

No. 35127-7-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DIVISION II  
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STATE OF WASHINGTON  
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IN THE MATTER OF  
EVERGREEN SCHOOL DISTRICT

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BRIEF OF RESPONDENT

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Lawrence B. Ransom, WSBA #7733  
Christine E. Gardiner, WSBA #33100  
Karr Tuttle Campbell  
1201 Third Avenue, Suite 2900  
Seattle, Washington 98101-3028  
(206) 223-1313  
Attorneys for Respondent

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## I. INTRODUCTION

This appeal arises from a complaint of gender discrimination in athletics in the Evergreen School District (the “District”) brought by Mark Rossmiller (“Rossmiller”), a parent of a student in the District. Rossmiller alleges unlawful gender discrimination in the District’s high school girls’ tennis program. An administrative hearing was held to address Rossmiller’s allegations. Administrative Law Judge Robert P. Kingsley (“the ALJ”) issued Findings of Fact, Conclusions of Law, and Order (“ALJ’s Order”) on June 16, 2005,<sup>1</sup> in Equal Educational Opportunity Cause No. 2004-EE-0001. The ALJ’s Order stated (1) that the District’s failure to increase the number of tennis courts at its high schools did not address girls’ interest in tennis,<sup>2</sup> and (2) that the District had not explored the addition of a third level of competition (i.e., a “C” team) to the District’s girls’ tennis program.<sup>3</sup> Additionally, the ALJ made findings regarding the overall participation of boys and girls in athletics in the District<sup>4</sup> and drew conclusions therefrom.<sup>5</sup>

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<sup>1</sup> AR \_\_\_: \_\_\_. The certified administrative record is cited by volume number and page as “AR \_\_\_: \_\_\_.” Citations to that record cannot be made to Clerk’s Papers (CP) as required by RAP 10.4(f), because it appears that the clerk did not assign CP page numbers to the administrative record and instead, attached the record as an exhibit.

<sup>2</sup> AR I:1 (ALJ’s Order at 15) (Conclusion of Law #39)

<sup>3</sup> AR I:1 (ALJ’s Order at 6, 15) (Finding of Fact #27, Conclusion of Law #38)

<sup>4</sup> AR I:1 (ALJ’s Order at 5) (Finding of Fact #22)

The District appealed the ALJ's Order to the Clark County Superior Court, which issued a Memorandum of Opinion and Order ("Final Order") on June 29, 2006, finding substantially for the District.<sup>6</sup> This appeal by Rossmiller followed. Directly at issue in this appeal is whether this case is about "accommodation" of all female athletes in the District or about "equal treatment" within the girls' tennis program. The District submits that this case is about equal treatment in the girls' tennis program.

## II. STATEMENT OF THE CASE

### A. Statement of Facts

#### 1. The District's Girls' and Boys' Tennis Programs

The District has three high schools: Heritage, Mountain View, and Evergreen. All three participate in interscholastic competition through the Greater St. Helens League.<sup>7</sup> The three schools each field boys' and girls' tennis teams. Boys' tennis is a fall sport, while the

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<sup>5</sup> AR I:1 (ALJ's Order at 13, 16) (Conclusions of Law #27, #40)

<sup>6</sup> CP 4-19. Reversing several of the ALJ's conclusions, the superior court held that the ALJ erred by expanding the issues at the hearing beyond those delineated in the prehearing order, that the number of the District's tennis courts did not have a disparate impact on the girls' tennis team, and that creation of another level of competition for the girls' tennis team would not increase the opportunity for competitive play.

<sup>7</sup> AR VII:1124 at line 4-6

girls' tennis season is in the spring.<sup>8</sup> Because the boys' tennis season is in the fall and the girls' tennis season is in the spring, the boys' and girls' teams at each of the three high schools use the exact same tennis courts. There are four tennis courts at each of the District's three high schools. Some of the schools in the Greater St. Helens league have four courts and some have six courts.

Coaching staffs for the boys' and girls' tennis teams in the District are identical. Because the boys' season is in the fall and the girls' season is in the spring, the same coaches usually coach both the boys' and girls' teams. Thus, both in terms of number and qualifications, coaching for tennis in the District is identical for boys and girls.<sup>9</sup>

Each high school fields a varsity and junior varsity tennis team for boys and girls. Seven players compete in a varsity or a junior varsity match.<sup>10</sup> Other players participate as an exhibition team or sub junior varsity team,<sup>11</sup> although they have the opportunity to move into the varsity or JV lineups. Typically, the girls' tennis teams carry a

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<sup>8</sup> AR VIII:1207 at line 20-24; 1279 at line 21-23

<sup>9</sup> AR I:1 (ALJ's Order at 12) (Conclusion of Law #19)

<sup>10</sup> AR VII:1112 at line 10-15

<sup>11</sup> AR VII:1112 at line 16-20

roster of 32 to 36 players,<sup>12</sup> which is many more than the 14 players who can participate in varsity and JV matches. Some of the high schools employ a “cut” policy for the girls’ tennis program in order to maintain the typical 32 - 36 player roster.<sup>13</sup>

In order to give players of diverse abilities opportunity for a quality practice experience, the coaches sometimes run “split” practices.<sup>14</sup> At split practices, the varsity and junior varsity teams (14 to 16 players) practice for two hours and then afterwards, the remaining 18 to 20 players have their practice for the next two hours.<sup>15</sup> The boys’ tennis team at Mountain View High School is the largest of the boys teams, and the coaches run split practices for the boys at Mountain View. When there are not split practices, the practice time is up to two hours and thirty minutes. The coaches believe that the split practices provide a more productive experience for the athletes because there are a smaller number of athletes in each session.<sup>16</sup>

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<sup>12</sup> AR VII:1124 at line 12-13

<sup>13</sup> AR VII:1124 at line 14-17

<sup>14</sup> AR VII:1128 at line 23 to 1129 at line 11

<sup>15</sup> *Id.*

<sup>16</sup> AR VII:1107 at line 4-12

Since 2001, Heritage High School has sponsored a Heritage Tourney for the boys' tennis team.<sup>17</sup> The two other high schools, Evergreen and Mountain View, have participated in that tournament as have five other schools.<sup>18</sup> Starting in 2005, Heritage High School started a similar tournament for the girls' tennis teams.<sup>19</sup> A tournament for the girls program was not adopted earlier out of concern that matches in the early spring would be rained out and schools would be stuck with voided, non-league matches in their schedules that could not be scheduled.<sup>20</sup> In his conclusions, the ALJ addressed the "tournament" issue as follows:

In the past, the District has provided an early season tournament for the boys that was not available for the girls. The District has committed to including a similar competition during the girls' season despite concerns about cancellation due to poor weather.<sup>21</sup>

Both the girls' and boys' tennis teams play teams in the 4A and 3A divisions. 4A schools are larger than 3A schools.<sup>22</sup> Whether a team is a 4A or a 3A school does not determine the level of ability of players on

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<sup>17</sup> AR VII:1129 at line 12-16

<sup>18</sup> AR VII:1130 at line 14-18; 1136 at line 13-17

<sup>19</sup> AR VII:1129 at line 16

<sup>20</sup> AR VII:1135 at line 14 to 1136 at line12; 1137 at line 6-17

<sup>21</sup> AR I:1 (ALJ's Order at 12) (Conclusion of Law #21)

<sup>22</sup> AR VIII:1282 at line 18-25; 1284 at line 1-4

the tennis teams.<sup>23</sup> There are strong and weak teams from both 4A and 3A schools.<sup>24</sup> Starting in the spring of 2005, the girls' tennis schedule was changed so the girls would compete against more 4A schools, similar to a change in the boys' schedule made in the fall of 2004 (which is in the same school year as the spring of 2005).<sup>25</sup>

## 2. Procedural History

Rossmiller claimed to have initiated a complaint about the girls' tennis programs at the District's high schools through a letter to the Superintendent of the District dated June 22, 2004.<sup>26</sup> Most of the letter was about public records requests, and did not contain the word "complaint." A sentence on the second page referred to Rossmiller's "position" on the subject of under-representation of girls in athletics. The District did not interpret Rossmiller's statement of his "position" about the tennis program as a proper complaint under WAC 392-190-065. The District therefore did not initially conduct an investigation under WAC 392-190-065.<sup>27</sup>

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<sup>23</sup> AR VIII:1207 at line 6-9

<sup>24</sup> AR VIII:1206 at line 24 to 1207 line 5; 1280 at line 14-24

<sup>25</sup> AR VIII:1266 at line 1-16

<sup>26</sup> AR II:411-412

<sup>27</sup> Complaints of gender-based inequities in school programs are the subject of regulations adopted by the Office of the Superintendent of Public Instruction and codified at Chapter 392-190 WAC.

Rossmiller sent a letter to the District's Board of Directors dated July 27, 2004 requesting a hearing before the Board.<sup>28</sup> In response, the District informed Rossmiller by letter dated August 11, 2004, that it did not believe his June 22, 2004 letter qualified as a complaint. The District advised Rossmiller that if he wanted to pursue a complaint he should complete the District's Discrimination Inquiry Form.<sup>29</sup> Rossmiller refused to complete the inquiry form and continued to request a hearing before the Board.<sup>30</sup>

The Board replied to Rossmiller by letter dated September 7, 2004, stating its position that Rossmiller had not yet submitted a proper complaint.<sup>31</sup> The Board urged Rossmiller to complete the Discrimination Inquiry Form, noting that if he did so, the District would undertake an appropriate investigation. On September 8, 2004, Rossmiller filed an appeal to the Office of Administrative Hearings, seeking to compel the District to treat his June 22, 2004 letter as a complaint.<sup>32</sup>

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<sup>28</sup> AR II:406

<sup>29</sup> AR II:395-396; 378

<sup>30</sup> AR II:384

<sup>31</sup> AR II:372

<sup>32</sup> AR II:362, 364

The Office of Administrative Hearings (“OAH”) is an independent state agency. Pursuant to WAC 392-101-010(3), the Office of the Superintendent of Public Instruction (“OSPI”) has assigned hearings arising under WAC 392-190-075 to the OAH. Typically, the OAH is not involved in a case arising under Chapter 392-190 WAC until after a complaint has been received and investigated by a school district, has been appealed to the school board, and has been decided by the board.<sup>33</sup> When an appeal under Chapter 392-190 WAC is filed with OSPI, it is forwarded to the OAH. In the present case, the OAH was involved prior to any investigation by the District because the District did not believe that Rossmiller’s June 22, 2004 letter was a proper complaint under WAC 392-190-065.

A prehearing conference before the OAH was held on September 24, 2004. At that hearing, in response to the District’s position that Rossmiller’s June 22, 2004 letter was not specific enough to meet the requirements of WAC 392-180-065(1), the ALJ rewrote Rossmiller’s “position” statement from his June 22, 2004 letter into a specific complaint. The following chart indicates what the ALJ did with Rossmiller’s June 22, 2004 letter:

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<sup>33</sup> WAC 392-190-065 through -075.

Rossmiller's June 22, 2004 Letter	ALJ Kingsley's September 24, 2004 Prehearing Order <sup>34</sup>
<p>It is our position that the girls remain under-represented in athletics at every high school in the Evergreen School District particularly in the girls' tennis programs due to lack of adequate facilities, equipment, and coaching to meet the level of interest in the sport. At a minimum, we are asking the District comply and should provide the following:</p>	<p>The Appellant complains that girls in the District do not receive an equal education opportunity with respect to the tennis program. The deficiencies are as follows:</p>
<p>(a) Six tennis courts at each and every ESD high school for practice and competitive events including court maintenance equipment.</p>	<p>(a) There are not enough tennis courts to meet the level of interest. The lack of facilities has a disparate impact on girls because the level of interest is higher for girls than for boys. A minimum of six courts at each high school with court maintenance equipment is needed to meet the demand.</p>
<p>(b) A qualified Varsity tennis coach and assistant tennis coach; and Junior Varsity tennis coach and assistant tennis coach to meet the girls' expressed interests and abilities.</p>	<p>(b) Coaching levels are inadequate. The coach/student ratio is higher for girls in the tennis program than for boys in the program, or for students in other sports. A qualified coach and assistant coach is needed for each of the varsity and junior varsity teams.</p>

<sup>34</sup> AR II: 285

(c) Complete uniforms and warm-ups for both Girls' Varsity and JV Tennis teams as provided in other sports.	(c) Girls in the tennis program are expected to provide elements of their uniform (i.e., skirts) when students in other sports programs received uniforms from the District. The girls on both the varsity and junior varsity teams should receive complete uniforms and warm-ups as provided in other sports.
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Based on the rewritten complaint, the ALJ's September 24, 2004 Prehearing Order set forth the issues the District was to investigate:

1. Whether the number of tennis courts existing in the School District is adequate to meet the level of interest in girls' tennis.
2. Whether the coach to student ratio in the girls' tennis programs in the School District is adequate, despite being higher than the ratio in the boys' tennis program.
3. Whether girls who participate in the girls' tennis program in the School District should be responsible for providing portions of their own uniforms.

The ALJ thus converted Rossmiller's general "position" statement into a complaint. The ALJ directed the District to treat the Prehearing Order as a complaint to trigger the processes of WAC 392-190-065.<sup>35</sup>

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<sup>35</sup> Surprisingly, after he went to considerable effort to rewrite Rossmiller's "position" statement into what he considered to be a valid complaint, the ALJ in his order aggressively criticized the District for not having accepted Rossmiller's June 22, 2004 letter as a valid complaint under WAC 392-190-065.

The District investigated the ALJ's three issues, pursuant to WAC 392-190-060 through -070. Jerry Piland, the District's Equal Educational Opportunity Officer, conducted the investigation and issued a report to the District's Superintendent on October 18, 2004.<sup>36</sup> After investigating the ALJ's three issues, Mr. Piland found no inequality between the boys' and girls' tennis programs. The District's Superintendent then issued a letter to Rossmiller denying the allegations in the rewritten complaint.

Rossmiller appealed to the Board of Directors of the District. Following a hearing, the board issued a letter dated November 30, 2004 affirming the Superintendent's denials of the allegations contained in Rossmiller's complaint.<sup>37</sup> Rossmiller submitted a second "Appeal Statement" to the OAH, and the case proceeded to a hearing before the ALJ.<sup>38</sup>

A hearing was held before the ALJ on February 17, 2005 and March 29, 2005. The ALJ issued his order on June 16, 2005. The District appealed the ALJ's Order to the Superior Court for Clark

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<sup>36</sup> AR V:909-915

<sup>37</sup> AR IV:800-802

<sup>38</sup> AR I:202-207, even though Rossmiller filed a second appeal statement, the case proceeded under the same case number as had originally been assigned in September of 2004.

County on July 14, 2005. The superior court issued its Final Order on June 29, 2006.

### III. ARGUMENT

#### A. Standard of Review

The order at issue in this case was issued by an ALJ from the OAH, operating on behalf of OSPI. Because OSPI is an administrative agency of the State of Washington, this Court's review of the ALJ's decision is governed by the Administrative Procedures Act ("APA").<sup>39</sup> Under the APA, a reviewing court may grant relief from an order from an adjudicative administrative proceeding if (1) the order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law, (2) the agency has failed to follow a prescribed procedure, (3) the agency has erroneously interpreted or applied the law, (4) the order is not supported by substantial evidence, or (5) the order is arbitrary or capricious.<sup>40</sup>

An agency's interpretation of a statute or regulation is reviewed under the "error of law" standard.<sup>41</sup> The "error of law" standard

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<sup>39</sup> *Frazier v. Superintendent of Pub. Instruction*, 106 Wn.2d 754, 756, 725 P.2d 619 (1986).

<sup>40</sup> RCW 34.05.570(3).

<sup>41</sup> *Cobra Roofing v. Labor & Indus.*, 122 Wn. App. 402, 409 (2004); *St. Francis Extended Health Care v. Dep't of Soc. & Health Servs.*, 115 Wn.2d 690, 695 (1990).

permits an appellate court to substitute its own interpretation of a statute or regulation for that of the agency.<sup>42</sup> A court need only give deference to an agency's interpretation of a statute or regulation if the statute or regulation falls within the realm of the agency's expertise.<sup>43</sup> The OAH is an independent agency and it is not OSPI. ALJ Kingsley and the OAH are not OSPI, and the ALJ's interpretation of the regulations of OSPI is not the interpretation of that agency and therefore is not entitled to any deference. Since ALJ Kingsley has no particular expertise in the realm of OSPI, this Court is free to substitute its own interpretations of Chapter 28A.640 RCW and the regulations set forth in Chapter 392-190 WAC in place of those of the ALJ.

B. Rossmiller Did Not Meet His Burden of Proving Discrimination on the Basis of Gender

Under the APA, the burden of demonstrating the invalidity of agency action is on the party asserting the invalidity. RCW 34.05.570(1)(a). Following the investigation of Rossmiller's complaint by Mr. Piland, the District's Board of Directors affirmed the Superintendent's denial of the allegations of the rewritten complaint. It is the Board's decision that Rossmiller appealed to the ALJ. Rossmiller,

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<sup>42</sup> *Cobra Roofing*, 122 Wn. App. at 409; *St. Francis*, 115 Wn.2d at 695.

<sup>43</sup> *See Cobra Roofing*, 122 Wn. App. at 409.

therefore, bore the burden of demonstrating that the Board's decision was wrong.

In order to meet his burden, Rossmiller was required to prove that the District was discriminating on the basis of gender in its high school tennis program. The ALJ erroneously found that the evidence presented by Rossmiller was sufficient to carry his burden. The superior court's Final Order reversing several of the ALJ's findings indicated that the evidence presented to the ALJ failed to establish that the District was engaged in gender discrimination in its high school tennis programs.<sup>44</sup> In essence, the superior court found that Rossmiller did not carry his burden of showing that the Board's action was invalid.<sup>45</sup> This Court sits in the same position as a superior court in reviewing an agency's action. This Court must therefore determine whether the evidence presented by Rossmiller to the ALJ was sufficient to establish that the action of the Board was wrong. As explained in the arguments below, Rossmiller has failed to meet this burden.

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<sup>44</sup> CP 13 and 15 (Final Order at 10 and 12)

<sup>45</sup> The superior court held that there was "insufficient evidence" brought forth at the hearing to support the ALJ's findings regarding the number of tennis courts, quality of coaching, and level of competition. CP 12, 13, 15 (Final Order at 9, 10, 12).

C. Rossmiller Presented Evidence and Arguments Outside the Scope of the ALJ's Prehearing Order

1. The ALJ Limited the Scope of the Hearing

Rossmiller's brief in this appeal focuses on issues which, as correctly held by the superior court, were outside the scope of the hearing before the ALJ. The ALJ's September 24, 2004 Prehearing Order directed the District to investigate a complaint as rewritten by the ALJ. The ALJ expressly limited the issues which the District was to investigate to the three included in the chart on pages 10-12, above.<sup>46</sup>

WAC 392-190-065 requires a school district to investigate complaints of gender discrimination, but also provides that every complaint must "set forth specific acts, conditions, or circumstances" that are indicative of gender discrimination. WAC 392-190-065(1). As the superior court discussed in its Final Order, the regulation's requirement of specificity in complaints is intended to allow a school district's investigation of a complaint to be focused and meaningful.<sup>47</sup> WAC 392-190-065 thus requires a school district to investigate only the specific issues alleged in a complaint.

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<sup>46</sup> AR II: 285.

<sup>47</sup> CP 10 (Final Order at 7)

After the ALJ directed the District to investigate the rewritten complaint, the District did investigate the three issues enumerated in the ALJ's Prehearing Order. The District only investigated those three issues, as there was no indication in the Prehearing Order that it should investigate any other issues. It should be noted that in a second Prehearing Order, dated January 28, 2005, the ALJ stated "[t]he issues for investigation were clarified in the previous Prehearing order."<sup>48</sup>

The ALJ clearly limited what was to be investigated by the District, and thus clearly limited the scope of the hearing. The ALJ himself indicated that it was his intent to narrow the issues at the hearing:

These issues were framed by the Prehearing order and your [Rossmiller's] complaint and I will be confining this hearing to what has been framed by those materials. So I would find that I'm not going to view receiving evidence as to claims of unequal opportunity that have not at least been presented in the complaint process through the District and then identified in the Prehearing process.<sup>49</sup>

The superior court's holding that the ALJ's expansion of the scope of the hearing was an "erroneous interpretation and application of the law" should be affirmed.<sup>50</sup>

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<sup>48</sup> AR I: 147

<sup>49</sup> AR VI:968 at lines 5-14.

<sup>50</sup> CP 10 (Final Order at 7)

2. The Limited Issues Before the ALJ Address an “Equal Treatment” Claim Related to the Girls’ Tennis Program, Not an “Accommodation” Claim

Rossmiller confuses “equal treatment” claims with “accommodation” claims and thereby attempts to expand the scope of the issues before this Court. As stated in Rossmiller’s own brief, “accommodation” claims relate to the general allocation of athletic participation opportunities to male and female students within the school’s entire athletic program, not to under-representation in a single sport.<sup>51</sup> Rossmiller’s general allegation that female students are “under-represented in athletics at every high school” in the District might be a preface to an “accommodation” claim, but the specific issues identified by the ALJ turn it into a “treatment” claim.

“Equal treatment” claims relate to the unequal treatment of boys’ and girls’ in a specific context, such as treating boys’ and girls’ teams in the same sport unequally.<sup>52</sup> The only three issues before the ALJ at the hearing, as narrowed by his Prehearing Order, related to alleged deficiencies in the girls’ tennis program. Such allegations are “equal treatment” claims. Nothing in the three specific issues before the ALJ

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<sup>51</sup> *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 291, (2<sup>nd</sup> Cir. 2004).

<sup>52</sup> *Id.* at 299.

addressed a broad “accommodation” claim. Rossmiller’s attempt to again argue and provide evidence on some sort of “accommodation” claim is, therefore, improper. There cannot be an “underrepresentation” issue in a single sport.

Rossmiller broadly cites to WAC 392-190-030, which lists several factors school districts should evaluate in order to ensure equal opportunities for both genders in athletic programs.<sup>53</sup> Because this is an “equal treatment” case and not an “accommodation” case, the majority of the factors in WAC 392-190-030 are not applicable. Only three of the factors set forth in WAC 392-190-030 remained relevant after the ALJ narrowed the issues for hearing: the provision of equipment and supplies (relevant to the issue of requiring girls to provide elements of their tennis uniforms), the use of courts (relevant to the issue of the number of tennis courts available), and the opportunity to receive coaching (relevant to the ratio of coaches to players).<sup>54</sup> The District

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<sup>53</sup> (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.

<sup>54</sup> WAC 392-190-030(2), (3), and (5)

directed its limited financial and human resources toward investigating only those three factors, because those were the only factors germane to the issues identified by the ALJ.

At the hearing, Rossmiller presented evidence (over the District's objections) related to other factors in support of what he now characterizes as an "accommodation" claim. In spite of the Prehearing Order limiting the scope of the hearing, the ALJ improperly considered evidence presented by Rossmiller pertaining to several of the factors the District had not investigated, because they were outside the scope of the three issues clarified by the ALJ's Prehearing Order. Most critical for the District, the ALJ considered evidence and ruled that the District's overall selection of sports and levels of competition failed to effectively accommodate the interests and abilities of girls in all athletic programs, which states a broad-based "accommodation" claim not at issue before the ALJ. By permitting Rossmiller to present evidence on this factor, as well as other factors listed in WAC 392-190-030, the ALJ improperly expanded the scope of the hearing beyond a simple "equal treatment" case regarding girls' tennis and beyond the three issues the District was directed to investigate by his Prehearing Order.

Rossmiller continues his attempt to enlarge the issues beyond those properly before the ALJ (and this Court) by listing the factors in WAC 392-190-030 in his opening brief in support of an “accommodation” claim. However, Rossmiller’s broad recitation of these factors, without addressing how they relate to the only three issues that fell within the scope of the hearing before the ALJ, does nothing to change this from an “equal treatment” case to an “accommodation” case and does not support his attempt to enlarge the scope of the issues before this Court.

3. The District Restricted Its Investigation and Preparation for the Hearing Based on the ALJ’s Limitation on the Issues in the Prehearing Order

In preparation for the hearing, the District investigated the specific issues delineated in the ALJ’s Prehearing Order; namely the number of tennis courts, the adequacy of coaching for girls’ tennis, and the provision of uniforms for girls’ tennis players. The narrow scope of the District’s investigative effort was brought to light at the hearing when the ALJ asked questions outside of those three issues:

Q. . . . [I]n your investigation did you identify the percentage of girls in the overall population and compare it to the percentage of girls participating in sports?

A. I didn’t in this investigation, because as the order came out it said – if I remember, in the order it said these are the areas of investigation, and that’s what I investigated,

A, B and C, 1, 2 and 3, however they were numbered. So no, I didn't investigate proportionality. I investigated numbers of tennis courts, I investigated the uniform situation, and I investigated the coaching situation.<sup>55</sup>

At several points in the hearing, the ALJ stated his intent to only consider issues to which the District was given an opportunity to investigate and respond. For instance, when Rossmiller argued that all factors from WAC 392-190-030 must be considered in evaluating the equal opportunity of boys and girls in high school athletics, the ALJ responded that the issues set out in the Prehearing Order "identify what the parties are prepared for" and that evidence at the hearing would therefore be required to relate to those issues.<sup>56</sup> In response to an objection by Rossmiller about the limitation of the issues, the ALJ stated:

I do state that by Prehearing order I have confined this to a certain set of issues so that both parties can be prepared to present evidence. And if you go outside of that, I'm going to deny it.<sup>57</sup>

The ALJ later reiterated the importance of limiting the issues to those for which the parties were prepared, stating:

I have to have both parties having the opportunity to present their case and that means having matters presented

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<sup>55</sup> AR VII:1158 at line 22 to 1159 at line 7 (testimony of Jerry Piland)

<sup>56</sup> AR VI:968 at line 2-8

<sup>57</sup> AR VI:969 at line 9-13

sufficiently in advance. Now, what I view the administrative process here to be is that the District is given an opportunity to respond initially and it then comes before me and evidence presented. But that's how it is properly framed. These kind of hearings would be entirely unmanageable if one complaint was then a springboard for me to look at the entire district.<sup>58</sup>

Despite these statements about the importance of limiting the evidence presented at the hearing to the issues identified in the Prehearing Order, the ALJ did not so limit the evidence and considered many issues beyond those stated in the Prehearing Orders in making his final decision. To cite but one example, in Conclusion of Law #33, the ALJ appears to have either considered evidence of or made a ruling regarding (1) the District's failure to conduct interest surveys in compliance with WAC 392-190-040, and (2) whether participants in the District's football program are cut from the sport. The District did not make investigations into any of these issues, as they were unrelated to the very specific tennis-related issues the District was directed by the ALJ to investigate.

As the ALJ correctly stated, in order to properly bring such ancillary issues within the scope of the hearing, it was Rossmiller's burden to "tie" them in to the three deficiencies alleged in the Prehearing Order, namely to relate them to his "equal treatment" claim.

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<sup>58</sup> AR VI:990 at line 8-16

Rossmiller failed to do this. The District had no opportunity to investigate or respond to a number of issues considered by the ALJ. The District had no notice that such issues would be addressed at the hearing, because Rossmiller failed to show how the issues were related to the three discrete, tennis-related issues delineated by the ALJ in his Prehearing Order.

Clearly, the District was only required to investigate, only did investigate, and only came to the hearing prepared to present evidence on, the tennis-related issues specifically delineated in the ALJ's Prehearing Order. Rossmiller's continued attempt to present evidence and argument on his allegation that female students "are under-represented in athletics at every high school" improperly expands the issues, obfuscates the fact that only the girls' tennis program was at issue before the ALJ (and before this Court), and only serves to create confusion. Rossmiller's arguments regarding "equal opportunity" and "effective accommodation" for all female athletes in the District found in sections IV (B) and (C) of his brief are merely recitations of Title IX law, the statutes and regulations regarding the prohibition of discrimination in athletics, and the various tests used to determine compliance. Such boilerplate language fails to convert this from an

“equal treatment” to an “accommodation” case, does not support his assertion that the issues should be expanded beyond the ALJ’s Prehearing Order and, further, fails to support an alleged violation arising from any of the three issues delineated by the Prehearing Order regarding gender equity standards in the girls’ tennis program.

As the superior court correctly held, the District was “substantially prejudiced” by the ALJ’s failure to conform to his own Prehearing Order, when he admitted and considered evidence outside of the issues listed therein. The superior court found that the District’s failure to investigate or present evidence on those expanded issues was “understandable, considering the specific issues raised in the complaint and prehearing orders” and that:

[t]he hearing officer erred by including additional issues in the hearing, and in ruling upon, and imposing sanctions related to, those issues.<sup>59</sup>

As correctly recognized by the superior court, proper issues for hearing only concerned the girls’ tennis program under an “equal treatment” claim. The superior court’s holding on this point should be affirmed.

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<sup>59</sup> *Id.*

D. Boys' and Girls' Within the Tennis Program Are Not Treated Unequally

1. The Same Tennis Courts Are Used by the Boys' and Girls' Tennis Teams

In Conclusions of Law 36 and 39, the ALJ erroneously concluded that the District had not accommodated girls' interest in tennis because of its lack of tennis courts and the fact that girls' coaches sometimes conducted split practices.<sup>60</sup> The superior court concluded in its Final Order that there was "insufficient evidence [in the record] to support these findings."<sup>61</sup> As noted above, split practices are not utilized due to a lack of available tennis courts, but to better accommodate the varying skill levels of the varsity, junior varsity, and developmental players. Nothing in the record supports the ALJ's conclusion that a lack of tennis courts forces the District's girls' tennis programs to utilize split practices. As stated in Mr. Piland's investigation memorandum, "increasing the number of courts from four to six would not eliminate the need to conduct split practices in order to maximize the instruction of singles and doubles practices."<sup>62</sup> Rossmiller provided no rebuttal of this testimony.

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<sup>60</sup> AR I:15

<sup>61</sup> CP 12 (Final Order at 9)

<sup>62</sup> AR V:909-915 (Piland's Investigation of Rossmiller's Complaint Memorandum, page 4, ¶4)

The District did, however, present evidence that the exact same four tennis courts are used for both the boys' and girls' tennis teams. The same four courts are also used for boys' and girls' competitive matches and have never been found to be deficient. Based on his investigation, Mr. Piland concluded that:

. . . while more courts would be nice . . . they're not needed in order to meet the participation levels available to boys and girls in tennis in Southwest Washington, and in any event, regardless, they're the same for boys and girls.<sup>63</sup>

Rossmiller seems to argue that he would prefer it if there were six tennis courts at each of the high schools instead of four. Rossmiller's preference for six tennis courts over four courts, however, is not evidence that the District discriminates against girls in its tennis program. Rossmiller, in fact, presented no evidence to rebut the District's clear evidence that the tennis programs, both boys' and girls', function well with four tennis courts. The superior court correctly held, "[t]here is no requirement that a school district construct sufficient facilities so that all sport participants, at all levels, can practice and play their games at the same time."<sup>64</sup> However, this seems to be exactly what Rossmiller believes must occur, despite no citation to any authority

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<sup>63</sup> AR VIII:1355 at line 22 to 1356 at line 1

<sup>64</sup> CP 12 (Final Order at 9)

which requires an institution to do this. Citing to evidence that building additional courts is “feasible” falls far short of proving that new courts are necessary to alleviate some sort of alleged gender discrimination in the girls’ tennis program.

In his brief, Rossmiller also notes that one of the District’s tennis coaches testified that a factor limiting the number of participants in girls’ tennis is the fact that there are only four courts available on which to play. A factor that likely limits the number of participants far more than the number of available courts, however, is the lack of competition from other schools. As the superior court noted in its Final Order, “the un rebutted evidence” shows that other schools in the area do not have “C” teams in girls’ tennis; therefore the creation of “C” teams in the District’s schools “would not increase the opportunity for competitive play.”<sup>65</sup> Building more tennis courts will do nothing to remedy this lack of competition.

Rossmiller also weakly attempts to bolster his argument that the District should be required to build more tennis courts by citing testimony from the District’s Athletic Director that additional tennis courts “might” expand the opportunities for girls to play tennis. Yet

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<sup>65</sup> CP 15 (Final Order at 12)

virtually any conceivable change in the girls' tennis program might expand opportunities for girls to play tennis, and the Athletic Director offered no testimony as to the probability that additional courts actually would result in more opportunities for girls. The Athletic Director's testimony does not support Rossmiller's belief that additional courts are necessary to effectively address girls' interest in tennis.

The ALJ's conclusion that the District failed to address girls' interest in tennis by failing to increase the number of tennis courts is clearly erroneous and arbitrary and capricious. The evidence shows that the District's boys' and girls' tennis teams use the exact same tennis courts equally and that an increase in tennis courts from four to six would not necessarily increase girls' participation in the sport. The record does not, therefore, support the ALJ's order that the District must create a spending program to increase the number of tennis courts.<sup>66</sup> As held by the superior court:

Rossmiller failed to prove that the number of courts deprived any girl of an equal opportunity to participate in the tennis program, or that the District's lack of additional courts had a disparate impact on the girls' tennis team.<sup>67</sup>

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<sup>66</sup> AR I:1 (ALJ's Order at 18)

<sup>67</sup> CP 13 (Final Order at 10)

The superior court's Final Order on this substantive issue should be affirmed.

2. The Levels of Competition in the Girls' and Boys' Tennis Program Are Similar

The District provides competition for both the varsity and junior varsity teams in the girls' tennis program similar to the competition provided for the boys' tennis teams. Starting in 2005, the girls' tennis schedule was changed so the girls would compete against more 4A schools, similar to the change in the boys' tennis schedule made in fall 2004 (which is the same school calendar year).<sup>68</sup> In addition, Heritage High School started a tournament for the girls' tennis teams which included competition with up to eight different schools similar to the boys' Heritage Tourney.<sup>69</sup>

Rossmiller asserted that a third level of competition for girls' tennis should be added. Testimony confirmed that, at the time, adding a third (or C team) competition level would do no good because of the lack of any other teams to compete against. An Athletic Director at one of the high schools testified that without anyone to compete against, adding a new level of competition would not permit the girls who were

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<sup>68</sup> AR VIII:1266 at line 1-16

<sup>69</sup> AR VII:1129 at line 16

cut to compete.<sup>70</sup> The District's Athletic Director clarified that, at the time, there were no third level or C teams to compete against, even if the District's high schools were to add a third level of competition.<sup>71</sup> Testimony from the District's Superintendent and the Program Supervisor for Equity Coordination at OSPI also confirmed that whether there are other teams to play would be a factor in determining whether to add another level of competition.<sup>72</sup>

Therefore, the District's decision not to add a third level of competition for girls' tennis at the time, because there were no teams to play, does not show that the District had failed to provide effective levels of competition or to consider adding new levels.<sup>73</sup> While beyond the evidence presented below, it is worth noting that the District did add a C team for the girls' tennis program starting in the 2005-06 school year. Clearly, the levels of competition provided by the District effectively accommodate the interests and abilities of girls in the girls' tennis program and are similar to those provided for the boys' tennis teams.

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<sup>70</sup> AR VII:1113 at line 5-17

<sup>71</sup> AR VIII:1246 at line 18 to 1245 at line 17

<sup>72</sup> AR VI:1041 at line 15-19; AR VIII:1354 at line 15-22

<sup>73</sup> The superior court found that the District did consider the possibility of adding a C team. CP 15 (Final Order at 12).

3. Girls in the Tennis Program Received Coaching Similar to Boys in the Tennis Program

The District presented uncontroverted evidence that the hiring process and criteria for selecting girls' tennis coaches was the same as for boys' tennis and for other sports and consistent with WIAA standards.<sup>74</sup> According to Jerry Piland's testimony:

A. Our policy and practice for hiring coaches across the district for each and every sport are the same, and I found consistent quality or qualifications in our coaches, and particularly in our tennis program I found that in most cases the same coaches were coaching boys and girls; in some cases there may be a different assistant, but that the coaches were often the same for both programs and were well-qualified.

Q. And that could be done because they had different seasons, right?

A. They have different seasons, yes.<sup>75</sup>

As the above passage indicates, the same individuals generally coach both boys' and girls' tennis. The same coaches are available because the boys' tennis season is in the fall, while the girls' season is in the spring. Even in situations where the same individuals were not able to coach

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<sup>74</sup> AR VII:1143 at line 8-14; *see also* AR V:909-915 (Piland's Investigation of Rossmiller's Complaint Memorandum, page 5, ¶3)

<sup>75</sup> AR VIII:1357 at line 7-16

both the boys' and the girls' tennis teams, the District provided the same number of coaches (two) for both the boys' and girls' tennis teams.<sup>76</sup>

The evidence presented to the ALJ clearly demonstrated that the District's provision of coaches for the girls' tennis programs was comparable to other girls' and boys' sports in the District. Rossmiller offered no proof whatsoever that the coaching of girls' tennis teams in the District was inadequate, and the evidence was clear that there is no difference in the nature or quality of coaching for the boys' and girls' programs. The girls' tennis teams likely received higher quality coaching through split practices than did the boys' teams that did not utilize split practices. The ALJ's conclusion that girls in the tennis program did not receive an equal opportunity to receive adequate coaching is unsupported and should be reversed.

Evidence in the record fails to support the ALJ's Order that the District must develop a spending program to increase the number of coaches.<sup>77</sup> The ALJ's Order on this subject provided:

4(c). The District shall develop 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

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<sup>76</sup> AR VII:1087 at line 17-20

<sup>77</sup> AR I:1 (ALJ's Order at 18)

programs. Consideration shall be given to enhancing the compensation for tennis coaches to attract qualified applicants . . . <sup>78</sup>

This provision makes no sense, is arbitrary and capricious, and, in light of evidence that coaching in the girls' tennis programs is comparable in terms of numbers and quality of coaches to coaching in other sports, is not rationally based on evidence presented at the hearing.

There was no proof whatsoever of the inadequacy of coaching for the tennis program, and the evidence was clear that there is no difference in the nature or quality of coaching for the boys' tennis programs as for the girls' tennis program. Rossmiller argues that because there are more coaches for programs such as the football program, there should therefore be more coaches for the tennis program. Rossmiller's attempts to compare coaching ratios across entirely dissimilar sports is absurd. As District witnesses indicated, there are ample coaches for the tennis program to meet the needs of the program given the different coaching considerations when compared to a sport such as football. The District's Superintendent testified that while there were differences in coaching ratios among all the sports, particularly girls' tennis, "some of those differences are because of the nature of the

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<sup>78</sup> *Id.*

sport, the different skills to be coached, the safety issues in the sport, et cetera.”<sup>79</sup> Rossmiller has provided no authority whatsoever for a comparison between coaching ratios in tennis and coaching ratios in football. The comparison is obviously one of apples to oranges.

E. Even if This is, in Part, an “Accommodation” Case, the District Effectively Accommodated Girls in Its Athletic Program

This case was clearly an “equal treatment” case related to girls’ tennis, not one based on a broad “accommodation” claim regarding all female athletes in the District. However, even assuming that this is in any way an “accommodation” case, the evidence does not support the ALJ’s conclusion that the District failed to accommodate female athletes in the District.

1. The District Effectively Provided Girls Who Were Interested in the Tennis Program Opportunities to Participate in District Athletics

a. The District is Only Required to Provide Equal Opportunity, Not Actual Equal Participation

Assuming for the sake of argument that girls in the District’s high schools are underrepresented in athletics participation in comparison to the percentage of girls in the overall student population in the District’s high school and that the underrepresentation is deemed to

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<sup>79</sup> AR VIII:1356 at line 12-15

be substantial for purposes of addressing Title IX (and related state law) issues, the District nonetheless is not out of compliance.

Rossmiller references the three part test for Title IX compliance in an accommodation case. However, focus on the language of the first part of the test has been given short shrift by Rossmiller. The first part of the test reads as follows:

Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, January 16, 1996<sup>80</sup>, p. 4 (emphasis added). Despite Rossmiller's repeated emphasis on participation issues, he ignores the fact that "opportunities" are the focus of the first prong of the three-part test.<sup>81</sup> The essence of the first test is not actual participation, it is "participation opportunities." Rossmiller cites to the figures which show (correctly) that the percentage of girls who

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<sup>80</sup>This document is available on the OCR website at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html>. The document is cited below as Clarification.

<sup>81</sup> Interestingly, even though Rossmiller's discussion focuses on participation rather than opportunity to participate, he correctly stated in his brief to the superior court that "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." Rossmiller's Brief in the superior court, p. 9, lines 3-6. Despite this recognition, Rossmiller's discussion (and that of the ALJ) focused on participation rather than opportunity to participate.

participate in State-sanctioned athletic programs in the District is lower than the overall percentage of girls in the school population when compared to the percentage of boys who participate compared to the overall percentage of boys in the school population. However, Rossmiller has failed to prove any disproportionality in opportunities for girls to participate in other athletic programs in the District. Rossmiller's analysis ignores the fact that there are opportunities for a far greater number of girls to participate than there are girls who actually do participate. Girls are thus not underrepresented by opportunity to participate. If the drafters of the Title IX guidelines had meant "participation," they would not have used the term "participation opportunities."

The ALJ confused the concepts of actual participation with participation opportunities. By relying on evidence that participation in sports by girls is lower than participation by boys and lower than the overall female student population, the ALJ erroneously concluded that girls were under-represented. However, the District is not required to provide equal participation, but is only required to provide equality of participation opportunities. The regulation addressing accommodation of athletic interest under Title IX provides:

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes . . .

34 C.F.R. § 106.41(c)(1). The Program Supervisor for Equity Coordination at OSPI agreed that for girls interested in tennis but who do not make the tennis team, the District's obligation is to make sure that those girls have opportunities in other sports.

Q. And if girls are interested in tennis and there's not enough space in the tennis program for them, then the district needs to make sure that girls interested in sports have other opportunities for other sports, don't they?

A. Either that or . . . you have two opportunities. You have the opportunity to add a sport or you have the opportunity to expand current sports.<sup>82</sup>

The Program Supervisor for Equity Coordination at OSPI further stated:

A. . . . I believe that you stated that it didn't have to be that sport, it could be another sport and that is correct. But again, the line would be if we aren't meeting the proportionality and there are girls interested in playing . . . and you have exhausted all other sports offerings or you haven't attempted to offer other sports offering . . . then, . . . you have girls who are interested so you should be meeting their interests.

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<sup>82</sup> AR VI:1042 at line 8-15

Q. Either through tennis or through something else . . .

A. Yes . . .<sup>83</sup>

The Program Supervisor for Equity Coordination at OSPI effectively stated that the interests of girls who try out for the tennis team, but do not become participants, can be met through opportunities to participate in other sports. The District provides such opportunities.

The District offers a selection of sports for girls that equates to its selection of sports offered to boys. In the District, there are ten competitive sports programs in the high schools for each gender.<sup>84</sup> Gymnastics and volleyball are offered exclusively for girls, while separate programs in basketball, soccer, golf, and tennis are offered for both boys and girls.<sup>85</sup> Testimony supported the fact that girls who do not make the tennis team have the opportunity to participate in other sports offered for girls.

Q. . . . if girls are cut from the tennis team, are their other sports for them to go out for?

A. There are.<sup>86</sup>

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<sup>83</sup> AR VI:1044 at line 12-23

<sup>84</sup> AR I:1 (ALJ's Order at 4) (Finding of Fact #18)

<sup>85</sup> *Id.*

<sup>86</sup> AR VIII:1246 at line 10-12

Rossmiller's primary argument in this case is that there are girls who are interested in interscholastic tennis at the high school level who are being cut from the tennis team. There is nothing improper about having cuts in a sport. All of the girls who are cut from the tennis team have a number of opportunities to participate in other sports programs at the District's high schools. In fact, girls cut from the tennis program have a variety of sports to choose from in all seasons, some of which have cut programs and some which do not:

Q. When either boys or girls are cut from high school tennis teams in the Evergreen School District are there are other sports in those seasons – boys in the fall, girls in the spring – other sports that they can go out for?

A. [By Jerry Piland] There are. In fact, every season, fall, winter or spring, there are sports that are actually no-cut sports that boys or girls may turn out for if they're cut from a particular sport.

Q. Couldn't they also go out even for a cut sport if they were good enough?

A. They could.

Q. So, for example, a girl who gets cut from the tennis team who is an excellent softball player could go out for the softball team?

A. She could.

Q. And if she went out for the softball team and got cut from that, she could go out for track, where there's no cut?

A. That's correct.<sup>87</sup>

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<sup>87</sup> AR VIII:1354 at line 24 to 1355 at line 16

Therefore, the District provides a variety of opportunities for girls interested in tennis, but who are cut from the team, to participate in other sports. By providing a selection of sports programs (ten for boys and ten for girls), a number of which are “no cut” programs, the District is providing the girls equal opportunity to participate, and has specifically provided girls cut from the tennis program an opportunity to participate in other sports. No evidence was presented by Rossmiller, and no finding was made by the ALJ, to indicate that girls who did not make the cut in the tennis program did not have other athletic opportunities available to them, and there was no evidence of any disparity in participation opportunities for girls, even if girls are underrepresented in actual participation.

Rossmiller quotes a portion of OCR’s “Clarification” document (cited above) for the proposition that participation opportunities must be “real, not illusory.” Rossmiller’s reliance on these guidelines is misplaced. Guidelines issued to clarify the application of Title IX to intercollegiate sports do not translate to middle and high school athletic programs that include “no cut” sports. At the collegiate level, such unfilled slots may amount to illusory opportunities, because of the intense competition for varsity spots, for scholarships, and other benefits

received by collegiate athletes. Those rationales do not hold true at the middle and high school levels. Middle and high school sports that have no-cut policies are designed to provide opportunities for participation to students of all abilities. *All* such sports (whether for girls or boys) at the middle and high school level provide essentially unlimited opportunities for participation. Rossmiller simply did not carry his burden of proving that participation opportunities for girls in the various “no cut” sports are lacking or in any way “illusory,” when in fact opportunities for girls to participate in athletics in the District are virtually unlimited.

Significantly, in the course of his presentation before the ALJ, Rossmiller did not provide testimony of a single participant in the girls tennis program at any high school. Despite his own daughter having tried out for the tennis team, he was unable to produce her – or any other girl or parent of a girl – as a witness to state any complaint or criticism of the District’s high school tennis program. If the program were discriminatory, one would expect that those most affected by the program would be available to Rossmiller to voice their concerns.

Similarly, Rossmiller did not produce a female student who had been cut from one of the District’s tennis teams to present evidence about any lack of opportunities in other sports for a girl who is cut from

the tennis team. The absence of such testimony is significant because it underscores the fact that there are many opportunities for participation by girls in the athletic programs in the District. Rossmiller – who has the burden of proof – presented no evidence to suggest that participation opportunities for girls in the District were not proportional to the overall percentage of females in the District’s high school population. It was an error of law for the ALJ to conclude otherwise.<sup>88</sup>

b. The District is Not Required to Accommodate All Known Interest of Girls in the Tennis Program

Many of the ALJ’s conclusions were based on Rossmiller’s argument that equality in accommodation for the tennis program should be based on the amount of interest in that particular sport. Rossmiller’s theory, apparently, is that if 250 girls turned out for the tennis program at Heritage High School, the District is obligated to provide a tennis program for all of those girls. This is patently incorrect, and the ALJ’s Findings and Conclusions which are consistent with that position are erroneous and arbitrary and capricious. Rossmiller cites no case, statute, or regulation for the proposition that a school district must provide a place on a team for every person interested in a particular

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<sup>88</sup> For the same reasons, the ALJ’s conclusion that the District was required to show that girls cut from the tennis program were interested in and able to participate in

sport. The District is, plain and simply, under no obligation to meet all of girls' interest in tennis by expanding the girls' tennis program, so long as it has explored the possibility of adding other levels of competition (which it has) and is providing other athletic opportunities for girls who do not make the tennis team.

Rossmiller's assertion – which appears to have been erroneously adopted by the ALJ -- that because there is a greater interest in tennis by girls than boys the District must meet that level of interest by enlarging the girls' tennis program to increase actual participation misstates the law. Rossmiller appears to claim that because more girls try out for tennis than boys, more girls are excluded from participating, thereby creating inequality, despite the fact that all aspects of the boys' and girls' tennis programs are similar or identical. Arguments that compliance is based on the “level of interest” have been rejected.<sup>89</sup> If there is interest in athletics by some girls that cannot be met due to the size of the tennis program, the District fulfills its obligation regarding gender equity in athletics by providing other athletic opportunities for those girls. No

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an alternate program was clearly erroneous. AR I:1 (ALJ's Order at 14) (Conclusion of Law #33). No such determination is required of the District.

<sup>89</sup> *Neal v. Board of Trustees of Calif. State Universities*, 198 F.2d 763 (9<sup>th</sup> Cir. 1999).

evidence was presented at the hearing to establish any lack of opportunities for girls who do not make the cut in the tennis program.

In *Neal v. Board of Trustees of Calif. State Universities*, 198 F.2d 763 (9<sup>th</sup> Cir. 1999), the university established standard team sizes, which effectively decreased the size of the men's teams across the board and expanded the size of the women's teams.<sup>90</sup> Plaintiffs comprised a group of male wrestlers seeking an injunction to prevent the capping of men's teams.<sup>91</sup> Plaintiffs argued that equal opportunity is achieved when each gender's athletic participation roughly matched each gender's interest in participating.<sup>92</sup> The *Neal* court disagreed, stating that schools were to provide athletic opportunities in proportion to the gender composition of the **entire student body**, "not in proportion to the expressed interests of men and women."<sup>93</sup>

Rossmiller is effectively making the same argument as the wrestler plaintiffs in *Neal* that was rejected; that level of interest is the measure by which equal accommodation is determined. However, instead of measuring the amount of interest in any one sport, such as

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<sup>90</sup> *Id.* at 765

<sup>91</sup> *Id.* at 766

<sup>92</sup> *Id.* at 767

<sup>93</sup> *Id.*

tennis, the measure should be the percentages of total male and female student body enrollment as compared to the percentages of male and female athletic roster opportunities. The District is under no obligation to address all known interest in girls' tennis, and because, as stated below, "exact" proportionality is not required, only "substantial," the District is effectively accommodating the interests of girls in the District based on its percentage of female student body enrollment as compared to its percentage of female athletic roster opportunities.

2. Even if Accommodation is Based Upon Actual Participation, Not Participation Opportunities, the District Still Achieved Substantial Proportionality

In Conclusions of Law 27, 28, 29, and 33, the ALJ concluded that the District failed to show its selection of sports accommodated the interests of girls in the District. In support of his conclusion, the ALJ relied on evidence regarding the total population of girls in the District as compared to the total number of girls participating in sports throughout the District.<sup>94</sup> The ALJ noted that for the 2003-2004 school year, girls represented 49% of the overall student population in the District, while only 37-44% of the girls participated in sports district-

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<sup>94</sup> AR I:1 (ALJ's Order at 13) (Conclusion of Law #27)

wide.<sup>95</sup> Relying only on this statistic, the ALJ erroneously concluded that the District failed to identify and support programs that would ensure participation by girls to the same extent as boys.<sup>96</sup>

However, “exact” proportionality between overall female student body enrollment and percentage of female participation is not required. Only “substantial” proportionality is required based on the school’s specific circumstances and overall size of its athletic program. Proportionality is determined on a case-by-case basis and therefore can take into account uncontrollable factors such as natural fluctuations in enrollment and participation rates. Office of Civil Rights, U.S. Department of Education, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996). By relying solely on the overall female student population percentage of 49% versus the 37-44% of female sports enrollment, the ALJ seemingly required “exact” proportionality.

The evidence clearly showed that state-wide, male participation in sports at 57% was higher than female participation at 53%, as indicated in the testimony of Jerry Piland:

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

A. Well, I have a recent copy of a memo from Darcy Lees from OSPI based upon WIAA's information that shares that in the 2003/2004 school year of the number of athletes participating in sports across the state of Washington approximately 57 percent of them were boys and approximately 53 percent of them were girls.

Q. So does that – based on that information, does it appear to you to be unusual for a school district to have a lower percentage of girls actually participating – and I'm not talking about opportunities – actually participating than their percentage in the population and a higher percentage of boys participating than their percentage of school population?

A. No, it's not unusual. In fact, the document, I think, goes back to 1988, and for every year since 1988 through to the 2003-2004 school year the percentage of participants between boys and girls, you know, the percentage differences is in the 12 to 13, 14 percentage range. So no, it's not unusual.<sup>97</sup>

Based on historic, state-wide percentages, it is not unusual for more boys to be actual participants in sports than girls. With the difference between boys and girls in state-wide participation in the 12-14% range, it is an uncontrollable factor that more boys than girls participate in sports state-wide. Under Rossmiller's theory, as adopted by the ALJ, virtually every school district in the state would fail under the "exact" proportionality standard.

Based on the fact that only "substantial" proportionality is required, not "exact" proportionality, the District's mere 5-12%

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<sup>97</sup> AR VIII:1373 at line 12 to 1374 at line 4

difference between overall female enrollment and participation should be considered "substantial" compliance. With 37-44% female participation in athletics throughout the District, and an overall enrollment of approximately 49%, and based on historic state-wide averages, the District achieved "substantial" proportionality in participation.

#### IV. CONCLUSION

This case is simply about gender equity in the girls' tennis program within the District under an "equal treatment" claim. Rossmiller did not carry his burden of proving any gender discrimination. He should not be permitted to turn this case into an "accommodation" case. Even if this is an "accommodation" case, the District effectively accommodated girls in its athletic program. For the reasons set forth above, the Final Order of the superior court reversing the ALJ's findings regarding gender discrimination in the girls' tennis program in the District should be affirmed.

DATED this 2<sup>nd</sup> day of January, 2007.

KARR TUTTLE CAMPBELL

By:



Lawrence B. Ransom, WSBA #7733  
Christine E. Gardiner, WSBA #33100  
1201 - 3<sup>rd</sup> Avenue, Suite 2900  
Seattle, Washington 98101  
(206) 223-1313  
Attorneys for Respondent

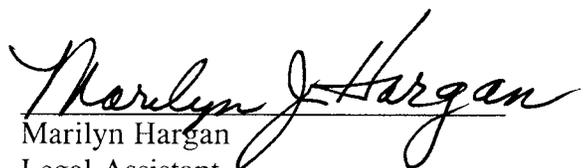
CERTIFICATE OF SERVICE

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I, Marilyn J. Hargan, hereby declare that on January 2, 2007, I caused a copy of Brief of Respondent to be served on opposing counsel by sending a true copy of same as indicated below.

Jill Diane Bowman Stoel Rives LLP 600 University St., Ste 3600 Seattle, WA 98101	<input type="checkbox"/> Certified U.S. Mail <input type="checkbox"/> Regular U.S. Mail <input checked="" type="checkbox"/> Messenger (hand delivery)
Rob McKenna Attorney General of Washington PO Box 40100 Olympia, WA 98504-0100	<input type="checkbox"/> Certified U.S. Mail <input checked="" type="checkbox"/> Regular U.S. Mail <input type="checkbox"/> Messenger (hand delivery)

DATED this 2nd day of January, 2007.

  
 Marilyn Hargan  
 Legal Assistant  
 Karr Tuttle Campbell

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