No. 10-3595

United States Court of Appeals for the Seventh Circuit

AMBER PARKER, *ET AL.*,
Plaintiff-Appellant,

vs.

FRANKLIN COUNTY COMMUNITY SCHOOL CORPORATION, *ET AL.*,
Defendants-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, CIVIL ACTION NO. 09-CV-00885, HON. WILLIAM T. LAWRENCE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES AND AFFIRMANCE

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Appellate Court No: 10-3595

Short Caption: Amber Parker et al. v. Indiana High School Athletic Ass'n et al.

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this *amicus* brief with the consent of all parties.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported autonomy in areas (like education) of predominantly local concern. Eagle Forum has a longstanding interest in applying Title IX consistent with its anti-discrimination intent, without distortion from unreasonable feminist demands to always treat boys and girls identically or to satisfy unjustified sex-based quotas. Eagle Forum has advocated that boys' and girls' best interests are advanced by acknowledging their differences and having the flexibility to adopt educational programs that reflect their different interests. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

This section outlines the factual and legal background relevant to

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

this litigation.

Factual Background

In this litigation, the mothers of two members of a girls' high school basketball team (collectively, "Plaintiffs") sue not only their daughters' own school but also its competitors in the basketball season (collectively, "Schools") on the flawed premise that boys' and girls' basketball are similarly situated. In Plaintiffs' view, the Schools discriminatorily deny the Plaintiffs their due, relegating them to second-class status compared with the boys' basketball team.

Amicus Eagle Forum respectfully – and as delicately as possible – submits that Plaintiffs' entire premise is flawed. For example, with roughly equal numbers of teams and games, the National Collegiate Athletic Association ("NCAA") experienced attendance of 32,820,701 for men's basketball[2] and 11,134,738 for women's basketball.[3] As this three-to-one ratio suggests, the two sports are not similarly situated with

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[2] The NCAA men's attendance figure for 2010 are available at http://fs.ncaa.org/Docs/stats/m_basketball_RB/Reports/attend/2010.pdf (last visited April 6, 2011).

[3] The NCAA women's attendance figure for 2010 are available at http://fs.ncaa.org/Docs/stats/w_basketball_RB/reports/Attend/10att.pdf (last visited April 6, 2011).

respect to spectator interest. Nor are they similarly situated with respect to athletic prowess or ability, which drives attendance:

> Sport is basically a strength, speed and reaction time activity involving propelling a mass through space or overcoming the resistance of a mass. Physiologically and anatomically you cannot compare highly skilled male and female athletes on these parameters because of the inherent biological differences between the sexes. Men are stronger, faster, have better reaction time and more muscle tissue per unit of body mass. That is why athletic teams and competition are sex separate.

Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association, 558 F.Supp. 487, 496 (D.D.C. 1983) (quoting Dr. Donna Lopiano), *aff'd* 735 F.2d 577 (D.C. Cir. 1984); *accord Cape v. Tennessee Secondary Sch. Athletic Ass'n,* 563 F.2d 793, 795 (6th Cir. 1977) ("It takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation"). Indeed, Plaintiffs candidly admit that spectators regard their game as inferior to the boys' game. Pls.' Br. at 6 (*quoting* Plaintiffs' affidavits).

Although Plaintiffs complain that this negatively affects their self esteem, two issues are noteworthy. First, not all girls' basketball

players want to play in primetime. For example, the Batesville girls' basketball team voted unanimously to play on weeknights, in lieu of "primetime" weekend games. Schools Br. at 13. Second, and what is worse, joining boys' and girls' basketball into doubleheaders can also damage the girls' self esteem. Steve Vedder, "Title IX backlash: Girls basketball loses crowds when boys play first" GRAND RAPIDS PRESS (Jan. 23, 2011). As the Vedder article shows in word and pictures, crowds leave when the boys' game ends. "Instead of focusing on the game, we were looking at our fans. We're thinking, 'Oh, my gosh, they're all leaving.'" *Id.* (quoting the team captain of the Forest Hills Northern girls' team).

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd if the record discloses that the lower court was without jurisdiction [an

appellate] court will notice the defect" and dismiss the action. *Id.*

The Fourteenth Amendment's Equal-Protection Clause prohibits states' "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV §1, cl. 4. The Fourteenth Amendment covers only intentional discrimination, with no "disparate-impact" component. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 272 (1979). The Fourteenth Amendment provides Congress the "power to enforce, by appropriate legislation, the provisions" of that Amendment. U.S. Const. amend. XIV, §5.

Statutory Background

Modeled on Title VI of the Civil Rights Act of 1964, Title IX prohibits sex-based discrimination in federally funded education. 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.,* action taken *because* of sex, not merely *in spite of* sex), *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001), and authorizes all funding agencies to issue regulations to effectuate Title IX's prohibition of intentional discrimination. 20 U.S.C. §1682. Congress enacted Title IX under only the Spending Clause, not under the Fourteenth Amendment. *Jackson v. Birmingham Bd. of Educ.,* 544

U.S. 167, 181 (2005).

In 1974, Senator Tower introduced an amendment to the Education Amendments of 1974 to exempt revenue-producing intercollegiate athletics from Title IX and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 CONG. REC. 15,322-23 (1974). Although he believed that Title IX did not apply to sports, his amendment clarified that – *if a court found Title IX to apply to sports* – it would exempt revenue-producing sports. *Id.* The requirement to publish proposed rules was "not intended to confer on [the Department of Health, Education and Welfare ("HEW")] any authority it does not already have under the act." *Id.*

The Tower Amendment passed the Senate, but was amended in conference (becoming the "Javits Amendment") to require HEW's Secretary (instead of the Commissioner of Education) to publish proposed regulations and to replace the revenue-sport exemption with a requirement to "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *Compare* H.R. 69, §536 (Tower Amendment), *reprinted in* 120 CONG. REG. 15,444, 15,477 (1974) *with* PUB. L. NO. 93-380, §844, 88 Stat. at

612. The committee otherwise left the Senate bill unchanged. S. CONF. REP. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271.

In splitting HEW into ED and HHS, the Department of Education Organization Act, PUB. L. NO. 96-88, 93 Stat. 668 (1979) ("DEOA") transferred various "functions" from HEW and its officers to ED and its officers. 20 U.S.C. §3441(a)-(b). DEOA reserved to HHS all HEW functions not transferred to ED. 20 U.S.C. §3508(b).

Regulatory Background

In 1975, HEW issued regulations, which included the following relevant provisions with respect to assessing equal athletic opportunity:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
>
> (2) The provision of equipment and supplies;
>
> *(3) Scheduling of games and practice time;*
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;

> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.

45 C.F.R. §86.41(c) (emphasis added); 34 C.F.R. §106.41(c) (same). This regulatory equal-opportunity mandate plainly differs from the statutory intentional-discrimination prohibition. *Horner v. Kentucky High Sch. Athletic Ass'n,* 206 F.3d 685, 694 (6th Cir. 2000) (distinguishing the regulations' equal-opportunity provisions from intentional discrimination). As relevant here, a school could schedule events based on spectator interest, which might not only disparately impact one sex over the other but also violate the regulation, without intentionally discriminating *because of sex.*

Consistent with Title IX's legislative history and its Title VI template, these Title IX regulations incorporate Title VI's procedural provisions. 45 C.F.R. §86.71 ("[t]he procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and

incorporated herein by reference"); 34 C.F.R. §106.71 (same).[4] "If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or *by any other means authorized by law*." 45 C.F.R. §80.8(a) (emphasis added); 34 C.F.R. §100.8(a) (same).

As relevant here, the regulations prohibit filing a regulation-based lawsuit – assuming *arguendo* that regulations-based lawsuits were "authorized by law" – until the agency determines that compliance cannot be achieved voluntarily and the funding recipient receives ten days' written notice of its noncompliance and the plan to effect compliance:

> *No action to effect compliance* by any other means authorized by law *shall be taken until* (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been

[4] 118 CONG. REC. 5803 (1972) (Title IX has the same procedural protections afforded under Title VI) (Sen. Bayh); *id.* at 5808 ("These provisions parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh).

> notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

45 C.F.R. §80.8(d) (emphasis added); 34 C.F.R. §100.8(d) (same).

SUMMARY OF ARGUMENT

Neither the United States nor third-party beneficiaries can enforce Title IX's regulations without the regulatory conditions precedent (*e.g.,* attempts at voluntary compliance and notice), which undermines Plaintiffs' standing and ability to state a claim for relief (Sections I.B, IV.A.1.a-IV.A.1.b). Although Title IX regulations that exceed the scope of the statutory prohibition of intentional discrimination are not privately enforceable as a merits question (Section IV.A.1.a), this Court also lacks jurisdiction to consider such claims because Plaintiffs lack standing to enforce non-vested rights of the United States and, in any event, are not third-party beneficiaries of the regulations because the regulations do not impose direct benefits on Plaintiffs (*i.e.,* the Schools could comply by elevating treatment of other girls' programs).

Agencies' Title IX regulations do not warrant deference because Congress did not delegate interpretive authority to any one agency, at least not for *interscholastic* athletics (Section II). Prior Circuit precedent on deference failed to consider various arguments, but in any event expressly relied on HEW's Javits Amendment authority to adopt requirements only for *intercollegiate* athletics. Even if it feels compelled by Circuit procedure to honor HEW's regulations with respect to intercollegiate athletics, this Court cannot presume that Congress intended to encroach onto local control of interscholastic education.

On the constitutional and statutory merits, federal courts and Congress must confine themselves to clear violations before encroaching in an area of traditional local concern (Section III.A.1), and equal-protection violations that do not disadvantage legally protected interests require proof of discriminatory intent, which Plaintiffs have not even attempted to show (Section III.A.2). In any event, although Plaintiffs cannot prevail under heightened scrutiny, the rational-basis test applies to educational decisions made with respect to single-sex teams (Sections III.A.3). Provided that they do not rise to the level of defeating substantial equality, allegations of "stereotyping" cannot

prevent the Schools' decisions (Section III.A.4).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO ENFORCE TITLE IX'S REGULATIONS

Under the plain terms of the regulations that Plaintiffs seek to enforce, "[n]o action to effect compliance by any … means authorized by law shall be taken" until certain regulatory preconditions have been met. Plaintiffs' failure to meet those regulatory preconditions denies them either prudential standing or statutory standing. *See, e.g., Kohen v. Pacific Inv. Management Co. LLC,* 571 F.3d 672, 677 (7th Cir. 2009) (distinguishing statutory and constitutional standing); *Frey v. E.P.A.,* 270 F.3d 1129, 1136 (7th Cir. 2001) ("both Article III and statutory standing requirements must be satisfied") (*citing Ragsdale v. Turnock,* 941 F.2d 501, 509 (7th Cir. 1991)); *cf. Davis v. Ball Memorial Hospital Ass'n,* 640 F.2d 30, 41-42 (7th Cir. 1980) (an "enforceable interest is 'akin' to the requirement of standing").[5] Either way, the Plaintiffs

[5] Although the failure to satisfy regulatory conditions precedent negates both Plaintiffs' constitutional standing and their statutory standing, this Court may address statutory standing first. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999); *Norfolk Southern Ry. Co. v. Guthrie,* 233 F.3d 532, 534 (7th Cir. 2000). Moreover, because this standing argument overlaps with the merits, Eagle Forum reprises this issue as a merits argument in Sections IV.A.1.b, *infra.*

cannot prevail.

A. Federal Agencies Lack Vested Rights to Enforce Regulations with Unmet Conditions Precedent

Courts analogize Spending-Clause programs to contracts struck between the government and recipients, with the public as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002); *Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin.,* 603 F.3d 365, 386 (7th Cir. 2010); *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847, 850 (5th Cir. 1967). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. With the required notice, recipients face enforcement for violations of the *statute. Id.* at 187-89. As indicated in Section IV.A.1.a, *infra,* no similar provision even authorizes private enforcement of the regulations:

> The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.

Astra USA, Inc. v. Santa Clara County, Cal., __ U.S. __, 2011 WL 1119021, 5 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). Federal agencies, of course, are bound by their own

regulations, which prevent enforcement before the agencies determine that compliance cannot be secured voluntarily, notify recipients of planned actions, and provide ten days' notice. 45 C.F.R. §80.8(d); 34 C.F.R. §100.8(d). None of that happened here. Instead, Plaintiffs propose to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra,* __ U.S. __, 2011 WL 1119021, at 5. The Schools never agreed to that, and federal law does not sanction it.

Assuming *arguendo* that the relevant Title IX regulations create enforceable individualized rights, *but see* Sections IV.A.1.a, *infra,* Plaintiffs still cannot enforce the regulations without satisfying the regulatory conditions precedent. When a regulation under Spending-Clause legislation defines schools' obligations, the *entire* regulation constitutes schools' bargain that agencies (or third-party beneficiaries) can enforce. *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 550 U.S. 45, 59 (2007); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000). Accepting the regulations as implementing the statute dooms Plaintiffs' regulation-based Title IX claims.

Under "traditional principles of contract interpretation," third-party beneficiaries like Plaintiffs cannot "cherry-pick" the specific

regulatory provisions that they wish to enforce. *In re United Airlines, Inc.,* 368 F.3d 720, 725 (7th Cir. 2004) ("[d]ebtors in bankruptcy can't cherry-pick favorable features of a contract to be assumed") *Thompson v. Goetzmann,* 337 F.3d 489, 501 (5th Cir. 2003) ("litigants cannot cherry-pick particular phrases out of statutory schemes simply to justify an exceptionally broad – and favorable – interpretation of a statute"). Moreover, third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of Am. v. Rawson,* 495 U.S. 362, 375 (1990); *Holbrook v. Pitt,* 643 F.2d 1261, 1273 n.24 (7th Cir. 1981) ("tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts"); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.,* 933 F.2d 314, 318 (5th Cir. 1991) ("[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee's] rights"). Here, no federal agency can enforce its regulations in court without meeting the regulatory prerequisites. *What agencies cannot do directly, Plaintiffs cannot do as third-party-beneficiaries.*

Under Title VII, such pre-litigation notice is a procedural prerequisite to filing suit. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982). Under environmental statutes' analogous notice

requirements for citizen suits, the "purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance … and thus ... render [private enforcement] unnecessary." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,* 528 U.S. 167, 174-75 (2000) (interior quotations omitted). "Accordingly, … citizens lack statutory standing … to sue for violations that have ceased by the time the complaint is filed." *Id.* at 175; *see* Section IV.A.1.b, *infra.* Regardless of "whether the notice provision is jurisdictional or procedural," Plaintiffs' regulatory claims are "barred" and "must be dismissed." *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989).

B. Plaintiffs Lack Standing to Enforce Non-Vested, Group-Based "Rights"

As explained in Section I.A *supra* and Section IV.A.1.b *infra,* lack of conditions precedent affects both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). But even if lack of conditions precedent implicated only Rule 12(b)(6) *for federal agencies,* it nonetheless implicates jurisdiction for third-party beneficiaries because third-party beneficiaries lack standing to enforce non-vested claims. *OEC-Diasonics, Inc. v. Major,* 674 N.E.2d 1312, 1314-15 (Ind. 1996) ("intent of the contracting parties to bestow rights upon a third

party must affirmatively appear from the language of the instrument when properly interpreted and construed") (internal quotations omitted); *Fowler v. Perry,* 830 N.E.2d 97, 105 (Ind. App. 2005) (rights do not vest until conditions precedent satisfied); *Wedel v. American Elec. Power Service Corp.,* 681 N.E.2d 1122, 1134 (Ind. App. 1997) (same); *Palma v. Verex Assur., Inc.,* 79 F.3d 1453, 1458 (5th Cir. 1996); *Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 822-24 (9th Cir. 1985).[6] Without the conditions precedent to regulatory enforcement, Plaintiffs lack a legally protected interest in regulatory enforcement and thus lacks standing.

Similarly, in much the same way that the Supreme Court has held that group-based benefits do not provide privately enforceable rights, *Alexander v. Sandoval,* 532 U.S. 275, 285-90 (2001), Plaintiffs cannot even claim third-party beneficiary status to enforce the group-based regulations under Indiana law, which requires a "*direct* benefit" to

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[6] Whatever federal agencies may say, schools plainly never signed up for private regulatory enforcement, especially without the regulatory conditions precedent. If the schools did not agree to such enforcement, then that enforcement is not part of the agreement. *Holbrook,* 643 F.2d at 1271 (courts construe third-party beneficiaries' rights by looking to intent of promisee and promisor); *Price v. Pierce,* 823 F.2d 1114, 1122 (7th Cir. 1987) (same).

Plaintiffs. *Luhnow v. Horn,* 760 N.E.2d 621, 628-29 (Ind. App. 2001) (emphasis added); *accord NN Investors Life Ins. Co. v. Crossely,* 580 N.E.2d 307, 309 (Ind. App. 1991). As Plaintiffs candidly admit, Pls.' Br. at 12 & n.12, the Schools *could* meet their regulatory obligations by benefiting other girls' teams. That admission is fatal to their status as third-party beneficiaries under Indiana law, which is fatal to their standing for regulation-based claims. *U.S. v. Andreas,* 216 F.3d 645, 664 (7th Cir. 2000) (those "not parties or third-party beneficiaries … do not have standing to enforce the terms of [an] agreement); *Pierce,* 823 F.2d at 1120 (third-party beneficiary status goes to standing).[7]

To the extent other courts have assumed jurisdiction without addressing this issue, "drive-by jurisdictional rulings" that reach merits issues without considering a particular jurisdictional issue "have no precedential effect" on that jurisdictional issue. *Steel Co.,* 523 U.S. at 94-95; *Waters v. Churchill,* 511 U.S. 661, 678 (1994) ("cases [cited by Plaintiffs] cannot be read as foreclosing an argument that they never

[7] Plaintiffs claim that the Schools bear the burden of proof on this issue, Pls.' Br. at 12 & n.12, but *plaintiffs* always bear the burden of proving jurisdiction, and this issue goes to their standing to enforce the regulations. *Summers v. Earth Island Inst.,* 129 S.Ct. 1142, 1150 (2009).

dealt with"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157, 170 (2004) (interior quotations omitted). Courts that never *considered* a jurisdictional issue plainly never *decided* it.

In addition, the Title IX decisions that Plaintiffs would cite either pre-date or fail to address *Sandoval.* As such, they fail to distinguish between enforcing the regulations and enforcing the statute. Because those other courts never considered the additional impediments to enforcing Title IX's regulations, as distinct from enforcing the statute, this Court cannot rely on their holdings to enforce the regulations.

II. THIS COURT OWES NO DEFERENCE TO FEDERAL AGENCIES' INTERPRETATIONS IN THIS LITIGATION

This Court previously has found HEW guidance entitled to deference. *Kelley v. Board of Trustees,* 35 F.3d 265, 270 (7th Cir. 1994); *Boulahanis v. Bd. of Regents,* 198 F.3d 633, 637 (7th Cir. 1999) (*citing Kelley*). *Kelley* cited the "Javits Amendment" as a delegation for HEW to adopt "reasonable provisions considering the nature of particular sports" for "intercollegiate athletics." *Kelley,* 35 F.3d at 270. For several

reasons, this Court does not owe deference to the federal regulatory provisions cited by Plaintiffs and their *amici*.

At the outset, however, it does not matter what Congress and federal agencies believe about the Fourteenth Amendment: the "power to interpret the Constitution … remains in the Judiciary." *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997). Even statutes that allow or acquiesce to sex-based actions cannot make those actions constitutional:

> The fact that [§901(a)(5)] applies to [the school] provides the State no solace: "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application … would conflict with the Constitution.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731-33 (1982). On constitutional issues, only prior holdings of this Court or the Supreme Court bind the panel here.

A. The Javits Amendment Did Not Delegate Any Relevant Authority

Because agencies axiomatically lack authority not expressly delegated to them, *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988), and judicial deference applies only to actions within agencies' delegations, *Chevron,* 467 U.S. at 865, the Javits Amendment cannot

justify deference.

First, the Javits Amendment directed HEW's Secretary to issue *proposed* regulations, which command no deference. *Matter of Appletree Markets, Inc.,* 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala,* 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, F.D.A.,* 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney,* 222 F.3d 819, 829 (10th Cir. 2000). By requiring only *proposed* regulations, the Amendment met the stated objective of "not … confer[ring] on HEW any authority it does not already have." 120 CONG. REC. 15,323 (Senate version); S. CONF. REP. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4271 (adopting Senate language).

Second, assuming *arguendo* that it confers *any* authority, the Javits Amendment confers only the one-time authority to issue proposed regulations within 30 days of the Education Amendments of 1974's enactment. As such, courts would defer only to HEW's 1974 proposal, not to HEW's 1975 final rule, much less to any agency's subsequent actions, proposed or final. Unlike *Chevron*'s broad delegation, such temporary, special-circumstance delegations cannot

elevate the delegate to the delegator's stature. *U.S. v. Eaton,* 169 U.S. 331, 343 (1898).

Third, and most importantly, assuming *arguendo* that the Javits Amendment conferred special Title IX authority, the Javits Amendment's exclusive focus on *intercollegiate* athletics would leave HEW without deference for the *interscholastic* athletics at issue here. Given the *Kelley* court's reliance on the Javits Amendment in that *intercollegiate*-athletics case, it necessarily follows that this Court has recognized that HEW had (and ED has) no claim to authority with respect to *interscholastic* athletics. This congressional distinction – evident on the face of the Javits Amendment – coalesces with the long history of local control over education:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172-73 (2001) (citations omitted).

Finally, any conferred authority would not belong to ED because DEOA left any Javits Amendment delegation with HHS. *See* Section II.C, *infra.* Because Congress cannot have intended to crown HHS as the Title IX czar, this Court should read the Javits Amendment consistent with its history and language as not conferring any authority.

B. Courts Owe No Deference to Federal Agencies' Interpretation under Statutes that Delegate Identical Authority to Multiple Agencies

Title IX delegates the same authority to multiple agencies. 20 U.S.C. §1682. Senator Bayh's failed 1971 amendment explicitly delegated rulemaking authority only to HEW. 117 CONG. REC. 30,399, 30,404 (1971); *accord id.* 30,407 (Sen. Bayh). Senator Bayh's 1972 amendment (which, with the House bill, became Title IX) delegates rulemaking authority to *all* federal agencies. 118 Cong. Reg. 5803 (1972). "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other

language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted). Consequently, neither ED nor ED's predecessor (HEW) "owns" Title IX in any way that triggers *Chevron* deference.

Under the circumstances, either no deference or the lesser "*Skidmore*" deference applies. *Compare Chevron, U.S.A., Inc. v. N.R.D.C.,* 467 U.S. 837, 843-44 (1984) *with Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944); *see Bragdon v. Abbott,* 524 U.S. 624, 642 (1998); *U.S. v. Mead Corp.,* 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hospital Ass'n,* 476 U.S. 610, 643 n.30 (1986) (plurality); *Wachtel v. O.T.S.,* 982 F.2d 581, 585 (D.C. Cir. 1993) (*Chevron* deference is "inappropriate" to affirmative-action statute administered by four agencies). Even if *Kelley* correctly deferred to HEW's intercollegiate-athletics provisions within the Javits-Amendment delegation, the Javits Amendment does not apply here.

C. ED Lacks Unique Title IX Authority

In splitting HEW into ED and HHS, Congress did not transfer HEW's interpretive authority to ED.[8] Nothing in DEOA §301 (or

[8] In a footnote, the Supreme Court stated that "HEW's functions under Title IX were transferred to [ED]." *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 517 n.4 (1982). The footnote explains why ED

elsewhere) transfers Title IX rulemaking authority to ED. DEOA §301(a)(1)'s laundry list of transferred offices does not include HEW's Secretary, and DEOA §301(a)(2)'s laundry list of transferred statutes does not include Title IX or the Javits Amendment. 20 U.S.C. §3441(a)(1)-(2). Because it applies only to "functions transferred by this section," DEOA §301(a)(3) cannot include rulemaking authority under Title IX or the Javits Amendment, which "this section" (§301) did not transfer. 20 U.S.C. §3441(a)(3). Further, HEW's *rulemaking* authority was administered by the *HEW Secretary,* and thus was not "being administered by the Office of Civil Rights" ("OCR"), as required by §301(a)(3). Like all agencies, ED draws rulemaking authority from Title IX itself, 20 U.S.C. §1682, which authorizes *each* federal agency to issue Title IX regulations.[9]

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defended that litigation on *certiorari,* but nothing substantive hinged on which agency defended there. Procedurally, *North Haven* parties challenging Title IX's application to employment received ED funding, so they would have lacked standing against HHS. "[F]leeting footnotes" on which nothing turned are not precedents. *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 512-13 & n.9 (2006) (disregarding remarks "*[e]n passant*" in "fleeting footnote[s]" when "our decision did not turn on that characterization, and the parties did not cross swords over it").

[9] Had DEOA transferred HEW's OCR to ED, as the Senate Bill proposed, Doe could make the strained argument that §301(a)(3)'s

Under §902, ED issued regulations upon its formation in 1980, 34 C.F.R. pt. 106, and HHS retains the original HEW regulations, 45 C.F.R. pt. 86. One of two situations applies: (1) as inheritor of all non-transferred HEW authority, HHS is the nation's Title IX czar, 20 U.S.C. §3508(b), or (2) consistent with their plain language and legislative histories, neither Title IX nor the Javits Amendment delegated special authority to HEW, HHS, or ED.

D. Deference Cannot Overturn Plain Regulatory or Statutory Text

Courts owe no deference to regulatory interpretations inconsistent with the statute, *Chevron,* 467 U.S. at 842-43, which here prohibits only intentional discrimination. *See* Section IV.A.2, *infra.* Under similar circumstances, the Supreme Court easily found that regulations did not expand Title VI's enforceable scope. *U.S. v. Fordice,* 505 U.S. 717, 732 n.7 (1992). Even if Title IX affords agencies deference, regulations beyond the statute deserve no deference in private-party litigation.

"relates-to" clause includes any "function" related to any authority wielded by OCR. But the Senate receded to the House in conference, and the DEOA created a new OCR within ED instead of transferring HEW's OCR. H.R. CONF REP. 96-459, 46-47, *reprinted in* 1979 U.S.C.C.A.N. 1612, 1626; 20 U.S.C. § 3413 (*creating* ED's OCR). Thus, the strained argument is neither availing nor available.

III. THE PLAINTIFFS CANNOT SHOW A VIOLATION OF THE FOURTEENTH AMENDMENT OR TITLE IX

Neither the Fourteenth Amendment nor Title IX prohibits the schools' actions here. At the outset, as the Schools explain in their brief, any schools that played Franklin in "primetime" obviously cannot be liable for the Plaintiffs' perceived slights about non-primetime slots. Schools Br. at 2-3. Similarly, for any schools where the basketball players prefer weeknight (*i.e.,* non-primetime) games, Plaintiffs cannot fault those schools for accommodating their own students. Schools Br. at 13. The question presented here is whether the differential rates of primetime versus non-primetime slots for boys' and girls' basketball violate either the Equal Protection Clause or Title IX. They do not.

A. The Constitution Does Not Prohibit Differential Basketball Scheduling

The parties divide sharply on discriminatory intent's role in equal-protection violations for what Plaintiffs characterize as sex-based distinctions in basketball scheduling. *Compare* Pls.' Br. at 38-40 *with* Schools Br. at 52-53. Because girls' basketball is not similar to boys' basketball, however, the Equal Protection Clause does not require equal treatment. In any event, opportunity is substantially equal (*i.e.,* any differences here do not approach "substantial *inequality*"). Finally, the

less-demanding rational-basis test applies to educational decisions *within single-sex teams*. Accordingly, the Schools are correct.

1. Federal Oversight of Education – a Traditionally Local Concern – Requires Clear Fourteenth-Amendment Violations

Pursuant to education's First-Amendment protections, *Grutter v. Bollinger,* 539 U.S. 306, 328-29 (2003), and its traditional regulation by states and localities, *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968), courts require a clear constitutional violation before encroaching on schools' prerogatives: "[e]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Graff v. City of Chicago,* 9 F.3d 1309, 1325-26 (7th Cir. 1993) (*quoting FCC v. Beach Communications, Inc.,* 113 S.Ct. 2096, 2101 (1993)).

2. Sex Discrimination Requires either Intent or Disadvantageous Sex-Based Preferences

"[O]rdinary equal protection standards … require … show[ing] both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.,* 470 U.S. 598, 608 (1985). Although Plaintiffs would have this Court ignore intent, all of the cases that she and her *amici* cite involve discriminatory sex-based preferences that denied the plaintiff an

otherwise-applicable entitlement (*e.g.,* denying admission to unique institutions, post-season competition, pensions or benefits, or opportunities for promotion).[10] The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its *adverse* effects upon an identifiable group." *Feeney,* 442 U.S. at 279 (emphasis added); *Franklin v. City of Evanston,* 384 F.3d 838, 846 (7th Cir. 2004) ("equal protection violation … may not rely on a disparate impact claim but must show that [government] acted with discriminatory intent"). For "cases of [that] genre," heightened review "address[es] specifically and only an … opportunity recognized … as 'unique.'" *Virginia,* 518 U.S. 515, 534-35 & n.7 (1996). In contrast, the Schools have not acted because of sex but because boys' basketball draws bigger crowds than girls' basketball.

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[10] *See, e.g., Feeney,* 442 U.S. at 274 (higher scrutiny covers "covert or overt" sex preferences); *Hogan,* 458 U.S. at 723 & n.8 (scrutiny applies to state actions that "discriminate" and "disadvantage" by sex); *Virginia,* 518 U.S at 531-34 (scrutiny applies to state action "denying rights or opportunities," "artificial[ly] constraint[ing] an individual's opportunity," or "creat[ing] or perpetuat[ing] the legal, social, and economic inferiority of women").

To prevail, Plaintiffs must prove discriminatory purpose, which their opening brief fails to do. By failing to brief the issue, they waive it. *Long v. Teachers' Retirement System of Illinois,* 585 F.3d 344, 349 (7th Cir. 2009). Without discrimination, Plaintiffs cannot claim *any* relief.

3. Differential Basketball Scheduling Does Not Trigger Heightened Scrutiny

In *U.S. v. Virginia,* the Supreme Court announced heightened scrutiny for unique post-secondary educational opportunities. *U.S. v. Virginia,* 518 U.S. at 533. At the outset, that regime is entirely inapposite to local elementary and secondary schools that offer substantially equal single-sex programs: heightened scrutiny should not apply to this local school issue. In cases where this heightened scrutiny applies, defendants will prevail if their sex-based classifications achieve "important governmental objectives," and the classifications "substantially relate" to achieving those objectives. *Id.* Even under this standard, Plaintiffs cannot prevail because the Schools acted not on the basis of sex but on the basis of community interest and in scheduling sporting events – not just basketball, but all sports – within the available resources.

Certainly, managing resources is an important government

objective, and nothing suggests that the Schools' allocation fails to relate substantially to that objective. Thus, *if heightened scrutiny applied,* the Schools would readily meet it. But Plaintiffs' entire case lies in the flawed premise that girls' and boys' basketball have equal rights, notwithstanding any differences between the sports or in school and community interest. Here, "it is important to distinguish between what the Constitution permits and what it requires," *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 385 (1979), and to focus on the level of scrutiny that applies to actions taken within single-sex teams in multi-sport athletic departments.

Even assuming that they could show the necessary "adverse effect," Plaintiffs would also need to show that the schools acted *because of sex,* not those *in spite of sex. Feeney,* 442 U.S. at 279. Once the Schools permissibly segregate their athletic departments into single-sex teams, however, sex no longer necessarily factors into decisions about the conditions on those single-sex teams. Instead, coaches and athletic directors decide what works best for particular sports, within the context not only of a larger athletic department but also community interest. When the team in question consists entirely of one sex, the

rational-basis test applies:

> It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."

Harris v. McRae, 448 U.S. 297, 322 (1980) (rational-basis test applies to abortion-funding restrictions notwithstanding the exclusive effect on women). At least until the boys' and girls' overall athletic regimes become *substantially* unequal, individual teams can defend decisions based on sex-neutral criteria such as spectator interest.[11] Unlike elite institutions like the Virginia Military Institute that provide unique and selective opportunities, *Virginia,* 518 U.S. at 550, public elementary and secondary schools certainly can educate children in a non-discriminatory manner that takes into consideration all of the factors relevant to athletics (e.g., community interest, other demands of resources, etc.).

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[11] For the reasons set forth in this brief, *amicus* Eagle Forum submits that the Second and Sixth Circuits wrongly decided the sports-scheduling litigation on which Plaintiffs rely. In any event, the district court readily distinguished those extra-circuit authorities.

4. Equal Protection Does Not Prohibit Differential Treatment of Groups that Fundamentally Differ

At bottom, Plaintiffs and their *amici* argue that schools nationwide must treat boys' and girls' (and men's and women's) basketball the same because they all play basketball and only sex-based discrimination could explain any differential treatment. But "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson,* 403 U.S. 431, 442 (1971); *Reed v. Reed,* 404 U.S. 71, 75 (1971) (Fourteenth Amendment allows "treat[ing] different classes of persons in different ways"). Indeed, even *Virginia* recognizes that males and females are different. *Virginia,* 518 U.S. at 533. Calling something a stereotype does not change reality. Equal Protection does not empower Plaintiffs to compel the Schools (and the communities they serve) to conform to unisex stereotypes. Like it or not, boys' basketball is more interesting to more spectators than girls' basketball. Spectator interest is an entirely permissible basis on which to schedule games.

B. Title IX Does Not Prohibit Differential Basketball Scheduling

The Plaintiffs' ability to challenge the Schools' basketball scheduling raises two distinct questions: (1) can they challenge

scheduling under the regulations, and (2) can they challenge scheduling under the statute? The regulations are unenforceable here, and the statute does not prohibit differential scheduling not "*because of* sex."

1. Plaintiffs Cannot Enforce Title IX Regulations

Title IX's regulations (as distinct from Title IX) are unenforceable here for two reasons.

a. Regulations that Exceed the Statute Are Unenforceable

Under *Sandoval,* statutes like Title IX create an implied private right of action to enforce *statutory* bans of intentional discrimination, but do not create a private right of action to enforce *regulations* that address conduct that the statute does not prohibit. *Sandoval,* 532 U.S. at 288-89; *Gebser v. Lago Vista Independent School District,* 524 US 274, 292 (1998). Only regulations that define statutory discrimination are enforceable: "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval,* 532 U.S. at 291. If the regulations prohibit more than statutory intentional discrimination, the regulations are unenforceable.

The regulations here are several steps removed from §901(a)'s

rights-creating language that guided *Cannon:* (1) §902 does not itself contain any rights-creating language; (2) the regulations' statutory source (§902) applies to enforcing agencies, not to regulated recipients much less to beneficiaries like Plaintiffs; (3) the regulations confer group-wide benefits, not individual rights, so that the athletic department as a whole conforms to the regulations' equal-opportunity regime (*i.e.,* the Schools could reach *overall* equality without benefiting girls' basketball); and (4) the regulations require more (equal opportunity) than the statute prohibits (intentional discrimination). *Sandoval,* 532 U.S. at 288-89. Thus, the regulations are not enforceable beyond statutory discrimination.

b. Failure to Meet Regulatory Conditions Precedent Requires Dismissal

As indicated in Section I.A, *supra,* Title IX's regulations impose several conditions precedent on regulatory enforcement – *e.g.,* agencies' attempting voluntary resolution, ten days' written notice – that remain unmet here. Under federal common law, failure to meet conditions precedent can render third-party beneficiaries unable to state a claim for relief. *See, e.g., Shaw Constructors v. ICF Kaiser Engineers, Inc.,* 395 F.3d 533, 540 & n.15 (5th Cir. 2004); *Kane Enterprises v. MacGregor*

(USA) Inc., 322 F.3d 371, 375 (5th Cir. 2003). Alternatively, Plaintiffs lack standing as third-party beneficiaries to the federal contracts because the regulations' enforceability has not vested. *See* Section I.B, *supra.* Either way, Plaintiffs cannot prevail on their Title IX regulatory claims. Assuming *arguendo* that this defect – namely, the lack of a vested, enforceable regulatory interest – is *not* jurisdictional, it nonetheless precludes Plaintiffs' stating a claim for regulatory relief.

2. Title IX Statutorily Prohibits Only Intentional Discrimination under Fourteenth Amendment

Shorn of their regulatory claims, Plaintiffs can argue only their statutory claims under Title IX. No-one can dispute that §901(a) prohibits only intentional, sex-based discrimination. *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. at 173-74. It would be "absurd" to contend otherwise. *Sandoval,* 532 U.S. at 282 & n.2. Because this Court owes no deference to competing agency interpretations (Section II, *supra*) and those agency interpretations are unenforceable without the regulatory conditions precedent (Section I.A, *supra*), the substantive Title IX question collapses to the constitutional question discussed in Section III.A, *supra.*

For the same reasons outlined in Section III.A, *supra,* that the

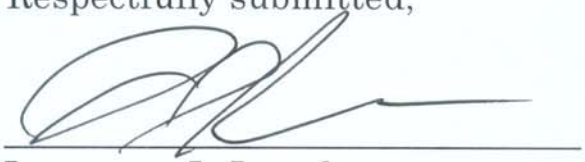
Schools have not violated the Fourteenth Amendment's intentional-discrimination prohibitions, the Schools have not violated Title IX's intentional-discrimination prohibitions. *Hildebrandt v. Illinois Dep't of Natural Resources,* 347 F.3d 1014, 1036 (7th Cir. 2003) (because "[t]he same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection claims," the "§ 1983 claims … can be dismissed on the same basis as the Title VII claims"); *Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (relying on Title VII to interpret Title IX).

CONCLUSION

This Court should dismiss Plaintiffs' Title IX claims for lack of standing and affirm the grant of summary judgment for the constitutional claims on the merits.

Dated: April 6, 2011

Respectfully submitted,



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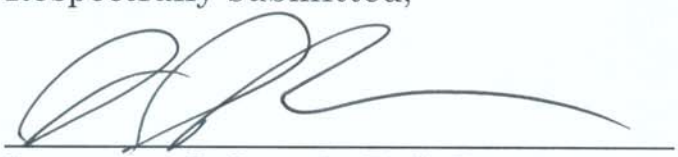
CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that, pursuant to Circuit Rule 31(e), this brief has been filed electronically.

Dated: April 6, 2011

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 7,000 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

Dated: April 6, 2011

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No. 10-3595

United States Court of Appeals for the Seventh Circuit

AMBER PARKER, *ET AL.*,
Plaintiffs-Appellants,

vs.

FRANKLIN COUNTY COMMUNITY SCHOOL CORPORATION, *ET AL.*,
Defendants-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, CIVIL ACTION NO. 09-CV-00885, HON. WILLIAM T. LAWRENCE

ADDENDUM TO BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEES AND AFFIRMANCE

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2010 NATIONAL COLLEGE BASKETBALL ATTENDANCE

(For All NCAA Men's Varsity Teams)

	Total Teams	Games or Sessions	2010 Attendance	Average	Change In Total	Change In Avg.
Home Attendance, NCAA Division I	*334	*4,995	25,164,431	5,038	-213,804	-147
NCAA Championship Tournament		35	706,246	20,178	-2,050	-59
Other Division I Neutral-Site Attendance		221	1,668,782	7,551	-11,798	338
NCAA DIVISION I TOTALS	***334**	***5,251**	**27,539,459**	**5,245**	**-227,652**	**-133**
Home Attendance, NCAA Division II^	*274	*3,737	2,837,993	759	-89,526	-43
Home Attendance, NCAA Division III^	*409	*4,909	2,008,222	409	-21,210	-25
Reclassifying Teams	16	201	266,553	*1,326	--	--
Neutral-Site Attendance for Divisions II & III		134	140,084	1,045	--	--
NCAA Division II Tournament Neutral Sites		17	21,555	1,268	--	--
NCAA Division III Tournament Neutral Sites		6	6,835	1,139	--	--
NATIONAL TOTALS FOR 2010	***1,033**	***14,255**	**32,820,701**	**2,302**	**-290,319**	**-91**

* Record high. NOTES: The Neutral-Site Attendance for Divisions II and III does not include the NCAA tournaments. The total attendance for the Division II Tournament was 62,553 for a 1,691 average over 37 sessions and the Division III Tournament was 49,286 for a 1,173 average over 42 sessions.
^ Division II attendance figures do not include five NCAA Puerto Rican schools. Division III schools that did not report attendance were Maine-Presque Isle and Menlo.

2010 NCAA DIVISION I MEN'S BASKETBALL ATTENDANCE TEAM LEADERS

Rank	School	G	Attendance	Average
1.	Kentucky	18	433,989	24,111
2.	Syracuse	19	420,890	22,152
3.	Louisville	19	368,537	19,397
4.	Tennessee	16	306,680	19,168
5.	North Carolina	19	337,934	17,786
6.	Wisconsin	17	292,910	17,230
7.	Maryland	16	268,673	16,792
8.	Memphis	20	329,968	16,498
9.	Kansas	19	312,230	16,433
10.	Marquette	17	265,484	15,617
11.	Indiana	17	260,028	15,296
12.	Illinois	18	267,658	14,870
13.	Michigan St.	17	250,903	14,759
14.	Texas	17	248,697	14,629
15.	Creighton	17	246,419	14,495
16.	Ohio St.	18	255,265	14,181
17.	BYU	16	224,460	14,029
18.	UNLV	19	264,422	13,917
19.	Arizona	16	221,047	13,815
20.	Purdue	16	218,896	13,681
21.	Vanderbilt	16	217,965	13,623
22.	New Mexico	18	244,718	13,595
23.	Minnesota	17	228,709	13,453
24.	North Carolina St.	17	224,131	13,184
25.	Arkansas	21	276,821	13,182
26.	Iowa St.	18	224,846	12,491
27.	West Virginia	15	185,629	12,375
28.	Dayton	18	220,657	12,259
29.	Georgetown	16	192,638	12,040
30.	South Carolina	16	191,905	11,994
31.	Kansas St.	17	202,020	11,884
32.	Wake Forest	15	177,498	11,833
33.	Michigan	16	187,602	11,725
34.	Connecticut	19	222,024	11,685
35.	Oklahoma St.	16	185,362	11,585
36.	Florida	17	186,106	10,947
37.	Alabama	17	186,068	10,945
38.	Villanova	14	153,105	10,936
39.	Oklahoma	15	159,744	10,650
40.	Missouri	18	186,290	10,349
41.	Wichita St.	18	185,994	10,333
42.	Pittsburgh	18	185,209	10,289
43.	Virginia	17	172,389	10,141
44.	Xavier	15	151,843	10,123
45.	Nebraska	18	179,343	9,964
46.	Texas A&M	16	158,222	9,889
47.	Utah St.	18	176,260	9,792
48.	Iowa	18	171,902	9,550
49.	Clemson	16	151,442	9,465
50.	California	16	150,773	9,423
51.	Washington	19	178,281	9,383
52.	Bradley	15	140,079	9,339
53.	Duke	17	158,338	9,314
54.	Texas Tech	19	176,510	9,290
55.	Virginia Tech	19	176,159	9,272
56.	Utah	17	156,429	9,202

Rank	School	G	Attendance	Average
57.	LSU	18	160,836	8,935
58.	UTEP	17	147,854	8,697
59.	DePaul	15	126,760	8,451
60.	Notre Dame	20	168,033	8,402
61.	Providence	17	140,920	8,289
62.	Penn St.	16	130,402	8,150
63.	UCLA	16	129,290	8,081
64.	Cincinnati	18	145,360	8,076
65.	Georgia Tech	16	127,669	7,979
66.	Siena	17	133,505	7,853
67.	Fresno St.	17	132,045	7,767
68.	Arizona St.	20	150,510	7,526
69.	Baylor	16	119,305	7,457
70.	Florida St.	16	117,381	7,336
71.	Washington St.	15	109,850	7,323
72.	San Diego St.	15	108,412	7,227
73.	St. Louis	22	157,274	7,149
74.	Oregon	19	135,322	7,122
75.	Seton Hall	18	127,848	7,103
76.	Old Dominion	15	104,930	6,995
77.	Mississippi St.	17	116,919	6,878
78.	Butler	15	102,786	6,852
79.	Georgia	16	109,348	6,834
80.	Missouri St.	21	139,543	6,645
81.	Stanford	16	105,561	6,598
82.	Illinois St.	17	111,537	6,561
83.	Temple	14	89,263	6,376
84.	Auburn	17	106,867	6,286
85.	Mississippi	19	119,278	6,278
86.	Colorado	16	100,265	6,267
87.	Charlotte	15	92,346	6,156
88.	St. John's (NY)	17	103,820	6,107
89.	Oregon St.	16	97,339	6,084
90.	Gonzaga	14	84,000	6,000
91.	VCU	19	113,993	6,000
92.	UAB	18	107,460	5,970
93.	Nevada	17	100,222	5,895
94.	George Mason	16	93,392	5,837
95.	Hawaii	21	119,004	5,667
96.	New Mexico St.	15	84,878	5,659
97.	UNI	14	78,981	5,642
98.	Tulsa	18	98,846	5,491
99.	Marshall	19	104,143	5,481
100.	UCF	15	81,161	5,411

LARGEST DIVISION I MEN'S BASKETBALL AVERAGE ATTENDANCE INCREASE FROM PREVIOUS YEAR

Rank	School	G	2010 Avg.	2009 Avg.	Change in Avg.
1.	Kansas St.	17	11,884	8,940	2,943
2.	Ark.-Pine Bluff	9	3,994	1,975	2,019
3.	Hampton	12	3,799	1,885	1,914
4.	Kentucky	18	24,111	22,239	1,871
5.	West Virginia	15	12,375	10,552	1,823
6.	Colorado	16	6,267	4,637	1,630
7.	Oklahoma St.	16	11,585	10,031	1,554
8.	Villanova	14	10,936	9,404	1,532
9.	Prairie View	14	2,483	958	1,524
10.	UNI	14	5,642	4,212	1,429
11.	UNC Greensboro	15	3,185	1,872	1,313
12.	William & Mary	13	3,144	1,879	1,266
13.	Western Caro.	16	2,427	1,204	1,223
14.	Auburn	17	6,286	5,108	1,178
15.	Michigan	16	11,725	10,568	1,157
16.	Syracuse	19	22,152	21,044	1,108
17.	UCF	15	5,411	4,390	1,020
18.	UAB	18	5,970	4,953	1,017
19.	Texas	17	14,629	13,616	1,013
20.	Utah St.	18	9,792	8,798	994

DIVISION I ALL GAMES ATTENDANCE (HOME, ROAD, NEUTRAL)

Rk.	School	Attendance
1.	Kentucky	724,145
2.	Duke	679,274
3.	Syracuse	653,366
4.	North Carolina	598,610
5.	Michigan St.	589,783
6.	Tennessee	588,824
7.	Louisville	569,740
8.	Kansas	562,726
9.	Ohio St.	550,441
10.	West Virginia	531,732
11.	Illinois	485,557
12.	Purdue	481,839
13.	Texas	477,369
14.	Marquette	473,992
15.	Wisconsin	472,490
16.	Kansas St.	450,159
17.	Maryland	445,431
18.	Georgetown	441,789
19.	Minnesota	437,499
20.	North Carolina St.	431,739
21.	Memphis	429,140
22.	Connecticut	425,102
23.	BYU	422,556
24.	Vanderbilt	416,564
25.	Arkansas	411,342
26.	New Mexico	410,555
27.	Indiana	409,990
28.	Baylor	403,393
29.	Butler	401,314
30.	Florida	399,173

2010 NCAA DIVISION I MEN'S BASKETBALL CONFERENCE ATTENDANCE

		Entire Season					Conference Tournament		
		Total Teams	Games or Sessions	2010 Attendance	Average	Change In Avg.	Total Sessions	Total Attendance	Average
1.	Big Ten	11	194	2,442,591	12,591	72	5	81,625	16,325
2.	Southeastern	12	214	2,518,749	11,770	145	6	105,967	17,661
3.	Big 12	12	211	2,366,232	*11,214	819	6	113,398	18,900
4.	Big East	16	285	3,138,877	11,014	132	8	155,000	19,375
5.	Atlantic Coast	12	207	2,217,642	10,713	-230	6	140,223	23,371
6.	Mountain West	9	154	1,259,160	8,176	-104	5	60,012	12,002
7.	Pacific-10	10	174	1,420,503	8,164	-377	5	62,272	12,454
8.	Missouri Valley	10	168	1,242,638	7,397	-355	5	51,613	10,323
9.	Conference USA	12	206	1,174,441	5,701	-98	6	47,073	7,846
10.	Atlantic 10	14	219	1,226,238	5,599	-41	8	43,975	5,497
11.	Western Athletic	9	148	750,375	5,070	-305	4	17,877	4,469
12.	Colonial	12	184	657,371	3,573	-57	6	44,372	7,395
13.	Horizon	10	149	509,056	3,416	-67	7	20,228	2,890
14.	Mid-American	12	184	514,870	2,798	-151	8	27,818	3,477
15.	West Coast	8	125	*346,916	2,775	-117	4	31,125	7,781
16.	Southern	12	177	440,914	2,491	70	6	27,935	4,656
17.	Sun Belt	13	191	468,152	2,451	-87	5	21,477	4,295
18.	Metro Atlantic	10	138	336,188	2,436	-26	5	36,956	7,391
19.	Big Sky	9	122	292,933	2,401	109	4	16,625	4,156
20.	Ohio Valley	10	152	334,274	2,199	-301	6	16,745	2,791
21.	Summit	10	144	309,711	2,151	-538	4	14,294	3,574
22.	Atlantic Sun #	9	126	251,710	1,998	26	4	9,543	2,386
23.	Ivy	8	105	207,223	1,974	182	-	-	-
24.	Big West	9	123	241,662	1,965	94	4	9,923	2,481
25.	Southwestern	10	118	222,179	1,883	352	4	8,143	2,036
26.	America East	9	118	220,293	1,867	-169	4	10,668	2,667
27.	Mid-Eastern	11	142	259,293	1,826	-179	7	33,865	4,838
28.	Patriot	8	114	183,236	1,607	-86	7	15,416	2,202
29.	Big South	9	135	200,832	1,488	-297	6	8,346	1,391
30.	Southland	11	159	231,587	1,457	-201	4	7,069	1,767
31.	Northeast	11	149	163,013	1,094	-36	7	14,105	2,015
	Independent #	6	73	72,273	990	37	-	-	-

* Record high for that conference. # Different alignment from the previous year.
NOTE: Entire season total attendance includes the conference tournaments.

2010 DIVISION I MEN'S BASKETBALL CHAMPIONSHIP TOURNAMENT ATTENDANCE

Round	Site	Att.	Site	Att.	Site	Att.	Site	Att.
Opening Round	Dayton	8,205						
First Round	Buffalo	18,653	Milwaukee	17,580	Oklahoma City	13,382	San Jose	12,712
	Buffalo	18,948	Milwaukee	17,875	Oklahoma City	13,484	San Jose	15,427
	Jacksonville	10,657	New Orleans	10,484	Providence	11,106	Spokane	10,899
	Jacksonville	12,251	New Orleans	10,984	Providence	10,788	Spokane	10,861
Second Round	Buffalo	18,934	Milwaukee	18,031	Oklahoma City	15,668	San Jose	16,044
	Jacksonville	12,547	New Orleans	11,966	Providence	11,271	Spokane	11,036
Regional Semifinals	Houston	45,505	St. Louis	26,377	Salt Lake City	17,254	Syracuse	22,271
Regional Finals	Houston	47,492	St. Louis	25,242	Salt Lake City	17,587	Syracuse	22,497
Final Four								
National Semifinals	Indianapolis	71,298						
National Final	Indianapolis	70,930						
Final Four Total		142,228						
Total Tournament Attendance		706,246						
Average per Session		20,178						

2010 NCAA DIVISION II AND III MEN'S BASKETBALL ATTENDANCE TEAM LEADERS

Rank	Division II	G/S	Attendance	Avg.
1.	Northern St.	15	51,207	3,414
2.	Elizabeth City St.	12	38,089	3,174
3.	St. Cloud St.	18	56,574	3,143
4.	Central Mo.	14	40,638	2,903
5.	Fort Hays St.	15	43,511	2,901
6.	Morehouse	14	40,600	2,900
7.	Benedict	14	34,668	2,476
8.	Midwestern St.	16	38,805	2,425
9.	Dixie St.	12	27,747	2,312
10.	Virginia St.	11	25,129	2,284
11.	Augustana (SD)	17	37,966	2,233
12.	Ky. Wesleyan	19	41,700	2,195
13.	Washburn	15	31,708	2,114
14.	S.C. Aiken	16	33,352	2,085
15.	Emporia St.	14	27,341	1,953
16.	Valdosta St.	15	28,353	1,890
17.	Mo. Western St.	13	24,254	1,866
18.	Southern Ind.	16	28,476	1,780
19.	Pittsburg St.	14	24,531	1,752
20.	Minn. St. Mankato	18	31,521	1,751
21.	Alas. Anchorage	15	25,655	1,710
22.	Augusta St.	18	30,477	1,693
23.	Fort Valley St.	15	24,923	1,662
24.	Southwest Minn. St.	15	24,843	1,656
25.	Northern Ky.	14	22,591	1,614
26.	Colorado St.-Pueblo	11	17,512	1,592
27.	West Ga.	14	21,954	1,568
28.	Central St. (OH)	12	18,402	1,534
29.	Tarleton St.	17	25,772	1,516
30.	Mary	13	18,945	1,457

Rank	Division III	G/S	Attendance	Avg.
1.	Hope	16	45,381	2,836
2.	Calvin	17	36,298	2,135
3.	Wis.-Stevens Point	17	27,683	1,628
4.	Wooster	18	27,520	1,529
5.	Carthage	13	18,535	1,426
6.	Whitworth	15	18,750	1,250
7.	Frank. & Marsh.	17	19,674	1,157
8.	Maryville (TN)	13	14,667	1,128
9.	Guilford	16	17,628	1,102
10.	East. Mennonite	13	13,558	1,043
11.	Northwestern (MN)	13	13,482	1,037
12.	Wheaton (IL)	11	11,131	1,012
13.	Ill. Wesleyan	14	14,065	1,005
14.	Hampden-Sydney	13	11,842	911
15.	Mississippi Col.	11	10,011	910
16.	Otterbein	11	9,983	908
17.	Wis.-Whitewater	13	11,675	898
18.	Mary Hardin-Baylor	18	16,100	894
19.	Washington-St. Louis	15	13,412	894
20.	Gust. Adolphus	14	12,388	885
21.	Albright	13	11,479	883
22.	York (PA)	15	13,193	880
23.	New York U.	16	13,661	854
24.	Wis.-Platteville	11	9,382	853
25.	Augustana (IL)	12	10,122	844
26.	Elmhurst	11	9,271	843
27.	Willamette	10	8,372	837
28.	Defiance	13	10,871	836
29.	Anderson (IN)	16	13,300	831
30.	Wabash	13	10,676	821

2010 NCAA DIVISION II AND III MEN'S BASKETBALL ATTENDANCE CONFERENCE LEADERS

Rank	Division II	Total Teams	Games or Sessions	2010 Attendance	Average	Change In Avg.
1.	Mid-America	11	156	263,817	1,691	-16
2.	Northern Sun	14	203	290,945	1,433	-267
3.	CIAA	11	128	163,308	1,276	-147
4.	SIAC	13	172	214,990	1,250	89
5.	Great Lakes Valley	15	222	214,568	967	-125
6.	Gulf South	14	193	178,937	927	70
7.	Peach Belt	13	194	173,184	893	-46
8.	Lone Star	14	195	172,160	883	17
9.	Great Northwest	9	121	99,996	826	-99
10.	RMAC	14	170	137,391	808	42

Rank	Division III	Total Teams	Games or Sessions	2010 Attendance	Average	Change In Avg.
1.	Michigan Intercol.	8	100	106,564	1,066	7
2.	Illinois & Wisconsin	8	98	76,189	777	-195
3.	Wisconsin AC	9	112	84,799	757	-32
4.	ODAC	11	140	94,400	674	92
5.	Northwest	9	101	65,863	652	-18
6.	Ohio AC	11	114	72,783	638	-87
7.	North Coast	10	118	73,845	626	21
8.	Iowa Intercollegiate	9	103	62,238	604	-45
9.	Great South	4	48	25,972	541	23
10.	Heartland Athletic	9	113	58,887	521	-9

2010 NCAA DIVISION I TEAM-BY-TEAM BASKETBALL ATTENDANCE

Team	G	Attendance	Avg.
A&M-Corpus Christi	12	18,520	1,543
Air Force	17	42,875	2,522
Akron	18	50,830	2,824
Alabama	17	186,068	10,945
Alabama A&M	14	30,553	2,182
Alabama St.	12	20,435	1,703
Albany (NY)	13	34,394	2,646
Alcorn St.	10	10,925	1,093
American	15	20,862	1,391
Appalachian St.	18	36,456	2,025
Arizona	16	221,047	13,815
Arizona St.	20	150,510	7,526
Ark.-Pine Bluff	9	35,947	3,994
Arkansas	21	276,821	13,182
Arkansas St.	15	49,887	3,326
Army	14	15,064	1,076
Auburn	17	106,867	6,286
Austin Peay	15	41,835	2,789
Ball St.	17	57,297	3,370
Baylor	16	119,305	7,457
Belmont	13	19,322	1,486
Bethune-Cookman	14	9,872	705
Binghamton	12	44,031	3,669
Boise St.	16	48,980	3,061
Boston College	17	90,394	5,317
Boston U.	14	13,550	968
Bowling Green	14	23,922	1,709
Bradley	15	140,079	9,339
Brown	13	16,498	1,269
Bucknell	13	32,686	2,514
Buffalo	13	25,707	1,977
Butler	15	102,786	6,852
BYU	16	224,460	14,029
Cal Poly	12	25,980	2,165
Cal St. Fullerton	13	18,116	1,394
Cal St. Northridge	13	14,620	1,125
California	16	150,773	9,423
Campbell	15	29,739	1,983
Canisius	12	16,833	1,403
Centenary (LA)	14	12,329	881
Central Conn. St.	12	18,357	1,530
Central Mich.	13	23,342	1,796
Charleston So.	14	10,459	747
Charlotte	15	92,346	6,156
Chattanooga	16	55,866	3,492
Chicago St.	12	16,068	1,339
Cincinnati	18	145,360	8,076
Citadel	14	29,572	2,112
Clemson	16	151,442	9,465
Cleveland St.	18	41,009	2,278
Coastal Caro.	19	19,872	1,046
Col. of Charleston	13	50,888	3,914
Colgate	13	6,604	508
Colorado	16	100,265	6,267
Colorado St.	15	50,878	3,392
Columbia	13	16,184	1,245
Connecticut	19	222,024	11,685
Coppin St.	13	12,863	989
Cornell	12	43,897	3,658
Creighton	17	246,419	14,495
Dartmouth	15	8,925	595
Davidson	14	55,230	3,945
Dayton	18	220,657	12,259
Delaware	15	37,186	2,479
Delaware St.	15	15,060	1,004
Denver	16	31,671	1,979
DePaul	15	126,760	8,451
Detroit	16	40,577	2,536
Drake	16	72,156	4,510
Drexel	14	19,040	1,360
Duke	17	158,338	9,314
Duquesne	15	51,915	3,461
East Carolina	15	57,912	3,861
East Tenn. St.	14	49,656	3,547
Eastern Ill.	16	19,826	1,239
Eastern Ky.	18	41,400	2,300
Eastern Mich.	15	15,104	1,007
Eastern Wash.	13	20,331	1,564
Elon	11	12,240	1,113
Evansville	16	77,314	4,832
Fairfield	14	34,029	2,431
Fairleigh Dickinson	14	7,335	524
FIU	13	14,848	1,142
Fla. Atlantic	13	16,947	1,304
Florida	17	186,106	10,947
Florida A&M	12	18,469	1,539
Florida St.	16	117,381	7,336
Fordham	13	33,980	2,614
Fresno St.	17	132,045	7,767
Furman	14	20,348	1,453
Ga. Southern	14	26,119	1,866
Gardner-Webb	15	20,825	1,388
George Mason	16	93,392	5,837
George Washington	15	33,113	2,208
Georgetown	16	192,638	12,040
Georgia	16	109,348	6,834
Georgia St.	14	19,396	1,385
Georgia Tech	16	127,669	7,979
Gonzaga	14	84,000	6,000
Grambling	11	14,245	1,295
Green Bay	15	57,707	3,847
Hampton	12	45,587	3,799
Hartford	13	16,279	1,252
Harvard	13	20,450	1,573
Hawaii	21	119,004	5,667
High Point	13	17,449	1,342
Hofstra	17	40,963	2,410
Holy Cross	12	26,354	2,196
Houston	15	48,033	3,202
Howard	9	8,918	991
Idaho	14	22,965	1,640
Idaho St.	12	26,001	2,167
Ill.-Chicago	14	50,803	3,629
Illinois	18	267,658	14,870
Illinois St.	17	111,537	6,561
Indiana	17	260,028	15,296
Indiana St.	14	67,298	4,807
Iona	14	28,959	2,069
Iowa	18	171,902	9,550
Iowa St.	18	224,846	12,491

Team	G	Attendance	Avg.
IPFW	14	27,259	1,947
IUPUI	14	18,422	1,316
Jackson St.	12	22,674	1,890
Jacksonville	11	33,417	3,038
Jacksonville St.	17	28,082	1,652
James Madison	14	52,251	3,732
Kansas	19	312,230	16,433
Kansas St.	17	202,020	11,884
Kennesaw St.	14	16,160	1,154
Kent St.	16	54,501	3,406
Kentucky	18	433,989	24,111
La Salle	13	28,222	2,171
La.-Lafayette	14	38,672	2,762
La.-Monroe	14	19,570	1,398
Lafayette	16	29,690	1,856
Lamar	18	53,469	2,971
Lehigh	17	21,838	1,285
Liberty	14	37,441	2,674
Lipscomb	14	21,542	1,539
Long Beach St.	11	32,266	2,933
Long Island	13	9,425	725
Longwood	12	12,391	1,033
Louisiana Tech	14	34,129	2,438
Louisville	19	368,537	19,397
Loyola (IL)	15	33,120	2,208
Loyola (MD)	13	13,725	1,056
Loyola Marymount	15	33,886	2,259
LSU	18	160,836	8,935
Maine	12	15,879	1,323
Manhattan	14	18,088	1,292
Marist	13	22,706	1,747
Marquette	17	265,484	15,617
Marshall	19	104,143	5,481
Maryland	16	268,673	16,792
Massachusetts	14	55,823	3,987
McNeese St.	12	6,604	550
Md.-East. Shore	12	23,591	1,966
Memphis	20	329,968	16,498
Mercer	16	35,765	2,235
Miami (FL)	16	75,411	4,713
Miami (OH)	13	25,628	1,971
Michigan	16	187,602	11,725
Michigan St.	17	250,903	14,759
Middle Tenn.	16	46,794	2,925
Milwaukee	14	40,364	2,883
Minnesota	17	228,709	13,453
Mississippi	19	119,278	6,278
Mississippi St.	17	116,919	6,878
Mississippi Val.	9	23,472	2,608
Missouri	18	186,290	10,349
Missouri St.	21	139,543	6,645
Monmouth	14	20,852	1,489
Montana	16	54,108	3,382
Montana St.	14	47,443	3,389
Morehead St.	17	47,724	2,807
Morgan St.	12	26,385	2,199
Mt. St. Mary's	13	18,889	1,453
Murray St.	15	55,230	3,682
N.C. A&T	13	33,412	2,570
Navy	14	30,138	2,153
Nebraska	18	179,343	9,964
Nevada	17	100,222	5,895
New Hampshire	13	14,642	1,126
New Mexico	18	244,718	13,595
New Mexico St.	15	84,878	5,659
New Orleans	13	6,207	477
Niagara	12	25,484	2,124
Nicholls St.	11	3,608	328
NJIT	13	5,482	422
Norfolk St.	10	16,668	1,667
North Carolina	19	337,934	17,786
North Carolina St.	17	224,131	13,184
North Dakota St.	14	39,085	2,792
North Florida	12	17,585	1,465
North Texas	14	38,022	2,716
Northeastern	13	26,902	2,069
Northern Ariz.	12	10,064	839
Northern Colo.	15	34,383	2,292
Northern Ill.	14	22,502	1,607
Northwestern	19	96,691	5,089
Northwestern St.	14	17,752	1,268
Notre Dame	20	168,033	8,402
Oakland	14	38,263	2,733
Ohio	17	89,918	5,289
Ohio St.	18	255,265	14,181
Oklahoma	15	159,744	10,650
Oklahoma St.	16	185,362	11,585
Old Dominion	15	104,930	6,995
Oral Roberts	13	60,603	4,662
Oregon	19	135,322	7,122
Oregon St.	16	97,339	6,084
Pacific	15	52,097	3,473
Penn	13	51,558	3,966
Penn St.	16	130,402	8,150
Pepperdine	16	18,485	1,155
Pittsburgh	18	185,209	10,289
Portland	15	32,829	2,189
Portland St.	12	12,109	1,009
Prairie View	14	34,755	2,483
Princeton	14	32,360	2,311
Providence	17	140,920	8,289
Purdue	16	218,896	13,681
Quinnipiac	15	26,380	1,759
Radford	16	26,283	1,643
Rhode Island	17	88,853	5,227
Rice	17	33,924	1,996
Richmond	15	69,429	4,629
Rider	13	20,926	1,610
Robert Morris	15	15,428	1,029
Rutgers	19	99,476	5,236
Sacramento St.	13	8,846	680
Sacred Heart	13	10,421	802
Sam Houston St.	14	20,081	1,434
Samford	14	16,608	1,186
San Diego	14	34,664	2,476
San Diego St.	15	108,412	7,227
San Francisco	13	24,273	1,867
San Jose St.	14	25,949	1,854
Santa Clara	18	37,202	2,067
Savannah St.	11	12,739	1,158
Seton Hall	18	127,848	7,103
Siena	17	133,505	7,853
SMU	17	45,694	2,688
South Ala.	15	40,586	2,706

Team	G	Attendance	Avg.
South Carolina	16	191,905	11,994
South Carolina St.	13	14,603	1,123
South Dakota St.	14	30,851	2,204
South Fla.	16	78,144	4,884
Southeast Mo. St.	14	35,151	2,511
Southeastern La.	15	11,197	746
Southern California	16	80,258	5,016
Southern Ill.	15	71,704	4,780
Southern Miss.	14	46,267	3,305
Southern U.	12	6,049	504
Southern Utah	14	29,366	2,098
St. Bonaventure	15	62,596	4,173
St. Francis (NY)	13	6,762	520
St. Francis (PA)	14	14,766	1,055
St. John's (NY)	17	103,820	6,107
St. Joseph's	14	63,389	4,528
St. Louis	22	157,274	7,149
St. Mary's (CA)	16	50,452	3,153
St. Peter's	14	12,820	916
Stanford	16	105,561	6,598
Stephen F. Austin	15	36,284	2,419
Stetson	14	20,030	1,431
Stony Brook	14	20,789	1,485
Syracuse	19	420,890	22,152
TCU	17	62,656	3,686
Temple	14	89,263	6,376
Tennessee	16	306,680	19,168
Tennessee St.	11	12,739	1,158
Tennessee Tech	14	22,368	1,598
Tex.-Pan American	10	5,133	513
Texas	17	248,697	14,629
Texas A&M	16	158,222	9,889
Texas Southern	11	14,981	1,362
Texas St.	14	23,158	1,654
Texas Tech	19	176,510	9,290
Texas-Arlington	16	12,099	756
Toledo	15	59,298	3,953
Towson	15	22,506	1,500
Troy	12	21,688	1,807
Tulane	15	26,106	1,740
Tulsa	18	98,846	5,491
UAB	18	107,460	5,970
UALR	15	50,407	3,360
UC Davis	13	22,728	1,748
UC Irvine	15	23,989	1,599
UC Riverside	14	10,493	750
UC Santa Barbara	13	31,450	2,419
UCF	15	81,161	5,411
UCLA	16	129,290	8,081
UMBC	13	21,599	1,661
UMKC	14	24,489	1,749
UNC Asheville	16	14,567	910
UNC Greensboro	15	47,776	3,185
UNC Wilmington	13	41,563	3,197
UNI	14	78,981	5,642
UNLV	19	264,422	13,917
UT Martin	13	23,510	1,808
Utah	17	156,429	9,202
Utah St.	18	176,260	9,792
Utah Valley	15	20,460	1,364
UTEP	17	147,854	8,697
UTSA	14	21,746	1,553
Valparaiso	13	35,606	2,739
Vanderbilt	16	217,965	13,623
VCU	19	113,993	6,000
Vermont	12	34,530	2,878
Villanova	14	153,105	10,936
Virginia	17	172,389	10,141
Virginia Tech	19	176,159	9,272
VMI	14	22,149	1,582
Wagner	13	14,398	1,108
Wake Forest	15	177,498	11,833
Washington	19	178,281	9,383
Washington St.	15	109,850	7,323
Weber St.	15	79,648	5,310
West Virginia	15	185,629	12,375
Western Caro.	16	38,829	2,427
Western Ill.	15	14,750	983
Western Ky.	16	71,376	4,461
Western Mich.	15	44,990	2,999
Wichita St.	18	185,994	10,333
William & Mary	13	40,877	3,144
Winthrop	14	31,787	2,271
Wisconsin	17	292,910	17,230
Wofford	12	23,047	1,921
Wright St.	13	68,597	5,277
Wyoming	18	87,931	4,885
Xavier	15	151,843	10,123
Yale	12	17,351	1,446
Youngstown St.	15	37,464	2,498

Reclassifying Teams to Division I

Team	G	Attendance	Avg.
Bryant	11	6,628	603
Cal St. Bakersfield	11	22,050	2,005
Central Ark.	14	15,872	1,134
Fla. Gulf Coast	13	20,352	1,566
N.C. Central	11	15,993	1,454
North Dakota	14	26,869	1,919
Presbyterian	10	6,198	620
Seattle	13	46,122	3,548
S.C. Upstate	12	10,881	907
South Dakota	14	20,894	1,492
SIU Edwardsville	11	17,518	1,593
Winston-Salem	13	30,732	2,364

2010 NCAA Women's Basketball Attendance

	Total Teams	Games or Sessions	2010 Attendance	Avg.	Change In Total	Change In Avg.
Div. I Home Attendance	*332	*4,747	7,518,183	1,584	16,352	-26
Div. I NCAA Tr. Neutral Sites		25	138,899	5,556	--	--
Div. I Neutral Sites		146	394,726	2,704	-17,698	-102
NCAA DIVISION I TOTALS	***332**	***4,918**	**8,051,808**	**1,637**	**9,768**	**-27**
Div. II Home Attendance	270	3,570	1,676,999	470	-78,910	-26
Div. II NCAA Tr. Neutral Sites		22	16,928	769	--	--
Div. II Other Neutral Sites		78	83,916	1,076	--	--
NCAA DIVISION II TOTALS	**270**	**3,670**	**1,777,843**	**484**	**-47,272**	**-19**
Div. III Home Attendance	419	5,046	1,143,052	227	-39,727	-12
Div. III NCAA Tr. Neutral Sites		5	5,429	1,086	--	--
Div. III Other Neutral Sites		70	12,735	182	--	--
NCAA DIVISION III TOTALS	**419**	**5,121**	**1,161,216**	**227**	**-41,946**	**-12**
Reclassifying Teams	16	210	143,871	685	--	--
NAT'L TOTALS FOR 2010	***1,037**	**13,919**	**11,134,738**	**800**	**-25,555**	**-18**

* Record high. NOTES: NCAA tournaments overall totals were 231,644 for DI, 56,430 for DII and 38,423 for DIII.
Note: Attendance figures do not include the five NCAA Puerto Rican schools in Division II.

2010 Women's Basketball Attendance Team Leaders

DIVISION I

Rk.	School	G	Attendance	Average
1.	Tennessee	17	219,233	12,896
2.	Connecticut	20	203,648	10,182
3.	Iowa St.	19	177,002	9,316
4.	Notre Dame	17	142,412	8,377
5.	Purdue	18	146,868	8,159
6.	Oklahoma	16	122,902	7,681
7.	Nebraska	16	118,232	7,390
8.	Baylor	17	122,550	7,209
9.	New Mexico	18	127,623	7,090
10.	Texas Tech	19	129,896	6,837
11.	Louisville	14	89,571	6,398
12.	Michigan St.	15	92,883	6,192
13.	Wisconsin	14	78,884	5,635
14.	Kentucky	17	95,615	5,624
15.	Texas A&M	14	72,165	5,155
16.	Maryland	21	104,562	4,979

Rk.	School	G	Attendance	Average
17.	Texas	16	78,539	4,909
18.	Duke	17	80,134	4,714
19.	Penn St.	15	66,476	4,432
20.	Minnesota	16	69,557	4,347
21.	Vanderbilt	16	69,521	4,345
22.	Georgia	16	69,371	4,336
23.	Stanford	17	72,767	4,280
24.	Indiana St.	13	54,235	4,172
25.	Kansas St.	15	60,137	4,009
26.	Middle Tenn.	13	51,691	3,976
27.	Virginia	17	65,506	3,853
28.	Ohio St.	20	76,437	3,822
29.	Kansas	18	67,892	3,772
30.	Wyoming	16	57,539	3,596
31.	Missouri St.	17	59,804	3,518
32.	Iowa	16	55,813	3,488
33.	South Carolina	12	41,300	3,442
34.	Dayton	13	44,253	3,404
35.	LSU	16	54,133	3,383
36.	Murray St.	11	36,078	3,280
37.	Rutgers	15	47,915	3,194
38.	Montana	14	44,088	3,149
39.	East Tenn. St.	11	33,092	3,008
40.	Old Dominion	15	45,101	3,007
41.	North Carolina	18	54,038	3,002
42.	Gonzaga	16	46,894	2,931
43.	Pittsburgh	17	48,605	2,859
44.	Fresno St.	14	39,703	2,836
45.	Arizona St.	16	44,730	2,796
46.	Ark.-Pine Bluff	9	25,133	2,793
47.	Delaware	14	39,002	2,786
48.	Toledo	14	38,081	2,720
49.	Oklahoma St.	17	45,891	2,699
50.	Florida St.	18	48,567	2,698

All Games (Home, Road, Neutral)

Rk.	School	G	Attendance
1.	Connecticut	39	357,627
2.	Tennessee	35	332,353
3.	Baylor	37	248,283
4.	Oklahoma	38	245,432
5.	Iowa St.	33	233,645
6.	Notre Dame	35	223,470
7.	Purdue	32	197,305
8.	Texas Tech	33	190,520
9.	Stanford	38	190,463
10.	Nebraska	34	189,431

Largest Increase From Previous Year

Rk.	School	G	2010 Avg.	2009 Avg.	Change in Avg.
1.	Nebraska	15	7,390	3,211	4,179
2.	Dayton	13	3,404	878	2,526
3.	Ark.-Pine Bluff	11	2,793	720	2,073
4.	Prairie View	11	2,120	361	1,759
5.	Delaware	12	2,786	1,110	1,676
6.	Temple	13	2,302	1,056	1,246
7.	Notre Dame	14	8,377	7,168	1,209
8.	Kentucky	17	5,624	4,423	1,201
9.	Xavier	16	2,415	1,487	928
10.	Mississippi	17	1,866	955	911

2010 Women's Basketball Conference Attendance

(Figures include home attendance of each member plus conference tournament neutral site games or sessions)

DIVISION I

Rk.	School	Teams	Games	Attendance	Average
1.	Big 12	12	208	**1,091,289	5,247
2.	Southeastern	12	185	740,993	4,005
3.	Big Ten	11	184	735,453	3,997
4.	Big East	16	260	778,916	2,996
5.	Atlantic Coast	12	209	568,184	2,719
6.	Mountain West	9	142	320,676	2,258
7.	Pacific-10	10	160	331,392	2,071
8.	Missouri Valley	10	148	275,960	1,865
9.	Western Athletic	9	137	181,234	1,323
10.	Atlantic 10	14	204	*253,367	*1,242
11.	Colonial	12	177	217,964	1,231
12.	Southwestern	10	118	*134,052	1,136
13.	Sun Belt	13	186	203,869	1,096
14.	Big Sky	9	124	130,436	1,052
15.	Mid-American	12	166	169,957	1,024
16.	Ohio Valley	10	139	142,110	1,022
17.	Mid-Eastern	11	135	131,335	973
18.	Conference USA	12	183	175,961	962
19.	Atlantic Sun #	9	124	*116,398	*939
20.	Summit	10	135	124,624	923
21.	America East	9	120	108,426	904
22.	West Coast	8	117	105,747	904
23.	Metro Atlantic	10	145	125,842	868
24.	Southland	11	152	117,516	773
25.	Patriot	8	108	78,975	731
26.	Horizon	10	144	102,289	710
27.	Ivy	8	105	63,018	600
28.	Big West	9	131	74,744	571
29.	Southern	11	152	86,354	568
30.	Big South	8	118	66,209	561
31.	Northeast	11	153	69,026	451
	Independents #	6	84	32,981	393

*** national record; * conference record; # different conference lineup from previous year*

2010 Women's Basketball Attendance Team Leaders

DIVISION II

Rk.	School	G	Att.	Avg.
1.	Northern St.	14	40,563	2,897
2.	Fort Hays St.	14	30,995	2,214
3.	Emporia St.	13	27,529	2,118
4.	St. Cloud St.	13	27,044	2,080
5.	Washburn	13	26,401	2,031
6.	Pittsburg St.	12	23,111	1,926
7.	Elizabeth City St.	13	20,651	1,589
8.	Augustana (SD)	18	28,068	1,559
9.	Michigan Tech	19	29,230	1,538
10.	Tarleton St.	13	19,518	1,501

DIVISION III

Rk.	School	G	Att.	Avg.
1.	Hope	20	22,764	1,138
2.	Howard Payne	11	9,225	839
3.	Wis.-Stout	12	9,318	777
4.	Mississippi Col.	11	8,498	773
5.	George Fox	15	11,504	767
6.	New York U.	14	10,615	758
7.	Bowdoin	15	11,172	745
8.	Dubuque	10	6,976	698
9.	Ill. Wesleyan	18	12,468	693
10.	Buena Vista	11	7,495	681

2010 Women's Basketball Conference Attendance

DIVISION II

Rk.	School	G	Teams	Attendance	Average
1.	Mid-America	11	149	195,831	1,314
2.	CIAA	11	141	138,493	982
3.	Northern Sun	14	192	182,171	949
4.	Lone Star	15	195	138,738	711
5.	Gulf South	14	191	117,102	613
6.	SIAC	12	156	92,935	596
7.	GLIAC	13	173	97,384	563
8.	Rocky Mountain	14	177	97,870	553
9.	Great Lakes Valley	13	195	105,130	539
10.	Peach Belt	13	181	96,949	536

DIVISION III

Rk.	School	G	Teams	Attendance	Average
1.	Iowa Intercol.	9	105	48,450	461
2.	American Southwest	15	175	71,908	411
3.	Michigan Intercol.	9	110	44,116	401
4.	Wisconsin Intercol.	9	110	43,633	397
5.	Ohio AC	10	118	45,856	389
6.	University	8	104	36,316	349
7.	NESCAC	10	120	41,650	347
8.	Illinois & Wisconsin	8	99	32,789	331
9.	Northwest	9	105	34,548	329
10.	Commonwealth	8	101	28,894	286

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Title IX backlash: Girls basketball loses crowds when boys play first

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By **Steve Vedder | The Grand Rapids Press**

Becca Quinn knew her priority should be focusing on her basketball game with a cross-district rival. But it was impossible to ignore the hundreds of fans streaming past her toward the exits.

In fact, her Forest Hills Northern team's game against Forest Hills Central was delayed to allow for the sweeping exodus right after the 6 p.m. boys game.

"Instead of focusing on the game, we were looking at our fans. We're thinking, 'Oh, my gosh, they're all leaving,'" said Quinn, a senior and team captain.

The crowd of more than 1,600 would eventually dwindle to about 300 for the nightcap.

That type of scene has played out in Friday night doubleheaders across West Michigan this winter. This season is the first to see the effect of the OK Conference's decision to have the boys play first — crowds that drop off by 80 percent or more for the girls.

The scenario has left the girls and their coaches using words like "embarrassed" and "humiliated," but the conference's athletic directors, wary of legal pressure over a possible Title IX violation, say they have little choice to but to schedule the girls as the late game every other year.

Cory Morse | The Grand Rapids Press

Few fans stay for Wayland girls "marquee" game that followed boys game, below. Since a state panel triggered rotation of the play order, crowds for the girls have dropped as much as 80 percent across West Michigan.

Cory Morse | The Grand Rapids Press

Wayland High School fans watch the boys basketball team play the opening game of a Friday night doubleheader against Ottawa Hills.

That decision was affirmed last week as the OK scheduling committee opted to continue the rotation, meaning girls will play the second half of doubleheaders again in 2013.

Few players, coaches and fans — male or female —are content. An OK survey completed by the schools shows at least 90 percent of all participants prefer the girls playing first.

"Bottom line, this isn't working," said coach Colleen-Lamoreaux-Tate, whose Catholic Central girls are the defending Class B champions. "What we're finding is that this just doesn't make sense."

There is a difference in interest, reflected last year when girls games were played first. Many of those contests featured large second-half crowds, which arrived early for boys' games. This year, at best, many linger until halftime of the girls game.

"Everyone I've talked to thinks it's a fiasco," said coach Glenn Davis of Byron Center, whose girls are a top 10 team in Class A this season. "I haven't talked to either a girls or boys coach who likes it.

"The mass exodus is insulting. It makes you feel like you're an afterthought."

Will it matter in a decade?

Those opinions come as no surprise to OK Conference athletic directors, who point to the 2009 settlement of a civil-rights complaint by the Michigan Women's Commission against the Michigan High School Athletic Association and Lansing-area schools over the order of play.

The commission, which operates under the state Department of Civil Rights, argued that as part of Title IX compliance, girls should have equal access to Friday's second game — what it called the "marquee" game.

Tom Wilson, a commission member and women's rights activist, attributed the fan departure after boys games to growing pains in a long-term effort to increase the profile of the girls game.

He predicted that if the starting times keep rotating, players and coaches will have forgotten their concerns within a decade.

"Friday is the key night and (the second game) highlights the girls," he said. "By appearances, that is considered the big game and so it should be rotated. ...

"Girls will start building numbers in the second half when they play at six o'clock."

Coaches and players, however, say the difference in crowd sizes proves the second game is not automatically the marquee event.

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Girls basketball supporters said they realize the boys game is more popular, but the girls are still being denied the chance to showcase their talents if fans aren't watching. They say girls deserve a chance to play before more than just family and friends.

So far, though, not even success has made much of a difference. Lamoreaux-Tate said her state champs routinely play before smaller crowds than the boys, and at a recent matchup between Grand Haven and Rockford girls, both OK Red powers, the crowd grew considerably smaller once the boys game was done.

Many adults leaving didn't want to discuss the issue, but several students said the girls' game just didn't hold their interest.

"It's not as exciting," Rockford junior Zach Trudell. "There would be more people here, but the girls are just not as athletic. It's more fun to watch the boys."

That sentiment may sting, but some players are taking a businesslike approach.

Crowd exodus following Rockford High School Boys game
Time lapse video- Girls basketball loses crowds when boys play first

"Some of the players don't mind it so much," said West Catholic senior captain Rachel Sprenger. "We just try to focus on our game and not who is there. It's not that easy, but I think we've done that pretty well."

Will it be settled in court?

The future of Friday night starting times is up in the air, given that Lansing's Capital Area conference opted to settle the civil -rights complaint and that state athletic association decided not to fight it.

Without an official ruling, it is unclear if the OK Conference's decision to have girls play second on Fridays would comply with Title IX, said Harold Core, director of public affairs for the Michigan Department of Civil Rights.

"There is no way to know because the investigation was not completed," Core said. "Generally speaking, we advocate for equality in terms of both boys and girls."

Some OK athletic directors, wary following the 2007 ruling by the U.S. Supreme Court ruling against MHSAA that put the girls and boys basketball seasons together, said lack of finances may keep schools from pursuing a legal remedy.

But others, citing the widespread discontent among players and coaches, would behoove schools to go to court.

Jenison athletic director Leroy Hackley said when girls teams lose so many fans, schools need to find better options.

"It is bad and not only for the girls, but the boys, too. Girls have got to be a little devastated and a little embarrassed," Hackley said.

"When the seasons changed a few years ago, I said, 'Congratulations, you've just killed girls basketball.' In my mind since that change, girls basketball has become a second-tier sport. Girls can play in front of decent crowds, but now they aren't. People are taking off."

OK Conference president Jim Haskins said considering the Title IX question, athletic directors are still sorting through their best scheduling options and interpretation of the law.

"It is confusing and frustrating right now, but we have to abide by the law," Haskins said. "We know it hasn't been much fun and it's sad to see when large crowds for the boys go down to two or three hundred people. The girls are suffering."

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2011, fifteen copies of the foregoing *amicus* brief, bound with its accompanying addendum, were dispatched to the Clerk of the Court, and two copies of the same brief were served on counsel for the parties via Federal Express and email, at the addresses indicated below:

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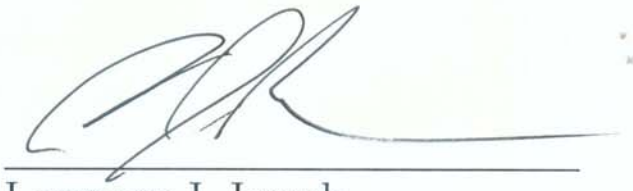

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