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I. INTRODUCTION

The Evergreen School District, for too long, has failed to follow Washington law requiring gender equity in education, specifically in its athletic programs. Despite their clear desire to participate in sports, in this case, tennis, girls have been denied athletic opportunities by the District's failure to consider their interests, meet their interests, or provide facilities to accommodate those interests. Administrative Law Judge ("ALJ") Kingsley correctly found the District out of compliance with state law, and ordered specific remedies designed to improve athletic opportunities for female students. The ALJ decision is fully supported by the record and should be reinstated.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENT OF ERROR

The superior court erred in partially reversing the Findings of Fact, Conclusions of Law, and Order entered by the Office of Administrative Hearings for the Superintendent of Public Instruction in Cause No. 2004-EE-0001, and remanding the same for further consideration.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A school District is required to investigate a complaint that “girls remain under-represented in athletics at every high school.” In its report prepared at the conclusion of such investigation, the District acknowledged that to determine whether schools are “accommodating the interests and abilities of both sexes in compliance with . . . state law” required an inquiry into “whether . . . equal opportunity is provided for members of both sexes to participate and whether the selection of sports and levels of competition effectively accommodates the abilities of both sexes.”

Did ALJ Kingsley erroneously interpret or apply the law, fail to follow prescribed procedures, or otherwise act arbitrarily or capriciously, when he considered (1) whether the District had effectively accommodated its female high school athletes’ interests and abilities, as well as (2) whether the District had treated the female athletes equally, and (3) admitted evidence relevant to accommodation and equal treatment claims to decide whether the District had violated the state’s antidiscrimination laws?

C. STANDARD OF REVIEW

When reviewing administrative action, this Court is in the same position as the superior court. *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *King County Pub. Hosp. Dist. No. 2 v. Pub. Serv. & Pub. Safety Employees, Local 674*, 24 Wn.App. 64, 68, 600 P.2d 589 (1979) (an appellate court reviewing agency action is not bound by the findings or conclusions of the superior court that considered only the administrative record). On appeal, the review standards of the Washington Administrative Procedure Act (“APA”) are applied directly to the record before the agency. *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 673, 887 P.2d 411 (1994). The Court can grant relief if the agency erroneously interpreted or applied the law, or failed to follow a prescribed procedure to the substantial prejudice of a party. RCW 34.05.570(1)(d), (3)(c) and (3)(d). The Court can also grant relief if the agency’s order was arbitrary or capricious. RCW 34.05.570(3)(i).

But when a superior court reverses an ALJ’s decision by applying its own incorrect legal theory absent any error by the ALJ,

the superior court's decision should be reversed and the ALJ's decision reinstated. *See Skelly v. Criminal Justice Training Comm'n*, ___ Wn. App. ___, 143 P.3d 871, 2006 WL 2847860 at ¶ 1 (Wash. Ct. App. Oct. 3, 2006). The party asserting that the ALJ's decision is invalid (here, the District), has the burden of demonstrating its invalidity. RCW 34.05.570(1)(a); *Kauzlarich v. Washington State Dep't of Soc. & Health Servs.*, 132 Wn. App. 868, 872, 134 P.2d 1183 (2006).

III. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The Evergreen School District ("District") in Vancouver, Washington has three high schools: Heritage, Mountain View, and Evergreen. AR V: 910.¹ Mark Rossmiller is the father of a female student and tennis player at Mountain View. *Id.* During the 2003-04 school year, female students in the District made up almost 50 percent of the student population. AR V: 917, 927, 935.

¹ The certified administrative record is cited by volume and page number. For example, AR V: 910 refers to Administrative Record Volume V at page 910.

Although at least 48 percent of the students at each high school are female, girls' overall participation in sports is significantly lower. *Id.* At Evergreen high school, only 37 percent of students participating in athletics in 2003-04 were girls. AR V: 917. At Heritage and Mountain View, the numbers were only slightly higher, 43 and 44 percent respectively. AR V: 927, 935.

At each high school, girls and boys had ten programs each from which to choose. These included co-ed programs for cross country and track and field, and separate programs for tennis, basketball, soccer, and golf. AR V: 917, 926, 935. Boys could also participate in baseball, wrestling and football, while girls could participate in softball, gymnastics and volleyball. *Id.*

Some of the ten programs, however, were subject to a "cut" policy. AR V: 911. Students were "cut" from programs which could not accommodate all who wished to participate due to constraints on the number of players on a team (*e.g.*, basketball or baseball) or physical space limitations. *Id.* Five programs offered to female high school athletes were subject to a cut policy, compared to

only four of the programs offered to male high school athletes. AR V: 911.

Tennis – a popular offering for girls – was subject to a cut policy and the District offered only two levels of competition. AVR VIII: 1244; AVR V: 911. In contrast, the football program – the most popular offering for boys – made no such cuts, and offered three levels of competition including varsity, junior varsity, and freshman. AR V: 917, 919, 921, 925-26, 929, 931, 934-37, 943-44. During the three academic years reviewed by the ALJ, the football program accounted for approximately one-third of male student athlete participation at each high school. AR V: 917-22, 926-32, 935-37. Girls who wanted to play tennis, however, were subject to being cut from the teams, and the District kept no records of how many girls were cut from the tennis program or whether they were able to play another sport. AR V: 1366 at ll. 12-15.

The girls on the tennis teams had one coach for every 18-23 players, while boys on the tennis teams had one coach for every 8-15 players; boys on the football teams had one coach for every 2-13 players. AR V: 913, 917, 919, 921, 926, 929, 931, 935, 936, 937.

At each high school, students had access to four tennis courts, less than the average maintained by the entire competition pool of schools. AR V: 910, 916. An average tennis practice takes 2.5 hours; to address the shortage of coaches and tennis courts available to female students, the District held “split practices.” AR V: 911-12. Under this system, the students who qualified for competitive play got to practice for half the allotted time, while the developmental players were relegated to the other half. AR V: 911-12.

B. PROCEDURAL HISTORY

This proceeding was initiated on June 22, 2004, when Mr. Rossmiller complained of sex discrimination in high-school athletic programs in a letter to the Superintendent of the Evergreen School District. AR II: 411-12. Mr. Rossmiller alleged that “girls remain under-represented in athletics at every high school in the Evergreen School District particularly in the girls tennis programs . . .” *Id.* at 412. He asked for information regarding athletic budget expenditures “by sport for all three high schools for the last three years” and for the documents supporting the District’s “assurances,” filed with the Office of the Superintendent of Public Instruction, that

the District was in compliance with state law. *Id.* at 411. The District failed to respond.

On July 27, 2004, Mr. Rossmiller wrote to the Evergreen School Board requesting a hearing. AR II: 407. Jerry Piland, the District's Director of Personnel, responded to the July 27 letter advising Mr. Rossmiller that the District had not "perceived" his June letter as a complaint. AR II: 401. Mr. Rossmiller was told that if he wished to file a "formal complaint," he should do so by completing and returning a Discrimination Inquiry Form. *Id.*

By letter dated August 16, 2004, Mr. Rossmiller advised the School Board that his June letter was a legally sufficient complaint under WAC 392-190-065 and that it met the requirements of the Board's Administrative Policy No. 3210. AR II: 392. He reiterated his request for an open hearing before the Board. *Id.*

Neither Board Policy No. 3210 nor Board Administrative Procedure No. 3210P require that a party complaining of unlawful discrimination file the District's Discrimination Inquiry Form. AR II: 349-50, 351-53. Nor do the state statutes or state regulations impose such a requirement. Ch. 28A.640 RCW; ch. 392-190 WAC.

Nevertheless, Mr. Piland insisted that Mr. Rossmiller do so: “Quite frankly, whether or not you view [your June letter] as a proper complaint is not our concern. If you wish to file a proper complaint, please complete the Discrimination Inquiry Form previously sent to you and return it to my office.” AR II: 389.

Mr. Rossmiller again asked for a public hearing before the Board on August 24, 2004. AR II: 384. The President of the Board responded on September 7, 2004, stating that the Board would not schedule a hearing on the allegations of discrimination against female athletes until Mr. Rossmiller filed a “proper complaint” by completing a Discrimination Inquiry Form and returning it to Jerry Piland. AR II: 372.

Mr. Rossmiller turned to the state for relief, submitting a request for a hearing to the Office of the Superintendent of Public Instruction (“OSPI”). AR II: 327. At the prehearing conference held before ALJ Kingsley on September 24, 2004, the District unsuccessfully moved to dismiss Mr. Rossmiller’s allegations for failure to communicate a sufficiently specific complaint. AR II: 284. The ALJ ruled that the allegations in the June 22, 2004 letter

met the requirements of WAC 392-190-065, and that the information Mr. Rossmiller provided was sufficiently detailed for the District to start an investigation of the high school athletic program and determine if the requirements of RCW 28A.640 had been satisfied. AR II: 284-85. The ALJ referred the matter back to the District to complete the review process set forth in the District's policies and procedures and mandated by WAC 392-190-065, -070, and -075. AR II: 285.

In referring the matter back to the District, the ALJ directed the District to investigate whether there were enough tennis courts to meet the level of interest for girls. AR V: 907; AR VIII: 1300 (directing the District to investigate "whether equal opportunity has been afforded and whether or not those remedies [tennis courts, additional coaches, and competition levels] are necessary to do that."). Mr. Piland investigated whether girls in the Evergreen School District received an equal educational opportunity, and reported his findings for the Superintendent. AR V: 909-15. Mr. Piland's report stated that the correct inquiry for measuring the level of interest is to determine "whether or not equal opportunity is

provided for members of both sexes to participate and whether the selection of sports and levels of competition effectively accommodate the abilities of both sexes.” AR V: 910.

On October 22, 2004, Superintendent Melching issued a written response denying the allegations to Rosmiller’s Complaint based on Mr. Piland’s report. AR II: 254-55. A copy of the report was included with the Superintendent’s response. AR II: 255, AR V: 909-15. Mr. Rosmiller appealed the Superintendent’s decision to the Board. AR I: 204.

The Board held a hearing on Mr. Rosmiller’s appeal, and affirmed the Superintendent’s decision. AR I: 201, 204. AR IV: 800-02. Mr. Rosmiller appealed the Board’s decision and the matter proceeded to a two-day evidentiary hearing before ALJ Kingsley. AR I: 1-19, 147-50, 202-07, AR I: 1, AR I: 1-19.

In his Findings of Fact and Conclusions of Law, the ALJ found that girls were underrepresented in athletic programs in the District; for each of the three school years at issue (2001-02, 2002-03, and 2003-04), athletic participation by girls was less than the percentage of female enrollment in each of the three schools. AR I:

5-6. The ALJ also found that although districts are directed to administer and file survey forms with the OSPI to show compliance with the requirements of WAC 392-190, the District had last submitted the results of an interest survey in 1990, had completed a partial survey during the 1999-2000 school year, and had not maintained records of cuts for specific sports or determined whether participants cut from one sport were able to participate in another.

Id. at 8-9.

Based on these and other findings, the ALJ concluded that the District had failed to meet its legal obligation to provide equal opportunity for girls in high school athletic programs. To remedy that failure, the ALJ ordered that the District be placed on probation with the OSPI, on condition that it develop and implement an affirmative action program approved by the OSPI. The affirmative action program was required to include (a) revision of policies and procedures for responding to complaints of non-compliance with the requirements of Chapter 392-190 WAC; (b) conducting and filing the surveys required under WAC 392-190-040; and (c) development of an operations and capital spending improvement plan to increase

the number of tennis courts and coaches so that participants in girls' tennis are provided the same coaching ratio and practice time available to participants in the wrestling, gymnastics and golf programs. Compliance with the conditions of probation was to be monitored by OSPI, and the District was granted a three-year period to achieve compliance. AR I: 18.

The District petitioned for judicial review. The Clark County Superior Court entered a Memorandum of Opinion and Order affirming in part and reversing in part the ALJ's Findings of Fact, Conclusions of Law, and Order. CP 4-18. Mr. Rossmiller appealed to this Court. CP 19-36.²

IV. ARGUMENT

A. **Washington Law Prohibits Discrimination in Athletic Opportunities Based on Sex**

Washington has a strong and clear public policy against sex discrimination. *Roberts v. Dudley*, 140 Wn.2d 58, 66, 993 P.2d 901 (2000). This policy is reflected in the Equal Rights Amendment

² The Superior Court affirmed the ALJ's ruling that in its handling of Mr. Rossmiller's complaint, the District violated its procedural obligations under Chapter 392-0190 WAC. Neither party is challenging that aspect of the Superior Court's order.

(“ERA”) to the Washington Constitution that requires equal treatment of all citizens regardless of sex. Const. art. XXXI. The policy is also codified in a number of state statutes. *See, e.g.*, RCW 2.36.080 (prohibiting exclusion from jury pools based on gender); RCW 74.04.515 (prohibiting discrimination based on sex for purposes of public assistance); RCW 49.12.175 (prohibiting sex discrimination in the payment of wages).

In public schools, discrimination against students on the basis of sex is prohibited by RCW Chapter 28A.640. RCW 28A.640.010 expressly provides that inequality in the educational opportunities afforded women and girls at all levels of public schools in the state is a breach of the ERA. RCW 28A.640.020 requires that athletic activities be offered to all students without regard to sex. In 1976, the Attorney General issued an advisory opinion explaining that “the basic objective of any public school district’s interscholastic or intramural athletic program under the equal rights amendment must be to afford an equal opportunity to engage in athletic competitions to both boys and girls.” Op. Att’y Gen. 1976 No. 8 at 5 and 18.

WAC 392-190-030, promulgated pursuant to RCW

28A.640.020, addresses interscholastic athletic programs and lists factors relevant to determining whether a district's athletic program affords equal opportunities to boys and girls. They include:

1. Whether the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. The scheduling of games and practice times including the use of playfields, courts, gyms, and pools;
4. Transportation and per diem allowances, if any;
5. The opportunity to receive coaching and academic tutoring;
6. The assignment and compensation of coaches, tutors, and game officials;
7. The provision of medical and training facilities and services including the availability of insurance;
8. The provision of housing, laundry, and dining facilities and services, if any; and
9. Publicity and awards.

WAC 392-190-030. This regulation is comparable to 30 C.F.R. § 106.41 (c), implementing Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. *See* WAC 392-190-005 (“It is the intent of this chapter to encompass those similar substantive areas addressed by the Title IX regulations and in some aspects extend beyond the Title IX regulations. Accordingly, . . . school districts should be aware that compliance with the Title IX regulations above may not constitute compliance with this chapter.”)

Under federal law, discrimination claims relating to factor one are commonly referred to as “accommodation” claims, and generally relate to the allocation of athletic participation opportunities to its male and female students. *See, e.g., McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 291, 300-01 (2nd Cir. 2004).³ Discrimination claims relating to the other factors are commonly referred to as “equal treatment” claims, and generally involve claims of unequal treatment or benefits. *See, e.g., id.* at 291-99. A school can violate the prohibition against sex discrimination

³ The program supervisor for equity coordination at the OSPI, Darcy Lees, testified that state law is interpreted consistently with federal laws related to Title IX. AR VI: 1034 (ll. 17-21)

either by failing to accommodate effectively the interests and abilities of student athletes of both sexes, *see, e.g., Horner v. Kentucky High School Athletics Ass'n*, 34 F.3d 265, 273 (6th Cir. 1993), or by treating boys and girls' teams unequally, *see McCormick*, 370 F.3d at 299, or both, *see id.* at 299-302.

B. The ALJ Correctly Concluded that the District Violated Washington Law by Failing to Provide Equal Opportunity to Female Students in its Athletic Programs

Mr. Rossmiller alleged that female students were “under-represented in athletics at every high school” in the District. In particular, he noted that the tennis programs failed to provide sufficient participation opportunities to meet the level of interest shown by girls and that the facilities, equipment, and number of coaches for girls' tennis were not meeting their interest level and could not adequately support additional female players or teams. To remedy these inequities, he sought the addition of another competition level (the “C team”) for girls' tennis, along with two additional courts, equipment, and assistant coaches at each high school. AR II: 324.

Mr. Rossmiller’s Complaint that female students are “under-represented in athletics at every high school” stated an accommodation claim. To assess the District’s compliance with its obligation to effectively accommodate the interests and abilities of its male and female high school athletes, the ALJ correctly admitted the testimony of Darcy Lees, the program supervisor for equity coordination at the OSPI, regarding the three-part test developed under Title IX for accommodation claims. The ALJ determined her testimony to be credible. AR I: 13 (Conclusion of Law 27). The District did not offer any evidence to rebut Lees’ explanation of the three-part test or its application.

The test allows a school district to demonstrate compliance in meeting the interests and abilities of the under-represented sex if it satisfies any one of the three parts. *See Neal v. Bd. Of Trustees of Calif. State Univ.*, 198 F.3d 763, 767 (9th Cir. 1999); *see also* 44 Fed. Reg. 71,418 (1979) (Policy Interpretation promulgated by the U.S. Department of Education – then the Department of Health, Education, and Welfare – stating that compliance with any one of the three parts is sufficient).

The ALJ correctly ruled that the first part involved a comparison between the ratio of male and female athletes with the overall student population. AR I: 13 (Conclusion of Law 27); AR VII: 1021 at l. 25 and AR VII: 1022 at ll. 1-4; *see also Neal*, 198 F.3d at 767-68 (upholding substantial proportionality interpretation of first test). If the athletic participation opportunities for male and female students are substantially proportionate to the overall student enrollment, then the District has satisfied Washington law and its implementing regulations.

The second way to demonstrate compliance is by showing a history and continuing pattern of program expansion for the underrepresented sex. AR I: 14 (Conclusion of Law 28); AR VII: 1022 at ll. 5-9 (Lees' testimony explaining the second part); *see also Neal*, 198 F.3d at 767.

The third way for proving compliance is when the members of one sex are underrepresented in the athletic program but the institution can show that the interests and abilities have nevertheless been fully and effectively accommodated by the present program. AR I: 14 (Conclusion of Law 29); AR VII: 1022 at ll. 9-12 (Lees'

testimony explaining the third part); *Neal*, 198 F.3d at 767. The ALJ correctly ruled that to meet the third test the District must show “that there are sound effective methods for determining interest and that the current program is addressing all known interest.” AR I: 14 (Conclusion of Law 29); AR VII: 1022 at ll. 9-12; *see also Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (noting that “this benchmark sets a high standard” and “demands not merely some accommodation, but full and effective accommodation”). As the First Circuit explained, although some interest does not *per se* require the addition of a team, “[i]f 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.” *Cohen*, 991 F.2d at 898.

C. Substantial Evidence Supports the ALJ’s Ruling that the District Was Not Effectively Accommodating the Interest Levels of Female Students District-Wide in Violation of WAC 392-190-030

Relying on the overall enrollment and athletic participation data supplied by the District, the ALJ found that the “ratio of girls in overall interscholastic sports participation is substantially lower than

the ratio of girls in the overall enrollment.” AR I: 13 (Conclusion of Law 27). Specifically, the ALJ found that for the 2003-04 school year, female students made up 49 percent of the student population but represented only 37 percent to 44 percent of the total number of athletic participants. AR V: 917-18, 926-27, 929-30, 935 (disparity ranging from 5 percent to 12 percent). An examination of the enrollment data and participation data for the 2001-02 and 2002-03 school years only confirms the District’s historical trend of failing to provide its female students equal opportunity in athletics. AR 919-20, 921-22, 929-30, 931-32, 936-37 (disparity ranging from 6 percent to 10 percent). As the First Circuit noted in *Cohen*, “the raw numbers tell an unambiguous tale.” 991 F.2d at 903.

Disparity ranging from 5 percent to 12 percent does not constitute substantial proportionality in compliance with the three-part test as a matter of law. AR VII: 1022 at ll. 13-18⁴; *see, e.g.*,

⁴ Ms. Lees of OSPI testified that 10 percent constitutes a disparity in violation of Washington law:

Q. I see. So when they make a comparison between student populations and the numbers of participation in athletics, what – let’s say if the populations were 50/50 and the actual

Cohen v. Brown Univ., 809 F. Supp. 978, 991 (D.R.I. 1992) (11.6% percent disparity not substantially proportionate), *aff'd*, 991 F.2d 888 (1st Cir. 1993); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) (10.5 percent disparity not substantially proportionate); *see also* Valerie Bonnette and Daniel Lamar “*Title IX Athletics Investigator’s Manual*,” Office for Civil Rights, Department of Education, 1990 at 24 (while “[t]here is no set ratio that constitutes “substantially proportionate,” there must be a fairly close relationship”). Five to twelve percent is not “fairly close.”

The District cannot avoid liability by arguing that having ten sports *teams* for girls and ten sports *teams* for boys, provides girls with equal opportunity. Substantial proportionality under WAC 392-190-030(1) is measured by the number of participants, not the number of teams. AR VII: 1021 at l. 25 and AR VII:1022 at ll.1-4; *see also Cohen*, 991 F.2d at 897 (explaining first part of the three-part test is met by comparison of “athletic participation opportunities

participation in athletics was 60/40, would that represent a substantial disparity?

A Yes.

AR VII: 1022 at ll. 13-18.

in numbers” to the overall student enrollment”). Neither can the District explain away the disparity between boys’ and girls’ participation opportunities by the fact that it offers girls some sports with no cut policies. This argument fails because meeting part one of the three-part test is measured by actual participants as opposed to illusory opportunities. Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, January 16, 1996 (OCR will not count “unfilled slots, *i.e.*, those positions on a team that an institution claims the team can support but which are not filled by actual athletes” because “participation opportunities must be real, not illusory”).

Having correctly concluded that the District did not fall within part one of the three-part test, the ALJ then proceeded to analyze whether the District effectively accommodated girls’ interest by showing a history and continuing pattern of program expansion. AR VII: 1022 at ll. 5-9 (Lees’ testimony explaining the second part of the three-part test); *see also Neal*, 198 F.3d at 767. The District did not offer any evidence of establishing a pattern of program expansion to increase athletic participation opportunities for girls.

AR I: 14 (Conclusion of Law 28). Nor could it do so because the District has not expanded the girls' athletic program through the sponsorship of additional teams or competition levels.

The third part of the three-part test allows an institution to demonstrate compliance if it can show – despite the underrepresentation of female participation opportunities – that it has assessed student interest and that its current athletic program meets the interests of the underserved population. AR VII: 1022 at ll. 9-12 (Lees' testimony explaining the third part of the three-part test); *Neal*, 198 F.3d at 767. The evidence demonstrates that the District cannot satisfy this prong of the three-part test because it has not surveyed student interest and because the evidence showed a strong unmet interest in tennis.

The public records from the Office of Superintendent of Public Instruction show that the District last submitted the results of a student interest survey in 1990. AR III: 458. A partial survey of interest was conducted in the 1999-2000 school year. AR III: 659-673. WAC 392-190-040 requires school districts to survey the student interest in specific sports among male and female students at

least every three years. Mr. Gillingham, the athletic director for the District, testified that a survey was not done for the 2002-03 school years.⁵ Stated simply, the District has not even complied with its statutory obligations to gauge student interest in particular sports teams. *See* AR VII:1050 at ll. 18-25 and AR VII:1051 at ll. 1-4 (Lees' testimony that, if the District does not complete triennial interest survey as required by Washington law, the only other way to ensure compliance with WAC 390-192-030(1) is by demonstrating substantial proportionality, or part of the three-part test).

The testimony before the ALJ revealed that the District is well aware that there is a high interest in tennis among female students. AR VIII:1244 at ll. 18-19 (District-wide athletic director testified that “[t]ennis is pretty popular for the girls”); AR V: 910-11 (District's investigation acknowledging girls were cut from tennis).

⁵ Mr. Gillingham testified as follows:

Q. Are you aware that, according to statute, these [surveys of student interest] are to be done on a three-year rotation?

A. I am.

Q. Do you have any idea why this wasn't done in the 2002/2003 school year?

A. I don't know that – we should have, yeah.

AR VIII: 1239 at ll. 17-22.

Despite the District's failure to survey the students since 2000, the District also was well aware that the girls' interest in tennis is not met.

In sum, the evidence offered at the hearing supports the ALJ's findings that the District failed to provide equal opportunity to its female students district-wide.

D. The District Was Not Prejudiced by the Admission of Evidence Relating to the Effective Accommodation Claim

The record reveals that the District was well aware throughout the entire hearing that Mr. Rossmiller contended the District was in violation of WAC 392-190-030. During the second day of the hearing, the ALJ rejected the District's efforts to narrow the scope of the complaint. AR VIII: 1299-300. The Investigation Findings prepared by the District in response to Mr. Rossmiller's Complaint *before the hearing* shows that Mr. Piland, the Title IX officer for the District, understood and investigated whether female students' interest in athletics was being met. AR V: 910 (October 24, 2004 Investigation Findings ¶ 2 noting that "[w]hat must be addressed is whether or not equal opportunity is provided

for members of both sexes to participate and whether selection of sports and levels of competition effectively accommodates the abilities of both sexes”). Thus, the District was on notice that Mr. Rossmiller’s Complaint asserted an accommodation claim well before the evidentiary hearing. At the hearing, Mr. Piland testified that he analyzed whether the District was accommodating the interest level of its female students. AR VIII: 1354 at ll. 9-23; AR VIII: 1362 at ll. 19-21. In fact, Mr. Piland testified that: “I know that based upon percentage of enrollment and percentage of participation that girls are under-represented.” AR VIII: 1369 at ll. 21-22. In light of the evidence that the District investigated Mr. Rossmiller’s effective accommodation claim *prior* to the hearing, it cannot claim that it was somehow prejudiced by the ALJ allegedly “expanding” the scope of Mr. Rossmiller’s Complaint.

E. The ALJ’s Decision Was Neither Arbitrary Nor Capricious

The ALJ’s conclusions with respect to coaching are fully supported by the record. The ALJ relied on the District’s own data when he reached the conclusion that the coaching ratio for girls’

tennis far exceeds the coaching ratios for comparable sports involving individual competition and far exceeds the coaching ratio for football. AR V: 917, 919, 921, 926, 929, 931, 935, 936, 937. Moreover, the state employee tasked with evaluating gender equity in schools testified that if coaching ratios were not similar, it would constitute a violation. AR VI:1040 at ll. 13-16.⁶ Ms. Lees also testified that the remedy for such a disparity would be to hire additional coaches. AR VII: 1040 at 4-12.

F. The ALJ Correctly Concluded That More Tennis Courts Are Needed to Effectively Address the Girls' Interest in Tennis

Presently, each high school in the District maintains four tennis courts. AR V: 910. Steve Marshall, the athletic director for Mountain View High School, testified that one of the factors limiting the number of female participants for tennis is the fact that the high schools only have four courts. AR VII:1086 at ll. 1-7, 16-17; AR

⁶ Ms. Lees testified that coaching ratios must be similar:

Q. So if there was one coach to ten players for boys and one coach to 20 players for girls, that would be considered a disparity in coaching?

A. Yes, it could be.

AR VII:1040 at ll. 13-16.

VII:1087 at ll. 1-3. Dennis Gillingham, the athletic director for the District, testified that the addition of tennis courts, based on the high level of interest in girls' tennis, might further expand the opportunities for girls. AR VIII:1246 at ll. 2-4. Ms. Lees, from OSPI, confirmed in her testimony that four courts for both boys and girls would constitute evidence of a disparity with respect to an interest and abilities claim if there were more female participants than male. AR VII:1038 ll. 18-23⁷; AR VII:1039 at ll. 14-25 and AR VII:1040 at ll. 1-3. Finally, Reg Martinson, the Director of Facilities, testified that building additional courts at the high schools is feasible. AR VIII:1257 at ll. 3-6. Based on this evidence, coupled with the evidence about the resources allocated to the football program, the ALJ properly concluded that the District has not met

⁷ Ms. Lees testified as follows:

Q Ms. Lees, if you did provide four courts for both boys and girls let's say, if there's twice the number of girls turning out to use those courts as the boys, would that have to be considered a disparity?

A That would be an overall disparity in order to meet the interests and abilities piece.

AR VI:1038 at ll. 18-23.

the interests of its female students in tennis with an increase in courts. AR I: 15 (Conclusion of Law 39).

G. The ALJ Properly Concluded the District Violated the Law Requiring Equality in Athletics, Although It Could Continue to Field Separate Tennis Teams for Each Sex

WAC 392-190-025 permits school Districts to maintain separate sports teams for boys and girls in grades 7 through 12 if separate teams constitute the best method for providing both sexes equal opportunity to participate and if the sports teams at issue are substantially equal for both boys and girls. Stated differently, if more students will be able to participate in tennis if a school maintains separate teams for each sex, then Washington law permits the segregation by sex so long as the two programs are substantially equal. Op. Att'y Gen. 1976 No. 8 at 11 and 19; *see, e.g., Haffer v. Temple University*, 678 F. Supp. 517, 525 (E.D. Penn. 1987) (finding that fielding separate but equal athletic teams for men and women comports with the federal constitution because sponsoring separate teams increases the opportunity for women to participate in athletics and expanding the number and quality of athletic opportunities for women is an important governmental interest).

The ALJ noted as a preliminary matter that Mr. Rossmiller did not oppose Evergreen Public Schools sponsoring separate tennis teams for boys and girls. AR I: 12 (Conclusion of Law 18). To answer the question whether the District could sanction separate tennis teams under WAC 392-190-025, the ALJ had to compare the District's tennis programs for boys and girls in isolation. Op. Att'y Gen. 1976 No. 8 at 15-16.

After considering the factors outlined in the regulation, the ALJ properly concluded that separate teams for boys and girls in tennis (as opposed to a coed team) would expand the participation opportunities for girls. These conclusions of law, however, relate to the sanctioning of separate teams, not to the issue whether the District has provided equal opportunity in its athletic programs to its students as required by WAC 392-190-030. As discussed above, the ALJ's finding that the District failed to do so is fully supported by the record.

V. CONCLUSION

In bringing this Complaint, Mr. Rossmiller sought to ensure equal education opportunity for his daughter and other female

students in the Evergreen School District. The evidence submitted at the hearing revealed inequities in the District's interscholastic athletics program. Although girls' participation in high-school sports has dramatically increased since the passage of the ERA and the state anti-discrimination statutes in the 1970's, girls in Washington still do not receive equal opportunities.⁸ Based on the record before him, the ALJ's decision is consistent with the law and fully supported by the record and should be reinstated.

⁸ The Women's Sports Foundation reported in January 2006 that high school female athletes receive 1.2 million, or 41 percent fewer participation opportunities than their male counterparts. Lopiano, D., and Lakowski, T. *Increasing Youth Sports & Physical Participation: A Women's Sports Foundation Public Policy Guide*, East Meadow, NY: Women's Sports Foundation, 6 (2006).

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The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on the date indicated below, the foregoing **Brief of Appellant** was caused to be served via First-Class U.S. Mail on the individuals and/or offices at the addresses listed below:

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DATED: November 9th, 2006 at Seattle, Washington.


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