

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

SUSAN MYERS and JAMES MYERS, on behalf of their minor daughters ELIZABETH MYERS and REBECCA MYERS, and MARIA WALSH, on behalf of her minor daughter KIMBERLY WALSH, on behalf of themselves and all persons similarly situated

Plaintiffs

v.

BOARD OF EDUCATION of the BATAVIA CITY SCHOOL DISTRICT Defendant

COMPLAINT

CLASS ACTION

JURY TRIAL REQUESTED

PRELIMINARY STATEMENT

1. Plaintiffs bring this action for declaratory and injunctive relief to remedy the unlawful sex discrimination of Batavia City School District (“the District”) against present and future female student athletes who participate in girls’ softball. The Defendant has discriminated against the girls’ softball players by providing superior facilities and equipment to the boys’ baseball program than it provides to the girls’ softball program. The most glaring example of the District’s disparate treatment lies in its funding of the varsity boys’ baseball team to play all home games at a professional minor league baseball stadium while relegating varsity girls’ softball to a field that is poorly maintained, hazardous, lacks outfield fencing, and has no scoreboard, dugouts or stands. Plaintiffs do not ask that the District discontinue use of the professional stadium for boys’ baseball, instead they simply ask for improvement of their own substandard facilities.

Defendant's unlawful sex discrimination violates female students' rights under Title IX of the Education Amendments of 1972 and the United States Constitution, and sends a harmful message to the young women of Batavia that their athletic activities are not as important as those of their male classmates.

JURISDICTION AND VENUE

2. Jurisdiction is conferred on this Court pursuant to 28 U.S.C. § 1331, 1343(a)(3) and 1343(a)(4).
3. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201-2202.
4. Venue is proper in the Western District of New York pursuant to 28 U.S.C. § 1391(b), because the events giving rise to Plaintiffs' claims occurred in this District. All Plaintiffs reside in this District. Defendant Batavia City School District is located in this District.

JURY TRIAL DEMANDED

5. Plaintiffs request a trial by jury pursuant to Fed. R. Civ. P. 38 on any and all issues triable by a jury in this matter.

PARTIES

6. Plaintiff REBECCA MYERS is a 14-year old female student who attends Batavia Middle School ("BMS"). She is in the 8th grade. She plays softball and plans to continue playing until she graduates from high school. The Defendant has discriminated against REBECCA MYERS on the basis of her sex by denying her equal athletic treatment and benefits. REBECCA MYERS, a minor, is proceeding in this action by her next friends, her mother Susan Myers and her father James Myers. REBECCA MYERS and her parents reside in Batavia, NY.

7. ELIZABETH MYERS is a 17-year old female student who attends Batavia High School (“BHS”). She is a junior and is currently the captain of the BHS varsity women's softball team. She has played softball at BHS since her freshman year and plans to continue playing throughout high school. She also intends to play softball in college. The Defendant has discriminated against ELIZABETH MYERS on the basis of her sex by denying her equal athletic treatment and benefits. ELIZABETH MYERS, a minor, is proceeding in this action by her next friends, her mother Susan Myers and her father James Myers. ELIZABETH MYERS and her parents reside in Batavia, NY.
8. Plaintiff KIMBERLY WALSH is a 17-year old female student who attends BHS. She is a senior. She has played softball since her freshman year and will continue to play until she graduates. She also intends to play softball in college. The Defendant has discriminated against KIMBERLY WALSH on the basis of her sex by denying her equal athletic treatment and benefits. KIMBERLY WALSH, a minor, is proceeding in this action by her next friend, her mother Maria Walsh. KIMBERLY WALSH and her mother reside in Batavia, NY.
9. Defendant Batavia City School District ("the District") is a public school district. The District is a state actor subject to the Fourteenth Amendment's Equal Protection Clause as enforced through 42 U.S.C. § 1983. Additionally, the District receives federal funding and, therefore, all of its programs and activities are governed by the requirements of Title IX pursuant to 20 U.S.C. § 1687. The District is authorized to operate, and does operate, Batavia High School and Batavia Middle School, and is responsible for both schools' conduct. The District is located in Batavia, NY, which is within the Western District of New York.

CLASS ACTION ALLEGATIONS

10. The named individual Plaintiffs bring this action on behalf of themselves and on behalf of a class of all those similarly situated pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

Definition

11. Plaintiffs seek to represent a class of all present and future Batavia City School District female students and potential students who participate, seek to participate and/or are deterred from participating in girls' softball programs at Batavia High School and/or Batavia Middle School.

Numerosity

12. The class is so numerous that joinder of all members is impractical. There are approximately 49 female students who currently participate in the girls' softball program at BHS and BMS. It is unknown how many of the current female students or how many future female students would seek to participate in girls' softball if female athletes were given equal treatment and benefits as male athletes. Moreover, members of the class who may suffer future injury are not capable of being identified at this time, as the class includes future female softball players and the class is constantly in flux, with students graduating and new students attending BHS and BMS each year.

Common Questions of Law and Fact

13. Common questions of law and fact predominate as to whether female student athletes participating in girls' softball at Batavia are receiving unequal treatment and benefits in comparison to the male student athletes.

Typicality

14. The claims of the named Plaintiffs are typical of the claims of the class. Plaintiffs have received unequal treatment and benefits as members of the girls' softball program in the Batavia City School District, constituting unlawful discrimination on the basis of sex.
15. REBECCA MYERS is a member of the proposed class in that she is a current female student athlete participating in the Batavia City School District's girls' softball program who is subject to the discriminatory unequal treatment and benefits that the District provides to female student athletes participating in girls' softball.
16. ELIZABETH MYERS is a member of the proposed class in that she is a current female student athlete participating in the Batavia City School District's girls' softball program who is subject to the discriminatory unequal treatment and benefits that the District provides to female student athletes participating in girls' softball.
17. KIMBERLY WALSH is a member of the proposed class in that she is a current female student athlete participating in the Batavia City School District's girls' softball program who is subject to the discriminatory unequal treatment and benefits that the District provides to female student athletes participating in girls' softball.

Adequacy of Representation

18. The named Plaintiffs are members of the proposed class and will fairly and adequately represent and protect the interests of the class. Plaintiffs intend to prosecute this action rigorously in order to secure remedies for the entire class. Counsel of record for Plaintiffs are experienced in federal civil rights litigation and class actions, including complex education cases.

Injunctive and Declaratory Relief

19. Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final declaratory and injunctive relief with respect to the class as a whole under Federal Rule of Civil Procedure 23(b)(2).

FACTUAL ALLEGATIONS

20. Batavia City School District is a recipient of federal funding.
21. The District is a state actor for the purpose of the Plaintiffs' Fourteenth Amendment claims.
22. The District sponsors and administers high school and middle school amateur athletic programs, including girls' and boys' softball and baseball teams and competitions.
23. The District currently sponsors three girls' softball teams at the high school and middle school level: a varsity team for grades 9-12, a Modified A team for grades 7-9 and a Modified B team for grades 5-8.
24. In past years the District has also fielded a junior varsity girls' softball team.
25. This year the District did not field a junior varsity girls' softball team.
26. The District currently fields a varsity boys' baseball team, a junior varsity team, and Modified A and B teams.
27. Plaintiffs Kimberly Walsh and Elizabeth Myers are members of the varsity girls' softball team.
28. Plaintiff Rebecca Myers is a member of the Modified A girls' softball team.
29. Despite discriminatory treatment from the District, the girls' varsity softball team has performed well in recent years.
30. The varsity softball team won the league championship in 2004.

31. The varsity softball team made it to sectional finals in 2009, semi-finals in 2010 and the quarter-finals in 2011.

Provision of Locker Rooms, Practice Facilities and Competitive Facilities

32. The varsity girls' softball field and junior varsity boys' baseball field are located next to each other and were constructed at the same time.

33. BHS pays for and arranges the schedule for the varsity boys' baseball team to play all of its home games at Dwyer Stadium, a professional minor league stadium located next to the high school.

34. Dwyer Stadium is a \$3 million, 2,200 seat stadium which is home to the Batavia Muckdogs, a minor league professional baseball team affiliated with the St. Louis Cardinals and the Rochester Red Wings.

35. The junior varsity boys' baseball field was originally intended to be the varsity boys' baseball field, until arrangements were made for the boys' varsity team to use Dwyer Stadium.

36. The varsity boys' baseball team practices on the junior varsity boys' baseball field.

37. As the home of a minor league professional team, Dwyer Stadium has various amenities which include: a ticket booth, lighting for night games, outfield fencing, an electronic scoreboard, covered grandstand seating, a press box, covered dugouts, a concession stand and bullpens for both the home team and visiting teams.

38. In contrast with Dwyer Stadium, the varsity girls' softball field has no ticket booth, no lighting for night games, no outfield fencing, no scoreboard, a small set of portable stands which are in poor condition and are shared with other athletic teams, no covered seating for either players or fans, no press box, no dugouts whatsoever, and no bullpen.

39. The varsity girls' softball infield is covered with pebble-sized gravel mixed with some dirt, making it dangerous and painful for players to slide.
40. The varsity girls' softball field becomes uneven and hazardous during play.
41. The varsity girls' softball infield material causes balls to bounce off the field during play.
42. The infield material makes it harder for the players to play at their most competitive level and has given them a reputation in their league for having the worst field.
43. Some of the girls have gotten hurt because of the field's condition.
44. The varsity girls' softball field is located next to a swamp and becomes quickly waterlogged when it rains.
45. The lack of outfield fencing precludes the girls' softball players from hitting "out of the park" home runs during home games.
46. Many of the other district's fields in the varsity league have outfield fencing, allowing the BHS team to hit "out of the park" home runs during away games.
47. The lack of outfield fencing also causes balls to get lost in the swamp next to the field during games.
48. The lack of a scoreboard makes it difficult for players to see the score from the field.
49. Due to the lack of and/or inferior quality of stands, fans of the varsity girls' softball team are either forced to sit on the ground or bring lawn chairs to sit on, in order to watch the games.
50. Unlike the field at Dwyer Stadium, the BHS varsity girls' softball field has been poorly maintained.
51. BHS physical education classes play on the girls' varsity softball field, causing additional wear and tear.

52. A number of other interscholastic sports teams play on the girls' varsity softball outfield, causing additional wear and tear.
53. Frequent use of the varsity girls' softball field by high school gym classes and other interscholastic sports causes a need for greater maintenance.
54. At the same time, because the field is occupied so frequently this leaves less opportunity to perform needed maintenance.
55. Prior to the start of the 2012 softball season, members of the varsity girls' softball team requested repairs to their infield.
56. In response to this request, some dirt was added to the mound area on top of the already existing infield material.
57. The added dirt did not significantly improve the infield.
58. Shortly afterwards, more thorough repairs were made to the pitcher's mound on the junior varsity boys' baseball field.
59. The junior varsity boys' field has infield material of superior quality to that of the varsity girls' softball field.
60. The junior varsity boys' field is not located next to a swamp, and does not become waterlogged as easily.
61. The junior varsity boys' field has stands superior in quality and quantity to the varsity girls' softball field stands.
62. The junior varsity girls' softball field is located next to Vandetta Football Stadium ("Vandetta"), approximately one mile from BHS.
63. The junior varsity girls' softball infield consists of gravel-like material similar to the infield material on the varsity girls' softball field, as described in Paragraph 39 above.

64. This results in problems similar to what is described in Paragraphs 40-43 above.
65. BHS does not adequately maintain the junior varsity girls' softball field.
66. In the past, junior varsity players have dedicated portions of their practice time to picking up rocks.
67. The junior varsity boys' baseball team has full access to bathrooms and locker rooms during games and practices.
68. The junior varsity girls' softball team does not have equal access to bathrooms and locker rooms during games and practices, as the facilities at Vandetta are often locked during their game and practice times.
69. The junior varsity softball players have on occasion been instructed to use the bathroom before coming to the field for practice or games, due to lack of accessible facilities at Vandetta.
70. Both the Modified A boys' baseball and Modified A girls' softball teams play on fields located at John Kennedy Intermediate, an elementary school in Batavia.
71. During the summer of 2012 the District made repairs to the boys' baseball field at John Kennedy.
72. Equivalent repairs were not made to the girls' softball field at John Kennedy.

Scheduling of Games

73. Because of the lighting at Dwyer Stadium, the boys' varsity baseball team is able to schedule some of its home games at night.
74. The absence of lighting at the BHS varsity softball field precludes the girls' team from scheduling night games.
75. Night games have a big-league quality not associated with day games..

76. Night games are generally more popular with spectators, since they take place after practices for other sports have concluded, and they allow parents to attend without having to rush home from work.

77. In the past, some BHS softball games have been called early when it became too dark to continue playing.

Provision of Equipment and Supplies

78. Upon information and belief, the District provides inequitable equipment and supplies to girls' softball players as compared to boys' baseball players.

Funding

79. Upon information and belief, the District provides inequitable funding to girls' softball as compared to boys' baseball.

Awareness of Title IX Concerns

80. The District has been aware of its failure to comply with Title IX since at least February of 2011.

81. The District currently has over \$500,000 in a capital improvement reserve fund.

82. The District has had this amount in a capital improvement fund since prior to February 2011.

83. In March of 2011, the District attempted to procure funding to address the Title IX violations by putting a referendum to the town for a vote.

84. Around that time the District estimated the cost of improvements which would bring the BHS varsity softball field into Title IX compliance at \$234,000.

85. That amount was only a fraction of the approximate \$3.9 million in improvements put to a vote in March of 2011.

86. Most of the funding to be generated from the March 2011 vote was intended for improvements to the football stadium.
87. Prior to the March 2011 vote, members of the varsity softball team volunteered their time to call residents of Batavia to encourage voters to consider the proposal.
88. The March 2011 referendum lost by a vote of 982 against, 542 in favor.
89. Despite the defeat of the 2011 referendum, the District has since made capital repairs to the boys' locker rooms at Vandetta, which are used by both the boys' football and boys' track teams.
90. No repairs have been made to the girls' side of the Vandetta locker rooms during the same time period.
91. Plaintiffs and other individuals have made various requests since 2011 for the District to correct the large disparities in treatment between girls' softball and boys' baseball.
92. In May 2012 the District was notified in writing that the varsity softball infield material was hazardous to the safety of players.
93. On February 14, 2013, counsel for Plaintiffs sent a letter to the District demanding that the Title IX violations be addressed.
94. On March 14, 2013, counsel for Plaintiffs met with Superintendent Christopher Dailey, as well as counsel for the District and other District staff.
95. At that meeting, the District informed Plaintiffs' counsel that another referendum was scheduled to be voted on in May 2013.
96. The District further represented that the May 2013 proposal includes approximately \$3.9 million in funds.
97. Most of the approximately \$3.9 million is intended for repairs to Batavia's public library.

98. \$548,000 of that amount is to be divided between (a) improvements to Vandetta Stadium and (b) improvements to the BHS varsity softball field.
99. The improvements proposed for Vandetta Stadium include: (a) installing handicapped bathrooms and a concession stand at Vandetta, (b) creating ramp access to Vandetta and (c) adding handicapped seating to Vandetta.
100. The improvements proposed for the BHS girls' softball field are "dugouts, scoreboard, fence."
101. The District implied that it has no plans in place to make improvements to the varsity girls' softball field in time for the 2013 softball season.
102. On information and belief, the District in fact has no such plans in place.
103. The District further implied that if the May referendum were voted down, it had no other plans in place to remedy the disparity between girls' softball and boys' baseball.
104. On information and belief, the District in fact has no other plans in place to remedy this disparity.
105. Even if the May referendum were to pass, this measure would not fully cure the legal violations described in this Complaint, and the District would have to take additional measures to address the disparities.
106. The District has scheduled 4 out of 11 home games during the 2013 varsity softball season at Genesee Community College ("GCC"), which has a softball field superior to the BHS softball field.
107. BHS softball players are required to provide their own transportation to any games scheduled at GCC, located approximately three miles away.

FIRST CLAIM FOR RELIEF:
Unequal Treatment and Benefits in Athletic Programs

in Violation of Title IX of the Education Amendments of 1972

108. Plaintiffs repeat, reallege, and incorporate hereunder by reference the allegations contained in paragraphs 1 through 107, above.
109. Title IX, enacted in 1972, provides in relevant part: "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).
110. Since the passage of Title IX, the District has received and continues to receive federal financial assistance and benefits. Therefore, all programs in the Batavia City School District, including the athletic programs, are subject to the requirements of Title IX. 20 U.S.C. § 1687.
111. Title IX's implementing regulations provide that "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 the recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a).
112. Under Title IX, schools must provide "equal treatment and benefits" to members of both sexes in their athletic programs. 44 Federal Register 71,413 (1979), U.S. Department of Education, Office of Civil Rights' 1979 Policy Interpretation (the "Policy Interpretation").
113. Under both the regulations and the Policy Interpretation, compliance in the area of equal treatment and benefits is assessed by comparing factors (2) through (10) of 34

C.F.R. § 106.41(c) for the athletic programs of both sexes. Factors (2) through (10) are:

- "(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 services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity." 34 C.F.R. § 106.41(c) (2) - (10).

114. The Policy Interpretation also requires that disparities in athletic funding and the availability, quality, and kinds of treatment and benefits be considered. Policy Interpretation, 44 Fed. Reg. at 71415.
115. The regulations required that sponsors of interscholastic athletics comply with the regulations and take any remedial action necessary to overcome the effects of sex discrimination within three years of their effective date, or by July 21, 1978. 34 C.F.R. § 106.3(a).
116. Now, more than thirty-four (34) years later, the District still does not comply with Title IX.
117. Plaintiffs and other individuals have informed the District that its actions constitute violations of Plaintiffs' Title IX rights.
118. Upon information and belief, the District has not taken remedial actions to address these violations, and any remedial actions which the District may have taken unbeknownst to the Plaintiffs have been insufficient to satisfy the District's obligations under Title IX.

119. The District has intentionally violated Title IX by knowingly and deliberately discriminating against female students, including Plaintiffs, by, among other things, failing to provide female student softball players with treatment and benefits that are comparable to the treatment and benefits provided to male student baseball players in areas including, but not limited to: the provision of equipment and supplies; scheduling of games and practice time; travel and per diem allowance; provision of locker rooms, practice and competitive facilities and funding.
120. The inequitable treatment of female and male student athletes, as detailed above, demonstrates the District's intentional and conscious failure to comply with Title IX. The District's conduct has persisted despite the information provided by and the requests made by Plaintiffs and other individuals, and despite the mandates of the relevant Title IX regulations, particularly 34 C.F.R. §§ 106.31 and 106.41, and the Policy Interpretation.
121. As a result of these unlawful acts, the Plaintiffs and others similarly situated have suffered and continue to suffer irreparable injury.
122. Plaintiffs and others similarly situated are entitled to relief, including declaratory relief and injunctive relief.
123. Counsel for the Plaintiffs and the proposed class of similarly situated individuals are entitled to attorneys' fees and costs.

SECOND CLAIM FOR RELIEF:
Sex-Based Discrimination in Violation of the
Fourteenth Amendment to the United States Constitution

124. Plaintiffs repeat, reallege, and incorporate by reference the allegations contained in paragraphs 1 through 123, above.

125. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits state actors from discriminating on the basis of sex.
126. Under 42 U.S.C. § 1983, certain Defendants may be held liable for their actions in violating Plaintiffs' rights under the Fourteenth Amendment.
127. By failing to provide female student athletes with the same treatment and benefits as the male student athletes (as detailed above), the District has purposely discriminated against female students, including the named Plaintiffs, on the basis of sex and have intentionally deprived them of their rights to equal protection secured by the Fourteenth Amendment to the Constitution.
128. As a result of these unlawful acts, the Plaintiffs and others similarly situated have suffered and continue to suffer irreparable injury.
129. The Plaintiffs and others similarly situated are entitled to relief, including declaratory and injunctive relief.
130. Counsel for the Plaintiffs and the proposed class of similarly situated individuals are entitled to attorneys' fees and costs.

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Certify the proposed class of plaintiffs;
2. Issue a declaratory judgment in favor of Plaintiffs, declaring that Defendant has discriminated against female students on the basis of sex in violation of Title IX and the regulations promulgated thereunder, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;
3. Enter preliminary and permanent injunctive relief requiring the Defendant to remediate its violations of federal law prohibiting sex discrimination by, among other required

actions, providing female student athletes with treatment and benefits comparable to those provided to male athletes;

4. Award Plaintiff's costs, expenses, and attorneys' fees pursuant to 28 U.S.C. § 1988 and/or other applicable statutes;
5. Order such other and further relief as the Court deems just and proper.

DATED: April 5, 2013
Rochester, New York

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