



Title IX at Trial

If you schedule it, will they come?

by JOSHUA DUNN and MARTHA DERTHICK

The Hoosier State is famous for its passionate devotion to high school basketball. But that devotion might be putting one Indiana high school in legal jeopardy. Parents of female basketball players at Franklin High School have sued, claiming that because it does not schedule as many girls' games during

“prime time” slots as it does boys' games, the school district is in violation of Title IX, which forbids discrimination based on gender in programs receiving federal funds. Most Title IX litigation has focused on providing equal opportunities for participation by female athletes, so this case, *Parker v. Franklin County Community School Corp.*, raises the novel question of whether scheduling can constitute a violation of the statute.

While Title IX makes no mention of athletics and was hardly noticed during congressional debates, this provision of the Education Amendments of 1972 has become most famous, and controversial, for the effect it has had on athletic opportunities for females. The Office for Civil Rights (OCR) in 1979 created a three-pronged test to determine compliance with the law. Schools receiving federal financial assistance could prove their compliance by 1) providing athletic opportunities for both sexes in numbers substantially proportionate to their numbers in the student body, or 2) showing a history of increasing opportunities for the underrepresented sex, or 3) demonstrating that the interests and abilities of the underrepresented sex have been fully accommodated. Most schools have focused on complying with the first prong since it provides a clear standard that they can meet. But over time, the OCR regulations have been elaborated to address many aspects of equal treatment, including scheduling of games and practice times.

Initially filed in 2009, the parents' claim hinged on the fact that nearly 95 percent of the boys' basketball games were scheduled for Friday or Saturday nights, while 47 percent of the girls' games were scheduled for Mondays through Thursdays. According to the plaintiffs, this resulted in smaller crowds for the girls, caused greater difficulties for students to finish homework, and created feelings of inferiority. The school district responded that its athletic director, Beth Foster, had tried to schedule more girls' games in prime time but could not because she “can't get anybody to come play us on those nights.” The school district asked for a summary judgment,

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which the district court granted, saying that the disparity in scheduling was not significant enough to have denied girls' teams equal athletic opportunities.

On appeal, however, a Seventh Circuit panel reinstated the parents' lawsuit and said that case should go to trial. The court held that the possible harms caused by disparate scheduling “are not

insignificant and may have the effect of discouraging girls from participating in sports.” Of particular concern to the court was the possibility that the disparate scheduling could create feelings of inferiority. The court started its decision with the image of a typical Indiana Friday-night game: “A packed gymnasium, cheer-leaders rallying the fans, the crowd on their feet supporting their team, and the pep band playing the school song.” Without similar support from the community, the court speculated that “girls might be less interested in joining the basketball team because of a lack of school and community support, which results in the perception that the girls' team is inferior and less deserving than the boys'.” As a result, girls might feel like they are “second-class.”

Whatever the precise outcome of the case after a trial, we hope that judges will forgo psychological speculation. With their presumption that girls were at risk of being made to feel inferior, the appellate judges seemed to be very close to announcing a right to have large crowds cheering them on. But courts cannot compel attendance, much less vociferous cheering and players' consequent gratification, at high school basketball games, whatever the gender of the players. If lack of fan support can make a female athlete feel second-class, what if the school schedules more girls' games in prime time and the fans still don't come? Or don't come in the same numbers they do for boys' games? One glance at the Nielsen ratings for women's and men's NCAA tournaments would suggest that this could occur.

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