Via U.S. Mail and Facsimile:(626) 856-4901 and (626) 960-7741

October 27, 2017

Christina Lucero
President
Baldwin Park Unified School District
3699 North Holly Ave.,
Baldwin Park, CA 91706

Christine Simmons
Principal
Sierra Vista High School
3600 North Frazier St.,
Baldwin Park, CA 91706

RE: *Sierra Vista High School – Title IX Violations*

Dear Ms. Lucero and Ms. Simmons,

Legal Aid at Work, the California Women's Law Center, and Simpson Thacher & Bartlett LLP have become aware of serious gender-based inequalities throughout the Sierra Vista High School ("Sierra Vista") athletic program (hereinafter "athletic program"), as described below through illustrative, non-exhaustive examples of program inequities. We request that Sierra Vista make immediate changes to ensure Title IX compliance.

I. TITLE IX

Title IX of the Education Amendments of 1972 prohibits educational programs receiving federal financial assistance from discriminating against students on the basis of sex. 20 U.S.C. § 1681, *et seq.* Title IX's implementing regulations specifically provide: "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). Title IX further prohibits retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 870-71 (9th Cir. 2014).

Sierra Vista is out of compliance with Title IX. Based on available information, we understand that throughout Sierra Vista's athletic program, male students receive disproportionately more participation opportunities as well as superior treatment and benefits with regard to scheduling, equipment, spending, coaching, facilities, and more.

II. TITLE IX COMPLIANCE

Under Title IX, educational institutions must provide female students with equal athletic treatment and benefits as compared to male students. *See* Department of Education, Office for Civil Rights' Policy Interpretation, 44 Fed. Reg. 71,415 (1979); 34 C.F.R. § 106.41(c)(2)–(10); *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1111-12 (S.D. Cal. 2012) (finding unequal treatment and benefits as to class of female athletes). Further, Title IX requires female students be afforded equal participation opportunities, 20 U.S.C. § 1681, and prohibits any retaliation against those raising Title IX concerns, *Ollier*, 858 F. Supp. 2d at 1113.

A. Equal Treatment and Benefits

Based on available information, Sierra Vista fails to provide female athletes with equal treatment and benefits. Among other considerations, equality in treatment and benefits is analyzed based on the following factors: equipment and supplies; scheduling of games and practice time; travel allowances; opportunities to receive coaching; practice and competitive facilities; training facilities and services; publicity; and failure to provide necessary funds for teams for one sex. 34 C.F.R. § 106.41(c).

1. *Provision of Equipment and Supplies*

"Equipment and supplies" include, but are not limited to, uniforms, sport-specific equipment, and general equipment. 44 Fed. Reg. 71,416. Supplies may be assessed based on quality, amount, suitability, maintenance and availability. *Id.* Here, Sierra Vista provides female athletes with inferior equipment and supplies.

Female uniforms are not of the same quality and quantity as male uniforms. For instance, male water polo players receive newer uniforms in better condition than female water polo players. Sierra Vista also provides male water polo players with parkas, yet does not provide an equivalent to female water polo players. Sierra Vista recently ordered the wrong uniforms for female water polo players and refused to remedy this mistake when the issue was raised. Female softball jerseys are also too small for several of the teams' athletes. This past spring season, female softball players had to pay $300 each in order to obtain good quality uniforms. In addition, female wrestlers are not provided with their own singlets and are stuck using the boys' singlets that do not fit properly.

As to equipment, the equipment Sierra Vista provides to its female volleyball teams is outdated. Currently, the female volleyball program has just 20 balls for three teams, whereas the boys' volleyball team has more balls for its teams. The majority of the equipment provided to the female volleyball program is secondhand. Female volleyball players were required to wait until the start of the male volleyball season before Sierra Vista purchased new, necessary poles for the volleyball courts. To order new equipment, the female volleyball program must make its request through the athletic director for Sierra Vista's male teams, which creates delays and results in female teams not receiving the equipment they need at the time they need it. The girls' volleyball program also does not have its own dedicated closet to store its equipment and

supplies, while the boys' volleyball program has a dedicated storage and snack space. Girls' basketball has to store its equipment in the faculty restrooms. Female soccer players were required to fundraise to purchase equipment, while male soccer players were not required to fundraise to the same degree to obtain equipment of similar quality, such that male soccer team equipment was subsidized.

2. *Scheduling of Games and Practice Times*

Title IX requires schools to treat athletes equitably as to "the time of day competitive events [and practices] are scheduled." 44 Fed. Reg. 71,416. Yet, Sierra Vista schedules practices and games in a manner that is inequitable between female and male athletes. For example, during the summer league, girls' basketball practices for just 2.75 hours, and only in the very early morning, from 6:00 a.m. to 8:45 a.m. However, boys' basketball practices for up to 9 hours, with access to the gym for most of the day, from 12:00 p.m. to 9:00 p.m. During the school year, Sierra Vista reserves the gym for boys' basketball immediately after school from 2:00 p.m. to 4:00 p.m., whereas girls' basketball must wait until 4:00 p.m. to gain access to the gym. Based upon available information, girls' softball practices in the evenings, yet boys' baseball practices immediately after school. Throughout the athletic program, male athletes are also more likely to have a 6th period dedicated to their team's practice. For instance, football players have a dedicated 6th period to practice year-round, while girls' volleyball only has a dedicated 6th period during its season.

3. *Travel Allowances*

Compliance with Title IX in the category of travel allowances is assessed by comparing, among other factors, the "modes of transportation" for male and female athletes. 44 Fed. Reg. 71,416. At Sierra Vista, male athletes receive better quality transportation than female athletes. For example, during California Interscholastic Federation ("CIF") playoffs, male soccer players received charter buses for all away games. However, female soccer players only received a charter bus for their CIF championship game several seasons ago. In fact, charter buses are often afforded to the male athletes and are usually equipped with air-conditioning, televisions and restrooms in comparison to the yellow school buses and/or vans that the girls' teams take, which lack similar amenities. Furthermore, on at least one occasion, Sierra Vista forgot to order a bus for the girls' varsity volleyball team, causing the team to arrive severely late to its game.

4. *Opportunities to Receive Coaching*

Compliance with Title IX with regard to coaching is assessed by examining the relative availability of full-time coaches, part-time coaches, and assistant coaches. 44 Fed. Reg. 71,416. Coaches for male teams at Sierra Vista, in particular the football, basketball and baseball teams, are generally permanent school staff members. In comparison, female sports teams at Sierra Vista have more "walk-on" coaches who lack both teaching credentials and comparable access to school resources, facilities and students for recruiting and training purposes. Furthermore, there is a higher turnover rate for coaches of girls' teams compared to boys' teams. Thus, Sierra Vista female student athletes are not receiving the same benefits as to coaching. *See Ollier*, 858 F.

Supp. 2d at 1105 (finding school district violated Title IX by failing to hire consistent coaching staff for female athletes).

5. *Provision of Practice and Competitive Facilities*

Compliance with Title IX is assessed by examining the quality and availability of practice and competition facilities, as well as the quality and availability of team rooms. 44 Fed. Reg. 71,416. Here, Sierra Vista provides inferior practice and competitive facilities to female athletes. *See Ollier,* 858 F. Supp. 2d at 1100 (finding the locker room, practice and competition facilities available to female athletes were unequal as compared to those available to male athletes).

Girls' volleyball does not have access to practice and competitive facilities of the same quality as comparable male teams. In the summer, Sierra Vista reserves its gymnasium primarily for male basketball practices and summer league tournaments even though girls' volleyball is in pre-season during that time in preparation for its fall season, and boys' basketball does not start its season until the winter. Girls' volleyball is forced to practice in a small area with less than a third of the total gym space, which is partitioned by a curtain from boys' basketball, which takes up the rest of the gym. Because the male basketball coach complained that the permanent volleyball poles were too close to the boys' basketball area, female volleyball was required to use flimsy portable poles to move their court over even farther, right up against the bleacher area. Girls' volleyball practice is often interrupted when the ball hits the net because the portable poles must be readjusted in order to pull the net taut, and the net often "sags" because of the low quality of the portable poles. When the female volleyball team informed the school about the net issue, Sierra Vista provided sandbags to put on top of the poles to temporarily keep them in place. However, this "remedy" has created a dangerous hazard that could easily lead to tripping or rolled/broken ankles. In addition, because the court is right up against the bleachers, players cannot move outside of the court nor can they make many plays for the ball for fear of injury. Male basketball players also have access to six fans, which provide a cooler and better ventilated practice facility area than the practice facility provided to the female volleyball players, who have access to just one fan for their curtained-off portion of the gymnasium. On at least one occasion, the male basketball coach, Herman Flores, went so far as to prevent the female volleyball players from entering their reserved gym space to practice.

Furthermore, Coach Flores informed the female volleyball team that they could not have a summer league because the gymnasium is reserved for the male basketball summer league from 2:00 p.m. to 10:00 p.m. daily. The girls' volleyball's summer league had to practice off-campus in West Covina, even though their season started before the boys' basketball season.

Similarly, Sierra Vista maintains pristine baseball fields, but its softball fields are regularly neglected. During the fall, the freshman football team practices on the softball fields' grass, leaving the softball fields ripped up and in disrepair once softball season begins. Complaints have been made several times to Sierra Vista's administration about the softball fields' condition, but Sierra Vista repeatedly replied it did not have money to allocate toward the repair of the softball fields. In addition, it is only in recent years that Sierra Vista added covers

to the girls' softball dugouts to shield them from the sun, while the baseball dugouts have always been covered and shaded.

Despite communicating to female coaches that there was no money available for field improvement, Baldwin Park Unified School District recently allocated $1.9 million to Sierra Vista and another high school in its district, in order to build a new football field. The new field will primarily benefit the all-male football teams. Yet, we are aware of no plans to provide fields of similar quality that will benefit all-female sports teams, such as softball. *See Ollier*, 858 F. Supp. 2d at 1100 (relying on an expert report that concluded the facilities available to female athletes were inferior based on the quality of the fields, location of fields, etc.).

6. *Provision of Training Facilities and Services*

Another category requiring examination under Title IX is the adequacy of training facilities and services including, among other factors, the availability and quality of weight rooms. 44 Fed. Reg. 71,416. The training facilities and services at Sierra Vista are more readily available to male athletes than female athletes. For example, in order for girls' teams to gain entry into the weight room, their coaches must first obtain keys from the boys' athletic director. It took an entire season before the female volleyball coach was given keys to the weight room, despite asking multiple times, and she was not able to get them until the boys' volleyball season began in the spring. Boys' teams, on the other hand, do not face the same hurdles to gain access to the weight room, as the weight room is readily available to male teams. Male football players dominate the usage of the weight room and regularly leave their notes on the white board, their pictures on the wall, and their equipment on the floor, deterring other teams, and particularly girls' teams, from using the space. Further, the weight room is tailored to support male athletes over female athletes because it is equipped with heavier weights and machinery. *See Ollier*, 858 F. Supp. 2d at 1106 (noting a weight training facility for women's sports will "typically have lower weight plates, free weights, flexibility equipment, core strength equipment.").

7. *Publicity and Promotional Support*

Publicity is assessed by examining, among other factors, the "[a]ccess to . . . publicity resources for men's and women's programs," and the "[q]uantity and quality of publications and other promotion devices featuring men's and women's programs." 44 Fed. Reg. 71,417. Sierra Vista recognizes the accomplishments of male athletes much more widely than those of female athletes. For example, female sports are covered less than male sports in the yearbook and the only pictures hanging on the walls in the weight room are of male football players. In addition, Sierra Vista's band and cheer team attend and perform at all of the football and boys' basketball games. However, the cheer team attended only two of the girls' basketball games this past season. Further, Sierra Vista's morning announcements focus on male athletic teams. For instance, when a student morning announcer attempted to publicize female sports, in recognition of the lack of such announcements about girls' teams and athletes, she was told by the staff to stick to her script (which only gave "shout outs" to boys' teams and athletes). *See Ollier*, 858 F. Supp. 2d at 1112 (finding Title IX violation where female sports were covered less in yearbooks, fewer announcements were made in the school's daily newsletter, and cheerleaders attended

more male athletic games than female athletic games).

8. *Fundraising*

Although the unequal expenditure on boys' and girls' sports does not itself constitute noncompliance, compliance may be assessed by examining the "failure to provide necessary funds for teams for one sex." C.F.R. § 106.41(c). At Sierra Vista, girls' teams more heavily rely on external fundraising than boys' teams in order to obtain proper equipment and uniforms. For instance, as already described above, female soccer players had to rely on fundraising in order to purchase equipment. However, male soccer players were not required to fundraise to the same degree to obtain equipment of similar quality because male soccer team equipment was subsidized.

B. Equal Participation Opportunities

The Department of Education, Office for Civil Rights' 1979 Policy Interpretation created a "three-part" test to determine whether a recipient of federal funds is in fact providing equal participation opportunities for male and female students. 44 Fed. Reg. 71,418.

In determining whether a recipient is providing the sexes with "equal athletic opportunity," one factor listed in the regulations is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c). The 1979 OCR interpretation created a "three-part" test to determine whether a recipient is effectively accommodating both sexes as follows:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
(2) Whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of an underrepresented sex; or
(3) Whether it can be demonstrated that the interests and abilities of the members of an underrepresented sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,418. While initially written in the collegiate context, this test unambiguously applies to high school sports as well. *See Ollier*, 768 F.3d at 855 ("[T]he three-part test applies to a high school."). Here, Sierra Vista cannot show it satisfies the test under any of its three parts.

1. *Part One: Participation Numbers Are Not Substantially Proportionate*

Part one examines whether participation opportunities for male and female students are substantially proportionate to their respective enrollments. *Cohen v. Brown*, 101 F.3d 155, 163 (1st Cir. 1996) (affirming that the "participation opportunities" offered by an institution are

measured by counting *actual* participants on teams). "Substantial proportionality requires a close relationship between athletic participation and enrollment." *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1271-72 (S.D. Cal. 2009) (rejecting 6.7% as an acceptable gap between girls' enrollment and participation in athletics); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012) (describing a non-compliant 3.62% disparity between female enrollment and female athletic participation).

The athletic opportunities Sierra Vista provides for females and males are not substantially proportionate. Based on the 2016-2017 enrollment numbers, male students represented 49.2% of the student population and female students represented 50.8% of the student population.[1] However, based on an analysis of 2016-2017 athletic seasons, female students received 42.3% of athletic opportunities overall, constituting a participation gap of 8.5%. Sierra Vista would need to add 70 female athletes to achieve proportionality under Title IX.

Therefore, Sierra Vista fails part one of the test. *See Ollier*, 768 F.3d at 856-57 (affirming as unacceptable 6.7% gap between female enrollment and participation in athletics).

2. *Part Two: No History or Practice of Program Expansion for Female Students*

Where an institution fails to meet proportionality under part one, it bears the burden of showing a history and continuing practice of program expansion demonstrably responsive to girls' interest. *Cohen v. Brown Univ.*, 991 F.2d 888, 901-02 (1st Cir. 1993). Part two examines an "institution's record of adding female participation opportunities and its current 'plan of program expansion that is demonstrably responsive to the developing interests and abilities' of women." *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 969 (9th Cir. 2010) (citing the *1996 Office for Civil Rights Guidance Letter*); *see also Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 WL 328446, at *11 (N.D.N.Y. June 11, 1996) ("[t]he hallmarks of this defense are *continuity and persistence*.") (emphasis added). Title IX was passed over forty-five years ago and thus, all educational institutions that receive federal funding have been on notice of the law's requirements since the 1970s. *See Ollier*, 768 F.3d at 857 (finding defendants failed to demonstrate a history and continuing practice where female participation had dramatic ups and downs during the relevant period).

Here, Sierra Vista cannot show a history and continuing practice of program expansion demonstrably responsive to girls' interest. In fact, the participation rate has only become worse. While the participation gap for the 2015-2016 school year was 6.7 %, the participation gap for the 2016-2017 season was 8.5%, an increase of about 2%.

[1] *See* California Interscholastic Federation - Participation Census Submission Data, *available at* http://cifstate.org/coaches-admin/census/index.

3. *Part Three: No Effective Accommodation of the Interests of Female Students*

As to part three, "[i]f there is sufficient interest and ability among [girls], not slaked by existing programs, an institution necessarily fails this prong of the test." *Cohen*, 991 F.2d at 898. *See, e.g., Ollier*, 768 F.3d at 858-59 (noting school's inability to find a field hockey coach does not indicate female students' interest waned). It is not a defense to cite evidence that more boys try out or express interest in sports, if interested girls are turned away. *Neal v. Cal. State Univs.*, 198 F.3d 763, 769-73 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d at 178-80.

Here, Sierra Vista's female students' interest in athletics is not satisfied by existing programs. Sierra Vista does not adequately accommodate girls interested in participating because Sierra Vista could form additional teams with the girls it cuts during try-outs for teams such as girls' volleyball. Indeed, despite a great amount of interest in girls' volleyball in the area that would provide ready competition for such additional teams, many girls have been cut in the past due to Sierra Vista's refusal to find on-campus or off-campus spaces to host more teams. Girls are also often cut from teams after try-outs despite expressing clear interest in participation. Further, many female students interested in athletics are likely not aware of try-outs being held despite their desire to join Sierra Vista sports teams. For example, try-outs for female athletic teams are announced only once a week during morning announcements, while tryouts for male athletic teams are better and more frequently advertised. Furthermore, Sierra Vista does not take affirmative steps to gauge female interest in new sports teams.

As Sierra Vista does not accommodate female interest in athletics, Sierra Vista does not meet part three of the test. Sierra Vista thus fails to provide its female students with equitable participation opportunities under the law.

III. REMEDY

We request that Sierra Vista take immediate steps to remedy violations of Title IX. If we do not hear from you by Monday, November 27 regarding concrete changes to address the above Title IX violations, we intend to file a complaint in the U.S. District Court for the Central District of California to remedy these violations. For your information, from the Title IX matter of *Ollier v. Sweetwater Unified School District*, we enclose a copy of the Southern District of California's 2009 Order Granting Plaintiffs' Motion for Summary Adjudication, that court's 2012 Findings of Fact and Conclusions of Law, and the Ninth Circuit Court of Appeals' September 2014 decision affirming the entirety of the trial court's rulings. The district and appellate courts found in favor of the female athlete plaintiffs in the *Sweetwater* matter. There the school district chose not to engage in productive, structured negotiations, instead opting to litigate for more than seven years, at the expense of the plaintiffs, their families, and all female student athletes. For further background, we also include a copy of the 2009 Fee Order from the Central District of California in the Title IX case *Cruz v. Alhambra School District* and other recent, relevant opinions. We hope to avoid litigation and resolve these critical issues through negotiations on a quick timeline. However, if we are not able to reach a fair and just resolution, we will have little choice but to file suit.

Please direct all communications regarding these matters to Legal Aid at Work. We look forward to hearing from you.

Sincerely,

Kim Turner	Harrison "Buzz" Frahn	Amy Poyer
		
Legal Aid at Work	Simpson Thacher & Bartlett LLP	California Women's Law Center

Encl.

- *Working v. Lake Oswego Sch. Dist.*, No. 3:16-CV-0581-SB, 2017 WL 3083256, (D. Or. July 19, 2017)
- *T.S. by & through Struthers v. Red Bluff Joint Union High Sch. Dist.*, No. 217CV00489TLNEFB, 2017 WL 2930702 (E.D. Cal. July 10, 2017) (denying reconsideration)
- *T.S. by & through Struthers v. Red Bluff Joint Union High Sch. Dist.*, No. 2:17-CV-0489-TLN-EFB, 2017 WL 3149425 (E.D. Cal. June 28, 2017)
- *Ollier v. Sweetwater*, Ninth Circuit Court of Appeals Decision (September 2014)
- *Ollier v. Sweetwater*, Findings of Fact and Conclusions of Law (February 2012)
- *Ollier v. Sweetwater*, Order Granting Plaintiffs' Motion for Summary Adjudication (March 2009)
- *Cruz v. Alhambra School District*, Fee Order (2009)

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Only the Westlaw citation is currently available.
United States District Court,
D. Oregon.

Lauren WORKING, et al., Plaintiffs,
v.
LAKE OSWEGO SCHOOL DISTRICT, an Oregon public school district, Defendant.

Case No. 3:16–cv–0581–SB
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Signed 07/19/2017

Attorneys and Law Firms

Andrew D. Glascock, Glascock Street Waxler LLP, Portland, OR, Elizabeth Kristen, Pro Hac Vice, Kim Turner, Pro Hac Vice, Legal Aid at Work, San Francisco, CA, for Plaintiffs.

Beth Plass, Blake H. Fry, Karen M. Vickers, Mersereau & Shannon LLP, Portland, OR, for Defendant.

ORDER

Michael H. Simon, United States District Judge

***1** United States Magistrate Judge Stacie F. Beckerman issued Findings and Recommendation in this case on June 29, 2017. ECF 42. Judge Beckerman recommended that Plaintiffs' motion to amend be granted. No party has filed objections.

Under the Federal Magistrates Act ("Act"), the court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). If a party files objections to a magistrate's findings and recommendations, "the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." *Id.*; Fed. R. Civ. P. 72(b)(3). If no party objects, the Act does not prescribe any standard of review. *See Thomas v. Arn*, 474 U.S. 140, 152 (1985) ("There is no indication that Congress, in enacting [the Act], intended to require a district judge to review a magistrate's report to which no objections are filed."); *United States. v. Reyna–Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc) (holding that the court must review de novo magistrate's findings and recommendations if objection is made, "but not otherwise").

Although review is not required in the absence of objections, the Act "does not preclude further review by the district judge[ ] *sua sponte* ... under a *de novo* or any other standard." *Thomas*, 474 U.S. at 154. Indeed, the Advisory Committee Notes to Fed. R. Civ. P. 72(b) recommend that "[w]hen no timely objection is filed," the court review the magistrate's findings and recommendations for "clear error on the face of the record."

No party having made objections, this Court follows the recommendation of the Advisory Committee and reviews Judge Beckerman's Findings and Recommendation for clear error on the face of the record. No such error is apparent. Accordingly, the Court **ADOPTS** Judge Beckerman's Findings and Recommendation, ECF 42. Plaintiffs' Motion to Amend (ECF 25) is GRANTED.

IT IS SO ORDERED.

All Citations

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United States District Court,
E.D. California.

T.S. BY AND THROUGH their next friend Jeramie STRUTHERS, et al., Plaintiffs,
v.
RED BLUFF JOINT UNION HIGH SCHOOL DISTRICT, Defendant.

No. 2:17–cv–00489–TLN–EFB
|
Signed 07/10/2017

Attorneys and Law Firms

Daniel M. Siegel, Jane Brunner, Emily Rose Johns, Siegel & Yee, Oakland, CA, Elizabeth Kristen, Kim Turner, Legal Aid at Work, San Francisco, CA, for Plaintiffs.

Jimmie E. Johnson, Leone & Alberts, Louis Anthony Leone, Stubbs and Leone, Walnut Creek, CA, for Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION

***1** Plaintiffs brought this action under Title IX of the Education Amendments Act of 1972 on March 7, 2017. (ECF No. 1.) Thereafter, the Court issued a Pretrial Scheduling Order bifurcating discovery to allow class discovery to commence prior to any other discovery. (ECF No. 17.) During class discovery, Plaintiffs submitted to Defendant Red Bluff Joint Union High School District ("Defendant") requests for on-site measurements and inspection. On June 7, 2017, the parties filed a Statement of Discovery Dispute before Magistrate Judge Edmund F. Brennan. (ECF No. 12.) Defendant objected to the on-site inspection and measurements requested by Plaintiffs as overly broad and outside the claims at issue. Magistrate Judge Brennan ruled in favor of Plaintiffs and permitted on-site discovery. Defendant filed a Request for Reconsideration before this Court on June 27, 2017. [1] (ECF No. 25.) Plaintiffs oppose the request. (ECF No. 27.)

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 72(a) permits a party to file a request for reconsideration of a magistrate judge's non-dispositive order within 14 days of being served with a copy of the order. "A district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). The objecting party has the burden of showing that the magistrate judge's ruling is clearly erroneous or contrary to law. *In re eBay Seller Antitrust Litig.*, No. C 07–1882 JF (RS), 2009 WL 3613511, at *1 (N.D. Cal. Oct. 28, 2009); *Winz–Byone v. Metro. Life Ins. Co.*, No. EDCV 07–238–VAP (OPx), 2007 WL 4276751, at *1 (C.D. Cal. Nov. 16, 2007).

"The 'clearly erroneous' standard applies to factual findings and discretionary decisions made in connection with non-dispositive pretrial discovery matters." *F.D.I.C. v. Fid. & Deposit Co. of Maryland*, 196 F.R.D. 375, 378 (S.D. Cal. 2000). Under the clearly erroneous standard, the district court can overturn the magistrate judge's ruling when the court is "left with the definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods. of Cal., Inc., v. Constrs. Laborers Pension Trust*, 508 U.S. 602, 622 (1993).

In contrast, a "contrary to law" standard is applied to the magistrate judge's legal conclusions and amounts to a *de novo* review. *United States v. McConney*, 728 F. 2d 1195, 1200–01 (9th Cir. 1984) (en banc) *abrogated on other grounds* by *Pierce v. Underwood*, 487 U.S. 552 (1988). "An order is 'contrary to law' when it fails to apply or misapplies relevant statutes, case law, or rules of procedure." *Calderon v. Experian Info. Sols., Inc.*, 290 F.R.D. 508, 511 (D. Idaho 2013). However, "a magistrate judge's decision is contrary to law only where it runs counter to controlling authority." *Pall Corp. v. Entegris, Inc.*, 655 F. Supp. 2d 169, 172 (E.D.N.Y. 2008). Consequently, "a magistrate judge's order simply cannot be contrary to law when the law itself is unsettled." *Id.*

II. ANALYSIS

***2** First, Defendant argues Magistrate Judge Brennan erred by finding Plaintiffs are entitled to measuring during the on–site inspection. (ECF No. 25 at 6.) Defendant cites two cases as its main support for its contention that other forms of discovery should instead be used. (ECF No. 25 at 9–8.) The cases cited by Defendant do not stand for the

proposition that other forms of discovery necessarily must be used prior to an inspection and measuring. *See Belcher v. Basset Furniture Industries, Inc.*, 588 F.2d 904, 905 (4th Cir. 1978) (discussing the permissibility of an inspection of facilities in a sexual and race discrimination case); *E.E.O.C. v. United States Bakery*, No. Civ. 03–64–HA, 2004 WL 1307915, at *4 (D. Or. Feb. 4, 2004) (explaining the building was not relevant to the claims at issue and any information about where the harassment occurred could have been obtained through other forms of discovery). Moreover, even if the cases supported such a contention, none of the cases are binding on this Court. Consequently, failure to follow them would not render Magistrate Judge Brennan's ruling contrary to law. *Pall Corp.*, 655 F. Supp. 2d at 172. Accordingly, Defendant has not presented this Court with evidence that Magistrate Judge Brennan's order permitting measuring at the inspection is contrary to law.

Second, Defendant asserts Plaintiffs are not entitled to measurements because the notice of inspection lacks sufficient particularity. (ECF No. 25 at 9.) Defendant asserts it has no way of knowing what measuring is contemplated or what tangible things will be measured. (ECF No. 25 at 10.) Defendants contend Magistrate Judge Brennan's reliance on these terms is misplaced. Magistrate Judge Brennan stated "I think the fact that the notice specifically referenced their intent to measure —and it does use the word measure—and I think that is sufficient." (ECF No. 23 at 10:5–8.) The notice describing the inspection stated Plaintiffs' intent to measure "the tangible things set forth in this request." (ECF No. 19 at 3.) The notice went on to describe the areas to be inspected and measured. Defendant's exception to the terms measuring and tangible things is taken out of context of the whole notice. Furthermore, Defendants cite no authority which would demonstrate the term "measuring" is insufficient in the context of the description of the areas to be inspected. The statutory rules cited by Defendants require no such finding. Defendant does not present any argument that would make the Court feel a mistake has been committed with respect to Magistrate Judge Brennan's finding that the notice is sufficient. Accordingly, Defendant has failed to meet its burden to demonstrate the finding is clearly erroneous.

Lastly, Defendant contends Plaintiffs are not entitled to inspect any portion of Defendant's campus not pled in Plaintiff's Second Amended Complaint. (ECF No. 25 at 10.) Defendant argues the magistrate judge erred by determining that paragraphs 35 and 37 of the complaint put all the athletic facilities at issue in the action. (ECF No. 25 at 11.) Defendant asserts this determination was clearly erroneous for three reasons: (1) any violation not suffered by Plaintiffs is beyond class discovery; (2) paragraphs 35 and 36 do not raise a claim of a system-wide violation; and (3) Plaintiffs do not have standing to prosecute violations they did not personally suffer.

Defendant's arguments rely on one misconception—that Plaintiffs do not allege a system-wide violation under Title IX in their Second Amended Complaint. Magistrate Judge Brennan relied on paragraphs 35 and 37 and the relief sought to determine the appropriate scope of the complaint. The magistrate judge found the complaint alleges more than a single sport violation, but instead a system-wide Title IX violation by Defendant. While Plaintiffs allege specific violations regarding the basketball team and softball team, they also allege violations within the whole athletic program. Beyond the allegations Magistrate Judge Brennan specifically mentioned, the complaint also seeks to certify a class of "all present and future Red Bluff High School female students and potential students who participate, seek to participate, and/or are or were deterred from participating in athletics at Red Bluff High School." (ECF No. 12 ¶ 16.) Plaintiffs seek to represent all female athletes in all sports, not just those in which they participate. Defendant does not present the Court with any evidence suggesting Plaintiffs may only represent the sports they themselves play in a complaint for system-wide violations. Nor does Defendant present evidence Plaintiffs may not provide only some examples of violations when raising a claim for system-wide violations. Accordingly, Defendant failed to show Magistrate Judge Brennan's ruling on the scope of the inspection was clearly erroneous.

***3** For the reasons set forth above, Defendant's Request for Reconsideration (ECF No. 25) is hereby DENIED.

IT IS SO ORDERED.

All Citations

Slip Copy, 2017 WL 2930702

Footnotes

1 Magistrate Judge Brennan issued a written order on June 28, 2017, one day after Defendant filed its objections to the order. Federal Rule of civil procedure 72(a) states that a "party may serve and file objections to the order within 14 days after being served with a copy." As a procedural matter, Defendant cannot object to an order that has not yet been served on it. Despite this procedural deficiency, Plaintiffs ask the Court to consider the merits of the request in order to attempt to resolve the issue before the scheduled inspection on July 11, 2017. Accordingly, the Court will address the merits of Defendant's arguments.

2017 WL 3149425

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~ .

Only the Westlaw citation is currently available.

United States District Court,
E.D. California.

T.S. BY AND THROUGH their next friend Jeramie STRUTHERS; J.M.B. and J.E.B., by and through their next friend James Brandt; E.A., by and through their next friend Hazel Brandt; C.K. by and through their next friend Teresa Hill; and G.K. by and through their next friend Lesliann Jones and all others similarly situated, Plaintiffs,

v.

RED BLUFF JOINT UNION HIGH SCHOOL DISTRICT, Defendant.

Case No. 2:17–cv–0489–TLN–EFB

|

Signed 06/27/2017

|

Filed 06/28/2017

Attorneys and Law Firms

Daniel M. Siegel, Jane Brunner, Emily Rose Johns, Siegel & Yee, Oakland, CA, Elizabeth Kristen, Kim Turner, Legal Aid at Work, San Francisco, CA, for Plaintiffs.

Jimmie E. Johnson, Leone & Alberts, Louis Anthony Leone, Stubbs and Leone, Walnut Creek, CA, for Defendant.

[~~PROPOSED~~] ORDER FOR PARTIES' JOINT STATEMENT RE DISCOVERY DISAGREEMENT

EDMUND F. BRENNAN, UNITED STATES MAGISTRATE JUDGE

***1** Plaintiffs have filed a putative civil rights class action on behalf of "all present and future Red Bluff High School female students and potential students who participate, seek to participate, and/or are or were deterred from participating in athletics at Red Bluff High School." Second Amended Complaint ("SAC"), Dkt. No. 12, ¶16. Plaintiffs' action seeks to remedy Defendant's alleged ongoing violations of Title IX of the Education Amendments of 1972 ("Title IX"). The claim for relief primarily at issue in this discovery dispute is Plaintiffs' First Claim for Relief for Defendant's Unequal Provision of Treatment and Benefits in the Red Bluff High School Athletics Program. Dkt. No. 12, ¶¶ 103–111 ("Equal Treatment and Benefits Claim"). Plaintiffs' SAC alleged "Defendant failed to provide equitable athletic treatment and benefits at Red Bluff High School as to female students in comparison to male students" (SAC ¶ 35), as to an array of athletic program components, thus requiring an overall athletic programmatic analysis to determine the impact of alleged inequities on Plaintiffs and the putative class.

On May 12, 2017, Plaintiffs served via mail and email, their Request for Site Inspection ("Notice") (Dkt. No. 16, Ex. 2) requesting to inspect athletic facilities and related amenities at Defendant's public high school. On May 19, 2017, Defendant served via email, Defendant's Response/ Objections (Dkt. No. 16, Ex. 3) endeavoring to limit the scope and manner of Plaintiffs' site inspection.

On June 7, 2017, the Parties' submitted a Joint Statement regarding their Discovery Disagreement (Dkt. No. 16) regarding three issues: (1) the scope of the on-site facilities to be inspected for the Site Inspection; (2) limitations on the manner of the Site Inspection; and (3) the attendance of Plaintiffs' team at the Site Inspection. The matter came for hearing before this Court on June 14, 2017.

Based upon the Joint Statement and oral argument regarding the Discovery Disagreement, the Court hereby grants Plaintiffs permission to conduct the Site Inspection as set out in the Notice and as follows: (1) Plaintiffs are permitted to conduct the Site Inspection of all on-site athletic facilities and related amenities at Red Bluff High School as the scope of Plaintiffs' Notice is appropriate and proportional in light of the allegations of the SAC; (2) Plaintiffs are permitted to measure and count athletic facilities and related amenities at Red Bluff

High School; and (3) Plaintiffs are permitted to bring, as requested, four (4) attorneys, their expert, and Plaintiffs' representatives to attend and aid in conducting the Site Inspection.

IT IS SO ORDERED

2017 WL 3149425

All Citations

Slip Copy, 2017 WL 3149425

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768 F.3d 843
United States Court of Appeals,
Ninth Circuit.

Veronica OLLIER; Naudia Rangel, by her next friends Steve and Carmen Rangel; Maritza Rangel, by her next friends Steve and Carmen Rangel; Amanda Hernandez, by her next friend Armando Hernandez; Arianna Hernandez, by her next friend Armando Hernandez, individually and on behalf of all those similarly situated, Plaintiffs–Appellees,
v.
SWEETWATER UNION HIGH SCHOOL DISTRICT; Arlie N. Ricasa; Pearl Quinones; Jim Cartmill; Jaime Mercado; Greg R. Sandoval; Jesus M. Gandara; Earl Weins; Russell Moore, in their official capacities, Defendants–Appellants.

No. 12–56348.
|
Argued and Submitted June 3, 2014.
|
Filed Sept. 19, 2014.

Synopsis

Background: Female high school athletes brought class action against public school district and its administrators and board members under Title IX, alleging unequal treatment and benefits in athletic programs, unequal participation opportunities in athletic programs, and retaliation. The United States District Court for the Southern District of California, M. James Lorenz, Senior District Judge, 604 F.Supp.2d 1264, granted partial summary judgment for plaintiffs, entered various pre-trial rulings, 267 F.R.D. 339 and 735 F.Supp.2d 1222, and then granted judgment for plaintiffs after bench trial, 858 F.Supp.2d 1093. School district appealed.

Holdings: The Court of Appeals, Gould, Circuit Judge, held that:

[1] school district did not fully and effectively accommodate interests and abilities of its female athletes;

[2] district court did not abuse its discretion when it barred retired superintendent of different school district and assistant principal at different high school from testifying as expert witnesses at trial;

[3] school district did not satisfy its obligation to disclose its 30 employee and eight non-employee fact witnesses through other disclosed witnesses mentioning them at their depositions;

[4] district court did not abuse its discretion by declining to consider contemporaneous evidence at trial before issuing permanent injunction to require school district to comply with Title IX;

[5] athletes alleged judicially cognizable injuries flowing from public school district's retaliatory responses to Title IX complaints made by their parents and coach;

[6] athletes engaged in protected activities;

[7] validity of permanent injunction was not impaired on basis that portion of class were not members of softball team at time of retaliation, and yet they benefited from the relief; and

[8] causation was demonstrated.

Affirmed.

West Headnotes (48)

[1] Federal Courts
Failure to mention or inadequacy of treatment of error in appellate briefs

Public school district waived issue of whether district court's decision to grant class certification was proper, on Title IX unequal participation claim, by not including that issue in its briefs on appeal, although school district had given notice of its intent to appeal decision to certify proposed class. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

Cases that cite this headnote

[2] **Civil Rights**
Extracurricular activities;athletics

Public school district did not fully and effectively accommodate interests and abilities of its female athletes, and thus violated Title IX, where female athletic participation was not substantially proportionate to overall female enrollment at school, there was no history or continuing practice of program expansion for women's sports at school, and school did not prove that interests and abilities of female students had been fully and effectively accommodated by present program. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

1 Cases that cite this headnote

[3] **Civil Rights**
Extracurricular activities;athletics

When making the determination under the Title IX "effective accommodation" test of whether athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments, a court counts only "actual athletes," not "unfilled slots," because Title IX participation opportunities are real, not illusory. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

1 Cases that cite this headnote

[4] **Civil Rights**
Extracurricular activities;athletics

Second step of the analysis under the first prong of the three-prong "effective accommodation" test under Title IX is to consider whether the number of athletic participation opportunities, i.e., athletes, is substantially proportionate to each sex's enrollment; exact proportionality is not required, and there is no magic number at which substantial proportionality is achieved. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

2 Cases that cite this headnote

[5] **Civil Rights**
Extracurricular activities;athletics

Under the "effective accommodation" test under Title IX, substantial proportionality of each sex's enrollment to athletic participation opportunities, i.e., athletes, is determined on a case-by-case basis in light of the institution's specific circumstances and the size of its athletic program; as a general rule, there is substantial proportionality if the number of additional participants required for exact proportionality would not be sufficient to sustain a viable team. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

2 Cases that cite this headnote

[6] **Civil Rights**
Extracurricular activities;athletics

The second prong of the Title IX "effective accommodation" test that considers whether an institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female athletes looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion; there are no fixed intervals of time within which an institution must have added participation opportunities, and a particular number of sports is not dispositive because the focus is on whether the program expansion was responsive to developing interests and abilities of female students. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

1 Cases that cite this headnote

[7] **Civil Rights**
Extracurricular activities;athletics

Under the Title IX "effective accommodation" test, an institution must do more than show a history of program expansion to show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female athletes; it must demonstrate a continuing, i.e., present, practice of program expansion as warranted by developing interests and abilities. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

Cases that cite this headnote

[8] **Civil Rights**
Extracurricular activities;athletics

On Title IX unequal participation claim, public school district's decision to cut female field hockey twice during relevant time period, coupled with its inability to show that its motivations were legitimate, was enough to show sufficient interest, ability, and available competition to sustain field hockey team. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

Cases that cite this headnote

[9] **Civil Rights**
Extracurricular activities;athletics

When making the determination under Title IX as to whether interests and abilities of female students have been fully and effectively accommodated by the present program, a court must consider whether there is (1) unmet interest in a particular sport; (2) ability to support a team in that sport; and (3) a reasonable expectation of competition for the team. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

1 Cases that cite this headnote

[10] **Civil Rights**
Extracurricular activities;athletics

Under the Title IX "effective accommodation" test, when considering whether the interests and abilities of female students have been fully and effectively accommodated by the present program, if an institution has recently eliminated a viable team, a court presumes that there is sufficient interest, ability, and available competition to sustain a team in that sport absent strong evidence that conditions have changed. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.41.

1 Cases that cite this headnote

[11] **Federal Courts**
Expert evidence and witnesses

Federal Courts
Discovery sanctions

Federal Courts
Preliminary proceedings;depositions and discovery

Federal Courts
Exclusion of Evidence

The Court of Appeals reviews a district court's evidentiary rulings, such as its decisions to exclude expert testimony and to impose discovery sanctions, for an abuse of discretion, and a showing of prejudice is required for reversal.

4 Cases that cite this headnote

[12] **Federal Civil Procedure**
Trial by Court

In a non-jury case, a district judge is given great latitude in the admission or exclusion of evidence.

Cases that cite this headnote

[13] **Federal Courts**
Discovery sanctions

A district court's discretion to issue sanctions for failure to disclose or to supplement an earlier response is given particularly wide latitude. Fed.Rules Civ.Proc.Rule 37(c)(1), 28 U.S.C.A.

9 Cases that cite this headnote

[14] Evidence

Sources of Data

Evidence

Speculation, guess, or conjecture

District court did not abuse its discretion when it barred retired superintendent of different public school district and assistant principal at different high school from testifying as expert witnesses at trial on Title IX unequal participation claim after finding their testimony to be inherently unreliable and unsupported by the facts; proposed experts based their proposed testimony on superficial inspections of defendant school district's facilities and their conclusions had been based on their personal opinions and speculation rather than on a systematic assessment of defendant's athletic facilities and programs. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

2 Cases that cite this headnote

[15] Evidence

Matters involving scientific or other special knowledge in general

Evidence

Competency of Experts

Bare qualifications alone cannot establish the admissibility of expert testimony; rather, expert testimony must be both relevant and reliable. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

7 Cases that cite this headnote

[16] Evidence

Matters involving scientific or other special knowledge in general

Evidence

Necessity and sufficiency

A proposed expert's testimony must have a reliable basis in the knowledge and experience of his discipline; this requires district courts, acting in a "gatekeeping role," to assess whether the reasoning or methodology underlying the testimony is valid and whether that reasoning or methodology properly can be applied to the facts in issue because it is not the correctness of the expert's conclusions that matters, but the soundness of his methodology. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

11 Cases that cite this headnote

[17] Evidence

Matters of opinion or facts

Personal opinion testimony is inadmissible as expert opinion. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

Cases that cite this headnote

[18] Evidence

Speculation, guess, or conjecture

Speculative expert testimony is inherently unreliable, and thus is inadmissible.

3 Cases that cite this headnote

[19] Federal Civil Procedure

Failure to respond;sanctions

Public school district did not satisfy its obligation to disclose its 30 employee and eight non-employee fact witnesses through other disclosed witnesses mentioning them at their depositions, on Title IX unequal participation claim, and thus district court did not abuse its discretion in excluding them on basis that failure to comply with disclosure requirement was neither substantially justified nor harmless; reopening discovery 15 months after discovery cutoff and only 10 months before trial would have burdened plaintiffs and disrupted court's and parties' schedules. Education Amendments of 1972, § 901(a), 20

U.S.C.A. § 1681(a); Fed.Rules Civ.Proc.Rule 26(a, e), 28 U.S.C.A.

8 Cases that cite this headnote

[20] Federal Civil Procedure
Discretion of Court

A district court has wide discretion in controlling discovery.

15 Cases that cite this headnote

[21] Federal Civil Procedure
Failure to respond;sanctions

A passing reference made by one witness in a deposition to a person with knowledge or responsibilities who conceivably could be a witness does not satisfy a party's disclosure obligations; an adverse party should not have to guess which undisclosed witnesses may be called to testify. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

7 Cases that cite this headnote

[22] Civil Rights
Education

Federal Civil Procedure
Reception of Evidence

District court did not abuse its discretion by declining to consider contemporaneous evidence at trial before issuing permanent injunction to require public school district to comply with Title IX; establishing cutoff date after which it would not consider supplemental improvements to facilities at school, especially one that was only 90 days before trial, aided orderly pre-trial procedure, and district court still could have issued injunction based on past harm in light of systemic problem of gender inequity in public school district athletics program even if contemporaneous evidence showed that school district was complying with Title IX at time of trial. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[23] Federal Civil Procedure
Role and Obligations of Judge

A trial court's power to control the conduct of trial is broad.

Cases that cite this headnote

[24] Federal Courts
Standing

Whether a party has standing to bring a claim is a question of law that is reviewed de novo, but a district court's fact-finding on standing questions is reviewed for clear error.

Cases that cite this headnote

[25] Federal Civil Procedure
In general;injury or interest

Article III of the Constitution requires a party to have standing to bring its suit. U.S.C.A. Const. Art. 3, § 1 et seq.

2 Cases that cite this headnote

[26] Federal Civil Procedure
In general;injury or interest

Federal Civil Procedure
Causation;redressability

In order to have standing to bring its suit, a party must have suffered (1) an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of, which means that the injury has to be fairly traceable to the challenged action of the defendant; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

4 Cases that cite this headnote

[27] **Federal Civil Procedure**
Representation of class;typicality; standing in general

In a class action, standing is satisfied if at least one named plaintiff meets the requirements. U.S.C.A. Const. Art. 3, § 1 et seq.; Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

4 Cases that cite this headnote

[28] **Civil Rights**
Education

Civil Rights
Education

High school softball players' suit, alleging that their coach was fired in retaliation for making Title IX complaints on their behalf, asserted their own rights, rather than coach's, and thus was not subject to limitations on third-party standing. U.S.C.A. Const. Art. 3, § 1 et seq.; Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[29] **Administrative Law and Procedure**
Interest in general

An injured party may sue under the Administrative Procedure Act if he falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. U.S.C.A. Const. Art. 3, § 1 et seq.; 5 U.S.C.A. § 551 et seq.

2 Cases that cite this headnote

[30] **Action**
Persons entitled to sue

Any plaintiff with an interest arguably sought to be protected by a statute with an anti-retaliation provision has standing to sue under that statute.

1 Cases that cite this headnote

[31] **Civil Rights**
Education

Student softball players alleged judicially cognizable injuries flowing from public school district's retaliatory responses to Title IX complaints made by their parents and coach, and thus had Article III standing to claim that school district impermissibly retaliated against them by firing their coach, since coach gave players extra practice time and individualized attention, persuaded volunteer coaches to help them with specialized skills, and arranged for team to play in tournaments attended by college recruiters, and after termination school stripped team of its voluntary assistant coaches, canceled team's awards banquet, and forbade team from participating in tournament attended by college recruiters. U.S.C.A. Const. Art. 3, § 1 et seq.; Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

1 Cases that cite this headnote

[32] **Federal Courts**
Injunction

The Court of Appeals reviews a district court's decision to grant a permanent injunction for an abuse of discretion, but it reviews for clear error the factual findings underpinning the award of injunctive relief.

Cases that cite this headnote

[33] **Federal Courts**
Injunction

Rulings of law relied upon by a district court in awarding injunctive relief are reviewed de novo.

Cases that cite this headnote

[34] **Civil Rights**
Sex Discrimination

Title IX's private right of action encompasses suits for retaliation because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex. Education

Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[35] Civil Rights
Sex Discrimination

The familiar framework used to decide retaliation claims under Title VII is applied to Title IX retaliation claims. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

4 Cases that cite this headnote

[36] Civil Rights
Sex Discrimination

Civil Rights
Education

On a claim of retaliation under Title IX, a plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing that he or she was engaged in protected activity, that he or she suffered an adverse action, and that there was a causal link between the two; the burden on a plaintiff to show a prima facie case of retaliation is low in that only a minimal threshold showing of retaliation is required. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

5 Cases that cite this headnote

[37] Civil Rights
Education

On a claim of retaliation under Title IX, after a plaintiff who lacks direct evidence of retaliation has made a prima facie case of retaliation, the burden shifts to the defendant to articulate a legitimate, non-retaliatory reason for the challenged action; if the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

3 Cases that cite this headnote

[38] Civil Rights
Extracurricular activities;athletics

Female high school athletes engaged in protected activities under Title IX, as required for retaliation claim, where father of two of the named plaintiffs complained to high school's athletic director in May 2006 about Title IX violations, athletes' counsel sent demand letter to public school district in July 2006 regarding Title IX violations at high school, and athletes filed their class action complaint in April 2007. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

1 Cases that cite this headnote

[39] Civil Rights
Sex Discrimination

A private right of action under Title IX includes a claim for retaliation. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

4 Cases that cite this headnote

[40] Civil Rights
Education

Validity of permanent injunction was not impaired on basis that portion of class were not members of softball team at time of retaliation, and yet they benefited from the relief, in female high school athletes' class action against public school district and its administrators and board members under Title IX alleging retaliation, since relief of injunction was equitable and district court had broad powers to tailor equitable relief so as to vindicate the rights of former and future students. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[41] Civil Rights

Sex Discrimination

Under Title IX, as under Title VII, the adverse action element of retaliation claim is present when a reasonable person would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable person from making or supporting a charge of discrimination. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

3 Cases that cite this headnote

[42] Civil Rights

Extracurricular activities;athletics

Causation was demonstrated on retaliation claim under Title IX in female high school athletes' class action against public school district and its administrators and board members, where athletes engaged in protected activity in May 2006, July 2006, and April 2007, and athletes' coach was fired in July 2006 and annual awards banquet was canceled in spring of 2007. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[43] Civil Rights

Extracurricular activities;athletics

Firing softball coach and replacing him with far less experienced coach, stripping team of its assistant coaches, canceling team's annual award banquet, prohibiting parents from volunteering with team, or not allowing team to participate in tournament attended by college recruiters were materially adverse actions in response to protected activity that significantly disrupted successful softball program to detriment of program and participants, any of which might have dissuaded reasonable person from making or supporting charge of discrimination, as required for retaliation claim under Title IX in female high school athletes' class action against public school district and its administrators and board members. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[44] Civil Rights

Sex Discrimination

Under Title IX, the causal link element of the retaliation framework is broadly construed; a plaintiff merely has to prove that the protected activity and the adverse action are not completely unrelated. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

2 Cases that cite this headnote

[45] Civil Rights

Retaliation claims

In Title VII cases, causation on a retaliation claim may be inferred from circumstantial evidence, such as the defendant's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory conduct. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[46] Civil Rights

Causal connection;temporal proximity

Education

Causation

Public Employment

Causal connection;temporal proximity

Walk-on softball coach was fired in retaliation for Title IX complaints, not for legitimate, nonretaliatory reasons; although there was preference for certified teachers and coach played ineligible student which forced team to forfeit games as result, certified teacher preference was in place long before coach was hired and there was no certified teacher ready to replace him after he was fired, and coach was not reprimanded at time of playing ineligible student, he

was not fired until more than one year later, and eligibility determinations were responsibility of school administrators, not coaches. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[47] Civil Rights
Education

On a retaliation claim under Title IX, shifting, inconsistent reasons for an adverse action may be evidence of pretext. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[48] Civil Rights
Causal connection;temporal proximity

Education
Causation

Public Employment
Causal connection;temporal proximity

Softball coach was fired in retaliation for Title IX complaints, not for legitimate, nonretaliatory reasons; although unauthorized parent coached summer softball team and coach filed late paperwork for tournament, coach was absent when unauthorized coaching occurred, he forbade parent from coaching after learning of his ineligibility to do so, and summer team was not conducted under auspices of high school, and coach was not admonished for late paperwork when it was filed. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

Attorneys and Law Firms

***850** Paul V. Carelli, IV (argued), Daniel R. Shinoff, and Patrice M. Coady, Stutz Artiano Shinoff & Holtz, APC, San Diego, CA, for Defendants–Appellants.

Elizabeth Kristen (argued), Robert Borton, and Kim Turner, Legal Aid Society Employment Law Center, San Francisco, CA; Vicky L. Barker and Cacilia Kim, California Women's Law Center, Los Angeles, CA; Joanna S. McCallum and Erin Witkow, Manatt, Phelps & Phillips, LLP, Los Angeles, CA, for Plaintiffs–Appellees.

Erin H. Flynn (argued), United States Department of Justice, Civil Rights Division, Appellate Section; Philip H. Rosenfelt, Deputy General Counsel; Thomas E. Perez, Assistant Attorney General; Vanessa Santos, United States Department of Education Office of the General Counsel; Dennis J. Dimsey and Holly A. Thomas, United States Department of Justice, Civil Rights Division, Appellate Section, for Amicus Curiae United States of America.

Fatima Goss Graves, Neena K. Chaudhry, and Valarie Hogan, National Women's Law Center, Washington, D.C.; Lauren B. Fletcher and Anant K. Saraswat, Wilmer, Cutler, Pickering, Hale & Dorr LLP, Boston, MA; Megan Barbero, Dina B. Mishra, and Brittany Blueitt Amadi, Wilmer, Cutler, Pickering, Hale & Dorr LLP, Washington, D.C., for Amicus Curiae National Women's Law Center, et al.

Kristen Galles, Equity Legal, Alexandria, VA; Nancy Hogshead–Makar, Women's Sports Foundation, Jacksonville, FL, for Amicus Curiae Women's Sports Foundation, et al.

Appeal from the United States District Court for the Southern District of California, M. James Lorenz, Senior District Judge, Presiding. D.C. No. 3:07–cv–00714–L–WMC.

Before: RONALD M. GOULD and N.R. Smith, Circuit Judges, and ***851** MORRISON C. ENGLAND, JR., Chief District Judge. [*]

OPINION

GOULD, Circuit Judge:

Defendants–Appellants Sweetwater Union High School District and eight of its administrators and board members (collectively "Sweetwater") appeal the district court's grant of declaratory and injunctive relief to Plaintiffs–Appellees Veronica Ollier, Naudia Rangel,

Maritza Rangel, Amanda Hernandez, and Arianna Hernandez (collectively "Plaintiffs") on Title IX claims alleging (1) unequal treatment and benefits in athletic programs;[1] (2) unequal participation opportunities in athletic programs; and (3) retaliation. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

I

On April 19, 2007, Plaintiffs filed a class action complaint against Sweetwater alleging unlawful sex discrimination under Title IX of the Education Amendments of 1972 ("Title IX"), *see* 20 U.S.C. § 1681 *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment, *see* 42 U.S.C. § 1983.[2] They alleged that Sweetwater "intentionally discriminated" against female students at Castle Park High School ("Castle Park") by "unlawfully fail [ing] to provide female student athletes equal treatment and benefits as compared to male athletes." They said that female student athletes did not receive an "equal opportunity to participate in athletic programs," and were "deterred from participating" by Sweetwater's "repeated, purposeful, differential treatment of female students at Castle Park." Plaintiffs alleged that Sweetwater ignored female students' protests and "continued to unfairly discriminate against females despite persistent complaints by students, parents and others."

Specifically, Plaintiffs accused Sweetwater of "knowingly and deliberately discriminating against female students" by providing them with inequitable (1) practice and competitive facilities; (2) locker rooms and related storage and meeting facilities; (3) training facilities; (4) equipment and supplies; (5) transportation vehicles; (6) coaches and coaching facilities; (7) scheduling of games and practice times; (8) publicity; (9) funding; and (10) athletic participation opportunities. They also accused Sweetwater of not properly maintaining the facilities given to female student athletes and of offering "significantly more participation opportunities to boys than to girls [.]" Citing Sweetwater's "intentional and conscious failure to comply with Title IX," Plaintiffs sought declaratory and injunctive relief under 20 U.S.C. § 1681 *et seq.* for three alleged violations of Title IX: (1) unequal treatment and benefits in athletic programs; (2) unequal participation opportunities in athletic programs; and (3) retaliation.[3]

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In July 2008, Plaintiffs moved for partial summary judgment on their Title IX claim alleging unequal participation opportunities in athletic programs. Sweetwater conceded that "female athletic participation" at Castle Park was "lower than overall female enrollment," but argued that the figures were "substantially proportionate" for Title IX compliance purposes, and promised to "continue to strive to lower the percentage." As evidence, Sweetwater noted that there are "more athletic sports teams for girls (23) than ... for boys (21)" at Castle Park.

The district court gave summary judgment to Plaintiffs on their unequal participation claim in March 2009. *See Ollier v. Sweetwater Union High Sch. Dist.*, 604 F.Supp.2d 1264 (S.D.Cal.2009). The court found that "substantial proportionality requires a close relationship between athletic participation and enrollment," and concluded that Sweetwater had not shown such a "close relationship" because it "fail[ed] to provide female students with opportunities to participate in athletics in substantially proportionate numbers as males." *Id.* at 1272. Rejecting one of Sweetwater's arguments, the district court reasoned that it is the "actual number and the percentage of females participating in athletics," not "the number of teams offered to girls," that is "the ultimate issue" when evaluating participation opportunities. *Id.* After finding that Plaintiffs had met their burden on each prong of the relevant Title IX compliance test, the district court determined that Sweetwater "failed to fully and effectively accommodate female athletes and potential female athletes" at Castle Park, and that it was "not in compliance with Title IX based on unequal participation opportunities in [the] athletic program." *Id.* at 1275; *see Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 767–68 (9th Cir.1999) (laying out the three-prong test for determining whether a school has provided equal opportunities to male and female students).

B

Before trial, the district court decided three other matters at issue in this appeal. First, it granted Plaintiffs' motion to exclude the testimony of two Sweetwater experts because

(1) the experts' conclusions and opinions "fail[ed] to meet the standard of Federal Rule of Evidence 702" because they were based on "personal opinions and speculation rather than on a systematic assessment of [the] athletic facilities and programs" at Castle Park, and (2) the experts' methodology was "not at all clear."

Second, it granted Plaintiffs' motion to exclude 38 of Sweetwater's witnesses because they were not timely disclosed, reasoning that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and non-cumulative witnesses is harmful and without substantial justification." Because Sweetwater "offered no justification for [its] failure to comply with" Federal Rule of Civil Procedure 26(a) and (e), the district court concluded that exclusion of the 38 untimely disclosed witnesses was "an appropriate sanction" under Federal Rule of Civil Procedure 37(c)(1).

Third, it considered Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim as if it were a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss that claim, and denied it on the merits. *See Ollier v. Sweetwater Union High Sch. Dist.,* 735 F.Supp.2d 1222 (S.D.Cal.2010). In so doing, the district court determined that Plaintiffs had standing to bring their Title IX retaliation claim—a claim the court viewed as premised on harm to the class, not harm to the softball coach whose ***853** firing Plaintiffs alleged was retaliatory. *See id.* at 1226 ("Plaintiffs ... have set forth actions taken against the plaintiff class members after they complained of sex discrimination that are concrete and particularized."). The district court also concluded that Plaintiffs' retaliation claim was not moot after finding that class members were still suffering the effects of Sweetwater's retaliatory conduct and that Sweetwater's actions had caused a "chilling effect on students who would complain about continuing gender inequality in athletic programs at the school." *Id.* at 1225.

C

After a 10–day bench trial, the district court granted Plaintiffs declaratory and injunctive relief on their Title IX claims alleging (1) unequal treatment of and benefits to female athletes at Castle Park, and (2) retaliation. *See Ollier v. Sweetwater Union High Sch. Dist.,* 858 F.Supp.2d 1093 (S.D.Cal.2012).

The district court concluded that Sweetwater violated Title IX by failing to provide equal treatment and benefits in nine different areas, including recruiting, training, equipment, scheduling, and fundraising. *Id.* at 1098–1108, 1115. Among other things, the district court found that female athletes at Castle Park were supervised by overworked coaches, provided with inferior competition and practice facilities, and received less publicity than male athletes. *Id.* at 1099–1104, 1107. The district court found that female athletes received unequal treatment and benefits as a result of "systemic administrative failures" at Castle Park, and that Sweetwater failed to implement "policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." *Id.* at 1108.

The district court also ruled that Sweetwater violated Title IX when it retaliated against Plaintiffs by firing the Castle Park softball coach, Chris Martinez, after the father of two of the named plaintiffs complained to school administrators about "inequalities for girls in the school's athletic programs." *Id.* at 1108; *see id.* at 1115. The district court found that Coach Martinez was fired six weeks after the Castle Park athletic director told him he could be fired at any time for any reason-a comment the coach understood to be a threat that he would be fired "if additional complaints were made about the girls' softball facilities." *Id.* at 1108.

Borrowing from "Title VII cases to define Title IX's applicable legal standards," the district court concluded (1) that Plaintiffs engaged in protected activity when they complained to Sweetwater about Title IX violations and when they filed their complaint; (2) that Plaintiffs suffered adverse actions—such as the firing of their softball coach, his replacement by a less experienced coach, cancellation of the team's annual awards banquet in 2007, and being unable to participate in a Las Vegas tournament attended by college recruiters—that caused their "long-term and successful softball program" to be "significantly disrupted"; and (3) that a causal link between their protected conduct and Sweetwater's retaliatory actions could "be established by an inference derived from circumstantial evidence"—in this case, "temporal proximity." *Id.* at 1113–14. Finally, the district court rejected Sweetwater's non-retaliatory reasons for firing Coach Martinez, concluding that they were "not credible and are pretextual." *Id.* at 1114. The district court determined that Sweetwater's suggested non-retaliatory

justifications were *post hoc* rationalizations for its decision to fire Coach Martinez—a decision the district court said was impermissibly retaliatory. *See id.*

D

[1] Sweetwater timely appealed the district court's decisions (1) to grant partial ***854** summary judgment to Plaintiffs on their Title IX unequal participation claim; (2) to grant Plaintiffs' motions to exclude expert testimony and 38 untimely disclosed witnesses; (3) to deny Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim; and (4) to grant a permanent injunction to Plaintiffs on their Title IX claims, including those alleging (a) unequal treatment of and benefits to female athletes at Castle Park, and (b) retaliation. [4]

II

We review *de novo* a district court's grant of a motion for summary judgment to determine whether, viewing the evidence in the light most favorable to the nonmoving party, there exists a genuine dispute as to any material fact and whether the district court correctly applied the substantive law. *See* Fed.R.Civ.P. 56(a); *Cameron v. Craig,* 713 F.3d 1012, 1018 (9th Cir.2013).

Title IX of the Education Amendments of 1972 states that "[n]o 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). Title IX's implementing regulations require that schools provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). Among the factors we consider to determine whether equal opportunities are available to male and female athletes is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." *Id.* § 106.41(c)(1). In 1979, the Office of Civil Rights of the Department of Health, Education, and Welfare—the precursor to today's Department of Health & Human Services and Department of Education—published a "Policy Interpretation" of Title IX setting a three-part test to determine whether an institution is complying with the "effective accommodation" requirement:

> (1) Whether ... participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among ... athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among ... athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

See 44 Fed.Reg. 71,413, 71,418 (Dec. 11, 1979). We have adopted this three-part test, which by its terms provides that an athletics program complies with Title IX if it satisfies any one of the above conditions. *See Neal,* 198 F.3d at 767–68. [5]

***855 A**

[2] Sweetwater contends that the district court erred in granting summary judgment to Plaintiffs on their Title IX unequal participation claim because (1) there is "overall proportionality between the sexes" in athletics at Castle Park; (2) Castle Park "expanded the number of athletic teams for female participation over a 10–year period"; (3) "the trend over 10 years showed increased female participation in sports" at Castle Park; and (4) Castle Park "accommodated express female interest" in state-sanctioned varsity sports. Relatedly, Sweetwater argues that there was insufficient interest among female students to sustain viable teams in field hockey, water polo, or tennis.

Plaintiffs, on the other hand, contend that (1) the number of female athletes at Castle Park has consistently lagged behind overall female enrollment at the school-that is, the two figures are not "substantially proportionate"; (2) the number of *teams* on which girls could theoretically participate is irrelevant under Title IX, which considers

only the number of female *athletes;* and (3) "girls' interest and ability were not slaked by existing programs."

The United States as *amicus curiae* sides with Plaintiffs and urges us to affirm the district court's award of summary judgment. The Government says that the district court "properly analyzed" Castle Park's athletic program under the three-part "effective accommodation" test, and that it correctly concluded that Sweetwater "failed to provide nondiscriminatory athletic participation opportunities to female students" at Castle Park. The Government's position rejects Sweetwater's argument that Title IX should be applied differently to high schools than to colleges, as well as the idea that the district court's "substantial proportionality" evaluation was flawed.[6] We agree with the Government that the three-part test applies to a high school. This is suggested by the Government's regulations, *See* 34 C.F.R. § 106.41(a) (disallowing sex discrimination "in any interscholastic, intercollegiate, club or intramural athletics"), and, accordingly, apply the three-part "effective accommodation" test here. Although this regulation does not explicitly refer to high schools, it does not distinguish between high schools and other types of interscholastic, club or intramural athletics. We give *Chevron* deference to this regulation. *See* note 5, supra. *See also McCormick ex rel. McCormick v. School Dist. of Mamaroneck,* 370 F.3d 275, 300 (2d Cir.2004) (applying three-part test to high school districts); *Horner v. Ky. High Sch. Athletic Ass'n,* 43 F.3d 265, 272–75 (6th Cir.1994) (same).

B

[3] In 1996, the Department of Education clarified that our analysis under the first prong of the Title IX "effective accommodation" test—that is, our analysis of whether "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments," 44 Fed.Reg. at 71,418—"begins with a determination of the number of participation opportunities afforded to male and female athletes." Office of Civil Rights, U.S. Dep't of Educ., ***856** *Clarification of Intercollegiate Athletics Policy Guidance: The Three–Part Test* (Jan. 16, 1996) ("1996 Clarification"). In making this determination, we count only "actual athletes," not "unfilled slots," because Title IX participation opportunities are "real, not illusory." Letter from Norma V. Cantú, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 16, 1996) ("1996 Letter").

[4] **[5]** The second step of our analysis under the first prong of the three-prong test is to consider whether the number of participation opportunities—*i.e.,* athletes—is substantially proportionate to each sex's enrollment. *See* 1996 Clarification; *see also Biediger v. Quinnipiac Univ.,* 691 F.3d 85, 94 (2d Cir.2012). Exact proportionality is not required, and there is no "magic number at which substantial proportionality is achieved." *Equity In Athletics, Inc. v. Dep't of Educ.,* 639 F.3d 91, 110 (4th Cir.2011); *see also* 1996 Clarification. Rather, "substantial proportionality is determined on a case-by-case basis in light of 'the institution's specific circumstances and the size of its athletic program.' " *Biediger,* 691 F.3d at 94 (quoting 1996 Clarification).[7] As a general rule, there is substantial proportionality "if the number of additional participants ... required for exact proportionality 'would not be sufficient to sustain a viable team.' " *Id.* (quoting 1996 Clarification).

Between 1998 and 2008, female enrollment at Castle Park ranged from a low of 975 (in the 2007–2008 school year) to a high of 1133 (2001–2002). Male enrollment ranged from 1128 (2000–2001) to 1292 (2004–2005). Female athletes ranged from 144 (1999–2000 and 2003–2004) to 198 (2002–2003), while male athletes ranged from 221 (2005–2006) to 343 (2004–2005). Perhaps more helpfully stated, girls made up 45.4–49.6 percent of the student body at Castle Park but only 33.4–40.8 percent of the athletes from 1998 to 2008. At no point in that ten-year span was the disparity between the percentage of female athletes and the percentage of female students less than 6.7 percent. It was less than 10 percent in only three years, and at least 13 percent in five years. In the three years at issue in this lawsuit, the disparities were 6.7 percent (2005–2006), 10.3 percent (2006–2007), and 6.7 percent (2007–2008).[8]

There is no question that exact proportionality is lacking at Castle Park. Sweetwater concedes as much. Whether there is substantial proportionality, however, requires us to look beyond the raw numbers to "the institution's specific circumstances and the size of its athletic program." 1996 Clarification. Instructive on this point is the Department of Education's guidance that substantial proportionality generally requires that "the number of additional participants ... required for

exact proportionality" be insufficient "to sustain a viable team." *Biediger,* 691 F.3d at 94 (internal quotation marks omitted).

At Castle Park, the 6.7 percent disparity in the 2007–2008 school year was equivalent to 47 girls who would have played ***857** sports if participation were exactly proportional to enrollment and no fewer boys participated.[9] As the district court noted, 47 girls can sustain at least one viable competitive team.[10] Defendants failed to raise more than a conclusory assertion that the specific circumstances at Castle Park explained the 6.7% disparity between female participation opportunities and female enrollment, or that Castle Park could not support a viable competitive team drawn from the 47 girls. As a matter of law, then, we conclude that female athletic participation and overall female enrollment were not "substantially proportionate" at Castle Park at the relevant times.

C

[6] **[7]** Participation need not be substantially proportionate to enrollment, however, if Sweetwater can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of" female athletes. 44 Fed.Reg. at 71,418; *see also Neal,* 198 F.3d at 767–68. This second prong of the Title IX "effective accommodation" test "looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." 1996 Clarification. The Department of Education's 1996 guidance is helpful: "There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of" female students. *Id.* The guidance also makes clear that an institution must do more than show a *history* of program expansion; it "must demonstrate a continuing (*i.e.,* present) practice of program expansion as warranted by developing interests and abilities." *Id.*

Sweetwater contends that Castle Park has increased the number of teams on which girls can play in the last decade, showing evidence of the kind "history and continuing practice of program expansion" sufficient to overcome a lack of "substantial proportionality" between female athletic participation and overall female enrollment. But Sweetwater's methodology is flawed, and its argument misses the point of Title IX. The number of *teams* on which girls could theoretically participate is not controlling under Title IX, which focuses on the number of female *athletes. See Mansourian,* 602 F.3d at 969 ("The [Prong] Two analysis focuses primarily ... on increasing the number of women's athletic opportunities rather than increasing the number of women's teams.").

The number of female athletes at Castle Park has varied since 1998, but there were more girls playing sports in the 1998–1999 school year (156) than in the 2007–2008 school year (149). The four most recent years for which we have data show that a graph of female athletic participation at Castle Park over time looks nothing like the upward trend line that Title IX requires. The number of female athletes shrank from 172 in the 2004–2005 school year to 146 in 2005–2006, before growing to 174 in 2006–2007 and shrinking again to 149 in 2007–2008. As Plaintiffs suggest, these "dramatic ups and downs" are far from the kind of "steady march ***858** forward" that an institution must show to demonstrate Title IX compliance under the second prong of the three-part test. We conclude that there is no "history and continuing practice of program expansion" for women's sports at Castle Park.

D

[8] Female athletic participation is not substantially proportionate to overall female enrollment at Castle Park. And there is no history or continuing practice of program expansion for women's sports at the school. And yet, Sweetwater can still satisfy Title IX if it proves "that the interests and abilities of" female students "have been fully and effectively accommodated by the present program." 44 Fed.Reg. at 71,418; *see also Neal,* 198 F.3d at 767–68. This, the third prong of the Title IX "effective accommodation" test, considers whether a gender imbalance in athletics is the product of impermissible discrimination or merely of the genders' varying levels of interest in sports. *See* 1996 Clarification. Stated another way, a school where fewer girls than boys play sports does not violate Title IX if the imbalance is the result of girls' lack of interest in athletics.

[9] **[10]** The Department of Education's 1996 guidance is again instructive: In evaluating compliance under the third prong, we must consider whether there is (1) "unmet interest in a particular sport"; (2) ability to support a team in that sport; and (3) a "reasonable expectation of competition for the team." *Id.* Sweetwater would be Title IX-compliant unless all three conditions are present. *See id.* Finally, if an "institution has recently eliminated a viable team," we presume "that there is sufficient interest, ability, and available competition to sustain" a team in that sport absent strong evidence that conditions have changed. *Id.; see also Cohen v. Brown Univ.,* 101 F.3d 155, 180 (1st Cir.1996).

Sweetwater contends that (1) Plaintiffs were required to, but did not, conduct official surveys of female students at Castle Park to gauge unmet interest; (2) field hockey is irrelevant for Title IX purposes because it is not approved by the California Interscholastic Federation ("CIF"); and (3) in any event, field hockey was eliminated only because interest in the sport waned.

Sweetwater's arguments are either factually wrong or without legal support. First, Title IX plaintiffs need not themselves gauge interest in any particular sport. It is the school district that should evaluate student interest "periodically" to "identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex." 1996 Clarification. Second, field hockey *is* a CIF-approved sport.[11] But even if it were not, Sweetwater's position is foreclosed by Title IX's implementing regulations, which state that compliance "is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association." 34 C.F.R. § 106.6(c); *see also Biediger,* 691 F.3d at 93–94 (noting that we are to determine whether a particular "activity qualifies as a sport by reference to several factors relating to 'program structure and administration' and 'team preparation and competition' " (quoting Letter from Stephanie Monroe, Assistant Sec'y for Civil Rights, Office of Civil Rights, U.S. Dep't of Educ., to Colleagues (Sept. 17, 2008))). Third, the record makes clear that Castle Park cut its field hockey team not because interest in the sport waned, but because it was unable to ***859** find a coach. And the school's inability to hire a coach does not indicate lack of student interest in the sport.

Castle Park offered field hockey from 2001 through 2005, during which time the team ranged in size from 16 to 25 girls. It cut the sport before the 2005–2006 school year before offering it again in 2006–2007. It then cut field hockey a second time before the 2007–2008 school year. The Department of Education's guidance is clear on this point: "If an institution has recently eliminated a viable team ..., there is sufficient interest, ability, and available competition to sustain a[ ] ... team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists." 1996 Clarification; *see also Cohen,* 101 F.3d at 180. Castle Park's decision to cut field hockey twice during the relevant time period, coupled with its inability to show that its motivations were legitimate, is enough to show sufficient interest, ability, and available competition to sustain a field hockey team.

E

We conclude that Sweetwater has not fully and effectively accommodated the interests and abilities of its female athletes. The district court did not err in its award of summary judgment to Plaintiffs on their Title IX unequal participation claim, and we affirm the grant of injunctive relief to Plaintiffs on that issue.

III

[11] We review a district court's evidentiary rulings, such as its decisions to exclude expert testimony and to impose discovery sanctions, for an abuse of discretion, and a showing of prejudice is required for reversal. *See Estate of Barabin v. AstenJohnson, Inc.,* 740 F.3d 457, 462 (9th Cir.2014) (en banc); *see also United States v. Chao Fan Xu,* 706 F.3d 965, 984 (9th Cir.2013) (exclusion of expert testimony); *R & R Sails, Inc. v. Ins. Co. of Pa.,* 673 F.3d 1240, 1245 (9th Cir.2012) (imposition of discovery sanctions for Rule 26(a) and (e) violations).

[12] **[13]** In non jury cases such as this one, "the district judge is given great latitude in the admission or exclusion of evidence." *Hollinger v. United States,* 651 F.2d 636, 640 (9th Cir.1981). The Supreme Court has said that district courts have "broad latitude" to determine whether expert testimony is sufficiently reliable to be admitted. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 153, 119 S.Ct. 1167,

143 L.Ed.2d 238 (1999). And "we give particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)," which is "a recognized broadening of the sanctioning power." *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir.2001); *see also R & R Sails,* 673 F.3d at 1245 (same); *Jeff D. v. Otter,* 643 F.3d 278, 289 (9th Cir.2011) ("[A] district court has wide discretion in controlling discovery.") (alteration in original) (internal quotation marks omitted).

A

[14] We first address the exclusion of defense experts. Federal Rule of Evidence 702 governs the admissibility of expert testimony. It provides that a witness "qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if":

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> ***860** (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed.R.Evid. 702.

[15] **[16]** "It is well settled that bare qualifications alone cannot establish the admissibility of ... expert testimony." *United States v. Hermanek,* 289 F.3d 1076, 1093 (9th Cir.2002). Rather, we have interpreted Rule 702 to require that "[e]xpert testimony ... be both relevant and reliable." *Estate of Barabin,* 740 F.3d at 463 (alteration and ellipsis in original) (internal quotation marks omitted). A proposed expert's testimony, then, must "have a reliable basis in the knowledge and experience of his discipline." *Kumho Tire,* 526 U.S. at 148, 119 S.Ct. 1167 (internal quotation marks omitted). This requires district courts, acting in a "gatekeeping role," to assess "whether the reasoning or methodology underlying the testimony" is valid and "whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 592–93, 597, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) ("*Daubert I* "). It is not "the correctness of the expert's conclusions" that matters, but "the soundness of his methodology." *Estate of Barabin,* 740 F.3d at 463 (internal quotation marks omitted).

The district court excluded the proposed testimony of Peter Schiff—a retired superintendent of a different school district who would have testified about "the finances of schools and high school athletic programs, as well as equitable access to school facilities at Castle Park,"—because it could not "discern what, if any, method he employed in arriving at his opinions." The district court also found that Schiff's "conclusions appear to be based on his personal opinions and speculation rather than on a systematic assessment of ... athletic facilities and programs at [Castle Park]." Further, the district court called Schiff's site visits "superficial," and noted that "experience with the nonrelevant issue of school finance" did not qualify him "to opine on Title IX compliance."

Similarly, the district court excluded the proposed testimony of Penny Parker—an assistant principal at a different high school who would have testified about the "unique nature of high school softball and its role at Castle Park,"—because her "methodology is not at all clear" and "her opinions are speculative ... inherently unreliable and unsupported by the facts."

We assume without deciding that (1) Schiff and Parker's proposed testimony was relevant, and (2) Schiff and Parker were qualified as Title IX experts under Rule 702. Nonetheless, we conclude that the district court did not abuse its discretion when it struck both experts' proposed testimony. The record suggests that the district court's determination that Schiff and Parker's proposed testimony was based on, at best, an unreliable methodology, was not illogical or implausible.

Schiff did not visit Castle Park to conduct an in-person investigation until *after* he submitted his initial report on the case. And when he did visit, his visit was cursory and not inseason: Schiff only walked the softball and baseball fields. His opinion that the "girls' softball field was in excellent shape," then, was based on no more than a superficial visual examination of the softball and baseball fields. Schiff—who Sweetwater contends is qualified "to assess the state of the athletic facilities for both boys and girls teams" at Castle Park because of his "experience

on the business side of athletics," his "extensive[ ]" work with CIF, and his high school baseball coaching tenure —did not enter the softball or baseball dugouts (or batting ***861** cages), and yet he sought to testify "on the renovations to the softball field, including new fencing, bleachers, and dugout areas."

Parker's only visit to Castle Park lasted barely an hour. And that visit was as cursory as Schiff' s: Parker—a former softball coach who Sweetwater offered as an expert on "all aspects of the game of softball,"—"toured the Castle Park facilities," including the softball and baseball fields and boys and girls locker rooms, and "was present while both a baseball and a softball game were being played simultaneously." She "observed the playing surfaces, dugout areas, field condition, fencing, bleachers, and amenities," but only from afar. Like Schiff, Parker took no photographs and no measurements. She did not speak to anyone at Castle Park about the fields. And she admitted that her proposed testimony about the softball team's allegedly inferior fundraising and accounting practices was speculative.

[17] **[18]** Schiff and Parker based their proposed testimony on superficial inspections of the Castle Park facilities. Even if a visual walkthrough, without more, *could* be enough in some cases to render expert testimony admissible under Rule 702, it certainly does not *compel* that conclusion in all cases. Moreover, as the district court found, Schiff and Parker's conclusions were based on their "personal opinions and speculation rather than on a systematic assessment of [Castle Park's] athletic facilities and programs." But personal opinion testimony is inadmissible as a matter of law under Rule 702, *see Daubert v. Merrell Dow Pharm., Inc.,* 43 F.3d 1311, 1319 (9th Cir.1995)("*Daubert II* "), and speculative testimony is inherently unreliable, *see Diviero v. Uniroyal Goodrich Tire Co.,* 114 F.3d 851, 853 (9th Cir.1997); *see also Daubert I,* 509 U.S. at 590, 113 S.Ct. 2786 (noting that expert testimony based on mere "subjective belief or unsupported speculation" is inadmissible). We cannot say the district court abused its discretion when it barred Schiff and Parker from testifying at trial after finding their testimony to be "inherently unreliable and unsupported by the facts." The district court properly exercised its "gatekeeping role" under *Daubert I,* 509 U.S. at 597, 113 S.Ct. 2786.

B

[19] We next address the exclusion of fact witnesses. The general issue is whether witnesses not listed in Rule 26(a) disclosures—and who were identified 15 months after the discovery cutoff and only ten months before trial—were identified too late in the process.

The Federal Rules of Civil Procedure require parties to provide to other parties "the name ... of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses." Fed.R.Civ.P. 26(a)(1)(A)(i). And "[a] party who has made a disclosure under Rule 26(a) ... must supplement or correct its disclosure" in a "timely manner if the party learns that in some material respect the disclosure ... is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." *Id.* R. 26(e). A party that does not timely identify a witness under Rule 26 may not use that witness to supply evidence at a trial "unless the failure was substantially justified or is harmless." *Id.* R. 37(c)(1); *see also Yeti by Molly,* 259 F.3d at 1105. Indeed, Rule 37(c)(1) is "intended to put teeth into the mandatory ... disclosure requirements" of Rule 26(a) and (e). 8B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2289.1 (3d ed.2014).

***862** The district court excluded 38 Sweetwater witnesses as untimely disclosed, in violation of Rule 26(a) and (e), in part because it found "no reason why any of the 38 witnesses were not disclosed to [P]laintiffs either initially or by timely supplementation." The district court concluded that "the mere mention of a name in a deposition is insufficient" to notify Plaintiffs that Sweetwater "intend[s] to present that person at trial," and that to "suggest otherwise flies in the face of the requirements of Rule 26." And the district court reasoned that "[w]aiting until long after the close of discovery and on the eve of trial to disclose allegedly relevant and noncumulative witnesses is harmful and without substantial justification."

[20] A "district court has wide discretion in controlling discovery." *Jeff D.,* 643 F.3d at 289 (internal quotation marks omitted). And, as we noted earlier, that discretion is

"particularly wide" when it comes to excluding witnesses under Rule 37(c)(1). *Yeti by Molly,* 259 F.3d at 1106.

Sweetwater argues that exclusion of 30 of its 38 witnesses was an abuse of discretion because (1) "Plaintiffs were made aware" of those witnesses during discovery —specifically, during Plaintiffs' depositions of other Sweetwater witnesses, and (2) any violation of Rule 26 "was harmless to Plaintiffs." Of the remaining eight witnesses, Sweetwater contends that untimely disclosure was both justified because those witnesses were not employed at Castle Park before the discovery cutoff date, and harmless because they were disclosed more than eight months before trial. We conclude that the district court did not abuse its discretion by imposing a discovery sanction. The record amply supports the district court's discretionary determination that Sweetwater's lapse was not justified or harmless.

Initial Rule 26(a) disclosures were due October 29, 2007. At least 12 of Sweetwater's 38 contested witnesses were Castle Park employees by that date. The discovery cutoff was August 8, 2008, and lay witness depositions had to be completed by September 30, 2008. At least 19 of the 38 witnesses were Castle Park employees by those dates. And yet, Sweetwater did not disclose any of the 38 witnesses until November 23, 2009, more than 15 months after the close of discovery and less than a year before trial.

Sweetwater does not dispute that it did not formally offer the names of any of the 38 witnesses by the October 29, 2007, deadline for initial Rule 26(a) disclosures (or by the August 8, 2008, discovery cutoff, for that matter). Nor does it dispute that it did not "supplement or correct its disclosure or response," *see* Fed.R.Civ.P. 26(a)(1), by offering the witnesses' names in accord with Rule 26(e). Instead, Sweetwater contends that because other disclosed witnesses had mentioned the contested witnesses at their depositions, Plaintiffs were on notice that the contested witnesses might testify and were not prejudiced by untimely disclosure. Sweetwater contends, in essence, that it complied with Rule 26 because Plaintiffs knew of the contested witnesses' existence.

The district court did not abuse its discretion by rejecting Sweetwater's argument. The theory of disclosure under the Federal Rules of Civil Procedure is to encourage parties to try cases on the merits, not by surprise, and not by ambush. After disclosures of witnesses are made, a party can conduct discovery of what those witnesses would say on relevant issues, which in turn informs the party's judgment about which witnesses it may want to call at trial, either to controvert testimony or to put it in context. Orderly procedure requires timely disclosure so that trial efforts ***863** are enhanced and efficient, and the trial process is improved. The late disclosure of witnesses throws a wrench into the machinery of trial. A party might be able to scramble to make up for the delay, but last-minute discovery may disrupt other plans. And if the discovery cutoff has passed, the party cannot conduct discovery without a court order permitting extension. This in turn threatens whether a scheduled trial date is viable. And it impairs the ability of every trial court to manage its docket.

With these considerations in mind, we return to the governing rules. Rule 26 states that "a *party* must, without awaiting a discovery request, provide to the other parties ... the name and, if known, the address and telephone number of each individual likely to have discoverable information." Fed.R.Civ.P. 26(a)(1)(A) (emphasis added). Compliance with Rule 26's disclosure requirements is "mandatory." *Republic of Ecuador v. Mackay,* 742 F.3d 860, 865 (9th Cir.2014).

[21] The rule places the disclosure obligation on a "party." That another witness has made a passing reference in a deposition to a person with knowledge or responsibilities who could conceivably be a witness does not satisfy a party's disclosure obligations. An adverse party should not have to guess which undisclosed witnesses may be called to testify. We—and the Advisory Committee on the Federal Rules of Civil Procedure—have warned litigants not to " 'indulge in gamesmanship with respect to the disclosure obligations' " of Rule 26. *Marchand v. Mercy Med. Ctr.,* 22 F.3d 933, 936 n. 3 (9th Cir.1994) (quoting Fed.R.Civ.P. 26 advisory committee's note (1993 amend.)). The record shows that the district court did not abuse its discretion when it concluded that Sweetwater's attempt to obfuscate the meaning of Rule 26(a) was just this sort of gamesmanship. There was no error in the district court's conclusion that "the mere mention of a name in a deposition is insufficient to give notice to" Plaintiffs that Sweetwater "intend[ed] to present that person at trial."

The district court did not abuse its discretion when it concluded that Sweetwater's failure to comply

with Rule 26's disclosure requirement was neither substantially justified nor harmless. *See* Fed.R.Civ.P. 37(c)(1). Sweetwater does not argue that its untimely disclosure of these 30 witnesses was substantially justified. Nor was it harmless. Had Sweetwater's witnesses been allowed to testify at trial, Plaintiffs would have had to depose them—or at least to consider which witnesses were worth deposing—and to prepare to question them at trial. *See Yeti by Molly,* 259 F.3d at 1107. The record demonstrates that the district court's conclusion, that reopening discovery before trial would have burdened Plaintiffs and disrupted the court's and the parties' schedules, was well within its discretion. The last thing a party or its counsel wants in a hotly contested lawsuit is to make last-minute preparations and decisions on the run. The late disclosures here were not harmless. *See Hoffman v. Constr. Protective Servs., Inc.,* 541 F.3d 1175, 1180 (9th Cir.2008).

Nor did the district court abuse its discretion by finding that the untimely disclosure of the eight remaining witnesses also was not harmless. Allowing these witnesses to testify and reopening discovery would have had the same costly and disruptive effects. Nor was it substantially justified merely because the eight witnesses were not employed at Castle Park until after the discovery cutoff date. Sanctioning this argument would force us to read the supplementation requirement out of Rule 26(e). We will not do that.

***864** Sweetwater did not comply with the disclosure requirements of Rule 26(a) and (e). That failure was neither substantially justified nor harmless. The district court did not abuse its discretion when it excluded Sweetwater's 38 untimely disclosed witnesses from testifying at trial.

C

[22] The next issue concerns whether the district court abused its discretion by declining to consider contemporaneous evidence at trial. On April 26, 2010, the district court set a June 15, 2010, cutoff date for Sweetwater to provide evidence of "continuous repairs and renovations of athletic facilities at Castle Park" for consideration at trial. Improvements made after June 15, 2010, but before the start of trial on September 14, 2010, the district court explained, would not be considered. Sweetwater did not then object to the district court's decision.

On appeal, however, Sweetwater argues that injunctive relief should be based on contemporaneous evidence, not on evidence of past harm. And if the district court had considered contemporaneous evidence at trial, Sweetwater speculates, it would have found Castle Park in compliance with Title IX and would not have issued an injunction.

[23] This argument fails for several reasons. First, a "trial court's power to control the conduct of trial is broad." *United States v. Panza,* 612 F.2d 432, 438 (9th Cir.1979). Establishing a cutoff date after which it would not consider supplemental improvements to facilities at Castle Park—especially one that was only 90 days before trial—aided orderly pre-trial procedure and was well within the district court's discretion.

Second, the district court *did* consider some of Sweetwater's remedial improvements, "particularly with respect to the girls' softball facility," but concluded that "those steps have not been consistent, adequate or comprehensive" and that "many violations of Title IX have not been remedied or even addressed." Sweetwater's contention that "the District Court appeared to ignore key evidence of changed facilities" is unpersuasive.

Third, even if contemporaneous evidence showed that Sweetwater was complying with Title IX at the time of trial, the district court *still* could have issued an injunction based on past harm. *See United States v. Mass. Mar. Acad.,* 762 F.2d 142, 157–58 (1st Cir.1985). The plaintiff class included *future* students, who were protected by the injunction. "Voluntary cessation" of wrongful conduct "does not moot a case or controversy unless subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* 551 U.S. 701, 719, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) (alteration in original) (internal quotation marks omitted).

Fourth, the district court found no evidence that Sweetwater had "addressed or implemented policies or procedures designed to cure the myriad areas of general noncompliance with Title IX." In light of the systemic problem of gender inequity in the Castle Park athletics

program, the district court did not abuse its discretion by issuing an injunction requiring Sweetwater to comply with Title IX.

IV

[24] We review *de novo* a district court's decision to deny a Rule 12(b)(6) ***865** motion to dismiss.[12] *See Dunn v. Castro,* 621 F.3d 1196, 1198 (9th Cir.2010). Similarly, whether a party has standing to bring a claim is a question of law that we review *de novo. See Jewel v. Nat'l Sec. Agency,* 673 F.3d 902, 907 (9th Cir.2011). But we review a district court's fact-finding on standing questions for clear error. *See In re ATM Fee Antitrust Litig.,* 686 F.3d 741, 747 (9th Cir.2012).

[25] **[26]** **[27]** Article III of the Constitution requires a party to have standing to bring its suit. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The elements of standing are wellestablished: the party must have suffered (1) an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of," meaning the injury has to be "fairly traceable to the challenged action of the defendant"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61, 112 S.Ct. 2130 (alteration, ellipsis, citations, and internal quotation marks omitted).[13] "In a class action, standing is satisfied if at least one named plaintiff meets the requirements." *Bates v. United Parcel Serv., Inc.,* 511 F.3d 974, 985 (9th Cir.2007) (en banc).

[28] The district court held that Plaintiffs had standing to bring their Title IX retaliation claim, but gave few reasons for its decision. *See Ollier,* 735 F.Supp.2d at 1226. On appeal, Sweetwater argues, as it did before the district court, that Plaintiffs lack standing to enjoin the retaliatory action allegedly taken against Coach Martinez because students may not "recover for adverse retaliatory employment actions taken against" an educator, even if that educator "engaged in protected activity on behalf of the students." Sweetwater contends that while Coach Martinez would have had standing to bring a Title IX retaliation claim himself, the "third party" students cannot "maintain a valid cause of action for retaliation under Title IX for their coach's protected activity and the adverse employment action taken against the coach."

We reject this argument. It misunderstands Plaintiffs' claim, which asserts that Sweetwater impermissibly retaliated against *them* by firing Coach Martinez in response to Title IX complaints he made on Plaintiffs' behalf. With their softball coach fired, Plaintiffs' prospects for competing were hampered. Stated another way, Plaintiffs' Title IX retaliation claim seeks to vindicate not Coach Martinez's rights, but Plaintiffs' own rights. Because Plaintiffs were asserting their own "legal rights and interests," not a claim of their coach, the generally strict limitations on third-party standing do not bar their claim. *See Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

***866** Justice O'Connor correctly said that "teachers and coaches ... are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are the only effective adversaries of discrimination in schools." *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 181, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (alteration and internal quotation marks omitted). Sweetwater's position—that Plaintiffs lack standing because it was not they who made the Title IX complaints—would allow any school facing a Title IX retaliation suit brought by students who did not themselves make Title IX complaints to insulate itself simply by firing (or otherwise silencing) those who made the Title IX complaints on the students' behalf. We will "not assume that Congress left such a gap" in Title IX's enforcement scheme. *Id.*

[29] An injured party may sue under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.,* if he "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Thompson v. N. Am. Stainless, LP,* 562 U.S. 170, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011) (internal quotation marks omitted). Plaintiffs, of course, do not bring their suit under the APA, but the Supreme Court has extended its "zone of interests" jurisprudence to cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* whose antiretaliation provisions are analogous here. *See Thompson,* 131 S.Ct. at 870. And

students like Plaintiffs surely fall within the "zone of interests" that Title IX's implicit antiretaliation provisions seek to protect. *See Jackson,* 544 U.S. at 173–77, 125 S.Ct. 1497.

[30] Finally, the Supreme Court has foreclosed Sweetwater's position. Faced with the argument that anti-retaliation provisions limit standing to those "who engaged in the protected activity" and were "the subject of unlawful retaliation," the Court has said that such a position is an "artificially narrow" reading with "no basis in text or prior practice." *Thompson,* 131 S.Ct. at 869–70.[14] Rather, "any plaintiff with an interest arguably sought to be protected by" a statute with an anti-retaliation provision has standing to sue under that statute. *Id.* at 870 (alteration and internal quotation marks omitted). Students have "an interest arguably sought to be protected by" Title IX——indeed, students are the statute's very focus.

[31] Coach Martinez gave softball players extra practice time and individualized attention, persuaded volunteer coaches to help with specialized skills, and arranged for the team to play in tournaments attended by college recruiters. The softball team was stronger with Coach Martinez than without him. After Coach Martinez was fired, Sweetwater stripped the softball team of its voluntary assistant coaches, canceled the team's 2007 awards banquet, and forbade the team from participating in a Las Vegas tournament attended by college recruiters. The district court found these injuries, among others, sufficient to confer standing on Plaintiffs. We agree.

Plaintiffs have alleged judicially cognizable injuries flowing from Sweetwater's retaliatory responses to Title IX complaints ***867** made by their parents and Coach Martinez. The district court's ruling that Plaintiffs have Article III standing to bring their Title IX retaliation claim and its decision to deny Sweetwater's motion to strike that claim were not error.

V

[32] **[33]** We review a district court's decision to grant a permanent injunction for an abuse of discretion, but we review for clear error the factual findings underpinning the award of injunctive relief, *see Momot v. Mastro,* 652 F.3d 982, 986 (9th Cir.2011), just as we review for clear error a district court's findings of fact after bench trial. *See Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 665 (9th Cir.1996). However, we review *de novo* "the rulings of law relied upon by the district court in awarding injunctive relief." *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1177 (9th Cir.2011) (internal quotation marks omitted).

[34] **[35]** We come to the substance of Plaintiffs' retaliation claim, an important part of this case. "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.... Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson,* 544 U.S. at 178, 180, 125 S.Ct. 1497. The Supreme Court "has often looked to its Title VII interpretations ... in illuminating Title IX," so we apply to Title IX retaliation claims "the familiar framework used to decide retaliation claims under Title VII." *Emeldi v. Univ. of Or.,* 698 F.3d 715, 724–25 (9th Cir.2012), *cert. denied,* —— U.S. ——, 133 S.Ct. 1997, 185 L.Ed.2d 866 (2013) (internal quotation marks omitted).

[36] **[37]** Under that framework, a "plaintiff who lacks direct evidence of retaliation must first make out a *prima facie* case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two." *Id.* at 724. The burden on a plaintiff to show a *prima facie* case of retaliation is low. Only "a minimal threshold showing of retaliation" is required. *Id.* After a plaintiff has made this showing, the burden shifts to the defendant to "articulate a legitimate, non-retaliatory reason for the challenged action." *Id.* If the defendant can do so, the burden shifts back to the plaintiff to show that the reason is pretextual. *See id.*

A

[38] The district court found that Plaintiffs had made out a *prima facie* case of retaliation: They engaged in protected activity when they complained about Title IX violations in May and July 2006 and when they filed their complaint in April 2007. They suffered adverse action because the softball program was "significantly disrupted" when, among other things, Coach Martinez was fired and replaced by a "far less experienced coach." And a causal link between Plaintiffs' protected conduct and the adverse actions they suffered "may be established

by an inference derived from circumstantial evidence"—in this case, the "temporal proximity" between Plaintiffs' engaging in protected activity in May 2006, July 2006, and April 2007, and the adverse actions taken against them in July 2006 and spring 2007.

Sweetwater contends that these findings were clearly erroneous because (1) "At most, the named plaintiffs who attended CPHS at the time of the complaints can legitimately state they engaged in protected activity"; (2) the district court did not ***868** articulate the standard it used to determine which actions were "adverse" and did not, as Sweetwater says was required, evaluate whether Plaintiffs "were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation"; and (3) there was no causal link between protected activity and adverse action because Coach Martinez was fired to make way for a certified, on-site teacher, not because of any Title IX complaints.

"In the Title IX context, speaking out against sex discrimination ... is protected activity." *Id.* at 725 (alteration and internal quotation marks omitted). Indeed, "Title IX empowers a woman student to complain, without fear of retaliation, that the educational establishment treats women unequally." *Id.* That is precisely what happened here. The father of two of the named plaintiffs complained to the Castle Park athletic director in May 2006 about Title IX violations; Plaintiffs' counsel sent Sweetwater a demand letter in July 2006 regarding Title IX violations at Castle Park; and Plaintiffs filed their class action complaint in April 2007. These are indisputably protected activities under Title IX, and the district court's finding to that effect was not clearly erroneous.

[39] **[40]** It is not a viable argument for Sweetwater to urge that a class may not "sue a school district for retaliation in a Title IX athletics case." As we have previously held: "The existence of a private right of action to enforce Title IX is well-established." *Mansourian v. Regents of Univ. of California,* 602 F.3d 957, 964 n. 6 (9th Cir.2010). Further, a private right of action under Title IX includes a claim for retaliation. As the United States Supreme Court has said: "Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.... Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Jackson,* 544 U.S. at 178, 180, 125 S.Ct. 1497. Nor is it a viable argument for Sweetwater to complain that only some members of the plaintiff's class who attended CPHS when complaints were made can urge they engaged in protected activity. That the class includes students who were not members of the softball team at the time of retaliation, and who benefit from the relief, does not impair the validity of the relief. *See Thompson v. N. Am. Stainless, LP,* 562 U.S. 170, 131 S.Ct. 863, 870, 178 L.Ed.2d 694 (2011) (holding that Title VII "enabl[es] suit by any plaintiff with an interest arguably sought to be protected.") (internal quotations and alteration omitted); *Mansourian,* 602 F.3d at 962 (approving a class of female wrestlers "on behalf of all current and future female" university students). The relief of injunction is equitable, and the district court had broad powers to tailor equitable relief so as to vindicate the rights of former and future students. *See generally Dobbs on Remedies,* §§ 2.4, 2.9.

[41] **[42]** **[43]** Under Title IX, as under Title VII, "the adverse action element is present when 'a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination.' " *Id.* at 726 (alterations in original) (quoting *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)). Sweetwater does not argue—because it cannot argue—that the district court's adverse action findings do not satisfy this standard. [15] The district court found that ***869** Plaintiffs' "successful softball program was significantly disrupted to the detriment of the program and participants" because: (1) Coach Martinez was fired and replaced by a "far less experienced coach"; (2) the team was stripped of its assistant coaches; (3) the team's annual award banquet was canceled in 2007; (4) parents were prohibited from volunteering with the team; and (5) the team was not allowed to participate in a Las Vegas tournament attended by college recruiters. It was not clear error for the district court to conclude that a reasonable person could have found any of these actions "materially adverse" such that they "well might have dissuaded [him] from making or supporting a charge of discrimination." *Id.* (internal quotation marks omitted).

[44] **[45]** We construe the causal link element of the retaliation framework "broadly"; a plaintiff "merely has to prove that the protected activity and the [adverse] action are not completely unrelated." *Id.* (internal

quotation marks omitted). In Title VII cases, causation "may be inferred from circumstantial evidence, such as the [defendant's] knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory" conduct. *Yartzoff v. Thomas,* 809 F.2d 1371, 1376 (9th Cir.1987). *Emeldi* extended that rule to Title IX cases. *See* 698 F.3d at 726 ("[T]he proximity in time between" protected activity and allegedly retaliatory action can be "strong circumstantial evidence of causation."). Plaintiffs have met their burden: They engaged in protected activity in May 2006, July 2006, and April 2007. Coach Martinez was fired in July 2006 and the annual awards banquet was canceled in Spring 2007. The timing of these events is enough in context to show causation in this Title IX retaliation case. That the district court found as much was not clearly erroneous. Plaintiffs state a *prima facie* case of Title IX retaliation.

B

[46] Sweetwater offered the district court four legitimate, nonretaliatory reasons for firing Coach Martinez: First, Castle Park wanted to replace its walk-on coaches with certified teachers. Second, Coach Martinez mistakenly played an ineligible student in 2005 and forced the softball team to forfeit games as a result. Third, he allowed an unauthorized parent to coach a summer softball team. Fourth, he filed late paperwork related to the softball team's participation in a Las Vegas tournament —a mishap that Sweetwater said created an unnecessary liability risk. The district court rejected each reason, concluding that all four were "not credible and are pretextual."

Sweetwater argues on appeal that the district court committed clear error by disregarding these legitimate, nonretaliatory reasons because it "failed to evaluate and weigh the evidence before it" when it "looked past the abundance of uncontradicted information preexisting the Title IX complaints ... and focused almost entirely" on Coach Martinez's termination. Sweetwater also adds that Castle Park did not renew Coach Martinez's contract in part because "he was a mean and intimidating person" who often spoke in a "rough voice" and could be "abrasive." Coach Martinez, Sweetwater contends, "did not possess the guiding principles required ***870** of a coach because he constantly failed to follow the rules" at Castle Park.

[47] Sweetwater disregards the salient fact that the district court held a trial on retaliation. The district court could permissibly find that, on the evidence it considered, Sweetwater's non-retaliatory reasons for firing Coach Martinez were a pretext for unlawful retaliatory conduct. First, Sweetwater contends that Castle Park fired Coach Martinez "primarily" because he allowed an unauthorized parent to coach a summer league team, but also that this incident merely "played a role" in his firing, and that the reason given Martinez when he was fired was that Castle Park "wanted an on-site coach." These shifting, inconsistent reasons for Coach Martinez's termination are themselves evidence of pretext. *See Hernandez v. Hughes Missile Sys. Co.,* 362 F.3d 564, 569 (9th Cir.2004) ("From the fact that Raytheon has provided conflicting explanations of its conduct, a jury could reasonably conclude that its most recent explanation was pretextual.").

Second, the district court's findings underlying its conclusion that Sweetwater's "stated reasons for Martinez's termination are not credible and are pretextual" are convincing and not clearly erroneous. Coach Martinez was not fired as part of a coordinated campaign to replace walk-on coaches with certified teachers, as Sweetwater contends. There was a preference for certified teachers in place long before Coach Martinez was hired, and there was no certified teacher ready to replace him after he was fired. Nor was the district court required by the evidence to find that Coach Martinez was fired because he played an ineligible student and forced the softball team to forfeit games as a result. This incident occurred during the 2004–2005 school year, but Coach Martinez was not reprimanded at the time and was not fired until more than a year later. Also, eligibility determinations were the responsibility of school administrators, not athletics coaches.

[48] Sweetwater's argument that it fired Coach Martinez because he let an unauthorized parent coach a summer softball team is specious. Not only was Coach Martinez absent when the incident occurred, but he forbade the parent from coaching after learning of his ineligibility to do so. Moreover, the summer softball team in question "was not conducted under the auspices of the high school." Finally, while Coach Martinez did file late

paperwork for the Las Vegas tournament, he was not then admonished for it. As with the ineligible player incident, the timing of his termination suggests that Sweetwater's allegedly nonretaliatory reason is merely a *post hoc* rationalization for what was actually an unlawful retaliatory firing. *See Gaffney v. Riverboat Servs. of Ind., Inc.,* 451 F.3d 424, 452 (7th Cir.2006) (concluding that a district court's finding that "defendants first fired the plaintiffs and then came up with *post hoc* rationalizations for having done so" was not clearly erroneous).

On the record before it, the district court correctly could find that Coach Martinez was fired in retaliation for Plaintiffs' Title IX complaints, not for any of the pretextual, non-retaliatory reasons that Sweetwater has offered.

C

Having determined that the district court did not clearly err when it found (1) that Plaintiffs established a *prima facie* case of Title IX retaliation, and (2) that Sweetwater's purported non-retaliatory reasons for firing Coach Martinez were pretextual excuses for unlawful retaliation, we conclude that it was not an abuse of ***871** discretion for the district court to grant permanent injunctive relief to Plaintiffs on their Title IX retaliation claim. We affirm the grant of injunctive relief to Plaintiffs on that issue. [16]

VI

We reject Sweetwater's attempt to relitigate the merits of its case. Title IX levels the playing fields for female athletes. In implementing this important principle, the district court committed no error.

AFFIRMED.

All Citations

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Footnotes

* The Honorable Morrison C. England, Jr., Chief District Judge for the U.S. District Court for the Eastern District of California, sitting by designation.

1 Neither of Sweetwater's briefs on appeal includes argument on Plaintiffs' unequal treatment and benefits claim. Thus, Sweetwater has waived its appeal on that claim. *See Hall v. City of L.A.,* 697 F.3d 1059, 1071 (9th Cir.2012).

2 Plaintiffs' 42 U.S.C. § 1983 sex-based discrimination claim dropped out of the case in July 2010, when the district court severed it from the Title IX claims upon agreement of the parties.

3 Plaintiffs' retaliation claim was premised on (1) the July 2006 firing of Chris Martinez, "a highly qualified and well-loved softball coach," which occurred shortly after Castle Park received a formal Title IX complaint; (2) a ban on a parent-run snack stand during softball games; and (3) a ban on parental assistance in softball coaching.

4 Sweetwater also gave notice of its intent to appeal the district court's decision to certify the Plaintiffs' proposed class. However, neither of Sweetwater's briefs on appeal includes argument on the district court's decision to grant class certification. Sweetwater's appeal on that issue is waived. *See Hall,* 697 F.3d at 1071.

5 We give deference to the Department of Education's guidance according to *Chevron USA v. Natural Resources Defense Council,* 467 U.S. 837, 843–44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Mansourian v. Regents of Univ. of Cal.,* 602 F.3d 957, 965 n. 9 (9th Cir.2010).

6 On appeal, Sweetwater propounds a new theory that, with respect to the first prong of the "effective accommodation" test, "the idea of proportionality relies on percentages, rather than absolute numbers." The Government calls this theory, which has no precedential support, "flatly incorrect."

7 An institution that sought to explain a disparity from substantial proportionality should show how its specific circumstances justifiably explain the reasons for the disparity as being beyond its control.

8 That there are "more athletic sports teams for girls (23) than ... for boys (21)" at Castle Park is not controlling. We agree with Plaintiffs that counting "sham girls' teams," like multiple levels of football and wrestling, despite limited participation by girls in those sports, is "both misleading and inaccurate." It is the number of female athletes that matters. After all, Title IX "participation opportunities must be real, not illusory." 1996 Letter.

9 In 2005–2006 (6.7 percent; 48 girls) and 2006–2007 (10.3 percent; 92 girls), the disparity was even greater.

10 The Department of Education says only that a 62–woman gap would likely preclude a finding of substantial proportionality, but that a six-woman gap would likely not. 1996 Clarification.

11 See Field Hockey, Cal. Interscholastic Fed'n, http://www. cifstate.org/index.php/other-approved-sports/field-hockey (last visited July 28, 2014).

12 Because the district court construed Sweetwater's motion to strike Plaintiffs' Title IX retaliation claim as a Rule 12(b)(6) motion to dismiss that claim, *see Ollier,* 735 F.Supp.2d at 1224, we do the same.

13 Sweetwater does not contest that Plaintiffs' alleged harm is "fairly traceable" to them. Sweetwater's argument against redressability is premised on the idea that prospective injunctive relief cannot redress past harm. Because Plaintiffs' harm is ongoing, that argument fails. *See McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 284–85 (2d Cir.2004); *see also N. Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 553 n. 15, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (Powell, J., dissenting). Only Plaintiffs' alleged injury in fact, then, is at issue in our analysis.

14 *Thompson v. North American Stainless, LP* was a Title VII case, but the Supreme Court's reasoning applies with equal force to Title IX.

15 Rather, Sweetwater contends that the district court applied the wrong standard and that Plaintiffs, to show adverse action, must prove "that they were denied access to the educational opportunities or benefits provided by the school as a direct result of retaliation." Our decision in *Emeldi v. University of Oregon,* however, illustrates that Sweetwater's position is simply not the law.

16 We also affirm the grant of injunctive relief to Plaintiffs on their Title IX unequal treatment and benefits claim, any objection to which Sweetwater waived on appeal by not arguing it. *See Hall,* 697 F.3d at 1071.

858 F.Supp.2d 1093
United States District Court,
S.D. California.

Veronica OLLIER, et al., Plaintiffs,
v.
SWEETWATER UNION HIGH SCHOOL DISTRICT, et al., Defendants.

Civil No. 07cv714–L(WMC).
|
Feb. 9, 2012.
|
Order Denying Motion to Dismiss June 21, 2012.

Synopsis

Background: Female high school athletes brought class action against school district, alleging that district violated Title IX regarding facilities for female athletes, as well as asserting a retaliation claim.

Holdings: The District Court, M. James Lorenz, J., held that:

[1] recruiting efforts were not equal;

[2] locker rooms and practice and competition facilities were of better quality, size, and location for male athletes;

[3] males were provided with more and superior quality equipment and supplies;

[4] females did not have equitable number of competitive events or practices;

[5] coach and players suffered retaliation;

[6] termination was pretext for retaliation; and

[7] injunctive relief was warranted requiring district to comply with Title IX.

Judgment for plaintiffs.

West Headnotes (22)

[1] **Civil Rights**
Extracurricular activities;athletics

Title IX equal treatment claims allege sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[2] **Civil Rights**
Extracurricular activities;athletics

Recruiting efforts by school district of female high school athletes were not equal to those of male athletes, and therefore, violated Title IX, where female athletes were provided with fewer coaches, who also had more limited experience, coaches had excessive other assignments, one head coach for girls' teams was head coach of three teams but no head coach for male teams was assigned as head coach for three teams, coaches for female athletes had higher turnover and several times were appointed shortly before start of season, meaning there was no time for recruiting, athletic director went to feeder schools to talk about boys' athletic programs, and middle-school boys and parents were invited to watch football practice. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[3] **Civil Rights**
Extracurricular activities;athletics

Locker rooms and practice and competition facilities were of better quality, size, and location for male high school athletes than female athletes, in violation of Title IX; football team had its own separate locker room that was rated as superior in size and quality, female athletes had access only to generic locker room with lockers too small

to store equipment and which was shared by all other girls' athletic teams and all other physical education classes, female athletes were required to carry all their equipment with them during the school day, superior or adequate team meeting facilities were provided to 58% of male athletes but only 30% of females, girls' softball dugouts were chain link and did not have a roof most of the time while boys' baseball dugouts were cinderblock and had roofs, as well as being painted in school colors, softball team and coaches maintained field because it did not have anyone designated to care for it, softball field was not secured from other uses, softball field was hard and uneven and had no dedicated bullpen, unlike baseball field, softball players and spectators suffered injuries because of the poor conditions, and concessions were offered less at female athletic events than male events. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[4] Civil Rights

Extracurricular activities;athletics

Male high school athletes were provided with more and superior quality equipment and supplies than female athletes, as well as storage and uniforms, in violation of Title IX, where coaches were hired late and with less experience for female sports, resulting in fewer and lesser quality equipment and consumable supplies compared to male athletes, girls' softball program had fewer balls, carts, and buckets than boys' baseball program, baseball field had large maintenance storage area while softball field did not, and school district did not monitor uniform replacement practices for gender equity. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[5] Civil Rights

Extracurricular activities;athletics

Female high school athletes did not have equitable number of competitive events or practices as male athletes, in violation of Title IX, where coaches for girls' sports were hired late, resulting in fewer competitive opportunities than boys, and boys had greater access to premium game time for competition and practice time that was immediately after school. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[6] Civil Rights

Extracurricular activities;athletics

Coaching for female high school athletes was not equivalent to that for boys' sports, in violation of Title IX, where coaches for girls' teams were fewer in number, less experienced, and overburdened in comparison to boys' teams' coaches, which directly impacted quantity and quality of instructional benefits provided to athletes. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[7] Civil Rights

Extracurricular activities;athletics

Male high school athletes were provided with greater access to athletic trainers and medical services than female athletes, in violation of Title IX, where weight training facility was used predominately by boys, and equipment available was designed for absolute-strength-based sports in which boys participated. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[8] Civil Rights

Extracurricular activities;athletics

Publicity and promotional support for male high school sports was greater than for female sports, in violation of Title IX, where band and cheerleaders performed more at boys' sports than girls' sports, and girls' sports were

provided with less coverage and promotion in yearbooks, fewer announcements in school's daily bulletin, less signage, and inferior signage. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[9] **Civil Rights**
Extracurricular activities;athletics

Fundraising benefits between male and female high school sports was not equitable, and therefore were in violation of Title IX, where girls' teams had high turnover for coaches, new coaches were not told how to receive funds from group that supported athletic programs while boys' coaches were already aware of how to receive funds, and girls' softball team was unable to attend post-season or non-conference competitions from lack of fundraising. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[10] **Civil Rights**
Extracurricular activities;athletics

Female high school students' action against school district, alleging various violations of Title IX as to unequal treatment and benefits between male and female athletes, was not moot, even though district had implemented several changes to facilities and scheduling, where district continued to fail to address gender equity in full and comprehensive manner, including for publicity and coaching. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[11] **Civil Rights**
Sex Discrimination

Retaliation against individuals because they complain of sex discrimination is intentional conduct that violates the clear terms of Title IX; Courts generally look to Title VII cases to define Title IX's applicable legal standards. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

1 Cases that cite this headnote

[12] **Civil Rights**
Extracurricular activities;athletics

Coach for girls' high school softball team, and players, engaged in protected activities, as required for their action alleging retaliation in violation of Title IX, where a parent for one student complained of Title IX violations to athletic director and principal, an attorney for students sent letter regarding such violations to school board and officials, and students filed class action alleging violations of Title IX. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

1 Cases that cite this headnote

[13] **Civil Rights**
Extracurricular activities;athletics

Education
Exercise of Rights;Retaliation

Public Employment
Exercise of Rights;Retaliation

Coach for girls' high school softball team, and players, suffered adverse actions, as required for their action alleging retaliation in violation of Title IX, where coach was fired and was replaced with far less experienced coach, team had no assistant coaches, replacement was coach for three different teams, softball teams did not obtain necessary equipment or have annual banquet, awards were not given to players, parents were not permitted to volunteer for fundraising, and team was withheld from a tournament. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[14] **Civil Rights**
Extracurricular activities;athletics

Education

Causation

Public Employment

Causal connection;temporal proximity

Protected activities of coach for girls' high school softball team and team's players, including complaining of Title IX violations, were causally connected to adverse actions, including coach's being fired and players not receiving equipment, as required for their Title IX retaliation claim, where adverse actions were taken shortly after protected activities. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[15] Civil Rights

Extracurricular activities;athletics

Education

Motive, intent, and pretext

Public Employment

Motive and intent;pretext

Stated reasons for school district's termination of coach for girls' high school softball team following coach's meeting with parent and athletic director about conditions of softball facilities, that school preferred certified teaching employees, that coach improperly determined eligibility of a player resulting in forfeits, that coach allowed parent to coach without a qualification, and that coach provided late paperwork for a tournament, constituted pretext for retaliation in violation of Title IX, where school had expressed intention for coach to continue but had threatened his position only after he raised Title IX non-compliance issues, no certified employee replaced coach, eligibility situation occurred several years prior and coach was not written up for incident, eligibility was responsibility of school administration rather than coach, parent was not permitted to coach without qualification at a school event but rather at an independent event, and coach was not written up for late paperwork. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[16] Civil Rights

Education

Injunctive relief is appropriately granted under Title IX. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[17] Injunction

Grounds in general;multiple factors

In order to be entitled to permanent injunctive relief, a plaintiff must establish the following: (1) the likelihood of irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

Cases that cite this headnote

[18] Civil Rights

Education

In female high school athletes' class action against school district, alleging violations of Title IX, injunctive relief was warranted requiring school district to accord female high school athletes equivalent programs and facilities in compliance with Title IX; females had been denied equal opportunity to participate in sports, hardships weighed firmly in females' favor, and district implemented some changes, but not a comprehensive scheme of remedying inequalities. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

1 Cases that cite this headnote

[19] Federal Civil Procedure

Amendment or correction

Motions under rule allowing a court to amend findings after a bench trial are designed to

correct findings of fact which are central to the ultimate decision; the rule is not intended to serve as a vehicle for a rehearing. Fed.Rules Civ.Proc.Rule 52(b), 28 U.S.C.A.

3 Cases that cite this headnote

[20] Federal Civil Procedure
Amendment or correction

Motions to amend findings after a bench trial are appropriately granted in order to correct manifest errors of law or fact or to address newly discovered evidence or controlling case law. Fed.Rules Civ.Proc.Rule 52(b), 28 U.S.C.A.

3 Cases that cite this headnote

[21] Federal Civil Procedure
Amendment or correction

A motion to amend a court's factual and legal findings is properly denied where the proposed additional facts would not affect the outcome of the case or are immaterial to the court's conclusions. Fed.Rules Civ.Proc.Rule 52(b), 28 U.S.C.A.

2 Cases that cite this headnote

[22] Federal Civil Procedure
Opinion or findings of court, error in

Federal Civil Procedure
Newly Discovered Evidence

Motion for amended, additional or new findings on a motion for new trial is granted in order to correct manifest errors of law or fact or to address newly discovered evidence. Fed.Rules Civ.Proc.Rule 59(a)(2), 28 U.S.C.A.

2 Cases that cite this headnote

Attorneys and Law Firms

***1096** Elizabeth Kristen, San Francisco, CA, Erin Cranman Witkow, Manatt Phelps and ***1097** Phillips, Jeeyung Cacilia Kim, Vicky Linda Barker, Los Angeles, CA, for Plaintiffs.

Daniel R. Shinoff, Gil Abed, Patricia Michelle Coady, Paul Vincent Carelli, IV, Stutz Artiano Shinoff and Holtz, San Diego, CA, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

M. JAMES LORENZ, District Judge.

This is a class-action case[1] in which the plaintiff class is defined as all present and future Castle Park High School ("CPHS") female students and potential students in the Sweetwater Union School District ("District") who participate, seek to participate, and are or were deterred from participating in student athletics activities at CPHS. The class representatives are Veronica Ollier, Naudia Rangel, Martiza Rangel, Amanda Hernandez and Arianna Hernandez. Defendant Sweetwater Union High School District ("SUHSD" or the "District"), is a public school district located in Chula Vista, California. CPHS is a school within the District.

Defendant District is alleged to have unlawfully discriminated against female student athletes at CPHS with respect to "practice and competitive facilities; locker rooms; training facilities; equipment and supplies; travel and transportation, coaches and coaching facilities; scheduling of games and practice times; publicity; and funding" in violation of Title IX. (Complaint, ¶ 40.) Additionally, plaintiffs allege that defendant has "failed to provide female students with equal athletic participation opportunities, despite their demonstrated athletic interest and abilities to participate in athletics." *Id.*, ¶ 71. Because of these alleged failures, plaintiffs assert that girls' participation in sports is severely limited and interested girls are discouraged from going out for sports. *Id.*, ¶ 74.

On March 30, 2009, 604 F.Supp.2d 1264 (S.D.Cal.2009), the Court granted plaintiffs' motion for summary adjudication on their second cause of action finding that plaintiffs demonstrated through uncontroverted, admissible evidence that defendants are not in compliance with Title IX based on unequal participation opportunities in athletic program.[2] [doc. # 87] The remaining claims are violation of Title IX based on

unequal treatment and benefits to females at CPHS, and retaliation. [3]

A ten-day bench trial was held between September 14, 2010 and October 15, 2010. Based on the trial, the parties' stipulations, and admitted evidence, the Court issues the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a).

*1098 *FINDINGS OF FACT*

I. Equal Treatment and Benefits Under Title IX

A. Background

"The impact of Title IX on student athletes is significant and extends long beyond high school and college; in fact, numerous studies have shown that the benefits of participating in team sports can have life-long positive effects on women." *Parker v. Franklin County Community School Corp.,* 667 F.3d 910, 916 (7th Cir.2012) (citing Dionne L. Koller, *Not Just One of the Boys: A Post–Feminist Critique of Title IX's Vision for Gender Equity in Sports,* 43 CONN. L.REV. 401 (2010)). In her article, Koller states:

> Studies have shown that sports participation provides important lifetime benefits to participants such as "discipline, teamwork, time management, and leadership that further long-term personal growth, independence and well being" and "better physical and mental health, higher self-esteem, a lower rate of depression, and positive body image, as well as the development of responsible social behaviors, greater educational success, and interpersonal skills." (quotations omitted).

43 CONN. L.REV. at 413.

"[D]iscriminating against female athletes and creating feelings of inferiority with their male counterparts can have long-lasting negative effects." *Parker,* 667 F.3d at 916 (citing *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n,* 178 F.Supp.2d 805, 837–38 (W.D.Mich.2001), aff'd, 377 F.3d 504 (6th Cir.2004), judgment vacated on other grounds, 544 U.S. 1012, 125 S.Ct. 1973, 161 L.Ed.2d 845 (2005), aff'd on remand, 459 F.3d 676, 695 (6th Cir.2006)).

Plaintiff Veronica Ollier attended CPHS for four years, graduating in 2007. She played softball on the JV and Varsity teams during her freshman year of high school and then on the Varsity team the remaining three years. Veronica also played basketball and was the football team manager her first and second years of high school.

Maritza Rangel attended CPHS in 2008 and 2009. She played JV softball during her first year of high school.

Naudia Rangel attended CPHS from the second semester of her freshman year through her graduation in 2007. Naudia played softball all four years she attended CPHS and played girls' basketball during her second year of high school.

Amanda Hernandez played softball on the JV team her first, second and fourth years of high school. She also played basketball during her time at CPHS.

Arianna Hernandez entered CPHS in 2008 and will graduated in 2012. She plays softball, and has played Varsity water polo, and basketball. Arianna was the captain of the JV softball team in 2008–09.

Douglas Christopher Martinez ("Coach Martinez" or "Chris Martinez") was the walk-on coach of the CHPS girls' softball team from 1999–2006. He became the head coach of the softball team in 2000.

Defendant District is a public school district located in Chula Vista, California. CPHS is a school within the District. CPHS has an active athletic program with numerous sports offered to enrolled students.

Maria Castilleja was the Principal of CPHS from the fall semester of 2002 through the spring semester of 2006. Paul Van Nostrand was the Athletic Director at CPHS from the 1999–2000 to 2004–05 school years; Russell Moore was the Athletic Director at CPHS from the 2005–06 school year through January 2010. The Athletic Director supervises all athletic coaches. Neither Athletic Director testified at trial. Gary Gauger is the Maintenance ***1099** Manager for the District and was designated as the Person Most Knowledgeable about documents relating to improvements to the softball field at CPHS. Angela Yuhas–Russo was an English teacher who became the girls softball coach at CPHS after Coach Martinez's employment was terminated.

Just prior to the 2006–07 school year, Coach Martinez was relieved of his duties as softball coach at CPHS. On July 27, 2006, plaintiffs' counsel sent a letter regarding alleged Title IX violations at CPHS to the School Board, Interim Superintendent, Principal and Athletic Director. This action was filed on April 19, 2007.

Plaintiffs called Sue Enquist as an expert in the area of softball. She is an All–American, world champion and national champion softball player, and has coached softball at UCLA for more than 26 years. The Court found Sue Enquist qualified to testify as an expert witness regarding softball and baseball.

Plaintiffs retained Donna Lopiano as a Title IX expert. The Court qualified Lopiano as an expert witness in Title IX compliance issues. On May 9, 2008, Lopiano conducted an on-site inspection at CPHS. In conducting a comprehensive Title IX evaluation of CPHS's athletic program and facilities, Lopiano also reviewed documents produced by defendants and deposition testimony. Lopiano's evaluation used the Title IX analysis set forth in the Policy Interpretation and Investigator's Manual.

At trial, Lopiano testified that she found wide-spread Title IX equal treatment and benefits violations at CPHS. Equal treatment and benefits claims allege sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics. The Court notes that while Lopiano's testimony was challenged, her methodology and conclusions were uncontroverted.

B. Recruiting Benefits

Each athletic coach at CPHS is tasked with recruiting new team players and conducting publicity for the team. If there is no coach for a team, no recruiting occurs. The decision for how recruiting is to occur is left to the discretion of the individual coaches.

Female athletes were provided with fewer coaches, coaches with more limited experience, and coaches who were unable to adequately coach because of excessive other assignments. Coaches for female athletic teams had higher turnover rates than coaches for male teams and as a result, there was less stable coaching for girls' teams which in turn means less successful teams and recruitment of players. Further, coaches for girls' sports teams were on several occasions appointed shortly before the start of the season and therefore, there was no time for recruiting by the coach. Sports teams were discontinued when coaches were not hired. The lack of coaches for girls' teams impacted negatively the teams' ability to participate in conference and non-conference competitions. This also influenced the ability to adequately recruit girls for athletic teams.

For purposes of obtaining players, head coaches need time for recruiting but at least one of the coaches for girls' teams was the head coach for three teams. No coach for male teams was ever assigned to be head coach for three teams. The head coach for the three girls' teams was unable to recruit for softball and was told by the CPHS Athletic Director to not recruit for softball because she was an inexperienced new coach and had the burden of three head coaching positions.

Coaches of boys' teams recruit more heavily than girls' teams coaches. The Athletic Director went to feeder schools to talk about boys' athletic programs programs. Middle-school boys and their parents ***1100** were invited to watch football practice at CPHS. There were three sports—wrestling, football and roller hockey—that were designated as co-ed. Participation by girls on these teams was minimal but there were no efforts by the coaches to recruit additional girls on the coed teams.

Defendants presented no evidence that recruitment practices had changed at CPHS since the filing of this action.

C. Locker Rooms, Practice and Competition Facilities

For Title IX compliance, locker rooms are evaluated with respect to location, size of lockers, exclusivity, and whether the locker room area is a team meeting area.

With respect to the quality and size of locker rooms at CPHS, 38.8% of male athletes had superior facilities as compared to 0% of female athletes. The remaining 61.2% of all male athletes had adequate facilities and 100% of female athletes had adequate facilities.

The CPHS football team had its own separate locker rooms that was rated as superior in size and quality. But female athletes had access only to a generic locker room with lockers that were too small to store athletic equipment, and was shared with all the other girls' athletic teams and with all the other physical education classes. Because of the small size of the lockers, females athletes,

including the CPHS softball team, were required to carry all of their equipment with them during the school day. Female athletes at CPHS were required to vacate the girls' locker room whenever a visiting football team came to campus and therefore, they were unable to use the locker room during that time.

Locker rooms are rated superior if lockers are next to the practice and competition facilities, adequate if the lockers are in close proximity and on-campus, and inadequate if lockers were located off-campus. At CPHS, 82.9% of male athletes and 54% of female athletes have superior location of locker rooms; 11.8% of male athletes and 40% of female athletes have adequate locker rooms with respect to locker room location.

Superior or adequate team meeting facilities were provided to 58% of male athletes and 30% of female athletes. The main gymnasium at CPHS has two adjacent team rooms. The basketball, volleyball and wrestling teams have access to these team rooms.

Prior to the 2010 softball season, the softball team did not meet in a team room. During the 2010 softball season, an empty classroom near the JV field was the designated softball team room; however, there were no lockers in the room. Nor was the room painted with the school colors.

With respect to the quality and size of practice facilities, 90% of male athletes had superior practice facilities compared to 78% of female athletes. Dr. Lopiano's 2008 analysis of the girls' softball field, indicated that the practice facility was of much lower quality than the boys' practice facilities in that boys had separate instructional areas, more instructions aids, and additional equipment. Ninety percent of male athletes and 80% of female athletes benefitted from superior location of practice facilities.

With respect to the size and quality of competition facilities at CPHS, 97% of male athletes and 79.3% of female athletes have superior competition facilities. Adequate competition facilities were available for field hockey and tennis.

The location of athletic competition facilities showed that 86.8% of male athletes and 77.6% of female athletes had access to superior locations.

Sue Enquist testified that the softball facility was inferior to the boys' baseball ***1101** facility. The baseball facility had a netted instructional complex consisting of a main competition field for practices, two pitching areas or bullpens, rollaway backstop, multi-station instructional areas, a batting cage, significant storage area, four stands for spectators, on-field facilities that allowed for multiple practice stations, protective screens, and a separate batting cage for batting from multiple areas. The baseball complex was fully enclosed which restricted its use from any other use and prevented damage from use and overuse. The playing surface was high quality, and the outfield fences were wind-screened.

Veronica Ollier and Naudia Rangel testified that when they played softball at CPHS, between 2003–07, the Varsity softball field had a too-small backstop that was wooden which allow for balls to ricochet off at a high rate of speed. The dugouts were chain-link rather than cinder block, and for most of the time, the dugouts did not have a roof. As a result the players were not adequately protected from the sun and wind, and were susceptible to distractions from spectators.

The baseball field has large, cinder block dugouts with aluminum benches with backrests, cubby holes inside the dugout to store gear, and storage attached to the dugouts. The baseball dugouts are painted with the school colors and have the school logo and mascot on them. These dugouts allow greater privacy for greater player focus and fewer interruptions from the general public. The cinder block dugouts also provide protection against the weather for the players.

There was no outfield fence for the softball field. The infield dirt was extremely hard, uneven with many grooves and divots which caused players to be afraid of bad hops and reluctant to slide or dive for balls in the infield. There were large holes in the dirt in the batter's box. The outfield grass encroached into the infield dirt. The outfield grass was patchy, uneven and dangerous. The poor condition of the softball field made practices and games difficult and negatively impacted player development.

Because no one from CPHS was designated or acted to maintain the softball field, the softball team and its coach performed maintenance on the field. Maintenance Manager Gauger has not seen a regular maintenance schedule for the softball field. Maintenance of a softball

field requires watering, raking and scarification so the dirt surface can be consistent and safe. The outfield needs cutting, watering and fertilization. At CPHS, the maintenance of the softball facility was particularly problematic because of the lack of perimeter fencing, the use of the field by physical education classes for kickball, softball and soccer, and use by the girls' field hockey and soccer programs. Recreational youth soccer leagues used the softball fields on weekends when Veronica Ollier and Naudia Rangel attended CPHS. In contrast, the boys' baseball field was not used for physical education classes or for any other uses. Regular maintenance was provided for the baseball field by the baseball coach's father, Mr. Sosa.

Administrators at CPHS knew the softball field was inferior to the baseball field. Principal Castilleja testified that she believed the softball field was in need of improvement in 2006.

In 2006–07, certain renovations to the softball field were undertaken. Roofs were added to the dugouts, new dirt was put on the infield, new pitching rubber and a permanent walkway next to the field were installed. But the new dirt did not adhere to the hard-packed dirt and as a result, the new layer of dirt did not remain in place. The newly added permanent asphalt walkway was a hazard because players ***1102** in cleats could slip on the smooth surface, as Naudia Rangel did.

Sue Enquist examined the softball and baseball infields in 2008, 2009, and 2010. Each time the softball infield was deemed to be inferior to the baseball infield. In May 2008, the softball soil was very firm and cement-like. The softball field had been insufficiently watered. The soil had not been graded to create a consistent and firm field which increased the risk of injury to the players. The hard dirt made it difficult for players to slide without being bruised. The grass in the second base area of the softball field was growing into the dirt and was unmanicured which results in unevenness of the soil area and increases inconsistent bounces in the infield. In May 2008, the boys' baseball infield playing surface was in good condition, was level, the dirt was excellent with a firm blending of two types of dirt resulting in consistent bounces and decreased risk of injury when players would slide.

In April 2009, the softball infield remained inferior to the baseball infield with respect to safety and quality. The softball infield had uneven transitions and overgrowth of grass onto the dirt while the baseball field had clean, smooth transitions from grass to dirt which allowed for a more consistent playing surface for running bases or fielding ground balls.

In May 2010, the softball infield remained inferior to the baseball infield because it had a false top layer of soil that increased the risk of injury. In contrast, in May 2010, the baseball infield had clean lines of transition and the field was manicured and level which decreases the risk of player injury.

Sue Enquist testified that the softball outfield was inferior to the baseball outfield in 2008 and 2009 in that it was uneven and consisted of areas of thatches of grass and dead areas which increased the risk of player injury and untrue or bad ball bounces.

In May 2008, there was no outfield fence at the softball field. As a result, students were able to cut through the outfield leading to more outfield grass damage. During Enquist's site visit to the softball field, a physical education class was in session on the softball field. In contrast, the boys' baseball outfield playing surface was more level, the quality of the grass was more consistent and was firmer than the girls' softball outfield playing surface.

In her site visit in April 2009, Enquist did not see improvements to the softball outfield—dead grass areas created an inconsistent playing surface and a plumbing repair to the softball outfield caused an uneven area in the grass. In May 2010, Enquist noted that the softball outfield had been improved.

As previously noted, perimeter fencing provides for an enclosed outfield that protects the field from overuse and damage. Further, not having a side fence hampers the ability to designate out-of-play ball and increases the risk of injury for spectators. The boys' baseball field is enclosed by fencing, includes a home run fence, and is a secure, locked facility. The baseball fencing was installed approximately 20 years ago. Although CPHS Administrators were aware that the softball field did not have perimeter fencing while the baseball field did, and Maintenance Manager Gauger suggested the softball field be enclosed, fencing was not provided.

In April 2009, the softball field had a non-permanent outfield fence and the site was still not secured. In 2010, the varsity softball field was completely enclosed with secure, permanent fencing, which included a windscreen. Enquist opined that the fencing improvements to the softball field remained inferior and unsafe in comparison ***1103** to the baseball field because the side fencing did not have safety caps.

The baseball team has an instructional complex consisting of a main competition field for practices, two pitching areas or bullpens, rollaway backstop, multistation instructional areas, a batting cage, storage area, four grandstands for spectators, on-field facilities that allow multiple practice stations, protective screens and a separate batting cage for batting from multiple areas rather than just on home plate.

The Junior Varsity softball team practices on the JV field but plays games on the Varsity field. The JV softball infield was gravel, there was little grass in the outfield, there were no fixed bases, the pitcher's rubber would move around, and home plate was in disrepair. The JV field had lots of potholes and rocks making for unsafe conditions for the players.

In 2008, Sue Enquist noted that there has been little to no maintenance to the JV softball field. The infield soil was extremely hard and uneven, and stones and other debris was on the field. The Varsity and JV outfields overlap making it impossible for players to use the JV and Varsity fields at the same time for practices or games without risk of injury. There were no dugout areas on the JV field and the backstop was too small to protect spectators at the JV field.

Also in 2008, the pitcher's rubber on the JV field was incorrectly lined up to home plate by eight feet and turned to the left. There were no fixed bases or fixed base plugs. The use of flat, rubber bases on the JV field increased the risk of injury to players who run bases.

When the perimeter fence was added to the Varsity softball facility, the practice facility outfield became non-regulation size.

Sue Enquist found no improvements to the JV field during any of her three site evaluation. There was very little to no maintenance to the field. The infield soil was extremely hard and uneven. The outfield grass was uneven with inconsistent thatches of grass. There were no dugout areas on the JV softball field and no protection was available for spectators at the field.

The softball facility has no dedicated bullpens on the field. The girls use a warm-up area that was next to the Conex box. This area is unsafe because neither the catcher nor the pitcher in the area can see that ball that is being hit from the player at home plate. The boys' baseball facility had bullpens that had cement blocks that built up the mound to maintain the mound integrity, and there were two designated lanes allowing for two sets of pitchers and catchers warming up for each team. Both bullpens had protection chainlink on one side so players were able to see the home plate area.

Because of the inferior conditions on both the JV and Varsity softball fields, players and spectators suffered injuries. Amanda Hernandez tripped over a pothole on the JV softball field in May 2010, which resulted in her being on crutches for two weeks and missing one week of school. Naudia Rangel's glasses kept breaking from balls taking wild hops on the hard dirt and hitting her in the face. A paramedic was required to assist when a spectator was hit in the head by a ball that was hit over the softball backstop.

In 2008, Lopiano deemed the girls' softball competition facility inadequate. In 2010, the Varsity softball competition facility received improvements including the installation of a permanent fence, outfield improvements, and the removal of a dangerous drainage area. Notwithstanding these improvement, the quality of the surface of the softball field remained dangerous in 2010 according to Enquist.

***1104** CPHS's baseball complex has four separate seating areas surrounding the backstop while the girls' softball complex has a single section of stands. A second set of stands was added to the softball complex. But Dr. Lopiano was unable to determine if that modification would alter her opinion that male sport facility amenities remain superior to fans of female sports.

Dr. Lopiano found that concessions for female athletic events were offered less than concessions for male athletic events and the CPHS did not have a non-discriminatory policy regarding when concessions would be provided.

In 2006, the baseball field had a concession stand run by the baseball team but the softball team did not. In April 2009, Enquist found that there was a fully functioning concessions stand for baseball with snacks, drinks, apparel, and press guides for sale. Although a concession stand was added next to the softball field, no evidence was presented that it has been used or opened.

Scoreboards were available for 55.6% of all male athletes at CPHS compared to 29.9% of all female athletes.

The locker room, practice and competition facilities provided to females athletes at CPHS are unequal as compared to the locker room, practice and competition facilities provided to male athletes.

D. Equipment, Uniforms and Storage

Because of late hires and more inexperienced coaches for the girls' athletic teams, female athletes receive fewer and lesser quality equipment and consumable supplies compared to male athletes. Specifically, girls' sports like softball and hockey, where there are no corresponding male teams that would allow for borrowing equipment for the boys' sports, are significantly disadvantages. Softball coach Yuhas/Russo testified that she had insufficient balls for the pitching machine and could not order more because it was late in the season and budgets had been frozen.

Sue Enquist found that the softball program had significantly less sports specific equipment, e.g., ball carts, buckets and balls, than the baseball program. There was no replacement schedule for equipment that the softball team uses.

In May 2008, located on the baseball field was a large maintenance storage area that held all maintenance-related items. There was no similar storage area on the softball field.

During Coach Martinez's tenure, because of the lack of maintenance equipment, Martinez brought in his own equipment to use on the softball field.

With respect to uniforms, there was a nondiscriminatory uniform replacement schedule in place at CPHS but coaches were permitted to make different determinations as to what they could buy with their budgets and that could be in conflict with the replacement schedule policy. Each head coach had discretion to select and order team uniforms. The Athletic Director provided no oversight to determine whether the uniform replacement schedule was followed.

Coaches were also given discretion to require their players to purchase a "spirit pack" which typically consisted of a t-shirt and pair of shorts. The Athletic Director did not provide oversight to ensure that the same percentage of male and female athletes were require to purchase the spirit packs or not.

At trial, no evidence was presented to show monitoring of uniform replacement practices for gender equity occurs.

The CPHS athletic department has a policy requiring coaches to complete an inventory at the end of each season. But defendant provided no written equipment or uniform inventories either prior to or at ***1105** trial. In order to conduct a Title IX analysis concerning the quality and quantity of equipment and other supplies provided to male and female athletes, basic inventories are essential. Because defendant provided no equipment or uniform inventories at trial, Lopiano was able to consider only what she observed during her site visit.

Whether dedicated and accessible storage areas are equitably available to male and female athletes is part of a Title IX analysis. Lopiano found that 65% of male athletes and 41% of female athletes had dedicated storage areas. CPHS provided the softball team with half of a Conex box in which to store softball equipment; the other half was used by the boys' baseball program. But in addition to the Conex box, the boys' baseball team had a storage room attached to their dugouts.

In May 2008, player equipment storage, *i.e.,* where players have their bat bags, helmets and other amenities that they use as individual players, was available for CPHS baseball players only. There was no such equipment storage for the girls' softball players.

No evidence was presented that defendant monitors the provision of athletic equipment storage for gender equity. The Athletic Director did not provide any oversight for gender equity in the provision of equipment, supplies and uniforms to ensure that male and female athletes were provided with the same benefits.

E. Scheduling Benefits

Girls and boys are required under Title IX to have the same optimum practice or competition times. Immediately after schools is the most desirable practice times for sports. With respect to desirable competition times, that time is when parents are available to come and watch the sporting events. Ordinarily, desirable competition times are early evening rather than immediately after school.

Dr. Lopiano testified that female athletes had less access to premium game times than male athletes. Girls basketball games were played on Friday nights at 6:00 p.m. while the boys' basketball games were played on Friday nights at 7:30 p.m. No effort was made to alternate the times by week or season. Similarly, boys' water polo was scheduled for Fridays at 5:00 p.m. and the girls' events were at 3:00 p.m.; field hockey competition was scheduled at 3:00 or 5:00 p.m. but boys' football played in the evening. Girls' basketball practice times were from 5–7:00 p.m., while the boys' Varsity basketball team practiced immediately after school during all four years Amanda Hernandez was at CPHS.

In 2010, boys' and girls' basketball scheduling was corrected to meet equitable competitive scheduling requirements but no evidence of any other time changes for any other sports was produced.

Athletic Director at CPHS permitted coaches to determine practice times. There is an absence of monitoring athletic practice times for gender equity at CPHS. Similarly, the District did not appoint a person responsible for monitoring the number of practice opportunities provided to the school's athletic teams for gender equity.

F. Equal Access to Coaching

Female athletes were provided with fewer coaches. The athlete/coach instructional ratio, which is calculated by dividing the total number of athletes on a team by the total number of coaches provided to that team, is an indicator of access to equitable coaching for males and females. The athlete/coach instructional ratio for females was not equal to that afforded to males.

Assistant coaches were not provided in the same quantity or quality for female athletes at CPHS. Head coaches who were ***1106** assigned late, which happened with some frequency, did not get an assistant coach although head coaches had the discretion to decide what assistants they needed.

The Athletic Director allowed coaches of boys' teams to use their coaching salary for additional assistant coaches. As a result, coaching support for the boys' programs was not equitably determined based on the coaching salary schedule. Although the salary would appear equal for the baseball and softball coaches, there were more baseball coaches because the head baseball coach did not take his salary but instead used his salary for assistant coaching salaries. More assistant coaches for the baseball team were available than provided for the softball team.

In the season after Coach Martinez was terminated, softball coach Yuhas/Russo decided not to have any assistant coaches for the Varsity and JV teams. This resulted in her being the only coach present at practices and games.

The hiring of coaches for girls' sports was the responsibility of the Athletic Director. An open coaching position was first offered to on-campus teachers through the school's Daily Bulletin. If no response was obtained, the position was posted at the District. CPHS would take no other action to fill an open coaching position.

If no coach was hired, a team was discontinued. The current athletes in that sport would be unable to participate during that year and even if a team was reconstituted the following year, the participants would have an inferior schedule. This is because the Metro Conference would not create a conference schedule for the following year for sports that were not sponsored in the current year.

Girls' field hockey, tennis, water polo and golf teams have often lacked consistent coaching staffs. CPHS had no girls' field hockey team in 2005, 2007 or 2008, or girls' tennis team during the 2007 and 2008 school years because no coaches were hired for those sports. Neither girls' water polo nor girls' lacrosse has been offered at CPHS, also because CPHS failed to hire coaches. CPHS' lack of efforts to consistently and timely obtain coaches for girls' teams severely impacts girls' opportunities for competitive athletics.

Athletic Director Moore acknowledged that he had not done any analysis on gender equity for the quality of coaches for the boys' and girls' teams. Nor did CPHS conduct any reviews to determine if they were providing quality coaches equitably to male and female athletes.

G. Medical and Training Services

At CPHS, an athletic trainer, Eddy Ayub, was available during the fall football season to work with the football players. Also during the fall, a physician, Dr. Camarada, was available for rehabilitation every Saturday morning. The Saturday clinic was predominately during the football season but was not limited to football.

Dr. Lopiano opined that if it were assumed that only athletes who participated in fall sports had access to the trainer and doctor, 43% of the male athletes and 29% of the female athletes could receive these services.

The weight training facility, while available for use by boy and girls, was used predominately by boys. The nature of the available equipment at CPHS was designed for absolute-strength-based sports in which boys' participate. For women's sports, a training facility will typically have lower weight plates, free weights, flexibility equipment, core strength equipment. In 2010, significant changes were made to the weight-training and conditioning facility with the intent to make the area more gender equitable. But no evidence was presented that the renovated facility was ***1107** being used by girls' and boys' teams in an equitable manner. Further, neither the Athletic Director nor defendant monitored weight room usage for gender equity.

H. Publicity and Promotional Support

At CPHS, there was greater coverage of boys' athletic teams than girls' teams in the yearbook. The Castle Park Daily Bulletin featured almost twice as many announcements for boys' athletic teams compared to announcements for girls' athletic teams. Coaches have discretion to submit announcement to the Daily Bulletin. Coach Martinez never was told he needed to do any publicity on behalf of the softball team during his seven years as coach.

Band, cheerleaders and pep squads can provide support at athletic events. Forty-six per cent of male athletes and 13% of female athletes received the benefit of a band being at their events.

The cheerleaders' schedule was decided at the discretion of the cheer coach. During the time Veronica Ollier was at CPHS, the cheerleaders would cheer for football and boys' basketball games but not for any girls' teams games.

From 1998 through the date of the trial, no one at CPHS was tasked with monitoring publicity or promotional opportunities for gender equity. The publicity or promotional opportunities at CPHS include the Daily Bulletin, announcements, the electronic marquee, and yearbook.

I. Fund-raising Benefits

Equitable Fund-raising benefits are required under Title IX. At CPHS, boys teams were permitted to fund-raise. The boys' baseball team sold concessions from their snack stand and the money raised was used for the baseball team. In contrast, softball coach Yuhas/Russo was permitted by the Athletic Director to prohibit all fund-raising by the softball team. As a result, the girls were unable to attend post-season competitions or non-conference competitions that they had previously attended with parent-raised funds.

A grant-making body—the Trojan Foundation—supported the athletic program at CPHS. The coaches of girls' teams were not advised as to what they could request and the method for receiving Trojan Foundation funds. Because the coaches for boys' teams did not have the same turnover rate as coaches for the girls' teams, they were aware of the availability of and requirements for obtaining Trojan Foundation funds. It was the responsibility of the Athletic Director and defendant to inform coaches about their funding sources so that equitable access to those sources could be obtained. Testimony was presented that action has been taken to remedy this disparity in this particular Fund-raising practice.

No one at CPHS has monitored Fund-raising opportunities or donations to the athletic program for gender equity. Defendant did not present any evidence to indicate that this situation has changed.

J. Administrative Activity

CPHS failed to provide a system for Title IX implementation and compliance. Instead, Title IX compliance was at the discretion of individual coaches and the defendant did not monitor coaches to determine if equitable treatment and benefits for male and female athletes was carried out. School principals are tasked with ensuring that the individual school is in compliance with Title IX. The Athletic Director is generally given the responsibility, however, to monitor gender equity requirements.

Mercedes Lopez is the Director of Student Support Services at the District and, since 2010, she is the District's Title IX Coordinator. Her responsibility is to submit ***1108** a report to the U.S. Department of Education Office of Civil Rights every two years regarding participation numbers. She testified that she based her reports on information reported to her by the high schools in the District and she did not independently verify the numbers she received from the school.

No evidence was presented that CPHS had ever conducted a Title IX self-evaluation, a requirement under the implementing regulations.

As a result of systemic administrative failures at CPHS, female athletes have received unequal treatment and benefits before and during the time this action has been pending. Although some remedial measures have been taken at CPHS, particularly with respect to the girls' softball facility, those steps have not been consistent, adequate or comprehensive. Additionally, there has been no evidence presented that the District has addressed or implemented policies or procedures designed to cure the myriad areas of general noncompliance with Title IX.

II. Retaliation

Steve Rangel, parent of named plaintiff Maritza Rangel, complained to CPHS Principal Castellija and Athletic Director Moore about inequalities for girls in the school's athletic programs in May 2006. Rangel met with Principal Castellija about improvements for the girls' softball field and non-compliance with Title IX.

Also in May 2006, Rangel spoke to Moore about Title IX concerns relating to improvements to the softball field dugouts, including needed fencing, grass growing in the infield, a broken backstop, potholes in the outfield, and limited audience seating. Moore informed Assistant Principal Duggan a few days later of his meeting with Rangel. Moore did not recall Duggan doing anything about Rangel's complaint about the softball field, took no further action and spoke to no one else about alleged Title IX violations at CPHS.

Moore and Coach Chris Martinez, who had been a walk-on softball coach for seven years at CPHS, held a meeting in May 2006, that was intended to discuss the upcoming softball season and to walk the softball field. Rangel was also present at the meeting between Moore and Martinez. Rangel pointed out the disparities between the girls' softball field and the boys' baseball field. In his deposition, Moore acknowledged that he told Martinez, with Rangel present, that walk-on coaches, *i.e.,* coaches who were not CPHS teachers, could be released from their employment at any time. Both Martinez and Rangel understood that Moore was threatening to terminate Martinez's continued coaching of the softball team if additional complaints were made about the girls' softball facilities. Moore also stated that the gymnasium was more of a priority than the softball field. Approximately six weeks after this conversation, Coach Martinez was terminated by Principal Castellija.

Defendants provided several reasons for terminating Martinez: (1) the school wanted to replace coaches with certified teaching employees; (2) Martinez improperly determined the eligibility of a player and the softball team forfeited games as a result; (3) Rangel could not get his Blue Card to coach but Martinez allowed him to coach the summer club team; (4) Martinez provided late paper work to the school board in seeking approval for a tournament in Las Vegas and although the Board made an exception allowing the team to go on the trip, the trip posed an unnecessary liability risk for the Board.

In January 1987, a preference for certified teachers as coaches was adopted and has remained in place. The long-standing policy is to first offer a coaching position to a certified employee if a coaching position ***1109** becomes available and is implemented as coaching vacancies arise. Once an individual becomes a District employee, it no longer matters whether a coach is a certified teacher or not. When a coaching vacancy occurs it is offered to a certified employee and if a coaching position is not covered, the position is offered more broadly. A certified teacher does not have the right to have a coach removed so the teacher can fill a coaching position. When Principal

Castilleja terminated Martinez, she did not have anyone selected to fill the coaching position.

Coaches are not responsible for determining the academic eligibility of students to play on athletic teams. Assistant Principal Mary Rose Peralta was responsible for eligibility determinations in 2005. In 2005, Coach Martinez mistakenly believed a player, Erica Rangel, was eligible to play. When the Administration determined Rangel was academically ineligible and had been improperly played, the girls' softball team forfeited games. Even though the playing of an ineligible player and the resulting forfeiture of games were given as a reason for Martinez's termination, Castilleja did not write up Martinez and no action was taken against him at the time. Martinez had been told by a prior assistant principal in charge of eligibility that taking an advanced placement class could be used in determining eligibility. Assistant Principal Peralta wrote to the CIF stating that Martinez had made an honest mistake in determining the eligibility of Erica Rangel. During the seven years Martinez coached, he did not play any other ineligible player. Other CPHS coaches had played ineligible players but no other coach was disciplined for this infraction. Athletic Director Moore apologized to Martinez for providing incorrect information concerning eligibility rules and agreed that the system for determining eligibility was difficult. Finally, the eligibility error occurred in the 2004–05 school year but Martinez was not terminated or otherwise disciplined that year.

In order for a parent or other individual to assist with on-campus athletic activities, a Blue Card must be obtained. Parent Steve Rangel had a Blue Card from 1997 to 2002, and coached in the District. But when Rangel reapplied for a Blue Card in 2006, he was denied due to felony convictions on his record. While his application for a Blue Card was pending, Rangel had assisted with coaching during the school year. Once Martinez was told not to allow Rangel to coach because Rangel could not obtain a Blue Card, Rangel no longer assisted with coaching the school's softball team. Athletic Director Moore told Rangel, however, that he could help maintain the softball field without a Blue Card. Principal Castilleja saw Rangel on the softball field in the summer of 2006, when Martinez was not present. The summer ball club was not under the auspices of the high school. Martinez asked for assistance from CPHS administrators to deal with Rangel in keeping him off the field because the school had responsibility for dealing with Rangel as the parent of a player.

In 2005, Coach Martinez did not comply with the required submission of paperwork prior to leaving on a softball team trip. Castellija admitted she did not write him up for anything, including the late paperwork in 2005. In 2006, Martinez completed the required paperwork for a team trip to Las Vegas although he turned in the paperwork late. After the Las Vegas trip, Martinez and Moore met to discuss the upcoming 2006 softball season.

CONCLUSIONS OF LAW

I. Title IX, Equal Treatment and Benefits

Title IX prohibits sexual discrimination in educational programs or activities that ***1110** are supported by federal financial aid. 20 U.S.C. § 1681(a). Title IX and its implementing regulations provide:

> No person in the United States 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 intermural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a).

"Congress enacted Title IX in response to its finding —after extensive hearings held in 1970 by the House Special Subcommittee on Education—of pervasive discrimination against women with respect to educational opportunities." *Cohen v. Brown Univ. ("Cohen II"),* 101 F.3d 155, 165 (1st Cir.1996). The goals of Title IX were "to avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." *Id.* (quoting *Cannon v. Univ. of Chicago,* 441 U.S. 677, 704, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)).

[1] Title IX requires "equal treatment," which has been interpreted by the OCR to require "equivalence in the availability, quality and kinds of other athletic

benefits and opportunities provided male and female athletes." Department of Education, Office for Civil Rights, Policy Interpretation ("Policy Interpretation"), 44 Fed.Reg. 71,413, 71,417–418; Clarification of Intercollegiate Athletics Policy Guidance: The Three—Part Test (Clarification) (1996). Equal treatment claims allege sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics. *See McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 299 (2d Cir.2004). Policy interpretation by the OCR is entitled to deference by the Court. *Mansourian v. Regents of the University of California, University of EFB California at Davis,* 594 F.3d 1095, 1103, n. 9 (9th Cir.2010). The Court takes judicial notice of the *Title IX Investigator's Manual,* Office of Civil Rights, Department of Education (1990) ("Investigator's Manual").

Compliance in the area of equal treatment and benefits is assessed based on an overall comparison of the male and female athletic programs, including an analysis of recruitment benefits, provision of equipment and supplies, scheduling of games and practices, availability of training facilities, opportunity to receive coaching, provision of locker rooms and other facilities and services, and publicity. 34 C.F.R. 106.41(c).

"[A] disparity in one program component (*i.e.,* scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school." *McCormick v. School Dist. of Mamaroneck,* 370 F.3d 275, 293 (2d Cir.2004); Policy Interpretation, 44 Fed.Reg. 71,417 (Dec. 11, 1979). A disparity in one program component, however, "can be offset by a comparable advantage to that sex in another area," *McCormick,* 370 F.3d at 293, as long as "the overall effect of any differences is negligible." Policy Interpretation, 44 Fed.Reg. at 71,415.

A. Recruiting Benefits

[2] Equal efforts to recruit male and female athletes are required under Title IX. Policy Interpretation, 44 Fed.Reg. at 71,417. The evidence presented at trial demonstrates that defendants have not instituted recruiting policies and have failed to monitor athletic recruiting that provide for equitable efforts to recruit female athletes at CPHS. As a result, there are ***1111** significant disparities in female athlete recruitment. Female athletes at CPHS are denied opportunities and benefits that male athletes have and these opportunities are not negligible. This violates Title IX.

B. Locker Rooms, Practice and Competition Facilities

Male and female athletes are required under Title IX to have access to the same quality facilities on the same basis. Policy Interpretation, 44 Fed.Reg. at 71,417.

[3] The evidence provided at trial demonstrates that the quality, size and location of the locker rooms were better for male athletes than female athletes at CPHS. Similarly, the evidence shows that male athletes have higher quality practice and competitive facilities than female athletes. The boys' facilities also are better maintained and protected from damage and overuse. Defendants do not monitor locker rooms, practice and competition facilities for gender equality. The disparities concerning locker rooms, practice and competition facilities are disadvantages to female athletes that are not negligible.

C. Equipment, Uniforms and Storage

Under Title IX, schools must provide female athletes with equitable "equipment and supplies which include, inter alia, uniforms, sport-specific equipment, general equipment, and conditioning and weight-training equipment." Policy Interpretation, 44 Fed.Reg. at 71,416. Supplies are assessed for quality, amount, suitability, maintenance and availability. *Id.*

[4] Male athletes were provided with more and superior quality equipment and supplies than those provided to female athletes. The availability and type of uniforms provided to the female athletes were not equitable compared to male athletes. Further, male athletes were provided with more and better storage facilities than the female athletes at CPHS.

The disparities in the provision of equipment, uniforms and storage denied girls opportunities and benefits that boys enjoy, and that denial of opportunities and benefits was not negligible.

D. Scheduling Benefits

Male and female athletes are entitled to equitable number of competitive events per sport, the time of day competitive events are scheduled, the number and length of practice opportunities, and the time of day practice

opportunities are scheduled. Policy Interpretation, 44 Fed.Reg. at 71,416.

[5] Because of defendants' consistent failure to timely hire coaches for girls' sports, girls were provided with fewer competitive opportunities than boys. Boys also had greater access to premium game times for competition and practice times that are provided immediately after school than the girls.

Evidence produced shows that defendants do not monitor this element for gender equity. These disparities are in scheduling benefits are not negligible.

E. Equal Access to Coaching

Female and male athletes are required to receive equivalent opportunities for quality coaching under Title IX. Policy Interpretation, 44 Fed.Reg. at 71,416. Equivalent coaching is assessed by examining the relative availability of full-time coaches, part-time coaches and assistant coaches. *Id.* With respect to the assignment of coaches, compliance with Title IX is assessed by examining the training, experience, and other qualifications of coaches and their professional standing. *Id.*

[6] The girls' teams coaches at CPHS were fewer in number, less experienced, and more overburdened than the boys' teams coaches. This disparity directly ***1112** impacted the quantity and quality of the instructional benefits that the coaches provided to the female athletes. The disadvantages to the girls in equal access to coaching are not negligible.

F. Medical and Training Services

Title IX requires medical and training services to be provided equitably. Policy Interpretation, 44 Fed.Reg. at 71,417.

[7] Male athletes at CPHS were provided with greater access to athletic trainers and medical services than female athletes. These disparities deny girls opportunity and benefits that boys enjoy and they are not negligible.

G. Publicity and Promotional Support

Equitable publicity benefits and promotional support are required under Title IX. Policy Interpretation, 44 Fed.Reg. at 71,417.

Factors to consider in assessing whether publicity is equitably provided include access to publicity resources. The quantity and quality of publications and other promotional devices featuring men's and women's programs. *Id.*

[8] Evidence presented shows that girls' athletic activities were provided with less coverage and promotion in yearbooks, fewer announcements in the school's Daily Bulletin, less signage on the school's electronic marquee, and inferior signage. The CPHS band and cheerleaders performed at more boys' sports than girls' sports.

The inferior publicity and promotional support to girls are not negligible.

H. Fund-raising Benefits

Title IX requires that revenues from all sources be used to provide equitable treatment and benefits to both girls and boys. A source of revenue may not justify the unequal treatment of female athletes. Investigator's Manual at 5.

[9] Defendants fail to monitor athletic Fund-raising opportunities and allow coaches full discretion over Fund-raising. Further, defendants do not review this element for gender equity.

I. Mootness

Since the filing of this action, defendants have made some improvements to the girls' athletic facilities and the scheduling of boys and girls basketball. Mootness can be found when a defendant voluntarily ceases a practice when "the record [ ] show[s] that (1) it can be said with assurance that there is no reasonable expectation ... that the alleged violation with recur, and (2) interim relief or events have completely and irrevocable eradicated the effects of the violation." *Sossamon v. Texas,* —— U.S. ——, 131 S.Ct. 1651, 1668, 179 L.Ed.2d 700 (2011) (citing *Smith v. Univ. of Wash. Law Sch.,* 233 F.3d 1188, 1194 (9th Cir.2000) (alteration in original)). Although defendant may change a policy or take some remedial measures while litigation is pending, the fact of "voluntary cessation" nevertheless may allow claims to go forward. *Sossamon,* 131 S.Ct. at 1670 (2011); *see e.g., Parents Involved in*

Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 719, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007) ("Voluntary cessation does not moot a case or controversy unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur" (internal quotation marks and alterations omitted)); *United States v. Bradau,* 578 F.3d 1064, 1068 (9th Cir.2009) (citing *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)).

***1113** The Supreme Court has stated that when a party asserts that a case has become moot, "[t]he burden of demonstrating mootness 'is a heavy one.' " *County of Los Angeles v. Davis,* 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979).

[10] In this case, even though defendants have presented some evidence of changes to athletic facilities at CPHS and scheduling of basketball practices and games, additional evidence shows that many violations of Title IX have not been remedied or even addressed. Because of defendants' continuing failure to address gender equity in athletics in a full and comprehensive manner, CPHS has not met its burden to demonstrate that the interim measures have completely and irrevocably eradicated the effects of the alleged violations. This action is not moot.

II. Retaliation

[11] "[R]etaliation against individuals because they complain of sex discrimination is 'intentional conduct that violates the clear terms of [Title IX].' " *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 173–174, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). Courts generally look to Title VII cases to define Title IX's applicable legal standards. *Burch v. University of Cal. Davis,* 433 F.Supp.2d 1110, 1125 (E.D.Cal.2006); *see also Oona R.-S. by Kate S. v. McCaffrey,* 143 F.3d 473, 476 (9th Cir.1998) (holding that Title VII standards apply to hostile environment claims under Title IX). Under Title VII, and, by analogy, Title IX, to establish a *prima facie* case of retaliation plaintiffs must show: (1) they engaged in a protected activity; (2) they were thereafter subjected to an adverse action; and (3) a causal link exists between the protected activity and the adverse action. *Papelino v. Albany Coll. of Pharmacy of Union Univ.,* 633 F.3d 81, 91 (2d Cir.2011); *Wallis v. J.R. Simplot Co.,* 26 F.3d 885, 890 (9th Cir.1994); *see also Jackson,* 544 U.S. at 184, 125 S.Ct. 1497. Once the plaintiff establishes a *prima facie* case of retaliation, the burden shifts to the defendant to advance a legitimate, non-retaliatory reason for its conduct; "if it does so, the plaintiff must be able to convince the factfinder both that the [defendant's] proffered explanation was false, and that retaliation was the real reason for the adverse ... action." *Isler v. Keystone Sch. Dist.,* 2008 WL 3540603, at *4 (W.D.Pa. Aug. 12, 2008) (internal quotations omitted).

[12] Plaintiffs engaged in the following protected activities: Parent Steve Rangel complained of Title IX violations to Athletic Director Moore and to Principal Castilleja; counsel for plaintiffs sent a letter regarding Title IX violations at CPHS to the School, Board, Interim Superintendent, Principal, and Athletic Director in July 2006; and plaintiffs filed this action in April 2007.

[13] Plaintiffs suffered adverse actions as follows: Coach Martinez was terminated shortly before the start of the softball season for pretextual reasons; Coach Martinez was replaced with a far less experienced coach who did not conduct a winter ball program; the softball team had no assistant coaches; the replacement coach was assigned as the head coach for three sports; the girls' softball program was disrupted; the softball program's donated Conex box was removed; the 2007 softball teams did not obtain necessary equipment; an annually celebrated banquet for the 2007 softball team was not held; award letters and patches to plaintiffs during their senior year were not given; parents were not permitted to volunteer for the softball team; the softball team's Las Vegas tournament opportunity was withheld. These actions were adverse to plaintiffs because their long-term and successful softball program was significantly disrupted ***1114** to the detriment of the program and participants.

[14] A causal link may be established by an inference derived from circumstantial evidence, such as knowledge of plaintiffs participation in protected activities and the proximity in time between the protected action and allegedly retaliatory adverse action. *Jordan v. Clark,* 847 F.2d 1368, 1376 (9th Cir.1988). In the present case, there was a causal connection between the protected activities and the adverse actions in temporal proximity: plaintiffs engaged in protected activities in May and July 2006, and April 2007, and adverse actions were taken against plaintiffs in July 2006, and Spring of 2007.

Defendant must articulate a legitimate, non-retaliatory reasons for its action. "The defendant's burden at this stage is one of production, not persuasion. The court may not make a credibility assessment." *Njenga v. San Mateo County Superintendent of Schools,* 2010 WL 1261493, at *14 (N.D.Cal.2010) (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 142, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)). As set forth above, defendants offered four non-retaliatory reasons for terminating Martinez.

Then plaintiffs must show defendant's proffered explanation was false, and that retaliation was the real reason for the adverse action.

[15] Prior to the May 2006 meeting between Martinez and Athletic Director Moore, the clear intention was for Martinez to continue coaching the 2006–07 season. It was only after Rangel raised Title IX non-compliance issues for the first time at the May 2006 meeting that Martinez's coaching position was threatened by the Athletic Director. Shortly thereafter, Martinez was terminated as coach for girls' softball.

A preference for certified teachers was in place long before Martinez was hired. Principal Castilleja denied speaking to coaches in 2005–06 about wanting to go in a different direction by having more on-campus coaches. Offering a coaching position to a certified employee occurs only when vacancies arise. When Castilleja terminated Coach Martinez, she had no certificated employee ready to replace Coach Martinez.

The student eligibility situation occurred during the 2004–05 school year. Martinez was not written up for the forfeited games in 2005. Nor was Martinez terminated after that year but instead after the 2005–06 school year. Determination of player academic eligibility was the responsibility of school administration, specifically Assistant Principal Mary Rose Peralta, not Coach Martinez. Peralta acknowledged that Martinez made an honest mistake concerning his belief that the student was eligible to play.

Martinez did not permit Steve Rangel to coach after being notified Rangel could not obtain a Blue Card. The summer softball club that was practicing at CPHS was not conducted under the auspices of the high school. Martinez was not present when Principal Castilleja saw Rangel on the softball field.

Prior to the date of the Las Vegas softball team trip, Martinez provided the required paperwork to the District, albeit late. Principal Castilleja did not write up Martinez for the late paperwork. The May 2006 meeting between Moore and Martinez was to discuss the coming softball season so there was no intent to terminate Martinez for the late paperwork.

Defendant's stated reasons for Martinez's termination are not credible and are pretextual.

*1115 *RELIEF*

Since the filing of this action, defendants have made some improvements to facilities in an attempt to bring the facilities and programs into Title IX compliance. The improvement include: the removal of the inadequate JV field; the creation of a dedicated softball field enclosed by fencing; new, covered dugouts with cubbies; backstop; grandstand; maintenance schedules for watering; and a better infield. Other improvements include the scheduling of practices to avoid discrimination over practice times on dual facilities. Expert witness Donna Lopiano testified to the substantial inequities in most of the programs identified in the Investigator's Manual on her site visit. In some cases she was unable to fully evaluate whether gender equity was in place because of inadequate information provided by the defendants. Overall she found CPHS was not in compliance with Title IX. Lopiano also testified that a subsequent site visit would not change her opinion about compliance even though improvements had been made specifically to the softball facilities because her opinion was based on overall compliance of the athletic program at CPHS rather than limited remediation. Looking to hand-selected individual changes or improvements without conducting a new overall study is insufficient for determining compliance with Title IX.

Defendants have violated Title IX in failing to provide equal treatment and benefits, and retaliating against the plaintiff class. Plaintiffs are entitled to declaratory relief.

[16] **[17]** Injunctive relief is appropriately granted under Title IX. In order to be entitled to permanent injunctive

relief, a plaintiff must establish the following: (1) the likelihood of irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1184 (9th Cir.2011).

[18] Here the plaintiff class has suffered and continues to suffer irreparable injury. Female athletes and potential athletes have been denied the opportunity to participate in high school sports on an equal level with the male students at their school. When inequalities are not addressed and corrected, female athletes, prospective students, faculty and the community at large, are told athletics for girls are not as important as boys.

The balance of hardships weighs firmly in plaintiffs' favor. The inequalities demonstrated at trial should have been rectified years ago by the District. Female students consistently have been denied athletic opportunity equal to male students. This inequity is highlighted and most apparent between the boys' baseball team and the girls' softball team at CPHS. The girls' softball team has been treated as vastly inferior to the boys' baseball team, which it is not.

The public interest in remedying gender discrimination is strong and promoting compliance with Title IX is an important societal value:

> Equal athletic treatment is not a luxury. It is not a luxury to grant equivalent benefits and opportunities to women. It is not a luxury to comply with the law. Equality and justice are not luxuries. They are essential elements which are woven into the very fiber of this country. They are essential elements now codified under Title IX.

Cook v. Colgate Univ., 802 F.Supp. 737 (N.D.N.Y.1992) (holding that university's unequal treatment of men's and women's ***1116** ice hockey teams violated Title IX), vacated as moot, 992 F.2d 17 (2d Cir.1993).

A recent assessment of the impact of Title IX suggests:

> Although Title IX has gone a long way in increasing the status and respect for female athletes, discrimination endures. Title IX has not ended the long history of discrimination against females in sport programs; many educational institutions continue to place male sport programs in a position of superiority. *See McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 296 (2d Cir.2004) ("Despite substantial progress in attitudes about women and sports, the competitive accomplishments of male athletes may continue to be valued more than the achievements of female athletes.").

Parker, 667 F.3d at 916.

Because of the defendant's long-standing and continuing overall violations of Title IX with respect to the treatment and benefits accorded female athletes compared to male athletes, and the fact that interim remedies have not completely and irrevocable eradicated the effects of these violations, this action is not moot.

Based on the foregoing, plaintiffs are entitled to injunctive relief. Defendants are required to comply with Title IX in all aspects of its athletic programs and activities at CPHS and violations identified through this action be corrected.

The parties are directed to jointly prepare a proposed compliance plan to include the Court's continuing jurisdiction and the monitoring of defendants' athletic programs and activities. The parties shall submit the proposed compliance plan within 45 days of the filing of this Order.

IT IS SO ORDERED.

ORDER DENYING MOTION FOR AMENDED, ADDITIONAL OR NEW FINDINGS [doc. # 197]

In the guise of a motion for amended, additional or new findings under Federal Rules of Civil Procedure 52(b) and 59(a)(2), defendant seeks: (1) rulings on objections to designated deposition testimony that was submitted for trial purposes and (2) the result of a site visit at Castle Park High School. Plaintiffs oppose the motion.

I. Background

Defendant District was alleged to have unlawfully discriminated against female student athletes at CPHS with respect to "practice and competitive facilities; locker rooms; training facilities; equipment and supplies; travel and transportation, coaches and coaching facilities; scheduling of games and practice times; publicity; and funding" in violation of Title IX. (Complaint, ¶ 40.) Additionally, plaintiffs alleged that defendant had "failed to provide female students with equal athletic participation opportunities, despite their demonstrated athletic interest and abilities to participate in athletics." *Id.,* ¶ 71. Because of these alleged failures, plaintiffs asserted that girls' participation in sports is severely limited and interested girls are discouraged from going out for sports. *Id.,* ¶ 74.

On March 30, 2009, the Court granted plaintiffs' motion for summary adjudication on their second cause of action finding that plaintiffs demonstrated through uncontroverted, admissible evidence that defendants are not in compliance with Title IX based on unequal participation opportunities in athletic program. [doc. # 87] The remaining claims were violation of Title IX based on unequal treatment and benefits to females at CPHS, and retaliation against the District defendant only. [1]

***1117** A ten-day bench trial was held between September 14, 2010 and October 15, 2010. Based on the trial, the parties' stipulations, and admitted evidence, the Court issued findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a) on February 9, 2012. [doc. # 193] The evidence considered included live testimony at trial, exhibits admitted at trial, discovery responses, deposition testimony to which there were no objections, stipulated facts. Some marked and lodged deposition testimony was submitted that had objected to by defendant. Defendant did not seek rulings on the objected-to deposition testimony after the conclusion of the trial or prior to the issuance of the Court's Findings of Fact and Conclusions of Law.

II. Legal Standard

Defendant relies on Federal Rules of Civil Procedure 52(b) or 59(a)(2) for the relief it seeks.

Rule 52(b) allows a court to amend findings after a bench trial:

> On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

[19] **[20]** **[21]** Motions under Rule 52(b) are "designed to correct findings of fact which are central to the ultimate decision; the Rule is not intended to serve as a vehicle for a rehearing." *R.C. Fischer and Co. v. Cartwright,* 2011 WL 6025659, *4 (N.D.Cal.2011) (citing *Davis v. Mathews,* 450 F.Supp. 308, 318 (E.D.Cal.1978)). Rule 52(b) motions are appropriately granted in order to correct manifest errors of law or fact or to address newly discovered evidence or controlling case law. *Fontenot v. Mesa Petroleum Co.,* 791 F.2d 1207, 1219–1220 (5th Cir.1986). A motion to amend a court's factual and legal findings is properly denied where the proposed additional facts would not affect the outcome of the case or are immaterial to the court's conclusions. *Weyerhaeuser Co. v. Atropos Island,* 777 F.2d 1344, 1352 (9th Cir.1985).

As plaintiffs accurately point out, defendant is seeking evidentiary rulings to certain submitted designated deposition testimony and not to correct any particular findings of fact that are found in the Court's Order. Moreover, defendant has not identified which, if any, of the requested evidentiary objections found in depositions could possibly be central to the Court's ultimate decision. The Court therefore denies defendant's motion under Rule 52(b)

Rule 59(a)(2) provides that:

> After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

[22] A motion under Rule 59, like a motion under Rule 52(b), is granted in order to correct manifest errors of law

or fact or to address newly discovered evidence. *Brown v. Wright,* 588 F.2d 708, 710 (9th Cir.1978)

Defendant has not moved for a new trial as required under Rule 59(a)(2). Nor does defendant suggest any manifest errors of law or fact that would form the basis for a new trial or the grounds on which the court could grant a new trial or amend its findings of fact and conclusions of law. Indeed all defendant seeks are (1) rulings for objections made during various depositions that were taken pre-trial and (2) the results of a site inspection that did not occur. Accordingly, the Court denies the ***1118** motion as being without factual or legal basis.

Conclusion

Based on the foregoing, defendant's motion for amended, additional or new findings is **DENIED.**

IT IS SO ORDERED.

All Citations

858 F.Supp.2d 1093, 284 Ed. Law Rep. 299

Footnotes

1 The Court granted plaintiffs' motion for class certification on August 25, 2008, 251 F.R.D. 564 (S.D.Cal.2008).

2 In the same Order, the Court granted plaintiffs' motion for summary adjudication with respect to defendants' affirmative defenses: promissory estoppel, contribution and indemnity, failure to mitigate, statute of limitations, excuse, condition subsequent, good faith, act of God, failure to exhaust administrative remedies, complaint barred for failure to exhaust judicial remedies, deliberate indifference, general governmental immunity, exercise of discretion within scope of employment—Government Code § 820.2, failure to exhaust internal remedies, legitimate business purpose, business necessity, failure to comply with Tort Claims Act—Government Code §§ 900 *et seq.,* immunity from negligent misrepresentation, eleventh amendment immunity, qualified immunity and reservation of additional affirmative defenses.

3 Plaintiffs have stipulated that they will dismiss their 42 U.S.C. § 1983 claim which results in the dismissal of claims against all individual defendants. The remaining Title IX claims are against the District defendant only.

1 Plaintiffs stipulated to dismissal of their 42 U.S.C. § 1983 claim which resulted in the dismissal of claims against all individual defendants.

604 F.Supp.2d 1264
United States District Court,
S.D. California.

Veronica OLLIER, et al., Plaintiffs,
v.
SWEETWATER UNION HIGH SCHOOL DISTRICT, et al., Defendants.

Civil No. 07cv714–L(WMc).
|
March 30, 2009.

Synopsis

Background: Current and prospective female high school students brought class action alleging, inter alia, claim against school district under Title IX for unequal participation opportunities in athletic programs. Students moved for partial summary judgment.

Holdings: The District Court, M. James Lorenz, J., held that:

[1] district failed to provide female high school students with opportunities to participate in athletics in substantially proportionate numbers as males;

[2] district failed to show a history and continuing practice of program expansion which was demonstrably responsive to the developing interest and abilities of female students; and

[3] evidence that female students were interested in playing a number of sports and were prevented from doing so because a coach could not be found sufficiently demonstrated that district failed to fully and effectively accommodate students' interests.

Motion granted.

West Headnotes (17)

[1] Civil Rights
Extracurricular activities;athletics

There is no set ratio between female athletic participation and enrollment that constitutes the "substantially proportionate" athletic opportunities for male and female students required by Title IX or that, when not met, results in a disparity or a violation; rather, substantial proportionality requires a close relationship between athletic participation and enrollment. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

3 Cases that cite this headnote

[2] Civil Rights
Extracurricular activities;athletics

School district failed to provide female high school students with opportunities to participate in athletics in substantially proportionate numbers as males required by Title IX; difference of at least 6.7% between female athletic participation and enrollment reflected at least 47 girls who would have played sports if athletic participation was proportional to female enrollment, a sufficient number to field one or more viable competitive non-contact sports teams. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

4 Cases that cite this headnote

[3] Civil Rights
Extracurricular activities;athletics

When an educational institution fails to achieve the substantial proportionality between athletic opportunities for male and female students required by Title IX, compliance may nevertheless be found if the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of the underrepresented sex. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[4] **Civil Rights**
Extracurricular activities;athletics

The increase in the number of female sports teams standing alone does not show that an educational institution has a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female students, as would comply with Title IX requirement for an institution with disproportionately lower athletic opportunities for female students; whether there has been continuing program expansion for female students is determined by looking at the actual number and the percentage of females participating in athletics. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

2 Cases that cite this headnote

[5] **Civil Rights**
Extracurricular activities;athletics

School district with disproportionately lower athletic opportunities for female high school students failed to show a history and continuing practice of program expansion which was demonstrably responsive to the developing interest and abilities of female students, as would comply with Title IX, although the number and variety of female athletic teams at school increased and school had more female teams than male teams, where there was no steady increase in percentage of female students participating in athletics. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[6] **Civil Rights**
Extracurricular activities;athletics

A slight decrease in female athletic participation in a given year at an educational institution with disproportionately lower athletic opportunities for female students is not necessarily fatal to showing compliance with Title IX by demonstrating the institution's history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of female students. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

1 Cases that cite this headnote

[7] **Civil Rights**
Extracurricular activities;athletics

A school which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a).

Cases that cite this headnote

[8] **Civil Rights**
Extracurricular activities;athletics

If there is sufficient interest and ability among members of the statistically underrepresented gender at an educational institution, not slaked by existing athletic programs, the institution necessarily violates Title IX. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[9] **Civil Rights**
Extracurricular activities;athletics

Although an educational institution has an exacting burden under Title IX to demonstrate that its athletic programs fully and effectively accommodate the interests and abilities of the members of the underrepresented sex, an institution is not required to field a team in response to the pleas of one talented athlete if sufficient numbers of individuals to form teams to compete do not exist. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[10] **Civil Rights**
Extracurricular activities;athletics

Evidence that a significant number of female high school students were interested in playing field hockey and were prevented from doing so when the sport was eliminated because a coach could not be found sufficiently demonstrated that school district with disproportionately lower athletic opportunities for female students failed to fully and effectively accommodate interest and abilities of students under Title IX; whether or not district was successful at obtaining a coach was not an indicator of lack of female students' interest or ability, as demonstrated by field hockey participation in years sport was offered, statements of two students, and inquiries from multiple students to athletic director's about playing sport. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[11] **Civil Rights**
Extracurricular activities;athletics

For purposes of an educational institution's demonstration that its athletic programs fully and effectively accommodate the interests and abilities of the members of the underrepresented sex under Title IX, the methods chosen by the institution to determine students' interests must be nondiscriminatory and must not disadvantage members of the underrepresented sex. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[12] **Civil Rights**
Extracurricular activities;athletics

A specific survey or assessment of students' interests and abilities is not required for purposes of an educational institution's demonstration that its athletic programs fully and effectively accommodate the interests and abilities of the members of the underrepresented sex under Title IX, even though they may be required as part of a remedy if the institution's current program does not equally effectively accommodate the interests and abilities of students. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

1 Cases that cite this headnote

[13] **Civil Rights**
Extracurricular activities;athletics

For purposes of determining whether an educational institution's athletic programs fully and effectively accommodate the interests and abilities of underrepresented female students under Title IX, the expressed interests of girls and other programs indicative of interests and abilities, such as club and intramural sports, sports programs at feeder schools, community and regional sports programs, and physical education classes may provide a basis for assessing unmet interest and ability. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[14] **Civil Rights**
Extracurricular activities;athletics

For purposes of determining whether an educational institution's athletic programs fully and effectively accommodate the interests and abilities of underrepresented female students under Title IX, attempts to discern female students' interest in participating in athletic programs is not limited to addressing hardcore sports. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

[15] **Civil Rights**

Extracurricular activities;athletics

When a viable athletic team is eliminated, unmet interest is strongly suggested for purposes of determination under Title IX whether an educational institution's athletic programs fully and effectively accommodate the interests and abilities of underrepresented the underrepresented sex. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

1 Cases that cite this headnote

[16] Federal Civil Procedure

Burden of proof

When coupled with admissible evidence of unmet interest in athletic program by students of underrepresented sex, Title IX defendants must go beyond the pleadings and by their own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial in order to defeat motion for summary judgment on claim alleging unequal participation opportunities under Title IX. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11; Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.App.(2006 Ed.)

Cases that cite this headnote

[17] Civil Rights

Extracurricular activities;athletics

Elimination of girls high school tennis and water polo programs because there was no coach available demonstrated that school district with disproportionately lower athletic opportunities for female students failed to fully and effectively accommodate interest and abilities of students under Title IX, despite contention that both sports would be offered going forward; prior elimination of sports showed unmet need on the part of females whether or not coaches were available. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681(a); 34 C.F.R. § 106.11.

Cases that cite this headnote

Attorneys and Law Firms

***1267** Elizabeth Kristen, Legal Aid Soc–Emp Law Ctr., San Francisco, CA, Erin Cranman Witkow, Manatt Phelps and Phillips, Los Angeles, CA, J. Cacilia Kim, Vicky L. Barker, California Women's Law Center, Los Angeles, CA, for Plaintiffs.

Daniel R. Shinoff, Gil Abed, Patricia Michelle Coady, Stutz Artiano Shinoff and Holtz, San Diego, CA, for Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY ADJUDICATION [doc. # 66]

M. JAMES LORENZ, District Judge.

Plaintiffs move for partial summary judgment on their second cause of action. [doc. # 66]. The motion has been thoroughly briefed and the Court finds this matter suitable for determination on the papers submitted and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the Court grants plaintiffs' motion.

I. Background

Plaintiffs are female students who attend or will attend Castle Park High School ("CPHS") in the Sweetwater Union School District ("District") and participate or would participate in interscholastic athletic activities. On April 19, 2007, named plaintiffs brought this case as a class action. [1]

Defendants are alleged to have unlawfully discriminated against female student ***1268** athletes with respect to "practice and competitive facilities; locker rooms; training facilities; equipment and supplies; travel and transportation, coaches and coaching facilities; scheduling of games and practice times; publicity; and funding." (Complaint, ¶ 40.) Additionally, plaintiffs allege that defendants have "failed to provide female students with equal athletic participation opportunities, despite their demonstrated athletic interest and and abilities to

participate in athletics." *Id.,* ¶ 71. Because of this alleged failure, plaintiffs assert that girls' participation in sports is severely limited and interested girls are discouraged from going out for sports. *Id.,* ¶ 74.

Defendants[2] filed their answer on June 29, 2007 [doc. # 14] which included 31 affirmative defenses. In their present motion, plaintiffs seek summary adjudication of their second cause of action and 21 of the 31 affirmative defenses raised by defendants: 9, 10, 11, 13, 16, 19–31. In response to plaintiffs' motion, defendants state that "the District does not have evidence to support the affirmative defenses challenged in this motion, and therefore agrees to dismiss these particular affirmative defenses." (Opp. at 17.)

II. Summary Judgment Legal Standard

Federal Rule of Civil Procedure 56 empowers the court to enter summary judgment on factually unsupported claims or defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is material when, under the substantive governing law, it affects the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Arpaio,* 125 F.3d 732, 735 (9th Cir.1997).

The party moving for summary judgment bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex,* 477 U.S. at 323, 106 S.Ct. 2548. If the moving party does not have the burden of proof at trial, it may carry its initial burden by "produc[ing] evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.,* 210 F.3d 1099, 1106 (9th Cir.2000). When the moving party bears the burden of proof on an issue—whether on a claim for relief or an affirmative defense—the party "must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in its favor." *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1194 (5th Cir.1986); *see S. Cal. Gas Co. v. City of Santa Ana,* 336 F.3d 885, 889 (9th Cir.2003).

If the moving party fails to discharge its initial burden of production, summary judgment must be denied and the court need not consider the nonmoving party's evidence, even if the nonmoving party bears the burden of persuasion at trial. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 159–60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Nissan Fire,* 210 F.3d at 1102–03. When the moving party carries its initial burden of production, the nonmoving party ***1269** cannot "rest upon mere allegation or denials of his pleading." *Anderson,* 477 U.S. at 256, 106 S.Ct. 2505. Rather, the non-movant must "go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324, 106 S.Ct. 2548 (internal quotations omitted); *Anderson,* 477 U.S. at 256, 106 S.Ct. 2505; *Nissan Fire,* 210 F.3d at 1103.

A "genuine issue" of material fact arises if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. "Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987). When ruling on a summary judgment motion, the court cannot engage in credibility determinations or weighing of the evidence; these are functions for the jury. *Anderson,* 477 U.S. at 255, 106 S.Ct. 2505; *Playboy Enters., Inc. v. Welles,* 279 F.3d 796, 800 (9th Cir.2002). The court must view the evidence in the light most favorable to the nonmoving party, and draw all reasonable inferences in favor of the nonmovant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Gibson v. County of Washoe, Nev.,* 290 F.3d 1175, 1180 (9th Cir.2002), *cert. denied,* 537 U.S. 1106, 123 S.Ct. 872, 154 L.Ed.2d 775 (2003). The court is not required "to scour the record in search of a genuine issue of triable fact," *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir.1996), but rather "may limit its review to the documents submitted for purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified Sch. Dist.,* 237 F.3d 1026, 1030 (9th Cir.2001).

III. Title IX

Title IX provides that "[n]o 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). Plaintiffs' second cause of action alleges a violation of Title IX based upon unequal participation opportunities for females in athletic programs at CPHS against defendant District. [3]

The Office of Civil Rights ("OCR") published a Policy Interpretation of Title IX in 1979, that laid out the three factors used to assess whether an institution complies with Title IX. *See* OCR Policy Interpretation, 44 Fed.Reg. 71,413 (1979); *see also Neal v. Bd. of Trustees of Cal. State Universities,* 198 F.3d 763, 767 (9th Cir.1999).

In the present case, the parties agree that compliance in the area of equivalent participation opportunities must be determined by the three-part test:

1. Whether intercollegiate [4] level participation opportunities for male and female students are provided in ***1270** numbers substantially proportionate to their respective enrollments;

2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

3. Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Policy Interpretation, 44 Fed.Reg. 71,418.

A. Substantially Proportionate

[1] Plaintiffs argue that the undisputed facts demonstrate that under the first prong of the test, the District does not provide girls with athletic opportunities that are substantially proportionate to their enrollment at CPHS during the class period. [5] Girls enrollment and their participation in athletic activities are provided by plaintiffs as Tables 1 and 2, and Table 3 shows the difference between girls' enrollment percentage and percentage of girls participating in sports and the number of additional girls who would have played sports if participation were proportional to enrollment and no fewer boys participated in sports. Plaintiffs prepared the Tables from information obtained from defendants in response to various discovery requests and from the California Department of Education website. (*See* Kristen Decl. *passim.*). Defendants do not challenge the accuracy of these numbers. [6] Tables 1 through 3 follow:

***1271** For the relevant class-period years, the percentage differences between female enrollment and female participation in sports were 6.7%, 10.3% and 6.7%. (*See* Table 3.) Defendants contend that despite the obvious disparity between the female enrollment and the female athletic participation figures, the percentages are substantially proportionate. Defendants cite to several cases where courts found that certain disparities were sufficiently large to show non-compliance but in each of these cases, the percentages "were at least 10.5%." (Opp. at 5.) A 10.5 percentage does not provide a benchmark as defendants suggest. There is no set ratio that constitutes ***1272** "substantially proportionate" or that, when not met, results in a disparity or a violation. Rather, substantial proportionality requires a close relationship between athletic participation and enrollment.

[2] When looking at the 2007–08 school year, girls comprised 45.4% of the school population but only 38.7% of athletic participants. This 6.7% difference does not show a close relationship between female athletic participation and enrollment. Instead, this particular disparity is not substantially proportionate because the 6.7% difference reflects 47 girls who would have played sports if athletic participation was proportional to female enrollment.

The Policy Interpretation states that:

> Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

...

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team....

44 Fed.Reg. 71,418.

Forty-seven females could sustain at least one viable competitive team and likely several competitive teams. The 2005–06 and 2006–07 figures show an even greater disparity between female enrollment and participation when considering the additional number of girls who would have played sports if participation were substantially proportionate to enrollment. (*See* Table 3.)

The Court must conclude, as a matter of law, that plaintiffs have demonstrated that defendants fail to provide female students with opportunities to participate in athletics in substantially proportionate numbers as males. But the District's failure to meet substantial proportionality at CPHS does not preclude it from complying with Title IX in either of the other two approved methods.

B. Program Expansion for Girls

[3] As the Court has found here, when an institution fails to achieve substantial proportionality, compliance may be found under the second prong of the test if the "institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex." 44 Fed.Reg. 71,418; *see also Boucher v. Syracuse University,* 164 F.3d 113, 117 (2d Cir.1999)(courts look to the institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion).

[4] **[5]** Defendants argue that the number and variety of athletic teams available at CPHS has increased since 1998–99 thereby demonstrating that the athletic programs for girls has expanded. In support of their contention, defendants also point to the fact that CPHS currently has more athletic sports teams for girls (23) than it does for boys (21). But as plaintiffs correctly note, the number of teams offered to girls is not the ultimate issue. For example, a single team may support nine athletes or 30 athletes. Three teams of nine females provide fewer athletic opportunities than one team of 30 males. The number of teams available for female participation standing alone is not conclusive under this prong of the Title IX compliance test. Whether there has been continuing program expansion for girls is determined by looking at the actual number and the percentage of females participating in athletics.

[6] Table 2 shows that the percentage of girls participating in athletics at CPHS ranges from a 2004–05 low of 33.4% to a ***1273** 2003–04 high of 40.8% with the 2007–08 school year having a 38.7% female participate rate. The undisputed data shows that female athletic participation at CPHS is not continuing to expand. Although a slight decrease in athletic participation in a given year will not be fatal to showing compliance with Title IX, when, as here, there is no steady increase in female participation, defendants are not entitled to show compliance with Title IX based on a history and continuing practice of program expansion.

C. Accommodation of Girls' Interest

[7] **[8]** **[9]** A school "which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup." *Cohen v. Brown University,* 991 F.2d 888, 897–98 (1st Cir.1993) (*Cohen I*); accord *Roberts v. Colorado State Bd. of Agriculture,* 998 F.2d 824, 829 (10th Cir.1993). If the plaintiffs prove disparity, as they have here, then the school must show that it has a history and continuing practice of program expansion under the second prong of the test. Because the Court finds that the school has not met the second prong, plaintiffs may prevail by sustaining their burden of proof under the third prong demonstrating an unmet interest on the part of the underrepresented sex. *Roberts,* 998 F.2d at 830–31; *Cohen I,* 991 F.2d at 901. The third prong

> 'sets a high standard: it demands not merely some accommodation, but full and effective accommodation. [7] If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.'

Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265, 275 (6th Cir.1994)(quoting *Roberts,* 998 F.2d at 831–32 (quoting *Cohen I,* 991 F.2d at 898)).

[10] Contending that the interests of female athletes are fully and effectively accommodated at CPHS, defendants assert plaintiffs have failed to provide evidence that specific girls or groups of girls have the necessary interest and ability to field a competitive, approved interscholastic sports team. [8] (Opp. at 19.)

[11] **[12]** **[13]** Plaintiffs first note that defendants have not sought to determine the athletic interests and abilities of their students through a formal written process. "With respect to the manner in which the interest of the students is to be determined, the Policy Interpretation instructs that the methods chosen by the institution must be nondiscriminatory and must not disadvantage members of an underrepresented sex." *Horner,* 43 F.3d at 273 (citing Policy Interpretation, 44 Fed.Reg. at 71,417). But a specific survey or assessment of interests and abilities is not required by the Title IX regulation or the Policy Interpretation, *see Cohen v. Brown,* 101 F.3d 155, 180 (1st Cir.1996) ("*Cohen IV* "), even though they may be required as part of a remedy when OCR has concluded that an institution's current program does not equally effectively accommodate the interests and abilities of ***1274** students. *See* Investigator's Manual at 27; *Cohen III v. Brown University,* 879 F.Supp. 185, 210 n. 51 (D.R.I.1995). However, the expressed interests of girls and "other programs indicative of interests and abilities, such as club and intramural sports, sports programs at 'feeder' schools, community and regional sports programs and physical education classes" may provide a basis for assessing unmet interest and ability.

[14] Although defendants have not surveyed their students, [9] plaintiffs have provided evidence to show unmet interest coupled with the ability of female students to participate in interscholastic athletics at CPHS.

1. Field Hockey

Plaintiffs point to field hockey as a viable sport that has been discontinued to demonstrate unmet interest. A review of the history of female participation shows that a significant number of girls at CPHS have an ability to competitively participate in this sport. CPHS has had female field hockey teams over the course of the past ten years; however, the sport was eliminated twice during the class period.

Table 4: Girls Playing Field Hockey at CPHS

Year	Girls Field Hockey Participants
2007–08	not offered
2006–07	9; no competition secured
2005–06	not offered
2004–05	16
2003–04	25
2002–03	23

2001–02	16
2000–01	not offered
1999–00	not offered

Defendants provide no evidence that interest in field hockey waned in 2005–06 or 2007–08, but rather explain that a coach was not available for a team. (*See* Kristen Decl. ¶ 22.) Whether defendants are unsuccessful at obtaining or maintaining a coach for a sport is not an indicator of lack of student interest or inability on the part of female students. In his deposition, Paul Van Nostrand, the Athletic Director of CPHS from 2001–05, stated that an unidentified number of girls approached him and expressed an interest in playing field hockey at CPHS during the years between 2001 and 2005. (Exh. G, Van Nostrand Dep. at 200–01.) Plaintiffs also provide the sworn statements of Naudia Rangel and Veronica Ollier, class representatives, concerning interest in field hockey during relevant time periods. (Exhs. P, Q, R.) Although asserting in its opposition that nine players are necessary to support a competitive field hockey team, defendants must acknowledge that the required number is a minimum seven and a maximum of 11 players. (*See* Opp. Exh. I.)

[15] **[16]** As the *Cohen IV* court noted, when a viable team is eliminated, unmet interest is strongly suggested. When coupled with admissible evidence of unmet interest, defendants must "go beyond the pleadings and by [their] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 324, 106 S.Ct. 2548 (internal quotations omitted).

***1275** Plaintiffs, as the moving party, have provided admissible evidence showing unmet interest and an ability to participate on the part of female students in field hockey at CPHS. Defendants have failed to provide admissible evidence to counter plaintiffs' proof. As a result, plaintiffs have proven that defendants have not met the third prong of the test in that they have failed to fully and effectively accommodate female athletes and potential female athletes at CPHS.

2. Other Sports

[17] Plaintiffs also contend there is unmet interest on the part of female students with respect to tennis and water polo. In support of their position, plaintiffs point to several depositions that demonstrate that girls tennis has not been offered since 2004 or 2005 because there was no coach available. (Kristen Decl. Exh. F, Moore Depo at 34, 97, 238, 266; Weins Depo at 52, 53; Exh. G, MacGreggor Depo 476.) For the same reason, the lack of a coach, water polo was not offered at various times. Defendants, rather than addressing past years availability of these sports, contends both sports are being offered during the 2008–09 school year and that water polo was offered in 2005–06 and 2007–08. (Opp. at 16.) Rather than provide any evidence to counter plaintiffs' showing of interest by female students tennis and water polo, defendants argue a lack of coaching personnel and their good faith in attempting to obtain coaches to justify the elimination of teams during certain years. As discussed above, the issue is whether there is unmet need on the part of females; not whether coaches are available.

Plaintiffs have demonstrated with admissible evidence the interest and ability among females at CPHS. Defendants have failed to counter that proof. Consequently, defendants fail the third prong of the compliance test.

IV. Conclusion

As a matter of law, the Court finds defendants have allowed significant gender-based disparity, *i.e.,* not substantially proportionate, with respect to female athletic opportunities; failed under prong two to show a history and continuing practice of expansion of opportunities for females; and failed under prong three to demonstrate that female interest and abilities have been fully and effective accommodated. Because plaintiffs have demonstrated through admissible evidence that defendants are not in compliance with Title IX based on

unequal participation opportunities in athletic program, plaintiffs are entitled to summary judgment on their second cause of action.

Based on the foregoing, **IT IS ORDERED** plaintiffs' motion for partial summary judgment with respect to the second cause of action and certain affirmative defenses is **GRANTED.** The following affirmative defenses are dismissed with prejudice from this action: promissory estoppel, contribution and indemnity, failure to mitigate, statute of limitations, excuse, condition subsequent, good faith, act of God, failure to exhaust administrative remedies, complaint barred for failure to exhaust judicial remedies, deliberate indifference, general governmental immunity, exercise of discretion within scope of employment—Government Code § 820.2, failure to exhaust internal remedies, legitimate business purpose, business necessity, failure to comply with Tort Claims Act—Government Code § § 900 *et seq.,* immunity from negligent misrepresentation, eleventh amendment immunity, qualified immunity and reservation of additional affirmative defenses.

IT IS FURTHER ORDERED that the parties shall jointly contact Magistrate Judge McCurine's chambers for further ***1276** proceedings within five days of the filing of this Order.

IT IS SO ORDERED.

All Citations

604 F.Supp.2d 1264, 243 Ed. Law Rep. 767

Footnotes

1 The Court granted plaintiffs' motion for class certification on August 25, 2008, 251 F.R.D. 564. [doc. # 71] The certified class includes "[a]ll present and future CPHS female students and potential students who participate, seek to participate, and/or are or were deterred from athletics at CPHS." *Id.* at 565.

2 Defendants include the District and individual defendants Arlie N. Ricasa, Pearl Quinones, Jim Cartmill, Jaime Mercado, Greg R. Sandoval, Jesus M. Gandara, Earl Weins and Russell Moore (collectively "defendants").

3 Plaintiffs' complaint alleges four causes of action: first cause of action: violation of Title IX of the Education Amendments of 1972—unequal treatment and benefits in athletic programs against defendant Sweetwater School District; second cause of action: violation of Title IX—unequal participation opportunities in athletic programs against defendant Sweetwater Union School District; third cause of action: violation of Title IX—retaliation against Sweetwater School District; and fourth cause of action: 42 U.S.C. § 1983, sex-based discrimination in violation of the fourteenth amendment against the individual defendants in their official capacities. Plaintiffs' motion for summary adjudication is directed to the second cause of action only.

4 The Policy Interpretation reference to "intercollegiate" sports has been made applicable to all recipients of federal education funds, including high schools and is applicable to interscholastic high school sports as well as intercollegiate sports. *See* 34 C.F.R. § 106.11. Defendants do not dispute that Title IX is applicable here.

5 As plaintiffs note, the time frame for the class dates to April 2005 based on the applicable two-year statute of limitations. (Plts' Mtn. Ps & As at 2 fn. 3.) However, plaintiffs have provided statistical information for prior years and defendants have not challenged consideration of this longer-range information.

6 Defendants do not challenge specifically the numbers provided in the tables prepared by plaintiffs; however, defendants object to certain evidence submitted by plaintiffs. Objected to evidence includes the deposition testimony of Maria Castilleja concerning softball; evidence related to purported interest in girls' flag/Powder Puff football; evidence showing that girls' tennis was not offered in prior years to the extent that it is intended to prove that girls' tennis will not be offered during the 2008–09 school year; evidence concerning the Clubs of Troy to the extent it is offered to show there are identified needs of female athletes that have not been met at CPHS; evidence concerning the lack of written process to assess current or future students' interests and evidence showing that girls' water polo was not offered in prior years to the extent that it is intended to prove that girls' water polo will not be offered during the 2008–09 school year. (*See* Defendants' objections, doc. no. 75–7.)

TABLE 1: ENROLLMENT AT CASTLE PARK BY GENDER

Year	Girls	Percentage Girls	Boys	PercentageBoys	Total

2007–08	975	45.4%	1173	54.6%	2148
2006–07	1092	46.7%	1246	53.3%	2338
2005–06	1092	46.7%	1246	53.3%	2338
2004–05	1128	46.6%	1292	53.4%	2420
2003–04	1119	46.9%	1268	53.1%	2387
2002–03	1098	47.8%	1201	52.2%	2299
2001–02	1133	49.0%	1178	51.0%	2311
2000–01	1087	49.1%	1128	50.9%	2215
1999–00	1115	49.6%	1132	50.4%	2247
1998–99	1083	48.4%	1153	51.6%	2236

TABLE 2: ATHLETIC PARTICIPATION AT CASTLE PARK BY GENDER

Year	Girls	Percentage Girls	Boys	PercentageBoys	Total
2007–08	149	38.7%	236	61.3%	385
2006–07	174	36.4%	304	63.6%	478
2005–06	146	40.0%	221	60.0%	367
2004–05	172	33.4%	343	66.6%	515
2003–04	144	33.5%	286	66.5%	430
2002–03	198	40.8%	287	59.2%	485
2001–02	161	38.8%	254	61.2%	415
2000–01	163	35.3%	298	64.6%	461
1999–00	144	36.6%	249	63.4%	393
1998–99	156	34.0%	303	66.0%	459

TABLE 3: DIFFERENCE BETWEEN GIRLS' ENROLLMENT AND PARTICIPATION, AND NUMBER OF GIRLS WHO WOULD BE PARTICIPATING IF PARTICIPATION WERE PROPORTIONAL TO ENROLLMENT

YEAR	Difference Between Girls' irls' Enrollment Percentage and Percentage of Girls Participating in Sports	Additional Girls Who Would Have Played Sports If Participation Were Proportional To Enrollment and No Fewer Boys Participated
2007–08	– 6.7	47
2006–07	–10.3	92

2005–06	– 6.7	48
2004–05	–13.2	127
2003–04	–13.4	108
2002–03	– 7.0	65
2001–02	–10.2	83
2000–01	–13.8	124
1999–00	–13.0	101
1998–99	–14.4	128

7 Although "the institution's burden under subsection (3) is an exacting one, an institution is not required to field a team in response to, *e.g.,* the pleas of 'one talented softball player,' if sufficient numbers of individuals to form teams to compete do not exist." *Horner,* 43 F.3d at 275 fn. 9 (citing *Roberts,* 998 F.2d at 831 n. 10; *Cohen,* 991 F.2d at 898).

8 Defendants attempt to limit the unmet interest and ability prong of the three-part test to an approved California Interscholastic Federation ("CIF") sport in CPHS's interscholastic conference. (Opp. at 19.) However, there is no evidence submitted that CIF approval is a necessary prerequisite for a school to determine or act on athletic interest and abilities.

9 Defendants provide an after-school program, the Clubs of Troy, that provides opportunities for students to "get together to participate in various friendly activities." (Opp. at 11). Defendants acknowledge that some of the activities are "physical in nature." *Id.* The Clubs of Troy conducted an interest survey defendants contend was "not concerned with hardcore interscholastic competition" and therefore the survey is not relevant to determining whether there is sufficient interest to field certain interscholastic teams." *Id.* Attempts to discern female students' interest is not limited to addressing "hardcore" sports.

601 F.Supp.2d 1183
United States District Court,
C.D. California.

Lauren M. CRUZ, by her next friend Jean CRUZ; Valerie Herrera, by her next friend Carolina Herrera; Jennifer N. Cerros; Catherine Grempel, by her next friend Tina Grempel, individually and on behalf of all those similarly situated, Plaintiffs,
v.
ALHAMBRA SCHOOL DISTRICT; The City of Alhambra; Russell Lee Sung, Victor Sandoval, Lou Torres, William A. Vallejos, John H. Nuñez, Robert L. Gin, Ruth E. Castro, and Barbara A. Messina, in their official capacities, Defendants.

Case No. CV 04–1460 ABC (Mcx).
|
March 3, 2009.

Synopsis
Background: Current and future female high school students brought Title IX action against various individuals, school district, and city for their failure to provide female students with an equal opportunity to participate in school athletics. The parties entered into settlement agreements, and students moved for attorney fees. The United States District Court for the Central District of California, Dickran M. Tevrizian, J., awarded students approximately one-third of their requested attorney fees, and denied their subsequent motion to amend or alter judgment. Students appealed. The Court of Appeals, 282 Fed.Appx. 578, vacated in part, reversed in part, and remanded.

Holdings: The District Court, Audrey B. Collins, Chief Judge, held that:

[1] lodestar claimed by students was reasonable, though it would be reduced by 5%;

[2] attorneys' market rates were appropriate for calculating lodestar;

[3] paralegal and law clerks' market rates were mostly appropriate for calculating lodestar;

[4] students were not entitled to lodestar enhancement;

[5] students were entitled to post-judgment interest;

[6] lodestar for remand fee motion was reasonable; and

[7] costs billed by students for post-remand work were reasonable.

So ordered.

West Headnotes (25)

[1] Federal Civil Procedure
Result;prevailing parties;"American rule"

Litigants generally pay their own attorney fees regardless of the outcome of a case, although Congress may provide otherwise by statute.

Cases that cite this headnote

[2] Federal Civil Procedure
Amount and elements

Once a party has demonstrated that it is entitled to some award of fees, a district court determines the amount of such an award by first calculating the "lodestar" figure by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate.

3 Cases that cite this headnote

[3] Federal Civil Procedure
Amount and elements

The lodestar, used by the district court to determine award of attorney fees, is presumed to provide reasonable fees, but the court may if circumstances warrant adjust the lodestar amount to account for other factors which are not subsumed within it.

Cases that cite this headnote

[4] **Federal Civil Procedure**
Amount and elements

In calculating the lodestar figure to determine the amount of fees to award prevailing plaintiffs, court takes into account the following factors: (1) the number of years plaintiffs litigated the case; (2) the number of drafts of the settlement agreements; (3) the skill and expertise of plaintiffs' counsel; and (4) the excellent results obtained.

1 Cases that cite this headnote

[5] **Civil Rights**
Amount and computation

Lodestar claimed by class of current and future female high school students in Title IX action which led to settlement agreement with school district, city and other individuals was reasonable, though it would be reduced by 5% from rate claimed by students due to minor duplication of effort, excessive billing, excessive conferencing, and billing for clerical work; from initial investigation to settlement, plaintiffs litigated matter for roughly three years, exchanged roughly thirty drafts of settlement agreements with school district, were affiliated with two non-profit organizations recognized for expertise in challenging allegedly discriminatory or otherwise impermissible employment and educational access practices and demonstrated significant skill and expertise in handling litigation, and obtained excellent results in utilizing Title IX to obtain far-reaching changes that significantly benefit many young women. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

[6] **Federal Civil Procedure**
Amount and elements

In calculating the amount of an award of attorney fees by using the lodestar method, the court must eliminate from the lodestar time that was unreasonably, unnecessarily, or inefficiently devoted to the case.

8 Cases that cite this headnote

[7] **Civil Rights**
Time expended;hourly rates

Number of hours billed by prevailing plaintiffs in Title IX action alleging that school district, city and various individuals failed to provide female students with an equal opportunity to participate in school athletics resulted in part from unnecessary duplication and excessive billing, and thus, claimed hours would be modestly reduced to compensate for duplication and excessive billing; numerous attorneys billed to inspect athletic facilities, numerous attorneys appeared at mediation without adequate explanation, and five attorneys worked on class certification motion for 194 hours where defendants had no legal argument why certification was not appropriate. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

[8] **Federal Civil Procedure**
Amount and elements

Participation of more than one attorney at a mediation does not automatically constitute an unnecessary duplication of effort requiring a reduction of the calculation of an award of attorney fees under the lodestar method.

1 Cases that cite this headnote

[9] **Federal Civil Procedure**
Amount and elements

Attorney fees billed for internal conferencing, in calculating lodestar to determine an award of fees, are recoverable to the extent they are reasonably necessary to conducting the litigation.

1 Cases that cite this headnote

[10] **Civil Rights**
Time expended;hourly rates

Number of hours billed for internal conferencing by prevailing plaintiffs in Title IX action alleging that school district, city and various individuals failed to provide female students with an equal opportunity to participate in school athletics was unreasonably high, and thus, claimed hours would be modestly reduced to compensate for excessive conferencing; significant detail was not provided by either party as to whether time spent on communications was reasonable. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

Cases that cite this headnote

[11] **Federal Civil Procedure**
Amount and elements

Parties cannot recover attorney fees in a lodestar calculation for conducting clerical matters.

1 Cases that cite this headnote

[12] **Civil Rights**
Services or activities for which fees may be awarded

Civil Rights
Time expended;hourly rates

Fees improperly billed for clerical work by prevailing plaintiffs in Title IX action alleging that school district, city and various individuals failed to provide female students with an equal opportunity to participate in school athletics would be accounted for through a modest reduction to the plaintiffs' claimed hours, where it was clear that the improperly billed hours were relatively few in number in relation to the total fee award. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

Cases that cite this headnote

[13] **Federal Civil Procedure**
Amount and elements

The hourly rates used to calculate the lodestar determination of attorney fees must be in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation.

1 Cases that cite this headnote

[14] **Civil Rights**
Time expended;hourly rates

Attorneys' market rates between $200 and $490 per hour, for attorneys with one to thirty-five years' experience in litigating discriminatory or otherwise impermissible employment and educational access practices, were appropriate for calculating lodestar award of attorney fees in Title IX action; attorneys collected data on then-current rates charged by local law firms as to attorneys with similar experience, and provided rates determined to be reasonable by other court. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

7 Cases that cite this headnote

[15] **Civil Rights**
Time expended;hourly rates

Paralegal and law clerks' market rates at $100 and $150 per hour were appropriate for calculating lodestar award of attorney fees in Title IX action, though senior paralegal rate of $150 per hour would be reduced to $125 per hour, in line with prevailing market rate. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

6 Cases that cite this headnote

[16] **Federal Civil Procedure**
Amount and elements

Federal Civil Procedure
Attorney fees

A strong presumption exists that the lodestar figure determined in calculating an award

of attorney fees represents a reasonable fee and should be enhanced only in rare and exceptional cases; to overcome the strong presumption that the basic fee is reasonable, the fee applicant bears the burden of coming forward with specific evidence, based on factors not already subsumed in lodestar calculation, that the lodestar amount is unreasonably low.

4 Cases that cite this headnote

[17] **Federal Civil Procedure**
Amount and elements

"Exceptional results" in resolving a legal dispute generally do not provide a basis for enhancing the lodestar calculation of an award of attorney fees, because the results obtained are generally subsumed within the initial lodestar calculation.

Cases that cite this headnote

[18] **Federal Civil Procedure**
Amount and elements

Federal Civil Procedure
Attorney fees

Not only must the results be excellent to warrant an enhancement to the lodestar calculation for an award of attorney fees, but an upward adjustment is justified only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged.

1 Cases that cite this headnote

[19] **Federal Courts**
Allowance of interest, attorney fees, and costs

Arguments made by current and future female students in initial fee motion in support of enhancement to lodestar were abandoned on remand, since they argued only on appeal that enhancement was warranted by results obtained in settlement of Title IX action with school district, city and other individuals. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

Cases that cite this headnote

[20] **Civil Rights**
Amount and computation

Civil Rights
Time expended;hourly rates

Plaintiffs in Title IX action alleging that school district, city and various individuals failed to provide female students with an equal opportunity to participate in school athletics established that hourly rates ranging from $200 to $490 to hour for 95% of 2,358.1 hours billed were reasonable, but failed to carry their burden of justifying entitlement to lodestar enhancement. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

Cases that cite this headnote

[21] **Interest**
Interest from date of judgment or decree

Plaintiffs in Title IX action alleging that school district, city, and various individuals failed to provide female students with an equal opportunity to participate in school athletics were entitled to post-judgment interest, accruing from date of initial order for attorney fees, on additional amount of fees awarded to plaintiffs on remand. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 28 U.S.C.A. § 1961; 42 U.S.C.A. § 1988.

1 Cases that cite this headnote

[22] **Interest**
Suspension

Plaintiffs in Title IX action alleging that school district, city, and various individuals failed to provide female students with an equal opportunity to participate in school athletics were entitled to post-judgment interest, accruing from date of initial order

for attorney fees, on original amount of fees awarded to plaintiffs by district court; even though city offered to immediately pay its portion of the award, the offer was contingent on plaintiffs not appealing original fee order, and city should have deposited money with court to halt accrual of interest. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 28 U.S.C.A. § 1961; 42 U.S.C.A. § 1988; Fed.Rules Civ.Proc.Rule 67(a), 28 U.S.C.A.

1 Cases that cite this headnote

[23] Federal Civil Procedure

Amount and elements

A prevailing plaintiff may recover fees for work done in litigating attorney fees.

Cases that cite this headnote

[24] Civil Rights

Costs and fees on appeal

Lodestar claimed by class of current and future female high school students in Title IX action which led to settlement agreement with school district, city and other individuals in preparing its motion for attorney fees on remand was reasonable; hours claimed were reasonable and rates claimed by attorneys for plaintiffs were reasonable. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

Cases that cite this headnote

[25] Civil Rights

Costs and fees on appeal

Costs billed by prevailing plaintiffs for post-remand work in Title IX action alleging that school district, city and various individuals failed to provide female students with an equal opportunity to participate in school athletics were reasonable; two separate shipments for briefing was necessary due to volume of materials, and travel costs were recoverable since they were normally billed to client. Education Amendments of 1972, §§ 901-909, 20 U.S.C.A. §§ 1681-1688; 42 U.S.C.A. § 1988.

Cases that cite this headnote

Attorneys and Law Firms

***1187** Claudia Center, Elizabeth Kristen, Patricia A. Shiu, Legal Aid Society, Employment Law Ctr., San Francisco, CA, Vicky L. Barker, California Women Law Center, Los Angeles, CA, for Plaintiffs.

Gary R. Gibeaut, John W. Allen, Nancy Ann Mahan–Lamb, Nancy Ann Mahan–Lamb, Gibeaut Mahan and Briscoe, Joseph M. Montes, Burke Williams & Sorensen, Los Angeles, CA, Harold W. Potter, Kimberly Hall Barlow, Michael R. Capizzi, Jones & Mayer, Fullerton, CA, for Defendants.

ORDER RE: ATTORNEY FEES AND COSTS

AUDREY B. COLLINS, Chief Judge.

Contrary to the Supreme Court's hope that attorneys' fees motions not become a "second major litigation," this matter presents precisely such a situation. The parties have filed thousands of pages of papers in battling over the appropriate fees to be awarded to Plaintiffs after they successfully concluded this Title IX matter through settlement. The fighting has ranged from the reasonableness of Plaintiffs' overall claimed hours down to the ability to recover $1.34 for a bottle of water purchased during travel to a status conference.

In addition to the initial motion for fees, Plaintiffs filed a Rule 59(e) motion for reconsideration and ultimately appealed the Court's determination of fees. The Ninth Circuit then vacated and remanded for recalculation. Pursuant to the Ninth Circuit's mandate, this Court has pending before it Plaintiffs' request for attorneys' fees incurred in litigating this matter prior to the filing of the Rule 59(e) motion. Also pending before this Court is Plaintiffs' motion for attorneys' fees and costs incurred on remand.

Upon consideration of the parties' papers and the case file, the Court hereby rules as follows.

I. BACKGROUND

On March 4, 2004, Plaintiffs Lauren M. Cruz, Valerie Herrera, Jennifer N. Cerros, and Catherine Grempel (collectively "Plaintiffs") filed this class action lawsuit against Defendants Alhambra School District (the "District") and the City of Alhambra (the "City") (collectively "Defendants"). Plaintiffs alleged that Defendants engaged in unlawful sex discrimination against female student athletes at Alhambra High School pursuant to Title IX of the Education Amendments of 1972, the United States Constitution, the California Constitution, and California's anti-discrimination laws. The Court certified the class on October 4, 2004. [1]

Following the order certifying the class, the parties spent approximately a year mediating and negotiating before reaching resolution of all of the pending claims. The settlements provide for wide-ranging changes, giving substantial benefits to many young women student-athletes. The settlements include: the creation of two new softball fields; the dedication of new locker room facilities for female students; providing equal access to weight rooms and other facilities, as well as for desirable practice and game times; equitable funding ***1188** and fund-raising opportunities; equitable publicity; and enhanced coaching. *See, e.g.,* Center Initial Decl. ¶¶ 80–91. The settlements further provide for a grievance policy, Title IX training, and future monitoring. *See, e.g., id.* ¶¶ 92–95.

A. DETERMINATION OF INITIAL FEE REQUEST

Plaintiffs filed a motion for attorneys' fees and costs on January 10, 2006 (the "Initial Fee Motion"). That motion requested fees and costs incurred both in litigating the merits of the case and for work done on the Initial Fee Motion and reply brief. In connection with their Initial Fee Motion, Plaintiffs seek $767,944.69 in fees, [2] plus a 25% enhancement. On February 27, 2006, the Court granted the Initial Fee Motion in part ("Initial Fee Order"). As a threshold matter, the Court ruled that Plaintiffs are prevailing parties entitled to attorneys' fees under 42 U.S.C. § 1988. Initial Fee Order at 5–6. But the Court ruled that the hours claimed were unreasonable given the non-complex nature of the matter, unnecessary duplication of effort, excessive inter- and intra-office conferencing, and billing for clerical and administrative tasks. *Id.* at 10–16. The Court also ruled that Plaintiffs failed to prove that the rates requested are reasonable because they were improperly based on "hourly charges claimed by large, well known highly regarded law firms" rather than the local legal community as a whole, and were otherwise too high given the "inefficient manner in which this case was conducted." *Id.* at 16–19. Based on these findings, the Court reduced Plaintiffs' proposed lodestar amount by 50%. *Id.* at 19. The Court also denied Plaintiffs' request for a lodestar enhancement. *Id.* at 20.

B. DETERMINATION OF RULE 59(E) MOTION

Plaintiffs then filed a motion to reconsider the Initial Fee Order pursuant to Fed.R.Civ.P. 59(e), arguing that the Court improperly failed to include fees incurred after filing the Initial Fee Motion (*i.e.,* fees related to the reply brief and the final settlement approval hearing). On May 1, 2006, the Court denied the motion ("Rule 59(e) Order"). The Court expressed concern that Plaintiffs failed to adequately indicate that they would be adjusting their fees on reply and failed to provide specific documentation detailing the new fees. Rule 59(e) Order at 5–8. The Court also found that the additional fees reflected "continued inefficiencies and unreasonable duplication of effort." *Id.* at 8.

C. NINTH CIRCUIT MANDATE

Plaintiffs timely appealed both the Initial Fee Order and the Rule 59(e) Order. The Ninth Circuit vacated the Initial Fee Order and remanded it to this Court for recalculation. Ninth Circuit Memo. at 581. The Ninth Circuit held that the Court erred in the Initial Fee Order by failing to use the lodestar method and failing to explain how the purported deficiencies in Plaintiffs' fee application correlated to the percentage of the fee reduction. *Id.* at 580–81. The Ninth Circuit instructed that, in conducting the lodestar analysis on remand, the Court should carefully consider (1) the number of years spent litigating the case, (2) the number of drafts of the settlement agreements prepared and reviewed, (3) the considerable skill and expertise of Plaintiffs' counsel, and (4) the excellent results obtained. *Id.* at 581 n. 5.

***1189** The Ninth Circuit reversed outright the determination in the Rule 59(e) Order that Plaintiffs could not recover the fees incurred after filing their Initial Fee Motion. *Id.* at 581–82. The Ninth Circuit rejected the contention that insufficient notice was provided in

the Initial Fee Motion that additional fees would be sought and also rejected the contention that Plaintiffs had submitted insufficient evidence to support the additional award. *Id.* at 581–82.

D. ADDITIONAL FEES AND COSTS SOUGHT ON REMAND

In addition to the issues raised by the Ninth Circuit's Mandate, Plaintiffs filed a motion seeking further attorneys' fees and costs associated with pursuing this matter on remand. Plaintiffs also assert that they are entitled to recover post-judgment interest on the fees related to the Initial Fee Motion.

II. DISCUSSION

Before the Court are several issues for determination. First, the Court must determine the amount of fees to be awarded in connection with the Initial Fee Motion. Second, the Court must determine whether Plaintiffs are entitled to recover post-judgment interest on that amount. Lastly, the Court must determine whether Plaintiffs are entitled to fees and costs on remand and, if so, the amount thereof.

A. INITIAL FEE REQUEST

[1] **[2]** **[3]** Litigants in the United States generally pay their own attorneys' fees, regardless of the outcome of a case, although Congress may provide otherwise by statute. *Camacho v. Bridgeport Fin., Inc.,* 523 F.3d 973, 978 (9th Cir.2008). Once a party has demonstrated that it is entitled to some award of fees, the Ninth Circuit requires a district court to determine the amount of such an award by first calculating the "lodestar" figure. *Id.* "The 'lodestar' is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate." *Id.* (quoting *Ferland v. Conrad Credit Corp.,* 244 F.3d 1145, 1149 n. 4 (9th Cir.2001)). The lodestar is presumed to provide reasonable fees, but "the district court may, if circumstances warrant, adjust the lodestar amount to account for other factors which are not subsumed within it." *Camacho,* 523 F.3d at 978 (quoting *Ferland,* 244 F.3d at 1149 n. 4).

1. PLAINTIFFS' CLAIMED LODESTAR AMOUNT

Plaintiffs claim a lodestar of $767,944.69 for fees sought in connection with the Initial Fee Motion:

Biller	Hours Claimed in Initial Motion	Hours Claimed in Initial Reply	Hours After Filing Initial Reply[3]	Total Hours	Rate	Total Amount
William McNeil	4.45	0	0	4.45	$490	$2,180.5
Patricia Shiu	326.86	62.12	7.0	395.98	$470	$186,110.6
Vicky Barker	216.1	36.3	0	252.4	$410	$103,484
Claudia Center	484.95	9.78	0	494.73	$400	$197,892
Nancy						

Solomon	308.2	0	0	308.2	$325	$100,165
Elizabeth Kristen	285.87	69.0	10.6	365.47	$275	$100,504.25
Cacilia Kim	0	14.7	0	14.7	$275	$4,042.5
Sharon Terman	0	57.67	0	57.67	$225	$12,975.75
Anya Lakner	0	9.7	0	9.7	$200	$1,940
LAS–ELC Paralegals	262.71	0.6906 [4]	0	263.4006	$150	$39,510.09
CWLC Paralegals	11.0	0	0	11.0	$100	$1,100
LAS–ELC Law Clerks	90.5	0	0	90.5	$100	$9,050
CWLC Law Clerks	89.9	0	0	89.9	$100	$8,990

FN3. Plaintiffs initially included anticipated hours for work to be done the day of filing the Initial Reply and thereafter. *See* Shiu Initial Reply Decl. Ex. I. On remand, Plaintiffs replaced those anticipated hours with the actual hours worked. Kristen Remand Reply Decl. Ex. H.

FN4. Plaintiffs claimed 9.69 hours in paralegal work in the Initial Reply but calculated a lodestar for that work of only $103.59. *See* Shiu Initial Reply Decl. Ex. I. The Court reduces the number of hours claimed accordingly.

***1190** *See* Shiu Initial Reply Decl. Exs. A, I; Kristen Remand Reply Decl. Ex. H. Defendants object to Plaintiffs' claimed lodestar, asserting that the number of hours billed and the hourly rates are not reasonable.

[4] **[5]** In calculating the lodestar, the Court takes into account the factors outlined in the Ninth Circuit Mandate: (1) the number of years Plaintiffs litigated the case; (2) the number of drafts of the settlement agreements; (3) the skill and expertise of Plaintiffs' counsel; and (4) the excellent results obtained. Ninth Circuit Memo. at 581 n. 5. These four factors militate in favor of the reasonableness of Plaintiffs' claimed lodestar.

a. The Number of Years Spent Litigating

Plaintiffs began investigating this matter in January 2003 and filed their complaint in March 2004. *See, e.g.,*

Barker Initial Decl. ¶ 16. The case was litigated until final approval of the settlements in January 2006. Thus, Plaintiffs litigated this matter for roughly three years.

b. The Number of Draft Settlement Agreements

Drafting and finalizing the settlement agreement with the District was a significant undertaking. Plaintiffs drafted the initial settlement agreement. *See* Center Initial Decl. ¶ 45. They met with the District at least six times by phone, with those conferences sometimes lasting two or more hours. *Id.* at ¶ 46. During the course of the negotiations, Plaintiffs and the District exchanged roughly 30 drafts of the agreement, each of which was more than 50 pages long. *Id.* at ¶ 48.

The City did not participate in these settlement negotiations, but instead separately negotiated a draft settlement agreement with Plaintiffs. *Id.* at ¶¶ 49, 61.

c. The Skill and Expertise of Plaintiffs' Counsel

It is clear that Plaintiffs' counsel has considerable skill and expertise. Plaintiffs' ***1191** attorneys are affiliated with two non-profit organizations: the Legal Aid Society—Employment Law Center ("LASELC") and the California Women's Law Center ("CWLC"). LAS–ELC is nationally-recognized for its expertise in challenging discriminatory or otherwise impermissible employment and educational access practices. *See, e.g.,* Shiu Initial Decl. ¶ 4. Similarly, CWLC has extensive expertise in sex discrimination and Title IX, in particular. *See, e.g.,* Barker Initial Decl. ¶ 5. And the individual attorneys demonstrated significant skill and expertise in handling the litigation.

d. The Excellent Results Obtained

"Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). This will normally encompass all hours reasonably expended on the litigation. *Id.* In cases of "exceptional success," an enhancement above the lodestar may be warranted. *Id.* Here, the results obtained were "undeniably excellent." Ninth Circuit Memo. at 581 n. 5. Indeed, Plaintiffs successfully utilized Title IX to obtain far-reaching changes that significantly benefit many young women.

2. REASONABLENESS OF HOURS CLAIMED BY PLAINTIFFS

[6] Mindful of the four factors analyzed above, the Court now turns to calculating the lodestar. In order to calculate the lodestar, the Court must determine the number of hours "reasonably expended on the litigation." *Hensley,* 461 U.S. at 433–34, 103 S.Ct. 1933. Hence, the Court must eliminate from the lodestar time that was unreasonably, unnecessarily, or inefficiently devoted to the case. *Id.* at 434, 103 S.Ct. 1933. Plaintiffs here are claiming 2,358.1 hours spent on this litigation. Defendants contend that Plaintiffs' claimed hours should be reduced significantly, for the reasons discussed below. *See, e.g.,* District's Initial Opp'n at 13. [5]

a. Duplication of Effort and Excessive Billing

Billed time that includes unnecessary duplication of effort should be excluded from the lodestar. *See Herrington v. County of Sonoma,* 883 F.2d 739, 747 (9th Cir.1989). "[C]ourts ought to examine with skepticism claims that several lawyers were needed to perform a task, and should deny compensation for such needless duplication as when three lawyers appear for a hearing when one would do." *Democratic Party of Wash. State v. Reed,* 388 F.3d 1281, 1286 (9th Cir.2004) (internal citations omitted). Of course, there is some degree of duplication that is necessary in any case. *Moreno v. City of Sacramento,* 534 F.3d 1106, 1112 (9th Cir.2008). Defendants identified nearly 600 hours that they claim involve unnecessarily duplicative billing by Plaintiffs' counsel. District Initial Opp'n at 20–21.

[7] The Court's review of the record indicates that some of the hours claimed did result from unnecessary duplication. For example, Shiu, Barker, Center and Kristen each billed to inspect the relevant athletic facilities. *See* Gibeaut Initial Decl. Ex. J. Plaintiffs explained that Kristen filmed the inspection, while Shiu, Center, and Barker took notes and measurements. Shiu Initial Reply Decl. ¶¶ 6, 7. Among other things, they also counted lockers and checked the cleanliness and functioning of the bathrooms. *Id.* at ¶ 7. Although

an understanding of the disparities in the facilities is important, that does not justify ***1192** having four attorneys (three of whom request fees of $400 or more per hour) personally conduct the actual inspection.

[8] Plaintiffs also billed to have Shiu, Center, Barker and Solomon appear at the January 31, 2005 mediation. *See* Gibeaut Initial Decl. Ex. J; Shiu Initial Reply Decl. ¶ 6, Ex. C. Participation of more than one attorney at a mediation does not automatically constitute an unnecessary duplication of effort. *See Kim v. Fujikawa,* 871 F.2d 1427, 1435 n. 9 (9th Cir.1989). But Plaintiffs do not provide an adequate explanation as to why it was necessary to have four attorneys (with requested rates of $470, $410, $400 and $325 per hour) attend the mediation. Plaintiffs assert generally that they only billed for the time of attorneys that participated in, "or might be needed" at, a hearing or conference, and that multiple attorneys attended hearings or conferences because "several attorneys had specific knowledge about discrete sub issues." Initial Reply to District's Opp'n at 19. It is clear that Plaintiffs' counsel decided to take a "team" approach to handling this matter. Nonetheless, that explanation is insufficient to show that it was necessary to have four attorneys attend the mediation. *See, e.g., Anderson v. Rochester–Genesee Regional Transp. Auth.,* 388 F.Supp.2d 159, 164–65 (W.D.N.Y.2005).

Similarly, Shiu, Center, Barker, Solomon, and Kristen spent a total of 194 hours in connection with Plaintiffs' class certification motion. Shiu Initial Reply Decl. ¶¶ 14, 51.[6] While having five attorneys work on class certification may not be unnecessarily duplicative in all instances, it was here. At an earlier status conference, the Court indicated that it would certify a class in this case. *See, e.g.,* Shiu Initial Decl. ¶ 70. Moreover, Plaintiffs acknowledge that Defendants had "no particular legal argument for why certification was not appropriate." *Id.* at ¶ 71. Indeed, the Court's order granting class certification makes clear that Defendants did not dispute much of Plaintiffs' motion. *See* Order Granting Plaintiffs' Motion for Class Certification for Injunctive Relief (Oct. 6, 2004). Plaintiffs did not need to have five attorneys spend nearly 200 hours preparing straightforward class certification briefing.

Nor does the Court's review of the record reveal that these were isolated occurrences. Accordingly, the Court finds it necessary to calculate the lodestar based on a modest reduction to the hours claimed by Plaintiffs, as discussed below.

b. Excessive Conferencing

[9] Time billed for internal conferencing is recoverable to the extent it is reasonably necessary to conducting the litigation. *See Davis v. City & County of San Francisco,* 976 F.2d 1536, 1545 (9th Cir.1992). Defendants identified roughly 264 hours of inter- and intra-office communications within and between LAS–ELC and CWLC, representing roughly 13% of the total hours claimed in the Initial Fee Motion. *See* District's Initial Opp'n at 18.[7] This is the equivalent of spending approximately one hour conferencing for every eight hours billed. Unfortunately, neither Plaintiffs nor Defendants provides significant detail as to whether the time spent on these communications is reasonable. Plaintiffs assert in blanket terms that the hours were reasonable in light of the "issues ***1193** and challenges that plaintiffs faced in investigating, filing, litigating and resolving this matter." *See, e.g.,* Shiu Initial Reply Decl. ¶ 40. Plaintiffs also assert that much of the conferencing was necessitated by the settlement negotiations. *See id.* ¶ 42. Unfortunately, Defendants do not provide specificity in challenging these hours. Rather, they appear to rely solely on generalized assertions that the total fees for conferencing appears to be too high. *See, e.g.,* District's Initial Opp'n at 18.

[10] Based on the Court's review of the billing records and Plaintiffs' explanations for the hours billed conferencing, the Court finds that the hours claimed are on the higher end of what it would expect as reasonably necessary for litigating this matter. The Court finds that a modest reduction to Plaintiffs' claimed hours will compensate for any excessive conferencing.

c. Non–Billable Clerical Work

[11] **[12]** Parties cannot recover fees for conducting clerical matters. *See Missouri v. Jenkins,* 491 U.S. 274, 288 n. 10, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989); *Davis,* 976 F.2d at 1543. Defendants contend that Plaintiffs' claimed hours should be reduced because they billed for clerical work, pointing to entries in which Plaintiffs billed for *inter alia* printing labels and copying documents. While

it is clear that some clerical work was improperly billed by Plaintiffs, the Court's review of the record indicates that these hours are relatively few in number in relation to the total fee award. Accordingly, the Court finds that improperly billed clerical work can be properly accounted for through a modest reduction to Plaintiffs' claimed hours.

d. Total Reasonable Hours

Accordingly, the Court finds that Plaintiffs' claimed hours are at least somewhat excessive. Especially in light of the factors identified in the Mandate, however, the Court does not believe that the reasonable number of hours is nearly as low as suggested by Defendants. Instead, balancing these factors with the above instances of excessiveness, the Court determines in its discretion that a small reduction is warranted. The Court finds that a 5% reduction is appropriate here.[8] Thus, the lodestar will be calculated at 95% of the hours claimed by Plaintiffs.

3. REASONABLENESS OF RATES CLAIMED BY PLAINTIFFS

[13] Defendants also argue that the rates claimed by Plaintiffs are unreasonable. The hourly rates used to calculate the lodestar must be "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." *Blum v. Stenson,* 465 U.S. 886, 895 n. 11, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). "Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate." *United Steelworkers of Am. v. Phelps Dodge Corp.,* 896 F.2d 403, 407 (9th Cir.1990) (citing *Chalmers v. City of Los Angeles,* 796 F.2d 1205, 1214 (9th Cir.1986)). In analyzing the prevailing market rate, the Court is also mindful that these attorneys have considerable skill and expertise, and of the excellent results obtained. *See* Ninth Circuit Memo. at 581 n. 5.

***1194 a. Attorneys' Rates**

Plaintiffs request the following rates for attorneys:

William McNeil	35 years experience	$490
Patricia Shiu	23 years experience	$470
Vicky Barker	21 years experience	$410
Claudia Center	13 years experience	$400
Nancy Solomon	9 years experience	$325
Elizabeth Kristen	5 years experience	$275
Cacilia Kim	3 years experience	$275
Sharon Terman	2 years experience	$225
Anya Lakner	1 year experience	$200

See, e.g., Shiu Initial Reply Decl. Exs. A, I. In support of their request, Plaintiffs submitted testimony of private attorneys who handle federal litigation; data on then-current rates charged by Los Angeles area law firms; and rates determined to be reasonable by other courts.

As to the appropriateness of the rates sought the LAS–ELC attorneys, Plaintiffs submitted a declaration from a former LAS–ELC board member and current partner at the law firm of Pillsbury Winthrop Shaw Pittman LLP. *See* Odgers Initial Decl. ¶¶ 2–3. He explained that the LAS–ELC board sets hourly rates by collecting billing rate

information from the board members and their firms, as well as from other attorneys working for San Francisco law firms. *Id.* at ¶¶ 5–6. He further declared that the rates sought for Shiu, Center and Kristen in particular are in-line with those charged by attorneys of comparable experience at his firm, and other San Francisco and Los Angeles law firms. *Id.* at ¶¶ 7–9. Plaintiffs made a similar showing for the rates requested for Barker and Solomon by way of declarations from two current CWLC board members and current partners at Los Angeles area law firms. *See* Berkowitz Initial Decl.; Jordan Initial Decl. Plaintiffs also submitted survey evidence of Los Angeles law firm rates in line with those requested here. *See* Shiu Initial Decl. ¶ 56 & Ex. H.

[14] The requested rates are also in line with those awarded to McNeill, Shiu, Center and Kristen in *Lopez v. San Francisco Unified School Dist.,* 385 F.Supp.2d 981 (N.D.Cal.2005). In *Lopez,* Plaintiffs brought suit for alleged violations under the Americans with Disabilities Act and parallel state laws. Following settlement, Plaintiffs sought fees for McNeill, Shiu, Center and Kristen based on rates of $490, $460, $395, and $250, respectively. *Id.* at 987. The court found all of those rates to be reasonable. *Id.* at 991–92. The Court finds *Lopez* constitutes significant support for these attorneys' requested rates. *See United Steelworkers,* 896 F.2d at 407.

None of the parties devoted substantial attention to the specific rates of Kim, Terman and Lakner. The Court has reviewed those attorneys' qualifications and their claimed rates appear reasonable based on case law from this district. *See, e.g., Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,* No. CV 04–9396 CBM (JTLx), 2006 WL 4081215, at *2–4 (C.D.Cal. Dec. 12, 2006).

Defendants raise a variety of arguments to counter Plaintiffs' showing, none of which are persuasive.[9] For example, Defendants contend that it is inappropriate to determine rates for Plaintiffs' attorneys ***1195** using data from large law firms because such firms generally do work in areas of federal litigation that garner higher rates than those charged for civil rights litigation. *See, e.g.,* City's Opp'n to Initial Fee Motion at 17.[10] But Defendants did not come forward with persuasive evidence that Title IX litigation is not comparable with the types of litigation undertaken by large law firms. Plaintiffs' declarants stated that the rates claimed are similar to those charged by attorneys of similar skill and experience "for comparable work." *See, e.g.,* Odgers Initial Decl. ¶ 6; Jordan Decl. Initial ¶ 6. While Defendants dispute that this case was "complex," other courts have found that "Title IX is a complex area of the law and contains relatively few reported decisions to guide practitioners." *Communities for Equity v. Michigan High School Athletic Ass'n,* No. 1:98–cv–479, 2008 WL 906031, at *15 (W.D.Mich. March 31, 2008) (citing *Cohen v. Brown Univ.,* 101 F.3d 155, 169 (1st Cir.1996)). That the type of work done in this case is comparable to the federal litigation conducted by major law firms is borne out by the fact that other courts have relied on data from large firms in determining rates for Title IX litigation. *See Hess v. Ramona Unified School Dist.,* No. 07–cv–0049 W(CAB), 2008 WL 5381243, at *3 (S.D.Cal. Dec. 19, 2008) (setting rates for successful Title IX plaintiffs based on declaration from Latham & Watkins partner).[11]

Defendants also contend that it is inappropriate for Plaintiffs to be awarded all fees based on the rates prevailing at the time of the fee motion, rather than at the time the work was completed. Defendants fail to take into account that "compensation received several years after the services were rendered ... is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed." *Jenkins,* 491 U.S. at 283, 109 S.Ct. 2463. The Court finds it appropriate to award the prevailing market rate at the time of the Initial Fee Motion to compensate Plaintiffs for the delay in receiving fees. *See, e.g., id.* at 283–84, 109 S.Ct. 2463.

Based on all of the evidence regarding the prevailing rate in the community for counsel of similar experience for similar services, the Court finds that the requested rates for all of Plaintiffs' attorneys are reasonable and will calculate the lodestar at their requested rates.

b. Law Clerks' and Paralegals' Rates

[15] Plaintiffs also seek to recover fees for law clerk and paralegal work. LAS–ELC seeks to recover at rates of $100 for law clerks and $150 for senior paralegals. CWLC seeks to recover at rates of $100 for law clerks and $100 for paralegals. The parties provide very little evidence as to the reasonableness of these rates. While the Court finds that the rates for the law clerks and CWLC's paralegals are in-line with the prevailing market rate, the requested rate of $150 per hour for LAS–ELC's senior paralegals is not.

See Comite de Jornaleros, 2006 WL 4081215, at *3–4; *see also Lopez,* 385 F.Supp.2d at 992. Instead, the Court finds that a rate of $125 to be in-line with the prevailing market rate and will adjust the rate accordingly in calculating the lodestar.

***1196 4. LODESTAR AMOUNT FOR INITIAL FEE REQUEST**

The Court determines that the lodestar amount for the Initial Fee Motion is ***$723,296.10.*** This amount is calculated based on the reasonable hours spent litigating this matter, which is 95% of the hours claimed. The hours are multiplied by the claimed hourly rates, which the Court finds to be reasonable except for LAS–ELC's senior paralegals. Thus, the lodestar amount is as follows:

Biller	Total Hours	Rate	Total Amount
William McNeil	4.23	$490	$2,072.70
Patricia Shiu	376.18	$470	$176,804.60
Vicky Barker	239.78	$410	$98,309.80
Claudia Center	469.99	$400	$187,996
Nancy Solomon	292.79	$325	$95,156.75
Elizabeth Kristen	347.20	$275	$95,480
Cacilia Kim	13.97	$275	$3,841.75
Sharon Terman	54.79	$225	$12,327.75
Anya Lakner	9.22	$200	$1,844
LAS–ELC Paralegals	250.23	$125	$31,278.75
CWLC Paralegals	10.45	$100	$1,045
LAS–ELC Law Clerks	85.98	$100	$8,598
CWLC Law Clerks	85.416	$100	$8,541

5. PLAINTIFFS' REQUESTED LODESTAR ENHANCEMENT

[16] The calculation of the lodestar does not end the Court's inquiry. Instead, the lodestar may be adjusted in light of additional considerations, including the important factor of the results obtained. *Hensley,* 461 U.S. at 434, 103 S.Ct. 1933. Nonetheless, a "strong presumption" exists that the lodestar figure represents a "reasonable fee" and should be enhanced only in "rare and exceptional cases." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986). To overcome the strong presumption that the basic fee is reasonable, the fee applicant bears the burden of coming forward with "specific evidence" that the lodestar amount is unreasonably low. *See Van Gerwen v. Guarantee Mut. Life Co.,* 214 F.3d 1041, 1045 (9th Cir.2000) (citing *Delaware Valley,* 478 U.S. at 565, 106 S.Ct. 3088). This showing must be based on factors not already subsumed in the lodestar calculation. *Id.*

[17] [18] [19] Plaintiffs assert that the Court should award a 25% enhancement because the results achieved were excellent. *See, e.g.,* Kristen Remand Reply Decl. Exs. B at 60, C at 27–28. [12] Exceptional results generally do not provide a basis for enhancing the lodestar because the results obtained are generally subsumed within the initial lodestar calculation. *Blum,* 465 U.S. at 900, 104 S.Ct. 1541; *see also* Ninth Circuit Memo. at 581 n. 5 (excellence of results should be included in lodestar calculation). Moreover, not only must the results be excellent to warrant a lodestar enhancement, but an upward adjustment is justified "only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged." *Blum,* 465 U.S. at 899, 104 S.Ct. 1541; *see also Lopez,* 385 F.Supp.2d at 998–99.

***1197 [20]** Plaintiffs attempt to meet their burden by offering declarations from their counsel describing the results of the settlement as better than settlements obtained in other cases. *See, e.g.,* Shiu Initial Decl. ¶ 26; Barker Initial Decl. ¶ 38. While the results of the settlement are excellent, blanket assertions that the results here are better than results in other cases is not "specific evidence" showing that the results achieved in this case would not have been achieved by other similarly paid attorneys. Indeed, case law cited in other sections of Plaintiffs' briefing suggests that the results here are not so extraordinary. *See Communities for Equity,* 2008 WL 906031, at *2, 5 n. 8 (awarding no lodestar modification in Title IX case involving significant statewide changes to high school athletics).

Plaintiffs also submitted several declarations articulating the important benefits of sports to young women and the broader athletic opportunities they will have as a result of the settlements. *See, e.g.,* Center Initial Decl. ¶¶ 80–96; Barker Initial Decl. ¶¶ 39–44. The Court has no reason to disagree that the settlement will provide great benefits to many young women; however, that does not make the case "exceptional." *See Blum,* 465 U.S. at 900 n. 16, 104 S.Ct. 1541; *Lopez,* 385 F.Supp.2d at 998.

Accordingly, the Court denies the request for a 25% enhancement.

B. PLAINTIFFS' REQUEST FOR POST–JUDGMENT INTEREST

Plaintiffs also seek to collect post-judgment interest on the fees awarded in connection with the Initial Fee Motion. They seek interest on two sets of fee amounts: (1) the fees and costs awarded in the Initial Fee Order (the "Undisputed Amount" of $335,831.63 in fees and $19,968.06 in costs) and (2) the fees awarded by the Court on remand above the undisputed amount of fees (the "Additional Amount" of $387,464.47). The Court finds that post-judgment interest is available on both amounts.

1. INTEREST ON THE "ADDITIONAL AMOUNT"

Plaintiffs assert that they are entitled to post-judgment interest accruing from the date of the Initial Fee Order for the Additional Amount of fees awarded in this order. Thus, they seek to recover interest accruing from February 28, 2006 to the date of this Order on the $387,464.47 awarded above. A party may recover interest on attorneys' fees awarded under 42 U.S.C. § 1988. *Spain v. Mountanos,* 690 F.2d 742, 748 (9th Cir.1982) (discussing 28 U.S.C. § 1961). "Interest runs from the date that entitlement to fees is secured, rather than from the date that the exact quantity of the fees is set." *Friend v. Kolodzieczak,* 72 F.3d 1386, 1391–92 (9th Cir.1995). This Court held that Plaintiffs are entitled to recover fees in the Initial Fee Order, entered on February 28, 2006. Thus, post-judgment interest would ordinarily accrue from that date.

Nonetheless, Defendants assert that post-judgment interest cannot be awarded at all here because the Ninth Circuit mandate did not include specific instructions to allow it. For this proposition, Defendants rely on *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists,* 518 F.3d 1013, 1022 (9th Cir.2008) (discussing Fed. R.App. P. 37). Defendants' argument is unavailing, as made clear by *Planned Parenthood* itself:

> Rule 37(b) governs *only* when our mandate "modifies or reverses a judgment with a direction that a money judgment be entered in the district court." When the court of appeals remands to the district court to determine the amount of a damages award, then the mandate does not direct the entry of a money ***1198** judgment. The *Briggs* [*v. Pennsylvania R.R. Co.,* 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948)] and

> Rule 37(b) limitations on district court authority are therefore not implicated ...

518 F.3d at 1018–19 (emphasis in original). The Ninth Circuit mandate in this case vacated the Initial Fee Order with instructions to recalculate the fees. *See* Ninth Circuit Memo. at 581. Thus, the award of post-judgment interest is not barred.

[21] Post-judgment interest began accruing on February 28, 2006 for the $387,464.47 awarded by this Court today. Defendants do not dispute that the appropriate interest rate is 4.72%. *See* Kristen Remand Reply Decl. ¶ 17. It has now been 1099 days since the issuance of the Initial Fee Order. Accordingly, Plaintiffs are entitled to $55,059.90 in interest for the Additional Amount, plus $50.10 for each day until Defendants make payment.

2. INTEREST ON THE "UNDISPUTED AMOUNT"

As noted above, the Initial Fee Order awarded Plaintiffs attorneys' fees of $335,831.63 and costs of $19,968.06. Initial Fee Order at 22. The City paid 20% of the underlying amount due pursuant to the Initial Fee Order (or $71,159.94) on August 10, 2006. *See, e.g.,* Kristen Remand Decl. ¶ 22. The District paid the remaining 80% of the underlying amount due (or $284,639.75) on January 25, 2007. *See, e.g., id.* at ¶ 33. Plaintiffs assert that they are entitled to recover interest on the Undisputed Amounts accruing from February 28, 2006 to the date of payment by each of the Defendants. The amount of interest requested is $13,674.25. *Id.* at ¶ 39.

[22] Given that Defendants did not appeal Plaintiffs' entitlement to fees, there is no reason why payment of the Undisputed Amount should have been delayed. *See Fadhl v. City & County of San Francisco,* 804 F.2d 1097, 1099 (9th Cir.1986). As noted above, an award of fees begins accruing interest on the date of the initial order establishing an entitlement to them. *Friend,* 72 F.3d at 1391–92. Thus, post-judgment interest began accruing on February 28, 2006.

Defendants again contest the availability of post-judgment interest, however. The City argues that it should not be required to pay interest on the Undisputed Amount because it expressed to Plaintiffs a "willingness to immediately pay its portion of the award" shortly after the Initial Fee Order and, at any rate, that it paid Plaintiffs in a "reasonable" amount of time. The District argues that any delay in its payment to Plaintiffs for the Undisputed Amount was caused by the fact that the funds had to be issued by the Los Angeles County Office of Education. Neither Defendant cites to any authority in support of their positions and their arguments are not convincing.

First, the City's claim that it offered to pay immediately is disingenuous given that its offer was contingent on Plaintiffs not appealing the Initial Fee Order. *See* Kristen Remand Reply Decl. Ex. A ("We hope that you will agree that accepting the Defendants' offer to pay the full award now, *rather than appealing the District Court's order,* is in the best interest of the current and future students at Alhambra High School." (emphasis added)). In any event, were the City truly ready to make payment at that time and Plaintiffs were unreceptive, the City should have deposited the money with the court pursuant to Fed.R.Civ.P. 67(a) to halt the accrual of interest. *See Perkins v. Standard Oil Co. of Cal.,* 487 F.2d 672, 675 n. 7 (9th Cir.1973); *Cordero v. De Jesus–Mendez,* 922 F.2d 11, 18–19 (1st Cir.1990).

Second, the Court need not consider whether the delays in this case were reasonable and/or caused by third-parties because ***1199** Defendants should bear the cost of delay regardless. The award of post-judgment interest in civil rights cases is allowed to ensure that the policy underlying the award of attorneys' fees (i.e., encouraging counsel to bring private civil rights actions) is not undermined by delay in payment. *See Spain,* 690 F.2d at 748. With that policy in mind, the cost incurred by delay in payment should be borne by the defendants whose initial wrongful conduct invoked the judicial process. *See, e.g., Perkins,* 487 F.2d at 676. [13]

Accordingly, Plaintiffs are entitled to post-judgment interest of $13,674.25 on the Undisputed Amount awarded in the Initial Fees Order.

C. PLAINTIFFS' REMAND FEE MOTION

In addition to fees from the Initial Fee Motion, Plaintiffs also seek to recover fees and costs for work done after the Initial Fee Motion but not covered in their separate fee request to the Ninth Circuit ("Remand Fee Motion"). This request focuses primarily on fees associated with motion work on remand and efforts to collect the Undisputed Amount from Defendants pending appeal.

Plaintiffs' Remand Fee Motion seeks $14,112.50 in fees and $569.40 in costs. *See* Kristen Remand Reply Decl. ¶ 16.

[23] There is no dispute that a prevailing plaintiff may recover fees for work done in litigating attorneys' fees. *See, e.g., Thompson v. Gomez,* 45 F.3d 1365, 1366 (9th Cir.1995). So the only dispute on the Remand Fee Motion is the proper amount to award. Plaintiffs claim the following lodestar amount:

Attorney	Experience	Rate	Hours	Lodestar
Patricia Shiu	26 years	$530	1.55	$821.50
Elizabeth Kristen	7 years	$340	35.5	$12,070
Sharon Terman	4 years	$275	4.44	$1,221
			Total:	**$14,112.50.**

[24] *See* Remand Fee Reply at 8. For the reasons set forth below, the Court finds that Plaintiffs are entitled to the amount requested.

1. REASONABLENESS OF HOURS CLAIMED BY PLAINTIFFS.

As they did with the hours claimed for in the Initial Fee Motion, Defendants contend that the hours billed are excessive and unreasonable. While the Court found some deduction necessary for the hours in the Initial Fee Motion, the hours claimed in the Remand Fee Motion are reasonable.

Defendants assert that roughly seven hours for which Plaintiffs request fees in the Remand Fee Motion were "cut" from the Ninth Circuit fee request and, as a result, that Plaintiffs should not be able to recover for that time here. *See* District's Remand Opp'n at 5. The papers presented to the Ninth Circuit indicate that some of the "cuts" were made because the time claimed was "time spent on case-related issues not relating to the appeal." *See* Kristen Ninth Circuit Fee Decl. ¶ 16 (attached to Mullane Remand Decl. Ex. 2); *see also* Kristen Ninth Circuit Fee Reply Decl. ¶ 12(e) (attached to Kristen Remand Reply Decl. Ex. D). While it is not clear that Plaintiffs were intending to seek those fees on remand, it does not appear that Plaintiffs were representing that the cut hours would not be claimed on remand. [14] ***1200** Thus, the disputed time that had been excised from the Ninth Circuit fee claim is recoverable here.

Plaintiffs request 7.3 hours for Kristen's travel time from San Francisco to Los Angeles in conjunction with the August 4, 2008 status conference. Defendants claim that those hours are unreasonable because Plaintiffs' local counsel, Barker, attended the status conference. Given Kristen's familiarity with the case and the issues on appeal, *see* Kristen Remand Reply Decl. ¶ 8, it was proper for her to attend the status conference. And the hours that she billed are especially reasonable given that Barker did not bill her time attending the status conference. *Id.* Thus, the hours claimed are reasonable.

Plaintiffs requested 9.4 hours for Kristen's preparation of the Remand Fees Motion. Defendants contend that such fees are excessive because the motion is "at least partially duplicative" of work previously done by Plaintiffs' counsel. City's Remand Opp'n at 8. This argument is also unavailing. Even if prior briefs were written with significantly overlapping issues, preparing the Remand Fees Motion in less than 10 hours is inherently reasonable. As to Plaintiffs' assertion that research had been conducted on post-judgment interest by a colleague of Kristen's in 2006, the Court finds it entirely

proper (and expected) that Kristen would not have relied solely on outdated research. *See Moreno,* 534 F.3d at 1112.

Defendants lastly contend that the time spent conferencing is not recoverable, objecting specifically to 1.5 hours of billed time. City's Remand Suppl. Opp'n at 8. But, as the City notes, the time sought for conferencing in the Remand Fees Motion is "minute" compared to the overall fees sought. City's Remand Suppl. Opp'n at 8. The Court does not find the conferencing here to be unnecessary or unreasonable.

2. REASONABLENESS OF RATES CLAIMED BY PLAINTIFFS

Plaintiffs assert that the remand fee lodestar should be calculated using the following rates: (1) $530 for Shiu; (2) $340 for Kristen; and (3) $275 for Terman. In support of these rates, Plaintiffs submitted another declaration from Richard Odgers. *See* Kristen Remand Decl. Ex. V. [15] The rates requested on remand are slightly higher than the rates that the Court found reasonable above for these attorneys. The Court finds that these rates are reasonable in light of the additional years of experience that each has acquired in the interim and the Odgers Declaration.

3. LODESTAR AMOUNT FOR POST–REMAND FEE REQUEST

Accordingly, Plaintiffs are awarded their requested lodestar amount for their Remand Fee Motion of $14,112.50. [16]

*1201 4. COSTS FOR POST–REMAND WORK

Lastly, Plaintiffs seek to recover costs of $569.40 in their Remand Fee Motion. *See* Remand Reply at 18. Not surprisingly, Defendants dispute the reasonableness of those costs. The Court finds that Plaintiffs are entitled to the full amount of costs requested.

[25] Defendants first argue that Plaintiffs incorrectly seek double recovery for Federal Express delivery of the copies of the prior briefing to this Court. District's Remand Opp'n at 10. But Kristen noted that two separate shipments were required because the briefing was voluminous. Kristen Remand Reply Decl. at ¶ 14. This is a plausible explanation and the Court finds the delivery fees recoverable. *See, e.g., United Steelworkers,* 896 F.2d at 407 (allowing recovery for reasonable out-of-pocket expenses).

Defendants next argue that Kristen's travel costs are not recoverable because they would ordinarily not be billed to a paying $customer. District's Remand Opp'n at 10. The Court disagrees. *See Marbled Murrelet v. Pacific Lumber Co.,* 163 F.R.D. 308, 327 (N.D.Cal.1995).

Accordingly, Plaintiffs are entitled to recover the full amount of costs sought in their Remand Fees Motion.

III. CONCLUSION

For the reasons set forth above, the Court hereby AWARDS Plaintiffs the following:

Fees for Initial Fee Motion:	**$723,296.10** [17]	
Interest on Additional Amount:	**$ 55,059.90,**	**plus $50.10 per day until paid**
Interest on Undisputed Amount:	**$ 13,674.25**	
Fees Awarded for Remand Fee Motion:	**$ 14,112.50**	
Costs Awarded for Remand Fee Motion:	**$ 569.40**	

FN17. As noted above, a portion of this fee amount has already been paid by Defendants.

IT IS SO ORDERED.

All Citations

601 F.Supp.2d 1183, 243 Ed. Law Rep. 276

Footnotes

1 This matter was previously assigned to Judge Tevrizian, but was reassigned to Chief Judge Collins on remand because Judge Tevrizian retired while the appeal was pending.

2 Plaintiffs have amended the amount requested on numerous occasions. The above amount reflects the amount previously awarded by the Court (the "undisputed amount") and the additional, revised amount sought on remand in connection with the Initial Fee Motion. *See* Kristen Remand Reply Decl. ¶ 17.

5 The arguments by the District and City do not always overlap exactly, but they are significantly similar. Thus, the Court will generally refer to them as "Defendants" without differentiation.

6 The 194 hours include work done on the initial motion, reply brief, declarations, preparing for and attending the hearing, and conferring with Plaintiffs. Shiu Initial Reply Decl. ¶ 14.

7 Plaintiffs subsequently amended that requested fee amount in their reply brief to include additional hours worked after the Initial Fee Motion was filed. The above figure does not include conferencing time added through amendment.

8 The Court finds this amount sufficient to cure any overbilling, especially given that Plaintiffs have already exercised their billing judgment before submitting their hours to the Court. *See, e.g.,* Shiu Initial Reply Decl. ¶¶ 24–27.

9 Defendants rely heavily on an opinion holding that the lodestar should be calculated using the "hourly rate that would be charged by reasonably competent counsel." *See Albion Pacific Property Resources, LLC v. Seligman,* 329 F.Supp.2d 1163, 1170 (N.D.Cal.2004) (reducing requested rates in determining fees for improper removal pursuant to 28 U.S.C. § 1447(c)). That standard does not take into account the skill and expertise of these particular attorneys. As such, the Court declines to follow *Albion. See Fleming v. Kemper Nat'l Servs., Inc.,* 373 F.Supp.2d 1000, 1011 (N.D.Cal.2005).

10 It bears noting that Plaintiffs are requesting rates at or *below* those charged by these firms. *See, e.g.,* Berkowitz Initial Decl. ¶ 8 ("If [Vicky Barker] worked at my firm, her time would be billed at, and our clients would be asked to pay, a minimum of $410 an hour and more likely $560 per hour.")

11 Defendants' contention that the rates for Plaintiffs' attorneys should be in accord with rates charged by the attorneys working for the government is inconsistent with Ninth Circuit law. *See Trevino v. Gates,* 99 F.3d 911, 925 (9th Cir.1996).

12 Plaintiffs made a variety of other arguments in the Initial Fee Motion for enhancement, often devoting only one sentence to each. *See* Initial Fee Motion at 23–24. On appeal, Plaintiffs argued only that an enhancement is warranted by the results obtained. *See, e.g.,* Kristen Remand Reply Decl. Exs. B at 60, C at 27–28. Thus, those arguments have been waived to the extent they were not purposefully abandoned. *See, e.g., United States v. Nagra,* 147 F.3d 875, 882 (9th Cir.1998); *see also* Remand Reply at 1 n. 1 (asserting that Plaintiffs rely on their appellate briefing as to the recalculation of fees in the Initial Fee Order). In any event, the Court has reviewed the other arguments and finds that they do not warrant an enhancement.

13 The Court rejects the contention that Plaintiffs cannot recover post-judgment interest on the Undisputed Amount because the Initial Fee Order did not specifically provide for it. *See, e.g., Tinsley v. Sea–Land Corp.,* 979 F.2d 1382, 1384 (9th Cir.1992).

14 The Court is not unsympathetic to Defendants' frustration, however. Plaintiffs often submitted voluminous papers that did not highlight important information. Thus, it can be difficult to ascertain precisely what is being claimed. That certainly appears to be the case with the time "cut" in the Ninth Circuit fee request. Plaintiffs are well off the mark in proclaiming that the papers before the Ninth Circuit "plainly show" that Plaintiffs would seek to recover some of the excised time on remand. *See* Remand Reply at 9.

15 Defendants object to these rates, largely reiterating the arguments addressed above. For the reasons discussed above, Defendants' arguments are not persuasive. Defendants also assert on remand that rates should be set according to the matrix in *Laffey v. Northwest Airlines, Inc.,* 572 F.Supp. 354 (D.D.C.1983). *See* Mullane Remand Decl. Ex. 4 (attaching Declaration of Gerald Knapton). The Court will not apply the *Laffey* matrix because *inter alia* it is inconsistent with the standards applicable here requiring that the Court consider the skill and expertise of these particular attorneys in setting their rate. *See, e.g., Perez v. Cozen & O'Connor Group Long Term Disability Coverage,* No. 05cv0440 DMS AJB, 2007 WL 2142292, at *2 (S.D.Cal. March 27, 2007).

16 The City also requests that the Court hold it responsible for "no more than twenty percent of [the awarded] fees, given its limited involvement in the alleged violations, the overall litigation and the limited relief obtained by Plaintiffs as to Defendant City specifically." City's Remand Suppl. Opp'n at 13. The Court declines to make such a determination. First, the request appears to be moot as the Defendants seemingly have already worked out an agreement on apportioning fees in this case. *See, e.g.,* Kristen Remand Decl. ¶ 22, 33 (the City paid 20% of undisputed fee amount and the District paid the remaining 80%). Second, the issue was not sufficiently briefed for this Court to make any such determination. The City provides a few examples of instances in which fees purportedly relate to the District rather than the City. *See, e.g.,* City's Remand Suppl. Opp'n at 2–3. The District for its part is silent on the issue.