IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH C. BARRETT, et al.,	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 03-CV-4978
	:	
WEST CHESTER UNIVERSITY OF PENNSYLVANIA OF THE STATE SYSTEM OF HIGHER EDUCATION, et al.	:	

MEMORANDUM & ORDER

Surrick, J. **November ___, 2003**

I. INTRODUCTION

Plaintiffs, eight[1] members of the former West Chester University Women's Gymnastics Team, bring this lawsuit[2] against West Chester University ("WCU"); Madeleine Wing Adler, President of WCU; Edward M. Matejkovic, Director of Athletics; and Barbara Cleghorn, Assistant

[1] As originally filed, this lawsuit included a ninth plaintiff, Cecile Allen. Plaintiffs subsequently withdrew Allen as a Plaintiff, agreeing that she lacked the requisite standing for the preliminary injunction because she had transferred to Penn State University after West Chester University announced its decision to eliminate the gymnastics program. Plaintiffs agreed to the withdrawal "so long as it was (i) without prejudice to any claim she [Allen] might make in separate proceedings, and (ii) without prejudice to her reentering this litigation in the event that the scope of remedies sought make that appropriate." (Mem. of Law in Opp'n to Defs.' Mot. to Dismiss at 13.) We will dismiss Allen without prejudice.

[2] As originally filed, Plaintiffs brought this lawsuit as a class action. However, Plaintiffs did not subsequently move for class certification. Accordingly, we proceed with only the eight named individuals as plaintiffs to this lawsuit.

Director of Athletics for Eligibility and Compliance, alleging gender discrimination in education under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq. Presently before the Court is Plaintiffs' Motion for a Preliminary Injunction Directing Defendants to Reinstate the West Chester University Women's Gymnastics Team. For the following reasons, the Preliminary Injunction will be granted.

II. FACTUAL BACKGROUND

WCU is a public university, one of fourteen universities that comprise the Pennsylvania State System of Higher Education. As a member of the National Collegiate Athletic Association ("NCAA") Division II,[3] WCU currently provides its students with twenty-two intercollegiate athletic teams, ten for men and twelve for women. The most recent change in the composition of these twenty-two teams came on April 28, 2003, when WCU announced that it would eliminate both women's gymnastics and men's lacrosse. At that same time, WCU added women's golf to the already existing men's golf program. Immediately upon hearing the announcement, Plaintiffs began their attempts to have the gymnastics program reinstated.

Plaintiffs wrote a letter to the Office of the President at WCU, expressing their desire to have the team reinstated. The letter went unanswered. (Tr. at 29:10-16, 33:12-15, S. Herrmann, Sept. 29, 2003.) Plaintiffs also consulted with concerned parents. One such parent, James Barrett, contacted the Department of Education's Office for Civil Rights ("OCR") and filed a complaint with that office on May 3, 2003. On May 7, 2003, Barrett received a notice indicating that his complaint was being processed. On or around May 18, 2003, Barrett also contacted Trial Lawyers for Equal Justice

[3] While officially a Division II university, many of WCU's intercollegiate athletic teams actually compete across the three NCAA divisions.

("TLEJ"), and began the process of retaining their services.[4] Before the end of May, Brenda Johnson, the Investigative Team Leader with OCR, contacted Barrett regarding the complaint. At that time, Barrett believed OCR was acting on the complaint. Sometime in early July, Barrett learned that OCR had drafted a letter to WCU, but that the letter was "hung up" in the Department of Education in Washington, DC. On or around July 7, 2003, Barrett withdrew the complaint with OCR because it became apparent that OCR would be unable to act quickly enough to have the team reinstated with sufficient time to prepare for the 2004 season. (Tr. at 15:9-25, 17:6-19:25, J. Barrett, Oct. 1, 2003.)

On July 25, 2003, shortly after TLEJ agreed to represent Plaintiffs, TLEJ mailed a demand letter to WCU. The July 25th letter stated that TLEJ believed that WCU violated Title IX when it eliminated the women's gymnastics team. The letter went on to request a meeting with WCU in order to avoid costly litigation. TLEJ received no response. After one week, TLEJ contacted WCU and learned that many of the WCU representatives were on vacation and unavailable to meet. Sometime later, TLEJ spoke with Jeff Cooper, an attorney for WCU, who stated that his clients were not interested in meeting or settling the matter. Despite Cooper's initial statement, a meeting finally took place. On August 26, 2003, TLEJ attorney, Leslie Brueckner, and Plaintiffs' local counsel, Sharon McKee, represented Plaintiffs in a meeting with WCU Athletic Director, Edward Matejkovic; Vice President for Student Affairs, Matthew Brickett; and at least two other WCU administrators. Plaintiffs' attorneys detailed what they believed to be the strengths of Plaintiffs' case

[4] As a public interest law firm, TLEJ must obtain the approval of its board before getting involved in any matter. In addition, TLEJ has a lengthy intake process where hundreds of claims are reviewed each month. It was not until late June or early July that Plaintiffs actually retained TLEJ as counsel. At that time, TLEJ also began the process of seeking local counsel to try the case, if needed. (Tr. at 30:3-15, 36:14-21, L. Brueckner, Oct. 1, 2003.)

and stated that they believed Plaintiffs would prevail in litigation, including damages for attorney's fees, but did not want to waste "precious time" in litigating the matter. (Tr. at 31:25-34:14, 37:19, L. Brueckner, Oct. 1, 2003.) Defendants said they would need time to consider the matter. Plaintiffs set a deadline of noon on Friday, August 29, 2003. Plaintiffs heard nothing, and on September 4, 2003, Plaintiffs filed their Complaint and present Motion for a Preliminary Injunction Directing Defendants to Reinstate the West Chester University Women's Gymnastics Team. (Id. at 37:19-21; Doc. Nos. 1-2.)

In examining the events culminating in WCU's decision to eliminate the women's gymnastics team, we begin with WCU's Athletic Department. In 1995, Matejkovic began his tenure as athletic director, the eighth such director in eight years. Matejkovic inherited a department in chaos and was immediately faced with challenges in the area of gender equity. (Tr. at 39:6-24, E. Matejkovic, Oct. 1, 2003.) Sometime in 1995, Deborah Anekstein, an administrative assistant and "pseudo athletic administrator" in the Athletic Department, drafted a memo to Matejkovic explaining what she described as WCU's shortcomings in the area of Title IX. (Id. at 40:18-42:10, E. Matejkovic, Oct. 1, 2003.) That memo indicated that Anekstein believed that WCU failed to meet the first two prongs of the accommodation test and that, at that time, it was impossible to determine whether WCU was fully and effectively meeting the interests of its female students under prong three.[5] (Pls.' Trial Ex. 86 at 553-54.)

In 1998, the Athletic Department created the Sports Equity Committee ("Committee"), "[t]o obtain a basic and working knowledge of Title IX in order to begin the task of ensuring that the athletics program is in compliance with the law." (Pls.' Trial Ex. 88 at unnumbered 2.) The

[5] The three-part test for accommodation is hereinafter discussed in greater detail.

Committee's report, issued on April 6, 2000, stated: "Upon examination of WCU's athletics program, it has been determined that (1) student athletic participation is not proportional to the rates of enrollment, and (2) WCU does not have continuing program expansion for women (the underrepresented sex)." (Pls.' Trial Ex. 96; Recommendations of the Sports Equity Committee for Achieving Gender Equity in Athletics at 1.) The Committee then stated that because it could not initially determine whether WCU was in violation of prong three, it conducted a student survey. Based on the results of this survey, the Committee determined that WCU was "meeting the 'interests' of its students." (Id. at 1-2.) Plaintiffs question the reliability of this survey.

In May 2001, the Committee voiced its frustration with WCU's failure to take sufficient action to bring the school in compliance with Title IX in the area of coaching. In a strongly worded letter to Matejkovic the Committee stated:

> WCU continues to fall short regarding compliance. The Sports Equity Committee had been hopeful that the University would take a pro-active stand and address the coaching inequities that place the institution in violation of Title IX. We see the inaction of the University as placing West Chester University in jeopardy of civil litigation and/or investigation by the Office of Civil Rights.... We have presented a plan that will help eliminate the possibility of legal action and have been ignored. This work would be used effectively against us in a legal action. We will not be a part of setting up our institution for greater difficulties regarding a Title IX investigation or litigation.

(Pls.' Trial Ex. 101 at 772.)

Additional information regarding WCU's noncompliance with Title IX was directed to the Office of the President. On April 26, 2001, Adler instructed the Athletics Advisory Board ("Advisory Board") to conduct a review of women's gymnastics, men's tennis, men's golf, and

men's lacrosse. The Advisory Board spoke with other athletic departments and WCU officials. After considering information gathered from these sources, the Advisory Board responded to Adler citing its concern in the area of Title IX and stating: "[W]e cannot recommend dropping Women's Gymnastics." (Pls.' Trial Ex. 20; Memorandum from Moran to Adler of 11/15/01.)

During the first two months of 2003, WCU learned that it would likely suffer a five percent reduction in its state funding. The Office of Student Affairs, with the Athletic Department being its largest sub-division, was faced with the challenge of cutting $260,000 from its budget. The Athletic Department was asked to absorb between $95,000 and $98,000 of those cuts. This economic reality required that Matejkovic make difficult decisions regarding the status of WCU's Tier C athletic teams.[6] (Tr. at 166:23-25, 169:5-10, E. Matejkovic, Oct. 1, 2003.)

During the 2002-03 academic year, nine women participated on the WCU's gymnastics team. Plaintiffs lost one teammate to graduation and claim that three of their five recruits for the year 2003-2004 decided to enroll elsewhere upon hearing of the team's elimination. In addition, the announcement caused one teammate, Cecile Allen, to transfer to Penn State University. (Pls.' Mem. of Law in Supp. of Pls.' Mot. for a Prelim. Inj. Directing Defs. to Reinstate the West Chester University Women's Gymnastics Team at 9 [hereinafter Pls.' Mem. for Prelim. Inj.].) It appears that there are currently nine identifiable women who would participate on the gymnastics team if it were reinstated.

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[6] In 1999, the Athletic Department had relegated four intercollegiate teams – men's lacrosse, tennis and golf, and women's gymnastics – to Tier C status. As a result, these teams would operate on a smaller budget than those teams in Tiers A and B. (Pls.' Trial Ex. 22 at 134-35.)

Upon eliminating both the women's gymnastics and the men's lacrosse teams, WCU invited women to participate in the previously all male golf program. Plaintiffs claim that, prior to making its decision to include women in the golf program, WCU failed to investigate whether the university's women athletes were interested in participating in the sport. The Athletic Department currently has a tentative spring schedule set for the women's golf team. At this time, there is only one other competitor with a women's golf program. In addition, the future coach of the women's team, (currently serving as the coach of the men's golf team), has corresponded with women who have an interest in the women's golf team, but as of yet, there are no definite players for the team. (Tr. at 28:3-7, M. Maurer, Sept. 30, 2003.)

With this background, we turn to the role of Title IX in this case and its effect on the Athletic Department at WCU.

III. JURISDICTION

This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1331.

IV. LEGAL FRAMEWORK OF TITLE IX

Title IX prohibits gender discrimination by educational institutions receiving federal funding. The statute provides:

> "No person in the United States shall, on the basis of sex, 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...."

20 U.S.C. § 1681(a).

The parties agree that WCU is a public university and receives federal funding, thus

subjecting the university to Title IX and its regulations. The U.S. Department of Education has promulgated regulations for programs that receive federal funds. Title IX regulations in the realm of athletics provide:

> General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.[7]

34 C.F.R. § 106.41(a).

The regulations further provide that "[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). The regulations instruct that equal opportunity is defined by the following program factors:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The 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

[7] Despite the wording, the regulations do make exceptions for gender-segregated teams. 34 C.F.R. § 106.41(b).

services;

9. Provision of housing and dining facilities and services;
10. Publicity.

34 C.R.F. § 106.41(c).

The Office for Civil Rights in the Department of Education is authorized to issue regulations effectuating the provisions of Title IX. 20 U.S.C. § 902. In 1979, OCR published Policy Interpretations to provide a better understanding of Title IX's athletic provisions and the Department of Education's regulations. More specifically, the Policy Interpretation's purpose is to "'clarif[y] the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, the Policy Interpretation provides a means to assess an institution's compliance with equal opportunity requirements of the regulation which are set forth at [34 C.F.R. §§ 106.37(c) and 106.41(c)].'" Cohen v. Brown Univ., 809 F. Supp. 978, 983 (D. R.I. 1992) [hereinafter Cohen I] (citing 44 Fed. Reg. 71,415 (Dec. 11, 1979)). The clarifications of the regulations state that the test for compliance does not require recipients of federal funds to provide identical opportunities for men and women, rather, the test is a comparison of the:

> [A]vailability, quality and kinds of benefits, opportunities and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible.

44 Fed. Reg. 71,415 (Dec. 11, 1979).

Focusing on the goal of equal opportunity, the Policy Interpretation examines three areas: athletic scholarship; equal treatment as determined by recruitment and the support services

outlined in factors two through ten of section 106.41(c); and "the effective accommodation of student interests and abilities," which is identified in the first of the ten section 106.41(c) factors. Cohen I, 809 F. Supp at 984. As discussed below, Plaintiffs allege non-compliance in the areas of both treatment and accommodation. However, as with most Title IX cases, the core of Plaintiffs' case falls in the area of accommodation. The Policy Interpretation outlines a three-part test to determine compliance in the area of accommodation:

> 1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to the respective enrollments; or
> 2. Where the members of one sex have been and are underrepresented among intercollegiate athletics, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
> 3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as cited above, whether it can be demonstrated that the interests and abilities of the members of the sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,418 (Dec. 11, 1979).

Plaintiffs have the burden of proving that the school has failed to meet the first prong. If successful, the burden then shifts to the Defendants who bear the burden under the second and third prongs. Favia v. Indiana Univ. of Pa., 812 F. Supp. 578, 584 (W.D. Pa. 1993) [hereinafter Favia I]. In Cohen v. Brown Univ., 991 F.2d 888, 897-98 (1st Cir. 1993) [hereinafter Cohen II], the First Circuit explained that universities that wish to remain on the "sunny side" of Title IX

can do so by simply complying with the first factor.[8] That is, compliance is satisfied when the school provides equal participation opportunities for men and women in proportion with the male to female ratio of the student body. However, the "second and third parts of the accommodation test recognize that there are circumstances under which, as a practical matter, something short of this proportionality is a satisfactory proxy for gender balance." Cohen II, 991 F.2d at 898. In the instant case, the parties have stipulated to the fact that WCU does not meet the first prong. Therefore, the burden is on Defendants to prove that WCU complies with either the second or third prong. Favia I, 812 F. Supp at 584 (placing the burden of proof for the second and third prongs on the university).

V. DISCUSSION

In seeking a preliminary injunction, a plaintiff must show: (1) a likelihood of success on the merits; and (2) a probability of irreparable harm. Bradley v. Pittsburgh Bd. of Educ., 910 F.2d 1172, 1175 (3d Cir. 1990) (citing Hohe v. Casey, 868 F.2d 69, 72 (3d Cir. 1989)). In addition, courts must consider the effect a preliminary injunction would have on other interested persons and the public interest. Arthur Treacher's Fish & Chips, Inc. v. A & B Mgmt. Corp., 689 F.2d 1137, 1143 (3d Cir. 1982).

A. The Likelihood of Success on the Merits

1. Plaintiffs' Claim Under Title IX

[8] The most recent guidance from OCR states that universities should not consider the first prong to be a "safe harbor" any more than the second or third. That is, a university can bring itself within compliance by proving it meets any one of the three prongs. (Pls.' Mem. for Prelim. Inj. at Ex. 4.)

Plaintiffs make two distinct Title IX claims in the areas of equal treatment and equal accommodation.

a. Equal Treatment

Plaintiffs contend that women have been denied equal treatment in two separate areas: coaching support and recruiting money. The Department of Education's regulations list coaching opportunities and coaches' compensation as two of the ten factors in determining equal opportunity. 34 C.F.R. § 106.41(c)(5-6). In the area of coaching, it is apparent that WCU fails to not only provide equal coaching services to its male and female athletes, but WCU also pays the coaches of its women's teams less than the coaches of its men's teams. (Decl. of Christine Grant at ¶ 13.) Prior to April 2003, WCU offered one more team for women than for men. Despite that fact, Plaintiffs present evidence that women's teams receive "just 44% of the coaches and these coaches earn only about 40% of the dollars West Chester University spends on coaching salaries." (Id.) In the area of assistant coaches, the disparity is even greater. Men's teams benefit from twenty-one assistant coaches, while women's teams have only fourteen. Id. In addition, assistant coaches of men's teams earn nearly three times that of their counterparts on women's teams. Id.

There is even greater inequity in the number of dollars spent on recruiting for women's teams as compared to men's teams. Although recruiting is not listed as a factor under 34 C.F.R. section 106.41(c), the Policy Interpretations do identify this area as significant. Cohen I, 809 F. Supp. at 997 (identifying recruiting dollars as a "target area" under the Policy considerations and finding a disparity in Brown University's allocation of those funds). In 2001-02, women's

recruiting accounted for less than thirty-eight percent of that spent on recruiting male athletes to WCU. (Decl. of Christine Grant at ¶ 13 (analyzing the relevant figures in WCU's Equity in Athletics Disclosure Act ("EADA") reports).) Plaintiffs' assertion that WCU has failed to comply with Title IX's equal treatment requirement in the areas of coaching and recruiting appears to be correct.

b. Equal Accommodation

As stated, the core of Plaintiffs' complaint and present request for a preliminary injunction falls squarely within the area of equal accommodation. We are satisfied that Defendants have failed to meet all three prongs of the accommodation test.

i. Prong One

The parties have stipulated that WCU does not meet prong one's proportionality requirement. However, a brief discussion of this prong is helpful. According to the most recent EADA report, covering the 2001-02 academic year,[9] WCU had a student body size of 8,725. Male undergraduates were 39.2% of the student body, while females comprised 60.8%. (Pls.' Trial Ex. 33 at unnumbered 1.) However, the total number of female participants in intercollegiate athletics during that same year was only 44.6%, as compared to a male participation rate of 55.4%. (Id. at Table 1.) As both parties acknowledge, WCU fell short of compliance by 16.2%. With the elimination of both the men's lacrosse and women's gymnastics teams, that disparity will be closer to 12 or 13%. (Tr. at 185:17-187:11, B. Cleghorn, Sept. 30,

[9] Defendants were required to make the 2002-03 statistics public on October 15, 2003, which was after the conclusion of this hearing. (Pls.' Mot. for a Prelim. Inj. Directing Defs. to Reinstate the West Chester University Women's Gymnastics Team at ¶ 9.)

2003.)

ii. Prong Two

While admitting its failure in the area of proportionality, WCU contends that it meets the accommodation test by satisfying the second and third prongs. We disagree. Prong two saves non-proportional schools from violation if they can show "a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex." 44 Fed. Reg. 71,418 (Dec. 11, 1979). In support if its contention, WCU points to its efforts in the area of gender equity through the formation of its Sport Equity Committee. While we applaud WCU's recognition of its need to assess equality in athletics, we are concerned with WCU's failure to heed that committee's warning: "We see the inaction of the University [in the area of Title IX] as placing West Chester University in jeopardy of civil litigation and/or investigation by the Office of Civil Rights." (Pls.' Trial Ex. 101 at 772.) Furthermore, in its April 6, 2000, report, this same committee declared, "WCU does *not* have continuing program expansion for women (the underrepresented sex)." (Pls.' Trial Ex. 96 at 694 (emphasis added).)

We agree with the Sports Equity Committee that there is no convincing evidence that WCU has a "history and continuing practice of program expansion." WCU's newest women's team, soccer, was added more than ten years ago, in 1992. Prior to soccer, WCU added women's cross country in 1979. While Defendants are correct in their assertion that "[t]here are no fixed intervals of time within which an institution must have added participation opportunities" (Defs.' Mem. in Opp. to Pls.' Mot. for a Prelim. Inj. at 16 (quoting Bryant v. Colgate Univ., No. 93-CV-

1029, 1996 WL 328446, at *11 (N.D.N.Y. June 11, 1996)).), we believe that periods in excess of a decade are too long to constitute continued expansion. We find support for this conclusion in Cohen I, where, in 1992, that court determined that "evidence has shown that Brown does not have a *continuing* practice of program expansion for women athletes, even though it can point to impressive growth in the 1970s." Cohen I, 809 F. Supp. at 991 (emphasis in original). While Brown also added women's indoor track in 1982, the Cohen I court was not convinced that these acts constituted continued expansion. Id. Like Brown University, WCU emphasizes its expansion during the 1970s and points to its one addition more than ten years ago. Now, eleven years after the Cohen I decision, we are equally unconvinced that the expansion that took place in the 1970s, followed by one additional women's team over a decade ago, constitutes a *continuing* practice of expansion.[10]

It is also worth noting that the "Policy Interpretation directly links the 'program expansion' step to the number of teams and athletes participating in intercollegiate competition, regardless of whether the quality of the program has improved." Cohen I, 809 F. Supp. at 991. Therefore, Defendants' showing that coaching for women's teams has improved, that space and equipment has equalized, and that Athletic Director Matejkovic has developed a plan to ameliorate many of the current inequities, while laudable, does not demonstrate program expansion.

iii. Prong Three

[10] While Defendants claim that their expansion of women's athletics took place in the 1970s, other sources suggest that WCU's most significant growth in women's athletics actually came in the 1960s. (Pls.' Trial Ex. 26 (providing an informal list of WCU's women's athletic teams and the years the teams received varsity status).)

Regarding the third prong, Plaintiffs demonstrated interest by presenting evidence of the hours of training that they have dedicated, and continue to dedicate, to improving themselves as gymnasts. Despite the setbacks they have suffered as a team, Plaintiffs continue to express their interest in competing in gymnastics. For example, last fall Plaintiffs were without a coach until November 13th. As a result, WCU could not permit the team to train in the university's facilities. During that time, Plaintiffs drove one hour each way to use a public gym in order to practice. Plaintiffs contributed their own money for this expense. (Decl. of Stephanie Herrmann at ¶ 10.) This dedication shows that Plaintiffs are indeed interested in competing.

During the course of testimony, we heard from several of the Plaintiffs regarding their ability to compete. Stephanie Herrmann has been participating in competitive gymnastics for fifteen years and was to be a co-captain for the 2004 season. In high school, Herrmann was named to the 1998 Mid-Penn Champions Team, was twice named to the USA Gymnastics Regional Team, and was Nations's Capitol Cup Level 9 All-Around Champion. Herrmann was also Pennsylvania State Level 9 All-Around Champion, Regional Level 9 Floor Champion, and Level 9 National Qualifier. As a member of the WCU team, Herrmann gained honors, for herself and her university, as 2001 Eastern Collegiate Athletic Conference Division II Gymnastics Rookie of the Year.[11] Herrmann also represented WCU at the USAG Collegiate National Championship. Several of Herrmann's teammates also gave similar testimony, detailing their equally impressive individual and team achievements.

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[11] In fact, during each of the last four years a member of the WCU gymnastics team has been named Eastern College Athletic Conference Division II Gymnastics Rookie of the Year. (Decl. of Stephanie Herrmann at ¶ 13.)

We also heard from Thomas Kovic and Jeff Schepers, head women's gymnastics coaches from the University of Pennsylvania and Ursinus College. Both coaches competed against WCU during the 2003 season. Kovic described the Plaintiffs' ability as providing "good and consistent competition." (Tr. at 9:15-10:1, T. Kovic, Sept. 30, 2003.) Schepers described the Plaintiffs as "very talented" and "capable of competing at the college level." (Tr. at 18:5-10, J. Schepers, Sept. 30, 2003.)

Defendants present several arguments in support of their claim that the predominantly female student body at WCU is satisfied with forty-five percent of the participation opportunities that the school currently offers. First, Defendants point to the fact that, as a Division II program, gymnasts are unable to compete in the Division I-dominated NCAA national competition, and as a result, the gymnastics program does not serve to accommodate the interests of WCU's female athletes. Like the district court in Favia I, we are not persuaded by this fact. 812 F. Supp. at 585 (disagreeing with Indiana University of Pennsylvania's claim that because their gymnasts could not compete in NCAA post-season play that it was justified in eliminating the program). While it is true that WCU gymnasts do not have a realistic opportunity to qualify for the NCAA national competition, they regularly qualify for and compete in the USA Gymnastics National Championship. (Decl. of Carmen Mills at ¶ 6.) This alternative to the NCAA event provides a sufficient level of quality competition and further supports the conclusion that Plaintiffs possess the requisite ability to compete. Id.

Defendants point to their 1999 student survey as additional proof of their success in meeting prong three. However, the Sports Equity Committee failed to follow NCAA guidelines in conducting the 1,200-student survey. As a result, the findings are not reliable. NCAA

guidelines state that response rates below sixty percent "would almost always be cause for concern because almost half of those selected to represent your school did not participate in the study." (Pl.'s Trial Ex. 77(a) at 531.) The guidelines further warn that a response rate below sixty percent, would result in findings that "could always be called into question and challenged for their representativeness." (Id.) Defendants student survey achieved only a 39% response rate. (Tr. at 153:25, B. Cleghorn, Sept. 30, 2003.) In addition, this survey was conducted prior to WCU's decision to eliminate the women's gymnastics and men's lacrosse teams, which, according to the Sports Equity Committee, causes the results to be even less reliable for the present analysis. (Pls.' Trial Ex. 16 at 1 ("[I]f the University decides to drop women's gymnastics the survey will become unusable.").) Overall, the 39% response rate to WCU's 1,200-student survey was not sufficient to provide the Committee with a reliable basis upon which to conclude that WCU was in compliance with Title IX.[12]

Defendants argue that they have simply replaced the participation opportunities in gymnastics with those of the future women's golf team. In light of the present status of the women's golf team, this argument is unpersuasive. Moreover, even if the golf team were to provide as many female participation opportunities as did the gymnastics team, there is still a significant disparity in proportionality. At present, what Defendants offer as a replacement for a team with a tradition and history of accomplishment is a mere promise of a golf team for next spring. As of now, the golf coach (who is currently coaching the men's golf team), can only

[12] The Sports Equity Committee tried to avert just this problem when it warned Matejkovic that, "Not to use the survey properly could be costly given the current state of affairs within the Department of Athletics; lawsuits or Title IX complaints could cost the University and the Department of Athletics much more than thorough investigation." (Pl.'s Ex. 81 at 586.)

present this Court with the names of a few women who have expressed interest in joining the team, and nothing is known about the level of interest of these potential participants or their ability to compete. Again, we do not wish to discourage WCU from developing this opportunity for future women-athletes at the university, and we do not doubt that golf is growing in popularity among college women, but we cannot agree that this golf plan is a viable alternative for a previously successful gymnastic team with ten to fifteen participation opportunities.[13]

The court in Cohen I found that Brown University could not prove that it had met the interests and abilities of its female athletes because Brown had eliminated "varsity opportunities where there is great interest and talent, *and* where Brown still has an imbalance between men and women varsity athletes in relation to their undergraduate enrollments." Cohen I, 809 F. Supp. at 992 (emphasis in original). Like the court in Cohen I, we cannot agree with WCU's position that it has met the interests and abilities of its female athletes, while lacking proportionality and reducing the viable number of participation opportunities for women.

WCU also contends that its simultaneous decision to eliminate it's thirty-member men's lacrosse team actually brings the university closer to proportionality, and therefore entitles them to eliminate women's gymnastics. We disagree. The court in Roberts v. Colorado State Bd. of Agric., squarely addressed this very issue:

> We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools

[13] We note that reinstating the women's gymnastics team *and* creating the women's golf team would result in significant progress in WCU's movement toward the goal of proportionality.

> have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs. Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population.

998 F.2d 824, 830 (10th Cir. 1993). Accordingly, we conclude that unless and until WCU offers proportional participation opportunities to its male and female athletes, WCU violates the third prong of the accommodation test when it eliminates women's intercollegiate teams.

2. Plaintiffs' Right to Bring a Private Cause of Action

a. The Effect of Alexander v. Sandoval

Pursuant to the Supreme Court's decision in Alexander v. Sandoval, Defendants challenge Plaintiffs' standing to bring this complaint as a private cause of action. 532 U.S. 275 (2001). Defendants argue that under Sandoval, Plaintiffs, as private citizens, do not have a right to bring a claim for disparate impact discrimination under § 902.[14] In Sandoval, the Supreme Court held that a private right of action was not available to enforce disparate impact regulations

[14] Like its counterpart in Title VI, § 902 of Title IX states, in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity ... is authorized and directed to effectuate the provisions of section 1681 [§ 901] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

under Title VI.[15] Id. The Sandoval court began its analysis by stating three propositions that it accepted as true. First, there is a private cause of action to enforce § 601 of Title VI. Sandoval, 532 U.S. at 279-80 (citing Cannon, 441 U.S. at 694). Second, "§ 601 prohibits only intentional discrimination." Sandoval, 532 U.S. at 280 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 272 (1978)). Third, "regulations promulgated under § 602 of Title VI may validly proscribe activities that have a disparate impact on racial groups, even though such activities are permissible under § 601." Sandoval, 532 U.S. at 281 (admitting that no Supreme Court majority opinion had yet held as such and discussing plurality opinions and dicta to support the proposition). The Court went on to address the central issue before it – whether the plaintiff had a private cause of action to enforce disparate impact regulations promulgated pursuant to § 602.

In Sandoval, the plaintiff claimed that Alabama's Department of Public Safety's policy of administering all driving tests in English violated Title VI because it had a disparate impact on

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[15] Title IX was patterned after Title VI and the two statutes are similar both textually and structurally. As a result, courts have relied on precedents interpreting Title VI to guide their understanding of Title IX. Atkinson v. Lafayette Coll., No. 01-CV-2141, 2002 WL 123449, at *5 (E.D. Pa. Jan. 29, 2002) (applying Sandoval analysis to a claim under Title IX in denying a private cause of action under regulations promulgated under § 902). The two statutes have nearly identical wording and courts have construed the two statutes in a similar manner:

> Title IX was patterned after Title VI of the Civil Rights Act of 1964. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the two statutes use identical language to describe the benefitted class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination.

Cannon v. University of Chic., 441 U.S. 677, 694-96 (1979) (finding an implied private right of action for intentional discrimination under Title IX).

minorities. The plaintiff in Sandoval based the cause of action on a disparate impact regulation promulgated under § 602. The Court classified the regulation before it as "a Department of Justice regulation promulgated pursuant to § 602 of Title VI that forbade recipients of federal funding from 'utilizing criteria or methods of administration which have the effect of subjecting individuals to discrimination because fo their race, color, or national origin.'" Johnson v. Galen Health Inst., Inc., 267 F. Supp. 2d 679, 693 (W.D. Ky. 2003) (citing 29 C.F.R. § 42.104(b)(2)(1999)). The plaintiff in Sandoval did not state a claim for intentional discrimination. Instead, the Sandoval plaintiff relied solely on a disparate impact theory and claimed that "implicit in the grant of § 602 authority to federal agencies to enact regulations was a private right to sue under § 602 for violations of those regulations." Johnson, 267 F. Supp. 2d at 693 (discussing the holding in Sandoval). The Court disagreed.

The Sandoval Court marked a clear distinction between those § 602 regulations promulgated to enforce disparate impact claims and those promulgated to enforce claims of intentional discrimination. Regarding intentional discrimination, the Court explained:

> We do not doubt that regulations applying to § 601's ban on intentional discrimination are covered by the cause of action to enforce that section. Such regulations, if valid and reasonable, authoritatively construe the statute itself, ... and it is therefore meaningless to talk about a separate cause of action to enforce the regulations apart from the statute. A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well.

Sandoval, 532 U.S. at 284.

The Court then turned to the issue of disparate impact claims under § 602. It explained that the disparate impact regulations go beyond simply enforcing the § 601 ban on intentional

discrimination because "they indeed forbid conduct that § 601 permits." Sandoval, 532 U.S. at 285. The Court further reasoned that because the disparate impact regulations go beyond § 601, it is "clear that the private right of action to enforce § 601 does not include a private right to enforce these [disparate impact] regulations." Id. Sandoval denies a private right of action for disparate impact claims arising under § 602 of Title VI. We see no reason why Sandoval would not apply to disparate impact claims under § 902 of Title IX. Sandoval, 532 U.S. at 293. Accordingly, Plaintiffs in the instant case cannot pursue a private right of action to enforce disparate impact regulations under § 902.

b. Proving Intentional Discrimination

Defendants argue that Plaintiffs do not have a claim of intentional discrimination because Plaintiffs simply cannot prove that WCU acted with animus in making its financially-motivated decision to eliminate both a men's and a women's athletic team, while also creating a new women's team. In making this argument, Defendants point to several steps that the university has taken to address gender equity in athletics. Such steps include forming the Sports Equity Committee, conducting a survey on student participation interests so as to better address the interests of both male and female athletes, and improvements in the areas of equipment and facilities for women athletes. Defendants believe that in light of these acts, it is impossible to prove intentional discrimination. Defendants also state that "there certainly isn't any question that both men's lacrosse and women's gymnastics suffered the same fate, at the same time, under the same circumstances. And since one of those teams is a women's team and one is a men's team, I think the implication that we had a decision made because of sex is farfetched." (Tr. at 4:7-12, C. Tesoro, Oct. 1, 2003.) Defendants' arguments misconstrue the meaning of "intent" in

the context of Title IX claims.

In the athletics realm of Title IX, intent is found on the face of most decisions. In Neal v. Board of Trs. of the Cal. State Univs., the Ninth Circuit stated:

> [A]thletic teams are gender segregated, and universities must decide beforehand how many athletic opportunities they will allocate to each sex. As a result, determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons. Because men are not 'qualified' for women's teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance.

198 F.3d 763, 772 n.8 (9th Cir. 1999) (emphasis in original). In Haffer v. Temple Univ. of the Commonwealth Sys. of Higher Educ., the district court found that intent was demonstrated by the very existence of "Temple's explicit classification of intercollegiate athletic teams on the basis of gender." 678 F. Supp. 517, 527 (E.D. Pa. 1987) (defining intent for the purposes of equal protection). In Pederson v. Louisiana State Univ., the court found intentional discrimination where the university failed to effectively accommodate its female athletes. 213 F.3d 858, 880-81 (5th Cir. 2000). The Pederson court explained that the university's "ignorance about whether they are violating Title IX does not excuse their intentional decision not to accommodate effectively the interests of their female students by not providing sufficient athletic opportunities." Id. at 880. Like WCU, the Pederson defendants were already on notice of their potential Title IX violations when they made their decision not to field additional intercollegiate teams for women. Id. The Pederson court further explained that "intentional" simply means the university's actions were not accidental and defendants "need not have intended to violate Title

IX, but need only have intended to treat women differently." Id. at 881.[16]

WCU considered gender on the face of its decision. Its decision to eliminate the *women's* gymnastics team was an intentional act based on gender. It was also a decision that was intentionally made after WCU was put on notice that eliminating the women's gymnastics team would put it at odds with Title IX. Because the facts call for an analysis based upon intent, not disparate impact, Plaintiffs have a private cause of action under § 901.

c. Regulations Enforcing Intentional Discrimination

Defendants argue that, even if Plaintiffs' claim were one of intentional discrimination, they would still be prohibited from bringing this cause of action because Plaintiffs do not seek to enforce the general statutory prohibition on sex discrimination, but instead rely on enforcement of the regulations promulgated under § 902. (Defs.' Reply Mem. in Further Supp. of their Mot. to Dismiss at 8-9.) Defendants contend that "such disparate impact regulations do not invest individuals with a private cause of action, but rather, are guidelines for administrative agency enforcement." (Mem. of Law in Supp. of Mot. to Dismiss at 3.) If Plaintiffs' cause of action were premised on impact rather than intent, Defendants' argument would be correct. However, because Plaintiffs' claim is based on intent, we are satisfied that, pursuant to Sandoval, the regulations at issue confer a private cause of action. 532 U.S. at 284 ("We do not doubt that regulations applying § 601's ban on intentional discrimination are covered by the cause of action

[16] It is worth noting that courts use a similar definition in the context of employment discrimination, where "'intentional discrimination' is treated as synonymous with discrimination resulting in 'disparate treatment,' which contrasts with 'disparate impact.'" Pandazides v. Virginia Bd. of Educ., 13 F.3d 823, 830 n.9 (4th Cir. 1994) (rejecting the claim that plaintiffs must show discriminatory animus to make out a claim of intentional discrimination in employment discrimination).

to enforce that section.").

As Defendants state: "Regulations which directly illuminate and effectuate the statutory bans on intentional discrimination are judicially enforceable as part and parcel of the implied causes of action whereby the statutory bans themselves may be enforced." (Def.'s Reply Mem. in Further Supp. of their Mot. to Dismiss at 5.) See also Sandoval, 532 U.S. at 284 ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."). The regulation at issue, section 106.41, and its relevant policy interpretations clearly aim to enforce § 901's ban on intentional sex discrimination by demanding equal opportunity in athletics. Because section 106.41 seeks to enforce gender equity in athletics, (an area segregated by sex that triggers intentional discrimination), it follows that Plaintiffs' claim of intentional discrimination permits a private right of action to enforce the regulation. Defendants agree that section 106.41(a) is enforceable as a private cause of action. "[W]hen it comes to an athletics-related Title IX claim, 34 C.F.R. § 106.41(a) translates the broad prohibition of 20 U.S.C. § 1681 into athletic terms and, as such, is as judicially enforceable as 20 U.S.C. § 1681(a)." (Def.'s Reply Mem. in Further Supp. of their Mot. to Dismiss at 6.) However, Defendants do not extend this reasoning to subsection (c) of section 106.41.[17] Defendants' distinction implies that we should view subsection (a) as enforcing

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[17] Section 106.41(c) states:

> 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...

34 C.F.R. § 106.41(c)

intentional discrimination and subsection (c) as enforcing disparate impact discrimination because subsection (c) goes "beyond the scope of the main statutory prohibition on intentional discrimination" in § 901. (Defs.' Reply Mem. in Further Supp. of their Mot. to Dismiss at 7.) We disagree.

Subsection 106.41(a) and subsection 106.41(c) both serve to prohibit intentional sex discrimination. Both authoritatively construe the statute. While subsection (a) admittedly tracts the language of § 901 more closely than subsection (c), we fail to see why that difference triggers a distinction between intentional and disparate impact discrimination. Subsection (a) prohibits sex discrimination in athletics. Subsection (c) prohibits sex discrimination in athletics by requiring equal treatment and prohibiting different treatment. Both subsections "directly illuminate and effectuate the statutory ban on intentional discrimination." And both apply § 901's ban on intentional discrimination. Plaintiffs may rely on both subsections to enforce their claim of intentional discrimination under § 901.

Based upon the foregoing, we are satisfied that Plaintiffs are likely to prevail on the merits of their claim. Plaintiffs have therefore satisfied the first requirement for a preliminary injunction.

B. Irreparable Harm

Plaintiffs have demonstrated a strong likelihood of irreparable harm if the preliminary injunction is not granted. In addressing whether the plaintiffs in Favia I had shown that they would suffer irreparable harm if their university did not reinstate the women's field hockey and gymnastic teams, the court stated:

> By cutting the women's gymnastics and field hockey teams, IUP has denied plaintiffs the benefits to women athletes who compete interscholastically: they develop skill, self-confidence, learn team cohesion and a sense of accomplishment, increase their physical and mental well-being, and develop a lifelong healthy attitude. The opportunity to compete in undergraduate interscholastic athletics vanishes quickly, but the benefits do not. We believe that the harm emanating from lost opportunities for the plaintiffs [is] likely to be irreparable.

812 F. Supp. 578, 583 (W.D. Pa. 1993).

Plaintiffs in this case would be subjected to the same irreparable harm if their request for an injunction were denied. In fact, Plaintiffs have already suffered harm. The gymnastics team lost three of its five recruits and one of its former participants when WCU eliminated the team. (Tr. at 5:6-14, S. Herrmann, Sept. 29, 2003 (correcting the numbers originally provided by Herrmann in her declaration at ¶ 14).) This loss adversely impacts the team's ability to compete and to develop its program. Foregoing the 2004 season pending a full trial would eliminate the program's ability to attract recruits for the 2005 season and would severely affect the team's growth and development. Cohen I, 809 F. Supp. at 997-98 (describing the teams' difficulties in attracting quality players after the teams were downgraded from their varsity status). In addition, November is already upon us and we have therefore passed the time when the team would have ideally begun its regular training. Further loss of training time could lead to a loss in a competitive edge and an increase in the potential for injury. (Tr. at 101:23-103:15, E. Ovalle, Sept. 30, 2003.)

Still another factor demonstrating irreparable harm is the fact that Plaintiffs have a finite period of time in which to compete. Preventing the 2004 season from moving forward will deny

players one of only four competitive seasons at the college level. Several of the players are in their final year of school and would be denied their last opportunity to compete. Only the reinstatement of the gymnastics program could avoid this harm.

C. Effect on Other Interested Persons

This Court recognizes that a preliminary injunction requiring WCU to reinstate the women's gymnastics team could affect those WCU students who are not currently before us as plaintiffs. Defendants claim that other student-athletes at WCU would suffer if we were to require reinstatement of the gymnastics team. Defendants contend that such an order would override the university's discretion "regarding the best use of limited resources in its athletic programs with their [the Plaintiffs'] own self-interested proposition that West Chester is prohibited from eliminating a sport in which they participated, regardless of the impact on the University, its programs, and its other students." (Defs.' Mem. of Law in Supp. of Mot. to Dismiss at 1.) In examining this factor, courts generally look to the school's athletic budget and consider the overall expense of reinstating the program as compared with the entire athletic budget. Favia I, 812 F. Supp. at 584 (finding no irreparable harm to the university because the athletic budget had "space for reallocation and cutbacks in other areas").

In the instant case, the dispute actually concerns a relatively small sum of money. WCU could reinstate the women's gymnastics team for $30,000.[18] Athletic Director Matejkovic allocated some of the money previously earmarked for the women's gymnastics and men's

[18] We understand that this figure does not account for the increased demand that an additional varsity sport would have on support staff such as athletic trainers. However, we also understand that while WCU allocated $30,000 to the women's gymnastics team in 2002-03, that the failure to hire an assistant coach caused WCU to expend only $25,000 on the team.

lacrosse teams to make several of the pre-existing Pennsylvania State Athletic Conference ("PSAC") teams at WCU more competitive. (Pls.' Trial Ex. 22 at 134 (describing Matejkovic's plan as one that "appropriates more resources to selected teams and less to others").) The Athletic Department could reallocate that money from the PSAC teams to the women's gymnastics team with little or no harm to those PSAC teams since they previously operated without those funds.

Plaintiffs have suggested that WCU could also look to its contingency funds. Currently, WCU has a "catastrophic circumstances" reserve fund of approximately $6 million and a fund earmarked for "critical needs" situations of $3,678,315. (Dep. of M. Mixner at 26:14-16, 28:11-23, Sept. 26, 2003; Pls.' Trial Ex. 75 at 1.) While it is not ideal for any university to dip into its emergency funds to sponsor an athletic team, this is a unique situation and the amount of money involved is not significant.[19]

We understand that WCU finds itself in a difficult economic situation. However, we observe that WCU could have heeded the warning of its internal committees and avoided this problem. WCU intentionally made the decisions that brought them to this courtroom, knowing full well the potential implications.

D. Public Interest

Promoting compliance with Title IX serves the public interest. Cohen I, 809 F. Supp. at

[19] We also note that Mark Mixner, Vice President for Administrative and Fiscal Affairs at WCU, testified that it is possible to shift money from these funds to remedy a violation of federal law, although it is not desirable. (Dep. of M. Mixner at 24:3-25:17, 26:1-11, 27:5-29:11, Sept. 26, 2003.)

1001 (stating that "the public interest will be served by vindicating a legal interest that Congress has determined to be an important one"); Favia I, 812 F. Supp. at 585 ("The public has a strong interest in prevention of any violation of constitutional rights."). Defendants contend that the public interest is served by allowing WCU, a public university, the financial autonomy to decide both which intercollegiate sports best meet the needs and interests of its own students, and how to allocate resources during a difficult economic time. We do not disagree. However, the public interest demands that WCU comply with federal law and in this instance that means compliance with Title IX. "Title IX does not purport to override financial necessity. Yet, the pruning of athletic budgets cannot take place solely in comptrollers' offices, isolated from the legislative and regulatory imperatives that Title IX imposes." Cohen II, 991 F.2d at 905. For these reasons, we find the public interest is best served by upholding the goals of Title IX.

VI. CONCLUSION

In light of West Chester University's failure to comply with Title IX, we will grant Plaintiffs' Motion for a Preliminary Injunction Directing Defendants to Reinstate the West Chester University Women's Gymnastics Team.

An appropriate Order follows.