Defendants and remand for trial.

A. Title IX And Its Regulations And Policies.

Title IX provides that:

> 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(a).[8] This statute "must [be] accord[ed] . . . a sweep as broad as its language" to fulfill Title IX's remedial purpose of eliminating discrimination against women and girls in education. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982). While Title IX has

[7] Remand of the Title IX claim would thus be necessary only to formulate injunctive and monetary remedies, both of which are appropriate in this case. *See Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 75-76 (1992).

[8] Defendants are covered by Title IX, as they unquestionably operate an education program or activity that receives federal aid. Moreover, as discussed herein, each Defendant has a hand in "subject[ing] [J.L.P. and C.H.] to discrimination under" the Defendants' athletic programs and "den[ying] [them] the benefits" of those programs made available to boys. 20 U.S.C. § 1681(a).

served "as the source of a vast expansion of athletic opportunities for women in the nation's schools," *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 961 (9th Cir. 2010), as the facts of this case make clear, discrimination against female athletes remains pervasive.

Under Title IX, any recipient of federal funding that "operates or sponsors interscholastic . . . athletics shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c).[9] A 1979 Policy Interpretation sets forth three areas to be considered when analyzing whether an institution is in compliance with this requirement: (1) whether male and female students are provided with equal opportunities to participate in athletics; (2) whether male and female shares of athletic financial aid are substantially proportionate to their respective shares of participation opportunities; and (3) whether all other benefits, treatment, and opportunities made available to male and female athletes are equal. *See 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).[10]

Parker alleges a violation of the third area, and such claims are generally known as "equal treatment" claims. *See Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 855 n.56 (W.D. Mich. 2001) ("*Cmtys. for Equity I*"), *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 76, 694 (6th Cir. 2006) ("*Cmtys. for Equity II*"). The regulations identify nine non-exhaustive components in which schools must treat male and female athletes equally, one of which is the

[9] This regulation is entitled to deference as a reasonable interpretation of Title IX. *See Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994) (citing *Chevron U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)).

[10] Courts give substantial deference to this policy interpretation as a reasonable interpretation of the agency's own regulation. *See Kelley*, 35 F.3d at 271; *see also, e.g., Mansourian*, 602 F.3d at 965 n.9. The Policy Interpretation applies to high school athletics. *See* 44 Fed. Reg. at 71,413, App. A-4 at 71,413.

scheduling of games and practice times. *See* 34 C.F.R. § 106.41(c); 44 Fed. Reg. at 71,415, App. A-4 at 71,415.[11] The Policy Interpretation explains the relevant analysis for equal treatment claims:

> The Department will assess compliance with . . . the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

Id., App. A-4 at 71,415. A disparity in an individual program component, such as the scheduling of game times at issue in this case, can violate Title IX when it is substantial enough to deny equality of athletic opportunity or treatment. *See id.*, App. A-4 at 71,417; *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 294, 296 (2d Cir. 2004); *Cmtys. for Equity I*, 178 F. Supp. 2d at 856.[12] In other words, under Title IX, different treatment of male and female athletes in the scheduling of games is not permissible if the differences are substantial and their effect is more than "negligible." Because the differences at issue here are substantial and Parker has provided

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[11] These components include:

> [t]he provision of equipment and supplies; *[s]cheduling of games and practice time*; travel and per diem allowance; [o]pportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; [p]rovision of locker rooms, practice and competitive facilities; [p]rovision of medical and training facilities and services; [p]rovision of housing and dining facilities and services; [and] [p]ublicity.

34 C.F.R. § 106.41(c)(2)-(10) (emphasis added).

[12] A disparity that disadvantages girls in one area may be rebutted by a showing that male and female athletes are treated equally program-wide. To make such a showing, however, a school district must meet the high burden of demonstrating that disparities elsewhere in the athletic program actually *favor* girls, and that they are sufficiently substantial to offset a disparity, for example in scheduling, that disadvantages girls. *See McCormick*, 370 F.3d at 294 (determining that a scheduling disparity had not been offset by "any areas in which female athletes receive comparably better treatment than male athletes"). Defendants are unable to make any such showing here. As the district court recognized, despite hundreds of pages of affidavits from Defendants' athletic directors (*see* Doc. No. 85-91, 93, 95, 97-107), Defendants provided no evidence that girls receive more favorable treatment with respect to other "equal treatment" components outlined in 34 C.F.R. § 106.41(c)(2)-(10). (*See* Doc. No. 127 at 7; App. A-3 at 7).

evidence that these differences produce harmful effects for girls that are more than negligible, Defendants have violated Title IX.

With respect to the scheduling of games and practice times, the Policy Interpretation lists five factors to be examined when assessing compliance, one of which relates to the scheduled times of competitive events. *See* 44 Fed. Reg. at 71,416, App. A-4 at 71,416. A 1997 letter from the Department of Education's Office for Civil Rights ("OCR"), the primary federal agency charged with enforcing Title IX, provides insight into Title IX's application to the disparate scheduling at issue in this case. In that letter, OCR wrote to the Indiana High School Athletic Association (with instructions to relay the message to every superintendent) expressing concern that it had received "a number of inquiries" relating to school districts' practices of reserving Friday night play for boys' basketball teams and forcing girls to play on "non-optimal weeknights, such as Tuesday." (Doc. No. 96-7 at 2, 4.) The letter states, in part:

> In enforcing the Title IX regulatory requirements pertaining to the scheduling of games, OCR also examines the day of the week on which competitive events are scheduled and assesses whether the scheduling of competitions by a given recipient allows athletes of both sexes an equivalent opportunity to compete before audiences.
>
> Under Title IX, an institution that reserves a particular day of the week for the games of a boys team while scheduling the games of the same or similar girls team on other days of the week would be expected to provide a non-discriminatory justification for the difference in treatment if it is determined that the day of the week reserved for the boys team is the optimal day for such competitions, sometimes referred to as "prime time." In addition, even if competitions are scheduled on the same day of the week for both boys and girls teams, an institution that reserves a particular time of day for the boys team would be expected to provide a non-discriminatory justification for the difference in treatment if it is determined that the time of day reserved for the boys team is the optimal or "prime" time of day for such competitions.
>
> Please note, however, that an institution's adherence to "tradition" or to the scheduling practices of the conference or any of its member[] schools would not constitute a legitimate, non-discriminatory justification for a gender-based difference in treatment. . . .

> . . . The compliance determination would . . . include an examination of the impact the scheduling practice has on the members of the teams in question. Among other things, OCR would examine whether Friday night games offer the best opportunity to compete before the largest possible audience, whether week night games, particularly when travel is involved, have a disproportionately negative effect on the academic studies of the members of the girls basketball team, and whether the athletes and coaches of the boys and girls basketball teams consider Friday nights to be the optimal time to compete.

(Doc. No. 96-7 at 3).

The OCR letter is instructive in explaining the legal analysis applicable here, and given the "specialized experience" of OCR, the letter is "'entitled to respect' to the extent that [it] ha[s] the 'power to persuade.'" *Am. Fed'n of Gov't Employees v. Rumsfeld*, 262 F.3d 649, 656 (7th Cir. 2001) (quoting *Christensen v. Harris County*, 529 U.S. 576, 587 (2000)).

B. Defendants Schedule A Substantial Number of Weeknight, Non-Primetime Games for Girls.

J.L.P., C.H., and their teammates in Franklin County are disproportionately relegated to non-primetime play, and this disparity in scheduling is substantial. The girls' basketball team rarely plays on weekend evenings, which are considered to be the optimal or primetime to play because crowds are typically larger and the academic burden of having to play in the evening while also preparing for school the next day is not present. The Franklin County athletic director admits that the scheduling is inequitable (Doc. No. 97 at 7; Doc. No. 97-2 at 36, 41), as did Defendants in their briefing before the district court (Doc. No. 83 at 32). Based on Defendants' own schedules introduced at summary judgment, during the 2009-2010 season, Defendants scheduled almost 95 percent of Franklin County's varsity boys' basketball games (excluding tournaments and sectionals), but slightly less than 53 percent of the varsity girls' games, on Friday or Saturday. (*See* Doc. No. 97-2, at 36, 41 (basketball schedules introduced by Defendants); *see also* Doc. No. 97-5,

at 3-4 (same introduced by Plaintiffs)).[13] And even among girls' weekend games, many took place on Saturday afternoons, a less desirable time than Friday or Saturday nights. (Parker Aff. ¶ 16).

Even the boys' *junior varsity* team plays during primetime far more frequently than the girls' *varsity* team. According to Defendants' own evidence, during the 2009-2010 season, the junior varsity boys' basketball team played 16 of 18 non-tournament games on a Friday or Saturday night, with one additional game on a Saturday afternoon. (Doc. No. 97 at 37). Thus, approximately 94 percent of the junior varsity boys' games took place on a Friday or Saturday, compared to less than 53 percent of girls' varsity basketball games. The junior varsity girls, like their varsity peers, are largely relegated to non-primetime play. (*See* Doc. No. 97-2 at 40).

C. The Discriminatory Scheduling of Girls' Basketball Games Is a Longstanding Practice to Which All Defendants Have Agreed.

The undisputed evidence shows that each Defendant has a hand in the longstanding discriminatory scheduling of girls' basketball games. The Franklin County athletic director works with other Defendants' athletic directors to arrange game schedules for boys' and girls' basketball, which the directors formalize by executing two- or four-year contracts. (*See* Foster Dep. at 15). The contracts cover the dates and times of scheduled games. (*Id.* at 17). Thus, it is clear to both contractual parties when girls' games with Franklin County are placed disproportionately in non-primetime slots.[14] Although the scheduling process varies somewhat depending on whether

[13] Defendants have also directly conceded that there is at least a twenty-five percentage point gap favoring boys in the share of games played by the Franklin County girls' and boys' basketball teams during primetime. (Foster Dep. at 21).

[14] Defendants asserted in the district court that because some Defendants at some times played the Franklin County girls' basketball team on a Friday or Saturday, they could not have violated Title IX. (*See* Doc. No. 83, at 27-28). But this argument misses the point. The necessary question for the purpose of Title IX is whether the girls' team as compared to the boys' team was disproportionately scheduled in non-primetime slots, and, as set forth above, both parties and the district court agree that the girls' team was in fact disproportionately relegated to non-primetime play.

Franklin's opponent is a conference or non-conference competitor (*see id.* at 16-18, 23), in every case, the decision to alter or maintain a schedule is made jointly by two or more schools, including Franklin County. Since all Defendants work together to create the discriminatory scheduling regime at issue here, all Defendants must be found liable under Title IX to tailor a remedy that dismantles it.

Unfortunately, discriminatory scheduling of girls' basketball games is a longstanding and pervasive problem in Indiana. As discussed in Part II.A., in 1997, OCR wrote to the Indiana High School Athletic Association about the very issue that Parker continues to raise here—the discriminatory scheduling of girls' basketball games on disadvantageous weeknights as compared to the reservation of weekend nights for the boys' games. The association distributed this letter to all superintendents in the state, including Defendants. Nevertheless, Defendants continue to commit the districts to schedules years in advance of the actual games, making discriminatory contracts to schedule girls', but not boys', basketball games throughout the region on non-primetime days and times.

Defendants also jointly schedule other non-Franklin Defendants' girls' basketball teams primarily in non-primetime slots, providing further evidence that Defendants' decisions constitute a pervasive discriminatory pattern. For example, according to Defendants' own evidence, the Sunman-Dearborn girls' basketball team played only 3 of 19 games on a Friday or Saturday during the 2009-2010 season, while the boys' team played 18 of 20 games on those two days. (*See* Doc. No. 99 at 7-8). Likewise, the South Dearborn County girls' varsity basketball team played only 8 of 22 games on a Friday or Saturday during the 2009-2010 season, while the boys' team played 17 of 22 games on those days. (*See* Doc. No. 85 at 8).

D. Defendants' Inequitable Scheduling of Basketball Games Harms Girls.

The discriminatory scheduling disparity in this case is stark, longstanding, and widespread. It causes great harm to J.L.P., C.H., and their teammates and denies them the important benefits that boys receive from playing during primetime. These girls bear greater academic burdens, enjoy less crowd and school support, and suffer from the psychological harm caused by receiving the message that they are less valuable athletes and individuals than boys. There is no question that the effects of Defendants' discriminatory scheduling are more than negligible and violate Title IX.

1. Disproportionate academic burdens

Defendants' discriminatory scheduling policy forces female basketball players, but rarely males, to study and compete during the school week. As a result, J.L.P. found it difficult to do her homework, and she often went to bed between 11:30 p.m. and 12:30 a.m. on game nights. (J.L.P. Aff. ¶ 2). The scheduling policy affected J.L.P.'s grades during the grading periods overlapping with the basketball season. (Parker Aff. ¶ 12). The negative impact of the scheduling policy extended to other female basketball players as well. Parker noted that when the team "returned home from an away game, the girls would ask [her] to have the bus driver keep the lights on so they could finish their homework or study for a test the next day." (*Id.* at 7-8). Another Franklin County parent had approached the administration about the scheduling issue and its impact on his daughter "but was told he should just accept it because that's the way things had always been done." (*Id.* at 8).

Administrators were also well aware of the negative impact that school night games have on an athlete's academic life. In fact, the state high school athletic association has a rule limiting basketball teams to two weeknight games per week, because, as stated by the commissioner of the association: "If you are out every night playing a ball game, you will not get home early and you should have an opportunity to study." (Ress Dep. at 15). Franklin County's athletic director also

acknowledged the disadvantage faced by girls forced to play on school nights, stating that "anybody that has to play during the week, you got your academics." (Foster Dep. at 27).

Even the boys on the basketball team acknowledged the extra burden on the girls. One boy told Parker, who taught as well as coached at Franklin County High School, that "he did not know how the girl players were able to cope with playing mid-week games for most of the season." (Parker Aff. ¶ 13; *see also* J.L.P. Aff. ¶ 4 (J.L.P. noting that boys on the basketball team told her, "I don't know how you do this," i.e., study and compete during the week for nearly the whole season)). On the rare occasions that boys had games on a school night, they asked Parker not to assign homework or to reschedule tests because such assignments were difficult to complete—a difficulty regularly faced by J.L.P., C.H., and their teammates. (Parker Aff. ¶ 13).

2. Reduced school and community support

The scheduling disparity also denies J.L.P. and C.H. the opportunity to compete in front of a larger, more enthusiastic audience. As OCR told the IHSAA and Defendants in the 1997 letter, spectator attendance is a factor to be examined when assessing compliance with Title IX. (Doc. No. 96-7 at 3). The girls' season starts before the boys' season, and it is during that early period that the girls often play during primetime. At those weekend games, there "are large crowds in attendance . . . , substantial student and community support in the stands, and the presence of the band, cheerleaders, and dance teams." (Parker Aff. ¶ 3). Once the boys' season starts, and the girls are largely relegated to non-primetime slots, the "atmosphere [i]s markedly different." (*Id.*). As J.L.P. stated,

> Monday through Thursday on the girls' game nights the bleachers are nearly deserted. We have no cheerleaders or dance squad. We don't have any kids in the student section half the time. When I go to Friday or Saturday night boys' games the atmosphere in the gym is completely different. Everyone is there. The student section is so packed we all stand up to make more room. The dance squad and cheerleaders are also there. The starting five and coach of the boys team have banners with their names on them that drop from the hands of the stacked

> cheerleaders when they are announced. All of us girls miss out on that every single time we play on weekdays.

(J.L.P. Aff. ¶ 5); *see also* (Simonson Dep. at 22)(Franklin County High School principal stating that attendance is higher for weekend games than weeknight games); (Ress Dep. at 9)(state high school athletic association commissioner recognizing that alumni and parental attendance at weekend games is higher than during the school week).

Adding insult to injury, support for the girls' team was reduced despite the fact that the team was on its way to winning its ninth straight conference championship. (Parker Aff. ¶ 9). In contrast, the boys' team had only once posted a record better than .500 in the school's history. (*Id.*).

The reduction in school and community support for girls' games, especially when considered in conjunction with the academic harm to female players, significantly disadvantages J.L.P. and C.H. and therefore violates Title IX. *See, e.g., Cmtys. for Equity I*, 178 F. Supp. 2d at 819 (finding that a high school association's practice of scheduling girls' sports in nontraditional seasons violated Title IX and focusing, in part, on the girls' basketball team's inability to play during "March Madness" and enjoy the season's corresponding "excitement and publicity"); *Landow v. Sch. Bd. of Brevard County*, 132 F. Supp. 2d 958, 965 (M.D. Fla. 2000) (holding that disparities in scheduling and facilities available to softball and baseball teams violated Title IX and focusing on the impact that disparate scheduling had on "spectator attendance, parental involvement, and player and spectator enjoyment").[15]

[15] Parker's Title IX claim focuses on the scheduling disparity's effect on pep band, dance team, and cheerleader attendance to show that Defendants are violating the regulation that requires equivalent scheduling of games and practice times. *See* 34 C.F.R. § 106.41(c)(3). Attendance of the band, dance team, and cheerleaders is a significant benefit provided to athletes, and disparate attendance by these groups is likewise a significant harm. In addition, the disproportionate withholding of publicity resources—such as cheerleaders or bands—may constitute an independent violation of another Title IX regulation that requires

3. Psychological harm to girls

Finally, Defendants' unequal scheduling of girls' games causes psychological harm to girls, sending the message that girls are inferior to and less valuable than boys. (*See* Parker Aff. ¶¶ 5-6; Doc. No. 96-6 at 3-4). Were the games scheduled equally, J.L.P. and the other girls "would feel like people cared about [them] as much as the boys." (*Id.* at 4). Instead, by always reserving the vast majority of primetime play for boys, Defendants make the pecking order clear and deny girls the opportunity to be considered—and treated like—valued athletes and students.

The message that female basketball players are less worthy or talented than the males pervades the school and local community as well. For example, despite the girls' basketball team's superior record, a cheerleader stated that the team was not good and that "[i]f [they] were, they would schedule [the girls] to play on the weekend." (Parker Aff. ¶ 8). A male student also told Parker, "Coach, when [the girls] get really good, they will let them play on a Friday night and then I will come and watch them." (*Id.*) Likewise, when Parker first moved to Indiana, she went to a Friday boys' basketball game between two area teams and asked a man in the audience when the girls played. (Parker Aff. ¶ 2). The man was "baffled" and stated, "Girls don't play on premier nights. Only boys do." (*Id.*)

Courts routinely recognize such psychological harm caused by this pervasive message of inferiority when assessing whether a disparity violates Title IX. *See Cmtys. for Equity I*, 178 F. Supp. 2d at 837 (highlighting evidence in a scheduling discrimination case that girls who receive a message of inferiority carry it with them "throughout adulthood" and into "careers and interpersonal relationships"); *Landow*, 132 F. Supp. 2d at 964 (highlighting a school district's message to girls "that they are not as important as the boys" before finding that disparities in

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equivalent publicity for girls' and boys' teams. *See* 34 C.F.R. § 106.41(c)(10); 44 Fed. Reg. at 71,417, App. A-4 at 71,417.

scheduling and facilities available to baseball and softball teams violated Title IX); *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 536 (W.D. Va. 1999) (recognizing that the defendant's practice of reclassifying girls' sporting seasons forced girls, but not boys, "to cho[o]se between two sports" and sent a "negative message . . . to girls' teams," and concluding that the issue of whether defendant's practice violated Title IX was a question for trial).

Parker showed that Defendants' disparate scheduling of girls' basketball games in non-primetime slots imposes upon girls burdens that boys are spared and deprives girls of the benefits that boys get by playing on weekends. This discriminatory scheduling harms female athletes in many ways, all of which are more than negligible, and therefore violates Title IX. *See* 44 Fed. Reg. at 71,415, 71,417, App. A-4 at 71,415, 71,417. Defendants, at a minimum, admit that weekday play places academic burdens on students not endured by athletes playing on the weekend. This harm alone entitles Parker to summary judgment. In the alternative, Parker is entitled to present the evidence of harm to a jury. *See Alston*, 144 F. Supp. 2d at 536.

E. The District Court Erred in Ignoring the Harms that Girls Suffer from Being Relegated to Weeknight Games.

The district court wrongly concluded as a matter of law that Defendants' disparate scheduling of girls' basketball games does not violate Title IX, and it did so without *any* discussion or even recognition of the harms that Parker identified. Instead, the district court merely described two other scheduling cases involving girls who were assigned to nontraditional and disadvantageous seasons and concluded that because this case did not involve the same harm as the other two cases, Defendants did not violate Title IX. (Doc. No. 127 at 8-10; App. A-2 at 8-10). The district court's conclusion is at odds with the very cases it cites and the longstanding interpretation of Title IX by other courts and OCR.

As shown by Parker's reliance on the two cases cited by the district court, *McCormick v. School District of Mamaroneck* and *Communities for Equity v. Michigan High School Athletic Association*, those cases in fact support the claim here that Defendants have violated Title IX. In *McCormick*, the defendant school districts were held to violate Title IX because they scheduled girls' soccer in the nontraditional spring season and boys' soccer in the traditional fall season, which denied girls the opportunity to compete for the state championship and "sen[t] a message to the girls on the teams that they [we]re not expected to succeed and that the school d[id] not value their athletic abilities as much as it value[d] the abilities of the boys." 370 F.3d at 295. In *Communities for Equity*, the Michigan High School Athletic Association scheduled six girls' sports, but no boys' sports, in nontraditional and disadvantageous seasons (e.g., girls' basketball was scheduled in the nontraditional fall season, while boys' basketball was scheduled in the traditional winter season). The court held that the scheduling of girls' sports in this manner violated Title IX because girls suffered a variety of harms, including less access to collegiate recruiters, a greater risk of injury to girls associated with playing more often each week than boys as a result of the scheduling policy, and a deprivation of role models, skills development, and team-building opportunities. *See generally* 178 F. Supp. 2d at 817-39. Thus, the court relied on some of the same harms identified in this case, such as the academic burden that the scheduling scheme placed on girls, *see id.* at 819, and the general message of inferiority that girls received, which it noted "can contribute to or cause girls and boys to have dramatically different perceptions of self-worth and to cause girls to have lower expectations for themselves," *id.* at 836-39.

The district court erred in concluding that the harms to J.L.P. and C.H. in the instant case are not sufficient to violate Title IX because they are not precisely the same as those identified in *McCormick* and *Communities for Equity*. An examination of the evidence actually presented by Parker at the summary judgment stage reveals the many disadvantages, discussed above, that girls

are forced to bear by being scheduled to play more frequently on school nights. Because these harms are more than negligible, Parker is entitled to summary judgment, or at a minimum, reinstatement of her Title IX claim for trial.

III. Defendants Are Political Subdivisions, Not Arms of the State that Are Entitled to Eleventh Amendment Immunity.

In addition to her Title IX claim, Parker brought a claim pursuant to 42 U.S.C. § 1983, asserting that Defendants' discriminatory scheduling violates the Equal Protection Clause.[16] Without reaching the merits of this claim, the district court granted summary judgment to Defendants on the basis that Indiana local school districts are "arms of the state," and therefore immune from suit under the Eleventh Amendment. The Seventh Circuit and Indiana state courts have long held to the contrary. *See EEOC v. North Gibson Sch. Corp.*, 266 F.3d 607, 621 n.10 (7th Cir. 2001), *abrogated on other grounds*, *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002); *Bd. of Trs. of Hamilton Heights Sch. Corp. v. Landry*, 638 N.E.2d 1261, 1266 (Ind. Ct. App. 1994).[17] Thus, the only conceivable basis for the district court's decision is Indiana's recent alteration of its educational financing scheme. *See* Ind. Pub. L. 146-2008, House Enrolled Act 1001, §§ 450-529 (2008) (amending Education Title), *available at* http://www.in.gov/legislative/bills/2008/HE/HE1001.1.html.; *see also* Digest of HB 1001, http://www.in.gov/apps/lsa/session/billwatch/billinfo?year=2008&session=1&request=getBill&docno=1001 (last visited Jan. 19, 2011) (summary of Public Law 146). However, as discussed *infra*, this new Indiana law prohibits local school districts from levying a

[16] Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

[17] This Court did not provide its rationale for concluding in *EEOC v. North Gibson School Corporation* that Indiana school districts are not arms of the state. *See* 266 F.3d at 621 n.10 (7th Cir. 2001).

property tax for the purpose of tuition expenses and replaces this portion of local education funding with a state sales tax that is redistributed to school districts. Pub. L. 146 Sec. 333(f). This law does not change the established status of school districts as political subdivisions, and therefore the district court's decision should be reversed.

Under the Eleventh Amendment, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974) (internal citations omitted). This grant of immunity, however, is limited: The Eleventh Amendment bars suit only against a state and arms of the state, not political subdivisions such as counties and municipal corporations. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir. 1987). The distinction between arms of the state and political subdivisions is animated by the "impetus" for Eleventh Amendment immunity, that is, "prevent[ing] . . . federal-court judgments that must be paid out of a State's treasury." *Burrus v. State Lottery Comm'n of Ind.*, 546 F.3d 417, 422-23 (7th Cir. 2008) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994)). The party asserting that the Eleventh Amendment applies carries the burden of persuasion. *See Baxter by Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 734 n.5 (7th Cir. 1994), *superseded by statute on other grounds as recognized by Holmes v. Marion County Office of Family and Children*, 349 F.3d 914, 919 (7th Cir. 2003); *see also Woods v. Rondout*, 466 F.3d 232, 237 (2d Cir. 2006) (collecting cases and noting "unanimous[]" agreement that the burden rests with the party asserting immunity).

"A local school district ordinarily is not a 'State' and hence may be sued in federal court for damages or other retroactive relief for violations of . . . the constitution." *Gary A. v. New Trier High Sch. Dist. No. 203*, 796 F.2d 940, 945 (7th Cir. 1986) (citing *Mt. Healthy*, 429 U.S. at 280). Indeed, this Court and an Indiana appellate court have concluded that Indiana school districts are

"not an arm of the state government and therefore [are] not entitled to Eleventh Amendment immunity." *North Gibson Sch. Corp.*, 266 F.3d at 621 n.10; s*ee also Landry*, 638 N.E.2d at 1266 (same). These decisions are in accordance with the vast majority of courts nationwide, which have held that local school districts in a slew of states are not immune from suit. *See Eason v. Clark County Sch. Dist.*, 303 F.3d 1137, 1141 (9th Cir. 2002) (collecting cases).

Public Law 146 does not provide a basis for the district court's departure from these authorities. In its decision, the district court acknowledged that it was following *Long v. Franklin Community School Corporation*, No. 1:08-cv-0890, 2010 WL 3781350 (S.D. Ind. Sept. 21, 2010). (*See* Doc. No. 126 at 3-4; App. A-1 at 3-4). It did so despite the fact that the *Long* court, unsatisfied with either party's briefing on the impact of Public Law 146, stated that *Long*'s "precedential effect, even in this Court, is nil and its persuasive effect, if any, should be and is intended to be strictly limited to the circumstances and arguments presented in this case." *Long*, 2010 WL 3781350, at *2.

In relying on *Long*, the district court accepted the baseless assumption that, after Public Law 146, the payment of any judgment against Defendants would by necessity come from each district's "General Fund."[18] It did so despite noting that Defendants had failed "to explain why" a judgment against them "would have to be paid from their respective General Funds," which are used for general operating expenses. (Doc. No. 126 at 10; App. A-1 at 10).[19] The district court further relied on "common knowledge" to determine that Defendants' General Funds are largely derived from state support, even though it noted that Defendants failed to cite evidence

[18] The district court referred to the relevant Indiana law as "Public Law 148," not "Public Law 146." (*See* Doc. No. 126 at 6; App. A-2). However, it is clear from the court's discussion that it was referring to the latter in its analysis.

[19] Although Defendants repeatedly argued before the district court that material facts were undisputed, they did not delineate such facts in their briefing. In this regard, Defendants failed to comply with S.D. Ind. L.R. 56.1, for they included no section in their Brief in Support of their Motion for Summary Judgment labeled "Statement of Material Facts Not in Dispute." (*See* Doc. No. 49).

"quantifying what percentage of [their] operating revenues" are state-supported. (*Id.* at 6). Finally, the court concluded, without any actual basis in law or evidence, that "the state would have to make up any losses in the . . . General Funds by providing additional funding so that the School Defendants could meet the state's educational mandates." (*Id.* at 11).

Contrary to the district court's conclusion, Public Law 146 did not cause a sea change in financing or state control of school districts that creates Eleventh Amendment immunity. It altered the method of financing districts' General Funds, replacing a local property tax for tuition expenses with a state sales tax redistributed to districts. However, it did not change districts' power—or in some cases, duty—under state law to create and operate other types of funds, and to do so in whole or in part through local financing. It also left intact longstanding authority at the local level to impose some taxes and issue bonds, and it maintained provisions of the Indiana Code that define school districts as "political subdivisions" and treat them as autonomous entities.

Therefore, school districts have not been transformed into arms of the state, and the equal protection claim pursuant to Section 1983 must be reinstated.

A. Under The Governing Precedent, Defendants Are Political Subdivisions.

In determining whether Defendants are arms of the state, the Court must "look primarily at two factors": (1) the extent of their financial autonomy from the state; and (2) their general legal status. *Burrus*, 546 F.3d at 420 (citing *Kashani*, 813 F.2d at 845-47, which holds that Purdue University is an arm of the state).

The first factor—the extent of financial autonomy from the state—is the most important, as "the vulnerability of the State's purse [i]s the most salient factor in Eleventh Amendment determinations." *Hess*, 513 U.S. at 48. The extent of a district's financial autonomy is in turn determined by analyzing five subparts: (1) the state's oversight and control of Defendants' fiscal

affairs; (2) Defendants' ability to raise funds independently of the state; (3) whether the state taxes Defendants; (4) the extent of state funding; and (5) whether a judgment against Defendants would result in an increase in state appropriations to them. *Peirick*, 510 F.3d at 695-96; *Kashani*, 813 F.2d at 845.

With respect to the second factor—the Defendants' general legal status—relevant considerations include whether the state statutory scheme defines political subdivisions to include school districts; whether Defendants exercise autonomy from the state in terms of leadership and activities; and the geographic scope of the area served by Defendants. *See Peirick*, 510 F.3d at 696; *Kashani*, 813 F.2d at 846-48.

In its seminal decision in *Mt. Healthy*, the Supreme Court looked to four factors to conclude that an Ohio school district was not entitled to Eleventh Amendment immunity. The Court recognized that the district was subject to some guidance from the State and received a "significant" amount of money from the State. 429 U.S. at 280. However, it also emphasized that the district maintained a board with extensive power to issue bonds and levy taxes "within certain restrictions of state law" and was defined by state law as a "political subdivision," not a state agency. *Id.* The Supreme Court concluded, on balance, that the school board was "more like a county or city" than an arm of the state, *id.*, and thus did not enjoy immunity from suit, *id.* at 281.

Similarly, in *Gary A.*, this Court concluded that Illinois school districts are subject to suit in federal court. As the Supreme Court did in *Mt. Healthy*, it took for granted that Illinois school districts received significant state support. 796 F.2d at 945. However, to conclude that districts were political subdivisions, it relied on other factors that outweighed such state support, such as the fact that districts had "extensive powers to issue bonds and levy taxes and usually pay their own judgments" and that they served local communities, not the entire state. *Id.* at 945 & n.9. In *Gary A.*, this Court deemed it "irrelevant" that "state aid may find its way to the plaintiffs' pockets,"

noting that to hold otherwise "would provide immunity to municipalities," almost all of which receive some state funding. *Id.* at 945. Rather, the Court focused on whether a judgment in effect runs against both the district and the state. *Id.* Because the state was not required to reimburse the district for a judgment against it, but had merely chosen to do so, this factor did not support a finding of immunity.

In *Landry*, the Indiana Court of Appeals determined that Indiana school districts, such as Defendants here, are not arms of the state. The court considered it highly relevant that Indiana school districts "have the power to levy taxes, to issue bonds, and to pay their own judgments." 638 N.E.2d at 1265. Moreover, the court concluded that Indiana law treats school districts for multiple purposes as "political subdivisions." *Id.* Finally, the court emphasized that the school districts can sue and be sued, enter contracts, and serve local communities, not the state as a whole. *Id.*

B. Defendants Are Financially Autonomous from the State.

As *Landry* concluded, and like the school districts in *Mt. Healthy* and *Gary A.*, Defendants retain substantial financial autonomy from Indiana, and so are properly subject to suit. Even assuming they receive the bulk of all funding from state support, an assertion unsupported by Defendants at summary judgment, such support is outweighed by other considerations. Defendants are able to raise their own funds through bonds or taxes, including funds to pay judgments, and the applicable state law and evidence suggest that the state would not bear the cost of any judgment against Defendants in this case. Moreover, Defendants failed to show that the state controls the management of their financial affairs.

1. Defendants introduced no evidence demonstrating that the state closely oversees and controls their fiscal affairs.

The record is bereft of any evidence that the state oversees and controls the fiscal affairs of Defendants. Before the district court, Defendants claimed only that the State Division of Local Government Finance ("DLGF") provided fiscal oversight of the Defendants. But, as the district court concluded, Defendants' evidence shows at most that the DLGF has oversight of local school districts with regard to school construction projects. (Doc. No. 126 at 7-8; App. A-1 at 7-8).[20] Such power is not tantamount to control of Defendants' financial affairs. *Compare Kashani*, 813 F.2d at 846 (noting that Purdue University's finances were subject to careful examination by the state, and that Purdue would have to report the payment of a judgment to the legislature). Moreover, even assuming that DLGF provides some oversight of specific projects, Defendants failed to show that this oversight is different in kind from that applicable to cities and towns, which are unquestionably political subdivisions, not arms of the state.

Because the Defendants failed to meet their burden of showing that the state oversees and controls their fiscal affairs, this factor favors rejection of Defendants' immunity claim.

2. Defendants are able to raise funds independently of the state, including funds to pay judgments.

Indiana local school corporations continue to exercise substantial control over their financial affairs after the enactment of Public Law 146, retaining the power to issue bonds and impose levies and some property taxes. Such power strongly suggests the districts are not arms of the state. *See, e.g., Mt. Healthy*, 429 U.S. at 280; *Kashani*, 813 F.2d at 843; *Gary A.*, 796 F.2d at 945.

Defendants may levy the amount of property taxes they deem necessary in their judgment "to produce income sufficient to conduct and carry on the public schools committed to" that

[20] In fact, the State Board of Education does not have the power to approve or disapprove construction or repair plans except when federal money or law is involved, or the project concerns a special school for children with disabilities. Ind. Code § 20-19-2-13.

governing body, Ind. Code § 20-44-2-2, even though they no longer have the power to institute a levy for the specific purpose of tuition support, *see id.* § 20-40-3 (repealed by Public Law 146). They may also place a referendum tax levy on the ballot if one is necessary to "carry out [a district's] public educational duty." *Id.* § 20-46-1-8. Moreover, they may impose property taxes for other specific costs, such as capital projects, *id.* § 20-46-6-5, qualified utility and insurance expenses, *id.* § 20-46-6-6, advances received for an educational technology program, *id.* § 20-46-6-7, and repayment of emergency loans, *id.* § 20-48-1-4.

Defendants also have broad power to issue bonds. Most strikingly, state law specifically authorizes them to issue bonds for the purpose of funding judgments. *Id.* § 20-48-1-1(b)(2). Defendants may also issue bonds to fund, for example, real estate, *id.* § 20-48-1-1, and "contractual retirement or severance liability," *id.* § 20-48-1-2(c). School corporations bear the risk of unwise decisions in the bond market as well. Where a school corporation fails to pay the principal and interest due on its general obligation bonds, the state will pay those obligations for the corporation. However, it may do so only to the extent that it deducts such payments from the appropriations already designated for the school district, including tuition support that the state would otherwise provide; the school district's financial inability to pay its bond obligations "does not create a debt of the state." *Id.* § 20-48-1-11(c), (d).

Defendants' power to levy taxes and issue bonds to pay judgments is critical in the immunity inquiry. For example, in *Kashani*, this Court emphasized that Purdue University had no taxing authority, which "ensure[d] [its] ultimate fiscal reliance upon the state," and although the university could issue bonds, "[p]aying a judgment . . . [wa]s not one of the purposes" for which such power was authorized. 813 F.2d at 846. Purdue University's lack of authority in this regard contributed to this Court's ultimate holding that the university was an arm of the state and so immune from suit. In contrast, Defendants' bond and tax powers give them "an important kind of

independence" from the state, and specifically contemplate bonds to fund judgments, a fact that weighs heavily in favor of their status as political subdivisions. *Id.*

3. The state does not tax Defendants.

Plaintiffs concede that Defendants, as Indiana school corporations, are exempt from taxation. Normally, this factor might suggest that they are arms of the state; however, Indiana has exempted *all* political subdivisions from taxation. *See Kashani*, 813 F.2d at 846. Thus, as the district court concluded (Doc No. 126 at 9-10; App. A-1 at 9-10), the "state taxation" factor is neutral in this case. *Kashani*, 813 F.2d at 846.

4. Defendants failed to demonstrate the extent of their reliance on state funding, and in any event, such funding is outweighed by other factors.

Defendants offered no quantum of evidence — let alone established the absence of a genuine issue of material fact — to show that the majority of their overall funding is provided by the state. Although they introduced some evidence suggesting that their General Funds, which are used toward operations, are now exclusively dependent on state funding (*see* Doc. No. 49-2 at 3), they did not assert that other funds either required or permitted by state law are likewise exclusively state-supported, and their own documents indicate that this is not the case, (*see id.* at 2). Moreover, Defendants did not assert or produce evidence to show that their General Funds provide the bulk of their operating expenses.

Defendants' bare assertions in this case fall far short of demonstrating that they receive significant overall support from the state. *Compare*, *e.g.*, *Kashani*, 813 F.2d at 845 (detailing, in at least one case to one-tenth of a percent, the sources of a university's state and other funding). The district court in turn simply relied on the "common knowledge" that schools receive "most" of their funding from the state. (Doc. No. 126 at 6; App. A-1 at 6). This kind of "hunch" cannot be the basis of a claim's dismissal. *See Baxter*, 26 F.3d at 734 n.5.

In any event, even assuming that Defendants "receive[] 'a significant amount of money from the state,'" that "does not mean that [they] [are] an arm of the state." *Gary A.*, 796 F.2d at 945 (quoting *Mt. Healthy*, 429 U.S. at 280). Even substantial funding may be outweighed by other relevant factors. *See, e.g., Duke v. Grady Mun. Sch.*, 127 F.3d 972, 980, 981 (10th Cir. 1997) (holding that a New Mexico school district that received 98 percent of its funding from the state was not entitled to Eleventh Amendment immunity because the extent of state support was outweighed by other considerations). In *Landry*, the Indiana state appeals court reached just such a conclusion, determining that Indiana's "significant" funding of local school corporations was outweighed by other factors, such as the fact that Indiana school districts "have the power to levy taxes, to issue bonds, and to pay their own judgments." 638 N.E.2d at 1265. Defendants' own documents indicate that in 1994, the year *Landry* was decided, the average Indiana school corporation already received 71 percent of its General Fund revenue from the state. (*See* Doc. No. 49-2 at 3). Thus, even assuming that this share of state funding increased after Public Law 146, whether a "significant" amount of a district's funding comes from the state is not dispositive.

Defendants did not carry their burden of persuasion for the purpose of summary judgment, so the "extent of state funding" factor favors rejection of Defendants' immunity claim. Moreover, even assuming a "significant" share of state funding, such assumption is outweighed by the other factors in this section.

5. A judgment against Defendants need not result in an increase in state appropriations.

Finally, despite Defendants' assertions to the contrary, there is absolutely no evidence that a judgment against them would directly affect state coffers. The district court assumed that any judgment would be paid from Defendants' General Funds, and that if such General Funds were used, the state would be forced to reimburse Defendants to ensure that educational mandates are

met. Both assumptions are unfounded, and indeed contradict Indiana state law and evidence introduced by Parker.

First, state law makes clear that Defendants may or must create certain other Funds in addition to their General Funds, and that some of these funds could be used to pay a judgment. Indiana school corporations are *required* by state law to create a "Debt Service Fund." Ind. Code § 20-40-9-4. "Money in the fund may be used for payment of . . . [a]ll debt and other obligations arising out of funds borrowed to pay judgments against the school corporation." *Id.* § 20-40-9-6. The requirement that school districts maintain such funds weighs in favor of finding them subject to suit. *See Woods*, 466 F.3d at 249-50. Defendants are also permitted to create a "Self Insurance Fund" against potential liability for the payment of a judgment against them. Ind. Code § 20-40-12-4. This fund may be used to pay a "claim . . . or settlement for which the school corporation is liable under a federal . . . statute." *Id.* § 20-40-12-5. The existence of such authority indicates that it is school districts, not the state, that bear responsibility for judgments against them. Moreover, Defendants may create a Referendum Tax Levy Fund, to which they may funnel money obtained through a referendum levy and which they may use to pay any lawful expenses of the school corporation, which would presumably include a judgment. *Id.* § 20-40-3-5.

Second, Defendants may pay judgments against them by issuing bonds or purchasing liability policies. Unlike Purdue University in *Kashani*, Defendants have explicit authority to issue bonds to pay a judgment, *id.* § 20-48-1-1(b), and so enjoy a "separate financial basis" from the state in this respect, 813 F.2d at 846. Further, there is evidence that the Defendants have purchased liability insurance for claims against them in matters such as the instant action. Defendants noted during discovery that they requested copies of insurance agreements under which an insurance company may be liable to satisfy part or all of a judgment that may be entered in this action. (*See* Doc. No. 58-1 at 1).

In any event, it is "irrelevant" whether state appropriations, once in the "General Funds" of Defendants, are used to pay a judgment. *Gary A.*, 796 F.2d at 945; *see also Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 234 (3d Cir. 2006) (rejecting immunity argument based on fact that funds used to pay a judgment once belonged to the state but had been transferred to a board of education, at least absent evidence that the state still controlled or retained ownership of funds). Defendants did not produce any evidence before the district court that showed the state has an *obligation* in this case to reimburse the districts for, or pay directly, any judgments against them, and there does not appear to be any legal support for such an obligation. The district court's assumption that the State would be compelled to reimburse Defendants simply has no basis.

C. Defendants' General Legal Status Is that of Political Subdivisions.

In addition to financial autonomy, this Court must examine the general legal status of Defendants to determine whether immunity is warranted. As noted above, this Court should consider whether the state statutory scheme defines political subdivisions to include school districts; whether Defendants exercise autonomy from the state in terms of leadership and other activities; and the geographic scope of the area served by Defendants. *See Peirick*, 510 F.3d at 696; *Kashani*, 813 F.2d at 846-48. These considerations all favor holding that Defendants are not entitled to immunity.

1. Defendants are defined by statute as political subdivisions.

Under Indiana's Local Government law, a "political subdivision" includes a school corporation. *See* Ind. Code §§ 36-1-2-13; 36-1-2-10. And as further evidence that Indiana law does not treat Defendants as arms of the state, its State Budget Act, which defines "state agencies," excludes "school districts . . . []or other municipal corporations or political subdivisions." *Id.* § 4-

12-1-2(d). *Compare Kashani*, 813 F.2d at 845-46 (noting that Indiana's Budget Agency Act defined Purdue University, held to be an arm of the state, as a "state agency").

2. Defendants have a great degree of autonomy from the state.

The State has granted very broad powers to Defendants. School corporations enjoy home rule, "possessing all the powers granted by statute" or rules of the state board, and "all other powers necessary or desirable in the conduct of the[ir] . . . affairs." Ind. Code § 20-26-3-3(a),(b). This authority includes the power to sue and be sued, purchase real and personal property, make budgets, and purchase insurance. *See generally id.* § 20-26-5-4. If there is a question as to whether a school corporation has any particular power, the question is resolved in favor of the existence of the power. *Id.* § 20-26-3-2. In addition, the regulatory role of the state over school corporations is limited to that expressly prescribed by statute. *Id.* § 20-26-3-6.

Moreover, Defendants failed to introduce evidence that the State maintains substantial control over districts' boards of education, a "very significant" fact in the determination of immunity. *See Kashani*, 813 F.2d at 847. In *Kashani*, for example, this Court noted that the Governor of Indiana appointed a majority of Purdue University's Board of Trustees, a fact which "circumscribed" the Board's independence, and helped the Court conclude Purdue was an arm of the state. *Id.* In this case, Defendants do not and could not claim that any state official appoints members of the boards. Generally, board members of county school corporations are composed of township trustees, Ind. Code § 20-23-1-1, who are elected by voters living within the bounds of the school corporation or appointed by a variety of purely local officials, *see id.* § 20-23-4-1 *et seq.*

3. Defendants serve local communities, not the entire state.

Finally, Defendants serve local communities, not the State of Indiana as a whole, which favors holding that they are not arms of the state. *See Kashani*, 813 F.2d at 847-48 (citing *Mt. Healthy*, 429 U.S. at 280). Indiana "could have established a single state agency to control all

public education instead of establishing local school districts," and in so doing, it "might have conferred eleventh amendment immunity on that agency." *Gary A.*, 796 F.2d at 945 n.9. "Instead, it chose to organize public education through local school districts that do not have immunity." *Id.* Defendants are therefore subject to suit.

For all of the foregoing reasons, Defendants are not entitled to immunity because they are not arms of the state. Instead, they are defined as political subdivisions by law, possess a broad degree of autonomy, and can levy taxes and issue bonds to pay judgments.

IV. Defendants' Discriminatory Scheduling Policy Violates J.L.P. and C.H's Right to Equal Protection Under the Law.

Since as demonstrated in Part III, Defendants are political subdivisions, not arms of the state, Parker can maintain a cause of action against them pursuant to Section 1983. She may pursue her Section 1983 claim that Defendants' discriminatory scheduling policy violates the Equal Protection Clause alongside her Title IX claim. *See Barnstable v. Fitzgerald*, 129 S. Ct. 788, 797 (2009); *Trentadue v. Redmon*, 619 F.3d 648, 652 (7th Cir. 2010) (recognizing that *Barnstable* abrogated this circuit's case law to the contrary).

While the district court did not reach the merits of Parker's equal protection claim, there are sufficient undisputed facts in the record for this Court to determine whether Defendants' violated J.L.P. and C.H.'s constitutional rights, and the issue has been fully briefed. This Court may therefore reach the substance of the Section 1983 claim, and avoid unnecessary delay for plaintiffs. *See Whitman v. Bartow*, 434 F.3d 968, 971 n.1 (7th Cir. 2006); *Hasbro, Inc. v. Catalyst USA, Inc.*, 367 F.3d 689, 692 (7th Cir. 2004). Because Parker has set forth a *prima facie* equal protection claim and Defendants have not met their burden to demonstrate an exceedingly persuasive justification for the discriminatory treatment, Parker is entitled to summary judgment.

A. Parker's Equal Protection Claim Is Actionable Under Section 1983.

Defendants, as municipal entities, may be held liable under Section 1983 only for "'acts or edicts [that] may fairly be said to represent official policy.'" *Woods v. City of Mich. City*, 940 F.2d 275, 278 (7th Cir. 1991) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). To determine whether Defendants bear responsibility for the discriminatory scheduling at issue in this case, the court must determine whether Defendants maintain an official policy, practice, or custom that deprives J.L.P. and C.H. of their constitutional rights. *See McNabola v. Chi. Transit Auth.*, 10 F.3d 501, 511 (7th Cir. 1993). "[A]gency action in accordance with delegated authority, actions by individuals with final decisionmaking authority, inaction or custom" may all constitute evidence of such municipal action. *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1324 (7th Cir. 1993).

In this case, the official schedules of the schools—enshrined in contracts—constitute an "'affirmative[] command'" that boys receive preferential scheduling slots, while girls are relegated to second-class days and times. *McNabola*, 10 F.3d at 510 (quoting *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)). The athletic directors have the power to bind the school districts to contracts for future games. (*See* Foster Dep. at 16; *see also* Simonson Dep. at 6 (Franklin County High School principal stating that scheduling was the athletic director's "responsibilit[y]")). They conduct negotiations, (Foster Dep. at 16); form contracts on behalf of the schools, (*id.*); and wield the power to unilaterally block changes in schedules with other Defendants, (*id.* at 40). The athletic directors, therefore, have either final policymaking authority with respect to scheduling, or act in accordance with such authority delegated to them.[21]

[21] In the alternative, the athletic directors' scheduling practices were surely custom, given the great difficulty of trying to change them. (*See, e.g.*, Foster Dep. at 19-21). Local school boards, superintendents, and principals acquiesced in this "standard operating procedure" of discrimination. *McNabola*, 10 F.3d at 510 (quoting *Jett*, 491 U.S. at 737). Both the length of a practice and its broad scope of application "support the inference that policymaking officials must have known about it but failed to stop it." *Id.* at 511 (internal quotation marks omitted). The scheduling in this case dates at least to 1997, when OCR sent a letter to all

B. Defendants Treat Male And Female Athletes Differently on the Basis of Sex.

Parker set forth a *prima facie* equal protection claim against Defendants. First, she introduced sufficient evidence to show that J.L.P. and C.H. are members of a protected class of female basketball players, *Greer v. Amesqua*, 212 F.3d 358, 370 (7th Cir. 2000), who are similarly situated to male basketball players. Defendants conceded this point before the district court. (Doc. No. 83 at 31).

Moreover, as discussed in detail in Sections II.B. and II.C., *supra*, Defendants treat J.L.P. and C.H. differently from male athletes. *See Greer*, 212 F.3d at 370. Defendants have conceded that the Franklin girls' basketball team is relegated to non-primetime play far more frequently than the boys' basketball team, at least by twenty-five percentage points.

Finally, Defendants make scheduling decisions using facially gender-based classifications, and they enter into contracts that distinguish between the girls' and boys' teams. Where, as here, there exists a facially gender-based classification that results in unequal treatment between boys and girls in athletics, intent is established as a matter of law for the purpose of an equal protection violation. *See Cmtys. for Equity II*, 459 F.3d at 694 ("Disparate treatment based upon facially gender-based classifications evidences an intent to treat the two groups [of male and female athletes] differently."); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 527 (E.D. Pa. 1987) (noting that "intent" for the purpose of an equal protection athletics claim "is provided by [a school's] explicit classification of intercollegiate athletic teams on the basis of gender").[22]

Indiana superintendents warning that the widespread practice of reserving primetime play for boys was likely discriminatory.

[22] Before the district court, Defendants argued that Parker must show that discriminatory scheduling policies were chosen at least in part *because of* their adverse impact on girls. (*See* Doc. No. 83, at 31 (citing *Chavez v. Ill. State Police*, 251 F.3d 612, 645 (7th Cir. 2001))). However, this standard applies only where equal protection claims involve *facially neutral* policies. *See, e.g.*, *Chavez*, 251 F.3d at 635-36; *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996). Because Defendants use facially gender-based classifications,

C. Defendants Have Not Met Their Burden to Demonstrate An "Exceedingly Persuasive Justification" for the Discriminatory Scheduling of Girls' Basketball.

Because Parker has established that Defendants used a gender-based distinction in their scheduling practices, Defendants bear the burden of "demonstrat[ing] an 'exceedingly persuasive justification' for th[eir] [gender-based] 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)); *see also Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996). They "must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. at 533 (internal quotation marks and alterations omitted).

Defendants fail to meet this "demanding" burden of justification. *Id.* Before the district court, Defendants recognized that there were scheduling inequities between the Franklin girls' and boys' basketball teams. (*See* Doc. No. 83 at 31). However, their only response to this inequity was that it was "difficult to change the schedules with four year contracts" and that Defendants could not make scheduling changes unilaterally. (*Id.* at 32). They asserted that when Franklin County's athletic director approached other Defendants about the possibility of doubleheaders for boys and girls on the weekend, recalcitrant athletic directors refused. (*Id.* at 31; *see also* Foster Dep. at 22).

Thus, Defendants' have advanced no important governmental objective whatsoever for their discriminatory scheduling, much less an exceedingly persuasive one. To the extent that they are claiming administrative ease as a justification, that does not constitute an important governmental objective justifying gender-based classifications. *Craig v. Boren*, 429 U.S. 190, 198 (1976); *Reed v. Reed*, 404 U.S. 71, 76 (1971).

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there is "no requirement upon [Parker] to show that an evil, discriminatory motive animated [Defendants'] scheduling" of girls' and boys' basketball games. *Cmtys. for Equity II*, 459 F.3d at 694.

Defendants' arguments make clear that they are denying girls the equal protection of the law. Defendants give boys first-class treatment by scheduling them to play in primetime and treat girls as second-class athletes. They will not change their discriminatory practices unless they are ordered to do so. Therefore, this Court must reverse the district court's grant of summary judgment to Defendants, instead granting summary judgment to Parker on her constitutional claim, and so ensure that girls are given the equal treatment to which they are entitled.

Conclusion

For the reasons set forth above, this Court should reverse the district court's grant of summary judgment to Defendants on the Title IX and equal protection claims, reverse its denial of Parker's cross-motion for summary judgment on the same claims, and remand to the district court to formulate the appropriate remedy.

Respectfully submitted,

s/ William R. Groth

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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 13,588 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 12-point Baskerville Old Face for the main text and 11-point Baskerville Old Face for footnotes.

Dated: January 24, 2011

s/ William R. Groth
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Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, and accompanying Appendix, has been served, via first class mail, postage prepaid, upon:

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on this 24th day of January, 2011.

s/ Mark W. Sniderman
Mark W. Sniderman

SHORT APPENDIX

CASE NO: 10-3595

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMBER PARKER, *et al.*,
Plaintiffs-Appellants,

v.

INDIANA HIGH SCHOOL
ATHLETIC ASSOCIATION, *et al.*,
Defendants-Appellees.

CERTIFICATION PURSUANT TO CIRCUIT RULE 30(d)

Come now plaintiffs-appellants, by their counsel of record, and pursuant to Circuit Rule 30(d) certify that the following Short Appendix in this cause, consisting of the trial court's Entry on Motion for Partial Summary Judgment, Entry on Motions for Summary Judgment and Entry of Judgment, contains all of the materials required by Circuit Rule 30(a); and contains *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, pursuant to Circuit Rule 30(b) and Rule 32(b)(2) of the Federal Rules of Appellate Procedure.

Dated: January 24, 2011

s/ William R. Groth
William R. Groth, *Counsel of Record*
Attorney for Appellants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMBER PARKER et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	**Cause No. 1:09-cv-885-WTL-JMS**
INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION et al.,	)	
	)	
Defendants.	)	
	)	

ENTRY ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the Court is a Motion for Partial Summary Judgment (Docket No. 29) filed by the School Defendants.[1] This motion is fully briefed, and the Court being duly advised, now **GRANTS** the School Defendants' motion for the reasons set forth below.

I. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c)(2) provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the admissible evidence presented by the non-moving party must be believed and all

[1] The School Defendants are: Franklin County Community School Corporation, South Dearborn Community School Corporation, Decatur County Community Schools, Switzerland County School Corporation, Fayette County School Corporation, Lawrenceburg School Community Corporation, Greensburg Community Schools Corporation, Sunman-Dearborn Community School Corporation, Richmond Community Schools Corporation, Batesville Community School Corporation, Jennings County School Corporation, Rush County Schools Corporation, Union County School Corporation d/b/a Union County College Corner Joint School District, and Muncie Community Schools Corporation.

reasonable inferences must be drawn in the non-movant's favor. *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009). However, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007). Finally, the non-moving party bears the burden of specifically identifying the relevant evidence of record, and "the court is not required to scour the record in search of evidence to defeat a motion for summary judgment." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001).

II. BACKGROUND

Amber Parker is the mother of J.L.P., who previously played basketball for the Franklin County High School ("FCHS") girls' basketball team.[2] From 2007 to 2009, Parker also served as the head coach of the FCHS girls' basketball team. Tammy Hurley is the mother of C.H., who currently plays for the FCHS girls' basketball team.[3]

The Plaintiffs' suit alleges that the School Defendants and the Indiana High School Athletic Association ("IHSAA") violated Title IX of the Education Amendments of 1972 and the Fourteenth Amendment of the United States Constitution[4] by scheduling girls' basketball games on non-preferred dates and times. The gist of the Plaintiffs' claim is that the Defendants

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[2] In July 2010, the Parker family relocated to Massachusetts. Accordingly, J.L.P. withdrew from FCHS and she no longer plays basketball for the school. Nonetheless, for the time being, Parker and J.L.P. remain plaintiffs in this suit.

[3] After the Parkers decided to move out of state, the Plaintiffs filed an unopposed motion to add Hurley and C.H. Docket No. 116. The Court granted the Plaintiffs' motion on July 27, 2010. Docket No. 117.

[4] The Plaintiffs' Fourteenth Amendment claim is brought pursuant to 42 U.S.C. § 1983.

assigned boys' basketball teams to play on preferred dates and times, typically Friday and Saturday evenings, more frequently than the Defendants assigned girls' basketball teams to play at these preferred times.

The Defendants filed motions to dismiss, which the Court granted in part and denied in part.[5] *See* Docket No. 56. Upon reconsideration, the Court again granted in part and denied in part the Defendants' motions to dismiss.[6] *See* Docket No. 77. What remains to be resolved are the Title IX and § 1983 claims against the School Defendants and the § 1983 claim against the IHSAA. The School Defendants now assert that they are immune from the Plaintiffs' § 1983 claim pursuant to the Eleventh Amendment to the United States Constitution.

III. DISCUSSION

Before beginning its analysis the Court notes that in *Long v. Turner*, 1:08-cv-890-SEB-TAB, Judge Barker addressed the same issue that this Court faces here. Indeed, the parties to the instant case have called the Court's attention to the briefs and the Entry from the *Long* case. As Judge Barker cautioned, district court cases do not have any precedential authority and thus, although the Court does not rely on Judge Barker's decision, the Court believes that her analysis

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[5] The Court dismissed any claims that Parker purported to bring as a class action, as well as any claims brought by Parker's younger daughter, H.K.P. In reliance on *Doe v. Smith*, 470 F.3d 331 (7th Cir. 2006), the Court also dismissed the Fourteenth Amendment claim against the School Defendants. Finally, the Court concluded that the IHSAA was not a recipient of federal funds and thus was not a proper Title IX defendant. Accordingly, the Court dismissed the Title IX claims against the IHSAA.

[6] Based on new Supreme Court case law, *Fitzgerald v. Barnstable School Committee*, 129 S. Ct. 788 (2009), which recognized parallel rights of action under Title IX and § 1983, the Court reinstated the Plaintiffs' Fourteenth Amendment Claim against the School Defendants. However, the Court reiterated its conclusion that the Title IX claim against the IHSAA, as well as any class action claims and any claims brought by H.K.P. were properly dismissed.

and her conclusion are persuasive. Thus, the Court shall use the same approach as Judge Barker and ultimately the Court reaches the same conclusion. With that in mind, the Court turns now to the Eleventh Amendment analysis.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. "The bar of the Eleventh Amendment to suit in federal courts extends to States and state officials in appropriate circumstances but does not extend to counties and similar municipal corporations." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). Although there are exceptions to this blanket rule, the Plaintiffs have not alleged that any of them apply. Accordingly, if the School Defendants are arms of the state for Eleventh Amendment purposes, then they are immune from the Plaintiffs' § 1983 suit. The arm of the state analysis is governed by a two-part inquiry. First, and most important, "is the extent of the entity's financial autonomy from the state." *Kashani v. Purdue Univ.*, 813 F.2d 843, 845 (7th Cir. 1987). Second, the Court must consider the entity's general legal status. *Id*. at 847.

A. The School Defendants' financial autonomy.

In assessing financial autonomy courts consider: "(1) the extent of state funding; (2) the state's oversight and control of the entity's fiscal affairs; (3) the entity's ability to raise funds; (4) whether the entity is subject to state taxation; and (5) whether a judgment against the entity would result in an increase in its appropriations." *Peirick v. IUPUI Athletics Dept.*, 510 F.3d 681, 696 (7th Cir. 2007); *see Kashani*, 813 F.2d at 845.

1. Extent of state funding.

The Indiana Code sets out a non-exhaustive list of fourteen operating funds from which schools can draw funds. They are the: (1) General Fund; (2) Referendum Tax Levy Fund; (3) Special Education Preschool Fund; (4) Racial Balance Fund; (5) School Transportation Fund; (6) School Bus Replacement Fund; (7) Capital Projects Fund; (8) Debt Service Fund; (9) Levy Excess Fund; (10) Repair and Replacement Fund; (11) Self-Insurance Fund; (12) Petty Cash Fund; (13) Special Purpose Funds without Local Tax; and (14) School Technology Fund. *See* IND. CODE 20-40-2 to -15. Although the Indiana Code establishes all fourteen funds, only some are required, some are necessary only in certain situations, and some may be created at a school corporation's discretion. One of the required funds is the General Fund, which is the primary source of monies for a school corporation. Teacher salaries and benefits, supplies, and utility costs are paid from the General Fund. General Fund monies may also be used to pay expenses that would normally come from other funds so long as this activity is not prohibited by state law. The General Fund is also used to finance other funds.

Until recently, Indiana public school corporations' General Funds were financed primarily through local property tax levies, which were left largely to the discretion of the school corporation. There was only minimal state supplementation. Following the 2008 enactment of Public Law 148, the school financing regime has shifted. Now, schools' General Funds are primarily funded by the state – from distributions from the statewide sales tax. In addition, school corporations' abilities to levy property taxes to raise funds have been severely limited. However, this is not to say that school corporations cannot use property tax levies to fill other school funds. For example, a school corporation can impose a School Bus Replacement Levy to

raise money for its School Bus Replacement Fund.[7] *See* IND. CODE 20-46-5-1 to -12.

The School Defendants argue that the enactment of Public Law 148 has effectively given the state total control over the their General Funds. *See* Docket No. 30 at 9-10. The School Defendants analogize *Kashani* and posit that because a judgment in this case "would be paid directly out of funds allocated from the state treasury to the respective schools," they should benefit from Indiana's Eleventh Amendment immunity. *Id*. at 10. In response, the Plaintiffs allege that the School Defendants do not receive all of their funding from the state because the School Defendants have admitted the "receipt of federal funding." Docket No. 58 at 9. Further, the Plaintiffs note that the School Defendants have not explained which funds, or what proportion of each fund, is state-supported. *See id.* at 10. It is true that the School Defendants do retain some ability to levy property taxes for specific purposes. However, neither party cites any evidence quantifying what percentage of the School Defendants' operating revenues is provided by the state. In addition, neither party effectively compares the instant situation to *Kashani*, where thirty-six percent of the university's income was provided by the state. 813 F.2d at 845. However, because the General Fund is the primary source of income for the School Defendants, and because it is common knowledge that the state now provides the bulk of the School Defendants' General Funds, the Court concludes that this factor weighs in the School Defendants' favor.

2. State oversight and control of fiscal affairs.

With respect to the second factor, the School Defendants argue: "To the extent that the

[7] Similarly, Racial Balance Levies, School Transportation Levies, Capital Projects Levies, and Debt Service Levies are all permitted by the Indiana Code. *See* IND. CODE 20-46-3-1 to -9; IND. CODE 20-46-4-1 to -10; IND. CODE 20-46-6-1 to -20; IND. CODE 20-46-7-1 to -14.

School Defendants have locally raised funds (Capital Projects and Debt Service), in recent years with the Governor's leadership, the State has taken on almost complete oversight and control over such funds through the Department of Local Government Finance ("DLGF")." Docket No. 30 at 12. The School Defendants rely on the DLGF website and mission statement, which state that the DLGF is "responsible for ensuring property tax assessment and local government budgeting are carried out in accordance with Indiana law." *Id*. In addition, the DLGF "is charged with publishing property tax assessment rules and annually reviewing and approving the tax rates and levies of every political subdivision in the state, including all counties, cities, townships, school corporations, libraries, and other entities with tax levy authority." *Id*. The School Defendants do not explain whether the DLGF's review and approval is substantive. However, as the School Defendants note, the DLGF website states:

> The Department is committed to working with schools and other government agencies to review school construction funding to ensure fiscal responsibility on behalf of Indiana taxpayers . . . . [T]he Department reviews school construction proposals and makes a decision to approve, disapprove, or modify the project. The review of the project goes beyond the bricks and proposed classrooms.

Id.

In response, the Plaintiffs argue that "[t]he State has very little control over the School Defendants." Docket No. 58 at 7. The Plaintiffs claim that the "Board of Education is bereft of any power to approve or disapprove plans and specifications regarding the construction, alteration, or repair of school buildings" and "[t]he state has now power . . . that is commensurate with that of the School Defendants regarding the operations of school corporations." *Id*. In essence the Plaintiffs assert that "the School Defendants, as school corporations, possess a great degree of power, independence and autonomy from the state, and

this factor militates against a conclusion that they are arms of the state." *Id*. at 8. Unfortunately, the Plaintiffs' argument ignores the fact that the focus of the inquiry is the School Defendants' *financial* affairs, not their affairs in general.

In sum, the Court concludes that neither side has adequately described the DLGF's oversight of the School Defendants. At most, the School Defendants have shown that the DLGF has oversight with respect to school construction projects; however, this does not automatically mean that the DLGF controls all of the School Defendants' financial affairs. The School Defendants have the burden of showing that they are financially dependent on the state and they have not met this burden. Accordingly, this factor cuts in the Plaintiffs' favor.

3. Ability to raise funds.

The School Defendants claim that their ability to independently raise funds was effectively eliminated by *Nagy v. Evansville-Vanderburgh School Corp.*, 844 N.E.2d 481 (Ind. 2006). According to the School Defendants, *Nagy* "held that schools could not impose additional fees outside of the State dollars." Docket No. 30 at 13. "While schools retain some limited ability to raise funds, this only occurs in two areas, construction and transportation, and these two areas are highly regulated." *Id*.

Nagy's holding, however, is substantially narrower than the School Defendants claim. In *Nagy*, the Evansville-Vanderburgh School Corporation imposed a $20 activity fee on all students. The Indiana Supreme Court reviewed Article 8, Section 1 of the Indiana Constitution, which provides:

> Knowledge and learning, generally diffused throughout a community, being essential to the preservation of a free government; it shall be the duty of the General Assembly to encourage, by all suitable means, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and

> uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.

IND. CONST. art VIII, § 1. The court discussed the historical development of common schools in Indiana and the meaning of "tuition" and concluded that the $20 fee, which was deposited into the school's general fund and was used to "offset the costs of such things as: a coordinator of student services, nurses, media specialists, alternative education, elementary school counselors, a drama program, a music program, speech and debate programs, academic academies, athletic programs, and a police liaison program," was a violation of the Indiana Constitution. *Nagy*, 844 N.E.2d at 492. The court explained that "either the legislature or the State Board [of Education] has already determined that all such items are part and parcel of a public school education and by extension qualify for public funding." *Id*. Therefore, "the very programs, services, and activities for which [the school] charges a fee already are a part of a publicly-funded education in the state of Indiana." *Id*. at 493. Although the school could charge a fee for services, activities, or programs that were outside of those required by the legislature or the State Board of Education, the school could not charge students for things that were mandatory parts of a public education. *Id*. *Nagy* did not discuss the school's ability to raise funds through tax levies, bonds, or other charges. And indeed, Indiana school corporations can still use tax levies to raise money to be deposited into certain funds. However, as discussed below with respect to the fifth factor, this factor weighs in the School Defendants' favor.

4. State taxation.

The Defendants do not offer any argument about the fourth factor and the Plaintiffs concede that "school corporations are exempt from taxation." Docket No. 58 at 12. However, as the Plaintiffs rightly note, this factor is neutral because "Indiana has exempted political

subdivisions from taxation," *id*., and political subdivisions (as well as counties and cities) are undisputedly not arms of the state.

5. Increased appropriations following a judgment.

Thus, we come to the fifth and final factor of the financial autonomy analysis. The School Defendants argue that this factor cuts in their favor because "[a] judgment against the School Defendants would be paid from their General Funds and thus would be paid out of state tuition support money which would then need to be replaced by the State to maintain the level of instruction for the school." Docket No. 30 at 13. Although the School Defendants assert that a judgment would have to be paid from their respective General Funds, they fail to explain why this is true.[8] In response, the Plaintiffs cite IND. CODE 20-48-1-1(b) and argue that the "School Defendants are . . . allowed to issue a bond to pay the cost of a judgment that may be entered against them." Docket No. 58 at 9. However, this argument is flawed because it assumes either that the School Defendants already have enacted such a levy or that voters would automatically approve a tax levy to pay a judgment against the School Defendants.

Further, the Plaintiffs do not dispute the fact that if a judgment in this case must be paid from the School Defendants' General Funds, then the result would be an increase in state appropriations to make up the shortfall. This would be, in effect, a judgment against the state treasury. The state calculates General Fund revenue for each school based on what is known as the Foundation Program which is, in effect, a pre-determined formula designed to supply the School Defendants with the operational revenue that the state considers necessary. *See* Docket

[8] Specifically, the School Defendants fail to explain why a judgment could not be paid from their Debt Service or Self-Insurance Funds.

No. 30 at 9-10. The Foundation Program does not account for judgments against the School Defendants; therefore, the state would have to make up any losses in the School Defendants' General Funds by providing additional funding so that the School Defendants could meet the state's educational mandates. Therefore, this factor weighs against the School Defendants' financial autonomy from the state.

What this analysis reveals is that Indiana supplies the majority of the School Defendants' operational budgets, the School Defendants are not able to raise additional revenue independent of the state, and if a judgment were entered against the School Defendants the state would be required to increase its appropriations to the School Defendants. Therefore, the School Defendants are not financially autonomous because the state exercises substantial oversight and control over their finances. Accordingly, this portion of the analysis weighs in favor of finding that the School Defendants are arms of the state and thus enjoy Eleventh Amendment immunity.

B. The School Defendants' general legal status.

The School Defendants concede that this portion of the arm of the state analysis is of lesser importance. Docket No. 30 at 13. Nonetheless, they claim that this factor cuts in their favor because the Indiana Supreme Court's decisions in *Nagy* and in *Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009),

> recognized the exclusive and almost unbridled discretion the State of Indiana through the General Assembly has over local schools and the fact that these local schools are now under the almost exclusive direction and control of the State of Indiana through comprehensive legislation by the General Assembly, comprehensive rulemaking by the Indiana State Board of Education and the State Board of Accounts, and day to day regulation by the Indiana Department of Education and State Superintendent of Public Instruction.

Docket No. 30 at 13-14.

The Court does not read either *Nagy* or *Bonner* as broadly as do the School Defendants. Further, the Court agrees with the Plaintiffs that portions of the Indiana Code define school corporations as non-state entities. In addition, there is nothing in the record indicating that members of the School Defendants' governing boards are appointed by state officials. *See* Docket No. 58 at 6-7, 13. In fact, the converse is true – the School Defendants independently elect their decisionmakers. This tends to show that the School Defendants are not arms of the state. Accordingly, the Court concludes that the School Defendants' general legal status is not as an arm or agency of the state.

Nevertheless, the School Defendants' financial dependence on the state of Indiana far outweighs their generally independent legal status. Therefore, the Court concludes that the Eleventh Amendment immunity enjoyed by the state of Indiana extends to the School Defendants in this case.

CONCLUSION

For the foregoing reasons, the School Defendants' Motion for Partial Summary Judgment (Docket No. 29) is **GRANTED**.

SO ORDERED: 09/27/2010

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMBER PARKER et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Cause No. 1:09-cv-885-WTL-WGH**
	)	
INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION et al.,	)	
	)	
Defendants.	)	
	)	

ENTRY ON MOTIONS FOR SUMMARY JUDGMENT

Presently before the Court are three motions for summary judgment – one filed by the School Defendants[1] (Docket No. 82), one filed by the Plaintiffs (Docket No. 92), and one filed by the Indiana High School Athletic Association (Docket No. 108). All of these motions are fully briefed, and the Court being duly advised, now **GRANTS** the School Defendants' motion, **DENIES** the Plaintiffs' motion, and **GRANTS** the Indiana High School Athletic Association's motion.

I. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c)(2) provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

[1] The Plaintiffs sued fourteen Indiana school corporations: Franklin County Community School Corporation, South Dearborn Community School Corporation, Decatur County Community Schools, Switzerland County School Corporation, Fayette County School Corporation, Lawrenceburg Community School Corporation, Richmond Community Schools, Batesville Community School Corporation, Jennings County Schools, Rush County Schools, Union County/College Corner Joint School District, and Muncie Community Schools. For simplicity's sake the Court will refer to these Defendants as the "School Defendants" throughout this Entry.

the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment, the admissible evidence presented by the non-moving party must be believed and all reasonable inferences must be drawn in the non-movant's favor. *Zerante v. DeLuca*, 555 F.3d 582, 584 (7th Cir. 2009). However, "[a] party who bears the burden of proof on a particular issue may not rest on its pleadings, but must affirmatively demonstrate, by specific factual allegations, that there is a genuine issue of material fact that requires trial." *Hemsworth v. Quotesmith.com, Inc.*, 476 F.3d 487, 490 (7th Cir. 2007). Finally, the non-moving party bears the burden of specifically identifying the relevant evidence of record, and "the court is not required to scour the record in search of evidence to defeat a motion for summary judgment." *Ritchie v. Glidden Co.*, 242 F.3d 713, 723 (7th Cir. 2001).

II. BACKGROUND

The Indiana High School Athletic Association ("IHSAA") is an Indiana not-for-profit corporation that administers interscholastic athletic competitions among its member schools. To this end, the IHSAA promulgates rules and regulations for its members and their students. The IHSAA also sponsors season-ending tournaments, which it terms "Tournament Series Contests," for the twenty sports that it recognizes. Although the IHSAA schedules Tournament Series Contests, the scheduling of all other games, which are known as "Season Contests," is left to member schools. The IHSAA does not permit its members to schedule Season Contests on Sundays. It also, with some limited exceptions not relevant here, does not allow its members to

schedule either girls' or boys' basketball teams to play more than two weeknight[2] Season Contests per week. Finally, the IHSAA dictates when, and for how long, athletic seasons run. For example, the IHSAA allows its members to schedule boys' basketball Season Contests "beginning on Monday, week 21 of the IHSAA calendar, until the starting date of the basketball sectional of the Boys' Basketball Tournament Series." Docket No. 109 at 6. Similarly, "[m]ember schools may schedule girls' basketball Season Contests beginning on Monday, week 19 of the IHSAA calendar, until the starting date of the basketball sectional in the Girls' Basketball Tournament Series." *Id*. at 7.

Amber Parker is the mother of J.L.P., who previously played basketball for the Franklin County High School ("FCHS") girls' basketball team.[3] From 2007 to 2009, Parker also served as the head coach of the FCHS girls' basketball team. Tammy Hurley is the mother of C.H., who currently plays for the FCHS girls' basketball team.[4]

Parker and Hurley brought this suit on behalf of their daughters, alleging that the School Defendants and the IHSAA violated Title IX of the Education Amendments of 1972 and the Fourteenth Amendment of the United States Constitution[5] by scheduling girls' basketball games on non-preferred dates and times. The gist of the Plaintiffs' claim is that the Defendants

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[2] The IHSAA defines a weekday as "a night game when school is scheduled the next day." Docket No. 109 at 6-7.

[3] In July 2010, the Parker family relocated to Massachusetts. Accordingly, J.L.P. withdrew from FCHS and no longer plays basketball for the school.

[4] After the Parkers decided to move out of state, the Plaintiffs filed an unopposed motion to add Hurley and C.H as plaintiffs. Docket No. 116. The Court granted the Plaintiffs' motion on July 27, 2010. Docket No. 117.

[5] The Plaintiffs' Fourteenth Amendment claim is brought pursuant to 42 U.S.C. § 1983.

assigned boys' basketball teams to play on preferred dates and times, typically Friday and Saturday evenings, more frequently than the Defendants assigned girls' basketball teams to play at these preferred times.

III. DISCUSSION

The Court previously dismissed the Title IX claim against the IHSAA, *see* Docket No. 77, and on September 27, 2010, the Court granted the School Defendants' partial motion for summary judgment on the Plaintiffs' § 1983 claim. *See* Docket No. 126. Thus, what remains to be resolved is the Plaintiffs' Title IX claim against the School Defendants and the Plaintiffs' § 1983 claim against the IHSAA.

A. Title IX claim against the School Defendants.

Title IX provides, with some exceptions not relevant here, that "[n]o 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(a). The Department of Education's athletic regulations interpret Title IX and set forth the standards for assessing whether an institution's athletic programs are in compliance with Title IX. The parties and the Court agree that under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Department of Education's regulations are entitled to deference. "'The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX.'" *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004) (quoting *Cohen v. Brown Univ.*, 991 F.3d 888, 895 (1st Cir. 1993)).

The relevant regulation states:

> A recipient which 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 Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provision of equipment and supplies;
> (3) Scheduling of games and practice time;
> (4) Travel and per diem allowance;
> (5) Opportunity to receive coaching and academic tutoring;
> (6) Assignment and compensation of coaches and tutors;
> (7) Provision of locker rooms, practice and competitive facilities;
> (8) Provision of medical and training facilities and services;
> (9) Provision of housing and dining facilities and services;
> (10) Publicity.

34 C.F.R. § 106.41(c) (2000). The first factor, "[w]hether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes," *id.* § 106.41(c)(1), is associated with so-called effective accommodation claims. *See Pederson v. Louisiana State Univ.*, 213 F.3d 858, 865 n.4 (5th Cir. 2000); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 115 (2d Cir. 1999). Effective accommodation claims allege that the selection of sports or the number of opportunities for participation by female athletes are unequal. *See Boucher*, 164 F.3d at 115. Factors two through ten are geared toward another issue – equal treatment. An example of an equal (or unequal) treatment claim is an allegation that a school provides "unequal scholarship funding to varsity female athletes as compared to varsity male athletes." *Id.* The Plaintiffs in this case assert an equal treatment claim against the School Defendants based on the School Defendants' scheduling of girls' and boys' basketball games.

A Policy Interpretation issued in 1979 by the Department of Health, Education, and

Welfare's Office for Civil Rights[6] and used by the Department of Education's Office for Civil Rights explains how the Department of Education interprets the Title IX regulations. This document, entitled Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (hereinafter "1979 Policy Interpretation"), is given substantial deference by the courts. *See Cohen*, 991 F.2d at 896-97. Although the 1979 Policy Interpretation "is designed specifically for intercollegiate athletics . . . its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by the regulation." 44 Fed. Reg. at 71,413. The 1979 Policy Interpretation is divided into three sections, which address: (1) compliance in financial assistance (scholarships) based on athletic ability; (2) compliance in other program areas; and (3) compliance in meeting the interests and abilities of male and female students. *Id*. at 71,414. Part two, compliance in other program areas, corresponds to 34 C.F.R. § 106.41(c)(2)-(10), and is relevant to the instant case.

The 1979 Policy Interpretation explains:

> The Department will assess compliance with . . . the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

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[6] The Department of Health, Education, and Welfare ("HEW") was the predecessor to the modern Department of Education. In 1979, Congress split HEW into the Department of Health and Human Services and the Department of Education. *See* Department of Education Organization Act, Public Law Number 96-88, 93 Stat. 669 (1979) (codified at 20 U.S.C. §§ 3401-3510). All educational functions were transferred to the Department of Education, *see* 20 U.S.C. § 3441(a)(1), and all HEW regulations in effect when the split occurred were duplicated by the Department of Education. *See* 34 C.F.R. pt. 106.

44 Fed. Reg. at 71,415. For each program component (e.g., equipment and supplies, scheduling of games and practice time, or travel and per diem allowance) the 1979 Policy Interpretation lists the factors that should be examined to determine compliance. With respect to the scheduling of games and practice times the interpretation states:

> Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
> (1) The number of competitive events per sport;
> (2) The number and length of practice opportunities;
> (3) The time of day competitive events are scheduled;
> (4) The time of day practice opportunities are scheduled; and
> (5) The opportunities to engage in available pre-season and post-season competition.

44 Fed. Reg. at 71,416. The 1979 Policy Interpretation also states that the Department of Education's determination of compliance is based on:

> a. Whether the policies of an institution are discriminatory in language or effect; or
> b. Whether 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; or
> c. Whether 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.

Id. at 71,417. What this means is that a disparity in a single program component, such as scheduling, *can* constitute a violation of Title IX if the disparity is "substantial enough . . . to deny equality of athletic opportunity." *Id*. However, the 1979 Policy Interpretation does not require identical scheduling for boys' and girls' sports. Moreover, a disparity that disadvantages one sex in one area can be offset by a benefit to that sex in another area. In the instant case the School Defendants have not provided the Court with any evidence that their female athletes receive better treatment than their male counterparts so as to offset any disadvantage resulting

from the School Defendants' basketball scheduling practices. Accordingly, the Court must determine whether the disparity in the scheduling of girls' basketball games is substantial enough by itself to deny the Plaintiffs equality of athletic opportunity.

The Plaintiffs cite *McCormick*, 370 F.3d at 275, and *Communities for Equity v. Michigan High School Athletic Ass'n*, 178 F.Supp 2d. 805 (W.D. Mich. 2001), *aff'd*, 459 F.3d 676 (6th Cir. 2006), in support of their argument that the School Defendants' disparate scheduling of girls' and boys' basketball games is significant enough to constitute a stand alone violation of Title IX. However, the Court does not believe that either of these cases is analogous to the instant situation.

McCormick arose out of the scheduling of girls' high school soccer in New York. The majority of school districts scheduled girls' soccer in the fall and the state championship was held in the fall. Nonetheless, the defendant school districts – Pelham and Mamaroneck – scheduled their girls' soccer seasons in the spring. As a result, girls who played soccer for Pelham or Mamaroneck could not compete in the state championship. *McCormick*, 370 F.3d at 280. Members of the Pelham and Mamaroneck girls' soccer teams filed suit alleging that the schools' scheduling practices violated Title IX. *Id*. Following a trial, the district court entered judgment for the schools and the plaintiffs appealed. The Second Circuit concluded that the scheduling disparity was significant enough to violate Title IX and accordingly reversed the lower court. The appellate court was swayed by the fact that "[t]he scheduling of soccer in the spring . . . places a ceiling on the possible achievement of the female soccer players that they cannot break through no matter how hard they strive. The boys are subject to no such ceiling." *Id*. at 295.

Similarly, in *Communities for Equity*, the Michigan High School Athletic Association ("MHSAA") scheduled "athletic seasons and tournaments for six girls' sports during less advantageous times of the academic year than boys' athletic seasons and tournaments." 178 F.Supp. 2d at 807. By "less advantageous" the plaintiffs meant that the girls' sports were "played in a non-traditional season, i.e., a season of the year different from when the sport is typically played." *Id*. The plaintiffs alleged that "the non-traditional season [was] a disadvantageous time of the year to play the sport." *Id*. The district court concluded that the MHSAA's scheduling practices imposed a number of specific disadvantages to the girls' sports teams scheduled during non-traditional seasons. These disadvantages were countered by very few potential advantages to the girls' teams. The court explained that the scheduling practice deprived girls of "contemporaneous role models, skills development, and team-building opportunities." *Id*. Based on these disadvantages, the district court concluded that the MHSAA "violated and continues to violate Title IX by scheduling seasons of the sports at issue in the manner which it has." *Id*. at 857.

Despite the Plaintiffs' arguments to the contrary the instant case is not similar to either *McCormick* or *Communities for Equity*. In *McCormick*, the schools' scheduling of girls' soccer deprived girls of an opportunity to compete for a state championship. Boys were not denied such an opportunity. In *Communities for Equity*, the MHSAA scheduled only girls' sports out-of-season. In the instant case the Plaintiffs play basketball during the "appropriate" season and they are able to compete for the state championship. The Plaintiffs' complaint is that they are scheduled to play on non-preferred dates more frequently than the boys' team. This does not deprive the Plaintiffs of role models, inhibit their skills development, or prevents team-building.

Unlike *Communities for Equity* and *McCormick*, where the defendants' conduct affected the plaintiffs' athletic development and capped their ability for athletic achievement, in the instant case the School Defendants' conduct does not hinder the Plaintiffs' development of basketball skills. In short, the disparity in treatment in this case simply does not rise to the level seen in either *Communities for Equity* or *McCormick*. The School Defendants' treatment of the Plaintiffs does not result in a disparity that is so substantial that it denies the Plaintiffs equality of athletic opportunity. Accordingly, there is no violation of Title IX and the School Defendants' motion for summary judgment is **GRANTED**.

B. Equal protection claim against the IHSAA.

The Plaintiffs' Fourteenth Amendment Equal Protection claim against the IHSAA is brought pursuant to 42 U.S.C. § 1983. "To be liable under 42 U.S.C. § 1983 for violating the Fourteenth Amendment, an entity . . . must be considered a 'state actor.'" *Communities for Equity*, 178 F. Supp. 2d at 846. In addition, "[t]o state a Fourteenth Amendment claim, Plaintiffs must also allege that Defendant treats high school boys differently from girls." *Id*. at 848. "Once Plaintiffs have established a gender classification, the burden of justifying the classification shifts to Defendant, and the justification must be 'exceedingly persuasive.'" *Id.* In other words, in order to succeed, the Plaintiffs in the instant case must establish that they suffered deprivation of a federally-recognized right (the Fourteenth Amendment) perpetrated by a state actor (the IHSAA).

The IHSAA does not challenge the Plaintiffs' assertion that it is a state actor. And, based on the Indiana Supreme Court's decision in *IHSAA v. Carlberg*, 694 N.E.2d 222, 229 (Ind. 1997), it appears that the IHSAA is a state actor. Accordingly, the Court turns to the second

prong of the § 1983 analysis and considers whether the IHSAA has violated the Plaintiffs' Fourteenth Amendment Equal Protection rights.

The Plaintiffs concede that the IHSAA has not taken any direct action against them. It is undisputed that the Plaintiffs' § 1983 claim stems from the scheduling of Season Contests. It is also undisputed that the IHSAA does not schedule either boys' or girls' basketball Season Contests. Although the IHSAA regulates how many weeknight games can be played each week and the IHSAA ultimately controls the length of the basketball season, these responsibilities are managed in an undisputedly even-handed and non-discriminatory manner by the IHSAA.

Apparently in recognition of the fact that the IHSAA has not taken any discriminatory action against them, the Plaintiffs propose a novel theory that purports to hold the IHSAA liable for its "deliberate indifference to gender-based discrimination." Docket No. 94 at 27. According to the Plaintiffs, despite the fact that the IHSAA was "warned in 1997 by [the Office of Civil Rights] that some of its member schools may be engaged in discriminatory scheduling practices, IHSAA decided to look the other way." *Id*. at 28. And, in spite of a "January 24, 2009 article in the *Indianapolis Star* . . . showing that these inequalities persisted, and despite the fact that it regulates most other aspects of the scheduling of high school basketball competitions[,] [t]he IHSAA made a conscious choice to remain on the sidelines." *Id*. Thus, the Plaintiffs argue that "by failing to mandate gender equality in the scheduling of basketball games during prime times through its otherwise expansive regulatory powers in accordance with its policy of deliberate indifference, IHSAA is actually facilitating discriminatory gender-based scheduling by its member schools." *Id*.

The problem with the Plaintiffs' argument is that despite their rhetoric, they have not

cited a single federal case that supports using a deliberate indifference theory to hold the IHSAA liable in this situation. The cases that the Plaintiffs cite deal with pretrial detainees, false arrests, and students subjected to sexual harassment or bullying. None of these cases are analogous to the present situation. Just because the Plaintiffs have allegedly suffered an injury does not mean that they can hold the IHSAA liable. Before a state actor's failure to act can give rise to legal liability, there must be a constitutionally recognized duty on the defendant to act. *See Jackson v. Byrne*, 738 F.2d 1443, 1446 (7th Cir. 1984). Here, the Plaintiffs point to no such duty on behalf of the IHSAA. Accordingly, the IHSAA's motion for summary judgment is **GRANTED**.

CONCLUSION

For the foregoing reasons, the School Defendants' Motion for Summary Judgment (Docket No. 82) is **GRANTED**. The Plaintiffs' Motion for Summary Judgment (Docket No. 92) is **DENIED**. The Indiana High School Athletic Association's Motion for Summary Judgment (Docket No. 108) is **GRANTED**.

SO ORDERED: 10/06/2010

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

AMBER PARKER et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**Cause No. 1:09-cv-885-WTL-WGH**
	)	
INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION et al.,	)	
	)	
Defendants.	)	
	)	

JUDGMENT

The Court having this date granted the Defendants' motions for summary judgment, judgment is hereby **ENTERED** in favor of the Defendants on the Plaintiffs' Complaint.

SO ORDERED: 10/06/2010

William T Lawrence

Hon. William T. Lawrence, Judge
United States District Court
Southern District of Indiana

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Appendix G

U.S. Department of Education Athletic Guidelines, 44 Fed. Reg. 71413 (1979)

federal register

Tuesday
December 11, 1979

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

■

Intercollegiate Athletics: Sex Discrimination
HEW/Secretary/Civil Rights Office issues policy interpretation of Title IX Education Amendments of 1972: effective 12-11-79

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT: Colleen O'Connor, 330 Independence Avenue, Washington, D.C. (202) 245-6671

SUPPLEMENTARY INFORMATION:

I. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

> 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.

Section 844 of the Education Amendments of 1974 further provides:

> The Secretary of (of HEW) shall prepare and publish * * * proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.[1]

[1] The regulation specifically refers to club sports separately from intercollegiate athletics. Accordingly, under this Policy Interpretation, club

Footnotes continued on next page

Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

- *Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:* Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.
- *Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services):* Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.
- *Compliance in Meeting the Interests and Abilities of Male and Female Students:* Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and
- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either:

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or
- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. In most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

(3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditures patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department

Footnotes continued from last page
teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition.

published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

A. Athletic Financial Assistance (Scholarships)

1. *The Regulation*—Section 86.37(c) of the regulation provides:

> [Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in * * * inter-collegiate athletics.[2]

2. *The Policy*—The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. *Application of the Policy*—a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. *Definition*—For purposes of examining compliance with this Section, the participants will be defined as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. *The Regulation*—The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club, or intramural athletics, "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics, the regulation requires the Department to consider, among others, the following factors:

(1) [3]

(2) Provision and maintenance of equipment and supplies;

(3) Scheduling of games and practice times;

(4) Travel and per diem expenses;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training services and facilities;

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

(10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.[4]

2. *The Policy*—The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits' Amendment"[5] to Title IX, which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation,

[2] See also § 86.37(a) of the regulation.

[3] 86.41(c) (1) on the accommodation of student interests and abilities, is covered in detail in the following Section C of this policy Interpretation.

[4] See also § 86.41(a) and (b) of the regulation.

[5] Section 844 of the Education Amendments of 1974, Pub. L. 93-380, Title VIII, (August 21, 1974) 88 Stat. 612.

nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such diferences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports—notably football and men's basketball—traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at § 86.3(b) of the regulation.

3. *Application of the Policy—General Athletic Program Components*—a. *Equipment and Supplies (§ 86.41(c)(2)).* Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies, instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) The quality of equipment and supplies;

(2) The amount of equipment and supplies;

(3) The suitability of equipment and supplies;

(4) The maintenance and replacement of the equipment and supplies; and

(5) The availability of equipment and supplies.

b. *Scheduling of Games and Practice Times (§ 86.41(c)(3)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) The number of competitive events per sport;

(2) The number and length of practice opportunities;

(3) The time of day competitive events are scheduled;

(4) The time of day practice opportunities are scheduled; and

(5) The opportunities to engage in available pre-season and post-season competition.

c. *Travel and Per Diem Allowances (§ 86.41(c)(4)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(1) Modes of transportation;

(2) Housing furnished during travel;

(3) Length of stay before and after competitive events;

(4) Per diem allowances; and

(5) Dining arrangements.

d. *Opportunity to Receive Coaching and Academic Tutoring (§ 86.41(c)(5)).* (1) Coaching—Compliance will be assessed by examining, among other factors:

(a) Relative availability of full-time coaches;

(b) Relative availability of part-time and assistant coaches; and

(c) Relative availability of graduate assistants.

(2) Academic tutoring—Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

(a) The availability of tutoring; and

(b) Procedures and criteria for obtaining tutorial assistance.

e. *Assignment and Compensation of Coaches and Tutors (§ 86.41(c)(6)).*[6] In general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) Assignment of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Training, experience, and other professional qualifications;

(b) Professional standing.

(2) Assignment of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

(a) Tutor qualifications;

(b) Training, experience, and other qualifications.

(3) Compensation of Coaches—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

(a) Rate of compensation (per sport, per season);

(b) Duration of contracts;

(c) Conditions relating to contract renewal;

(d) Experience;

(e) Nature of coaching duties performed;

(f) Working conditions; and

(g) Other terms and conditions of employment.

(4) Compensation of Tutors—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

[6] The Department's jurisdiction over the employment practices of recipients under Subpart E, §§ 86.51–86.61 of the Title IX regulation has been successfully challenged in several court cases. Accordingly, the Department has suspended enforcement of Subpart E. Section 86.41(c)(6) of the regulation, however, authorizes the Department to consider the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes. It is on this section of the regulation that this Policy Interpretation is based.

(a) Hourly rate of payment by nature of subjects tutored;
(b) Pupil loads per tutoring season;
(c) Tutor qualifications;
(d) Experience;
(e) Other terms and conditions of employment.

f. *Provision of Locker Rooms, Practice and Competitive Facilities (§ 86.41(c)(7)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(1) Quality and availability of the facilities provided for practice and competitive events;
(2) Exclusivity of use of facilities provided for practice and competitive events;
(3) Availability of locker rooms;
(4) Quality of locker rooms;
(5) Maintenance of practice and competitive facilities; and
(6) Preparation of facilities for practice and competitive events.

g. *Provision of Medical and Training Facilities and Services (§ 86.41(c)(8)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(1) Availability of medical personnel and assistance;
(2) Health, accident and injury insurance coverage;
(3) Availability and quality of weight and training facilities;
(4) Availability and quality of conditioning facilities; and
(5) Availability and qualifications of athletic trainers.

h. *Provision of Housing and Dining Facilities and Services (§ 86.41(c)(9)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(1) Housing provided;
(2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. *Publicity (§ 86.41(c)(10)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:
(1) Availability and quality of sports information personnel;
(2) Access to other publicity resources for men's and women's programs; and
(3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. *Application of the Policy—Other Factors (§ 86.41(c)).* a. *Recruitment of Student Athletes.*[7] The athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:
(1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;
(2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and
(3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. *Provision of Support Services.* The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:
(1) The amount of administrative assistance provided to men's and women's programs;
(2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. *Overall Determination of Compliance.* The Department will base its compliance determination under § 86.41(c) of the regulation upon an examination of the following:
a. Whether the policies of an institution are discriminatory in language or effect; or
b. Whether 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; or
c. Whether 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.

C. Effective Accommodation of Student Interests and Abilities.

1. *The Regulation.* The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at § 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available—

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

2. *The Policy.* The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:
a. The determination of athletic interests and abilities of students;
b. The selection of sports offered; and
c. The levels of competition available including the opportunity for team competition.

3. *Application of the Policy—Determination of Athletic Interests and Abilities.*

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:
a. The processes take into account the nationally increasing levels of women's interests and abilities;
b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
c. The methods of determining ability take into account team performance records; and
d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. *Application of the Policy—Selection of Sports.*

In the selection of sports, the regulation does not require institutions

[7] Public undergraduate institutions are also subject to the general anti-discrimination provision at § 86.23 of the regulation, which reads in part:

"A recipient * * * shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action * * * and may choose to undertake such efforts as affirmative action * * *"

Accordingly, institutions subject to § 86.23 are required in all cases to maintain equivalently effective recruitment programs for both sexes and, under § 86.41(c), to provide equivalent benefits, opportunities, and treatment to student athletes of both sexes.

to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. Non-Contact Sports—Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. *Application of the Policy—Levels of Competition.*

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(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.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(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; or

(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.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. *Overall Determination of Compliance.*

The Department will base its compliance determination under § 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. 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

c. Whether 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.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in § 86.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights Act of 1964.[8] The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.[9]

According to the regulation, there are two ways in which enforcement is initiated:

- *Compliance Reviews*—Periodically the Department must select a number of recipients (in this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX. (45 CFR 80.7(a))
- *Complaints*—The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate.

[8] Those procedures may be found at 45 CFR 80.6–80.11 and 45 CFR Part 81.

[9] *WEAL v. Harris*, Civil Action No. 74–1720 (D. D.C., December 29, 1977)

If the plan is not adequate to correct the violations (or to correct them within a reasonable period of time) the recipient will be found in noncompliance and voluntary negotiations will begin. However, if the institutional plan is acceptable, the Department will inform the institution that although the institution has violations, it is found to be in compliance because it is implementing a corrective plan. The Department, in this instance also, would monitor the progress of the institutional plan. If the institution subsequently does not completely implement its plan, it will be found in noncompliance.

When a recipient is found in noncompliance and voluntary compliance attempts are unsuccessful, the formal process leading to termination of Federal assistance will be begun. These procedures, which include the opportunity for a hearing before an administrative law judge, are set forth at 45 CFR 80.8–80.11 and 45 CFR Part 81.

IX. Authority

(Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374, 20 U.S.C. 1681, 1682; sec. 844, Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 612; and 45 CFR Part 86)

Dated: December 3, 1979.

Roma Stewart,

Director, Office for Civil Rights, Department of Health, Education, and Welfare.

Dated: December 4, 1979.

Patricia Roberts Harris,

Secretary, Department of Health, Education, and Welfare.

Appendix A—Historic Patterns of Intercollegiate Athletics Program Development

1. Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. During the 1977–78 academic year women students accounted for 48 percent of the national undergraduate enrollment (5,496,000 of 11,267,000 students).[1] Yet, only 30 percent of the intercollegiate athletes are women.[2]

The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women.[3]

2. Participation by women in sports is growing rapidly. During the period from 1971–1978, for example, the number of female participants in organized high school sports increased from 294,000 to 2,083,000—an increase of over 600 percent.[4] In contrast, between Fall 1971 and Fall 1977, the enrollment of females in high school decreased from approximately 7,600,000 to approximately 7,150,000 a decrease of over 5 percent.[5]

The growth in athletic participation by high school women has been reflected on the campuses of the nation's colleges and universities. During the period from 1971 to 1976 the enrollment of women in the nation's institutions of higher education rose 52 percent, from 3,400,000 to 5,201,000.[6] During this same period, the number of women participating in intramural sports increased 108 percent from 276,167 to 576,167. In club sports, the number of women participants increased from 16,386 to 25,541 or 55 percent. In intercollegiate sports, women's participation increased 102 percent from 31,852 to 64,375.[7] These developments reflect the growing interest of women in competitive athletics, as well as the efforts of colleges and universities to accommodate those interests.

3. The overall growth of women's intercollegiate programs has not been at the expense of men's programs. During the past decade of rapid growth in women's programs, the number of intercollegiate sports available for men has remained stable, and the number of male athletes has increased slightly. Funding for men's programs has increased from $1.2 to $2.2 million between 1970–1977 alone.[8]

4. On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources, services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. Presently, in institutions that are members of both the National Collegiate Athletic Association (NCAA) and the Association for Intercollegiate Athletics for Women (AIAW), the average annual scholarship budget is $39,000. Male athletes receive $32,000 or 78 percent of this amount, and female athletes receive $7,000 or 22 percent, although women are 30 percent of all the athletes eligible for scholarships.[9]

Likewise, substantial amounts have been provided for the recruitment of male athletes, but little funding has been made available for recruitment of female athletes.

Congressional testimony on Title IX and subsequent surveys indicates that discrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.[10]

5. At several institutions, intercollegiate football is unique among sports. The size of the teams, the expense of the operation, and the revenue produced distinguish football from other sports, both men's and women's. Title IX requires that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulations in the administration of any revenue producing intercollegiate athletic activity."[11] However, the unique size and cost of football programs have been taken into account in developing this Policy Interpretation.

Appendix B—Comments and Responses

The Office for Civil Rights (OCR) received over 700 comments and recommendations in response to the December 11, 1978 publication of the proposed Policy Interpretation. After the formal comment period, representatives of the Department met for additional discussions with many individuals and

[1] *The Condition of Education 1979*, National Center for Education Statistics, p. 112.

[2] Figure obtained from Association for Intercollegiate Athletics for Women (AIAW) member survey, *AIAW Structure Implementation Survey Data Summary*, October 1978, p. 11.

[3] U.S. Commission on Civil Rights, Comments to DHEW on proposed Policy Interpretation; Analysis of data supplied by the National Association of Directors of Collegiate Athletics.

[4] Figures obtained from National Federation of High School Associations (NFHSA) data.

[5] *Digest of Education Statistics 1977–78*, National Center for Education Statistics (1978), Table 40, at 44. Data, by sex, are unavailable for the period from 1971 to 1977; consequently, these figures represent 50 percent of total enrollment for that period. This is the best comparison that could be made based on available data.

[6] Ibid, p. 112.

[7] These figures, which are not precisely comparable to those cited at footnote 2, were obtained from *Sports and Recreational Programs of the Nation's Universities and Colleges*, NCAA Report No. 5, March 1978. It includes figures only from the 722 NCAA member institutions because comparable data was not available from other associations.

[8] Compiled from NCAA *Revenues and Expenses for Intercollegiate Athletic Programs*, 1978.

[9] Figures obtained from *AIAW Structure Implementation Survey Data Summary*, October, 1978, p. 11.

[10] 121 Cong. REc. 29791–95 (1975) (remarks of Senator Williams); Comments by Senator Bayh, Hearings on S. 2106 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 94th Congress, 1st Session 48 (1975); "Survey of Women's Athletic Directors," AIAW Workshop (January 1978).

[11] See April 18, 1979, Opinion of General Counsel, Department of Health, Education, and Welfare, page 1.

groups including college and university officials, athletic associations, athletic directors, women's rights organizations and other interested parties. HEW representatives also visited eight universities in order to assess the potential of the proposed Policy Interpretation and of suggested alternative approaches for effective enforcement of Title IX.

The Department carefully considered all information before preparing the final policy. Some changes in the structure and substance of the Policy Interpretation have been made as a result of concerns that were identified in the comment and consultation process.

Persons who responded to the request for public comment were asked to comment generally and also to respond specifically to eight questions that focused on different aspects of the proposed Policy Interpretation.

Question No. 1: Is the description of the current status and development of intercollegiate athletics for men and women accurate? What other factors should be considered?

Comment A: Some commentors noted that the description implied the presence of intent on the part of all universities to discriminate against women. Many of these same commentors noted an absence of concern in the proposed Policy Interpretation for those universities that have in good faith attempted to meet what they felt to be a vague compliance standard in the regulation.

Response: The description of the current status and development of intercollegiate athletics for men and women was designed to be a factual, historical overview. There was no intent to imply the universal presence of discrimination. The Department recognizes that there are many colleges and universities that have been and are making good faith efforts, in the midst of increasing financial pressures, to provide equal athletic opportunities to their male and female athletes.

Comment B: Commentors stated that the statistics used were outdated in some areas, incomplete in some areas, and inaccurate in some areas.

Response: Comment accepted. The statistics have been updated and corrected where necessary.

Question No. 2: Is the proposed two-stage approach to compliance practical? Should it be modified? Are there other approaches to be considered?

Comment: Some commentors stated that Part II of the proposed Policy Interpretation "Equally Accommodating the Interests and Abilities of Women" represented an extension of the July 1978, compliance deadline established in § 86.41(d) of the Title IX regulation.

Response: Part II of the proposed Policy Interpretation was not intended to extend the compliance deadline. The format of the two stage approach, however, seems to have encouraged that perception; therefore, the elements of both stages have been unified in this Policy Interpretation.

Question No. 3: Is the equal average per capita standard based on participation rates practical? Are there alternatives or modifications that should be considered?

Comment A: Some commentors stated it was unfair or illegal to find noncompliance solely on the basis of a financial test when more valid indicators of equality of opportunity exist.

Response: The equal average per capita standard was not a standard by which noncompliance could be found. It was offered as a standard of presumptive compliance. In order to prove noncompliance, HEW would have been required to show that the unexplained disparities in expenditures were discriminatory in effect. The standard, in part, was offered as a means of simplifying proof of compliance for universities. The widespread confusion concerning the significance of failure to satisfy the equal average per capita expenditure standard, however, is one of the reasons it was withdrawn.

Comment B: Many commentors stated that the equal average per capita standard penalizes those institutions that have increased participation opportunities for women and rewards institutions that have limited women's participation.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumptive compliance, the question of its effect is no longer relevant. However, the Department agrees that universities that had increased participation opportunities for women and wished to take advantage of the presumptive compliance standard, would have had a bigger financial burden than universities that had done little to increase participation opportunities for women.

Question No. 4: Is there a basis for treating part of the expenses of a particular revenue producing sport differently because the sport produces income used by the university for non-athletic operating expenses on a non-discriminatory basis? If, so, how should such funds be identified and treated?

Comment: Commentors stated that this question was largely irrelevant because there were so few universities at which revenue from the athletic program was used in the university operating budget.

Response: Since equality of average per capita expenditures has been dropped as a standard of presumed compliance, a decision is no longer necessary on this issue.

Question No. 5: Is the grouping of financially measurable benefits into three categories practical? Are there alternatives that should be considered? Specifically, should recruiting expenses be considered together with all other financially measurable benefits?

Comment A: Most commentors stated that, if measured solely on a financial standard, recruiting should be grouped with the other financially measurable items. Some of these commentors held that at the current stage of development of women's intercollegiate athletics, the amount of money that would flow into the women's recruitment budget as a result of separate application of the equal average per capita standard to recruiting expenses, would make recruitment a disproportionately large percentage of the entire women's budget. Women's athletic directors, particularly, wanted the flexibility to have the money available for other uses, and they generally agreed on including recruitment expenses with the other financially measurable items.

Comment B: Some commentors stated that it was particularly inappropriate to base any measure of compliance in recruitment solely on financial expenditures. They stated that even if proportionate amounts of money were allocated to recruitment, major inequities could remain in the benefits to athletes. For instance, universities could maintain a policy of subsidizing visits to their campuses of prospective students of one sex but not the other. Commentors suggested that including an examination of differences in benefits to prospective athletes that result from recruiting methods would be appropriate.

Response: In the final Policy Interpretation, recruitment has been moved to the group of program areas to be examined under § 86.41(c) to determine whether overall equal athletic opportunity exists. The Department accepts the comment that a financial measure is not sufficient to determine whether equal opportunity is being provided. Therefore, in examining athletic recruitment, the Department will primarily review the opportunity to recruit, the resources provided for recruiting, and methods of recruiting.

Question No. 6: Are the factors used to justify differences in equal average per capita expenditures for financially

measurable benefits and opportunities fair? Are there other factors that should be considered?

Comment: Most commentors indicated that the factors named in the proposed Policy Interpretion (the "scope of competition" and the "nature of the sport") as justifications for differences in equal average per capita expenditures were so vague and ambiguous as to be meaningless. Some stated that it would be impossible to define the phrase "scope of competition", given the greatly differing competitive structure of men's and women's programs. Other commentors were concerned that the "scope of competition" factor that may currently be designated as "non-discriminatory" was, in reality, the result of many years of inequitable treatment of women's athletic programs.

Response: The Department agrees that it would have been difficult to define clearly and then to quantify the "scope of competition" factor. Since equal average per capita expenditures has been dropped as a standard of presumed compliance, such financial justifications are no longer necessary. Under the equivalency standard, however, the "nature of the sport" remains an important concept. As explained within the Policy Interpretation, the unique nature of a sport may account for perceived inequities in some program areas.

Question No 7: Is the comparability standard for benefits and opportunities that are not financially measurably fair and realistic? Should other factors controlling comparability be included? Should the comparability standard be revised? Is there a different standard which should be considered?

Comment: Many commentors stated that the comparability standard was fair and realistic. Some commentors were concerned, however, that the standard was vague and subjective and could lead to uneven enforcement.

Response: The concept of comparing the non-financially measurable benefits and opportunities provided to male and female athletes has been preserved and expanded in the final Policy Interpretation to include all areas of examination except scholarships and accommodation of the interests and abilities of both sexes. The standard is that equivalent benefits and opportunities must be provided. To avoid vagueness and subjectivity, further guidance is given about what elements will be considered in each program area to determine the equivalency of benefits and opportunities.

Question No. 8: Is the proposal for increasing the opportunity for women to participate in competitive athletics appropriate and effective? Are there other procedures that should be considered? Is there a more effective way to ensure that the interest and abilities of both men and women are equally accommodated?

Comment: Several commentors indicated that the proposal to allow a university to gain the status of presumed compliance by having policies and procedures to encourage the growth of women's athletics was appropriate and effective for future students, but ignored students presently enrolled. They indicated that nowhere in the proposed Policy Interpretation was concern shown that the current selection of sports and levels of competition effectively accommodate the interests and abilities of women as well as men.

Response: Comment accepted. The requirement that universities equally accommodate the interests and abilities of their male and female athletes (Part II of the proposed Policy Interpretation) has been directly addressed and is now a part of the unified final Policy Interpretation.

Additional Comments

The following comments were not responses to questions raised in the proposed Policy Interpretation. They represent additional concerns expressed by a large number of commentors.

(1) *Comment:* Football and other "revenue producing" sports should be totally exempted or should receive special treatment under Title IX.

Response: The April 18, 1978, opinion of the General Counsel, HEW, concludes that "an institution of higher education must comply with the prohibition against sex discrimination imposed by that title and its implementing regulation in the administration of any revenue producing activity". Therefore, football or other "revenue producing" sports cannot be exempted from coverage of Title IX.

In developing the proposed Policy Interpretation the Department concluded that although the fact of revenue production could not justify disparity in average per capita expenditure between men and women, there were characteristics common to most revenue producing sports that could result in legitimate non-discriminatory differences in per capita expenditures. For instance, some "revenue producing" sports require expensive protective equipment and most require high expenditures for the management of events attended by large numbers of people. These characteristics and others described in the proposed Policy Interpretation were considered acceptable, non-discriminatory reasons for differences in per capita average expenditures.

In the final Policy Interpretation, under the equivalent benefits and opportunities standard of compliance, some of these non-discriminatory factors are still relevant and applicable.

(2) *Comment:* Commentors stated that since the equal average per capita standard of presumed compliance was based on participation rates, the word should be explicitly defined.

Response: Although the final Policy Interpretation does not use the equal average per capita standard of presumed compliance, a clear understanding of the word "participant" is still necessary, particularly in the determination of compliance where scholarships are involved. The word "participant" is defined in the final Policy Interpretation.

(3) *Comment:* Many commentors were concerned that the proposed Policy Interpretation neglected the rights of individuals.

Response: The proposed Policy Interpretation was intended to further clarify what colleges and universities must do within their intercollegiate athletic programs to avoid discrimination against individuals on the basis of sex. The Interpretation, therefore, spoke to institutions in terms of their male and female athletes. It spoke specifically in terms of equal, average per capita expenditures and in terms of comparability of other opportunities and benefits for male and female participating athletes.

The Department believes that under this approach the rights of individuals were protected. If women athletes, as a class, are receiving opportunities and benefits equal to those of male athletes, individuals within the class should be protected thereby. Under the proposed Policy Interpretation, for example, if female athletes as a whole were receiving their proportional share of athletic financial assistance, a university would have been presumed in compliance with that section of the regulation. The Department does not want and does not have the authority to force universities to offer identical programs to men and women. Therefore, to allow flexibility within women's programs and within men's programs, the proposed Policy Interpretation stated that an institution would be presumed in compliance if the average per capita expenditures on athletic scholarships for men and women, were equal. This same flexibility (in scholarships and in other areas) remains in the final Policy Interpretation.

(4) *Comment:* Several commentors stated that the provision of a separate dormitory to athletes of only one sex, even where no other special benefits were involved, is inherently discriminatory. They felt such separation indicated the different degrees of importance attached to athletes on the basis of sex.

Response: Comment accepted. The provision of a separate dormitory to athletes of one sex but not the other will be considered a failure to provide equivalent benefits as required by the regulation.

(5) *Comment:* Commentors, particularly colleges and universities, expressed concern that the differences in the rules of intercollegiate athletic associations could result in unequal distribution of benefits and opportunities to men's and women's athletic programs, thus placing the institutions in a posture of noncompliance with Title IX.

Response: Commentors made this point with regard to § 86.6(c) of the Title IX regulation, which reads in part:

"The obligation to comply with (Title IX) is not obviated or alleviated by any rule or regulation of any * * * athletic or other * * * association * * *"

Since the penalties for violation of intercollegiate athletic association rules can have a severe effect on the athletic opportunities within an affected program, the Department has re-examined this regulatory requirement to determine whether it should be modified. Our conclusion is that modification would not have a beneficial effect, and that the present requirement will stand.

Several factors enter into this decision. First, the differences between rules affecting men's and women's programs are numerous and change constantly. Despite this, the Department has been unable to discover a single case in which those differences require members to act in a discriminatory manner. Second, some rule differences may permit decisions resulting in discriminatory distribution of benefits and opportunities to men's and women's programs. The fact that institutions respond to differences in rules by choosing to deny equal opportunities, however, does not mean that the rules themselves are at fault; the rules do not prohibit choices that would result in compliance with Title IX. Finally, the rules in question are all established and subject to change by the membership of the association. Since all (or virtually all) association member institutions are subject to Title IX, the opportunity exists for these institutions to resolve collectively any wide-spread Title IX compliance problems resulting from association rules. To the extent that this has not taken place, Federal intervention on behalf of statutory beneficiaries is both warranted and required by the law. Consequently, the Department can follow no course other than to continue to disallow any defenses against findings of noncompliance with Title IX that are based on intercollegiate athletic association rules.

(6) *Comment:* Some commentors suggested that the equal average per capita test was unfairly skewed by the high cost of some "major" men's sports, particularly football, that have no equivalently expensive counterpart among women's sports. They suggested that a certain percentage of those costs (e.g., 50% of football scholarships) should be excluded from the expenditures on male athletes prior to application of the equal average per capita test.

Response: Since equality of average per capita expenditures has been eliminated as a standard of presumed compliance, the suggestion is no longer relevant. However, it was possible under that standard to exclude expenditures that were due to the nature of the sport, or the scope of competition and thus were not discriminatory in effect. Given the diversity of intercollegiate athletic programs, determinations as to whether disparities in expenditures were nondiscriminatory would have been made on a case-by-case basis. There was no legal support for the proposition that an arbitrary percentage of expenditures should be excluded from the calculations.

(7) *Comment:* Some commentors urged the Department to adopt various forms of team-based comparisons in assessing equality of opportunity between men's and women's athletic programs. They stated that well-developed men's programs are frequently characterized by a few "major" teams that have the greatest spectator appeal, earn the greatest income, cost the most to operate, and dominate the program in other ways. They suggested that women's programs should be similarly constructed and that comparability should then be required only between "men's major" and "women's major" teams, and between "men's minor" and "women's minor" teams. The men's teams most often cited as appropriate for "major" designation have been football and basketball, with women's basketball and volleyball being frequently selected as the counterparts.

Response: There are two problems with this approach to assessing equal opportunity. First, neither the statute nor the regulation calls for identical programs for male and female athletes. Absent such a requirement, the Department cannot base noncompliance upon a failure to provide arbitrarily identical programs, either in whole or in part.

Second, no subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. Use of the "major/minor" classification does not meet this test where large participation sports (e.g., football) are compared to smaller ones (e.g., women's volleyball) in such a manner as to have the effect of disproportionately providing benefits or opportunities to the members of one sex.

(8) *Comment:* Some commenters suggest that equality of opportunity should be measured by a "sport-specific" comparison. Under this approach, institutions offering the same sports to men and women would have an obligation to provide equal opportunity within each of those sports. For example, the men's basketball team and the women's basketball team would have to receive equal opportunities and benefits.

Response: As noted above, there is no provision for the requirement of identical programs for men and women, and no such requirement will be made by the Department. Moreover, a sport-specific comparison could actually create unequal opportunity. For example, the sports available for men at an institution might include most or all of those available for women; but the men's program might concentrate resources on sports not available to women (e.g., football, ice hockey). In addition, the sport-specific concept overlooks two key elements of the Title IX regulation.

First, the regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely on the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge.

Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (86.41(c)). As implied above, Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer.

(9) *Comment:* A coalition of many colleges and universities urged that there are no objective standards against which compliance with Title IX in intecollegiate athletics could be measured. They felt that diversity is so great among colleges and universities that no single standard or set of standards could practicably apply to all affected institutions. They concluded that it would be best for individual institutions to determine the policies and procedures by which to ensure nondiscrimination in intercollegiate athletic programs.

Specifically, this coalition suggested that each institution should create a group representative of all affected parties on campus.

This group would then assess existing athletic opportunities for men and women, and, on the basis of the assessment, develop a plan to ensure nondiscrimination. This plan would then be recommended to the Board of Trustees or other appropriate governing body.

The role foreseen for the Department under this concept is:

(a) The Department would use the plan as a framework for evaluating complaints and assessing compliance;

(b) The Department would determine whether the plan satisfies the interests of the involved parties; and

(c) The Department would determine whether the institution is adhering to the plan.

These commenters felt that this approach to Title IX enforcement would ensure an environment of equal opportunity.

Response: Title IX is an anti-discrimination law. It prohibits discrimination based on sex in educational institutions that are recipients of Federal assistance. The legislative history of Title IX clearly shows that it was enacted because of discrimination that currently was being practiced against women in educational institutions. The Department accepts that colleges and universities are sincere in their intention to ensure equal opportunity in intercollegiate athletics to their male and female students. It cannot, however, turn over its reponsibility for interpreting and enforcing the law. In this case, its responsibility includes articulating the standards by which compliance with the Title IX statute will be evaluated.

The Department agrees with this group of commenters that the proposed self-assessment and institutional plan is an excellent idea. Any institution that engages in the assessment/planning process, particularly with the full participation of interested parties as envisioned in the proposal, would clearly reach or move well toward compliance. In addition, as explained in Section VIII of this Policy Interpretation, any college or university that has compliance problems but is implementing a plan that the Department determines will correct those problems within a reasonable period of time, will be found in compliance.

[FR Doc. 79-37965 Filed 12-10-79; 8:45 am]

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