Girls Granted Class Cert. In Female Football League Suit

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Summary

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Body

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U.S. District Judge Robert J. Shelby ruled Tuesday that while the girls satisfied class requirements for an equal protection clause claim against the Jordan School District, other nearby districts and the Utah High School Activities Association in regard to the football teams, they were unable to show evidence to determine how many girls were deterred from athletics opportunities in general from a lack of offerings.

The girls had sought two class certifications in a complaint alleging they had been discriminated against because of their sex because their high schools did not offer female football leagues and because male students had far more opportunities for sports than female students. One class was for female students seeking athletic opportunities, while another was specific to the football team.

The seven named, minor defendants had created a recreational girls-only football league in 2015 that grew from 50 participants to 200 in two years. They alleged violations of Title IX and the U.S. Constitution's equal protection clause, saying a high school-backed league would offer the opportunity for recognition, funding and awards.

For the first class, the court agreed with the school districts that the girls did not meet the numerosity requirement, as they didn't produce evidence or a reasonable estimate of how many girls sought to participate in athletics but were deterred.

The plaintiffs conducted no surveys about student interest, Judge Shelby wrote, and their evidence that a girls' golf team got a higher response rate than the district anticipated wasn't sufficient to back the claims, nor was their inclusion of all future students in the proposed class.

"Plaintiffs have still provided no reasonable estimate or basis for the court to extrapolate how many future members of the class would actually seek to participate or are deterred from participating in athletics," he wrote.

The football class, however, had more direct evidence in the growth of the recreational organization from 50 to 200 participants in only two years, Judge Shelby wrote. He also rejected the districts' argument that they required

evidence the girls would choose to play football over other sports, saying that was unnecessary for the definition of the class.

While saying there is a "paucity of evidence" that troubles the court, Judge Shelby noted that in a case where only injunctive relief is sought, further evidence is not necessary and the court must infer that a substantial number of recreational league players want to play and are eligible for high school play.

"Even assuming some of the girls on the recreational league are ineligible to play on a high school team, common sense leads to the conclusion that the remaining athletes would constitute a number too great for joinder," he wrote.

On the question of commonality, Judge Shelby ruled that the Title IX claims — which centered on the question of whether there was interest by the girls at the school for more athletics opportunities — would require individualized assessment. Resolving the question would require the court to determine the answer separately for each school, and determining whether there is interest at each school would not necessarily resolve the issue for all class members, he wrote.

The equal protection clause claim, however, centers on a common question of law — whether the districts discriminate on the basis of sex by providing a football team to the boys but not the girls. All the high schools involved in the suit offer a boys' football team but not a girls' team, Judge Shelby noted, so determining whether they discriminate on sex would resolve the question for the entire class.

Finally, he ruled that the class demonstrated typicality, as all the proposed class members are in the same situation: They attend high schools that have refused to establish girls' football teams.

While the districts argued the girls lacked standing for the equal protection claim, pointing to Pederson v. Louisiana State University, in which the Fifth Circuit held that plaintiffs who weren't members of a varsity team don't have standing to challenge the treatment of existing athletes, Judge Shelby ruled the girls are not seeking to act on behalf of existing athletes — only themselves and other female students that are not playing varsity football.

Brent Gordon of Brent Gordon Law, representing the girls and the father of one of the plaintiffs, told Law360 in an email: "The court's decision to certify a class under the equal protection clause claim helps focus the case on girls' football teams and has potentially broader implications than the Title IX claims.

"States spend significant amounts of money on stadiums, facilities and coaches to promote boys' and men's football. In fact, the highest paid state employee in many states is a football coach," he added. "Yet girls are offered virtually no participation opportunities in football because the biological differences between boys and girls make it difficult for girls to find meaningful opportunities to compete against the boys in football, and schools fail to offer separate girls' teams in football like they do in other sports such as basketball, track and field and swimming."

Mark L. Smith of Smith Washburn LLP, also representing the girls, said they plan to pursue the Title IX claims as individual actions, adding they believe it will result in system-wide changes that will help young women gain participation opportunities.

"The court's order is an important step toward our clients' goal of giving the young women of Utah additional opportunities to participate, grow and learn valuable lessons while in high school," he told Law360 in an email. "Specific to girls' tackle football, we're excited to press forward on the class claims under the equal protection clause of the Constitution."

Attorneys for the Utah High School Activities Association declined to comment.

"The subject lawsuit involves complicated issues related to Title IX," the districts said in a statement. "The districts strive to comply with all federal and state laws, including Title IX, and are committed to providing a wide range of educational opportunities, including activities and athletics, to all of their students."

The girls are represented by Mark L. Smith, D. Loren Washburn and Jacob L. Fonnesbeck of Smith Washburn LLP and Brent Gordon of Brent Gordon Law

The school district defendants are represented by Rachel G. Terry and Phillip S. Lott of the Utah attorney general's office.

The Utah High School Activities Association is represented by Mark O. Van Wagoner of Savage Yeates & Waldron PC and D. Craig Parry and Michael S. Lehr of Parr Brown Gee & Loveless.

The case is Gordon et al. v. Jordan School District et al., case number 2:17-cv-00677, in the U.S. District Court for the District of Utah.

--Editing by Marygrace Murphy.

Update: This story has been updated with a response from attorneys for the Utah High School Activities Association and for the school districts to a request for comment.

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