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Bad Sport: Title IX and the High Cost of Inequitable Athletic Programs in Portz v. St. Cloud State University

Education Law Notes

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Being found noncompliant with Title IX can be costly. This was reiterated in late January, when a federal judge in Minnesota ordered St. Cloud State University [“SCSU”] to pay $1,171,442.90 in prevailing-party legal fees and costs to the attorneys for a class of current and former St. Cloud female athletes who had sued the university. The court’s order in Portz v. St. Cloud State University followed a seven-day bench trial and consequent August 1, 2019 decision, which held that since at least 2014, SCSU had failed to equitably allocate athletic-participation opportunities or athletic treatment and benefits in violation of Title IX. That August 1 ruling constitutes one of the most comprehensive explications of Title IX athletic opportunity and athletic benefits claims in years. It is also a kind of throwback to the original Title IX cases, which focused on athletic programs rather than on campus sexual assault claims.

In its August 1, 2019 ruling, the court issued a permanent injunction requiring that SCSU take actions that were reasonably calculated to achieve full compliance with Title IX. This included eliminating the unequal distribution of male and female participation opportunities, including keeping the women’s tennis and Nordic skiing teams at a level comparable to equivalent SCSU teams so long as there was sufficient interest and athletic ability to do so. The court further ordered that SCSU immediately provide its female athletes with equitable athletic benefits by permanently improving their practice and competitive facilities, such as renovating one of the playing fields and eliminating inequities between the male and female teams’ locker and team rooms. In addition, the court retained jurisdiction over the case, requiring six-month reports to ensure SCSU complied with its orders, and raised the possibility of a court-appointed monitor if SCSU’s progress was insufficient. Finally, the court noted that it would award reasonable legal fees and costs to the plaintiffs for those claims on which the plaintiffs prevailed.

Although the court’s subsequent January 21, 2020 ruling on the plaintiffs’ fee application was evenhanded – denying a significant amount of the hours claimed by the plaintiffs – it nonetheless resulted in an award of almost $1.2 million. The reason, of course, is that such cases are extremely labor-intensive, a fact to which I

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can attest, having successfully defended a Title IX class action that lasted approximately seven years. For example, in Portz, the plaintiffs' attorneys collectively claimed over 3,000 hours of billable time.

Although the COVID-19 pandemic has put all team sports on hold, the Portz court's thoughtful analysis and the substantial fee award could, upon the resumption of organized activities, spark a resurgence in Title IX litigation that addresses athletic opportunities and benefits. As such, it may be helpful to review the factual and legal considerations in such cases.

Both the United States Department's Office of Civil Rights ["OCR"] and courts apply a three-pronged test to determine whether an educational institution that receives federal funds is providing equitable athletic opportunities to students of both genders. Athletic-opportunity claims are initially analyzed by correlating the proportionality of each gender's enrolled students with the number of participation opportunities afforded to each gender. If a discrepancy in that proportionality exceeds a somewhat subjective parameter, then the second prong of this tripartite test requires schools to demonstrate an ongoing history of program expansion that is responsive to the developing interests and abilities of the underrepresented gender. If the institution is unable to satisfy *either* the first or second prongs, the focus will shift to whether there is unmet interest in a particular sport sufficient to sustain a team, and whether there is a reasonable expectation that there are comparable teams at other institutions with which to compete.

A persistent myth is that Title IX requires schools to eliminate male sports in order to maintain equitable ratios between male and female athletes. This erroneous interpretation mischaracterizes Title IX's fundamental requirement, which is that schools equally gauge and respond to the interests of female and male athletes. In essence, compliance can be guided by a three-word alliteration: "Ascertain and Accommodate." It is that simple. Consequently, if a school determines there is sufficient interest in a viable female sport, but rather than add that sport the school seeks to equalize proportionality by cutting a male sport, it will *still* be in violation of Title IX.

As for inequitable-benefits claims, OCR and courts consider how resources are allocated between athletes of both genders, including but not limited to: facilities; equipment; practice and game schedules; number, compensation, and experience of the coaches; modes of travel; publicity; expenditure of school funds; use of booster clubs, and support of student bands and cheerleaders. Although they assess whether such allocations are equitable, they also recognize that not all disparities are discriminatory. For example, the Portz court noted that SCSU spent more money on hockey sticks for its male team than for its female team simply because male players more frequently broke their sticks.

It is always preferable for educational institutions to conduct their own self-audits rather than wait for OCR or a federal court to do so. Again, not all disparities are discriminatory, but if they exist, the key is for schools to ask themselves "Why?" and to respond accordingly, for it is the same question that OCR and courts could one day be asking, and as Portz makes clear, the wrong answer comes at a steep price.

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If you have any questions, feel free to contact any one of our School Law attorneys.

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