

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Balow v. Michigan State Univ.

No. 21-1183, United States Court of Appeals for the Sixth Circuit (February 1, 2022)

SUMMARY

****Title IX – Athletic Participation Opportunities – Substantial Proportionality – Preliminary Injunction**** The Sixth Circuit vacated the denial of a preliminary injunction in a Title IX suit by female swimmers challenging Michigan State University's elimination of the women's swimming-and-diving team. The court held that the district court erred by (1) measuring the participation gap as a percentage of the athletic program rather than focusing on the numerical gap, (2) comparing the gap to the average team size instead of the size of a viable team (one with sufficient interest, ability, and competition), and (3) potentially applying a bright-line 2% safe harbor for substantial proportionality. The court also noted that at the preliminary-injunction stage, plaintiffs may rely on Equity in Athletics Disclosure Act (EADA) data to show a likelihood of success, even though Title IX counts participants differently.

CASE DETAILS

COURT	United States Court of Appeals for the Sixth Circuit
WRITING FOR THE COURT	Karen Nelson Moore; Ralph B. Guy Jr.; Julia Smith Gibbons
JURISDICTION	Federal
DECIDED	February 1, 2022
DOCKET	21-1183
DISPOSITION	vacated
PROCEDURAL POSTURE	Appeal from denial of preliminary injunction
STANDARD OF REVIEW	Abuse of discretion for the district court's decision; clear error for factual findings; de novo for legal conclusions
PRECEDENTIAL VALUE	published
PARTIES	Sophia Balow, Ava Boutrous, Julia Coffman, Kylie Goit, Emma Inch, Sheridan Phalen, Madeline Reilly, Olivia Starzomski, Sarah Zofchak, Taylor Arnold, Elise Turke, individually and on behalf of all those similarly situated v. Michigan State University; Michigan State University Board of Trustees; Samuel L. Stanley, Jr.; Bill Beekman

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QUESTIONS PRESENTED

1. Whether the district court erred in analyzing the substantial proportionality test under Title IX by considering the participation gap as a percentage of the athletic program rather than as a numerical gap.
2. Whether the district court erred by comparing the participation gap to the average team size rather than to the size of a viable team.
3. Whether the student-athletes could rely on EADA data at the preliminary injunction stage to calculate the participation gap.

HOLDINGS

1. The district court erred by considering the participation gap as a percentage of the athletic program. The correct inquiry focuses on the number of participation opportunities, not the gap as a percentage.
2. The district court erred by comparing the participation gap to the average team size. The correct comparison is to the size of a viable team, defined as one for which there is sufficient interest, ability, and competition.
3. At the preliminary injunction stage, it may be appropriate to rely on EADA data to calculate the participation gap, given that schools have access to the underlying Title IX data.

KEY QUOTATIONS

“Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments” (at 3-4)

“OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.” (at 4-5)

“As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.” (at 5)

“An interpretation that conflates 'viable team' with 'average team' creates a strict numerical formula.” (at 13)

FACTUAL BACKGROUND

Michigan State University eliminated both its men's and women's swimming-and-diving teams. The women's team members sued, arguing that MSU fails to provide women athletes with equal participation opportunities as required by Title IX. The parties agreed on the gender breakdown of the undergraduate student body

(approximately 51% female) but disagreed on the number of female athletes. The district court denied the plaintiffs' motion for a preliminary injunction.

PROCEDURAL HISTORY

The district court denied the student-athletes' motion for a preliminary injunction, finding they were not likely to succeed on the merits of their Title IX claim. The plaintiffs appealed.

DISPOSITION

vacated

REMAND INSTRUCTIONS

For further proceedings consistent with this opinion, including the district court's determination of the participation gap and whether it is substantially proportionate using the correct legal standards (numerical gap analysis and viable team comparison).

CASES CITED

- Kentucky v. U.S. ex rel. Hagel, 759 F.3d 588 (6th Cir. 2014)
- City of Pontiac Retired Emps. Ass'n v. Schimmel, 751 F.3d 427 (6th Cir. 2014) (en banc)
- Leary v. Daeschner, 228 F.3d 729 (6th Cir. 2000)
- Biediger v. Quinnipiac Univ. (Biediger III), 691 F.3d 85 (2d Cir. 2012)
- Anders v. Cal. State Univ., Fresno, No. 1:21-cv-179-AWI-BAM, 2021 WL 1564448 (E.D. Cal. Apr. 21, 2021)
- Biediger v. Quinnipiac Univ. (Biediger I), 616 F. Supp. 2d 277 (D. Conn. 2009)
- Portz v. St. Cloud State Univ. (Portz II), 401 F. Supp. 3d 834 (D. Minn. 2019)
- Lazor v. Univ. of Connecticut, __ F. Supp. 3d __, 2021 WL 2138832 (D. Conn. May 26, 2021)
- Robb v. Lock Haven Univ., No. 4:17-CV-00964, 2019 WL 2005636 (M.D. Pa. May 7, 2019)
- Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91 (4th Cir. 2011)
- Boulahanis v. Bd. of Regents, 198 F.3d 633 (7th Cir. 1999), abrogated on other grounds by Trentadue v. Redmon, 619 F.3d 648 (7th Cir. 2010)
- Ohlensehlen v. Univ. of Iowa, 509 F. Supp. 3d 1085 (S.D. Iowa 2020)
- Univ. of Texas v. Camenisch, 451 U.S. 390 (1981)
- Biediger v. Quinnipiac Univ. (Biediger II), 728 F. Supp. 2d 62 (D. Conn. 2010)
- Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992), aff'd 991 F.2d 888 (1st Cir. 1993)
- Porter v. Lee, 328 U.S. 246 (1946)
- Di Biase v. SPX Corp., 872 F.3d 224 (4th Cir. 2017)
- Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016)
- Horner ex rel. Horner v. Kentucky High Sch. Athletic Ass'n, 206 F.3d 685 (6th Cir. 2000)
- Comcast Corp. v. Nat'l Ass'n of African American-Owned Media, 140 S. Ct. 1009 (2020)

- *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021)
- *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019)
- *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993)
- *Pederson v. Louisiana State Univ.*, 213 F.3d 858 (5th Cir. 2000)
- *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843 (9th Cir. 2014)
- *Mayerova v. E. Michigan Univ.*, No. 19-1177, 2019 U.S. App. LEXIS 9373 (6th Cir. Mar. 28, 2019)
- *Neal v. Bd. of Trs.*, 198 F.3d 763 (9th Cir. 1999)
- *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994)
- *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993)
- *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994)
- *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002)
- *Benisek v. Lamone*, 138 S. Ct. 1942 (2018)
- *Winter v. NRDC, Inc.*, 555 U.S. 7 (2008)
- *McNeilly v. Terri Lynn Land*, 684 F.3d 611 (6th Cir. 2012)

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