Playing Between the Lines: The Legality of Male Athletes in Interscholastic Field Hockey

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Introduction

"I wish boys didn't choose to play field hockey. It is a girls [sic] game.''[1] Those are the words of Barry Haley, Chairman of the Massachusetts Interscholastic Athletic Association Board of Directors, in 2011 after voting down proposed changes to high school rules that would have limited the on-field participation of boys. Haley's comments would have been more accurate to state, "It is a girls' game *in the United States*." Over the past four decades women's field hockey has been on the rise[2] and men's

* J.D., University of Notre Dame Law School, 2012; B.A., College of the Holy Cross, 2007. The author is extremely grateful to University of Notre Dame Law School Associate Dean and Professor of Law Ed Edmonds, for his dedicated guidance and support in developing and publishing this article. This article is dedicated to the author's fiancée and constant supporter, Beth A. Richard.

[1] Bob Holmes, *Boys Get Green Light; MIAA Votes Down Field Hockey Limits*, BOS. GLOBE, June 10, 2011, (Sports), at 9, *available at* http://www.boston.com/sports/schools/articles/2011/06/10/boys_get_green_light/.

[2] *See Participation Statistics*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, http://www.nfhs.org/Participation/HistoricalSearch.aspx (select applicable year and "field hockey") (last visited May 1, 2012) (Women's field hockey participation: 1971-72: 4,260; 1981-82: 53,137; 1991-92: 49,160; 2001-02: 60,737; 2010-11 (most recent available season): 61,996).

legal challenges to play with the women have developed.[3] Federal legislation in the 1970's gave rise to the increase in women's sports, and today they are at their most popular level ever.[4] Boys participating on girls' field hockey teams at the high school level have been the subject of news accounts in recent years, especially in the Northeastern United States.[5]

This paper looks at the concerns many people have about boys playing on girls' field hockey teams and the legal tools available to litigants. Part I provides a brief background of field hockey and its presence in the United States. Part II looks at two concerns that are often argued for why boys should not be allowed to play on traditionally female teams: fairness and safety. Part III reviews the three legal avenues that can be taken to address rules that limit boys' participation: Title IX of the Education Amendments of 1972 ("Title IX"),[6] the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution ("Equal Protection Clause"),[7] and state Equal Rights Amendments.[8] Part IV evaluates five important cases demonstrating the legal avenues available and what questions remain. Part V questions how athletic associations are to proceed in light of the judicial rulings. Part VI provides a conclusion.

I. Background

The history of field hockey (simply known as "hockey" outside of the United States) dates back to Persia in 2000 BC, and is the oldest ball and stick game of record.[9] Evidence shows that some form of hockey was played among various cultures since 1 BC, but it was not until the mid-18th century that the modern game came into existence at the schools of England.[10] The growth of field hockey is attributable to workers and the military in the British Empire.[11] The men's game found its first Olympic competition in the 1908 Games with the teams of England, Ireland, and Scotland.[12] Although the men's sport had been dropped in 1912, it made a brief return in the 1920 Olympic Games only to be removed again from the 1924 Games.[13] It has been a stable competition at each Olympic program since its reintroduction at the 1928 Games in Amsterdam.[14] The women's sport entered the Olympic fray in 1980 at the Moscow Games.[15] In 1924, the International Hockey Federation ("FIH" a/k/a Fédération Internationale de Hockey

[3] *See* Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979); B.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist., 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987); Kleczek v. R.I. Interscholastic League, Inc., 612 A.2d 734 (R.I. 1992); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993); Me. Human Rights Comm'n v. Me. Principals Ass'n, No. CV-97-599, 1999 Me. Super. LEXIS 23 (Jan. 21, 1999).

[4] R. Vivian Acosta & Linda Jean Carpenter, *Women in Intercollegiate Sport, A Longitudinal, National Study, Thirty-Five Year Update*, 1 (2012), http://acostacarpenter.org/AcostaCarpenter2012.pdf; *See also infra* Part III.A.

[5] *See infra* Parts II & V.A.

[6] Education Amendments of 1972, Pub. L. No. 92–318, tit. IX, 86 Stat. 373 (1974) (codified as amended at 20 U.S.C. §§ 1681–1688 (2006)).

[7] U.S. CONST. amend XIV, § 1.

[8] *See, e.g.*, Mass. Const. art. I, *amended by* Mass. Const. art. CVI.

[9] *Hockey Equipment and History*, http://www.olympic.org/hockey-equipment-and-history?tab=history (last visited May 1, 2012).

[10] *The History of Hockey*, INTERNATIONAL HOCKEY FEDERATION, http://www.fih.ch/en/fih/history (last visited May 1, 2012).

[11] *Hockey Equipment and History*, *supra* note 9.

[12] *The History of Hockey*, *supra* note 10.

[13] INTERNATIONAL OLYMPIC COMMITTEE, HOCKEY: PARTICIPATION DURING THE HISTORY OF THE OLYMPIC GAMES (Sept. 2011), http://www.olympic.org/Assets/OSC%20Section/pdf/QR_sports_summer/Sports_Olympiques_hockey_eng.pdf.

[14] *Id.*

[15] *Hockey Equipment and History*, *supra* note 9.

sur Gazon) was formed as the world governing body of the sport.[16] Only three years later, the International Federation of Women's Hockey Associations came into being.[17] The two organizations joined forces in 1982 to establish the current FIH, which currently has 127 member associations.[18] USA Field Hockey is the national governing body of the sport in the United States, and is a member of both the FIH and the United States Olympic Committee.[19]

As the game appears to be popular among both genders worldwide, statistics demonstrate a different account in the United States. In the United States it remains almost exclusively a women's game.[20] The status of the men's game in the United States has been termed "very fragile."[21] Field hockey was played at the high school level during the 2010/2011 season in nineteen states from California to Maine and Vermont to North Carolina, with a heavy emphasis in the Northeast quadrant of the country.[22] During that season, high school teams hailed from over 1,800 high schools, with 192 male participants and 61,996 female participants.[23] In 2011, there were 78 Division I, 27 Division II, and 159 Division III field hockey programs within the National Collegiate Athletic Association ("NCAA") at the collegiate level.[24] A 2012 survey of NCAA member schools with a women's athletic department indicated that field hockey is the eleventh most popular collegiate sport with 28.1% of schools offering a program.[25] Across divisions I, II, and III, the percentage of schools offering a program were 28.8%, 11.4%, and 38.7%, respectively.[26]

Although high school and collegiate hockey is largely unavailable to male athletes, the Futures program of USA Field Hockey provides a pipeline for potential Olympic players.[27] USA Field Hockey maintains both a women's and a men's national team that compete in international competitions including the Olympics. Since women's Olympic field hockey began at the 1980 Games,[28] the Women's National team has competed in four Olympics.[29] Similarly, the Men's National team has competed in only two Games since 1956, both of which were the result of automatic berths for the host country in 1984 and 1996.[30] The U.S. Men's National team, ranked twenty-four out of seventy-four countries with teams,

[16] *The History of Hockey*, *supra* note 10.
[17] *Id.*
[18] *Id.*
[19] USA FIELD HOCKEY, http://usafieldhockey.com/usa-field-hockey (last visited 3/19/12).
[20] Corey Kilgannon, *Rugby It's Not. But Watch the Teeth.*, N.Y. TIMES, Apr. 24, 2011, (New York ed.), at MB4, *available at* http://www.nytimes.com/2011/04/24/nyregion/mens-field-hockey-isnt-rugby-but-watch-the-teeth.html.
[21] Nick Zaccardi, *Again, U.S. Will Not Send A Men's Field Hockey Team To Olympics*, SI.COM (Jan. 30, 2012, 4:21 PM), http://sportsillustrated.cnn.com/more/news/20120130/u-s-mens-field-hockey/ (quoting Terry Walsh, Technical Director of High Performance for USA Field Hockey).
[22] *Participation Statistics*, NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, http://www.nfhs.org/Participation/SportSearch.aspx (select Year "2010/2011," State "All," and Sport "field hockey") (last visited Mar. 19, 2012).
[23] *Id.*
[24] *See Field Hockey Ranking Summary*, NAT'L COLLEGIATE ATHLETIC ASS'N, http://web1.ncaa.org/stats/StatsSrv/ranksummary?sportCode=WFH (select the applicable division and "2011-12" and "Thru Games 11/13/2011") (last visited Mar. 19, 2012).
[25] Acosta & Carpenter, *supra* note 4, at 7.
[26] *Id.* at 8.
[27] *Futures*, USA FIELD HOCKEY, http://usafieldhockey.com/futures/about-futures (last visited 3/19/12).
[28] *Hockey Equipment and History*, *supra* note 9.
[29] Roxanna Scott, *Dawson's Play Helps USA Earn Field Hockey Berth In Beijing*, USA TODAY (APR. 29, 2008, 1:00 PM), http://www.usatoday.com/sports/olympics/2008-04-29-dawson-athlete-of-the-week_N.htm (identifying U.S. women's participation in 1984, 1988, 1996, 2008).
[30] Zaccardi, *supra* note 21.

decided not to send its squad to the Olympic qualifier in February 2012.[31] Club teams exist in small numbers around the country, but many players are foreign-born or are imported just for the games.[32]

Based on the lack of opportunities for men to develop their skills in hopes of reaching the Olympic Games or other international competitions with the national squad, it is relevant to ask whether they should be allowed to participate with women's teams at the interscholastic level. The arguments surrounding this inquiry have been propelled by Title IX and Equal Protection Clause claims.[33] Yet opponents often claim fairness and safety concerns as reasons against mixed-sex teams.[34] This is not a small consideration; as one author put it, "this isn't just a field hockey issue. It's boys vs. girls. It's constitutional law vs. common sense."[35]

II. Common Concerns: Fairness & Safety

A. Fairness

In 1979, a case concerning a boy's desire to play interscholastic volleyball on the women's team required the Appellate Court of Illinois to evaluate evidence that the sexes were physiologically different.[36] The court found that the evidence showed, "in general, high school boys are substantially taller, heavier and stronger than their girl counterparts and have longer extremities. Although we recognize that high school girls have no general disadvantage as to balance, coordination, strategic acumen, or quickness (as distinguished from running speed)."[37]

There are a number of accounts emanating from east coast high schools that detail concern over fairness and safety issues in field hockey. Bob Hindy, a member of the U.S. Men's Field Hockey Foundation, which provides funding and opportunities to grow men's field hockey claims, "[w]e want the sport to grow, but there are different styles of play between men and women and there will come a time when someone gets hurt."[38] "You want to see equality but it's not in the spirit of competition to see males going against females," Hindy said.[39] Fairness concerns generally focus on boys' ability to be bigger, faster, and stronger than girls. Some critics argue that the physicality of boys can be so dominating that the competition can be dramatically altered.[40] A few of these stories are worth noting as illustrative of the issues fueling the current debate.

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[31] Mike Pesca, *No Olympics For U.S. Men's Field Hockey Team*, NPR (Feb. 29, 2012), http://www.npr.org/2012/02/29/147616964/u-s-mens-field-hockey-team-to-skip-olympics.
[32] *See* Kilgannon, *supra* note 20.
[33] *See infra* Part IV.
[34] *See infra* Part II.
[35] Bob Holmes, *Quite A Lot To This Mix; MIAA Weighing How Boys Play In Field Hockey*, BOS. GLOBE, June 8, 2011, (Sports), at 9, *available at* http://www.boston.com/sports/schools/articles/2011/06/08/miaa_weighing_how_boys_play_in_field_hockey/.
[36] *See* Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855 (Ill. App. Ct. 1979).
[37] *Id.* at 861 (identifying the consequences of such a disadvantage in other sports by referencing (1) *Gomes v. R.I. Interscholastic League*, 469 F. Supp. 659 (D.R.I. 1979) where mixed-gender teams consisted of predominantly male athletes and (2) testimony in the instant case indicating differences in track times between the sexes).
[38] Jill Snowden, *Controversy Overshadows Seminary's State Title Bid*, THE CITIZENS' VOICE (Nov. 20, 2010), http://citizensvoice.com/sports/controversy-overshadows-seminary-s-state-title-bid-1.1066543#axzz1phVJcdHN.
[39] *Id.*
[40] Mike Wise, *High School Sports; In Field Hockey, A Twist On Title IX*, N.Y. TIMES, Oct. 18, 2001, (Late ed. – Final), at S1, *available at* http://www.nytimes.com/2001/10/18/sports/high-school-sports-in-field-hockey-a-twist-on-title-ix.html.

In 2010, Greensburg Central Catholic in Pennsylvania sported five boys on its roster.[41] Two boys profiled in an early-season newspaper article were said to have "dominated play" against a recent opponent because they were "bigger, faster and quicker than anyone else."[42] A five foot eight inch tall and 170 pound boy claimed to be participating to keep in shape for spring lacrosse, while another boy who stood five foot seven inches tall and 165 pounds stated he was playing "just to do it."[43] Both boys also play ice hockey and lacrosse.[44] Another Pennsylvania high school had six boys on its 2010 field hockey team which accounted for twenty-seven of the team's twenty-nine goals during the season.[45] A third Pennsylvania school, Wyoming Seminary, included Cornelius Tietzea, a sixteen-year-old boy from Germany on its 2010 field hockey roster.[46] The controversy over Tietzea's inclusion on the team overshadowed Seminary's road to an undefeated division record and state title,[47] which it eventually accomplished.[48] One news article claimed, "[h]e's quicker, has excellent vision on the field and can guide the ball down the field with one hand" and "[t]here's no question he is more athletic [than a girl]."[49]

Also in 2010, two brothers led their South Hadley, Massachusetts, field hockey team to a state championship game after a brother-to-brother go-ahead scoring play in the semi-final game.[50] South Hadley brothers Chris and Ben Menard are not average skill level players. They are both ice hockey and *The Republican* All-Scholastic lacrosse players who joined the field hockey team for physical conditioning and ball-handling improvement.[51] Ben became one of the best players "in the history" of Western Massachusetts.[52] Due to his "speed, strength and skill level, Ben was the most lethal offensive player" in the region, leading the area with forty-three goals in only twenty-one games.[53]

These fairness concerns center on whether boys should be able to compete against girls and whether their alleged advantage will lead to their domination of the game, both qualitatively and quantitatively. Courts that have considered the field hockey issue and discussed the physiological differences of male and female high school athletes have not cited studies indicating greater injuries of females when males are participants or that males are able to hit harder than females.[54] A review of national high school track and field records indicates that males do have greater speed and strength ability than females.[55] In fact, the female record holder in these statistics would not qualify for the top ten in the

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[41] Mike White, *Gender Clash; Five Boys On Field Hockey Team At Greensburg C.C. Fuels Crossover Debate*, PITTSBURGH POST-GAZETTE, Sept. 19, 2010, (Two Star ed.), at C2, *available at* http://old.post-gazette.com/pg/10262/1088700-364.stm.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Snowden, *supra* note 38.
[46] *Id.*
[47] *Id.*
[48] *Varsity Girls Field Hockey*, WYOMING SEMINARY COLL. PREP. SCH., http://www.wyomingseminary.org/page.cfm?p=599, (last visited Mar. 19, 2012).
[49] Snowden, *supra* note 38.
[50] Bill Wells, *Brothers Ben And Chris Menard Have South Hadley Field Hockey In Position To Win Its First State Title*, MASSLIVE.COM (Nov. 16, 2010, 11:10 AM), http://highschoolsports.masslive.com/news/article/536395352075891059 4/brothers-ben-and-chris-menard-have-south-hadley-field-hockey-in-position-to-win-its-first-state-title/.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *See infra* Part IV(no specific studies cited).
[55] *See Record Book: Track & Field*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, http://www.nfhs.org/recordbook/Records.aspx?CategoryId=1359 (boys' records), http://www.nfhs.org/recordbook/Records.aspx?CategoryId=1687 (girls' records) (last visited May 1, 2012) (Speed: 100-meter dash: 0:10.15 (b), 0:11.14 (g); 400-meter dash: 0:45.25 (b), 0:50.74 (g); 800-meter run: 1:46.45 (b),

respective male event.[56] The statistics are exceptionally disparate among the sexes in the events that could be considered strength events, such as discus, high jump, javelin throw, long jump, and shot put.[57] Aside from the physical advantage on the field, another negative aspect of allowing integrated teams is that it could significantly reduce the number of athletic opportunities for females.[58] "Even for boys not as talented or as physical as their female teammates, some coaches and parents argue that they should not play because they would be displacing girls from teams . . . ."[59]

B. Safety[60]

The power and physical attributes of boys create not only concerns of fairness, but safety as well.[61] Ben Menard, the star of the brother-duo in Massachusetts, is a lightning rod on this issue. In the 2010 Western Massachusetts title game, Menard collided with Longmedow's senior goalie, Corey Hedges, on a go-ahead goal late in the game.[62] A photo depicts Menard's stick at head level.[63] Hedges suffered a concussion that had lingering effects.[64] Although the debate about safety continues, opponents of boys' participation have not shown a correlation between mixed-gender field hockey teams and an increased risk of injury to female participants.[65]

III. Legal Avenues for Challenge: Title IX, Equal Protection, and Equal Rights

There are three claims common to this context of sex discrimination in interscholastic sports:[66] Title IX,[67] the Equal Protection Clause,[68] and state Equal Rights Amendments.[69] Each one looks at different legal parameters, although the Equal Protection Clause and state Equal Rights Amendments can be very similar depending on the jurisdiction. For the most part, the order in which these are listed range from the least legal protection to perhaps the greatest legal protection. The claims are laid out below and

2:02.04 (g); 1600-meter run: 3:59.51 (b), 4:33.82 (g). Strength: Discus: 236-6 (b), 191-6 (g); High Jump: 7-5$^{3/4}$ (b), 6-4 (g); Javelin Throw: 244-2 (b), 173-0 (g); Long Jump: 26-4$^{3/4}$ (b), 22-1$^{3/4}$ (g); Shot Put: 77-0 (b), 55-4$^{3/4}$ (g)).

[56] *See id.*

[57] *See id.*

[58] Jessica Constance Caggiano, Note, *Girls Don't Just Wanna Have Fun: Moving Past Title IX's Contact Sports Exception*, 72 U. PITT. L. REV. 119, 136–37 (2010).

[59] Wise, *supra* note 40; *see* Matthew Stanmyre, *In New Jersey, Boys Are Shut Out of High School Field Hockey*, NJ.COM (updated Aug. 23, 2011, 5:30 AM), http://www.nj.com/hssports/blog/fieldhockey/index.ssf/2011/08/in_new_jersey_boys_are_shut_out_of_high_school_field_hockey.html (quoting Shore Regional, New Jersey coach Nancy Williams, the nation's winningest field hockey coach at any level as saying, "If you allow boys to play on girls teams, you eliminate opportunities for girls").

[60] At time of submission, this author is unaware of any studies evaluating the affect of boys' participation in interscholastic field hockey on female injuries.

[61] *See generally* Holmes, *supra* note 35 (indicating a debate in Massachusetts concerning whether boys present a safety risk); Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979) (discussing male participation and the risks of female injuries in various sports).

[62] Holmes, *supra* note 35.

[63] *Id.*

[64] *Id.*

[65] *See, e.g.*, Holmes, *supra* note 1 (rule to limit boys' involvement in Massachusetts rejected amidst lack of statistics evidencing correlation; concern among coaches that necessary statistics cannot be produced).

[66] *See infra* Part IV and accompanying cases covering the three types of claims.

[67] Education Amendments of 1972, Pub. L. No. 92–318, tit. IX, 86 Stat. 373 (1974) (codified as amended at 20 U.S.C. §§ 1681–1688 (2006)).

[68] U.S. CONST. amend XIV, § 1.

[69] *See, e.g.*, Mass. Const. art. I, *amended by* Mass. Const. art. CVI.

then followed by five leading cases from Massachusetts, New Jersey, Rhode Island, Pennsylvania, and Maine which have addressed these claims in the field hockey context.

A. Title IX of the Education Amendments of 1972

In 1971, there were 294,015 girls and 3,666,971 boys participating in high school athletics in the United States, which is roughly one girl for every twelve boys.[70] In 2012, there were 3,173,549 girls and 4,494,406 boys participating, which is roughly one girl for every 1.4 boys.[71] The NCAA also saw substantial growth in female participation numbers since 1971, with the highest marks coming in 2012.[72] Many authorities believe that the growth in women's sports is a product of the enactment of Title IX.[73] Title IX has certainly increased athletic opportunities for girls,[74] but it might now be used as an antidiscrimination tool benefiting boys. A brief history Title IX is warranted before evaluations of the claims presented under it are discussed.

Title IX has its origins in testimony from congressional hearings on sex discrimination in education.[75] During the summer of 1970, United States Representative Edith Green chaired a set of hearings on the "Discrimination Against Women."[76] Testimony revealed that a large measure of sex discrimination complaints emanated from educational institutions.[77] Witnesses at the hearings, including members of the Justice Department and of the United States Commission on Civil Rights, recommended that a similar—but more limited—provision to Title VI be constructed.[78] "Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class."[79] "The purpose of Title IX was to apply the same standard prohibiting racial discrimination to gender discrimination."[80] President Richard M. Nixon signed Title IX into law in June of 1972.[81] Title IX provides in relevant part: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

[70] Acosta & Carpenter, *supra* note 4, at 1.
[71] *Id.*
[72] *Id.*
[73] Ross A. Jurewitz, Note, *Playing At Even Strength: Reforming Title IX Enforcement In Intercollegiate Athletics*, 8 AM. U. J. GENDER SOC. POL'Y & L. 283, 285–86 (2000) (citing Warren P. Strobel, *Clinton Fetes Olympians at White House, Credits Title IX for Women's Finish*, WASH. TIMES, Aug. 8, 1996, at A4; *Hearing on Title IX of the Education Amendments of 1972: Hearing Before the House Subcomm. on Postsecondary Educ., Training and Life-long Learning of the House Comm. on Economic and Educ. Opportunities*, 104th Cong., 353 (1995); Brian L. Porto, *Completing the Revolution: Title IX as Catalyst for an Alternative Model of College Sports*, 8 SETON HALL J. SPORT L. 351, 352 (1998)) (arguing that Title IX has played a key role in women's sports, but "is mistakenly viewed by these authorities and the public as either the primary cause of the improvement of conditions for female athletes, or the sole catalyst for their success as athletes." (citations omitted)).
[74] *See id.*
[75] Jurewitz, *supra* note 73, at 290 (citing *Hearings Before the Special Subcomm. On Educ. Of the House Comm. On Educ. And Labor of § 805 of H.R. 16098*, 91st Cong. (1970); Cannon v. Univ. of Chi., 441 U.S. 677, 696 n.16 (1979); 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh)).
[76] Cannon v. Univ. of Chi., 441 U.S. 677, 696 n.16 (1979) (citing *Hearings Before the Special Subcomm. On Educ. Of the House Comm. On Educ. And Labor of § 805 of H.R. 16098*, 91st Cong. (1970)).
[77] Jurewitz, *supra* note 73, at 290 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 696 n.16 (1979)).
[78] *Cannon*, 441 U.S. at 696 n.16 (citing *Hearings Before the Special Subcomm. On Educ. Of the House Comm. On Educ. And Labor of § 805 of H.R. 16098*, 91st Cong. 664–66, 677–78, 690–91 (1970)).
[79] *Cannon*, 441 U.S. at 696 ("Title IX was patterned after Title VI of the Civil Rights Act of 1964.").
[80] Adam S. Darowski, *For Kenny, Who Wanted To Play Women's Field Hockey*, 12 DUKE J. GENDER L. & POL'Y 153, 159 (2005) (citation omitted).
[81] Statement on Signing the Education Amendments of 1972, PUB. PAPERS 701 (June 23, 1972); Eric Wentworth, *Nixon Signs Busing Bill Reluctantly*, WASH. POST, June 24, 1972, at A1.

subjected to discrimination under any education program or activity receiving Federal financial assistance."[82]

Title IX was not explicitly considered in the athletic context until after its enactment.[83] Congress denoted the responsibility of issuing regulations implementing Title IX to the Office of Civil Rights within the Department of Health, Education, and Welfare ("HEW").[84] HEW's regulations were proposed and received comment in 1975.[85] HEW found it appropriate to regulate "extracurricular activities sponsored by entities receiving federal funding, including high school athletic teams."[86] After amendment, the regulations were enacted in July of 1975.[87] In 1979, Congress divided HEW into the Department of Health and Human Services and the Department of Education. Title IX regulation was granted to the Office of Civil Rights within the Department of Education.[88] The applicable regulations for athletics,[89] 34 C.F.R. § 106.41, provide in relevant part:

> (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
>
> (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, 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. However, where a recipient 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. For the purposes of this part, contact sports include boxing, wrestling,

[82] Education Amendments of 1972, Pub. L. No. 92–318, tit. IX, 86 Stat. 373 (1974) (codified as amended at 20 U.S.C. §§ 1681–1682 (2006)).

[83] Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 387 (2000) (citing Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1 (1992); 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, 493–96 (1998)); *Id.* at 412.

[84] Jurewitz, *supra* note 73, at 290 (citing 20 U.S.C. § 1682 (1994)).

[85] Christopher Paul Reuscher, Comment, *Giving The Bat Back To Casey: Suggestions To Reform Title IX's Inequitable Application To Intercollegiate Athletics*, 35 AKRON L. REV. 117, 124–25 (2001).

[86] Darowski, *supra* note 80, at 160 (citing Proposed Title IX Regulations, 39 Fed. Reg. 22,228–240 (June 20, 1974)).

[87] 34 C.F.R. § 106.41 (2011) ("purpose and effective date").

[88] David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal Its Demise*, 47 FLA. L. REV. 741, 754 (1995) (citing Pub. L. No. 96–88, §§ 101–511, 93 Stat. 669 (codified at 20 U.S.C. §§ 3401–3510); 20 U.S.C. § 3441(a)(1), (a)(3) (1995); Cohen v. Brown Univ., 991 F.2d 888, 895 n.7 (1st Cir. 1993)).

[89] The regulations have been largely viewed through a 1979 Policy Interpretation issued by HEW. The Policy Interpretation has been "the most powerful and controversial guidepost in the Title IX regulatory morass." Aronberg, *supra* note 88, at 754 (arguing that the Policy Interpretation has taken on a life of its own and expanded the scope of Title IX beyond its original purpose). Discussion of the Policy Interpretation is beyond the scope of this paper. For the complete text of the Policy Interpretation, see Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 40 Fed. Reg. 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86).

> rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.[90]

Title IX provides two inquiries that could open the door for male athletes to play on traditionally female teams: the Athletic Opportunity Test and the Contact Sports Exception. Both avenues of challenge extend from part (b) of the regulations. The majority of courts have declined to require that male athletes be given the opportunity to join female teams under part (b) of the regulations.[91]

(i) Athletic Opportunities Test

Under subsection (b) of the regulation, if a team is offered for only one sex and the sport is not a contact sport, the opposite sex must be allowed to try-out if "athletic opportunities for members of that sex have previously been limited."[92] The result is shaped by how athletic opportunities are defined.[93] In other words, is the inquiry sport-specific or not? Narrowing the inquiry to field hockey alone would find that boys' opportunities have been previously limited due to the sport being traditionally all-female in the United States. Expanding the inquiry to sports in general would find the opposite, as males have traditionally enjoyed athletic opportunities greater than females. At least one court has found that the inquiry is sport-specific.[94] Other courts have declined to construe the regulation in the same manner, finding that the inquiry is athletic opportunities in general.[95] A discussion of the cases below will provide more detail on this test.

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[90] 34 C.F.R. § 106.41 (2011).

[91] Renee Forseth & Walter Toliver, Note, *The Unequal Playing Field – Exclusion of Male Athletes From Single-sex Teams: Williams v. School District of Bethlehem, PA.*, 2 VILL. SPORTS & ENT. L.J. 99, 103 (1995).

[92] 34 C.F.R. § 106.41(b) (2011).

[93] *See* Darowski, *supra* note 80, at 161–62 (discussing two possible readings of the regulation which narrow and broaden the athletic opportunities inquiry depending on if it is a sport-specific inquiry or not).

[94] *See* Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 665 (D.R.I. 1979) ("The theoretical opportunity to play other sports has never been a justification for sexual discrimination which bars the door to a particular sport . . . . A separate and exclusive female team may be established only when males previously had, and presumably continue to have, adequate athletic opportunities to participate in that sport."), *vacated as moot*, 604 F. 2d 733 (1st Cir. 1979).

[95] *See* Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 174 (3d Cir. 1993) ("We believe that the contrary interpretation adopted by the New York and New Hampshire courts is more persuasive. In *Mularadelis v. Haldane Central School Board*, 74 A.D.2d 248, 427 N.Y.S.2d 458, 461–64 (1980), the court looked at the phrase at issue in the context of the entire regulation. The court noted that the first clause expressly refers to a 'particular sport' ('where a recipient operates or sponsors a team in a particular sport'), and the second clause uses broad and general language, defining the inquiry as whether 'athletic opportunities' for members of the excluded sex have previously been limited. If Congress had intended the inquiry into 'athletic opportunities' to be limited to a 'particular sport,' it would have so stated, particularly since the phrase 'particular sport' was used earlier in the same sentence." (citations omitted)); *Id.*, at 174 n.7 ("Moreover, HEW's interpretation, issued contemporaneously with the regulation, requires inquiry into athletic opportunities 'at the institution in question' rather than in the particular sport. The final regulation was accompanied by explanations addressing comments and questions received by the agency, which stated, 'If tennis is offered for men and not for women and a woman wishes to play on the tennis team, *if women's sports* have previously been limited *at the institution in question* that woman may compete for a place in the 'men's' team.'" (citing 40 Fed. Reg. 24,143 (June 4, 1975))); Kleczek v. R.I. Interscholastic League, Inc., 768 F. Supp. 951, 955 (D.R.I. 1991) ("Plaintiffs here simply can not [sic] point to *Gomes* to support their contention that they are likely to succeed on the merits of their Title IX claim. For one thing, other courts have called into question the necessity of *Gomes*'s construction of the regulation, which disregarded the plain language of the regulation and substituted new language to avoid a feared constitutional problem. Indeed, since the date of the *Gomes* decision, other courts have ruled that it is constitutionally permissible to enforce the plain meaning of the regulations." (citations omitted)).

(ii) Contact Sports Exception

The Contact Sports Exception allows schools to exclude a sex from a team that involves a certain amount of bodily contact. Subsection (b) of the regulation provides in relevant part: "[f]or the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the *purpose* or *major activity* of which involves bodily contact." [96] It can be argued that boxing, wrestling, rugby, and football likely fall into the "purpose" category, while ice hockey and basketball fall more into the "major activity of which involves bodily contact." It is probably easy to dismiss field hockey as having physical contact as its "purpose," although one commentator has noted that determining the purpose of a sport could be more of a philosophical inquiry than a legal one.[97]

To fall within the exception, field hockey will have to be considered as having a major activity that involves bodily contact. Courts have differed over what meets the contact exception.[98] Some courts have required that bodily contact constitute the major activity of the sport, while others simply require that bodily contact be incidental.[99] As can be drawn from some of the actual accounts of the 2010 interscholastic game discussed earlier, physical contact does occur in field hockey. Players run towards a ball with a stick in hand and attempt to hit the ball downfield and into a net. Players must wear eye protective goggles, mouth protectors, and shin guards.[100] One could make the argument that field hockey contains incidental contact similar to basketball, and to a lesser-extent ice hockey, which are both enumerated as contact sports. In basketball, most contact is not allowed outside of traditional "boxing-out" and incidental contact of attempting to possess a loose ball. One commentator has claimed that contact in field hockey is similar to that of basketball.[101] It has been argued that field hockey is more in line with contact sports than non-contact sports.[102] Expert witnesses have testified in relevant cases on the issue, but a clear determination has not been made among them or the courts.[103]

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[96] 34 C.F.R. § 106.41 (2011) (emphasis added).

[97] Darowski, *supra* note 80, at 163 ("Most people would probably say that apart from recreational fun or exercise, the 'purpose' behind playing a particular sport is to win. Still, one could argue that the 'purpose' behind boxing, wrestling, and football, for instance, is the creation of bodily contact between opponents.").

[98] Forseth & Toliver, *supra* note 91, at 102.

[99] *Id.* (citations omitted).

[100] MASS. INTERSCHOLASTIC ATHLETIC ASS'N, RULES AND REGULATIONS GOVERNING ATHLETICS 64 (July 1, 2011 – June 30, 2013), *available at* http://www.miaa.net/gen/miaa_generated_bin/documents/basic_module/MIAAHandbook1113.pdf (Rule 68.1 National Federation of State High School Associations Field Hockey rules shall be used. Rule 68.1.1 All players must wear eye protective goggles approved for field hockey.); *Protective Eyewear Mandated for Field Hockey*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS (Apr. 15, 2011), http://www.nfhs.org/content.aspx?id=5117&terms=field%20hockey%20rules (noting that the requirement will appear in the 2011–2012 NFHS Field Hockey Rules Book); *2011 NFHS National Field Hockey Rules Interpretation PowerPoint*, NAT'L FED'N OF STATE HIGH SCH. ASS'NS, 44 (2011), www.nfhs.org/WorkArea/DownloadAsset.aspx?id=5464 (noting that Rule 1-6 should read: If an entire team has no mouth protectors, shin guards or protective eyewear that meets the ASTM standard for field hockey and they are not immediately available, that team shall forfeit the game.)

[101] Darowski, *supra* note 80, at 163 ("[F]ield hockey is akin to basketball, where physical contact between players is simply inevitable (and expected) but many types of touching can result in fouls.").

[102] *Id.* at 163–64 ("Hard or purposeful contact is against the rules and can result in a foul or penalty being assessed. In this sense the sport of field hockey is akin to basketball, where physical contact between players is simply inevitable (and expected) but many types of touching can result in fouls. Basketball was considered a contact sport in the Title IX regulations. Boxing, wrestling, rugby, ice hockey, football, and basketball all undeniably involve and allow bodily contact in the pursuit of the particular games' objectives. In contrast, in sports like golf, tennis, bowling, badminton, track and field, rowing, skiing, volleyball, gymnastics, softball, and even baseball bodily contact between opponents is rare and not an essential part of the game. Field hockey is more similar to the sports

B. Equal Protection Clause of the Fourteenth Amendment

Another potential avenue of challenge is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Equal Protection Clause provides in relevant part: "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[104] One commentator has noted factors that have limited the scope of protection available under the Equal Protection Clause, including: (1) the requirement of state action; (2) the failure to use strict scrutiny analysis; and (3) the use of a formal equality model of analysis when the sexes are considered not similarly situated.[105]

In the interscholastic context, the Equal Protection Clause has been a legal basis for women attempting to join men's teams. One commentator has argued that in the context of a female athlete wanting to play on a male team, the Equal Protection Clause is both broader and narrower than the Contact Sports Exception of Title IX.[106] It is broader since most courts considering the issue have found that public institutions cannot ban women from trying out for a contact sport.[107] It is narrower in that private institutions, although likely subject to Title IX regulations for accepting some federal funding, are not state actors and can prevent girls from trying out for male teams in a contact sport.[108] Would the same result be true of plaintiffs that are males? Most courts have declined to allow men to try-out for women's teams, even when the school lacks a male team in the same sport.[109]

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listed in the regulation as contact sports than the sports just mentioned that really do not involve bodily contact. Under this line of reasoning, field hockey should be considered a contact sport." (citations omitted)).

[103] *Id.* at 164. *See also* Adam Epstein, *The Fundamentals of Teaching Sports Law*, 4 WILLAMETTE SPORTS L. J. 1, 20 (2007) ("While boxing, wrestling, rugby, ice hockey, football, and basketball are considered contact sports, the law remains unclear regarding field hockey and lacrosse.").

[104] U.S. CONST. amend. XIV, § 1.

[105] Linda J. Wharton, *State Equal Rights Amendments Revisited: Evaluating Their Effectiveness In Advancing Protection Against Sex Discrimination*, 36 RUTGERS L.J. 1201, 1205 (2005) (discussing four factors that limit protection under the Equal Protection Clause with the fourth disparately impacting women (thus, only three listed above)).

[106] Caggiano, *supra* note 58, at 125–26.

[107] *Id.* at 125 (citing Adams v. Baker, 919 F. Supp. 1496, 1505 (D. Kan. 1996) (holding plaintiff was likely to succeed on the merits of her equal protection claim; school could not preclude female student from joining boy's wrestling team); Lantz v. Ambach, 620 F. Supp. 663 (S.D.N.Y. 1985) (enjoining school district from preventing female athlete from trying out for boys' football team as a matter of equal protection); Leffel v. Wis. Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 1978) (holding plaintiffs' constitutional rights were violated by athletic association's rule preventing them from trying out for boy's sports teams)).

[108] *Id.* at 125–26 (citing 20 U.S.C. § 1681(a) (2006)).

[109] *Id.* at 126 (claiming that the majority of courts have declined to allow men to try-out) (citing Clark v. Ariz. Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982) (holding that excluding boys from playing on girls' volleyball teams was not a violation of the equal protection clause because the policy's purpose was to promote opportunities for girls and to remedy past discrimination); Kleczek v. R.I. Interscholastic League, Inc., 768 F. Supp. 951, 956 (D.R.I. 1991) (denying injunctive relief, in part, because plaintiff was unlikely to be successful on the merits of his Equal Protection claim where excluding male student from girl's field hockey team was unlikely to be a violation of the Equal Protection Clause)); Barbara A. Dillon, Topical Survey, *Constitutional Law – He Wore The Skirt But Still Could Not Play The Game – Kleczek v. Rhode Island Interscholastic League, 612 A.2d 734 (R.I. 1992)*, 21 SUFFOLK U. L. REV. 463, 464–65 (1993) (claiming that courts have differed in determining the constitutionality of regulations that prevent males from participating on female teams); Renee Forseth & Walter Toliver, *The Unequal Playing Field – Exclusion of Male Athletes From Single-sex Teams: Williams v. School District of Bethlehem, PA.*, 2 VILL. SPORTS & ENT. L.J. 99, 99–100 (1995) ("Courts have consistently held that the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972 prohibit the exclusion of female athletes from trying out for or participating on male athletic teams. This precedent seemingly affords excluded male athletes a similar avenue to challenge gender-based restrictions. However, numerous judicial interpretations have

Courts apply an intermediate level of scrutiny for an Equal Protection claim based on gender.[110] Intermediate scrutiny requires that the action "serve important governmental objectives and must be substantially related to the achievement of those objectives."[111] Most courts have found two justifications for single-sex participation in athletics that are important governmental objectives: physiological differences between the sexes and rectifying past discrimination against female athletes.[112] Physiological differences focus on the claim that males have a greater physical ability than females and that high school boys are "taller, heavier, and stronger than their girl counterparts and have longer extremities."[113] This claim harkens back to the concerns of both fairness and safety. It also has similarities to the Contact Sports Exception of Title IX. Courts have found that excluding boys from girls' teams is considered substantially related to achieving the objectives of accounting for physiological differences and rectifying past discrimination against women.[114]

Since the enactment of Title IX, interscholastic sports have evolved significantly, and both important governmental objectives under the Equal Protection Clause may now hold less weight. It is arguable as to whether women and men are moving closer or father apart physiologically in the athletic arena. Similarly, with the significant rise in women's athletic participation since Title IX's creation, it is arguable that past discrimination has been sufficiently rectified. Would an Equal Protection claim today survive in light of the potential changes mentioned?

C. Equal Rights Amendments Under State Constitutions

A third avenue of legal recourse is the Equal Rights Amendments adopted by state legislatures. Equal Rights Amendments are designed to eliminate discrimination between the sexes as a class.[115] As of 2005, twenty-two states had adopted an Equal Rights Amendment.[116] Attempts to add an Equal Rights Amendment to the United States Constitution have not been successful.[117] The proposed amendment to the Constitution was approved by Congress in March of 1972, but only thirty-five states ratified it.[118] State Equal Rights Amendments may require a heightened level of scrutiny beyond the intermediate level applied to Equal Protection claims for gender classifications.[119] States that have adopted Equal Rights

declined to extend similar anti-discrimination principles to excluded male athletes." (citations omitted)); Polly S. Woods, Comment, *Boys Muscling In On Girls' Sports*, 53 OHIO ST. L.J. 891, 892 (1992) (citations omitted)).

[110] Craig v. Boren, 429 U.S. 190, 197 (1976). *See also* Barbara A. Dillon, Topical Survey, *Constitutional Law – He Wore The Skirt But Still Could Not Play The Game – Kleczek v. Rhode Island Interscholastic League, 612 A.2d 734 (R.I. 1992)*, 21 SUFFOLK U. L. REV. 463, 463 n.5, 464 n.12 (1993).

[111] *Craig*, 429 U.S. at 197.

[112] Forseth & Toliver, *supra* note 91, at 108 (citations omitted).

[113] Polly S. Woods, Comment, *Boys Muscling In On Girls' Sports*, 53 OHIO ST. L.J. 891, 894–95 (1992) (citing Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979); Gomes v. R.I. Interscholastic League, 469 F. Supp. 659, 662 (D.R.I. 1979), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979); Helga Deutsch, *Sex-Fair Performance Evaluation* (Aug. 13, 1981)).

[114] Forseth & Toliver, *supra* note 91, at 108 (citations omitted).

[115] 16B AM. JUR. 2D *Constitutional Law* § 886 (2012) (citation omitted).

[116] Wharton, *supra* note 105, at 1201–02.

[117] *Id.* at 1202.

[118] Martha F. Davis, *The Equal Rights Amendment: Then And Now*, 17 COLUM. J. GENDER & L. 419, 425–26 (2008).

[119] *See, e.g.*, Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 291 (Mass. 1979) (in applying strict scrutiny to state's Equal Rights Amendment, gender-based classifications are not permissible unless they "further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose").

Amendments provide various constructions.[120] Some states provide for an absolute or literal interpretation.[121] Although, a few of these states have permitted classifications that are reasonably based on physical characteristics identified with one sex.[122] On the other end of the spectrum are states that apply a permissive interpretation requiring that the gender classification be reasonably related to a legitimate state interest.[123] In between the two poles lies strict scrutiny. In fact, most states apply strict scrutiny analysis to equal rights claims.[124]

A heightened level of scrutiny may not result in boys being allowed to play on girls' teams. Action can survive strict scrutiny if the governmental interest is compelling and the method of achieving that compelling interest is narrowly tailored.[125] Sex-based classifications are rejected if gender-neutral alternatives exist.[126] Even under this standard, other alternatives may be considered impractical or unnecessary.[127] Analysis under a state Equal Rights Amendment will require a determination as to the standard of scrutiny applied in that jurisdiction.

IV. Five Cases of Male Field Hockey Players

The cases that follow incorporate the three avenues of litigation discussed above. The case discussions are detailed and may include lower court opinions to provide the reader with a full sense of the judicial analysis and reasoning for the holdings. The cases are provided in chronological order.

A. Massachusetts

The status of boys' eligibility to play field hockey in Massachusetts is shaped by a 1979 Massachusetts Supreme Court case, *Attorney General v. Massachusetts Interscholastic Athletic Association, Inc.*[128] The litigation grew out of a Massachusetts Interscholastic Athletic Association ("MIAA") rule that had been amended in 1976 to provide that a student could not be denied the opportunity to try-out for a team as a result of the athlete's gender, unless the school provided a separate but equal team.[129] The rule change was evidently the result of both the state Board of Education's regulations and the state's adoption of its Equal Rights Amendment[130] that same year.[131] As a result of

[120] 16B AM. JUR. 2D *Constitutional Law* § 886 (2012); *See also* Paul Benjamin Linton, *State Equal Rights Amendments: Making A Difference Or Making A Statement?*, 70 TEMP. L. REV. 907, 911–16 (1997); Wharton, *supra* note 105, at 1239–47 (discussing the various standards among the states).
[121] 16B AM. JUR. 2D *Constitutional Law* § 886 (2012) (citation omitted).
[122] *Id.* (citation omitted).
[123] *Id.* (citation omitted).
[124] Wharton, *supra* note 105, at 1240.
[125] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).
[126] Wharton, *supra* note 105, at 1241.
[127] Woods, *supra* note 113, at 903 (discussing Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855 (Ill. App. Ct. 1979) and Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458, 461–64 (1980)).
[128] Att'y Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979)
[129] *Id.* at 287.
[130] *Id.* at 286 n.4 ("Article 1 of the Declaration of Rights of the Massachusetts Constitution, as amended by art. 106 of the Amendments to the Constitution, ratified by the people on November 2, 1976, provides in part: 'Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.'"). Note also that the case references an educational opportunity statute, Mass. Gen. Laws ch. 76 § 5, which provides in part: "No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion or national origin" and which had provided a higher level of protection against sex discrimination than federal or state constitutions at the time of passage. *Id.* at 286 n.5.
[131] *Id.* at 287.

the 1976 amended rule, Newton South High School allowed two boys to play on its 1978 softball team because a male-only softball team did not exist.[132] In the wake of a suit to prevent the school from competing in post-season play, a rule-making council associated with the MIAA adopted a new provision to the rule stating, "[w]ith due regard to protecting the welfare and safety of all students participating in MIAA athletics: 1) No boy may play on a girls' team. 2) A girl may play on a boys' team if that sport is not offered in the school for the girl."[133] At the time the rule was announced, Pioneer Valley Regional High School had been allowing boys to participate on the field hockey team and other schools were doing the same for various sports.[134] The Pioneer Valley School District and other schools applied for waivers from the rule in the fall of 1978 but were denied.[135]

The court noted that the rule "attacks a small problem with heavy artillery" and that there had been "no demonstration by those defending rule 17(d)(1) that male participation on girls' teams after 1976 was other than limited or that it involved any serious distortion or disruption."[136] Finding that the absolute bar to male participation under 17(d)(1) was prima facie invalid under the state's Equal Rights Amendment, the court looked to the MIAA's offered justifications of ability, safety, and protection against male inundation of female sports.[137] The court applied strict scrutiny to the offered justifications, claiming that under the Equal Rights Amendment, sex classifications are subject to scrutiny "at least as strict as the scrutiny required by the Fourteenth Amendment for racial classifications."[138] Such classifications are not permissible unless they "further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose."[139]

Under the Equal Rights Amendment analysis, the court first addressed the claim that the rule was not based on gender discrimination, but rather on functional differences of the male and female athlete.[140] It noted that if males were always functionally superior to females in sports, total separation might be justifiable, but that the complete superiority of boys is simply not reality.[141] The court determined that the rule was the "intentional use of sex as a discriminant," in violation of the Equal Rights Amendment "unless somehow excused or justified."[142]

The court next evaluated the MIAA's argument that safety of female athletes required the rule and provided justification. The court stated, "a girl is entitled as much as a boy to choose to take a risk, subject always to safety rules and appropriate supervision and equipment."[143] Finding that the statements of the MIAA's medical advisor connecting male participation to female injuries were "replete with stereotypical assumptions and generalities,"[144] the court questioned the results in less-physical sports, and

[132] *Id.*
[133] *Id.* (quoting *MIAA Rules*, Part II § 1, rule 17(d)).
[134] *Id.* at 288.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 290–91.
[138] *Id.* at 291 (citation omitted) (internal quotation marks omitted).
[139] *Id.* (citation omitted) (internal quotation marks omitted).
[140] *Id.* at 293.
[141] *Id.* ("The general male athletic superiority based on physical features is challenged by the development in increasing numbers of female athletes whose abilities exceed those of most men, and in some cases approach those of the most talented men. Coordination, concentration, strategic acumen, and technique or form (capabilities of both sexes) intermix with strength and speed (where males have some biologic advantages) to produce athletic results." (footnotes omitted)).
[142] *Id.*
[143] *Id.* at 294.
[144] *Id.*

found that the risks are not constant throughout all female sports.[145] In finding that the rule violated the Equal Rights Amendment, the court noted that it would have to be more narrowly tailored to survive.[146]

Finally, the court looked at the third proposed justification: the protection of girls' participation in sports. The court determined that this attempt at "affirmative action" was "out of proportion to any looming danger."[147] It also noted that less offensive alternatives were available that had not been attempted,[148] and suggested height, weight, and skill standards, as well as limiting the number of male participants.[149]

In this opinion, the Massachusetts Supreme Court reviewed physiological differences and redressing past discrimination against women as proffered governmental objectives that are traditionally offered under an Equal Protection claim. Even though the court applied a strict scrutiny analysis due to the state's Equal Rights Amendment, the court's findings that males are not always physiologically superior to females and that safety concerns are not constant throughout sports are significant for litigants. It is also important to note the court's determination that there was no evidence to indicate that male participation involved any serious disruption to female opportunities and that the action was not proportional to any looming danger. Even under the less-heightened standard of scrutiny of the Equal Protection Clause, it appears that the Massachusetts court could reach the same conclusion. But, consider that the court left open the door for safety and affirmative action to qualify as demonstrably compelling interests if evidence could demonstrate that a true interest existed. In this regard, the court would require an actual threat to women's opportunities and a more narrowly tailored action with respect to the safety claim. Other questions remain after this opinion as well, such as: could the MIAA exclude boys from a specific sport, such as field hockey, specifically based on safety (as opposed to a no-boys-on-girls'-teams ban); what threshold of male participation is enough to threaten female opportunities in athletics; and are we in a different factual scenario today than in the late 1970s that would result in a different outcome?

B. New Jersey

In 1985, the New Jersey State Interscholastic Athletic Association had adopted a resolution preventing males from playing on female athletic teams to promote equal athletic opportunities and to redress past discrimination of girls' athletics.[150] Pursuant to the regulation, C.C. who had played junior varsity field hockey his freshman year, was no longer allowed to participate.[151]

Interestingly, the testimony provided at an administrative hearing included that of Richard Neal, the then-director of the Massachusetts Interscholastic Athletic Association.[152] Neal testified that in his opinion, the 1979 Massachusetts decision allowing boys to play girls' field hockey had proven disastrous because of safety, intimidation, male dominance, and displacement of female athletes.[153] The

[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* (noting that for an exhaustive analysis of "less restrictive alternatives," see Note, *Equal Protection: A Closer Look at Closer Scrutiny*, 76 MICH. L. REV. 771, 871–881 (1978)).
[149] *Id.* at 295. But, note the court stated, "[o]ur mention of alternative patterns is intended merely to throw light on the question of the constitutional validity of the Draconian choice made by the defendants." *Id.*
[150] B.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist., 531 A.2d 1059, 1061 (N.J. Super. Ct. App. Div. 1987)
[151] *Id.*
[152] *Id.* at 1062.
[153] *Id.* ("He testified that while approximately only 20 to 30 boys have participated on girls' teams since that decision, their impact upon the girls' interscholastic sports has been highly detrimental. Neal testified that permitting boys to play on girls [sic] teams caused safety problems and resulted in the intimidation of females which permitted male dominance in volleyball, softball, soccer and field hockey teams. As a result, girls were displaced in sports where they had previously participated. He recounted that on one occasion a girl participant sustained serious

Administrative Law Judge ruled in favor of C.C., finding that no substantial public interest was served by the exclusion of males, and, therefore, the ban based entirely on gender was a violation of the New Jersey Constitution and statutes forbidding discrimination in interscholastic sports on gender alone.[154] The Commissioner of the Athletic Association rejected the Administrative Law Judge's conclusion.[155]

On appeal in state superior court, the plaintiff-petitioner argued that the rule violated the New Jersey Constitution and the New Jersey Law Against Discrimination,[156] and that they provide greater protection than the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[157] The court found that the rule withstood the intermediate scrutiny of the Equal Protection Clause of the Fourteenth Amendment.[158] The court based this determination on its finding that the rule's purpose was to achieve equality of athletic opportunity for both sexes and to remedy the past discrimination of women's athletic opportunities.[159] It found that providing an equal opportunity goal for women was an important governmental objective, and that the rule provided an "appropriate and proper" method of achieving that goal.[160] It also noted that other jurisdictions had reached the same determination.[161] The court noted a Sixth Circuit case where it was observed that "it takes little imagination to realize that were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement."[162] The court found that the petition failed under the state Constitution for the same reasons it had under the federal Constitution.[163] It also failed under the Law Against Discrimination because reasonable restrictions are allowed where they promote important governmental objectives.[164]

The New Jersey opinion demonstrates that providing equal athletic opportunities for women is an important governmental objective and excluding boys is substantially related to that objective and, thus, survived an Equal Protection Clause challenge. Unlike the Massachusetts court, this court reviewed the proffered reasons for the rule under an intermediate level of scrutiny. The court's language divided the proffered reason of women's athletic opportunities into both rectifying past discrimination and achieving equality. This language means that this court finds maintaining a level of equality to be an important governmental interest. The court was less reluctant than the Massachusetts court to require hard facts indicating an erosion of women's opportunities, instead relying on "little imagination" (albeit imagination from the Sixth Circuit).

injuries as a direct result of a boy's participation in an integrated sport. Neal noted that in the 1985 field hockey season at one school, five senior boys played on the girls' field hockey team. He stated that the boys' presence intimidated other girls' field hockey opponents and, in addition to displacement of girls in integrated sports, other girls were quitting girls' teams as a direct result of boys' participation.").

[154] *Id.*

[155] *Id.* at 1063.

[156] *Id.* (citing N.J. STAT. ANN. 10:5-1 et seq and N.J. STAT. ANN. 18A:36-20).

[157] *Id.*

[158] *Id.* at 1065.

[159] *Id.*

[160] *Id.*

[161] *Id.* ("We note, as did the Commissioner, that this conclusion is supported by decisions of other jurisdictions: *Clark v. Arizona Interscholastic Association*, 695 F.2d 1126 (9th Cir.1982) *cert. den.* 464 U.S. 818, 104 S.Ct. 79, 78 L.Ed.2d 90 (1983); *Mularadelis v. Haldane Central School Board*, 74 A.D.2d 248, 427 N.Y.S.2d 458 (N.Y.App.Div.1980); *Petrie v. Illinois High School Association*, 75 Ill.App.3d 980, 31 Ill.Dec. 653, 394 N.E.2d 855 (Ill.App.Ct.1979); *Forte v. North Babylon Union Free School District Bd. of Ed.*, 105 Misc.2d 36, 431 N.Y.S.2d 321 (N.Y.Sup.Ct.1980).").

[162] *Id.* at 1066 (citing Cape v. Tenn. Secondary Sch. Athletic Ass'n, 563 F.2d 793, 795 (6th Cir. 1977)).

[163] *Id.*

[164] *Id.*

C. Rhode Island

In 1991, the Rhode Island Interscholastic League, Inc. ("RIIL") was met with a similar challenge as Massachusetts regarding its rule[165] which prohibited boys from competing on girls' field hockey teams.[166] The plaintiffs in *Kleczek v. Rhode Island Interscholastic League, Inc.*[167] were the parents of seventeen-year-old Brian Kleczek who had attempted to receive a waiver from the RIIL to play with the South Kingston High School girls' field hockey team.[168] The plaintiffs claimed that the rule violated Article I, Section II of the Rhode Island Constitution, which provided in part that "no person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws" and that "no otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state."[169] Since Article I, Section II, which was adopted in 1986, had not been interpreted by the Rhode Island Supreme Court, the applicable standard of review was a matter of first impression for the trial court.[170]

The Superior Court sought to answer three questions: (1) whether state action was present; (2) if so, what standard of review applied; and (3) whether the RIIL's restriction violated Article I, Section II of the state constitution?[171] In finding that state action was present in the RIIL's ban, the court noted that the "League is supported by membership dues of public schools and gate receipts from public facilities" and that the "League's involvement with the state as a source of funding . . . would clearly constitute state action."[172]

The court looked to how other states had reviewed their respective constitutional measures providing equal rights.[173] It found that three levels of scrutiny have been applied: intermediate, strict, and an absolute bar.[174] The court concluded that strict scrutiny was the standard that should be applied to gender classifications, and, thus, required a compelling state interest.[175] The court dismissed the absolute bar standard by finding it a "rigid position," and dismissed the intermediate standard by finding protection against gender discrimination to be constitutionally mandated with gender as a "suspect classification" alongside race.[176]

In finding the rule unconstitutional under the Rhode Island Constitution for lack of a compelling state interest,[177] the court noted that "[w]hile there is no general right to play field hockey, once it is made available as part of defendants' programs, it must be open to all."[178] The court stated, "[p]roviding girl-

[165] *R.I. Interscholastic Rules and Regulations*, Art. 25 § 1 (1989–1991 ed.).
[166] *See* Kleczek v. R.I. Interscholastic League, PC 91-5475, 1991 WL 789881, at *4 (R.I. Super. Sept. 27, 1991) ("In fact, in that case, the Supreme Judicial Court of Massachusetts considered the very same issue which is being considered here: does an interscholastic association rule prohibiting boys from playing on a girls' field hockey team violate rights under a state equal rights amendment?"), *vacated by*, 612 A.2d 734 (R.I. 1992).
[167] PC 91-5475, 1991 WL 789881, (R.I. Super. Sept. 27, 1991), *vacated by*, 612 A.2d 734 (R.I. 1992).
[168] *Id.* at *1.
[169] *Id.* (quoting R.I. Const. Art. I § II) (internal quotation marks omitted).
[170] *Id.* at *2.
[171] *Id.*
[172] *Id.*
[173] *Id.* at *3.
[174] *Id.*
[175] *Id.* at *4.
[176] *Id.*
[177] *Id.* at *6–7.
[178] *Id.* at *6 (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (Colo. 1977)).

only competition in field hockey through a blanket exclusion of boys does nothing to benefit girls" and is "counterproductive and simply reinforces the insidious notion of female inferiority."[179] The court also thought that a complete ban on boys in field hockey was "out of proportion to any danger of girls being displaced from athletics."[180] The court used similar language to the Massachusetts's court in its reasoning.[181]

The RIIL appealed the Superior Court's decision to the Rhode Island Supreme Court.[182] The Rhode Island Supreme Court disagreed with the reasoning of the Massachusetts court,[183] which had been cited by the lower court. The court found the development of Rhode Island's equal protection law to be different from its counterpart in Massachusetts and not an Equal Rights Amendment.[184] The court believed that article I, section II of the Rhode Island Constitution was an adoption of an equal-protection and nondiscrimination clause, not an equal rights amendment, allowing for different levels of scrutiny based on the classification.[185] The court concluded that an intermediate level of scrutiny is to be applied to gender classifications, particularly for those which affect athletic opportunities for boys and girls.[186] The court reasoned that the sexes have innate physiological differences rendering them not similarly situated at the entrance of athletic competition.[187] Therefore, gender classifications may be justified if they reflect reasoned judgments.[188] The court cited *Petrie v. Illinois High School Association*[189] as support for the opinion that boys are not similarly situated as they enter athletic competition.[190] Following *Petrie*, the court noted that there is a long tradition of having separate teams for males and females,[191] and that this tradition is not based on archaic and overbroad generalizations or romantic paternalism,[192] but rather "on a realization that 'high school boys are substantially taller, heavier and stronger than their girl counterparts.'"[193] Additionally, the court found that "the classifications are based on the realization that distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls."[194] Although leaving the task of determining whether the League's rule would pass intermediate scrutiny (i.e. the action must serve an important governmental objective and be substantially related to that objective) for the trial judge, the court opined that "the promotion of safety and the

[179] *Id.*
[180] *Id.*
[181] *Id.* at *5–7.
[182] Kleczek v. R.I. Interscholastic League, 612 A.2d 734 (R.I. 1992).
[183] *Id.* at 738.
[184] *Id.* ("The development of Rhode Island equal-protection law is different from the development of Massachusetts' equal-protection law in several respects. Rhode Islanders' adopted an equal-protection clause and an antidiscrimination clause when they adopted art. 1, sec. 2, of the Rhode Island Constitution. Massachusetts, on the other hand, adopted an equal-protection clause that was specifically intended to function as an [Equal Rights Amendment]. As is fully explained later in this opinion, it is clear that Rhode Islanders' did not adopt such a measure. Moreover, the constitutional amendment that became art. 1, sec. 2, was passed to bring Rhode Island equal-protection law on par with federal equal-protection law. It is clear that federal equal-protection law requires intermediate scrutiny for gender classifications."); *See also Id.* at 738 n.4 ("It is important to note that art. 1, sec. 2, of the Massachusetts Constitution was adopted specifically as an [Equal Rights Amendment].").
[185] *Id.* at 740.
[186] *Id.* at 738.
[187] *Id.*
[188] *Id.*
[189] Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855 (Ill. App. Ct. 1979).
[190] *Kleczek*, 612 A.2d at 738.
[191] *Id.* at 739 (citing Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979)).
[192] *See id.*
[193] *Id.* (quoting Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979)).
[194] *Id.*

preservation of interscholastic athletic competition for both boys and girls constitute an important governmental interest."[195]

In the Rhode Island Supreme Court opinion, the court was forthright in holding that preservation of athletic competition and safety qualify as important governmental objectives. It also is important to note the court's stance that appears to be in opposition to the Massachusetts's court regarding the physiological differences between the sexes. Recall that Massachusetts found males to lack total superiority over females. Rhode Island appears to point to a finding that boys are physically superior to girls, enough so that the sexes can be treated differently. Going a step beyond the New Jersey court, the Rhode Island Supreme Court found the physiological difference by citing to the Illinois case of *Petrie*. The question remained whether the rule was tailored in a fashion to qualify as being substantially related to the objectives. Even though the Rhode Island court was evaluating the claims under the lesser standard of scrutiny, it made some different findings than its Massachusetts counterpart, while also giving credibility to a similar decision by a mere trial court in New Jersey.

D. Pennsylvania

In 1992, another challenge in the field hockey context emerged, this time in the Eastern District Court of Pennsylvania in *Williams v. School District of Bethlehem*.[196] In August of 1990, fourteen-year-old John Williams and another male student tried out for the Liberty High School field hockey team in the Bethlehem School District.[197] Williams had been selected for the junior varsity team and was issued equipment and a team uniform.[198] At the end of August, the school district notified the coach that boys were not allowed to play on the girls' field hockey team.[199] The plaintiffs—the parents of Williams—claimed that barring him from playing field hockey violated Title IX, the Equal Rights Amendment of the Pennsylvania Constitution, and the Fourteenth Amendment to the United States Constitution through the Equal Protection and Due Process Clauses.[200]

The court began with an evaluation of the Title IX claim. The court reviewed the language of Title IX and determined that field hockey is not considered a contact sport.[201] First, the court specifically focused on the exclusion of field hockey with the inclusion of ice hockey on the enumerated contact sports list at the time of Title IX's drafting.[202] Second, the court looked to the rules of the game to determine that virtually every instance of bodily contact was a violation or foul, and, thus, would be illogical to conclude that bodily contact is a purpose or major activity of the game.[203] Third, none of the affiants claimed that bodily contact is the purpose of a major activity of the sport.[204]

The court then looked at the question of whether athletic opportunities for the excluded sex had previously been limited.[205] The court noted that since the district's implementation of a plan to increase athletic opportunities for women in 1973, opportunities for men have been limited.[206] It construed the

[195] *Id.*
[196] 799 F. Supp. 513 (E.D. Pa. 1992), *rev'd*, 998 F.2d 168 (3d Cir. 1993).
[197] *Id.* at 514.
[198] *Id.*
[199] *Id.*
[200] *Id.* at 515.
[201] *Id.* at 516.
[202] *See id.*
[203] *Id.* at 516–17.
[204] *Id.* at 517.
[205] *See id.*
[206] *Id.* at 517–18 ("In an effort to comply with Title IX, the defendant has established at Liberty High School ten sports teams which are exclusively for girls, ten teams designated as boys' teams but for which the girls may also

term "previously" to refer to a "reasonable time in the past," which includes current limitations.[207] It found that the factual account of at least eighteen years of athletic opportunity limitations for males, including current enforcement, met the Title IX requirement of previous limitation of athletic opportunities for the excluded sex.[208]

Although the Title IX holding was dispositive, the court went on to discuss the 42 U.S.C. § 1983 claims of Equal Protection and Due Process brought by the plaintiffs for the "sake of completeness."[209] Because the court's analysis is relevant to the discussion of the various legal avenues for a male field hockey player, it is included here. First, the court found that the government interest in remedying past discrimination of girls was not justified in the current situation that affects students at the school who mostly were not alive when the redress began.[210] But, the court did determine that "awareness of, and accommodation to, biological differences between males and females in high school athletic programs may, in appropriate circumstances, be substantially related to the important government interest of *maintaining equality* of athletic opportunity."[211] The court acknowledged that "boys, on average, have a size and weight advantage over girls at the high school level, and that such advantage increases between ages fourteen and eighteen, the usual span encompassed by the high school years."[212] The court also noted that an absolute bar on accounting for the physiological difference of the sexes could ultimately restrict athletic opportunities for girls.[213] Yet, the court found that in the case at bar, the policy against boys was not substantially related to furthering the government interest of maintaining equality of athletic opportunities due to unsupported assumptions and broad generalizations underlying the policy.[214] The evidence in the record demonstrated that in the defendant's experience, the "interest among boys and girls in playing on a team designed for the opposite sex is both small and approximately equal."[215] There was no evidence to support the defendant's assertion that even one female would be deprived the opportunity to play because of male participants.[216] The court believed that the defendant had relied on opinions lacking factual support in its argument for the preclusion of summary judgment.[217] The court, therefore, found a violation of the Equal Protection Clause.[218] It also found that the Equal Rights Amendment to the Pennsylvania Constitution was due at least as much scrutiny as the Equal Protection Clause of the

try-out, and two teams designated as co-ed. Thus, since the new policies were implemented, boys have been permitted to try-out for twelve teams, while girls could try-out for all twenty-two teams offered at Liberty High School. Moreover, a girl who is good enough could play on a boys' team for which there is no comparable girls' team, such as wrestling, as well as on a boys' team in a sport for which there is also a girls' team, such as basketball. On the other hand, a boy such as the plaintiff in this case, who wishes to play a non-contact sport for which a boys' team is not offered, may not try-out or play for the girls' team." (citations omitted)).

[207] *Id.* at 518.

[208] *Id.* ("We conclude, therefore, that, in this instance, defendant is violating Title IX by excluding boys from the field hockey team since there is no boys' team for that sport, field hockey is a non-contact sport and the excluded sex, males, have previously been denied athletic opportunities.").

[209] *See id.* at 518 n.5.

[210] *See id.* at 519.

[211] *Id.* (emphasis added).

[212] *Id.*

[213] *Id.*

[214] *Id.* at 520 ("The substance of defendant's argument is that the average boy is bigger, stronger, faster and has a longer reach than the average girl. Permitting any boy, therefore, to try-out and play for the field hockey team will have the effect of flooding the team with boys, who will then certainly dominate it to the exclusion of girls who wish to play field hockey.").

[215] *Id.*

[216] *Id.* at 521 (noting that the team barely had enough players at times and that it was the coach's policy to let anyone play who tried-out).

[217] *Id.*

[218] *See id.*

Fourteenth Amendment to the United States Constitution and, thus, was also violated.[219] The court granted summary judgment for the plaintiffs.[220]

The School District appealed the granting of summary judgment.[221] The Third Circuit Court of Appeals began its discussion with a review of the Title IX claims. The court stated that the corresponding regulation[222] to Title IX "does not preclude a school from maintaining a team for one sex only."[223] The court acknowledged that all parties agreed that "the 'purpose' of field hockey, unlike boxing, wrestling, or football, does not involve bodily contact."[224] The court articulated that the district court may have "misapprehended the legal inquiry" with respect to the Contact Sports Exception.[225] The court found a distinction between "whether a major activity of field hockey 'involves bodily contact' (the regulation's language) or whether bodily contact 'is the purpose or major activity of field hockey,' the language used by the district court and the plaintiffs."[226] It found that the district court had viewed the inquiry in the latter form.[227] The defendants had raised an issue of material fact regarding whether a major activity of the sport involves bodily contact.[228] The court noted that "[i]t is not insignificant that the . . . rules . . . require mouth protectors and shin guards, prohibit spiked shoes, require that artificial limbs be padded, and prohibit wearing jewelry. These rules suggest that bodily contact does in fact occur frequently and is expected to occur during the game."[229] The court disclosed its limitation of the inquiry by stating that unlike a trial court that is in a position to make its own findings of fact,[230] it is not in a position to hold that field hockey is a contact sport.[231] It did hold that with respect to the contact sports issue, there was sufficient evidence to preclude a summary judgment decision for the plaintiffs.[232]

The court next addressed the issue of previous limitations of athletic opportunities for the excluded sex. Plaintiffs argued in the district court that the inquiry is sport-specific, meaning the parameters are boys' opportunities in field hockey itself.[233] The Court of Appeals disagreed with the plaintiffs' interpretation.[234] Instead, the Court of Appeals agreed with other jurisdictions in finding that

[219] *Id.* at 522.
[220] *Id.*
[221] *See* Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168 (3d Cir. 1993).
[222] *Id.* at 172 (citing 34 C.F.R. § 106.41 (1990)).
[223] *Id.* ("The touchstone of the regulation is to effectively accommodate the interests and abilities of male and female athletes so that individuals of each sex have the opportunity to have competitive team schedules which equally reflect their abilities." (citations omitted) (internal quotation marks omitted)).
[224] *Id.* at 173.
[225] *Id.*
[226] *Id.*
[227] *Id.* ("The district court's inquiry as to the major activity suggests that bodily contact can be deemed a 'major activity' of a sport only if it is sanctioned activity. We believe that limiting the inquiry in that way would be duplicative of the 'purpose' inquiry. Instead, the 'major activity' prong takes into account the realities of the situation on the playing field.")
[228] *Id.*
[229] *Id.*
[230] The court reviewed the limited precedent on the issue. It cited Kleczek v. R.I. Insterscholastic League, 768 F. Supp. 951 (D.R.I. 1991) and Gil v. N.H. Interscholastic Athletic Ass'n, No. 85-E-646, slip op. at 4 (N.H. Super. Ct. Nov. 8, 1985) (unpublished decision) as two trial courts finding that bodily contact does occur, even if incidental or illegal. *See Williams*, 998 F.2d at 173.
[231] *Williams*, 998 F.2d at 173.
[232] *Id.* at 173–74.
[233] *Id.* at 174.
[234] *Id.* at 174–75.

Congress did not intend for the inquiry to be limited to a particular sport.[235] The court stated, "[i]f Congress had intended the inquiry into 'athletic opportunities' to be limited to a 'particular sport,' it would have so stated, particularly since the phrase 'particular sport' was used earlier in the same sentence."[236] As the defendants argued, the plaintiffs' interpretation would mean that there could never be an instance where a non-contact sport existed for only one sex without limiting the athletic opportunity for the other sex.[237] The court stated that such an interpretation would make the regulatory phrase in question trivial.[238] It affirmed the district court's holding that the relevant inquiry is overall athletic opportunities, rather than sport-specific.[239]

Additionally, the court concluded that the district court had not properly analyzed the limited opportunities inquiry.[240] The district court had looked at the opportunity to try-out for a team as the determinative factor, whereas the Third Circuit found the inquiry to be whether there were "real opportunities, not illusory ones."[241] The court reversed the summary judgment grant on the Title IX issue of limited opportunities and remanded for further factual findings, including whether "meaningful physiological differences between boys and girls of high school age negate the significance of allowing girls to try out for boys' teams but not allowing the reverse."[242] In other words: whether the female opportunities to be on male teams were real opportunities. The court noted that "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in high schools as well as colleges."[243]

In following precedent holding that constitutional claims are subsumed in Title IX,[244] the court held that the district court should have exercised restraint in regards to the section 1983 federal claims.[245] The court did not reach the constitutional issues and vacated the district court's decision on the section 1983 claims.[246]

The court then reviewed the district court's judgment as to the Equal Rights Amendment of the Pennsylvania Constitution.[247] The Pennsylvania Supreme Court has determined that its Equal Rights Amendment "does not prohibit differential treatment among the sexes when . . . that treatment is reasonably and genuinely based on physical characteristics unique to one sex."[248] Therefore, the validity of the School District's action depends on whether there are "physical characteristics unique to boys

[235] *Id.* (citing Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458, 461–64 (N.Y. App. Div. 1980); Gil v. N.H. Interscholastic Athletic Ass'n, No. 85-E-646, slip op. at 31–32 (N.H. Super. Ct. Nov. 8, 1985) (unpublished decision)).
[236] *Id.* at 174 (citing Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458, 461–64 (N.Y. App. Div. 1980)).
[237] *Id.*
[238] *Id.*
[239] *Id.* at 175.
[240] *Id.*
[241] *Id.* at 174 ("If, to satisfy title IX, all that the School District were required to do was to allow girls to try out for the boys' teams, then it need not have made efforts, only achieved in 1989, to equalize the numbers of sports teams offered for boys and girls.").
[242] *Id.* at 175.
[243] *Id.*
[244] *Id.* at 176 (citing Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990)).
[245] *Id.*
[246] *Id.*
[247] The district court had not separately discussed the Pennsylvania Equal Rights Amendment other than to hold that since the Equal Protection clause of the U.S. Constitution had been violated, the Pennsylvania E.R.A. had also been violated. The Third Circuit reviewed the district court's federal Equal Protection analysis as if it had been applied to the Pennsylvania E.R.A. *Id.* at 176–77.
[248] *Id.* at 177 (quoting Fischer v. Dep't of Pub. Welfare, 502 A.2d 114, 125 (Pa. 1985) (internal quotation marks omitted)).

which warrant differential treatment."[249] Real physical differences between the two sexes render them "not similarly situated as they enter into most athletic endeavors"[250] and "exclusion based on sex may be justified."[251] The issue of physical differences between the sexes raises a question of fact which precludes summary judgment.[252] On a related issue of whether allowing boys to play field hockey would displace girls from the team, the court stated that the district court must first resolve the factual question as to the physiological differences between the two sexes.[253]

The Supreme Court of Pennsylvania had yet to decide the level of scrutiny required under its Equal Rights Amendment, and the court expressed hesitation in deciding the issue before the state judiciary had spoken.[254] In fact, the level of scrutiny may not have been a dispositive issue because the School District *could* potentially meet even the strict scrutiny bar.[255] The court determined that since the disposition could turn on the level of scrutiny, it was necessary to decide the applicable level.[256] It concluded that in the absence of a Pennsylvania Supreme Court decision on the issue, it was better to require the more favorable standard to the plaintiff of strict scrutiny considering the "strong state policy to equalize opportunities for the sexes."[257] The district court's rejection of rectifying past discrimination against females as a legitimate government interest was considered a "narrow view" and overlooked "the possibility that the vestiges of longstanding discriminatory practices may still inhibit high school girls from actively pursuing athletic opportunities."[258] Only after the physiological difference inquiry is made, could the court then consider whether the policy is necessary to preserving meaningful athletic opportunities for girls and/or whether there is a need to rectify past discrimination.[259] The case was remanded to the district court for factual findings.[260]

The two opinions from the federal judiciary in Pennsylvania provide significant discussion of the issues under all three avenues for litigants. The district court's findings that Title IX had limited the opportunities for boys and that field hockey was not a contact sport could have far reaching effects and solve many challenges if found to be persuasive by other jurisdictions. The past discrimination finding for males since Title IX's enactment is an interesting and unintuitive viewpoint. Interestingly, the district court had found that past discrimination of females would no longer serve as a justification, but protection of maintaining athletic opportunities could. It is also relevant to note that the school barely had enough people to field a team, which is why the lower court had found that women's opportunities would not be affected. In light of this finding, what is the result when the factual scenario is altered and girls are missing out on playing as a result of the boys? Perhaps important at the time of the decision was the determination by the Court of Appeals that precedent points to federal claims being subsumed under Title IX actions. However, the case relied on by the Court of Appeals for that precedent[261] was recently abrogated by the United States Supreme Court in *Fitzgerald v. Barnstable School Committee*.[262] The

[249] *Id.* at 177–78.
[250] *Id.* at 178 (quoting Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 863 (Ill. App. Ct. 1979)) (internal quotation marks omitted).
[251] *Id.* at 178 (citing Bartholomew v. Foster, 541 A.2d 393, 397 (Pa. Commw. Ct. 1988)).
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* (citation omitted).
[256] *Id.*
[257] *Id.*
[258] *Id.* at 179.
[259] *Id.*
[260] *Id.* at 170.
[261] *See id.* at 176 (citing Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990)).
[262] 555 U.S. 246 (2009) (holding that Title IX was not intended to be an exclusive remedy for gender discrimination claims in education or a substitute for Equal Protection Clause claims for enforcing constitutional rights).

Court of Appeals is also clear that much of the results turn on factual findings regarding the physiological differences between the sexes. Citing to the same Illinois case that Rhode Island had evaluated, the court noted how males are not similarly situated to females as they enter most athletic competition. It is clear that the court is not willing to claim males have physical dominance in all athletic endeavors, but it does so in softer language than the Massachusetts court.

E. Maine

In 1999, the Maine Superior Court of Cumberland County addressed the issue of two boys who had been banned from playing field hockey in their high schools.[263] The Maine Principals Association (MPA) was a non-profit association responsible for the "interscholastic invitational athletic competition and tournaments for its member public and private high schools and establishe[d] the rules for qualification for post season championship play."[264] The rule in question designated field hockey as a girls sport, making boys ineligible for contests affecting tournament competition and requiring a forfeiture by a team in each game a boy played for the team.[265] Ignoring federal or state constitutional rights and Title IX, the plaintiffs only made claims that the ban against boys' participation violated The Maine Human Rights Act, which made it unlawful to deny any person equal opportunity in athletic programs based on sex.[266] Field hockey had been designated a girls' sport due to high rates of male participation in football during the fall season and a need under the regulations to effectively accommodate girls' athletic interests and abilities.[267]

The court found that boys had not been denied an equal athletic opportunity, focusing on the overall program rather than the individual sport.[268] According to the court, the corresponding regulations to The Maine Human Rights Act place superior status on the overall equal athletic opportunity of a sex as compared to the right to not be excluded from a particular team based on gender.[269] The regulations provide that teams are not required to be integrated or identical for both sexes to satisfy the overall equal athletic opportunity required.[270] One of the rights of students addressed by the regulations is "the right not to be excluded on the basis of gender from a specific sport unless the inclusion of both sexes will likely result in an overall lessening of equal opportunities in athletics for one sex."[271] Therefore, the specific issue the court reviewed was whether male participation would likely result in "an overall lessening of equal opportunity in athletics for girls."[272]

In reviewing the effect boys would have on the game, the court extensively noted:

> High school age boys are, as a group, bigger, faster and stronger and more powerful than high school girls. Physiologically they have superior cardiovascular endurance and aerobic capacity. . . . This puts boys at a genetic advantage. . . . [B]ecause of their longer limbs and greater strength boys are faster to the ball. Because of their superior strength and power boys can hit the ball harder and faster and farther. . . . [B]oys have the capacity to dominate integrated field hockey games. . . . [B]oys

[263] Me. Human Rights Comm'n v. Me. Principals Ass'n, No. CV-97-599, 1999 Me. Super. LEXIS 23 (Jan. 21, 1999).
[264] *Id.* at *2.
[265] *Id.* at *12–13.
[266] *Id.* at *3–5; *id.* at *3 n.1.
[267] *Id.* at *9–10.
[268] *Id.* at *7–8.
[269] *Id.* at *9.
[270] *Id.* at *5–6.
[271] *Id.* at *7 (citation omitted) (internal quotation marks omitted).
[272] *Id.* at *3.

> of similar age and experience intimidate girls and affect the way girls play field hockey.[273]

The court found that the evidence established that allowing boys to participate on a co-ed field hockey team would likely result in the overall lessening of equal opportunities for girls in athletics, and, therefore, upheld the rule under the state's Human Rights Act.[274]

Even though the court reviewed the claim under a state law, the Maine court opinion provides another example of a judicial body finding that past athletic opportunities is not sport-specific and that boys have an advantage over girls in the athletic arena. In perhaps the most elaborate language since the oft-cited Illinois case of *Petrie*, the court provided a detailed analysis of the relative athletic abilities of the two sexes. The Maine regulations provided protection of athletic opportunities as a reason for excluding boys. In opposition to the Massachusetts court, the court in Maine found that allowing boys access to the team would likely lessen athletic opportunities for girls, and that "likely" was an adequate threat to exclude boys.

V: Where do Athletic Associations go from Here?

A. Alternatives to an Outright Ban: Considerations of Surviving a Strict Scrutiny Standard

As evidenced by the cases discussed, the greatest legal challenge for defendants is the state Equal Rights Amendments that apply an absolute ban or a strict scrutiny analysis. For over three decades, Massachusetts has been subject to the 1979 court ruling that held the outright ban on male participation to be unconstitutional under the state's Equal Rights Amendment. According to MIAA spokesman Paul Wetzel, "Coaches don't like [the rule]. [Athletic directors] and principles don't like it. The parents, they hate it. . . . (But) it's part of our state constitution. So that's where we're at."[275] Where does that leave athletic associations that want to limit or exclude males from competing on women's field hockey teams?

Under strict scrutiny, the MIAA will have to create rules that are narrowly tailored to achieving important governmental objectives. Recently, the MIAA has considered how boys can participate on girl's teams, while addressing the concerns of fairness and safety. In April of 2011, the MIAA Field Hockey Committee voted twelve to zero in favor of a rule change to limit the participation of boys.[276] The vote came amid coaches' concerns that boys are "dominating the game"[277] and creating a "major safety issue for the girls."[278] The vote only sent the proposed rule change to the larger MIAA Board of Directors for approval.[279] The rule change proposal had three parts, including: no boy is allowed to play inside the striking circle (the sixteen-yard semi-circle around each goal), mixed-gender teams may play no more than two boys at a time, and during tournament games of mixed-gender teams versus girls' teams, a mixed-gender team may play no more than one boy in seven-on-seven overtime periods.[280] The committee considered separating the rule change to prevent a complete overturn amid a legal challenge,

[273] *Id.* at *14–15.
[274] *Id.* at *16.
[275] Stanmyre, *supra* note 59.
[276] Bob Holmes, *Boys May Be Facing Field Hockey Limits*, BOS. GLOBE, April 28, 2011, (Sports), at 16, *available at* http://www.boston.com/sports/schools/articles/2011/04/28/boys_may_be_facing_field_hockey_limits/?rss_id=Boston+High+School+Sports.
[277] *Id.* (quoting Gloucester, Mass. field hockey coach and athletic director Kim Patience).
[278] *Id.* (quoting Walpole, Mass. field hockey coach Marianne Murphy).
[279] *Id.*
[280] *Id.*

but decided against it.[281] In June 2011, the MIAA Board of Directors voted down the proposed rule changes ten to one amid legal concerns.[282] Members of the board claimed that evidence of a correlation between boys' participation and injuries had not been presented.[283] One coach expressed concern that statistics could not be produced because girls would intentionally steer clear of male players to avoid injury.[284]

The MIAA has previously applied a rule that was not a complete ban on male participation, only to be struck down by the judiciary. In 1992, four Massachusetts high schools: Harwich, Martha's Vineyard, Provincetown, and Nantucket, forfeited games to avoid playing Chatham because its roster included male player Niles Draper.[285] That same year, Chatham and the American Civil Liberties Union challenged MIAA Rule 51, which had allowed a single-gender team to forfeit a game against a mixed-gender team without a loss.[286] In 1993, a Massachusetts Superior Court judge determined that the rule violated the state's Equal Rights Amendment.[287]

What rules will be considered narrowly tailored enough to survive a strict scrutiny analysis? Recall that the Massachusetts court had suggested that height, weight, and skill standards, as well as limiting the number of male participants, might survive the heightened analysis. The problem with these considerations is that although boys may be *generally* bigger, faster, and strong than girls, a height and weight requirement would exclude a number of female athletes as well. It also says nothing about smaller boys who would survive the restriction and would still have an advantage over girls, thus eliminating their roster spots. In that sense, it may address safety, but not fairness. This is troubling, especially considering that females reach puberty before males and could result in a number of girls being taller than some boys. Even with that consideration in mind, boys could still be faster and stronger without being bigger. Skill standards also create a problem. Although skill may focus on ball handling ability, the ability to run faster and hit harder must be a consideration. As was noted in the fairness concerns section, some boys are participating because it is the ice hockey offseason. They may possess superior stick skills. Additionally, simply limiting the number of male participants as a narrowly tailored means would still result in some females losing roster spots to the males. The MIAA should have gone through with the recent proposed rule change to see how it would stand up to a strict scrutiny analysis in the judiciary.

Aside from providing rules that will be narrowly tailored, defendants will have to show that there are compelling governmental objectives. Physiological difference between the sexes and maintaining equal athletic opportunities might not be construed to qualify as "compelling" under strict scrutiny even though they have been held to be "important" under an intermediate standard. How can physiological differences be shown? Should studies be ordered by the courts measuring quickness, impact of a hit, ball speed, etc? These questions remain open for litigation.

B. Reconsideration of Title IX

Title IX was extended to athletics in the educational setting in order to give women an equal opportunity of participation. Even allowing a few boys to play on a team takes away the full opportunity for girls. Some argue that boys should play on girls' teams until there is enough interest to form a team for each gender. What happens in the period before enough interest is garnered among males to create

[281] *Id.*
[282] Holmes, *supra* note 1.
[283] *Id.*
[284] *Id.* (quoting Reading, Mass. coach Mim Jarema).
[285] Holmes, *supra* note 35.
[286] *Id.*
[287] *Id.*

their own teams, assuming that level can even be reached? There is a gray area which is being witnessed in some schools now where a handful of boys participate on the team. The boys do not have the numbers to create their own team, but they certainly have enough numbers to limit the athletic opportunity for women and to create significant influence on the field in a particular school or district. That Massachusetts court, although not discussing Title IX, noted the lack of a looming harm by boys taking athletic opportunities away from girls. Perhaps the nationwide picture shows that in the 2010/2011 season males only accounted for 0.3% of all high school field hockey athletes, but what result if most of those 192 males play in Massachusetts or Pennsylvania?

Title IX should be reconsidered. This is not a paper on the complete evaluation and reconsideration of Title IX. Instead, the interscholastic field hockey dilemma that has loomed for forty years and has become more prominent as of late is evidence of why at least the Contact Sports Exception should be addressed. Title IX claims could be dismissed if the Title IX regulations eviscerated the "portion or major activity" language of the Contact Sports Exception and simply enumerated which sports are contact sports. In this fashion, the Department of Education can evaluate testimony and studies to determine on a periodic basis which sports should be granted the exception. This method removes the need for courts all around the country to evaluate the testimony of a variety of "experts," eliminates the diversity of outcomes that emerge from judicial rulings, and forecloses one avenue of integrating a traditionally female sport. It also allows players to be evaluated on a more equal basis for collegiate recruitment purposes by having girls play against girls.

VI: Conclusion

This paper has looked at three legal tools that male athletes can use to challenge restrictions on their participation with female interscholastic field hockey teams. The only state to rule that boys must be allowed to play is Massachusetts. To address issues of safety, fairness, and physiological differences between the sexes, Congress and the Department of Education should address Title IX and the Contact Sports Exception. The legislative branch is in a better position to gather testimony and debate the issues. State jurisdictions will provide the battle ground for more litigation because of state Equal Rights Amendments, which are the product of the democratic process of debate and voting in a particular state. Even under a strict scrutiny standard, states should consider that that there are physical attributes unique to one sex and perhaps safety and fairness are compelling governmental interest. The safe road for boys is to create enough interest among their peers to petition their athletic associations and schools for a male team.