

Boys Muscling in on Girls' Sports

I. INTRODUCTION

Athletics have historically been, and remain, an integral part of the American culture and educational system. Yet gender discrimination in interscholastic athletics did not become a major issue in America until the early 1970s. In 1972, Congress passed Title IX of the Education Amendments of 1972,¹ which prohibits sex-based discrimination in public schools and, today, after nearly twenty years of arduous litigation, it is well established that the Equal Protection Clause of the Fourteenth Amendment² prevents schools from excluding girls from boys' athletic teams in the absence of a corresponding girls' team.³ The question remains, however, whether boys should be afforded the same treatment in the absence of a boys' athletic team. Generally, the courts have held that boys need not be afforded equal treatment.⁴ This Comment

¹ Education Amendments of 1972, 20 U.S.C. § 1681 (1982).

² U.S. CONST. amend. XIV, § 1.

³ See *Brenden v. Independent Sch. Dist. 742*, 477 F.2d 1292 (8th Cir. 1973) (enjoining enforcement of rule prohibiting females from playing on male teams in noncontact sports); *Morris v. Michigan State Bd. of Educ.*, 472 F.2d 1207 (6th Cir. 1973) (enjoining enforcement of high school rule forbidding females from playing on all-male tennis team); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F Supp. 1117 (E.D. Wis. 1978) (striking rule denying females opportunity to qualify for competition with male students on high school interscholastic varsity baseball team); *Hoover v. Meiklejohn*, 430 F Supp. 164 (D. Colo. 1977) (striking rule limiting participation on soccer team to males); *Carnes v. Tennessee Secondary Sch. Athletic Ass'n*, 415 F Supp. 569 (E.D. Tenn. 1976) (striking rule prohibiting two female high school students from playing tennis on male team); *Gilpin v. Kansas State High Sch. Activities Ass'n*, 377 F Supp. 1233 (D. Kan. 1973) (striking rule prohibiting males and females from competing on same athletic team in interscholastic contest); *Reed v. Nebraska Sch. Activities Ass'n*, 341 F Supp. 258 (D. Neb. 1972) (enjoining enforcement of rule prohibiting females from participating with or against males in golf and basketball); *Haas v. South Bend Community Sch. Corp.*, 289 N.E.2d 495 (Ind. 1972) (striking rule prohibiting females from playing on all male golf team); *Commonwealth ex rel. Packel v. Pennsylvania Interscholastic Athletic Ass'n*, 334 A.2d 839 (Pa. 1975) (striking rule forbidding females from competing with or practicing against males in any athletic contest); *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975) (striking school district rule forbidding females to play on high school football team).

⁴ See *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983) (rule excluding males from female volleyball team permissible under the equal protection clause of the Fourteenth Amendment); *Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F Supp. 951 (D.R.I. 1991) (rule excluding boys from girls' field hockey team permissible; decided on both statutory and constitutional grounds); *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855 (Ill. App. Ct. 1979) (excluding males from female volleyball team acceptable under Fourteenth Amendment and state

focuses on whether school district regulations prohibiting boys from participating on girls' high school sports teams can withstand constitutional and statutory challenges. The proposition is that such regulations are valid.

Part II of this Comment concentrates on claims under the United States Constitution, Title IX, state constitutions and state statutes involving sex discrimination in high school athletics. Part III analyzes the manner in which federal and state courts have resolved cases involving the prohibition of boys participating on girls' high school sports teams.

II. CONSTITUTIONAL AND STATUTORY PROTECTIONS

A. *The Equal Protection Clause*

Courts have confirmed that the Equal Protection Clause of the Fourteenth Amendment⁵ prohibits discrimination in sports based on gender, at least with regard to girls' access to boys' teams.⁶ However, the courts have generally refused to extend the same protection to boys.⁷

Although the doctrine has been repudiated in the context of racial discrimination⁸ and the reasons for its survival in the context of gender discrimination are not entirely clear,⁹ "separate but equal" teams remain a

constitution); *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (rule excluding boys from girls' field hockey team permissible; decided on statutory and constitutional grounds); *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458 (App. Div. 1980) (excluding males from female volleyball team permissible; decided on statutory and constitutional grounds); *Forte v. Board of Educ., N. Babylon Union Free Sch. Dist.*, 105 Misc. 2d 36 (N.Y. Sup. Ct. 1980) (rule excluding male from participating on all-girl power volleyball team permissible under state statutory challenge); *but see Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979) (males may not be excluded from female volleyball team when only one team exists; decided on Title IX and Fourteenth Amendment grounds); *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284 (Mass. 1979) (exclusion of boys from girls' teams prohibited under strict scrutiny as mandated by state's equal rights amendment).

⁵ U.S. CONST. amend. XIV, § 1.

⁶ *See supra* note 3.

⁷ *See supra* note 4; *see also* Carolyn E. Staton, *Sex Discrimination in Public Education*, 58 MISS. L.J. 323, 346-47 (1988).

⁸ *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

⁹ Courts generally hold that "separate but equal" teams fulfill the facial requirements of an equal protection test but often do not address factors which affect whether separate teams are truly equal. *See cases cited supra* notes 3 and 4; *see also* Virginia P. Croudace & Steven A. Desmaris, Note, *Where the Boys Are: Can Separate Be Equal in School Sports?*, 58 S. CAL. L. REV. 1425, 1426 (1985). *But see* O'Connor v. Board of Educ. of Sch. Dist. 23, 449 U.S. 1301, 1306 (1980) (implying factors to consider when determining whether

constitutionally permissible alternative to gender-integrated teams.¹⁰ The question that remains, however, is what is the meaning of "equal"? Apparently, the standard is one of comparability rather than absolute equality.¹¹ Therefore, if teams are given substantially equal support and have substantially comparable programs, separate-sex teams will satisfy the equality of opportunity required by the Equal Protection Clause.¹²

The United States Supreme Court has determined that gender-based classifications should be analyzed under an intermediate level scrutiny: the gender-based classification must "serve important governmental objectives and must be substantially related to achievement of those objectives."¹³ The important governmental objective in denying boys access to girls' athletic teams has been articulated as: "maintaining, fostering and promoting athletic opportunities for girls"¹⁴ and "redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes";¹⁵ in short, "redressing the disparate athletic opportunities available to males and females."¹⁶ Most courts addressing the issue have found a substantial relationship between excluding boys from girls' teams and providing equal opportunities for females. Hence, exclusion is considered a permissible means of achieving this objective.¹⁷

In applying this standard to gender-based classifications, it is permissible to take into account "actual differences between the sexes, including physical ones."¹⁸ Furthermore, the Supreme Court has conceded that a classification

"separate but equal" teams are equal include "the time, money, personnel, and facilities devoted to each") (opinion of Stevens, J., in chambers, on application to vacate stay).

¹⁰ See *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1129-30 (9th Cir. 1982), *cert. denied*, 464 U.S. 818 (1983); *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659, 663 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 170 (D. Colo. 1977).

¹¹ *Hoover v. Meiklejohn*, 430 F. Supp. 164, 170 (D. Colo. 1977).

¹² *Id.* at 171.

¹³ *Craig v. Boren*, 429 U.S. 190, 197 (1976).

¹⁴ *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979).

¹⁵ *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

¹⁶ *Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F. Supp. 951, 956 (D.R.I. 1991).

¹⁷ See *id.* at 956; *Clark*, 695 F.2d at 1131; *Petrie*, 394 N.E.2d at 862; *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. 1987). *But see* *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 296 (Mass. 1979).

¹⁸ *Clark*, 695 F.2d at 1129; *see also* *Michael M. v. Superior Court*, 450 U.S. 464 (1981). In the words of Justice Stewart,

[W]hile detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between

based on sex may be upheld if sex represents "a legitimate, accurate proxy" That is, a classification based on sex may be upheld if there is a specific factual justification for the classification in a regulatory scheme.¹⁹ Finally, gender-based classifications may withstand constitutional challenge when the purpose of the discrimination is to redress past discrimination.²⁰ On the other hand, regulations that provide for gender-based classifications solely for administrative convenience or that reflect "archaic and overbroad generalizations" promoting sexual stereotypes will be struck down.²¹

In applying these criteria to exclusionary regulations, the analysis begins with a discussion of the physical differences between males and females.²² Inherent physiological differences between the sexes are the gravamen of this analysis. Under an equal protection inquiry, these differences strongly substantiate the relationship between prohibiting boys from participating on all-girl teams and the governmental objective of providing equal opportunity in athletics.

Physiological differences affect physical and performance abilities of the average boy and girl.²³ Cases and research data²⁴ show that "at the high school

males and females that the Constitution necessarily recognizes In short, the Equal Protection Clause does not require that the physiological differences between men and women must be disregarded.

Id. at 478-81 (Stewart, J., concurring).

¹⁹ *Craig v. Boren*, 429 U.S. 190, 204 (1976). See also *Orr v. Orr*, 440 U.S. 268, 280-82 (1979); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975); *Kahn v. Shevin*, 416 U.S. 351, 355 (1974).

²⁰ *Califano v. Webster*, 430 U.S. 313, 318 (1977); *Califano v. Goldfarb*, 430 U.S. 199, 209 n.8 (1977).

²¹ See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975); *Schlesinger v. Ballard*, 419 U.S. 498, 507-08 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971).

²² Within the context of this Comment physical differences between the sexes are attributed primarily to physiological differences; however, it has been suggested that environmental factors, especially cultural and social ones, may result in producing biological sex differences rather than purely physiological criteria, or, at least, the degree to which such differences are present. AGNES CHRIETZBERG, *EASTERN KENTUCKY UNIVERSITY, BIOLOGICAL SEX DIFFERENCES, PHYSICAL EDUCATORS FOR EQUITY, MODULE 3*, 3 (1981) [hereinafter "BIOLOGICAL SEX DIFFERENCES"]. Furthermore, recent studies suggest that some innate gender differences may have to do with the chemistry of the brain. Christine Gorman, *Sizing Up the Sexes*, *TIME*, Jan. 20, 1992, at 42, 44.

²³ *BIOLOGICAL SEX DIFFERENCES* at 1-2; see also Croudace & Desmaris, *supra* note 9, at 1445-46.

²⁴ The author recognizes that these data inevitably reflect averages and that within each sex there is a broad range of abilities. However, generalizations provide some insight into the actual differences between the sexes. *BIOLOGICAL SEX DIFFERENCES* at 7, 10.

level, the average male is objectively more physically capable than the average female."²⁵ In general, high school boys are taller, heavier, and stronger than their girl counterparts and have longer extremities.²⁶ Due to differences in body structure and composition, females are at a disadvantage in activities that involve leg strength and speed, arm strength, and cardiovascular endurance.²⁷ Based on such objective data, courts might conclude that generally males are *potentially* superior physiologically with regard to performance in certain sports.²⁸ As a result, males may displace females to a substantial degree if they were allowed to compete for positions on girls' sports teams.²⁹ Therefore, it cannot be said that boys and girls are "similarly situated as they enter into most athletic endeavors."³⁰ Of course there is always the exceptional female,³¹ but because of the physical differences, "in most forms of athletic competition, males will generally defeat females."³²

The implication is not that such differences are the only factor accounting for disparity in athletic ability. It has been suggested that to some extent the competitive advantage of males over females in athletics "may be solely attributable to the longer history of male participation rather than to any physical advantage."³³ However, the disparity in physical abilities in particular

²⁵ *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659, 662 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); *see also* Letter to the Editor from Martin C. Ushkow, M.D., 90 NEW YORK STATE JOURNAL OF MEDICINE 76 (1990) ("Following puberty girls have less lean body mass than boys. Girls will absorb more of a force created by a collision. Females are relatively weaker than males in upper body strength. Postpubertal females on the average have 15% to 25% less aerobic capacity than males.").

²⁶ *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979); *see also* *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659, 662 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); Helga Deutsch, *Sex-Fair Performance Evaluation* (Aug. 13, 1981) (paper presented at the Physical Education Ability Grouping and Performance Evaluation Symposium sponsored by the Illinois State Board of Education Equal Education Opportunity Section).

²⁷ BIOLOGICAL SEX DIFFERENCES at 3; *see also* Deutsch, *supra* note 26, at 1; Barbara J. Delong, *A Conceptual Approach to Sex-Fair Performance Evaluation 2* (Aug. 13, 1981) (paper presented at the Physical Education Ability Grouping and Performance Evaluation Symposium (sponsored by the Illinois State Board of Education Equal Educational Opportunity Section)).

²⁸ Deutsch, *supra* note 26, at 3.

²⁹ *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *see also* *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059, 1065 (N.J. Super. Ct. 1987) (quoting *Clark*, 695 F.2d at 1131).

³⁰ *Petrie*, 394 N.E.2d at 863; *see also* *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

³¹ Deutsch, *supra* note 26, at 2 ("[T]rained female athletes often achieve higher physical performance levels than average male performers.").

³² Croudace & Desmaris, *supra* note 9, at 1446.

³³ *Id.* at 1446-47

sports cannot be explained solely by females' relative inexperience. Until recently, boys and girls have been differentially socialized toward involvement in sports. What will happen when, and if, integrated teams become the norm and social and cultural expectations minimize rather than magnify gender differences is unknown.³⁴ Given the diversity, the challenge is how to develop sports programs that will be fair to everyone.

A gender-based regulation may also be upheld if it reflects a "legitimate, accurate proxy"³⁵ Illustrating a specific factual justification for excluding boys from girls' athletic teams, statistics show that nationally 3,398,192 high school boys participated on sports teams in 1989-90 compared with only 1,858,659 girls.³⁶ In Ohio, the overall number of sports teams available to high school boys in 1990-91 was 6,036 compared with 4,551 available to high school girls; 169,313 boys participated and 94,852 girls participated.³⁷

Boys have had, and continue to have, greater overall athletic opportunities.³⁸ By excluding boys from girls' high school athletic teams, males are prevented from further dominating and displacing females "from meaningful participation in available athletic opportunities."³⁹

Finally, the alleged favorable treatment toward females—the right to try out for boys' teams when no girls' team exists—is most often rationalized by courts denying boys the same treatment as a means of redressing past discrimination against female students in interscholastic athletic programs.⁴⁰ Although the number of girls participating in high school sports has increased

³⁴ Deutsch, *supra* note 26, at 3.

³⁵ See *supra* note 19.

³⁶ In 1971, only 294,015 girls, or 7 4% of all members of high school athletic teams participated in interscholastic sports compared to 3,666,917 boy participants. In 1989-90, the proportion of female athletes had increased to 35% and the number of female participants had increased to 1,858,659; 3,398,192 boys participated on high school sports teams in 1989-90. NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, 1990-1991 HANDBOOK 73 (1990).

³⁷ Approximately 36% of all members participating on Ohio high school athletic teams in 1990-91 were females, as compared to 33% in 1980-81, an increase of only 3% relative to total participants. OHIO HIGH SCHOOL ATHLETIC ASSOCIATION, 1991-1992 HANDBOOK OF THE OHIO HIGH SCHOOL ATHLETIC ASSOCIATION.

³⁸ *Id.* See also *supra* note 36 and accompanying text.

³⁹ B.C. v. Board of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059, 1065 (N.J. Super. Ct. App. Div. 1987).

⁴⁰ See, e.g., Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982); Kleczek v. Rhode Island Interscholastic League, Inc., 768 F Supp. 951, 956 (D.R.I. 1991); B.C. v. Board of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059, 1061 (N.J. Super. Ct. App. Div. 1987); Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458, 464 (N.Y. App. Div. 1980); Forte v. Board of Educ., N. Babylon Union Free Sch. Dist., 431 N.Y.S.2d 321, 324 (N.Y. Sup. Ct. 1980).

dramatically over the last twenty years, large discrepancies continue to exist.⁴¹ It is acknowledged by the author that at some point this rationale must fail—the point at which athletic opportunities for males do not exceed those afforded their female counterparts.⁴² However, the legitimacy of redressing past discrimination still holds true today

On the other hand, it has been espoused by at least one court that the exclusion alternative advances old notions that girls need protection and perpetuates sexual stereotyping.⁴³ The court stated, “to immunize girls’ teams totally from any possible contact with boys might well perpetuate a psychology of ‘romantic paternalism’ inconsistent with such development [of competitive athletics for girls] and hurtful to it in the long run.”⁴⁴

However, other courts considering the issue have generally ignored or denied the proposition that gender-based classification in athletics advances sexual stereotypes.⁴⁵ These courts rely on the benign or remedial nature of such gender-based discrimination and the inherent physiological differences between males and females in upholding regulations based on sex in athletics. Furthermore, the exclusion of boys from girls’ sports teams “carries no stigma of unworthiness to the excluded class,”⁴⁶ as the reverse situation may imply. This Comment in no way condones the prohibition of boys from participating on girls’ teams to perpetuate any archaic notions or stereotyping that females need protection and are unable to compete with males. Instead, it is espoused that girls be allowed to develop their own sports prowess, via all-girl teams, which may not be possible through a coeducational-team system.

As the above discussion indicates, there is ample reason to uphold the validity of regulations excluding boys from participating on girls’ athletic teams under the equal protection clause. There may, however, be additional protection for boys under Title IX, state constitution equal rights amendments and state statutes.

⁴¹ See *supra* notes 36–37 and accompanying text. See also Note, *Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines*, 66 MINN. L. REV. 1115, 1115 (1982).

⁴² See *Mularadelis*, 427 N.Y.S.2d at 464.

⁴³ *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n, Inc.*, 393 N.E.2d 284, 290 (Mass. 1979) (“[D]isadvantages suffered by males are often premised on a ‘romantic paternalism’ stigmatizing to women.”).

⁴⁴ *Id.* at 296. See also *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (“Traditionally, discrimination was rationalized by an attitude of ‘romantic paternalism’ which, in practical effect, put women, not on a pedestal, but in a cage.”).

⁴⁵ See *Clark v. Arizona Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982); *Petrie v. Illinois High Sch. Ass’n*, 394 N.E.2d 855, 861–62 (Ill. App. Ct. 1979).

⁴⁶ *Petrie*, 394 N.E.2d at 859; *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n, Inc.*, 393 N.E.2d at 291.

B. Title IX

Congress also acted against gender-based discrimination in school sports by enacting Title IX of the Education Amendments of 1972,⁴⁷ which prohibits sex discrimination in any "program or activity receiving Federal financial assistance."⁴⁸ However, only *federally* funded programs are affected by the statute. To come within the purview of Title IX, the particular athletic program must have received a sufficient amount of direct federal financial aid.⁴⁹ A violation of the statute, by discriminating in athletic programs on the basis of gender, may result in withdrawal of federal funding.⁵⁰ The power to enforce Title IX is vested in the Department of Education.⁵¹ In addition, the United States Supreme Court has recognized a private cause of action under Title IX.⁵²

The regulation promulgated under the authority of Title IX which deals with athletics⁵³ has provided the courts with the means to deny boys access to girls' athletic teams. The pertinent section provides:

[W]here a recipient [of federal funds] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and *athletic opportunities for members of that sex have previously been limited*, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport.⁵⁴

Under the plain meaning of the regulation, courts have generally reasoned that boys need not be provided the opportunity to participate on girls' teams under a Title IX claim because athletic opportunities have not previously been limited for members of their sex.⁵⁵ This contention is undoubtedly difficult to dispute. If participation serves as a measure of opportunity, the overall athletic opportunities provided to males have been substantially greater than those

⁴⁷ Education Amendments of 1972, 20 U.S.C. § 1681 (1982).

⁴⁸ 20 U.S.C. § 1681(a) (1982).

⁴⁹ *Othen v. Ann Arbor Sch. Bd.*, 507 F Supp. 1376, 1380 (E.D. Mich. 1981) (held that direct federal financial aid to a specific educational program is required before the provisions of Title IX can be applied); *see also Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F Supp. 951, 954 (D.R.I. 1991).

⁵⁰ 20 U.S.C. § 1682 (1982).

⁵¹ 20 U.S.C. § 1681 (1982).

⁵² *See Cannon v. University of Chicago*, 441 U.S. 677 (1979).

⁵³ 45 C.F.R. § 86.41 (1991).

⁵⁴ 45 C.F.R. § 86.41(b) (1991) (emphasis added).

⁵⁵ *See, e.g., Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F Supp. 951, 955 (D.R.I. 1991); *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458, 463 (N.Y. App. Div. 1980). *But see Gomes v. Rhode Island Interscholastic League*, 469 F Supp. 659, 665 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

afforded females in the past and continue to exceed those enjoyed by females today⁵⁶

C. State Constitutions and Statutes

Several states have equal rights provisions within their constitutions.⁵⁷ In the context of this Comment, a boy may experience greater protection under a state equal rights amendment if it is interpreted to afford greater protection against gender-based discrimination than the equal protection clause of the federal constitution.⁵⁸ However, even if a state constitution prohibiting school districts from denying equal protection on the basis of sex imposes a stiffer test than does the federal constitution, it may not be enough to ensure boys access to girls' sports teams.⁵⁹ One court reasoned that although other classifications may be set up in interscholastic sports, for example limiting membership to a team based on height, weight, age or other objectively measured characteristics, using sex as a classifying factor is a "practical necessity"⁶⁰ in promoting equalization of general athletic opportunities for girls.

Statutes prohibiting gender-based discrimination in education, including school athletic programs, have also been enacted in some states.⁶¹ However,

⁵⁶ See *supra* notes 36–37 and accompanying text.

⁵⁷ See, e.g. ALA. CONST. art. I, § 1; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, § 4; ILL. CONST. art. I, § 18; MD. DECLARATION OF RIGHTS, art. 46; MASS. CONST. part I, art. I; MONT. CONST. art. II, § 4; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 28; TEX. CONST., art. I, § 3a; UTAH CONST. art. IV, § 1; WASH. CONST. art. 31, § 1.

⁵⁸ See, e.g., Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 291 (Mass. 1979) (quoting Commonwealth v. King, 372 N.E.2d 196 (Mass. 1977)) ("[C]lassifications on the basis of sex are subject to a degree of constitutional scrutiny 'at least as strict as the scrutiny required by the Fourteenth Amendment for racial classification.'"). But see *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 862–64 (Ill. App. Ct. 1979) (rule prohibiting male participation on all-girl volleyball team permissible under strict scrutiny standard applied to classifications based on gender under Illinois Constitution).

⁵⁹ See, e.g., *Petrie*, 394 N.E.2d at 864–65 (although heightened scrutiny is applied under the state equal rights amendment to gender-based classifications, in the context of high school athletics excluding boys from girls' teams is a "practical, though not absolute, necessity").

⁶⁰ *Id.*

⁶¹ See, e.g., N.J.S.A. 18A, § 36-20 (1989) ("No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex, or national origin."); N.J.A.C. 6:4-1.5(f)(2) proscribes discrimination in school athletics.

boys have not generally received greater rights under such statutes than those afforded under the federal and state constitutions.⁶²

III. CASES DECIDED ON CONSTITUTIONAL AND STATUTORY GROUNDS

There are presently only a handful of cases dealing directly with the prohibition of boys on girls' athletic teams.⁶³ A brief discussion of these cases will demonstrate the controversy at issue.

To date, Massachusetts is the only state that allows boys to participate on girls' athletic teams. This situation is the result of two 1979 cases, *Gomes v. Rhode Island Interscholastic League*⁶⁴ and *Attorney General v. Massachusetts Interscholastic Athletic Association, Inc.*⁶⁵

Gomes involved the denial of a boy's participation on an all-girl volleyball team. Although the court conceded that "[o]pen competition would, in all probability, relegate the majority of females to second class positions as benchwarmers or spectators,"⁶⁶ it issued a preliminary injunction enjoining the school from denying participation by Gomes on the girls' volleyball team.⁶⁷

The court construed the section 86.41(b) phrase, "and athletic opportunities for members of that [excluded] sex have previously been limited"⁶⁸ to refer to the *particular* sport under consideration.⁶⁹ The court viewed the establishment of an all-female team in a particular sport, from which males are totally excluded from playing and in which males *only* have limited opportunities to participate, as not directed toward the special disadvantages women have suffered in that sport. As such, the athletic scheme was viewed as impermissibly overbroad.⁷⁰ The *Gomes* court further contended that as an affirmative action remedy the unprecedented absolute bar on the participation of boys in a particular sport raised a "serious question concerning the constitutionality [under the federal equal protection clause] of that regulation."⁷¹

⁶² See, e.g., *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059, 1066 (N.J. Super. Ct. App. Div. 1987).

⁶³ See *supra* note 4.

⁶⁴ 469 F Supp. 659 (D.R.I.), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

⁶⁵ 393 N.E.2d 284 (Mass. 1979).

⁶⁶ *Gomes*, 469 F Supp. at 662.

⁶⁷ *Id.* at 665.

⁶⁸ 45 C.F.R. § 86.41(b) (1991).

⁶⁹ *Gomes*, 469 F Supp. at 665.

⁷⁰ *Id.* at 664.

⁷¹ *Id.* at 665 (citing *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978) (suggesting it is inequitable to require innocent members of a group to suffer harm to redress discrimination for which they were not responsible); see also *Schlesinger v. Ballard*,

The court in *Gomes* conceded that separate but equal teams would be a better alternative—that distinguishing between male and female athletics raises no constitutional problems.⁷² But the court believed that in the absence of such an approach, when athletic opportunities for boys in a particular sport have been limited, boys must not be denied access to girls' sports teams.

Gomes has been questioned by several courts addressing the exclusion of boys from girls' high school sports teams.⁷³ In fact, on appeal, *Gomes* was vacated as moot⁷⁴ and is left without precedential value. But the case is still important in that courts have disagreed with the *Gomes* court's construction of section 86.41(b).⁷⁵

The majority of courts interpret the regulation to refer to past participation in *overall* athletic opportunities, not opportunities in a particular sport.⁷⁶ This interpretation is more consistent with the plain meaning of the regulation. Had Congress intended that the past gender-based discrimination refer to a particular sport, arguably it would have used specific language to indicate such intent.⁷⁷

In *Attorney General v. Massachusetts Interscholastic Athletic Association, Inc.*,⁷⁸ the exclusion of boys from girls' teams was prohibited under the state's equal rights amendment. As in *Gomes*, the court concluded that the total exclusion of boys' participation in a particular sport, even when overall athletic opportunities are equal or greater for boys,⁷⁹ can be a violation of the Equal Protection Clause.⁸⁰ Furthermore, the court emphatically rejected the ban on boys' participation under the state's equal rights amendment, which required strict scrutiny of classifications based on sex.⁸¹ Other cases under state equal rights amendments or statutes prohibiting sex discrimination in education,

419 U.S. 498 (1975) (women granted certain procedural advantages for promotion in Navy, yet men not barred from promotions).

⁷² *Gomes*, 469 F Supp. at 622, 666.

⁷³ See, e.g., *Kleczek v. Rhode Island Interscholastic League, Inc.*, 768 F Supp. 951, 955 (D.R.I. 1991); *Mularadelis v. Haldane Cent. Sch. Bd.*, 427 N.Y.S.2d 458, 461 (N.Y. App. Div. 1980); *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 863 (Ill. App. Ct. 1979).

⁷⁴ *Gomes v. Rhode Island Interscholastic League*, 604 F.2d 733 (1st Cir. 1979).

⁷⁵ See, e.g., *Kleczek*, 768 F Supp. at 955; *Mularadelis*, 427 N.Y.S.2d at 461-63.

⁷⁶ *Id.*

⁷⁷ *Mularadelis*, 427 N.Y.S.2d at 462.

⁷⁸ 393 N.E.2d 284 (Mass. 1979).

⁷⁹ *Id.* at 287 (school rules provided for sixteen boys' sports teams and only thirteen girls' sports teams).

⁸⁰ *Id.* at 292.

⁸¹ *Id.* at 291-95.

however, have come to the opposite conclusion and not provided boys with greater protection.⁸²

The predominant rationale for the *Massachusetts Interscholastic* court's decision was that even though "biological circumstance does contribute to some overall male advantages [in high school sports],"⁸³ strict classifications based on sex, without taking into account actual skill differentials in the specific sport, "would merely echo 'archaic and overbroad generalizations.'"⁸⁴ According to the court, other approaches to classifying eligibility for high school sports teams could be accomplished through less draconian approaches less stigmatic to females as a class,⁸⁵ such as separate but equal teams for males and females, use of standards based on height, weight, or skill, a system of handicapping, or, short of complete exclusion, limiting the number of boys allowed to participate on the girls' team.⁸⁶

However, the court failed to recognize the costs involved in providing an equivalent male team or the strength differential between males and females of corresponding weight or height.⁸⁷ Instead, the court intimated that the general athletic superiority of males is a thing of the past and the physiological differences between males and females is not "so clear or uniform as to justify a rule in which sex is sought to be used as a kind of 'proxy' for a functional classification."⁸⁸ The court ignores objective evidence regarding physical differences between the sexes which generally advantage males on the same playing field. Furthermore, the *Massachusetts Interscholastic* court dismisses the regulation as an appropriate means of eradicating discrimination against girls based on its proposition that less athletic males have also been denied participation in sports because of sex segregation.⁸⁹

Classification based on gender is a *functional* classification in that the impracticability of other alternatives creates a "substantial element of necessity" for the exclusion of boys from girls' sports teams.⁹⁰ Furthermore, the existence of various alternatives to the complete exclusion of boys does not mean that the

⁸² See, e.g., *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059, 1064 (N.J. Super. Ct. App. Div. 1987); *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 864-65 (Ill. App. Ct. 1979).

⁸³ *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 293 (Mass. 1979).

⁸⁴ *Id.* at 293 (citing *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

⁸⁵ *Id.* at 295.

⁸⁶ *Id.*

⁸⁷ *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 862 (Ill. App. Ct. 1979).

⁸⁸ *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 293 (Mass. 1979).

⁸⁹ *Id.* at 290.

⁹⁰ *Petrie*, 394 N.E.2d at 863.

required substantial relationship does not exist to sustain the gender-based classification at issue.⁹¹

Even under a strict scrutiny analysis, various alternatives may be rejected as either impractical or otherwise unnecessary to the constitutionality of the exclusion alternative. Such was the case in *Petrie v. Illinois High School Association*,⁹² decided in the same year as *Gomes* and *Massachusetts Interscholastic*. In *Petrie*, a high school boy prohibited from participating on the girls' volleyball team brought suit under the Fourteenth Amendment Equal Protection Clause and the state constitution's equal rights amendment.⁹³ The court reasoned that as the only feasible classification to promote interscholastic opportunities for girls, precluding boys from participating on girls' sports teams could not be considered draconian or stigmatizing to the very class it was designed to protect. Nor is there any stigma attached to a boy eliminated by this system from competing in a class in which he might have an undue advantage.⁹⁴ The classification of high school sports teams upon the basis of sex is better rationalized by the innate physical differences between males and females rather than generalizations that are "archaic" or a psychology of "romantic paternalism."⁹⁵

In *Mularadelis v. Haldane Central School Board*,⁹⁶ the court found that exclusion of a male student from the girls' tennis team did not violate Title IX or the Fourteenth Amendment Equal Protection Clause.⁹⁷ The court rejected the interpretation of section 86.41(b) of Title IX espoused in *Gomes* and, because male students had an equal opportunity to participate in sports in general under the school regulations, approved the favored treatment shown toward female students as a means of reducing the disparity in overall high school athletic opportunities for females.⁹⁸

The analysis of the *Mularadelis* court, although subsequent to *Petrie*, relied solely on the goal of redressing past discrimination without addressing the issue of inherent physiological differences between the sexes. The latter issue presents an even more persuasive argument, in view of advances in female athletics and the caliber of female athleticism within the past twenty years, because at some point in time it may be deemed that females have achieved

⁹¹ *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982).

⁹² 394 N.E.2d 855 (Ill. App. Ct. 1979).

⁹³ *Id.* at 856.

⁹⁴ *Id.* at 861-62.

⁹⁵ *Id.* at 862.

⁹⁶ 427 N.Y.S.2d 458 (N.Y. App. Div. 1980).

⁹⁷ *Id.* at 463-64.

⁹⁸ *Id.*

equal opportunity in high school sports. On the other hand, innate physical differences between males and females are not likely to change dramatically.⁹⁹

In *Forte v. Board of Education, North Babylon Union Free School District*,¹⁰⁰ a case decided in the same year as *Mularadelis*, the court applied only a rational basis test to a regulation excluding boys from girls' interscholastic volleyball teams. Under a Fourteenth Amendment Equal Protection analysis, this test constitutes a lower level of scrutiny than the intermediate standard generally applied in similar cases addressing the issue.¹⁰¹ The court, in upholding the constitutionality of the regulation, relied on the fact that there were more sports teams available to boys than girls and that, so long as there was a disproportionate advantage for males in overall high school athletic opportunities, the special treatment to females was a discernible and permissible means of redressing past discrimination. In other words, regulations preventing male participation afford girls an opportunity to develop programs equal to those of boys.¹⁰²

In the 1982 case of *Clark v. Arizona Interscholastic Association*,¹⁰³ a boy who was excluded from participating on the girls' volleyball team brought a Fourteenth Amendment equal protection claim against the AIA regulation forbidding boys to play on girls' teams in noncontact sports.¹⁰⁴ The court agreed with the analysis set forth in *Petrie*.¹⁰⁵ It recognized that although equality in specific athletic opportunities was a "worthwhile ideal" and high school sports could be equalized more fully in various ways, "it should not be purchased at the expense of ultimate equality of opportunity to participate in sports."¹⁰⁶ In other words, the displacement of even one female participant from a girls' team is unwarranted to satisfy the personal interest of a boy not offered a corresponding male team upon which to play.

The court conceded that the exclusion alternative "may not maximize equality, and may represent trade-offs between equality and practicality."¹⁰⁷ However, taking into consideration innate physical differences and the inequality of past and present athletic opportunities afforded males and females,

⁹⁹ See *Hoover v. Meiklejohn*, 430 F. Supp. 164, 167 (D. Colo. 1977) ("[S]ex is comparable to race in that it is 'an immutable characteristic determined solely by the accident of birth.'").

¹⁰⁰ 431 N.Y.S.2d 321 (N.Y. Sup. Ct. 1980).

¹⁰¹ *Id.* at 324.

¹⁰² *Id.*

¹⁰³ 695 F.2d 1126 (9th Cir. 1982).

¹⁰⁴ *Id.* at 1127. Note that this regulation is more prohibitive than Title IX, which provides an exception for contact sports.

¹⁰⁵ *Id.* at 1131-32, citing *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855 (Ill. App. Ct. 1979).

¹⁰⁶ *Id.* at 1132.

¹⁰⁷ *Id.* at 1131-32.

school regulations discriminating against males based on sex in athletics are justified and represent an accurate proxy.¹⁰⁸ In other words, courts need not rely on any old notions or presumptions of the athletic inferiority of girls to uphold such regulations. A factual analysis is available as a basis for judicial distinctions.

*B.C. v. Board of Education, Cumberland Regional School District*¹⁰⁹ involved a claim brought under the Fourteenth Amendment Equal Protection Clause, the New Jersey Constitution, New Jersey statutes prohibiting sex discrimination in education,¹¹⁰ and the New Jersey Law Against Discrimination.¹¹¹ The court rejected the petitioner's contention that the state statutes provided greater protection than the Fourteenth Amendment Equal Protection Clause.¹¹² The court upheld the validity of the school regulation excluding males from female athletic teams on several grounds.

One factor affecting the court's decision was that the school offered nine sports exclusively for males and only seven sports exclusively for females. This fact caused the court to reject the proposition that females had the same athletic opportunities as males at Cumberland Regional.¹¹³ The court also considered the average physiological differences between the sexes. In doing so, the court followed *Petrie* and *Clark* and reached the same conclusion "in balancing B.C.'s [petitioner's] right not to be discriminated against on the basis of his sex against the public need to promote equalization of athletic opportunities."¹¹⁴ The court reasoned that the exclusive treatment was substantially related to the important governmental interest and an appropriate means to achieve the desired objective—equality in sports for girls.

The most recent case on point, *Kleczek v. Rhode Island Interscholastic League, Inc.*,¹¹⁵ is evidence that the issue of the exclusion alternative in school sports remains vital. In *Kleczek*, the plaintiff was prevented from participating in girls' interscholastic field hockey.¹¹⁶ Plaintiff's Title IX claim was undermined for failure to show that the athletic department at the school received sufficient federal funds to fall within the purview of the statute. The court did, however, reject the *Gomes* interpretation of section 86.41(b) and, because only female athletes had limited opportunities at the high school, the court implied that any Title IX claim would have failed regardless of the

¹⁰⁸ *Id.* at 1131.

¹⁰⁹ 531 A.2d 1059 (N.J. Super. Ct. 1987).

¹¹⁰ *Id.* at 1063, 1064. *See supra* note 61.

¹¹¹ N.J.S.A. 10:5-1 *et seq.* (1976).

¹¹² *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.*, 531 A.2d 1059, 1066 (N.J. Super. Ct. App. Div. 1987).

¹¹³ *Id.* at 1065 n.5.

¹¹⁴ *Id.* at 1066.

¹¹⁵ 768 F Supp. 951 (D.R.I. 1991).

¹¹⁶ *Id.* at 953.

funding problem.¹¹⁷ The court followed the equal protection analysis set forth in *Mularadelis* and *Clark*, in light of the decision in *Massachusetts Interscholastic*, and found the requisite relationship between excluding males from girls' teams and redressing disparate athletic opportunities.¹¹⁸

As the cases indicate, relying on some combination of historical disparate treatment, current disparities in opportunities, and inherent physiological differences, courts generally agree that precluding boys from participating on girls' athletic teams is warranted and withstands constitutional and statutory challenge. Other arguments have been put forth in support of regulations precluding boys from participation on girls' athletic teams but have not been discussed because they do not contribute significantly to the validity of these regulations, that is, they are not viable under constitutional and statutory analysis. For instance, from a competitive standpoint, allowing boys to participate on girls' teams may be unfair to other teams that disallow or have no male participants.¹¹⁹ Such teams may not expect to compete with boys and are forced either to do so or forfeit the game.¹²⁰ Furthermore, permitting boys to play on girls' teams may cause safety problems by increasing the risk of injury, especially in contact sports, and may result in intimidation of females. However, the protection of players' safety has been rejected as an important government objective in determining the validity of gender-based regulations in school athletics¹²¹ and is rarely mentioned as the purpose for these regulations. The intimidation factor of allowing boys on girls' teams may be legitimate, but has not been used as a validating factor.

IV CONCLUSION

Permitting boys to play on girls' teams will impede the progress in reaching full athletic competition that girls are seeking to achieve. Although promoting equal opportunity in sports for females by excluding males may suffer from the backlash of reverse discrimination¹²² or carry with it the

¹¹⁷ *Id.* at 954-55.

¹¹⁸ *Id.* at 956.

¹¹⁹ *See, e.g.,* B.C. v. Board of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059, 1062 (N.J. Super. Ct. 1987); *Petrie v. Illinois High Sch. Ass'n*, 394 N.E.2d 855, 864 (Ill. App. Ct. 1979).

¹²⁰ B.C., 531 A.2d at 1066.

¹²¹ *See, e.g.,* Hoover v. Meiklejohn, 430 F Supp. 164, 169 (D. Colo. 1977); *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d 284, 294 (Mass. 1979); *see also* Note, *supra* note 41, at 1119-20; *Croudace & Desmaris, supra* note 9, at 1441-42.

¹²² *Croudace & Desmaris, supra* note 9, at 1454; *see also* *Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc.*, 393 N.E.2d at 290, 296.

“baggage of sexual stereotypes,”¹²³ a better alternative has yet to be formulated by the courts or regulatory agencies.¹²⁴

Until athletic opportunities for boys and girls are equal in terms of the number and caliber of teams available and until athletic programs are fashioned to minimize the inherent physiological differences between the sexes, if this is indeed possible, the practical and necessary solution is to preclude boys from both participating on girls' teams and displacing girls at their own game. In other words, boys should not be permitted to “muscle in” on girls' sports until the existing inequities are resolved and programs are initiated that substantially diminish the advantages males may enjoy in a given sport because of the physiological differences between the sexes.

Polly S. Woods

¹²³ *Orr v. Orr*, 440 U.S. 268, 283 (1979).

¹²⁴ *Cf.* Joan Ruth Kutner, Comment, *Sex Discrimination in Athletics*, 21 VILL. L. REV. 876, 902-03 (1976) (espousing school classifications based on ability rather than by gender in interscholastic sports).

