

No. 10-3595

United States Court of Appeals for the Seventh Circuit

AMBER PARKER, *ET AL.*,

Plaintiffs-Appellants,

v.

INDIANA HIGH SCHOOL ATHLETIC ASSOCIATION, *ET AL.*,

Defendants-Appellees.

On Appeal from the United States District Court for the
Southern District of Indiana, Civil Action No. 09-cv-00885
Hon. William T. Lawrence

**Brief for *Amici Curiae* Women's Sports Foundation; National
Organization for Women Foundation; Southwest Women's Law
Center; California Women's Law Center; National Association of
Social Workers (Indiana Chapter); Pick Up The Pace; Sargent
Shriver National Center on Poverty Law; Legal Voice; The Legal
Aid Society - Employment Law Center; Women's Law Project; and
Hadassah, The Women's Zionist Organization of America,
in Support of Appellants and Reversal**

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Appellate Court No: 10-3595

Short Caption: Amber Parker, et al. v. Indiana High School Athletic Association, et al.

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Not applicable

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Not applicable

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INTEREST OF THE *AMICI CURIAE*¹

The Women's Sports Foundation (WSF) is a nonprofit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and to creating an educated public that supports gender equity in sports. The WSF distributes over \$1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquires per year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of girls and women in sports.

The National Organization for Women Foundation (NOW Foundation) is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with hundreds of thousands of contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goal has

¹ No one other than *amici* and their counsel authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting the brief.

been to achieve equal rights for all women and to assure that women and girls have equal access to all aspects of education, including high school athletics.

The Southwest Women's Law Center (SWLC) is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by (i) eliminating gender bias, discrimination and harassment; (ii) lifting women and their families out of poverty; and (iii) ensuring that women have full control over their reproductive lives through access to comprehensive reproductive health services and information. The SWLC has worked diligently to protect the rights of New Mexico girls and women under Title IX. In January 2009, the SWLC worked to pass the School Athletics Equity Act in New Mexico, which mandates reporting of funding and participation in athletics in both high and middle schools. These figures must be made public to ensure equal opportunity for female and male athletes.

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. It was established in 1989 to address the comprehensive civil

rights of women and girls in the following priority areas: gender discrimination, women's health, reproductive justice and violence against women. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education. The issues raised in this case will have an enormous impact on the rights of women and girls to participate fully in educational and athletic programs.

The National Association of Social Workers (NASW) is the largest professional membership organization of social workers in the world, comprising nearly 145,000 social workers, with chapters located in all fifty states, the District of Columbia, the Virgin Islands, Guam, and Puerto Rico, as well as abroad. The Indiana Chapter of NASW has 2,571 members. Since its inception in 1955, NASW has worked to develop and maintain high standards of professional practice, to advance sound social policies, and to strengthen and unify the social work profession. NASW has long been committed to working toward the elimination of all forms of discrimination against women. NASW supports vigorous enforcement of Title IX and the development of practices and programs that empower women and girls, enabling them to resist gender stereotypes, develop positive self-esteem and body image, and chal-

lenge sexual double standards, so girls and women might develop the power and sense of entitlement that fuels self-advocacy. NASW's policies and the work of its members provide NASW with expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

Pick Up the Pace is a San Francisco-based nonprofit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting-edge gender bias issues through public education and legal advocacy as *amicus curiae* before state and federal courts, including the United States Supreme Court.

The Sargent Shriver National Center on Poverty Law (Shriver Center) champions social justice through fair laws and policies so that people can move out of poverty permanently. The Shriver Center's methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communi-

ties building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to girls and women's access to education at all levels that provide fair and equal opportunities both in the classroom and on the playing fields. Discriminatory policies and practices have a negative impact on girls and young women's immediate and long-term educational and employment opportunities, and their economic security. Nondiscrimination in all aspects of education is vital if women are ever to obtain true economic well-being. The Shriver Center has a strong interest in the enforcement of Title IX and the eradication of unfair and unjust policies and practices that limit girls and young women's educational opportunities and serve as a barrier to economic equity.

Legal Voice is a regional nonprofit public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has been involved in both litigation and legislation in the Pacific Northwest aimed at ending all forms of discrimination against women. As part of that effort, Legal Voice has been dedicated

to protecting and ensuring women's rights to equality in education and athletics, and has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country in cases under Title IX and state law to ensure equal athletic opportunities for girls and women.

The Women's Law Project (WLP) is a nonprofit public interest law firm with offices in Philadelphia and Pittsburgh, PA. Founded in 1974, the WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, the WLP engages in high-impact litigation, advocacy, and education. The WLP has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under Title IX. The WLP has worked throughout its history to eliminate sex discrimination in athletics, representing student athletes, coaches, and other players in the athletic arena in their efforts to achieve equal treatment and equal opportunity, and pursuing public policy and educational initiatives aimed at realizing Title IX's goal of equality in athletics.

The Legal Aid Society - Employment Law Center (LAS-ELC) is a nonprofit public interest law firm whose mission is to protect, preserve,

and advance the rights of individuals from traditionally under-represented communities in cases involving access to education and employment non-discrimination. Since 1970, the LAS-ELC has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor. The LAS-ELC's Title IX K-12 Equality Project's focus is bringing claims on behalf of female athletes denied equal participation opportunities and equal treatment and benefits in violation of Title IX. The LAS-ELC's interest in vigorously enforcing this country's antidiscrimination laws is longstanding.

Hadassah, The Women's Zionist Organization of America, Inc., is the largest women's and the largest Jewish membership organization in the United States, with nearly 300,000 members. While traditionally known for its role in funding health care and other initiatives in Israel, Hadassah also has had a longstanding commitment to the advancement of healthcare and the protection of civil rights in the United States, particularly the rights of women and the Jewish community. Hadassah has long been committed to removing barriers to women's participation in society and to advocating for improvements in women's health. Title

IX serves these goals by promoting equality for women and participation by women in sports that provide an opportunity for beneficial exercise.

All parties have consented to the filing of this *amicus* brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The scheduling of boys' sports games during "prime time" and girls' sports games at less desirable times has long been a subject of deep concern among legislators, parents, and athletes. In 1975, Senator Birch Bayh, the Senate sponsor of Title IX, condemned the relegation of "female athletics to . . . second-rate schedules," characterizing it as "fundamentally wrong." Sex Discrimination Regulations, Hr'gs Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. and Labor, 94th Cong. 171 (1975). A 1976 Title IX manual commissioned by the U.S. Department of Health, Education, and Welfare (HEW) observed that "women's teams have often been scheduled to practice or compete at inconvenient times," and "[t]he lack of opportunity for women's teams to practice and compete can, perhaps more than any other factors, dry up burgeoning interest in athletic competition by women." Margaret Dunkle, *Competitive Athletics: In Search of Equal Opportuni-*

ty, in SUSAN WARE, TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 64, 64 (2007). These concerns are reflected in the Title IX regulations, which expressly include “[s]cheduling of games” as a factor for courts to consider when “determining whether equal opportunities are available.” 34 C.F.R. § 106.41(c)(3).

Unfortunately, as this case illustrates, “[t]he issue of scheduling is a persistent one.” WELCH SUGGS, A PLACE ON THE TEAM: THE TRIUMPH AND TRAGEDY OF TITLE IX 149 (2005). *See also* KATHRYN M. REITH, PLAYING FAIR: A GUIDE TO TITLE IX IN HIGH SCHOOL & COLLEGE SPORTS 22 (2d ed. 1994) (“One issue that often arises is that of game times for boys’ teams versus girls’ teams in high schools.”). “Countless OCR [Office of Civil Rights of the U.S. Department of Education] agreements have required schools to move girls’ contests into prime time.” SUGGS, *supra*, at 149. *See also* REITH, *supra*, at 22 (observing that OCR found a violation in Ohio school district’s scheduling 64 boys’ games—but only six girls’ games—on Friday evenings or Saturdays).

Title IX guidebooks continue to counsel against such scheduling inequities.² And leagues are beginning to equalize their schedules on their own in order to avoid disadvantaging female athletes. *See, e.g., Changes Come to Schuylkill Schedule*, REPUBLICAN HERALD, available at <http://republicanherald.com/sports/changes-come-to-schuylkill-schedule-1.1092950#> (Jan. 20, 2011) (reporting that basketball league changed its scheduling of boys' and girls' games to "give[] girls' teams the chance to play on a 'premier' night, Friday"); Gary Brown, *Many DIII Leagues Have Addressed Scheduling Concern*, NCAA.org, available at <http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Latest+News/2010+news+stories/August+latest+news/Many+DIII+leagues+have+addressed+scheduling+concern> (Aug. 11, 2010) (reporting on "[a] recent Great Lakes Intercollegiate Athletic Conference action to reverse the order of its men's and women's basketball games during conference doubleheaders this year in response to an inquiry from the [OCR]").

² *See, e.g.,* LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, TITLE IX 61 (2005) ("Access to prime time is a benefit that you need to provide equally. The opportunity to have parents see their children play is important to kids. The boys shouldn't be the only ones who have that opportunity."); REITH, *supra*, at 22 ("Always scheduling the boys' team in a particular sport for a preferred time that makes it easier for parents and friends to attend is not permissible if the girls' team plays at less convenient times.").

The district court in this case nevertheless concluded that the disparity in the scheduling of girls’ and boys’ basketball games—in which nearly all of the boys’ games were slated for “prime time,” but half the girls’ games were assigned much less desirable midweek slots—was not substantial enough to constitute a violation of Title IX.³ Dkt. No. 127 (“Order”) (A-2) at 10. The district court identified and quickly rejected three potential harms to the female players that plaintiffs had never raised in their briefing: “depriv[ation] . . . of role models, inhibit[ion of] skills development, [and] prevent[ion of] team-building.” *Id.* at 9. But the district court inexplicably ignored several other harms that form the basis of the Title IX violation in this case and that *were* raised by the plaintiffs in the briefing below: (1) limiting the opportunity of girls to play before a larger audience, (2) sending girls a message of inferiority, and (3) imposing disproportionate or unnecessary academic burdens on girls. Accordingly, *amici* file this brief to explain why such harms are far from negligible, and in fact are serious, long-lasting, and precisely the type of harms Title IX was enacted to prevent.

³ *Amici* adopt appellants’ definition of “prime time.” *See* Appellants’ Br. at 3.

ARGUMENT

I. Unequal Scheduling Limits The Opportunity For Girls Basketball Players To Compete Before A Larger Audience.

The opportunity to play before an audience is fundamental to the experience of sports. When they think of game day, few people picture a near-empty gym in the middle of the week—the atmosphere of the girls’ weeknight games in this case. *See* Affidavit of J.L.P. (“J.L.P. Aff.”) at 3 (Dkt. No. 96-6) (“the bleachers are nearly deserted” and there are “no cheerleaders or dance squad”). Instead, most people picture a gym full of boisterous spectators, with a band and cheerleaders leading the crowd—the atmosphere of the girls’ and boys’ “prime time” games in this case. *See id.* (“prime time” boys’ games enjoy a “packed” student section and “dance squad cheerleaders”); Affidavit of Amber Parker (“Parker Aff.”) at 3 (Dkt. No. 96-4) (“prime time” girls’ games enjoy “large crowds,” “substantial student and community support,” and a “band, cheerleaders, and dance teams”). But because of unequal scheduling, the plaintiffs and their teammates largely missed out on the experience of “run[ning] out onto the floor with the gym filled with applause and cheering from their friends and family.” J.L.P. Aff. at 4.

The district court’s dismissive treatment of the issue notwithstanding, the opportunity to play before an audience is far from inconsequential. To the contrary, it goes directly “to *encourag[ing]* women to participate in sports”—“a central aspect of Title IX’s purpose.” *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 768 (9th Cir. 1999) (emphasis in original).⁴ For at least two reasons, the size and enthusiasm of the audience are critical factors in creating an environment that encourages girls to play team sports.

First, the energy of the crowd feeds the energy of female athletes during the game, and vice versa. Athletes feel “a certain thrill in knowing that [their] gift, [their] talent, was received and appreciated.” Todd W. Crosset, *Role Model: A Critical Assessment of the Application of the Term to Athletes*, in JOHN R. GERDY, *SPORTS IN SCHOOL: THE FUTURE OF AN INSTITUTION* 31, 37 (2000). And “[p]art of the appeal of sport is that the audience believes (and rightly so) that it can have an effect on the emotional state of the players and thus impact the final result.” *Id.* at

⁴ See also Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX’s Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 412 (2010) (“Courts and scholars have stated that Title IX’s goal is to encourage women to participate in sports by giving them equal participation opportunities.”).

36. In fact, it has been recognized that “[b]oys’ interest in sports might . . . be fueled by a strong audience participation component, which is less active for girls.” WSF, GO OUT AND PLAY: YOUTH SPORTS IN AMERICA 143 (Oct. 2008), *available at* <http://www.womenssportsfoundation.org/~media/Files/Research%20Reports/Go%20Out%20and%20Play%20report%209%2018%2008.pdf>.

Second, and more measurably, the presence of an audience tells young girls that their participation in athletics is supported. Research has shown that “[s]upport and encouragement by family members, especially by parents, are important in young athletes’ initial involvement in sport, as well as their continued participation and performance.” Stephen S. Leff & Rick H. Hoyle, *Young Athletes’ Perceptions of Parental Support and Pressure*, 24 J. OF YOUTH & ADOLESCENCE 187, 189 (1995) (citations omitted). Indeed, an audience may be *more* important to female athletes than to their male counterparts: Research suggests that “males require less support than do females” because the public has a “more favorable view toward males participating in sport.” *Id.* at 201.

The importance of playing before an audience has been recognized by the federal agency primarily charged with enforcing Title IX, as well as by the federal courts, for several decades. HEW's 1979 Policy Interpretation cautions recipients of federal funding against actions that "limit the potential for women's athletic events to rise in spectator appeal." Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 FED. REG. 71413, 71416 (Dec. 11, 1979). The OCR has stressed the importance of scheduling competitions in such a way that "allows athletes of both sexes an equivalent opportunity to compete before audiences." 2/13/97 Letter to Comm'r of Ind. High Sch. Athletic Ass'n at 2 ("2/13/97 OCR Letter") (Dkt. No. 96-7).

In *Daniels v. School Board of Brevard County*, 985 F. Supp. 1458, 1461 (M.D. Fla. 1997), the district court found that the plaintiffs had a substantial likelihood of prevailing on a Title IX claim and issued injunctive relief based in part upon the fact that "the boys' baseball field is lighted for nighttime play; the girls' softball field is not." *Id.* at 1461. As a result, the boys' team—but not the girls' team—was able to play at night. The court found this inequity to be material because "[n]ighttime

play affects *spectator attendance, parental involvement, and player and spectator enjoyment*. Nighttime games have a ‘big league’ quality not associated with daytime play.” *Id.* at 1461 (emphasis added). In *Communities for Equity v. Michigan High School Athletic Association*, 178 F. Supp. 2d 805 (W.D. Mich. 2001), the district court suggested that scheduling decisions that deprive girls’ teams of, among other things, the same “attention” paid to their male counterparts may violate Title IX. *See id.* at 818-19 (finding “credible evidence” that the “scheduling of girls’ basketball in the fall disadvantages girls” because they “do not get to participate in ‘March Madness’ or the excitement and publicity surrounding this time period”), *aff’d*, 377 F.3d 504 (6th Cir. 2004), *cert. granted and judgment vacated on other grounds*, 544 U.S. 1012 (2005), *aff’d on remand*, 459 F.3d 676 (6th Cir. 2006), *cert. denied*, 549 U.S. 1322 (2007).

Indeed, it is commonplace for the size of the audience to be viewed as a proxy for the success, and the significance, of an athletic program. The Ninth Circuit observed that “[t]his past summer, 90,185 enthusiastic fans crowded into Pasadena’s historic Rose Bowl for the finals of the Women’s World Cup soccer match,” and commented that the American

team's victory in that match "sparked . . . a realization by many that women's sports could be just as exciting, competitive, and lucrative as men's sports." *Neal*, 198 F.3d at 773. The Ninth Circuit continued by noting that "Title IX has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, [and] the agony of defeat" *Id.* Moreover, spectator support is often a factor in setting a coach's pay. *See generally Weaver v. Ohio State Univ.*, 71 F. Supp. 2d 789, 800 (S.D. Ohio 1998) ("In determining whether men's and women's coaching positions are equal, courts have looked to such factors as . . . the amount of spectator attendance and community interest in the sport."), *aff'd*, 194 F.3d 1315 (6th Cir. 1999).

Accordingly, it would be naïve to suggest that the size of the audience is a trivial matter, or is an interest that the courts may ignore in assessing whether Title IX has been violated.

II. Scheduling Decisions That Convey A Message Of Inferiority To Female Athletes Violate Title IX.

The district court completely ignored the strong message of inferiority conveyed to the members of the girls' basketball team by the defendants' scheduling decisions. That was error. Courts applying Title IX have repeatedly "recogniz[ed] that the significance of . . . discrimina-

tion goes well beyond tangible differences in treatment,” and the courts consequently have shown “sensitivity to the harms of discrimination from the perspective of the students who experience it.” DEBORAH L. BRAKE, *GETTING IN THE GAME: TITLE IX AND THE WOMEN’S SPORTS REVOLUTION* 154 (2010).

Accordingly, courts have found violations of Title IX where, among other things, disparities “signal[] to the girls that they are not as important as the boys.” *Landow v. Sch. Bd. of Brevard Cty.*, 132 F. Supp. 2d 958, 964 (M.D. Fla. 2000). *See, e.g., McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295 (2d Cir. 2004) (“Scheduling the girls’ soccer season out of the championship game season sends a message to girls on the teams that they are not expected to succeed and that the school does not value their athletic abilities as much as it values the abilities of the boys.”); *Cmtys. for Equity*, 178 F. Supp. 2d at 836 (“the practice of scheduling only girls’ sports, but not boys’ sports, in disadvantageous and/or non-traditional seasons sends the clear message that female athletes are subordinate to their male counterparts, and that girls’ sports take a backseat to boys’ sports in Michigan”).

In this case, the defendants’ decision to schedule boys’ basketball games during times associated with “prestige” and “‘big league’ quality” (*Landow*, 132 F. Supp. 2d at 965 (nighttime games)), and girls’ basketball games at times that “prevent[] many potential spectators from attending[,] sends the message that women’s and girls’ sports are not important.” Note, *Cheering on Women and Girls in Sports: Using Title IX to Fight Gender Role Oppression*, 110 HARV. L. REV. 1627, 1630 (May 1997). “When girls are treated unequally as compared to boys, girls receive the psychological message that they are ‘second-class’ or that their athletic role is of less value than that of boys.” *Cmtys. for Equity*, 178 F. Supp. 2d at 837.

This message can discourage girls from playing basketball—a traditionally “male” sport—altogether. “There can . . . be little doubt that . . . second-class treatment [for female athletes] is at least part of the reason why women do not take up, or continue in, sport at the same rate as men.” Dionne L. Koller, *Not Just One of the Boys: A Post-Feminist Critique of Title IX’s Vision for Gender Equity in Sports*, 43 CONN. L. REV. 401, 405-06 (2010). See also *Neal*, 198 F.3d at 769 (“where society has conditioned women to expect less than their fair

share of the athletic opportunities, women's interest in participating in sports will not rise to a par with men's overnight"); Ruth Ference & K. Denise Muth, *Helping Middle School Females Form a Sense of Self Through Team Sports and Exercise*, 13 WOMEN IN SPORT AND PHYSICAL ACTIVITY J. 28, 33 (Spring 2004) (“[Y]oung females who would like to participate [in sports] choose not to because of gender inequities that still exist in sports. They learn that males get more attention through media coverage, accolades, and money in sports.”).

Moreover, “unequal treatment such as prime time game scheduling” may result in girls “develop[ing] unhealthy coping mechanisms to rationalize away the unfair treatment,” such as lowered expectations. *Cmtys. for Equity*, 178 F. Supp. 2d at 837-38. And the effects are hardly fleeting. The message of inferiority can “stay[] with girls throughout adulthood and can extend to careers and interpersonal relationships. . . . [A] girl will recognize she is being discriminated against but expect that this will continue for the rest of her life and assume she must adjust to the discrimination rather than seek to change it.” *Id.*

Finally, disparate scheduling of boys' and girls' games tends to make the entire community view the girls' team as less important than

the boys' team. Such discrimination "stunt[s] the development of a base of women's sports fans" (Note, *supra*, at 1630) by entrenching in the community the idea that boys' games have a "higher value." See EILEEN McDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORTS 240 (2008) (discussing impact of ticket cost on perception of men's and women's sports).⁵ And, as researchers have observed, "the impact of sport participation on a female's self-worth could . . . be negligible (or even negative) were she concerned about the nontraditionality of her behavior *or about others' negative reactions to it.*" Erin L. Richman & David R. Shaffer, "*If You Let Me Play Sports*": *How Might Sport Participation Influence the Self-esteem of Adolescent Females?* 24 PSYCHOL. OF WOMEN Q. 189, 197 (2000) (emphasis added).⁶

⁵ Accordingly, "[d]iscriminatory treatment of girls also has an effect on boys." *Cmtys. for Equity*, 178 F. Supp. 2d at 838. In particular, "[b]oys receive the message that girls are inferior and are harmed by that message." *Id.*

⁶ *Cf.* David R. Shaffer & Erin Wittes, *Women's Precollege Sports Participation, Enjoyment of Sports, and Self-esteem*, 55 SEX ROLES 225, 231 (2006) ("Sports participation appears to foster the self-esteem of girls who enjoy sporting activities because they perceive themselves as benefiting in some way by their participation. But in the absence of these positive outcomes, participating in sporting activities may have little psychosocial impact or could actually undermine self-worth."); Alyce

The record in this case supports a finding that the girls basketball players and the school community at large—boys and girls alike—have internalized the clear message sent by the defendants’ scheduling decisions. J.L.P. stated that “because of our scheduling no one comes to our games to cheer us on and make us feel important.” J.L.P. Aff. at 3. Amber Parker stated that she heard a cheerleader state: “[T]he girls’ teams just aren’t as good. If you were, they would schedule you to play on the weekend.” Parker Aff. at 6. A male student echoed this sentiment: “[W]hen they [the girls] get really good, they will let them play on a Friday night and then I will come and watch them.” *Id.*

In sum, the disparate scheduling at issue in this case is part of a long tradition of “[g]irls and women . . . not receiv[ing] the same opportunities as boys to play or the same positive reinforcement about their sports participation.” Amateur Sports Act: Hr’g Before the Subcomm. on Consumer Affairs, Foreign Commerce & Tourism of the S. Comm. on Commerce, Sci., & Transp., 104th Cong. 196 (1995) (statement of Donna

Holland & Thomas Andre, *Athletic Participation and the Social Status of Adolescent Males and Females*, 25 YOUTH & SOC’Y 388, 405 (Mar. 1994) (“a greater role conflict for female athletes would be expected to occur among participants in . . . basketball . . . , because this participation presents a greater departure from traditional feminine expectations than does participation in [certain other] sports”).

Lopiano, Exec. Dir., WSF). That is precisely the type of discrimination that Title IX is designed to correct.

III. Unequal Scheduling Places Disproportionate Academic Burdens On Female Athletes.

The district court brushed aside the plaintiffs' evidence that the disparate scheduling decisions at issue in this case place a disproportionate academic burden on girls by forcing them to juggle their schoolwork with midweek games. That, too, was error.

The executive branch and the federal courts have expressed concern that inequitable scheduling may academically disadvantage female students. For example, the OCR has recognized that disparate scheduling of girls' and boys' basketball games may "have a disproportionately negative effect on the academic studies of the members of the girls basketball team." 2/13/97 Letter at 2. Accordingly, the OCR trains its investigators to determine whether game schedules "conflict with classes," or are otherwise inconvenient. OCR, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 37 (April 1990), *available at* <http://www.eric.ed.gov/PDFS/ED400763.pdf>. *See also Cmtys. for Equity*, 178 F. Supp. 2d at 819 (observing that one basketball player testified that "she and her

teammates had to bring homework to do at the games or on the bus because we had school the next day”) (internal quotation marks omitted).

That concern is justified in this case. J.L.P. stated in her affidavit that playing on weeknights—when the varsity games end as late as 10 p.m.—“forces [girls’ basketball players] to stay up extremely late to finish homework and study for tests.” J.L.P. Aff. at 2. J.L.P. stated that she finds it “really difficult . . . to stay up and do [her] homework” because she is “[e]xhausted from the games,” and that she goes to school the next day “feeling nearly as tired as [she] did before [she] went to sleep.” *Id.* J.L.P. stated that two players from the boys’ basketball team, who have only one weeknight game per season, have commented to her, “I don’t know how you do this.” *Id.* at 3. Amber Parker testified that her daughter’s grades were adversely affected by having to stay up late. Parker Aff. at 8.

Placing academic burdens on female—but not male—basketball players discourages girls from playing on the basketball team in the first place. It also puts the girls who do play at a distinct disadvantage in the classroom, where they compete with their male counterparts. This, too, is plainly a violation of Title IX.

* * *

The defendants' decision to schedule nearly all of the boys' basketball games in "prime time" while relegating half the girls' games to far less desirable weeknight slots deprives the girls' team of a large and enthusiastic audience; sends a clear message that the girls' team is inferior to and less important than the boys' team; and places a disproportionate burden on the girls' ability to balance schoolwork and sports. The court below brushed all of these effects aside, finding that "the School Defendants' conduct does not hinder the Plaintiffs' development of basketball skills," and that it consequently did not constitute a violation of Title IX. Order (A-2) at 10. The district court's crabbed reading of Title IX cannot be squared with the many authorities holding that the statute's purpose goes well beyond affording girls the opportunity to develop athletic skills. This Court should reverse.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) the undersigned counsel for the *amici curiae* hereby certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 4,750 words, excluding the parts of the brief exempted by Fed. R. App. R. 32(a)(7)(B)(iii); and

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Dated: January 31, 2011.

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CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that, pursuant to Circuit Rule 31(e), this brief has been filed electronically.

Dated: January 31, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2011 fifteen copies of this *amicus* brief were dispatched to the Clerk of the Court, and two copies of the brief were served on counsel for the parties via overnight delivery and email, at the addresses indicated below:

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