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**COMMUNITIES FOR EQUITY, et al., Plaintiffs, v. MICHIGAN HIGH SCHOOL
ATHLETIC ASSOCIATION, et al., Defendants.**

Case No. 1:98-CV-479

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF
MICHIGAN, SOUTHERN DIVISION**

2000 U.S. Dist. LEXIS 574

January 21, 2000, Decided

DISPOSITION:

[*1] Defendants' motions for summary judgment denied.

association was a state actor subject to liability for civil rights violations. Summary judgment was also denied to individual defendants who were subject to suit in their official capacity.

CASE SUMMARY

PROCEDURAL POSTURE: Defendants, high school athletic association and others, filed motions for summary judgment in case alleging discrimination against female athletes. Plaintiffs proceeded under Title IX of the Education Amendments of 1972, 20 U.S.C.S. § 1681 et seq., under 42 U.S.C.S. § 1983, for equal protection violation, and under state law.

OVERVIEW: Defendants, high school athletic association and others, sought summary judgment in case alleging discrimination against female athletes. Plaintiffs proceeded under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C.S. § 1681 et seq., under 42 U.S.C.S. § 1983, and state law. Although defendant athletic association was not a federal funding recipient, it was an entity which perhaps had controlling authority over a program or activity receiving federal financial assistance, and thus the court found it possibly subject to Title IX's anti-discrimination rule. Therefore, the court denied summary judgment on Title IX claims because of factual questions about the extent of defendant's controlling authority. The court held that defendant athletic association was a state actor under state compulsion and symbiotic relation tests, allowing it to be sued under 42 U.S.C.S. § 1983. The court concluded plaintiffs had standing and individual defendants were subject to suit in their official capacity.

OUTCOME: Summary judgment denied to defendant high school athletic association in gender discrimination suit brought on behalf of female athletes where

CORE CONCEPTS

Civil Procedure : Summary Judgment or Summary Adjudication : Summary Judgment Standard

Summary judgment requires that the court determine whether the plaintiffs have presented enough evidence so that a jury could reasonably find for them.

Civil Procedure : Summary Judgment or Summary Adjudication : Summary Judgment Standard

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge.

Civil Procedure : Summary Judgment or Summary Adjudication : Summary Judgment Standard

When considering a summary judgment motion, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor.

Constitutional Law : Substantive Due Process : Equal Protection : Sex

See 20 U.S.C.S. § 1681(a).

Constitutional Law : Substantive Due Process : Equal Protection : Sex

See 20 U.S.C.S. § 1687(2)(A).

Constitutional Law : Substantive Due Process : Equal Protection : Sex

A private right of action, in contrast to a suit brought by the federal government, is fully consistent with - and in some cases even necessary to - the orderly enforcement of Title IX of the Education Amendments of 1972, 20 U.S.C.S. § § 1681 et seq.

Constitutional Law : Substantive Due Process : Civil Rights Enforcement : State Action

In the Sixth Circuit, the principal inquiry in determining whether a private party is a "state actor" is whether the party's actions may be fairly attributable to the state. The Supreme Court has created three tests to assist courts in making this determination. First, the public function test. Second, the state compulsion test. Third, the symbiotic relationship or nexus test. The Supreme Court has suggested that these tests may be simply different ways of characterizing the necessarily fact-bound inquiry that confronts the court when resolving state actor questions.

Constitutional Law : Substantive Due Process : Civil Rights Enforcement : State Action

In determining whether a private party is a state actor for purposes of creating liability for an alleged civil rights violation, the public function test asks whether the private entity exercises powers which are traditionally exclusively reserved to the state, such as holding elections, or eminent domain.

Constitutional Law : Substantive Due Process : Civil Rights Enforcement : State Action

In determining whether a private party is a state actor whose actions could give rise to liability for civil rights violations, the state compulsion test examines the extent to which the party seeking to establish state action can prove that the state so coerced or encouraged a private entity to act in a given way that the entity's action must be regarded as the choice of the state.

Constitutional Law : Substantive Due Process : Civil Rights Enforcement : State Action

Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.

Civil Procedure : Justiciability : Standing

Plaintiffs bear the burden of demonstrating standing.

Civil Procedure : Justiciability : Standing

To establish Article III standing to sue in federal court, an individual plaintiff must show that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and

(3) the injury will likely be redressed by a favorable decision.

Civil Procedure : Justiciability : Standing

Organizations have standing to assert claims on behalf of members provided that three additional requirements are met beyond the requirements that ordinarily apply to determinations of standing. These requirements are (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations' purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members.

Constitutional Law : Substantive Due Process : Equal Protection : Sex

Individuals who exercise administrative control over an entity which is subject to Title IX of the Education Amendments of 1972, 20 U.S.C.S. § § 1681 et seq., liability may be sued in their official capacity. This is because official capacity suits represent another way of pleading an action against the entity represented by the individuals.

COUNSEL:

For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: H. Rhett Pinsky, Pinsky, Smith, Fayette & Hulswit, Grand Rapids, MI.

For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: Marcia D. Greenberger, The National Women's Law Center, Neena Chaudhry, Barbara A. Burr, National Women's Law Center, Washington, DC.

For COMMUNITIES FOR EQUITY, DIANE MADSEN, JAY ROBERTS-EVELAND, plaintiffs: Kristen Galles, Equity Legal, Alexandria, VA.

For MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, defendant: Edmund J. Sikorski, Ann Arbor, MI.

For JOHN ROBERTS, KEITH ALTO, GERALDINE DAVID, KEITH ELDRED, PAUL ELLINGER, ERIC FEDERICO, DAN FLYNN, MARGRA GRILLO, ROBERT GRIMES, NORM JOHNSON, DEWAYNE JONES, DENNIS KNIOLA, WILLIAM NEWKIRK, THOMAS RASHID, ROBERT RIEMERSMA, RANDY SALISBURY, JOYCE SEALS, MICHAEL SHIBLER, CHRISTI BRILINSKI, EUNICE MOORE, defendants: William M. Azkoul, Azkoul & Azkoul, Grand Rapids, MI.

UNITED STATES OF AMERICA, amicus: Charles R. Gross, U.S. Attorney's Office, Grand Rapids, MI.

JUDGES:

RICHARD ALAN ENSLEN, Chief Judge.

OPINIONBY:

RICHARD ALAN ENSLEN

OPINION:**Introduction [*2]**

On June 26, 1998, Plaintiffs, consisting of the parents of two female student-athletes and an organization named Communities for Equity ("CFE"), filed a class action lawsuit alleging that the Michigan High School Athletic Association ("MHSAA") discriminated against female athletes. Plaintiffs allege that the discrimination took a variety of forms including: (1) providing more participation opportunities to boys than girls; (2) requiring girls to play in "non-traditional" seasons; (3) operating shorter seasons for girls than boys; (4) scheduling female athletes to compete on less desirable dates than their male counterparts; (5) providing inferior athletic facilities for girls athletic tournaments in comparison to boys athletic tournaments; (6) requiring girls to play in some sports under rules that differ from the rules of the National Collegiate Athletic Association ("NCAA"); and (7) allocating more resources to support and promote boys athletic programs.

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n1 Plaintiffs filed an Amended Complaint on July 27, 1998.

[*3]

At this point in the litigation, Plaintiffs assert claims against the MHSAA and the individual members of the MHSAA Representative Council in their official capacity. Claims One and Two arise under Title IX of the Education Amendments of 1972, 20 U.S.C. § § 1681 et seq., ("Title IX"). Claim Three arises under the Equal Protection Clause of the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. Claims Four and Five arise under Michigan's Elliott-Larsen Civil Rights Act, Mich. Comp. Laws § § 37.3101 et. seq. Plaintiffs seek declaratory, injunctive and monetary relief.

There are three motions currently before the Court. The first motion is Defendants' Renewed Motion for Summary Judgment for Lack of Standing. The second is the Individual Defendants' Renewed Motion for Summary Judgment. The third is Defendant MHSAA's Supplemental Motion for Summary Judgment Pursuant to FRCP 56(c) as to the First and Second Claim of Plaintiffs and Motion Pursuant to FRCP 12(b)(6) as to Plaintiffs' Third Claim of Relief.

These motions raise four distinct issues. First, are Defendants properly subject to Title IX's requirements if they do not receive federal [*4] financial assistance? Second, are Defendants "state actors?" Third, do Plaintiffs have standing to sue? Fourth, even if Defendant MHSAA is subject to Title IX, may the Individual Defendants be sued in their official capacities?

Discussion

Summary judgment requires that the Court determine whether the Plaintiffs have presented enough evidence so that a jury could reasonably find for them. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Lapointe v. UAW, Local 600*, 8 F.3d 376, 378 (6th Cir. 1993). Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson*, 477 U.S. at 255. In addition, when considering a summary judgment motion, the evidence of the non-movant is to be believed and [*5] all justifiable inferences are to be drawn in his favor. *Adickes v. Kress*, 398 U.S. 144, 158-159, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1966).

I. TITLE IX

Section 901(a) of Title IX of the Education Amendments of 1972 provides that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). A "program or activity" includes "all the operations of ... a college, university, or other post-secondary institution, or a public system of higher education .. any part of which is extended Federal financial assistance." 20 U.S.C. § 1687(2)(A).

In most Title IX cases, the plaintiff attempts to demonstrate that the defendant is either a direct or indirect recipient of federal funds. *See generally Smith v. NCAA*, 525 U.S. 459, 119 S. Ct. 924, 142 L. Ed. 2d 929 (1999); *Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986); *Grove City College v. Bell*, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984). [*6] In this case, however, there is no evidence that the MHSAA is either a direct or indirect recipient of federal funds. First, the MHSAA does not receive any direct assistance from the federal

government. Second, the MHSAA receives the bulk of its funding from gate receipts generated at MHSAA-sponsored tournaments. Based upon this evidence, the MHSAA is neither a direct nor indirect recipient of federal funds. *See generally Smith*, 119 S. Ct. at 929-930 (holding that NCAA was not an indirect recipient of federal funds even though it received dues from schools that received federal funds); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994) (holding that Kentucky High School Athletic Association was an indirect recipient of federal funds because it was created by state law, its functions were determined by the Kentucky Board of Education, and it received dues from member schools who received federal funds); *Yellow Springs, etc. v. Ohio High Sch. Ath. Ass'n*, 647 F.2d 651 (6th Cir. 1981) (holding that Ohio High School Athletic Association was not a recipient of federal funds because it did not receive direct federal [*7] assistance, and it did not receive money from local schools who were recipients of federal assistance).

Although this might ordinarily end the Court's inquiry and justify a decision to grant Defendants' Motion for Summary Judgment, both Plaintiffs and the United States as amicus curiae argue that even though the MHSAA is not a federal aid recipient, it is nonetheless subject to Title IX. The premise of this argument is that because local Michigan school districts have "ceded control" over interscholastic athletics to the MHSAA, and because interscholastic athletic programs receive federal financial assistance, MHSAA has control over a federally funded activity and should be subject to Title IX. This precise issue was left unresolved by the recent Supreme Court decision in *Smith* which explicitly declined to consider whether, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless [of] whether it is itself a recipient." 119 S. Ct. at 930.

Given that the Supreme Court has left this issue unresolved, the Court believes that it must analyze two questions to resolve Defendants' motions [*8] relating to Title IX. First, as a matter of law, is the exercise of controlling authority over a federally funded program sufficient to trigger Title IX? Second, is there a genuine issue of material fact as to whether local Michigan school districts have ceded controlling authority over interscholastic athletics to the MHSAA, such that the MHSAA effectively controls those athletic programs? Each of these issues will be addressed in turn.

A. Legal Question

Turning first to the legal question, few courts have considered whether exercising "controlling authority" over a federally funded activity is sufficient to subject an entity to Title IX. *See generally Cureton v. NCAA*, 37 F. Supp. 2d 687 (E.D.Pa. 1999) (holding, in part, that the

NCAA was subject to Title IX because it exercised controlling authority over athletic programs receiving federal financial assistance) *rev'd Cureton v. NCAA*, 198 F.3d 107, 1999 WL 1241077 (3rd. Cir. 1999) (holding that the NCAA did not exercise "controlling authority" over school athletic programs). *See also Kemether v. Penn. Interscholastic Athletic Assoc.*, 1999 U.S. Dist. LEXIS 17326, 1999 WL 1012948 (E.D.Pa. Nov. 8, 1999) (holding that Title [*9] IX subjects state athletic association to suit under the theory that association controls athletic programs receiving federal aid). For the reasons stated below, the Court does not find the reasoning in these non-controlling cases to be persuasive.

This Court's analysis begins with *Cannon v. University of Chicago*, 441 U.S. 677, 60 L. Ed. 2d 560, 99 S. Ct. 1946 (1979). In *Cannon*, the Supreme Court was asked to determine whether Title IX implied a private right of action. In deciding this question, the Supreme Court engaged in an analysis of the history, subject matter, and purpose of Title IX. That analysis led the Supreme Court to two related conclusions. First, the Supreme Court concluded that the wording and purpose of Title IX indicated that it was enacted for the benefit of a particular class of people - those discriminated against on the basis of sex. *Id.* at 689-91. In reaching this conclusion, the Supreme Court explicitly rejected the proposition that Title IX was enacted "as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory [*10] practices." *Id.* at 691-92. Second, the Supreme Court recognized that Title IX "sought to accomplish two related, but nevertheless somewhat different objectives. . . Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices." *Id.* at 704. In reaching this conclusion, the Supreme Court explained that a private right of action, in contrast to a suit brought by the federal government, was "fully consistent with - and in some cases even necessary to - the orderly enforcement of the statute." *Id.* at 705-06. Based upon this analysis, the Supreme Court concluded that Title IX implied a private cause of action.

Based in large part upon the Supreme Court's understanding of Title IX in *Cannon*, this Court is convinced that any entity which has controlling authority over a "program or activity receiving Federal financial assistance" is subject to Title IX's anti-discrimination rule, even if that entity does not itself receive the federal funds which finance the program or activity. In reaching this [*11] conclusion, the Court rejects Defendants' argument that only recipients of federal funds are subject to Title IX because this interpretation is at odds with the plain meaning and purpose of the statute.

To begin with, Section 902 of Title IX does not, on

its face, confine the list of potential defendants to "recipients" of federal funds. Instead, it simply prohibits discrimination "under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). While the most likely entity subject to this prohibition would be a school district that is a recipient of federal aid, there is nothing in the statute which limits the class of potential defendants to such recipients. Instead, the statute prohibits discrimination, presumably by anyone, "under any education program or activity receiving Federal financial assistance." *Id.*

This interpretation of the statute is supported by the Supreme Court's analysis in *Cannon*. In that case, the Supreme Court made it clear that Title IX did not simply ban discrimination by recipients of federal funds; it provides a remedy for individuals who have been discriminated against on the basis of [*12] sex in the operation of programs receiving federal aid. *See Cannon*, 441 U.S. @ 691-92. Defendants ask the Court to interpret Title IX as only applying to recipients of federal funds, but this is precisely the interpretation of Title IX that the Supreme Court seemed to reject in *Cannon*. *Id.*

Not only is Defendants' suggested interpretation of Title IX unsupported by the plain meaning of Title IX and the *Cannon* decision, it is empty formalism. If Defendants' interpretation prevailed, Title IX would prohibit "recipients" of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves "recipients." Such a scheme would not only encourage "recipients" of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court's view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.

Although the [*13] Court concludes that exercising "controlling authority" is sufficient to subject an entity to liability under Title IX, it must acknowledge that prior Supreme Court and Sixth Circuit precedent has implied that Title IX is only triggered if the defendant is a "recipient" of federal money. *See Grove City College v. Bell*, 465 U.S. 555, 79 L. Ed. 2d 516, 104 S. Ct. 1211 (1984) (examining whether Grove City College was a recipient of federal financial assistance in order to determine whether it was subject to Title IX); *Dept. of Transp. v. Paralyzed Veterans*, 477 U.S. 597, 91 L. Ed. 2d 494, 106 S. Ct. 2705 (1986) (stating that Congress limited the scope of § 504 of the Rehabilitation Act -- a statute with similar wording and history to Title IX -- to cover only entities that receive federal financial assistance); *Horner v. Kentucky High Sch. Ath. Ass'n*, 43 F.3d 265 (6th Cir. 1994) (examining extent to which Kentucky High School Athletic Association ("KHSAA")

could be considered a recipient of federal financial assistance in order to determine whether it was subject to Title IX). n2

n2 As noted earlier, Section 902 of Title IX (20 U.S.C. § 1681(a)) does not use the term "recipient," although it does reference programs that "receive" federal funds. The Court suggests that one reason that courts have focused on "recipients" of federal funds is because entities that receive federal financial assistance will almost always be in control of those funds. Therefore, in the normal case, there is no need to inquire into who "controls" the funds. It is only in the rarest of cases, such as this one, where the entity that controls the federal funds and the entity that receives the federal funds are different, that the issue of control becomes important.

[*14]

While the Court is mindful of these three decisions, it concludes that they are not conclusive on the issue currently before the Court. The Court reaches this conclusion for three reasons.

First, none of these cases explicitly considered the "controlling authority" rationale. Therefore, while these cases focused on whether certain defendants were appropriately considered recipients of federal funds, these cases did not explicitly hold that only recipients could be Title IX defendants. *See Smith*, 119 S. Ct. at 929-930 (implying that the "controlling authority" theory of Title IX liability has not been addressed by the Supreme Court).

Second, the holdings in all three of these cases are logically consistent with the "controlling authority" theory of liability. *See Grove City*, 465 U.S. at 563-570 (finding that Grove City College was a proper defendant under Title IX where it had obvious control over its own financial aid program which was funded, in part, by federal grants); *Paralyzed Veterans*, 477 U.S. at 604-611 (finding that air carriers were not subject to Title IX where they had no control over program which developed airports [*15] and received federal aid); *Horner*, 43 F.3d at 272 (finding that KHSAA was properly sued under Title IX where it had control over interscholastic athletic programs that were receiving federal financial assistance).

Third, the case which goes the furthest in implying that only recipients of federal funds may be subject to Title IX, *Paralyzed Veterans*, is inconsistent with the Supreme Court's explicit analysis in *Cannon*. In *Paralyzed Veterans*, the Supreme Court held that § 504 of the Rehabilitation Act only applied to recipients of

federal funds, noted that § 504 and Title IX were similar statutes, and thereby implied that Title IX's requirements were similarly limited to recipients of federal aid. See *Paralyzed Veterans*, 477 U.S. at 605-606. This implication, however, is at odds with the Supreme Court's analysis in *Cannon* that Title IX does more than simply prevent recipients of federal funds from discriminating on the basis of sex. See *Cannon* 441 U.S. at 691-92, 704-06. Therefore, whatever implication arises out of *Paralyzed Veterans* is trumped by the Supreme Court's explicit analysis in *Cannon*.

Therefore, [*16] because the plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds, because the *Cannon* decision makes it clear that Title IX was designed to prevent sex discrimination in programs that are financed by federal money (as opposed to merely stopping recipients of federal resources from discriminating), because the precedent of the Supreme Court and the Sixth Circuit is consistent with the "controlling authority" theory of liability, and because holding otherwise would be nothing more than empty formalism, the Court concludes that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.

B. Factual Question

Having concluded that "controlling authority" is a valid basis for Title IX liability, the Court turns to whether Plaintiffs have offered sufficient evidence that the MHSAA possesses the necessary authority to create a genuine issue of material fact. In order to sustain this burden, Plaintiffs point to a variety of factors. First, they point out that local school districts receive federal funds and therefore [*17] those districts' athletic programs are "programs or activities receiving Federal financial assistance" See 20 U.S.C. § 1687(2)(A). Second, they note that the MHSAA's stated purpose is "to create, establish and provide for, supervise and conduct interscholastic programs throughout the state." Third, they argue that MHSAA promulgates rules and decisions that influence virtually every aspect of interscholastic athletics. Specifically, they point to: MHSAA's eligibility requirements, MHSAA's rules governing contests, MHSAA's rules relating to coaches, MHSAA's rules relating to the training of officials, MHSAA's decisions about the seasons in which certain sports will be played, MHSAA's rules relating to the number of practices that are allowed, and MHSAA's control over postseason competitions. In light of the fact that virtually every high school in Michigan is a member of MHSAA, each school agrees to be bound by the rules of MHSAA, and the MHSAA can impose sanctions on schools that violate its rules, the Plaintiffs argue that schools have ceded controlling authority over interscholastic athletics to the MHSAA.

In response, Defendants argue that MHSAA [*18] receives no money from its member schools either directly or indirectly. Furthermore, they point out that Michigan law vests a non-delegable duty to regulate interscholastic athletics in local school boards. More specifically, they counter Plaintiffs' assertion that local schools have ceded control over interscholastic athletics with the following facts: individual schools are solely responsible for decisions about what teams to sponsor, MHSAA rules must be formally adopted by local school districts, these districts are primarily responsible for enforcement, membership in MHSAA is voluntary, and local school districts often make and enforce rules that are more stringent than MHSAA rules. From Defendants' perspective, the relationship between school districts and the MHSAA is analogous to the relationship between adverse parties and an arbitrator. Defendants argue that the MHSAA simply provides member schools with a set of rules, which the member schools suggest and must formally adopt, so that a uniform set of rules can be obtained.

Essentially, Plaintiffs and Defendants disagree about what it means to "cede controlling authority." Plaintiffs assert that because the MHSAA makes the [*19] rules, it has controlling authority over interscholastic athletics -- even though the local school districts must formally ratify those rules. Defendants argue that MHSAA cannot have controlling authority over interscholastic athletics because a school district is only bound by MHSAA rules if that school district formally adopts those rules.

To resolve this disagreement, the Court begins with a review of the MHSAA and its historic role in interscholastic athletics. In 1924, the MHSAA was founded to "exercise control over the interscholastic athletic activities of all schools of the state through agreement with the Superintendent of Public Instruction." 1978-90 MHSAA Handbook, Foreword. Prior to 1965, the Superintendent of Public Instruction was given supervision and control over interscholastic athletics by statute. See *School Code of 1955*, 1955 PA 269 § 784. Then, in 1965, this authority was transferred to the State Board of Education via statute. Mich. Comp. Laws § 388.1014. From 1924 through 1974 the MHSAA appears to have been part of the state government, assisting either the Superintendent of Public Instruction or the State Board of Education in regulating [*20] interscholastic athletics.

In 1972, the Michigan legislature transferred authority over interscholastic athletics from the State Board of Education to the local school boards. In addition to transferring authority over interscholastic athletics in this manner, the Michigan legislature provided that:

The [MHSAA] is the official association of the state for

the purpose of organizing and conducting athletic events, contests, and tournaments among schools and shall be responsible for the adoption and enforcement of rules relative to eligibility of athletes in schools for participation in interschool athletic events, contests and tournaments.

Id. at § 380.1292(2). In addition to this "official designation," a representative of the State Board of Education was required to be a member of the MHSAA governing body. *Id.* at § 380.1292(1). In 1972, the MHSAA incorporated as a private association.

In 1995, the Michigan legislature again amended the statute. This time it removed MHSAA's official designation but explicitly provided that local school districts could "join organizations as part of performing the function of the school district." *Id.* at § 380.11a(4). [*21] While the MHSAA's public or private status may have changed throughout the years, its basic function appears to have remained the same since its inception in 1924 -- create rules and policies for the regulation of interscholastic athletics in the state of Michigan.

Against this historical backdrop, the Court's analysis of the extent to which the MHSAA currently exercises control over interscholastic athletics begins with a review of the "MHSAA Handbook For 1999-2000 School Year" (Handbook). The forward to the Handbook provides, "the Michigan High School Athletic Association, Inc. is a private, voluntary association of public, private and parochial secondary schools ...it is not necessary for any school to join the MHSAA in order to conduct a program of competitive athletics, and MHSAA member schools are not prohibited from engaging in competition against non-member schools ... MHSAA is a self-supporting organization that does not rely on taxpayer dollars from any agency of the state or federal government. Schools do not pay membership dues, tournament entry fees, or service fees. When schools host MHSAA events they are reimbursed their itemized expenses and usually generate additional [*22] income from concession and program sales, parking fees, and a portion of gate receipts. ..." Forward, MHSAA Constitution. The MHSAA Constitution goes on to provide that, "all high schools, junior high/middle schools, or other schools of Michigan ... may become members of this organization" Art. II, MHSAA Constitution. These provisions confirm Defendants' assertion that MHSAA is a private organization and that membership is purely voluntary. As such, these provisions go a long way in assuring the Court that the MHSAA does not exercise controlling authority over interscholastic athletics because the local schools can presumably disregard MHSAA rules, or exercise their option not to join the MHSAA, whenever they choose.

However, as the Court reads the MHSAA Handbook more closely, its initial assessment of the benign

relationship between the MHSAA and local school districts is called into question. In the same forward that promises individual school districts that their membership in MHSAA is purely voluntary, MHSAA writes, " ... schools adopt the Regulations and Interpretations of this Handbook as their own and agree to be primarily responsible for their enforcement. [*23] " (emphasis in original). This warning is then reiterated by the MHSAA Constitution which provides,

for a school to become a member of this organization, its board of education/governing body must complete the annual Membership Resolution stating that the board of education/governing body has adopted the organization's rules as its own and agrees to primary enforcement of such rules as to its own schools. Failure to implement required effects of policies and procedures promulgated by the organization to govern eligibility, competition and tournaments shall require that members of the administration and board of education/governing body appear before the [MHSAA] to show cause why the school is not in violation of the terms of its Membership Resolution.

Art. II, MHSAA Constitution. These provisions run contrary to the permissive and voluntary tone of the previously cited provisions and demand a closer examination of the relationship between the MHSAA and local school districts.

To uncover the precise nature of this relationship, it is necessary to examine the duties assigned to the Representative Council, the governing body of the MHSAA. The MHSAA Constitution provides: [*24]

Article VI -- Duties of the Council

Sec. 1. The Council shall have general control of interscholastic athletic policies.

Sec. 2. It shall make rules of eligibility for players.

Sec. 3. It shall make regulations for the conduct of interscholastic contests.

Sec. 4. It shall be the annual responsibility of the Council to ascertain that the Council elective process has provided for representation of females and minorities. If, in the judgment of the Council, these results have not been achieved, said Council shall not appoint not to exceed four Representative Council members-at-large for two-year terms.

Sec. 5. It may discipline member schools and contest officials for violations of rules and regulations

Sec. 6. It shall provide for the hearing of appeals from decisions of the Executive Director

Sec. 7. It shall exercise all other functions necessary for carrying out the spirit and purpose of the Constitution.

Art. VI, MHSAA Constitution. Not only is the

Representative Council given broad authority to regulate interscholastic athletics, a separate Due Process Procedure provides a complex process which governs "the investigation into alleged or contested violations [*25] by a party of the Constitution, By-Laws, regulations, rules, or interpretations of the MHSAA." The Regulations provide lengthy eligibility requirements, limitations on the number of games that may be played, specifications of what type of officials may be used, rules for playing MHSAA sports, practice and scrimmage schedules, limitations on the number of games in which an athlete may participate in a given week, day, month, etc, maximum number of competitions allowable in a given year, a list of sanctions for a wide variety of violations, and a calendar of MHSAA sponsored state tournaments. These Regulations cover 51 pages of the Handbook.

A comprehensive review of the Handbook undercuts Defendants' assertion that MHSAA has no real control over interscholastic athletics. Defendants may be correct, as a technical matter, that the local schools must formally adopt MHSAA rules and enforce MHSAA policies, but this does not necessarily mean that MHSAA does not have control over those rules or policies. There is only one interscholastic athletic association in the state of Michigan and that is the MHSAA. In a very real sense, the MHSAA has a de facto monopoly over interscholastic sports. [*26] This is evidenced by the fact that there is not a single high school in the state of Michigan, that is eligible for MHSAA membership, that is not a member. While local school districts may have the power to disregard MHSAA rules or policies, and the legal authority to leave the Association altogether, these are not realistic options given the nature of interscholastic sports in Michigan. If a local school district were to disregard MHSAA rules, or leave the MHSAA, it would subject itself to MHSAA imposed sanctions (including possible expulsion), jeopardize its ability to compete in statewide tournaments, find it difficult to schedule opponents, and in general have problems providing interscholastic athletic programs to its students.

This explains why Defendants' reliance, on statements by the Michigan Attorney General and several state courts that interscholastic sports is a "non-delegable" duty of the local school districts, is misplaced. While the regulation of interscholastic athletics under Michigan state law is "non-delegable," the local school districts have delegated it to the Defendants. Having delegated this duty, the local school districts have now lost the power to control [*27] interscholastic athletics independent from the MHSAA.

The evidence presented reveals a genuine issue of material fact regarding the extent to which the MHSAA exerts control over interscholastic athletics. Thus, summary judgment must be denied. n3

n3 The Court notes that the relief which the Plaintiffs seek cannot be obtained by suing the school districts directly. This is because the local school districts cannot unilaterally alter any policies of the MHSAA that are discriminatory. Assuming Plaintiffs allegations are true, the only way a local school districts could avoid whatever discrimination emanates from MHSAA policies would be to withdraw from the MHSAA. While this might end the discrimination, it would do so by depriving Plaintiffs of the ability to participate in interscholastic sports at all.

The Court believes that the potential inability to hold anyone accountable for alleged discrimination in a program receiving federal financial assistance is precisely why the ceding "controlling authority" is consistent with the purpose of Title IX. Without liability for those who control federal programs, such as interscholastic athletics, victims of discrimination are placed in an untenable dilemma clearly at odds with the spirit, purpose, and language of Title IX. On the one hand, these victims may seek a remedy from the athletic association, but that association will respond that it only makes "suggestions" to the local school districts, and that the local school districts have the real power to adopt and enforce policies and rules. On the other hand, these victims might go to the local school districts to address their problems, but these districts will respond that they are powerless to change the policies of the MHSAA on their own, and that the MHSAA holds all the real power over interscholastic athletics.

[*28]

II. EQUAL PROTECTION AND 42 U.S.C. § 1983

Defendants also ask this Court to grant summary judgment in their favor with respect to Plaintiffs' 42 U.S.C. § 1983 claim. Defendants argue that the MHSAA is not a state actor and therefore cannot be liable under § 1983. Plaintiffs respond that the symbiotic relationship between the state of Michigan and the MHSAA is so pronounced that the MHSAA should be considered a state actor.

In the Sixth Circuit, "the principal inquiry in determining whether a private party is a 'state actor' is whether the party's actions may be 'fairly attributable to the state.'" *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992) citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). The Supreme Court has created three tests to assist courts in

making this determination. First, the public function test. See *West v. Atkins*, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988). Second, the state compulsion test. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). [*29] Third, the symbiotic relationship or nexus test. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 6 L. Ed. 2d 45, 81 S. Ct. 856 (1961). The Supreme Court has suggested that these tests may be simply "different ways of characterizing the necessarily fact-bound inquiry that confronts the Court [when resolving state actor questions]." *Lugar*, 457 U.S. at 939.

The public function test asks whether "the private entity exercises powers which are traditionally exclusively reserved to the state, such as holding elections, or eminent domain." *Wolotosky*, 960 F.2d at 1335. Although the United States, as amicus, argues that interscholastic sports in Michigan is a public function, this position is contradicted by the Sixth Circuit's analysis in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 180 F.3d 758, 763 (6th Cir. 1999). In that case, the Sixth Circuit concluded, based upon the Supreme Court's decision in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 545, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987), that interscholastic sports is not a power traditionally [*30] reserved to the state. *Id.* While this Court agrees with the United States that the State of Michigan has a long history of regulating interscholastic athletics (see I, B above), and that many of the cases and Michigan Attorney General opinions which Defendants cite indicate that interscholastic athletics is a "traditional government function," the Sixth Circuit's analysis in *Brentwood* is controlling.

The state compulsion test examines the extent to which the party seeking to establish state action can prove that the state so coerced or encouraged a private entity to act in a given way that the entity's action must be regarded as the choice of the state. *Wolotosky*, 960 F.2d at 1335. The Court believes that the MHSAA is a state actor pursuant to this test. The most persuasive argument supporting this conclusion is made by Defendants, albeit in the context of Title IX, where they argue that interscholastic athletics is a "non-delegable" duty of local school districts. According to Defendants, because all power over interscholastic athletics is held by the local districts, the MHSAA only acts at the will and direction of those districts. This characterization [*31] of the MHSAA-local school district relationship, added to the fact that the MHSAA is governed by a Representative Council comprised of primarily state employees (16 of the Representative Council members are public school employees and the Superintendent of Instruction is an ex-officio member), combines to make a strong case that the MHSAA is a state actor pursuant to the state compulsion test.

While satisfaction of the state compulsion test is

reason enough to conclude that the MHSAA is a state actor, the Court is even more convinced by application of the symbiotic relationship test. As the Sixth Circuit explained, "under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Wolotosky*, 960 F.2d at 1335.

There is no denying that there is a unique and close relationship between the MHSAA and the State of Michigan. Among other factors which define this relationship, the MHSAA is made up of primarily public schools, n4 public school employees [*32] are elected to serve on the Representative Council which oversees the MHSAA, school employees who desire to serve on the Representative Council must have approval from their principal or school district superintendent, the Michigan Superintendent of Public Instruction is an ex-officio member of the Representative Council, the MHSAA exercises tremendous influence and control over the rules and policies that regulate interscholastic athletics, MHSAA rules and policies are binding on all schools unless they withdraw from the MHSAA, and local school districts are primarily responsible for enforcing MHSAA rules and policies. Based upon similar factual circumstances linking state athletic associations to the state, a variety of Circuit Courts have found that these associations are state actors. See *Griffin High School v. Illinois High School Athletic Ass'n*, 822 F.2d 671, 674 (7th Cir. 1987); *In Re: United States ex. rel. Missouri State High School Activities Ass'n*, 682 F.2d 147, 151 (8th Cir. 1982); *Clurk v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1128 (9th Cir. 1982); *Moreland v. Western Pennsylvania Interscholastic Athletic League*, 572 F.2d 121, 125 (3rd Cir. 1978); [*33] *Louisiana High School Athletic Ass'n v. St. Augustine High School*, 396 F.2d 224, 227 (5th Cir. 1968); *Oklahoma High School Athletic Ass'n v. Bray*, 321 F.2d 269, 273 (10th Cir. 1963). If this were the only precedent on the issue, the Court would be hard-pressed to justify any conclusion other than that the MHSAA is a state actor. n5 However, before the Court reaches this conclusion, there are two reported decisions which demand close attention.

n4 In the 1998-1999 school year, the MHSAA was comprised of 617 public high schools and 114 private schools.

n5 Defendants' argument that it is not a state actor, because it receives no state funds, is similar to its Title IX argument in that both ask the Court to exalt form over substance. The Supreme Court has repeatedly found, however, that when determining whether a private entity is a "state

actor," courts should engage in a factual and pragmatic inquiry as opposed to an overly formalistic mode of analysis. See *Lugar*, 457 U.S. at 939; *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953) (rejecting formalistic application of the Fifteenth Amendment and holding that Jaybird Political Party was a state actor on the grounds that the Jaybird primary had the practical effect of determining who would win the general election and the party was created for the sole purpose of avoiding the Fifteenth Amendment and discriminating against blacks); *Smith v. Allwright*, 321 U.S. 649, 661, 88 L. Ed. 987, 64 S. Ct. 757 (1944) (holding that Texas Democratic Party was subject to the Fourteenth Amendment as a state actor and rejecting as a "slight ...change in form" defendants' argument that because the Democratic Party was a private entity it was not a state actor).

[*34]

In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 180 F.3d 758 (6th Cir. 1999), the Sixth Circuit was asked to decide whether the Tennessee Secondary Athletic Association ("TSSAA") was a state actor when it enforced a rule against a private school, Brentwood Academy, that prohibited the school from using undue influence in recruiting student-athletes. The Sixth Circuit began by analyzing the structure and function of TSSAA which is strikingly similar to the MHSAA in this case. n6 The Sixth Circuit noted that: (1) the TSSAA was a voluntary organization, that authorized member schools to withdraw at any time; (2) the TSSAA was made up of public and private schools; (3) a Board of Control, made up of nine members elected from member schools, decided TSSAA policy; (4) at all relevant times the Board of Control was comprised of public high school administrators; (5) the TSSAA receives no state funding; (6) the TSSAA's revenue was generated from gate receipts at state tournaments and the TSSAA negotiated contracts with member schools for the use of their facilities to house these tournaments; and (7) while a Tennessee Board of Education rule at one [*35] time designated the TSSAA to conduct interscholastic athletics, this rule was repealed in 1995.

n6 There are only minor differences between the TSSAA and the MHSAA. First, whereas the TSSAA had nine members on the governing board, the MHSAA has 18. Second, whereas all members of the TSSAA Control Board were public school employees during the relevant time period, 16 of the 18 members of the MHSAA Representative Council were public school employees. Third and finally, whereas the

TSSAA was "designated" by the Tennessee Board of Education to conduct interscholastic athletics until 1995, the MHSAA was statutory authorized to oversee interscholastic athletics until 1995 at which time Michigan state law was amended.

With these facts in mind, the court examined prior Sixth Circuit precedent and concluded that Brentwood Academy had failed to satisfy any of the three tests for determining when a private entity should be considered a state actor. In reaching this conclusion, the Sixth Circuit examined several of its prior [*36] decisions that had held that a state athletic association was a state actor. See *Yellow Springs v. Ohio High School Athletic Association*, 647 F.2d 651 (6th Cir. 1981); *Aldering v. Ohio High School Athletic Association*, 779 F.2d 315 (6th Cir. 1985). The Sixth Circuit concluded that these decisions were not controlling. *Brentwood Academy*, 180 F.3d at 764-766.

Additionally, the Sixth Circuit examined the extent to which a finding that TSSAA was not a state actor was consistent with Footnote 13 of the Supreme Court's decision in *NCAA v. Tarkanian*, 488 U.S. 179, 193 n.13, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988). The Sixth Circuit explained that while *Tarkanian* Footnote 13 indicated that high school athletic associations might potentially be state actors in relation to public schools, the same footnote indicates that "even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationships with private universities.'" *Brentwood Academy*, 180 F.3d at 766 citing *Tarkanian* 488 U.S. at 193 n. 13. Therefore, the Sixth Circuit concluded that because [*37] Brentwood Academy was a private school, Footnote 13 did not require a finding that the TSSAA was a state actor. *Brentwood Academy*, 180 F.3d at 766.

This analysis misapplies the reasoning in *Tarkanian*. In *Tarkanian*, the Supreme Court was asked to decide whether the National Collegiate Athletic Association ("NCAA") was acting under color of state law when it conducted an investigation into athletic programs at the University of Nevada Las Vegas ("UNLV") and recommended to UNLV that it discipline its mens basketball coach, Jerry Tarkanian. In a 5-4 decision, the Supreme Court concluded that the NCAA was not a state actor.

The central issue in the case was whether the NCAA's recommendations, and UNLV's adverse employment actions, were so coordinated that they should be considered "joint actions" such that the NCAA was a state actor. *Tarkanian*, 488 U.S. at 194-199. Before analyzing this "joint action" issue, however, the

majority opinion briefly examined whether UNLV exercised such control over the NCAA that all NCAA policies and actions were transformed into state actions. *Id.* at 193. The majority observed that the NCAA was made [*38] up of colleges and universities from all across the country, and that UNLV had no more influence over the NCAA than other schools. *Id.* Therefore, because these colleges and universities outside of Nevada were not acting under color of Nevada state law, the NCAA's decisions and policies could not possibly be considered to be those of the state of Nevada. *Id.*

At this point, the majority inserted Footnote 13. *Id.* at 193 n. 13. The first sentence of the Footnote points out that the majority's analysis would be quite different in cases where an association's membership consisted entirely of schools from the same state, many of which were public institutions. *Id.* The majority then cited two circuit court decisions which found that state athletic associations were state actors. *Id.* In the second sentence of the Footnote, the majority notes that the dissenters accept the proposition that the NCAA is not a state actor when it takes "joint action" with a private university, and that the majority of the NCAA's membership is private schools. *Id.* The inference to be drawn from this second sentence is that because the dissenters accept the idea that "joint action" [*39] between the NCAA and a private university would not transform NCAA action into state action, and because the NCAA is made up of primarily private universities, the NCAA cannot be considered a state actor based upon its membership. The majority is using the dissenters "joint action" analysis to reinforce its own conclusion that the NCAA cannot possibly be a state actor because of its membership.

The *Tarkanian* case required the Supreme Court to examine two independent state actor questions. First, the Supreme Court was required to briefly analyze in what instances an athletic association might be considered a state actor because its members controlled the association and those members were state actors. ("The membership question"). Second, the Supreme Court examined in what instances an athletic association should be considered a state actor when it engages in joint activity with the state. ("The joint action question"). With these independent inquiries in mind, Footnote 13 appears to stand for three propositions. First, an athletic association made up of schools from across the country, the majority of which are private schools, is not a state actor because no one state controls [*40] the policy of the association. Second, if an association were made up of schools from the same state, and the majority of those schools were public, the association might well be a state actor. Third, while "joint action" between a public school and a private association might render the private association a state actor, joint action between a private school and a private association would not.

The Sixth Circuit's opinion in *Brentwood Academy* misstates the Supreme Court's reasoning in *Tarkanian*. The Sixth Circuit explained that the TSSAA was not a state actor, in part, because "all nine justices agree that even if an athletic association is a state actor when dealing with a public school, it 'was not acting under color of state law in its relationship with private universities.'" *Brentwood Academy*, 180 F.3d at 766 citing *Tarkanian* 488 U.S. at 193 n. 13. The problem with this analysis, however, is that this quoted line from Footnote 13 applies to the joint action question, not the membership question at issue in *Brentwood Academy*. In *Brentwood Academy*, the issue was not whether "joint action" between the TSSAA and Brentwood Academy [*41] transformed the TSSAA into a state actor, it was whether the TSSAA was a state actor because its members were primarily public schools, it was historically recognized by the state of Tennessee, and its Board was dominated by public school employees. As a result, there appears to be a serious disconnect between *Tarkanian* and the Sixth Circuit's reasoning in *Brentwood Academy*.

In the end, the Court concludes that the MHSAA is a state actor. The Court reaches this conclusion for four primary reasons. First, the actions of the MHSAA may be "fairly attributed to the state" as evidenced by the fact that under the state compulsion test or the symbiotic relationship test, the MHSAA is a state actor. Second, the vast majority of circuit courts to consider this issue have concluded that state athletic associations such as the MHSAA are state actors. Third, the *Brentwood Academy* decision is not controlling in this case because (a) it cannot be reconciled with Footnote 13 in *Tarkanian*, and (b) by its own terms its analysis is limited to a unique factual situation - a private school alleging that a state athletic association is a state actor when it regulates that private school [*42] - not present here. Fourth, Footnote 13 of the *Tarkanian* decision indicates that the Supreme Court believes that state athletic associations, such as the MHSAA, are state actors. Therefore, the Equal Protection Clause claim survives Defendants' Motion for Summary Judgment and Motion to Dismiss.

III. Standing

Plaintiffs bear the burden of demonstrating standing. "To establish Article III standing to sue in federal court, an individual plaintiff must show that (1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) the injury will likely be redressed by a favorable decision." *American Federation of Government Employees v. Clinton*, 180 F.3d 727, 732 (6th Cir. 1999) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)).

Organizations have standing to assert claims on

behalf of members provided that three additional requirements are met. These requirements are "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organizations' purpose; [*43] and (c) neither the claim asserted nor the relief requested requires the participation of individual members." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977); see also *American Federation*, 180 F.3d at 732.

In the context of a summary judgment motion, provided that there is sufficient evidence to create a genuine issue of material fact as to standing, the motion should be denied. See *Bennett v. Spear*, 520 U.S. 154, 167, 137 L. Ed. 2d 281, 117 S. Ct. 1154 (1997); *Kardules v. City of Columbus*, 95 F.3d 1335, 1346 (6th Cir. 1996). The Court has previously examined standing issues in relation to Defendants' Motion to Dismiss. In the Opinion and Order which resolved that Motion, the Court held that Plaintiffs had presented enough evidence to survive the Motion to Dismiss. (Dkt. Nos. 44 and 45.) Although Defendants have offered subsequent evidence and argument which undermines the credibility of Plaintiffs' position on the standing issue, the Court remains convinced that there are genuine issues of material fact still in controversy. Therefore, for the reasons [*44] stated here and the Court's prior rulings, Defendants' Motion for Summary Judgement for Lack of Standing is denied.

IV. Liability for Individual Defendants

The Court has previously considered whether the individual Defendants may be sued in their official capacity. (Opinion and Order Dkt. Nos. 44 and 45.) Individuals who exercise administrative control over an entity which is subject to Title IX liability may be sued in their official capacity. See generally *Smith v. Metro Sch. Dist.*, 128 F.3d 1014, 1020 (7th Cir. 1997). This is

because official capacity suits represent another way of pleading an action against the entity represented by the individuals. *Kentucky v. Graham*, 473 U.S. 159, 165, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985). In this case, there is no question that the MHSAA Representative Council has control over the MHSAA. Therefore, to the extent that the MHSAA is a viable Title IX defendant, so to are the members of the MHSAA Representative Council. As such, summary judgment is denied.

Conclusion

In 1924, the MHSAA was created by the State of Michigan to regulate interscholastic athletics. Coincident to the passage [*45] of Title IX, the MHSAA incorporated itself to operate as a private association, although its functions remained largely the same. Then, in 1995, after the Sixth Circuit's decision in *Horner*, the State of Michigan removed the "official designation" of the MHSAA, though its membership and function again remained unchanged. Since then, the MHSAA has continued to exercise de facto control over interscholastic athletic programs in the state of Michigan.

The various formulations of the MHSAA appear to have been motivated by a desire to avoid the requirements of Title IX and the Equal Protection Clause, not to alter its mission or purpose. Since resolution of Defendants' motions require that this Court not exalt from over substance, and instead inquire into the real and substantial legal acts of the Defendants, their arguments cannot prevail.

DATED in Kalamazoo, MI:

Jan 21, 2000

RICHARD ALAN ENSLEN

Chief Judge

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The Advocate (Baton Rouge, LA.)

February 10, 2000, Thursday METRO EDITION

SECTION: Sports; Pg. 2-C

LENGTH: 503 words

HEADLINE: LSU to petition for rehearing in discrimination suit today

BYLINE: GLENN GUILBEAU

BODY:

LSU's attorneys plan to file a petition for a rehearing today with the 5th Circuit **Court** of Appeal, which recently ruled that LSU intentionally violated **Title IX**.

The Jan. 27 ruling said that the five female LSU students who originally filed a discrimination suit against LSU in 1994 could seek monetary damages from the university along with any female student who wanted to play soccer or softball at the school after 1993.

Title IX is the federal law that requires equal opportunities for male and female college athletes. LSU, trailing other SEC schools, did not re-institute softball until 1997 and fielded its first soccer team in 1995.

LSU's lawyers dispute the claim that LSU intentionally violated **Title IX**.

"We think we are entitled to a rehearing," said Baton Rouge attorney Shelby McKenzie, who is representing LSU. "But it depends on if the **court** agrees to it." As of Wednesday afternoon, McKenzie was still working on the petition at the Taylor, Porter, Brooks & Phillips office, and a copy of it was not available.

"It will be available tomorrow (Thursday)," McKenzie said. "We plan to file it no later than 3 p.m." Today is the deadline for LSU to appeal the Jan. 27 unanimous decision made by the **appellate court's** three-judge panel.

McKenzie also has plans to ask the U.S. Supreme **Court** to review the **case**.

LSU chancellor Mark Emmert said LSU's problem with the ruling is the word "intentional. We are not going back to the **court** because we are disagreeing with any of the violations or rulings in relation to **Title IX**," Emmert said. "We are in compliance now and have been." LSU athletic director Joe Dean had little to say about the matter Wednesday.

"I don't really know much about it," he said. "I would refer you to our lawyers." In 1996, U.S. District Judge Rebecca Doherty ruled that LSU was not in violation of **Title IX** of the 1972 Education Amendment Act. That ruling came in a suit filed by five female students who claimed LSU denied them equal access and opportunity because the school did not have a women's soccer program.

While the lawsuit was pending, LSU started a women's soccer program and a softball team, which begins its fourth season this weekend. A judge ordered LSU to submit a plan for **Title IX** compliance, but said the university was not intentionally discriminatory. The judge also denied a request to turn the suit into a class action.

On Jan. 27, the 5th Circuit reversed that ruling, said LSU had practiced intentional discrimination and

opened the way for the plaintiffs to seek monetary damages.

The **appellate court** also ordered Doherty to reconsider her ruling on whether the suit could be turned into a class action. An attorney for the plaintiffs, Nancy Rafuse, has said that if the judge makes the suit a class action, thousands of present and former student-athletes could join the suit.

McKenzie called Rafuse's comments about "thousands" joining the lawsuit "an exaggeration."

(The Associated Press contributed to this report.)

GRAPHIC: Mug of Mark Emmert

LOAD-DATE: February 10, 2000

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Metropolitan News-Enterprise; Capitol News Service

December 16, 1999, Thursday

SECTION: Pg. 1

LENGTH: 852 words

HEADLINE: Court Permits Limits on Men's Teams to Create Chances for WomenDeck: Ninth Circuit Vacates Injunction, Says School's Title IX Compliance Didn't Violate Men's Rights

BYLINE: By KENNETH OFGANG, Staff Writer/**Appellate Courts**

BODY: A public university may limit the size of its men's athletic teams in order to comply with federal regulations designed to ensure equal opportunity for women, the Ninth U.S. Circuit **Court** of Appeals ruled yesterday.

A three-judge panel overturned a district judge's injunction barring California State University-Bakersfield from limiting the size of its men's wrestling team to 25. The **appellate** judges said the school didn't violate the rights of the male athletes by adopting the limit as part of a plan to increase the number of places for women on school teams to 55 percent.

Women have been 60 percent or more of the school's student body for a number of years.

Earlier Settlement

CSU adopted the plan, based on Department of Education **Title IX** guidelines, as part of a settlement of an earlier suit by the California Chapter of the National Organization of Women. **Title IX** of the 1972 federal education law prohibits federally funded schools from discriminating on the basis of sex, and the DOE regulations require that students be given "equal athletic opportunity."

"**Title IX** has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics," Judge Cynthia Holcomb Hall wrote for the panel. "Today we join our sister circuits in holding that **Title IX** does not bar universities from taking steps to ensure that women are approximately as well represented in sports programs as they are in student bodies."

Before the challenged plan was adopted, men made up 61 percent of the varsity teams at the Bakersfield school and received 68 percent of the athletic scholarship money.

At the time of the men's suit, which was joined by the National Wrestling Coaches Association and supported by other wrestling groups, the men's team had only 21 members. But in asking Chief U.S. District Judge Robert Coyle of the Eastern District of California for the preliminary injunction, they expressed the fear that the school would eventually eliminate the team entirely as part of its gender-equity efforts.

Coyle ruled that capping the size of men's teams violates the male athletes' rights to equal opportunity under **Title IX**. There was a strong argument that the caps also violated the Equal Protection Clause, Coyle said without ruling on the question.

But Hall said the district judge misconstrued the law. The university, she said, was entitled to make gender-conscious decisions in order to reconcile its obligation to prospective women athletes with the budgetary constraints that prevented it from offering every capable athlete a place on a team.

Proportionality Argued

Hall rejected the argument that the university went too far by insisting that equity be determined in close proportion to total enrollment rather than to the relative interest of men and women in participating. That contention, Hall wrote, has been rejected by several other circuits and is "fundamentally inconsistent with the purpose of **Title IX**."

The statute is "dynamic," not "static," the jurist wrote.

"**Title IX** has altered women's preferences, making them more interested in sports, and more likely to become student athletes," she elaborated. "Adopting Appellees' interest-based test for **Title IX** compliance would hinder, and quite possibly reverse, the steady increases in women's participation and interest in sports that have followed **Title IX**'s enactment."

Hall noted that Congress considered, but didn't pass, legislation backed by House Speaker Dennis Hastert, a former wrestling coach, among others which would have blocked the DOE regulations in order to prevent schools from having to shift resources from men's sports to women's. That fact exemplifies congressional intent to permit institutions like CSU to do what it did, the judge wrote.

The injunction was also erroneous, Hall went on to say, because the district judge failed to defer to the enforcing agency's interpretation of **Title IX**.

Judge Susan Graber and Senior Judge William Canby Jr. joined in the opinion.

University of Nebraska law professor Josephine Potuto, who authored an amicus brief in support of the male wrestlers, said the interpretation of **Title IX** by the Ninth Circuit panel and others "is bad law and likely unconstitutional."

Potuto, who described herself as "a huge supporter of athletic opportunities for women," said the decision was "really pernicious." It allows schools to "monkey around with numbers" in order to justify depriving men of athletic opportunities, she said, and to cut the number of male athletes without having to increase the number of women athletes.

CSU spokeswoman Colleen Bentley-Adler said the university was "delighted" with the decision. "It shows that CSU is on the right path and it does validate [the university's handling of] some of the gender-equity issues we've been dealing with," she told the MetNews.

The **case** is Neal v. Board of Trustees of the California State Universities, 99 S.O.S. 9775.

LANGUAGE: ENGLISH

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The News and Observer (Raleigh, NC)

December 16, 1999 Thursday, FINAL EDITION

SECTION: SPORTS; Pg. C6

LENGTH: 270 words

HEADLINE: Court backs equal funds for women

BYLINE: FROM STAFF AND WIRE REPORTS

BODY:

Universities receiving federal funds must provide opportunities for women to participate in sports in proportion to their numbers on campus and not their "relative levels of interest" in athletics, a federal **appellate court** in San Francisco ruled on Wednesday.

And schools that can't come up with the money to enlarge their women's teams must shrink their men's teams until the right proportions are achieved, said the 9th U.S. Circuit **Court of Appeals**.

The unanimous decision, reversing a ruling by a federal trial judge in Fresno, was handed down in a **case** filed by male wrestlers at California State University, Bakersfield, which put a cap on recruitment for all of its men's teams.

The **case** raised questions about the proper interpretation of **Title IX** of the U.S. Civil Rights Act, the law that requires equal athletic opportunities for women students, at a time when **courts** have been abandoning affirmative action in favor of strict neutrality toward individuals in school admissions and other programs.

But the 9th Circuit said athletic programs are different. Schools can't ignore sex when deciding the size of their teams because men must try out for a limited number of spots on men's teams and women, on women's teams, the **court** said.

FOUR IN ACC RANKED: Perennial baseball power Florida State leads four ACC teams ranked in the preseason poll by Collegiate Baseball.

The Seminoles, the NCAA runners-up last year with a 57-14

record, were ranked sixth.

Georgia Tech (38-20) was ninth, Clemson (42-27) 11th and North Carolina (41-18) 20th.

LANGUAGE: ENGLISH

LOAD-DATE: December 16, 1999



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The Chronicle of Higher Education

January 7, 2000

SECTION: ATHLETICS; Pg. A64

LENGTH: 1003 words

HEADLINE: 2 Appeals **Courts** Uphold Right of Universities to Reduce Number of Male Athletes

BYLINE: WELCH SUGGS

BODY:

Two universities have won the right to reduce the number of male athletes on varsity teams -- or even to drop the teams -- to meet the requirements of **Title IX** of the Education Amendments of 1972. Federal appeals **courts** ruled last month in favor of **California State University at Bakersfield** and Illinois State University in lawsuits brought by male athletes against the institutions.

The decisions are setbacks for groups trying to change the way universities comply with **Title IX**, which forbids discrimination by gender at institutions receiving federal funds.

In 1979, the U.S. Department of Education's Office for Civil Rights issued a policy interpretation that gives universities a three-part test to determine whether they are offering women enough opportunities to participate in sports. Colleges can follow the policy by fulfilling any one of the three criteria: having equivalent proportions of female athletes and female students, a condition known as substantial proportionality; demonstrating a "history and continuing practice" of expanding athletics programs for women; or showing that the athletic interests and abilities of women are being accommodated fully.

Along with **Title IX**, **Bakersfield** and the other Cal State campuses are operating under a consent decree that required them to ensure that their teams were within five percentage points of meeting the substantial-proportionality test by the end of the 1998-99 academic year. The Cal State system signed the consent decree after being sued by the California chapter of the National Organization for Women, which claimed that the campuses had far too few female athletes to be in compliance with **Title IX**.

Members of **Bakersfield's** wrestling team had won a preliminary injunction in February from a federal district **court** forbidding the university to drop their sport or limit the number of wrestlers, the first such **court** victory for athletes. However, a three-judge panel of the U.S. **Court** of Appeals for the Ninth Circuit refused to uphold the injunction last month.

Lawyers for the wrestlers and other advocates have argued that substantial proportionality, and by extension the consent decree, required a quota that discriminates against men.

"The **courts** are stubbornly refusing to apply the law as it's written," said Mark Martel, the lead lawyer on the **case** and a former wrestler at Stanford University. "The presumption underlying this thinking is that any time two different groups are participating in something at different rates, there is discrimination, and it has to be eliminated."

In September 1997, a group of wrestlers, led by Stephen Neal, filed for a temporary restraining order to block the university's decision to place limits on the number of men allowed on the team, alleging that it was discriminating against men on the basis of sex. Mr. Neal later won national-collegiate and world heavyweight championships.

The proportionality tests used in the consent decree and the first part of the **Title IX** policy interpretation

"have no rational basis absent a showing that men and women have equal interest and ability to participate in intercollegiate athletics." wrote the group's lawyers.

Judge Robert E. Coyle issued the temporary restraining order and then granted a preliminary injunction to the wrestlers last February, ruling that "relying on proportionality to cap the men's athletic teams at CSUB in order to comply with the consent decree constitutes implementation of a quota based on gender in violation of **Title IX**."

However, many other **courts** have ruled that dropping men's teams and imposing roster caps are acceptable ways of complying with **Title IX**. **Those courts** have found that women have historically been underrepresented in athletics programs at Brown, Colorado State, and Louisiana State Universities, among others. In its unanimous opinion in the **Bakersfield case**, written by Judge Cynthia Holcomb Hall, the appeals-**court** panel vehemently agreed with the other **courts**.

The defendants' interpretation of **Title IX** "would have allowed universities to do little or nothing to equalize men's and women's opportunities if they could point to data showing that women were less interested in sports," Judge Hall wrote. But "a central aspect of **Title IX's** purpose was to encourage women to participate in sports."

Rudy Carvajal, **Bakersfield's** director of athletics, released a statement saying that the university was pleased that the **court** had followed the lead of other appeals **courts**.

A spokesman for the athletics department said officials had not decided whether to reimpose the cap.

Judge Hall closed her opinion with a strong statement defending **Title IX**. Noting the excitement caused by the U.S. victory in the Women's World Cup last summer, she said that "**Title IX** has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics."

Mr. Martel, the plaintiffs' lawyer, said he would appeal the **case** to the entire Ninth Circuit.

In Illinois, a three-judge panel of the U.S. **Court** of Appeals for the Seventh Circuit unanimously dismissed a lawsuit brought by former men's soccer players and wrestlers against Illinois State after it eliminated their sports.

In 1995, Illinois State dropped the two men's sports and added women's soccer in order to meet substantial-proportionality guidelines. The male athletes sued the university that fall, charging that because it had decided to eliminate the teams on the basis of sex, it had violated **Title IX**.

The university responded that trying to achieve substantial proportionality was the only way it could afford to come into compliance with **Title IX**. The athletes' suit was dismissed by a lower **court** in February, and they appealed to the Seventh Circuit. They will next appeal for a hearing before the full **court**, lawyers said.

LANGUAGE: ENGLISH

LOAD-DATE: January 04, 2000

Copyright 1999 The Salt Lake Tribune
The Salt Lake Tribune

December 5, 1999, Sunday

SECTION: Final; Pg. B1

LENGTH: 1328 words

HEADLINE: Stuck in a Near Fall, BYU Slammed by Iowa; Dual Falls Well Short of Goal

BYLINE: MICHAEL C. LEWIS, THE SALT LAKE TRIBUNE

BODY:

The wrestling program at Brigham Young University has been sentenced to die, and only \$ 7 million in donations or a landmark Supreme **Court** decision can save it now.

But while the Cougars already have their heads wedged into the guillotine, they are not simply waiting for the blade to fall. As might be expected of men who train daily for combat, the Cougs are fighting back, struggling and straining against the leverage of reality in the hope of pulling off the ultimate reversal.

"This is going to be the story of all stories," said Coach Mark Schultz.

The first chapter already has been written, with the formation of the Utah Amateur Wrestling Foundation. It was officially organized in October, six months after BYU said it would eliminate wrestling and men's gymnastics because it said those sports are too expensive and do not exist at enough schools in the new Mountain West Conference.

Former Cougar wrestler Ross Brunson was elected to head the foundation, and he negotiated an agreement with BYU. If the foundation can raise \$ 7 million, the school told Brunson it will reconsider its decision. The money could be put into a trust fund and the interest could be used to fund the wrestling program. Even at only 5 percent interest, that would produce \$ 350,000 annually, more than the \$ 250,000 that goes to wrestling now.

To fuel the fund-raising, the wrestlers organized a dual meet against the No. 2-ranked Iowa Hawkeyes in the Delta Center on Saturday night. Iowa won the dual 33-6.

Former BYU athletic director and All-America wrestler Rondo Fehlberg -- the man who announced the program cuts in April -- arranged a private donation to pay the \$ 80,000 rental fee for the Delta Center, and the Cougs had hoped to sell out the 19,911-seat arena and set a wrestling attendance record.

"We want to make a statement that there are people here in the state who will support wrestling," Brunson said.

As it turned out, 5,877 fans paid at least \$ 5 apiece to watch the Hawkeyes while former Olympian Dan Gable watched from the Iowa sideline. Gable won a gold medal in the 1984 Olympics in Los Angeles, and later coached Schultz before Schultz and his late brother, Dave, won golds at the 1992 Barcelona Games.

And while a few thousand dollars is not going to make a huge difference on the ledger, the fans that the money represents might have an effect on the BYU administration when it meets with Brunson and other wrestling supporters at the end of May for an accounting of the foundation's progress.

Brunson said he already has pledged of more than \$ 1 million, and that if even the foundation falls short of the \$ 7 million next spring, it might make raise enough money and demonstrate enough support to keep the sport alive at least another few years while more donations are sought and influential decisions are made in **court**.

"I admire what they're trying to do," said BYU Athletic Director Val Hale.

'War on Men': The larger issue is the role of **Title IX** in the elimination of men's sports. Schultz and his supporters complain that the federal gender equity law is being applied illegally, because of an interpretation by the Office of Civil Rights. The law prohibits discrimination based on gender, yet that is what wrestlers and other male athletes in so-called minor collegiate sports say has been happening to them over the last decade.

"It has been a direct attack against men," said Schultz. "It's a war on men . . . and it's the war we have to win."

The number of college wrestling programs today is only about half of the more than 700 that existed in 1972, said Schultz, largely because of **Title IX**.

Fehlberg denied a direct link to **Title IX** when he announced the plan to cancel wrestling at BYU, "but indirectly it came into play, because so many wrestling and men's gymnastics programs have been eliminated at other schools in the past decade," he said. "We've ended up with a situation where there are only a couple of programs in each conference. And that makes a sport difficult to sustain."

When the Office of Civil Rights first issued an "interpretation" of **Title IX** in 1979, it laid out a three-point test for determining if a school was complying with the law.

Proving "proportionality" in the number of athletic opportunities open to men and women was one of the tests, and it quickly became the favorite method of demonstrating compliance because it was the easiest and least open to expensive legal challenges, said attorney Mark Martel, a former wrestler and coach who represents a wrestler suing the California Board of Trustees over its attempt to limit the number of wrestlers at Cal State-Bakersfield.

The idea was that the number of athletic opportunities --or scholarships, really -- should be proportional to the number of men and women enrolled in the school. A school with 55 percent women, then, ought to have 55 percent of its athletic scholarships for women.

Case Law: But a court case involving Brown University in 1993 changed everything.

Based on the ruling in that case, the Office of Civil Rights in 1996 changed its definition of "opportunities" to mean "actual participants," said Martel.

That meant that a school that might have been in compliance by allowing a proportional number of scholarships for men and women was suddenly not in compliance if not all of the women's scholarships were being filled, said Martel. Most schools then had to cut men's sports even more, he said, because fewer women went out for sports, and the result was a quota system that violates **Title IX** itself.

The number of scholarships "should basically reflect who wants to play," said Martel. "That's what the law requires."

Whether the law agrees remains to be seen.

LOAD-DATE: December 05, 1999

LEVEL 1 - 2 OF 6 CASES

BETH PEDERSON; LISA OLLAR; SAMANTHA CLARK, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, versus LOUISIANA STATE UNIVERSITY; WILLIAM E. DAVIS, Individually and in his official capacity as Chancellor of Louisiana State University; JOE C. DEAN; ELAINE D. ABELL; CLARENCE L. BARNEY; MILTON C. CHAPMAN; ELENORA A. CAWTHON; DAVID CONROY; CHARLES V. CUSIMANO; GORDON E. DORE; JANICE M. FOSTER; JIMMY A. LALONDE, JR.; JOSEPH LESAGE, JR.; ROLFE MCCOLLISTER, JR.; ROGER H. OGDEN; NICHOLAS SMITH, JR.; JOSEPH L. WAITZ; CHARLES S. WEEMS, III; JOHN R. WILLIAMS; MILTON J. WOMACK; ALL DEFENDANTS, Defendants-Appellees. BETH PEDERSON; LISA OLLAR; SAMANTHA CLARK, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, CINDY PINEDA; KARLA PINEDA, Intervenor Plaintiffs-Appellants, versus LOUISIANA STATE UNIVERSITY; WILLIAM E. DAVIS, Individually and in his official capacity as Chancellor of Louisiana State University; JOE C. DEAN; ELAINE D. ABELL; CLARENCE L. BARNEY; MILTON C. CHAPMAN; ELENORA A. CAWTHON; DAVID CONROY; CHARLES V. CUSIMANO; GORDON E. DORE; JANICE M. FOSTER; JIMMY A. LALONDE, JR.; JOSEPH LESAGE, JR.; ROLFE MCCOLLISTER, JR.; ROGER H. OGDEN; NICHOLAS SMITH, JR.; JOSEPH L. WAITZ; CHARLES S. WEEMS, III; JOHN R. WILLIAMS; MILTON J. WOMACK; ALL DEFENDANTS, Defendants-Appellees. BETH PEDERSON; LISA OLLAR; SAMANTHA CLARK, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, versus LOUISIANA STATE UNIVERSITY; WILLIAM E. DAVIS, Individually and in his official capacity as Chancellor of Louisiana State University; JOE C. DEAN; ELAINE D. ABELL; CLARENCE L. BARNEY; MILTON C. CHAPMAN; ELENORA A. CAWTHON; DAVID CONROY; CHARLES V. CUSIMANO; GORDON E. DORE; JANICE M. FOSTER; JIMMY A. LALONDE, JR.; JOSEPH LESAGE, JR.; ROLFE MCCOLLISTER, JR.; ROGER H. OGDEN; NICHOLAS SMITH, JR.; JOSEPH L. WAITZ; CHARLES S. WEEMS, III; JOHN R. WILLIAMS; MILTON J. WOMACK; ALL DEFENDANTS, Defendants-Appellees. BETH PEDERSON; LISA OLLAR; SAMANTHA CLARK, Individually and on behalf of all others similarly situated, Plaintiffs-Appellees, CINDY PINEDA; KARLA PINEDA, Plaintiffs-Appellees, versus LOUISIANA STATE UNIVERSITY; WILLIAM E. DAVIS; JOE C. DEAN; ELAINE D. ABELL; CLARENCE L. BARNEY; MILTON C. CHAPMAN; ELENORA A. CAWTHON; DAVID CONROY; CHARLES V. CUSIMANO; GORDON E. DORE; JANICE M. FOSTER; JIMMY A. LALONDE, JR.; JOSEPH LESAGE, JR.; ROLFE MCCOLLISTER, JR.; ROGER H. OGDEN; NICHOLAS SMITH, JR.; JOSEPH L. WAITZ; CHARLES S. WEEMS, III; JOHN R. WILLIAMS; MILTON J. WOMACK; ALL DEFENDANTS, Defendants-Appellants. BETH PEDERSON; LISA OLLAR; SAMANTHA CLARK, Individually and on behalf of all others similarly situated, Plaintiffs-Appellants, CINDY PINEDA; KARLA PINEDA, Plaintiffs-Appellants-Appellees, versus LOUISIANA STATE UNIVERSITY; WILLIAM E. DAVIS, Individually and in his official capacity as Chancellor of Louisiana State University; JOE C. DEAN; ELAINE D. ABELL; CLARENCE L. BARNEY; MILTON C. CHAPMAN; ELENORA A. CAWTHON; DAVID CONROY; CHARLES V. CUSIMANO; GORDON E. DORE; JANICE M. FOSTER; JIMMY A. LALONDE, JR.; JOSEPH LESAGE, JR.; ROLFE MCCOLLISTER, JR.;

2000 U.S. App. LEXIS 990

ROGER H. OGDEN; NICHOLAS SMITH, JR.; JOSEPH L. WAITZ;
CHARLES S. WEEMS, III; JOHN R. WILLIAMS; MILTON J. WOMACK;
ALL DEFENDANTS, Defendants-Appellees-Appellants.

No. 94-30680, No. 95-30777, No. 96-30310, No. 97-30427, No.
97-30719

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2000 U.S. App. LEXIS 990

January 27, 2000, Decided

PRIOR HISTORY: Appeals from the United States District Court for the Middle District of Louisiana. 94-CV-247 and 95-CV-228. Rebecca F Doherty, US District Judge.

DISPOSITION: Nos. 94-30680 and 95-30777 DISMISSED. Order appealed from in No. 97-30427 AFFIRMED. Order approving LSU's Compliance Plan in Nos. 97-30719 and 97-30722 VACATED with instructions. Final judgment appealed from in 97-30744 and 97-30781, and opinion appealed from in 96-30310 AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED in part with instructions. All carried motions DENIED.

CORE TERMS: athletic, varsity, female, team, immunity, numerosity, moot, softball, soccer, abrogate, Fourteenth Amendment, injunctive relief, athlete, sport, putative, accommodation, fast-pitch, mootness, Eleventh Amendment, recipient, effective, sex, class certification, States' Eleventh Amendment, intentionally, intercollegiate, sovereign immunity, validly, male, soccer team

COUNSEL: For BETH PEDERSON, LISA OLLAR, SAMATHA CLARK, Plaintiffs - Appellants (94-30680): Thomas L Krebs, Birmingham, AL. Nancy E Rafuse, R Lawrence Ashe, Jr, Kelly Jean Koelker, Paul, Hastings, Janofsky & Walker, Atlanta, GA.

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For UNITED STATES OF AMERICA, Intervenor (97-30427): Jessica Dunsay Silver, Washington, DC. Seth Michael Galanter, US Department of Justice, Appellate Section, Civil Rights Division, Washington, DC.

For LOUISIANA STATE UNIVERSITY, WILLIAM E DAVIS, JOE C DEAN, ELAINE D ABELL, CLARENCE L BARNEY, MILTON C CHAPMAN, ELENORA A CAWTHON, DAVID CONROY, CHARLES V CUSIMANO, GORDON E DORE, JANICE M FOSTER, JOSEPH LESAGE, JR, ROLFE MCCOLLISTER, JR, ROGER H OGDEN, NICHOLAS SMITH, JR, JOSEPH L WAITZ, CHARLES S WEEMS, III, JOHN R WILLIAMS, MILTON J WOMACK, ALL DEFENDANTS, Defendants - Appellants (97-30427): David Mark Bienvenu, Jr, Baton Rouge, LA. William Shelby McKenzie, G Michael Pharis, Taylor, Porter, Brooks & Phillips, Baton Rouge, LA.

For KARLA PINEDA, CINDY PINEDA, Plaintiffs - Appellants (97-30719): Thomas L Krebs, Birmingham, AL. Nancy E Rafuse, R Lawrence Ashe, Jr, Paul, Hastings, Janofsky & Walker, Atlanta, GA.

For LOUISIANA STATE UNIVERSITY, WILLIAM E DAVIS, JOE C DEAN, ELAINE D ABELL, CLARENCE L BARNEY, MILTON C CHAPMAN, ELENORA A CAWTHON, DAVID CONROY, CHARLES V CUSIMANO, GORDON E DORE, JANICE M FOSTER, JOSEPH LESAGE, JR, ROLFE MCCOLLISTER, JR, ROGER H OGDEN, NICHOLAS SMITH, JR, JOSEPH L WAITZ, CHARLES S WEEMS, III, JOHN R WILLIAMS, MILTON J WOMACK, ALL DEFENDANTS, Defendants - Appellees (97-30719): David Mark Bienvenu, Jr, Baton Rouge, LA. William Shelby McKenzie, G Michael Pharis, Taylor, Porter, Brooks & Phillips, Baton Rouge, LA.

JUDGES: Before KING, Chief Judge, and STEWART, Circuit Judge, and LITTLE, District Judge. *

* District Judge of the Western District of Louisiana, sitting by designation.

OPINIONBY: CARL E. STEWART

OPINION:

CARL E. STEWART, Circuit Judge:

We must today determine whether the largest public university in Louisiana has discriminated against women under Title IX in the provision of facilities and teams for intercollegiate athletic competition. Before us are eight appeals, which were consolidated for briefing and argument, concerning allegations of such discrimination against the instant plaintiffs and a putative class of female undergraduates at Louisiana State University ("LSU"). After threading our way through issues relating to class certification and subject matter jurisdiction, we conclude that LSU violated Title IX by failing to accommodate effectively the interests and abilities of certain female students and that its discrimination against these students was intentional.

I. Procedural & Factual History

On March 23, 1994, three female undergraduate students attending LSU--Beth Pederson, Lisa Ollar, and Samantha Clark ("Pederson Plaintiffs")--filed suit in the United States District Court for the Middle District of Louisiana, alleging that LSU had violated and continued to violate Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688 (1994) ("Title IX"), and the Equal Protection Clause of the United States Constitution by denying them equal opportunity to participate in intercollegiate athletics, equal opportunity to compete for and to receive athletic scholarships, and equal access to the benefits and services that LSU provides to its varsity intercollegiate athletes, and by discriminating against women in the provision of athletic scholarships and in the compensation paid coaches. n1 The Pederson Plaintiffs sought declaratory, injunctive, and monetary relief on behalf of themselves and all those similarly situated. The defendants to the action included LSU, Athletic Director Joe Dean (in his individual and official capacities) ("Dean"), Chancellor William E. Davis (in his individual and official capacities) ("Davis"), and the individual members of the LSU Board of Supervisors (in their official capacities only) (collectively, "Appellees"). n2

- - - - -Footnotes- - - - -

n1 Pederson, Ollar, and Clark all play soccer. Pederson enrolled at LSU beginning in the autumn term of 1992. Ollar enrolled at LSU beginning with the autumn term of 1990. Clark enrolled at LSU beginning in the autumn term of 1990 through December 1994. The district court found that, when LSU implemented a soccer team in the autumn term of 1995, Pederson tried out for and made the team but ultimately did not participate because of financial difficulties and lack of necessary skill, and Ollar and Clark did not participate because they had no remaining college eligibility.

n2 An exhaustive summary of the facts underlying this case and a more thorough procedural history may be found at *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 897-902 (M.D. La. 1996). In this opinion, we repeat only those aspects of the case necessary to our disposition and refer the reader to the district court's opinion for a fuller record of the events.

- - - - -End Footnotes- - - - -

Subsequently, plaintiffs Cindy and Karla Pineda ("Pineda Plaintiffs" and, together with Pederson Plaintiffs, "Appellants") sought to intervene in the original action. n3 The motion to intervene was denied, and the Pineda Plaintiffs filed suit on behalf of themselves and a class of those similarly situated in the Eastern District of Louisiana on January 3, 1995. Appellees transferred the Pineda action to the Middle District of Louisiana and moved to consolidate the Pineda action with the Pederson action. The district court granted the motion, and Appellants filed an amended complaint merging the actions.

- - - - -Footnotes- - - - -

n3 The Pineda Plaintiffs play fast-pitch softball. Cindy and Karla Pineda both enrolled at LSU beginning in the Autumn of 1992. When LSU implemented a softball team at the intramural level, Karla participated in the league. When LSU implemented a varsity fast-pitch softball team for the 1996-97 season, Cindy tried out for and made the team as a scholarship player.

- - - - -End Footnotes- - - - -

In the course of the litigation, the district court denied Appellants' motions for preliminary injunctions. On September 14, 1995, it granted Appellees' motion for partial summary judgment, dismissing for lack of standing Appellants' claims for equal treatment in the areas of coaches' salaries, budgets, facilities, training, and travel, on the ground that Appellants could not demonstrate injury-in-fact related to existing varsity athletic programs in which they had never sought to participate. n4 On the same date, the district court dismissed Appellants' 42 U.S.C. @ 1983 claims against defendants Davis and Dean in their individual capacities on the basis of qualified immunity, and also dismissed the remaining @ 1983 and Fourteenth Amendment claims. The district court also entered an order provisionally certifying the following class:

Those female students enrolled at LSU since 1993 and any time thereafter who have sought or seek to participate in varsity intercollegiate athletics at LSU but who are or were not allowed such participation due to LSU's failure to field teams in said female varsity athletics.

- - - - -Footnotes- - - - -

n4 Alleged violations of Title IX in the area of athletics are often divided into effective accommodation claims and equal treatment claims. The distinction is derived from the regulations promulgated under Title IX. Effective accommodation claims correspond to the portion of the implementing regulations that

provide that in determining whether equal athletic opportunities for members of both sexes are available, the Office of Civil Rights of the Department of Education (the office charged with enforcement of Title IX) will consider, among other factors, "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."

Boucher v. Syracuse Univ., 164 F.3d 113, 115 n.1 (2d Cir. 1999) (quoting 34 C.F.R. @ 106.41(c)(1)). Equal treatment claims "derive from the Title IX regulations found at 34 C.F.R. @@ 106.37(c) and 106.41(c)(2)-(10), which call

for equal provision of athletic scholarships as well as equal provision of other athletic benefits and opportunities among the sexes." Id. at 115 n.2.

- - - - -End Footnotes- - - - -

The district court conducted trial on Appellants' surviving claims from October 10, 1995, through November 8, 1995. On January 11, 1996, the district court entered an order decertifying the class because the numerosity requirement of Federal Rule of Civil Procedure 23(a) ("Rule 23(a)") had not been met and because a class was not needed to obtain the requested relief. On January 12, 1996, the district court entered its opinion on the merits finding that Appellees were in violation of Title IX. See *Pederson v. Louisiana State Univ.*, 912 F. Supp. 892, 917 (M.D. La. 1996). The district court ruled, however, that Appellees did not intentionally violate Title IX and therefore would not be liable for monetary damages. The district court also dismissed the claims of the Pederson Plaintiffs for lack of standing. As a result of its finding that Appellees were in violation of Title IX, the district court ordered Appellees to submit a plan for compliance with the statute (the "Compliance Plan").

The Pederson Plaintiffs filed a notice of appeal on January 12, 1996 from the district court's order. The notice of appeal encompassed all prior district court orders. On June 9, 1997, the Pineda Plaintiffs filed a notice of appeal from the district court's May 9, 1997 order approving the Compliance Plan. The notice of the appeal encompassed all prior district court orders. On July 24, 1997, Appellants collectively filed a notice of appeal from the final judgment entered on July 1, 1997. In this consolidated appeal, Appellants challenge the district court's decision to decertify the class, the district court's conclusion that Appellees did not intentionally violate Title IX, the district court's decision to dismiss the Pederson Plaintiffs' claims for lack of standing, and the district court's conclusion that Appellants lacked standing to pursue their claims alleging a lack of equal treatment in existing LSU varsity sports.

Prior to the entry of final judgment against Appellees, the Supreme Court decided *Seminole Tribe v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). In their answer to both complaints, Appellees had pled the affirmative defense of Eleventh Amendment immunity. In light of *Seminole Tribe*, Appellees filed a Rule 12(b)(1) motion to dismiss on May 14, 1996, contending that Eleventh Amendment sovereign immunity deprived the court of subject matter jurisdiction. On March 4, 1997, the district court denied Appellees' motion. On March 19, 1997, Appellees filed a notice of appeal of the district court's denial of their 12(b)(1) motion. On June 9, 1997, Appellees appealed from the district court's May 9, 1997 order approving the Compliance Plan. The notice of appeal encompassed all of the district court's earlier rulings, including the district court's finding that LSU is or was in violation of Title IX. On July 7, 1997, Appellees filed another notice of appeal from the final judgment entered on July 1, 1997. On appeal, Appellees challenge the district court's denial of their 12(b)(1) motion to dismiss, the district court's conclusion that Appellees were in violation of Title IX, and the district court's ordered injunctive relief on the ground that it is overbroad.

II. Jurisdiction

We begin our analysis by determining our jurisdiction to entertain these appeals. We must address the jurisdictional issues of standing, mootness,

state sovereign immunity, and class certification; we address these issues in no particular order. n5 We proceed, first, by reviewing the district court's decision to decertify the class it provisionally certified on September 14, 1995. Next, with regard to standing, we determine whether the district court correctly determined that the Pederson Plaintiffs lacked standing to pursue their claims and whether it correctly determined that Appellants lacked standing to pursue their claims of unequal treatment in existing varsity sports at LSU. Third, we examine Appellees' contentions regarding mootness. Finally, we determine whether the doctrine of sovereign immunity bars suit in this case.

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n5 When questions of both Article III jurisdiction and class certification are presented, the class certification questions, at times, "should be treated first because class certification issues are 'logically antecedent' to Article III concerns and pertain to statutory standing, which may properly be treated before Article III standing." *Ortiz v. Fibreboard Corp.*, 144 L. Ed. 2d 715, 119 S. Ct. 2295, 2300 (1999) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)) (internal citations omitted). Because the class certification issue presented here is not outcome determinative, as it was in both *Ortiz* and *Amchem*, it need not, in our minds, be treated first. We nonetheless begin by discussing the district court's decertification of the putative class.

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A. Class Decertification

We review a district court's class certification decisions for abuse of discretion. n6 See *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993); *Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 607 (5th Cir. 1986). "The district court maintains great discretion in certifying and managing a class action. We will reverse a district court's decision to certify a class only upon a showing that the court abused its discretion, or that it applied incorrect legal standards in reaching its decision." *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 624 (5th Cir. 1999). The decision to decertify a provisionally certified class is a class certification decision and, as such, is reviewed for abuse of discretion. See *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995); *Briggs v. Anderson*, 796 F.2d 1009, 1017 (8th Cir. 1986).

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n6 We review the district court's decertification of the class despite Appellees' contentions that this action is moot as to Appellants. Even if that contention holds true, Appellants are the proper parties to contest the district court's certification decisions regarding the putative class. See *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980). Appellees also argue that the class claims are moot. We determine, *infra*, that they are not.

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In the district court, Appellants sought to certify the class of "all LSU women students enrolled at any time since February, 1993 or who seek to enroll or become enrolled during the course of this litigation and who seek or have

sought to participate and or were deterred from participating in varsity intercollegiate athletics funded by LSU." n7 Memorandum Ruling of Jan. 12, 1996, at 1. On September 14, 1995, the district court provisionally certified the class of "those who have sought or seek to participate in varsity intercollegiate athletics at LSU but who are or were not allowed such participation due to LSU's failure to field teams in said female varsity athletics." Id. at 4. At that time, the district court voiced its concern that the numerosity requirement of Rule 23(a) had not been met. The court stated:

provisional certification will require plaintiffs, before judgment is rendered, to further support their assertion that the joinder of potential class members is impracticable. . . . In particular this Court is concerned that plaintiffs cannot show that one major argument on numerosity is causally weak, i.e. whether women who participate in intermurals [sic] at LSU would have the ability or interests to compete at the varsity level at LSU.

Memorandum Ruling of Sept. 14, 1995, at 10-11. Following the close of evidence at trial, both sides briefed the issue of numerosity.

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n7 In order to maintain a class action, plaintiffs must first show that the four requirements Rule 23(a) have been met and, additionally, that one of the requirements of Rule 23(b) have been met. See FED. R. CIV. P. 23. The requirements of Rule 23(a) are

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Id. 23(a). The district court initially certified a class under Rule 23(b)(2), which allows a class action if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Id. 23(b)(2). Appellants contend that they reserved the right to move for certification under Rule 23(b)(3), but the Appellees dispute this contention. We take no position on this debate because no appeal was filed with respect to the certification of a Rule 23(b)(3) class.

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Ultimately, the district court decertified the provisional class. See Memorandum Ruling of Jan. 12, 1996, at 8-9. It stated that it had "cautioned plaintiffs' counsel in its original ruling that the evidence presented on numerosity was not sufficient to uphold a class certification and granted plaintiffs the opportunity to bolster that information. [It] remained unconvinced that such numerosity exists." n8 Id. at 4-5.

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n8 The district court then established "lack of necessity" as an alternative ground for decertifying the class. This court has, in the past, declined to decide whether necessity can play a role in class certification decisions. See

Johnson v. City of Opelousas, 658 F.2d 1065, 1069-70 (5th Cir. 1981). We again decline to decide this question. We simply decide that, if indeed a necessity requirement exists, the substantial risk of mootness here created a necessity for class certification in this case, and the district court abused its discretion in finding no necessity for a class.

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Appellants challenge the decertification of the putative class. It is important for our purposes to recognize that Appellants do not challenge the district court's redefinition of the putative class; they merely challenge the district court's decision to decertify the redefined class.ⁿ⁹ The precise question before us, therefore, is whether the district court abused its discretion when it decertified, on the grounds of lack of numerosity and lack of necessity, the class of "those female students enrolled at LSU since 1993 and any time thereafter who have sought or seek to participate in varsity intercollegiate athletics at LSU but who are or were not allowed such participation due to LSU's failure to field teams in said female varsity athletics." Memorandum Ruling of Jan. 12, 1996, at 4.

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ⁿ⁹ Appellants assert in their brief before this court a desire to represent the class they originally proposed to the district court, but they fail to challenge the district court's redefinition of the putative class.

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Appellants' major contention appears to be that the evidence presented at trial clearly satisfied the numerosity requirement and that the district court's decertification order, therefore, erroneously assessed that evidence. Appellants also attack the district court's failure to make specific findings of fact in its memorandum ruling decertifying the putative class. See Appellants' Brief at 34-35 ("Although the District Court (contrary to Rules 23 and 52) made no factual findings supporting its holding as to numerosity, the trial evidence clearly established the numerosity element.").

The district court made clear that its decertification decision, in all aspects relevant to this discussion, rested on Appellants' inability to satisfy the numerosity requirement. Moreover, in its September 14, 1995, Memorandum Ruling, the district court explained that Appellants had failed to provide evidence that members of the intramural and club teams had the desire or ability to compete at the varsity level. Appellants are correct, however, that the district court failed to identify specific findings of fact to support its conclusion that the numerosity requirement had not been met. Both parties briefed the numerosity issue following the close of evidence at trial. These briefs detailed the evidence in favor of and against a conclusion that the numerosity prong of Rule 23(a) had been satisfied. This same evidence is reiterated in the briefs prepared on appeal.

At trial, Appellants established that a number of current LSU female students had a desire to try out for varsity soccer or fast-pitch softball.ⁿ¹⁰ Appellees admit that eight people showed up for varsity soccer tryouts. These eight, however, do not constitute the sum total of class members. The class consists of all "female students enrolled at LSU since 1993 and any time thereafter" who

wish to participate. Plaintiffs established that, around the time of trial, well over 5,000 young women were playing soccer or fast-pitch softball at the high school level in Louisiana. They also established that many former members of a Baton Rouge soccer club received scholarships to play intercollegiate soccer. As Appellees point out, these women, because they are not students at LSU, are not members of the putative class. However, considering the talent pool in Louisiana established by these figures and the number of LSU students who come from Louisiana, Appellants have established that numerous future female LSU students will desire to try out for varsity soccer and fast-pitch softball. To satisfy the numerosity prong, "a plaintiff must ordinarily demonstrate some evidence or reasonable estimate of the number of purported class members." *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981). The evidence presented brings Appellants' assertions as to numerosity beyond the "mere allegation that the class is too numerous to make joinder practicable" which, by itself, is insufficient. *Fleming v. Travenol Laboratories, Inc.*, 707 F.2d 829, 833 (5th Cir. 1983). n11

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n10 Because we determine, *infra*, that to establish standing, an individual need only demonstrate that she is able and ready to compete for a position on the unfielded team, we do not focus, as the district court seems to have, on whether potential class members have the skill necessary to obtain a position on a varsity team.

n11 We have previously stated that when conducting a numerosity analysis, district courts must not focus on sheer numbers alone but must instead focus "on whether joinder of all members is practicable in view of the numerosity of the class and all other relevant factors." *Phillips v. Joint Legislative Comm.*, 637 F.2d 1014, 1022 (5th Cir. 1981). We have found the inclusion of future members in the class definition a factor to consider in determining if joinder is impracticable. In *Jack v. American Linen Supply Co.*, we noted that "the alleged class . . . included unnamed, unknown future . . . [members] who will be affected by . . . discriminatory policies, and joinder of unknown individuals is certainly impracticable." 498 F.2d 122, 124 (5th Cir. 1974). In the case at hand, the fact that the class includes unknown, unnamed future members also weighs in favor of certification.

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Our independent review of the record satisfies us that the numerosity prong has been satisfied. Because the district court failed to identify specific findings that led it to conclude that the numerosity prong had not been satisfied, we can only conclude that its assessment of the evidence was clearly erroneous and, therefore, that it abused its discretion in declining finally to certify the putative class on the ground of lack of numerosity. Accordingly, we vacate the district court's decertification order.

It has been over four years since the district court provisionally certified the class at issue. While we have determined that the district court abused its discretion in decertifying the class on the grounds of numerosity and, possibly, lack of need, this court is not as well situated as the district court to determine whether the putative class should now finally be certified given all other considerations that go into a class certification decision. Upon remand, therefore, the district court should reconsider final class certification in

light of this opinion and all other class certification considerations, including the adequacy as a representative of any person who hereafter comes forward to represent the class.

B. Standing

The district court ruled that the Pederson Plaintiffs lacked standing to bring suit for violations of Title IX and that all Appellants lacked standing to challenge LSU's existing varsity program. We review each ruling in turn.

1. Legal Principles

"Jurisdictional questions are questions of law, and thus reviewable de novo by this Court. . . . If the district court resolves any factual disputes in making its jurisdictional findings, the facts expressly or impliedly found by the district court are accepted on appeal unless the findings are clearly erroneous." In the Matter of the Complaint of Tom-Mac, Inc., 76 F.3d 678, 682 (5th Cir. 1996) (internal citations omitted). "A question of standing raises the issue of whether the plaintiff is entitled to have the court decide the merits of the dispute or of particular issues. Standing is a jurisdictional requirement that focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." Cook v. Reno, 74 F.3d 97, 98-99 (5th Cir. 1996) (internal quotations and footnotes omitted).

To have standing, a plaintiff must establish three elements:

First, the plaintiff must show that it has suffered an injury in fact--a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical. Second, the plaintiff must establish causation--a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. Lastly, there must be redressability--a likelihood that the requested relief will redress the alleged injury.

Sierra Club v. Peterson, 185 F.3d 349, 360 (5th Cir. 1999). Additionally, courts have refused to adjudicate cases that raise only generalized grievances. "A generalized grievance is a harm shared in substantially equal measure by all or a large class of citizens. The prudential principle barring adjudication of generalized grievances is closely related to the constitutional requirement of personal injury in fact, and the policies underlying both are similar." Walker v. Mesquite, 169 F.3d 973, 979 n.16 (5th Cir. 1999) (internal citations and quotation marks omitted).

Finally, the doctrine of standing is distinguishable from that of mootness. The Supreme Court has acknowledged "mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980) (quoting Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L.J. 1363, 1384 (1973)).

2. Pederson Plaintiffs

The district court determined that the Pederson Plaintiffs--Pederson, Ollar, and Clark--lacked standing to bring claims for equitable or declaratory relief. With regard to Ollar and Clark, the court found that they "were ineligible to

compete in intercollegiate athletics after May, 1995 under the regulations of the National Collegiate Athletic Association [{"NCAA"}]." Pederson, 912 F. Supp. at 907. The court found that Pederson retained NCAA eligibility and had made the team, but she quit the team for financial reasons and was, at the same time, cut from the team due to a lack of skill. Id. at 907 & n.34. The court further found that LSU had no men's varsity soccer team and that it provided men and women the same opportunity to participate in club soccer. Finally, the court found that the Pederson Plaintiffs did not establish the ability to play soccer above the club level and that they did not establish the interest or ability to play any sport other than soccer. The court therefore concluded that "LSU's alleged violation of Title IX by not providing additional athletic opportunity to its female students in no way personally impacted these three plaintiffs." Id. at 907. Absent any personal impact, the court determined that the Pederson Plaintiffs lacked standing and dismissed their claims.

The district court failed appropriately to evaluate the Pederson Plaintiffs' standing. First, the district court addresses each plaintiff's NCAA eligibility at the time of trial. Eligibility at the time of trial, however, implicates mootness; it has no bearing on the particular litigant's standing at the time the suit was filed. n12

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n12 We discuss mootness in Part II.C., *infra*.

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Second, the district court's conclusion that LSU provided men and women the same opportunities to play soccer and that, therefore, LSU's Title IX violation did not impact the Pederson Plaintiffs reaches the merits of the Pederson Plaintiffs' effective accommodation claim. The Pederson Plaintiffs claim that LSU, by failing to field a women's varsity soccer team, ineffectively accommodated the interests and abilities of female students at the school. Whether or not the Pederson Plaintiffs produced evidence at trial sufficient to establish this alleged violation is the very heart of the matter in their case and does not implicate standing. Standing requires alleged misconduct, not proven misconduct. To the extent that the district court reached the merits of the Pederson Plaintiffs' claims in its opinion, we remark only that "it is inappropriate for the court to focus on the merits of the case when considering the issue of standing." *Hanson v. Veterans Admin.*, 800 F.2d 1381, 1385 (5th Cir. 1986).

Third, the district court misconceived the level of injury necessary to establish standing in this area. The district court's focus on the ability of each Pederson Plaintiff to secure a position on the varsity soccer team was misplaced. This inquiry will be appropriate in the determination of damages during Stage II. If the Pederson Plaintiffs have standing and succeed on their violation claims, then each plaintiff's ability to secure a position on the unfielded varsity soccer team during the period of the violation is a factor to consider in assessing damages. Of course, each plaintiff's ability to secure a position will be impacted both by skill and NCAA eligibility. The findings of the district court, therefore, do not help to determine whether the Pederson Plaintiffs have standing to challenge LSU's effective accommodation under Title IX, i.e., whether they met the minimum standing requirements at the time they instituted this suit.

We are unaware of, nor does either party point to, precedent delineating the precise level of injury a litigant must demonstrate to establish standing to assert a claim under Title IX for ineffective accommodation. Clearly, the alleged misconduct here is LSU's failure to field a varsity soccer team in violation of Title IX. The remedies sought are both monetary and injunctive. As a general matter, injury in fact is the "invasion of a legally protected interest." *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993). The difficult question, then, is whether there is, in this case, any legally protected interest actually violated or in imminent danger of being violated that is fairly traceable to the alleged misconduct and from which the Pederson Plaintiffs will likely obtain relief as a result of a favorable ruling. The district court seems to require that the Pederson Plaintiffs allege the injury of being denied the opportunity to compete on a specific varsity team. It follows from this reasoning that a determination that a plaintiff would not have made the specific varsity team, even had it existed, defeats her standing because she fails to demonstrate sufficient injury. The district court requires too much.

Our decision here is informed on two fronts. First, we find the case of *Boucher v. Syracuse Univ.*, 164 F.3d 113 (2d Cir. 1999) supportive. There, members of the club lacrosse and softball teams brought suit for violation of Title IX. Neither the district court nor the Court of Appeals for the Second Circuit discussed whether any of the students possessed the skills necessary to make one of the unfielded varsity teams. Nonetheless, the Second Circuit, after dismissing their equal treatment claims for lack of standing, never even questioned their standing to bring effective accommodation claims. See *id.* at 120.

Second, we find the Supreme Court's Equal Protection jurisprudence instructive. In the context of set-aside programs, the Court has stated:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. To establish standing, therefore, a party challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.

Northeastern Florida, 508 U.S. at 666 (citations omitted). Violating Title IX by failing to field women's varsity teams that effectively accommodate the interests and abilities of the university community certainly creates a barrier for female students. In much the same way as set-aside programs, the injury here results from the imposed barrier—the absence of a varsity team for a position on which a female student should be allowed to try out. We hold, therefore, that to establish standing under a Title IX effective accommodation claim, a party need only demonstrate that she is "able and ready" to compete for a position on the unfielded team.

The Pederson Plaintiffs have certainly established standing in this case. They all participated in club soccer, and, indeed, Pederson actually competed for a spot on the team once it was fielded. Whether or not they have proved sufficiently their claims on the merits, however, is for the district court to decide. The district court's conclusion that Appellees violated Title IX by failing to field a women's varsity fast-pitch softball team does not compel a conclusion that they likewise violated Title IX by failing to field a women's varsity soccer team. Upon remand, the district court should determine, prior to proceeding to Stage II, the merits of the Pederson Plaintiffs' claim.

3. Unequal Treatment Claims

Appellants also challenge the district court's determination that they did not have standing to challenge LSU's entire varsity athletic program as it then existed, including the allocation of scholarships and other benefits to varsity athletes. They argue that the district court should not have dismissed their claims for declaratory and injunctive relief with respect to women's varsity basketball, volleyball, track, tennis, golf, gymnastics, and swimming because they have individually sustained the requisite injury necessary to address the operation of LSU's athletic program as a whole, and because limiting the inquiry to specific teams contradicts the policies of Title IX as well as traditional notions of fairness.

The district court found that Appellants had standing to challenge the lack of effective accommodation but not the denial of equivalence in other athletic benefits. Appellees defend the district court's conclusion on the ground that persons who never participated in intercollegiate athletics have no standing to challenge the treatment of existing athletes.

We agree with the district court that Appellants lack standing to challenge the alleged unequal treatment of varsity athletes at LSU. At the time of trial, no named plaintiff was a member of a varsity team. n13 Moreover, the class that Appellants seek to represent includes women injured by LSU's failure to field teams for certain sports. Standing to challenge effective accommodation does not automatically translate into standing to challenge the treatment of existing varsity athletes. See *Boucher*, 164 F.3d at 116 ("The [district] court held that since none of the named plaintiffs were varsity athletes, they did not have standing to assert the equal treatment claims. Its ruling on this issue was proper and we affirm the dismissal of plaintiffs' equal treatment claims"). Because we agree substantially with the reasoning set forth by the district court in its September 14, 1995, Memorandum Ruling, for further explanation we rely on the district court's discussion. n14

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n13 We do not mean to imply that an equal treatment claim can only be brought by an existing varsity athlete. Whether, for example, a female student who was deterred from competing for a spot on an existing varsity team because of perceived unequal treatment of female varsity athletes would have standing to challenge the existing varsity program is a question we leave for another day.

n14 The district court stated:

If she [plaintiffs] cannot show personal injury, then no Article III case or controversy exists, and a Federal Court is powerless to hear that grievance.

The individual injury requirement is not met by alleging "that injury has been suffered by other, unidentified members of the class to which [the plaintiff] belongs and which she purports to represent." *Warth v. Seldin*, 422 U.S. 490, 502, 95 S. Ct. 2197, 2207, 45 L. Ed. 2d 343 (1975). Accordingly, a named plaintiff in a class action who cannot establish the requisite case or controversy between him or herself and the defendants simply cannot seek relief for anyone...not for herself, and not for any other member of the class. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L. Ed. 2d 674 (1974)...The treatment of participants in female varsity athletics has not impacted plaintiffs as they have not been female varsity athletes and therefore have not been discriminated against by any alleged treatment of LSU's female varsity athletes; therefore a change in said treatment would not impact plaintiffs. Plaintiffs have personally suffered no injury or threatened injury due to LSU's allegedly illegal treatment of its varsity athletes and as such fail the initial prong of the standing inquiry as to the claims for illegal treatment of athletes.

District Court Memorandum Ruling, September 14, 1995.

We note, additionally, that we would be unable to reach the merits of this claim even were Appellants to have standing. We determined, *supra*, that the putative class is not properly certified, and we determine, *infra*, that the claims for injunctive relief have been rendered moot as to the named plaintiffs by reason of their graduation; because there is no proper party before us to raise this issue, we would be unable to reach the merits of it. See *Geraghty*, 445 U.S. at 400 n.7, 404.

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C. Mootness

Appellees insist, at several points throughout their brief, that issues presented are moot as to the named plaintiffs and the class. Appellants seem to agree with this assertion, at least in relation to the injunctive claims asserted by the named plaintiffs. In their brief, Appellants state, "[The Pineda Plaintiffs'] graduation would render the issue [of injunctive relief] moot and thereby alleviate the requirement that LSU maintain a women's softball team" Appellants' Brief at 45. As to the class, Appellees assert that the district judge's order was "essentially class relief." Appellees' Brief at 76. They fault Appellants for failing to "argue in their brief that the compliance plan ordered by the District Court is deficient or that the plan does not bring LSU into compliance with respect to Title IX's effective accommodation requirements for participatory opportunities." *Id.* at 77. The gist of Appellees' argument is that the district court, in effect, ordered class relief; Appellants do not contest that relief; therefore, any class claims for injunctive relief are moot.

Appellees rely on *Locke v. Board of Public Instruction*, 499 F.2d 359 (5th Cir. 1974), for the proposition that the district court's acceptance of their Compliance Plan moots the class claims. In that case, a teacher sued her school district for race and sex discrimination surrounding her maternity leave. Before oral argument on appeal, the maternity policy was changed and Locke was transferred, at her own request, into a teaching position that she found satisfactory.

We noted there that "in her original complaint the only relief sought by Mrs. Locke other than money damages was an injunction restraining the school system from implementing its present leave policy against the plaintiff in a discriminatory manner." *Id.* at 363 (emphasis added). We went on to explain:

It is clear from the facts before us . . . that the plaintiff herein has now been satisfied as to her request for a job complete with supplemental work and pay. The counsel for the school board . . . has assured this court that the school board always had, and still maintains, good will toward Mrs. Locke. Furthermore, it is clear that the school board has done everything within its power to comply with Mrs. Locke's wishes within the limitations placed upon the board by the various federal orders and mandates. This court is aware . . . that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the cases, i.e., does not make the case moot. But, the mootness in this case . . . depends not at all upon a voluntary cessation of activity, but rather depends on the simple fact that Mrs. Locke's wishes have been complied with and it is a matter of record that the school board is complying with the various federal mandates and orders as to integration of its school system. Even though . . . it could be argued that this is a question that is capable of repetition, here, . . . that is not possible. The maternity leave policy allegedly forced on Mrs. Locke is no longer in existence, a new one having taken its place on December 12, 1972. Mrs. Locke will never again be forced to comply with that leave policy.

Id. at 364 (internal quotation marks and citations omitted). Finally, we concluded that "although this matter has generated public concern, the nature of the case itself we find is that of a single individual alleging infringement of her rights. This does not make the dispute one of 'general public interest' requiring a decision even if many attributes of mootness exist." *Id.* at 366.

Appellants here have consistently maintained that the alleged Title IX violation impacts not only themselves, but many women at LSU. Furthermore, the fact that the district court ordered a Compliance Plan demonstrates that the issues here go far beyond the impact of the alleged violations on the named plaintiffs. Finally, Appellees have failed to show the same dedication to accommodating the desires of Appellants that the school district in Locke demonstrated. Locke was rightly decided, but, without intending to put too fine a point on it, it is on all counts not the case before us today.

This appeal raises three merit-based questions. Appellees argue that the district court erred in its conclusion that LSU violated Title IX. Appellants argue that the district court erred in finding that Appellees did not discriminate intentionally. Finally, Appellees argue that the district court's Compliance Plan requirements were overly broad. The Title IX violation question is necessarily antecedent to the issue of intentional discrimination, and the intentional discrimination issue, as discussed *infra*, implicates Appellants' damages claim. The Compliance Plan question deals with the injunctive relief prayed for by Appellants. "Justiciability must be analyzed separately on the issues of money damages and the propriety of equitable relief." *Henschen v. City of Houston*, 959 F.2d 584, 587 (5th Cir. 1992). We, therefore, analyze separately the mootness of the injunctive claims and the damages claims. Furthermore, we examine mootness as to the named plaintiffs and the putative class. "The starting point for analysis is the familiar proposition that 'federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.'" *DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S. Ct.

1704, 40 L. Ed. 2d 164 (1974) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 92 S. Ct. 402 (1971)).

1. Injunctive Relief

In the present case, Appellants have all graduated from LSU. Even assuming that any one of them retains any NCAA eligibility at this point, they have not argued that there is any likelihood that any of them will return to LSU and attempt to play varsity sports. As is so often the case in suits for injunctive relief brought by students, graduation or impending graduation renders their claims for injunctive relief moot. See 416 U.S. at 319-20; *Sapp v. Renfro*, 511 F.2d 172, 175 (5th Cir. 1975). Because the named plaintiffs will not benefit from a favorable ruling on the question implicating injunctive relief, we hold that this question is moot as to them.

The issue of injunctive relief, however, is not moot as to the putative class. Appellees argue that the district court's effective class relief and their compliance with Title IX, based upon a plan entered into before this litigation began, renders the issue of injunctive relief moot as to the putative class as well. Contrary to Appellees' assertions, it is well established that the

voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. But jurisdiction, properly acquired, may abate if the case becomes moot because (1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.

When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.

The burden of demonstrating mootness is a heavy one.

County of Los Angeles v. Davis, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979) (internal citations and quotation marks omitted). In this case, Appellees bear the burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *ACLU v. Finch*, 638 F.2d 1336, 1346 (5th Cir. 1981) (quoting *United States v. W.T. Grant*, 345 U.S. 629, 633, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)). Appellees have failed to meet this burden. They have made no representation to this court that they are dedicated to ensuring equal opportunities and fair accommodation for both their female and male athletes in the long run. They simply state that they have instituted varsity women's fast-pitch softball and soccer and that they have, as required, submitted a Compliance Plan to the district court. Appellees have given no assurance that they will not disband these programs, as they have with varsity fast-pitch softball in the past. In its May 9, 1997, order, the district court, although speaking highly of LSU's turnaround in the area of effective accommodation, nonetheless required periodic reporting for several years. We will not second-guess the district court's reasoned judgment by declaring this issue moot when Appellees have failed to demonstrate that their Title IX effective accommodation violations will not recur.

We do not think, however, that the voluntary cessation exception applies equally to the individual Appellants. Even were LSU to resume its illegal activity, Appellants, because of their graduation, would be unaffected. The question of injunctive relief is therefore, as stated *supra*, rendered moot as to the named plaintiffs.

2. Monetary Relief

Finally, Appellants' damages claim is not moot. The district court held that, with regard to the Pineda Plaintiffs, and we have remanded for a determination whether, with regard to the Pederson Plaintiffs, LSU violated the individual rights of each named plaintiff by failing to accommodate effectively the interests and abilities of female students. Appellees contest the district court's holding. Appellants assert that LSU intentionally discriminated against women. If these questions on appeal are answered in Appellants' favor, then to the extent that LSU's violations caused a named plaintiff's actual damages, that person is entitled to be compensated for those damages. A live controversy, therefore, exists with regard to the damages claim, and the legal questions underlying that claim are not moot. See *Henschen*, 959 F.2d at 588.

D. Sovereign Immunity

Appellees contend that the district court lacked subject matter jurisdiction to consider Appellants' claims because Appellees are immune from suit pursuant to the Eleventh Amendment. Appellants, and the United States as Intervenor, counter that the Eleventh Amendment does not bar Appellants' suit because (1) Congress validly abrogated the States' Eleventh Amendment immunity for purposes of Title IX, (2) LSU waived its Eleventh Amendment immunity when it accepted federal funding for its educational institutions, or (3) jurisdiction properly lies under the doctrine of *Ex Parte Young*. n15 The district court held that Eleventh Amendment immunity did not deprive the court of subject matter jurisdiction. n16 See 912 F. Supp. at 901. The district court's ruling on Appellees' Eleventh Amendment immunity is subject to *de novo* review. See *Seminole Tribe v. Florida*, 11 F.3d 1016, 1021 (11th Cir. 1994), *aff'd*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996).

- - - - -Footnotes- - - - -

n15 The United States did not join in Appellants' argument that jurisdiction lies under the doctrine of *Ex Parte Young*. Because we determine that Congress validly abrogated state sovereign immunity in this context, we need not, and will not, address the two alternative arguments.

n16 The district court reasoned that Congress can validly abrogate Eleventh Amendment immunity pursuant to its Article I spending power. See 912 F. Supp. at 901. This reasoning cannot stand in light of *Seminole Tribe*. Nevertheless, the district court's ultimate conclusion is correct, as we will discuss *infra*.

- - - - -End Footnotes- - - - -

In order to abrogate a State's sovereign immunity, Congress must (1) have "unequivocally expressed its intent to abrogate the immunity," and (2) have "acted pursuant to a valid exercise of power." *Seminole Tribe*, 517 U.S. at 55 (internal quotations omitted).

There is no dispute that Congress unequivocally has expressed its intent to abrogate the States' sovereign immunity in the context of Title IX. In response to *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985), Congress enacted the Civil Rights Remedies Equalization Act ("CRREA") as part of the Rehabilitation Act Amendments of 1986, @ 1003, Pub. L. No. 99-506, 100 Stat. 1845 (codified at 42 U.S.C. @ 2000d-7). n17 Section 2000d-7 provides:

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, 42 U.S.C. @ 6101 et seq., Title VII of the Civil Rights Act of 1964, 42 U.S.C. @ 2000d et seq., or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. @ 2000d-7(a)(1) (some internal citations omitted).

- - - - -Footnotes- - - - -

n17 *Atascadero* held that @ 504 of the Rehabilitation Act of 1973, 29 U.S.C. @ 794, which prohibits discrimination on the basis of disability by programs receiving federal funds, did not unequivocally demonstrate Congress's intent to abrogate the States' Eleventh Amendment immunity in order to authorize private damage actions against State entities. See 473 U.S. at 245-46. Section 2000d-7 was a response to this decision; the provision explicitly abrogates the States' Eleventh Amendment immunity in the context of @ 504 of the Rehabilitation Act and other similar federal statutes, including Title IX.

- - - - -End Footnotes- - - - -

Thus, the only issue is whether Congress acted pursuant to a valid exercise of power when abrogating the States' immunity. See *Seminole Tribe*, 517 U.S. at 59 ("Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"). The Fourteenth Amendment is recognized to be such a power. See *id.*; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976) (finding that, because the Fourteenth Amendment expanded federal power at the expense of state power, the Fourteenth Amendment extended federal power into the province of the Eleventh Amendment and, therefore, @ 5 of the Fourteenth Amendment allows Congress to abrogate the immunity of the Eleventh Amendment). Formerly, the Interstate Commerce Clause, see U.S. CONST. art I, @ 8, cl. 3, was also recognized to be such a power. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989) (plurality opinion) (holding that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages"). *Seminole Tribe*, which involved the Indian Commerce Clause, overruled *Union Gas*. See *Seminole Tribe*, 517 U.S. at 63, 72-73 (finding "no principled distinction . . . to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause," and holding that the Eleventh Amendment restricts judicial power under Article III, and Article I powers cannot be used to circumvent constitutional limitations).

After *Seminole Tribe*, then, legislation passed pursuant to Congress's Article I powers cannot validly abrogate the States' sovereign immunity. Appellees contend that Title IX is Spending Clause legislation, and that therefore

Congress does not have the authority after Seminole Tribe to abrogate the States' Eleventh Amendment immunity when acting pursuant to the Spending Clause. Appellants respond that Title IX can also be justified as an exercise of Congress's power pursuant to Section 5 of the Fourteenth Amendment, and that Congress can, after Seminole Tribe, abrogate the States' Eleventh Amendment immunity when acting pursuant to Section 5 of the Fourteenth Amendment.

We must first decide whether Title IX is merely Spending Clause legislation, or whether it can also be supported by Section 5 of the Fourteenth Amendment. This court, in *Lesage v. Texas*, 158 F.3d 213 (5th Cir. 1998), rev'd on other grounds, 145 L. Ed. 2d 347, 120 S. Ct. 467 (1999), held that Congress validly abrogated the States' Eleventh Amendment immunity for purposes of Title VI of the Civil Rights Act of 1964 by enacting CRREA, 42 U.S.C. @ 2000d-7(a)(1). n18 In response to arguments that Title VI was enacted pursuant to the Spending Clause rather than Section 5 of the Fourteenth Amendment and that Congress therefore could not validly abrogate the States' Eleventh Amendment immunity for purposes of Title VI, we stated that the subjective intent of the legislators in enacting legislation is irrelevant:

In evaluating the constitutionality of a statute, we simply ask if Congress sufficiently articulated an abrogation of state sovereign immunity and if it had the power to do so This is an entirely objective inquiry, for "the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise."

Id. at 217 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 243 n.18, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)) (citations and further internal quotations omitted).

- - - - -Footnotes- - - - -

n18 Appellants contend that this provision also abrogates the States' Eleventh Amendment immunity for purposes of Title IX.

- - - - -End Footnotes- - - - -

Lesage supports the proposition that, even if Congress stated that it was acting pursuant to the Spending Clause in enacting Title IX, n19 if Congress could have acted pursuant to Section 5 of the Fourteenth Amendment, Congress has the authority to abrogate for purposes of Title IX. See 158 F.3d at 217-18; see also *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997) ("The resolution of defendants' contention therefore turns on whether Congress, as an objective matter, could have enacted Title IX pursuant to @ 5 of the Fourteenth Amendment."). Moreover, as the *Lesage* court recognized, "it is the statute abrogating immunity, not the particular substantive provision of the statute, which specifically concerns us." *Lesage*, 158 F.3d at 218. Because @ 2000d-7, the provision which abrogated the States' Eleventh Amendment immunity for purposes of both Title VI and Title IX, was enacted pursuant to Section 5 of the Fourteenth Amendment, the *Lesage* court found that Congress had validly abrogated the States' Eleventh Amendment immunity. See *id.* at 218-19.

- - - - -Footnotes- - - - -

n19 As Appellees recognize, Congress did not explicitly state upon which provision it relied for authority to pass Title IX. Appellees argue that the statutory framework conclusively demonstrates that Congress was acting

pursuant to its Spending Clause power. The Supreme Court has recently agreed. In a series of sexual harassment cases over the last two terms, the Court has made clear its belief that Title IX was enacted pursuant to the Spending Clause. In *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 119 S. Ct. 1661, 1669, 143 L. Ed. 2d 839 (1999), the Court explained that "we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause." This conclusion follows the Court's reasoning in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998) and *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74-75, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992).

- - - - -End Footnotes- - - - -

This reasoning supports the conclusion that Congress had the authority to abrogate the States' Eleventh Amendment immunity for purposes of Title IX--either because Title IX could have been enacted pursuant to Section 5 of the Fourteenth Amendment, see *Crawford*, 109 F.3d at 1283 ("We are unable to understand how a statute enacted specifically to combat [gender] discrimination could fall outside the authority granted to Congress by @ 5."), or because the legislation actually abrogating the States' immunity, @ 2000d-7, was enacted pursuant to Section 5, see *Lesage*, 158 F.3d at 218-19.

Other circuits have similarly concluded that Congress validly abrogated the States' Eleventh Amendment immunity for purposes of Title IX. In *Crawford v. Davis*, 109 F.3d 1281 (8th Cir. 1997), the court held that Title IX could be justified by Section 5 of the Fourteenth Amendment, even if Congress did not explicitly state that it was acting pursuant to its Section 5 authority, and therefore Title IX validly abrogated the States' immunity. See *id.* at 1283. In *Doe v. University of Illinois*, 138 F.3d 653 (7th Cir. 1998), the court similarly found that Title IX could be justified by Section 5 of the Fourteenth Amendment, and that Congress's abrogation of the States' Eleventh Amendment immunity was therefore valid. See *id.* at 660; accord *Franks v. Kentucky Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998) (holding that Congress validly abrogated Eleventh Amendment immunity for purposes of Title IX because Congress had authority pursuant to Section 5 of the Fourteenth Amendment to enact Title IX); cf. *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838-39 (6th Cir. 1997) (stating that it is not necessary for Congress to say explicitly which constitutional provision it is relying upon, and concluding that the Equal Pay Act was enacted pursuant to Section 5 of the Fourteenth Amendment).

Notwithstanding our conclusion that Title IX validly abrogates the States' sovereign immunity, we pause to address two recent decisions of the Supreme Court, handed down after oral argument in this case, which speak to abrogation issues in the area of Eleventh Amendment sovereign immunity. Appellees have submitted them to us as support for their contention that the instant suit be dismissed under the Eleventh Amendment. In the first, *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. , 144 L. Ed. 2d 605, 119 S. Ct. 2219, 1999 WL 412639 (1999), the Court held that legislation under @ 5 of the Fourteenth Amendment must be confined to enforcement of the Amendment's other provisions by legislation that remedies or prevents constitutional violations. In *College Savings Bank*, Petitioner argued that the Trademark Remedy Clarification Act ("TRCA") was designed to remedy and to prevent state deprivations of two property interests without due process of law, but the Court held that the asserted property interests--the right to be free from a business competitor's false advertising about its own product and the right to be

secure in one's business interests--did not qualify as protected property rights.

In *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. , 144 L. Ed. 2d 575, 119 S. Ct. 2199, 1999 WL 412723 (1999), the Court both reaffirmed its holding in *Seminole Tribe* that Congress may not rely on Article I powers--here, the Commerce Clause and the Patent Clause--to abrogate sovereign immunity and extended the principle of *College Savings Bank* to cover actions against states under the Patent and Plant Variety Protection Remedy Clarification Act. Specifically, the Court in *Florida Prepaid* held that abrogation under @ 5 is invalid where it cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause. In order to enact "appropriate" legislation under the remedial power of @ 5, see *City of Boerne v. Flores*, 521 U.S. 507, 519, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997), Congress must identify conduct transgressing the Fourteenth Amendment's substantive provisions and must tailor its legislative scheme to remedy or to prevent such conduct; unremedied patent infringement by the States did not meet the test of *City of Boerne* and could not, therefore, validly abrogate immunity.

We believe it beyond peradventure that Title IX meets the test first explained in *Seminole Tribe* and recently clarified by *College Savings Bank* and *Florida Prepaid*. Congress expressed a clear intent to abrogate immunity with CRREA, and that Act was appropriately passed under Congress's @ 5 power to remedy past discrimination. As such, it was appropriate legislation itself and its goal--protecting the reach of Title IX and other similar statutes--was, by extension, also appropriate.

III. Title IX

We now turn to the merits of this dispute, and we will address the underlying issues in Parts III and IV of this opinion. In this Part, we affirm the district court's judgment that LSU violated Title IX and reverse the district court's judgment that LSU did not intentionally discriminate against women in the provision of athletics.

A. Background

Title IX proscribes gender discrimination in education programs or other activities receiving federal financial assistance. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 514, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982). Patterned after Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, 42 U.S.C. @ 2000d (1994), Title IX, as amended, contains two core provisions. The first is a "program-specific" prohibition of gender discrimination:

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

@ 901(a), 20 U.S.C. @ 1681(a). The second core provision relates to enforcement. Section 902 of Title IX authorizes each agency awarding federal financial assistance to any education program to promulgate regulations "ensuring that aid recipients adhere to @ 901(a)'s mandate." *North Haven*, 456

U.S. at 514. The "ultimate sanction" for noncompliance is termination of federal funding or the denial of future federal grants to the offending institution. Id. Like @ 901, @ 902 is program-specific:

Such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding [of noncompliance] has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found

@ 902, 20 U.S.C. @ 1682.

Beginning in the mid-1970's, the Department of Health, Education and Welfare, and its successor, the Department of Education, have relied on their @ 902 power to promulgate regulations governing the operation of federally-funded education programs. These regulations encompass not only athletics policies, but also actions by funding recipients in the areas of, inter alia, admissions, textbooks, and employment. n20 See, e.g., 34 C.F.R. @@ 106.21 (admissions), 106.42 (textbooks), 106.51 (employment) (1999). The regulation most pertinent to the instant controversy requires that

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. @ 106.41(a) (1999). The regulations further provide that

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;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures

for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

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

- - - - -Footnotes- - - - -

n20 The regulations accompanying Title IX define a "recipient" as

any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. @ 106.2(h) (1999). The Supreme Court recently clarified, in holding that the National Collegiate Athletic Association ("NCCA") is not a Title IX recipient, that "entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not." National Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 119 S. Ct. 924, 929, 142 L. Ed. 2d 929 (1999).

- - - - -End Footnotes- - - - -

B. Title IX Violation

Appellees argue brazenly that the evidence did not demonstrate sufficient interest and ability in fast-pitch softball at LSU and that, therefore, they cannot be liable under Title IX. The heart of this contention is that an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist. It should go without saying that adopting this criteria would eliminate an effective accommodation claim by any plaintiff, at any time. In any event, the district court's finding that the requisite level of interest existed is a finding of fact subject to review for clear error. Having reviewed the record, we determine that the district court did not clearly err because there was ample indication of an interest by women in fast-pitch softball.

Appellees argue that the district court applied the wrong legal framework to assess Appellees' liability by placing the evidentiary burden upon them to explain the reason for their 1983 decision to disband the women's fast-pitch softball team. They argue for de novo review of that decision, but we agree with Appellants and the record supports that the district court considered all the evidence of interest and ability at LSU before concluding that Appellees were in violation of Title IX, not merely the fact that LSU disbanded its team in 1983.

Appellees would have us hold that, although the student population of LSU is 51% male and 49% female, the population participating in athletics is 71% male and 29% female. Given this breakdown, they argue that it is improper to

consider proportionality, because to do so would be to impose quotas, and that the evidence shows that female students are less interested in participating in sports than male students. The law suggests otherwise. Title IX provides that the district court may consider disproportionality when finding a Title IX violation:

This subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in or receipt of the benefits of, any such program or activity by the members of one sex.

20 U.S.C. @ 1681(b). LSU's hubris in advancing this argument is remarkable, since of course fewer women participate in sports, given the voluminous evidence that LSU has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students.

Nevertheless, Appellees persist in their argument by suggesting that the district court's reliance on the fact that LSU fields a men's baseball team as evidence of discrimination was improper because there is no requirement that the same sports be offered for both men and women and because LSU offers nine sports for women and only seven for men. We find that it was indeed proper for the district court to consider the fact that LSU fields a men's baseball team while declining to field a comparable team for women despite evidence of interest and ability in fast-pitch softball at LSU.

Appellees finally contest the district court's determination that LSU's decision to add fast-pitch softball and soccer was not for the purpose of encouraging women's athletics. They challenge the district court's finding that LSU did not attempt to determine the interest and ability level of its female student population, contending that there is evidence in the record that shows that LSU does analyze the interest level of its female student athletes. Our review of the record demonstrates no such analysis on the part of LSU. The proper analytical framework for assessing a Title IX claim can be found in the Policy Interpretations to Title IX, which require an analysis of the disproportionality between the university's male and female participation, the university's history of expanding opportunities for women, and whether the university effectively accommodates the interests of its female students. See Title IX of the Education Amendments of 1972, Policy Interpretation, 44 Fed. Reg. 71,413, 71,414 (1979). Specifically, the Policy Interpretation explains that Title IX's application to athletic programs covers three general subject areas: scholarships, equivalent treatment, and equal accommodation. See *id.* at 71,415, 71, 417. As a matter of law, a Title IX violation "may be shown by proof of a substantial violation in any one of the three major areas of investigation set out in the Policy Interpretation." *Roberts v. Colorado St. Univ.*, 814 F. Supp. 1507, 1511 (D. Colo.) (emphasis added), *aff'd in part & rev'd in part sub nom. Roberts v. Colorado St. Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993). Credible evidence supports the conclusion that LSU failed all three prongs. Nevertheless, addressing merely the accommodation prong, regulations adopted by the Department of Education in 1997 also support the district court's conclusions. See 34 C.F.R. @ 106.37(c)(1) (providing that recipients that award athletic scholarships must do so with a view toward reasonable opportunities for such awards to members of both sexes); *id.* @ 106.41(c)(1) (declaring that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes"); 45 C.F.R. @

86.41(c)(1) (requiring the consideration of "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes"). Applying this framework, as the Supreme Court has indicated that we should, see *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 150, 111 S. Ct. 1171, 113 L. Ed. 2d 117 (1991), the district court correctly found that LSU did not have a history of expanding women's athletic programs and had not presented credible evidence regarding the interests and abilities of its student body. These findings were not clearly erroneous. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). Regardless, our independent review of the record supports the district court's conclusion that Appellees failed to accommodate effectively its female students. Proper evaluation of the district court's conclusion that Appellees violated Title IX required a careful consideration of the evidence presented at trial. Based on that review, we believe that the district court did not commit clear error in its factual conclusions or legal error in the standards that it applied.

C. Intentional Discrimination

The district court found that LSU had violated and continued to violate the prescriptions of Title IX. The trial judge further concluded that, notwithstanding this threshold finding, a Title IX claimant must additionally prove intentional discrimination on the part of a recipient before she may recover monetary damages. n21 With respect to the claims at issue in this case, the district court considered the question to be a "very close one" but eventually held that LSU did not intentionally violate Title IX. 912 F. Supp. at 918. Having carefully reviewed the trial record we hold that the district court erred in its legal conclusion. We find that LSU did intentionally violate Title IX, thus we reverse that ruling.

- - - - -Footnotes- - - - -

n21 The district court held that damages could not be recovered under Title IX unless the plaintiff proves that the institution intentionally discriminated. Appellants do not argue on appeal that damages should be available for unintentional discrimination. We, therefore, need not and do not address the accuracy of the district court's holding in this regard.

- - - - -End Footnotes- - - - -

The district court stated that Appellees' actions were not a result of intentional discrimination but rather of "arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the by-product of resistance to change." Id. The district court reasoned, inter alia, that, because Athletic Director Dean testified that he believes that his "women's athletics" program is "wonderful" and because he was ignorant of the program's state of compliance with Title IX, Appellees did not intentionally discriminate against women. See id. at 919.

The district court's decision finding LSU to have unintentionally violated Title IX by not effectively accommodating their female student-athletes simply does not withstand scrutiny. The district court stated that

Rather than taking notice of the enormous social change which has taken place

in the past 25 years, LSU has continued to assume athletics is as it once was, a traditionally male domain, and its women students did not want to participate in athletics in the same manner and to the same extent as its men, and acted accordingly.

912 F. Supp. at 920 (emphasis added). If an institution makes a decision not to provide equal athletic opportunities for its female students because of paternalism and stereotypical assumptions about their interests and abilities, that institution intended to treat women differently because of their sex. Moreover, Appellees' ignorance about whether they are violating Title IX does not excuse their intentional decision not to accommodate effectively the interests of their female students by not providing sufficient athletic opportunities.

Apparently, Dean "believed his program to be so wonderful that he invited an investigator from the Department of Education's Office of Civil Rights to visit LSU to evaluate the athletics program's compliance with Title IX." *Id.* That representative's findings confirmed Dean's ignorance of the actual state of compliance with Title IX by his athletic program, see *id.*, but the district court nonetheless reasoned that Dean's testimony was "credible" because "otherwise he would not have invited OCR to LSU to assess the program." *Id.* This conclusion ignores the fact that, already on notice of potential violations, Dean and others continued to adhere to deprecatory nomenclature when referring to female athletes, refused to authorize additional sports for women, and instead seemed content that the "women's teams fielded [by LSU] during the relevant time frame performed well in competition." *Id.* This assessment of the athletics program is not merely "arrogance," as the district court concluded, see *id.*; it belies an intent to treat women differently in violation of the law.

It bears noting that the provisions of Title IX and its attendant regulations are not merely hortatory; they exist, as does any law, to sculpt the relevant playing field. Consequently, Appellees' alleged ignorance of the law does not preclude our finding that LSU acted intentionally. Appellees need not have intended to violate Title IX, but need only have intended to treat women differently. Cf. *Local 189, United Papermakers and Paperworkers v. United States*, 416 F.2d 980, 996 (5th Cir. 1969) (holding that "intent" under Title VII requires only that "the defendant meant to do what he did" and did not behave "accidentally"); *United States v. Koon*, 34 F.3d 1416, 1449 (9th Cir. 1994) (applying the same test to constitutional violations), *aff'd in part and rev'd in part on other grounds*, 518 U.S. 81 (1996); *United States v. Balistrieri*, 981 F.2d 916, 936 (7th Cir. 1992) (holding that a defendant need not actually know that he is violating the Fair Housing Act in order to be found to have discriminated). Appellees' outdated attitudes about women amply demonstrate this intention to discriminate, and the district court squarely found that LSU's treatment of women athletes was "remarkably outdated," "archaic," and "outmoded." 912 F. Supp. at 918-20. Well-established Supreme Court precedent demonstrates that archaic assumptions such as those firmly held by LSU constitute intentional gender discrimination. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533, 135 L. Ed. 2d 735, 116 S. Ct. 2264 (1996) (holding that an institution's refusal to admit women is intentional gender discrimination in violation of the Equal Protection Clause because, *inter alia*, of "overbroad generalizations about the different talents, capacities, or preferences of males and females"); *Roberts v. United States Jaycees*, 468 U.S. 609, 625, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984) (warning of the dangers posed by gender discrimination based on "archaic and overbroad assumptions"). We

conclude that, because classifications based on "archaic" assumptions are facially discriminatory, actions resulting from an application of these attitudes constitutes intentional discrimination.

In addition to the district court's evaluation of LSU's attitudes as "archaic," our independent evaluation of the record and the evidence adduced at trial supports the conclusion that Appellees persisted in a systematic, intentional, differential treatment of women. For instance, in meetings to discuss the possibility of a varsity women's soccer team, Dean referred to Lisa Ollar repeatedly as "honey," "sweetie," and "cutie" and negotiated with her by stating that "I'd love to help a cute little girl like you." Dean also opined that soccer, a "more feminine sport," deserved consideration for varsity status because female soccer players "would look cute running around in their soccer shorts." Dean, charismatically defending LSU's chivalry, later told the coach of the women's club soccer team that he would not voluntarily add more women's sports at LSU but would "if forced to." Among many other examples, Karla Pineda testified that, when she met with representatives of the Sports and Leisure Department to request the implementation of an intramural fast-pitch softball team, she was told that LSU would not sponsor fast-pitch softball because "the women might get hurt."

LSU perpetuated antiquated stereotypes and fashioned a grossly discriminatory athletics system in many other ways. For example, LSU appointed a low-level male athletics department staff member to the position of "Senior Women's Athletic Administrator," which the NCAA defines as the most senior women in an athletic department. LSU consistently approved larger budgets for travel, personnel, and training facilities for men's teams versus women's teams. The university consistently compensated coaches of women's team's at a rate far below that of its male team coaches.

Appellees have not even attempted to offer a legitimate, nondiscriminatory explanation for this blatantly differential treatment of male and female athletes, and men's and women's athletics in general; they merely urge that "archaic" values do not equate to intentional discrimination. Instead, LSU makes its mantra the contention that it was either ignorant of or confused by Title IX and thus cannot be held intentionally to have discriminated. To support this dubious argument, LSU turns for support to cases that deal with the standard for school liability for sexual harassment under Title IX. A series of cases, crowned by Supreme Court pronouncements in the last two terms, hold that schools sued for harassment under Title IX must have actual knowledge of the harassment and cannot be liable on a theory of strict liability. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 118 S. Ct. 1989, 1997, 141 L. Ed. 2d 277 (1998); *Rosa H. v. San Elizard Indep. Sch. Dist.*, 106 F.3d 648, 652-53 (5th Cir. 1997); *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 398-400 (5th Cir. 1997). Where the school has control over the harasser but acts with deliberate indifference to the harassment or otherwise fails to remedy it, liability will lie under Title IX. See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1671, 143 L. Ed. 2d 839 (1999). LSU seeks to apply these holdings to the case at bar, arguing that, before a finding of intentional discrimination is warranted, Appellees must have been aware that they were discriminating on the basis of sex by not effectively accommodating the interests and abilities of its female student-athletes.

We conclude that the Title IX sexual harassment cases discussed above have little relevance in determining whether LSU intentionally discriminated here.

Indeed, the most significant of the sexual harassment holdings actually supports Appellants' argument: LSU arguably acted with deliberate indifference to the condition of its female athletics program. Cf. Davis, 526 U.S. at , 119 S. Ct. at 1671 (holding that deliberate indifference to differential treatment between the genders can itself cause discrimination to occur). In any event, the requirement in the sexual harassment cases--that the academic institution have actual knowledge of the sexual harassment--is not applicable for purposes of determining whether an academic institution intentionally discriminated on the basis of sex by denying females equal athletic opportunity. In the sexual harassment cases, the issue was whether the school district should be liable for the discriminatory acts of harassment committed by its employees. These cases hold that school districts must themselves have actual discriminatory intent before they will be liable for the discriminatory acts of their employees. In the instant case, it is the institution itself that is discriminating. The proper test is not whether it knew of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity, and, as we noted above, we are convinced that they did. Our review of the record convinces us that an intent to discriminate, albeit one motivated by chauvinist notions as opposed to one fueled by enmity, drove LSU's decisions regarding athletic opportunities for its female students.

The judgment of the district court is REVERSED and the case REMANDED with instruction to proceed to Stage II.

IV. Compliance Plan

Appellees challenge the district court's Compliance Plan requirements, as they pertain to soccer. LSU argues that, because the plaintiffs who played soccer lacked eligibility by the time of trial, making their claims moot, the Compliance Plan requirements only should have pertained to fast-pitch softball. Appellees also challenge the requirement that they gauge the athletic interests of incoming students through surveys and like materials.

Appellants argue that the relief granted by the district court was not overbroad because the injury suffered by them was not merely the absence of a women's varsity fast-pitch softball team but Appellees' failure to provide equal athletic opportunity to its female students. They also argue that the requirement that Appellees implement procedures to gauge the interest levels of their students is necessary to promote effective accommodation because, in order effectively to accommodate student interests, the university must know what those interests are. They argue that the purpose of Title IX is to provide broad-based equality in federally-funded educational programs and not merely to provide relief to individual plaintiffs.

We find this issue nonjusticiable at this time. In Part II.A., we determined that the district court abused its discretion in decertifying the provisionally certified class. We remanded with instructions to consider further final certification of the putative class. In part II.C., we determined that the issue of injunctive relief is moot as to the named plaintiffs. A named plaintiff whose claim has become moot cannot press the merits of an issue on behalf of a class when that class has not properly been certified. See Geraghty, 445 U.S. at 400 n.7, 404. n22

- - - - -Footnotes- - - - -

n22 We note that, although we do not reach the merits of the district court's Compliance Plan requirements, we do not, at first blush, find that portion of the Compliance Plan dealing with the evaluation and assessment of student interests and abilities problematic. However, while we have not studied the matter closely, we are unclear how the district court justified granting relief with regard to women's varsity soccer when it determined that no plaintiff had standing to challenge LSU's failure to field such a team. Of course, this concern may disappear after the district court reaches the merits of the Pederson Plaintiffs' issues on remand.

- - - - -End Footnotes- - - - -

To maintain the status quo by leaving the district court's injunctive order in place would work an injustice to Appellees, who, through no fault of their own, would be forced to comply with an order the merits of which they are powerless to contest. "A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. The same is true when mootness results from unilateral action of the party who prevailed below." U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 25, 130 L. Ed. 2d 233, 115 S. Ct. 386 (1994). It cannot reasonably be argued that Appellees brought about mootness in this case by causing Appellants to be graduated. They were, it seems, "frustrated by the vagaries of circumstance." In such instances it is the custom of appellate courts to vacate the lower court's injunctive order, and we follow that custom here. See *id.* at 22-23, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40, 95 L. Ed. 36, 71 S. Ct. 104 (1950); *Karcher v. May*, 484 U.S. 72, 82-83, 98 L. Ed. 2d 327, 108 S. Ct. 388 (1987). On remand, however, should the district court finally certify a class, it is free to reinstate so much of its order and subsequent rulings as it deems necessary under the then-existing circumstances.

VI

The numerous holdings and dispositions included in this opinion warrant iteration:

1) We HOLD that this suit is not barred by the Eleventh Amendment.

2) We HOLD that to establish standing under a Title IX effective accommodation claim of the sort presented here, a party need only demonstrate that she is able and ready to compete for a position on the unfielded team.

3) With regard to Appellants, we REVERSE the district court's ruling that the Pederson Plaintiffs lacked standing to challenge LSU's failure to field a varsity soccer team and REVERSE its subsequent judgment dismissing their claims with prejudice. We AFFIRM the district court's ruling that Appellants lacked standing to challenge the entire LSU varsity program. We HOLD that Appellants' damages claims, and the questions of Title IX violation and intentional discrimination underlying them, are not moot as to the named Appellants. We further HOLD that the issue of injunctive relief is moot as to the named Appellants. We REMAND to the district court to determine the merits of the Pederson Plaintiffs' claims before proceeding to Stage II of trial, the damages phase.

4) With regard to the putative class, we HOLD that the numerosity prong of Rule 23(a) was satisfied and a class was necessary, if any such requirement exists. Accordingly, we VACATE the district court's decertification order, REVERSE the district court's judgment dismissing the claims for class relief, and REMAND with instructions to consider further the certification of the putative class in light of this opinion. We HOLD that the issue of injunctive relief is not moot as to the putative class.

5) With regard to the merit issues, we AFFIRM the district court's judgment that Appellees violated Title IX. We REVERSE the district court's finding that Appellees did not intentionally discriminate, VACATE its subsequent judgment denying the Pineda Plaintiffs' damages claims, and REMAND to the district court with instructions to proceed to Stage II of trial. We HOLD that we lack jurisdiction to address the district court's injunctive relief order and VACATE that order, leaving the district court free to reinstate so much of the order and subsequent rulings as it deems necessary, if and when a class is finally certified.

Appellants do not argue any points of error regarding the orders appealed from in Nos. 94-30680 and 95-30777; therefore, Nos. 94-30680 and 95-30777 are DISMISSED. We AFFIRM the order appealed from in No. 97-30427. With regard to Nos. 97-30719 and 97-30722, we VACATE the order approving LSU's Compliance Plan with instructions. With regard to the final judgment appealed from in 97-30744 and 97-30781, and the opinion appealed from in 96-30310, we AFFIRM in part, REVERSE in part, VACATE in part, and REMAND in part with instructions. All motions carried with the case are DENIED. Each party shall bear its own costs.

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