International Municipal Lawyers Association
www.imla.org

IMLA NEWS
Issue 5 – March 5, 2014

Education: Rule That Boys on Athletic Teams Must Maintain Short Hair Length While Girls Have No Restriction is Violation of Title IX and Equal Protection

Hayden v. Greensburg Community School Corp., No. 13-1757 (7th Cir. Feb. 24, 2014).

In a case brought by a long-haired male high school student, the Seventh Circuit has found that a school policy requiring boys on athletic teams to maintain short hair while girls have no such grooming restriction constitutes a violation of Title IX and Equal Protection.

The Greensburg (Indiana) Community School had a policy whereby the Board of Trustees directed the district superintendant to "establish such grooming guidelines as are necessary to promote discipline, maintain order, secure the safety of students, and provide a healthy environment conducive to academic purposes." In turn the district superintendant policy left the dress code decision to each principal, in consultation with staff, parents and the like.

At Greenburg Community School there was an athletic code of conduct. And within the athletic code of conduct was a provision providing "Hair Styles which create problems of health and sanitation, obstruct vision, or call undue attention to the athlete are not acceptable. Athletes may not wear haircuts that include insignias, numbers, initials, or extremes in differing lengths. Mohawks are not acceptable, and hair coloring is not permitted. Each varsity head coach will be responsible for determining acceptable length of hair for a particular sport. Ask a coach before trying out for a team if you have a question regarding hair styles." Stacy Meyer, the varsity basketball coach, had an unwritten policy that only applied to her boys' basketball team and required hair to be cut above the ears, eyebrows, and collar. Meyer stated the policy was created to promote unity on the team and to project a "clean cut" image. No girls' teams of any kind had a similar provision, though the male baseball team did.

A.H. was a seventeen year-old student who wanted to play basketball. He also wanted his hair to be longer than the policy permitted and claimed he did not "feel like himself" when his hair is not long. His parents contested the policy the first year he wanted to play, but the school principal, and ultimately the district superintendant, sustained the policy after reviewing it. A.H. was removed from the team.

The Hayden's sued the Greensburg Community School, the board, and various school officials and staff, arguing the policy violated A.H.'s substantive Due Process and Equal Protection rights, as well as Title IX. The district court denied the parents' request for a preliminary injunction; thereafter, the parties agreed to submit the case to a district judge for final resolution. The court rejected the Hayden's substantive Due Process claim, holding that schools may have dress codes and that athletes may be subject to even more strict rules than other students. The court also rejected the argument that the hairstyle policy constituted sex discrimination in violation of the Fourteenth Amendment and/or Title IX because the Hayden's needed to and failed to prove discriminatory intent. Moreover, since the policy only applied to male basketball players on Meyer's team and not males as a class at the school, it was not sex discrimination at all.

HELD: The majority affirmed the district judge as to the substantive Due Process claim, but reversed the lower court on the sex discrimination charges under the Equal Protection clause and Title IX since the school failed to provide evidence of comparable grooming standards applicable to female athletes.

DISCUSSION: The Hayden's first argued that their son had a fundamental liberty interest in his hair length. The court acknowledged that in *Breen v. Kahl*, 419 F.2d 1034 (7th Cir. 1969) the Seventh Circuit recognized hair length as a fundamental right, but that the Supreme Court's subsequent opinion in *Washington v. Glucksberg*, 521 U.S. 702 (1997), which held that fundamental rights are those "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed," was incompatible with the older opinion. As a result, hair length remains only a "cognizable aspect of personal liberty," and as circumscribed by *Glucksberg* it would be subject to a lesser test than the Seventh Circuit previously applied. Specifically, the government only had to prove that its intrusion on A.H.'s hairstyle was rationally related to a legitimate government interest. The majority held it was unable to express an opinion as to whether the policy met even rational basis review, however, since the burden was on the Hayden's to do so and they made "no genuine attempt" to show it failed the test.

The majority was more receptive to the Hayden's contention that the policy discriminated against A.H. based on his sex. The majority found the school failed to proffer the appropriate evidence and arguments in the case and deemed it fatal to their defense. The Court noted grooming standards for males and females have been litigated before, most notably in *PriceWaterhouse*. Since there were not only patterns of argumentation on point, but clear case law guidance, the majority felt the defendants had the opportunity to argue that though the hair-length policy only applied to boys, it was simply one component of a more comprehensive set of grooming standards that imposed comparable, albeit sex-specific, responsibilities on male and female athletes. But the defendants failed to do that, instead stipulating to the fact that only the boys' basketball team (and boys' baseball team) had hair-length policies and that other teams had *some* grooming standard policies. For the majority the school's failure to identify the content of what those other team's policies were made it impossible for the Court to determine whether comparable burdens were being imposed on the genders. The fact was that some boys at the

school, because they were boys, were subject to hair-length policies, while girls at the school were not, meaning the Hayden's "plainly made out a prima facie case of discrimination."

The school's defense that the policy was not discrimination because only two boys' teams were subject to it was ineffective. For the majority, the fact that the policy was not universally applied to every boy did not mean it was not based on sex. Simply put, only boys were subject to it and the Equal Protection clause protects individuals, not only groups, meaning boys that wanted to play basketball and baseball were discriminated against based on their sex. The majority similarly rejected the school's argument that no discrimination took place since it was not intentional discrimination. Because the case concerned disparate treatment and not disparate impact, the intent to treat boys differently from girls was "evident from the one-sided nature of the policy."

The Title IX claim was reversed for the same reasons as the Equal Protection claim. A noteworthy difference however is that to recover damages under Title IX, the Hayden's had to prove intent to discriminate. The court found there was no intent to discriminate on the part of the school since the policy was implemented by a coach and only applied to some boys. For the majority, damages were appropriate since the Hayden's contested the policy up the chain of command at the school and the district superintendant ultimately sustained the policy.

DISSENT: The primary problem for the dissent was that the majority decided the "school los[t] by default because the record was missing *some* of the grooming standards that [were] applicable to female athletes." The dissent held the stipulated facts provided all the evidence the court needed to determine that comparable grooming standards applied to each gender, and the majority's insistence on deciding the case based on an "equal protection argument A.H. did not make [and] rooted in authority he did not cite" was inappropriate. The wedge issue between the dissent and majority was the amount of proof a court needs to determine whether grooming policies applicable to all students at a school are comparable – e.g. how much of the content of the policy must be in the record?

http://www.ca4.uscourts.gov/Opinions/Published/131492.P.pdf (last accessed Mar. 6, 2014).

Education: School District not Liable under ADA and Rehabilitation Act for Alleged Failure to Accommodate Student's Disability

CTL v. Ashland School District, No. 13-1790 (7th Cir. Feb. 19, 2014).

The Seventh Circuit has denied claims of disability discrimination and failure to accommodate where a public school deviated marginally from an agreed-upon protocol to accommodate a diabetic student requiring an insulin pump and glucose monitoring.

CTL is a diabetic student who manages his condition with an insulin pump, a personal diabetes manager, and a continuous glucose monitor. Prior to entering kindergarten, CTL's parents met with the Ashland School District to develop a plan with the school to accommodate CTL's disability. The agreed-upon plan incorporated CTL's doctor's orders and required his school to train three adult staff on how to administer insulin and monitor and respond to the alarms on his