IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI`I

TRISHA NOBRIGA, by her parents and next friends, DENNIS NOBRIGA and SUSAN NOBRIGA; TAYLER SHIMIZU, by her parent and next friend, WESLEY SHIMIZU; JULIA KINOSHITA, by her parent and next friend, WAYNE KINOSHITA, and JOE DURAN, Plaintiffs, vs. DEPARTMENT OF EDUCATION, State of Hawaii; KATHRYN MATAYOSHI, in her official capacity as Interim Superintendent of Hawaii; NATALIE GONSALVES, in official capacity as the Baldwin High School Principal; KAHAI SHISHIDO, in his official capacity as the Baldwin High School Athletic Director; COUNTY OF MAUI, a municipal corporation; and DOES 1-30, Defendants.	CV. NO. 10-00159 DAE LEK

ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

On March 19, 2010, the Court heard Plaintiffs' Motion for Temporary Restraining Order / Preliminary Injunction. Daniel M. Gluck, Esq., Laurie A. Temple, Esq., Tina L. Colman, Esq., Allison Kirk Griffiths, Esq., and Shellie Park-Hoapili, Esq., appeared at the hearing on behalf of Plaintiffs; Holly Shikada, Esq., Jane Lovell, Esq., Cheryl Tipton, Esq., and Jefferey Ueoka, Esq. appeared at the hearing on behalf of Defendants. After reviewing the motion and the supporting and opposing memoranda, the Court **GRANTS** Plaintiffs' Motion.

BACKGROUND

Plaintiffs Trisha Nobriga, Tayler Shimizu, and Julia Kinoshita[1] (collectively, "Plaintiff Players") are members of the Baldwin High School ("BHS") girls' softball team. (See Mot., Declaration of Julia Kinoshita ("J.K. Decl.") ¶ 2; Declaration of Trisha Nobriga ("T.N. Decl.") ¶ 4; Declaration of Tayler Shimizu ("T.S. Decl.") ¶ 2.) Plaintiff Joseph Duran ("Coach Duran") is the team's coach. (Id., Declaration of Joseph Duran ("Duran Decl.") ¶ 2.) The team has won the Maui Interscholastic League title, competed at the state championship tournament for the last three years and won the state championship in 2007. (Id.,

[1] In accordance with Local Rule 100.11.1(b), the minor Plaintiffs and their respective next friends were previously identified by initials only. Pursuant to the Court's Order of March 20, 2010 (Doc. # 13), all Plaintiffs may proceed in this action under their true names.

Duran Decl. ¶¶ 9, 12.) Some team members hope to receive college scholarships to play softball. (Id., T.N. Decl. ¶ 16; T.S. Decl. ¶¶ 16, 23.)

BHS does not have its own softball and baseball facilities, so the BHS girls' softball and boys' baseball teams use the County of Maui's ("County") public park facilities, including the War Memorial Complex ("WMC") and Keopuolani Park. (Id., Duran Decl. ¶ 19.) The WMC is adjacent to BHS and has six fields, including the Iron Maehara Baseball Stadium (the "Stadium"), as well as facilities for other sports. (See id., Declaration of Shellie K. Park-Hoapili ("Park-Hoapili Decl."), Exs. 1-2.) Keopuolani Park includes three fields and two soccer fields that are approximately one mile from BHS. (See id., Park-Hoapili Decl. Ex. 2; Duran Decl. ¶ 33.)

The BHS boys' baseball team plays at the Stadium. (Id., Duran Decl. ¶ 19; Park-Hoapili Decl. Ex. 2.) The Stadium has approximately 1,500 covered seats, an air-conditioned press box, a PA system, a professional inning-by-inning scoreboard and a boys' baseball regulation distance safety fence. (Id., Duran Decl. ¶ 19, 40.) The Stadium field is described by Coach Duran as watered regularly, and free of rocks and weeds. (Id., Duran Decl. ¶¶ 19, 37, 40, 44; T.N. Decl. ¶ 30; T.S. Decl. ¶¶ 17, 24.) The Stadium provides the boys' baseball team use of two separate batting cages with artificial turf and two pitching machines. (Id., Duran

Decl. ¶ 53; Declaration of Dennis Nobriga ("D.N. Decl.") ¶ 32; Declaration of Wesley Shimizu ("W.S. Decl.") ¶11.) The girls' softball team has previously played on a field in the WMC, which was a recommended regulation size and was adjacent to BHS. (Id., Duran Decl. ¶¶ 9, 12, 19.)

Defendants state that the girls' softball team is unable to use the Stadium due to differences in the field necessities for baseball and softball, including the size of the fields and the fact that the boys' baseball field has a raised pitcher's mound while the girls' softball field has a flat pitcher's mound. (Defendants' Opposition ("Opp'n,") at 3, Doc. # 6, Declaration of Kahai Shishido ("Shishido Decl.".) However, the girls' softball team does not have use of the boys' team's batting cages and pitching machines and only has one pitching machine. (Id., Duran Decl. ¶¶ 19, 53.)

In November 2009, Plaintiffs learned that the girls' softball team's practices and games would be relocated to Keopuolani Field # 3 ("KP3"). (Id., Duran Decl. ¶¶ 19, 21; Declaration of Susan Nobriga ("S.N. Decl.) ¶ 3.) Plaintiff's were told that the County needed the WMC field for Little League games and practices. (Id., Duran Decl. ¶ 62.) Defendants state that the girls' softball team was moved to KP3 due to renovations to the field at WMC. (Opp'n, at 3.) However, Coach Duran claims that the girls' old field is not being used by anyone

and that it is rendered unusable by a pile of dirt. (Id., Duran Decl. ¶ 62.) Plaintiffs claim that the KP3 field is markedly inferior to the girls' old field for many reasons, including:

1. KP3 is allegedly covered in rocks and holes that have already caused numerous physical injuries to the players (id., T.N. Decl. ¶¶ 2, 5, 6, 24; T.S. Decl. ¶¶ 2, 5, 6, 11; Duran Decl. ¶¶ 37, 48, 52; J.K. Decl. ¶10; W.K. Decl. ¶11) and the threat of injury causes several girls to play "hesitantly and nervously." (Id., J.K. Decl. ¶ 10; T.N. Decl. ¶ 24; T.S. Decl. ¶ 23.);

2. KP3 is a mile away from BHS, (see id., Park-Hoapili Decl. Ex. 2; Duran Decl. ¶ 33) and there have been reported assaults, including at least one sexual assault or attempted sexual assault in the area between BHS and KP3. (Id., Park-Hoapili Decl., Ex. 10; Duran Decl. ¶ 34; J.K. Decl. ¶ 8; S.N. Decl. ¶ 18.) Additionally, BHS' athletic trainer remains near BHS, delaying medical attention. (Id., J.K. Decl. ¶ 14; W.K. Decl. ¶ 13; T.S. Decl. ¶ 18.) Plaintiffs also claim that the distance from BHS discourages BHS students from attending the girls' softball games. (Id., Duran Decl. ¶ 34; T.S. Decl. ¶ 12.)

3. KP3 is not a regulation size field, which skews game results, (see id., Duran Decl. ¶ 40; J.K. Decl. ¶ 17) and lacks necessary safety features including a

foul ball "warning track" along the edge of the field and an eight-foot fence with safety tubing. (Id., Duran Decl. ¶ 40.)

4. KP3 lacks batting cages and bullpens, allegedly resulting in less practice time for the girls than for the boys. (Id., J.K. Decl. ¶15; T.S. Decl. ¶16; W.S. Decl. ¶ 12.) Also, the girls' bathroom and storage room are immediately adjacent to a public men's bathroom, out of sight of the practice area, and the girls' safety is a concern. (W.S. Decl. ¶ 19; Duran Decl. ¶ 43.) Further, KP3, unlike the Stadium, lacks a professional scoreboard with inning-by-inning information, a PA system, covered seating for fans, and an air-conditioned press box. (Id., T.S. Decl. ¶ 17; Duran Decl. ¶¶ 19, 44.) Coach Duran also alleges that the wind and dust at KP3 are additional factors making KP3 inferior to the Stadium. (Id., Duran Decl. ¶ 39; T.N. Decl. ¶ 22; T.S. Decl. ¶ 10.)

Plaintiffs state that Coach Duran and several players' parents made numerous complaints to Natalie Gonsalves, BHS Principal and Kahai Shishido, BHS Athletic Director, who instructed Coach Duran in an email to "have the girls pick up rocks, drag the field, and rake the mound and home plate every day." (Id., Duran Decl. ¶¶ 25, 26 & Ex. 12.) Additionally, Susan and Dennis Nobriga, Trisha Nobriga's mother and father, met with County, Little League, and BHS representatives but received no assistance. (Id., S.N. Decl. ¶ 12.) Susan Nobriga

states that she contacted the Hawaii State Commission on the Status of Women and then the Maui County Committee on the Status of Women, causing a County representative to allegedly promise to rectify the situation prior to the start of the softball season. (S.N. Decl. ¶ 13; Duran Decl. ¶ 28.)

In February, Plaintiffs learned that they would need to share KP3 with the girls' softball team from St. Anthony's. (Id., Duran Decl. ¶¶ 29, 30.) Plaintiffs allege that although the BHS girls' team used to be able to practice from 3:00 p.m. to 6:00 p.m. every weekday, because of the shared field the team would only be allowed two hours a day from 2:30-4:30 and would not be allowed to practice at all on days when St. Anthony's had a home game, substantially reduced the girls' practice time and affected their ability to compete. (Id., Duran Decl. ¶¶ 31, 33; J.K. Decl. ¶ 16; S.N. Decl. ¶ 19; T.N. Decl. ¶ 29; T.S. Decl. ¶ 21.) Plaintiffs allege that the changed practice time also means that the girls must choose between softball practice and tutoring/study-hall opportunities at the school. (Id., Duran Decl. ¶ 35.)

On March 18, 2010, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief against the Department of Education, State of Hawaii; Kathryn Matoyoshi, in her official capacity as Interim Superintendent of the Department of

Education, State of Hawaii; Natalie Gonsalves, in her official capacity as the Baldwin High School Principal; Kahai Shishido, in his official capacity as the Baldwin High School Athletic Director; County of Maui, a municipal corporation; and Does 1-30 (collectively "Defendants"). ("Compl.," Doc. # 1.) Plaintiffs also simultaneously filed a Motion for Temporary Restraining Order / Motion for Preliminary Injunction ("Mot," Doc. # 4) and Memorandum in Support ("TRO," Doc. # 4-1.) On March 19, 2010, Defendants filed an Opposition to Plaintiff's Motion. ("Opp'n," Doc. # 6.)

STANDARD OF REVIEW

The standard for granting a preliminary injunction and the standard for granting a Temporary Restraining Order ("TRO") are identical. See Haw. County Green Party v. Clinton, 980 F. Supp. 1160, 1164 (D. Haw. 1997); Fed. R. Civ. P. 65. An alternative interpretation of the test requires: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Golden Gate Restaurant Ass'n v. San Francisco, 512 F.3d 1112, 1115 (9th Cir. 2008) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The first two factors may be looked at "on

a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Natural Resources Defense Council v. Winter, 502 F.3d 859, 862 (9th Cir. 2007). A district court has great discretion in determining whether to grant or to deny a TRO or preliminary injunction. See Wildwest Institute v. Bull, 472 F.3d 587, 589-90 (9th Cir. 2006); see also Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983) ("At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury. At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor.") (internal citations omitted).

Whether an injunction is prohibitory or mandatory is judged by the facts as they exist at the time the suit was initiated. See Stanley v. Univ. of Southern Calif., 13 F.3d 1313, 1320 (9th Cir. 1994). As the Stanley court explained:

> A prohibitory injunction preserves the status quo. A mandatory injunction 'goes well beyond simply maintaining the status quo pendent elite and is particularly disfavored. When a mandatory preliminary injunction is requested, the district court should deny relief unless the facts and law clearly favor the moving party.

Id. (citations, internal quotation marks and brackets omitted). When a party "seeks mandatory preliminary relief that goes well beyond maintaining the status quo

pendente lite, courts should be extremely cautious about issuing a preliminary injunction." Martin v. Int'l Olympic Comm., 740 F.2d 670, 675 (9th Cir. 1984) (citation omitted). Based on the fact that Plaintiffs request affirmative changes from the status quo, the instant case involves a request for mandatory injunctive relief, and the Court will evaluate Plaintiff's Motion under this elevated standard.

The restrictions contained in Federal Rule Civil Procedure 65(b), governing the issuance of TROs, "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 438-39 (1974) (citing Fed. R. Civ. P. 65(b)). Due to the Defendants' opportunity to oppose Plaintiffs' TRO Motion and appear at the March 19, 2010 hearing, the Court has converted Plaintiffs' TRO Motion to one for preliminary injunction. See Fed. R. Civ. P. 65.

DISCUSSION

Plaintiffs move for entry of a temporary restraining order and/or preliminary injunction prohibiting the State of Hawaii, Department of Education ("DOE"), Kathryn Matayoshi, Interim Superintendent of the DOE, Natalie Gonsalves, Principal of BHS, Kahai Shishido, Athletic Director of BHS, and the County, from allegedly discriminating against the Plaintiff Players on the basis of

gender and denying them equal and adequate access to public recreational facilities in violation of their Constitutional and statutory rights.

Plaintiffs seek immediate injunctive relief on two claims: (1) their Title IX claims against the DOE and the County for unequal treatment based on sex; and (2) their claims of sex discrimination against Kathryn Matayoshi, Natalie Gonsalves, Kahai Shishido, and the County under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs ask that the Court order Defendants to provide access to the team's old field and perform the needed repairs to the field to make it suitable for play. Specifically, Plaintiffs have asked this Court to order Defendants:

> (1) provide Plaintiffs access to their old playing field for practice and games;
> (2) allow Plaintiffs to have the same practice hours as the BHS boys' baseball team;
> (3) install a softball regulation distance home run fence on the old field;
> (4) install the same quality cinder on the old field as is used on the Iron Maehara Stadium and ensure that it is smoothed, graded, and ready for play;
> (5) prepare the old field for games on game days as is done at the boys' stadium, rather than the day before; and
> (6) provide any other maintenance (e.g. filling of holes, removing of dirt/rocks, etc.) necessary to make the old field safe and suitable for competitive play.

(Mot. at 3-4.)

Defendants argue that there is no discrimination and no disparate treatment of the BHS girls' softball team. (Opp'n at 2.) Defendants assert that the use of the Stadium by the BHS boys' baseball team does not constitute discrimination because there is a lack of an "equivalent" stadium for use by the girls. (Id.) Further, Defendants state that architectural drawings for a girls' softball facility at BHS is currently underway. (Id., Declaration of Duane Kashiwai ("Kashiwai Decl.") ¶ 13.)

I. Likelihood of Success on the Merits

A. Title IX Claims

Title IX of the Education Amendments of 1972, renamed the "Patsy Takemoto Mink Equal Opportunity Act" in honor of the Maui-born Congresswoman who co-authored Title IX, Pub. L. No. 107-255, 116 Stat. 1734 (2002), provides that "[n]o 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[.]" 20 U.S.C §1681. The U.S. Department of Education regulations effectuating Title IX state that 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." 34 C.F.R. §106.41(a).

Courts interpreting these regulations have given deference to two additional documents produced by the federal agencies implementing Title IX: (1) Office for Civil Rights, Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) ("Policy Interpretation"); and (2) Office for Civil Rights, U.S. Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) ("Clarification"). See Mansourian v. Regents of Univ. of Cal., 594 F.3d 1095, 1102 n.9 (9th Cir. 2010) ("We and other circuits have held that both the Policy Interpretation and the Clarification are entitled to deference[.]"). Although Mansourian and the Policy Interpretation and Clarification focus on intercollegiate athletics, the same principles apply to the instant case. See Clarification at n.1 ("The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation."); see also Ollier v. Sweetwater Union High School Dist., 604 F. Supp. 2d 1264, 1269 n.4 (S.D. Cal. 2009) ("The Policy Interpretation reference to "intercollegiate" sports has been

made applicable to all recipients of federal education funds, including high schools and is applicable to interscholastic high school sports.") (citing 34 C.F.R. § 106.11).

The U.S. Department of Education regulations require a recipient of federal funds to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(c). The regulations list the following factors as relevant in determining whether equal opportunities are available:

(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.

34 C.F.R. §106.41(c). These regulations have been interpreted as establishing two different types of Title IX claims: "effective accommodation" (derived from 34 C.F.R. §106.41(c)(1)) and "equal treatment" (derived from 34 C.F.R. § 106.41(c)(2)-(10)). See Mansourian, 594 F.3d at 1102.

In the instant case, Plaintiffs assert only an "Equal treatment" claim under Title IX. (See Compl. at 23.) "Equal treatment" means "'equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes.'" Mansourian, 594 F.3d at 1102 (quoting Clarification). "[I]dentical benefits, opportunities, or treatment are not required, provided the overall effect[] of any differences is negligible." Policy Interpretation at 71415. However, a large disparity between the services provided to male and female athletes in a single sport may constitute a violation of Title IX. The Policy Interpretation provides:

> The Department will base its compliance determination under [Section 41(c)] of the regulation upon an examination of the following:
> a. Whether the policies of an institution are discriminatory in language or effect; or
> ...
> c. Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.

Policy Interpretation at 71417, 71418.

The Court notes at the outset that Plaintiffs have met their burden in showing that it is clearly likely that both DOE and the County are liable for any proven violations of Title IX. Because the DOE and County have received funding for educational programs, it appears at this juncture that both the DOE and County

are required to comply with the anti-discrimination provisions of Title IX.[2] See 20 U.S.C. §1687; (Mot, Park-Hoapili Decl., Ex. 6 (information regarding U.S. Department of Agriculture's school nutrition program); Ex. 7 (showing the County's and DOE's receipt of funds for the U.S.D.A.'s "PALS" program).) Therefore, the facts and law clearly favor a determination that the County is liable for any proven violations of Title IX presented in the instant case. 20 U.S.C. §§1681-1688; 34 C.F.R. §106.41(c)(2)-(10); (see Mot., Park-Hoapili Decl. Exs. 3-5.) Additionally, the DOE cannot escape liability by blaming the County for the

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[2] Moreover, by accepting federal funds, the DOE, a state agency is clearly likely to have waived sovereign immunity for Title IX claims. 42 U.S.C. §2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... title IX of the Education Amendments of 1972[.]"). Section 504 of the Rehabilitation Act, as amended by § 2000d-7, conditions receipt of federal funds on a state's waiver of sovereign immunity. See Pace v. Bogalusa City School Bd., 403 F.3d 272, 280 (5th Cir. 2005) cert. denied 546 U.S. 933 (2005). The fact that § 2000d-7 authorizes a conditional waiver does not automatically mean, however, that a state waived its sovereign immunity by accepting federal funds under the Rehabilitation Act. See id. at 282 (An effective waiver of a state's sovereign immunity requires that the state has been put on notice clearly and unambiguously by the federal statute that the state's particular conduct or transaction will subject it to federal court suits brought by individuals") (internal quotation and quotation marks omitted). As such, to constitute a valid waiver of immunity, the state or state agency had to know, at the time it accepted federal funds, that it was waiving its sovereign immunity by accepting such funds. See id.; see Clark v. State of Cal., 123 F.3d 1267, 1271 (9th Cir. 1997) (characterizing 42 U.S.C. § 2000d-7 as "an unambiguous waiver of the States' Eleventh Amendment immunity.") (quoting Lane v. Pena, 518 U.S. 187, 200 (1996).

disparities in field conditions because of its independent responsibility to ensure equal athletic opportunities for both sexes. As the court explained in Daniels v. School Bd. of Brevard County, 985 F. Supp. 1458 (M.D. Fla. 1997):

> The Defendant [School Board of Brevard County, Florida] seeks to avoid liability on the basis that it provides equal funding for the boys' and girls' programs. . . . The Defendant suggests that it cannot be held responsible if the fund-raising activities of one [team's] booster club are more successful than those of another. The Court rejects this argument. It is the Defendant's responsibility to ensure equal athletic opportunities, in accordance with Title IX. This funding system is one to which Defendant has acquiesced; Defendant is responsible for the consequences of that approach.

Id. at 1462. Therefore, the Court finds that it is clearly likely that the DOE and County, as recipients of federal funding (see Mot., Park-Hoapili Decl., Exs. 6-7), are bound by Title IX. See 20 U.S.C. § 1687.

In order to obtain mandatory injunctive relief, Plaintiffs must show that the facts and law clearly favor Plaintiffs' allegations that: (1) the large disparities between the benefits, treatment, services, and/or opportunities provided to the girls' and boys' teams by DOE and the County are substantial enough in and of themselves to deny "equality of athletic opportunity;" (2) the Plaintiffs will suffer irreparable injury to if preliminary relief is not granted (3) the balance of hardships clearly favors such relief; and (4) such relief is in advancement of the

public interest. See Golden Gate Restaurant Ass'n, 512 F.3d at 1115; see also Stanley, 13 F.3d at 1320.

Plaintiffs allege that there are sex-based differences between the girls' softball team and the boys' baseball team in equipment and supplies, practice time, opportunity for tutoring, availability of medical staff, and training time, such that the DOE and the County are violating Title IX. See TRO at 15 (citing 20 U.S.C. 1681 et seq.; 34 C.F.R. §106.41(c)(2), (3), (5), (7), (8)). Defendants argue that any differences between the benefits, opportunities, and treatment provided to the BHS boys' baseball team and the BHS girls' softball team is negligible. (Opp'n at 9.) The Court will look at each factor in turn and analyze the factors as a whole in order to determine whether the alleged disparities are so substantial as to clearly favor Plaintiffs' claims that they are denied "equality of athletic opportunity."

1. Unequal equipment and supplies: 34 C.F.R. § 106.41(c)(2)

Compliance with 34 C.F.R. §106.41(c)(2) depends on the quality, amount, suitability, maintenance and replacement, and availability of equipment and supplies. Policy Interpretation at 71416.

Plaintiffs allege that the DOE and County provide Plaintiff Players with inferior equipment and supplies to those provided to the boys' baseball team. Specifically, Plaintiffs state that the players' uniforms are tailored

to fit boys, not girls, thus interfering with the girls' play, (Mot., Duran Decl. ¶54; W.K. Decl. ¶ 16; T.N. Decl. ¶¶ 27, 30), the girls' pitching machine functions poorly because it needs a new wheel, whereas the boys have two pitching machines, (id., Duran Decl. ¶ 53; D. N. Decl. ¶¶ 27, 32), and that the girls' team never has enough softballs for practice and the girls are not provided with any bats or nets whereas the Plaintiffs are unaware of the boys' team having any issue obtaining sufficient equipment (id., Duran Decl. ¶53.) Additionally, Plaintiffs contend that KP3, unlike the boys' Stadium, lacks bullpens, batting cages, and a designated warm up area. (Id., Duran Decl. ¶ 19, 44; D.N. Decl. ¶ 32.) Further, Plaintiffs have asked the Court to require the County to install a softball regulation distance home run fence on the old WMC field, similar to the regulation distance fence on the boys' field. (See Mot. at 2.)

In opposition, Defendants argue that both teams received new uniforms approximately three (3) years ago, that the uniform for the girls softball team was purchased after consultation with the players, and that the girls' uniforms are made for girls and are not boys' uniforms. (Opp'n at 7, Shishido Decl.) Defendants also state that in the years that Shishido has been Athletic Director at BHS, he has purchased more equipment for the girls' softball team than the boys' baseball team. (Id. at 7-8, Shishido Decl.) Shishido states that balls and batting

T's were purchased for baseball while balls, pitching machine balls, batting T's, whiffle balls, and catcher's equipment were purchased for softball. (Id. at 8, Shishido Decl.) Further, Defendants state that BHS does not purchase equipment such as pitching machines, bats, or nets for either teams. (Id.)

Shishido states that it is his understanding that the County is working on installing batting cages at KP3, (id.) but argues that argue that there are no regulation distances for the home run fence for softball. (See Opp'n at 6, Shishido Decl.) However, Defendants admit that the National Federation of State High School Associations provides recommended distances. (See id.)

2. Unequal scheduling of practice time: 34 C.F.R. § 106.41(c)(3)

Compliance with [34 C.F.R. §106.41](c)(3) depends on "the equivalence for men and women of ... [t]he number and length of practice opportunities" and "[t]he time of day practice opportunities are scheduled[.]" Policy Interpretation at 71416.

Plaintiffs allege that the DOE and County provide the BHS girls' softball team with "significantly less practice time" than the BHS boys' baseball team. Specifically, Plaintiffs contend that KP3, unlike the boys' Stadium, lacks bullpens, batting cages, and a designated warm up area. (Id., Duran Decl. ¶ 19, 44; D.N. Decl. ¶ 32.) Plaintiffs argue that because the boys' Stadium has these

facilities, each individual player on the boys' team gets significantly more practice time in each day than the girls because boys are able to rotate between practice areas so that each player is actively practicing during most of the allotted daily practice. (Id., Duran Decl. ¶ 44.) In contrast, the girls only have a field, such that individual players spend a lot of time on the bench while other team members practice batting or pitching and breaking up into two practice groups is limited by the size of the field and by the risk of injury in having two groups (without nets to catch practice pitches and hits) sharing a small space. (Id., Duran Decl. ¶ 44; J.K. Decl. ¶ 15.)

Additionally, Plaintiffs state that by requiring the girls play at KP3, Plaintiff Players lose time traveling to and from the field. (Id., Duran Decl. ¶¶ 23, 29; J.K. Decl. ¶ 8; W.K. Decl. ¶ 12; T.S. Decl. ¶¶ 12, 19; Park-Hoapili Decl. Ex. 2.) Plaintiffs also point to the County's maintenance practices that allegedly result in less practice time for girls than boys because the County prepares the fields (by, among other things, putting chalk lines on the field) the day before girls' games, but waits to chalk the Stadium and the Little League fields until the day of boys' games, allowing male players more practice time than female players. (Id., Duran Decl. ¶ 49.) Plaintiffs also state that they lose practice time clearing rocks from the playing surface. (Id., J.K. Decl. ¶ 12.)

Further, Plaintiffs state that Defendants require the BHS girls' softball team to share KP3 with St. Anthony's, further reducing practice time because on days when St. Anthony's has games, Plaintiff Players cannot practice at all. (Mot., Duran Decl. ¶¶ 31, 33; W.K. Decl. ¶ 12; T.N. Decl. ¶ 29.) In contrast, Plaintiffs state that although other teams use the Stadium, there does not appear to be any interference with the boys' ability to practice. (Id., Duran Decl. ¶ 35.) As a result of the female players less time for drills, Plaintiffs allege that their playing ability has deteriorated. (Id., J.K. Decl. at ¶ 10, 16.)

Defendants argue that the hours of usage of the County fields are the same for both the boys' and the girls' teams. However, although Defendants state that the BHS baseball team also shares the Stadium with St. Anthony's, Defendants do not argue that the boys' team is similarly impacted by conflicts in scheduling. Further, the Defendants admit that the boys' team has more practice time because of its facilities by stating that the BHS Athletic Director is willing to "explore the possibility of having the girls' softball team use the batting cages" at the stadium after their field practice time. (Opp'n at 5.) Further, Defendants admit that KP3 may have previously contained "bigger rocks than there should have been," but now claim that the field "has now been cleared of the big rocks and cinder has been put in." (Id. at 7.) As to the timing of

preparation of the fields, the County states that for the baseball games at the Stadium, the field is prepared by the County for games on Thursdays and Fridays and prepared by volunteers and coaching staff on Saturdays. (Opp'n at 6.) Defendants state that for softball games on County fields, the County prepares the fields. (Id.) Defendants do not address the alleged disparity in the timing of such preparation.

3. Unequal opportunities for tutoring: 34 C.F.R. § 106.41(c)(5)

"Compliance [with 34 C.F.R. §106.41(c)(5)] will be assessed by examining, among other factors, the equivalence for men and women of ... [t]he availability of tutoring[.]" Policy Interpretation at 71416.

Plaintiff Players argue that because they already have limited practice time, they feel that they must travel to KP3 as soon as possible after the school day ends in order to maximize such practice time. (TRO at 23.) Therefore, Plaintiffs contend that girls' team players must choose between after-school tutoring and study hall, whereas boys' team players have time for tutoring before they start their practice at the Stadium, which is immediately adjacent to BHS. (Mot., Duran Decl. ¶ 35.)

In opposition, Defendants argue that after school tutoring is available to both boys and girls equally. (Opp'n at 8.) Defendants contend that the

BHS' expectation is that a student will put the need for tutoring before practice and attend practice only after having completed their tutoring session. (Id.) In addressing the alleged disparity, Defendants state that "while the girls' field is farther than the boys' field, the extra time it takes for the girls to get to their field versus the boys' is approximately six (6) minutes longer). (Id., Shishido Decl.)

4. Unequal provision of locker rooms, practice and competitive facilities: 34 C.F.R. §106.41(c)(7)

Compliance with 34 C.F.R. §106.41(c)(7) is assessed by examining:

> (1) Quality and availability of the facilities provided for practice and competitive events;
> (2) Exclusivity of use of facilities provided for practice and competitive events;
> (3) Availability of locker rooms;
> (4) Quality of locker rooms;
> (5) Maintenance of practice and competitive facilities; and
> (6) Preparation of facilities for practice and competitive events.

Policy Interpretation at 71417.

In support of their Motion, Plaintiffs also allege that girls' softball players have vastly inferior locker rooms, practice and competitive facilities to that of the boys' baseball team. Plaintiffs state that the boys have a well-manicured, 1,500-seat stadium while the girls have a rock-strewn field with uncovered bleachers that is not the recommended regulation size. (Mot., Duran

Decl. ¶¶ 19, 37, 40, 44.) Further, Plaintiffs state that the girls' field has holes and other safety hazards while the boys' field does not. (Id., Duran Decl. ¶¶ 37, 48; T.N. Decl. ¶ 30 ("The baseball stadium is huge and immaculate and beautiful.").)

Moreover, the Plaintiffs point to the boys' access to batting cages (id., Duran Decl. ¶ 44; D.N. Decl. ¶ 32), the boys' field has a warning track, a warm-up area, an air-conditioned press box, and concession stands, and the girls' field has none of these things (id., Duran Decl. ¶¶ 19, 38, 44.) Plaintiffs also state that the girls' field is windy and dusty. (Duran Decl. ¶39; T.N. Decl. ¶¶ 22-23.) Moreover, Plaintiffs claim that the girls' scoreboard is inferior to the boys' scoreboard. (T.S. Decl. ¶ 17.)

Defendants argue that the girls' field is appropriate and safe for use as a softball field, but do not attempt to compare it to the Stadium. Instead, Defendants submit that the BHS softball team is not the only girls' softball team playing on KP3, that Coach Duran selected the cinder for the infield of KP3, that the current scoreboard was replaced a year and a half ago and that "[n]ot all County softball fields have scoreboards, that the field has a working water faucet, and that the field has storage facilities, an announcer's booth, and the facilities for a concession booth if a permit is obtained. (See Declaration of Tamara L. Horcajo, Director of the Department of Parks and Recreation ("Horcajo Decl.").)

5. Unequal provision of medical and training facilities and services – 34 C.F.R. §106.41(c)(8)

Compliance with Title IX 34 C.F.R. §106.41(c)(8) is assessed by examining the availability of medical personnel. Policy Interpretation at 71417.

Plaintiffs argue that the fact that the boys' baseball team practices on a field adjacent to BHS, while the girls' team practices a mile away, evidences that the boys' are provided better access to the school's athletic trainer when an athlete is injured. (TRO at 25.) Plaintiffs state that Coach Duran must either call an ambulance or call the athletic trainer and wait for him/her to travel the mile to KP3 if one of the girls is hurt. (Mot., Duran Decl. ¶ 37; T.S. Decl. ¶ 18.)

Defendants argue that equal access is provided to the BHS athletic trainer and that the trainer must drive to both the Stadium and KP3 in order to assist the players. (Opp'n at 8.) Moreover, Defendants argue that it takes approximately two minutes longer to reach KP3 and that coaches are directed to call 911 in the event of serious emergencies. (Id., Shishido Decl.)

From the factors as outlined above, the Court finds that the facts and law clearly favor Plaintiffs' allegations that the large disparities between the

benefits, treatment, services, and/or opportunities provided to the girls' and boys' teams by Defendants are substantial enough in and of themselves to deny "equality of athletic opportunity." Defendants' primary trouble in attempting to defend against Plaintiffs' Motion is that they attempt to argue that the girls' field is "safe and appropriate" and proceed to compare girls' teams' facilities with girls' teams' facilities instead of focusing on the equality of athletic opportunity for the BHS girls' softball team as compared to the BHS boys' baseball team. (See Opp'n at 11 ("That same field is also being used by St. Anthony's girls' softball team.").)

KP3, unlike the boys' Stadium, lacks bullpens, batting cages, a warning track, and a designated warm up area. As the court in Daniels stated: "[t]he use of a batting cage sharpens hitting skills. The girls' softball team is technically disadvantaged by the absence of such equipment." Daniels, 985 F. Supp. 1461. Further to the inequality in equipment, the girls' team only has one pitching machine, alleged to be functioning poorly, whereas the boys have two pitching machines. Additionally, the boys' Stadium has a field that is regulation distance, while Defendants do not even admit that there are regulation distances for the home run fence for softball. (See Opp'n at 6, Shishido Decl.) Defendants stress that the National Federation of State High School Associations provides recommended distances but fail to justify why these distances would not be utilized

for the girls' softball field. (See id.); see Landow, 132 F. Supp. 2d at 964 ("[W]hile the boys' teams have 'dedicated' fields with dimensions correct for their sport, the girls' teams do not.... This signals to the girls that they are not as important as the boys.").

The Stadium also boasts an air-conditioned press box, concession stands, covered seating and a better scoreboard than KP3. Although Defendants argue that KP3 also has some of these facilities and equipment, they do not argue that the they are of comparable quality or prestige to that of the Stadium. These premier amenities lend to the prestige of the sport and attract fans, which in turn instills pride in the players. See, e.g., Landow v. School Bd. of Brevard County, 132 F. Supp. 2d 958, 963 (M.D. Fla. 2000) (providing lighting for night games for boys' baseball, but not girls' softball, violated Title IX because lighting allowed flexibility and prestige in scheduling practices and games); Daniels, 985 F. Supp. at 1460-61("The prestige factor of a scoreboard is also obvious."); id. at 1460 ("[T]he bleachers on the girls' softball field are in worse condition, and seat significantly fewer spectators, than the bleachers on the boys' field. . . . [T]he

message this sends the players, spectators and community about the relative worth of the two teams is loud and clear.").[3]

Besides demonstrating a gross disparity in facilities and equipment, the fact that the girls' lack access to facilities and equipment provided to the boys supports Plaintiffs' argument that they are denied equal playing time. Use of multiple areas provides the boys' team with more flexibility in practices and sharing field space through rotating practice areas in the Stadium. See Cook v. Colgate Univ., 802 F. Supp. 737, 745 (N.D.N.Y. 1992) (prima facie Title IX violation where, inter alia, men's hockey team was allowed more time to practice and was allowed to practice at better times of the day), vacated as moot, 992 F.2d 17 (2d Cir. 1993). Further, Plaintiff Players lose additional practice time traveling to and from the KP3 field and even more time because they must move and pack their equipment and must spend five minutes before an already short practice clearing the field of rocks. Moreover, the Court finds that Defendants failed to address the alleged disparity in maintenance practices for preparing the different fields for games that allegedly results in even less practice time for the girls' team.

[3] Plaintiffs argued in their Motion that there were differences in the uniforms provided to softball and baseball players. The Court does not find these differences to be persuasive at this juncture.

It also appears to the Court that boys' baseball players have more opportunities for tutoring than girls. Although Defendants contend that BHS' expectation is that a student will put the need for tutoring before practice and attend practice only after having completed their tutoring session, the Court notes that the important consideration is that the boys apparently do not have to choose between tutoring and practice because their practice time is later, their practice field is adjacent to BHS, and they are provided more facilities on which to extend playing time. Further, was a female softball player to choose to stay later at tutoring before commuting to practice, Defendants have not addressed the safety of the area through which the player would have to travel alone to reach KP3.

These disparities when taken as a whole clearly evidence that Plaintiffs are substantially likely to succeed on their claim under Title IX that they are being denied an "equal athletic opportunity." A large disparity under the law is apparent on its face. The contrast between facilities is stark and unfortunate. The fact that the boys' team is able to feel the pride of their presence on the field in a premier facility and the girls have to bend down and pick up rocks before every practice does not in any way evidence a comparable experience. There is no place for such unequal treatment at BHS.

B. Equal Protection Clause Claim

Plaintiffs' allege that all Defendants (with the exception of the DOE)[4] have violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by providing starkly unequal playing fields and facilities to comparable male and female athletes. (TRO at 27.)

The Equal Protection Clause ensures "skeptical scrutiny of official action denying rights or opportunities based on sex." United States v. Virginia, 518 U.S. 515, 531 (1996). As a result, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." Id. (internal quotation marks omitted). "The burden of justification is demanding, and it rests entirely on the [defendants]." Id. at 533 (citation omitted). Defendants must demonstrate that the challenged classification on the basis of gender serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives.'" Id. (quotation omitted). The justification proffered by the Defendants must be genuine, not hypothesized or invented in response to litigation. Id. When official action is based on an overtly discriminatory classification,

[4] Plaintiffs do not bring their Equal Protection claim against the DOE. (TRO at 27 n.12.) However, for ease of reference, the Court will continue to refer to "Defendants" in its discussion of Plaintiffs' Equal Protection claim.

Plaintiffs need not show discriminatory intent against women or girls motivated the action. See Wayte v. United States, 470 U.S. 598, 608 n.10 (1985) (citation omitted). As a result, the burden is on Defendants to demonstrate an "exceedingly persuasive justification" for the inequalities presented by Plaintiffs. Virginia, 518 U.S. at 531.

Plaintiffs allege that Defendants currently impose an allocation system that provides female softball players with fewer resources and privileges in comparison to their male counterparts, thus "engaging in action that on its face discriminates on the basis of gender and doing so without an 'exceedingly persuasive justification.'" (TRO at 28.) Specifically, Plaintiffs point to the fact that the Stadium, described as a "premier facility," has always been used by male athletes and has never been offered to female athletes. (Mot., Duran Decl. ¶ 19.) As a result, Plaintiffs allege that the girls' softball team has been relegated to playing on a poorly-maintained field that offers few of the amenities available to comparable male athletes. (TRO at 28.)

Defendants argue that there is lack of an "equivalent" stadium for use by the girls, and girls' softball is unable to use the Stadium because of differences in the field necessities for baseball and softball. (Opp'n at 2-3.) Moreover, the County stated at the hearing that it is not financially capable of upgrading KP3 or

appropriating and upgrading another field for girls' softball. Defendants defend moving the BHS girls' softball team from the WMC old field to KP3 by stating that the WMC field was slated for renovation. (Id. at 11.)

As described by the Court above, based on evidence of unequal equipment and facilities, amenities, and playing time Plaintiffs have met their burden to show that the facts and law clearly support a finding that Defendants have engaged in action that on its face treats male athletes differently from comparable female athletes and that has a substantial likelihood of constituting unlawful gender discrimination in violation of Title IX. Similarly, such facts are likely to constitute a violation of federal Equal Protection guarantees if Defendants cannot provide an "exceedingly persuasive justification" for their actions.

Defendants do not provide the Court with an adequate reason, let alone an "exceedingly persuasive justification," for why girls' softball does not have access to equal facilities in order to receive an "equal athletic opportunity" or even why renovation of the girls' old field could not be delayed until the end of the softball season in May. The County has no constitutional obligation to provide BHS the use of any athletic fields or public parks. However, once it has allowed such use of resources, the Equal Protection Clause requires the County to

administer these fields in a nondiscriminatory manner absent an exceedingly persuasive justification.

It appears to the Court that Defendants agreed to the removal of the girls' softball team from WMC, and refused to allow the girls' team to use the Stadium, because the facilities were originally built and/or traditionally used by boys' baseball and Little League. This rational, without more, does not provide an exceedingly persuasive justification" for that action. "Simply doing things the way they've always been done is not an 'important government objective,' if indeed it is a legitimate objective at all." Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394, 398 (E.D. Ark. 1979) (holding that rules requiring girls' teams to play halfcourt basketball, while boys' teams played full-court basketball, violated the Equal Protection Clause). "[T]radition alone, without supporting gender-related substantive reasons, cannot justify placing girls at a disadvantage for no reason other than their being girls." Id.; see also Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (holding nursing school's single-sex admission policy violated Equal Protection Clause when it served only to perpetuate traditional views of nursing as a women's job).

Moreover, any financial argument regarding the disparities in facilities and equipment in the instant case will not provide an exceedingly persuasive

justification" for that action. A lack of finances alone does not constitute an "exceedingly persuasive justification" for continuing gender-based discrimination. See, e.g., Russo v. Shapiro, 309 F. Supp. 385, 393 n.9 (D. Conn. 1969) (although a State has a valid interest in preserving the fiscal integrity of its public assistance programs, "[t]he saving of welfare costs cannot justify an otherwise invidious classification.") (quotation omitted); Doe v. Plyler, 458 F. Supp. 569, 586 (E.D. Tex. 1978) (ruling that "[i]t is not sufficient justification that a law saves money" for Equal Protection purposes); (see also Park-Hoapili Decl. Exs. 3-5 (alleging that the County allocated $1,241,000 to repair the Stadium in 2010, $524,000 in 2009, and spent $100,000 to fix Stadium lights earlier this year).)

For all the reasons above, Defendants to date have failed to proffer any exceedingly persuasive justification for the reassignment of the girls' team to KP3, or for generally providing unequal facilities and equipment, and none is apparent. The result of such actions is the appearance that Defendants believe that girls' sports do no require equal facilities, equipment, and practice times to those of boys' sports. See, e.g., Cmtys. for Equity v. Michigan High School Athletic Ass'n, 459 F.3d 676, 692-93 (6th Cir. 2006) (holding that defendant failed to establish an exceedingly persuasive justification for its discriminatory scheduling of girls' sports events), affirming Cmtys. for Equity v. Michigan High School Athletic

Ass'n, 178 F. Supp. 2d 805, 840 (W.D. Mich. 2001) (finding that state had failed to offer an exceedingly persuasive justification for scheduling girls' sports in nontraditional seasons when "administrative convenience against a historical background of treating girls' athletics inequitably" was a major cause of such differential treatment). Therefore, the facts and law clearly favor Plaintiffs' likelihood of success on their Equal Protection claim.

II. Possibility of Irreparable Injury

The Ninth Circuit has recognized that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." Goldie's Bookstore, Inc. v. Super. Ct. of the State of Cal., 739 F.2d 466, 472 (9th Cir. 1984) (citing 11A Charles Alan Wright, Arthur R. Miller, & March Kay Kane, Federal Practice & Procedure § 2948.1 (2d ed. 1995) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of an irreparable injury is necessary" before issuing a preliminary injunction.)). Generally, a preliminary injunction, especially a mandatory one, will not issue if there is an adequate remedy at law. Anderson v. United States, 612 F.2d 1112, 1115 (9th Cir. 1979). However, monetary damages will not be adequate because where it is likely that a pattern of unconstitutional deprivation of rights will be established. See Perez-Funez v. Dist. Dir., I.N.S., 611F. Supp. 990, 1003 (C.D.

Cal. 1984) (citation omitted); see also 13 Charles Alan Wright, Arthur R. Miller, & March Kay Kane, Federal Practice & Procedure § 3531.2 (2d ed.1984) (a plaintiff seeking injunctive relief must show that he or she "can reasonably expect to encounter the same injury in the future") (citing Los Angeles v. Lyons, 461 U.S. 95 (1983))).

According to the President's Council on Physical Fitness and Sports, Title IX has helped to increase girls' and women's involvement in sports and physical activity over the last few decades. See President's Council on Physical Fitness and Sports, Physical Activity & Sport in the Lives of Girls: Physical & Mental Health Dimensions from an Interdisciplinary Approach, at 13 (1997). Participation in sports and athletics instills a sense of accomplishment in the participant, helps to foster the development of social networks, and provides the practical benefit of making the participant physically healthier and stronger. Id. at 77-78. Moreover, girls' physical activity and participation in sports has been documented as having positive physiological, psychological and sociological effects which benefit not only the individual girls participating in sports, but society as a whole. Id. at 22, 23, 41, 44, 49, 59, 97, 100.

Defendants state that KP3 is "appropriate and safe" for use as a softball field, but fail to compare the BHS girls' softball team's athletic experience

to that of the BHS boys' baseball team's athletic experience. (Opp'n at 10.) Defendants have not presented any evidence to show the Court that equality of athletic experience exists and that Plaintiffs are not suffering a constitutional and irreparable injury for which there is no adequate remedy at law. This Court has already determined that the facts and evidence clearly favor Plaintiffs' substantial likelihood of success in showing that Defendants have denied the BHS softball team equal access to comparable facilities, equipment and amenities without an exceedingly persuasive justification, thereby providing Plaintiffs a substantial likelihood of success on the merits of their Title IX and Equal Protection claims against Defendants.

From the facts and law before the Court, the BHS girls' softball team will suffer irreparable harm in the form of loss of some of the physiological, psychological, and social benefits of athletics if they are not provided athletic opportunities comparable to those provided to the BHS boys' baseball team. Equality of athletic opportunity helps provide self esteem, self advancement and self success for the participants and for those who look up to them. Therefore, Plaintiff Players' have shown that they will suffer irreparable injury unless this Court issues some form of injunctive relief. Daniels, 985 F. Supp. at 1462 (finding irreparable injury where "[e]ach day these inequalities go unredressed, . . . [there

is] a clear message that girls' high school varsity softball is not as worthy as boys' high school varsity baseball, i.e., that girls are not as important as boys").

Plaintiffs also allege that the poor field conditions affect Plaintiff Players' on-field performance, and the girls' on-field nervousness may affect their eligibility for scholarships. (Mot., T.S. Decl. ¶¶ 10, 23.) Moreover, Coach Duran and others have also expressed concern over the lack of publicity of the girls' games, which could also affect the girls' exposure to recruiters. (Id., W.K. Decl. ¶ 20; Duran Decl. ¶ 50; T.N. Decl. ¶ 30.) Defendant states that any loss of scholarships is speculative and also possible to address with a monetary remedy. (Opp'n at 10.) The Court does not decide on these grounds, but notes that a potential loss of eligibility for scholarships may constitute irreparable harm. See Daniels, 985 F. Supp. at 1462 (holding that there was a substantial threat of irreparable injury where two softball players were competing for athletic scholarships that were not awarded until after the close of the season).

Based on the above, the Court finds that Plaintiff Players are at risk of irreparable harm absent an injunction by this Court and that monetary damages cannot adequately compensate them for the loss of an equal athletic opportunity.

III. Balance of Hardships

Plaintiffs' Motion requests limited relief: Plaintiffs ask to be restored to the status quo as it existed a few months ago. Plaintiffs request access to their old field, which allegedly currently sits empty and unused, (Mot., Duran Decl. ¶ 62), a recommended regulation-distance fence, which the County already has, (id., D.N. Decl. ¶25), and the dirt on the field smoothed and graded for play. (TRO at 37.) Defendants admit that no one is currently using the field, but indicated at the hearing that it is slated for the use of multiple teams once it has been renovated. Specifically, Defendants argue that the WMC field is currently being renovated, that the fence is down, that there is grass being planted in the infield, and that a raised mound is being put in for the use of the field by the Maui Little League baseball organization. (Opp'n at 5.)

Defendants argue that BHS girls' softball team already has the opportunity to play athletics on an "appropriate, safe field" that provides an equal athletic opportunity to that of the boys' team. (Opp'n at 10-11.) This Court disagrees for all the reasons stated above. The primary hardship for Defendants appears to be monetary and administrative considerations. At the least, part of this situation is of the Defendants' own making as the County made the choice to have repairs on the field done now, which further exasperates what appears to be an already vastly unequal situation.

Federal courts have held that sex-based discrimination in athletics cannot be justified by claims of limited budgets, especially considering that there has been ample time to comply with Title IX's requirements. See Landow, 132 F. Supp. 2d at 966 ("The Court is not unsympathetic to the fact that the School Board operates under a tight budget . . . However, Title IX is the law; it must be followed."); Daniels, 985 F. Supp. at 1462 (finding that the balance of hardships favored the plaintiffs: "[T]hese inequalities should have long ago been rectified . . . . For too long, the girls' softball team has been denied athletic opportunity equal to the boys' baseball team. The harm associated with that treatment as second-class athletes is significant."); see also Chalenor v. Univ. of North Dakota, 142 F. Supp. 2d 1154, 1159 (D.N.D. 2000) ("[M]oney is not a justification for discrimination."). Further, the fact that Plaintiffs will suffer an alleged deprivation of equal protection may be viewed in this Court's balance of hardships analysis. See Goldie's Bookstore, Inc., 739 F.2d at 472.

Because Plaintiff Players' are clearly likely to succeed on the merits of their claim, their softball season ends in May, and Defendants will suffer minimal monetary and administrative impositions, the balance of hardships clearly tips in Plaintiffs' favor.

IV. Advancement of Public Interest

Protection of constitutional rights is a compelling public interest. See United States v. Raines, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees[.]"); see also Int'l Soc'y for Krishna Consciousness v. Kearnes, 454 F. Supp. 116, 125 (E.D. Cal. 1978) ("the protection of constitutional rights is always in the public interest"). Similarly, the public interest is served by enforcing Title IX. See Daniels, 985 F. Supp. at 1462 ("The players and all others associated with these programs, the school system as a whole, and the public at large, will benefit from a shift to equal treatment."); Cohen v. Brown Univ., 809 F. Supp. 978, 1001 (D.R.I. 1992) (in context of Title IX, "the public interest will be served by vindicating a legal interest that Congress has determined to be an important one").

Defendants state that reinstating the BHS girls' softball team to the WMC field is not is not in the public interest because the team already has the opportunity to play athletics on a safe field that is only six minutes farther from school. (Opp'n at 11.) This argument is not persuasive given Plaintiffs' substantial likelihood of success on the merits.

For all the reasons above, a preliminary injunction to enforce Title IX and the Fourteenth Amendment is in the public interest. There is of course an important state interest of "promoting equality of athletic opportunity between the

sexes." Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982).

In conclusion, the Court finds that in the instant case a preliminary injunction providing limited mandatory relief is warranted. First, the facts and law clearly favor a finding that Plaintiffs have a substantial likelihood of success on the merits of their claims. Second, without an injunction, Plaintiffs will suffer irreparable harm as their softball season ends in May and Plaintiffs will lose their opportunity to be afforded an "equal athletic opportunity." Third, the balance of equities tips in Plaintiffs' favor because the girls' old WMC field is not currently in use and permitting the girls to return to their old field requires only minor financial and administrative hardships for Defendants. Fourth, remedying sex-based discrimination is in the public interest and especially in the interest of BHS and the County of Maui.

At the hearing, Defendant DOE admitted that it is looking into installing a softball field "because of the need for it." The Court is mindful of Defendants' plans down the road to install batting cages at KP3 and to create a new field for girls' softball, however, it appears that the BHS girls' facilities are currently vastly inferior to what is available for the boys' use and remedy is necessary at this juncture. Although, the law does not require the County to build

another Stadium and provide identical facilities, it does require "equality of athletic opportunity," and it is clearly within Defendants' power to provide the BHS girls' softball team with such equality.

Consequently, the Court GRANTS Plaintiffs' Motion for a Preliminary Injunction in accord with Plaintiffs' requested relief. However, the Court will stay the injunction until it can obtain additional input from the parties concerning the specific manner in which the BHS girls' softball team may safely be returned to their old field. The Court takes cognizance of the County's concern regarding the appropriateness and safety of the old field at the WMC complex given its current state of renovations.

Accordingly, no later than March 24, 2010, the parties shall submit to this Court the names of experts to evaluate: (1) what is necessary to put the old WMC field back into a safe, appropriate, playable position for the BHS girls' softball team; and (2) the safety of the KP3 field on which the BHS girls' softball team currently plays.[5] The parties should attempt to confer and agree on an expert. This Court has already appointed a magistrate judge in hopes of a speedy and appropriate solution to the alleged violations without further order from this Court.

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[5] Such an approach has been recognized by other courts. See Daniels, 985 F. Supp. at 1460-61; see also Cohen v. Brown Univ., 101 F.3d 155, 185-88 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997); Landow, 132 F. Supp. 2d at 967.

Further hearing before this Court regarding the expert's determinations on the appropriateness of the injunctive relief is set for April 6, 2010 at 9:00 a.m.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' Motion for Preliminary Injunction. Effect of the injunction is stayed until this Court's determination of what measures are appropriate at the further hearing scheduled for April 6, 2010.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, March 24, 2010.

David Alan Ezra
United States District Judge