Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines

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I. INTRODUCTION

Although participation in athletics is an important part of the educational process in American high schools, only recently have females been encouraged to participate in competitive sports. The number of females participating in interscholastic athletics has increased dramatically in the last decade. Large discrepancies continue to exist, however, in the participation rates of female and male athletes, and the female

1. U.S. COMMISSION ON CIVIL RIGHTS, MORE HURDLES TO CLEAR: WOMEN AND GIRLS IN COMPETITIVE ATHLETICS (1980) [hereinafter cited as MORE HURDLES]. According to the Commission, the benefits of athletic participation include the promotion of good health and the development of teamwork, cooperation, and a competitive spirit. Id. Similarly, the Minnesota Supreme Court has noted that "interscholastic activities . . . [are] today recognized . . . as an important and integral facet of the . . . education process." Thompson v. Barnes, 294 Minn. 528, 535 n.11, 200 N.W.2d 921, 926 n.11 (1972).

2. In the Victorian era, females were commonly considered too weak, fragile, and passive for rigorous exercise. Spears, The Emergence of Women in Sport, in WOMEN'S ATHLETICS 27 (1974). In the early 1900's, many physical educators were convinced that the enthusiasm of college women for competitive sports was both dangerous and unwomanly. E. GERBER, J. FELSHIN, P. BERLIN & W. WYRICK, THE AMERICAN WOMAN IN SPORT 12-13 (1974). In recent years the major obstacle to female participation in interscholastic athletics has been inequality between female and male athletic programs in the allocation of facilities, equipment, practice schedules, and funding. See infra note 5 and accompanying text.

3. In 1970-71, approximately 300,000 women, or 7.4 percent of all members of high school athletic teams participated in interscholastic sports. NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, SPORTS PARTICIPATION SURVEY (1971-72), reprinted in MORE HURDLES, supra note 1, at 13. In 1980-81, the proportion of female athletes had increased to 31.7 percent and the number of female participants had increased 617.9 percent to 1,853,789. NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, SPORTS PARTICIPATION SURVEY (1980-81) (Telephone conversation with Warren Brown, Assistant Director of National Federation of State High School Associations (April 30, 1982)).

4. Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,419 (1979). Statistics utilized by the Department of Health, Education, and Welfare (HEW) for the period of 1977-78 show that, although women students accounted for 48 percent of the national undergraduate enrollment, only 30 percent of the students involved in intercollegiate athletics were women. Id. For comparable high school statistics, see PA. COMM. FOR WOMEN, SEX DISCRIMINATION IN HIGH SCHOOL SPORTS (1979) (on file at the Minnesota Law Review) [hereinafter cited as SEX DISCRIMINATION].
who does participate continues to receive less than a fair share of athletic resources, services, and benefits.\footnote{5}

The exceptional female athlete, perhaps prompted by these program disparities as well as by heightened female interest in competitive athletics, has increasingly attempted to participate in male athletic programs. If barred from such competition, the female athlete has invoked the judicial process to establish her right to compete for a position on a male athletic team.\footnote{6} Most courts facing this question over the last decade have held that denying a qualified female the opportunity to compete in state supported athletics where no comparable female team exists violates the equal protection clause of the fourteenth amendment.\footnote{7} The enactment of Title IX to the Education Amendments of 1972 supports this judicial trend by requiring equal opportunity for male and female athletes,\footnote{8} and public high

\footnotetext[5]{5}{44 Fed. Reg. 71,413, 71,419 (1979). HEW cited a finding of the United States Commission on Civil Rights that colleges and universities generally provide twice the number of sports for men as they do for women. \textit{Id.} HEW also noted that male athletes receive 78 percent ($32,000) of the average annual scholarship budget of schools while female athletes receive 22 percent ($7,000), even though 30 percent of all athletes eligible for scholarships are women. \textit{Id.} The report also notes disparities in funding for recruitment of male and female athletes, ratios of coaches to athletes, quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities. \textit{Id.} See also \textit{SEX DISCRIMINATION, supra} note 4, at 9-11. Courts and commentators have stated that male athletes generally possess higher levels of athletic skill than female athletes, see, e.g., \textit{O'Connor v. Board of Educ.}, 449 U.S. 1301, 1306-07 (1980); \textit{Cape v. Tennessee Secondary School Athletic Ass'n}, 563 F.2d 793, 795 (1977), suggesting that male athletes may be exposed to more demanding levels of competition than female athletes. See \textit{Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n}, 647 F.2d 651, 666 (1981) (Jones, J., dissenting); \textit{Note}, \textit{Sex Discrimination in High School Athletics}, 57 Minn. L. Rev. 339, 369 (1972).}


\footnotetext[7]{7}{See, e.g., \textit{Brenden v. Independent School Dist. 742}, 477 F.2d 1292, 1302 (8th Cir. 1973) (high school provided non-contact sports only for boys); \textit{Leffel v. Wisconsin Interscholastic Athletic Ass'n}, 444 F. Supp. 1117, 1121 (E.D. Wis. 1978) (athletic association denied girls the opportunity to try out for a boys' athletic team where no girls' team was provided); \textit{Hoover v. Meiklejohn}, 430 F. Supp. 164, 169 (D. Colo. 1977) (complete denial of any opportunity to play interscholastic soccer violated the plaintiff's right to equal protection). See also \textit{Fabri & Fox, The Female High School Athlete and Interscholastic Sports}, 4 J. L. & Educ. 285, 394 (1975).}

\footnotetext[8]{8}{Congress demonstrated its intent to provide equal opportunity to female and male athletes in non-contact sports with the adoption of Title IX to the Education Amendments of 1972. Education Amendments of 1972, § 901, 20 U.S.C. § 1681 (1976). \textit{See infra} notes 57-58 and accompanying text. Under Title IX, however, the plaintiff must demonstrate both that the state provides only a}
schools have been compelled to focus more attention upon their female athletic programs. As a result there has been a marked increase in sports offerings for females. This recent proliferation of female teams places the exceptional female athlete in a difficult position, however, because courts have not consistently upheld the qualified female athlete’s right to try out for a male team if her school district has established a separate female team in the same sport.

This Note discusses the legal doctrines affecting the female athlete’s effort to establish a right to compete for a position on a male athletic team when the school affords the athlete an opportunity to participate on a separate female team in the same sport. In such circumstances, the female athlete may challenge a separate sex program under the Federal Constitution, under a federal civil rights statute, or under applicable state constitutional or statutory provisions. This Note examines and criticizes the traditional legal analysis of claims of sex discrimination by female athletes under each of these legal doctrines. The Note suggests that the female athletes’ claims should be resolved in light of the underlying social policies of each doctrine to afford equal opportunity to individuals regardless of gender.

single sex team and that athletic opportunities have previously been limited for her gender. See Fabri & Fox, supra note 7, at 294. For a further discussion of the limits on the right of female athletes to compete under Title IX, see infra notes 58-91 and accompanying text.

9. See More Hurdles, supra note 1, at 11-12.

10. The split in recent decisions results from the different treatment which the issue receives under federal and state law. Courts addressing the issue under federal law provide some direction for the legal practitioner. See, e.g., Leffel v. Wisconsin Interscholastic Athletic Ass’n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) (provision of separate girls’ teams for contact sports was constitutionally valid); Hoover v. Meikeljohn, 430 F. Supp. 164, 170 (D. Colo. 1977) (separate sex teams meet the constitutional requirement of equal opportunity when teams receive substantially equal support in substantially comparable programs). One commentator asserts that the regulations promulgated under Title IX merely reflect the current decisional trend in federal courts to deny the female plaintiff a right to compete on a male team when a separate female team exists. See Kadzielski, Title IX of the Educational Amendments of 1972: Change or Continuity?, 6 J. L. & EDUC. 183, 201 (1977).

Several courts have decided under applicable state law that the female athlete has a legal right to compete for a male team even if a comparable female team exists. See, e.g., Darrin v. Gould, 85 Wash. 2d 859, 877-78, 540 P.2d 882, 889 (1975) (denial of girl’s right to try out for male sports team is invalid under state equal rights provisions whether or not a “separate but equal” girls’ team exists); Commonwealth ex rel. Packel v. Pennsylvania Interscholastic Athletic Ass’n, 18 Pa. Commw. 45, 52, 334 A.2d 839, 842 (1975) (same).
II. ANALYSIS OF APPLICABLE LEGAL DOCTRINES

A. FEDERAL CONSTITUTION

Many female plaintiffs seeking the right to compete for a position on a male high school athletic team have challenged local prohibitions of their participation under the United States Constitution. The athletes have most frequently argued that separate sex interscholastic teams deny the exceptional female athlete equal athletic opportunity in violation of the equal protection clause of the fourteenth amendment. A less commonly litigated question is whether state denial of a female athlete's freedom to compete for a male athletic team position violates the due process clause of the fourteenth amendment.

1. Equal Protection Under the Fourteenth Amendment

Many female plaintiffs seeking the opportunity to compete for a position on a male high school sports team have brought suit under the equal protection clause of the fourteenth amendment. To maintain such a suit, the plaintiff must show that the defendant's action is sufficiently governmental in character to be subject to the constitutional limits on state action. The current standard of review under the equal protection clause provides that state action involving a gender-based classification will be upheld only if the classification is substantially related to the achievement of important governmental objectives. The government has the burden of defending the

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12. The state action doctrine provides that constitutional rights can only be enforced against actions by government officials or those significantly involved with them. See generally L. Tribe, AMERICAN CONSTITUTIONAL LAW §§ 18-1 to 18-3 (1978). Courts usually find the requisite nexus between the state and the defendant athletic sponsor when evidence exists that the state has provided the defendant's facilities or a major portion of its funding. See, e.g., Fortin v. Darlington Little League, Inc., 514 F.2d 344, 346-47 (1st Cir. 1975). See generally Note, supra note 5, at 350-51.

13. Since the 1960's, the Supreme Court has applied two different standards of review in equal protection cases depending upon the substantive area under consideration. See Gunther, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 HARV. L. REV. 1, 8-10 (1972). Those classifications which are "suspect" or which otherwise affect fundamental rights are subjected to an exacting strict scrutiny standard, which requires a "necessary" relationship between the classification and a "compelling" state interest. Id. Other classifications are held to a minimum rationality test, which is satisfied by the mere showing of a "rational" relationship to a "permissible"
discrimination and must prove the importance of its asserted objective and a substantial relationship between the classification and that objective.\textsuperscript{14} If the government is unable to show that its asserted objective cannot be effectively achieved by a gender-neutral classification its ability to satisfy this burden may be substantially diminished.\textsuperscript{15} In the present context, the separate sex athletic team system is commonly alleged to be substantially related to governmental interests in the prevention of bodily harm due to physiological differences between males and females,\textsuperscript{16} the prevention of psychological harm to governmental objective. \textit{Id. See also} Comment, \textit{The Constitutionality of Statutory Rape Laws}, 27 U.C.L.A. L. Rev. 757, 779 (1980).

In Craig v. Boren, 429 U.S. 190 (1976), the Court departed from its established two-tier analysis and introduced an intermediate level of scrutiny for the review of gender-based classifications. Under the standard established in \textit{Craig}, a gender-based classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." \textit{Id.} at 197 (interpreting Reed v. Reed, 404 U.S. 71 (1971)). \textit{See also} Michael M. v. Superior Court, 450 U.S. 494, 469 (1981). This intermediate level of scrutiny has been adopted by courts dealing with sex-based classifications in interscholastic athletics. \textit{See, e.g.}, O'Connor v. Board of Educ., 645 F.2d 578, 581-82 (7th Cir.), \textit{cert. denied}, 102 S. Ct. 641 (1981); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978). \textit{But see} Hoover v. Meiklejohn, 430 F. Supp. 164, 168-71 (D. Colo. 1977) (balancing the importance of the opportunity being denied or burdened, the strength of the state interest served by its denial, and the character of the group whose opportunities are denied).


Traditionally, one factor which courts consider in determining whether the sex-based classification underlying a separate sex team system is properly related to a valid state purpose is the contact or non-contact nature of the particular sport. It is argued that because of physical differences between the sexes, females would suffer serious physical injury if they participate in coeducational sports involving bodily contact. Separate sex contact sports teams are therefore found sufficiently related to the avowed governmental objective of harm prevention. \textit{See, e.g.}, Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212, 1216 (W.D. Pa. 1973), \textit{aff'd}, 516 F.2d 1328 (3rd Cir. 1975); \textit{Comment, Sex Discrimination in Interscholastic High School Athletics}, 25 Syracuse L. Rev. 535, 550 (1974). For a discussion of the demise of the distinction between contact and non-contact sports, see Commentary, \textit{Sex Discrimination in Athletics: Conflicting Legislative and Judicial Approaches}, 29 Ala. L. Rev. 390, 395 (1978). For a definition of "contact sports" utilized in Title IX analysis, see \textit{infra} note 79.
athletes in a coeducational system, the prevention of potential harm posed to female athletic programs by a coeducational system, and the promotion of maximum athletic participation by both genders. Although each of the commonly advanced governmental interests can be said to be sufficiently important, the substantiality of the relationship between the segregated team system and the achievement of these interests is less clear.

Courts have increasingly found little merit in the defendant's assertion that the separate sex team system is necessary to prevent physical harm to female athletes. Physiological differences between the sexes change as males and females age and mature. Moreover, there exists a wide range of individual differences in physiological attributes within either sex at any given age. Therefore, a blanket rule that separate teams are necessary to protect females because they are more susceptible to bodily injury than males inaccurately reflects true physical differences between the sexes. In addition, the state does not extend this protection to weaker and less athletically


skillful males, a further reflection of the irrationality of this justification for the separate sex team system. The governmental interest in preventing physical harm could be served by a less arbitrary gender-neutral classification which segregates athletes on the basis of individual size, strength, and athletic skill. The wide range of physical differences within and between the sexes at a given age seriously undermines the credibility of the relationship between the gender classification and the asserted governmental interest. Because the government will be unable to show that its asserted objective cannot be achieved by a gender-neutral classification, the separate sex team system is not substantially related to the prevention of bodily harm to female athletes.

Some courts and commentators have asserted that schools need a separate sex team system to prevent the psychological harm resulting from a coeducational athletic program in which females are unable to successfully compete with males and males are unable to fulfill their athletic potential. This assertion is undermined, however, by two basic flaws. First, proponents of this assertion offer no evidence to support the premise that an athlete who always or never wins will suffer psychological harm. In the absence of such evidence, it is unreasonable to assume that the coeducational athletic program will cause participants to suffer serious psychological harm. Second, the assertion is flawed because even if such

24. See supra note 15 and accompanying text.
25. The dissent in Yellow Springs observed that proponents "will be hard-pressed ever to prove [the prevention of harm] rationale. Every athlete must accept the risk of injury. The goal of safety strikes me as another example of patronizing protection for women. . . . [S]uch 'romantic paternalism' has the 'practical effect' of putting women 'not on a pedestal, but in a cage.'" Yellow Springs Exempted Village Bd. of Educ. v. Ohio High School Athletic Ass'n, 647 F.2d 651, 664 n.5 (6th Cir. 1981) (Jones, J., concurring in part and dissenting in part).
26. See, e.g., Hollander v. Connecticut Interscholastic Athletic Conference, Inc., No. 12-49-27, slip op. at 8 (Super. Ct. Conn. March 29, 1971) ("In the world of sports, there is ever present as a challenge, the psychology to win. With boys vying with girls . . . the challenge to win, the glory of achievement, at least for many boys, would lose incentive and become nullified.").
27. See, e.g., Note, supra note 5, at 352-53.
29. The possibility that a coeducational system would cause psychological harm to athletic participants has not prevented HEW, New York, or Michigan from promulgating regulations which allow coeducational competition in non-contact sports. See infra notes 78, 101 and accompanying text. Several other states have construed applicable state provisions to allow coeducational participation whether or not the sport at issue is a contact sport. See infra note 101 and accompanying text. Such legislative action suggests that there may exist a
serious psychological harm actually would occur, the type of athletic team structure would not prevent it. Every competitive athletic system is comprised of relatively greater and lesser skilled individuals. Thus, if it is true that athletes who either always or never compete successfully suffer psychological harm, the harm will occur regardless of whether the individual competes in a separate sex or coeducational team system. For this reason, even if psychological harm is a realistic concern, its prevention is not substantially related to maintaining a separate sex team system.

Another alleged governmental objective underlying the separate sex team system is the prevention of the adverse effect on the future development of female athletic programs. Supporters of the separate sex team system argue that the development of the level of competition in new female athletic programs will be seriously undermined if the most able female competitors are lost to established male athletic programs.

lack of firm data supporting the proponent's argument that institution of a coeducational team system will result in psychological harm to athletes. For a discussion of a New York study designed to examine the effects of a coeducational system on athletic participants which adds some support to this theory, see Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1301-02 (8th Cir. 1973); Note, supra note 5, at 353.

The proponents of the psychological harm theory appear to envision an athletic system which provides one or more male-dominated athletic teams, thus frequently forcing the female athlete to face her inability to successfully compete with her peers and causing her to suffer psychological harm. This result appears unrealistic, however, in view of the requirement under Title IX that both female and male athletes be given an equal opportunity to participate in athletics. See infra notes 82-86 and accompanying text. Thus, the female athlete will be afforded the choice of participating within the female or male athletic program, assuring, to some degree, that she will be mentally prepared for the psychological effects of her choice.

Alternatively, it has been argued that a separate sex athletic team system is necessary to protect the future development of female athletic programs because a mandatory coeducational team system would result in male-dominated teams.
Courts weighing this argument have found it too speculative to have merit. Coeducational programs which attract the best female athletes may just as easily have a positive effect on female athletic programs by “calling attention to the abilities of female athletes and consequently raising fan interest and funding.” In addition to its overly speculative nature, the argument is unpersuasive because it proposes that the exceptional female athlete be required to participate at less than her optimal skill level solely because, if she does not do so, other female athletes may be forced to play at lower levels of competition. That requirement is repugnant to the fundamental ideal of equal athletic opportunity.

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In some respects, Karen's claim is no different from that of any other sixth or seventh grader. The younger children are permitted to tryout for the eighth-grade teams, but the eighth graders are excluded from the seventh-grade teams because their participation would be unfair to the younger students. The fact that an eighth-grader must face competition from talented seventh-graders without reciprocal rights indicates that there is no necessary reason why boys may not be required to compete with talented girls without reciprocal rights.


34. See, e.g., Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass’n, 647 F.2d 651, 664 (6th Cir. 1981) (Jones, J., concurring in part and dissenting in part); Brenden v. Independent School Dist., 742, 477 F.2d 1292, 1302 (8th Cir. 1973). The court in Yellow Springs did not make any ruling on the merits of the defendant's harm to female athletic programs, because it determined that the district court could have decided the case without reaching the constitutional issue. See infra note 53.


36. Courts must look to the overall athletic experience provided an individual under a particular athletic system and pay closer attention to the objectives underlying interscholastic athletics to best define equality of opportunity for high school athletes. If the major objective of participation in interscholastic athletics is to increase athletic skills, a system which allows the athlete to compete at his or her optimal skill level will best achieve this goal. If the major objective is to teach athletes how to compete and cooperate well within a team structure, it becomes less clear which system will best effectuate this purpose. The close bonds and friendship which result from participating on a single sex team, especially during those years when the commingling of the sexes may feel unnatural to many, suggests that a system of single sex teams may produce a more conducive atmosphere for the development of the individual athlete's skills in cooperation and leadership. On the other hand, courts must recognize the increased potential for males and females to interact with each other in today's work environment. If an objective of interscholastic athletics is to foster the individual athlete's "strength of character, leadership qualities and to provide competitive situations through which [she or] he will better learn to cope with the demands of the future," Clinton v. Nagy, 411 F. Supp. 1396, 1400
Finally, proponents of the separate sex team system have argued that if courts forbid sex-based classifications in interscholastic athletics, males will dominate the athletic programs offered, and thus deny to most female athletes a meaningful opportunity to participate. The relationship between the separate team system and the asserted governmental interest in maximizing athletic participation can be discredited on two grounds. First, the fear that allowing females to try out for male athletic teams will necessarily lead to a decrease in female athletic participation is entirely unsupported by evidence. This rationale assumes without qualification that females as a class are athletically inferior to males. Although it may be true that some females are unable to compete in sports on an equal basis with their male peers, it is arbitrary to assume that all females are unable to effectively compete with males. Second, proponents have argued that a coeducational

(N.D. Ohio 1974), it must be recognized that the separate sex team system is not the most effective means to achieve these objectives. See, e.g., O'Connor v. Board of Educ., 449 U.S. 1301, 1307 (1980); Cape v. Tennessee Secondary School Athletic Ass'n, 563 F.2d 793, 795 (6th Cir. 1977) (per curiam); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69, 75 (N.D. Ill. 1972); cf. Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1299 (8th Cir. 1973) (males are physiologically stronger); Ritacco v. Norwin School Dist., 361 F. Supp. 930, 932 (W.D. Pa. 1973) (same). The Cape court stated, "[I]t 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." 563 F.2d at 795. See generally Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletics Ass'n, 647 F.2d 651, 657 (6th Cir. 1981); Comment, supra note 16, at 558-59.

Since there has never been a mandatory requirement that schools establish a system of coeducational interscholastic athletic teams, no firm evidence based on actual experience exists regarding the effect of coeducational teams on maximizing participation in sports. Litigants could just as easily suggest that increased competition and skill will more strongly motivate female athletes to participate in interscholastic athletics. Furthermore, the possibility of disrupting female participation has not prevented Congress and numerous states from allowing coeducational athletic competition. See supra note 29. Litigants might also assert that because large discrepancies exist in the availability of teams in certain sports, such as football, for males and females, a coeducational team system would substantially maximize the female athlete's opportunity to compete in interscholastic athletics. See supra notes 4-5 and accompanying text.

Recent studies reveal that an undetermined percentage of physical inequality between men and women results from the social or cultural restrictions imposed on the female. See Wilmore, Exploding the Myth of Female Inferiority, Physician & Sportsmedicine, May 1974, at 54, 55. Wilmore argues that the young female athlete is caught in a vicious cycle. While she is denied the opportunity to increase her strength, skill, and physical well-being because of alleged physical differences between males and females, her male peers are, at the same time, encouraged to participate in the male athletic program. This
system would result in a restriction of opportunities for prospective female athletes, erroneously assuming that schools would abandon female programs in favor of one or more male-dominated coeducational athletic teams. Title IX, however, mandates that each school provide equal athletic opportunity to both female and male students.40 This mandate would not be followed if female athletes are not capable of participating on the only coeducational athletic team provided by a school.41 In such circumstances, Title IX directs that schools provide additional opportunities for female athletes.42 Accordingly, the abandonment of the separate sex team system would not result in a restriction of athletic opportunities for females. Therefore, the system is not substantially related to the important governmental interest in the maximization of athletic participation.43

Proponents have not yet demonstrated that separate sex teams are substantially related to an important governmental objective.44 Even if assumed to be of sufficient importance, the avowed government interests may be served by less intrusive gender-neutral classifications, thus rendering the gender-based team system virtually unjustifiable.45 Thus, separate sex teams

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40. See Yellow Springs Exempted Village School Dist. Bd. of Educ. v. Ohio High School Athletic Ass'n, 647 F.2d 651, 665 (6th Cir. 1981) (Jones, J., concurring in part and dissenting in part); infra notes 71-73 and accompanying text. Several states have also enacted constitutional provisions or legislation requiring equal athletic opportunity for both genders. See infra notes 92-111 and accompanying text. Thus, even if a particular plaintiff is unable to invoke the protections of Title IX, see infra notes 65-74 and accompanying text, an applicable state provision may mandate that equal opportunity to participate be extended to both genders.

41. See infra note 80.

42. Id. See supra note 30.

43. Although the Seventh Circuit reached a contrary result in O'Connor v. Board of Educ., 645 F.2d 578, 582 (7th Cir.), cert. denied, 102 S. Ct. 641 (1981), the court failed to consider properly whether the defendant's separate sex athletic program, which appeared to comply with HEW regulations, nonetheless violated Title IX or an applicable state provision requiring equal athletic opportunity for both females and males. Id. Thus, the court did not properly consider the mandate of Title IX, or potentially existing state law, in its determination that the separate sex team system provided the plaintiff with the requisite equality of athletic opportunity.

44. The weakness of the purported relationship has become even clearer with the enactment of Title IX and state legislation, and the requirements they place on the structure of interscholastic sports teams. See supra note 36; infra notes 57-111 and accompanying text. The precedential effect of equal protection cases decided prior to the implementation of Title IX, as well as recent promulgations of applicable state laws, must be reinterpreted in the present context.

45. See authorities cited supra note 15.
appear to violate the equal protection clause of the fourteenth amendment.

2. Due Process Under the Fourteenth Amendment

The female athlete may also challenge a separate sex interscholastic athletic team under the due process clause of the fourteenth amendment. The due process clause prohibits the state from depriving an individual of an interest in liberty or property unless the state shows that an avowed government interest is sufficient to justify the deprivation. Thus, to proceed under the due process clause, the individual claimant must allege a deprivation of a protected liberty or property interest.

The claim that a separate team system is unconstitutional under the due process clause was upheld in at least one case. The federal district court in Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association found that female students have a liberty interest in freedom of choice in matters concerning their state-supported education. In assessing whether the deprivation of this liberty interest was justified by the asserted governmental interests in preventing injuries to female athletes and maximizing female athletic opportunities, the Yellow Springs court reasoned that both avowed interests rested upon a conclusive presumption that females are less skilled athletes than males solely because of their gender. The Yellow Springs court found this underlying presumption invalid, because the due process clause does not permit the state to deny an individual’s protected liberty interest on the basis of a presumption that might be rebutted on an individual basis. Since the Association’s rule barring physically capable female athletes from par-

46. U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).
49. Id. at 758. For a general discussion of the Yellow Springs case, see 4 U. DAYTON L. REV. 197 (1979).
50. 443 F. Supp. at 758.
51. Id. (citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974)). The Supreme Court held in LaFleur that an irrebuttable presumption, embodied in certain school board regulations, concerning a pregnant woman’s inability to teach “is neither ‘necessarily [nor] universally true’ and is violative of the Due Process Clause.” 414 U.S. at 646 (quoting Vlandis v. Kline, 412 U.S. 441, 452 (1973)). The Yellow Springs court stated, “[A]lthough some women are physically unfit to participate with boys in contact sports, it does not ‘necessarily and universally’ follow that all women suffer similar disabilities.” 443 F. Supp. at 758.
ticipating with males in interscholastic sports was based on an irrefutable presumption, the *Yellow Springs* court held that the rule deprived them of liberty without due process of law.\textsuperscript{52}

Subsequent judicial decisions, however, have raised strong doubts as to the viability of a due process argument for the female athlete wishing to compete for a position on an all-male athletic team. The Court of Appeals for the Sixth Circuit, reversing the district court's decision in *Yellow Springs* on the grounds that the "irrebuttable presumption doctrine" was not an issue properly before the court,\textsuperscript{53} asserted that the court should review most cases of alleged sex discrimination under the equal protection standard rather than under the due process clause.\textsuperscript{54} Moreover, the irrebuttable presumption doctrine has engendered frequent criticism,\textsuperscript{55} and the Supreme Court has exhibited an increased reluctance to refer to the doctrine.\textsuperscript{56} The plaintiff may therefore find future courts unresponsive to the argument that an athletic system of separate sex teams denies the female athlete due process under the fourteenth amendment.

\textsuperscript{52} Id.

\textsuperscript{53} 647 F.2d at 658. The court found it inappropriate to make any ruling on the merits of the due process argument since the lower court could have decided *Yellow Springs* without reaching the constitutional question by finding that the athletic association rule at issue was being interpreted and applied too restrictively to prohibit females from participating on a male team in any contact sport in violation of Title IX regulations. Id. at 656. See 20 U.S.C. §§ 1681-1686 (1976).

\textsuperscript{54} 647 F.2d at 657. As stated by the *Yellow Springs* circuit court, "The Supreme Court has now clearly held that in most cases of alleged sex discrimination it is equal protection which provides the standard for judicial scrutiny . . . not due process." Id. (citing Craig v. Boren, 429 U.S. 190, 197 (1976)). The Seventh Circuit has also expressly declined to follow the reasoning of the *Yellow Springs* district court. See O'Connor v. Board of Educ., 645 F.2d 578, 582 (7th Cir.), cert. denied, 102 S. Ct. 641 (1981).


\textsuperscript{56} See, e.g., Fiallo v. Bell, 430 U.S. 787 (1977). Several appellate courts have recently begun to treat the doctrine of irrebuttable presumptions as coextensive with the equal protection clause. See, e.g., Trafelet v. Thompson, 594 F.2d 623, 630 (7th Cir.), cert. denied, 444 U.S. 906 (1979); West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977), cert. denied, 435 U.S. 926 (1978). These courts suggest that the objections to an irrebuttable presumption rest in its arbitrary classification of individuals. If a court finds, however, that an individual has received equal protection under a law, that individual cannot be said to have concurrently suffered an arbitrary classification under that law. See, e.g., O'Connor v. Board of Educ., 645 F.2d 578, 582 (7th Cir.), cert. denied, 102 S. Ct. 641 (1981). Thus, the female athlete who has been denied relief under the equal protection clause may meet with little success in her attempt to invalidate a separate sex system of athletic teams under the due process clause.
B. TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

In addition to constitutional challenges, female plaintiffs may challenge gender-based classifications and program disparities in high school athletics under Title IX of the Education Amendments of 1972.\(^{57}\) Title IX generally prohibits sex discrimination in educational programs receiving federal financial assistance.\(^{58}\)

The power to enforce Title IX\(^{59}\) is vested in the Department of Education,\(^{60}\) which has the authority to withdraw federal funding from those institutions with athletic programs that violate the statute.\(^{61}\) In addition, the Supreme Court has recognized that an individual may maintain a private cause of action

58. Title IX of the Education Amendments of 1972 provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance . . .” Id. § 1681.
59. All functions of HEW relating to Title IX were transferred to the newly created Department of Education. See 20 U.S.C. § 1681 (Supp. III 1979).
60. Title IX further provides that compliance by the recipient may be effected by any other means authorized by law. Id. HEW regulations, promulgated pursuant to Title IX, 20 U.S.C. § 1682 (1976), provide the enforcement procedures of the agency from investigation of complaints through the final termination of federal assistance. 45 C.F.R. §§ 80.7-80.11 (1980).
under Title IX. In either case, the particular educational institution's athletic program must have received sufficient federal assistance to come within the purview of Title IX. The plaintiff's success in this showing will depend on the court's interpretation of the degree to which the challenged athletic program must benefit from the institution's receipt of federal funds. The challenged athletic program must also have precluded the plaintiff from participating in, or deriving benefits from, that program solely on the basis of sex. The plaintiff's success in showing preclusion is more problematic and will depend upon both the nature of the plaintiff's claim and the nature of the challenged athletic program. If the plaintiff successfully demonstrates these two elements, Title IX is available to remedy the prohibited sex discrimination.

It is unclear what constitutes a sufficient funding relationship between the federal government and the athletic program at issue to invoke judicial scrutiny under Title IX. The Department's most recent policy interpretation extends the coverage of Title IX to every program of an institution receiving federal financial aid, regardless of any traceable benefit to the particular program at issue. In contrast, a federal district court recently held that Title IX applies only if the challenged athletic program has received direct federal financial assistance.

63. Title IX provides that “[e]ach Federal department . . . empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the [Title IX] provisions . . . with respect to such program or activity.” 20 U.S.C. § 1682 (1976).
64. See supra note 58.
65. The Department's proposed policy interpretation applied Title IX to any athletic program which is maintained at an institution which receives federal financial assistance directly or indirectly benefitting the athletic program. In addition, it expressly extended Title IX jurisdiction to any athletic program maintained at an institution which receives federal financial assistance for a defined program, where the discriminatory aspects of the athletic program are so integrally related to the financially funded program that it “infects” the funded program. 40 Fed. Reg. 24,128 (1975). In December of 1979, HEW announced its adoption of a final policy interpretation designed to provide greater guidance to recipient institutions regarding the demands of Title IX in the area of athletics. HEW's policy interpretation of Title IX coverage extends “to any public or private institution . . . that operates an educational program or activity which receives or benefits from [federal] financial assistance.” 44 Fed. Reg. 71,414 (1979) (emphasis added). The “institutional” focus adopted in HEW's final policy interpretation appears to have expanded Title IX jurisdiction to all athletic programs of any institution receiving benefits from federal financial assistance regardless of any direct benefit to a particular athletic program. See 44 Fed. Reg. 71,414 (1979).
66. Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1389 (E.D. Mich. 1981). The Othen court held that direct federal financial aid to a specific educa-
These opposing interpretations of the scope of Title IX have great practical significance due to the nature of federal financial aid to secondary schools. A highly restrictive direct assistance interpretation will cripple the impact of Title IX on sex discrimination in high school athletics. No interscholastic athletic program receives direct federal aid, and institutions wishing to avoid Title IX may be able to funnel federal dollars into programs which are not likely to be challenged as sex discriminatory. Such a result cannot be justified when viewed against the background of the social policies Title IX promotes.

67. The only federal program of noncategorical assistance to local educational agencies is the federal impact program, under which the federal government provides financial aid to school districts financially burdened by federal activities within the district. 20 U.S.C. §§ 236-241 (1976). This type of federal aid goes directly to school districts' general funds and is thus distributed to all the districts' educational programs. Comment, Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools, 53 TEX. L. REV. 103, 112 n.60 (1974). Other federal programs providing funds to local educational agencies are categorical in nature, thus requiring states to use funds to supplement and not supplant local funds. Kuhn, supra note 58, at 71. Allowing such categorical funds to free local funds for an interscholastic athletic program would violate federal law. See, e.g., Vocational Education Act of 1963, 20 U.S.C. § 2306(a)(6) (1976); Education of the Handicapped Act, 20 U.S.C. § 1413(a)(9) (1976).

68. Under the direct assistance interpretation, the institution receiving noncategorical federal impact aid may avoid liability under Title IX simply by funneling federal dollars into its nondiscriminatory education programs, thus freeing non-federal funds to support a sex discriminatory athletic program. See, e.g., Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1389 (E.D. Mich. 1981). On the other hand, the institutional assistance interpretation would extend coverage to any institution receiving federal funds, barring calculated disbursement of federal funds in a manner enabling the recipient to support discriminatory activity with federal funds. 44 Fed. Reg. 71,414 (1979). The Department has, arguably, extended Title IX coverage to those institutions receiving purely supplementary federal assistance from a federal categorical aid program even if the funds do not benefit the alleged sex discriminatory athletic program. See Gaal, Di Lorenzo & Evans, HEW's Final "Policy Interpretation" of Title IX and Intercollegiate Athletics, 6 J. COLLEGE & U.L. 345, 352 (1979-80). At least one court has held, however, that this interpretation of the scope of Title IX is overbroad. Othen v. Ann Arbor School Bd., 507 F. Supp. 1376, 1387 (E.D. Mich. 1981). Numerous commentators adopt a more moderate jurisdictional approach than either the Department or the Othen court. Under this view, the athletic program at issue must have received a specific benefit, direct or indirect, from federal financial assistance to fall within the scope of Title IX. See, e.g., Cox, Intercollegiate Athletics and Title IX, 46 GEO. WASH. L. REV. 34, 37-39 (1977); Gaal, Di Lorenzo & Evans, supra, at 351; Comment, supra note 67, at 112.

69. See supra note 67.

70. Funneling of federal dollars can occur only if the school district is receiving noncategorical federal impact aid. See supra notes 67-68.
Seeking to eliminate sex discrimination in education, Congress designed Title IX both to prevent the injustices of sex stereotyping resulting from a segregation of the sexes in group activities, and to provide equal access to educational opportunities so that all individuals can develop their full potential. Because of the subtle yet pervasive influence of athletics on cultural norms and social stereotypes, the important social policies underlying the enactment of Title IX require the courts to apply the statute broadly to athletic programs.

Once it is determined that Title IX applies to the athletic program at issue, the female athlete must demonstrate that the program does not comply with the requirements of the statute. The Department of Health, Education, and Welfare promulgated regulations in 1975 to delineate the criteria that an affected institution’s athletic programs must meet to comply with Title IX. Although the regulations generally forbid schools from providing separate sex teams in the same sport, exceptions are recognized “where selection for such teams is based upon competitive skill or the activity is a contact sport.” By permitting schools to maintain separate sex teams in the same sport if the selection of team members is based on competitive skill, the scope of the statute is severely restricted. If a school provides a team in a particular non-contact sport for members of one sex only, however, the regulations provide that the school must permit members of the excluded sex to compete for a position on that team if the school has previously limited athletic opportunities for the excluded sex. Under the contact sports exception, schools may deny the female athlete an op-

72. 118 CONG. REC. 5804 (statement of Sen. Bayh) (strong measure needed to end persistent discrimination that perpetuates second-class citizenship for American women).
73. Id. at 5808 (statement of Sen. Bayh) (Title IX affords American women what is rightfully theirs—an equal chance to develop their potential in the educational setting).
74. See Note, supra note 58, at 1266-67.
75. 45 C.F.R. § 86.41(a) (1981).
76. Id. § 86.41(b).
77. Virtually all interscholastic teams have member selection based on skill and thus are arguably outside the reach of section 86.41(a). See id. See also infra note 80 and accompanying text. Thus, major high school sports, such as football, basketball, and baseball are exempt from section 86.41(a)’s general prohibition of separate sex teams.
78. 45 C.F.R. § 86.41(b) (1981). The regulation provides:
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 been previously limited, members of the excluded sex must
portunity to compete for a position on a contact sports team even if no female team in that sport is provided.\textsuperscript{79}

The overall effect of these regulations on the structure of team sports is unclear, though, because even in instances in which the exceptions operate, a requirement of greater opportunity for female athletes may be implied from the general equal opportunity provision. The general equal opportunity provision, found in the Department's regulations, provides that a recipient educational institution's athletic program must provide equal athletic opportunity and effectively accommodate the interests and abilities of both female and male athletes.\textsuperscript{80}

The regulations require recipient institutions to accommodate the interests and abilities of female and male athletes effectively by providing an appropriate selection of sports and advanced levels of competition.\textsuperscript{81}

Hence, even if the recipient educational institution comports with Title IX by offering "tangibly" equivalent separate sex athletic teams,\textsuperscript{82} the exceptional female athlete can invoke

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\textsuperscript{79} Id.

\textsuperscript{80} Id. § 86.41(c).

\textsuperscript{81} 44 Fed. Reg. 71,417-18 (1979). The Department recently published its final policy interpretation, intended to provide greater guidance for institutions wishing to comply with the requirements of Title IX. For a general definition of what the agency considers to constitute "equal athletic opportunity" and "effective accommodation of student interests and abilities," see id. at 71,415-18.

Although the Department frames its general compliance standard under section 86.41(c) in terms of equivalent benefits and opportunities on a "program-wide" basis rather than by a "sport-specific" comparison, id. at 71,421-22 (1979), the final policy interpretation provides that noncompliance may be found under Title IX if "disparities in benefits, treatment, services, or opportunities in individual segments of the [athletic] program are substantial enough in and of themselves to deny equality of athletic opportunity." Id. at 71,417. Thus, the female athlete should be awarded relief under Title IX upon a showing that a recipient is operating demonstrably unequal separate sex teams in a particular sport. The right of the individual athlete to participate in a nondiscriminatory federally financed athletic program can be achieved only if female and male athletes are afforded equivalent treatment, benefits, and opportunities in similar sports or circumstances.

\textsuperscript{82} Title IX may be invoked by a female athlete competing on a separate female team to challenge the level of benefits the recipient educational institution provides her team. The equality of opportunity Title IX mandates will not be attained until female and male athletes receive equivalent "tangible" benefits, including athletic equipment, supplies, and facilities. The regulations recognize this, and provide a list of factors to be considered in assessing program disparities in the provision of tangible benefits. See 45 C.F.R. § 86.41(c) (1980); see also 44 Fed. Reg. 71,415-17 (1979). The regulations, however, only require
the general equal opportunity provision in an effort to secure
the opportunity to compete for a position on the male team.
The differing levels of competition offered by male and female
athletic teams often afford inherently unequal athletic opportu-
nity for the exceptional female athlete able to compete with her
male peers. Although the exceptional female athlete may be
afforded an equal opportunity to participate in an increased
number of female sports offerings,83 the regulation requiring a
school to provide separate female teams upon a showing of ade-
quate female interest84 may not effectively accommodate her
interests and abilities. If restricted to competing only on a
fledgling female team, the exceptional female athlete will not
be afforded a qualitatively equal opportunity to maximize ath-
etic skills and realize athletic potential.85 If a Title IX recipi-
ent requires an exceptional female athlete to participate in a
female athletic program offering a demonstrably lower level of
competition, federal financial funds will have perpetuated the

83. In an effort to comply with Title IX, recipient educational institutions
have greatly increased the number of athletic opportunities provided the fe-
male athlete. See More Hurdles, supra note 1, at 12.
This requirement may be satisfied by affording proportionately equal numbers
of male and female athletes equivalently advanced competitive opportunities.
Id. Thus, the HEW regulations do not appear to require that the exceptional
female athlete be given the opportunity to try out for a male athletic team if
she is competing at a level consistent with other exceptional female athletes
within the athletic program.
85. It has been asserted that the group equalization mandated by Title IX
and the regulations, 44 Fed. Reg. 71,421 (1979), "requires equal opportunity for
the most qualified athletes of either sex to participate at the most competitive
level." Note, supra note 58, at 1274. Even if the school offers a female team,
allowing the exceptional female athlete to compete for a more highly skilled
male team is a reasonable remedy to promote group equalization in light of his-
torically limited athletic opportunities for females. Id.
current disparity in athletic skills between genders. This result is unacceptable under a statute designed to remedy sex discrimination in federally-aided educational programs.

The female athlete may also invoke the general equal opportunity provision of Title IX to challenge a recipient institution's athletic program and to gain an opportunity to compete for a position on a male contact sports team when the school provides no female team in the particular sport. The exception in section 86.41(b) of the Department's regulations permitting a Title IX recipient to deny a female athlete the opportunity to compete for a position on a male contact sports team is irrational and inconsistent with the social policies underlying the enactment of Title IX. The Department apparently designed the contact sports exception to prevent physical injury to female athletes. Although the prevention of athletic injury is certainly desirable, it rests on the unsupported assumption that females capable of successfully competing with males in a contact sport are, as a class, more susceptible to injury. Moreover, a rule which bars female athletes from competing against males in contact sports while providing no similar bar for the demonstrably weak male athlete is clearly arbitrary. In addition to its irrational character, the exception for contact sports is inconsistent with the purposes of Title IX because it perpetuates the stereotypical view of the female as weak, fragile, and unable to compete with males in sports requiring physical contact. Congress intended to reduce this type of sex-stereotyping with the enactment of Title IX.

The effect of Title IX, and HEW regulations promulgated thereunder, on sex discrimination in federally aided interscholastic athletics remains unclear. As an initial matter, it is unclear how directly a challenged athletic program must benefit from the educational institution's receipt of federal funds to trigger the prohibitions of the statute. Secondly, it is unclear whether equality of opportunity is to be determined by considering the relative opportunities in an entire athletic program or whether a more restricted inquiry is appropriate. This Note

86. See supra note 39.
87. 45 C.F.R. § 86.41(b) (1981). Although the HEW interpretation requires a recipient school to sponsor a separate female contact sports team if adequate interest is shown, 44 Fed. Reg. 71,418 (1979), when the interest is inadequate interested females do not have a right to try out for the male teams. Id.
88. See supra notes 22-25 and accompanying text.
89. See supra note 2.
90. See Note, supra note 58, at 1266.
91. See supra notes 75-80 and accompanying text.
suggests that courts resolve these uncertainties in light of the social policies that prompted the enactment of Title IX, permitting the female athlete to invoke the statute to challenge sex discriminatory practices in interscholastic athletic programs.

C. STATE CONSTITUTIONAL AND STATUTORY ANALYSIS

Although efforts to amend the United States Constitution by adding the proposed equal rights amendment have been unsuccessful, fourteen states have adopted their own equal rights amendments. The female athlete residing in one of these states may thus bring suit to establish the right to compete for a position on an all-male athletic team under her state's constitutional provision. In addition, state civil rights legislation, or state statutes specifically prohibiting sex discrimination, may be invoked in a number of jurisdictions to challenge the separate sex team system.

State constitutional equal rights provisions which prohibit the government from making classifications on the basis of sex can provide a strong basis of support for the female athlete challenging an interscholastic gender separate athletic team system. Those state equal rights amendments which have been adopted, however, have not been uniformly interpreted. Some states have read their constitutional provisions to provide no greater protection than that available under the Federal Constitution. A number of state courts, however, recognizing

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93. Eight of these states have adopted provisions very similar to the proposed federal equal rights amendment. COLO. CONST. art. II, § 25; MD. DECLARATION OF RIGHTS, art. 46; MASS. CONST. part I, art. 1; N.H. CONST. part I, art. 21; N.M. CONST. art. II, § 18; PA. CONST. art. I, § 23; TEX. CONST. art. I, § 3a; WASH. CONST. art. 31, § 1. The remaining six states have adopted provisions which vary in text from the proposed federal provision. ALA. CONST. art. I, § 1; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, § 4; ILL. CONST. art. I, § 18; MONT. CONST. art. II, § 4; VA. CONST. art. I, § 1. Utah and Wyoming included provisions prohibiting discrimination on the basis of sex in their original state constitutions. UTAH CONST. art. IV, § 1; WYO. CONST. art. I, § 2.

94. To maintain such a suit, the plaintiff must initially show that the defendant's action constitutes a degree of state involvement sufficient to permit application of the state equal rights amendment. Lincoln v. Mid-Cities Football Ass'n, 576 S.W.2d 922, 924-25 (Tex. 1979). The Lincoln court held that the plaintiff must show that the alleged discrimination is "state action or private conduct that is encouraged by, enabled by, or closely interrelated in function with state action." Id. at 925. See also Murphy v. Harleysville Mut. Ins. Co., 422 A.2d 1097, 1104 (Pa. Super. 1980); MacLean v. First N.W. Indus. of Am., 24 Wash. App. 161, 165-66, 600 P.2d 1027, 1029 (1979).

95. See, e.g., Feddy v. Montgomery, 345 So.2d 631, 633 (Ala. 1977) (rights
that a state constitutional provision may be interpreted to afford greater protection of individual rights than the Federal Constitution, have construed equal rights provisions more expansively than the equal protection clause of the fourteenth amendment. Female athletes have successfully challenged the separate sex athletic team system under such state provisions. Therefore, a viable ground of relief exists for the plaintiff residing in those states which have enacted and broadly construed a constitutional equal rights provision.

Statutes specifically prohibiting sex discrimination in the context of interscholastic athletics have been enacted in a number of states. These statutes vary in their terms. Some protected by state constitution are same as those protected by Federal Constitution; State v. Barton, 315 So.2d 289, 291 (La. 1975) (sex-based classification permissible if reasonable); Archer v. Mayes, 213 Va. 633, 636, 194 S.E.2d 707, 711 (1973) (sex-based classification must bear a rational relationship to state objective).


99. The Minnesota legislature, for example, recently enacted a statute providing that "members of a sex whose overall athletic opportunities have previously been limited . . . shall be permitted to try out" for any team in any sport. Minn. Stat. § 126.21(3) (4) (1980). Consequently, a Minnesota school district providing a mandatory system of separate sex athletic teams will be held in violation of state law if a female athlete challenging the system demonstrates that her gender has had limited athletic opportunity in the past. See also Morris v. Michigan State Bd. of Educ., 472 F.2d 1207, 1209 (6th Cir. 1972) (injunction against the Michigan high school athletic association which prevented female athletes from participating in interscholastic non-contact athletics solely because of their sex; court notes that the statute allowed females to participate on male non-contact athletic teams).

The "overall limited athletic opportunity" clause in Minn. Stat. § 126.21(3) (4) (1980) has not been interpreted by the courts. Courts have split on their interpretation of the similar "limited opportunity" clause contained in the regulations promulgated under Title IX to the Education Amendments of 1972. Compare Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659,
SEX DISCRIMINATION

states appear to have adopted legislation which closely corresponds to the provisions of Title IX. Other state provisions provide greater protection against gender-based classification in interscholastic sports than does the federal statute. The effect of the application of such statutes to a separate sex interscholastic athletic team system depends largely upon an interpretation of the statutory terms. The enactment of such

665 (D.R.I.), vacated, 604 F.2d 733 (1st Cir. 1979) with Mularadelis v. Haldane Cent. School Bd., 74 A.D.2d 248, 253-54, 427 N.Y.S.2d 458, 464 (1980), appeal dismissed, 54 N.Y.2d 760 (1982) and Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 988-92, 394 N.E.2d 855, 860-64 (1979). Nonetheless, if other states follow Minnesota in adopting such legislation in this area, the female athlete in the future may have several state statutes upon which to firmly assert her right to participate on male athletic teams.

100. See, e.g., CAL. EDUC. CODE § 41 (West 1978) (publicly-funded athletic program must provide equal athletic opportunity for both sexes although no requirement for coeducational teams); HAWAI'I REV. STAT. §§ 296-60, -61 (1976) (same language as Title IX); S.D. CODEFIED LAWS ANN. § 20-13-22 (Supp. 1981) (separate sex team system is not discriminatory if opportunity to participate in athletic program is substantially equal for both sexes), WIS. STAT. ANN. § 118.135 (West Supp. 1981) (no person may be denied on basis of sex opportunity to participate in athletics, as provided in Title IX).

101. See, e.g., ALASKA STAT. § 14-18-040 (Supp. 1981) (separate sex teams in a particular sport allowed only if no disparate distribution of tangible benefits); MINN. STAT. § 126.21(3)(4) (1980) (if separate sex teams are provided, one team may be restricted to members of sex whose overall athletic opportunities have previously been limited, and members of either sex shall be permitted to try out for the other team); WASH. REV. CODE ANN. § 28A.85.020(3) (West Supp. 1981) (separate sex teams allowed if no disparate distribution of tangibles). Several states determine the requisite equality of opportunity based on whether the sport at issue is a contact or non-contact sport. See, e.g., LA. REV. STAT. ANN. § 17:276 (West Supp. 1982) (public schools shall offer sexually segregated contact sports and sexually integrated non-contact sports); MICH. COMP. LAWS ANN. § 380.1289(5) (Supp. 1981) (female may compete for position on any offered non-contact team even if provided with girls' team in the particular sport); N.Y. ADMIN. CODE tit. 8, § 135.4(c)(7)(ii)(c) (1979) (if school provides separate sex teams in sports other than basketball, boxing, football, ice hockey, rugby, and wrestling, chief executive officer may permit females to participate on male team although males may not participate on female teams). Other states have adopted statutes appearing less restrictive than Title IX. See, e.g., MISS. CODE ANN. § 37-11-3 (1972) (Board of Trustees has discretion to separate students on basis of sex if it will promote or preserve the public peace or morals of the students).

102. For example, the recently enacted Minnesota statute provides that "[i]f two teams are provided in the same sport, one of these teams may be restricted to members of a sex whose overall athletic opportunities have previously been limited, and members of either sex shall be permitted to try out for the other team." MINN. STAT. § 126.21(3), (4) (1980). The courts' interpretation of the limited opportunity clause will ultimately determine the utility of this provision for the female athlete. If the plaintiff must demonstrate previous limited athletic opportunity to participate in the particular sport at issue, see, e.g., Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 665 (D.R.I.), vacated, 604 F.2d 733 (1st Cir. 1979), it may be a difficult burden of proof if the school district offers an equivalent separate female team. If the courts, however, interpret the statutory language to mean "overall athletic opportunity" as
specific provisions clearly evidences legislative intent to remedy existing inequities and to provide an equal opportunity for members of both genders to participate in interscholastic athletics. Such legislation should be interpreted broadly to prohibit schools from maintaining gender classifications in their athletic programs which deny equal access to educational opportunities, thus providing relief for the female athlete barred from participating in, or deriving benefit from, an athletic program solely on the basis of sex.

Those states which have adopted neither an equal rights amendment nor specific legislation prohibiting gender-based classifications in interscholastic athletics may nonetheless provide relief for the plaintiff challenging sex discriminatory athletic programs under general sex discrimination or civil rights legislation. Several states have enacted legislation prohibiting sex discrimination in educational programs. Other states, under general civil rights legislation, prohibit discrimination on the basis of sex in places of public accommodation. Because sex discrimination in interscholastic athletics has been held to constitute discrimination in education, and because interscholastic athletic programs are often conducted in places of public accommodation, such general state legislation may be construed to apply to alleged sex discrimination in interscholastic athletics. The apparent underlying objective of general state sex discrimination or civil rights legislation in this context is to promote sexual equality by providing equal access to educational opportunities and by preventing the promotion of delu-

the words imply, see, e.g., Petrie v. Illinois High School Ass'n, 75 Ill. App. 3d 980, 992, 394 N.E.2d 855, 864 (1979), the plaintiff may be afforded relief, whether or not a separate female team exists, because of the long history of limited athletic opportunity for females. See supra note 2. The avowed legislative purpose to rectify past inequities and provide an equal opportunity for members of both sexes to participate in athletics, MINN. STAT. § 126.21(1) (1980), will be better met if the female athlete is afforded relief from the separate sex athletic team system.

103. See, e.g., MINN. STAT. § 126.21(1) (1980).
107. See, e.g., TENN. CODE ANN. § 4-21-102(j) (Supp. 1981) ("places of public accommodation" include any place or establishment which is supported directly or indirectly by government funds).
sory sex stereotypes resulting from a segregation of the sexes in group activities. Because of the powerful socializing role of interscholastic athletics, the underlying objectives of general state sex discrimination or civil rights legislation require that such statutes be construed to apply to sex discriminatory athletic programs.

A female athlete may invoke state constitutional or statutory provisions in an effort to establish her right to compete for a position on an exclusively male athletic team. Fourteen states have amended their constitutions to include provisions expressly prohibiting discrimination on the basis of sex. Such provisions may provide strong support for the female athlete's position. In addition, a number of states have enacted legislation prohibiting sex discrimination which can be construed to apply to interscholastic athletics. These state provisions are all of recent origin, and reflect a growing consensus that efforts must be undertaken to ensure that females are provided an equal opportunity to participate in public educational programs. Because of the strong influence of athletics on the formation and maintenance of traditional sex-role stereotyping, and the resulting impact on individual growth and potential, these provisions should be construed to provide relief to the female athlete competing in a sex discriminatory interscholastic athletic program.

III. CONCLUSION

The exceptional female athlete's right to compete for a male athletic team in a school district operating separate sex teams may be found to exist under the Federal Constitution, Title IX, and state constitutional or statutory provisions. Prior applications of these doctrines to the female athlete's claims have been discordant and poorly reasoned. This Note proposes that such claims should be resolved with reference to the social policy against sex discrimination underlying the development of the law.

109. Id. at 287 (statement by M. Dunkle, representative of the Women's Equity Action League (WEAL)) (implications of Title IX go far beyond the athletic arena—athletic competition is a powerful socializing agent in our society).
110. See supra note 93.
The major barrier that the exceptional female athlete must ultimately face is the belief of some members of our society that coeducational athletic teams are improper. Although Congress, several states, and the courts have demonstrated a policy against sex discrimination, the emphasis on overall equality for separate sex programs may permit a school to restrict the exceptional female athlete to a female team allegedly to ensure that all female athletes have an equal opportunity to participate in athletics. This focus on equality of athletic opportunity for a sex, rather than for individual athletes, can serve only to perpetuate any present differences in the athletic abilities and opportunities for high school female and male athletes.