

ISSUES RELATED TO GIRLS AND BOYS COMPETING WITH AND AGAINST EACH OTHER IN SPORTS AND PHYSICAL ACTIVITY SETTINGS

Athletic opportunities for girls and women are protected by an array of civil rights laws that apply broadly to physical education, intramural, club, varsity, and other physical activity programs conducted by schools, colleges, parks and recreation departments, and organizations operating open amateur sports programs in public facilities or under the jurisdiction of the United States Olympic Committee and its national sports governing bodies. Title IX of the Education Amendments of 1972,ⁱ the Equal Protection Clause of the United States Constitution,ⁱⁱ state and local Equal Rights Amendments,ⁱⁱⁱ the Ted Stevens Olympic and Amateur Sports Act,^{iv} and state and local public accommodations laws^v are all designed to prevent and remedy sex discrimination. In general, the following guidelines are consistent with these laws and, also importantly, with the body of research regarding the physical and psychological development of girls and boys.

I. WHEN IS IT APPROPRIATE OR NECESSARY THAT FEMALES AND MALES PARTICIPATE WITH AND AGAINST EACH OTHER IN SPORTS?

POSITION: Prior to puberty, females and males should compete with and against each other on coeducational teams.

Prior to puberty, there is no gender-based physiological reason to separate females and males in sports competition. In fact, research demonstrates that girls who participate with boys in youth sports are more resilient. Competition groupings should be

organized around skill and experience. Girls and boys possessing similar skills should be playing with each other and against teams consisting of boys and girls who are similarly skilled. For instance, the “blue” league could consist of teams with the highest skill levels; “red” for players with experience and basic skills and “green” for beginners with little skill. Such coed participation between similarly skilled teams should be encouraged.

POSITION: After puberty, coeducational sport competition should be encouraged at all levels where there are rules that require equal numbers of females and males on both teams and also rules that maximize fair competition between the sexes.

Coeducational competition, when appropriately governed to prevent female or male advantage, is desirable. Physical differences among members of one sex are actually greater than the average difference between the two sexes.^{vi} This lack of substantial physical differences between the sexes means that girls and boys should be encouraged to compete with and against each other in sports whenever possible. Mixed doubles in tennis, coed volleyball and coed basketball are good examples of competitions in which females and males on the same team and in equal numbers compete against identical number of females and males on the opposing team. Such competition is safe, healthy and desirable and should be encouraged.

II. WHEN ARE SINGLE-SEX TEAMS NECESSARY OR APPROPRIATE?

POSITION: Voluntary, single-sex teams for girls is the only permissible instance of sex segregation in athletics.

Title IX and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution (EPC) permit schools to create single-sex teams for girls in response to girls' past and continued discrimination and under representation in athletics. These teams must be offered on a voluntary basis; meaning that girls have the right to compete on a single-sex team for girls or to participate on a coeducational team with boys.

Title IX expressly requires schools to create single-sex teams for girls under the following circumstances:

- a. For non-contact sports, a school must provide a single sex team for girls where their opportunities have historically been limited, there is sufficient interest and ability to sustain a viable team, there is a reasonable expectation for competition for that team, and the girls would not possess sufficient skill to be selected for a single integrated team or compete actively on such a team if selected.^{vii}
- b. For contact sports, Title IX requires that schools offer a separate team for girls where the opportunities for girls have historically been limited, there is sufficient interest and ability to sustain a viable team, and there is a reasonable expectation for competition for that team.^{viii}

III. ARE SCHOOLS REQUIRED TO ALLOW GIRLS TO TRY OUT FOR BOYS' TEAMS WHEN THE SCHOOL DOES NOT OFFER A TEAM FOR GIRLS IN THAT SPORT?

POSITION: Yes. When a school does not offer a team for girls in a certain sport, a school must allow the girl to try out to participate on the boys' team when girls are underrepresented among a school's athletes and possess the interest and ability to participate.

- a. For *non-contact sports*, Title IX requires that if no team exists for girls in that sport, then a school must provide girls with the opportunity to compete on the boys' team.
- b. For *contact sports*, the EPC requires that schools allow girls to try out for the boys' teams when no team exists for girls. Specifically, courts have held that because girls are underrepresented in athletics, the exclusion of females from participation on a boys' team, in non-contact and contact sports violates the EPC.^{ix} (The EPC in this case takes precedence over Title IX's contact sport exemption, which permits school not to allow a girl to compete on boys' team for contact sports.)

IV. ARE SCHOOLS REQUIRED TO ALLOW GIRLS TO TRY OUT FOR BOYS' TEAMS EVEN WHEN THE SCHOOL DOES OFFER A TEAM FOR GIRLS IN THAT SPORT?

POSITION: Even when a school does offer a team for girls in a certain sport, a school must allow the girl to try out for the boys' team when girls are underrepresented among a school's athletes and possess the interest and ability to participate.

Girls must be allowed to try out for boys' teams, contact or non-contact sport, even if a team for girls exists. Schools are required to offer single-sex teams for girls in certain circumstances as a means to remedy the past and continued discrimination against girls in sport. However, these teams must be offered on a completely voluntary basis, meaning that girls have the right to play on the all-girls team or to try out to play on the boys' team.

Courts have found, under the EPC, that allowing girls to compete on boys' teams even when a corresponding girls' team exists is substantially related to the important government objective of maintaining and promoting athletic opportunities for girls.^x Denying girls the right to choose what level of competition is most appropriate for their abilities restricts their opportunities for participation and violates equal protection.^{xi} As one court noted, the government objective of promoting participation of girls in sports "is patently not served when female athletes are denied any opportunity to play..."^{xii} Any opportunity includes playing with the boys even when a school sponsors a team for girls.

Accordingly, courts have held that schools may not prohibit girls from playing on boys' teams without an individualized assessment of each athlete's abilities.^{xiii} This means that schools must give girls the opportunity to choose which particular team—single-sex or coeducational—will most appropriately match their skill level.

V. ON WHAT BASIS CAN SCHOOLS RESTRICT PARTICIPATION?

POSITION: If the skill, size and strength of any participant, female or male, compared to others playing on the team creates the potential of a hazardous environment, participation may be limited on the basis of these factors, rather than the sex of the participant.

Teachers and coaches are obligated to ensure safe sports and physical activity environments. Gender, however, cannot be a proxy for safety. For instance, a teacher or coach would not pair a heavyweight Olympic boxer with a novice lightweight because the situation creates the potential of significant injury. In such cases, objective decisions by experienced teachers should be made. In instructional settings, teachers are better able to control skill match-ups. In competitive athletics, that control is possible in sports that use weight classes, but may not be possible in other sports.

While schools may restrict teams based on skill, they cannot do so by requiring that some athletes pass more strenuous fitness and skills tests than others for admission onto the team. For example, it is discriminatory to require a girl to pass a more strenuous fitness test than other team members to try out for a spot on the boys' team.^{xiv}

VI. WHEN SHOULD SCHOOLS ALLOW BOYS TO TRY OUT FOR GIRLS' TEAMS?

POSITION: Boys should be allowed to play on a girls' team only when there is no team for boys offered in that sport, boys are underrepresented with regard to total athletic opportunities, and the strength and skill levels of the boys are comparable to those of the girls.

Boys cannot participate on girls' teams when there is no team offered for boys in the sport if girls are underrepresented in the sports program. While courts have found girls have the right to compete on boys' teams under the EPC and Title IX, the courts have not granted boys the same access to girls' teams.^{xv}

First, under Title IX, boys do not have the right to participate on girls' teams in schools even when no boys' team exists because their opportunities in athletics have not historically been limited, and they are typically overrepresented in athletic departments.^{xvi}

Additionally, under the EPC, courts have repeatedly denied boys the right to participate on girls' teams when no boys' team exists on the grounds that it contradicts the important government interest of "maintaining, fostering and promoting athletic opportunities for girls."^{xvii} It is the class of girls, not boys, with whom the government seeks to redress past discrimination and promote equality.^{xviii} It is girls, not boys, who have suffered and continue to suffer from discrimination and inequalities in athletics.

While some courts in Equal Rights Amendment (ERA) states have found that such a position violates the individual rights of boys,^{xix} other courts in ERA states^{xx} and federal courts supporting EPC protections have found that protecting the participation rights of girls as a previously discriminated against “class” outweigh the rights of an “individual” boy to play on a girls’ team.^{xxi}

As long as boys continue to enjoy significantly more opportunities for athletic competition than girls, opening boys’ teams to girls even where girls’ teams exist should not be viewed as harming boys, but rather as leveling the playing field for girls. Allowing a girl to try out for the boys’ team breeds competition. Her participation should be viewed no differently than if another boy joined the program and competed against the rest of the squad for a slot on the team. In the arena of sports, the most talented athlete gets to play; a girl has just as much of a right to demonstrate her ability to fill that spot as a boy does.

VII. DOES ALLOWING GIRLS TO COMPETE ON BOYS’ TEAMS TAKE GIRLS AWAY FROM GIRLS’ TEAMS?

POSITION: No. Allowing girls the right to compete on the boys’ teams does not have an adverse impact on girls’ teams.

Athletics is not a zero-sum environment where the participation of one girl on the boys’ team comes at the expense of a loss of participation on the girls’ team. Opening boys’ teams to girls should not be viewed as a loss of participation for the girls’ teams, but a broadening of opportunities for girls to compete that will only serve to expand the participation and growth of girls in sports.

Just as girls’ participation in sport expanded when Title IX opened the doors of opportunity for competition by creating teams for girls, opening the door to boys’ teams will also help expand opportunities for girls to compete. As one court noted, denying girls this choice actually works to restrict girls’ participation because it denies them the right to choose which particular competition is most appropriate for their ability.^{xxii}

Offering competition with the boys provides girls with a different type of competitive experience that could increase overall participation by drawing girls into sport who previously chose to remain on the sidelines because they did not want to participate on sex-segregated teams. Furthermore, to the extent that girls from all-girls teams choose to compete with boys,

overall participation for girls will increase because it opens slots on female teams that girls not currently participating in sports can then fill.

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Endnotes

¹ 20 U.S.C. Section 1681, et. seq. "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 education program or activity receiving Federal financial assistance." Generally, there are three elements of the law as it applies to athletics:

(1) Participation, (2) Scholarships and (3) Treatment. 34 C.F.R. § 106 (2002). In order to determine whether male and female students are being provided equitable participation opportunities to play sports, the high school or college must meet any one of the following three standards:

(1) Student-athlete participation is proportional to the student body. (For example, if 50% of the students are male and 50% of are female, then this criteria would be met if half of the athletes are male and half are female).

(2) The college or high school has a history and continuing practice of program expansion for the underrepresented gender (e.g., adding sports, expanding squad sizes).

(3) The college or high school has met the interests and abilities of the underrepresented gender.

44 Fed. Reg. 71413 (1979).

If athletic scholarships are being provided, the law requires that they must be provided in proportion to the student-athlete percentage. (For example, if women comprise 55% of the student-athlete population, then women should be receiving 55% of the athletic scholarship dollars.) The treatment requirements call for benefits and services provided to male athletes and female athletes to be similar in quality, quantity and suitability with 11 areas that must be examined in order to determine overall compliance. These 11 areas are:

- Equipment and Supplies
- Scheduling of Games and Practice Times
- Travel and Related Expenses
- Availability of Coaches and their Compensation
- Locker Rooms, Practice and Competitive Facilities
- Medical and Training Services
- Publicity
- Support Services
- Recruitment of Student-Athletes
- Housing and Dining Facilities and Services
- Availability of Tutors

44 Fed. Reg. 71413 (1979).

ⁱⁱ United States Constitution. Fourteenth Amendment (1868). Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ⁱⁱⁱ Various states have promulgated equal rights amendments (ERA) requiring that state laws treat men and women equally. State ERAs support the rights of female athletes to participate on men's teams in both contact and non-contact sports. In general, while males have the same rights to play on women's teams, such rights have not been upheld when women are underrepresented in athletic programs and the courts have considered the issue in that context.

^{iv} 36 U.S.C. § 220501, et seq., hereinafter the "Amateur Sports Act" established the current governance structure for amateur and Olympic sports in the United States. The Amateur Sports Act specifically addressed the obligations of the USOC and the National Governing Bodies (NGBs) to address gender discrimination. Specifically:

1. USOC to encourage women's sports. Section 220503 (12) notes that the USOC's purposes include to "encourage and provide assistance to amateur athletic activities for women."
2. NGBs must provide equal opportunity. Section 220522 (a) (8) mandates that an amateur sports organization cannot be recognized as an NGB unless it "provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators and officials to participate in amateur athletic competition, without discrimination on the basis of race, color, religion, age, sex or national origin, and with fair notice and opportunity for a hearing to any amateur athlete, coach, trainer, manager, administrator or official before declaring the individual ineligible to participate."
3. NGBs must have women on their boards. Section 220522 (a) (9) follows the previous provision, declaring that an amateur sports organization cannot be recognized as an NGB unless it "is governed by a board of directors or other governing board whose members are selected without regard to race, color, religion, national origin or sex, except that, in sports where there are separate male and female programs, it provides for reasonable representation of both males and females on such board of directors or other governing board."
4. NGBs must provide equitable support for women. Sec. 220524(6) says that a national governing body is under a duty to "provide equitable support and encouragement for participation by women where separate programs for male and female athletes are conducted on a national basis."

^v In athletics cases, public accommodation laws are used to prevent municipal recreation programs from discriminating on the basis of sex in the provision of programs or facilities or prevent businesses, organizations or clubs offering public services or using public facilities from discriminating on the basis of sex in membership, participation opportunities.

^{vi} Hoover v. Meiklejohn, 430 F. Supp. 164, 164 (D.Colo.1977).

^{vii} OCR Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, (Jan. 16, 1996); available at <http://www.ed.gov/offices/OCR/docs/clarific.html> at 10.

^{viii} Id.

^{ix} Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (holding that the exclusion of two females, based solely on sex and who completely satisfied all requirements for participating in their school district's football program, violated the ERA).

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

^{xi} *Commonwealth of Pennsylvania v. Pennsylvania Interscholastic Athletic Ass'n*, 334A.2d 839, 843 (Pa. Cmwlth. 1975).

^{xii} *Yellow Springs v. Ohio High Sch. Athletic Ass'n*, 647 F.2d 651, 656 (6th Cir. 1981).

^{xiii} *Pennsylvania*, 334 A.2d at 841.

^{xiv} *Mercer v. Duke University*, 190 F.3d 643 (4th Cir. 1999).

^{xv} See *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (Ariz. 1982) (holding that a rule excluding males from female volleyball team did not violate the Equal Protection Clause); *Kleczek v. Rhode Island Interscholastic League*, 768 F.Supp. 951 (D.R.I. 1991) (holding prohibiting boys from playing on the girls' field hockey team did not violate Equal Protection); *Petrie*, 394 N.E.2d at 862 (holding that excluding boys from girls' volleyball team did not violate Equal Protection); *B.C. v. Board of Educ., Cumberland Regional Sch. Dist.* 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (holding that a rule excluding boys from girls' field hockey team did not violate Equal Protection); *Forte v. Board of Educ., N. Babylon Union Free Sch. Dist.*, 105 Misc. 2d 36 (N.Y. Sup. Ct. 1980) (upholding a rule prohibiting boys' from participating on girls' volleyball team).

^{xvi} 34 C.F.R. 106.41 (c)(1).

^{xvii} *Petrie*, 394 N.E.2d at 862.

^{xviii} *Clark*, 695 F.2d at 1131.

^{xix} *Attorney General v. Massachusetts Interscholastic Athletic Ass'n*, 393 N.E.2d 284 (Mass. 1979) (overturning an interscholastic league policy forbidding males to participate in females' sports teams, but permitting females to participate in males' teams). Comment per Farina, Elizabeth. (2005) Unpublished manuscript prepared for Professor Deborah Brake, University of Pittsburgh, dated August 11, 2005.

^{xx} *Cumberland Regional Sch. Dist.*, 531 A.2d at 1059 (holding that preserving women's athletic opportunities was an important governmental objective, and that prohibiting males from participating on females' teams was substantially related to that objective); *Petrie*, 394 N.E.2d at 863 (holding that preserving and fostering athletic competition for females, and preventing unfair athletic domination by males were compelling state interests, thus allowing the school's policy to restrict membership on the only volleyball team to females). Comment per Farina, Elizabeth. (2005) Unpublished manuscript prepared for Professor Deborah Brake, University of Pittsburgh, dated August 11, 2005.

^{xxi} *Clark*, 695 F.2d at 1126 (holding that excluding males from participating on the female volleyball team did not violate Equal Protection rights of the male students because it was a substantially related method of achieving the important objectives of promoting sport opportunities for females and redressing past discrimination); *Mularadelis v. Haldane Central Sch. Board*, 74 A.D.2d 248 (N.Y. App. Div. 1980) (holding that the petitioner's exclusion was justified because males in general still had more opportunities than females in the institution's sports program). Comment per Farina, Elizabeth. (2005) Unpublished manuscript prepared for Professor Deborah Brake, University of Pittsburgh, dated August 11, 2005.

^{xxii} *Pennsylvania*, 334 A.2d at 840.