

Diving In: MSU's Aquatic Cuts and the Battle for Title IX Compliance



Photo Source: Tammie Mead, *Backstroking boy swimmer stock photo*, FLICKR (Sept. 12, 2012)

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Introduction: MSU Women's Aquatics Makes Waves

In October of 2020, Michigan State University (“MSU”), an NCAA Division I institution, announced the discontinuation of both the men’s and women’s varsity swimming and diving programs by the end of the 2020-2021 season.¹ MSU cited budgetary restrictions as the reason for their discontinuation.²

As a result of this announcement, eleven women on the team retained legal representation to challenge MSU’s decision.³ On January 15, 2021, they filed a lawsuit in the U.S. District Court for the Western District of Michigan, alleging that MSU’s decision violated Title IX and the Michigan Civil Rights Act.⁴ To further their cause and potentially halt the University’s actions during the litigation process, they also filed a motion for a preliminary injunction.⁵

In their lawsuit, the plaintiffs stated the University added non-competing athletes to the rosters of other women’s sports teams, effectively accusing the University of fraudulently portraying adherence to Title IX compliance.⁶ Accordingly, they argued the elimination of the women’s

¹ Balow v. Michigan State Univ., 620 F. Supp. 3d 694, 698 (W.D. Mich. 2022).

² *Id.*

³ John Juenemann, et al., *Case: Balow v. Michigan State University*, CIVIL RTS. LITIG. CLEARINGHOUSE (Mar. 15, 2023), <https://clearinghouse.net/case/43196/>.

⁴ *Id.* (alleging that MSU’s decision violated Title IX by unequally allocating athletic participation opportunities, financial assistance, and treatment and benefits and violated the Michigan Civil Rights Act’s prohibition on gender discrimination in education).

⁵ *Id.*

⁶ *Id.* (summarizing the students’ main argument that MSU’s decision to disband the aquatics team exacerbated their pre-existing Title IX violations since every member on the aquatic team actively competed in competition, whereas many of MSU’s other women’s sports teams included non-competing athletes in order to make it appear that MSU athletics complied with Title IX).

aquatics team exacerbated already-existing violations, given that all its members actively competed.⁷

Policy Background: A Stroke of Title IX Compliance

Title IX of the Education Amendments of 1972 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.”⁸

The purpose of Title IX is to ensure that no student is denied an opportunity to receive an education and benefit from other federally funded activities based on their gender.⁹

Prior to 1988, it was unclear whether the entire college or university, or just the program that received federal funding, was prohibited from discriminating on the basis of gender under the Title IX.¹⁰ However, the enactment of the Civil Rights Restoration Act of 1987 addressed this ambiguity and stated if a single department or program at a college or university receives federal financial assistance, the entire institution must comply with Title IX.¹¹

Timeline

Below illustrates a timeline of the key moments between the former students and the University.

After filing the initial lawsuit in January 2021, on February 19, 2021, the district court denied the plaintiffs’ motion for a preliminary injunction and rejected the argument that there was a private right of action under Title IX.¹² The district court found the students could not demonstrate a substantial likelihood of success on the merits.¹³

The plaintiffs appealed the decision, and on February 1, 2022, the court of appeals vacated the district court’s opinion and remanded the case, holding that the district court was required to focus on number of participation opportunities meaning “numbers substantially proportionate to

⁷ *Id.*

⁸ 20 U.S.C.A. § 1681.

⁹ *The 14th Amendment and the Evolution of Title IX*, U.S. COURTS (last visited Oct. 10, 2023), <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix>.

¹⁰ 129 A.L.R. Fed. 571.

¹¹ *Id.* (noting how the adoption of the “institution-wide approach” to Title IX made it possible for female college athletes to file suits against colleges and universities that claimed decisions to discontinue particular sports deprived them of equal education opportunities required by Title IX).

¹² *Balow v. Michigan State Univ.*, No. 1:21-CV-44, 2021 WL 650712, *3 (W.D. Mich. Feb. 19, 2021).

¹³ *Id.* at *4 (holding that this court does not evaluate requests for preliminary injunction under a “fair chance” standard, an Eighth Circuit standard by which this court is not bound by precedent). *See Roth v. Bank of Commonwealth*, 583 F.2d 527, 537-38 (6th Cir. 1978) (quoting *Metro. Detroit Plumbing & Mech. Contractors Assoc. v. HEW*, 418 F. Supp. 585, 586 (E.D. Mich. 1976)) (“the precise wording of the standard for the likelihood of success on the merits is not as important as a realistic appraisal of all the traditional factors weighed by a court of equity. A balancing is required, and not the mechanical application of a certain form of words”).

their respective enrollments,” not participation gap as percentage of the athletic program’s size.¹⁴ In addition, the court held the district court was required to compare participation gap to size of viable team, rather than size of average team.¹⁵

Back on remand, on August 8, 2022, the district court granted preliminary injunction in part to the former students.¹⁶ In the plaintiffs’ initial request for injunctive relief, the students sought reinstatement of the women’s swimming and diving team; however, the district court ordered MSU to draft a Title IX compliance plan instead.¹⁷

On July 29, 2022, MSU sought clarification regarding the language and application of Title IX and filed a petition for a Writ of Certiorari with the U.S. Supreme Court.¹⁸ The question presented revolved around determining how to measure compliance under Title IX.¹⁹ The former swimmers contended that the statute required numerical compliance, whereas MSU believed that an overall percentage constituted compliance.²⁰ On December 12, 2022, the Supreme Court denied hearing the case.²¹

Finally, on January 23, 2023, the parties agreed to have the case dismissed with prejudice.²² As a result of mediation, MSU agreed to hire an independent director for gender equity review and pledged to achieve full Title IX compliance by the conclusion of the 2026-27 academic year.²³

Analysis: Diving into the Partial Preliminary Injunction

MSU primarily contended that the court should reject the plaintiffs’ plea to reinstate the swimming and diving team, arguing that such a move would disrupt the status quo.²⁴ However, after a series of legal battles across multiple courts, both parties appeared to have reached an

¹⁴ Balow v. Michigan State Univ., No. 1:21-CV-44, 2021 WL 650712 (W.D. Mich. 2021), *vacated and remanded*, 24 F.4th 1051, 1059-62 (6th Cir. 2022) (finding that though financial implications of restoring a team can influence the district court’s assessment of preliminary injunction criteria, this does not suggest that courts lack the authority to correct an error if a preliminary injunction is initially denied due to a legal misinterpretation). *See* Porter v. Lee, 328 U.S. 246, 251 (1946) (“It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo”).

¹⁵ *Id.* at 1055 (quoting the Department of Education’s “Dear College” letter which clarified the prongs of the three-part Title IX compliance test); U.S. Dep’t of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996).

¹⁶ Balow v. Michigan State Univ., 620 F. Supp. 3d 694, 712-13 (W.D. Mich. 2022).

¹⁷ *Id.*

¹⁸ Michigan State University and Michigan State University Board of Trustees, Petitioners, v. Sophia Balow, et al., Respondents., 2022 WL 3044804.

¹⁹ *Id.* at *i (arguing overall percentage constitutes compliance by citing how the Department of Health, Education, and Welfare issued a “Policy Interpretation” that provided guidance on what constitutes compliance with Title IX, which stated that a college or university can establish compliance with Title IX by showing that “intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to their respective enrollments”) (emphasis added).

²⁰ Morgan Womack, *U.S. Supreme Court will not hear MSU swim and dive Title IX case*, STATE NEWS (Dec. 12, 2022), <https://statenews.com/article/2022/12/u-s-supreme-court-will-not-hear-msu-swim-and-dive-title-ix-case>.

²¹ Balow v. Michigan State Univ., 24 F.4th 1051 (6th Cir.), *reh’g denied*, No. 21-1183, 2022 WL 1072866 (6th Cir. Mar. 31, 2022), and *cert. denied*, 143 S. Ct. 525, 214 L. Ed. 2d 301 (2022).

²² Stipulated Ord. Dismissal with Prejudice, 3243, No. 162 (W.D. Mich. 2023).

²³ *The 14th Amendment and the Evolution of Title IX*, *supra* note 8.

²⁴ Balow, 620 F. Supp. 3d at 700.

impasse, highlighted by the district court's decision to grant the preliminary injunction only in part.²⁵

The court had to determine whether the participation gap was large enough to sustain a viable team, i.e., “a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.”²⁶ In doing so, the court also considered whether it should issue an injunction requiring MSU to restore the aquatics team, keeping in mind the focus was on “prevention of injury by a proper order.”²⁷

The most recent data provided by the plaintiffs indicates a participation gap of 36 athletes, and a long-term average of a gap of 31.²⁸ Because the plaintiffs demonstrated there is sufficient interest, ability, and available competition at MSU to sustain a women’s aquatics team of at least 21 members, their evidence of an average participation gap of 31 meant there was a substantial probability the participation discrepancy at MSU surpassed the requirements for a viable varsity women’s swimming and diving team.²⁹ Additionally, because the discontinuation of the aquatics team had significant impacts on plaintiffs’ collegiate athletic experience, the plaintiffs met their burden of showing irreparable harm.³⁰

Conclusion: Charting the Course for Relief

Here, the appropriate remedy is a “choice within the court’s discretion.”³¹ The court found that although the factors weighed in favor of preliminary injunction, because there was no evidence to suggest MSU **deliberately** evaded Title IX compliance, and MSU would face financial burden if the court required it to assemble a team to compete in the upcoming season, the proper relief was to require MSU to submit a compliance plan to reduce or eliminate the existing participation gap for women.³² While the court’s decision takes into account MSU’s financial concerns, one cannot help but wish for a more immediate resolution to address the participation gap for women in collegiate sports.

²⁵ *Id.* at 694.

²⁶ *Id.* at 702 (citing *Dear Colleague Letter* from Norma V. Cantú, Assistant Secretary for Civil Rights, United States Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>).

²⁷ *See Stenberg v. Cheker Oil Co.*, 573 F.2d 921, 925 (6th Cir. 1978) (“[i]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury, either by returning to the last uncontested status quo between the parties, by the issuance of a mandatory injunction, or by allowing the parties to take proposed action that the court finds will minimize the irreparable injury. The focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo”).

²⁸ *Balow*, 620 F. Supp. 3d at 707-08.

²⁹ *Id.* at 709.

³⁰ *Id.*

³¹ *Balow*, 24 F.4th at 1062 (quoting *Cohen v. Brown Univ.*, 991 F.2d 888, 906 (1st Cir. 1993)).

³² *Balow*, 620 F. Supp. 3d at 711-12. (citing *Cohen*, “that “specific relief” (i.e., requiring a school to maintain or eliminate a particular sports team) is “most useful in situations where the institution, after a judicial determination of noncompliance, demonstrates an unwillingness or inability to exercise its discretion in a way that brings it into compliance with Title IX” to support their conclusion that MSU did not intentionally evade compliance by purposely inflating the sizes of women’s teams, manipulating rosters, or improperly counting athletes). *See Cohen*, 991 F.2d at 907.