

Professor Hausegger
11/20/2009

NCAA v. Saxton

Decision by Justice John Paul Stevens

PRIOR HISTORY: On Writ of Certiorari From The United States Court Of Appeals For The Third Circuit.

DISPOSITION: Remanded to district court.

[Type the abstract of the document here. The abstract is typically a short summary of the contents of the document. Type the abstract of the document here. The abstract is typically a short summary of the contents of the document.]

INTRODUCTION

The case before us, *NCAA Boston University and University of Pittsburgh v. Saxton*, brings forth issues related to the application of the Title IX amendments to an institution that is not part of a school that receives federal funds but one that benefits from those funds that its members receive. The NCAA is an association of 1291 schools for the purpose "...of which is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body." (NCAA.com), the organization requires its member schools, many of which are publicly funded, to comply with its regulations and requirements if they are to remain a member. One of the regulations is its Post-baccalaureate Bylaw, contained in Sec. 14.1-14.2 of the Bylaws (Sec. 14.1-14.2), another is the 10 semester/15 quarter waiver bylaw contained in Sec. 30.6 of the Bylaws (Sec. 30.6). The first outlines the requirements that post baccalaureate students need to meet if they are to be qualified to play NCAA sports. The second requirement is the 10 semester/15 quarter rule, which states that if you are going to be involved in NCAA sports while in graduate school, it must be within the first 10 semesters or 15 quarters of your college career (Sec. 30.6). You can get the 10 semester/15 quarter rule waived by a 2/3 majority of the Management Council if you have had situations beyond your or the institutions control that prevented you from fully participating in the semesters/quarters that were officially counted as part of your quota (Sec. 30.6). The NCAA regulations also state that if you want to play intercollegiate sports during your time in graduate school, you must do your graduate work at the same school that you received your undergraduate degree, with exceptions granted through the Post-Baccalaureate waiver (Sec. 14.1-14.2)(Sec. 30.6). The trouble that Saxton ran into was that she was doing her graduate work at other universities besides the one

where she received her undergraduate degree. She therefore, according to the NCAA rules, could not technically be involved intercollegiate sports without a waiver (Sec. 14.1-14.2). (The above paragraph relied heavily on Hausegger).

Julie Saxton played division III volleyball at Washington University, which is a member of the NCAA, for two and a half years; she then graduated and decided not to play the rest of the academic year. The following academic year after graduation she enrolled in a graduate program at Boston University where she was not involved in any NCAA sports, the next year she enrolled in a different graduate program at the University of Pittsburgh where she wanted to play NCAA volleyball, however, the NCAA deprived her of the opportunity based on their post baccalaureate policies. She was able to get both the University of Pittsburgh and Boston University to petition the NCAA to waive the restrictions; however the NCAA denied both of these petitions. (The above paragraph relied heavily on Hausegger).

Saxton then filed a lawsuit against the NCAA under Title IX because of alleged sex discrimination in their waiver granting process; her reasoning for doing this is that on average more males get waivers than females, a fact that was later verified by the district court. The NCAA petitioned for the case to be dismissed because they argued that they are not covered by Title IX due to the fact that they are a private organization and are not recipients of federal funds. Saxton countered that the dues that the NCAA received from member institutions that are federally funded, are enough to bring the NCAA under the umbrella of Title IX. She also argued that if discrimination by the NCAA is permissible, then the objective of the Title IX statute would be damaged because the NCAA has much of the decision making authority in the area of athletic admissions. (The above paragraph relied heavily on Hausegger).

The case went to district court where the court sided with the NCAA on the reasoning that the relationship of federal funds with the NCAA was not strong enough to bring it under Title IX. Saxton then appealed the case to the Third Circuit Court of Appeals where the court reversed the decision of the lower court on the reasoning that the dues it received from member institutions “would be sufficient to bring the NCAA within the scope of Title IX as a recipient of federal funds and would survive a motion to dismiss.” The NCAA then appealed the case to the Supreme Court, where we granted them certiorari. (The above paragraph relied heavily on Hausegger).

LEGAL QUESTIONS

The larger legal question that is before this Court is whether the NCAA is under the legal umbrella of Title IX. To answer this we will examine three theories that consider the idea that the NCAA is under Title IX. These theories are 1) the benefit that the NCAA indirectly receives from federally funded entities and the dues from those institutions creates a strong enough link to federal funds to be considered covered by the Title IX's program or activity clause (*NCAA v. Smith*), 2) the controlling authority that the NCAA wields over its member institutions, more specifically those that are federally funded, creates a link to federal funds through the decision making authority/pressure it wields over its member institutions (*NCAA v. Tarkanian*), and finally 3) the controlling authority that the NCAA exercises over the federally funded National Youth Sports Program (NYSP) is enough to bring it under Title IX for its decision making influence on the NYSP (*Smith v. NCAA*) (*Bowers v. NCAA*).

ARGUMENT

To evaluate the preceding theories I have carefully examined the precedents that pertain to all of legal theories that were mentioned and I have come to the conclusion that the NCAA is under Title IX and that the case should be remanded to district court for retrial where the court should seek to find more data on admissions statistics and other details that will assist to answer the question of whether or not there was in fact gender discrimination by the NCAA. Below is an analysis of each of the legal theories that I presented earlier, and the conclusions that I have come to regarding each of them.

I. BASED ON THE PRECEDENTS SET FORTH BY THE SUPREME COURT AND THE THIRD CIRCUIT COURT, I FIND THAT THE NCAA IS LEGALLY UNDER THE UMBRELLA OF TITLE IX.

1. Receiving dues from member institutions does not bring NCAA under Title IX

a. According to a unanimous vote by the Supreme Court of the United States in *NCAA v. Smith*, the benefit received by the NCAA from the dues that it gets from federally funded member institutions does not create a strong enough link to federal funds to put the organization under the legal umbrella of Title IX. According to the opinion written by Justice Ginsburg, “Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not”. The reasoning behind this interpretation came mostly from two sources, 1) *Grove City College v. Bell* (1984) and 2) *Department of Transportation v. Paralyzed Veterans of America* (1986). Analysis’ of which are written below. (The above paragraph relied heavily on *NCAA v. Smith* S.C. 1999).

b. In *Grove City*, the Supreme Court held that a school is under Title IX if any part of the school receives federal funds, or if any of the students receive federal funds. In other words the federal funds trigger of Title IX, according to the language of the decision, "encompasses all forms of federal aid to education, [*467] direct or indirect."*(NCAA v. Smith)*. This case is important because it laid out how far Title IX would reach in regards to the interpretation of "program or activity" which is used in the Title IX statute (*Grove City v. Bell*). It may have established that Title IX would go farther than was previously argued, but it did not establish exactly how far it would reach, this was discussed in the next case that Ginsburg used in her reasoning, *Department of Transportation v. Paralyzed Veterans of America* (1986).

c. In *Department of Transportation v. Paralyzed Veterans of America* (1986), a case regarding the extent of the coverage of the Rehabilitation Act of 1973, 29 U.S.C. § 794, the Supreme Court held that federal funds do not extend to entities that "benefit" from federal funds but rather those entities that "receive" funds from the federal government. If it were to include even those entities that only benefited from federal funds, the Court reasoned that it would result in practically "limitless" coverage. In the decision written by Justice Powell, he describes the "limitless" coverage by giving the example of the Federal-Aid Highway Act of 1956 where "Congress in this program [*611] used a Trust Fund approach similar to the Airport and Airway Development Act of 1970" and that if they were to accept the reasoning that was provided by *Paralyzed Veterans of America*, then under this new precedent all industries that use the federal highways would be covered under the federal restrictions that go along with the funds, delivery services and other companies that make use of the federal highway system. In the opinion of Powell and the majority of the Court this was well beyond what Congress had intended, and

would put a limitless range on the reaches of federal restrictions that are tied to federal funds (The above paragraph relied heavily on *Department of Transportation v. Paralyzed Veterans*).

d. Based on the two precedents above, Ginsburg argued that in the Smith case there was no doubt that the NCAA did benefit from the federal funds that the schools received, however the NCAA did not “receive” those federal funds, which would have put them under the precedent of Grove City, but instead they only benefited from the aid that the member schools received and were thus under the precedent of Paralyzed Veterans and using the reasoning outlined in that case, the Court ruled that the NCAA was not covered by Title IX. The implications of *NCAA v. Smith* are clear, in our current case the situation is almost exactly the same as the situation in Smith and using the precedent of Smith the argument by Saxton that the NCAA by accepting dues from federally funded member institutions amounts to coverage of Title IX, fails. (The above paragraph relied heavily on *NCAA v. Smith*)

The precedent in Smith is clear and unmistakable and it applies to Saxon; so we will now have to turn our attention to the other two arguments that speculate that the NCAA is covered under Title IX (*NCAA v. Smith*).

2. Having controlling authority over a publically funded NCAA member institution, does not bring the NCAA under Title IX.

a. An argument brought up in the case *Cureton v. NCAA* had to do with an allegation by several African American student athletes that the academic aptitude test that was required for all freshmen student athletes in the NCAA resulted in disparate impact, affecting African American students negatively. They brought the suit under Title VI, which has essentially the same language as Title IX except it is directed towards race discrimination, making this case valid in

the interpretation of Title IX (*Smith v. NCAA*). What the Third Circuit decided in this case was that 1) the financial assistance that was given by the federal government to the NYSP did not constitute federal assistance to the NCAA and 2) the “controlling authority” that the NCAA wielded over the member institutions was not enough to bring it under Title VI. (The above paragraph relied heavily upon *Cureton v. NCAA*).

c. The Courts’ reasoning for their decision that the NCAA does not wield controlling authority over its’ member institutions, came from the Supreme Court case *NCAA v. Tarkanian* (1988). In this case they decided that although the NCAA had influence on the member institutions in decision making, the NCAA did not constitute a “state actor” or possess controlling authority over the member institutions because although the member institutions did agree to comply and enforce the rules of the NCAA, the member institutions had 1) the option of not joining the organization and 2) the final authority over the affairs of their sports teams. The Court did acknowledge that even though they had final authority over the affairs of their sports teams, they would have to face sanctions from the NCAA if they disobeyed the rules of the NCAA and would thus be pressured to comply, but never the less, they did have the final authority and accordingly we ruled that this argument was not compelling enough. (The above paragraph relied heavily on *NCAA v. Tarkanian* (1988) and *Smith v. NCAA* (1999)).

d. The last point on the issue of controlling authority is the fact that the concept, although rejected in the case of *Tarkanian*, is not imaginary. The Court of Appeals for the Third Circuit in their decision in *Smith v. NCAA* established that if on remand *Smith* was able to prove that the NCAA demonstrated controlling authority over the NYSP then the NCAA would be under Title IX (*Smith v. NCAA*). This idea has also been discussed in law review journals (*Abernethy*)(*Baker*)(*Estevao*)(*Rowland*).

3. NCAA directly and indirectly receives federal funds from the NYSP by the fact that the NCAA wields controlling authority over the NYSP, bringing it under Title IX.

a. Based on the "controlling authority" principles lined out above, the question that now remains is whether or not the NCAA administers controlling authority over the NYSP. To answer this question there are first several facts regarding the NYSP situation that need to be addressed. According to the decision in the Third Circuit case *Smith v. NCAA*, Smith argued that

“1) the NYSP Committee was an NCAA committee responsible for the administration of the NYSP; 2) the Council of the NCAA, the entity that directed the general policy of the NCAA during certain periods, limited the powers of the Fund's Board of Directors; 3) the Executive Director of the NCAA and the chairperson [**26] of the NYSP Committee were ex officio members of the Fund's Board of Directors; 4) all of the members of the Fund's Board were either employees of the NCAA or members of the NCAA's NYSP Committee; 5) the Fund had to report to the Council of the NCAA on an annual basis; 6) upon dissolution of the Fund, its assets will be distributed exclusively to the NCAA; and 7) the NCAA's Executive Director remarked that the NYSP is "one of the NCAA's best kept secrets."

Appellant's Br. at 13-14 (citing *Bowers v. NCAA*, 9 F. Supp. 2d 460, 493-94 (D.N.J. 1998)).”

These seven points, with out a doubt, make a compelling argument that the NCAA has controlling authority over the NYSP. (The above paragraph relied heavily on *Smith v. NCAA*)

b. In addition to this the Third Circuit also brought up the district courts' decision in *Bowers v. NCAA* where they analyzed the issue and came to the conclusion that “there is evidence that the NCAA may be in control of the NYSP and the federal funds the NYSP receives." They made this conclusion based on the fact that 1) “the NYSP was established in 1969 and was run exclusively by the NCAA until 1989, when a not-for-profit corporation, the Fund, was created to administer the NYSP”, 2) “According to a member of the NYSP's Board of Directors, the Fund

was established because the NCAA wanted to ensure that it was not a recipient of federal grant dollars or a contractor with the federal government.”, 3) even though the NCAA created the Fund so that they would not be technically tied to federal money, it still has basically the same function in relation to the NYSP as it did before, the reasons for the courts’ statements on this point are (a) the NCAA “administers” the Fund for only one dollar per year, (b) the Fund has no employees and its business address is the same as the NCAAs’ address, and (c) the NCAA “seems to have the ability to influence significantly how the NYSP’s federal funding is spent[]’ given the involvement of the NCAA with the Fund’s Board of Directors.” (The above paragraph relied heavily on *Bowers v. NCAA* [as quoted in *Smith v. NCAA*]).

c. Based on these facts, it is my opinion that the NCAA does have controlling authority over the NYSP and I believe that the Appeals Court of the Third Circuit reasoned correctly in their decision in *Smith v. NCAA* when they stated that “the relationship between the NYSP, the Fund, and the NCAA, if proven, would establish that the NCAA is a recipient of federal funds within the meaning of Title IX.” (*Smith v. NCAA*).

II. BASED ON MY ANALYSIS OF THE FACTS THAT HAVE BEEN PRESENTED TO THIS COURT, I FIND THAT THERE IS NOT ENOUGH INFORMATION TO MAKE A JUST DECISION ON THE QUESTION OF THE NCAAs’ ALLEGED TITLE IX VIOLATION.

1. Facts Regarding the Allegations of Sexual Discrimination by the NCAA in Saxtons’ case.

a. The original reason for the Title IX claim that was brought forth by Saxton was that the NCAA gave out more waivers for the Post-Baccalaureate by-law to males than to females, an allegation that was later verified by the lower courts (Hausegger). Based on the analysis in the

previous section I believe that it is clear that the NCAA is rightfully under Title IX and as such must comply with all the requirements of the statute. This being said, we must now examine the NCAAs' alleged sex discrimination in the administering of waivers. To do this we will need to examine 1) what part of Title IX policy this situation would reside under, and 2) how the actions of the NCAA lined up with the policy of Title IX.

b. In the official Title IX policy written by the Office of Civil Rights in the Department of Education it states in § 106.41 (a) Athletics. "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." (Title IX). This means precisely what it says, you cannot treat anyone differently based on their sex. This would include giving preference to males when granting waivers for the Post-Baccalaureate by-law.

c. It is clear from the evidence from the lower courts that the NCAA has in fact given more fee waivers to males than to women. The questions that still remain are 1) what proportion of females are granted waivers versus the proportion of males who are granted waivers? 2) Are there any other nondiscriminatory reasons that could be argued for why there is a difference in the number of males and females who get waivers? Regarding the first question, if it did turn out to be the case that the percentage of females who applied for waivers and received waivers, was the same as the percentage of males who applied for waivers and received them, then it would mean that the chances or opportunity of getting a fee waiver was the same for both males and females. Going back to the Office of Civil Rights policy which states "No person shall, on the basis of sex...be treated differently from another person..." (Title IX), it clearly implies that

males and females must have the same “chance” or “opportunity” in all the decision making processes of the athletic admissions process, including waivers. So giving out MORE waivers to men does not necessarily mean that males received preferential treatment, it could have been the case that more men applied, in which case the percentages of those who applied versus those who received the waivers could still be the same for both males and females. The problem is that I don’t know the data on this, making it hard to make a decision on the matter.

d. What I have established so far in regards to whether or not the NCAA has in fact violated Title IX, consists of only two things, 1) it is a violation of Title IX to give preference to males over females in granting Post-Baccalaureate waivers (Title IX) and 2) the NCAA grants MORE Post-Baccalaureate waiver to males than females (Hausegger). What we have more of than established facts are fundamental questions. What are the percentages of the males who receive waivers out of the total number of those who apply? What are the percentages of females who receive waivers out of the total number who apply? Are there any other nondiscriminatory reasons for why there would be more males granted waivers than females? The answers to these questions are critical to determine in order to make a proper decision on whether the NCAA did in fact violate Title IX in their process for granting Post-Baccalaureate waivers.

e. After reviewing all of the evidence presented, the conclusion that I come to is that there is not enough data regarding the NCAAs’ Post-Baccalaureate waiver granting process for an accurate judgment to be made on the question of whether or not they are in violation of Title IX.

III Conclusion

In the preceding discussion I have explained how 1) the theory that the receipt of dues from publicly funded member institutions does not put the NCAA under Title IX, based on the precedent set in *NCAA v. Smith*; which held that the dues that NCAA received from its’ federally

funded member institutions, was not a strong enough link to federal funds to bring it under Title IX (*NCAA v. Smith*). 2) The controlling authority theory as it pertains to the control that the NCAA has over its member institutions is also not persuasive enough to bring the NCAA under Title IX; due to the Supreme Court's ruling in *NCAA v. Tarkanian* where they held the NCAA does not control its' member institutions enough for them to be considered a "controlling authority" because the members do have the final authority on whether they are to join the NCAA (*NCAA v. Tarkanian*). 3) When the controlling authority principle is applied to the NYSP situation, using the precedent set out in *Smith v. NCAA* and *Bowers v. NCAA* which held the there was compelling evidence that the NCAA does have controlling authority over the federally funded NYSP, in my judgment it does in fact bring the NCAA under Title IX (*Smith v. NCAA*) (*Bowers v. NCAA*). Finally, 4) the facts regarding whether the NCAA violated Title IX are not extensive enough to make an accurate judgment on the question (Hausegger). I have also uncovered several law review journals that discuss the issues in a similar light as I do (Abernethy)(Baker)(Estevao)(Rowland).

Therefore, based on the preceding analysis I hold that the NCAA is under Title IX, and to answer the question of whether they are in violation of Title IX, I remand this case back to district court for a new trial consistent with this ruling.

It is so ordered.

TABLE OF AUTHORITIES

Cases

1. *Bowers v. NCAA*, 118 F. Supp. 2d 494 (D.N.J. 2000)
2. *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998)
3. *Cureton v. NCAA*, 198 F.3d 107 (3d Cir. 1999)
4. *Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986)
5. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984)
6. *NCAA v. Smith*, 525 U.S. 459 (1999)
7. *NCAA v. Tarkanian*, 488 U.S. 179 (1988)
8. *Smith v. NCAA*, 266 F.3d 152 (2001)

Statutes

1. Title IX, Office of Civil Rights, § 106.41 (a),
<<http://www.ed.gov/policy/rights/reg/ocr/34cfr106.pdf>>
2. Rehabilitation Act of 1973, 29 U.S.C. § 794

Other Authorities

1. Abernethy, Amy M., Mondello, Michael J. “*Symposium Article: An Historical Overview Of Student-Athlete Academic Eligibility And The Future Implications Of Cureton V. Ncaa*”, Copyright (c) 2000 Villanova University Villanova Sports and Entertainment Law Journal, 2000.
2. Baker, Thomas A. III, & Connaughton Daniel P, “*Cureton v. NCAA: A Blow-by-Blow Account of the Landmark Title VI Challenges to the NCAA and Their Recent Implications*” Society for the Study of the Legal Aspects of Sport and Physical Activity Journal of Legal Aspects of Sport, Spring / Summer, 2003, University of Florida.
3. Estevao, Lesley Chenoweth. “*Student-Athletes Must Find New Ways to Pierce the NCAA's Legal Armor*”, Copyright (c) 2002 Seton Hall Journal of Sport Law.
4. Hausegger, Lori, Class Handout, Case 2.
5. NCAA.com, <[http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/About The NCAA/Membership/Our Members/membership_breakdown.html](http://www.ncaa.org/wps/ncaa?key=/ncaa/NCAA/About%20The%20NCAA/Membership/Our%20Members/membership_breakdown.html)>.
6. Rowland, Thomas M. “*Level the Playing Field: The NCAA Should Be Subject to Title IX*”, Sports Lawyers Journal Spring, 2000. 7 Sports Law.J.143.

NCAA Bylaws

1. Sec. 14.1-14.2, <http://www.ncaapublications.com/Uploads/PDF/D3_Manual0c5a4b77-4ccc-4eac-9ae3-c634b0afb89a.pdf>.
2. Sec. 30.6, < http://www.ncaapublications.com/Uploads/PDF/D3_Manual0c5a4b77-4ccc-4eac-9ae3-c634b0afb89a.pdf>.

