

**OLLIER v. SWEETWATER UNION HIGH SCHOOL DISTRICT United States District Court,  
S.D. California  
604 F.Supp.2d 1264 (2009)  
March 30, 2009**

**Summary of the lower court's 2009 ruling addressing Title IX's "3-Prong Test" and the sports participation opportunities for female student-athletes at Castle Park High School**

**Title IX**

Title IX provides that "[n]o 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."

In the present case, the parties agree that compliance in the area of equivalent participation opportunities must be determined by the three-part test:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
3. Where the members of one sex are under-represented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

When looking at the 2007-08 school year, girls comprised 45.4% of the school population but only 38.7% of athletic participants. This 6.7% difference does not show a close relationship between female athletic participation and enrollment. Instead, this particular disparity is not substantially proportionate because the 6.7% difference reflects 47 girls who would have played sports if athletic participation was proportional to female enrollment. Forty-seven females could sustain at least one viable competitive team and likely several competitive teams. The 2005-06 and 2006-07 figures show an even greater disparity between female enrollment and participation when considering the additional number of girls who would have played sports if participation were substantially proportionate to enrollment. (For a ten-year summary of sports participation data at Castle Park High School, see the full-text of this case in the appendix to the 506 manual).

The Court must conclude, as a matter of law, that plaintiffs have demonstrated that defendants fail to provide female students with opportunities to participate in athletics in substantially proportionate numbers as males. But the District's failure to meet substantial proportionality at CPHS does not preclude it from complying with Title IX in either of the other two approved methods.

As the Court has found here, when an institution fails to achieve substantial proportionality, compliance may be found under the second prong of the test if the "institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex." The undisputed data shows that female athletic participation at CPHS is

not continuing to expand. Although a slight decrease in athletic participation in a given year will not be fatal to showing compliance with Title IX, when, as here, there is no steady increase in female participation, defendants are not entitled to show compliance with Title IX based on a history and continuing practice of program expansion.

Because the Court finds that the school has not met the second prong, plaintiffs may prevail by sustaining their burden of proof under the third prong demonstrating an unmet interest on the part of the underrepresented sex. The third prong sets a high standard: it demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically underrepresented gender, not slaked by existing programs, an institution necessarily fails this prong of the test.'

Plaintiffs first note that defendants have not sought to determine the athletic interests and abilities of their students through a formal written process. However, the expressed interests of girls and "other programs indicative of interests and abilities, such as club and intramural sports, sports programs at 'feeder' schools, community and regional sports programs and physical education classes" may provide a basis for assessing unmet interest and ability. Although defendants have not surveyed their students, plaintiffs have provided evidence to show unmet interest coupled with the ability of female students to participate in interscholastic athletics at CPHS.

Plaintiffs, as the moving party, have provided admissible evidence showing unmet interest and an ability to participate on the part of female students in field hockey, water polo, and tennis at CPHS. Defendants have failed to provide admissible evidence to counter plaintiffs' proof. As a result, plaintiffs have proven that defendants have not met the third prong of the test in that they have failed to fully and effectively accommodate female athletes and potential female athletes at CPHS.

As a matter of law, the Court finds defendants have allowed significant gender-based disparity, i.e., not substantially proportionate, with respect to female athletic opportunities; failed under prong two to show a history and continuing practice of expansion of opportunities for females; and failed under prong three to demonstrate that female interest and abilities have been fully and effectively accommodated. Because plaintiffs have demonstrated through admissible evidence that defendants are not in compliance with Title IX based on unequal participation opportunities in athletic program, plaintiffs are entitled to summary judgment on their second cause of action.

IT IS SO ORDERED.