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APRIL 24, 2023

Hot Topics in Title IX Athletics: Recent Cases about Title IX Compliance in Athletics

In the past six months, the federal courts have addressed some novel issues about what is a “sport” under Title IX, as well as questions of standing, retaliation, financial aid, class certification and Title IX’s equitable opportunities and benefits requirements. These cases reflect that the landscape of Title IX continues to change and requires careful attention to ensure that your school or institution does not inadvertently drift into Title IX violation.

Standing/Jurisdiction

Ng v. Bd. of Regents of the Univ. of Minn., 2023 WL 2779339 (8th Cir. April 5, 2023). The 8th Circuit ruled that a former member of the disbanded Minnesota (UM) men’s gymnastics team waited too long to seek an injunction requiring UM to reinstate his team pending the outcome of his Title IX lawsuit, even though he spent the 13 months between the filing of his complaint and his motion for an injunction in attempts to settle the dispute.

Becker v. North Dakota Univ. System, 2023 WL 130410 (D.N.D. Jan. 9, 2023). Four female athletes who were not currently enrolled at the university could not challenge the elimination of its women’s hockey team because their alleged injury was hypothetical. This decision has been appealed to the 8th Circuit.

Graham v. State Univ. of New York at Albany, 2023 WL 28076 (2d Cir. Jan. 4, 2023). The court ruled that elimination of SUNY Albany’s women’s tennis team was proper because the school’s athletic conference ceased sponsoring the sport. The court also ruled that former students and those without remaining eligibility lacked standing to sue.

Failure to Maintain Substantial Proportionality

Navarro, et al. v. Florida Institute of Technology, Inc., 2023 WL 2078264 (M.D.Fla. Feb. 17, 2023). Members of Florida Institute of Technology’s (FIT) men’s rowing team alleged that the elimination of their team caused a loss of the proportionality in athletic opportunities that is required by Title IX. The court rejected FIT’s argument that “e-sports” (competitive video gaming) players should be counted as athletes for Title IX purposes. Thus, FIT was in violation of Title IX, and was ordered to reinstate the men’s rowing team.

Balow v. Michigan State Univ., 24 F.4th 1051 (6th Cir. 2022), *cert. denied*, 143 S.Ct. 525 (2022). Members of Michigan State University’s (MSU) women’s swimming team alleged that elimination of their team caused a loss of substantial proportionality. The court ruled that, when counting athletic participation numbers for female athletes, “novice” rowers and non-competing track athletes were properly counted. However, it rejected the trial court’s averaging all MSU’s team rosters to find the number of athletes needed for a viable team and sent the case back for recalculation based on the size of the women’s swimming team. (Recalculation showed a significant participation gap. Although the usual remedy would reinstatement of the discontinued team, because of the high capital costs required

to reinstate swimming at MSU, the court instead directed it to submit a plan to reduce its participation gap in other ways.)

Brooks v. State College Area School Dist., 2022 WL 17366397 (M.D.Pa. Dec. 1, 2022). A school district refused to create an ice hockey team for girls after their club team was disbanded. A purportedly co-ed varsity team existed, but no girls made the team, and the junior varsity was for boys only. The court ruled that allowing girls to try out for only the varsity squad was nothing but an “illusory” participation opportunity and ordered the school district to create a team upon which the girls could play.

Retaliation

MacIntyre v. Carroll College, 48 F.4th 950 (9th Cir. 2022). The Ninth Circuit reinstated plaintiff’s claim that MacIntyre’s coaching contract was not renewed in retaliation for his complaints about gender inequity in the college’s athletic department. The court noted that the definition of an adverse job action in a retaliation claim is broader than that for a discrimination claim, so could encompass nonrenewal of a contract. Also, under the “minimal threshold showing” required under Title IX, nonrenewal of plaintiff’s contract could reasonably deter him from reporting discrimination at the college.

Financial Aid

Fisk v. San Diego State Univ., 2023 WL 2919317 (S.D.Cal. April 12, 2023). Over the course of eleven years, San Diego State University (SDSU) provided women 4-9% less financial aid than required under Title IX’s proportionality rules. In partially denying/granting SDSU’s motion to dismiss, the court found that:

- a. only plaintiffs who previously received financial aid alleged sufficient injury in fact by showing that they were in a position to compete for the pool of financial aid funds;
- b. injunctive and declaratory relief is available only to current SDSU athletes;
- c. stigmatic and psychological harms are not redressable Title IX injuries;
- d. in their complaint, plaintiffs need not rebut SDSU’s purported legitimate reasons for the disparity in financial aid; and
- e. only the athletes who were present during a Zoom call where potentially threatening statements were made have standing to assert retaliation claims.

Class Certification

Anders v. Cal. State Univ., Fresno, 2022 WL 3371600 (E.D.Cal. Aug. 16, 2022), *recon. denied*, 2022 WL 17156145 (Nov. 22, 2022). After elimination of the women’s lacrosse team, female athletes sought class action certification for their claims that Fresno State failed to provide all female athletes with proportional participation opportunities and benefits. In partially denying class certification, the court held that:

- a. a class definition including “potential” students deterred from enrolling is “too conjectural or hypothetical”;
- b. “varsity” must be inserted into the class definition to preclude club athletes;

- c. the opportunities and benefits claims must each have its own class definition;
- d. joining all potential plaintiffs would be impracticable;
- e. issues of opportunities and benefits provided to female athletes apply generally to the class; and
- f. the proposed class representatives (two lacrosse players) did not adequately represent the interests of the broader class.

This decision has been appealed to the 9th Circuit.

The best way to ensure ongoing Title IX compliance is to perform a compliance audit of your athletic program. Bond attorneys continue to monitor developments in Title IX's requirements and stand ready to assist you. For more assistance with Title IX auditing or if you have questions about Title IX's requirements, please contact [Kristen Thorsness](#), [E. Katherine Hajjar](#), any attorney in Bond's [higher education practice](#) or the Bond attorney with whom you are regularly in contact.

