

U.S. DISTRICT COURT
WESTERN DIST ARKANSAS
FILED

JUL 14 2015

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

CHRIS R. JOHNSON, Clerk
By

Deputy Clerk

Chris D. Ezell, as parent and next friend of)
his minor daughter, K.E.,)

James Lyles and Donna Lyles, as)
parents and next friend of their minor)
daughter, E.L.)

Wes R. Mabry, as parent and next friend)
of his minor daughter, M.M.,)

Plaintiffs,)

Case No. 15-5161 TLB

vs.)

FAYETTEVILLE PUBLIC SCHOOLS)
a/k/a FAYETTEVILLE SCHOOL)
DISTRICT; DR. PAUL HEWITT in his)
official capacity as Superintendent of)
Fayetteville Public Schools;)
and DOES 1 through 50,)

Defendants.)

COMPLAINT

The above-captioned Plaintiffs, Chris D. Ezell, as parent and next friend of his minor daughter, K.E., James Lyles and Donna Lyles, as parents and next friend of their minor daughter, E.L., and Wes R. Mabry, as parent and next friend of his minor daughter, M.M. ("Plaintiffs"), respectfully file this Complaint against Defendants, Fayetteville Public Schools a/k/a Fayetteville School District; Dr. Paul Hewitt in his official capacity as Superintendent of Fayetteville Public Schools; and Does 1 through 50, ("Defendants"), and allege as follows:

STATEMENT OF THE CASE

1. This action is posed for declaratory and injunctive relief. Plaintiffs are also seeking compensatory damages. Defendants have violated (1) Title IX of the Education Amendment of 1972, 20 U.S.C. §1681 *et seq.* ("Title IX") and the regulations adopted thereto, and (2) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983, by illegally and intentionally denying Plaintiffs' daughters the equal treatment and benefits that must necessarily accompany an equal opportunity to participate in athletics.

2. Defendants' denial of equal treatment and benefits constitutes intentional discrimination against the Plaintiffs' daughters based solely on their gender. Specifically, Defendants have discriminated against Plaintiffs' daughters in the following areas: (1) funding of athletics; (2) provision of equipment and supplies; (3) scheduling of games and practice times; (4) assignment and compensation of coaches; (5) opportunities to receive coaching; (6) provision of locker rooms and facilities for both practice and competition; (7) provision of training facilities and services; and (8) publicity.

3. This action seeks to redress the deprivation of Plaintiffs' daughters' rights to receive the equal treatment and benefits which must necessarily accompany an equal opportunity to participate in interscholastic and other school-sponsored athletics. This action seeks a declaratory judgment that Defendants have violated Plaintiffs' daughters' rights under federal law. This action further seeks an injunction requiring Defendants to immediately cease their discriminatory practices, to remedy the effects of their discriminatory practices, to remedy the effects of their discriminatory conduct, and to provide Plaintiffs' daughters with treatment and benefits equivalent to that provided to the boys' athletic teams at Fayetteville Public Schools.

4. The Plaintiffs, in their capacities as the parents and next friends of their minor daughters, seek monetary relief in order to compensate for damages resulting from Defendants' discrimination in the Fayetteville Public Schools athletics program, including, among other things, (1) the actual out-of-pocket costs incurred in paying for equipment and supplies for their daughters to participate in interscholastic and other school-sponsored athletics which would not be incurred by parents of boys similarly situated, and (2) the damages associated with their daughters' reduced opportunities to obtain college athletic scholarships.

JURISDICTION AND VENUE

5. The Plaintiffs' first claim arises under 20 U.S.C. §1681, *et seq.* and its interpreting regulations. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

6. The Plaintiffs' second claim arises under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. §1983. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).

7. Jurisdiction for declaratory and other relief is invoked pursuant to 28 U.S.C. §§ 2201(a) and 2202.

8. Venue is proper pursuant to 28 U.S.C. § 1391(b). These claims arose in Washington County, Arkansas, which is within the jurisdiction of this Court.

THE PARTIES

9. Plaintiff Chris D. Ezell is the parent of K.E., a student at Fayetteville High School, in Fayetteville Public Schools. K.E. is a talented athlete who participates in softball. She has endured the unequal treatment and benefits directed by Fayetteville Public Schools toward its female

athletes. Chris D. Ezell and K.E. are residents of Fayetteville, Arkansas, which is within the jurisdiction of this Court.

10. Plaintiffs James Lyles and Donna Lyles are the parents of E.L., a student at Fayetteville High School, in Fayetteville Public Schools. E.L. is a talented athlete who participates in softball. She has endured the unequal treatment and benefits directed by Fayetteville Public Schools toward its female athletes. James Lyles and Donna Lyles and E.L. are residents of Fayetteville, Arkansas, which is within the jurisdiction of this Court.

11. Plaintiff Wes R. Mabry is the parent of M.M., a student at Fayetteville High School, in Fayetteville Public Schools. M.M. is a talented athlete who participates in softball. She has endured the unequal treatment and benefits directed by Fayetteville Public Schools toward its female athletes. Wes R. Mabry and M.M. are residents of Fayetteville, Arkansas, which is within the jurisdiction of this Court.

12. Defendant Fayetteville Public Schools is authorized by Arkansas law to operate and control Fayetteville High School, where the Plaintiffs' daughters are students. Therefore, Defendants' conduct is considered state action under 42 U.S.C. §1983. Fayetteville Public Schools is located in Fayetteville Arkansas, and a substantial part of the events or omissions giving rise to this lawsuit occurred in Fayetteville, which is within the jurisdiction of this Court. Since the passage of Title IX, Fayetteville Public Schools has received and continues to receive federal financial assistance and the benefits therefrom. Therefore, all programs at Fayetteville Public Schools, including athletics, are subject to the requirements of Title IX.

13. Defendant Dr. Paul Hewitt is the Superintendent of Schools at Fayetteville Public Schools. Dr. Hewitt is a resident of the State of Arkansas and thus is subject to the jurisdiction of this Court.

14. The named Plaintiffs are ignorant of the true names and capacities of Does 1-50, but believe them to be employees of Fayetteville Public Schools or members of the Fayetteville Public Schools Board of Education. Plaintiffs will seek to amend this Complaint to set forth their true names and capacities when they are ascertained. Plaintiffs are informed and believe, and on that basis allege, that each of these fictitiously named defendants is responsible in some manner for the discriminatory actions alleged herein and that each is a resident of the State of Arkansas and thus is subject to the jurisdiction of this Court.

GENERAL ALLEGATIONS
THE REQUIREMENTS OF TITLE IX

15. Title IX, enacted in 1972, provides in relevant part:

No 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.

20 U.S.C. § 1681(a). The Civil Rights Restoration Act of 1987 made Congress' intent plain that "program or activity", as used in Title IX, applies to any program or activity so long as any part of the public institution receives federal financial assistance. 20 U.S.C. § 1687. Thus, Fayetteville Public Schools is subject to Title IX even if none of the funding for either its girls' or boys' athletic programs comes specifically from federal sources.

16. In 1975, the Department of Health, Education and Welfare (the predecessor of the United States Department of Education (“DOE”)) adopted regulations interpreting Title IX. These regulations are codified at 34 C.F.R. Part 106. (the “Regulations”).

17. With regard to athletic programs, § 106.41(a) of 34 C.F.R. provides that interscholastic athletics are included within the “program or activity” requirements of Title IX:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient ...

18. 34 C.F.R. § 106.41 (c) specifies ten (10) factors that are to be considered in the determination of equal athletic opportunity:

1. Whether the selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice times;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services; and
10. Publicity.

Another factor to be considered is a school's "failure to provide necessary funds for teams for one sex." *Id.*

19. In 1979, the office of Civil Rights of the Department of Education ("OCR") issued a policy interpretation of Title IX and the Regulations. This policy interpretation is found at 44 Fed. Reg. 71413 (1979) (the "Policy Interpretation").

20. The Policy Interpretation provides that, in order to comply with Title IX and 34 C.F.R. § 106.41(c), schools must provide equal athletic opportunities in three general areas: (1) awarding of scholarships (aimed primarily at problems at the intercollegiate level); (2) participation opportunities (including both the number of opportunities and whether the selection of sports and the level of competition effectively accommodate the interests and abilities of members of both sexes); and (3) treatment and benefits. 44 Fed. Reg. at 71414.

21. Under both the Regulations and the Policy Interpretation, compliance in the area of equal treatment and benefits is assessed based on an overall comparison of the male and female athletic programs, including an analysis of factors (2) through (10) of 34 C.F.R. § 106.41 (c) listed above, and an analysis of whether the necessary funds are provided for teams of both sexes.

22. The Regulations require that sponsors of interscholastic and other school-sponsored athletics (such as Fayetteville Public Schools) take such remedial actions as are necessary to overcome the effects of gender discrimination in violation of Title IX. *See* 34 C.F.R. § 106.3(a). On information and belief, any remedial actions which Defendants have taken in the past have been insufficient to satisfy Defendants' obligations under Title IX.

23. The Regulations further require that sponsors of interscholastic and other school-sponsored athletics comply with the Regulations within three years of their effective date (which was

July 21, 1975). Now, more than thirty-nine (39) years later, Defendants have still not fully complied with Title IX.

THE U.S. CONSTITUTION

24. The Fourteenth Amendment to the United States Constitution requires that a state shall not "deny to any person within its jurisdiction the equal protection of the laws."

25. Under 42 U.S.C. § 1983, Defendants may be held liable for their actions in violating Plaintiffs' daughters' rights under the Fourteenth Amendment.

INJUNCTIVE RELIEF

26. Plaintiffs are entitled to injunctive relief to end Defendants' unequal, discriminatory and unlawful treatment of female student athletes. Because of Defendants' acts and omissions, Plaintiffs' daughters continue to be deprived of the rights guaranteed to them by the United States Constitution and the laws of the United States. Failure to grant the injunctive relief requested will result in irreparable harm to Plaintiffs' daughters in that Plaintiffs' daughters' rights will be violated and that Plaintiffs' daughters will never be able to participate in interscholastic and/or other school-sponsored athletics on an equal basis with their male classmates. Accordingly, Plaintiffs do not have an adequate remedy at law for this harm. This threatened harm far outweighs any possible harm that granting injunctive relief might cause Defendants. Finally, the injunctive relief sought would in no way disserve the public interest but, on the contrary, would prevent discrimination based on gender and would promote the goal of full equality before the law.

ATTORNEY'S FEES

27. Plaintiffs have been required to retain the undersigned attorneys to prosecute this action. Plaintiffs are entitled to recover reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

FIRST CLAIM FOR RELIEF: TITLE IX
(Unequal Treatment and Benefits)
(Against Fayetteville Public Schools Only)

28. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 27 inclusive of this Complaint.

29. Fayetteville Public Schools, by its conduct, has violated Title IX by knowingly and deliberately discriminating against female students, including the Plaintiffs' daughters, by failing to provide them with treatment and benefits which are comparable overall to the treatment and benefits provided to male athletes.

30. On information and belief, Plaintiffs allege that Fayetteville Public Schools has failed to comply with Title IX by failing to provide their daughters and other female athletes with comparable treatment and benefits including, but not limited to, the following areas:

- (1) Fayetteville Public Schools funds athletics in a manner that discriminates against Plaintiffs' daughters and other female athletes.
- (2) Fayetteville Public Schools discriminates against Plaintiffs' daughters and other female athletes in the provision of equipment and supplies. For example, the softball program is required to purchase more of their essential athletic equipment and supplies, as well as field maintenance equipment and supplies, as compared to boys' athletic programs. For example, the football

program receives uniforms and equipment, and/or preferential pricing on uniforms and equipment, from Under Armour, under an arrangement that is not available to the softball players or other female athletes.

- (3) Fayetteville Public Schools discriminates against Plaintiffs' daughters and other female athletes in the scheduling of their games and practices. For example, the baseball program and other boys' athletic programs are provided a "5th period" athletic hour for training and practice, while the softball program is denied a "5th period" athletic hour for training and practice. On information and belief, the baseball program is supplied superior opportunities to participate in tournaments as compared to the softball players. The baseball players are provided opportunities for out of state competition. The softball players are not provided equivalent opportunities for out of state competition.
- (4) Fayetteville Public Schools discriminates against Plaintiffs' daughters and other female athletes in the assignment and compensation of coaches. For example, the softball program has one experienced, paid coach. In contrast, the baseball program has three experienced, paid coaches, and the football program has more than a dozen experienced, paid coaches. Thus, for baseball and football, there are sufficient experienced, paid coaches for various levels of teams, some of which are provided the "5th hour" for training and practice. In contrast, since softball only has one experienced, paid coach, he obviously cannot handle various levels of teams by himself.

One result of this is that many students who try out for softball are not allowed to play. This of course affects the playing experience of Plaintiffs' daughters and other female athletes, who are not provided the opportunity to play with and benefit from the skills of others who have developed their skills through an ongoing training process, with multiple experienced, paid coaches and 5th hour athletics, such as the male athletes at Fayetteville Public Schools enjoy.

- (5) Fayetteville Public Schools discriminates against Plaintiffs' daughters and other female athletes in the provision of opportunities to receive coaching. As stated above, the baseball program is provided a "5th period" athletic hour, while the softball program is denied a "5th period" athletic hour. The practical effect is that the baseball coach has two athletic periods during the school day for providing training to baseball players while the softball coach has only one athletic period during the school day to provide training to softball players. Thus, the baseball program's players, as well as other male athletes, have twice as much time to receive coaching from their coaching staff during the school day as the softball program's players have. In addition, Fayetteville Public Schools has failed to use the same hiring practices for the coaches of female teams as compared to those of the male teams. It selects coaches for female athletic teams with less demanding experience and search criteria, and with less care and attention than it employs for male athletic teams. For example, Fayetteville Public Schools

has indicated that it may finally attempt to obtain one paid assistant coach for softball. However, on information and belief, Fayetteville Public Schools has purposefully restricted its search to candidates within the school system. In contrast, coaches for boys' teams are selected from candidates both from within the school system as well as those outside the school system, in order to get the most qualified and experienced coach available.

- (6) Fayetteville Public Schools supplies superior access to superior locker rooms and practice and/or competition facilities to boys as compared to girls. For example, the baseball indoor hitting facility is larger, with superior access, amenities and climate control, as compared to the softball hitting facility. The baseball program is provided on-campus competition and practice facilities. The competition and practice facility provided for softball is several miles off-campus. The baseball field press box has air conditioning. The softball field press box does not. The baseball field has larger dugouts compared to the softball field. The baseball dugouts have painted interior walls, painted in school colors, and an astroturf floor. The softball dugouts have unpainted interior walls and bare concrete floors. The baseball dugouts have superior benches compared to the softball dugouts. The baseball dugouts have higher quality screens compared to the softball dugouts. The baseball dugouts have lights. The softball dugouts do not have lights. The baseball field has distance signs on the outfield fence. The softball field does not have distance signs on the outfield fence. The baseball field has a

warning track at the outfield fence. The softball field does not have a warning track at the outfield fence. The bullpens at the baseball field are superior in quality to those at the softball field. The surface of the baseball bullpens is astroturf. The surface of the softball bullpens is dirt and grass. The baseball bullpens are enclosed. The softball bullpens are not enclosed. The baseball bullpens have large screens to protect the baseball pitchers and catchers from foul balls. The softball bullpens have no screens to protect the softball pitchers and catchers from foul balls. The baseball field has a designated, enclosed hitter warm-up area, with a large screen to protect the players from foul balls. The softball field has no designated hitter warm-up area. The baseball outfield fence is a superior, solid fence. The softball outfield fence is an inferior, chainlink fence. The sides of the baseball field are enclosed with windscreen. The sides of the softball field are not. The baseball program has a high-quality batting practice cage, with protective padding and large wheels for easy transport. The softball program has a smaller, inferior, home-made batting practice cage with no protective padding and inferior wheels for transport. The baseball program has a superior office/locker room/weight room complex, both as to size and quality, as compared to that provided for softball. The baseball program is provided superior locker rooms. For example, the baseball program has multiple locker rooms which include showers. The single softball locker room has no showers. The baseball lockers are superior to the softball lockers. The locker

rooms provided for the football program are also superior to those provided for softball.

- (7) Fayetteville Public Schools discriminates against Plaintiffs' daughters and other female athletes in the provision of training facilities and services. For example, the baseball program has an adequately equipped, heated and air-conditioned weight room in the baseball complex. The softball program has just a few pieces of inferior equipment that are not adequately designed for female physiological needs, in a storage area that has neither air conditioning nor adequate heat. The weight training facilities and equipment provided for football are also superior to that provided for softball.
- (8) Fayetteville Public Schools discriminates against Plaintiffs' daughters and other female athletes in the provision of publicity. The signage at the baseball field is superior both in number and in quality as compared to the softball field. For example, the baseball program has a large sign at its field, commemorating the accomplishments of the baseball program. The softball program has no such sign, even though the program has had many notable accomplishments over the years. The baseball program has a trophy case at the entrance of its baseball complex. The softball program has no trophy case, even though the program has numerous trophies. The website for the football program is superior to the website for the softball program or any other girls' sport.

31. The imbalance in the treatment of female and male athletes at Fayetteville Public Schools as detailed above, demonstrates Fayetteville Public Schools' intentional and conscious failure to comply with Title IX.

32. Fayetteville Public Schools' conduct has persisted despite the mandates of the Regulations, particularly 34 C.F.R. §§ 106.3(a) and 106.41(d), and the Policy Interpretation.

33. Fayetteville Public Schools' conduct violates 20 U.S.C. § 1681 *et seq.*, as interpreted by 34 C.F.R. §§ 106.31 and 106.41 and the Policy Interpretation thereof.

34. As a result of Fayetteville Public Schools' conduct, the Plaintiffs have incurred damages, including, among other things, (1) the actual out-of-pocket costs incurred in paying for equipment and supplies for their daughters to participate in interscholastic and other school-sponsored athletics which would not be incurred by parents of boys similarly situated, and (2) the damages associated with their daughters' reduced opportunities to obtain college scholarships.

SECOND CLAIM FOR RELIEF: EQUAL PROTECTION
(Against All Defendants)

35. Plaintiffs reallege and incorporate herein by this reference paragraphs 1 through 34 inclusive of this Complaint.

36. Defendants, by their failure to provide Plaintiffs' daughters with equivalent treatment and benefits as they have the male athletes (as detailed above), have purposefully and illegally discriminated against Plaintiffs' daughters and other female students on the basis of gender, and have intentionally and illegally deprived them of their rights to equal protection secured by the Fourteenth Amendment to the United States Constitution.

37. Defendants have illegally failed and refused to remedy the unequal treatment and benefits received by Plaintiffs' daughters and other female athletes as compared to male athletes at Fayetteville Public Schools. Therefore, Defendants' actions constitute a knowing and illegal disregard for Plaintiffs' daughters' constitutional rights.

38. Section 1983 of Title 42 of the United States Code provides, in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

39. When Defendants engaged in the improper actions described above, they were acting under color of law for purposes of the Equal Protection Clause of the United States Constitution and 42 U.S.C. § 1983. Under this section, the Defendants are liable for their violations of the Plaintiffs' daughters' constitutional rights under the Fourteenth Amendment.

RELIEF REQUESTED

WHEREFORE, on each of their claims, Plaintiffs respectfully pray that this Court:

A. Enter an order declaring that Defendants have engaged in a past and continuing pattern and practice of discrimination against female students, including Plaintiffs' daughters, on the basis of gender in violation of Title IX and the regulations promulgated thereunder (including

unequal treatment and benefits), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

B. Issue a permanent injunction (a) restraining Defendants and their officers, agents, employees, successors and any other persons acting in concert with them, from continuing to maintain practices and policies of discrimination against Plaintiffs' daughters on the basis of gender, and (b) requiring Defendants, immediately upon issuance of the injunctive order, to adopt and implement a budget and plan which corrects and remediates Defendants' violation of Title IX and the Fourteenth Amendment. Such a plan should include, among other things, providing Plaintiffs' daughters and other female athletes with treatment and benefits comparable to those provided to male athletes at Fayetteville Public Schools.

C. Grant an expedited hearing and ruling on the permanent injunction request in paragraph B above.

D. Award the Plaintiffs monetary relief as permitted by Title IX, 42 U.S.C. § 1983, and other applicable law, including but not limited to (1) the actual out-of-pocket costs incurred in paying for equipment and supplies for their daughters to participate in interscholastic and other school-sponsored athletics which would not be incurred by parents of boys similarly situated, and (2) the damages associated with their daughters' reduced opportunities to obtain college athletic scholarships.

E. Award Plaintiffs their reasonable attorneys' fees and costs pursuant to 42 U.S.C. § 1988.

F. Order such other and further relief as the Court deems appropriate.

G. Designate that the trial take place before the U. S. District Court in Fayetteville, Arkansas.

Dated: July 13, 2015

Respectfully submitted,

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