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TITLE IX AND STUDENT INJURY: LEGAL AND POLICY IMPLICATIONS**Overview**

As Title IX of the Education Amendments of 1972 states in relevant part, “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance....” For more than thirty-years courts have consistently enforced and expanded the mandates of Title IX. Coupled with the protections of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, 42 U.S.C 1983, and sources of remedy in state law, enforcement of Title IX, including an implied private right of action, Cannon v. University of Chicago (1978), and the availability of damages brought against third parties, Franklin v. Gwinnett County (1992), has greatly reduced the number of student sex discrimination situations that ripen into litigation. In fact, court decisions resolving claims of sex discrimination in school programs, activities, and sports are hard to find. As such, when you uncover such a case it is important to review the facts of the situation and to analyze the court’s rationale in resolving the matter.

Elborough et al v. Evansville Community School District (2009)

In 2010 the rule of law is clear. While identical treatment of male and female students is not required, and the law contains some exceptions, no student shall be denied equal access to or in any way be excluded from participation in school programs, activities, (including sports teams) solely on the basis of sex (gender). Recently, while doing research in the law library, I came across a Title IX case—one with an interesting twist. Decided by a federal district court in Wisconsin, on June 23, 2009, Elborough v. Evansville Community School District involves a high school, female athlete who alleged that she suffered physical injuries directly linked to acts of sex discrimination perpetrated by her coach. Recognizing that the decision itself is very narrow in scope, in my view it nonetheless has policy implications for local public school officials and school system personnel.

Facts: In early August of 2007, plaintiff student (hereafter referred to as I.E.) joined the high school football team as a freshman. She was the only female player on the team. It was during the first weeks of team practice that she claimed the discriminatory acts took place. More specifically, she alleged, among other things, that when she came to practice the locker room where she had to dress for practice (she had to dress by herself in the

girl's locker room) was locked, the team schedule and snacks were only available in the boy's locker room (where she was forbidden to enter), and the head coach told her to get her hair cut so that she would look "like a boy."

As the case moved forward the court was faced with the following *undisputed facts*:

1. I.E.'s protective equipment was stored in the girls' locker room.
2. She was not allowed in the boys' locker room.
3. She had to get someone with a key (the head coach testified that he did not have a key) to unlock the girls' locker room—which made her late for practice.
4. Latecomers to practice were required to do push-ups.
5. Snacks and a team practice schedule were kept in the boys' locker room.
6. The practices started each day at the same time.
7. The head coach knew that proper protective equipment is needed to reduce risk of injury when playing football.

The following *disputed facts* were before the court:

1. A practice schedule was posted in a hallway and was accessible to players of both sexes.
2. The head coach told I.E. that getting "a hair cut to look like a boy was a commitment she was going to have to make to be on the football team."
3. I.E. received a "permanent team jersey" as did the boys on the team.
4. The athletic director spoke to the head coach and the junior varsity coach about making sure the door to the girls' locker room was unlocked.
5. I.E. was the only player participating in practice drills not wearing pads?
6. Whether or not other instances existed where I.E. showed up without pads for practice.

In their formal complaint plaintiffs stated that because I.E. was denied access to the girl's locker room (where she could suit-up for practice); she participated in contact drills without wearing pads and other protective equipment. She further alleged that the head coach knew that she was without safety gear, but he did nothing to stop her from participating in the drills. Subsequently, I.E. injured her shoulder in one practice and broke her clavicle during another practice. Both injuries resulted in several doctor visits, diagnostic and surgical procedures, and her taking pain medications. She also claimed that her grade point average suffered because she had to miss so many classes.

Ultimately, I.E. and her mother filed suit in federal district court (Western District of Wisconsin) where they sued the school district under Title IX, the Due Process Clause of the Fourteenth Amendment, and state law. More specifically, they claimed that school officials were deliberately indifferent to the head coach's behavior. Also named in the law suit was the head coach. Claiming violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and state law, plaintiffs alleged in their complaint that the coach "maliciously intended" that I.E. suffer injury "in an effort to deter her and other female students at the high school from participating on the football team." The plaintiffs also named a health insurer in their suit.

In their petition to the court plaintiffs sought, as remedy, damages for: (1) both physical and emotional injuries directly linked to the coach's acts of sex-based discrimination, (2) failure to protect I.E. from a state created danger, (3) reckless and wanton disregard for I.E.'s safety, (4) battery, and (5) negligent infliction of emotional

distress. Defendants moved for summary judgment and the plaintiffs sought a motion to disregard new evidence submitted in defendants' reply brief.

Court Decision and Rationale: The court first resolved the Title IX claim in the defendant's favor. In the court's view plaintiffs had not carried the burden of showing that I.E. had either been outright excluded from the high school football team, or that she had been subject to any serious "sexual abuse." Moreover, the school district did not have notice of the head coach's alleged sexually discriminatory acts. Testimony showed that I.E.'s mother had complained that her daughter had difficulty getting into the girls' locker room, but not that her daughter was unable to use safety equipment. Thus, said the court, she gave little reason to believe that her daughter was a victim of sex discrimination.

In the court's view, even if the school district failed to follow its own procedures in handling complaints of sex discrimination and/or failed to review the coach's personnel files, such facts would not prove knowledge of the problem regarding sex discrimination. In the words of the court, "Title IX does not require school administrator's to be fortune tellers."

Regarding plaintiffs' Due Process Clause claim against the school district the court opined that while the head coach's behavior showed poor judgment on his part, it did not constitute a violation of the student's due process. For example, the coach's comment that I.E. should get a hair cut "like a boy" was not so severe and pervasive that it prevented I.E. from meaningful participation in a school activity on the basis of sex. And, the coach's failure to stop I.E. from participating in practice drills without protective equipment did not constitute a due process violation. It should be pointed out that I.E. did not suggest that the head coach forced her to participate, he only allowed her to do so. As such, no constitutional violation was established by plaintiffs.

Because an issue of material fact existed, the court acted more favorably concerning plaintiffs' Equal Protection Clause and state law claims—including defendants' claim of qualified immunity. Here the court precluded summary judgment and focused on I.E.'s injuries. The specific circumstances emphasized by the court were: (1) the head coach knowingly allowed her to practice without protective equipment (Equal Protection violation), and (2) the head coach disregarded the presence of a known danger (state law claim). In other words, the head coach had knowingly created and implemented an unsafe conditions policy. As the district court judge opined, where a known danger exists, or reckless conduct is present, a public official is required to do something. It should be pointed out, however, that defendants raised no issue regarding the merits of plaintiffs' claim of recklessness, and the head coach admitted that "safety equipment is an important part of preventing an injury during football."

The district court judge concluded with the following statement: "I agree with plaintiff that a reasonable jury could find that she has met both standards with respect to defendants' failure to insure that plaintiff participated in practice drills with proper safety equipment." Thus, plaintiffs' motion to disregard new evidence was granted. Defendants' motion for summary judgment was denied with regard to plaintiffs' claims that the head coach allowed her to participate in practice drills without protective equipment because of her sex, and that defendants were reckless in violation of state law. The motion was granted in all other respects.

Final Comment: As stated at the outset of this commentary the law is very clear. No student shall be denied equal access to, or be excluded from participation in any school program, or activity (including sports teams) solely on the basis of that student's sex. Moreover, where acts of sex-based discrimination have occurred, Title IX (Education Amendments of 1972) and other statutory sources (federal and state) provide remedy.

What is interesting about Elborough v. Evansville School District (2009), is that the female student involved had not been denied access to membership on the football team, and had not been directly and overtly excluded from the team. On its face this sounds like a case where school officials and the coach were in compliance with both Title IX and the mandates of the Fourteenth Amendment. The interesting twist is that the defendants were not held liable under a sex discrimination theory; rather, the case moved forward in court as a tort liability matter. In Elborough the seminal issue was: Did the hostile, dangerous, reckless and injurious set of conditions created by the coach directly result in both emotional and physical damage to the female student involved? To the court this is a reasonable question to put before a jury.

Policy Implications

To set a proper context for gleaning implications and policy suggestions from the court's rationale in Elborough (2009), the reader is reminded of *five* basic tenets of school law. First, the general rule is that "[a]n educator (e.g., administrator, teacher, coach) is expected to foresee the possible consequences of an action, inaction, or condition and to take measures, where necessary, to remedy them." Vacca and Boshier (2008) Second, establishing negligence on the part of a school system employee involves a careful analysis of the specific facts in a given situation—each situation is fact based. Third, liability does not attach where sudden and unforeseen events and conditions were the *proximate cause* of the injuries suffered by a student. Fourth, intentional conduct on the part of any school official or employee is different from negligent conduct. Finally, where school officials discover (i.e., have sufficient knowledge or direct notice) dangerous and/or reckless conduct or unsafe conditions, immediate action to remedy such conduct and/or conditions is required. Vacca and Boshier (2008) As the Supreme Court established in Davis v. Monroe County Board of Education (1999), "[d]eliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has direct control over the alleged harassment."

The policy suggestions gleaned from Elborough (2009) are found less in what the court says *per se* about Title IX and more in what the court says about the sex-bias acts and their direct links to student safety. School system policy must make it clear that:

- No student in the school system will be denied equal access to, or meaningful participation in, or be in anyway excluded from any school system program, activity, or sports team solely because of that student's sex (gender).
- The Board will not tolerate any acts of sex discrimination against any student.
- Where acts of discrimination against a student are discovered by or brought to the attention of school officials immediate action will be taken to investigate, intervene, and remedy the situation.
- School system employees who engage in acts of discrimination against any student, or create and maintain an unsafe school environment, or who engage in reckless conduct when working with students, will be immediately removed from his/her position pending the results of an investigation into the matter.
- All school employees are required to take appropriate steps to protect students from dangerous, unsafe, and harmful conditions and situations
- Any school system employee who intentionally and wantonly causes injury to any student will be immediately terminated from employment.

Resources Cited

Cannon v. University of Chicago, 441 U.S. 677 (1978)

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Note: The views expressed in this commentary are those of the author.