

## Contents

---

### **MPT 3: *Whitford v. Newberry Middle School District***

#### **FILE**

Memorandum from Sandy Gogh .....	3
Transcript of Hearing on Plaintiff's Motion for Preliminary Injunction.....	4

#### **LIBRARY**

Title IX, Education Amendments of 1972 .....	13
Code of Federal Regulations § 106.41 .....	13
<i>Metcalf v. Homer School District</i> , U.S. Court of Appeal (15th Cir. 1998) .....	15
<i>Milley v. Arlington School District</i> , U.S. Court of Appeal (15th Cir. 2000).....	17

# **FILE**

*Whitford v. Newberry*  
*Middle School District*

**The Gogh Law Offices  
647 Aiden Place  
Newberry, Franklin 33616**

MEMORANDUM

TO: Applicant  
FROM: Sandy Gogh  
RE: *Whitford v. Newberry Middle School District*  
DATE: February 28, 2002

I was very pleased with the way you handled the evidentiary phase of the motion for preliminary injunction in *Annie Whitford v. Newberry Middle School District*. You will be making the closing argument tomorrow afternoon. Before then, I'd like you to write out your closing argument to prepare for your presentation in court and let me review it.

The court has instructed you to focus your argument on the likelihood of Annie's success on the merits, which you know is a prerequisite for issuance of a preliminary injunction. The judge has already found irreparable injury, so there is no need for you to argue that point.

The closing argument should revolve around the facts that you brought out at the hearing. The School District refused to allow Annie to try out for her school's boys-only volleyball team. Since the District receives federal financial assistance, this refusal violated Annie's rights under Title IX of the Education Amendments of 1972. The refusal deprived her of an equal opportunity, based on gender, to participate in interscholastic athletics.

In the argument, you should tell a persuasive story about why Annie should prevail, highlight the salient facts of that story, and show how the evidence supports the factors that are enumerated in the statute, regulations, and case law. It is also important that you preempt the District's position by showing how the District's evidence fails to support its case and, in fact, supports Annie's. The structure of the argument—i.e., an introduction, main argument, and conclusion—is important. It should be persuasive, organized, well-reasoned, and compelling. You should end it with a clear statement of the relief you are seeking.

1 UNITED STATES DISTRICT COURT  
2 CENTRAL DISTRICT OF FRANKLIN  
3

4 Annie Whitford, a minor, by  
5 her best friends and natural  
6 guardians Pearl Whitford and George  
7 Whitford,

8 Plaintiff

Case Number 02-CV-1068

9 v.

10 Newberry Middle School District,  
11 Defendant  
12

---

13  
14 TRANSCRIPT OF HEARING ON PLAINTIFF'S  
15 MOTION FOR PRELIMINARY INJUNCTION

16 February 27, 2002  
17

18 THE COURT: Okay counsel, let's begin. You may proceed.

19 APPLICANT: In this case, plaintiff Annie Whitford is a 12-year-old student in the seventh grade at  
20 Newberry Middle School. She seeks an order requiring the Newberry Middle School District  
21 to let her try out for the interscholastic volleyball team at Newberry Middle School.  
22 Newberry Middle School is covered by Title IX of the Education Amendments of 1972,  
23 which prohibits gender discrimination in school athletic programs. Annie wanted to try out  
24 for her school's all-male volleyball team and was informed by the coach that she could not  
25 because a  
26 District rule prohibits females from playing with or against male students in contact  
27 sports.

28 THE COURT: Is that policy in writing?

29 APPLICANT: It's attached to my motion, Your Honor. Let me read it into the record: "Boys and  
30 girls shall not be permitted to participate in interscholastic athletic games as mixed teams,  
31 nor shall boys' teams and girls' teams participate against each other in interscholastic  
32 athletic contests when the sports involved are contact sports or sports in which the  
33 purpose or major activity involves physical contact, including football, baseball,  
34 basketball, volleyball, wrestling, and ice hockey."

35 THE COURT: Mr. Perdue, is this a fair summary of the problem?

36 PERDUE (Counsel for School District): Yes, Your Honor.

37 THE COURT: Call your first witness, counsel.

1 THE PLAINTIFF, Annie Whitford, WAS SWORN AND IDENTIFIED.

2 APPLICANT: Good morning, Annie. I am going to ask you a few questions, okay?

3 WHITFORD: Okay.

4 Q: When did you start playing volleyball?

5 A: When I was about seven years old, in the second grade.

6 Q: Have you been playing ever since?

7 A: Yes, constantly. I've played on teams through the YMCA, the Parks and Recreation  
8 Department, and the U. S. Volleyball League Juniors Club. I've gone to volleyball camps for  
9 the last five summers.

10 Q: Were there boys on these teams?

11 A: Yes, they were all co-ed.

12 Q: I notice you're wearing a T-shirt today that has something to do with volleyball.

13 A: Yeah, it's my lucky T-shirt. It's the one I got as a special award when my team won the silver  
14 medal at the National Junior Olympics this year in New Orleans. I play the position of  
15 middle blocker, so the T-shirt says, "Annie Whitford, Middle Blocker, Attacker of the  
16 Unwary, She Yields to No One."

17 Q: Have you received other awards?

18 A: Yes, I've gotten awards when my teams have won tournaments, and also as the team's Most  
19 Valuable Player.

20 Q: Do you know the win-loss statistics of your teams?

21 A: Counting it all up, the teams I've played on have won 97 matches and lost only seven. We've  
22 taken at least 20 titles.

23 Q: Annie, what does volleyball mean to you?

24 A: Volleyball is my life. I play it every day. If I'm not practicing or playing on teams, I'm  
25 working on my serves, passes, and spikes against the wall of the gym or behind the school.  
26 My goal is to get a scholarship to a college with a great women's volleyball team, like the  
27 University of Franklin or Stanford. My parents sure couldn't afford those schools otherwise.  
28 Maybe I'll even play in the Olympics one day. In fact, even before that, I've got a real good  
29 chance of getting a volleyball scholarship to Prescott next year. It's, like, the top prep school  
30 in the state and has got a great volleyball program.

31 Q: When did you first attend Newberry Middle School?

1 A: Just this year when my family moved here from out of state.

2 Q: Why do you want to play on the boys' volleyball team?

3 A: For one, seventh grade is the first chance you get to play interscholastic volleyball. Also, it's  
4 not like there is even a girls' team for me to try out for. Even if there were, I've played with  
5 boys on all of my past teams and I've watched the Newberry Middle School volleyball team  
6 play. I think that playing with the boys will give me the competition I need to develop my  
7 skills.

8 Q: Annie, suppose the judge decided you should be able to try out, but she waited six months  
9 before she made that decision. Would that be okay?

10 A: Well, I don't want to be impolite, but, like, what would be the point? The season starts in two  
11 weeks and only lasts three months. I mean, Prescott scouts and even some colleges wouldn't  
12 be able to see me play.

13 APPLICANT: I have nothing further for this witness.

14 THE COURT: Cross-examination?

15 PERDUE: Yes. Thank you, Your Honor.

16 Q: Annie, have you ever been hurt playing volleyball?

17 A: Well, just twice. In a tournament game last year, I was hit in the face by a ball. I got a bruised  
18 eye and a bloody nose.

19 Q: Was that ball hit by a boy?

20 A: Yeah.

21 Q: Any other injuries?

22 A: At last summer's volleyball camp, a boy on the other team bumped me at the net and caused  
23 me to come down off balance. I came down on my right ankle and sprained it.

24 Q: So, your injury was caused by coming into physical contact with a boy, isn't that right?

25 A: Yeah, but he did it intentionally and he got called for a foul because you're not supposed  
26 to do that. But you really try hard not to do stuff like that because your team could get  
27 penalized.

28 Q: And, lots of times, when you're scrambling to get the ball, you and your teammates collide,  
29 isn't that true?

30 A: Not lots of times, but sometimes.

31 Q: Thank you, Annie. Nothing further, Your Honor.

1 THE COURT: Next?

2 APPLICANT: The plaintiff calls Karin Wallenstein.

3 THE WITNESS, Karin Wallenstein, WAS SWORN AND IDENTIFIED.

4 APPLICANT: Ms. Wallenstein, in what positions are you employed at Newberry Middle School?

5 WALLENSTEIN: I am the Director of Physical Education and the volleyball coach.

6 Q: Were you previously employed in school athletics?

7 A: Yes, after graduating from college, I taught physical education courses for seventh and  
8 eighth graders for about six years. After that, I was at different times an assistant coach for  
9 the women's volleyball teams at Franklin Community College and Franklin State.

10 Q: Do you also play volleyball?

11 A: I play on the "Bruisers" adult co-ed team through the U.S. Volleyball League. I've played  
12 since high school.

13 Q: How many interscholastic sports teams are there at Newberry Middle School?

14 A: There are 10.

15 Q: What are they?

16 A: There are six boys' teams—football, basketball, baseball, ice hockey, volleyball, and  
17 wrestling. There are four girls' teams—cross-country, basketball, swimming, and tennis.

18 Q: Are there any co-ed interscholastic teams?

19 A: No.

20 Q: Is there a budget for interscholastic athletics at Newberry?

21 A: Yes, it pays for things like coaches' salaries, facilities upkeep, equipment and uniform  
22 purchases, athlete transportation, and publicity.

23 Q: What percentage of the athletic budget is spent on the boys' teams?

24 A: I'd say approximately 70%.

25 Q: Did you allow Annie Whitford to try out for the school volleyball team?

26 A: Ultimately, no.

27 Q: Why?

28 A: This is a little embarrassing. Being new to Newberry, I didn't even know that the District had  
29 a rule barring girls from the volleyball team. I had seen Annie play during P. E. class and she  
30 is by far the best player we have in the school—boy or girl. I told her I hoped she would try  
31 out.

1 Q: Did any other female students ask to try out?

2 A: No, but not for lack of interest.

3 Q: What do you mean?

4 A: Unlike me, they knew the rule. Before tryouts I asked some of the girls who played well in

5 class if they were going to try out. They told me it was no use, that, although some of them

6 love to play volleyball, they had given up a long time ago trying to get the school to start a

7 girls' team, or to allow a co-ed team. Once I found out about the rule barring girls, I had to

8 tell Annie she couldn't try out for the team.

9 Q: How much, if any, physical contact takes place between players during a game of volleyball?

10 A: We follow U. S. Volleyball League rules, which say volleyball is a non-contact sport. The

11 main activity of the game is hitting the ball back and forth over the net and trying to land the

12 ball in the opponent's court without its being returned successfully. Intentional or threatened

13 physical contact between players can cause the player who acts intentionally or threatens

14 another—and her team—to be penalized, including expulsion from the match.

15 Q: Thank you, Coach Wallenstein.

16 THE COURT: Cross-examination?

17 PERDUE: Thank you, Your Honor. Ms. Wallenstein, isn't it true that volleyball players wear

18 protective padding when they play?

19 WALLENSTEIN: Most players wear kneepads, and I have seen a few players wear elbow pads.

20 Q: In a game of volleyball, the six members of one team play on one side of the net and the six

21 members of the opposing team play on the other side, correct?

22 A: Yes, that's correct.

23 Q: And, in the course of running for the ball, team members collide with each other, don't they?

24 A: Not normally, if each player covers her area, but it can happen occasionally.

25 Q: And sometimes a player in the front line collides at the net with a player from the other team,

26 right?

27 A: Sometimes.

28 Q: For example, when trying to spike a ball over the net, a player jumps up to hit the ball, right?

29 A: Yes.

30 Q: And that player raises her arm over her head and attempts to slap the ball hard over the net.

31 A: Yes.



1 Q: And in trying to make that play, she may physically strike a player on the other team who  
2 may be trying to block or pass the ball, right?

3 A: In my experience, rarely.

4 Q: Well, isn't it considered a very good play when a player spikes a ball hard over the net?

5 A: Yes.

6 Q: And a hard, fast hit over the net that the other team can't respond to is even called a "kill,"  
7 right?

8 A: Yes, but certainly not with the aim of "killing" anyone.

9 Q: In the course of your impressive career as a college coach, how many injuries to players have  
10 you observed as a result of physical contact between players?

11 A: Some.

12 Q: Because a good player is going to use all her power, speed, and strength to get that volleyball  
13 over the net, right?

14 A: Come on, Mr. Perdue, we are talking about 12-year-old boys and girls.

15 Q: Ms. Wallenstein, please answer my question.

16 A: I guess so.

17 PERDUE: I have no further questions of this witness.

18 THE COURT: Redirect?

19 APPLICANT: Briefly, Your Honor. Ms. Wallenstein, do volleyball rules require players to wear  
20 knee or elbow pads?

21 WALLENSTEIN: No.

22 Q: How about mouth protectors or shin guards?

23 A: Neither.

24 Q: Do the rules prohibit players from wearing jewelry?

25 A: The rules don't but good sense does.

26 APPLICANT: Nothing further, Your Honor, and the plaintiff rests.

27 THE COURT: Mr. Perdue?

28 PERDUE: Your Honor, the District calls its only witness, Grace Huang.

29 THE WITNESS, Grace Huang, WAS SWORN AND IDENTIFIED.

30 PERDUE: Ms. Huang, you have been the Superintendent of the Newberry Middle School District  
31 for 10 years?

1 HUANG: Correct.

2 Q: What, if any, responsibility do you have over the interscholastic athletic programs at the  
3 schools in your District?

4 A: I decide the budget allocations, approve the types and number of interscholastic teams and,  
5 with help of counsel, monitor compliance with the law.

6 Q: Were you responsible for the issuance of the rule at issue in this case?

7 A: Yes.

8 Q: What are the reasons for this rule?

9 A: I read Title IX to prohibit co-ed interscholastic teams in contact sports and the District has  
10 concluded that volleyball is a contact sport.

11 Q: Your Honor, I have nothing further for this witness.

12 THE COURT: Cross-examination?

13 APPLICANT: Thank you, Your Honor. Ms. Huang, you have no firsthand experience in school  
14 athletics, do you?

15 HUANG: No, not really.

16 Q: You have never taught seventh grade students, have you?

17 A: My previous teaching experience was with high school students.

18 Q: Am I correct that only seventh and eighth grade students may participate in interscholastic  
19 athletic activities in the Newberry Middle School District?

20 A: Yes, that is correct.

21 Q: How many students are there in the seventh and eighth grades at Newberry Middle School?

22 A: Approximately 1,000.

23 Q: How many of the 1,000 students are female?

24 A: About 600.

25 Q: That would make about 400 of the students male?

26 A: Yes.

27 Q: Of the 600 female students, approximately how many participate in interscholastic athletics?

28 A: About 100 among the four girls' teams.

29 Q: And, of the 400 male students, how many play on interscholastic sports teams?

30 A: About 200.

31 Q: In the past, female students at Newberry Middle School have requested the formation of

1 a girls' interscholastic volleyball team, am I right?

2 A: I vaguely recall some parents sending me a letter to that effect.

3 Q: And their request was denied?

4 A: That's true.

5 Q: There are talented volleyball players among the female students at Newberry Middle School,  
6 aren't there?

7 A: I don't really know.

8 Q: I assume you have thought through the reasons why you denied the request for an  
9 interscholastic girls' volleyball team?

10 A: Yes, I have.

11 Q: Well, are some of those reasons that you have limited facilities, and that it would be hard to  
12 schedule practice and game times if you had both girls' and boys' teams?

13 A: Yes.

14 Q: You might have to hire another coach, and even if you didn't, you'd have to pay Ms.  
15 Wallenstein more to take on the extra work?

16 A: Yes.

17 Q: You would have to increase your lockers and other facilities to accommodate visiting teams.  
18 Is that right?

19 A: Yes.

20 Q: This all would cost a great deal of money, wouldn't it?

21 A: We only have so much money to spend on the athletic programs at each school.

22 Q: I have nothing further for this witness.

23 THE COURT: Mr. Perdue, any redirect?

24 PERDUE: No, the District rests.

25 THE COURT: Thank you, counsel. I see it's getting late, so let's reconvene tomorrow afternoon for  
26 argument. We will get you a transcript with our new simultaneous transcription equipment.  
27 Before we adjourn, however, let me say I think it's pretty clear Annie has established that  
28 waiting for a trial doesn't do her any good. If her legal theory is right, she will suffer  
29 irreparable harm. You have adequately briefed the issue whether the Title IX regulations  
30 comport with constitutional equal protection standards so do not argue that point again. I  
31 want you to focus your arguments on the likelihood of plaintiff's success on the merits.

# **LIBRARY**

*Whitford v. Newberry*  
*Middle School District*

**Title IX of the Education Amendments of 1972**  
**20 United States Code § 1681**

- (a) No person in the United States shall, on the basis of gender, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

**34 Code of Federal Regulations § 106.41. Athletics.**

- (a) General. No person shall, on the basis of gender, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
- (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams in a particular sport for members of each gender where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one gender but operates or sponsors no such team for members of the other gender, and athletic opportunities for members of that gender have previously been limited, members of the excluded gender must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of this paragraph, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.
- (c) Equal opportunity. A recipient that operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both genders. In determining whether equal opportunities are available, the following factors will be considered:
  - (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both genders;
  - (2) Provision of equipment and supplies;
  - (3) Scheduling of games and practice time;
  - (4) Travel and per diem allowance;

- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services; and
- (10) Publicity.

Unequal aggregate expenditures for members of each gender or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams may be considered in assessing equality of athletic opportunity for members of each gender.

## Metcalfe v. Homer School District

United States Court of Appeal for the Fifteenth Circuit (1998)

Ryan Metcalf, a male student at Homer High School in Homer, Franklin, alleges that he is unlawfully precluded on the basis of his gender from playing interscholastic field hockey because he is not allowed to compete for a place on the only field hockey team at his school, which is the girls' team. The district court ruled in favor of Ryan, under Title IX of the Education Amendments of 1972.

The District argues that its policy prohibiting boys from being members of the girls' field hockey team falls within both of the exceptions set forth in 34 C.F.R. § 106.41 (b) concerning the obligations placed upon a recipient when it sponsors a team for members of only one gender and not the other gender. When the sport is a contact sport, the recipient can provide a team for only one gender. When the sport is a non-contact sport, the recipient must provide an opportunity for the excluded gender to try out for the team only when "athletic opportunities for members of that gender have previously been limited." *Id.*

The contact sport exception is the broadest exception under Title IX. Whether field hockey is a contact sport depends on whether it is a sport "the purpose or major activity of which involves bodily contact." *Id.* An expert testifying on plaintiff's behalf stated that "field hockey is technically, and according to the international rules that govern the game, a

non-contact sport. Almost all bodily contact or threatened bodily contact between players is a violation or foul. Any physical contact is incidental."

The District offered its own expert, who explained that the major activities of the sport of field hockey involve running up and down the field attempting to score a goal or prevent the other team from doing so. She stated that these activities "inevitably produce and involve bodily contact." She concluded that field hockey is a contact sport because bodily contact regularly occurs throughout the course of any competitive field hockey game.

Both parties agreed that the "purpose" of field hockey, unlike wrestling, boxing or football, does not involve bodily contact. The district court held that "no major activity of field hockey involves bodily contact and it is, therefore, not a contact sport." We disagree.

The district court's inquiry as to the major activity suggests that bodily contact can be deemed a "major activity" of a sport only if it is sanctioned activity. While the fact that the rules penalize bodily contact is an important factor in determining whether the *purpose* of field hockey involves bodily contact, the regulation does not allow the inquiry to end there. It requires a further inquiry into whether the *major activity* of field hockey involves bodily contact.

In making this determination, we consider it significant that the rules require mouth protectors and shin guards, prohibit spiked shoes, and prohibit the wearing of jewelry. Such a level of protective rules suggests that bodily contact does in fact occur frequently. Further, even if bodily contact is incidental to the game, it may be an inevitable and frequent occurrence in the game. In sum, both the level of protective rules as well as the inevitability and frequency of bodily contact in the actual game must be analyzed to determine whether the major activities of a sport involve bodily contact.

Applying these factors, we find that field hockey is a contact sport under 34 C.F.R. § 106.41(b), and reverse. Because Ryan's Title IX claim is disposed of by our finding that field hockey is a contact sport, it is not necessary to inquire into whether the athletic opportunities of males at Homer High have previously been limited.



## Milley v. Arlington School District

United States Court of Appeal for the Fifteenth Circuit (2000)

Tommi-Jo Milley is an extraordinarily gifted female baseball pitcher. Since "T.J." was seven years old, she has pitched in organized baseball teams in programs run by the Arlington Park District and the Arlington Little League. She has also participated in the U. S. Baseball Association Batter-Up and Elks Club competitions. During this period the teams T.J. played on have won 95% of their games. She has received numerous awards recognizing her abilities. In all of these programs, T.J. played with boys.

In the fall of 1999, T.J., now 11, enrolled in sixth grade at Arlington Junior High School in Des Plaines, Franklin. She was then presented with her first opportunity to play interscholastic baseball. There is only one baseball team at Arlington and that is a boys' baseball team. Defendant in this case, the Arlington School District, denied T.J. permission to try out for the boys' baseball team. T.J. and her parents filed this action, seeking injunctive relief requiring defendants to permit her to try out for the boys' team. The district court's grant of summary judgment for the plaintiff is now before us on appeal.

Plaintiff challenges her exclusion from the tryouts under Title IX of the Education Amendments of 1972 and the regulations thereunder. 34 C.F.R. § 106.41 subsection (b) requires a recipient of federal funds who sponsors a team in a particular sport only for

members of one gender to allow members of the excluded gender to try out for the team if the sport is a non-contact sport and athletic opportunities for members of the excluded gender have previously been limited. The parties stipulate that baseball is not a contact sport. They agree that the sole question on appeal is whether "athletic opportunities . . . have previously been limited" for girls at Arlington.

In interpreting this language, the district court considered the absence of a girls' or a co-ed baseball team at Arlington and held that the District was in violation of Title IX because opportunities for girls in baseball have previously been limited. The court interpreted the regulation's inquiry as sports- specific. We disagree.

The phrase "have previously been limited" must be understood in the context of the entire athletic program. If the district court's construction were adopted, there could never be a situation in a non-contact sport in which a team was limited to a single gender without a corresponding team for the other gender because, by definition, the opportunities in that particular sport would be limited for the excluded gender. It would mean that girls would always be able to argue that they had previously limited athletic opportunities just because certain sports have traditionally been considered boys' sports, such as baseball.

Our view is consistent with subsection (c) of the regulation, which enumerates ten factors that will be considered in determining whether interscholastic programs provide equal athletic opportunity. That subsection further provides, "Unequal aggregate expenditures for members of each gender or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams may be considered in assessing equality of athletic opportunity for members of each gender." Thus, it is clear that the obligation of an educational institution in complying with the requirements of Title IX 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.

The district court's grant of summary judgment for the plaintiff is reversed.