

CLOSING ARGUMENT

I. Introduction: The District rule that prohibits Annie from trying out for the boys-only volleyball team violates Title IX, and this Court should issue an order requiring the District to let Annie try out for the teams.

Annie Whitford is a seventh-grade student at Newberry Middle School. Annie is a very talented volleyball player who has played for five years on various successful co-ed teams; she has received several awards and aspires to volleyball scholarships and competitive play in college and in the Olympics. The District has a rule that prohibits boys and girls from participating in interscholastic athletic games as mixed teams or against each other as single gender teams. The rule lists volleyball as a contact sport. Annie was prohibited from trying out for her school's volleyball team, which is a boys-only team and the only school volleyball team. The District rule violates Title IX, and Annie seeks an order requiring the District to let her try out for the Newberry volleyball team.

II. Argument: Under Title IX, girls must be permitted to try out for the boys-only volleyball team because the school does not also have a girls-only team, volleyball is not a contact sport, and athletic opportunities for girls have been previously limited in the school.

Title IX prohibits gender discrimination in any educational program, of which the interscholastic volleyball program at Newberry Middle School is one. Title IX's regulations allow a school to have single gender teams where selection is based on competitive skill, or the activity is a contact sport. However, where a school operates a boys-only team but not a girls-only team in a sport, *and* athletic opportunities for the girls have previously been limited, the girls must be permitted to try out for the team unless the sport is a contact sport. 34 C.F.R. § 106.41.

Here, it is undisputed that Newberry Middle School has a boys-only volleyball team, but not a girls-only team. Therefore, the remaining issues are whether volleyball is a contact sport and whether athletic opportunities for girls have been previously limited at Newberry Middle School.

A. Volleyball is not a contact sport.

A contact sport is one "the purpose or major activity of which involves bodily contact." *Id.* The regulation enumerates examples of contact sports—boxing, wrestling, rugby, ice hockey, football, and basketball—but volleyball is not among the enumerated contact sports. *Id.* The failure of the regulation to enumerate volleyball as a contact sport focuses the inquiry on whether "the purpose or major activity" of volleyball "involves bodily contact."

The first prong of the inquiry is whether the *purpose* of volleyball involves bodily contact. This discussion involves league rules and the generally accepted goal of the game. The fact that the rules of the sport penalize bodily contact is an important factor in determining whether the purpose of a sport involves bodily contact. *Metcalf v. Homer School District* (United States Court of Appeals, Fifteenth Circuit, 1998).

Neither the District nor Annie introduced evidence during the hearing that the purpose of the sport involves bodily contact. The following evidence supports the proposition that the purpose of volleyball does not involve bodily contact. First, the U. S. Volleyball League rules state that volleyball is a non-contact sport and contact between opposing players will result in a penalty. The purpose of the sport is to try to land the ball in the opponent's court without its being returned successfully. Additionally, Coach Wallenstein testified that intentional or threatened physical contact between players can result in a penalty against

a player and also against his or her team. (See Wallenstein testimony.) For example, the boy who intentionally injured Annie during an incident at a summer co-ed volleyball camp was penalized. (See Whitford testimony.) The District representative, Grace Huang, gave no testimony as to the purpose of the game of volleyball. She simply testified, without substantiation, that the District had concluded that volleyball is a contact sport. The coach's testimony should be deemed persuasive because of her years of experience coaching middle school and college volleyball and because neither the testimony of the District's witness nor the cross-examination of the coach contradicted the coach's testimony.

Thus, the purpose of the sport of volleyball does not involve bodily contact.

The second prong of the inquiry as to whether volleyball is a contact sport is whether the *major activity* of volleyball involves bodily contact. The criteria to determine whether the major activity of a sport involves bodily contact are contained in *Metcalf*. A high number of *protective rules* for a sport suggests that bodily contact occurs frequently. *Metcalf*. Even if bodily contact is incidental to the game, an analysis of the *inevitability* and *frequency* of bodily contact in the actual game determines whether the major activity of a sport involves bodily contact. *Id.*

The absence of protective rules in volleyball supports the argument that bodily contact is infrequent and therefore not a major activity of the sport. In *Metcalf*, the court concluded that the protective rules in field hockey, such as the requirement that players wear mouth guards and shin guards and are prohibited from wearing spiked shoes and jewelry, indicated that bodily contact occurred frequently. In contrast, although players wear knee pads when they play volleyball and common sense would dictate that players not wear jewelry, league rules do not require players to wear any protective equipment, including knee pads, elbow pads, mouth protectors, or shin guards, nor do they prohibit the wearing of jewelry during a game. (See Wallenstein testimony.) No District evidence contradicted Coach Wallenstein's testimony.

Bodily contact in volleyball is not inevitable or frequent, further indicating that the major activity of the sport does not involve bodily contact. Annie has suffered only two injuries in all the years she has played volleyball. (See Whitford testimony.) Collisions between teammates when they are scrambling for the ball are infrequent. (See Whitford and Wallenstein testimony.) In the course of trying to spike a ball over the net, a player may physically strike a player on the other team, but such an incident is rare. (See Wallenstein testimony.) Even though Wallenstein testified that a good volleyball player should use all her power, speed, and strength to get the volleyball over the net, the District did not introduce any evidence that such effort makes bodily contact inevitable or frequent, so it is not a major activity of the sport.

Therefore, volleyball is not a contact sport because it is not enumerated as such in the regulations, the purpose of volleyball is not bodily contact, and bodily contact is not a major activity of the sport.

B. Athletic opportunities for girls at Newberry Middle School have previously been limited.

"[T]he obligation of an educational institution in complying with the requirements of Title IX in [interscholastic athletics] cannot be measured only by comparing types of teams available to each gender, but instead must turn on whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's sports program as a whole." *Milley v. Arlington School District*, (United States Court of Appeals, Fifteenth Circuit, 2000). The inquiry is not sports-specific. *Milley* is consistent with the applicable regulation, 34 CFR § 106.41(c), "Equal Opportunity," which enumerates a set of factors to consider in determining whether equal athletic opportunities are available.

Of these, the relevant factors are: Factor 1, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both genders; Factor 2, the provision of equipment and supplies; Factor 4, the travel and per diem allowance; Factor 5, the opportunity to receive coaching and academic tutoring; Factor 6, the assignment and compensation of coaches and tutors; and Factor 10, publicity.

Here, applying these factors to the evidence supports the conclusion that female Newberry students were denied equal athletic opportunities. Girls and their parents had previously tried to get Newberry to start a girls' interscholastic volleyball team, but the District denied the requests for monetary and logistical reasons (e.g., difficulty in scheduling practice and games times, need to spend more money on coaching and expanded facilities). (See Wallenstein and Huang testimony.) In looking at Newberry's athletic program as a whole, there is disproportionate support for male athletics. Of 1,000 students in the seventh and eighth grades at Newberry, approximately 600 are female and 400 are male. There are 10 interscholastic sports teams, none of which is co-ed. Approximately 100 girls play on the four all-girls teams (cross-country, basketball, swimming, and tennis) and approximately 200 boys play on the six all-boys teams (football, basketball, baseball, ice hockey, volleyball, and wrestling). (See Huang and Wallenstein testimony.) The athletic budget pays for coaches' salaries, facilities upkeep, equipment and uniform purchases, athlete transportation, and publicity. Seventy percent of the athletic budget is spent on the boys' teams. (See Wallenstein testimony.)

Therefore, athletic opportunities for girls at Newberry Middle School have previously been limited, satisfying the second element of the Title IX test.

III. Conclusion: The District's refusal to let Annie try out for the volleyball team violated Title IX and this Court should issue an order requiring it to allow her to try out.

The evidence supports the conclusion that the District's refusal to let Annie try out for the school volleyball team violates Title IX. Volleyball is not a contact sport because it is not enumerated as one in the regulation and neither the purpose nor major activity of volleyball involves bodily contact. Newberry does not have a co-ed or girls-only volleyball team, and athletic opportunities for female students have previously been limited. As the District has violated Title IX, this Court should issue an order requiring it to allow Annie to try out for Newberry's interscholastic volleyball team.