Willamette Sports Law Journal

Volume 1:1 Winter 2004

Title IX: Straining Toward an Elusive Goal

By

Jennifer E. Powell*

Introduction

Title IX, praised for its great impact on women's interscholastic and intercollegiate sports, celebrated its 30th Anniversary in 2002. In 1971, before the law was enacted, fewer than 300,000 female students (1 in 27 females[1]) participated in interscholastic athletics.[2] By 1976, over two million females were participating in sports[3], an increase of 600%.[4] Today, nearly one out of every two females participates in sports.[5] Despite these impressive strides in female involvement in athletics, Title IX does not effectively equalize the athletic world between the sexes. In real life, nothing is perfectly equal and fair. Athletic programs cannot cater to every athlete's needs and desires. Limited budgets and low-levels of interest in particular sports often result in schools creating single-sex teams in certain sports. At such a school, for example, female athletes interested in playing a sport only offered to male athletes might seek to join the male team, or vice versa. Is this appropriate? Should females be allowed to play on all-male

* Jennifer Powell is a third-year student at Willamette University College of Law, she expects to earn her Juris Doctor in May, 2004.

[1] Kimberly Capadona, *The Scope of Title IX Protection Gains Yardage As Courts Continue to Tackle he Contact Sports Exception*, 10 SETON HALL J. SPORT L. 415, 423 (2000).

[2] Deborah Brake, *Symposium Competing in the 21st Century: Title IX, Gender Equity, and Athletics: The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, MICH. J. L. REFORM 13, 15 (Fall and Winter 2000 and 2001).

[3] Jessica E. Jay, *Women's Participation in Sports: Four Feminist Perspectives*, 7 TEX. J. WOMEN & L. 1, 4 (1997) (citing Joan O'Brien*, The Unlevel Playing Field*, Salt Lake Trib., Sept. 4, 1994, at A9).

[4] *Id.*

[5] *See* Capadona*, supra* note 1, at 423.

teams or, should males be allowed to play on all-female teams? Will there ever come a day that Title IX perfectly equalizes the sports world?

This article will focus on Title IX's legislative history and background; Part II will focus on the current legal treatment of this issue and further consider the legal treatment of females seeking to play on all-male teams, and vice versa. In addition, Part II will also review the specific role of the Equal Protection Clause in overcoming Title IX's contact sports exception barrier, and, the recent legal developments of *Mercer v. Duke Univ.* Part III concludes with potential steps towards a more equal sports world.

Part I: Legislative History & Background of Title IX

Little legislative history regarding Title IX is available because it was adopted without formal hearings or a committee report.[6] However, before 1972, there were constant efforts to enact sex discrimination protections for education into the Civil Rights Act (Title VII)[7], efforts that included language almost indistinguishable from that later included in Title IX. The legislative history of these efforts reveals the purpose behind Title IX (equal opportunity for females).[8] The efforts to amend Title VII eventually failed, primarily because others believed the proper vehicle for such protections was separate legislation and not an amendment to Title VII.[9]

---

[6] S. REP. NO. 92-798, 221-22 (1972); 118 CONG. REC. 5802 (1972) (statement of Sen. Bayh explaining that the amendment would generally track the provisions of the Civil Rights Act of 1964).
[7] Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 42 U.S.C. § 2000e (guaranteeing protection from discrimination in federally funded education based on race, color, ethnicity and national origin).
[8] *Higher Education Act of 1971: Hearings on H.R. 7248 Before the Special Subcomm. on Educ. and Labor*, 92nd Cong. (1971); H.R. REP. NO 92-554 (1971); Education Amendments of 1971, 117 CONG. REC. 30, 407 (1971).
[9] *Discrimination Against Women: Hearing on H.R. 16098 § 805 Before the Special Subcomm. on Educ. and Labor*, 91st Cong. 664-665 (1977).

The broad purpose of Title IX must be discerned from the meager legislative record of the bill. In 1972, Senator Evan Bayh, the sponsor of the bill, explained that Title IX was intended to "provide for women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice . . . "[10] Title IX's application to athletics was rarely explicitly considered until after enactment. Senator Bayh directed attention away from the subject both times sports were mentioned prior to passage.[11]

> What we are trying to do is provide equal access for women and men students to the educational process and the extracurricular activities in a school, where there is not a unique facet such as football involved. We are not requiring that intercollegiate football be desegregated, not that the men's locker room be desegregated.[12]

After enactment, the Department of Health, Education and Welfare (HEW) took the position that Title IX applied to athletics.[13] In response, a campaign of intensive lobbying was launched to amend Title IX to exempt sports generally, and failing that, to exempt men's revenue-producing sports.[14] Both failed; however, shortly thereafter the Javitz Amendment required HEW to issue proposed regulation in Title IX's application to intercollegiate athletics and "include . . . reasonable provisions considering the nature of the particular sports."[15] In 1975, HEW issued regulations specifically applying Title IX to athletic programs at educational institutions.[16] Under these rules, any educational

---

[10] 118 CONG. REC. 5804, 5808 (Feb. 28, 1972) (statement of Sen. Bayh).
[11] *Id.*
[12] 117 CONG. REC. 30, 407 (1971)(statement of Sen. Dominick).
[13] *Sex Discrimination Regulations, Hearings Before the House Subcomm. on Post Secondary Educ. of the Comm. on Educ. and Labor*, 94th Cong. 1st Sess. 438, 438 (1975).
[14] Crista D. Leahy, *The Title Bout: A Critical Review of the Regulation and Enforcement of Title IX in Intercollegiate Athletics*, 24 J.C. & U.L. 489, 493-94 (1998).
[15] Education Amendments of 1974, Pub. L. No. 93-380, § 884, 1974 U.S.C.C.A.N. 695.
[16] 34 C.F.R. § 106.41 (2002).

institution receiving federal funds must give both sexes equal athletic opportunities and must accommodate the interests and abilities of female and male athletes.[17] The regulations further state that recipients can offer separate teams for members of each sex,[18] but must provide equal athletic opportunity for members of both sexes.[19] It also provided a three-year transition period for compliance with the regulations.[20]

Title IX specifically states:

> [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.[21]

It also provides two exceptions, allowing teams to be divided according to gender: (1) "where selection for such teams is based upon competitive skill or [(2)] the activity involved is a contact sport."[22] Under the first exception, if a team is segregated by sex, members of the excluded sex must be allowed to try out for the team when there is no equivalent team available for them, and when "athletic opportunities have previously been limited" for them.[23] The second exception is the contact sports exemption, which excepts gender integration in contact sports, whether or not a team is selected by skill. In

---

[17] 34 C.F.R. § 106.41(c) (2002).
[18] 34 C.F.R. § 106.41(b) (2002) ("[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport").
[19] 34 C.F.R. § 106.41(c) (2002) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes").
[20] 34 C.F.R. § 106.41(d) (2002) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation").
[21] Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-09, 86 (Stat. 235) (codified at 20 U.S.C. §§ 1681-1688 (1994)).
[22] 34 C.F.R. § 106.41(b)(2002).
[23] *Id.*

1979, the Policy Interpretation explained that equivalent female contact sports teams must be provided when sufficient interest and ability and "a reasonable expectation of intercollegiate competition" exist.[24] Furthermore, an all-male team need not allow a female to try out; she can be excluded no matter what her ability. The regulation defines contact sports as, "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."[25]

The 1979 Policy Interpretation issued by HEW attempted to clarify and reduce the impact of the contact sports exception.[26] Although intended specifically for intercollegiate athletics, the Policy Interpretation explicitly asserts that "its general principles will often apply to . . . interscholastic athletic programs which are also covered by regulation," and may be used for guidance by the leadership of these programs.[27]

In order to establish whether an educational institution has met the interests and abilities of its students, the Policy Interpretation summarizes a three-prong test that could be applied to verify compliance with the statute.[28] Title IX allows schools receiving federal funds the discretion to determine for themselves how best to provide equality of

---

[24] 44 Fed. Reg. 71, 417-18 (C)(4)(a)(1 & 2) (Dec. 11, 1979).
[25] C.F.R. § 106.41(b) (2002).
[26] *See* Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statue*, 32 CONN. L. REV. 381, n. 41 (Winter 2000) (where the author argues that the 1975 Regulation was always intended to require that females' athletic interests and abilities be accommodated. "If those interests run toward contact sports, then contact sports opportunities must be provided. But it would seem that the regulation, on its face, was ambiguous about whether the requirement of nondiscrimination could be met by organizing huge female cheerleading squads for male teams and female teams for non-contact sports, so long as the numbers of athletic slots for females were substantially equal to the number of slots for males."); *See also* Julia Lamber, *Symposium Competing in the 21st Century: Title IX, Gender Equity, and Athletics Gender & Intercollegiate Athletics: Data & Myths*, 34 MICH. J. L. REFORM 151, 168 (citing Office for Civil Rights, US Dept of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test 2, 8 (Jan. 16, 1996)) (The author pointed out in 1996, OCR issued a Policy Clarification on the "three-part test" to assess an institution's effective accommodation of students' athletic interests and abilities in response to controversies and continuing pressure from institutions and coaches of male teams. The Policy Clarification reiterated the Policy Interpretation's three-part test and its position that an institution must meet only one part of the test).
[27] Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 171 (3rd Cir. 1993).
[28] *See* Capadona, *supra* note 2, at 420 (*See* Title IX of the Educational Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics).

athletic opportunity.[29] In order to comply with Title IX, schools must show: (1) they have respective enrollments; (2) they have a history of expanding program in response to developing interests and abilities in sports; or (3) they have fully and effectively accommodated females' interests and abilities.[30]

Part II: Current Legal Treatment

The current legal treatment of Title IX and sports equality has proven anything but uniform. This article breaks down these approaches to address the issue of ineffective approaches to sports equality. It considers judicial approaches to female inclusion on all-male teams under Title IX and then under the Equal Protection Clause. It specifically looks to the Equal Protection Clause's attempt to override Title IX's contact sports exception, and then considers whether courts follow the same approach regarding males desiring to participate on all-female teams. It also discusses the recent unprecedented decision made in *Mercer v. Duke Univ.*

A. Courts' Response to Females' Inclusion on All-Male Teams

Schools violate Title IX when interscholastic athletic programs discriminate against females. However, unlike their treatment of universities, courts have forced very few secondary schools to provide sports opportunities with Title IX substantial proportion to their enrollment.[31] Most litigation surrounding compliance with Title IX

[29] Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-09, 86 (Stat. 235) (codified at 20 U.S.C. §§ 1681-1688 (1994)).
[30] John Gibeaut, *Shooting for Parity on the Playing Fields*, 83 May A.B.A. J. 40, 40 (May 1997).
[31] *See, e.g.,* Horner v. Kentucky High Sch. Athletic Ass'n., 43 F.3d 265, 275 (6th Cir. 1994) (applying the "substantially proportionate" approach only to reverse a summary judgment against high school females who argued that the athletic association discriminated against them by refusing to create a females' softball team).

involves females wanting to play on a particular all-male team or males looking to play on a specific all-female team.[32] Although some courts have struck down rules excluding mixed competition in non-contact sports under Title IX, a different outcome is reached when females want to compete on an all-male contact sports team.[33] In their decisions, courts rely on Title IX's contact sports exception, which specifically states that an all-male team may exclude females, no matter the reason, if its "purpose or major activity . . . involves bodily contact."[34]

The two main reasons given for excluding females from contact sports center on the asserted physical and psychological differences between males and females, which imply that females are inferior athletes.[35] Most courts that have heard the argument of protecting females from injury have rejected them,[36] saying that when female plaintiffs were strong, fast, and skilled enough to play, courts have rejected injury prevention as an illegitimate government objective. However, this position is irrelevant under Title IX's contact sport exception. Under it, females can be displaced based solely on their sex.

---

[32] *Compare* Yellow Springs Exempted Village Sch. Dist. Bd. of Educ. v. Ohio High Sch. Athletic Ass'n., 647 F.2d 651, 656-57 (6th Cir. 1981) (requiring a school to allow females to try out for its male basketball team when the school offered no female basketball team) to O'Connor v. Bd. of Educ., 645 F.2d 578, 581-82 (7th Cir. 1981) (upholding a school's prohibition of females trying out for its male basketball team when the school offered a female basketball team). *Compare also* Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 179 (3rd Cir. 1993) (remanding case on the issue of whether real physical differences justified excluding males from the all-female field hockey team when the school offered no all-male field hockey team) to Clark v. Arizona Interscholastic Ass'n., 695 F.2d 1126, 1129 (9th Cir 1983), *cert. denied*, 464 U.S. 1818 (1983); (prohibiting a male athlete from playing on an all-female volleyball team when the school offered no all-male volleyball team).

[33] *See, e.g.,* Collins v. Day, 644 N.E.2d 72 (Ind. 1994) (finding that females cannot be prevented from competing with males on non-contact sport teams like track, gymnastics, swimming and golf); Bednar. Nebraska Sch. Activities Ass'n., 531 F.2d 922 (8th Cir. 1976) (stating that females should be permitted on the cross country team).

[34] C.F.R. § 106.41(b)(2002).

[35] *See, e.g.,* Yellow Springs Exempted Village Sch. Dist. Bd. of Educ., 443 F. Supp. at 759 ("[t]wo governmental objectives could be proffered to support the Association rule [prohibiting females from playing contact sports with males:]…preventing injury to public school children…and maximiz[ing] female athletic opportunities…[B]oth posit that [females] are somehow athletically inferior to [males] solely because of their gender."), *rev'd*, 647 F.2d 651 (6th Cir. 1981).

[36] Sangree, *supra* note 26 at 421.

For example, in *Barnett v. Texas Wrestling Association*, the federal district court held that the defendants did not infringe Title IX by prohibiting females from participating in wrestling matches against males because wrestling, by its very nature, is the "quintessential contact sport," which, according to Title IX, is exempted from its protection because of its statutory exceptions.[37] The district court promptly rejected the Title IX claim, maintaining the contact sport exception "expressly permit[s] schools to sponsor sexually segregated teams, 'where selection for such teams is based upon competitive skill or the activity involved is a contact sport'."[38] Similarly, in *Adams v. Baker*, a female filed suit for excluding female athletes from wrestling try-outs.[39] The federal district court, again relying on the contact sport exception, found that the plaintiff's Title IX claim could not succeed on the merits due to the nature of the sport.

In *O'Connor v. Board of Education of School District No. 23*, O'Connor desired to play on her middle school's all-male basketball team because it offered a higher level of play than the all-female team.[40] Initially, she obtained a preliminary injunction ordering the school to allow her to try out for the male team.[41] However, the 7th Circuit overturned the District Court, ruling that O'Connor was not allowed to try out for the male team because she had the opportunity to play on the admittedly inferior female team.[42] This result ran consistent with several earlier opinions holding that females are not necessarily free to try out for male teams when an "equivalent" female team existed.[43]

---

[37] Barnett v. Texas Wrestling Ass'n., 16 F. Supp.2d 690, 694 (N.D. Tex. 1998).
[38] *Id.* (quoting 34 C.F.R. § 106.41(b)).
[39] Adams v. Baker, 919 F. Supp. 1496, 1499-1500 (D. Kan. 1996).
[40] *See O'Connor*, 645 F.2d 578 (7th Cir. 1981).
[41] *Id*. at 579.
[42] *Id.* at 581-82.
[43] *See, e.g.,* Leffel v. Wisconsin Interscholastic Athletic Ass'n., 444 F. Supp. 1117, 1121 (E.D. Wis. 1978) (holding that a female swimmer need not be allowed to try out for male swim team when female swim team

Ultimately, the Supreme Court upheld the Circuit Court, reasoning that "without a gender-based classification in competitive contact sports, there would be a substantial risk that males would dominate the female programs and deny females an equal opportunity to compete in interscholastic events."[44]

These cases demonstrate the ineffectiveness of Title IX in today's athletics. Title IX was created to equalize the sports world for females. Unfortunately, many courts quash any female's attempt for an equal opportunity to compete on an all-male contact sport teams based on the statutory language of Title IX's contact sports exception. Female athletes who want to play contact sports have to find a remedy on grounds other than Title IX for an opportunity to join their male peers. The majority of courts keep teams segregated by gender in order to protect females from being overrun and dominated by their male counterparts, fearing that to do otherwise would compromise Title IX's purposes. This approach was challenged in 1999, with *Mercer v. Duke Univ.*, stating Title IX provides a remedy in contact sports discrimination.[45] *Mercer* and its role in future Title IX issues is discussed later in this paper.

B. Role of the Equal Protection Clause in Overcoming Title IX's Contact Sport Exception

Prior to the *Mercer* decision, many courts avoided the statutory language of Title IX's "contact sport" exception, by finding that educational institutions or athletic

existed and no intentional discrimination caused difference between level of competition on male and female teams).

[44] *O'Connor*, 449 U.S. at 1307.

[45] *See* Capadona, *supra* note 2 at 425.

associations violated the female athlete's 14th Amendment rights.[46] Even prior to the passage of Title IX, athletic programs were recognized as an important part of the educational process and subject to the U.S. Constitution's Equal Protection Clause.[47] The Equal Protection Clause of the 14th Amendment prohibits certain gender-based classifications.[48] In *Craig v. Boren*, the U.S. Supreme Court held that gender-based classifications should be analyzed under an intermediate level of scrutiny.[49] Gender-based classifications must "serve important governmental objectives and must be substantially related to the achievement of those objectives."[50] Thus, a school must demonstrate an important governmental objective for excluding an athlete from participation in a sport based solely on gender.[51] Although this appears to be a clear measure, it is not. In pursuing sports equality, suits have been filed on both federal and state grounds. Further complicating the issue are the inconsistent standards among the 50 state equal rights amendments. With individual state law claims come less uniform approaches towards equal treatment in sports. Unfortunately, courts, even among the same jurisdiction, have yet to agree on the appropriate standard.

---

[46] *See* U.S. CONST. amend. XIV (saying that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws"). *See, e.g.*, Lantz v. Ambach, 620 F. Supp. 633 (S.D.N.Y. 1985) (holding that a public high school regulation prohibiting mixed gender competition in all sports is a violation of the Equal Protection Clause); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974) (banning a football league from denying females the opportunity to play based on sex).

[47] *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 2, *reh'g denied* 403 U.S. 912 (1971) (analogous to remedies for gender discrimination are cases addressing school desegregation. In its decision, the Supreme Court sought to eliminate from schools all "vestiges of state-imposed segregation that was held violative of equal protection guarantees," which included athletics); *See, e.g.*, Caddo Parish Sch. Bd. v. United States, 372 F.2d 836, *cert. denied*, 389 U.S. 840 (1967).
But see U.S. v. Virginia, 518 U.S. 515, 531 (1996). (Justice Ginsburg mentioned that prior to 1971, the government could "withhold from women opportunities accorded to men so long as any 'basis in reason' could be conceived for the discrimination").

[48] *See* Craig v. Boren, 429 U.S. 190 (1976).

[49] *Id.* at 197.

[50] *Id.*

[51] *See, e.g., Clark*, 695 F.2d 1126, 1129 (9th Cir 1982), *cert. denied*, 464 U.S. 1818 (1983); Israel v. West Virginia Secondary Sch. Activities Comm'n, 388 S.E.2d 480, 484 (W. Va. 1989).

Most courts have found physiological differences between men and women and past discrimination against female athletes as two important reasons justifying single-sex participation in athletics. Under an equal protection analysis, it has been held that exclusion of females from contact sports in order to protect them from injury is not substantially related to any justifiable governmental interest.[52] In fact, defendants' arguments were rejected as both over and under expansive: all females are barred from contact sports, no matter how large, fast, strong and injury-prone, while all males are allowed to try out or play for contact sports no matter how weak, slow, undersized or injury-prone. As stated in *United States v. Virginia*, equal protection now requires that "[s]tate actors controlling gates to opportunity . . . may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females'."[53]

Unlike Title IX claims, equal protection claims have proved successful. However, the proper standard of review has yet to be agreed upon, even within the same jurisdiction.[54] Some courts have ruled that it is constitutional to deny females access to all-male teams whereas others have held that females must be permitted to play on all-

[52] *See, e.g.*, *Leffel*, 444 F. Supp. at 1122.
[53] 518 U.S. at 541; *See also* Mississippi Univ. v. Hogan, 458 U.S. 718, 725 (1982) (Justice O'Connor cautioned that "if the statutory objective is to exclude or "'protect' members of one gender, because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate").
[54] *See, e.g.*, Estate of Hicks, 174 Ill.2d 433, 438 (1996) (ruling that because Article 1, Section 18, of the 1970 Constitution bars discrimination on the basis of sex by the state or its units of local government or school districts, a classification based on sex is a "suspect classification" and must meet strict judicial scrutiny); People v. Ellis, 311 N.E.2d 98 (Ill. 1974); Phelps v. Bing, 316 N.E.2d 775 (Ill. 1974); People v. M.A., 529 N.E.2d 492 (Ill. 1988). *But see, e.g.,* Bucha v. Illinois High Sch. Ass'n., 351 F.Supp.69, 74-75 (holding that sex is not an inherently suspect classification and that treating the sexes differently is justified if a rational relationship is shown between the actions taken and the goals of interscholastic athletic competition); Petrie v. Illinois High Sch. Ass'n., 394 N.E.2d 855, 857 (Ill. 1979) (noting that the Supreme Court has never treated gender classifications as suspect and that gender classifications must serve important government objectives and be substantially related to achieving those objectives).

male teams whenever they want.[55] Others have held they must be given the opportunity to play on male teams only if a similar female team is unavailable.[56] Still other courts have held that females must only be allowed to play on male teams if the sport involved is not a contact sport.[57] Similarly, courts have handed down inconsistent rulings on the issue of whether males must be allowed a reciprocal right to play on female sports teams.[58] Numerous courts have found that rules preventing females from participating in contact sports infringe on the athlete's constitutional right to equal protection.[59]

Many courts address both Title IX and equal protection claims in the same decision. For example, in *Lantz v. Ambach*, when Lantz brought Title IX challenges to state rules prohibiting her from playing football, the Court found Title IX "simply neutral as to mixed competition in football"[60] because it fell within the statute's contact sports exception. Although the Court concluded that Title IX does not require that females be allowed to try out for male teams where there is no team for their own sex and when a contact sport is at issue, it concluded that Lantz should be allowed to try out.[61] The Court overrode Title IX with the Equal Protection Clause, holding that the 14th Amendment

---

[55] *See O'Connor*, 449 U.S. at 1301. *See also* Ritacco v. Norwin Sch. Dist., 361 F. Supp. 930 (W.D.Pa. 1973).; Commonwealth v. Pennsylvania Interscholastic Athletics Ass'n., 334 A.2d 839, 843 (Pa. 1975); Darrin v. Gould, 540 P.2d 882 (Wash. 1975); Hoover v. Meiklejohn**,** 430 F. Supp. 164 (D. Colo. 1997).

[56] *See, e.g.,* Reed v. Nebraska Sch. Activities Ass'n., 341 F. Supp. 258 (D. Neb. 1972) (enjoining enforcement of rule prohibiting females from participating with males in golf and basketball); Giplin v. Kansas State High Sch. Activities Ass'n., 377 F. Supp. 1233 (D. Kan. 1974) (striking rule prohibiting males and females from competing on same athletic team in interscholastic contest).

[57] *Bednar*, 531 F2d 922 (8th Cir. 1976).

[58] *Compare* Attorney General v. Massachusetts Interscholastic Athletic Ass'n., 393 N.E.2d 284, 292 (Mass. 1979) *with* Clark, 695 F.2d 1126, 1127, 1131 (9th Cir. 1982).

[59] *See, e.g.,* Commonwealth v. Pennsylvania Interscholastic Athletic Ass'n., 334 A.2d 839 (Pa. 1975) (applying the state's equal rights amendment to conclude that a regulation stating that males and females cannot compete together is unconstitutional); Darrin, 540 P.2d 882 (Wash. 1975) (maintaining that the Washington Equal Rights Amendment prevented females from being barred from playing football based on their sex).

[60] *Lantz*, 620 F. Supp. at 665. *See*, Haas v. South Bend Community School Corp., 289 N.E.2d 495 (Ind. 1972); Force v. Pierce City R-VI Sch. Dist, 570 F. Supp. 1020, 1024-25 (W.D. Mo. 1983).

[61] *Id*. at 666.

requires females to be judged by ability.[62] The Court held that for females who were so fit, the gender exclusion bore no reasonable relation to the achievement of the government objective.[63] As a result, the state regulation was invalidated and Lantz was permitted to try out.[64]

In Missouri, a school district claimed that Title IX prohibited it from allowing all females, qualified or not, from trying out for the men's football team.[65] The Court rejected this defense, finding that Title IX allows schools to decide "whether coeducational participation in a contact sport will be permitted."[66] While a school could decide to exclude females, Title IX does not dictate that result. Similar to *Lantz*, the Court concluded, "Title IX simply takes a neutral stand on the subject."[67]

Addressing equal protection claims, the court in *Fortin v. Darlington Little League* held that the defendants failed to supply a "convincing factual rationale going beyond 'archaic and overbroad generalizations' about the different roles of men and women."[68] The Court, in *Saint v. Nebraska School Activities Association*, rejected arguments and medical testimony implying that because on average, females are smaller and weaker than males, that they are more prone to injury and should be protected from wrestling with males.[69] It reasoned that even if this were true as to "typical school-age females in the population at large,"[70] the plaintiff had shown she was physically competent to wrestle.

---

[62] *Lantz*, 620 F. Supp. at 666.
[63] *Id.* at 665.
[64] *Id.* at 666.
[65] *Force*, 570 F. Supp. at 1024-25.
[66] *Id.* at 1025.
[67] *Id.*
[68] Fortin v. Darlington Little League, 514 F.2d 344, 348 (1st Cir. 1975).
[69] Saint v. Nebraska Sch. Activities Ass'n., 684 F. Supp. 626, 629 (D. Neb. 1988).
[70] *Id.*

The Court considered similar gender differences testimony, in *Hoover v. Meiklejohn*,[71] and noted that while "it is . . . true that . . . males as a class tend to have an advantage in strength and speed over females as a class, the range of differences among individuals in both sexes is greater than the average difference between the sexes."[72] Under the rules, "any male of any size and weight has the opportunity to be on an interscholastic team and no female is allowed to play, regardless of her size, weight, condition or skill."[73] The Court enjoined defendants from providing soccer to males only and concluded that, "[a]ny notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality."[74]

Several state court decisions have also rejected the fragile female justification under equal protection grounds. For example, Washington's Supreme Court held that two females who played football during practice could not be excluded from playing in games for the sole reason that they were female.[75] Applying Washington's Equal Rights Amendment, the Court rejected the fragile female defense and found that no compelling state interest justified depriving the sisters—one 5'6'' weighing 170 pounds, the other 5'9'' weighing 212 pounds—of the opportunity to play.[76] In rejecting the defendants' plea that the majority "of [females] are 'unable to compete with [males] in contact football, and the potential risk of injury is great," the Court noted that the risk of injury to 'the average [male]' is not used as a reason for denying males the opportunity to play on

[71] *Hoover*, 430 F. Supp. at 166.
[72] *Id.*
[73] *Id*.
[74] *Id.* at 169.
[75] Darrin v. Gould, 540 P.2d at 883-84.
[76] *Id.* at 884.

the team in the interscholastic competition.[77] Furthermore, the fact that some males cannot meet the team requirements is not used as a reason for disqualifying them from participation.[78] Similarly, the Pennsylvania Court found its Equal Rights Amendment as the basis for the trial court's invalidation of a state-wide restriction against high school females practicing or competing against males in both contact and non-contact sports.[79] The Court stated that, "if any individual [female] is too weak, injury-prone, or unskilled, she may, of course, be excluded from competition on that basis but she cannot be excluded solely because of her sex without regard to her relevant qualifications."[80]

Lafler v. Athletic Bd. of Control, a boxing case offers the only instance where a court relied upon testimony about natural biological differences to justify the broad exclusion of females from a sport.[81] The federal district court held that "real differences between the male and female anatomy are relevant in considering whether men and women may be treated differently with regard to their participation in boxing."[82] The Court concluded that "boxing is a dangerous enough sport under the best of circumstances,"[83] and "it is unrealistic to believe that women could enter the sport of boxing and operate under the same rules with no detrimental effect on the safety of participants."[84] The Court reasoned that because anatomy matters in boxing, females are not similarly situated to males and that equal protection guarantees allow the state to deal with the sexes differently in regulating boxing.[85]

---

[77] *Darrin*, 540 P.2d at 892.
[78] *Id*.
[79] Packel v. Pennsylvania Interschool. Athletic Ass'n., 334 A.2d 839 (Pa. Commw. Ct. 1975).
[80] *Packel,* 334 A.2d at 843.
[81] Lafler v. Athletic Bd. of Control, 536 F.Supp. 104 (W.D. Mich. 1982).
[82] *Id.* at 106.
[83] *Id.* at 107.
[84] *Id.*
[85] *Id.* at 106.

These cases reveal that the majority of courts want to override the gender stereotypes that Title IX's contact sports exception supports. Whether through federal or state constitutional equal rights, most courts find female exclusion on all-male teams based on natural biological differences unconstitutional. In fact, when females seek inclusion on an all-male team, most courts required a showing of an important governmental objective. As stated by *Hoover*, any notion that females are inherently weak compared to males is unrelated to reality and not substantially related to any justifiable governmental interest. Unfortunately, this approach is not uniform among all cases relating to gender integration in sports.

C. Courts' Response to Males' Inclusion on All-Female Teams

Despite the success of females' involvement on all-male teams, most courts hold that Title IX does not require that male athletes be allowed to participate on all-female teams. The disparity in athletic participation between male and female athletes has led most courts to deem the exclusion of male athletes as necessary to redress past discrimination against female athletes in interscholastic athletic programs.[86] Male athletes have consistently failed in challenging on constitutional grounds school district policies which bar male participation on female athletic teams.

Currently, the Massachusetts Supreme Judicial Court is the only court to hold that the exclusion of male athletes from female athletic teams is a constitutional violation.[87] In *Attorney General v. Massachusetts Interscholastic Athletic Ass'n*, the Court held that a regulation prohibiting males from playing on all-female athletic teams violated

[86] *Massachusetts Interscholastic Athletic Ass'n*., 393 N.E.2d at 296.
[87] *Id.*at 295.

Massachusetts' Equal Rights Amendment,[88] concluding that "classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo 'archaic and overbroad generalizations'."[89] In its decision, the Court recognized that physical differences may contribute to an overall male advantage; however, "physical differences were not so uniform as to justify a rule that used sex as a 'proxy' for functional classification."[90] The court emphasized that females excelled, sometimes surpassing males, in sports requiring balance and endurance, arguing that a classification based solely on sex was overbroad because it excluded males from playing on all-female teams even though males possibly were at a competitive disadvantage.[91]

Under Equal Protection Clause analysis, most courts have held the opposite view, finding the exclusion of males from participating on all-female teams is substantially related to achieving important governmental objectives.[92] In *Petrie v. Illinois High Sch.*, a male athlete was prohibited from participating on the high school volleyball team because the School District limited participation to females.[93] The trial court dismissed the suit, saying that the exclusion of male athletes from an all-female team was a constitutionally permissible gender-based restriction because it maintained, encouraged and increased

[88] *Massachusetts Interscholastic Athletic Ass'n*., 393 N.E.2d at 296.
[89] *Id.* at 293.
[90] *Id*.
[91] *Id.* at 293-94.
[92] *See, e.g.*, Clark, 695 F.2d 1126 (9th Cir. 1982) (policy excluding males from female volleyball team was constitutional); Kleczek v. Rhode Island Interscholastic League, 768 F. Supp. 951 (D.R.I. 1991) (rule excluding males from female hockey team permissible under Title IX and Equal Protection Clause); *Petrie*, 394 N.E.2d 855 (Ill. App. Ct. 1979) (exclusion of males from female volleyball team is permissible under the Fourteenth Amendment and state constitution); B.C. v. Bd. of Educ, Cumberland Regional Sch. Dist., 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (rule excluding males from female field hockey team was valid under the Equal Protection Clause, state constitution and gender discrimination laws); Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 321 (N.Y. 1980) (excluding males from female volleyball team was legitimate under Title IX and state statute).
[93] *Petrie*, 394 N.E.2d at 856.

female athletic opportunities.[94] The appellate court affirmed, recognizing that gender-based classification (by using weight, height or skill as qualifying factors) was the only possible system which would advance the substantial state interest of promoting equal athletic opportunities for female athletes.[95] However, such standards would be too difficult to implement because of the physical differences between the sexes.[96]

In *Mularadelis v. Haldane Cent. Sch. Bd.*, the Court held that the School Board's exclusion of a male athlete from the all-female tennis team did not violate Title IX or the Equal Protection Clause.[97] The Court rejected plaintiff's argument that under Title IX's regulations male athletes must be allowed to try out for the female tennis team because male athletic opportunities in tennis had been traditionally limited.[98] Instead, the Court interpreted Title IX as requiring an inquiry into overall athletic opportunities rather than a sport-specific inquiry.[99] In addition, the Court concluded that female athletes were entitled to favored treatment because male athletes within the School District had greater overall athletic opportunities than females.[100] The Court also found that the school board's regulation did not violate the Equal Protection Clause because the school successfully sought to redress past discrimination.[101]

In *Forte v. Bd. of Educ.*, the petitioner sought to invalidate the school district's regulation banning participation of male athletes on the all-female high school volleyball team.[102] The Court upheld the regulation, reasoning that the school district's regulation

---

[94] *Petrie*, 394 N.E.2d at 856-57.
[95] *Id.* at 862.
[96] *Id.*
[97] *Mularadelis*, 427 N.Y.S.2d at 463-64.
[98] *Id.* at 461.
[99] *Id.* at 462.
[100] *Id*. at 464
[101] *Id.*
[102] Forte v. Bd. of Educ., 431 N.Y.S.2d 321, 322 (N.Y. 1980).

served to prevent the displacement of female athletes by male athletes who already had an advantage in overall athletic opportunities.[103] Additionally, the Court stated that the lack of opportunities in volleyball for male athletes did not violate Title IX because males had significantly more opportunities to participate in interscholastic athletics as a whole.[104]

A similar conclusion was made in the 9th Circuit, where a male athlete challenged an Arizona Interscholastic Association regulation prohibiting boys from participating on the all-female volleyball team, alleging that the regulation violated the Equal Protection Clause.[105] The 9th Circuit held that gender-based classifications were constitutional if the classifications could be supported by proof of physical differences between the sexes.[106] The Court found that the physical differences between male and female athletes justified the exclusion of males from all-female teams, explaining that if male athletes were allowed to participate on all-female teams, they would displace female athletes and weaken their athletic opportunities.[107]

In *Williams v. Sch. Dist. of Bethlehem*, a male athlete brought suit, challenging his exclusion from the all-female field hockey team.[108] The 3rd Circuit Court of Appeals considered Williams' arguments, on both Title IX and equal protection grounds.[109] Williams contended that males at his high school had limited athletic opportunities because females had been able to try out for more teams than males for almost twenty

[103] *Forte*, 431 N.Y.S.2d at 324.
[104] *Id.*
[105] *Clark*, 695 F.2d at 1129.
[106] *Id.* at 1130.
[107] *Id.* at 1127.
[108] *Williams*, 998 F.2d 168 (3rd Cir. 1993).
[109] *Id*. at 170.

years.[110] In response, the Court stated that the mere opportunity to try out for a team is not determinative of the inquiry of "previously limited" athletic opportunities under Title IX.[111] "'Athletic opportunities' means real opportunities, not illusory ones."[112] The Court interpreted Pennsylvania's Equal Rights Amendment as allowing differential treatment based on sex, as long as the treatment was founded on the physical characteristics unique to one sex.[113] Ultimately, the Court found that the School District's classification "would depend on the relationship between the classification and the governmental interest."[114]

These cases demonstrate an inherent tension with the judicial analysis when addressing the equal rights of females on all-male teams versus males on all-female teams. When addressing males' inclusion on all-female teams, the majority of courts change the equal rights standard. Most courts bar males from female teams based on inherent gender differences and the traditional exclusion of females from athletics. In addition, courts argue that males' greater overall athletic opportunities than females entitle courts to override males' constitutional rights.

D. Recent Legal Developments

As mentioned above, despite Title IX's contact sport exception, one court, in *Mercer v. Duke Univ.*, recently held that Title IX can provide protection to female athletes that participate in contact sports, thus affording a means in addition to equal protection by which women can gain access to traditional male sports.[115] *Mercer*

[110] *Williams*, 998 F.2d at 170.
[111] *Id*. at 174.
[112] *Id.* at 175.
[113] *Williams*, 998 F.2d at 177-78.
[114] *Id.* at 179.
[115] Mercer v. Duke Univ., 181 F. Supp. 2d 525 (4th Cir. 2001).

broadened the scope of Title IX protection. Initially, the federal district court dismissed the case, holding that Duke University was not required to permit Mercer, or any female, to participate in its football program.[116] On appeal, the 4th Circuit reversed, holding that a university, which has permitted a member of the opposite sex to try-out for a position on a single-sex contact sports team, is subject to the provisions of Title IX and barred from discriminating against the athlete on the basis of their gender.[117]

The 4th Circuit held that while Title IX's contact sports exception would have allowed Duke to exclude Mercer from the team despite her abilities, once she was allowed on the team, she could not be discriminated against based on her sex.[118] The Court stated that this was the only permissible reading of Title IX because Duke invited females to participate in the "traditionally all-male bastion of college football,"[119] finding that the interpretation of Title IX was consistent with the congressional intent of providing equal access without commanding the integration of the sexes in intercollegiate contact sports.[120] According to the 4th Circuit, Congress' intent was to prevent discrimination in all instances where it is unreasonable, such as when the educational institution itself voluntarily opened the athletic team to members of both sexes.[121]

Mercer reiterates the ineffectiveness of Title IX in achieving sports equality. In its holding, the 4th Circuit appears to override the purpose behind Title IX's statutory contact sport exception through finding an exception to the exception. Despite Mercer's

[116] *Mercer*, 32 F. Supp.2d 836, 839 (M.D.N.C. 1998).
[117] *Mercer*, 190 F.3d 643, 648 (4th Cir. 1999).
[118] *Id.* at 647.
[119] *Id.* at 648.
[120] *Id.* at 647.
[121] *Id.*

athletic ability, Mercer would have been permanently barred from Duke's football team had the coaching staff not voluntarily opened the team up to both sexes.

Part III: Conclusion & Potential Solutions

At first glance, Title IX provides an excellent vehicle for equal opportunity in the sports world. Its purpose was to provide equal opportunities for both sexes; and, today, nearly one in every two females participates in sports.[122] However, that figure is misleading. Like every other area of life, sports are often unequal and unfair. It is unrealistic to expect this to change in the future. We are unlikely to perfectly equalize the sports world while still living in a society rife with inequalities. However, there is still room for improvement.

Title IX was written over thirty years ago. In 1972, fewer than 300,000 females participated in interscholastic sports. Athletics was a realm for men and the non-feminine women. The stereotype of that time was that the average female was much weaker and more delicate than their male counterpart. Today, that stereotype has quickly disappeared. Females are participating in sports at a rate like never before; and they are beginning to gain respect for their abilities. Women are demonstrating their power and strength in hopes of completely defeating the stereotype of frailty and weakness and, more female athletes are competing in traditionally male sports.[123] For example, in 1997-98, 779 females competed on high school football teams, 1,262 on high school baseball teams, and 1,907 on high school wrestling teams.[124] Just fifteen years earlier, in the 1983-84

[122] Capadona, *supra* note 2 at 423.
[123] Brake, *supra* note 2 at 15.
[124] *Id.*

season, these numbers were 13, 137, and 0, respectively.[125] What do these numbers demonstrate? They show the tremendous growth of female athletic opportunity since Title IX's enactment in 1972. However, as noted earlier, much has changed since 1972. In 2002, the question is whether Title IX is as effective as it once was and as it should be in equalizing the athletic realm. The answer is no; thus, the need for new legislation to meet today's needs is obvious.

Looking at Title IX's legal treatment, it is flawed in its broad generalizations and inconsistent application. Depending on the jurisdiction and its mood, courts seem to determine athletic gender equality arbitrarily. It forces gender integration when females want to participate in non-contact sports, yet it does not provide the same opportunity for males. In addition, Title IX's contact sports exception is outdated and based on archaic stereotypes. No matter who it is, male or female, gender integration is barred. The contact sports exception provides an overbroad exclusion, basing its assumptions on the "average" female of thirty years ago. Due to earlier stereotypes, the contact sports exception was added, fearing female infiltration into sports like football, thus ruining the "great manly game." The contact sports exception proponents also argued that the average female needed an all-female team or superior male athletes would dominate her.[126] Today females are not only invading the sports realm in general, but also confidently attacking the exclusively all-male sports. Females, on average, cannot be compared to the females of the 1970s.

---

[125] Brake, *supra* note 2 at 15.

[126] *See*, Lamber, s*upra* note 26. *See, e.g.,* Yellow Springs Exempted Village Sch. Dist. Bd. of Educ., 443 F. Supp. at 759 ("[t]wo governmental objectives could be proffered to support the Association rule [prohibiting females from playing contact sports with males:]…preventing injury to public school children…and maximiz[ing] female athletic opportunities…[B]oth posit that [females] are somehow athletically inferior to [males] solely because of their gender."), *rev'd*, 647 F.2d 651 (6th Cir. 1981).

Further, the countless cases barring males from participation on all-female teams rely on the argument that integration is inappropriate due to the potential of all-female teams becoming overrun by males. In contrast, however, the females who want to play on an all-male contact sport team, as in *O'Connor* and *Darrin* are not "average" females. If females can meet the standards and expectations of male contact sports, then why exclude them from playing merely because they are female?!? Weaker males play although they fall short of the prerequisite athletic prowess. Besides, equal opportunity does not necessarily mean equal playing time. If a female makes a team does not necessarily require the coach to play her every minute of the game. All the female athlete wants is equal treatment: she wants to be treated like the males—as a player.

However, using the same argument, does the inclusion of females on all-male contact sports then mean that males should be allowed onto all-female teams based on ability? If true equality is what we want, then absolutely—open participation across the gender lines should be allowed. Ultimately, the former sounds like a weak excuse on the part of all-male teams. If we truly want to approach true equality in sports, we need to erase the contact sports exception from existence. It not only bars female athletic opportunity, but also sports equality in general. Some courts imply support of this position through alternative recommendations. The Massachusetts Supreme Judicial Court, for example, suggested that schools use height, weight and skill as a better measure for contact sport team eligibility as opposed to gender classifications.[127]

Further complicating the issue is *Mercer*. The *Mercer* court took an unprecedented step in allowing a female a Title IX remedy despite the contact sports

[127] *Massachusetts Interscholastic Athletic Ass'n*., 393 N.E.2d at 295 (Mass. 1979). *See Petrie* at 394 N.E.2d at 862.

exception. It still may be too soon to tell what this means. However, it appears that *Mercer* further clouds the issue of sports equality. In its holding, the 4th Circuit appears to override the purpose behind Title IX's statutory contact sport exception through finding an exception to the exception. Despite Mercer's superior ability to her male counterparts[128], had Duke's football team acted strictly to the contact sports exception, it would have had the ability to bar Mercer from participation exclusively based on her gender. With the Court expressly admitting this could lead to all-male teams' fear of female filtration, further crippling female athletic opportunity, hence disabling equalization in sports. Ultimately, *Mercer* demonstrates a need for statutory restructuring in order to create a consistent approach in addressing this issue of equality.

As if the issue of sports equality was not complicated enough with the multiple facets of Title IX, the Equal Protection Clause muddies the water even more. In an effort to override Title IX's archaic generalization excluding gender integration of contact sports, the Equal Protection Clause has merely made the courts' approaches to sports equality even less uniform. As mentioned in Part II, the level of scrutiny under an equal protection analysis is inconsistent among courts in the same jurisdiction, creating more uncertainty in its ability to overcome the unresolved problems of Title IX. Although the Equal Protection Clause successfully overrides Title IX's contact sports exception in many instances where females want to play on all-male teams, it may do more harm than good in creating further inconsistency in its attempt to equalize the sports realm. In

[128] *See Mercer*, 181 F.Supp.2d 525, 530-31, 537-38 (4th Cir. 2001). This is evidenced by the team's 1994-95 intra-squad "Blue-White" scrimmage, an event which players showcased their talents. Evidence revealed that the senior team members picked the teams for this game and the quality of teams were particularly important to the seniors because it provided the winning team "bragging rights." Mercer was the first place kicker chosen from the place kickers available at spring practice. Two of her teammates testified that Mercer's kicking ability was better than her fellow place kickers. In addition, Mercer kicked the game-winning field goal for her team in the "Blue-White" scrimmage in the closing seconds.

denying males who want to participate on all-female teams, courts argue that males' greater overall athletic opportunities than females entitle courts to override males' constitutional rights. Many courts support their approach of excluding male athletes from all-female teams as necessary in order to redress past discrimination against females in interscholastic athletics. However, such segregation will be hurtful in the long run.[129]

These differing approaches create an inherent tension with the judicial analysis used when addressing the equal rights of females on all-male teams versus males on all-female teams. When addressing males' inclusion on all-female teams, the majority of courts change the equal rights standard. Most courts bar males from female teams based on inherent gender differences and the traditional exclusion of females from athletics. In contrast, most courts allow females to participate on all-male teams regardless of other opportunities or factors as long as no reciprocal all-female team in that particular sport exists. As stated before, it runs counterproductive against the goals of equality; and, this tension seems to reach constitutional proportions—a seeming violation of the 14th Amendment. Unfortunately, there is no easy way to provide a better and more realistic answer to the goal of ending gender-based discrimination in athletic programs.

Ideally, the best solution to equalizing the sports realm is to create three teams: one based on ability and the other two segregated by sex. This solution ends the controversy of Title IX's contact sports exception as an excuse for keeping sports segregated by sex by providing an effective alternative. The court in *Petrie* acknowledged that weight, height and skill as qualifying factors was the best system in

[129] *See Massachusetts Interscholastic Athletic Ass'n*., 393 N.E.2d at 296 (Mass. 1979) (arguing that "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 in the long run.").

promoting athletic equality.[130] In addition, this solution addresses the concern of sports gender segregation in sports based 'archaic and overbroad generalizations' about the different roles of males and females.[131] Instead of focusing on the ever-present issues of gender differences, this solution creates a team based purely on skill-level, not gender lines. This approach also rids of the inconsistent Equal Protection Clause rulings for males and females seeking to participate on specific teams. By judging an athlete on ability, rather than gender differences or on the lack of athletic opportunities, the need for an equal protection analysis disappears. One team based purely on skill-level and two others based on gender appear to be the perfect gender equality solution.

However, this is not as realistic as it might sound. First, as some courts have acknowledged, most schools do not have the adequate funds to support three teams.[132] In addition, just because three teams exist, does not mean that the best athletes will play on the mixed-sex team. Some male athletes, for example, may prefer to compete against other males exclusively, defeating the whole purpose of creating three teams. Gender stereotypes remain, and they will continue to exist as long as the sexes are exclusively segregated. One possible step to destroy this stereotype is to begin integrating sports when males and females are young, creating a new attitude: one of equality and acceptance of gender differences at an early age. Complete integration is not preached, but an early acceptance of integration is.

Providing a gender-neutral team based on ability is an additional option. However, a gender-neutral team would nevertheless discriminate because more males than females would qualify, leading to male dominated teams and less female

[130] *Petrie*, 394 N.E.2d at 862.
[131] *Fortin*, 514 F.2d at 348.
[132] *See, Petrie*, 394 N.E.2d at 862.

participation. As the court in *Petrie* points out, it is because of the current inequality of athletic opportunity that allowing males to compete on all-female teams may diminish equality and increase overall disproportion in athletic opportunity.[133] As stated before, there is a fear of the stereotypical male taking over the stereotypical "weaker" female.

Having two teams is another alternative, allowing females to participate on the male team if they qualify based on ability. The *O'Connor* court analogized this to allowing 7th graders try out for 8th grade teams, without 8th graders having reciprocal rights—saying it is based on fairness.[134] But fairness to whom? It presents a Catch-22: it is unfair to males because they do not receive reciprocal rights to play on the all-female team. Additionally, this alternative is unfair to females because it caters to the historic assumption women have fought so hard to destroy: that female athletes are inferior in ability to their male counterparts. We either need to accept the fact that women, on average, are inherently weaker than males, or we need to establish guidelines that do not reinforce it. Currently, we are being counterproductive because we are arguing for equality, yet using inferiority as a basis for attaining that equal status. Is it truly a stereotype, or an accepted condition of the average female versus the average male?

As stated before, Title IX no longer provides an adequate road for sports equality. This unfortunately forces courts to use the Equal Protection Clause in equalizing the playing field and athletic opportunities for both sexes. This raises a red flag as Title IX has regularly failed Constitutional muster under the Equal Protection Clause. However, in both Title IX and Equal Protection Clause cases, females are perceived as needing protection in order to promote their athletic opportunity and growth in order to keep

[133] *See generally*, *Petrie*, 394 N.E.2d 855 (Ill. 1979).
[134] *O'Connor*, 449 U.S. at 1306, n. 4.

males from taking over their all-female teams. It appears that proponents are fighting so hard for female equality that they are feeding the historical stereotype of female inferiority. The sooner we accept the fact that sports are not equal and males and females are unique, the sooner our sports world will begin to integrate towards a new era of sports equality and opportunity between the sexes.