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Erika Denslow
University of Tennessee, edenslow@utk.edu

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A SPECTATOR SPORT WITHOUT SPECTATORS: DISCRIMINATION IN GIRLS' ATHLETICS

Parker v. Franklin County Cmty. Sch. Corp., 667 F.3d 910 (7th Cir. 2012)

Erika Denslow

I. INTRODUCTION

In *Parker v. Franklin County Cmty, Sch. Corp.*,[1] plaintiff Amber Parker ("Parker") brought an action on behalf of her minor daughter, J.L.P., against fourteen Indiana public school corporations, alleging discriminatory practices in the scheduling of high school basketball games. She alleged violations of Title IX of the Education Amendments and the Equal Protection Clause of the Fourteenth Amendment. Among the defendants were Franklin County Community School Corp. ("Franklin Corp.") and the school districts with contracts to play the Franklin County High School ("Franklin") girls' varsity basketball team during the 2009-2010 season. The defendants moved for summary judgment on Parker's claims, and she responded with a cross-motion for summary judgment. Before the district court ruled, Tammy Hurley, also on behalf of her minor daughter, C.H., joined as a plaintiff in each of the claims.[2] The district court granted summary judgment for the defendants. The Seventh Circuit reviewed the district court's decision *de novo*.

II. FACTUAL BACKGROUND

From 2007 to 2009, Parker served as head coach to Franklin (part of Franklin Corp.) varsity girls' basketball team. Her daughter, J.L.P. was a member of the team during the 2008-2009 season.

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[1] 667 F.3d 910 (7th Cir. 2012).

[2] Tammy Hurley ("Hurley")'s daughter, C.H. was also a member of the girls' varsity basketball team. Hurley filed a suit identical to Parker's, and then was added as a plaintiff in this suit. *Id*. at 914.

The girls' varsity basketball team began its season two weeks before the boys', during which time the girls play on primetime[3] weekend nights. When the boys' season began, they displaced the girls' primetime play, moving the girls to weeknights. Weeknight games have many disadvantages: drastically fewer spectators attend; neither the band, cheerleaders, nor the dance team perform; and the players must contend with the next day's homework as well as their basketball schedule. J.L.P. attested that her self-esteem also suffered because of the disparate scheduling practices "made her feel like girls' accomplishments are less important than boys'."[4] In the 2007-2009 seasons, ninety-five percent of the boys' games were primetime, compared to only forty-seven percent of the girls'.[5] During the 2009-2010 season, those numbers were ninety-five percent and fifty-three percent respectively.[6]

In 2007, Parker asked Franklin Athletic Director Beth Foster ("Foster") to balance the amount of primetime playing time that each team received. Foster replied that the scheduling and location of basketball games were set by contract[7] and maintained in subsequent years. Foster stated that she has tried to increase the girls' games played on primetime nights, but has experienced opposition from other athletic directors.

III. RATIONALE

A. Title IX Claim

The plaintiffs filed suit alleging discriminatory athletic scheduling practices in violation of Title IX. Title IX prohibits "discrimination on the basis of

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[3] "Primetime is defined as evening that precede days without school." *Id*. On primetime nights, "there are large crowds in attendance … substantial student and community support in the stands, and the presence of the band, cheerleaders, and dance teams." *Id*.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] Of the school defendants named by Parker, six of them are part of the Eastern Indiana Athletic Conference (EIAC). "The EIAC makes its decisions by majority rule and voted to enter into two- to four-year contracts for the scheduling of games. Franklin pays the non-conference schools once a season, and they alternate annually between home and away." *Id*.

gender by educational institutions receiving federal financial assistance."[8] Under regulations published by the Department of Health, Education, and Welfare ("HEW"), the recipient of federal funding, such as the school corporations in this case, "shall provide equal athletic opportunity for members of both sexes."[9]

Though an administrative enforcement scheme exists within Title IX, the Supreme Court has recognized an implied right of action for intentional discrimination pursuant to § 1681,[10] and claimants need not exhaust administrative remedies prior to bringing a private action.[11] More specifically, the plaintiffs in this action are eligible to receive money damages in addition to injunctive relief, due to the school corporations' advance notice of their potential liability for their alleged conduct.[12]

Most litigation under Title IX focuses on "accommodation" claims, wherein plaintiffs protest the unavailability of an athletic program that meets the "interests and abilities of the underrepresented sex."[13] However, Title IX also authorizes equal treatment claims that "allege sex-based differences in the schedules, equipment, coaching and other factors affecting participants in athletics."[14] Under Title IX, athletic programs for each sex must be "equal or equal in effect."[15] Among the factors considered to evaluate equal treatment are "the scheduling of games and practice times and[,] particularly, the day

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[8] "Subject to exceptions not pertinent here, 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.'" *Id*. at 917 (citing 20 U.S.C. § 1681(a)).

[9] *Id.* at 918 (citing 34 C.F.R. § 106.41(a)).

[10] *Id*. at 919 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979)).

[11] *Id*.; *see* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 247 (2009).

[12] "[F]unding receipts have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when [the Court] decided *Cannon*." *Id*. at 921 (citing Jackson v. Birmingham Bd. of Edu., 544 U.S. 167, 168 (2005)).

[13] *Id*. at 916.

[14] *Id*. at 918 (citing Mansorian v. Regents Univ. of Cal., 602 F.3d 957, 965 (9th Cir. 2010).

[15] *Id*. at 919 (citing Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86)).

competitive events are scheduled.[16] If the programs are inequitable, HEW may still deem them compliant if the disparities are the result of nondiscriminatory factors. Disparities present in benefits, treatment, services, or opportunities must be "substantial enough in and of themselves to deny equality of athletic opportunity.'"[17]

In the present case, the court employed a two-step analysis of the plaintiff's claim, determining first whether Franklin's scheduling practices caused a negative impact on one sex, and second, whether the disparity was substantial enough to deny equality of athletic opportunity, which, it asserted, "includes equivalent opportunity to compete before audiences."[18]

The court found that the disparity in scheduling practices at Franklin was "systemic."[19] It referenced a 1997 letter from the Office of Civil Rights ("OCR") to the Indiana High School Athletic Association that was also distributed to Franklin. The letter addresses OCR's concerns about scheduling practices of high school basketball games in Indiana, and states that schools "'could be found by OCR to be out of compliance with the scheduling of games and practice times component of the athletic provisions of Title IX if they reserve Friday nights for boys basketball games and schedule girls basketball games on other nights.'"[20] Despite receiving this letter fourteen years before this suit, Franklin did not alter its practices. The court asserted that a trier of fact could determine that the disparity was substantial enough to deny equal athletic opportunity.

The court agreed with the plaintiffs that the girls on the basketball team (loss of audience and feelings of inferiority) suffered significant harm that could dissuade girls from participating in athletics, which contravenes the aim of Title IX. As the court stated, "this disparate scheduling creates a cyclical effect that stifles community support, prevents the development of a fan base, and discourages females from participating in a traditionally male-dominated sport."[21]

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[16] *Id*. (citing Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,416).

[17] *Id*. (citing Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71,415).

[18] *Id*. at 922.

[19] *Id*.

[20] *Id*. at 923.

[21] *Id.* at 923-24.

Viewing the harm suffered by the Franklin girls' basketball team, the court concluded that "the plaintiffs . . . presented sufficient evidence for trial to determine whether the disparity and resulting harm in this case are substantial enough to deny equal athletic opportunity"[22] and vacated the district court's grant of summary judgment.

The court also approved the inclusion of the non-Franklin school districts as defendants, as they were complicit in the subordinated scheduling. The court directed them to comply with injunction issued,"[23] but exempted them from liability for monetary damages because the plaintiff's argument "focuses on the harm suffered as a result of Franklins overall disparate scheduling practices,"[24] not those of the other defendants.

B. Equal Protection Claim

The plaintiffs also asserted a claim under 42 U.S.C. § 1983 for violation of the Equal Protection Clause.[25] An action under § 1983 "requires a showing that the plaintiff was deprived of a right secured by the Constitution or federal law, by a person acting under color of law."[26] Here, the issue before the court was whether the defendants are "persons" within the meaning of § 1983, and therefore subject to suit.

The U.S. Supreme Court has defined "municipal corporations and similar governmental entities"[27] as persons within the scope of the statute. In *Will v. Mich. Dep't of State Police*[28] the Supreme Court stated that "units of local government are 'persons[,]'"[29] and thus persons for purposes of § 1983 liability.

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[22] *Id.* at 924.

[23] "The non-Franklin defendants must comply with an injunction that is issued in this case; otherwise the plaintiffs are left without an effective remedy." *Id*. at 924.

[24] *Id*. at 925.

[25] U.S. CONST. amend. XIV, § 1.

[26] *Parker*, 667 F.3d at 925 (citing Padula v. Leimbach, 656 F.3d 595, 600 (7th Cir. 2011).

[27] *Id*. at 926 (citing Howlett v. Rose, 496 U.S. 356, 376 (1990)).

[28] 491 U.S. 58 (1989).

[29] *Parker*, 667 F.3d at 926 (citing *Will*, 491 U.S. at 70).

The defendants argue however, that they are not independent political subdivisions, but rather, "arms of the state," which cannot be held liable.[30] The Supreme Court has set forth four relevant factors to determine whether an entity is merely an arm of the state: "(1) the characterization of the district under state law; (2) the guidance and control exercised by the state over the local school board; (3) the degree of state funding received by the district; and (4) the local board's ability to issue bonds and levy taxes on its own behalf."[31]

The court characterized school corporations as localized entities under state law – that is, independent political subdivisions with locally elected members that serve their local communities and not the state as a whole. The defendants, appealing to the court to reconsider a prior decision that local school districts are not a State,[32] contended that the state of Indiana's increased its overall guidance and control over the local school district with the passage of a 2008 educational oversight law.[33] It reasoned, instead, that the "most salient factor"[34] in determining control is who would be legally obligated to pay a judgment, if rendered. In this case, it was the defendants, not the State of Indiana. While local school corporations do receive a significant amount of funding from the state, they are legally obligated to pay their own judgments and can levy property taxes or issue bonds for such purposes. Accordingly, the court concluded that the defendants' are persons within the scope of § 1983.

Because the district court found that the defendants were not subject to suit under § 1983, it granted summary judgment without addressing the substance of the plaintiff's equal protection claims. The Seventh Circuit vacated the entry of summary judgment and remanded the equal protection claims for the district court's consideration.

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[30] *Id*.

[31] *Id*. at 927 (citing Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977).

[32] *Id*. (referencing Gary A. v. New Trier High Sch. Dist. No. 203, 796 F.2d 940, 945 (7th Cir. 1986).

[33] Through Public Law 146-2008, House Enrolled Act 1001, § 450-529 (amending Education Title), the legislature made significant amendments to its complex statutory and regulatory scheme governing the financial structure of its local school corporations and the level of state control and oversight over the decisions and activities of those school corporations." *Id*.

[34] *Parker*, 667 F.3d at 927.

IV. CONCLUSION

While Title IX has increased the number of female high school athletes and garnered status and respect for them, it "has not ended the long history of discrimination against females in sports programs; many educational institutions continue to place male sports programs in a position of superiority."[35] However, the outcome of this case on remand could change one manner in which schools and athletic conferences advantage male sports programs, by changing the way they schedule games. In *Parker*, the Seventh Circuit acknowledged that a claim for sex discrimination exists in the disparate scheduling practices of Franklin Corp. and its co-defendants. Through this decision, the court has made an important step towards making the promises of Title IX a reality for female athletes.

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[35] *Id*. at 916.