SCHEDULING GIRLS BASKETBALL GAMES AT NON-PRIME TIMES: A TITLE IX (SINGLE FACTOR, EQUAL TREATMENT) AND GENDER BASED EQUAL PROTECTION SUIT AGAINST 14 SCHOOLS AND THE IHSAA

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I. Background

Amber Parker was a teacher and, during the 2007-08 and 2008-09 school years, was the girl's varsity basketball coach at Franklin County High School. During her time as coach, she complained about Franklin County's scheduling of girls' basketball games versus the scheduling of boys' basketball games. Specifically, she claimed that 'most' of the girls games were scheduled at 'non-prime' times (with prime-time being Friday night, Saturday night and any night where there is no class scheduled the following day) and the Franklin County boys having their games scheduled primarily on 'prime time.' Ms. Parker says that her complaints were heard by the Franklin County administration, but nothing changed. In the spring of 2009, Ms. Parker was later relieved of her duties as basketball coach, apparently because of performance issues. If you asked Ms. Parker she might have suggested that the reason for the termination had more to do with her complaining.[1]

In July 2009, Ms. Parker filed suit in federal court on behalf of her two children, J.L.P., who had been a member of the Franklin County's girls basketball team during the 2008-09 school year, and H.K.P., who was in elementary school but planned on playing on the Franklin County girls' varsity basketball team when she was old enough. The Parkers complained about the discriminatory manner girls' high school basketball contests were scheduled at Franklin County where in 2008-09 the boys' basketball games were scheduled in 'prime-time' 95% of the time, but the girls games were only scheduled in prime time 47% of the time. Ms. Parker also sued on behalf of "all of those similarly situated."

Her suit wasn't just filed against Franklin County, however. No, she sued Franklin County and thirteen other Indiana school corporations which operate public schools, and who played at least one girls' basketball contest during the 2008-09 school year against Franklin County, and which also

[1] As an aside, in the lawsuit she filed, Ms Parker never raised the possibility that her termination as basketball coach was in retaliation to her complaining about the scheduling of the girls' basketball games on non-prime times, a potentially colorable claim. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (girls basketball coach had viable Title IX retaliation claim after being fired following Complaints about the used equipment used by the girls).

presumably played their girls basketball games during non-prime time.

And, of course, the Parkers sued the Indiana High School Athletic Association, Inc., which counted Franklin County and the other thirteen high schools as among its members.

In the Complaint, the Parkers raised two significant factual allegations about the IHSAA. First, the Parkers contended, generally, that the IHSAA administered high school athletics in Indiana, which was true, but also claimed that the IHSAA, along with the schools, determined the actual scheduling for boys' and girls' season basketball games, and this last part was, of course, untrue. Second, the Parker noted that in 1997, the Office for Civil Rights for Region V had informed the IHSAA in a letter that it was possible that "Association members could be found by OCR to be out of compliance with the scheduling of games and practice times component of the athletics provisions of Title IX if they reserve Friday nights for boys basketball games and schedule girls basketball games on other nights, but despite this warning the IHSAA had failed to take any affirmative measures. Actually, the IHSAA did take the action which David Blom of the OCR had requested, which was to send a copy of the OCR letter to the entire IHSAA membership, to advise each school of the IHSAA's support for gender equity and to encourage each member school to assess its programs for compliance. However, in the Complaint, the Parkers contended that even though the IHSAA knew of these discriminatory scheduling practices by the schools it nonetheless exhibited "a deliberate indifference" towards these discriminatory practices. The language used by The Parkers was foretelling.

The Parkers raise gender based discrimination claims under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* and under the Equal Protection Clause of the 14th Amendment of the United States Constitution.

II. District Court Proceedings

A. Motions to Dismiss

Shortly after The Parkers filed, Franklin County, the thirteen other schools and the IHSAA each moved to dismiss the Complaint.

(1.) Dismissal of "those similarly situated."

First, the schools and the IHSAA both moved to dismiss the Complaint insofar as it was being brought on behalf "of those similarly situated" because The Parkers had failed to comply with the most basic procedural provision of the local Rule 23.1 (which included class action requirements). The Parkers virtually conceded this point and the District Court granted the motion.

(2.) Dismissal of the younger Parker daughter.

Second, the schools and the IHSAA also moved to dismiss Ms. Parker's younger daughter, H.K.P., because she lacked standing to sue at this point because she had not yet suffered an injury in fact (she had no "particularized injury") and because any injury claimed would be speculative. And while the Parkers did make an attempt to show that the younger daughter did have a non-speculative injury, the District Court nonetheless granted the motion.

(3.) Dismissal of the Title IX claim against the IHSAA.

On the substantive side, the IHSAA moved to dismiss the Title IX claim because a

Title IX claim can only be brought against a recipient of federal funds, and since the IHSAA was not such a recipient, there was no jurisdiction to bring a Title IX claim against the IHSAA. The IHSAA argued that the Parkers were required to plead discrimination against an 'education program or activity' which actually received federal financial assistance, because Title IX's § 901(a) (20 U.S.C. § 1681(a)) 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....*" (Emphasis supplied.) While the Parkers had a jurisdictional basis to make a Title IX claim against the schools, since they were admittedly recipients of federal funding, the Parkers could not make the same claim against the IHSAA, a private Indiana citizen organized as an Indiana not-for-profit corporation, and most importantly, not a recipient of any federal funds.

The IHSAA is in the 7th Circuit and, luckily, the 7th Circuit has *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n.*[2] In *Johnny's Icehouse*, an Illinois District Court granted the Amateur Hockey Association's motion to dismiss, holding that a state athletic association, which was not a financial grant recipient with respect to a plaintiff, was not subject to Title IX. The *Johnny's Icehouse* court found the only appropriate defendant in a private Title IX action was the institution or entity which actually receives the federal financial assistance. Johnny's Icehouse claimed the Hockey Association should nonetheless be responsible under the controlling authority rationale. "Controlling authority" provides that when a federal financial aid recipient 'cedes controlling authority' over a federally funded program to another entity, the controlling entity is covered by Title IX regardless of whether it is itself a recipient. Fortunately, the *Johnny's Icehouse* court rejected that rationale. The *Johnny's Icehouse* court noted that in 1999 the Supreme Court had left open this issue of 'controlling authority,'[3] and recognized that the controlling authority rationale had been adopted by other courts,[4]; the rationale was to be rejected by the *Johnny's Icehouse* court.

Even though the IHSAA, like the Amateur Hockey Association, was not a recipient of federal financial aid, the Parkers nonetheless offered two principal arguments for holding the IHSAA in on the Title IX claim. First, the Parkers argued that the IHSAA might have received dues from its federally financed members, thereby suggesting that the IHSAA had received federal assistance "through another recipient." This argument by the Parkers was made with little enthusiasm, and frankly was never really fleshed out or even advanced later in the proceedings. Second, the Parkers re-argued that the federally financed school had ceded controlling authority to the IHSAA, making the IHSAA subject to Title IX and asked the District Court not follow *Johnny's Icehouse.*

The District Court, however, did embrace the *Johnny's Icehouse* thinking and dismissed the Title IX claim against the IHSAA, finding the Complaint failed to set forth an essential element -- that the IHSAA was a recipient of federal financial assistance. The District Court also noted that the Seventh Circuit has emphasized that since Title IX "prohibits discrimination against beneficiaries in programs and activities that receive federal financial

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[2], *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n Illinois, Inc.* 134 F.Supp.2d 965 (N.D.Ill.,2001)

[3] *NCAA v. Smith*, 525 U.S. 459, 119 S.Ct. 924 (1999)

[4] *Cureton v. NCAA,* 37 F.Supp.2d 687, 696 (E.D.Pa.1999), *Kemether v. Pennsylvania Interscholastic Athletic Ass'n,* 1999 WL 1012957 (E.D.Pa. Nov. 8, 1999). *Communities for Equity v. Michigan High Sch. Athletic Ass'n,* 80 F.Supp.2d 729, 734 (W.D.Mich.2000)

assistance, it is the educational institution themselves that must be sued for violations of Title IX."[5]

Even after the District Court dismissed the Title IX claim against the IHSAA, the Parkers proceeded to file a motion to reconsider the ruling, arguing again that the court really failed to directly address the controlling authority argument. The court responded by reaffirming its previous entry and noting that while there were district courts in Michigan and Pennsylvania which, at that time, had adopted the controlling authority rationale,[6] there was no court in the 7th Circuit which had adopted the rationale, and also because, in dicta in another 7th Circuit case, it was suggested that the 7th Circuit would not be receptive to the controlling authority argument.[7]

(4.) Denial of the Motion to Dismiss the Equal Protection claim against the IHSAA.

The IHSAA also moved to dismiss the Parkers' Equal Protection claim, primarily because the IHSAA had no opportunity to discriminate against the Parker girls for the simple reason that the IHSAA didn't do the scheduling which the Parker's found to be discriminatory. Although the IHSAA admitted that it did regulate, supervise and administer athletics, and had adopted some very general parameters about scheduling under the IHSAA General Eligibility Rules and Playing rules (dictating to both boys and girls in what season a sport's contests can be played, when the season starts and ends, when contests cannot be played, e.g., Sunday, and other similar scheduling-type rules), the IHSAA did not do the actual scheduling of season contests between member schools, and those were the only contests about which the Parkers complained.

However, the District Court observed that since the Parkers claimed in the Complaint that the IHSAA actually "determine[d] the schedules for girls' and boys' high school basketball programs, including the days of the week and the time of day the games are played", then the court was not going to determine who was right, noting that the court, in a trial rule 12(b)(6) setting, took all the facts alleged in the Complaint as true, and by taking those facts pled as true, there was a plausible set of facts which supported the Equal Protection claim.

(5.) Dismissal of the Equal Protection claim against the schools.

The thirteen schools (but not Franklin County) moved to dismiss the Parkers' Equal Protection claim because, they claimed, they also did nothing to the Parkers, other than to have the misfortune of having their girls' basketball team play against Franklin County during the 2008-2009, and that in order to state a Equal Protection claim, the Parkers had to allege that the thirteen schools actually treated young Parker differently from members of some unprotected class, and here the thirteen schools did not treat young Parker one way or the other.

In the District Court's ruling on the schools' motion to dismiss, the court ignored any of the arguments, and instead dismissed the Equal Protection claim against all fourteen schools ---including Franklin County, which had not even moved to dismiss the Equal Protection

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[5] *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1018, 1019 (7th Cir. 1997) (could not bring a Title IX claim against the principal and assistant principal).

[6] *Cureton v. NCAA*, 37 F.Supp2d 687 (E.D. Pa. 1999), rev'g., 198 F.3d 107 (3rd Circuit, Dec. 22, 1999); *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F.Supp.2d 729 (W.D.Mich.2000).

[7] *Smith*, 128 F.3d at1019.

claim --- under authority of *Doe v Smith*,[8] *Doe* held that "there is no parallel right of action under section 1983 against a federally funded education program where Title IX provides a sufficient private right of action for the allegedly unlawful policy or practice."

Regrettably, the Supreme Court had previously overruled *Doe* in January 2009 in *Fitzgerald v. Barnstable School Committee*,[9] and held that Title IX does not preclude a § 1983 action alleging unconstitutional gender discrimination in schools. Both the Schools and the Parkers filed a motion to reconsider the ruling, and the District Court reinstated the Parkers' Equal Protection claim against all fourteen schools.

(6.) Denial of the Motion to Dismiss the Title IX claim against the schools.

The thirteen schools, which as mentioned before, had the misfortune of playing against Franklin County in girls' varsity basketball during the 2008-09 school year, also moved to dismiss the Title IX claim on the basis that, while each of the thirteen schools were federally funded, the Parkers were not "beneficiaries in programs and activities that receive federal financial assistance"[10] with respect to the thirteen schools.

The District Court rejected this argument and denied the motion to dismiss because, at the 12(b)(6) level, the Court only required the Parkers to allege in the Complaint that the schools' programs receive federal financial assistance and that these schools actually "determine[d] the schedules of girls' and boys' high school basketball programs." In all fairness, the District Court also recognized that the requirements at the 12(b)(6) level were to raise the right to relief "above the speculative level" and that at summary judgment time, the court would not be as forgiving.

B. A new party enters the proceedings.

In late spring 2010, the IHSAA found out that the Parkers were being transferred out of state, to the Commonwealth of Massachusetts. Accordingly, the Parkers were faced with the prospect of having their suit be dismissed because of mootness. In fact, both the IHSAA and the schools argued in their later-filed motions for summary judgment that the Parkers' Complaint be dismissed for mootness, especially since the primary relief sought was injunctive relief.

The Parkers, however, did make the perfunctory request for compensatory damages in the Complaint, which would seemingly undercut any attempt to dismiss for mootness. However, in the Parkers' court-ordered settlement demand, the Parkers admitted that they had no economic damages and were unable to describe any actual compensatory damages sustained.

But before the time for filing motions for summary judgments, somehow, after learning of the pending move, another player on the Franklin County girls' basketball team, the daughter of Miss Hurley, stepped forward and indicated that she too felt that she had been discriminated against and wanted to file a Title IX and Equal Protection Complaint against Franklin County, the thirteen schools and the IHSAA. Coincidentally, she too hired the same lawyers who had filed the Parkers' action.

The Hurley's filed a separate new suit; however, immediately after filing, Miss Hurley sought to intervene in the Parkers action and, by

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[8] *Doe v Smith*, 430 F.3d 331 (7th Cir. 2006).
[9] *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246, 129 S.Ct. 788 (2009).
[10] Quoting *Smith v. Metro Sch. Dist. Perry Twp.*, 128 F.3d at 1018 and *Johnny's Icehouse*134 F. Supp.2d at 971.

agreement, was granted leave. In intervening, Miss Hurley accepted all previous activity in the action and agreed to be bound by the District Court's rulings on the various motions, including the Motion to Dismiss rulings and the any then-up-coming summary judgment ruling.

C. **Motions for summary judgment**.

After brief discovery (written discovery to all defendants, a deposition of the IHSAA Commissioner and depositions of two representatives of Franklin County), both the schools and the IHSAA moved for summary judgment on the remaining claims – the Equal Protection claim against the IHSAA and the Equal Protection claim against the schools and the Title IX claim against the schools. The Parkers and Hurley also moved for summary judgment on both their claims against all defendants.

(1.) Summary Judgment on the Equal Protection Claim against the IHSAA

The IHSAA moved for summary judgment on the Parkers' and Hurley's sole remaining theory against the IHSAA, the claimed violation of the Equal Protection clause. The Equal Protection claim was originally based upon two theories: direct discrimination by the IHSAA and the IHSAA's deliberate indifference to the claimed discrimination.

Parkers' and Hurley's direct discrimination claim was premised on the belief the IHSAA actually did the season contest scheduling for Franklin County and the other school defendants. This was not correct. The IHSAA provided the District Court uncontroverted evidence that the IHSAA had never scheduled boys or girls basketball season contests involving IHSAA member schools, much less any of the 2008-09 season contests involving the fourteen schools. The Parkers and Hurley eventually conceded the IHSAA actions did not include scheduling, and the District Court concluded that since the IHSAA did not take any direct action against young Parker or young Hurley, the IHSAA was entitled to judgment on the direct discrimination claim.

The second theory was that the IHSAA was deliberately indifferent to the schools discrimination. The IHSAA labeled the deliberately indifferent theory in these circumstance as 'novel.' The District Court also weighed in on the argument and also found the theory to be 'novel.'

The cornerstone of the Parkers' and Hurley's argument centered on the fact that the IHSAA was placed on notice in 1997 about the potential discrimination by its member schools, and that it failed to take adequate steps to fix the problem; the Parkers and Hurley faulted the IHSAA for having "looked the other way."

The Parkers and Hurley could not cite to an analogous case holding an entity like the IHSAA as being deliberately indifferent, but instead relied on deliberate indifference cases where the state has created a custodial or a "special" relationship with a particular class of individuals -- pretrial detainees, prison inmates, certain minor children, state mental hospital inmate, and student in public schools who were subject to sexual harassment and bullying.

In its memorandum, the IHSAA pointed out that an Equal Protection claim is really just a tort damage action, and that any "duty" a defendant like the IHSAA is alleged to have breached must have been created by the Constitution, or by federal law, and that before that defendant's failure to act can give rise to a legal liability, there must be a constitutionally recognized duty on that defendant to act.[11] Here,

[11] *Jackson v. Byrne,* 738 F.2d 1443, 1446 (7th Cir.1983) (duty to provide fire protection).

the Parkers and Hurley could point to no such duty on the part of the IHSAA.

The District Court adopted the rationale offered by the IHSAA on the issue of deliberate indifference and granted the IHSAA summary judgment on the Parkers' and Hurley's Equal Protection claim.

(2.) Summary Judgment on the Title IX Claim against the Schools.

The District Court granted each school, including Franklin County, summary judgment on Parkers' and Hurley's Title IX claim.

The District Court found that Title IX provides that no person, 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). The Department of Education's athletic regulations interpreting Title IX set forth the standards for assessing whether an institution's athletic programs are in compliance with Title IX, and these regulations are entitled to deference. The relevant regulations state that a recipient which operates or sponsors interscholastic athletics shall provide equal athletic opportunity for members of both sexes and to determine whether equal opportunities are available, several factors will be considered, including "... (3) Scheduling of games and practice time." 34 C.F.R. § 106.41(c) (2000). This third factor is geared toward equal treatment, and the Parker's and Hurley's case is an 'equal treatment' claim against the schools because of their scheduling of girls' and boys' basketball games.

There is also a 1979 Policy Interpretation issued by the Department of Health, Education and Welfare (predecessor to the Department of Education), and while it was designed specifically for intercollegiate athletics, it is to be applied to interscholastic athletic programs. 44 Fed. Reg. at 71,413. The 1979 Policy Interpretation is divided into three sections, and the second section -- compliance in other program areas -- is relevant to the case of the Parkers and Hurley.

The 1979 Policy Interpretation explains that "[t]he Department will assess compliance with . . . the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible." 44 Fed. Reg. at 71,415.

The 1979 Policy Interpretation also lists the five (5) factors that should be examined to determine compliance and with respect to the scheduling of games and practice, and the third factor looks to "(3) The time of day competitive events are scheduled..." 44 Fed. Reg. at 71,416.

The 1979 Policy Interpretation also states that the Department of Education's determination of compliance is based on "...:b. [w]hether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program as a whole; or, c. [w]hether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity. 44 Fed. Reg. at 71,417. And what this means is that a disparity in a single program component, such as scheduling, *can* constitute a violation of Title IX if the disparity is "substantial enough . . . to deny equality of athletic opportunity." *Id.*

The 1979 Policy Interpretation does not require identical scheduling for boys' and girls' sports, and notes that a disparity that disadvantages one sex in one area can be offset by a benefit to that sex in another area.

In the Parkers' and Hurley's case, however, the schools failed to provide any evidence that their female athletes receive better treatment than their male counterparts so as to offset any disadvantage resulting from the schools' basketball scheduling practices, and therefore, the District Court had to determine whether the disparity in the scheduling of girls' basketball games was substantial enough by itself to deny the Plaintiffs equality of athletic opportunity.

The Parkers and Hurley cited *McCormick v. Sch. Dist. Of Mamaroneck*[12] and *Communities for Equity v. Michigan High School Athletic Ass'n*[13] to support their argument that the schools' disparate scheduling of girls' and boys' basketball games is significant enough to constitute a standalone violation of Title IX. The District Court, however, found neither case analogous to Parkers' and Hurley's situation.

The District Court first noted that the 2nd Circuit in *McCormick,* which involved two New York high schools' scheduling of girls' high school soccer in the spring whereas the majority of schools scheduled girls' soccer in the fall when the NY state championship was held in the fall, concluded that the scheduling disparity was significant enough to violate Title IX, and reversed the lower court. The 2nd Circuit was swayed by the fact that "[t]he scheduling of soccer in the spring . . . places a ceiling on the possible achievement of the female soccer players that they cannot break through no matter how hard they strive. The boys are subject to no such ceiling." *Id.* at 295.

The District Court then looked at *Communities for Equity*, which involved the Michigan High School Athletic Association scheduling of athletic seasons and tournaments in six girls' sports during allegedly less advantageous or in a non-traditional season. The *Communities for Equity* district court concluded that the Michigan Association's scheduling practices imposed a number of specific disadvantages to the girls' sports teams deprived girls of "contemporaneous role models, skills development, and team-building opportunities" and based on these disadvantages concluded that the Michigan Association "violated and continues to violate Title IX by scheduling seasons." *Id.* at 857.

The District Court found Parkers and Hurley's situation similar to neither *McCormick* nor *Communities for Equity*. *McCormick* involved scheduling of girls' soccer in a manner which totally deprived girls of an opportunity to compete for a state championship, and in *Communities for Equity*, the Michigan Association scheduled only girls' sports 'out-of season.' In *Parker*, girls play basketball in the "appropriate" season and they are able to compete for the state championship. The District Court found that the scheduling of girls basketball games on non-preferred dates more frequently than the boys' team did not deprive young Parker and Hurley of role models, inhibit their skill development, or prevent team-building. And unlike *Communities for Equity* and *McCormick*, where the defendants' conduct affected the plaintiffs' athletic development and capped their ability for athletic achievement, in the Parkers' and Hurley's case the schools' conduct did not hinder the development of young Parker's and Hurley's basketball skills. Bottom line, the schools' alleged disparate treatment of young Parker and Hurley did not

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[12] *McCormick v. Sch. Dist. Of Mamaroneck,* 370 F.3d 275 (2nd. Cir. 2004).

[13] *Communities for Equity v. Michigan High Sch. Athletic Ass'n,* 178 F.Supp 2d. 805 (W.D. Mich. 2001), *aff'd*, 459 F.3d 676 (6th Cir. 2006).

rise to the level seen in either *Communities for Equity* or *McCormick,* and the schools' treatment of young Parker and Hurley did not result in a disparity that was so substantial that it denied the Parkers or Hurley "equality of athletic opportunity."

Since the District Court decided to grant summary judgment on the Title IX claim based upon the finding that the claimed sports specific disparity was not substantial enough, by itself, to deny young Parker and Hurley 'equality of athletic opportunity', it was not necessary for the District Court to address each school's circumstance to see if it was possible for the schools, other than Franklin County, to have even been involved in any disparate scheduling. Had it, it would have found, for example, that eight of the thirteen schools which played Franklin County in 2008-09, actually played their games at a prime time. And of the thirteen schools, four of those schools had participated in a recent voluntary Title IX audits, and it each case, there was a finding that the school was in full compliance with all civil rights laws.

(3.) Summary Judgment on the Equal Protection Claim against the Schools.

The District Court granted all the schools, including Franklin County, their motions for summary judgment on Parkers' Equal Protection claim based upon the 11th Amendment to United States Constitution. The 11th Amendment makes states immune from suit brought by their own citizens or citizens of other states, and the immunity extends to state agencies and state officials sued in their official capacities, but not to political subdivisions such as counties, cities, and similar municipal corporations.

The issue of Indiana schools' 11th Amendment immunity was novel because of Indiana's recent significant amendments to its complex statutory and regulatory scheme governing the financial structure of its local schools and the level of state control and oversight over the decisions and activities of those schools, and because Indiana courts not having yet addressed this new legal environment. Following an analysis, the District court concluded that the degree of the school's financial dependence on the state of Indiana substantially outweighed the schools' generally independent legal status in determining the issue of their immunity from suit. The District Court concluded that the Eleventh Amendment immunity enjoyed by the state of Indiana extended to all fourteen public schools in the case.

III. Appeal to the 7th Circuit.

The Parkers and Hurley filed a Notice of Appeal on the final day for filing, and raised issues with all the District Court's ruling, including the dismissal of the Title IX claim against the IHSAA, the summary judgment on the Equal Protection claim against the IHSAA, the summary judgment on the Title IX claims against the fourteen schools and finally, the summary judgment on the Equal Protection claim against the fourteen schools, based upon the 11th Amendment.

(1.) The Parkers and Hurley appealed the dismissal of the Title IX claim and the summary judgment in favor of the IHSAA on the Equal Protection claim.

The Parkers and Hurley originally appealed the dismissal of their Title IX claim against the IHSAA, and the summary judgment ruling in favor of the IHSAA on the their' Equal Protection claim.

When the Parkers filed their brief, however, they inserted a footnote indicating that

they had elected not to appeal the adverse rulings. The IHSAA demanded, and the Parkers and Hurley complied by filing a Motion to Voluntarily Dismiss the Indiana High School Athletic Association Pursuant to Federal Rule of Appellate Procedure 42 (b).

Accordingly, the IHSAA has won the case.

(2.) The Parkers and Hurley appealed the summary judgment in favor of the schools on the Title IX claim and the summary Equal Protection claim.

Parkers' and Hurley's have appealed the summary judgment in favor of the schools on the Title IX claim and the summary judgment in favor of the schools on the Equal Protection claim.

The Parkers and Hurley are not alone in their appeal. Their local attorneys are being joined by attorneys from the National Woman's Law Center on the Appellant's brief. In addition, a consolidated Amicus brief has been filed by Amici who include the California Women's Law Center, the Women's Sports Foundation, the National Organization for Women Foundation, Southwest Women's Law Center, National Association of Social Workers (Indiana Chapter), Pick Up the Pace, Sargent Shriver National Center on Poverty Law, Legal Voice, The Legal Aid Society-Employment Law Center, Woman's Law Project and Hadassah, The Women's Zionist Organization.

On the schools' side the Amici include the Indiana School Boards Association (on the 11th Amendment immunity issue) and the Eagle Forum Education & Legal Defense Fund.

The appeal is now fully briefed, the record has been filed and oral argument has been set for Thursday, May 12, 2011, at 9:30 a.m. in the main chamber of the 7th Circuit.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS -REGION V
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OFFICE OF THE
DIRECTOR

FEB 13 1997

Mr. Bob Gardner
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Dear Mr. Gardner:

This letter is intended as a follow-up to our telephone conversation on January 7, 1997. During this telephone conversation, I advised you that OCR was concerned about information it had received regarding the scheduling of high school basketball games in the State of Indiana. I informed you that OCR had received information indicating that Friday nights, which are considered to be optimal nights for watching basketball, are typically reserved exclusively for boys basketball games while girls basketball games are more likely to be scheduled on non-optimal week nights, such as Tuesday. You stated that similar concerns had been expressed to the Indiana High School Athletic Association (Association) but added that the Association does not regulate the time of day or day of week that boys and girls basketball games are scheduled by member districts. You offered, however, to disseminate to Association members information concerning the possible civil rights implications of any practice which reserves a particular day of the week for the athletic contests of teams of a particular gender. I want to thank you for your offer and submit the following information for consideration by Association members.

As you know, most, if not all of the Association's members are recipients of Federal financial assistance. As such, the member institutions are required to adhere to Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. § 1681 *et seq* (Title IX), and its implementing regulation, at 34 C.F.R. Part 106, which prohibit discrimination on the basis of gender. The specific provisions of Title IX that relate to athletics are set forth at 34 C.F.R § 106.41, and contain a number of areas wherein institutions that sponsor interscholastic athletic programs must provide equal opportunities to members of both sexes. One such area is the scheduling of games and practice times. 34 C.F.R. § 106.41(c)(3). Further clarification of the Title IX regulatory requirements is provided by the athletics Policy Interpretation, issued on December 11, 1979, and found at 44 Fed. Reg. 71413 et seq. (Policy Interpretation).

The Policy Interpretation states that compliance with Title IX in the scheduling of games and practice times will, in part, be assessed by considering the time of day competitive events are scheduled. In enforcing the Title IX regulatory requirements pertaining to the scheduling of games, OCR also examines the day of the week on which competitive events are scheduled and assesses whether the scheduling of competitions by a given recipient allows athletes of both sexes an equivalent opportunity to compete before audiences.

Under Title IX, an institution that reserves a particular day of the week for the games of a boys team while scheduling the games of the same or similar girls team on other days of the week would be expected to provide a non-discriminatory justification for the difference in treatment if it is determined that the day of the week reserved for the boys team is the optimal day for such competitions, sometimes referred to as "prime time." In addition, even if competitions are scheduled on the same day of the week for both boys and girls teams, an institution that reserves a particular time of day for the boys team would be expected to provide a non-discriminatory justification for the difference in treatment if it is determined that the time of day reserved for the boys team is the optimal or "prime" time of day for such competitions.

Please note, however, that an institution's adherence to "tradition" or to the scheduling practices of the conference or any of its members schools would not constitute a legitimate, non-discriminatory justification for a gender-based difference in treatment. The Title IX implementing regulation, at 34 C.F.R § 106.6(c) states that the obligation to comply with Title IX "is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association," which would limit the participation of any student on the basis of gender.

It is possible then that Association members could be found by OCR to be out of compliance with the scheduling of games and practice times component of the athletics provisions of Title IX if they reserve Friday nights for boys basketball games and schedule girls basketball games on other nights. The compliance determination would be made on a case by case basis and include an examination of the impact the scheduling practice has on the members of the teams in question. Among other things, OCR would examine whether Friday night games offer the best opportunity to compete before the largest possible audience, whether week night games, particularly when travel is involved, have a disproportionately negative effect on the academic studies of the members of the girls basketball team, and whether the athletes and coaches of the boys and girls basketball teams consider Friday nights to be the optimal time to compete.

OCR notes that the Association's Gender Equity Position Statement specifically recommends that member institutions "take steps to be sure that the spirit and intent of gender equity is met." Please be advised that OCR has received a number of inquiries, including some indications that complaints may be filed against Association members, regarding this issue. We therefore encourage all Association members to review their scheduling policies and procedures for boys and girls basketball games to ensure that they meet the requirements of Title IX. We are willing to provide Association members with any technical assistance they may need as they undertake such a review.

Once again, I appreciate your willingness to share this information with Association members. If I can be of any assistance to you or any of your members regarding this or any other issue, please do not hesitate to contact me at (312) 886-8405.

Sincerely,

David Blom
Equal Opportunity Specialist

IHSAA

INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION
9150 North Meridian Street • P.O. Box 40650 • Indianapolis, Indiana 46240-0650 • Phone: 317-846-6601 • FAX: 317-575-4244

March 19, 1997

Dear Superintendent:

The Indiana High School Athletic Association received an inquiry into the issue of gender equity from the Office for Civil Rights, United States Department of Education. The initial inquiry concerned the differences in the number of contests for girls from boys' teams in certain sports in Indiana High Schools. The IHSAA Board of Directors took steps to equalize the number of contests and length of seasons in boys and girls' sports effective with the 1997-98 school year.

Additional concerns have been expressed to the Office of Civil Rights by individuals regarding what nights certain schools play girls' contests as opposed to boys' contests. The IHSAA indicated to Mr. David Blom of the Office of Civil Rights that scheduling regular season contests is a responsibility of the local schools. In conversations with Mr. Blom regarding this issue, I indicated our support for the spirit and intent of gender equity as stated in our Position Statement in our By-Laws. As a result of my discussions with Mr. Blom, I agreed to disseminate to our member schools a copy of his letter to me concerning the regulations of Title IX.

Please review the contents of the enclosed letter. Using this information, I would encourage you to assess your programs.

Sincerely,

Bob Gardner
Commissioner

Encl. Copy of letter from Mr. David Blom
Office of Civil Rights, Region V
Chicago, Illinois 60606