IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Chris Boulahanis, Edward C. Vanduyne, Jamie R. Burton, et. al.,

Plaintiffs-Appellants

v.

Board of Regents, a body politic and corporate, Illinois State University, Thomas Wallace, et. al.,

Defendants-Appellees

PLAINTIFFS-APPELLANTS OPENING BRIEF

Appeal No. 99 -1561

District Court No. 95 C 1371

Louis S. Goldstein, Esq
Bruce S. Kreisman
Goldstein Fluxgold & McConnell
33 N. Dearborn, Suite 1015
Chicago, Illinois 60602
(312) 630-9630

Michael E. Rosman, Esq.
Nicholas S. Hentoff, Esq.
Center For Individual Rights
1233 Twentieth St., N.W. Suite 300
Washington, D.C. 20036
(202) 833-8400

Donald W. Anderson
Landau, Omahana, Tucker, Proger & Siebenhaar
222 N. LaSalle St., Suite 200
Chicago, IL 60601
(312) 630-9630

STATEMENT OF THE ISSUES

1. Does Title IX and its implementing regulations allow covered institutions to discriminate on the basis of gender against individual members of a proportionally represented gender class of student athletes?

2. Does a decision to eliminate athletic teams of one sex solely to achieve proportional gender representation between the underlying student body and overall participation rates in the athletic program, but which fails to effectively accommodate the interests and abilities of members of both sexes, constitute a violation of Title IX?

3. Did the District Court err in dismissing Plaintiffs Section 1983, Section 1985 and

Constitutional claims against the individual defendants?

STATEMENT OF THE CASE

A.•Relevant Procedural Background.

On September 22 1995, the Plaintiffs in this case -- present former and prospective students and participants in intercollegiate athletic programs at Illinois State University ("ISU") -- filed a complaint challenging the defendants actions in eliminating the men•s wrestling and soccer programs at ISU.

On October 6th the District Court entered an Order dismissing all claims against the individual defendants and dismissing Counts II, III, V, IX, X and XI against the University and Board of Regents. See Appendix of Orders, Tab "B". On February 3, the District Court entered Summary Judgment in favor of the defendants on Plaintiffs Title IX and Title VI claims, and declined to exercise pendant juridiction over the remaining state law claims. See Appendix of Orders, Tabs C and D. An Amended Judgment terminating the case was entered on February 26 1995, and the Plaintiffs filed a timely notice of appeal on March 5, 1999. See Appendix of Orders, Tabs F and G.

B.•Relevant Factual Background.

The process which lead to the filing of the complaint began in 1993 when ISU•s Gender Equity Committee ("Committee") began an investigation and evaluation of athletic data with the stated purpose of achieving gender equity for the areas examined.

Unlike the fact situations in Kelley v. Illinois State University, 35 F.3d 265 (7th Cir. 1994); Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) and Roberts v. Colorado State University, 998 F.2d 824 (10th Cir. 1993), the facts in this case reveal that there was no prior documented history of denying female students equal athletic opportunities, and there was no present or immediate budget shortful which mandated the immediate elimination of sports teams for financial reasons. It is undisputed that between the time that the Committee began its investigation, and the decision to eliminate the men•s wrestling and soccer teams was finalized, OCR was not conducting any investigation into Title IX violations at ISU, there was no monitoring by OCR of any corrective action, and there were no pending complaints of a violation of Title IX at ISU. See Appendix Vol. II: Excerpt of Record on Appeal ("ER"), Affidavit of United States Representative Dennis Hastert at pp. 796-799.

The 1993 Gender Equity Committee Report ("Report") sought to accomplish the following tasks: (1) Investigate and evaluate athletic data relevant to gender equity and Title IX compliance to determine the current status of the athletic department; (2) List objectives to achieve gender equity for each area it examined. Gender Equity Management Plan ("Plan"), ER at 585.

The Report "focused on the •test of proportionality of participation• as the primary guideline for compliance (one of the three methods employed by OCR to measure Title IX compliance)." Id., ER at 585. Noting that "enrollment and participation data have been relatively stable and consistent since 1988," the Report concluded that "[t]he opportunity for current participation as expressed by the 66% male athletes/34% female athletes does not mirror the undergraduate population of 45% male students/55% female students." The Report, ER at 122. Based solely on this statistical disparity, and without consideration of any other factors, the Report concluded that "[t]his does not reflect equitable participation opportunities." Id.

In January 1995 the NCAA Peer-Review Committee conducted an audit of ISU•s athletic programs as part of its normal certification process. The NCAA Peer-Review Team•s report concluded that ISU was "not in substantial conformity," almost exclusively on the fact that "[n]o written plan to achieve gender equity is in place two years after the completion of the gender equity report." ER at 716-717. However, the University was given an opportunity to respond to the report with new relevant information not considered by the team. ER at 720.

The Gender Equity Management Plan ("Plan") was completed in early 1995 and contained the recommendation to eliminate men•s soccer and wrestling, and elevate the women•s soccer club to a varsity sport. The Plan included an "Update and Response to the [1993] Gender Equity Report" ("Update") which contained findings inconsistent with the Plan•s recommendation to eliminate the men•s wrestling and soccer teams. The Update documented facts that were not available in 1993 including steady improvement across the board in the attainment of gender equity in the University•s athletic programs, including:

- The fact that "participation opportunities have increased for women and been reduced for men" by 1% to 2% per year

since FY1992. Citing unnamed "case law rulings," the Update nevertheless concluded "that only a 3% to 5% disparity may be an acceptable variance." ER at 585.

- The fact that ISU continued (from the 1993 data) to be in compliance with Title IX in the awarding of athletic scholarships between male and female athletes. ER at 586.
- That overall proportional funding of male and female athletic teams had "improved dramatically." Id.
- That salaries for coaches in womens• programs had increased from 1993 levels. Id. at 587.
- That the number of support staff for womens• athletic programs continued (from the 1993 data) to be "relatively gender equitable." Id. at 588.
- That "progress is being made in facility allocations that are gender equitable." Id.

In March 1995 the results of the 1994-1995 Survey of Student Interests and Abilities in Intramural, Club and Varsity Athletics at Illinois State was published. ER at 599. The purpose of the Study "was to assess whether the interests and abilities of female and male athletes have been "fully and effectively accommodated by the present athletic program." (Emphasis added). Id. at 614. The study revealed that "the overwhelming majority of female respondents are satisfied with the athletic opportunities at the University." Id. at 615. Moreover, the Study reflected that although women represented over fifty percent of the student body, male students expressed a significantly greater interest in participating in the athletic program than female students. Id. at 603. These findings are all the more compelling given the fact that "a significantly higher proportion of females compared to males returned the surveys." Id.

The Update demonstrated that the 1993 Report•s sole focus on proportionality to accomplish Title IX compliance was no longer reasonable since the women•s athletic program had been expanded, and the interests of the individual female athletes had been determined and effectively accomodated. The Defendants own Survey concluded that "the assessment of student interests and ability in athletics, is crucial in assessing gender equity at Illinois State." Id. at 604.

Nevertheless, the Committee ignored the results of the Survey and continued to insist that their focus should remain on establishing proportional gender representation at all cost. In fact, the Committee refused to seriously consider any plan that would result in an increase of any size in the Athletic Department•s budget in order to retain the men•s wrestling and soccer teams. See Affidavit of Linda Herman, ER at 451; Affidavit of Kenneth E. Newgren, ER at 815; Affidavit of Kevin Bellis, ER at 800. In spite of the potential availability to the Athletic Department of as much as $400,000 in unexpected revenues, the Gender Equity Committee chose the only plan which would result in an overall statistically proportional representation of male and female athletes within ISU athletic program. Newgren Affidavit, ER at 816; Bellis Affidavit, ER at 802. This plan mandated elimination of the men•s wrestling and soccer teams as the only option available to them that would achieve their goals of strict statistical gender proportionality in ISU•s athletics program.

In spite of the fact that Defendants were seriously contemplating the elimination of men•s wresting and soccer in the late fall, winter, and early spring of the 1994-95 academic year, the men•s soccer and wrestling coaches were allowed to continue to offer scholarships, make employment commitments and actively recruit highschool athletes throughout this period. See Bellis Affidavit, ER at 800-803. Assistant Athletic Director Donna Taylor even signed a letter of intent on behalf of ISU with respect to the matriculation of Plaintiff Justin Stone on February 6, less than two months before the decision to eliminate men•s soccer was published by ISU. See Affidavit of Justin Stone, ER at 833-844. Defendant Taylor signed the letter of intent at the same time as the Athletic Department•s recommendation to eliminate the men•s soccer team was being finalized and submitted to ISU•s President for approval. Herman Affidavit, ER at 454. On April 27, 1995, ISU President Thomas Wallace officially approved the Gender Equity Management Plan, thereby eliminating men•s wrestling and soccer at Illinois State University. Id. at 455.

The impact of the elimination of the wrestling and soccer teams on the individual male athletes was devastating and life altering:

- **Kevin Bracken.** Plaintiff Kevin Bracken was an Olympic class wrestler who was a member of the ISU men•s wrestling team at the time it was eliminated. Bracken was offered an assistant coaching position at ISU following the completion of his NCAA eligibility so that he would have a place to train for the 1996 U.S. Olympic team trials, and be able to train under Coach Bellis• direction. Because of the sudden elimination of the wrestling team and his coaching position, Braken was severely hampered in his efforts to train for the Olympics and was unable to train for the Olympics under the direction of Coach Bellis. Braken was named an alternate to the 1996 U.S. Olympic Greco-Roman wrestling team, but was not selected for the competitive squad. See Testimony of Kevin Bracken in Board of Regents v. Reynard, ER at 767; Affidavit of Kevin Bracken, ER at 831.
- **Jamie Burton.** Plaintiff Jamie Burton was heavily recruited by ISU in his native England. Burton chose ISU over a

number of other schools based on the promise that he would be awarded a full four to five year scholarship to play soccer at ISU. Burton received a restricted Visa that was conditioned on the funds he would receive as a result of his ISU athletic scholarship. Burton had aspirations of being a professional soccer player. Because of the elimination of the men•s soccer team he lost both his scholarship and his ability to play his senior year usually the most productive and crucial season for a soccer player with respect to his professional aspirations. See Testimony of Jamie Burton in Board of Regents v. Reynard, ER at 783; Affidavit of Jamie Burton, ER at 835.

- **Justin Stone.** Plaintiff Justin Stone was a Parade Magazine high school all-America soccer player at Springfield High School in Springfield, Illinois. Stone was heavily recruited by dozens of top-flight schools such as Notre Dame**,** Cornell University, University of Virginia, UCLA, and UNC, among many others. Defendants signed a letter of intent committing Stone to play soccer for ISU on February 6 1995, at the same time as they were transmitting its recommendation to eliminate men•s soccer to President Wallace. By the time that he obtained a release from his letter of intent, many of the opportunities that had been open were now foreclosed to him. Southern Methodist University had offered him an 80% scholarship, but that scholarship was no longer available. The scholarship offered by the University of South Florida also was no longer available. Stone was forced to attend Southern Methodist University at his own expense, a cost of approximately $20,000 during the 1995/1996 academic year. See Testimony of Justin Stone in Board of Regents v. Reynard, ER at 784; Affidavit of Justin Stone, ER at 843.
- **Bryan Simkins.** Bryan Simkins was a starting member of the men•s soccer team when it was eliminated. The main reason Simkins transferred to ISU was the opportunity to play Division I soccer. Simkins turned down an assistant coach•s position at Lincoln College in order to transfer to ISU. See Testimony of Bryan Simkins in Board of Regents v. Reynard, ER at 779; Affidavit of Bryan Simkins, ER at 833.
- **Chris Boulahanis.** Plaintiff Chris Boulahanis transferred to ISU for his senior year after being offered a scholarship to compete on the men•s soccer team. Because of the elimination of the men•s soccer team, Boulahanis lost his scholarship and his ability to play soccer his senior year. The loss of the season greatly impacted on his aspirations to become a professional soccer player. See Affidavit of Chris Boulahanis, ER at 839.
- **Mark Hibner.** Plaintiff Mark Hibner lost his student athlete fifth year aid scholarship when the wrestling team, and his assistant coaching position, were eliminated. See Affidavit of Mark Hibner, ER at 829.

All of the individual members of the men•s soccer and wrestling teams, to one degree or another, were subjected to intentional discrimination on the basis of their gender with devastating personal and professional consequences.

SUMMARY OF ARGUMENT

"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."

"Title IX" -- 20 U.S.C.A. Section 1681(a).

"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 . . .

34 C.F.R. Section 106.41 (c)

The Plaintiffs in this case are past and present members of the Illinois State University•s men•s wrestling and soccer teams. In order to achieve overall statistically proportionate representation of male and female student athletes in ISU•s athletic programs, the defendants elevated women•s soccer to a varsity sport and eliminated the men•s wrestling and soccer teams. This action was taken by defendants in spite of the fact that there was no documented history of denying women equal athletic opportunities at ISU, or claims that a budget shortfall required elimination of the two teams. The Plaintiffs•, as a result of the defendants• actions, were denied equal participation opportunities solely on the basis of their gender and suffered devastating personal and professional consequences.

The District Court held that individual male student athletes could not seek the protection of Title IX since male student athletes were afforded proportional equal athletic opportunities in the athletic program as a whole. The District Court•s

conclusion was based solely on a finding of strict statistical proportionality between the number of male students at the university and the number of male student athletes participating in its athletic programs. The District Court did not consider whether, through the selection of teams and the level of competition, ISU had effectively accommodated the interests and abilities of members of both sexes. The District Court therefore held that ISU can be said to have provided "equal opportunity" for members of both sexes simply by achieving statistically numerical gender proportionality between the two sexes.

The District Court•s analysis of ISU•s obligations under Title IX was based on a construction of an Office of Civil Rights Policy Interpretation at odds with the purpose and goals of Title IX and its implementing regulation. Although a number of Circuit Courts have adopted the same analysis of the relevant Policy Interpretation, they have done so under fact situations that are not analogous to those facts at issue in this case. These cases have adopted the proportionality rule to remedy a past denial of equal participation opportunities for female athletes, not for the sole purpose of achieving strict statistical gender proportionality, regardless of the interests and abilities of individual athletes. As a result, they have limited precedential value. In addition, several recent court decisions have begun to challenge the disputed construction of the relevant Policy Interpretation, and support Plaintiffs• position that the Circuit Court decisions should not be applied as binding precedent under the facts of this case.

There can be no agency-created exceptions to Title IX•s short and direct prohibition against discrimination on the basis of gender. The implementing regulation is equally clear that the provision of "equal opportunity" is to be measured against the institution•s effective accommodation of the interests and abilities of members of both sexes, not some strict statistical calculation of gender proportionality. If the disputed construction is correct, and the goal of achieving strict statistical gender equity can be used as a defense to a charge of discrimination against an individual on the basis of gender, than Title IX and its implementing regulation are unconstitutional

Any other interpretation of the law will allow institutions to practice the most blatant discrimination against particular individuals yet escape any liability by simply pointing to good overall numbers or to their efforts to comply other "more important" legal obligations (a conclusion rejected by the Supreme Court•s interpretation of other ant-discrimination statutes). Title IX•s motivating force and primary purpose is to protect the rights of individuals. Therefore, Title IX does not permit courts to allow colleges and universities to sacrifice the rights of individuals for the sake of reallocating aggregate outcomes among groups.

ARGUMENT AND CITATION TO AUTHORITY

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON DEFENDANTS TITLE IX CLAIMS

Title IX was passed with two objectives in mind: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." Cannon v. University of Chicago, 441 U.S. 677, 704, 99 S.Ct. 1946, 1961 (1979) (emphasis added). The goal of Title IX, therefore, is the protection of individual citizens, as opposed to classes of citizens, and the Supreme Court has held that anti-discrimination statutes will be construed in favor of protecting individuals as opposed to classes.

In City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the Supreme Court upheld a challenge under Title VII by female employees who were assessed an extra charge in contributions to the City•s retirement plan. The extra assessments were based on actuarial tables which showed that, on average, women live longer than men. The defendants argued that the extra assessment was justified out of fairness to the class of male employees who, without the surcharge, would be forced to subsidize the female employees• retirement plan. Rejecting these arguments, Justice Stevens noted that:

> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on natural origin or race, are unlawful. Acturial studies could unquestionably identify differences in life expectency based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment marketplace, see Griggs v. Duke Power Co., 401 U.S. 424, 436, 91 S.Ct. 849, 856, could not reasonably be construed to permit a take-home pay differential; based on a racial classification . . . Even if the language of the statutory language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes.

Manhart, 98 S.Ct. 1370, 1375-76, 435 U.S. 702 (emphasis added). See also, Connecticut v. Teal, 457 U.S. 440, 455,102 S.Ct. 2525, 73 L.Ed.2d 130 (1982) ("Title VII does not permit the victim of a facially discriminatory policy to be told that he has not

been wronged because other persons of his or her race or sex were hired").

Similarly, Title IX is a statute designed to prohibit discrimination on the basis of gender in education programs receiving Federal funds. Title IX cannot reasonably be construed to permit a gender equity scheme -- based solely on statistically proportional gender representation -- to exclude individual student athletes from an equal opportunity to participate in a university•s athletic program solely on the basis of their gender. Nor does Title IX permit Courts to inform a student athlete that has been the victim of a facially discriminatory policy that he has not been wronged under the Statute because other persons of his sex were allowed to compete in intercollegiate athletics.

Equality of opportunity under Title IX cannot be measured by an artificially imposed statistical calculation of gender proportionality between the two sexes, without reference to whether the selection of teams and levels of competition effectively accommodate the interests and abilities of members of both sexes. Yet that is precisely the result demanded by the District Court in this case based on it•s substantial deference to, and flawed construction of, an administrative Policy Interpretation that is at odds with the clear language of Title IX and its implementing regulation.

A.•No Deference Due: The District Court Erred in Giving Substantial Deference To The Construction of an Agency Policy Interpretation At Odds With The Purpose and Goals of Title IX.

Title IX provides 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 to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. Section 1681(a) (emphasis added). Title IX specifies that its prohibition against gender discrimination shall not "be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on an account of the imbalance which may exist" between the total number or percentage of persons of that sex participating in any federally supported program or activity, and "the total number or percentage of persons of that sex participating in any community, State, section or other area." 20 U.S.C.A. Section 1681(b).

Section 1682 authorizes the effectuation of the provisions of Title IX by "issuing rules, regulations or orders of general applicability which shall be consistent with the achievements of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C.A. Section 1682 (Emphasis added). Section 1682 also provides that that "no such rule shall become effective unless and until approved by the President." Id.

After the enactment of Title IX, the Department of Health Education and Welfare ("HEW") promulgated regulations implementing the statute•s nondiscrimination requirements which appear at 34 C.F.R. Sec. 106. The regulations clearly and unequivocally require that institutions "shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. Sec. 106.41(c). The first among ten factors used to determine whether equal athletic opportunities are available is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes . . ." Id. (emphasis added).

In 1979 HEW issued a Policy Interpretation governing the application of Title IX and its regulations to intercollegiate athletic programs. Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed.Reg. 71, 413 (Dec. 11, 1979) ("Policy Interpretation"). The 1979 Policy Interpretation provides that OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

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 interests and abilities 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.

Policy Interpretation, 44 Fed.Reg. at 71, 417-18. The Policy Interpretation instructs that the methods chosen by the institution to effectively accommodate the interests and abilities of both sexes must be nondiscriminatory and must not disadvantage members of an underrepresented sex. Policy Interpretation, Section VII.C.3, 44 Fed.Reg. at 71 417.

Some Courts have construed the Policy Interpretation to allow, in achieving equal opportunity for the "underrepresented gender," the elimination of opportunities for individual members of the proportionally represented gender (solely because they are a member of that gender). Although such an analysis is at odds with both Title IX and its implementing regulations, this is

the precise reasoning applied by the District Court in this case to defeat Plaintiff•s Title IX discrimination claims. The District Court•s language could not have been clearer on this finding: "[T]he elimination of men•s athletic teams, if done to achieve substantial proportionality among men and women•s athletes, is protected under Title IX." Order of United States District Court Judge Joe Billy McDade (October 6th 1997), Appendix of Orders,Vol. I at Tab B.

Following Cohen, Roberts and Kelley, the District Court applied the policy interpretation•s analysis of Title IX•s equal opportunity requirements broadly. It held that the Policy Interpretation justifies a finding that a gender•s overall statistically proportional representation in an institution•s athletic programs will always provide a "safe harbor" from charges of discrimination leveled by individual members of the proportionally represented gender.

This "cafeteria" approach to OCR•s Policy Interpretation allows institutions to choose between the three "safe harbors" in determining how to measure their compliance with Title IX•s requirements that they provide equal athletic participation opportunities to members of both sexes. It is an approach that also allows institutions to ignore many of the factors which Sec. 106.41(c) requires them to consider when determining whether equal athletic opportunities are available to members of both sexes, including "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes . . ." The results of such a flawed analysis, which is fundamentally at odds with Title IX and its implementing regulations, have been devastating and cannot be afforded "substantial deference" under applicable United States Supreme Court and Seventh Circuit case law.

In Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944), the United States Supreme Court addressed the issue of what standard to use in evaluating the interpretation of a Federal law published by a Federal agency:

> We consider that the rulings, interpretations and opinions of the Admninistrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the throughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore, 323 U.S. at 140. The Skidmore court rejected the agency•s interpretation of the Fair Labor Standards Act as being erroneous.

More recently, in Miller v. Johnson, 115 S.Ct. 2475, 2491-2492, 515 U.S. 900 (1995), the United States Supreme Court refused to accord any deference to a Justice Department policy interpretation of the Voting Rights Act, noting that the Department•s interpretation raised serious constitutional questions:

> [W]e think it inappropriate for a court engaged in constitutional scrutiny to accord deference to the Justice Department's interpretation of the Act. Although we have deferred to the Department's interpretation in certain statutory cases, see, e.g., Presley v. Etowah County Comm'n, 502 U.S. 491, 508-509, 112 S.Ct. 820, 831, 117 L.Ed.2d 51 (1992), and cases cited therein, we have rejected agency interpretations to which we would otherwise defer where they raise serious constitutional questions. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 574-575, 108 S.Ct. 1392, 1396-1397, 99 L.Ed.2d 645 (1988). When the Justice Department's interpretation of the Act compels race-based districting, it by definition raises a serious constitutional question, see, e.g., Bakke, 438 U.S., at 291, 98 S.Ct., at 2748 (opinion of Powell, J.) ("Racial and ethnic distinctions of any sort are inherently suspect" under the Equal Protection Clause), and should not receive deference.

Miller v. Johnson, 115 S.Ct. at 2491-2492.

This Circuit has repeatedly cast a wary eye on agency interpretations when they fail to provide a reasoned explanation as to why the statutory language supports the interpretation. Smith v. Metropolitan School District, Perry Tp., 128 F.3d 1014 (7th Cir. 1997) (OCR Policy Guidance had no foundation in the language of Title IX and was therefore not entitled to any deference). See also, Rowinsky v. Bryan Independent School District, 80 F.3d 1006, 1016 (5th Cir. 1996) ("Absent a reasoned explanation for why the statutory language supports applying Title VI to peer harassment, the OCR•s interpretation should not be accorded any deference."); Doe v. Reivitz, 830 F.2d 1441, 1446-47 (7th Cir. 1987) ("The preliminary power of interpretation is in the agency, but the final power of interpretation is in the courts . . . [T]he weight given to an agency interpretation depends on many factors, including the validity of its reasoning . . . "); Fennington v. Didrickson, 22 F.3d 1376, 1383 (7th Cir. 1994) (recognizing the "obligation to defer to the interpretation of the agency whenever that interpretation can be said to embody a deliberate and considered interpretation of legislative intent.").

The policy interpretation at issue in this case is not "consistent with the achievement of the objectives of the statute," does not

provide a "reasoned explanation for why the statutory language supports" the interpretation, and does not "embody a deliberate and considered interpretation of legislative intent." As the District Court noted in Pederson:

> This Court is not unaware of the necessity to grant great deference to an administrative agency and in particular an administrative agency that was specifically required by Congress to promulgate interpretive regulations. However, the jurisprudential emphasis on numerical proportionality is not found within the statute or regulations; rather, it is inferred from language within the Policy Interpretation and the statute which argues against such an inference. Title IX does not mandate equal numbers of participants. Rather, it prohibits exclusion based on sex and requires equal opportunity to participate for both sexes. As appears in the Policy Interpretation, inherent in this prohibition and mandate is knowledge of the desire to participate, the ability to participate, and the level of competition involved.
>
> Ceasing the inquiry at the point of numerical proportionality does not comport with the mandate of the statute.

Pederson, 912 F.Supp at 914.

The statute itself contains a clear and unambiguous prohibition against discrimination in educational programs on the basis of sex. The regulations promulgated pursuant to 20 U.S.C. Section 1681 mirror the general purpose and goals of the statute with clear and unambiguous language mandating equal athletic opportunity for members of both sexes. The regulations provide that effective accommodation of the interests and abilities of both sexes is the primary factor to be considered in evaluating whether an institution is granting equal opportunities to participate in athletic programs.

The application of statistical proportionality as the sole benchmark for the finding of compliance with Title IX • particularly where individual male athletes have been deprived of previously granted scholarships and existing opportunities to compete in athletics solely on the basis of their gender -- has no foundation in the language of Title IX or its implementing regulations. In fact, such an interpretation is at odds with the clear language of both the statute and the regulations. No reasoned explanation has ever been offered to justify any other conclusion. As a result, the District Court should not have upheld ISU•s actions based on such a fundamentally flawed construction of OCR•s Policy Interpretation.

B.•Lost Opportunities: The District Court Erred in Holding That Individual Members of A Proportionally Represented Gender Cannot Assert Individual Claims Under Title IX.

Title IX and its implementing regulations clearly guarantee an individual male or female student athlete a right to be accorded equal opportunities to participate in intercollegiate athletic programs and to be free from gender based discrimination which deprive them of these opportunities. Nevertheless, a few Circuit Court opinions have construed the OCR•s Policy Interpretation of Title IX and its implementing regulations to only provide an individual right to equal athletic participation opportunities, and to be free from discrimination, to the members of an underrepresented gender class.

These courts have held that individual male student athletes can never be said to have been discriminated against on the basis of gender if they are members of a proportionally represented gender class. The inquiry into the availability of equal athletic participation opportunities simply ends once an artificial and static compliance with gender proportionality is reached. Evidence of whether the selection of sports and level of competition effectively accommodates the interests and abilities of the members of both sexes is simply irrelevant under this flawed construction of the Policy Interpretation.

However, an increasing number of courts have rejected this analysis as being in clear contradiction to the purpose and goals of Title IX, holding that the presence of overall gender proportionality in a school•s athletic program cannot justify discrimination against individual student athletes in a specific sport. These cases have held that bare numerical proportionality, without considering the effective accommodation of individuals• interests and abilities, does not necessarily constitute equality of opportunity under either Title IX or its implementing regulation. See Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1993); Clark v. Arizona Interscholastic Association, 695 F.2d 1126, 1130-31 (9th Cir. 1992).

In Jeldness v. Pearce, 30 F.3d 1220 (9th Cir. 1993), the Ninth Circuit held that Title IX required prison officials to accommodate the interests of female prison inmates in providing equal opportunities for participation in education programs. In Clark, an equal protection case, the Ninth Circuit held that "[t]he denial of an opportunity in a specific sport, even when overall opportunities are equal, can be a violation of the equal protection clause. . . . [T]he presence of such equality cannot by itself justify specific inequality of opportunity in any given sport." Clark, 695 F.2d at 1130-31 (9th Cir. 1992).

In Cook v. Colgate University, 802 F.Supp. 737 (N.D.N.Y. 1992), judgment vacated as moot by 992 F.2d 17 (2nd Cir. 1993), the United States District Court for the Northern District of New York found that the Plaintiffs• established a prima facie case that Colgate violated Title IX by refusing to grant varsity status to the women•s ice hockey team. The District Court rejected Colgate•s argument "that Title IX and 34 C.F.R. Section 106.41 only prohibits descrimination in an athletic program as a

whole, and [is only violated where there has been] "gender discrimination in the overall athletic opportunities afforded women at Colgate." Colgate, 802 F.Supp. at 742. The District Court held that:

> The statutes and regulations . . . invite a comparison between separate teams in a particular sport because they are designed to protect not only a particular class of persons, but individuals as well. Section 1681 states that "no person . . .[shall], on the basis of sex, be excluded . . . be denied . . . or be subjected to discrimination . . ." 20 U.S.C. Section 1681(a) (emphasis added [by the court]). The same is true of 34 C.F.R. Section 106.41. Otherwise it would be of no little consequence for a woman•s basketball player to know that the overall athletic program is nondiscriminatory if her team is discriminated against through funding or otherwise, in comparison to men•s basketball. In a similar manner, it would be little solace for a male member of an underfunded and otherwise discriminated against men•s volleyball team, as opposed to a women•s volleyball team, to know that the overall athletic program was technically in compliance with Title IX. See Gomes v. Rhode Island Interscholastic League, 469 F.Supp. 659 (D.R.I. 1979) vacated as moot, 604 F.2d 733 (1st. Cir. 1979).

Colgate, 802 F.Supp. at 742-743.

There can be no doubt that, in this case, the individual members of the men•s soccer team were discriminated against in comparison to the opportunities afforded to the women•s soccer team. As was the case in Colgate, it is of little solace for the men•s players who lost their scholarship, athletic and professional opportunities because of their gender to know that ISU does not discriminate against men it its overall athletic program. See also, Connecticut v. Teal, 457 U.S. at 455.

In Pederson v. Louisiana State University, 912 F.Supp. 892 (M.D.La. 1996), the United States District Court for the Middle District of Louisiana strongly repudiated the proportionality analysis employed by Cohen and Roberts:

> This Court is not unaware of the Roberts, Cohen and Horner []holdings and, in fact, the explicit language within Roberts and Cohen, that one •may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup• . . . [T]his Court finds those decisions erroneous in this regard. To accept the interpretation in Roberts, Cohen and Horner, and the argument made by defendants, one must assume that interest and ability to participate is equal as between all men and women on all campuses. For instance, if a university has 50% female students and 50% male students, the assumption, under this argument must follow that the same percentage of its male population as its female population has the ability to participate in sports at the same competition level . . .Without some basis for such a pivotal assumption, this Court is loathe to join others in creating the "safe harbor" or dispositive assumption for which defendants and plaintiffs argue. Rather, it seems much more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time. To assume, and thereby mandate, an unsupported and static determination of interest and ability as the cornerstone of the analysis can lead to unjust results.

Pederson, 912 F.Supp. at 913-914.

Pederson•s analysis is particularly compelling when applied to the facts in this case since ISU•s student interest survey revealed that, although women represented over fifty percent of the student body, male students expressed a significantly greater interest in participating in athletic program than female students.

The latest case to address Cohen and its progeny is Stephen Neal v. Board of Trustees, No. CV-F-97-5009 REC (E.D. Ca.). In Neal, the United States District Court for the Eastern District of California declined to accept the defendants invitation to "conclude that an institution is automatically in compliance with Title IX if it has achieved substantial proportionality in the number of men and women participating in the athletic program when compared to the gender make-up of the institution." Order of United States District Judge Robert E. Coyle in Stephen Neal v. Board of Trustees, No. CV-F-97-5009 REC (December 26, 1997). See Appendix Vol. I, at Tab A.

Citing the Circuit Court opinions which have addressed this question, the Neal Court observed that "many of these courts have addressed the safe harbor approach in dicta," since the defendants were facing allegations of disparity and could not have invoked a safe harbor. Id. "[N]o court has ever directly held that the safe harbor rule is part and parcel of the Policy Interpretation." Id.

The District Court engaged in an exhaustive analysis of the two First Circuit opinions in "Cohen I and II" and came to the conclusion that "the First Circuit apparently misread the Policy Interpretation to address how an institution may comply with Title IX rather than what the Policy Interpretation was focused on -- addressing how an institution could be found to violate IX." Id. at 29. Adopting the Pederson courts rejection of the safe harbor rule the District Court held that "the safe harbor rule is not dictated by the policy interpretation and [is] inconsistent with the text, structure and policy of title IX itself . . ." Id.

On February 22 the District Court issued a Preliminary Injunction citing its earlier Memorandum Opinion denying the Defendants• Motion to Dismiss:

> Although all the court did by its ruling in the December 26 order was deny a motion to dismiss based on a certain construction of the first prong of the three-part test, the court concludes that relying on proportionality to cap the men's athletic team at CSUB in order to comply with the Consent Decree constitutes implementation of a quota based on gender in violation of Title IX.

Order Granting Plaintiff•s Motion for Preliminary Injunction (February 22, 1999) at 7. See Appendix Vol. I, at Tab B.

The District Court in this case clearly begs the question when it observes that "Title IX does not establish a right to participate in any particular sport at the college of one•s choice." Harper, 35 F.Supp.2d 1118, 1123 (C.D.Ill. 1999). The Plaintiffs are not claiming that ISU is required by Title IX to provide any athletic opportunities to its students whatsoever. It could shut down all of its athletic programs tomorrow and still be in compliance with Title IX. However, once ISU chooses to provide athletic opportunity for certain of its students, it then must provide equal athletic opportunity to all of its students, and not exclude the individual members of either sex from participation solely because of their gender.

As noted by the District Court in Pederson, the key concepts in protecting individual rights under Title IX are (1) exclusion from participation, and (2) equal athletic opportunity:

> Exclusion, in this instance, requires the existence of an interest to participate and the existence of an ability to participate. Opportunity is the possibility of participation, not the guarantee of participation.

Pederson, 912 F.Supp at 905.

What the cases cited above demonstrate is that any court wanting to remain true to the purpose and intent of Title IX cannot determine the availability of equal athletic opportunities solely on the basis of strict numerical proportionality. The availability of equal opportunity under Title IX can only be determined by an inquiry into whether the selection of specific sports and levels of competition effectively accommodate the interests and abilities of individual students. Such an inquiry is impossible under an analysis of the Policy Interpretation which holds that the inquiry ends once statistically proportional gender representation has been achieved.

C. Kelley, Cohen and Roberts Do Not Support The Elimination of Men•s Teams Solely To Achieve Proportional Gender Representation.

The defendants• decision to eliminate men•s wrestling and soccer was based solely on their unnecessary efforts to gerrymander a proportional solution to a numerical disparity between female student enrollment and female student athletic participation. This was not a situation, as in Kelley, Cohen or Roberts where the defendants were trying to remedy a documented history of denying equal athletic participation opportunities to female students, or attempting to cure a severe budget deficit.

At the time that it decided to eliminate the men•s wrestling and soccer teams, ISU was subject to neither a finding nor a charge that it was in violation of Title IX and was not being investigated or monitored by the OCR for potential Title IX violations. In fact, the record in this case contains convincing evidence that ISU was making substantial progress in expanding its program and had fully accommodated the interests and abilities of its female athletes.

Clearly, the defendants• actions were not motivated by a remedial purpose based on a documented history of denying equal athletic opportunities to female students. ISU•s actions were based solely on an affirmative action plan to increase the proportion of female student athletic opportunities in its athletic program by reducing the number of male student athletic opportunties. Once the number of male and female student athletic opportunities proportionally represented the make-up of the overall student body, ISU incorrectly believed it could claim "safe harbor" from any and all potential Title IX claims brought by individual students athletes.

By way of contrast, both Cohen II and Roberts involved fact situations where the defendant institutions were found by the OCR to be in violation of Title IX because of a documented history of denying equal athletic participation opportunities to female students. In both cases, the institutions were unable to defend their actions by showing that they had been able to comply with any of the three "safe harbor" tests set forth in the OCR•s Policy Interpretation. As noted by the Neal court, and discussed supra, a failure to meet the "substantial proportionality" provision of the first "safe harbor" prong was not the basis for finding a violation of Title IX in either case. As a result, these courts• "safe harbor" proportionality analysis of the Policy Interpretation•s first prong constitutes dicta, and has limited applicability to the facts of this case.

In addition, both Cohen and Roberts made it clear that their analysis of the Policy Interpretation first prong only allowed the affirmative elimination of opportunities for an overrrepresented gender based upon the documented history of a denial of equal athletic participation opportunities for women. The District Court in this case overlooked the fact that both Cohen and Roberts held that, in the absence of such a remedial objective, nothing in Title IX required or justified the elimination of athletic opportunities for men solely to achieve gender proportionality

Title IX specifies that its prohibition against gender discrimination shall not "be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on an account of the imbalance which may exist" between the total number or percentage of persons of that sex participating in any federally supported program or activity, and "the total number or percentage of persons of that sex participating in any community, State, section or other area." 20 U.S.C.A. Section 1681(b). Applying Section 1681(b), the First Circuit has held that Title IX "does not mandate strict numerical equality between the gender balance of a college•s athletic program and the gender balance of its student body." Cohen II, 991 F.2d at 894. Cohen II clearly held that, while evidence of a gender-based disparity in an institution•s athletics program is relevant to a determination of noncompliance, "a court assessing Title IX compliance may not find a violation solely because there is a disparity between the gender composition of an educational institution•s student constituency, on the one hand, and its athletic programs, on the other hand." Id. at 895. (Emphasis added). Accord, Roberts, 998 F.2d at 831.

Moreover, a recent OCR Policy Clarification specifically states that "[t]he three-part test gives institutions flexibility and control over their athletics programs . . . to respond to different levels of interest by its male and female students. . . . [N]othing in the three-part test requires an institution to eliminate participation opportunities for men." United States Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan 16, 1996). See ER at 293-309.

The notion that bare statistical disparity between genders requires the elimination of male athletic teams, and opportunities for individual male student athletes, was rejected by Assistant Attorney General Norma Cantu in testimony before Congress within a year of the actions taken by the defendants in this case:

> OCR does not advocate eliminating or "capping" teams as a means for achieving compliance with the law. Nor has OCR required that men's teams be cut in order for institutions to come into compliance with Title IX. In fact, the Clarification specifically states that "nothing in the three-part test requires an institution to eliminate participation opportunities for men." OCR's preference is that there be sufficient athletic opportunities for all students. Individual institutions must make their own decisions about their athletics programs, including the distribution of. athletic opportunities within the men's program and within the women's program. Indeed, the idea that "if women gain, men must lose" presents a false dichotomy.

Testimony given before the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism, Committee on Commerce, Science and Transportation, United States Senate (Wednesday, October 18, 1995) found at "Information Arcade, University Libraries, University of Iowa," (http://bailiwick.lib.uiowa.edu/ge/canttest.html) (Last Update: May 13, 1999). See Appendix Vol. I, at Tab C.

Under any reasonable interpretation of the applicable law, ISU was not vulnerable to a finding that it was in violation of Title IX solely because of a statistical disparity between the number of althetic opportunities available for male and female student athletes. ISU was therefore clearly on notice, at the time that it chose to eliminate the men•s wrestling and soccer teams to achieve gender proportionality, that statistical gender disparity did not, by itself, either require or justify the elimination of athletic participation opportunities for men under Title IX.

The District Court also erred in finding that this Circuit•s decision in Kelley supported the granting of summary judgment in favor of the defendants based on the facts of this case. In Kelley, the University of Illinois had been subject to a 1982 OCR determination that it had denied equal athletic participation opportunities to its female students. The University made a commitment to the OCR that it would rectify the situation, thereby avoiding a formal finding that it had violated Title IX.

A decade later, the University had failed to comply with its commitment to the OCR and was facing a severe budget shortfall requiring drastic cuts in its athletics program. The University originally considered the elimination of both the men•s and women•s swimming teams based on a number of program-oriented factors. The University chose not to eliminate the women•s swimming team because of the longstanding and ongoing Title IX compliance considerations.

In Kelley, the reasons for the termination of the men•s swimming team were entirely financial and program-oriented. Unlike the facts in this case, the University did not chose to eliminate the men•s team in order to comply with Title IX, and Title IX was not one of the factors that lead to the decision to eliminate the men•s swimming team. Kelley, 35 F.3d at 269. Title IX

only became a consideration when the University was faced with the decision on whether to eliminate the women•s swimming team in light of its documented history of denying equal athletic opportunities to female athletes. Id.

In this case, the asserted need to achieve statistical gender proportionality in ISU•s athletic program was the stated reason for the elimination of the men•s soccer and wrestling teams. In Kelley, the reason for the elimination of the men•s swimming team was financial, based on program-oriented considerations. In this case, there was no complaint, charge, or OCR investigation of ISU•s compliance with Title IX. In Kelley, the defendants were faced with a prior, unremedied and long-standing failure to provide equal athletic opportunities for women. In this case, ISU could have relied on the "safe harbors" of the Policy Interpretations• second and third prongs in defending against a Title IX challenge. In Kelley, none of the Policy Interpretation•s safe-harbors would have been available to defend against a charge that it had violated Title IX by eliminating women•s swimming. This Circuit•s opinion in Kelley simply does not insulate the defendants• actions from scrutiny under the facts of this case.

The District Court defended the elimination of participation opportunities for the male student athletes on the basis that the defendants were entitled to police themselves for Title IX compliance through affirmative action measures. See Harper, 35 F.Supp. at 1122. This analysis begs the question as to the reason for the affirmative action measures. The plain facts are that there was no reason for implementing affirmative action measures in this case. According to the First Circuit•s opinion in Cohen II, gender disparity alone does not constitute a violation of Title IX. There was nothing to police.

D.•The Phantom Menace: Since ISU Was Not In Violation of Title IX The Elimination of the Men•s Soccer and Wrestling Teams Was Entirely Unecessary and Unjustified Under Anyone•s Construction of the Policy Interpretation

Perhaps the most tragic aspect of this case is that there was no need or reasonable justification to eliminate the men•s wrestling and soccer teams. Because ISU was completely insulated from a Title IX challenge by all three of the Policy Interpretations "safe harbors", the shattering of these young men•s personal and professional aspirations was completely unnecessary.

As previously noted, both Cohen and Roberts held that Title IX "does not mandate strict numerical equality between the gender balance of a college•s athletic program and the gender balance of its student body." Cohen II, 991 F.2d at 894. There is not a single case which has held that the elimination of athletic opportunities for men solely to achieve gender proportionality in intercollegiate athletic programs is in any way sanctioned by Title IX . To the contrary, Cohen II held that "a court assessing Title IX compliance may not find a violation solely because there is a disparity between the gender composition of an educational institution•s student constituency, on the one hand, and its athletic programs, on the other hand." Id. at 895. (Emphasis added). Accord, Roberts, 998 F.2d at 831.

The record in this case establishes that the defendants were in substantial compliance with the second and third prong of the Policy Interpretations "safe harbor" test: evidence of program expansion and substantial accomodation of interests. For instance, the Gender Equity Management Plan documented steady improvement across the board in the attainment of gender equity in the University•s athletic programs including the increase in "participation opportunities," compliance in the proportional awarding of athletic scholarships, dramatic improvement in the overall proportional funding of male and female athletic teams, and increases in the salaries for coaches in womens• programs, among other factors. In addition, the student interest survey conducted by ISU revealed that although women represented over fifty percent of the student body, male students expressed a significantly greater interest in participating in the athletic program than female students.

The defendants have argued that they could not have complied with the second "safe harbor" without elevating women•s soccer to varsity status. See Herman Affidavit, ER at 449. If the defendants wanted to take a "belt and suspenders" approach to their Title IX compliance obligations, they could have easily elevated women•s soccer to a varsity sport thereby ensuring that the athletic program had adequately expanded its opportunities for women and substantially satisfied female student athletes• interests and abilities.

The defendants cannot justify discrimination against individual student athletes on the basis of their gender because that they would rather not spend any more money on their athletic program. The University cannot justify its elimination of equal opportunity for male student athletes by hiding the pre-textual excuse of limited finances or, as the District Court noted citing Roberts, "times of economic hardship." Harper, 35 F.Supp. at 1122. Financial concerns alone cannot justify gender discrimination. See Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973) (Proffered justification that gender based military regulation saves money is insufficient to withstand equal protection challenge); Haffer v. Temple University, 678 F.Supp. 517, 539 (E.D.Pa. 1987). The District Court in Colgate dismissed similar justifications for denying student athletes equal participation opportunities noting that:

> [I]f schools could use financial concerns as a sole reason for disparity of treatment, Title IX would become meaningless. Under such circumstances, a school could always use lack of funds as an excuse to deny equality because it costs money to implement equivalent women•s programs with long standing men•s programs. This cannot be either the spirit or meaning of Title IX.

Colgate, 802 F.Supp. at 750.

This was not a case, like Kelley, where there was a documented and unexpected budget shortfall that required the elimination of athletic teams. Simply put, there was no economic hardship. In fact, the record actually reflects that there were funds available that would have supported the two teams, but the defendants refused to consider any option that would allow the retention of men•s soccer and wrestling through an additional expenditure of funds.

In the second place, money was not the issue. The ISU athletic Department could have had all the money in the world and they still would have eliminated men•s wrestling and soccer. Elevating women•s soccer to a varsity sport without eliminating the men•s wrestling and soccer teams would not have attained the stated goal of proportional male and female participation levels in the athletic program. The bottom line is that eliminating opportunities for individual male student athletes is the only way that ISU could achieve their statistically proportional gerrymandering.

Opportunities for male student athletes were unecessarily eliminated to create phantom opportunities for female athletes based on non-existent interests. The result was the erection of a golden calf of numerical gender proportionality at odds with Title IX•s commandments against gender discrimination.

II. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS ALLEGING VIOLATIONS OF THEIR CONSTITUTIONAL RIGHTS

Plaintiffs' complaint contained a claim that alleged that (1) the actions of the individual defendants violated their Constitutional rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and (2) Title IX, as interpreted by OCR in its Policy Interpretation, violates the United States Constitution. The District Court dismissed these claims, relying on Waid v. Merrill Area Public Schools, 91 F.3d 857 (7th Cir. 1996). See Appendix of Orders, Tab "B". Finally, the Court appears also to have dismissed a series of claims based upon the Constitution that were not based upon the Equal Protection Clause, but rather other constitutional guarantees. In each of these holdings, the District Court erred.

A. The District Court Erred In Concluding That Non-Existent Title IX Claims Could Preempt Claims Under The Constitution

The District Court relied upon Waid v. Merrill Area Public Area Public Schools, 91 F.3d 857 (7th Cir. 1996) in holding that plaintiffs' Constitutional claims -- alleging sex and race discrimination in violation of the Equal Protection Clause and asserted pursuant to 42 U.S.C. Section 1983 -- were "subsumed and preempted" by Title IX. Waid held only that "Congress closed the avenue created by Section 1983 to all plaintiffs who could follow the way created by Title IX." Id. at 863 (emphasis added). Here, the District Court ignored the fact that plaintiffs have no Title IX claim against any of the individual defendants, none of whom are recipients of federal funds. Smith v. Metropolitan School District Perry Township, 128 F.3d 1014 (7th Cir. 1997).

If the District Court's extension of Waid were correct -- that is, if a claim against one defendant under Title IX precluded any separate claims under the Constitution and 42 U.S.C. Section 1983 against all individual defendants -- the result would be extraordinary.•

Under Gebser v. Lago Vista Independent School Dist., 118 S. Ct. 1989 (1998), a recipient of federal funds is liable for damages under Title IX for the conduct of a state actor in its employ only if the recipient (1) had actual notice of the state actor's discriminatory conduct and (2) was deliberately indifferent to the state actor's discriminatory conduct. Suppose, then, that a teacher at a public school or college were engaging in flagrantly discriminatory conduct -- forcing a high school student of the opposite sex into a sexual affair or requiring all women (but not men) in a college class to buy extra books, or clean the desks and blackboards after class. Under the District Court's view, the victims of such discriminatory conduct would have no monetary remedy at all under any federal law unless administrators at the school both knew about the conduct and did nothing about it. Given the eventual dismissal of school-related injunctive claims on grounds of mootness, the student would likely have no Federal remedy at all.

Plaintiffs submit that the Congress that passed Title IX simply could not have intended to insulate state actors engaging in such overtly unconstitutional conduct from liability, and to deprive the victims of such conduct from any federal remedy at all.

Support for the argument that Waid should not be extended to preclude all individual claims can be found in the unpublished opinions of this Circuit, but not as binding precedent. See El-Marazku v. University of Wisconsin System Bd. of Regents, Case No. 97-2069 (7th Cir., Decided Jan. 8, 1998). Cf. Kinman v. Omaha Public School District, 171 F.3d 607, 611(8th Cir. 1999).

B.•The District Court Erred In Concluding That Title IX Could Somehow Preclude Any Challenge To Its Own Constitutionality

The District Court also seemed to ignore the fact that plaintiffs' complaint alleged that Title IX itself, as interpreted by OCR's Policy Interpretation, violates the Constitution. Plaintiff•s Second Amended Complaint clearly separates their claims under Section 1983 and those claims brought directly under the Fourteenth Amendment to the United States Constitution. Second Amended Complaint, ER at 57. For instance, Count II of Plaintiffs• Second Amended Complaint is an equal protection claim which specifically argues that:

> The Defendants• purported objective of seeking to comply with Title IX does not shield them from having committed a Constitutional violation. In enacting Title IX, Congress did not intend to enact a Constitutional exemption, and Congress is in any event without power, by legislation, to "restrict, abrogate, or dilute" the guarantees of the Fourteenth Amendment.

Second Amended Complaint, ER at 84.

It is simply unfathomable that Congress intended to insulate Title IX itself from any Constitutional challenge -- or that it could do so even if it wanted to • and no case law supports such a conclusion.

The Policy Interpretation states that the statistical disparity between the percentage of a gender participating in sports and the percentage of that gender in the underlying student population is a factor that OCR will take into account in determining whether a recipient of federal funds is in compliance with Title IX. Many Courts have interpreted that provision as a "safe harbor," i.e., a recipient can protect itself from any Title IX liability in sports funding by demonstrating that the two percentages are the same. It cannot be denied that the District Court•s construction of the Policy Interpretation authorizes and/or encourages recipients of federal funds to affirmatively reduce athletic participation opportunities for individual male student athletes in order to reduce or eliminate any statistical disparity between the relevant percentages.

If that underlying conduct is unconstitutional, or otherwise discriminatory, then so is the Policy Interpretation that sanctions it. Saenz v. Roe, 1999 WL 303743,10 (U.S. May 17, 1999) ("we have consistently held that Congress may not authorize the States to violate the Fourteenth Amendment"); Reitman v. Mulkey, 387 U.S. 369, 376 (1967) (where purpose of state statute repealing fair housing laws was to "to authorize private racial discriminations in the housing market," statute violated the Equal Protection Clause); Lutheran Church -- Missouri Synod v. Federal Communication Comm'n, 141 F.3d 344, 353 (D.C. Cir. 1998) (where F.C.C. guidelines called for investigation of licensees if proportion of minority employees was below certain percentages, the guidelines were unconstitutional: "It cannot seriously be argued that this screening device does not create a strong incentive to meet the numerical goals [for minority employees]"); Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 710 (9th Cir. 1997) ("`the relevant question is not whether a statute requires the use of such measures [sexual or racial preferences] but whether it authorizes or encourages them'") quoting Bras v. California Public Utilities Commission, 59 F.3d 869, 875 (9th Cir. 1995)).

If the conduct needed to eliminate a disparity involves discrimination by a State actor in violation of the Fourteenth Amendment, or even authorizes discriminatory behavior by a private actor, then the Policy Interpretation itself violates the United States Constitution. The prohibition against sex discrimination by the federal government is contained within the Fifth Amendment's Due Process clause. The federal government can no more encourage others to engage in such conduct than it can do so on its own.

Thus, the District Court's strained efforts to avoid the substance of plaintiffs' Constitutional challenge were to no avail. Plainly, plaintiffs have plausible claims that (1) the failure to accomodate the interests of both sexes constitutes a violation of the Equal Protection Clause and (2) the construction of the Policy Interpretation encourages precisely such conduct. Plaintiffs should be permitted to pursue such claims in the lower court.

C.•The District Court Erred In Concluding That Title IX Preempts Constitutional Claims Not Based Upon Allegations Of Sex Discrimination.

For reasons not entirely explained, the District Court dismissed claims against individual defendants that were not based upon sex discrimination on the grounds that they were preempted by Title IX. See Appendix of Orders, October 6 Order at 34-35,

Tab B. The District Court dismissed claims asserted against the individual defendants pursuant to 42 U.S.C. Section 1985, which alleged a conspiracy to deprive the defendants of their federally guaranteed rights on the basis of their race, on the grounds that they were pre-empted by Title IX. The District Court also dismissed Plaintiffs Section 1983 race-based equal protection claim (Count V) on the basis that it was preempted by Title IX. With due respect to the lower court, neither Waid nor any other case suggests that Title IX preempts other federal claims covering conduct not at all covered by Title IX.

III. The District Court Erred In Granting Summary Judgment on Plaintiffs• Title VI Claim

The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." Id. at 2553. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986); Cain v. Lane, 857 F.2d 1139, 1142 (7th Cir.1988).

The Title VI claims in this case are based on the allegation that defendants• conduct had a disparate impact on Hispanic and Asian minorities. Defendants attempt to defeat this claim by offering evidence of the lack of impact of defendants• actions on minorities as a whole. Statistical evidence of the impact of defendants• conduct on minorities as a whole is not relevant to a claim alleging disparate impact on Hispanic and Asian student athletes. Consequently, defendants have entirely failed to meet their burden of establishing a prima facie entitlement to summary judgment.

In addition, to the extent that there was a conflict in statistical data in support of the parties• respective positions on the disparate impact claim, the sufficiency and weight of the statistical evidence are questions of fact to be decided by the trier of fact. The District Court•s allegations that the defendants superficially inflated the statistical evidence is without merit since there are other, equally reasonable calulations of the statistical disparity which would have increased the percentage of minority athletes impacted by the defendants conduct.

CONCLUSION

There can no longer be any question that freedom from discrimination is a two way street. As Justice Powell noted in his concurring opinion in Bakke, "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." Regents of the University of California v. Bakke, 438 U.S. 265, 295, 98 S.Ct. 2733, 2751 (1978).

Title IX does not require a showing of "sinister motives" to establish a violation of the statute, as the District Court suggests. In fact, the path to gender equity in intercollegiate athletics has been paved with good intentions. Nevertheless, the impact of gender equity schemes such as the one at issue in this case have been devastating, with mens• wrestling teams being the most frequent victim.

Since Title IX was passed in 1972, 352 intercollegiate wrestling programs have been dropped. See Tomlinson, "Grappling With A Dillema," The Denver Post (June 16 1997). In the ten-year period between 1985 and 1995 35 NCAA Division I wrestling teams were lost at a time when interest in high school wrestling programs was at an all time high. Nakamura, "Equity Leaves its Mark on Male Athletes: Some Schools Make Cuts to add Women•s Sports," The Washington Post at A1 (July 7, 1997). In the same ten-year period the United States Olympic wrestling team has been in a state of steady decline. Id.

Defendants• actions in this case deprived individual male student athletes of scholarships and the opportunity to compete in intercollegiate athletics solely on the basis of their gender. Defendants cannot be allowed to "expand" athletic participation opportunities for female student athletes as a class • irrespective of their individual interests and abilities -- by eliminating athletic participation opportunities of individual male student athletes who are entitled to just as much protection under Title IX as their female counterparts.

The District Court•s analysis of the Defendant•s obligations under Title IX leads to the inescapable and erroneous conclusion that Title IX stands for the proposition that "all [athletes] are equal, but some [athletes] are more equal than others." The adoption of such a flawed analysis strips male student athletes of "effective protection against discrimination practices" by leaving them without an effective means of redressing a violation of their individual rights under Title IX.

For the foregoing reasons the District Court•s orders must be reversed and this case remanded for further proceedings.

DATED this 21st Day of May 1999.

THE CENTER FOR INDIVIDUAL RIGHTS

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Nicholas S. Hentoff
Senior Associate Counsel

Attorneys for Plaintiffs-Appellants

Louis S. Goldstein, Esq
Bruce S. Kreisman
Goldstein Fluxgold & McConnell
33 N. Dearborn, Suite 1015
Chicago, Illinois 60602

Donald W. Anderson
Landau, Omahana, Tucker, Proger & Siebenhaar
222 N. LaSalle St., Suite 200
Chicago, IL 60601