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Case No. 1:18-cv-00477-LEK-RT

[CIVIL RIGHTS ACTION]

[CLASS ACTION]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

A.B., by her parents and next friends, C.B. and D.B., and T.T., by her parents and next friends, K.T. and S.T., Plaintiffs, vs. HAWAII STATE DEPARTMENT OF EDUCATION and OAHU INTERSCHOLASTIC ASSOCIATION, Defendants.	Case No. 1:18-cv-00477-LEK-RT [CIVIL RIGHTS ACTION] **MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE FIRST AMENDED COMPLAINT** [CLASS ACTION]

I. INTRODUCTION

Plaintiffs seek leave to amend their Title IX civil rights Complaint to add one additional plaintiff and putative class representative, A.M.B. Because Rule 15 of the Federal Rules of Civil Procedure favors allowing an amendment at this time and Defendants will not show any reasons to deny amendment, Plaintiffs' motion should be granted.

II. BACKGROUND

Plaintiffs brought this lawsuit on behalf of all similarly situated girls of James Campbell High School ("Campbell") against whom Defendants Hawaii State Department of Education ("DOE") and the Oahu Interscholastic Association ("OIA") (collectively, "Defendants") discriminate and retaliate in violation of Title IX of the Education Amendments of 1972 ("Title IX").[1] Title IX prohibits educational programs that receive federal financial assistance from discriminating against students on the basis of sex. The regulations require compliance in two broad areas: participation opportunities and equal benefits and treatment. Title IX also prohibits retaliation.

Under Title IX, federally-funded schools must accommodate girls with "equal athletic opportunity." 34 C.F.R. § 106.41(c). Courts employ a three-part test

[1] Plaintiffs bring their retaliation claim only against DOE.

delineated in the Department of Education's 1979 Policy Interpretation of Title IX, 44 Fed. Reg. 71,413 (the "Policy Interpretation"), to determine if an institution that receives federal funds is compliant with Title IX's "effective accommodation requirement." *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 854 (9th Cir. 2014) (internal quotation marks omitted) (reviewing Policy Interpretation). An athletic program complies with Title IX if it demonstrates it meets at least one part of the three-part test. *Id.* However, as explained in Plaintiffs' Motion for Class Certification, Dkt. No. 59-1 at 4-5, 8-12, Defendants will not meet any part of that test here.

Under Title IX, schools must also provide "equal treatment and benefits" to girls in their athletic programs. *See* Policy Interpretation, 44 Fed. Reg. 71,415. Equal treatment encompasses "equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided [to] male and female athletes." *Mansourian v. Regents of Univ. of California*, 602 F.3d 957, 964-65 (9th Cir. 2010) (quoting Department of Education Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test (1996) ("Clarification"), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html). Factors courts evaluate to assess equitable treatment and benefits include, but are not limited to, equipment and supplies; scheduling of games and practice time; quality and number of coaches; locker rooms, practice, training and

competitive facilities; and publicity. *See* 34 C.F.R. § 106.41(c)(2)-(10). "Compliance in the area of equal treatment and benefits is assessed based on an *overall comparison* of the male and female athletic programs . . . ." *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1110 (S.D. Cal. 2012) (emphasis added) (citing 34 C.F.R. 106.41(c)); *see also* Policy Interpretation, 44 Fed. Reg. 71,417 ("5. Overall Determination of Compliance [Compliance is assessed by examining] . . . b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services, or opportunities afforded male and female athletes in the institution's program *as a whole*," not simply with respect to the experience one athlete or one sport program, thus requiring evaluation of all female and male sports offerings. (emphasis added)). Plaintiffs' Motion for Class Certification explained that Defendants relegate girls who participate in athletics to substandard—or wholly non-existent—athletic benefits and treatment. Dkt. No. 59-1 at 5-6, 12-23.

Finally, Plaintiffs alleged that Defendant DOE subjected Plaintiffs to retaliation when they complained about discrimination in athletics. Dkt. No. 59-1 at 7, 23-25.

III. ARGUMENT

By this motion, Plaintiffs seek leave to file a First Amended Complaint ("Amended Complaint") pursuant to Rule 15(a)(2) of the Federal Rules of Civil

Procedure. Plaintiffs' Amended Complaint proposes to add an additional named plaintiff and class representative A.M.B., a current Campbell student entering tenth grade in the fall.[2] A.M.B. is the younger sister of A.B. and also is a student athlete (she played water polo in her first year at Campbell). Except for A.M.B. being added as an additional plaintiff, the allegations of the Amended Complaint are identical to those in the original Complaint.[3] Further, the gender discrimination experienced by A.M.B., A.B., and T.T., regardless of their individual sports and grade levels, is *emblematic* of the discriminatory experiences of Campbell female students and the proposed class.

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that "[t]he court should freely give leave when justice so requires." *See Foman v. Davis*, 371 U.S. 178, 182 (1962) (Leave to amend should be "freely given" . . . "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue

[2] A copy of the proposed Amended Complaint is attached hereto as Exhibit A. A redlined version of the proposed Amended Complaint, showing the proposed changes, is attached hereto as Exhibit B.

[3] Plaintiffs' counsel met and conferred with Defendants' counsel to seek Defendants' written consent to the filing of Plaintiffs' First Amended Complaint pursuant to Federal Rule of Civil Procedure 15. Counsel for the parties could not reach an agreement.

of allowance of the amendment, futility of amendment . . . ."). The Ninth Circuit has repeatedly reaffirmed that leave to amend is to be granted with "extreme liberality." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (citation omitted); *Eminence Capital, LLC v. Aspeon Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("Absent prejudice, or a strong showing of any of the remaining *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to amend."); *see also* 3 Edward Sherman & Mary P. Squiers, Moore's Federal Practice – Civil § 15.14 (2019) ("A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)(2).").

"Four factors are commonly used to determine the propriety of a motion for leave to amend . . . bad faith, undue delay, prejudice to the opposing party, and futility of amendment." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). None of these factors are present in the instant case.

First, Plaintiffs are not seeking to amend the complaint for any wrongful or bad faith reason. *DCD Programs*, 833 F.2d at 187 (suggesting that bad faith may be demonstrated where the moving party has a "wrongful motive" in amending). Here, the Plaintiffs simply seek to add an additional putative class representative, who is a younger student at the school where the Title IX violations to be remedied are taking place.

Second, this motion is brought without undue delay. The motion is timely because it is brought within the time limits set by the Court, Dkt. No. 34, and before any substantive proceedings have taken place in this matter (other than the OIA's unsuccessful motion to dismiss discussed below). In *Gibo v. U.S. Bank Nat'l Assoc.*, this Court found no undue delay where a class action plaintiff moved to amend her complaint to add additional class representatives even though the motion was brought six years after filing the initial complaint. Case No. 12-00514 SOM-RLP, 2018 WL 7198180, at *2 (D. Haw. June 14, 2018). Here, the motion is brought approximately five months after the initial Complaint was filed and before any substantive proceedings have taken place (other than the OIA motion).

Third, granting leave to file the Amended Complaint will not prejudice Defendants. Defendants have the burden to show prejudice. *DCD Programs*, 833 F.2d at 187. "Bald assertions of prejudice" are not sufficient. *Hurn v. Ret. Fund Tr. of Plumbing, Heating & Piping Indus. of S. Cal.*, 648 F.2d 1252, 1254 (9th Cir. 1981). "Prejudice sufficient to warrant denial of leave to amend must be substantial." *Royal Travel, Inc. v. Shell Mgmt. Hawaii, Inc.*, Case No. 08–00314 JMS–LEK, 2009 WL 1649753, at *3 (D. Haw. June 9, 2009). Defendants are not prejudiced, because they have had notice of the allegations in the Amended Complaint from at least the filing of the Complaint and Defendants have not conducted any discovery in the case (indeed, until last week, Defendants had

propounded no discovery at all and only recently began to schedule depositions of Plaintiffs). In *Gibo*, this Court found no prejudice where discovery, like here, was at an early stage. 2018 WL 7198180, at *2. Plaintiffs are seeking leave to add one named plaintiff. Discovery will not need to be reopened and indeed Defendants have not yet completed (or even materially begun) any phase of discovery.

Fourth, the amendment is not futile. Futility exists where the amendment cannot survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Pauline v. State of Haw. Dep't of Pub. Safety*, 773 F. Supp. 2d 914, 920 (D. Haw. 2011) ("A proposed amended complaint that would not survive a motion to dismiss is futile."). Because the amendment adds only one additional named putative class representative, the amended Complaint will not be substantively different from the initial one, which already survived a motion to dismiss. *See* Dkt. No. 51.

Finally, courts may look to whether the moving party has repeatedly failed to cure deficiencies through a prior amendment as a factor in deciding motions for leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1053 (9th Cir. 2003). Here, the proposed amendment constitutes Plaintiffs' first Amended Complaint; therefore, this factor should weigh in favor of allowing the amendment.

IV. CONCLUSION

For the reasons discussed above, Plaintiffs respectfully seek leave of this Court to file the proposed Amended Complaint.

DATED: Honolulu, Hawaii, May 16, 2019.

Respectfully submitted,

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