Participation of Boys on Girls’ Teams

Males shall be excluded from female athletic teams. The following legal opinion on this subject was provided the Board of Directors April 14, 2006.

RE: IOWA GIRLS HIGH SCHOOL ATHLETIC UNION: TITLE IX, THE EQUAL PROTECTION CLAUSE, AND THE POLICY THAT BOYS CANNOT PARTICIPATE ON GIRLS’ ATHLETIC TEAMS.

ISSUES

The Iowa Girls’ High School Athletic Union (“IGHSAU”) has a rule prohibiting participation by males on female athletic teams in Iowa high school sports. In reviewing this policy, the following were analyzed:

1. Applicability

Title IX prohibits sex discrimination under any educational program or activity that receives federal funds. 20 U.S.C. §1681(a). The Regulations define “recipient” as:

Any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution or organization, or any other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

34 C.F.R. §106.2(h). Congress subsequently amended Title IX to provide that its application was to be construed institution-wide, i.e., if any part of an institution receives federal financial assistance, then Title IX is applicable to that institution. See 20 U.S.C §1687.

In Horner v. Kentucky High School Ass’n, the Sixth Circuit discussed whether the Kentucky High School Athletic Association (“KHSAA”) was a recipient of federal funds such that Title IX was applicable. Horner v. Kentucky High Sch. Ass’n, 43 F.3d 265, 268-72 (6th Cir. 1994). The KHSAA is a voluntary, self-managing, unincorporated association of public, private and parochial schools that receives its funding from dues paid by the member schools. The authority of the KHSAA to manage interscholastic athletics in Kentucky was delegated by the Kentucky Board of Education. The court determined that the Kentucky Board of Education definitely qualifies as a recipient of federal financial assistance, and is thus subject to Title IX. Id. At 271-72. While the court recognized that the “status of the KHSAA present(ed) a closer question,” it concluded that the KHSAA also qualifies as a recipient of federal funds within the meaning and intent of Title IX. The court reasoned that the KHSAA’s functions are delegated to it by the
Kentucky Board of Education. In addition, the court determined that because the KHSAA “receives dues from member schools which do receive federal funds, . . . the association qualifies as an ‘agent’ which indirectly receives federal funds.” A recipient that receives federal funds indirectly is also subject to Title IX. 34 C.F.R. § 106.2(h). Furthermore, the court noted that “Congress has made clear its intent to extend the scope of Title IX’s equal opportunity obligations to the furthest reaches of an institution’s programs,” and to find that the KHSAA was not a recipient of federal funds and therefore not subject to Title IX would defeat that purpose.

Based on this analysis, and under the clear meaning of Title IX and its regulations, high schools that receive federal financial assistance are subject to Title IX. This is true even if high school sports are not funded through federal financial aid. Instead, if a school receives any federal financial support whatsoever, its athletics programs are required to comply with Title IX. Moreover, Title IX’s regulations apply to “interscholastic athletics, which necessarily includes high school sports.” Based on the analysis reached in Horner, it is probable that the IGHSAU is subject to Title IX.

It is also well settled that high school athletic associations are so intertwined with the state, such that their actions and regulations are considered state actions and thereby making the Equal Protection Clause of the Fourteenth Amendment applicable to the high school association. See Mitchell v. Louisiana High School Athletic Ass’n, 430 F.2d 1155, 1156 (5th Cir. 1970); see also Lenzy, Paulette Renee, Note, “Constitutional Law—Fourteenth Amendment—Exclusion of Males from Girls’ Volleyball Team Does Not Violate Equal Protection Clause—Clark v. Arizona Interscholastic Association, 866 F. 2d 1991 (9th Cir. 1989),” 1 Seton Hall J. Sport L. 307, 309-10 (1991).

In discussing this principle, the Sixth Circuit also determined that the Ohio High School Athletic Association (“OHSAA”) was a state actor and as a result the Equal Protection Clause of the Fourteenth Amendment applicable to its actions. See Yellow Springs Exempted Village Sch. Dist. Bd. Of Educ. v. Ohio High Sch. Athletic Ass’n, 647 F.2d 651, 661 (6th Cir. 1981). The court pointed out “the multiple linkages and interdependencies between the State and OHSAA.” Additionally, the court found it “apparent that the State permits and encourages OHSAA to regulate interscholastic athletics . . . [and] OHSAA’s authority to sanction member schools for noncompliance with its rules and to regulate members’ participation in competition not sponsored by it permits . . . ‘a technically nongovernmental entity to dictate terms to a State entity.’” Id. In other words, the OHSAA “plays an important role in public and private education” in the state and actually performs “a function which the State would otherwise be compelled to undertake.” Id. Thus, the OHSAA “operates with the implicit comment and at times explicit comment imprimatur of the State.” Id. Such a symbiotic relationship is sufficient to establish a finding of state action. Id.; see also Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973).

Similarly, the court in Force v. Pierce City R-VI School District also determined that the Missouri State High School Activities Association (“MSHSHA”) was subject to the Equal Protection Clause of the Fourteenth Amendment. Force v. Pierce City R-VI Sch. Dist.; 570 F. Supp. 1020, 1030-31 (W.D. Mo. 1983). The MSHSHA was supported in part by dues paid by member schools, and member schools have the power to amend the constitution, by-laws and administer the affairs of the MSHSHA. In addition, the MSHSHA has the power to impose sanctions on member schools for violation of its rules and regulations. Under these circumstances, the court found “it is clear that MSHSHA’s actions amount to ‘state actions’ within the meaning of the Fourteenth Amendment.” Id. at 1030 (citations omitted). Consequently, the rules and regulations of the MSHSHA were held to be subject to the requirements of the Equal Protection Clause. Id. at 1031. Thus, while the “MSHSHA performs a valuable and needed service for the schools and citizens of [the] state, . . . its rules cannot transcend constitutional requirements.” Id. at 1025.
As is evident from the foregoing analysis, the IGHSAU’s actions are to be considered “state actions” for purposes of applicability of the Fourteenth Amendment. Consequently, the rules and regulations of the IGHSAU are subject to the Equal Protection Clause of the Fourteenth Amendment.

2. Impact on Policy

Consistent with Title IX, which prohibits gender based discrimination in public schools, “it is well established that the Equal Protection Clause of the Fourteenth Amendment prevents schools from excluding girls from boys’ athletic teams in the absence of a corresponding girls’ team.” Woods, Polly S., “Boys Muscling in on Girls’ Sports,” 53 Ohio St. L.J. 891, 891 (1992). The converse issue, i.e., whether boys legally can or are required to be allowed to play on girls’ teams in the absence of a boys’ team, remains an open issue. Generally, however, the courts that have analyzed the issue have determined that nothing in either Title IX or the Equal Protection Clause of the Fourteenth Amendment requires that boys be afforded the same treatment. See Clark v. Arizona Interscholastic Ass’n, 695 F.2d 1126 (9th Cir. 1982) (finding rule excluding males from female volleyball team was permissible under the Equal Protection Clause of the Fourteenth Amendment); Kleczek v. Rhode Island Interscholastic League, Inc., 768 F. Supp. 951 (D.R.I. 1991) (finding rule excluding boys from girls’ field hockey team permissible under both statutory and constitutional grounds); Petrie v. Illinois High Sch. Ass’n, 394 N.E.2d 855 (Ill. App. 1979) (finding the exclusion of males from the female volleyball team acceptable under the Fourteenth Amendment); B.C. v. Bd. Of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (finding excluding boys from girls’ field hockey team permissible under both statutory and constitutional grounds); Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S. 2d 458 (App. Div. 1980) (finding rule excluding males from female volleyball team permissible under statutory and constitutional provisions); but see Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979) (finding that males may not be excluded from female volleyball team when only one team exists, and basing the decision on Title IX and Fourteenth Amendment grounds); Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n., Inc., 393 N.E. 2d 284 (Mass. 1979) (Finding that the exclusion of boys from girls’ team prohibited under the state’s equal rights amendment).

Title IX –

As noted above, Congress enacted Title IX to provide more opportunities for women by prohibiting discrimination based on gender.1 Title IX and its regulations have been interpreted2 to

---

1 “The passing of Title IX is intimately connected to skyrocketing growth in women’s athletics in America.” Darowski, Adam S., “For Kenny, Who Wanted to Play Women’s Field Hockey,” Duke J. Gender L. & Pol’y 153, 159 (Spring 2005). In fact, “‘Title IX has helped girls and women participate in interscholastic and intercollegiate athletics in far greater numbers than they had in the past.’” Id (quoting U.S. Dep’t of Educ., Title IX: 25 Years of Progress, available at http://www.ed.gov/about/offices/list/ocr/docs/t9interp.html (1987))

2 Under Title IX, the Department of Education has been given the responsibility of prescribing standards for athletic programs under Title IX. See McCormick v. Sch. Dist. Of Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004) (citations omitted). In addition to the regulations regarding athletics, see 34 C.F.R. 106.41, the Department of Education issued a policy interpretation that is used by courts in interpreting Title IX and its regulations. See Title IX of the Education Amendments of 1972, Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979), available at http://www.ed.gov/about/offices/list/ocr/docs/99interp.html (“Policy Interpretation”). While the title suggests the Policy Interpretation is applicable only to intercollegiate athletics, courts have determined (consistent with the language of the Policy Interpretation) that the Policy Interpretation also governs high school interscholastic athletic programs that otherwise fall under the gambit of Title IX coverage. See McCormick, 370 F.3d at 290-91 (citing the Policy Interpretation, 44 Fed. Reg. At 71,413 (explaining that “its general principles will often apply to club,
prohibit gender-based discrimination in athletics, and specifically in high school athletics. Relevant to interscholastic athletics, including Iowa high school sports, the Department of Education promulgated the following regulation:

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity

intramural, and interscholastic athletic programs, which are covered by regulation”); see also Horner, 43 F.3d at 273-74 (relying on the Policy Interpretation); Williams, 998 F.2d at 171-72, 175-76 (same).
Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams in assessing equality of opportunity for members of each sex.

34 C.F.R. 106.41. Thus, while subsection (a) of this regulation contains a general prohibition against gender-based discrimination in interscholastic athletics, subsection (b) provides that separate teams for boys and girls are permissible under Title IX. Id.

The regulation does, however, make clear that when separate teams are operated, “members of the excluded sex must be allowed to try-out for the team.” 34 C.F.R. § 106.41 (b). It is this rule that has given rise to the argument that boys must be allowed to try-out for girls’ athletic teams if no boys’ team is sponsored in that sport. Most courts that have dealt with this issue have found that this regulation does not necessarily require that high schools allow boys to try out for a girls’ sports team even when there is no boys’ team in that sport. The courts reach this conclusion on two bases. 3

First is the “contact sports” exception. Many of the decisions dealing with the prohibition of boys from a girls’ team involve girls’ field hockey teams. Played in the fall season, there is usually no corresponding field hockey team for boys. 4 In providing that “members of the excluded sex must be allowed to try-out for the team offered,” Section 106.41(b) contains an exception for “contact sport[s].” 34 C.F.R. § 106.41(b). Historically, the “contact sports” exception has justified prohibitions for participation by girls in sports such as football, hockey, and wrestling. 5 Likewise, courts have determined that this exception is also applicable to regulations that preclude boys’ participation on girls’ sports teams that are deemed to be contact sports.

While not expressly listed, most court that have dealt with the issue have determined that field hockey does constitute and qualify as a contact sport. See, e.g., Kleczek, 768 F. Supp. at 694 (“Although the purpose of field hockey is not to make bodily contact, such contact is inevitable in a sport that combines running, sticks, a hard ball, and a wide-open playing field.”) Consequently, the courts have concluded that schools are not required to allow boys to try-out and participate in girls’ field hockey, even though the school does not provide for a boys’ field hockey team. In other words, the “contact sports” exception serves as a shield from the requirement that where no separate team is provided, members of the excluded sex must be allowed to participate. See Williams, 998 F.2d at 172 (calling the “contact sports” exception “the broadest exception recognized to the overarching goal of equal athletic opportunity”).

---

3 In addition, based on the express language of the regulation, where a school provides separate teams for both boys and girls, members of the opposite sex are not allowed to participate on the team organized for the opposite gender. In other words, boys cannot try-out for the girls’ basketball team if their school also has a boys’ basketball team.

4 Most schools sponsor boys football in the fall.

5 Note, however, that the “contact sports” exception is permissive, in that the schools may still choose to allow girls participation in boys’ contact sports though they are not required to allow for such participation as they would be in a non-contact sport.

6 Though a school can choose to allow for participation. See discussion supra, at footnote 5.
The second exception to the participation requirement in the regulation, referred to as the “athletic opportunity” test, is probably more important to Iowa high school athletics and the IGHSAU’s policy. Specifically, the regulation is only applicable where “athletic opportunities for members of that sex have previously been limited.” 34 C.F.R. § 106.41 (b). While one court interpreted this as being sport-specific, see Gomes, 469 F. Supp. at 664, the majority of courts have interpreted this to refer to athletic opportunities in general. See, e.g., Williams v. Sch. Dist. of Bethlehem, Pa., 998 F.2d 168, 174 (3d Cir. 1993); Mularadelis, 427 N.Y.S.2d at 461-64. In other words, even though boys may have had limited athletic opportunities to participate in field hockey, so long as they have not been limited in their general athletic opportunities, the regulation will not apply based on this “athletic opportunities” test.

At this point in time, it is almost a universal reality that males have been given more opportunities to participate in interscholastic sports than females, though this gap is narrowing. Indeed, the courts have generally interpreted the athletic opportunities test in this manner, thereby finding that the opportunities for boys to participate in interscholastic sports has not been previously limited. See, e.g., Kieczek, 768 F. Supp. at 694. As a result, the courts have determined that this regulation does not require schools to allow boys to participate on girls’ sports teams.

Based on the foregoing analysis, neither Title IX nor the regulations promulgated thereunder prohibit the IGHSAU’s policy of prohibiting boys’ participation on girls’ sports teams. In Iowa, boys have historically been provided more opportunities than girls to participate in interscholastic athletics. Be aware, however, that as the gap between opportunities for participation in high school sports lessens between the genders, courts may be more inclined to find that the “athletic opportunity” test no longer serves as a bar to the applicability of the regulation requiring members of the excluded sex be allowed to participate on teams where no corollary team is provided for their gender. This would, however, require a finding that boys have previously been limited in their participation in interscholastic sports, which, as much as the gap may lessen, is not likely to occur for some time.

Equal Protection Clause –

The Equal Protection Clause of the Fourteenth Amendment also serves to prohibit forms of gender-based discrimination. The United States Supreme Court has determined than any gender-based classification is to be scrutinized under an intermediate level of scrutiny, i.e., the gender-based classification must “serve important governmental objectives and must be substantially related to achievement of those objectives.” Craig v. Boren, 429 U.S. 190, 197 (1976). Courts have articulated that there is an important governmental objective in denying boys access to girls’ athletic teams in order to “maintain, foster, and promote[e] athletic opportunities for girls” Petrie, 394 N.E.2d at 862, and to “redress past discrimination against women in athletics and promot[e] equality of athletic opportunity between the sexes.” Clark, 695 F.2d at 1131. In short, “redressing the disparate athletic opportunities available to males and females” has generally been found to be an important governmental objective under the Equal Protection Clause. Kieczek, 768 F.Supp. at 956. In so finding, the courts have further concluded that excluding or prohibiting boys from participating on girls’ athletic teams is a permissible means of achieving this objective. See Clark, 695 F.2d at 1131; Petrie, 394 N.E.2d at 862; B.C., 531 A.2d at 1065; but see Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n, Inc., 393 N.E.2d 284, 296 (Mass. 1979).

Boys have historically had, and at present continue to have, greater overall athletic opportunities than girls. The courts have found that regulations that exclude boys from girls’

---

7 The courts have noted the Gomes reading of the regulation and have summarily rejected it in all cases as misinterpreting the plain language of the regulation.
athletic teams serves to prevent males from further dominating and displacing females “from meaningful participation in available athletic opportunities.” B.C., 531 A.2d at 1065. In addition, the courts have generally concluded that denying boys the right to try-out for girls’ teams when no boys’ team exists is a means of redressing past discrimination against female students in interscholastic athletic programs. See, e.g., Clark, 695 F.2d 1126, 1131 (9th Cir. 1982); Kieczek, 768 F.Supp. at 324. Although the number of girls participating in high school sports has increased dramatically over the last twenty years, large discrepancies continue to exist. See Woods supra, at 896-97.

Apart from redressing past discrimination and promoting girls’ athletics, courts have recognized an additional rationale for excluding boys from girls’ high school athletic teams. Under the Fourteenth Amendment, gender-based preferences can be upheld if they are “founded upon a reasonable distinction” between the sexes. Kahn v. Shevin, 416 U.S. 351, 355 (1974) (quoting Allied Shores v. Bowers, 358 U.S. 522, 528 (1959)); see also Orr v. Orr, 440 U.S. 268, 280-82 (1979); Craig, 429 U.S. at 204 (1976); Schlesinger v. Ballard, 419 U.S. 498, 508 (1975). Thus, in applying the Equal Protection Clause to gender-based classifications, it is permissible to take into account “actual differences between the sexes, including physical ones.” Clark, 695 F.2d at 1129.

Indeed, the Supreme Court has held that a classification based on gender may be upheld if gender represents “a legitimate, accurate proxy,” that is, a gender-based classification based on gender may be upheld if there is a specific factual justification for the classification. Craig, 429 U.S. at 204. Moreover, a gender-based classification will generally be upheld if its purpose is to redress past discrimination. Califano v. Webster, 430 U.S. 313, 318 (1977); Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977). On the other hand, gender-based classifications arising solely out of administrative convenience or that reflect “archaic and overbroad generalizations” promoting sexual stereotypes will probably not withstand a constitutional challenge. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

Based on the foregoing discussion, it is evident that the IGHSAU’s policy of prohibiting participation of boys on girls’ athletic teams would withstand any challenge under the Equal Protection Clause as long as such a policy is tied to the permissible objective to redress past discrimination and equalize opportunities for females in interscholastic athletics. In addition, the policy may be supported on the premise that there are inherent physiological differences between boys and girls, and that participation by boys on girls’ teams would displace girls from athletic teams and, to a lesser extent, potentially endanger the girls that are participating. Note, however, that like with Title IX, as opportunities for girls to participate in interscholastic sports increases, courts may be more inclined to find the Equal Protection Clause of the Fourteenth Amendment no longer supports gender-based classifications in interscholastic sports.\(^8\)

**Illustrative Cases**

Clark v. Arizona Interscholastic Association, 695 F.2d 1126 (9th Cir. 1982).

In Clark v. Arizona Interscholastic Association, the plaintiff brought suit against the high school athletic association claiming the association’s rule precluding boys from playing on girls’ high school volleyball teams violated the Equal Protection Clause. After concluding the

---

\(^8\) As one commentator noted:

[[the once airtight reasoning for allowing boys to be excluded from girls’ teams even under the Equal Protection Clause is beginning to weaken. As more and more girls participate in high school athletics, the need to redress past inequities or to promote female athletic participation at the expense of male participation is going away. Likewise, the generalization that boys should be excluded due to a “reasonable distinction” regarding the physical capabilities between the sexes is starting to look “archaic and overbroad.” Still, courts must ultimately make these determinations.](Darowski, supra at 166)
association's actions constitute state action for purposes of the Equal Protection Clause, the court determined that the Equal Protection Clause did not prohibit the association policy at issue. In reaching this conclusion, the court (recognizing the policy's stated purpose) noted innate differences between boys and girls, the ample opportunities boys have historically had to participate in interscholastic sports, and the current sufficient avenues for boys to participate in interscholastic sports. The court further recognized that allowing boys to participate on girls' teams would probably displace girls from those teams, thereby decreasing the opportunities for girls to participate in interscholastic sports. Ultimately, the court concluded the association's policy "is one where there is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women."


In *B.C. v. Bd. Of Educ., Cumberland Regional Sch. Dist.*, the plaintiff brought suit against the high school interscholastic athletic association claiming the association's regulation prohibiting boys from participating on girls' teams (in this case, field hockey) violated the Equal Protection Clause, Title IX and the state constitution. The court determined the regulation at issue was not violative of the Equal Protection Clause, Title IX and the state constitution. The court recognized that "the equalization of athletic opportunities for women is an important governmental objective" and the association policy was appropriate and proper means to reach that objective. The court recognized the stated concerns of safety, intimidation and displacement that would arise if boys were allowed to participate on girls' teams, and found that the association's regulation was to avoid those issues and "is substantially related to the achievement of remedying disparate athletic opportunities for women."


In *Kleczek v. Rhode Island Interscholastic League, Inc.*, the plaintiffs brought suit challenging the state high school athletic association's denial of permission for their son to play on the girls' field hockey team at his school. While the court determined Title IX was not applicable⁹, the court found in the alternative that if Title IX were applicable, athletic opportunities had not been previously limited for boys at his high school and therefore Title IX did not require that boys be permitted to play field hockey at that school. In addition, the court determined that field hockey must be considered a contact sport for purposes of Title IX in that, while such contact was incidental, the nature of the sport was such that contact was inevitable. Additionally, the court concluded that the policy was permissible under the Equal Protection Clause in that redressing the disparate athletic opportunities available between girls and boys is an important governmental interest.


In *Williams v. Sch. Dist. of Bethlehem, Pa.*, the plaintiffs brought suit challenging the exclusion of their son from the girls' field hockey team. The court determined that athletic opportunities had not been previously limited for boys. Moreover, allowing boys to try-out and participate on girls' teams would serve to displace girls from those teams, thereby decreasing

---

⁹The court concluded that while the high school received federal funding, and the athletic association received funding in part from dues collected from member schools, the federal funds received were restricted to certain purposes and no federal funds were used to fund school activities such as athletics. This determination is contrary to the conclusion reached by most other courts, and supported by the language of the applicable statutes and regulations that any entity receiving federal funds, regardless of how those funds are used, is subject to the provisions of Title IX.
“realistic athletic opportunities” for girls. The court noted “that although [T]itle IX and the regulation apply equally to boys as well as girls, it would require blinders to ignore the motivation for promulgation of the regulation on athletics was the historic emphasis on boys’ athletic programs to the exclusion of girls’ athletic programs in high schools as well as colleges.”

Contrary Decisions –

Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979).

As noted above, the Gomes court based its determination on its interpretation that the athletic opportunities test was to be applied to athletic opportunities in the specific sport and at the specific school in question. All courts that have subsequently considered it have summarily rejected this interpretation. Moreover, this interpretation flies in the face of a plain reading of the regulation. Finally, the Gomes decision was subsequently vacated as moot. Consequently, the decision has no precedential value.

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

In reaching its decision, the court applied a strict scrutiny standard for the equal protection claims brought under the state constitution. Under the higher standard, the court determined the policy prohibiting boys from playing on girls’ athletic teams violated the state constitution. Iowa does not have the same language in its state constitution. As noted above, under the federal constitution, courts are to apply only an intermediate level of scrutiny for gender based classifications. This is the same standard that Iowa follows under its state constitution.

Conclusion

As explained above, it is highly probable that both Title IX and the Equal Protection Clause of the Fourteenth Amendment are applicable to and govern any actions taken by the IGHSAU, including the policy at issue here. It is equally probable that, should this policy be challenged under either Title IX or the Equal Protection Clause, the policy would be upheld. While there is not a vast amount of cases deciding this issue, the vast majority of those courts that have dealt with the issue have determined that neither Title IX nor the Equal Protection Clause of the Fourteenth Amendment preclude an association such as the IGHSAU from having a regulation or policy prohibiting boys from participating on girls’ interscholastic athletic teams. The fact that boys have been provided greater athletic opportunities in the past serves to defeat any Title IX claim, and the fact that such policies are being used to remedy past discrimination and equalize opportunities for girls in interscholastic athletics will overcome any challenge under the Equal Protection Clause.