You Make the Call. . .

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National Collegiate Athletic Ass'n v. Smith, 119 S.Ct. 924 (1999.)

3RD CIRCUIT OPINION LEAVING POSSIBILITY THAT NCAA IS SUBJECT TO TITLE IX OVERTURNED, BUT SUPREME COURT LEAVES POSSIBILITIES FOR THE FUTURE.

On February 23, 1999, the Supreme Court of the United States, disagreeing with the 3rd Circuit (in *Smith v. National Collegiate Athletic Ass'n*, 139 F.3d 180 (3rd Cir. 1998)), held that a plaintiff's demonstration that the NCAA receives dues payments from members who are recipients of federal funds was not enough to subject the NCAA to suit under Title IX.

As recounted in You Make the Call. . ., Vol. 1, Iss. 1, Renee Smith was an undergraduate at St. Bonaventure where she participated on the volleyball team in the 1991-92 and 1992-93 seasons. She decided not to play in the 1993-94 season and graduated from St. Bonaventure in 2 1/2 years. Subsequently she decided that she wanted to pursue a graduate degree in law, however, St. Bonaventure does not have a law school. Therefore, Smith enrolled at Hofstra University in 1994-95 and then in law school at the University of Pittsburgh in 1995-96.

During both of these years (1994-95 and 1995-96), Smith attempted to play intercollegiate volleyball. NCAA Bylaw 14.2.1 states that a student-athlete "shall complete his or her seasons of participation [four seasons being the maximum allowed] within a five calendar year period." Smith's five year period would have included these last two years of participation. Unfortunately, the NCAA denied her eligibility for these years based on another Bylaw, 14.1.7, the Postbaccalaureate Bylaw which mandates that student-athletes may not participate in intercollegiate athletics at a postgraduate institution other than the one from which they earned their undergraduate degree.

In August of 1996, Smith sued the NCAA claiming that the Postbaccalaureate Bylaw excluded her from participation on the basis of her sex in violation of Title IX of the Education Amendments of 1972. 20 U.S.C. § 1681, et seq. She did not attack the rule on its face, but rather, she argued that the NCAA discriminates by granting more waivers from such eligibility restrictions to male rather than female postgraduate students.

Before the United States District Court for the Western District of Pennsylvania, Smith argued that the NCAA was amenable to Title IX based on the nexus between the NCAA and federal financial assistance received by NCAA member schools. The court disagreed finding that such a connection was "far to attenuated" to sustain a Title IX claim. *Smith v. National Collegiate Athletic Assn*, 978 F. Supp. 213, 219 (W.D. Pa 1997). Smith's case was dismissed.

Smith immediately moved to file an amended complaint but the district court found her motion to be moot.

Smith appealed this decision to the Third Circuit Court of Appeals which found her Amended Complaint more acceptable. In this Amended Complaint Smith alleged that the NCAA is amenable to Title IX as a recipient of federal funds because it receives federal financial assistance "through another recipient (member schools) and operates an educational program or activity or benefits from such assistance." Am. Comp., ¶¶ 63-70. The Third Circuit found that Smith's allegations showed that the NCAA receives dues from member schools, which do receive federal funds. This was enough to bring the NCAA under Title IX. *Smith v. National Collegiate Athletic Assn*, 139 F.3d 180 (3rd Cir. 1998). On remand, all Smith had to show was that the NCAA receives dues from its members, a fact that was never in dispute. However, before this could happen, the NCAA appealed to the Supreme Court.

After reviewing these earlier decisions, the Supreme Court recounted the applicable statutes dealing with such sexual discrimination. As the Court explained, Title IX focuses on educational programs receiving federal financial assistance. Such programs as defined under the Civil Rights Restoration Act of 1987 (CRRA), 20 U.S.C. § 1687, include any college or university, "any part of which is extended Federal financial assistance." § 1687 (2)(A). The CRRA also provides coverage for entities engaged in the business of providing education and created by two or more covered entities. Therefore, as the Court stated "if any part of the NCAA received federal assistance, the NCAA operations would be subject to Title IX." National Collegiate Athletic Ass'n, 119 S.Ct. at 927.

The Court focused its discussion on two older cases. It first looked to G*rove City College v. Bell*, where it had held that a college receives financial aid when it enrolls students who receive such aid. 465 U.S. 555, 563 (1984). Moreover, in Grove City, the Court determined that Title IX covers both direct and indirect types of financial aid. Id.

The Court then looked to the case of *Department of Transp. v. Paralyzed Veterans of America*, which considered the scope of § 504 of the Rehabilitation Act of 1973 and its similar prohibitions against discrimination based on disability by entities receiving federal financial aid. 477 U.S. 567 (1986). As the Court explained, an entity is not covered if it merely benefits from such aid, the Act only covers those entities that receive such aid. Id. at 607.

In following these cases, the Supreme Court found that the 3rd Circuit did not follow the PVA case, instead, the 3rd Circuit Court of Appeals relied exclusively on language within a Title IX regulation, 34 C.F.R. § 106.2 (1997), which seemed to define a recipient of federal financial aid as someone who receives or benefits from federal funds. As the Court pointed out, the 3rd Circuits reading of the regulation failed to take into account the first part of the regulation

specifying that recipients are entities that receive, either directly or indirectly, federal financial assistance. And so, the regulation actually is in accord with Grove City and PVA in making clear that entities that merely benefit from such aid are not considered to be recipients covered by Title IX.

In the end, as the Court explained, unlike the particularly earmarked student aid in Grove City, there was no allegation that the NCAA member schools paid dues with such federal funds, and "[a]t most, the Association's receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members." National Collegiate Athletic Ass'n, 119 S.Ct. at 929.

Unfortunately, Smith's claim that the NCAA's alleged discriminatory conduct could be attacked under Title IX because of the federal funds received by NCAA member schools, has failed. Yet, the Supreme Court left avenues open for the future for Smith or other complainants.

As the Court noted, Smith had also presented two alternative theories which were not addressed by the Supreme Court because they were not addressed by the courts below, yet the Court's discussion of these theories allows for the possibility of their consideration in the future. Id. at 930.

First, Smith asserted that the NCAA receives federal financial assistance through its National Youth Sports Program. As the Court stated, two district courts have found that the Youth Sports Program creates an issue of fact as to whether the NCAA is a recipient of federal funds. Id. at n. 7, citing *Bowers v. NCAA*, 9 F.Supp.2d 460, 494 (NJ 1998) (found in You Make the Call. . ., Vol. 1, Iss. 2), & *Cureton v. NCAA*, No. Civ. A 97-131, 1997 WL 634376, at *2 (ED Pa. 1997). Moreover, the Department of Health and Human Services has issued two letter determinations that the NCAA is a recipient as a result of the Youth Sports Program. Id. Cases in the future which follow this pattern of reasoning may be able to argue the NCAA is a recipient and so amenable to Title IX.

Second, Smith alleged that member schools as recipients cede authority over their programs which do receive federal funds to the NCAA. Therefore, the NCAA should be amenable to Title IX because it controls its member institutions. Id Moreover, as the NCAA's rules dictate the manner in which member schools must to administer their athletics programs, and as a consequence several aspects of their programs which do receive financial aid, the NCAA should be found to more indirectly receive federal funding similar to that in Grove City.

With these two last possible ways in which to bring the issue of the NCAA's amenability to a court in the future, such conduct may become visible and force the NCAA to finally address the impact its policies have on gender equality.

Cureton v. National Collegiate Athletic Ass'n, 1999 WL 118667 (E.D. Pa 1999).

NCAA INITIAL ELIGIBILITY STANDARDS VIOLATE TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

In a case decided soon after the Supreme Court handed down the Smith decision, several African-American student-athletes alleged that they were unlawfully denied educational opportunities as freshman as a result of their ineligibility due to the NCAA's Proposition 16, specifically the minimum test score requirement. Therefore, the plaintiffs alleged that the NCAA rule violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.

Initially, the court held that even though a private right of action exists under Title VI, the plaintiffs still had to show that (1) the NCAA receives federal financial assistance and (2) that the minimum test score requirement has a disparate impact on African-American student-athletes. *Cureton v. NCAA*, 1998 WL 634376, * 2 (E.D. Pa 1997).

Both parties then filed motions for summary judgment which are the genesis of this case.

At first the court reiterated that the NCAA is covered by Title VI. It then moved to a discussion as to whether the NCAA receives federal financial assistance before subjecting the NCAA to Title VI. Id. at *4.

In answering this question the court looked to the plaintiff's argument that the NCAA indirectly receives federal financial assistance because the NCAA acts as the agent of its member institutions through its governance of intercollegiate athletics. In making its argument, the plaintiffs had relied on the 3rd Circuit Court of Appeals decision in Smith, which was overturned as explained above. The plaintiffs also argued that the NCAA was itself a recipient of federal funds through the National Youth Sports Program. Id. at *4-5.

In answer to the plaintiff's reliance on Smith, the district court noted that as a result of the Supreme Court's decision, the plaintiffs could no longer rely on their argument based upon the relationship between the NCAA and its member schools even though it was clear that Title's VI and IX use similar language and regulations. Moreover, the court pointed out that "the regulations implementing Title VI are even more explicit than the Title IX regulations at issue in Smith in excluding 'any ultimate beneficiary' as a 'recipient' for Title VI purposes." Id. at *5. However, according to the court, the plaintiffs could still use this theory of argument in conjunction with other facts, to establish that the NCAA does receive federal funds and is therefore covered by Title VI.

The plaintiff student-athletes presented several theories to bring the NCAA under Title VI. In essence, the court agreed with two of the plaintiffs theories, (1) that the NCAA exercises control over the National Sports Youth Program and as a result controls the Community Services Block Grant which funds this enterprise, and (2) that member schools have ceded authority over their federally funded programs to the NCAA. Id. at * 5-6. As the court explained, member schools agree to abide by NCAA rules and to administer their athletic programs in accordance with these rules. The NCAA is then given regulatory and enforcement authority over these members who receive federal funds. Therefore, there is a sufficient "nexus between the NCAA's allegedly discriminatory conduct with regards to intercollegiate athletics and the sponsorship of such programs by federal fund recipients." Id. at 8.

The court next considered whether Proposition 16 resulted in an unjustified disparate impact as prohibited by Title VI. In establishing their case the plaintiffs pointed to several memos from the NCAA which clearly admitted that African-American students were disproportionately impacted by Proposition 16 in that higher percentages of these individuals could not meet NCAA initial eligibility requirements under Title VI, and that white student-athletes were excluded at lower percentages. Id. at * 9-12.

The NCAA responded by pointing to several potential benefits of Title VI including increases in graduation rates for African-American student-athletes, and increased numbers of such student-athletes receiving athletic scholarships relative to their composition in the student body. Id. at *11-12. The court responded that despite the potentially positive results, Title VI still comes into play if any individuals are disparately impacted. Accordingly, the court found that the plaintiffs had presented a prima facie case showing a racially disproportionate effect as a result of Proposition 16, in violation of Title VI. Id. at 13.

The analysis then shifted to the NCAA's justifications for Proposition 16 as an educational necessity. The NCAA presented two goals for this rule (1) raising graduation rates, and (2) closing the gap between black and white student-athlete graduation rates. Id at *14. Regarding the first goal, the court determined that the NCAA has "no legitimate interest in promulgating academic standards that affect the graduation rates of students in general," their scope should only be toward student-athletes. Id. Still, the court held that "the NCAA is properly setting academic standards for student-athletes in hopes of improving the rate at which they graduate." Id. at *16.

As to the second goal, the court found that this goal was both inappropriate and was not the true purpose behind Proposition 16 in the first instance. Id. at *17. Therefore, this clearly race based goal was not a legitimate goal for the NCAA to follow.

Consideration then moved to an assessment of the use of test scores as a means for achieving the legitimate goal of increasing graduation rates, even given the disparate impact. The court accepted that such standardized test scores have some relationship to predicting success at the college level. However, the problem centered on the NCAA's seemingly arbitrary use of a cutoff score in its sliding scale. (The scale compares a high school students GPA at graduation and matches it to a necessary standardized test score based on this sliding scale. The cutoff sets a minimum test score needed to be eligible). The court concluded that even though it would "not preclude the use of the SAT, or any particular cutoff score of the SAT, in the NCAA's adoption of an initial eligibility rule," here the NCAA had offered no evidence as to why the particular cutoff score was used. Id. at *24.

Finally, the court analyzed whether there were effective alternatives to Proposition 16 that the NCAA could have used, resulting in a lesser disparate impact. The court looked at three alternatives as presented by the plaintiffs and found that all three would project a less disparate impact on eligibility at the cost of slightly lower graduation rates. Id. at * 25-26.

Therefore, the plaintiff's motions were granted, the court declared that Proposition 16 was illegal under Title VI, and the NCAA was permanently enjoined from continued use and implementation of Proposition 16.

Bingham v. Oregon School Activities Association, 24 F.Supp.2d 1110 (D.C. D. Or. 1998).

STATE HIGH SCHOOL ATHLETIC ASSOCIATION IS COVERED BY THE ADA AND IS ENJOINED FROM ENFORCING "EIGHT SEMESTER RULE" AGAINST DISABLED STUDENT ATHELTE

In another case involving the court which handed down the Casey Martin decision (found in You Make the Call. . ., Vol. 1, Iss. 1), the United States District Court for the District of Oregon was met with a challenge by a disabled high school student-athlete who claimed that an association age limitation rule violated the ADA.

Adam Bingham was an eighteen year old student who was forced to repeat tenth grade as a result of his disability, Attention Deficit Disorder (ADD). An Oregon School Activities Association (OSAA) eight semester rule barred him from playing on the football team in his ninth and tenth semester in school. As a result, Bingham sued for an injunction allowing him to participate, claiming that the rule violated the ADA by barring him from participation due to his disabled status.

The court initially found it clear that he was disabled and that his disability "substantially limits" his ability to fulfill the "major life activity" of learning. Id. at 1115. The court then pointed out that the OSAA, as made up of public and private schools, was expressly subject to the ADA, 42 U.S.C. § 12182(a), as a place of public accommodation under Title III. The court also noted that athletics and other extracurricular activities were part of the goods and accommodations offered by such schools to their students, therefore, the OSAA rule could not be used to discriminate against a disabled student-athlete. Id.

As to Bingham's claim that giving him a fifth year of eligibility was a "reasonable" accommodation by OSAA, taking into account his disability, the court initially noted that the OSAA had granted such waivers in the past. The court then explained that the purpose of the rule, encouraging students to graduate in four years, would not be frustrated if the student's failure to graduate in this time was caused by his disabled status. Id. at 1116.

The court then shifted to OSAA's arguments as to why the rule would fundamentally alter the athletics' programs provided. The court admitted that a true analysis of this argument could only take place at trial and did not want to address the issue at the motion stage. Id. at 1116-1117.

OSAA focused on the possible penalties Bingham's high school would suffer if OSAA were forced to punish the school, after a subsequent court addressing the issue had determined that the rule was valid and that a waiver of the rule for Bingham was not proper. In response to this possible problem the court enjoined OSAA from ever penalizing Bingham's high school as a

result of such a waiver. And in its ruling the court granted Bingham a preliminary injunction prohibiting OSAA from applying the rule to him, as a reasonable accommodation under Title III of the ADA.

Willis v. Anderson Community Sch. 158 F.3d 415 (7th Cir 1998) & Walton-Floyd v. U.S. Olympic Comm. 965 S.W.2d 35 (Ct. App. TX 1998)

DRUG TESTING IN HIGH SCHOOL AND INTERNATIONAL COMPETITION

Two recent drug testing cases have asked the court to examine current drug testing policies.

1) In *Willis v. Anderson Community Sch., Willis*, a freshman high school student, was suspended for fighting. The school's policies indicated that upon Willis' return to school he would have to submit to a drug test. The school's policy mandated testing for any student who possesses or uses tobacco, is suspended for fighting, or violates other identified school rules. Willis refused to undertake the test and was informed that he would then be considered to have engaged in drug use and would again be suspended. Willis brought an action against the school claiming that the policy violated his Fourth and Fourteenth Amendment rights.

The school asserted that this policy was necessary because research data demonstrated a "causal nexus" between drug use and violent behavior, such as fighting with classmates. The appeals court did not agree.

On appeal, the court distinguished this case from other cases involving drug testing policies in high school, those involving student athletes. For example, in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the court identified differences in the privacy interest involved, between drug testing of student athletes and the general student population, which made testing more acceptable in the case of student athletes. First, the very nature of participation in sport requires a greater compromise of privacy given the factor of communal undress in the locker room. Second, and more significantly, drug testing of student athletes is more acceptable as student athletes choose to play sports and thus submit to greater regulation, including like drug testing. The court followed this rationale in allowing the drug testing policy in, *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998) (found in You Make The Call. . ., Vol. 1, Iss. 1).

In this case the court rejected Anderson's policy primarily because the school's data did not support the policy reasons identified, that is, there was not a strong casual link between behaviors like fighting, and drug use. Finally, the court stated that it was important to prohibit this type of policy, and as a result to prevent routine drug testing of all students.

2) In *Walton-Floyd v. U.S. Olympic Comm. (USOC)*, an athlete banned from competition for failing a drug test brought an action against the USOC for breaching its duty of care.

The athlete was issued a card that listed several banned substances and a phone number to call for a complete list of banned substances. The instructions on the card directed that it was the responsibility of the athlete to call the hotline and to be aware of all the banned substances included. The athlete and her husband both claimed that they called the number numerous times to check on a particular substance, Sydnocarb. The hotline operator told them on each call that the substance was permitted. The drug test that disqualified the athlete indicated the presence of amphetamines which were produced by Syndnocard.

The athlete asserted that the USOC was negligent because of the erroneous information provided to her via the hotline. She also suggested that the USOC breached its duty by not keeping hotline officials up to date on the status of Syndnocard. The USOC countered stating that the Amateur Sports Act 36 U.S.C.A. §§ 371-396, did not create any legal duty of care for the USOC to protect a governed athlete. In other words, the USOC had no mandated responsibility to athletes to make them aware of banned substances. Additionally, the USOC claimed that as a charitable organization it was not liable for damages.

The court held that there was no cause of action allowed under the Amateur Sports Act in this situation, and that the USOC assumed no duty of care toward the athlete under the Amateur Sports Act.

These decisions indicate that drug testing can still be required at the high school and Olympic level. In general, a policy applying to students-athletes is likely to be permitted, if it is not administered arbitrarily and categorically. If students are involved in an activity that already compromises their privacy interest, such as athletics, drug testing is usually allowed. However, merely testing all students is still too extreme. Additionally, the administration of a policy will be evaluated on a case by case basis. In the case of organizational policies, like the USOC's drug testing policy, those who must submit bare the responsibility of compliance to the standards set forth in the policy. Misinformation, seemingly, is not excuse to policy standards clearly set out beforehand.

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