FINAL ROUND – "Feeling the Hornet's Sting"
BENCH BRIEF: WHAT JUDGES SHOULD KNOW FOR THE FINALS

The Competitors: You will be seeing the top four teams from the grueling preliminary rounds the day before. Although all teams were sent the general facts weeks ago and these facts included citations to the *Ollier* and *Daniels* cases, the final four teams only get their confidential facts on Saturday night after their place in the finals is confirmed. So they only have about 12-14 hours total between learning of their facts and getting ready for the final rounds; not much time to prepare as well as eat dinner, sleep, and eat breakfast.

Background: The finals involve a Title IX dispute between a school district and the local community over the construction of a new stadium and practice field for the baseball team. A group of local community members (the North Reading Citizens for Equality, or "NRCE") has threatened to bring the matter to the Office for Civil Rights or to court. The issue arose when a North Reading school district committee (the Secondary Schools Building Committee, or "SSBC") made the decision to cut the proposed girls' softball stadium on the high school campus and replace it with a practice field for the boys' baseball team citing budgetary shortfalls. The girls practice at Little Field, a grade school about 2.5 miles away from the high school. Although the girls' facilities are inferior in some ways (travel burden and costs, no locker rooms, no batting cages), the girls' softball coach prefers the "Little School" site because it has three softball fields and this allows the varsity, junior varsity, and freshman to practice at the same time. The competitors will be role-playing as the president of the NRCE (citizens group) the chairperson of the SSBC (school board committee) and their respective legal advisors who are trying to resolve the matter without administrative or court litigation. This fact pattern is based on a real life situation:

(See *Boston Globe*, Title IX Dispute Looms in North Reading: http://www.boston.com/yourtown/2013/04/24/title-battle-looms-north-reading/FdDdoFq2NlMS7VAtbeWI0M/story-1.html)

However, the competitors are limited to information from before August 9, 2013, when the school announced that it was building a girls' softball field on high

school campus because a baseball field would not fit and not for reasons of Title IX compliance. Essentially, teams are limited to facts in the negotiation if they differ from what was provided to them.

(See *Boston Globe*):
http://www.bostonglobe.com/metro/regionals/north/2013/08/17/north-reading-softball-gets-field-high-school-complex/r38pLrdQXnAg0HFh58fcOI/story.html

Legal Framework:

Title IX Violations: Equal Treatment Includes Equal Facilities

Title IX (see full text in appendix), prohibits discrimination on the basis of sex in any school program which receives federal funding. It has two separate bases for finding violations: "proportionality" which requires the opportunities for both males and females to be proportional to their numbers in the student population and "equal treatment" which requires "equal treatment." Equal treatment has been interpreted to require "equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes." Department of Education, Office for Civil Rights, Policy Interpretation), 44 Fed.Reg. 71, 413, 71,417–418. See *Ollier v. Sweetwater Union High School District*, 858 F.Supp. 2d. 1093, 1109 (S.D. Cal. 2012.)

Our case involves **only the equal treatment branch of Title IX.** (There is no evidence of a disparate participation rate in the facts given to the competitors in real life.) The implementing regulations indicate that in determining equal treatment, the Office for Civil Rights will consider among other things: Provision of locker rooms, practice and competitive facilities, travel and scheduling of games and practice time. 34 C.F.R. § 106.41(c). As the *Ollier* case given to the competitors states, significant differences in one component can by themselves be a violation "[A] disparity in one program component (*i.e.,* scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school." *McCormick v. School Dist. Of Mamaroneck,* 370 F.3d 275, 293 (2d Cir.2004); Policy Interpretation, 44 Fed.Reg. 71,417 (Dec. 11, 1979). A disparity in one program component, however, "can be offset by a comparable advantage to that sex in another area," *McCormick,* 370 F.3d at 293, as long as "the overall effect of any differences is negligible." Policy Interpretation, 44 Fed.Reg. at 71, 415.

<u>Title IX Remedies</u>: Courts Do Order Substantial Changes, but also Consider Feasibility and Often Rely on Parties to Negotiate the Remedy.

Although compensatory damages are conceivable, the principle remedies in Title IX cases are injunctive and mandatory relief equalizing treatment, but courts have looked at the feasibility of the remedy and have generally afforded the parties an opportunity to present or negotiate their own plan. For example in *Daniels v. School Bd. Of Brevard County, Fla.*, 995 F.Supp. 1394 (M.D. Fla. 1997), court found violations very similar to those in the instant case but then *asked the parties to submit plans to remedy them.* At the remedy hearing, the court considered feasibility and ordered a number of steps toward immediate equal treatment (e.g. removing a portion of the fence separating the boys' baseball field and girls' softball field, so that the restroom facilities are readily accessible to players and spectators at both fields; co-locating the girls' and boys' pitching machines so that both teams can use the batting cage, establishing a schedule allowing both teams equal use of the cage; changing signs to read "Mustangs Baseball *and Softball*" and required that lights be installed on the girls' softball field because the boys' baseball field had them). However, the court also denied other remedies such as the removal of a gender neutral sign on the boys' field and generally delayed more major remedies because of the pendency of two other actions against the county school district.

<u>Negotiating Dynamics</u>: There is substantial balance between in the bargaining power of the two parties based on the law. The NCRE has a strong legal argument that the district is violating Title IX by making the girls play off-campus and pay for their own transportation, by building 2 fields on campus for boys' baseball and none for girls' softball, by not having locker rooms for the girls' softball team etc. If the school district doesn't remedy at least some of these inequalities it would be in a tough position in litigation.

The SSBC (school district), on the other hand, has a possible argument that because there are three softball fields, the girls have advantages that balance any disadvantage they suffer, especially since the girls' coach prefers the Little School site. But given the lack of transport, locker rooms, batting cage, it seems clear that there are violations and that they could be remedied. The SSBC has a second and

stronger legal approach: "ok, there are potential violations, but we need to consider what the best remedies are. Let's focus our energies on finding solutions and not on litigating whether there is a violation. It would be hard to get anything more in court than a reasonable solution that we negotiate."

Regardless of whether there is a violation and even assuming there is no litigation and little discussion of Title IX law, both sides could achieve their objectives (better playing conditions for the softball teams, compliance with Title IX and most efficient expenditure of resources), by agreeing on a workable remedy. One criterion to judge teams is how effectively they are able to use the legal framework to push the negotiation in that direction, establishing or deflecting whatever leverage is created by the legal framework, but doing so in a way that maintains a productive relationship with the other side in order to work together to frame the best solution. But given the short amount of time available to the parties to prepare on the law, it is possible that they will use a common, sense, practical approach to reach the same conclusions: a negotiated settlement is a better result for each side. You should assess the teams' skills in part by how well they are able to navigate between applying any leverage they have based on the law and otherwise with maintaining a focus on reaching a workable solution. This is especially true because as *Ollier* and *Daniels* cases illustrate (see appendix), if a violations is found, courts often require the parties to negotiate the terms of the mandatory injunction that remedies the violation.

Parties' Preference and Scope of their Authority: The NRCE board has authorized their president to agree to a deal if the district commits to comply with Title IX in a binding and enforceable manner, but at a minimum, must include a plan to build a softball-only field on the North Reading High School campus within the next five years and to upgrade the Little School Facilities in the interim. The SSBC has given their Chairperson broad authority to negotiate the best deal he can to achieve these goals and, if push comes to shove to do what it takes to avoid counterproductive and costly litigation. The SSBC has a limited immediate budget of $50,000, but can commit to deal that includes both Little Field upgrades and a new girls' softball field within 10 years if NCRE can help with fund raising.

Beyond the overall authority given to their negotiators, each side has preferences for resolutions that they would like to see met. The following grid summarizes these:

	NRCE	**SSBC**
Overall Bottom Line	Deal must commit school board to binding and enforceable compliance and a minimum upgrade the Little Field facilities now and include a plan to build softball field on campus within five years.	Has authority to do anything necessary to avoid costly and unproductive litigation go away. But only has $50,000 additional budget to accomplish that. Can commit to Little Field upgrades plus softball on campus if NRCE will assist with fund raising
High School Facilities	It should be easy to just switch the plan for the second field back to its original arrangement, and give both the baseball team and the softball team their own fields.	Softball stadium on HS campus costs $60,000 more than baseball practice field. Must have 2 fields each for baseball and softball.
Little School Facilities	If the softball team is to stay at the Little School for the long term in any capacity, the NRCE is insistent that firm measures must be taken by the SSBC to improve the facilities.	If the NCRE wants an immediate response to the facilities issue, the best course of action to take is for the softball team to stay at the Little School's existing facilities.
Little School Facilities - **Needs for Upgrades**	Improving the Facilities = - New Locker Rooms/ Bathroom Facilities - New Dugouts - Free Transportation from High School	Supports these if there is the following founding: Improvement Costs = - Locker Rooms $40,000 - Batting Cages $6,000 - Dugouts $7,500 - new field elm, kids $15,000 TOTAL = $68,500

Resources	NRCE has raised $15,000 for possible legal fees and can raise more money. Can be used to supplement SSBC's costs if necessary to reaching a deal that is very desirable.	Has funding issues, but has been given an additional $50,000 to rectify situation. Can commit to more expenses if NRCE helps with fund raising.
Travel to Little Field	School must pay for and should provide.	School will pay for and provide.

Finding Solutions: Basically, there are three possible scenarios on which the parties might agree:

1. Build a softball field on campus (**cost $60,000**);
2. Continue to play at Little Field , but upgrade facilities **(cost: $68,500**);
3. Some version of both; (**potential costs $128,500,** plus any upgrades to practice baseball after girls move onto campus).

If they agree to cooperate, the parties have $65,000 potentially at their disposal. The SSBC (school) has been given an additional $50K budget to make this matter go away. The NRCE (citizens group) has $15,000 in a litigation fund that they might be able to devote to the project as well. So if they agree to combine their resources, there are enough funds for the softball field on campus in 2015 or almost enough for the Little Field improvements, including the extra field for the elementary school. (The total cost with the new field for the elementary school would be $68,500). Such a solution would still leave them the questions of what to do between now and then and where to find funding for anything beyond the softball field. There is a lot for the parties to discuss in terms of the details of the remedy and it is important for them to minimize posturing on legal positions in order to use the limited time they have to have those discussions.

One of the key criteria for assessing the effectiveness of the parties is their ability to work cooperatively with the other side, but at the same time stay firm in meeting their client’s interests and in seeking an optimal deal for their client. That is no easy task because while the parties have a common interest in resolving this matter without litigation, they also have separate budgetary interests that conflict. Ideally this negotiation should be a problem solving one in which the parties work

together to find the best solutions to satisfy all interests, but within the limits imposed by their clients. Teams should be judged both on their ability to meet their client's interests in a practical way and their ability to work effectively with the other side.. It seems likely that some teams will arrive at a solution that has softball on campus as soon as possible (2015) and others will agree to the upgrades to Little Field now and a plan to build a softball field on campus within five years. It will be up to the teams in their self-evaluations to convince you that their remedy best meets the interests of their client.

APPENDIX: APPLICABLE LAW

Title IX. 20 U.S.C. § 1681(a)
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 educational program or activity receiving Federal financial assistance.

Implementing Rules and Regulations Regarding Equal Treatment:

Department of Education, Office for Civil Rights, Policy Interpretation 44 Fed.Reg. 71,413, 71,417–418 requires: "equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes." Note: As mentioned above, courts have interpreted this provision as follows: "[A] disparity in one program component (i.e., scheduling of games and practice time) can alone constitute a Title IX violation if it is substantial enough in and of itself to deny equality of athletic opportunity to students of one sex at a school." (*McCormick v. School Dist. Of Mamaroneck,* 370 F.3d 275, 293 (2d Cir.2004); Policy Interpretation, 44 Fed.Reg. 71,417 (Dec. 11, 1979). A disparity in one program component, however, "can be offset by a comparable advantage to that sex in another area," *McCormick,*370 F.3d at 293, as long as "the overall effect of any differences is negligible." Policy Interpretation, 44 Fed.Reg. at 71, 415.

34 C.F.R. § 106.41(c)
(c) 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:

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

Case Law:

***Ollier v. Sweetwater Union High Sch. Dist.*, 858 F.Supp.2d 1093 (S.D.Cal. 2012) (A careful analysis of the equal treatment branch of Title IX doctrine):**

Plaintiffs, former students at Castle Park High School in Chula Vista, California, filed a class action lawsuit against Sweetwater Union High School District alleging violations of Title IX. In addition to claims regarding the district's failure to provide proportional opportunities, the plaintiffs asserted the district violated Title IX by failing to provide equal treatment to the girls' teams in regards to recruiting, coaching, scheduling, equipment, uniforms, and facilities. Under Title IX, "[c]ompliance in the area of equal treatment and benefits is assessed based on an overall comparison of the male and female athletic programs, including an analysis of recruitment benefits, provision of equipment and supplies, scheduling of games and practices, availability of training facilities, opportunity to receive coaching, provision of locker rooms and other facilities and services, and publicity. 34 C.F.R. 106.41(c)."

The Sweetwater School District was found to take a largely hands-off role in enforcing Title IX requirements. Recruiting and equipment, including uniforms, were among several areas that the school left to the discretion of the athletic coaches, with little to no oversight by school officials. Girls' team coaches were assigned multiple head coaching assignments making it difficult for them to expend the necessary energy to recruit team members and devote enough time and attention to their multiple assignments. In contrast, the coaches for the boys' teams were not given multiple head-coaching assignments. There were frequent turnovers in girls' team coaching staff while boys' teams generally had consistent staffing and support. The school consistently failed to hire coaches for the girls teams in a timely manner thus the playing opportunities for the girls' teams were significantly limited. Additionally, the boys' teams had greater access to optimal playing times

for both practices and games. An expert brought in by the plaintiffs to evaluate Title IX compliance found that the girls' locker rooms, practice facilities, and playing facilities were of a significantly lesser quality than the boys' facilities. When a parent, who also volunteered as an assistant coach, complained about the quality of the girls' softball team specifically, the softball coach was fired and the parent was not allowed to continue volunteering, and the coach who was hired as a replacement was less experienced and assigned the head coach position for three sports.

At the time this case was decided, the district had made some improvements to scheduling and facilities, but overall the court was not provided with enough evidence that sufficient progress had been made. Further litigation on this case is still in progress.

***Daniels v. School Board of Brevard County Fla*., 995 F.Supp 1394 (M.D. Fla. 1997) (Illustrates two key points: (1) that courts consider the feasibility (including budget) of ordering a Title IX remedy, and (2) once a court find a violation, it often asks the parties to negotiate or individually propose the remedies it will order):**

Plaintiffs sued the county school board under Title IX and state law because of disparities between the boys' baseball and girls' softball team. Specifically, the plaintiffs pointed to inequities regarding the electronic scoreboard, batting cage, bleachers, signs, bathroom facilities, concession stand/press box/announcer's booth, and lighting. In response to the plaintiff's complaints, the Defendants were given the opportunity to submit a plan to remedy the discrepancies. Defendants felt that immediate expenditure of funds to fix the issues would cause more harm given the budgetary situation.

Instead of presenting a long range fiscal plan to fix the identified discrepancies, it proposed a plan that did not upgrade any of the girls' facilities; rather, they proposed to limit the boys' access to their amenities. The courts agreed this plan appeared more punitive than constructive. While this case was pending, more plaintiffs filed suits that expand the Title IX claims to two other schools within the same district. With three schools implicated, the court could not make a

“reasoned determination” in regards to what the district would have to spend to adequately address the complaints in this case. As a result, the court ordered a number of steps toward immediate equal treatment (e.g. removing a portion of the fence separating the boys' baseball field and girls' softball field, so that the restroom facilities are readily accessible to players and spectators at both fields; collocating the girls' and boys' pitching machines so that both teams can use the batting cage, establishing a schedule allowing both teams equal use of the cage; changing signs to read “Mustangs Baseball *and Softball*” and required that lights be installed on the girls’ softball field because the boys’ baseball field had them) but the court also denied other remedies such as the removal of a gender neutral sign on the boys’ field and generally delayed more major remedies because of the pendency of two other actions against the county school district).