

Amicus Curiae Briefs Education Law

Athletics/ Title IX

Case: *Cook v. Colgate University*

Court: U.S. Court of Appeals for the Second Circuit, 1993

Amicus Brief: National Women's Law Center

Case: Colgate, a private university, has a male varsity ice hockey team and a female club ice hockey team. Due to Colgate's continuing failure to upgrade the club team to one of varsity status, plaintiffs, all former members of Colgate's women's club ice hockey team, brought an action alleging that Colgate's failure to provide a comparable ice hockey program to male and female students violated Title IX of the Education Amendments of 1972, as well as the Fifth and Fourteenth Amendments to the Constitution. Colgate argued that its compliance with Title IX should be measured by its overall athletic program and not by a sport-to-sport comparison. The District Court agreed that the disparate treatment of the teams violated Title IX and ordered Colgate to elevate its women's club ice hockey team to varsity status and to provide equal funding and benefits to its men's and women's ice hockey programs.

Amicus Brief: This brief argues that the Court should uphold the lower court's decision because Title IX requires Colgate to institute a varsity ice hockey program for women due to the fact that it offers one for males, women have historically been limited in their athletic opportunities, and there is adequate interest to support a women's varsity team.

CWEALF: CWEALF has demonstrated a long history of fighting for gender equality and has specifically been involved in Title IX issues. CWEALF joins this brief in an effort to mandate that the university meet its Title IX obligation and support men's and women's athletics equally.

Holding: Colgate appealed the District Court's ruling. It argued that the action had become moot because that year's ice hockey season had ended and all of the plaintiffs were graduating before the end of that academic year. The Court of Appeals for the Second Circuit stated that they agreed with Colgate that the controversy was moot, vacated the judgment of the District Court, and remanded with instructions to dismiss the action.

Case: *Cohen v. Brown University*

Court: United States Court of Appeals for the First Circuit, 1996

Amicus Brief: National Women's Law Center

Case: Brown University appealed a decision requiring it to add four additional varsity sports for women. This appeal followed a ruling by the United States District Court in Providence that Brown discriminated against women in its intercollegiate athletic program. Brown is attacking the longstanding test for Title IX compliance in this area that was adopted by the federal agency charged with enforcing Title IX. Under this test, an institution may comply with Title IX in any of the following three ways: (1) by providing participation opportunities to both sexes in

numbers substantially proportionate to their enrollment; (2) by demonstrating a history and continuing practice of program expansion for the underrepresented sex; or (3) by fully and effectively accommodating the athletic interest and abilities of the underreported sex. Brown argues that men are more interested in playing sports than women and, therefore, the three-part test discriminates against men.

Amicus Brief: The brief argues that Congress's intent in enacting Title IX was to remedy sex discrimination in intercollegiate athletics. A success by Brown would halt the progress that has been made toward expanding women's athletic opportunities. The brief also challenges Brown's assertion that men are more interested in sports than women and defends the three-part test, arguing that the test is entitled to substantial deference as it is an agency's interpretation of its own policy. The brief further argues that the three-prong test is not unconstitutional for it seeks to remedy past discrimination in the area of intercollegiate athletics.

CWEALF: CWEALF joined the brief because CWEALF recognizes the value that playing sports has for women and girls. CWEALF strongly believes that any weakening of Title IX enforcement will have a detrimental effect on equal athletic opportunities for female students.

Holding: The First Circuit rejected Brown's appeal but gave the University latitude in determining how to comply.

Case: *Klinger v. Department of Corrections*

Court: United States Court of Appeals for the Eighth Circuit, 1997

Amicus Brief: The National Women's Law Center

Case: The female prisoners incarcerated at the Nebraska Center for Women (NCW), brought a 1983 action alleging that the Nebraska Department of Correctional Services (DCS) violated their rights under the equal protection clause as well as under Title IX of the Education Amendments by failing to provide equal educational opportunities for male and female Nebraska prisoners. The prisoners also claimed that defendants violated their right of meaningful access to the courts by failing to provide them with an adequate law library. On appeal, the Court reversed the District Court's finding of an equal protection violation and remanded the case to the District Court, which issued three opinions. The Court of Appeals for the Eighth Circuit affirmed the District's judgment in favor of defendants on plaintiff's Title IX claim, reversed the District Court's judgment in favor of plaintiffs on the access-to-courts claim, and vacate the award of attorney's fees and expenses.

Amicus Brief: This brief first argues that the Court has misapplied the Court's gender-based equal protection jurisprudence by adopting a similarly situated test as a threshold to further review under the Equal Protection Clause. The similarly situated analysis has been used in conjunction with the heightened scrutiny test, not as a substitute for it. This analysis subverts the purpose of heightened scrutiny. Additionally, the Eighth Circuit Court ignored controlling Supreme Court precedent by requiring an additional showing of an intent to discriminate in a facial discrimination case. A showing of intentional discrimination is only necessary when a facially neutral law is challenged as having a disparate impact on a protected group.

CWEALF: CWEALF joined this brief because it believes in equal treatment of both men and women. In this case, men and women were treated differently in a situation where the women had no recourse. CWEALF hopes to encourage equal treatment for both sexes and discourage sexism.

Holding: The Court of Appeals for the Eighth Circuit affirmed the District Court's judgment in favor of defendants on plaintiff's Title IX claim, reversed the District Court's judgment in favor of plaintiffs on the access-to-courts claim, and vacated the award of attorney's fees and expenses.

Case: *Boucher v. Syracuse University*

Court: United States Court of Appeals for the Second Circuit, 1999.

Amicus Brief: National Women's Law Center

Case: Female athletes filed suit against Syracuse in 1995, seeking greater participation opportunities for women athletes. At the time, Syracuse had not added a team for women since 1982 despite very large gaps in women's athletic participation compared to women's enrollment. In a ruling for Syracuse, the District Court found that the University met the three-part test for participation opportunities, specifically finding that the University met the second prong of the test for women's expansion. The plaintiffs appealed.

Amicus Brief: The brief argues that the Court misapplied the second prong of the three-part test for participation opportunities and set a precedent that could be harmful in future Title IX litigation. By crediting the University with program expansion even though it added no women's teams between 1982 and 1995, the Court departed from other findings of Title IX violations based on similar history. Furthermore, the Court counted increases in the size of existing teams as program expansion without inquiring into whether those additional participants had a meaningful opportunity to play. The Court also permitted the University to avoid liability based on improvements it made to its program after the plaintiffs filed suit. The brief argues that, if this becomes the standard, then there will be no incentive for schools to bring themselves into compliance with the law.

CWEALF: CWEALF has worked to ensure that schools offer female student athletes the same athletic opportunities offered to their male peers. Because of this belief, CWEALF joined in the brief to advocate for proper enforcement of Title IX.

Holding: The Second Circuit affirmed and dismissed in part. The Court dismissed the accommodation claim after holding that it was moot to the extent that it sought the implementation of a varsity women's lacrosse team. The Second Circuit held that the District Court should have certified present and future female softball players as a subclass of plaintiffs, rather than merely excluding them from certified class. The Court also held that the District Court erred in raising and resolving a claim not asserted by students and that the students did not raise a broader claim on behalf of all current and future female students interested in varsity athletics at university generally.

Case: *Cureton v. NCAA*

Court: United States Court of Appeals for the Third Circuit, 1999

Amicus Brief: National Women's Law Center

Case: Four African American student-athletes filed a class action against the NCAA, alleging that they were unlawfully denied educational opportunities as freshmen through the operation of initial eligibility rules by the NCAA. They are specifically challenging "proposition 16" which includes a minimum test score requirement that they claim has an unjustified disparate impact on African Americans.

Amicus Brief: The brief explains that the NCAA should be subject to Title IX, Title VI, and Section 504, and, therefore, the NCAA is prohibited from discriminating on the basis of sex, race/national origin, or disability in its governance of intercollegiate athletics.

CWEALF: CWEALF joined in the brief because of its belief that the NCAA must be subject to other civil rights laws, such as Title VI, section 504, and Title IX, in order to prohibit discrimination.

Holding: The Third Circuit affirmed the lower court's decision in holding that the NCAA is not subject to Title VI in cases alleging disparate impact on the basis of race, color, or national origin.

Case: *Smith v. NCAA*

Court: United States Court of Appeals for the Third Circuit, On remand from the Supreme Court of the United States, 2001

Amicus Brief: National Women's Law Center

Case: Smith alleges that the NCAA violated Title IX by granting a disproportionate number of waivers of eligibility requirements under NCAA bylaws to male student-athletes. Smith was denied the waiver of eligibility to continue to play Division One basketball at a graduate level. CWEALF contributed to the amicus brief filed in this case for its original appearance before the Third Circuit. The case is currently back in the Third Circuit, after the Supreme Court's decision that dues from member schools alone are not enough to subject the NCAA to Title IX. The Third Circuit handed down a decision in *Cureton v. NCAA* that held that the NCAA is not subject to Title VI. Thus, the main issue presented in this case is whether *Cureton* is controlling.

Amicus Brief: The brief states that the NCAA is subject to Title IX and is prohibited from discriminating on the basis of sex in the governance of intercollegiate athletics. The NCAA is subject to Title IX because it receives federal funds in the form of grants from HHS for its National Youth Sports Programs. The NCAA is an assignee within the Title IX definition of "recipient" because member schools give the NCAA authority and control to govern their intercollegiate athletic programs. The NCAA is also a "program or activity" within the meaning of the Civil Rights Restoration Act of 1987. For these reasons, the NCAA should be subject to Title IX prohibitions on discrimination.

CWEALF: CWEALF joined in the brief because CWEALF understands how critical Title IX has been in terms of improving educational equity for girls and women, particularly in the area of athletics. CWEALF also believes that it is vital for the authoritative voice of intercollegiate athletics—the NCAA—to abide by Title IX if women’s sports are to be truly equitable.

Holding: The Third Circuit affirmed the lower court’s decision and rejected the argument that the NCAA is covered by Title IX despite its controlling authority over member schools’ athletic programs, thus extending *Cureton* (see above) to Title IX. However, the Third Circuit remanded the case to the District Court to allow Smith to amend her complaint to include a cause of action against the NCAA on the theory that it is covered by Title IX because it receives funds from HHS for the National Youth Sports Program (NYSP). The District Court will then have to determine whether in fact the relationship between the NCAA and NYSP is sufficient to render the NCAA a recipient of the federal funds that HHS provides for the NYSP.

Case: *Brentwood Academy v. Tennessee Secondary Schools Athletic Association*

Court: Supreme Court of the United States, 2001

Amicus Brief: National Women’s Law Center

Case: The Tennessee Secondary Schools Athletic Association (hereinafter “TSSAA”) is a nonprofit organization to which public and private schools must join in order for TSSAA interscholastic sports among the schools. While no school is forced to join, TSSAA is the only athletics-regulating body, so most of the schools in the state join for practical purposes. The voting membership for TSSAA is made up of the administrators of member schools. The schools also must pay dues to TSSAA, and TSSAA receives revenue earned at members’ games. TSSAA has been given statutory authority over these athletic programs. In 1997, TSSAA suspended plaintiff Brentwood Academy for “recruiting” athletes by writing to them and informing them of its spring training. Brentwood sued TSSAA in federal court, claiming that TSSAA was a state actor. The District Court found TSSAA to be a state actor under § 1983 and the Fourteenth Amendment because the State had delegated authority over high school athletics to TSSAA and because of the relationship between public schools and TSSAA. The Sixth Circuit reversed, holding that TSSAA was not engaging in any traditional or exclusive public function or responding to state compulsion. The Supreme Court granted certiorari in order to resolve a conflict between the Circuit courts.

Amicus Brief: The brief argues that, under dictum from *National Collegiate Athletic Association v. Tarkanian*, TSSAA is a state actor for its membership is made up, overwhelmingly, of public schools within one State—Tennessee. When looking at several factors, such as the TSSAA leadership, its composition, the source of its revenues, its exertion of control over public school athletic events, and its authority over public school athletic administration, the nexus between the TSSAA and the states appears sufficient to consider TSSAA a state actor. This nexus is further established by the State legislature’s recognition of TSSAA as a state athletic authority. The brief points out that considering TSSAA a state actor would make it subject to non-discrimination obligations which, in turn, benefits girls and minority students by giving them the option to participate in athletics programs.

CWEALF: CWEALF joined the brief because of its belief that athletic associations that have authority over and receive funds from public school programs should be obligated to refrain from discrimination. Only by recognizing these associations as state actors is that obligation enforceable under federal law. CWEALF believes that athletic associations need to be motivated by legal duties to provide girls with the same athletic opportunities traditionally given boys.

Holding: The Supreme Court reversed the decision of the Sixth Circuit and held that TSSAA was a state actor and, as such, was subject to suit in federal court under § 1983 and the Fourteenth Amendment. In coming to this decision, the Court found that the officials of public schools were acting in their official capacities when serving on the board of TSSAA. The Court also found the State government and TSSAA to be officially entwined, especially by the appointment of State officials to the governing body of TSSAA. On remand, the Sixth Circuit held that the District Court erred in granting TSSAA's motion for summary judgment and that the regulation prohibiting recruitment must be reviewed under intermediate scrutiny as a content neutral speech regulation.

Case: *Communities for Equity v. Michigan High School Athletic Association*

Court: United States Court of Appeals for the Sixth Circuit, 2003

Amicus Brief: American Association of University Women

Case: The original case was filed by students' parents and Communities for Equity against the statewide high school athletic organization for MHSAA's gender-biased practices in allocating money for sports and determining which sports would be played competitively, where the sports would be played, on what dates competitions would be held, and at what time of the year the sports could be played. After finding that MHSAA was subject to Title IX, the District Court determined that the practices of which the plaintiffs complained violated their rights under Title IX. The Court then accepted a compliance plan offered by the defendants that proposed several different options. The defendants then instituted one of the options and the plaintiffs filed a motion for reconsideration of that compliance plan. The Court only looked to the plan as a whole, as opposed to the real actions of schools under MHSAA's administration. The Court found the plan to be roughly equitable on its face. The Court refused to delve deeper into the effects the defendants' compliance plan would have on specific sports or specific schools. In finding the plan was roughly equitable, the Court, in essence, stated that MHSAA had done enough. The plaintiffs appealed to the Sixth Circuit.

Amicus Brief: The brief argues that, under *Brentwood Academy v. TSSAA* (see above), MHSAA is a state actor and, thereby, subject to § 1983 claims based on violations of the Equal Protection Clause. The brief also argues that MHSAA is liable under Title IX, as that statute is read in light of legislative history revealing that federal resources should not be used to support discriminatory practices. This is due, in part, to the fact that MHSAA exercises controlling authority over the school athletic programs receiving federal funds for educational use.

CWEALF: CWEALF joined the brief because of its commitment to Title IX issues. CWEALF believes that participation in athletic programs helps to boost girls' self-esteem, which in turn

makes them more confident in other endeavors. Permitting athletic associations to slide under the radar of Title IX because they operate as state or education programs in fact but not in name serves only to frustrate the goal of ending discrimination in educational programs, both those that are athletic and academic in nature.

Holding: The case is pending in the Sixth Circuit.