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DRUG TESTING STUDENTS PARTICIPATING IN EXTRACURRICULAR ACTIVITIES IS CONSTITUTIONAL

***Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (June 27, 2002).**

On June 27, 2002, reversing the decision of the United States Court of Appeals for the Tenth Circuit the United States Supreme Court held that a policy requiring drug testing of all students participating in extracurricular activities at the middle and high school level was constitutional.

In 1998, the Tecumseh, Oklahoma, School District adopted a Student Activities Drug Testing Policy that required all middle and high school students to consent to urinalysis testing for drugs before participating in any extracurricular activity. Students and their parents sued the district claiming that the policy violated the Fourth Amendment.

Following the Supreme Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), the district court upheld the policy by granting summary judgment in favor of the school district. Although the school district did not demonstrate that the drug problem had reached epidemic levels, the court found that special needs existed in the public school setting in support of the policy. On appeal, the Tenth Circuit Court of Appeals reversed, finding that the school district failed to show that there was an identifiable drug abuse problem among a sufficient number of the group tested, that justified testing as a measure of remedying an existing problem.

In its review, the Supreme Court applied the principles established by *Vernonia* to assess the reasonableness of the school district's drug testing policy. The Court began by looking at the nature of the students' privacy interests and noted that the privacy interests of all public school students are limited because the State is responsible for the students' discipline, health and safety while they are in school. Furthermore, similar to the student-athletes in *Vernonia*, students participating in extracurricular activities subject themselves to other intrusions, including rules of the extracurricular organization and possible communal undress.Therefore, "the students affected by this Policy have a limited expectation of privacy." (p. 2566).

The Court then examined whether the character of the testing policy intrudes on these privacy interests. The procedure used was virtually identical to that used in *Vernonia*, except that it was less intrusive because it allowed male students to produce their sample behind a closed door. Also, test results were kept confidential and only used to keep students who had failed the tests from participating in extracurricular activities. Therefore, the invasion of the students' privacy was not significant.

Finally, the Court analyzed the nature and immediacy of the government's concerns and the efficacy of the policy in addressing them. The plaintiffs argued that the school district had not presented evidence of an immediate or epidemic drug problem. However, "'[a] demonstrated problem of drug use. . .[is] not in all cases necessary to the validity of a testing regime'" (p. 2567), and there is no requirement that there be evidence of a pervasive drug problem to institute a testing policy. The Court pecifically rejected the Tenth Circuit's attempt to set a required threshold level of evidence of a drug abuse problem because "the safety interest furthered by testing is undoubtedly substantial for all children, athletes and nonathletes alike." (p. 2568).

The Supreme Court concluded that the drug testing policy was a "reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use." (p. 2569).

SCHEDULING OF GIRLS' SPORTS DURING SEASONS NOT AS ADVANTAGEOUS AS BOYS' SPORTSSEASONS BARRED BY TITLE IX AND THE EQUAL PROTECTION CLAUSE

***Communities for Equity v. Michigan High School Athletic Association*, 178 F.Supp.2d 805 (W. Dist. Mich., Dec. 17, 2001) and 2002 U.S. Dist. LEXIS 14220 (W. Dist. Mich., Aug. 1, 2002).**

Communities for Equity and several female student athletes filed a class action suit against the Michigan High School Athletic Association (MHSAA) alleging that the Association discriminates against female student-athletesby scheduling athletic seasons and tournaments for girls' sports during less advantageous times of the academic year than the boys' athletic seasons and tournaments in violation of the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972. The specific sports at issue are basketball, volleyball, tennis, soccer, Lower Peninsula golf, and Lower Peninsula swimming and diving (collectively "swimming").

The MSHAA provided several reasons why boys and girls sports were not scheduled during the same seasons, including: (1) the current schedule ensured the greatest number of participation opportunities for students wishing to participate in interscholastic athletics because many sports require the same officials, the same coaches, and the same facilities; (2) based upon a survey it had commissioned the MSHAA found that female student-athletes preferred the current manner

in which sports seasons were scheduled and member schools also indicated that they preferred the status quo; and (3) scheduling comparable boys' and girls' sports in separate seasons gave the girls an "independent identity" from the boys.

The district court agreed that ensuring the greatest number of participation opportunities for student-athletes of all sexes was a legitimate goal, but found insufficient evidence to prove the current scheduling system achieved that end. In addition, the MSHAA was not able to prove that boys' and girls' sports could not be scheduled during the same seasons.

In regard to the survey, the court found that it suffered from several design flaws that may have led to inaccurate survey results because: (1) the girls surveyed were not presented with any evidence of potential benefits from changing the seasons in which particular sports are played; (2) only one-third of the girls attending MSHAA's schools were surveyed; and (3) nearly one-third of the survey respondents participated in sports other than those at issue. Furthermore, many of the girls who voted in favor of maintaining the status quo apparently did so because they feared unfavorable funding and treatment if their sports competed against the comparable boys' sport during the same season.

As to the MSHAA's argument that its scheduling allowed girls' sports to develop their own identity, the court found instead that giving comparable boys' and girls' sports separate seasons denied girls sports the opportunity to prove they could stand on their own and that the separate basketball seasons sent a message that girls' basketball programs could not be fit into the "regular" winter basketball season. According to the court, the girls deserved to play in the "regular" season just as much as the boys.

Thus, the court concluded that the current MSHAA sports scheduling system was in violation of the female student athletes' equal protection rights under the Fourteenth Amendment and Title IX. The court enjoined the MHSAA from continuing its current scheduling system, ordering it to cure its violations of the Equal Protection Clause and Title IX by creating a schedule in which female and male high school student athletes equitably share the advantages and disadvantages of the new seasons. The MSHAA was required to submit a compliance plan consistent with the court's opinion by May 24, 2002.

On August 1, 2002, the court reviewed the MSHAA's proposed Compliance Plan. The proposal would reverse the seasons of Lower Peninsula girls' golf, swimming and tennis with the boys' seasons in those sports. In the Upper Peninsula, girls' golf and tennis would be moved to the normal boys' seasons, while boys' swimming and tennis would be moved to the normal girls' seasons. The plan would leave girls' basketball, volleyball and soccer in disadvantageous seasons when compared with the comparable boys' sport seasons.

In its review of the proposed plan for compliance, court noted that the plan would still leave a greater total number and percentage of female athletes in disadvantageous seasons because the sports selected in the plan were those that involved the smaller numbers of female athletes. The MSHAA argued that much of this perceived inequity stemmed from the fact that football was scheduled during an advantageous season, and because football has such a large number of participants it appeared as if there was inequity. The court made clear that it was because of this

fact that Title IX required that a similar large number of female athletes be provided with participation opportunities in an advantageous season. Moreover, due to the large numbers of female participants in basketball and volleyball, the court noted that any equitable plan must include moving these sports to advantageous seasons.

The court gave the MSHAA three options that it could follow in order to revise its Compliance Plan: (1) combine all sports seasons so both sexes' teams play in the same season ("combine seasons"), and move girls' volleyball to its advantageous season of fall; (2) reverse girls' basketball and volleyball; and in the Lower Peninsula, reverse two girls' seasons with two boys' seasons from among golf, tennis, swimming, and soccer; and in the Upper Peninsula, keep combined seasons in golf and swimming and reverse seasons in either tennis or soccer; or otherwise treat the Upper Peninsula the same as the Lower Peninsula; or (3) reverse girls' basketball and volleyball; and in both peninsulas, combine seasons in two sports, and reverse seasons in one of the two remaining sports at issue. (*Id.* at *19).

STUDENT ATHLETES' CLAIM THAT PROPOSITION 16 DISCRIMINATES ON THE BASIS OF RACE IS VIABLE

***Pryor v. NCAA*, 288 F.3d 548 (3rd Cir., May 6, 2002).**

On May 6, 2002, the United States Court of Appeals for the Third Circuit held that claims alleging that the NCAA's Proposition 16 discriminated on the basis of race sufficiently stated a claim for relief.

Kelly Pryor, a learning disabled African American student-athlete, was recruited to play soccer at San Jose State. Warren Spivey, also an African American student-athlete, signed a letter of intent to play football at the University of Connecticut. Neither Pryor nor Spivey met the NCAA's initial eligibility requirements mandated by Proposition 16.

Pryor petitioned for a waiver of the eligibility rules from the NCAA and was granted partial qualifier status due to her learning disability. As a result Pryor received athletics-related financial aid, although she could not participate in soccer during her freshman year. The University of Connecticut sought a similar waiver on Spivey's behalf that was denied by the NCAA. Thus, Spivey could not participate in athletics and did not receive any athletics related financial aid during his freshman year.

In their claims against the NCAA, Pryor claimed that Proposition 16 discriminated against her due to her learning disability in violation of the ADA and Rehabilitation Act, and Pryor and Spivey alleged that, in adopting Proposition 16, the NCAA had intentionally discriminated against them in violation of Title VI and 42 U.S.C. § 1981. The district court dismissed Pryor's ADA and Rehabilitation Act claims because she could earn back a year of eligibility. The court dismissed the plaintiffs' claims under Title VI because the NCAA implemented Proposition 16 "in spite of" its alleged disparate impact, rather than "because of" that impact which must be shown to constitute a violation of Title VI. The court also dismissed the § 1981 claims because the plaintiffs failed to allege intentional discrimination as required under the section.

On appeal, the United States Court of Appeals for the Third Circuit reviewed all three holdings. The court upheld the dismissal of Pryor's ADA and Rehabilitation Act claims, agreeing with the district court that "the court cannot order the declarative or injunctive relief Pryor seeks if the NCAA may later award her that relief anyway" (p. 560).

Regarding the Title VI claims, the court held plaintiffs needed to show the NCAA adopted Proposition 16 "because of" and not merely "in spite of" its adverse effects on an identifiable group. The court found that the plaintiffs produced sufficient evidence demonstrating that the NCAA knew that Proposition 16 would effectively screen out or reduce the percentage of black athletes who could qualify for athletic scholarships. This evidence would support a claim for purposeful discrimination against black athletes. Rejecting the NCAA's claim that it actually intended to help black athletes, not harm them, the court noted that regardless of their intention, a policy that purposefully discriminates on the basis of race is presumptively invalid.

The court also determined that the plaintiffs satisfied the elements of a § 1981 analysis: (1) they belong to a racial minority; (2) the NCAA intended to discriminate on the basis of race; and (3) the discrimination concerns one or more of the activities enumerated in § 1981, including the right to make and enforce contracts. The first element was met as both students were African American. The second element was met with the same evidence used to demonstrate that the NCAA intended to discriminate on the basis of race. As to the third element, the plaintiffs argued that the letter of intent is a contract, and that its requirement that they satisfy Proposition 16 requirements in order to be eligible to participate was an activity covered by §1981. The court agreed, noting that a contract term (like the letter of intent) is void if that term violates laws prohibiting racial discrimination. Therefore, because the court had already determined that the plaintiffs alleged sufficient facts showing that the NCAA intended to discriminate by using Proposition 16, the third element of a §1981 claim was also satisfied.

Thus, the court upheld the district court's ruling regarding Pryor's ADA and Rehabilitation Act claims, but reversed its holdings regarding the plaintiffs' Title VI and §1981 claims and remanded the issue to the district court for further review.

UNIVERSITY MAY ELIMINATE MEN'S WRESTLING TEAM TO COMPLY WITH TITLE IX

***Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir., May 30, 2002).**

On May 30, 2002, the United States Court of Appeals for the Eighth Circuit affirmed a district court's ruling that the University of North Dakota could eliminate men's wrestling to bring its athletic program into compliance with Title IX.

In 1998, the University of North Dakota decided to eliminate its men's wrestling program. Several male wrestlers sued, alleging that this decision constituted sex discrimination in violation of Title IX. The university moved for summary judgment, contending that: (1) it faced serious

budget constraints; (2) a greater percentage of men participate in intercollegiate athletics than women; and (3) men receive a disproportionately larger share of the athletic budget so that continuing to fund the team would have discriminated against women. The district court determined that Title IX did not prohibit the university from eliminating the men's wrestling team to reduce the inequality of athletic participation between its male and female students, and granted the school's motion for summary judgment.

On appeal, the plaintiffs argued that the university's alleged budgetary concerns did not justify its decision because a private donor had offered to fund the wrestling program. Had this been accepted, the wrestling team would not have used resources that otherwise would have been available to female athletes. The plaintiffs asserted that this key fact distinguished their case from previous Title IX decisions allowing universities to cut men's athletic programs in the interest of equalizing participation rates and resource allocation.

In affirming the district court, the Court of Appeals noted that universities are free to choose how to comply with Title IX's requirements, and that the elimination of male athletic programs is a permissible means of obtaining "substantial proportionality" in athletic participation. As to the plaintiffs' contention that private outside funding for the wrestling program was available, the court noted that the private donor cited by the plaintiffs never actually specified how much money he would be willing to contribute.The court also recognized that the University could not avoid its legal obligations by substituting funds from private sources for funds from public tax revenues. Once a university receives a monetary donation, the funds become public money subject to Title IX's legal obligations. Outside funding is not an available defense for a university that provides more than substantially proportionate athletic opportunities to one gender in violation of Title IX.

Therefore, the Court of Appeals affirmed thedistrict court's grant of summary judgment in favor of the university.

GOLF BALL MANUFACTURER'S ADVERTISEMENTS CLAIMING ITS PRODUCT WAS BETTER THAN COMPETITOR IS NOT FALSE ADVERTISEMENT

***Spalding Sports Worldwide, Inc. v. Wilson Sporting Goods Co.*, 198 F.Supp.2d 59 (D. Mass., May 14, 2002).**

A Wilson Sporting Goods television advertisement compared Wilson Staff True golf balls to Spalding golf balls, claiming that the Wilson balls are "perfectly balanced" and that the Wilson balls would roll straighter than Spalding balls. Specifically, the add claimed that five out of every twelve Spalding Strata Tour Ultimate II Gold balls were unbalanced and missed the hole, while the Wilson Staff True balls were accurate 99% of the time. The ad also referred to a Wilson website that explained its testing procedure.

Spalding Sports Worldwide, Inc. sued Wilson alleging that it was guilty of false advertising under the Lanham Act and Massachusetts law. Specifically, Spalding contended that Wilson's

ads implied a "literally false" claim that the Wilson balls will roll straighter than the Spalding balls. Spalding moved for a temporary restraining order and preliminary injunction, while demanding that the ads be stopped or modified.

The court began its review of Spalding's claims by noting that in order to establish that Wilson violated the Lanham Act because the ad was "literally false," the court must first determine the claim conveyed by the ad, and then evaluate whether that claim is false.As to the first issue, Spalding argued that Wilson's ads implied that Wilson True golf balls will tend to roll straighter than Spalding golf balls under actual playing conditions. Wilson argued that the ad simply provided test results about a factor it considered important in golf balls. The court disagreed, finding that the ads led to the implication that Wilson balls performed better.

The court then focused on whether this claim was "literally false." Spalding needed to show that the Wilson test did not substantiate the actual playing conditions claim. While the court agreed that Wilson specifically set up the test to focus on the result it desired and to highlight one positive aspect of its golf balls, Spalding could not prove that the test Wilson used to accomplish this result was inaccurate. Instead, the court determined that the test did substantiate Wilson's claims. The court noted "[t]he fact that 'balance' is only one among many factors that affects putting does not mean that Wilson is prohibited by law from isolating the effects of balance on putting in a test, and advertising the results." (*Id.* at 69).

Thus, the court denied Spalding's motions for a temporary restraining order and a preliminary injunction.

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