

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CIVIL ACTION NO. 5:19-CV-00394-KKC
-electronically filed-

ELIZABETH NIBLOCK and ALA HASSAN, Individually
and on behalf of all those similarly situated

PLAINTIFFS

v.

DEFENDANTS' PRETRIAL MEMORANDUM

UNIVERSITY OF KENTUCKY, MITCH
BARNHART and ELI CAPILOUTO

DEFENDANTS

Defendants University of Kentucky, Mitch Barnhart in his official capacity, and Eli Capilouto in his official capacity, through counsel, file this pretrial memorandum.

Plaintiffs have asserted two claims: one against Eli Capilouto and Mitch Barnhart in their official capacities for alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and one against the University for alleged violation of Title IX. Both claims are based on the University's allocation of athletic participation opportunities. In the 2021-2022 academic year, the University fielded 25 teams, including 13 women's teams, 10 men's teams, and two co-ed teams. Among these teams, the University provided 816 athletic participation opportunities, 428 of which were female and 388 of which were male, a ratio of 52.5% female to 47.5% male.

The Plaintiffs cannot prove this allocation of athletic opportunities for women violates the Equal Protection Clause because the University does not discriminate against women in providing athletic participation opportunities, in its support of the opportunities it offers, or in the decision which new sports to add—or not—at the University. For these same reasons, the Plaintiffs cannot prove the University violates Title IX.

ISSUES OF FACT AND LAW TO BE ADDRESSED AT TRIAL

1. Whether the Plaintiffs can meet their burden to show the University's allocation of athletic participation opportunities does not comply with the Equal Protection Clause.
2. The applicable test for determining whether the University complies with Title IX in its allocation of athletic participation opportunities.
3. Whether, applying the correct test, the Plaintiffs can meet their burden to establish the University's allocation of athletic participation opportunities does not comply with Title IX.

SUBSTANTIVE OUTLINE OF THE UNIVERSITY'S ARGUMENT

At the Court's status conference, the parties were requested to provide an outline of their arguments. This pretrial memorandum provides a summary of the University's legal arguments which are supported by the attached proposed Findings of Fact (Exhibit A) and Conclusions of Law (Exhibit B). Because Plaintiffs bear the burden of proof at trial, the University's proposed Findings of Fact and Conclusions of Law may change based on Plaintiffs' proof at trial and the University reserves the right to submit additional or different proposed Findings of Fact and Conclusions of Law based on the proof at trial.

The defense to the Plaintiffs' claims can be summarized as follows:

- I. The University complies with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Proposed Conclusions of Law ¶¶ 4–22).**
 - A. The Equal Protection Clause prohibits sex-based classifications except where substantially related to an important governmental interest. (Proposed Conclusions of Law ¶¶ 4–11).**
 - B. The University's intercollegiate athletics program complies with the Equal Protection Clause. (Proposed Conclusions of Law ¶ 12–22).**

1. **Overrepresentation of one sex in an education program is not a constitutional violation. (Proposed Conclusions of Law ¶¶ 13–15).**
2. **To the extent the University provides separate athletic teams for each sex, there is no evidence of differing treatment. (Proposed Conclusions of Law ¶¶ 16–19).**
3. **In determining whether to add sports, the University treats men and women equally. (Proposed Conclusions of Law ¶¶ 20–22).**

II. In resolving the Title IX claims, the Department’s 1979 Interpretation does not apply and instead this Court should apply an Equal Protection Clause analysis or the plain language of the Regulation. (Proposed Conclusions of Law ¶¶ 23–94).

A. The Department of Education’s 1979 Interpretation does not apply in this case. (Proposed Conclusions of Law ¶ 33–74).

1. **The 1979 Interpretation violates the major questions doctrine (Proposed Conclusions of Law ¶¶ 34–50).**
2. **After *Kisor*, the 1979 Interpretation is not entitled to deference. (Proposed Conclusions of Law ¶¶ 51–53).**
 - a. **The 1975 Regulation is not ambiguous. (Proposed Conclusions of Law ¶¶ 54–55).**
 - b. **The Department’s 1979 Interpretation is unreasonable. (Proposed Conclusions of Law ¶¶ 56–66).**
 - i. **The 1979 Interpretation ignores the unique nature of NCAA Division I sports. (Proposed Conclusions of Law ¶¶ 58–59).**
 - ii. **Because the Interpretation mandates a quota in the long term, the 1979 Interpretation violates the 20 U.S.C. 1681(b). (Proposed Conclusions of Law ¶ 60).**
 - iii. **The Department’s Interpretation encourages discrimination against the overrepresented sex. (Proposed Conclusions of Law ¶ 61).**
 - iv. **The Interpretation is confined to an elite group. (Proposed Conclusions of Law ¶ 62).**
 - v. **The Interpretation imposes artificial constraints on participation. (Proposed Conclusions of Law ¶ 63).**

- vi. The Interpretation assumes a direct relationship between enrollment and interests and abilities. (Proposed Conclusions of Law ¶¶ 64–66).
 - c. The Department’s Interpretation is not entitled to controlling weight. (Proposed Conclusions of Law ¶¶ 67–70).
 - i. The Interpretation does not involve the Department’s substantive expertise. (Proposed Conclusions of Law ¶ 69).
 - ii. Because of the constant Reinterpretations, the 1979 Interpretation does not reflect the Department’s fair and considered judgment. (Proposed Conclusions of Law ¶ 70).
 - 3. The 1979 Interpretation cannot be enforced through the implied private right of action under Title IX. (Proposed Conclusions of Law ¶¶ 71–74).
 - B. Instead of the 1979 Interpretation, this Court should apply an Equal Protection analysis to determine whether the University complies with Title IX. (Proposed Conclusions of Law ¶¶ 75–78).
 - C. If the Court does not apply an Equal Protection analysis to the Title IX claim, then the proper analysis is under the plain language of the Regulation, not the Department’s 1979 Interpretation. (Proposed Conclusions of Law ¶¶ 79–94).
- III. If the Court does not follow the Equal Protection Clause analysis or the plain language of the Regulation, the University complies with the 1979 Interpretation. (Proposed Conclusions of Law ¶¶ 95–142).
- A. The University Complies with Prong I of OCR’s 1979 Interpretation. (Proposed Conclusions of Law ¶ 96–112).
 - 1. When one sex has a majority of the athletic participation opportunities, there is no discrimination against that sex (Proposed Conclusions of Law ¶¶ 97–102).
 - 2. Because the University has a plan to achieve compliance, it cannot be found in violation under OCR’s 1979 Interpretation. (Proposed Conclusions of Law ¶¶ 103–112).

- B. The University has a history and continuing practice of expanding female athletic participation opportunities. (Proposed Conclusions of Law ¶¶ 113–120).
- C. The University complies with Prong III because it fully and effectively accommodates the interests and abilities of its female students. (Proposed Conclusions of Law ¶¶ 121–142).
 - 1. The University complies with OCR’s guidance by monitoring and accommodating both interest and ability. (Proposed Conclusions of Law ¶¶ 121–125).
 - 2. The University monitors interest consistent with OCR’s guidance. (Proposed Conclusions of Law ¶¶ 126–131).
 - 3. The University monitors ability consistent with OCR’s guidance. (Proposed Conclusions of Law ¶¶ 132–135).
 - 4. The University reacts appropriately to fully and effectively accommodate interest and ability when it is sufficient to sustain a team. (Proposed Conclusions of Law ¶¶ 136–142).

IV. Plaintiffs are not entitled to damages.

- A. Plaintiffs cannot recover damages for their claims under the Equal Protection Clause. (Proposed Conclusions of Law ¶¶ 143–158).
- B. Plaintiffs are not entitled to damages under Title IX. (Proposed Conclusions of Law ¶¶ 145–157).
 - 1. Plaintiffs are not entitled to recover damages for violations of the three-part test invented by OCR’s 1979 Interpretation. (Proposed Conclusions of Law ¶¶ 146–149).
 - 2. The waiver or abrogation of sovereign immunity in 42 U.S.C. 2000d-7 does not extend to claims based on alleged violation of OCR’s 1979 Interpretation. (Proposed Conclusions of Law ¶ 150).
 - 3. In light of *Cummings v. Premier Rehab Keller*, emotional distress damages are not recoverable under Title IX. (Proposed Conclusions of Law ¶¶ 150–152).
 - 4. Plaintiffs failed to make any of the required disclosures of damages under Fed. R. Civ. P. 26(a)(1) and are therefore precluded from seeking damages at trial. (Proposed Conclusions of Law ¶ 153).

5. **Plaintiffs cannot establish any compensatory damages. (Proposed Conclusions of Law ¶¶ 154–156).**
6. **Plaintiffs are not entitled to recover attorney fees because their claims fail on the merits. (Proposed Conclusions of Law ¶ 157).**

Respectfully submitted,

/s/ Bryan H. Beaman

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2022, the foregoing document was filed using the Court's CM/ECF system, which will send electronic notification to all counsel of record registered to receive electronic filings.

/s/ Bryan H. Beaman

ATTORNEY FOR DEFENDANTS