UK's battle with Title IX compliance continues

Case outcome could have national impact

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The University of Kentucky's legal battle with Title IX compliance continued Wednesday morning in the Sixth U.S. Circuit Court of Appeals.

Former UK students Ala Hassan and Lisa Niblock filed a federal lawsuit in 2019 alleging the school violated Title IX by not providing equal opportunities for women to participate in varsity sports. Last fall, U.S. District Judge Karen Caldwell ruled in the Eastern District of Kentucky that the university was not in violation of the gender-equity law. On Wednesday, plaintiff lawyer Lori Bullock and UK counsel Bryan Beauman argued the case before a panel of three appellate judges: Chief Judge Jeffrey S. Sutton, Judge Eric E. Murphy and Judge Rachel S. Bloomekatz.

UK's counsel argued it complies with Title IX but also asserted that the U.S. Department of Education's 46-year-old guidance, otherwise known as the three-prong test, should be thrown out, citing a 2024 Supreme Court ruling.

Bullock argued that Caldwell "misunderstood and misapplied" Title IX when she ruled that the plaintiffs hadn't proven UK failed to "fully and effectively" accommodate the interest of female students in sports. She also pushed back against UK's discrediting of the Department of Education's 1979 guidance and the lower court's decision to discount survey results that showed female students at UK were able to compete at the varsity level because they didn't leave contact information.

Sutton, Murphy and Bloomekatz asked extensively about UK's argument against the three-prong test, which could have massive implications regarding the participation enforcement aspect of Title IX.

Experts warn that if the Sixth Circuit Court of Appeals were to do away with the three-prong test, it could gut the anti-discrimination law.

What is the three-prong test?

Under the Department of Education's three-prong test, a school can be in compliance with the participation aspects of Title IX in any one of the following ways:

— The number of male and female athletes is substantially proportionate to their respective enrollments; or

— The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or

— The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.

UK's legal counsel tried multiple times during the lower court proceedings to have the three-prong test thrown out. Lawyers again cited a Supreme Court ruling from June 2024 between Loper Bright Enterprises and Raimondo. The decision made in favor of Loper Bright overturned a 40-year precedent known as "the Chevron doctrine" directing courts to defer to government agency interpretations of "ambiguous" laws.

The panel of judges Wednesday morning pressed Beauman about whether UK's argument against the three-prong test was a Loper Bright challenge or a Kisor challenge, the latter being a reference to the Supreme Court's 2019 decision in Kisor v. Wilkie. The Kisor test asks whether an agency's interpretation is "plainly erroneous or inconsistent with the regulation," whereas Chevron deals with statute. Beauman said Kisor "morphs" into Loper Bright when an agency's interpretation "rises to the level of a cause of action." In her rebuttal, Bullock said UK did not preserve an argument under Kisor in its briefs.

In August, Eastern District of Texas Judge Michael J. Truncale ruled that Loper Bright cannot be applied to Title IX in Myers v. Stephen F. Austin State University. While a case decided in the Eastern District of Texas doesn't have any direct impact on a case in the Sixth Circuit, renowned Title IX attorney John Clune, who represented the plaintiffs who sued SFA, called Truncale's decision an "incredibly important" win for gender equity in sports. The case has since been appealed to the Fifth U.S. Circuit Court.

Appellate court zeroes in on 1979 guidance, survey flaws and the 14th Amendment

Sutton inquired early in Bullock's argument about the three-prong test, saying it "blows me away" that the guidance seems to contradict the statute. Specifically, he asked what to do in a post-Loper Bright, post-Kisor world, with the discrepancy between the fact that Title IX itself focuses on anti-discrimination rather than quotas, while the three-prong test includes a "proportionality safe harbor."

Bullock pointed to the first prong, saying the point goes further than proportionality and asks if a big enough participation gap exists to field a viable team, as established by the Sixth Circuit Court in Balow v. Michigan State University (which Bullock worked on as an appellate attorney in 2021).

When asked whether eliminating a men's team to satisfy the "substantial proportionality" prong would be a violation of Title IX, Bullock said no. When pressed further and asked if that meant Title IX wasn't an anti-gender-based-discrimination law, Bullock pointed toward the decision for schools to sponsor sex-segregated athletics departments. From that decision onward, schools must operate with specific intentions for men and women.

Bullock used an analogy of UK offering separate math majors for men and women.

This case, she said, would be like if UK offered three classes for the men's major and one for the women's. The decision to segregate majors by gender was the "first intentional act."

Murphy then asked Bullock if, in her view, sex segregation "comports" with Title IX, to which she said yes. Bullock also reminded the court that the plaintiffs are not arguing for UK to get rid of sex-segregated sports.

Accepting the guidance, Sutton said it seemed "damning" for students filling out the interest and ability survey to not leave their names. Bullock said UK chose to make the survey anonymous. She also pointed to the school's club equestrian team and survey results as indication that there were enough women interested to field a varsity squad.

Bullock went further to say the "liability" and "remedy" questions in this case were being conflated. After the plaintiffs demonstrate UK violated Title IX, UK would have to create a compliance plan to address unmet interest and ability. The plaintiff burden has been met, Bullock argued, by virtue of the survey, the decades-long existence of club teams and "multiple requests" from women to elevate these sports to varsity.

In her rebuttal, Bullock addressed the differences between Title IX and the 14th Amendment's equal protection clause. She referenced the 2009 Supreme Court ruling in Fitzgerald v. Barnstable, which established that Title IX and the equal protection clause differ. In this case, Bullock pointed toward the fact that Title IX allows for segregation (i.e. men's and women's sports teams), whereas the equal protection clause does not. While the court in Fitzgerald didn't explain why, Bullock said there are "biological" and "practical" reasons to have separate sports teams for men and women. She iterated that Title IX was established to grow women's athletics and push back against the assumption that women are less interested in sport.

Part of UK's argument is that it shouldn't add these women's sports programs the plaintiffs seek because they don't have the ability to play at the Division I varsity level. Bullock pushed back, saying if that "ability" were to be defined by winning, would universities have to evaluate all their teams annually to see who won, who lost and whether to eliminate a team of the overrepresented gender that hadn't experienced success so that a new team for the underrepresented gender could be added? In the interest of "pure equal protection?"

Sutton said that seemed like a question about the third prong, calling it a "big, big topic and probably reason for caution here."

How was three-prong test previously applied to Niblock v. University of Kentucky case?

Caldwell declined to discard the three-prong test in the Eastern District of Kentucky but ultimately ruled in UK's favor.

She decided that UK did not meet two parts of the three-prong test and wrote in her ruling that the plaintiffs had proven UK "does not provide females (sic) students with intercollegiate varsity participation opportunities in numbers substantially proportionate to their respective enrollment." Women made up 58.9% of UK's enrollment during the 2023-24 academic year. But less than 51% of UK's varsity athletes participate in women's sports, according to the school's most recent NCAA financial report.

Caldwell also found UK didn't prove "either a history or a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of its female students," nor did it "present evidence of a plan of program expansion pursuant to which the committee regularly reviews multiple measures of developing interest and ability, like those reviewed for [STUNT], to expand its varsity participation opportunities for females."

However, Caldwell ultimately ruled that the plaintiffs did not prove there were enough female students at or admitted to UK who are "actually able to compete at a varsity level in a sport and that there are enough of them to form a team." She also wrote that the plaintiffs could not prove UK failed to address unmet student interest in the sports they argued it should add: women's lacrosse, field hockey and/or equestrian.

Regarding student ability, Caldwell wrote that "neither the club lacrosse nor field hockey club teams has won any championships or otherwise obtained recognition for the skill level of the team or its individual players." The equestrian team has won accolades at the club level (including a national championship in 2008), but most of the club's team members "fall below the skill level required for a varsity team," Caldwell wrote.

How could case impact Title IX?

This lawsuit raises fundamental questions about what Title IX compliance looks like 50 years after the law's passage in 1972, Ellen Staurowsky, Ed.D., Ithaca College professor and social justice in sports expert, told The Courier Journal earlier this year. She believes the plaintiffs effectively laid out how UK failed each prong of the three-prong test in their initial complaint and appellate court filings since.

If the Sixth Circuit Court of Appeals decides to do away with the three-prong test, it could spell disaster for Title IX. The three-prong test has been used to evaluate compliance for nearly half a century. Without it, Title IX could be rendered ineffective.

This decision converges with several attempts to undermine the anti-discrimination law. The Trump administration announced its "Special Investigations Team" earlier this year to speed up the process of Title IX investigations on the heels of halving the U.S. Department of Education's staff and laying off at least 43% of the Office for Civil Rights. For years, politicians have used transgender women to fearmonger in the name of "protecting" women's sports. And as the NCAA seeks congressional intervention with NIL and revenue sharing, Staurowsky said, the governing body uses Title IX as a smokescreen to avoid labeling athletes as "employees."

"These large pieces have slowly been getting put into place," Staurowsky said, "in very damaging ways."

A written ruling could be issued in the coming days, weeks or months. Should either party decide to appeal the Sixth Circuit's opinion, four of the nine Supreme Court justices would have to grant a writ of certiorari, meaning they will hear the case. If they deny a writ of certiorari, the appellate court's decision will stand, and the case will end.

Sutton ended oral arguments by thanking both sides for answering the panel's questions. "Very interesting case," he said. "We'll see what we can do with it."

Reach college sports enterprise reporter Payton Titus at ptitus@gannett.com and follow her on X @petitus25. Subscribe to her "Full-court Press" newsletter here for a behind-the-scenes look at how college sports' biggest stories are impacting Louisville and Kentucky athletics.

IN BRIEF

NASCAR reaches settlement to end antitrust trial, terms unknown

NASCAR reached a settlement agreement Thursday with Front Row Motorsports and Michael Jordan's 23XI racing in a federal courtroom in Charlotte.

The two race teams filed an antitrust lawsuit against the motorsports organization in 2024, alleging monopolist practices and accusing NASCAR of using anti-competitive tactics to pressure teams into compliance.

The terms of the settlement, which came one day after the plaintiffs rested their case following eight days of testimony, have not been disclosed but an attorney for the teams said he was "pleased."

"I'm pleased to say that the parties have positively settled this matter in a way that will benefit the industry going forward," plaintiffs' attorney Jeffrey Kessler said, per The Athletic.

Ex-LSU star invites Michigan QB Underwood to transfer to school

Within hours of Michigan firing Sherrone Moore on Wednesday, rumors and recruitment encircled quarterback Bryce Underwood.

The No. 1 player in the Class of 2025, Underwood infamously flipped his commitment from LSU to Michigan to join the Wolverines and play for Moore last year.

Underwood is expected to wrap his freshman season in the Cheez-It Citrus Bowl in a high-profile matchup with Arch Manning and Texas on New Year's Day. But players are permitted a 15-day window to enter the transfer portal following a coaching change, and other programs are not likely to tiptoe around the topic of adding a five-star quarterback.

To be sure, big-name alumni aren't waiting for any imaginary grace period.

"Come home son @BryceUnderwoo16," former LSU and NFL safety Tyrann Mathieu said via X on Wednesday night.

"We are waiting & will accept you with open arms. FOREVER LSU"

New LSU coach Lane Kiffin built a playoff team at Ole Miss utilizing the transfer portal and can point to 2025 first-round pick Jaxson Dart (New York Giants) as one such success story. Before Dart starred at Ole Miss, he was at USC when a coaching change brought Lincoln Riley to Los Angeles. Caleb Williams decided to transfer from Oklahoma and became the starter for the Trojans.

Braves sign former Royal, Giant OF Yastrzemski to 2-year, $23M deal

The Atlanta Braves signed free agent outfielder Mike Yastrzemski to a two-year, $23 million contract on Wednesday.

Yastrzemski will make $9 million in 2026 and $10 million in 2027 with a team option worth $7 million for 2028 or a $4 million buyout.

The grandson of Baseball Hall of Famer Carl Yastrzemski, Mike Yastrzemski has a career .238 average with 123 home runs and 364 RBIs over 840 games spanning seven seasons.

Yastrzemski, 35, was selected by the Baltimore Orioles in the 14th round of the 2013 draft but had spent his entire major league career with the San Francisco Giants before he was traded to the Kansas City Royals at this year's trade deadline for pitching prospect Yunior Marte. He became a free agent after the season. The left-handed batter broke onto the scene with a .272 batting average and 21 homers in 107 games as a rookie in 2019. He finished eighth in National League MVP voting in the COVID-shortened 2020 season when he hit .297 with 10 home runs and 14 doubles in 54 games.

Yastrzemski hasn't surpassed the 20-homer milestone or hit better than .235 in the four seasons since hitting 25 homers in 2021. He batted .233 with 17 homers, 28 doubles and 46 RBIs in 146 games last season between the Giants and the Royals.

Louisville WR/draft prospect Bell to undergo surgery for torn ACL

Louisville All-Atlantic Coast Conference receiver Chris Bell, a trending 2026 NFL Draft prospect, is set to undergo surgery this week to repair a torn ACL, ESPN reported on Wednesday.

Bell sustained the injury in the Cardinals' 38-6 defeat at SMU on Nov. 22, and he missed the team's regular-season finale vs. Kentucky.

It prematurely ended a strong season that saw the 6-foot-2 receiver rack up 917 receiving yards on 72 catches with six touchdowns. Bell had a 135-yard, two-touchdown performance in Louisville's 24-21 road upset of then-No. 2 Miami on Oct. 17.

A three-star prospect who signed with Louisville out of high school in the 2021 recruiting class, Bell grew exponentially in production, going from 105 yards as a true freshman to 407 as a sophomore and 737 as a junior in 2024.

– *Wire reports*