FOR KENNY, WHO WANTED TO PLAY WOMEN'S FIELD HOCKEY

ADAM S. DAROWSKI*

I. INTRODUCTION

An increasing number of women at the professional,[1] collegiate,[2] and high school[3] levels are successfully making their way into men's sports competitions and onto men's athletic teams. Within this evolving context of gender desegregation and athletic participation, the idea that boys and girls should only compete on separate teams is changing. Society is increasingly accepting the idea that girls who are good enough ought to be able to play on a boys' team, especially at high schools where a particular sport is offered for boys only. The same cannot be said for the idea of boys playing on girls' teams. Particularly in the sports of volleyball[4] and field hockey[5] administrators are having to deal with the

---

* Associate, Winstead, Sechrest & Minick. J.D., Duke University School of Law, 2004; B.A., Brigham Young University. The author did not play high school field hockey.

1. In 2003, Annika Sörenstam became the first female golfer to participate in a men's professional golf tour event since 1945 (58 years), by playing in the PGA's Bank of America Colonial tournament. Sörenstam played reasonably well, only missing the cut to compete in the final two rounds of the four round tournament by four strokes. Professional Golf Association, *Annika Sörenstam, at* http://www.pgatour.com/u/ce/feature/0,1977,837190,00.html (May 20, 2003).

2. In August of 2003, Katie Hnida became the first woman to score points in a Division I-A college football game, by kicking an extra point for the University of New Mexico. *Katie Hnida Timeline: 1998–2004*, SI.COM, *at* http://sportsillustrated.cnn.com/2004/football/ncaa/02/16/hnida.timeline/ (last visited Feb. 4, 2005). In 2002, Ashley Martin became the first woman to play and score in a Division I-AA college football game, by kicking in an extra point for Jacksonville State University. *It's Up, It's Good*, CNNSI.COM, *at* http://sportsillustrated.cnn.com/football/college/news/2001/08/30/woman_kicker_ap/ (last visited Feb. 4, 2005).

3. For instance, the members of the National Federation of State High School Associations ("NFSHSA") reported that during the 2003 high school football season, 1,615 girls played on high school football teams nationwide. NAT'L FEDERATION OF STATE HIGH SCH. ASS'NS, NFHS 2003-04 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 46 (2004), http://www.nfhs.org/scriptcontent/VA_Custom/SurveyResources/2003_04_Participation_Summary.pdf.

4. The members of the National Federation of State High School Associations reported female volleyball teams in forty-nine states and the District of Columbia during the 2003-04 school year. *See* NAT'L FEDERATION OF STATE HIGH SCH. ASS'NS, NFHS 2003-04 HIGH SCHOOL ATHLETICS PARTICIPATION SURVEY 60 (2004), http://www.nfhs.org/scriptcontent/VA_Custom/Survey Resources/2003_04_Participation.pdf. In contrast, only twenty two state athletic associations reported at least one male volleyball team during for the 2003-04 school year. *Id.* at 53.

5. Reports from fifty state high school athletic associations plus the District of Columbia indicate that girls' field hockey was played in 20 states during the 2003-2004 school year, clustered mainly in New England and the Upper Middle Atlantic region: California, Colorado, Connecticut, Delaware, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia and Wash-

legal and policy questions behind whether boys legally *can* and normatively *should* be allowed to play on girls' teams. This note will focus on the sport of high school field hockey and analyze whether, under Title IX[6] or the Equal Protection Clause,[7] public high schools *must* allow boys to try out for and play on their girls' field hockey teams.

In analyzing the issue of whether boys should be allowed to play on girls' high school field hockey teams, this note will provide (1) an overview of the scope and history of boys playing on girls' high school field hockey teams,[8] (2) a discussion of Title IX[9] and the Equal Protection Clause,[10] and (3) a comparison of the differing judicial opinions from states where this matter has been litigated.[11] Throughout this note, the author will make reference to a fictional character named Kenny,[12] a high school boy too small to play football and too short to play basketball, but just right for field hockey, and discuss—apart from the legal issues—whether Kenny *should* be allowed to play on a girls' high school field hockey team.

II. GENERAL DISCUSSION

A. Scope and History of Boys' Participation in Girls' High School Field Hockey

After a largely unsuccessful spat of lawsuits attempting to allow high school boys to play on girls' teams in the late 1970s and early 1980s,[13] boys are

---

ington. *See id.* at 57. Only three states— California, Vermont and Massachusetts— reported male field hockey participation. *Id.* at 55.

6. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2000).

7. U.S.CONST. amend XIV, § 1.

8. *See infra* Part I.

9. *See infra* Part II.

10. *See infra* Part III.

11. *See infra* Part IV.

12. Kenny is a fictional creation of the author's imagination and is not meant to be based on any actual person.

13. *See* Clark v. Arizona Interscholastic Ass'n, 995 F.2d 1126 (9th Cir. 1982) (holding that the exclusion of boys from a girls' volleyball team is acceptable under Fourteenth Amendment); Petrie v. Illinois High Sch. Ass'n, 394 N.E.2d 855, 864 (Ill. App. Ct. 1979) (holding that the exclusion of boys from a girls' volleyball team is acceptable under state constitution and Fourteenth Amendment); B.C. v. Board of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059, 1065 (N.J. Sup. Ct. App. Div. 1987) (holding that the exclusion of boys from a girls' field hockey team is acceptable under Title IX and the federal constitution); Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458, 464 (N.Y. App. Div. 1980) (holding that the exclusion of boys from a girls' volleyball team is acceptable under Title IX and state and federal constitution); Forte v. Bd. of Ed., N. Babylon Union Free Sch. Dist., 105 Misc. 2d 36, 39–40 (N.Y. Sup. Ct. 1980) (holding that the exclusion of boys from a girls' volleyball team is acceptable under state law); *But see* Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 665-66 (D.R.I.) *vacated as moot*, 604 F.2d 733 (1st Cir. 1979) (holding that where only a girls' team exists, boys may not be excluded from volleyball team; decided under both Title IX and the Fourteenth Amendment); Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979) (under state's new equal rights amendment, blanket exclusion from boy's participation on girls' teams is unconstitutional).

once again going to court to get onto girls' high school athletic teams, particularly girls' field hockey teams.[14] As the *Wall Street Journal* reported in 1998,

> Some teenage boys are suing for the right to run around school athletic fields in pleated skirts. In an unusual legal twist, they have been using sex discrimination laws to try to get onto girls' sports teams. Most of these cases involve field hockey, which in this country has traditionally been played by girls.[15]

The game of field hockey, where two 11-person teams try to hit a ball through a goal on a field using sticks,[16] is among the world's oldest sports.[17] The modern version of field hockey evolved in nineteenth century England where the first women's club was formed in 1887.[18] Field hockey was transported to America—by a woman—in the early twentieth century.[19] While a sport mainly played by men in the rest of the world,[20] in the United States field hockey is a game played almost exclusively by women. There are currently zero school-sponsored high school or college men's field hockey teams.[21]

There is no consensus among the states in which girls' high school field hockey is played as to whether boys should also be allowed to participate. Massachusetts became the first state to declare the blanket exclusion of boys from girls' high school athletic teams unconstitutional in 1979.[22] Boys have been playing girls' field hockey there for over 20 years. Boys can also play in New York,[23] and some parts of Pennsylvania.[24] In Maryland, local school districts may let boys play field hockey in the regular season, but boys are not permitted to play

---

14. *See* Erin White, *Court Sports: Boys Sue to Play With Girls*, WALL ST. J., August 5, 1998, at B1.

15. *Id.*

[16] This brief statement obviously does not do justice to the complexity of the game.

17. The United States Field Hockey Association reports that "the sport of field hockey dates back well before the Ancient Olympic Games. Although the exact origin of the game remains unknown, 4,000-year-old drawings found in the tomb at Beni-Hasen in the Nile Valley of Egypt depicted men playing the sport. Throughout the following centuries, variations of the game were played by a spectrum of cultures ranging from Greeks and Romans to Ethiopians and Aztecs." U.S. Field Hockey Ass'n, *Field Hockey History*,, *at* http://www.usfieldhockey.com/history/ (last visited Feb. 4, 2005).

18. "With more and more women becoming active in the sport, the liberating game of field hockey earned the dubious title as the only team sport considered proper for women." *Id.*

19. *Id.*

20. "Even though field hockey is as male as jock itch everywhere else in the world, the U.S. has zero boys' high school teams." Rick Reilly, Editorial, *Not Your Average Skirt-Chasers*, SPORTS ILLUSTRATED, Nov. 26, 2001 at 100.

21. *Id.*

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

23. Rick Reilly opined in a Sports Illustrated editorial that "Boys are a problem that's whittling away the fabric of field hockey in Massachusetts, New York, and Pennsylvania." Reilly, *supra* note 20.

24. Pennsylvania is a state where individual schools can choose whether to allow boys on their girls' field hockey teams. Because of a state court ruling on the states Equal Rights Amendment there is no state-wide prohibition. Randy Pennell, *Boys Find it's Not Easy Playing With Girls*, PHILLYBURBS.COM, *at* http://www.phillyburbs.com/pb-dyn/news/103-12072003-208807.html (Dec. 7, 2003).

in the state tournament.[25] Boys have lost legal challenges to rules excluding them from playing on girls' high school field hockey teams in Maine,[26] New Jersey,[27] and Rhode Island.[28]

B. Arguments Against a Boy's Right to Play

The idea of boys playing on girls' field hockey teams could be seen as violating traditional—although arguably paternalistic and increasingly outdated—notions of fairness. For instance, scientific data shows that most high school aged boys are bigger, faster, and stronger than most high school aged girls.[29] These physiological differences could give boys playing field hockey against girls an unfair competitive advantage.

This perception of fairness has not been lost on courts deciding whether boys should be allowed to play girls' field hockey. The Superior Court of Maine for Cumberland County, for instance, in upholding that states' ban on boys playing girls' high school field hockey, noted:

> as a consequence of their physiological advantages, boys have the capacity to dominate integrated field hockey games. Anecdotally, they do dominate. They handle the ball and control the play of the game such that their impact on the game is disproportionate to their numbers. This is so largely irrespective of their skill and experience. Anecdotally, boys of similar age and experience intimidate girls and affect the way girls play field hockey.[30]

Players, parents, and coaches complain about the inherent unfairness of larger and stronger boys playing on girls' high school field hockey teams. Female participants have said of playing field hockey with their male counterparts: "Playing with boys is *awful*! When you win, people think it's only because of the boys on your team. It's so defeating."[31] After playing against a high school junior varsity team in Massachusetts with a 5'10", 210 pound boy, a freshman girl said, "I was scared, and I don't think he has the right to come into our game and

---

25. *See* Pat O'Malley, *Boy Field Hockey Players Plan to Appeal Playoff Ban*, BALTIMORE SUN, Oct. 5, 2003, at 14E; Pat O'Malley, *In Fall, Athletes Aced Academic Test*, BALTIMORE SUN, Jan. 13, 2004, at 7C.

26. Me. Human Rights Comm'n. v. Me. Principals Ass'n, No. CV-97-599, 1999 Me. Super. Lexis 23, at *1 (Me. Super., Jan. 21, 1999).

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

28. *See* Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, (R.I. 1992).

29. *See generally* KURT FISCHER & ARLYNE LAZERSON, HUMAN DEVELOPMENT 567-570 (1984) ("Before adolescence, boys and girls of similar size and shape are also similar in strength. But at the end of the growth period, boys' muscles are both bigger and stronger . . . . [B]oys also develop larger hearts and lungs, greater capacity for carrying oxygen in the blood, a lower heart rate while at rest, and a greater capacity for neutralizing the chemical products of muscular exercise that produce feelings of fatigue."); Robert M. Malina, *Motor Development and Performance*, *in* THE CAMBRIDGE ENCYCLOPEDIA OF HUMAN GROWTH AND DEVELOPMENT 249-50 (Stanley J. Ulijaszek et al. eds., 1998) ("[S]ex differences in motor performance become marked during adolescence, such that few girls perform as well as average boys in many strength, power, and speed tasks in later adolescence."); Jerry R. Thomas & Karen E. French, *Gender Differences Across Age in Motor Performance: A Meta-Analysis*, 98 PSYCHOL. BULL. 260 (1985).

30. *See* Me. Human Rights Comm'n. 1999 Me. Super. Lexis 23, at *14-15.

31. Reilly, *supra* note 20, at 100.

make us scared. Besides, what self-respecting guy would wear a skirt to play a game?"[32] Safety is a major concern. An administrator seeking to keep boys out of girls' field hockey games in Maryland told *The Washington Times*, "Our objection [to boys playing] was that the athletes would be put at physical risk."[33]

A separate argument against allowing boys to play on girls' high school field hockey teams—aside from the competitive fairness issues—is that "girls could lose their playing time or their position on the team if boys are allowed to play."[34] This outcome would seem to fly in the face of Title IX, which was arguably meant solely to promote women's opportunities.[35] The Third Circuit wrote,

> we must note that although title IX and the regulation apply equally to boys as well as girls, 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.[36]

In summary, apart from the legal arguments that will be addressed, compelling normative arguments can be made that boys should not be allowed to play on girls' high school field hockey teams. Boys generally possess competitive physiological advantages over high school girls and when boys make it onto a field hockey team, the boys necessarily displace girls from those roster spots.

C. Arguments In Favor of a Boy's Right to Play

Still, boys can make compelling and persuasive arguments that they should be allowed to play on girls' high school field hockey teams. For instance, internationally, field hockey is predominantly a male sport.[37] Since no boys' high school field hockey teams exist,[38] one of the few chances high school aged boys who want to play have is to play on girls teams.

In addition, prohibiting boys from playing on girls' field hockey teams smacks of governmental paternalism—a state-sponsored attempt to protect "the weaker sex"[39] from male "hulking teenage piles of testosterone."[40] An attorney

---

32. *Id.*

33. Bob Cohn, *Playing Like a Girl is Goal For Boys*, WASH. TIMES, Sept. 26, 2003, at A01.

34. Jamie Kovach, *No Boys Allowed*, SILVER CHIPS ONLINE, *at* http://silverchips.mbhs.edu/inside.php?sid=873 (Oct. 4, 2002) (quoting Ned Sparks, executive director of the Maryland Public Secondary Schools Athletic Association).

35. *See* Polly S. Woods, Comment, *Boys Muscling in on Girls' Sports*, 53 OHIO ST. L.J. 891, 898 (1992) ("Under the plain meaning of the regulation, courts have generally reasoned that boys need not be provided the opportunity to participate on girls' teams under a Title IX claim because athletic opportunities have not previously been limited for members of their sex. This contention is undoubtedly difficult to dispute.").

36. Williams v. School District of Bethlehem, 998 F.2d 168, 176 (3d Cir. 1993).

37. Reilly, *supra* note 20, at 100.

38. *Id.*

39. "From the emergence of organized athletics in the United States in the mid-nineteenth century, sports have been deemed the rough and tumble site for inculcating and solidifying the masculine identity; not an appropriate place for 'the weaker sex.'" Suzanne Sangree, *Title IX and the Contact Sports Exception: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381, 401 (2000).

40. Reilly, *supra* note 20, at 100.

who successfully represented a boy seeking to play girls' field hockey in Massachusetts told the *Wall Street Journal*, "It was demeaning for the girls to be told that it was unsafe for them to play against a team where there was a boy."[41] A Rhode Island trial judge found that "[t]he ban of boys is based on archaic and overbroad generalizations and assumptions about female athletic ability."[42] An attorney trying to help a boy play field hockey noted that while keeping boys out of girls' sports "seemed to make common sense 10 years ago," the issue "has to be looked at again, and looked at more carefully, because the numbers have changed, and the opportunities for girls have changed."[43]

Furthermore, the exclusion of high school boys from girls' field hockey does seem like reverse discrimination, especially at schools where girls are permitted to play on boys teams. "It's basically sexist that guys can't play," says one boy excluded from field hockey participation in Maryland.[44] This would arguably be an easier issue if all the boys who wanted to play field hockey were over six feet tall and weighed more than 200 pounds. But many boys who want to play are essentially the same size as the girls.[45] In their cases, the arguments for exclusion based on competitive fairness or safety concerns would be unpersuasive.

Assume for upcoming discussion that Kenny[46] is small for an average boy his age, with a height of '5" and a weight of 135 pounds. His strength and quickness are average in comparison to the girls on his high school's field hockey team. Based on competitive tryouts he was good enough to make the squad, though he certainly did not stand out. Unfortunately for Kenny, he lives in a state that excludes boys from participation on girls' high school athletic teams. His only recourse is to challenge this state provision in court to see if it violates Title IX or the Equal Protection Clause of the Fourteenth Amendment. The balance of this note will analyze those provisions and the ways courts have interpreted them, with a brief conclusion regarding whether Kenny should be allowed to play.[47]

---

41. White, *supra* note 14, at B1.

42. *Kleczek v. R.I. Interscholastic League*, No. 91-5475, 1991 R.I. Super. LEXIS 101, at *16 (R.I. Super., Sept. 27, 1991), *vacated by*, 612 A. 2d 734 (R.I. 1992).

43. White, *supra* note 14, at B1..

44. *See* Kovach, *supra* note 34 (quoting Arman Mizani, a high school senior turned away from his high school's field hockey tryouts in Maryland).

45. *See e.g.* Cohn, *supra* note 33, at A01 (highlighting the desire to play field hockey of two boys who are 5'9", 160 pounds, and 5'7", 135 pounds respectively); White, *supra*, note 14 (highlighting a boy who stood 5'6", 145 pounds).

46. *See supra* note 12.

47. See *infra* Part IV.

III. TITLE IX

A. An Overview of Title IX

Prior to recent decades, most sporting activities in the United States have been played by and organized on behalf of men rather than women.[48] To provide more opportunities for women, Title IX was adopted by the United States Congress in 1982.[49] The passing of Title IX is intimately connected to a skyrocketing growth in women's athletics in America. "Title IX has helped girls and women participate in interscholastic and intercollegiate athletics in far greater numbers than they had in the past."[50] Of interesting note, however, is that Title IX itself says nothing about athletics. "Indeed, the statute's application to athletics was barely mentioned before it was enacted in 1972."[51] So what exactly is Title IX and how did athletics, including high school field hockey, come within its purview?

Title IX, a gender equality statute, was proposed as an amendment to Title VI of the Civil Rights Act of 1964.[52] Title VI provided that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[53] The purpose of Title IX was to apply the same standard prohibiting racial discrimination to gender discrimination.[54] The language of Title IX mirrors that of Title VI: "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."[55]

On its face Title IX does not mention athletics at all. "While it is clear from the legislative history that Title IX was modeled on Title VI (which did apply to athletics), and that it was meant to have broad effect in undoing pervasive sex discrimination, its application to athletics was rarely explicitly considered until after its enactment."[56] The role of Title IX in providing for gender equality in athletics first emerged with the creation of implementation regulations, a job assigned by Congress to the Department of Health, Education and Welfare

---

48. *See generally* Nancy L. Malcom, *Constructing Female Athleticism*, 46 AM. BEHAV. SCIENTIST 1387 (2003) ("Throughout history, the sporting arena has been a male domain, described as a 'male preserve' where boys take part in a 'masculine rite of passage' to join the ranks of 'real' men.") (citations omitted).

49. 20 U.S.C. § 1681, *supra* note 6.

50. U.S. DEP'T OF EDUC., TITLE IX: 25 YEARS OF PROGRESS, *at* http://www.ed.gov/pubs/TitleIX/part5.html (1997).

51. Sangree, *supra* note 39, at 387.

52. Robert R. Hunt, *Implementation and Modification of Title IX Standards: The Evolution of Athletics Policy*, 1999 BYU EDUC. & L.J. 51, 58 (1999).

53. 42 U.S.C. § 2000d (2005).

54. *See* U.S. CONST. amend. XV, § 1 and amend. XIX (noting that this pattern of advances in the prevention of the racial discrimination preceding advances in women's rights occurred at an earlier time in United States history, as non-White men were given the right to vote before women of any color. *See* U.S. CONST. amend. XV, § 1, and amend. XIX.

55. 20 U.S.C. § 1681 (2000) (emphasis added).

56. Sangree, *supra* note 39, at 412.

(HEW).[57] HEW "chose to give the statute a very broad interpretation, substantially expanding its coverage and the agency's own power of enforcement."[58]

Within its broad interpretation of the coverage of Title IX, HEW saw fit to promulgate regulations regarding participation in extracurricular activities sponsored by entities receiving federal funding, including high school athletic teams.[59] HEW's 1975 policy interpretation of Title IX stated in part,

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from 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.[60]

Including athletics under the umbrella of Title IX's coverage proved quite controversial at the time. Several pieces of legislation were proposed to exempt athletics from HEW's inclusion of them within the scope of Title IX. The Tower Amendment,[61] which did not pass, would have limited Title IX's scope with regards to athletics quite severely.[62] The Javits Amendment did pass however, requiring HEW to make "reasonable provisions considering the nature of particular sports"[63] such as field hockey. Responsibility for overseeing and implementing Title IX, including HEW's inclusion of athletics, was later given to the Department of Education and its Office of Civil Rights.[64]

B. Title IX and High School Field Hockey

High school field hockey fits within the scope of Title IX's regulation regarding athletics (the "regulation") for two reasons. First, though much of the discussion concerning Title IX and athletics has focused mainly on collegiate sports, high schools do receive "federal financial assistance."[65] In 1997, for instance, the Department of Education reported that almost 15,000 school districts with 51,700,000 elementary and secondary students, received federal funds.[66] Even if high school sports are not funded by federal dollars, if a school receives any federal financial support, its athletic programs must comply with Title IX. Furthermore, on its face the regulation applies to "interscholastic" athletics,

---

57. Hunt, *supra* note 52, at 61.

58. *Id*.

59. *See* Proposed Title IX Regulations, 39 Fed. Reg. 22,228-240 (June 20, 1974).

60. 45 C.F.R. § 86.41(a) (1975).

61. *See* Sangree, *supra* note 39, at 414 (the amendment was named after Senator John Tower of Texas).

62. "This section shall not apply to an intercollegiate activity insofar as such activity provides to the institutions gross receipts or donations required by such institutions to support that activity." 120 CONG. REC. 15,322 (1974).

63. Pub. L. No. 93-380, 88 Stat. 845 (codified at 20 U.S.C. § 1681 (1998)). *See generally* Hunt, *supra* note 52, at 64.

64. David Aronberg, *Crumbling Foundations: Why Recent Judicial and Legislative Challenges to Title IX May Signal its Demise*, 47 FLA. L. REV. 741, 754 (1995).

65. 20 U.S.C. § 1681 (2000).

66. U.S. DEP'T OF EDUC., TITLE IX: 25 YEARS OF PROGRESS, http://www.ed.gov/pubs/TitleIX/part3.html (1997).

meaning high school sports. Second, since field hockey is considered a girls' sport at all high schools at which it is played,[67] those high schools must comply with the regulation's provision regarding school sponsorship of a team for one sex with no corresponding team for the other:

> (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 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.[68]

Understanding field hockey's place within this statutory framework will require a detailed and extensive analysis. Since with regard to high school field hockey, "*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*,"[69] the analysis will focus on the latter half of the above regulation rather than the initial/introductory half. The relevant factors in deciding whether a high school can keep Kenny from playing on a girls' field hockey team under Title IX are (1) whether athletic opportunities for Kenny's sex (male) have not previously been limited (the "athletic opportunity test"), and (2) whether field hockey is a contact sport (the "contact sports exception").[70] Stated briefly, if field hockey is considered a contact sport, then a high school can keep Kenny off of its girls' field hockey team without even looking at the athletic opportunity test. However, if field hockey is not considered a contact sport, then a high school could only exclude Kenny from participating on the girls' team only if athletic opportunities for males at Kenny's high school have not previously been limited.

C. The Athletic Opportunity Test

The first question needing an answer in this Title IX analysis is what is meant by the phrase, "*and athletic opportunities for [the excluded] sex have previously been limited*"?[71] Where a high school sponsors a girls-only field hockey team, boys are necessarily excluded. This would seem to be allowed under the regulation as long as athletic opportunities for boys have not been limited in the past—with the comparison being to the athletic opportunities of girls at the high school. The regulation, under this line of reasoning, could be read as saying:

> However, where a recipient operates or sponsors a *field hockey team* for *girls only* but operates or sponsors no such team for *boys*, and athletic opportunities for

67. *See supra* note 5.
68. 34 C.F.R. § 106.41(b) (2004).
69. *Id.* (emphasis added).
70. *Id.*
71. *Id.*

> *boys in general, compared with girls at the high school,* have previously been limited, *boys* must be allowed to try-out for the team offered unless the sport involved is a contact sport.

Clearly, "in general," boys' high school athletic opportunities in relation to those of high school girls *have not* been limited in the past, at least at most high schools.[72]

But suppose the regulation needs to be read specifically with regard to field hockey rather than generally with regard to all sports. Another reading of the regulation with regard to field hockey *specifically* could be:

> However, where a recipient operates or sponsors a *field hockey team* for *girls only* but operates or sponsors no such team for *boys*, and athletic opportunities for *boys* have previously been limited *in the sport of high school field hockey at the high school*, then *boys* must be allowed to try-out for the team offered unless the sport involved is a contact sport.

As this note has already addressed, there can be no question that athletic opportunities for high school boys in the sport of high school field hockey *have indeed* been limited in the past in relation to those of girls.

So under the two possible readings of the phrase, "*and athletic opportunities for members of that sex have previously been limited*," courts interpreting the statute could reach (and have reached) completely opposite outcomes.[73] If the phrase is meant to cover athletic opportunities in general, then boys' opportunities have not previously been limited and Kenny can be excluded from trying out for the team *regardless* of whether field hockey is a contact sport. However, if the phrase is read to mean athletic opportunities solely within the sport of field hockey, then boys' opportunities have certainly previously been limited. Thus, Kenny must be allowed to try out for the high school field hockey team *unless* field hockey is a contact sport.

D. The Contact Sports Exception

The contact sports exception allows sports involving a large amount of bodily contact to be "exempt from Title IX's guarantee of equality."[74] This means that schools do not need to provide equal athletic opportunities for boys and girls, or stated differently, *can* discriminate between gender participation—in the sports of "boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact."[75] The Third Circuit has called this exemption "the broadest exception recognized

---

72. *See* NAT'L FEDERATION OF STATE HIGH SCH. ASS'NS, *supra* note 3, at 47 (providing a statistical breakdown of the number of boys and girls participating in high school sports from 1972 until 2004).

73. *See* Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 665 (D.R.I. 1979) ("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). *But see* Kleczek v. Rhode Island Interscholastic League, 768 F. Supp. 951, 955 (D.R.I. 1991) ("other courts have called into question *Gomes's* construction of the regulation").

74. Sangree, *supra* note 39, at 382.

75. 34 C.F.R. § 106.41(b) (2004).

to the overarching goal of equal athletic opportunity."[76] Others have called it "a living Godzilla amongst extinct T-Rexes," because it "remains as *de jure*, facial sex discrimination" in a time when "virtually all overt, *de jure* forms of sex discrimination have been eliminated."[77] But these criticisms appear somewhat unfounded in light of the current increases in participation by high school girls in the very sports exempted by the regulation, as well as non-contact sports.[78]

Field hockey is not among the sports specifically listed in the regulation, which as a matter of law are considered contact sports. The sports listed include only boxing, wrestling, rugby, ice hockey, football, and basketball.[79] However, the regulation provides for the inclusion of other athletic endeavors within the fold of the contact sports exception by stating "*other sports the purpose or major activity of which involves bodily contact*."[80] Thus, field hockey can fall within the scope of the contact sports exemption if either (1) the purpose of field hockey is bodily contact, or (2) the major activity of field hockey *involves* bodily contact.

Determining what the purpose of a particular sport is can become more of a philosophical exercise than a meaningful legal inquiry. 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. Physical contact, including hard contact, is *intended*. This is not the case with field hockey. The more fruitful inquiry here will be to determine what the "major activity" of field hockey is and whether that activity "involves" bodily contact.

At its most fundamental level, the "major activity" of field hockey is hitting a ball with a stick in order to score a goal. While players are running around trying to hit the ball with a stick during a field hockey game, bodily contact *is* involved. The players collide, jostle for position, push, shove, body-check, trip, and run into one another. Such contact is inevitable. 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.[81] 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 listed in the regulation as contact sports than the sports just mentioned that really do not involve bodily con-

76. Williams v. School District of Bethlehem, 998 F.2d 168, 172 (3d Cir. 1993).

77. Sangree, *supra* note 39, at 383-85.

78. *See supra* note 3 (showing that 1,615 girls played high school football nationwide during the 2003-2004 school year and that 4,008 girls competed in wrestling).

79. 34 C.F.R. § 106.41(b) (2004).

80. *Id.* (emphasis added).

81. *Id.*

tact. Under this line of reasoning, field hockey should be considered a contact sport.

In cases where field hockey experts have testified or been used as expert witnesses on this point, no consensus has emerged. For instance, in *Williams v. School District of Bethlehem*,[82] both sides filed affidavits by field hockey experts. The affidavit of the Director of Development and Marketing for the Field Hockey Association of America stated that "field hockey is technically, and according to the national and international rules which govern the play of the game, a non-contact sport."[83] Reaching an opposite conclusion, a former United States Field Hockey Women's Team coach stated that field hockey should be considered a contact sport.[84] The coach explained that the major activities of the sport of field hockey include running up and down the field attempting to score a goal or preventing the other team from doing so and that these activities, "inevitably produce and involve bodily contact."[85]

Whether field hockey is properly considered a contact sport within the meaning of the regulation is an open question for judicial determination. If courts find that field hockey is a contact sport then Kenny *can* (not *must*) be excluded from his girls' high school field hockey team even if a court determines it matters that boys' field hockey opportunities at the high school level have been limited in the past. If a court finds that the athletic opportunities test should apply generally to all sports, then the contact sports exception really does not matter. Kenny would not be able to argue that he has a right under Title IX to play girls field hockey at his high school. Seeking an alternative route to inclusion, Kenny turns next to the United States Constitution.

IV. THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause of the Fourteenth Amendment states "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[86] Before and immediately after the passage of Title IX and its implementation regulations in the 1970s, this clause was used successfully to strike down rules prohibiting girls from playing on boys' high school teams where the high school only offered a boys' team in a particular sport.[87] The conclusion drawn

82. 998 F.2d 168 (3d Cir. 1993).

83. *Id*. at 172.

84. *Id*.

85. *Id*.

86. U.S. CONST. amend. XIV, § 1.

87. *See* Brenden v. Independent Sch. Dist.,. 477 F.2d 1292 (8th Cir. 1973) (stopping enforcement of state rule excluding girls from playing on boys' teams in non-contact sports); Morris v. Michigan State Bd. Of Educ., 472 F.2d 1207 (6th Cir. 1973) (prohibiting schools from excluding girls from participation of boys' tennis team); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 117 (E.D. Wis. 1978) (rescinding rule disallowing girls from playing on boys' baseball teams); Hoover v. Meikljohn, 430 F. Supp. 164 (D. Colo. 1977) (rescinding rule disallowing girls from playing on boys' soccer teams); Carnes v. Tennessee Secondary Sch. Athletic Ass'n, 415 F. Supp. 569 (E. D. Tenn. 1976) (rescinding rule disallowing girls from playing on boys' tennis teams); Reed v. Nebraska Sch. Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (stopping enforcement of state rule excluding girls from playing on boys' golf and basketball teams); Haas v. South Bend Cmty. Sch. Corp., 289 N.E.2d 495

from these cases is that courts will use the Equal Protection Clause to prohibit gender discrimination in high school athletics, "at least with regard to girls' access to boys' teams."[88] But what about boys' access to girls' teams?

A. Redressing Past Discrimination and Promoting Women's Athletic Opportunities

The United States Supreme Court has ruled that state-sponsored, gender-based exclusions will be reviewed under an intermediate level of scrutiny.[89] In order to be in compliance with the Fourteenth Amendment, an act such as excluding all boys from playing on a girls' high school field hockey team must "serve important governmental objectives and must be substantially related to achievement of those objectives."[90] The two important governmental objectives courts have recognized in allowing states to exclude boys from girls' high school athletic teams are (1) "redressing past discrimination against women in athletics,"[91] and (2) "maintaining, fostering, and promoting athletic opportunities for girls."[92]

The need to redress past discrimination against women in high school athletics is (arguably) lessening. The number of girls playing high school sports reached 2,865,299 during the 2003-2004 school year according to the National Federation of State High School Associations.[93] The number of boys playing high sports that year was 4,038,253.[94] The gap in participation was 1,172,954. That gap is mostly accounted for by the 1,032,682 boys who played high school football that year.[95] Furthermore, the number of girls playing high school sports has increased each year since 1983, when only 1,779,972 girls played.[96] Numbers like these are beginning to indicate that state high school athletic associations are succeeding in "maintaining, fostering, and promoting athletic opportunities for girls."[97] Thus, as more and more girls are able to play high school sports—including sports like football and baseball,[98] which have traditionally been boys' sports—the necessity for excluding boys from girls' teams in order to redress past discrimination and promote female athletics will dwindle away.[99]

(Ind. 1972) (rescinding rule disallowing girls from playing on boys' golf team); Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (rescinding rule disallowing girls from playing on boys' football teams).

88. Woods, *supra* note 35, at 892.

89. *See* Craig v. Boren, 429 U.S. 190 (1976).

90. *Id.* at 197.

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

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

93. *See* NAT'L FEDERATION OF STATE HIGH SCH. ASS'NS, *supra* note 3, at 47.

94. *Id.*

95. *Id.*

96. *Id.*

97. *See Petrie*, 394 N.E.2d at 862.

98. *See* NAT'L FEDERATION OF STATE HIGH SCH. ASS'NS, *supra* note 3, at 46 (reporting that 1,924 high school girls played boys' baseball during the 2003-2004 school year).

99. *See* Woods, *supra* note 35, at 897 ("It is acknowledged by the author that at some point this rationale must fail—the point at which athletic opportunities for males do not exceed those afforded their female counterparts. However, the legitimacy of redressing past discrimination still holds true today.").

B. Reasonable Distinctions Between High School Boys and Girls

Apart from redressing past discrimination and promoting girls' athletics, an additional rationale for excluding boys from girls' high school athletic teams has also been recognized by courts. Gender-based preferences can be upheld under the Fourteenth Amendment if they are "founded upon a reasonable distinction" between the sexes.[100] The Ninth Circuit has noted that the physical differences between the average male and female high school athletes could justify gender based classifications.[101] Courts have certainly taken note of these physiological differences, stating, "at the high school level, the average male is objectively more physically capable than the average female."[102] This rationale would seem then to provide a concrete justification for excluding boys from girls' teams at least under the Fourteenth Amendment, regardless of the level of female athletic participation.

Still, this is not all bad news for Kenny. The Supreme Court has also ruled that gender-based exclusions justified by "archaic and stereotypic notions" about the sexes must be rescinded.[103] It is an open question as to whether excluding boys from playing on girls' high school field hockey teams because most high school boys are bigger, faster, and stronger than most high school girls would classify as exclusion based on "archaic and stereotypic notions." Courts could reasonably read it that way, since "to immunize girls' teams totally from any possible contact with boys might well perpetuate a psychology of 'romantic paternalism' inconsistent with such development of [competitive female athletics] and hurtful to it in the long run."[104]

The once airtight reasoning for allowing boys to be excluded from girls' teams even under the Equal Protection Clause is beginning to weaken. As more and more girls participate in high school athletics, the need to redress past inequities or to promote female athletic participation at the expense of male participation is going away. Likewise, the generalization that boys should be excluded due to a "reasonable distinction" regarding the physical capabilities between the sexes is starting to look "archaic and overbroad." Still, courts must ultimately make these determinations.

V. FIVE LAWSUITS ADDRESSING A BOY'S RIGHT TO PLAY

Five lawsuits have addressed the issue of whether high school boys have the right to play girls' high school field hockey. Only one eventually resulted in giving boys the right to play. What follows is a discussion of each lawsuit, with an analysis of each court's treatment of Title IX and the Equal Protection Clause, as well as any other bases for their decisions.

---

100. Kahn v. Shevin, 416 U.S. 351, 355 (1974) (quoting Allied Shores v. Bowers, 358 U.S. 522, 528 (1959)); *see also* Orr v. Orr, 440 U.S. 268, 280-82 (1979); Craig v. Boren, 429 U.S. 190, 204 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975).

101. Clark v. Arizona Interscholastic Ass'n, 995 F.2d 1129-30 (9th Cir. 1982).

102. Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 662 (D.R.I. 1979).

103. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

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

A. The Cases

1. Williams v. The School District of Bethlehem[105]

In the fall of 1990, John Williams, a fourteen-year-old freshman at Liberty High School in Pennsylvania, tried out for the school's girls' field hockey team. He had played coed intramural field hockey in junior high school, and wanted to continue playing. Along with another boy, John made it through the tryout process and was selected as a goalie for the junior varsity team. Before the season began however, the school district notified John's coach that boys could not play on the girls' field hockey team and that Williams could neither practice with the team nor participate in the games.[106] His parents immediately sued to allow John to play. While the litigation was pending, John was permitted to serve as a team manager during his freshman year in 1990, and then practice with the team but not play in games during his sophomore year in 1991.

a) The District Court Decision in *Williams*

John's case was first heard in the U.S. District Court for the Eastern District of Pennsylvania in 1992. The plaintiffs asserted that:

> [T]he defendant's exclusion of John Williams from the girls' field hockey team, which effectively bars him from playing that sport since there is no school field hockey team for boys, violates Title IX of the Education Amendments of 1972, and its implementing regulations, the Pennsylvania Constitution, specifically the Equal Rights Amendment thereof, and both the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution.[107]

The judge issued a summary judgment on John's behalf, allowing him to play field hockey during his junior year in the fall of 1992. The district court found that John's expulsion from the team violated *both* Title IX and the Equal Protection Clause.[108]

With regard to Title IX, the defendant school district alleged that field hockey is a contact sport and that the athletic opportunities for boys had not previously been limited in the school district.[109] The district court ruled as a matter of law that field hockey is not a contact sport since the defendants could not prove that "bodily contact is the purpose or a major activity of field hockey."[110] The court incorrectly examined whether bodily contact was itself a major activity in the sport of field hockey rather than whether bodily contact is *involved* with the major activity as the regulation requires.[111] The court further erred by dismissing the regulation's inclusion of other sports besides the five mentioned as contact sports by stating, "In the first instance, a number of contact sports are

---

105. Williams v. The School District of Bethlehem, 799 F. Supp. 513, 514 (E.D. Pa. 1992), *rev'd*, 998 F.2d 168 (3d Cir. 1993).

106. Williams, 799 F. Supp. at 514.

107. *Id.* at 515.

108. *Id.* at 518-522.

109. *Id.* at 515-16.

110. *Id.* at 517.

111. *Id.* At 516-17.

enumerated in § 106.41(b), including ice hockey. The omission of field hockey suggests that this sport was not recognized as a contact sport when the rule was drafted."[112]

As for the other critical piece of Title IX analysis, the court ruled that boys' athletic opportunities at the high school had indeed been previously limited.[113] The court noted that girls could try out for all of the boys' teams offered at John's high school, but boys could not try out for any girls' team.[114] "[T]he record demonstrates that as a consequence of this plan for expanding opportunities for girls in athletics, such opportunities are now limited for boys and have been since 1973 when the new athletic policies were implemented."[115]

The court then turned to an analysis of the Equal Protection Clause, and found defendants' policy in violation thereof.[116] The defendants claimed that their justifications for denying boys from participating on girls' teams were to remedy past discrimination against girls in athletics and to provide equal athletic opportunities for girls.[117] The court decided that the need to remedy past discrimination was over, since girls in the school district have had access to a greater number of sports teams than boys for over eighteen years by the time of the litigation.[118] The court further noted that any policy justifications for disallowing boys to play with girls based on physical differences were "overbroad and unsupported generalizations."[119] Defendants appealed the court's grant of summary judgment to the Third Circuit.

b) The Third Circuit's Decision in *Williams*

The Third Circuit wasted no time in reversing the district court's decision, disagreeing with the district court on both its Title IX and Equal Protection Clause analysis.[120] Regarding the contact sports exception, the court stated, "We note first that the district court may have misapprehended the legal inquiry."[121] The court noted that the district court missed a "subtle but important distinction" between analyzing "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."[122] The court concluded that the "major activity" prong of the contact exception test was meant to account for "the realities of the situation on the playing field."[123] The court found that "bodily contact does in fact occur frequently and is expected to occur during the game,"[124] thereby concluding that

112. *Id*. at 516.
113. *Id*. at 518.
114. *Id*. at 516-17.
115. *Id*. at 517.
116. *Id*. at 518-21.
117. *Id*. at 519.
118. *Id*.
119. *Id*. at 520 (quoting Haffer v. Temple University, 678 F. Supp. 517, 524 (E.D. Pa. 1987)).
120. Williams v. School District of Bethlehem, 998 F.2d 168, 169-70 (3d Cir. 1993).
121. *Id*. at 173.
122. *Id*.
123. *Id*.
124. *Id*.

the defendants had raised an issue of material fact sufficient to overturn the district court's summary judgment on that point.[125]

The court then went on to examine whether athletic opportunities for boys had previously been limited, noting still that "if it is determined that field hockey is a contact sport, no other inquiry is necessary because that will be dispositive of the Title IX claim."[126] The court found that athletic opportunities should be examined generally, rather than specifically for a particular sport.[127] Even though girls were permitted to try out for boys' teams, "'athletic opportunities' means real opportunities, not illusory ones."[128] The court determined that a fact-finder ought to decide whether the physical differences between high school boys and high school girls, in reality, "negate the significance of allowing girls to try out for boys' teams but not allowing the reverse."[129]

Turning to the Equal Protection claims, the Circuit Court found that the district court lacked sufficient information to grant a summary judgment on this point since it dismissed without a fact-finder an inquiry into the physical differences between high school girls and boys.[130] The court noted that past discrimination against girls in athletics did exist.[131] But whether excluding boys from the field hockey team is a permissible way to address this depends on "whether there are genuine physical differences between boys and girls or whether, instead, the policy is based on unwarranted and stereotyped assumptions about the sexes."[132]

The Circuit Court reversed and remanded John's case. A re-hearing was denied during the summer of 1993,[133] the summer before John's senior year. The Williams' writ of certiorari to the United States Supreme Court was also denied.[134]

2. *Attorney General v. Massachusetts Interscholastic Athletic Association*[135]

In the spring of 1979, while Title IX's policy interpretations and implementations were still being finalized, Massachusetts' State Board of Education petitioned the state's Attorney General to challenge a state rule barring high school boys from playing on girls' teams. The Massachusetts Interscholastic Athletic Association (the "Association") had promulgated a rule stating that "No boy may play on a girls' team," even though girls could tryout for boys' teams.[136]

---

125. *Id*. at 173-74.
126. *Id*. at 174.
127. *Id*. at 173.
128. *Id*. at 175.
129. *Id*.
130. *Id*. at 178.
131. *Id*.
132. *Id*.
133. Williams v. School District of Bethlehem, 1993 U.S. App. LEXIS 19717 (3d. Cir. 1993).
134. Williams v. School District of Bethlehem, 510 U.S. 1043 (1994).
135. Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, (Mass. 1979).
136. Attorney Gen. v. Mass., 393 N.E.2d at 287. The full text of the rule in question is "With 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." *Id.*

The Association had earlier tabbed field hockey as a girls-only sport, thereby precluding boys from trying-out for or playing on high school field hockey teams in the state. The Attorney General chose to challenge the rule under Massachusetts' new Equal Rights Amendment to the state constitution.[137]

The Supreme Judicial Court of Massachusetts struck down the Association's ban on boys playing on girls' teams, deciding that the rule was overly broad.[138] The court noted that the ban "attacks a small problem with heavy artillery," since only a few boys had wanted to play girls' sports at only a handful of high schools.[139] The court addressed the Equal Protection Clause, noting that it "condemn[s] discrimination on the grounds of sex—whether male or female."[140] The court recognized under this analysis that while "in the field of athletics, where opportunities in the past have grossly favored males, it remains the fact that some of the less athletic men have been denied active participation in competitive sports in part because of sex segregation."[141]

Rather than ruling on federal statutory or constitutional grounds, the court used the state's Equal Rights Amendment to find the rule banning boys from girls' teams "prima facie invalid."[142] Applying strict scrutiny under state law, rather than intermediate level scrutiny, the court ruled that no compelling state interest existed for banning *all* boys from *all* girls' teams, since "classification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo 'archaic and overbroad generalizations.'"[143] An alternative to a strict ban on boys playing field hockey which would be permissible would be "use of standards focusing on height, weight, or skill rather than solely on gender."[144] Rules could also limit the number of boys on the field at any one time.[145]

The Massachusetts approach provides a good model for use by states that do not want to see "hulking teenage piles of testosterone" dominating smaller girls, but who are sympathetic to the desire of some boys to play field hockey. While determining exactly what height and weight restrictions to apply may become too arbitrary, limiting the number of boys on the field at any one time, to one or two for instance, represents a fair compromise.

---

137. "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." MASS. CONST. art. I.

138. Attorney Gen, 393 N.E.2d at 296.

139. *Id*. at 288.

140. *Id*. at 289.

141. *Id*. at 290.

142. *Id*.

143. *Id*. at 293 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)). The court went on to quote Hoover v. Meiklejohn, 430 F. Supp. 164, (D. Colo. 1975), "Any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality." *Id. at 169.*

144. Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 295 (Mass. 1979).

145. *Id*.

3. *Kleczek v. Rhode Island Interscholastic League*[146]

In the fall of 1990, Brian Kleczek, a sophomore at Kingstown High School in Rhode Island, tried out for and made the girls' junior varsity field hockey team.[147] No female players had to be cut in order to make a roster spot for Brian.[148] There were open spaces on the team.[149] Furthermore, the coach and Brian's fellow players, all girls, were not opposed to Brian staying on the team.[150] Knowing that Rhode Island Interscholastic League (RIIL) rules prohibited boys from playing on girls' athletic teams, Brian's principal and coach petitioned for an exception on Brian's behalf.[151] An RIIL committee held a hearing regarding the matter but unanimously voted against approving a waiver and concluded that Brian should not be allowed to join the team.[152] Brian served as the team manager that season.[153] Complex litigation resulted, making stops along its path at the United States District Court, the Rhode Island Superior Court, and finally to the Supreme Court of Rhode Island.[154]

a) The District Court Decision in *Kleczek*

Upon learning that Brian would not be permitted to play on the girls' field hockey team in the fall of 1990, his parents filed for a preliminary injunction in the United States District Court for the District of Rhode Island. The complaint alleged that the RIIL violated Brian's rights under Title IX and the Equal Protection Clause of the Fourteenth Amendment, as well as the Rhode Island State Constitution.[155] In order for the preliminary injunction to be granted, the plaintiffs would need to "demonstrate a likelihood of success on the merits" of the federal claims, since the case was in federal court based on federal question jurisdiction.[156] The court therefore first analyzed the merits of the RIIL ban on boys playing field hockey under Title IX and the Equal Protection Clause.

Regarding the Title IX claim, the court found both that boys' athletic opportunities had not been limited at Kingstown High School and that field hockey is a contact sport. According to the court, either of those findings would alone have been enough to thwart Brian's Title IX claim.[157] In analyzing whether the athletic opportunities test should be applied generally to all sports or specifically to field hockey, the court criticized and rejected an earlier Rhode Island case holding that such analysis should be specific to field hockey.[158] The court

---

146. Kleczek v. Rhode Island Interscholastic League, 768 F. Supp. 951 (D.R.I. 1991).

147. Kleczek, 768 F. Supp. at 952.

148. *Id.*

149. *Id.*

150. *Kleczek v. R.I. Interscholastic League*, No. 91-5475, 1991 R.I. Super. LEXIS 101, at *1 (R.I. Super., Sept. 27, 1991), *vacated by*, 612 A. 2d 734 (R.I. 1992).

151. Kleczek, 768 F. Supp. at 953.

152. *Id.*

153. *Id.*

154. Kleczek v. R.I. Interscholastic League, 612 A.2d 734 (R.I. 1992).

155. Kleczek, 768 F. Supp. at 953.

156. *Id.*

157. *See infra* Part II.

158. Kleczek, 768 F. Supp. at 955 (discussing Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I. 1979).

noted that the prior construction "disregarded the plain language of the regulation and substituted new language to avoid a feared constitutional problem."[159] The court finally held that "under the obvious plain meaning of the statute regulation, Brian need not be provided the opportunity to play on the girls' field hockey team because athletic opportunities at Kingstown High School have not previously been limited for members of his sex."[160]

Any possible disagreement between the district court and state court regarding the athletic opportunity test was rendered moot when the district court further held that field hockey is a contact sport.[161] The court compared field hockey to the sports described in the regulation as contact sports, and determined that "field hockey is an 'incidental contact' sport, more akin to basketball than volleyball or tennis."[162] Finding that the major activity of field hockey involves bodily contact, the court concluded, "Although the purpose of field hockey is not to make bodily contact, such contact is inevitable in a sport that combines running, sticks, a hard ball, and a wide-open playing field."[163]

The court also found Brian's claim of an Equal Protection violation wanting. After noting that the state-sponsored, gender-based exclusion of boys playing girls' field hockey would receive intermediate level review, the court simply stated that "clearly a substantial relationship [exists] between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women."[164] Since the court found that redressing past discrimination against women in athletics and promoting female participation are "beyond question," important governmental interests, and "excluding males from female teams is substantially related to achieving that objective," Brian's equal protection claim was dismissed.[165] Having rejected Brian's two federal claims, the court refused to address the state law claims since federal question jurisdiction was then lacking.[166]

b) The Rhode Island Superior Court Decision in *Kleczek*

Having failed in federal court on the Title IX and Equal Protection Clause complaints, the Kleczeks next turned to state court, arguing that the RIIL's ban on boys playing on girls' teams violated the Rhode Island Constitution. Article I, Section II of the Rhode Island Constitution states, "No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimi-

159. Kleczek, 768 F. Supp. at 955.

160. *Id*.

161. *See infra* Part II. C.

162. Kleczek, 768 F. Supp. at 955-56.

163. *Id*.

164. *Id*. (quoting Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1131 (9th Cir. 1982)). To reiterate the intermediate level scrutiny test, the state must show that a gender-based classification serves "important governmental objectives and that the discriminatory means employed" are "substantially related to the achievement of those objectives." Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

165. Kleczek, 768 F. Supp. at 956.

166. *Id*.

nation by the state, its agents or any person or entity doing business with the state."[167]

Interestingly, although Article I, Section II of the Rhode Island Constitution had been adopted in 1986, by 1991 the provision still had "yet to be interpreted by the Rhode Island Supreme Court."[168] After a review of other states' interpretation of their equal rights amendments, the court decided that strict scrutiny would apply to the RIIL's ban.[169] The court then relied heavily on the Massachusetts Supreme Court's *Attorney General* analysis.[170] The court noted, along with the Massachusetts court, "that less offensive and better calculated alternatives exist for promoting the purported interest in advancing girls' athletics, than a blanket ban on boys' participation."[171] Addressing paternalism concerns, the court noted that the ban on boys "is counterproductive and simply reinforces the insidious notion of female inferiority."[172] The court granted the Kleczek's preliminary injunction during the middle of the field hockey season in Brian's junior year.[173] Brian was allowed to play field hockey with the girls' team for several days.[174]

c) The Rhode Island Supreme Court Decision in *Kleczek*

The RIIL filed an immediate writ of certiorari to the Rhode Island Supreme Court, seeking an injunction blocking enforcement of the Superior Court decision as well as a review of the decision.[175] The writ and the injunction were immediately granted, and Brian had to sit out for the rest of the season. The Rhode Island Supreme Court then reversed the lower court holding that, with regard to the Rhode Island Constitution, intermediate level scrutiny "is particularly appropriate for gender classifications that effect athletic opportunities for boys and girls. Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition. Some classifications based on gender may therefore be justified. The classifications can reflect reasoned judgment rather than prejudice."[176] Brian lost his challenge.

In a 1998 article discussing the issue of boys playing on girls field hockey teams, the *Wall Street Journal* caught-up with Brian Kleczek, who discussed the few days in between the Superior Court ruling and the Supreme Court's injunction:

---

167. R.I. CONST. art. I, § II.

168. *Kleczek v. R.I. Interscholastic League*, No. 91-5475, 1991 R.I. Super. LEXIS 101, at *5 (R.I. Super., Sept. 27, 1991), *vacated by*, 612 A. 2d 734 (R.I. 1992).

169. *Id*. at *11.

170. *See infra* Part IV.A.2.

171. *Kleczek v. R.I. Interscholastic League*, No. 91-5475, 1991 R.I. Super. LEXIS 101, at *13 (R.I. Super., Sept. 27, 1991) (quoting Attorney Gen. v. Mass. Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284, 294 (Mass. 1979), *vacated by*, 612 A. 2d 734 (R.I. 1992).

172. *Id*.

173. *See* White, *supra* note 14, at B1.

174. *Id*.

175. Kleczek v. R.I. Interscholastic League, 612 A. 2d 734 (R.I. 1992).

176. *Id*. at 738.

> One week later, Brian, then in the fall of his junior year, was set to make his debut. "I never practiced any harder than that week," he says. But when the big day came, he was called to the principal's office to learn that a member of the state Supreme Court had temporarily blocked the lower court's ruling. The Supreme Court later rejected his sex-discrimination argument.
>
> After graduating, Brian applied to be the girls' field hockey coach, but was turned down for that, too. Now 24 . . . [Brian] predicts that eventually pressure from boys will force the integration of his favorite sport. But for now he is "taking a break from field hockey."[177]

4. *Maine Human Rights Commission v. Maine Principals Association*

In 1996, and again in 1997, Jeremy Ellis tried out for the Portland High School girls' field hockey team and was barred from participating. In 1998, Jessie Turcotte suffered the same fate at St. Dominic's High School. The high schools refused to allow the boys to try out or play for the field hockey teams because the Maine Principals Association (MPA), which organizes interscholastic athletics in Maine, enacted a rule causing a team which plays a boy in competition to forfeit the game for purposes of post season play—effectively banning boys from girls' field hockey.[178] The Maine Human Rights Commission brought a lawsuit on the boys' behalf alleging a violation of Maine's Human Rights Act, rather than a violation of Title IX of the Equal Protection Clause. Still, the courts analysis covered those topics, especially since the MPA enacted the forfeit rule in order to comply with Title IX.[179]

In order to comply with Title IX's mandates, the MPA promulgated athletic regulations for Maine high schools designed to "provide an overall equal athletic opportunity for both sexes."[180] The court agreed with the MPA's construction of the athletic opportunity test, meaning that the boys would have to show that overall athletic opportunities for boys have been limited in general at their high schools rather than specifically in the sport of field hockey.[181] Since overall athletic opportunities for high school boys had not been limited in the past, there was no need to examine whether field hockey was a contact sport. With the court making this finding, the boys' claim was doomed to fail.[182]

The court explained that in Maine, since so many boys and so few girls play football, an additional fall sport needed to be played that would effectively

---

177. White, *supra* note 14, at B1.

178. Me. Human Rights Comm'n v. Me. Principals Ass'n, No. CV-97-599, 1999 Me. Super. LEXIS 23, at *12-13 (Me. Super. Jan. 21, 1999).

179. The language of the MPA's athletic regulations mirrors that of the policy interpretations of Title IX. *See id.* at *5-6.

180. *Id*. at *6.

181. *Id*.

182. *See Id*. at *7-8 ("The plaintiffs have failed to meet their burden of proof to show that they have been denied equal athletic opportunity. They have offered no evidence concerning program wide disparity in provision of equipment and supplies; scheduling of games and practice time; travel and per diem allowance; opportunity to receive coaching and academic tutoring; assignment of coaches, tutors, and officials; provision of locker rooms, practice and competitive facilities, medical and training machine facilities and services, rooming and dining facilities and services, supportive services and benefits or any disproportion in expenditures.").

accommodate the needs and interests of girls.[183] The sport chosen was field hockey. The court reasoned that "a rule change permitting coeducational field hockey would diminish the extent to which sports effectively accommodate the interests and abilities of girls during the fall athletic season."[184] Borrowing a page from equal protection analysis, the court finally concluded, "the evidence establishes that there is a substantial relationship between excluding boys from playing field hockey and providing equal opportunities for girls in athletics."[185]

Though the plaintiffs did not allege that the MPA had violated Title IX or the Equal Protection Clause, the court still used pieces of analysis applicable to those statutes.[186] The rationale was that boys could be excluded even under Title IX, since athletic opportunities for boys in general have not been limited in the past.[187] Likewise, the important governmental objective of providing equal athletic opportunity for girls is furthered by not allowing (arguably athletically superior) boys to fill up roster spots on girls' field hockey teams.[188]

5. *B.C. v. Board of Education, Cumberland Regional School District*

In 1984, a boy referred to as "C.C." played on the Cumberland High School junior varsity girls' field hockey team in New Jersey. Several opposing teams complained to the New Jersey State Athletic Association (NJSAA) about this, indicating that if C.C. were to play on his school's varsity field hockey team, "they would actively recruit males for their girls' field hockey teams thereby displacing otherwise eligible girls."[189] Responding to these concerns, in the spring of 1985, the NJSAA adopted a resolution stating, "Males shall be excluded from female athletic teams although there are no teams for boys in the same sport until such time as both sexes are afforded overall equal athletic opportunities."[190] C.C. and his parents challenged the resolution in an administrative law proceeding. The administrative law judge (ALJ) sided with C.C., deciding that "male participation on girls' field hockey teams would not have a detrimental impact."[191] The NJSAA's Commissioner rejected the ALJ's conclusion, and C.C.'s parents appealed the Commissioner's decision to New Jersey Superior Court.[192]

The appeal was based on New Jersey state constitutional grounds, but the court still relied on Title IX and Equal Protection Clause analysis in its decision.[193] The court articulated that "sex-based classification can withstand consti-

---

183. *Id*. at *9-10.

184. *Id*. at *16.

185. *Id*. The court goes on to state, "Conversely, the evidence also establishes that permitting boys to compete with girls will likely result in an overall lessening of equal opportunities for girls in athletics." *Id*.

186. *See id*. at *14-16.

187. *Id*. at 12-13.

188. *Id*. at 14-16.

189. B.C. v. Bd. of Educ., Cumberland Reg'l Sch. Dist., 531 A.2d 1059, 1061 (N.J. Super. A.D.,1987).

190. *Id*.

191. *Id*. at 1062.

192. *Id*. at 1063.

193. *Id*. at 1064-65.

tutional challenge under the Fourteenth Amendment where the actual purpose of the discrimination is to compensate for past discrimination."[194] Using that criteria, the court ruled that the NJSAA ban did act to prevent "males from dominating and displacing females from meaningful participation in available athletic opportunities."[195] The court finally concluded, "The governmental interest in promoting equality of athletic opportunities is advanced by the exclusion of C.C.'s participation on the girls' field hockey team."[196]

The court also addressed the contact sports exception, though not as part of the major holding of the case. The ALJ had decided initially that "although incidental contact may occur, field hockey is not a contact sport."[197] The NJSAA Commissioner specifically rejected this conclusion, noting that the presence of incidental contact was enough to characterize field hockey as a contact sport, especially if boys were to play due to the "physiological differences between boys and girls."[198] The court acquiesced with the Commissioner's characterization.[199] In the end, the court rejected C.C.'s complaint and affirmed the Commissioner's decision to ban C.C. from playing on the girls' field hockey team.

B. Analysis of the Cases

In analyzing the above cases and their final outcomes, some general conclusions can be made with regard to how courts have treated boys' arguments that they should be allowed to play girls' field hockey under Title IX and the Equal Protection Clause. First, under Title IX, no case resulted in the conclusion that the athletic opportunity test needed to be read specifically in terms of field hockey rather than generally covering all male high school athletic participation. This means that since it is still absurd at most high schools to suggest that boys' athletic opportunities have been restricted in the past compared with girls generally, the Title IX argument will likely fail.[200] Furthermore, in the cases where it was an issue, all of the courts making final decisions determined that field hockey is a contact sport, which is also enough to justify an exclusion of boys.[201]

Second, under the Equal Protection Clause, the courts all recognized that redressing past discrimination against girls in high school athletics is an important governmental objective. The courts that applied intermediate level scrutiny all found that bans on boys playing girls' field hockey passed muster. The lone hold-out was Massachusetts, where the court applied strict scrutiny under its state constitution's equal rights amendment.

---

194. *Id*. at 1065.
195. *Id*. at 1065.
196. *Id*. at 1066.
197. *Id*. at 1067.
198. *Id*.
199. *Id*. at 1068.
200. There could be the rare girls-only high school that begins to admit boys.
201. *See infra* Part II.C.

VI. CONCLUSION

Boys cannot claim a right under federal law to play on girls' high school field hockey teams. Under federal law, if states choose to permit boys to play high school field hockey they may. However, they are not required to unless the state has a more stringent equal protection right under the state constitution than is currently recognized under the federal Constitution. If a state chooses to ban boys from playing field hockey, the boys who challenge these decisions should look somewhere else besides Title IX or the Equal Protection Clause for a redress of their grievances.

So what about Kenny? While Kenny does not have a federal statutory or constitutional right to play girls' high school field hockey, should he still be permitted to play? As sports in America, especially at the high school level, continue to see a breakdown of traditional gender boundaries,[202] states should be encouraged to allow boys to play girls field hockey, within limits such as those suggested by the Massachusetts Supreme Court. States could set height and weight limitations on boys allowed to participate,[203] and could limit the number of roster spots boys can fill and the number of boys allowed on the field at any time.[204] This would be a fair way to address safety and competitive fairness concerns as well as accommodate Kenny's desire to play field hockey.

---

202. *See infra* INTRODUCTION.

203. This would be an arbitrary exercise, but what about no boys over 5'10 and 160 pounds, for instance?

204. A provision along the lines of no more than three or four boys on a varsity roster and no more than one or two boys on the field per team at any given time seems reasonable.