



June 10, 2015

VIA U.S. Mail and Email at williamse22@k12tn.net

Mr. Eric D. Williams
Director of Schools
West Carroll Special School District
PO Box 279
Trezavant, TN 38258

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION
OF TENNESSEE
P.O. BOX 120160
NASHVILLE, TN 37212
T/ (615) 320-7142
F/ (615) 691-7219
WWW.ACLU-TN.ORG

Dear Mr. Williams:

The American Civil Liberties Union of Tennessee (“ACLU-TN”) was recently contacted by the family of Thalia Townsend, a rising seventh grader at West Carroll Junior/Senior High School in the West Carroll Special School District (“WCSD”). Ms. Michelle Larsen, Thalia’s mother, informed us that WCSD refused Thalia’s request to join the school’s junior high football team solely because of her gender. WCSD allowed all of Thalia’s male peers to join the team without tryouts and regardless of their ability or size. Preventing a female student, because of her gender, from playing a school-sponsored sport is unconstitutional gender discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

Thalia Townsend excelled for two years playing left offensive tackle and defensive line in a community football league. A talented athlete since preschool, Thalia not only loves the game, but quickly became one of the most valuable players on the football team, proving herself a physical match against male opponents of all sizes.

Thalia and her junior league teammates arrived together on May 11, 2015, for the initial meeting of the West Carroll junior high football team. Thalia expected, like all the other students, to be fitted for her uniform and learn about the upcoming season from her new coach. Instead, she alone was sent away while every boy was allowed to join the team. The coach declared explicitly that “we don’t allow girls to play football at this school.”

Ms. Larsen intervened on her daughter’s behalf, speaking first with the coach and then with you. Coach Rich told Ms. Larsen that the school had a policy against allowing girls to play football. He did not elaborate or provided any other explanation. He told Ms. Larsen that if he knew Thalia was planning to attend the meeting he would have told her not to come and “saved her the trip.”

You supported this discriminatory policy, asserting that WCSD was only required to provide an alternative sport for girls to play. You insisted that softball is a

reasonable and suitable alternative to football. Therefore, you argued, WSCD can exclude all girls from playing on the school's only football team. As will be demonstrated below, this analysis is incorrect. Softball is not a suitable alternative for football under the U.S. Constitution, and excluding students from athletic activities because of their gender violates the Equal Protection Clause.

The Fourteenth Amendment of the Constitution prohibits any state government actor, including public schools, from "deny[ing] to any person within its jurisdiction the equal protection of the laws." The Equal Protection Clause protects all citizens from unequal treatment by government actors, including freedom from unjustified discrimination based on membership in a protected class, such as gender.

A practice or policy of excluding girls from a sport is unconstitutional even if it complies with Title IX. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 685 (6th Cir. 2006). Constitutional rights always trump Title IX. Id. Title IX cannot preempt or limit the full reach of the Equal Protection Clause. See, e.g., Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1120 (E.D. Wis. 1978) (Title IX "does not displace the plaintiffs' right to enforce the commands of the fourteenth amendment."); Adams ex rel Adams v. Baker, 919 F. Supp. 1496, 1503 (D. Kan. 1996) ("Congress cannot . . . substantively limit constitutional rights.") Thus, an assertion that the school has complied with Title IX is of no consequence if the school's policies still violate the Constitution.

Gender discrimination is subject to heightened intermediate scrutiny. To treat boys and girls differently, the school bears the burden of demonstrating an "exceedingly persuasive justification" for its discriminatory policy or actions. United States v. Virginia, 518 U.S. 515, 533 (1996). The school must present this "exceedingly persuasive justification" and prove that its discriminatory actions bear a substantial relation to an important government objective. See United States v. Virginia, 518 U.S. at 533. This burden cannot be satisfied by "archaic and stereotypic notions" or seek to "'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior." Miss. Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

Courts have consistently found that depriving girls of the same athletic opportunities as boys bears no substantial relation to important objectives, and that discriminating against girls who wish to join boys' teams where there is no equivalent for girls is therefore unconstitutional. See, e.g., Force ex rel Force v. Pierce City R-VI Sch. Dist., 570 F. Supp. 1020, 1021-22, 1032 (W.D. Mo. 1983) (holding that the Equal Protection Clause guaranteed a thirteen-year-old female athlete the same opportunity as her male peers to compete on the school's only football team); Clinton v. Nagy, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (granting a temporary restraining order against a regulation that prevented twelve-year-old girl from playing football in an otherwise male league).

In Hoover v. Meiklejohn, a female athlete was denied the chance to play soccer when her high school offered no girls' soccer team and prohibited her from playing on the then all-male team. 430 F. Supp. 164, 172 (D. Colo. 1977). The court held that she and other girls must be allowed to compete in the sport so long as the school continues to offer it, declaring that the school could not constitutionally "make interscholastic soccer available only to male students." Id.; see also Carnes v. Tenn. Secondary Sch. Athletic Ass'n, 415 F. Supp. 569, 591 (E.D. Tenn. 1976) (declaring that, so long as there was no girls' baseball team at the school, a female athlete could not be denied the opportunity to join the boys' team).

Offering a sport at a school but only allowing boys to play it violates the Equal Protection Clause, no matter how many other sports have girls' teams. See, e.g., Force, 570 F. Supp. at 1028; Adams, 919 F. Supp. at 1499, 1505 (granting a preliminary injunction enjoining school district from preventing a female athlete from joining the wrestling team irrespective of the fact that multiple other athletic options were available for girls at the school). In Force, the court firmly rejected the defendant's argument that preventing girls from trying out for football was acceptable because volleyball was available as an alternative. 570 F. Supp. at 1028. The court emphasized:

Each sport has its own relatively unique blend of requirements in terms of skills and necessary physical attributes and each person, male or female, will for a variety of reasons probably find one or another sport more enjoyable and rewarding than others. In point of fact, volleyball is *not* football; and baseball is *not* hockey; and swimming is *not* tennis. Accordingly, if the idea is to 'maximize educational athletic opportunities for all students, regardless of gender,' it makes no sense, absent some substantial reason, to deny all persons of one sex the opportunity to test their skills at a particular sport.

Id. The court held that prohibiting female students from playing football based on their gender was unconstitutional, and ordered the school to allow her the opportunity to play. Id. at 1031-32. Excluding girls from the sport of their choice while allowing boys the chance to play violates their established right to equal protection, and fact that they could play a different sport instead does not change this.

We anticipate that WCSC, like many other school districts, will rely next on the flawed, paternalistic argument that allowing Thalia to play football would jeopardize her safety. Courts around the country have firmly established, however, that a school cannot categorically prevent girls from playing a sport, contact or otherwise, because of a professed concern for safety. See, e.g., Beattie v. Line Mountain Sch. Dist., 992 F. Supp. 2d. 384, 393 (M.D. Penn. 2014); Lantz ex rel

Lantz v. Ambach, 620 F. Supp. 663, 665 (S.D.N.Y. 1985) (holding that preventing girls from playing football did not have even a rational relation to the objective of furthering student safety). In Beattie, the court declared that preventing girls from joining the wrestling team based on gender lacked the requisite substantial relation to the school's goal of maintaining safety. Like any overly broad rule, the policy was "both underinclusive and overinclusive:" the weakest boy would still be able to join while the strongest girl, likely far more capable and less prone to injury than him, would be excluded. 992 F. Supp. 2d. at 393; see also Hoover, 430 F. Supp. at 166 (noting that average characteristics are an especially poor justification for discrimination in school sports because "the range of differences among individuals in both sexes is greater than the average difference between the sexes.")

As long as discrimination is justified only by "generalized assumptions" about the average characteristics and abilities of boys and girls, it cannot survive heightened intermediate scrutiny. Adams, 919 F. Supp. at 1504; see United States v. Virginia, 518 U.S. at 533 (establishing the heightened intermediate scrutiny standard for gender discrimination and emphasizing that the government actor must have an "exceedingly persuasive justification" for treating females differently). Indeed, Force, over 30 years ago, criticized this frequently invoked safety argument as based in an "overly 'paternalistic' attitude about females which the Supreme Court has viewed with such concern," and as "not only inherently unfair but generally tend[ing] only to perpetuate 'stereotypic notions' of the proper roles of men and women." 570 F. Supp. at 1029 (citations omitted).

Since West Carroll offers only one football team, it cannot constitutionally exclude Thalia from playing on this team based on her gender. Like the school in Hoover, West Carroll may not offer an athletic opportunity exclusively for its male students. As long as West Carroll has football, it must allow Thalia an equal opportunity to play as her male peers.

Discriminatorily excluding Thalia from the football team violates her right to equal protection, regardless of the fact that she could play softball. As held in Force, softball is *not* football, and she has the right, the same as her male peers, to further her athletic education by choosing the sport that most appeals to her abilities and interest. 570 F. Supp. at 1028. Though administrators at West Carroll may believe that they have satisfied Title IX, this provides no defense for violating Thalia's constitutional rights.

Any argument that preventing Thalia from playing football is for her own safety will not justify West Carroll's policy. Such an argument would necessarily be based on overbroad generalizations about the characteristics of boys and girls. Thalia has proven herself a strong and skilled football player who is a physical match for her male teammates and opponents alike. Thalia must be given the same opportunities as her male peers to play on the team and use her talents on the field.

Mr. Eric D. Williams
June 10, 2015
Page 5 of 5

To act otherwise would have no substantial relation to protecting her safety, but instead only violate her rights while perpetuating “stereotypic notions of the proper roles of men and women.” Force, 570 F. Supp. at 1029.

West Carroll, like similarly situated schools in the cases discussed, has three options that would not violate Thalia’s constitutional rights. See, e.g., Hoover, 430 F. Supp. at 172. First, it could establish an equivalent girls’ football team. Even if West Carroll were able to fund a girls’ team and managed to field a full team with girls interested in playing, the lack of a girls’ football league in the TSSAA or on any club sport level would make it impossible to provide equivalent competitive opportunities. Alternatively, West Carroll could follow a petty and spiteful route and cease to offer football altogether for any student. This extreme measure would unfairly penalize the many students who currently benefit from the program, and would be a juvenile and unnecessary response to a problem that can be resolved much more simply. West Carroll’s third and only truly reasonable option is to simply allow Thalia to join the existing team, the same as her male classmates with whom she has played football for the past two years.

ACLU-TN invites you to sit down and discuss this issue with Thalia’s family and me to address any questions or concerns you may have. We hope that you will be willing to participate in an amicable solution which complies with Thalia’s constitutional rights. Please contact me by June 17, 2015 at [REDACTED] or at [REDACTED] to arrange a time for the meeting before the end of June 2015.

Sincerely,



Thomas H. Castelli
Legal Director