1995


Renee Forseth

Follow this and additional works at: https://digitalcommons.law.villanova.edu/mslj

Part of the Civil Rights and Discrimination Commons, and the Entertainment, Arts, and Sports Law Commons

Recommended Citation
Available at: https://digitalcommons.law.villanova.edu/mslj/vol2/iss1/5

This Casenote is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Jeffrey S. Moorad Sports Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.
Casenotes

THE UNEQUAL PLAYING FIELD—EXCLUSION OF MALE ATHLETES FROM SINGLE-SEX TEAMS: WILLIAMS v. SCHOOL DISTRICT OF BETHELHEM, PA.*

I. INTRODUCTION

School athletic programs rarely satisfy the competitive desires of every athlete. Rather, limited budgets and low levels of interest in certain sports often result in schools creating single-sex teams in particular sports. At such a school, for example, male athletes interested in playing a sport only offered to female athletes might seek to join the girls' team. Would precluding boys from playing on the all-female team constitute impermissible gender discrimination?

Courts have consistently held that the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments Act of 1972 prohibit the exclusion of female athletes from trying out for or participating on male athletic teams. This precedent seemingly affords excluded male athletes a similar ave-

* The authors wish to express their appreciation to Mr. Ryan Bornstein for his diligent editorial assistance without which this Casenote would never have been possible.

1. Common examples include volleyball, field hockey and lacrosse.
2. U.S. CONST. amend. XIV.

(99)
nce to challenge gender-based restrictions. However, numerous judicial interpretations have declined to extend similar anti-discrimination principles to excluded male athletes.5

Williams v. School District of Bethlehem, Pennsylvania,6 decided by the United States Court of Appeals for the Third Circuit, is among those cases that effectively bar male participation on female athletic teams.7 In Williams, Liberty High School offered a girls’ field hockey team without offering a corresponding boys’ team.8 In the absence of a boys’ team, John Williams tried out and was selected for the girls’ field hockey team.9 The School District of Bethlehem, however, prohibited Williams from participating on the girls’ field hockey team due to a school district policy that limited team participation to female athletes.10 The Third Circuit reversed and remanded the United States District Court for the Eastern District of Pennsylvania’s holding that the school district’s policy violated Title IX and the Equal Protection Clause.11

This Note commences with a brief analysis of Title IX and the Equal Protection Clause. Next, this Note analyzes prior cases addressing male participation on female athletic teams. This Note concludes with an analysis of the Williams case and its impact on athletic participation opportunities.


7. For a list of cases that bar male participation on female teams, see supra note 5 and accompanying text.

8. Williams, 998 F.2d at 168.

9. Id. at 170.

10. Id.

11. Id. at 170-80.
II. BACKGROUND

A. Title IX

In 1972, Congress enacted Title IX to eliminate gender discrimination in educational programs and activities receiving federal funding. Title IX provides that "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." In 1975, the Department of Health, Education and Welfare (HEW) issued regulations specifically applying Title IX to athletic programs at educational institutions. These regulations provide that any educational institution receiving federal funds must afford both sexes equal athletic opportunities and must accommodate the interests and abilities of both female and male athletes.

Although Congress enacted Title IX to provide equal athletic opportunities for both sexes, the regulations specify certain exceptions to this goal. The regulations interpreting Title IX, for example, specifically permit schools to maintain single-sex teams in


Title IX is not the only statute prohibiting discrimination in athletics. Several states have passed legislation specifically prohibiting gender discrimination in athletics. See, e.g., MINN. STAT. ANN. §§ 126.21, 363.01 (West Supp. 1994); WASH. REV. CODE ANN. §§ 28A.85.010, 28B.100 (West 1989 & West Supp. 1994); FLA. STAT. ANN. § 228.2001 (West 1989).


14. 34 C.F.R. § 106.41 (1994). Section 106.41(a) provides:

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

Id. § 106.41(a). Prior to the enactment of § 106.41(a) it was unclear whether Title IX applied to athletics. Jill K. Johnson, Title IX and Intercollegiate Athletics: Current Judicial Interpretation of the Standards of Compliance, 74 B.U. L. REV. 553, 557 (1994). This ambiguity resulted from the lack of legislative history concerning its applicability to athletics. Thomas A. Cox, Intercollegiate Athletics and Title IX, 46 GEO. WASH. L. REV. 34, 36 n.11 (1977) (noting only two references in legislative history concerning application of Title IX to sports).

15. 34 C.F.R. § 106.41(c) (1994). Section 106.41(c) provides, in pertinent part that, “[a] recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.” Id.

contact sports. A contact sport is defined in 34 C.F.R. § 106.41(b) as one in which the "purpose or major activity . . . involves bodily contact." Section 106.41(b) also specifically lists six sports as contact sports.

The meaning of "contact sport" has been further defined by judicial interpretation. Courts considering the issue of whether a particular sport is a contact sport have interpreted the "major activity" language of section 106.41(b) differently. Several courts have concluded that bodily contact must be the major activity of the sport in order for the sport to be classified as a contact sport. Other courts have stated that a sport can qualify as a contact sport even if the bodily contact involved in the sport is merely incidental.

If the sport is not a contact sport and the athletic opportunities of the excluded sex have been previously limited, then section 106.41(b) requires a school to permit a member of the excluded sex to try out for the single-sex team. Courts have interpreted the

17. *Id.* The relevant portion of § 106.41(b) states: (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 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.

18. *Id.*

19. *Id.* Section 106.41(b) states that boxing, wrestling, rugby, ice hockey, football and basketball are contact sports. *Id.*

20. *See Williams,* 998 F.2d at 172 (stating sport is contact sport if bodily contact occurs and is expected); Kleczek v. Rhode Island Interscholastic League, 768 F. Supp. 951, 955-56 (D.R.I. 1991) (finding sport is contact sport even if bodily contact is incidental). *But see* Gil v. New Hampshire Interscholastic Ass'n, No. 85-E-646, slip op. at 4 (N.H. Super. Ct. Nov. 8, 1985) (determining sport not contact sport if only "occasional forceful bodily contact and rigorous pitting of strength" occur).


24. 34 C.F.R. § 106.41(b).
phrase "limited athletic opportunities" in different ways. Most courts have held that the regulations require an inquiry into the overall limited athletic opportunities of the excluded sex, on either a school or school district-wide basis.\textsuperscript{25} One court, however, has interpreted this phrase to require an inquiry only as to whether the excluded sex's opportunities have traditionally been limited in the particular sport to which the excluded sex desires access.\textsuperscript{26}

The majority of courts have declined to hold that section 106.41 (b) mandates that male athletes have access to female athletic teams. Currently, only one federal court has held that Title IX allows males to play on female athletic teams.\textsuperscript{27} In Gomes v. Rhode Island Interscholastic League,\textsuperscript{28} the United States District Court for the District of Rhode Island issued a preliminary injunction enjoining Rogers High School from denying Donald Gomes the opportunity to participate on the girls' volleyball team.\textsuperscript{29} The district court held that the school district's policy excluding male athletes violated Title IX and the Equal Protection Clause.\textsuperscript{30}

The court construed section 106.41 (b) as requiring a sport-specific analysis.\textsuperscript{31} Engaging in this analysis, the court found that the athletic opportunities for male athletes had been limited because Rogers High School had never sponsored a male volleyball team.\textsuperscript{32}


\textsuperscript{26} Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 664 (D.R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979).

\textsuperscript{27} Id. at 659.

\textsuperscript{28} 469 F. Supp. 659 (D.R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979).

\textsuperscript{29} Id. at 666. Gomes played on an all-boys volleyball team before transferring to Rogers High. Id. at 661. After transferring to Rogers High, Gomes tried out for and made the all-girls' volleyball team. Id. Gomes was issued a uniform and began practicing with the team prior to being dismissed by the Rhode Island Interscholastic League. Id.

\textsuperscript{30} Id. at 664-65.

\textsuperscript{31} Id. at 664. The court stated that interpreting § 106.41 (b) as requiring an inquiry into the overall opportunities for males would violate the Equal Protection Clause because such an interpretation would give the Interscholastic League the power to establish female teams in any sport without establishing male teams simply because female athletes were discriminated against in the past. Id. The court held that the Constitution prohibited "affirmative action" programs that absolutely bar the other sex from participation. Id. (citing Regents of Univ. of Ca. v. Bakke, 438 U.S. 265 (1978)). Therefore, the court concluded that § 106.41 required the Interscholastic League to either establish a separate team for boys or allow Gomes to compete on the girls team. Id. at 665.

\textsuperscript{32} Id. at 661. In conducting a sport specific analysis, the court found that although Rogers High School never sponsored a male volleyball team, it offered a
Therefore, the court concluded that the policy violated Title IX because section 106.41(b) required that boys be provided access to the girls' volleyball team.\textsuperscript{33}

Moreover, the court also held that an absolute prohibition on participation by boys in a particular sport violated the Equal Protection Clause.\textsuperscript{34} The court reasoned that the creation of an all-female volleyball team was not directed toward rectifying past disadvantages because girls had never been denied the opportunity to play volleyball.\textsuperscript{35} The court, thus, found that the gender-based classification was "impermissibly overbroad."\textsuperscript{36}

In contrast to \textit{Gomes}, most courts hold that Title IX does not require that male athletes be able to participate on all-female teams. In \textit{Mularadelis v. Haldane Central School Board},\textsuperscript{37} the New York Supreme Court, Appellate Division, held that the school board's exclusion of a male athlete from the girls' tennis team did not violate Title IX or the Equal Protection Clause.\textsuperscript{38} The court rejected plaintiff's argument that under Title IX's regulations male athletes must be allowed to try out for the female tennis team because male athletic opportunities in tennis had been traditionally limited.\textsuperscript{39} The court interpreted section 106.41(b) as requiring an inquiry into overall athletic opportunities rather than a sport-specific inquiry.\textsuperscript{40} The court concluded that female athletes were entitled to favored treatment because male athletes within the Haldane Central School District had greater overall athletic opportunities.

wide variety of athletic opportunities in other sports for male athletes. \textit{Id.} The court also recognized that males overwhelmingly constituted the majority of participants on teams open to co-ed participation. \textit{Id.}

\textsuperscript{33} \textit{Gomes}, 469 F. Supp. at 665.

\textsuperscript{34} \textit{Id.} at 664.

\textsuperscript{35} \textit{Id.} The court determined the injustices to female athletes were in the aggregate and not in the sport of volleyball. \textit{Id.}

\textsuperscript{36} \textit{Id.} The court acknowledged that a regulation which provided women with separate and exclusive teams in sports previously dominated by men was a legitimate and narrowly drawn attempt to rectify past discrimination. \textit{Id.} The court also stated that a policy which only offered women the choice to play on a gender-integrated team or on a single-sex team was a valid way to enlarge opportunities for female athletes and to redress past discrimination. \textit{Id.}


\textsuperscript{38} \textit{Id.} at 463-64. The school policy stated that "[s]ince the opportunities for girls to participate were more limited than for boys, the school district shall prohibit the participation of boys on teams and in leagues organized to provide competition among girls." \textit{Id.} at 460.

\textsuperscript{39} \textit{Id.} at 461. The court rejected the \textit{Gomes} interpretation of § 106.41(b), which looked at each sport individually to determine past discrimination. \textit{Id.} at 461. For a full discussion of \textit{Gomes} see \textit{supra} notes 28-36 and accompanying text.

\textsuperscript{40} \textit{Mularadelis}, 427 N.Y.S.2d at 462.
than females. 41 The court also found that the school board's regulation did not violate the Equal Protection Clause because the school successfully sought to redress past discrimination. 42

In Forte v. Board of Education, North Babylon Union Free School District, 43 the petitioner sought to invalidate the school district's regulation banning participation of male athletes on the girls' high school volleyball team. 44 The Forte court declared the regulation valid, holding that Title IX's regulations authorized the exclusion of male athletes when the overall athletic opportunities of male athletes had not been limited in the past. 45

The court reasoned that the school district's regulation served to prevent the displacement of female athletes by male athletes who already had an advantage in overall athletic opportunities. 46 The court also found that the regulation sought to redress past discrimination against female athletes. 47 Further, the court stated that the lack of opportunities in volleyball for male athletes did not violate Title IX because male athletes had significantly more opportunities to participate in interscholastic athletics as a whole. 48

In Kleczek v. Rhode Island Interscholastic League, Inc., 49 a male athlete sought a preliminary injunction enjoining the high school athletic association from denying him the opportunity to partici-

41. Id. at 464. The court pointed out that opportunities for women were limited because the school offered 11 boys' teams and only 6 girls' teams. Id. at 461.
42. Id. at 464. The court held that precluding males from participating on the girls' athletic team was a permissible means of rectifying past discrimination against females in scholastic athletic programs. Id. The court determined that "[n]otwithstanding the alleged favorable treatment granted female students herein, the overall athletic opportunities at the appellants' schools for male students will exceed those afforded their female counterparts. Special recognition and favored treatment can constitutionally be afforded members of the female sex under the circumstances." Id. (citations omitted).
44. Id. at 322. Joanne Forte brought suit when her son was prohibited from playing on the North Babylon High School's girls' volleyball team. Id. The school only offered a female volleyball team. Id. Section 135.4(c)(7)(ii)(c) of the Regulations of the Commissioner of Education stated that "inasmuch as boys have not been denied an equal opportunity to participate on inter-scholastic sport teams in past years in Suffolk County, boys may not try out nor participate on girls' interscholastic teams in accordance with Federal Regulations." Id. at 323.
46. Id. at 324.
47. Id. The court held that the resolution furthered the objectives of Title IX and that the Title IX policy of barring males from female sports teams was proper treatment to remedy past discrimination in athletics. Id.
pate on the girls’ field hockey team. Plaintiff argued that the exclusion of male athletes from the girls’ team violated Title IX and the Equal Protection Clause. The district court denied plaintiff’s request for injunctive relief.

The court held that plaintiff’s Title IX claim failed. First, the court considered whether under section 106.41 (b) athletic opportunities had been previously limited for male athletes at plaintiff’s high school. Under the court’s limited athletic opportunity analysis, it ruled that plaintiff’s Title IX claim was meritless because only opportunities for female athletes had been traditionally limited. The court also determined that field hockey was a contact sport because it involved incidental physical contact. Thus, under section 106.41 (b), the association could sanction a single sex team and prohibit the excluded sex from trying out for the team.

50. Id. at 952. After making the girls’ field hockey team, Brian Kleczek asked for approval to play for both Kingstown High and the Rhode Island Interscholastic League (RIIL). Id. at 953. RIIL would not allow Brian Kleczek to play because Article 25 Section 1 of the RIIL’s Rules and Regulations prohibited him. Id. The rule “limits competition in field hockey to only girls.” Id. (quoting RIIL Rules, Article 25 § 1). This action began after the RIIL upheld this decision in a special hearing requested by Brian’s parents. Id.

51. Id.

52. Id. The court found that plaintiff failed to make a Title IX claim. Id. at 953-55. The court found RIIL was outside the scope of Title IX because the athletics program received no federal money. Id. (receiving federal money specifically to the athletic department is no longer required pursuant to the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988)). The court continued its analysis by discussing whether Kleczek would win if RIIL was within the scope of Title IX. Id. The court held that Kleczek would still lose because (1) males traditionally did not have limited opportunities because of their sex and (2) field hockey was an incidental contact sport similar to basketball. Id. at 955-56.

53. Id. at 955-55.

54. Kleczek, 768 F. Supp. at 955. The court acknowledged that there was a split among the courts’ interpretation of 106.41(b). Id. The court followed the Mularadelis Court’s approach by interpreting the section broadly. Id. (stating Gomes court’s construction “disregarded the plain language of the regulation and substituted new language to avoid a feared constitutional problem”). For a further discussion of Gomes, see supra notes 28-36 and accompanying text. For a further discussion of Mularadelis, see supra notes 37-42 and accompanying text.

55. Kleczek, 768 F. Supp. at 955. The court based its decision on evidence introduced at the hearing, but it did not discuss this information in its opinion. Id. The court inferred that the plaintiff would only be permitted the opportunity to play if males previously had limited athletic opportunities. Id. However, the court found that athletic opportunities for males were not previously limited. Id.

56. Id. at 955-56. The court, relying on expert testimony presented by the defendants, found that “the evidence presented to the court indicate[d] that field hockey [ ] in reality [was] [an] ‘incidental contact’ sport, more akin to basketball than volleyball or tennis.” Id.

57. Id. at 956. The court also rejected plaintiff’s Equal Protection argument. Id. The court found that there was a substantial relationship between the exclu-
As these cases indicate, male athletes may not pursue a Title IX claim demanding access to all-female teams. Courts have reasoned that male athletes are not afforded Title IX protection because male athletic opportunities have not been traditionally limited. Similarly, courts have found male athletes do not have a constitutional right to participate on all-female teams.

B. Equal Protection

Athletes also argue that exclusion from single-sex teams, based on gender, is a violation of their constitutional rights. The Equal Protection Clause of the Fourteenth Amendment prohibits certain gender-based classifications. In Craig v. Boren, the United States Supreme Court held that gender-based classifications should be analyzed under an intermediate level of scrutiny. The Court considered the important government objective of redressing past discrimination against female athletes.

58. See supra notes 37-57 and accompanying text.
59. See infra notes 87-104 and accompanying text.
63. 429 U.S. 190 (1976).

The Supreme Court has adopted three standards of review when determining whether a classification conforms with the guarantees afforded by the Equal Protection Clause. James Torke, The Judicial Process in Equal Protection Cases, 9 HASTINGS CONST. L.Q. 279, 282-83 (1982). The first standard of review is strict scrutiny. Id. Regulations or laws that make "suspect classifications" or infringe upon fundamental interests are subject to strict scrutiny. Id. Such regulations or laws must be necessary to promote a compelling state interest to satisfy Equal Protection requirements. Loving v. Virginia, 388 U.S. 1, 11 (1967). "Suspect" classifications include alienage, race and national origin. Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Loving, 388 U.S. at 11 (race); Korematsu v. United States, 323 U.S. 214 (1944) (national origin).

The second standard of review is intermediate scrutiny. Torke, supra, at 280-82. Under this standard of review, regulations or laws must be substantially related.
stated that gender-based classifications must "serve important governmental objectives and must be substantially related to the achievement of those objectives." Thus, a school must demonstrate an important governmental objective for excluding an athlete from participation in a sport based solely on gender.

Most courts have found two reasons important enough to justify single-sex participation in athletics: physiological differences between men and women and past discrimination against female athletes. Courts have found that excluding boys from participating on girls' teams is substantially related to achieving these important governmental objectives.

The first permissible reason for denying males participation is based on physiological differences between males and females. The Supreme Court in *Michael M. v. Superior Court* recognized that classifications based on gender may be upheld if they are based on "actual differences between the sexes, including physical ones." Physiological differences are generally thought to be highly rele-

to important governmental objectives in order to pass constitutional muster. *Craig*, 429 U.S. at 197. Presently, gender, and illegitimacy are subject to this standard of review. See, e.g. *Id.* (defining intermediate scrutiny and application to gender); *Lalli v. Lalli*, 439 U.S. 259 (1978) (applying intermediate scrutiny to illegitimacy).

The third standard of review is the rational basis test. *Torke*, supra note 280-82. Under this standard of review, a classification need only be rationally related to a legitimate governmental interest. *Mcdonald v. Board of Election Commrs*, 394 U.S. 802, 809 (1969). Under a rational basis test, a classification will be upheld unless it is patently arbitrary. *Id.*


69. See *Clark*, 695 F.2d at 1131; *Petrie*, 394 N.E.2d at 863.

70. 450 U.S. 464 (1981) (Stewart, J., concurring) (holding rape statute applied singularly to men because only women were subject to pregnancy).

71. *Id.* at 478-81.
vant to the performance abilities of female and male athletes.\textsuperscript{72} The average male is taller, heavier, stronger and may be more physically capable than the average female.\textsuperscript{73} Therefore, female athletes are at a physical disadvantage in activities that involve speed, strength or cardiovascular endurance.\textsuperscript{74} Clearly, these physical differences could affect the competitive balance between the sexes if they compete against the other.\textsuperscript{75} Thus, courts attempt to avoid displacement or competitive imbalances by recognizing these physical differences.\textsuperscript{76}

The second governmental objective accepted by the courts is redressing past discrimination against female athletes.\textsuperscript{77} Female participation in interscholastic athletics has increased dramatically in the last twenty years.\textsuperscript{78} Male athletic participation and opportunities, however, continues to exceed the opportunities available to women.\textsuperscript{79} This disparity in athletic participation has led most courts to deem the exclusion of male athletes as necessary in order to redress past discrimination against females in interscholastic athletic programs.\textsuperscript{80}

\textsuperscript{72} Agnes Chrietzberg, \textit{Eastern Kentucky University, Biological Sex Differences, Physical Educators for Equity}, Module 3, 3 (1981).

\textsuperscript{73} See Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 662 (D.R.I. 1979), \textit{vacated as moot}, 604 F.2d 733 (1st Cir. 1979); Petrie, 394 N.E.2d at 861.

\textsuperscript{74} Chrietzberg, \textit{supra} note 73, at 3; cf. Attorney Gen. v. Massachusetts Interscholastic Athletics Ass’n, 393 N.E.2d 284, 293 (Mass. 1979) (“The general male athletic superiority based on physical features is challenged by the development in increasing number of female athletes whose abilities exceed those of most men and in some cases approach those of the most talented men.”) (citations omitted).

Disparity in athletic ability may not only be attributed to physical differences. See Polly S. Woods, Comment, \textit{Boys Muscling in on Girls’ Sports}, 53 \textit{Ohio St. L.J.} 891, 895 (1992). Commentators suggest that some of the advantages of males over females in athletics is attributable to the lack of athletic opportunities available to female athletes rather than a purely physical advantage. \textit{Id}.

\textsuperscript{75} Woods, \textit{supra} note 74, at 895. Not all women would be at a disadvantage. \textit{Id}. For example, female athletes that have been trained can attain a higher level of physical performance than their male counterparts. \textit{Id}.

\textsuperscript{76} See Clark, 695 F.2d at 1131; Cumberland, 531 A.2d at 1065.


\textsuperscript{79} \textit{Id}.

\textsuperscript{80} Cf. Attorney Gen. v. Massachusetts Interscholastic Athletic Ass’n, 393 N.E.2d 284, 296 (Mass. 1979) (contending “to immunize girls' teams totally from any possible contact with boys might well perpetuate a psychology of ‘romantic
Male athletes have had very little success in challenging, on constitutional grounds school district policies which bar male participation on female athletic teams. Presently, the Massachusetts Supreme Judicial Court is the only court to hold that the exclusion of male athletes from female athletic teams is a constitutional violation. In Attorney General v. Massachusetts Interscholastic Athletic Ass'n (MIAA), the court held that a regulation prohibiting boys from playing on girls' athletic teams violated the Equal Rights Amendment to the Massachusetts Constitution. The court concluded that "[c]lassification on strict grounds of sex, without reference to actual skill differentials in particular sports, would merely echo 'archaic and overbroad generalizations." The court stated that such a classification was impermissible unless it was justified by an important governmental objective.

Contrary to the holding in MIAA, most courts have held that male athletes do not have a constitutional right to play on all-female athletic teams. For instance, in Petrie v. Illinois High School

paternalism' inconsistent with such development [of competitive athletics for girls] and hurtful in the long run”).

81. Id. at 295.
83. Id. at 296. Rule 17 of the MIAA regulations states that "[w]ith due regard to protecting the welfare and safety of all students participating in MIAA athletics: (1) No boy may play on a girls' team; (2) A girl may play on a boy's team if that sport is not offered in the school for the girl." Id. at 287.
84. Id. at 293 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)). In support of the regulation, MIAA argued that the physical differences between the sexes necessitated sex-based teams because it protected the athletes and preserved athletic opportunities for women. Id.

The court recognized that physical differences may contribute to an overall male advantage. Id. However, the court held that "physical differences were not so uniform as to justify a rule that used sex as a 'proxy' for functional classification." Id. The court emphasized that girls excelled, sometimes surpassing males, in sports requiring balance and endurance. Id. Therefore, a classification based solely on sex was overbroad because it excluded boys from playing on girls' teams even though boys possibly were at a competitive disadvantage. Id. at 293-94. According to the court, less draconian measures could be used to classify eligibility for high school sports teams. Id. at 295. The court suggested that the MIAA use standards such as height, weight and skill or limit the number of boys allowed to participate on all female teams. Id.

85. Id. at 293. The court found that MIAA's safety and displacement concerns were not important governmental objectives. Id. at 293-94. First, the court stated that the connection between the presence of male athletes and injuries to female athletes were tenuous and based on stereotypes that women were weak and physically inadequate. Id. at 294. Second, the court stated that protecting female athletes from displacement due to superior athletic abilities of male athletes did not justify the use of a gender-based classification. Id. at 294-95.

86. See Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982) (policy excluding males from female volleyball team was constitutional); Kleczek v. Rhode Island Interscholastic League, Inc., 768 F. Supp. 951 (D.R.I. 1991) (rule
Ass'n, Trent Petrie was prohibited from participating on the high school girls' volleyball team because the Champaign Community Unit School District limited participation to girls. Petrie brought suit against the Champaign School District alleging that the gender-based classification violated both the Equal Protection Clause of the United States Constitution and the Illinois Equal Rights Amendment. The trial court dismissed the plaintiff's suit. The court reasoned that the exclusion of male athletes from an all-female team was a constitutionally permissible gender-based restriction because it maintained, encouraged and increased athletic opportunities for girls.

The Appellate Court of Illinois, Fourth Circuit, affirmed the trial court's decision. The court held that the Champaign School District's gender-based participation restriction was constitutional because it was based on natural physical differences between the


88. Id. at 856. Petrie began to practice and play on the girls' volleyball team, but he was later informed by school officials that he could no longer play because of the school district's participation restriction. Id. at 857. The high school association restricted participation despite the apparent applicability of section 27-1 of the school code which provided in part: "No student shall, solely by reason of the person's sex, be denied equal access to physical education and interscholastic athletic programs or comparable programs supported from school district funds." Id. at 857.

89. Id. at 856. The Illinois' Equal Rights Amendment prohibits "the State or its units of local government and school districts' from denying equal protection of the law based on sex." Id. at 857 (quoting ILL. CONST. art. I, § 18). The court noted that under the Illinois Equal Rights Amendment, a gender-based classification must withstand strict scrutiny. Id. at 857-58 (citing People v. Ellis, 311 N.E.2d 98 (1974)) (discussing legislative history of amendment).

90. Id. at 856-57.

91. Id. Petrie conceded that the school district had a valid interest in maintaining and increasing athletic opportunities for female athletes. Id. Plaintiff argued, however, that there was no important state interest in avoiding an imbalance in competition based on male dominance in sports. Id. Plaintiff also argued that the classification was both constitutionally overbroad and underbroad. Id.

92. Petrie, 394 N.E.2d at 862.
sexes. The court recognized that gender-based classifications might be avoided by using weight, height or skill as qualifying factors for participating in a given sport. The court explained, however, that such standards would be too difficult to implement because of the physical differences between the sexes. Gender-based classification, according to the court, was the only viable system which would advance the substantial state interest of promoting equal athletic opportunities for female athletes.

The United States Court of Appeals for the Ninth Circuit reached a similar conclusion in Clark v. Arizona Interscholastic Ass’n. In Clark, a male athlete challenged an Arizona Interscholastic Association (AIA) regulation prohibiting boys from participating on the girls’ volleyball team, alleging that the regulation violated the Equal Protection Clause. The United States District Court for

93. Id. Evidence was presented to the court demonstrating that high school boys were substantially taller, heavier, stronger and had longer limbs than high school girls. Id. at 861. Based on this evidence, the court concluded that high school girls were at a substantial physical disadvantage in playing volleyball. Id.

94. Id. at 862.

95. Id. The court noted that the strength differentials would cause hardship on tall girls because most high school girls would not have the musculature to compete with taller boys. Id. The court also rejected a system of handicapping because this type of rating players was too subjective and impractical. Id. Further, the court concluded that handicapping was inconsistent with a system of full and open competition. Id.

96. Id. at 862. The court conceded that the gender-based system was overbroad and underbroad because it included females who were athletically superior to males and excluded males who were “less well-endowed.” Id.

Justice Craven, in his dissent, criticized the majority for failing to acknowledge the federal court decision rejecting categorizations based upon outdated stereotypes concerning the capabilities of the sexes. Id. at 865 (Craven, J., dissenting) (citing Reed v. Reed, 404 U.S. 71 (1971)) (unwilling to uphold mandatory preference for males as estate administrators). Justice Craven stated that the majority was not attempting to protect girls from boys, but was trying to protect the weak from the strong. Id. at 866-67 (Craven, J., dissenting). Justice Craven concluded that this position was erroneous given the fact that no attempt was made to protect smaller and weaker females from competition with larger and stronger females. Id. at 867 (Craven, J., dissenting).

97. 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983).

98. Id. at 1127. The AIA’s policy provided in pertinent part:

That the nondiscrimination policy of the A.I.A. permits participation by girls on boys’ teams in noncontact sports in order to compensate for the girls’ historical lack of opportunity in interscholastic athletics, however, boys are not allowed to play on girls’ teams in noncontact sports since boys historically have had ample opportunity for participation and currently have available to them sufficient avenues for interscholastic participation, and since to allow boys to play on girls’ teams in noncontact sports would displace girls from those teams and further limit their opportunities for participation in interscholastic athletics.

Id. For a discussion on the issue of noncontact and contact sports, see supra notes 17-23 and accompanying text.
the District of Arizona disagreed and granted summary judgment in favor of the AIA.99

The Ninth Circuit affirmed the district court's grant of summary judgment.100 The Ninth Circuit held that gender-based classifications were constitutional if the classifications could be supported by proof of physical differences between the sexes.101 The court found that the physical differences between male and female athletes warranted the exclusion of males from all-female teams.102 The court explained that if male athletes were permitted to participate on all-female teams, they would displace female athletes and diminish female athletic opportunities.108 The court concluded that the AIA regulation was substantially related to the AIA's goal of creating equal participation opportunities for females in athletics.104

---

99. Id. The district court held that excluding male athletes from participating on the girls' volleyball team was "substantially related to and serves the achievement of the important governmental objective" of providing equal athletic opportunities for females in interscholastic sports and redressing past discrimination against female athletes. Id.

100. Id. at 1127. Before considering whether Clark could be constitutionally excluded from the girls' volleyball team, the court considered whether the AIA regulations met the state action requirement of the Fourteenth Amendment. Id. at 1128. The court concluded that the activities of AIA were so "intertwined" with the state that the regulations had to be considered state action. Id. The court supported its conclusion by analyzing the relationship of AIA with the public school system. Id. The court recognized that the public schools played a substantial role in determining and enforcing the policies and regulations of AIA. Id. For example, school administrators and coaches represented their schools on advisory boards and the legislative council consisted of delegates elected by public schools. Id. Further, the court noted that the rules promulgated by AIA were binding on all public high schools in Arizona. Id. Lastly, the court noted that both athletic and nonathletic activities authorized by the AIA occurred at public schools. Id.

101. Id. at 1129 (citing Michael M. v. Superior Ct., 450 U.S. 464 (1981)) (upholding application of statute differently to women because only they are subject to pregnancy); Schlesinger v. Ballard, 419 U.S. 498 (1975) (finding different promotion systems for male and female naval officers constitutional because of existence of different opportunities for combat duty).

102. Clark, 695 F.2d at 1130 (citing Petrie v. Illinois High School Athletic Ass'n, 394 N.E.2d 855 (III. App. Ct. 1979)).

103. Id. at 1127. The court relied on a stipulation presented at trial stating that physical differences, such as height and strength, existed between high school males and females. Id. The court noted that these differences were specifically relevant to volleyball because basic skills such as hitting and blocking were enhanced by physical size, strength and vertical jump. Id. The court established that males may dominate these two skills in volleyball due to their physical advantage. Id.

104. Id. at 1131. The court recognized that excluding male athletes from all-female teams was not the only way to equalize athletic opportunities. Id. The court proposed several plausible alternatives: (1) participation could be limited on the basis of height, weight or other physical characteristics; (2) a separate boys' team could be provided; (3) junior varsity teams could be added; or (4) boys par-
As these cases demonstrate, courts have interpreted that the Equal Protection Clause of the Fourteenth Amendment and state equal rights amendments do not prevent schools from excluding male athletes from participating on all-female teams. The courts have refused to extend these protections to male athletes based on the historical disparate treatment of female athletes, the limited athletic participation opportunities available to females and the physiological differences between the sexes.

III. DISCUSSION: WILLIAMS V. SCHOOL DISTRICT OF BETHLEHEM, PA.\textsuperscript{105}

A. Facts

In August 1990, John Williams tried out for the Liberty High School girls' field hockey team.\textsuperscript{106} Williams made the team as a goalie and began practicing with the junior varsity team.\textsuperscript{107} At the end of August, the Bethlehem School District prohibited Williams from practicing with the team or participating in team activities.\textsuperscript{108} The school district's rationale was that it limited participation on

\begin{itemize}
  \item the girls' teams. \textit{Id.}
  \item Despite the existence of these alternatives, the court found that AIA's regulation was substantially related to the achievement of its objective. \textit{Id.}
  \item Although these alternatives existed, the court held that a gender classification could be sustained. \textit{Id.} (citing Kahn v. Shevin, 416 U.S. 351 (1974)).
  \item A similar result was reached in B.C. v. Board of Education, Cumberland Regional School District, 531 A.2d 1059 (N.J. Super. Ct. 1987). In \textit{Cumberland}, a male athlete claimed that a resolution prohibiting boys from participating on girls' athletic teams violated the Equal Protection Clause. \textit{Id.} at 1064-65. The court held that the regulation did not violate the Equal Protection Clause because the regulation promoted athletic opportunities for females and redressed past discrimination. \textit{Id.} at 1065.
\end{itemize}

Relying on \textit{Clark} and \textit{Petrie}, the \textit{Cumberland} court held that equalization of athletic opportunities for females is an important governmental objective and that the regulation prohibiting males from playing on female teams adequately protects the athletic opportunities for female athletes. \textit{Id.} The court also accepted the school district's argument that females would be displaced and female athletic opportunities would be reduced if male athletes were permitted to play on all-female teams. \textit{Id.} For a full discussion of \textit{Cumberland}, see Lisa M. Rufolo, \textit{Discrimination in High School Athletics-Court Prohibits Boys from Playing on Girls' Team-B.C. on Behalf of C.C. Cumberland Regional School District, 220 N.J. Super. 214, 531 A.2d 1059 (App. Div. 1987), 1 SETON HALL J. SPORT L. 325 (1991).

\textsuperscript{105} 998 F.2d 168 (3d Cir. 1993), cert. denied, 114 S. Ct. 689 (1994).

\textsuperscript{106} \textit{Id.} at 170. John Williams was not the only male student to try-out for the field hockey team, in the summer of 1990. \textit{Id.} Another male student tried out for the team but was not a party to the action. \textit{Id.} at 170 n.1.

\textsuperscript{107} \textit{Id.} at 170. Williams previously played intramural coed field hockey in junior high school, but the high school only had a girls' field hockey team. \textit{Id.}

\textsuperscript{108} \textit{Id.} After learning that Williams and the other male student had been issued uniforms, school officials notified the coach that the boys were not permitted to play on the field hockey team. \textit{Id.}
the girls’ teams to female students.109 Williams’ parents filed suit on his behalf in the United States District Court for the Eastern District of Pennsylvania to challenge the school district’s policy of excluding male students from the girls’ field hockey team.110

The United States District Court for the Eastern District of Pennsylvania granted plaintiffs’ motion for summary judgment.111 The district court held that the school district’s policy violated both Title IX, the Equal Protection Clause of the United States Constitution, under 42 U.S.C. § 1983 and the Pennsylvania Equal Rights Amendment (Pennsylvania ERA).112 The district court concluded that the school district’s policy violated Title IX because field hockey was not a contact sport and the athletic opportunities for boys had previously been limited in the Bethlehem School District.113 In addition, the district court also found that the school district’s policy violated the Equal Protection Clause because the


110. Id. at 514-15. On October 5, 1990, Williams’ parents filed for a preliminary injunction and restraining order to have their son restored to the field hockey team. Id. at 515. The court denied the preliminary injunction and temporary restraining order because plaintiffs failed to prove irreparable harm. Id. The case proceeded through discovery, and the parties reached a compromise agreement for the 1991 field hockey season, which allowed John Williams to practice with the team but not to play in the interscholastic games. Id. In order to ensure Williams’ participation in the 1992 season, plaintiffs filed for summary judgment. Id. Plaintiffs argued that the exclusion of male students violated Title IX, the Equal Protection and the Due Process clauses of the Fourteenth Amendment of the United States Constitution and the Pennsylvania Equal Rights Amendment. Id.

111. Id. at 522.

112. Id. Title 42 U.S.C. § 1983 provides, in pertinent part:
   Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


Section 1983 allows a private suit for damages to be brought against state or local government officials who violate an individual’s civil rights. Monell v. Department of Social Serv., 436 U.S. 658 (1978) (holding local government officials as “persons” under statute); City of Greenwood, Mississippi v. Peacock, 384 U.S. 808 (1966) (holding state officials as “persons” under statute).

113. Williams, 799 F. Supp. at 518. The district court found that field hockey was not a contact sport under Title IX’s implementing regulations. Id. at 517. First, the court examined the definition of a “contact sport” found in § 106.41(b). Id. at 515-17. For a further discussion of the regulation, see supra notes 17-26. The court held that field hockey was not per se a contact sport because (1) field hockey was not specifically listed in § 106.41(b) as a contact sport and (2) the national
policy was not substantially related to achieving the school district's goals of remedying past discrimination and maintaining equal athletic opportunities for females. The Bethlehem School District appealed the district court's grant of summary judgment to the United States Court of Appeals for the Third Circuit.

The Third Circuit reversed the district court's grant of summary judgment on several grounds. First, the Third Circuit held that Title IX permitted a school to maintain single-sex teams.

field hockey rules prohibited bodily contact and bodily contact was not the "purpose or major activity" of field hockey. Id. at 516-17.

The district court also concluded that athletic opportunities for boys had previously been limited in the Bethlehem School District. Id. In the 1970's, Liberty High School attempted to comply with Title IX by establishing ten sports teams, which were exclusively for girls, ten teams designated for boys but girls could try out, and two coed teams. Id. The district court found that the athletic program limited the athletic opportunities for boys in the Bethlehem School District. Id. at 518. The court based this conclusion on the fact that boys were only permitted to try out for twelve teams, whereas girls could try out for twenty-two teams. Id.

Id. at 518-21. The court held that the school district's policy could not be justified as a remedy for past discrimination. Id. at 519. The court declared that a reasonable time-frame was needed as a reference for determining whether past discriminatory practices justified the present policy. Id. The court stated that "[f]or the current students of Liberty High School the years for which the school district is still trying to make amends is equivalent to prehistoric times, since most, if not all, of them were not then in existence." Id. Therefore, the court concluded that because female athletes had not suffered discrimination in athletics in the past eighteen years, a remedy for past discrimination did not presently constitute a important governmental interest. Id.

The court also concluded that the school district's fear that the boys would dominate the field hockey team was an insufficient justification for a policy that discriminated against boys. Id. at 521. The court acknowledged that real differences between males and females had to be respected, but it stated that it would not accept overbroad and unsupported generalizations regarding the athletic abilities of boys and girls. Id. at 519. Further, the court found that the evidence presented did not support the defendant's contention that the field hockey team would be flooded by male athletes. Id. at 521. The court found that in general there was a lack of interest in playing on the girls' teams, such as field hockey, among males at Liberty High School. Id.

Having concluded that the school district's policy violated the Equal Protection Clause, the district court found that it was unnecessary to address Williams' Due Process and Pennsylvania ERA claims in detail. Id. The court stated that the school district's failure to afford Williams notice and an opportunity to be heard before banning Williams from the team may have constituted a Due Process violation. Id. at 522. However, the court noted that without a judicial determination that the policy was unlawful, Williams could not have obtained the type of relief he was seeking. Id. Therefore, the court concluded that finding a Due Process violation would lead to an ineffectual remedy. Id. The court also concluded that if the school district's policy violated the Equal Protection Clause it also violated the Pennsylvania ERA. Id.

Id. at 521.

Id. at 176. For a further discussion of the Third Circuit's Title IX analysis, see infra notes 124-46 and accompanying text.
Second, the court found that Title IX's comprehensive scheme precluded consideration of plaintiffs' Equal Protection claim. Finally, the court concluded that the Pennsylvania ERA permitted schools to exclude male athletes from female athletic teams.

B. Narrative Analysis

In Williams, the Third Circuit considered whether male athletes have a right to participate on all-female athletic teams under Title IX or the Pennsylvania ERA. First, the court discussed whether single-sex teams were prohibited under Title IX. Second, the court examined the effect of Title IX's comprehensive enforcement scheme on plaintiffs' constitutional claims. Finally, the court evaluated plaintiffs' argument that the Pennsylvania ERA forbids gender-based classifications in athletics.

The court began its analysis by rejecting plaintiffs' interpretation of Title IX's regulations. Plaintiffs claimed that Title IX's regulations precluded a school from maintaining a single-sex team. The court explained that the regulations did not require schools to provide gender-integrated teams or the same choices of sports to female and male athletes. Instead, the court explained

---

118. Id. The court of appeals vacated the district court's judgment on the 42 U.S.C. § 1983 claim based on the United States Supreme Court's admonition that courts should refrain from reaching federal constitutional claims. Id. For a further discussion of the Third Circuit's analysis of section 42 U.S.C. § 1983, see infra notes 147-49 and accompanying text.

119. Id. at 179. The court also remanded the Pennsylvania ERA claim for further fact finding on whether genuine differences existed between boys and girls to justify different treatment and whether boys would dominate the school's athletic programs if allowed to join girls' teams. Id. For a further discussion of the Third Circuit's discussion of the Pennsylvania ERA, see infra notes 150-60 and accompanying text.

120. Williams, 998 F.2d at 170.
121. Id. at 170-76.
122. Id. at 176.
123. Id. at 176-80.
124. Id. at 172.
125. Williams, 998 F.2d at 171-72. The plaintiffs specifically relied on § 106.41(b) which generates a general responsibility to make athletic teams open to boys and girls. Id. at 171.
126. Id. at 172. The Third Circuit relied on Title IX which specifically allows separate teams for each sex. Id. In addition, the court acknowledged two exceptions in Title IX, "contact sports" and historically limited opportunities for one gender, which allows an institution to field a team for one gender only. Id. Also the court relied on a Policy Interpretation which states "[i]n the selection of sports, the regulation does not require institutions to integrate their teams nor to provide exactly the same choice of sports to men and women." Id. (citing Title IX of Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,417-18 (1979) [hereinafter Policy Interpretation]).
that Title IX's regulations only require a school to effectively accommodate the interests and abilities of both male and female athletes.\textsuperscript{127} The Third Circuit closely examined the language in section 106.41(b).\textsuperscript{128} The court found that section 106.41 (b) permits schools to field separate teams for members of each sex when either the sport is a contact sport or the excluded sex's athletic opportunities have been previously limited.\textsuperscript{129}

In its discussion of whether the district court properly classified field hockey as a noncontact sport, the Third Circuit rejected the district court's contention that field hockey was not a contact sport as specifically identified in the regulations.\textsuperscript{130} The Third Circuit also rejected the district court's conclusion that field hockey could not, as a matter of law, be a contact sport because the national field hockey rules prohibit bodily contact.\textsuperscript{131} Rather, the Third Circuit focused on the definition of contact sport in section 106.41(b).\textsuperscript{132}

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} The Third Circuit noted "[t]he touchstone of the regulation is to 'effectively accommodate [ ] the interests and abilities of male and female athletes' so that individuals of each sex have the opportunity 'to have competitive team schedules which equally reflect their abilities.' " \textit{Id.} (quoting \textit{Policy Interpretation, supra} note 126).

Judge Scirica, in his concurring opinion, stated that the nature of field hockey mandated that it be considered a contact sport. \textit{Id.} at 180-81 (Scirica, J., concurring). Judge Scirica likened field hockey to basketball which is explicitly listed as a contact sport in \textsection 106.41(b). \textit{Id.} (Scirica, J., concurring). Field hockey, like basketball, "forbid[s] a player from hold[ing], push[ing], trip[ping], [ ] or imp[eding], the progress of an opponent." \textit{Id.} at 180 (Scirica, J., concurring). However, as Judge Scirica noted, the fact that this contact is penalized has little relevance to \textsection 106.41(b) because the contact still occurs. \textit{Id.} (Scirica, J., concurring). Further, Judge Scirica found that the major activities of field hockey, entailed running, advancing the ball, checking, shooting and blocking, all involve bodily contact. \textit{Id.} at 181 (Scirica, J., concurring). Therefore, Judge Scirica concluded that field hockey was a contact sport because its major activity involved bodily contact. \textit{Id.} (Scirica, J., concurring).

\item \textsuperscript{128} \textit{Id.} The Third Circuit noted that the "contact sport" exception is the broadest exception to Title IX's goal of equal athletic opportunity. \textit{Id.} at 172.

\item \textsuperscript{129} \textit{Id.} at 172-76.

\item \textsuperscript{130} \textit{Williams,} 998 F.2d at 173. The district court concluded that field hockey was not a contact sport because field hockey was not one of the six sports specifically mentioned in \textsection 106.41(b). \textit{Id.}

\item \textsuperscript{131} \textit{Id.} The district court considered the testimony of six experts in deciding whether field hockey was a contact sport. \textit{Id.} at 172-73. Four experts testified for the plaintiffs stating that field hockey was not a contact sport. \textit{Id.} at 172. "[T]hese experts relied on the rules of play for field hockey promulgated by the National Federation of State High School Associations, which provide that almost all bodily contact or threatened bodily contact between players is a violation or foul." \textit{Id.} The two defense experts relied on the nature of the sport and concluded that it involved significant bodily contact. \textit{Id.}

\item \textsuperscript{132} \textit{Id.} at 172-74.
\end{itemize}
The court concluded that field hockey's purpose, "unlike boxing, wrestling or football," did not involve bodily contact. Therefore, the court next analyzed whether bodily contact was a "major activity" in field hockey under section 106.41(b). In its analysis, the Third Circuit rejected the district court's interpretation that bodily contact must be the "major activity" of field hockey and a sanctioned activity of the sport. Instead, the court determined that under the "major activity" prong, a sport may be found to be a contact sport when bodily contact occurs and is expected to occur. The Third Circuit rejected the district court's holding that field hockey was a contact sport, as a matter of law. Rather, it held that there was sufficient evidence on the record to preclude summary judgment in favor of plaintiffs.

The court next considered whether the athletic opportunities for male athletes had been traditionally limited at Liberty High School. The court dismissed plaintiffs' contention that the focus of this inquiry should be sport-specific. The Williams court stated

133. Id. at 173. Both parties agreed that field hockey's purpose does not involve bodily contact. Id.
134. Id.
135. Williams, 998 F.2d at 173-74. The Third Circuit specifically disagreed with the district court's holding that "major activity suggests that bodily contact can be deemed a 'major activity' of a sport only if it is a sanctioned activity." Id. at 173.
136. Id. at 173. The court explained that in determining whether contact was likely to happen it is necessary to examine the rules of field hockey. Id. The court stated that contact was expected because the rules "require[d] mouth protectors and shin guards, prohibit spiked shoes, require that artificial limbs be padded, and prohibit wearing jewelry." Id. The court also relied on Keczek v. Rhode Island Interscholastic League Inc., 768 F. Supp. 951 (D.R.I. 1991), as precedent for its conclusion that field hockey is a contact sport. Id. For a full discussion of Keczek, see supra notes 47-54 and accompanying text.
137. Id. at 173-74.
138. Id. The Third Circuit distinguished its decision in Williams from the Keczek decision because the Keczek court determined that field hockey was a contact sport as a matter of law. Id. at 173. The Third Circuit further stated that its holding, on the issue of summary judgment, was limited to determining the existence of material facts sufficient to create a factual dispute as to whether field hockey is a contact sport and preclude judgment as a matter of law. Id.
139. Id. at 174. The court noted that if field hockey were a contact sport, it would not need to inquire into whether athletic opportunities existed for male athletes. Id. Such an inquiry would not be necessary because a school can maintain single-sex teams if the sport is a contact sport. 34 C.F.R. § 106.41(b) (1994). However, because of its limited review, Williams was before this court solely on appeal for summary judgment. Williams, 998 F.2d at 171. Therefore, it is the role of the court to determine if there is any aspect of the district court's decision which is a material fact and not a matter of law. Id.
140. Williams, 998 F.2d at 174. Plaintiffs argued that in a Title IX analysis it is necessary to inquire if one gender has had limited participation opportunities in that particular sport. Id. In this case, the plaintiffs argued that historically boys have had limited opportunities to participate in the sport of field hockey. Id.
that the broad language in section 106.41(b) required a court to focus on athletic opportunities generally afforded to the excluded sex. \(^{141}\) Further, the court maintained that if Congress had intended the inquiry into athletic opportunities to be sport specific, it would have expressly provided this in the regulation. \(^{142}\)

The Third Circuit further concluded that the district court erred in holding that, as a matter of law, athletic opportunities for boys at Liberty High School were previously limited. \(^{143}\) The district court concluded that opportunities for male athletes were limited because male athletes, were only allowed to try out for twelve of the twenty-two Liberty High School teams, while females were permitted to try out for all twenty-two teams. \(^{144}\) The Third Circuit concluded that the opportunities for male athletes were limited only if there were no meaningful physiological differences between boys and girls of high school age. \(^{145}\) The court reversed the district court's grant of summary judgment and remanded for further factual development because conflicting evidence was introduced by the parties on this issue. \(^{146}\)

The second issue addressed by the Third Circuit was whether plaintiffs could pursue their constitutional claims under 42 U.S.C. § 1983. \(^{147}\) The court stated that when a federal statute provides its

\(^{141}\) Id.

\(^{142}\) Id. The Williams court acknowledged a split among the courts on this issue. Id. The Third Circuit found the analysis in Mularadelis v. Haldane Central School Board, 427 N.Y.S.2d 458 (N.Y. App. Div. 1980) to be the most persuasive. Id. In Mularadelis, the court determined that Congress would have specifically included the language “particular sport” in the second clause of § 106.41(b) had they intended the inquiry to be sport specific. Id. But see Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659, 664 (D.R.I.) (finding Title IX violation occurred at school which only offered volleyball to females), vacated as moot, 604 F.2d 733 (1st Cir. 1979). For a full discussion of Mularadelis, see supra notes 37-42 and accompanying text. For a full discussion of Gomes, see supra notes 28-36 and accompanying text.

\(^{143}\) Williams, 998 F.2d at 174.

\(^{144}\) Id. at 175. The school district allowed females to try out for all the sports because their gender previously had “limited athletic abilities.” Id.

\(^{145}\) Id. The defendants argued that these physical differences gave boys an advantage in high school athletics. Id. (discussing expert testimony submitted by both plaintiff and defendant concerning physical characteristics of boys and girls in high school).

\(^{146}\) Id. Although the court remanded the case to the district court for further factual development on the issue of limited athletic opportunities for male athletes, the court noted that plaintiffs probably would not succeed on this claim because “it would require blinders to ignore that the motivation for promulgation of the regulation . . . was the historic emphasis on boys' athletic programs to the exclusion of girls' athletics programs.” Id.

\(^{147}\) Id. at 176. For the text and discussion of 42 U.S.C. § 1983, see supra note 112 and accompanying text.
own comprehensive enforcement scheme, the remedies of that scheme may not be bypassed by bringing suit under section 1983.148 Thus, the court determined that Title IX’s comprehensive enforcement scheme supplanted any remedies available under 42 U.S.C. § 1983.149

The Third Circuit concluded by evaluating plaintiffs’ claim under the Pennsylvania ERA.150 The school district argued that its gender-based rule was necessary to achieve its goal of promoting athletic opportunities for female athletes and to redress past discrimination.151 Additionally, the school district argued that the physical differences between the sexes warranted the use of the classification because boys were likely to displace girls from field hockey teams.152

The court interpreted the Pennsylvania ERA as permitting differential treatment based on gender, if the treatment was founded on the physical characteristics unique to one sex.153 Based on this interpretation, the court determined that the legality of the school district’s policy depended upon whether there were actual physical differences between the sexes that warranted disparate treatment

148. Williams, 998 F.2d at 176. The court relied on the Supreme Court’s decision in Middlesex County Sewerage Authority v. National Sea Clammers Ass’n, 453 U.S. 1, 20-21 (1981), which held that when statutes contain enforcement provisions, a course of action under 42 U.S.C. § 1983 cannot be pursued. The court also followed its own ruling in Pfeiffer v. Marion Central Area School District, 917 F.2d 779, 789 (3d Cir. 1990), which denied plaintiff the right to pursue constitutional claims while pursuing a Title IX claim. Williams, 998 F.2d at 176.

149. Id.

150. Id. at 176-78. The Pennsylvania ERA states that “[e]quality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.” Id. at 177 (quoting Pa. Const. art. I, § 28). The district court in this case analyzed the school policy under the Equal Protection Clause without regard to the Pennsylvania ERA because it determined that, if the school policy failed the Equal Protection Clause, it would also fail the Pennsylvania ERA. Id. Therefore, once the district court found the Equal Protection Clause was violated, it assumed the school district also violated the Pennsylvania ERA. Id. The Third Circuit did not address this aspect of the court’s holding. Id.

151. Id.

152. Id. at 178.

153. Williams, 998 F.2d at 177-78. The Third Circuit asserted that the Pennsylvania ERA would be violated if the gender-based classification was grounded on impermissible assumptions and stereotypes about the athletic abilities of males and females. Id. (citing Bartholomew ex rel. Bartholomew v. Foster, 541 A.2d 393, 397 (Pa. Comw. Ct. 1988) (holding gender classification only allowable when based on genuine physical characteristics unique to one sex), aff’d without opinion, 565 A.2d 1390 (Pa. 1989). The court concluded, however, that if real physical differences existed between boys and girls then the single-gender teams would be permissible under the Pennsylvania ERA. Id.
by gender.\textsuperscript{154} The court stated that if there were real physical differences, then the sexes were not similarly situated and the school’s classification was not prohibited by the Pennsylvania ERA.\textsuperscript{155} Further, the Third Circuit stated that the issue of physical differences between the sexes must be resolved by the district court before any determination could be made of whether female athletes would be displaced by male participation on the field hockey team.\textsuperscript{156}

The court concluded that ultimately the validity of the Bethlehem School District’s classification “would depend on the relationship between the classification and the governmental interest.”\textsuperscript{157} Adopting a strict level of scrutiny,\textsuperscript{158} the court held that the school district would have to show that its rule bears a necessary relationship to a compelling state interest.\textsuperscript{159} The court found that the need to rectify past inequality in interscholastic athletic opportunities for female students was a compelling state interest justifying the school district’s policy of limiting the field hockey team to girls.\textsuperscript{160}

C. Critical Analysis

Although \textit{Williams} did not decide the merits of plaintiffs’ claims, the Third Circuit seemed to align itself with the majority view that male athletes do not have a right under Title IX to participate on female athletic teams. The Third Circuit also appeared to reinforce the view that constitutional protections do not extend to male athletes. The Third Circuit, however, differentiated their holding by precluding plaintiffs from simultaneously pursuing a possible remedy under 42 U.S.C. § 1983 and a Title IX claim.\textsuperscript{161}

The \textit{Williams} court’s interpretation of Title IX is consistent with previous judicial interpretation and with congressional intent.

\textsuperscript{154} Id. at 178.
\textsuperscript{155} Id. The Third Circuit stated that “the E.R.A. does not prohibit differential treatment among the sexes when ... that treatment is reasonably and genuinely based on physical characteristics unique to one sex.” Id. (quoting Fischer v. Department of Welfare, 502 A.2d 114 (Pa. 1985)).
\textsuperscript{156} Id. at 179.
\textsuperscript{157} Id. The Third Circuit noted that this issue depended on what level of scrutiny was applied. Id. The level of scrutiny will determine how narrow the rule must be to remain valid under the Pennsylvania ERA. Id.
\textsuperscript{158} Williams, 998 F.2d at 177. The Third Circuit adopted the strict scrutiny standard of review because the Pennsylvania Supreme Court had not decided the level of scrutiny under the Pennsylvania ERA. Id.
\textsuperscript{159} Id. at 179.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 176. The Third Circuit is the only circuit to find that Title IX subsumes a claim under 42 U.S.C. § 1983. Id.; see Pfeiffer v. Marion Cent. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990).
The court, like the majority of the courts considering this issue, concluded that section 106.41 (b) requires an inquiry into the overall athletic opportunities of the excluded sex and a broad definition of the term "contact sport." 162

The Third Circuit remanded the issue of whether boys and girls at the high school age are physiologically different. 163 The court stated that such a finding was needed in order to determine whether the overall athletic opportunities for male athletes at Liberty High School had been previously limited. 164 The Third Circuit's focus on overall athletic opportunities is consistent with Title IX's purposes and the intent behind section 106.41 (b). Congress enacted Title IX to promote overall equal athletic opportunities for both sexes. 165 This intent is evidenced by the exclusion of the words "particular sport" as a modifier for the words "athletic opportunities" in the second clause of section 106.41 (b). 166 Therefore, the Third Circuit correctly concluded that section 106.41 (b) requires an inquiry into the overall athletic opportunities for the excluded sex.

Similarly, the Third Circuit's broad interpretation of the term "contact sport" is also consistent with the holding of a majority of the courts and congressional intent. The Third Circuit's rejection of the district court's conclusion that field hockey is a noncontact sport as a matter of law, was soundly based on the plain meaning of the regulation. The focus of the regulation is clear: if a sport's purpose or major activity involves physical contact, then that sport is a

163. Williams, 998 F.2d at 175.
164. Id. at 175. If physical differences exist, according to the court, then under Title IX, exclusion of male athletes is justified as giving women athletes a chance to try out for a greater number of teams. Id. The court reasoned that a finding that males are physiologically superior at the high school level would "negate the significance of allowing girls to try out for boys' teams but not allowing the reverse." Id. If such disparity existed then the greater try out rights of the girls would only be illusory athletic opportunities because girls would not, in most instances, displace any boys from teams. Id.
165. See Cumberland, 531 A.2d at 1069.
166. See Mularadelis, 427 N.Y.S.2d at 461-62. The court in Mularadelis noted that had Congress intended the limitation to refer to a particular sport, then it would be reasonable to assume that the following language would have been incorporated: "athletic opportunities [in such sport or particular sport] for members of [the excluded] sex have been limited" or "athletic opportunities for members if [the excluded] sex have previously been limited [in a particular sport or in such sport]." Id. (bracketed language added by the court for illustration).
contact sport. Section 106.41(b) specifically lists basketball as a contact sport. By listing basketball as a contact sport, Congress indicated that "bodily contact" need not be the "major activity" of a sport in order for that sport to qualify as a contact sport. The Williams court's broad definition of "contact sport" is, thus, consistent with the plain language of section 106.41(b) and the underlying congressional intent.

The Third Circuit's interpretation that gender-based classifications are valid under the Pennsylvania ERA is consistent with other courts that have interpreted state equal rights amendments. The Third Circuit stated that the issue of whether there are physical differences between girls and boys was also dispositive of whether different treatment was warranted under the Pennsylvania ERA. In interpreting the Pennsylvania ERA to allow gender-based classifications, the Williams court concurs with the majority of courts that deem gender-based classifications as permissible means of preserving athletic opportunities for women and addressing past discrimination.

The Third Circuit, however, distinguishes its holding by concluding that Title IX's comprehensive scheme precludes an action under 42 U.S.C. § 1983. No other circuit has specifically precluded an Equal Protection claim in favor of a Title IX claim. Under the Third Circuit's holding, all athletes are prohibited from bringing section 1983 claims concurrently with claims under Title IX. Thus, this decision forces plaintiffs to choose between Title IX and section 1983 causes of action.

167. 34 C.F.R. § 106.41(b) (1994).
168. Id.
169. Id.
170. See Williams, 998 F.2d at 179-80.
172. Williams, 998 F.2d at 176. "Where a federal statute [such as Title IX] provides its own comprehensive enforcement scheme, Congress intended to foreclose a right of action under section 1983." Id. (citing Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 20-21 (1981)).
IV. IMPACT

The Williams decision effectively bars male athletes from challenging their exclusion from all-female teams in the Third Circuit. The court's holding also furthers the incongruence between the literal meaning of Title IX, the Equal Protection Clause, the Pennsylvania ERA and judicial interpretations construing these laws as favoring only female athletes.

The Williams court's interpretation that section 106.41(b) requires an overall, rather than a sport specific inquiry into limited athletic opportunities, will cripple claims by male plaintiffs. Excluded male athletes will find difficulty demonstrating that their overall opportunities to participate in athletics have been traditionally limited.\textsuperscript{173} Male athletes will not be able to demonstrate limited athletic opportunities because there is a high improbability that females and males on the high school level will ever be found to be physically equal.

The court's definition of "contact sport" as any sport where incidental physical contact occurs and is foreseeable, greatly expands the contact sports exception. Few sports qualify as noncontact sports under the Third Circuit's interpretation because most team sports involve some degree of bodily contact.\textsuperscript{174} While a broad definition would certainly protect female opportunities to compete on all-female teams, it may also produce a negative affect in the future. Just as a broad interpretation of contact sport serves to exclude males from participation on all-female teams, a broad interpretation could be asserted to exclude female athletes from participating on all-male teams. Thus, the Third Circuit's interpretation of section 106.41(b) could ultimately decrease athletic opportunities.

The Third Circuit's decision in Williams also provides guidance to school districts and interscholastic athletic associations in formulating policies to exclude male athletes from all-female teams. When drafting a policy excluding male athletes from noncontact sports, the school district or athletic association need only justify the exclusion by explaining that the purpose behind the policy is to provide female athletes with athletic opportunities that have histori-

\textsuperscript{173} See Kleczek, 768 F. Supp. at 955; Mularadelis, 427 N.Y.S.2d at 463.

\textsuperscript{174} Most team sports involve some degree of bodily contact at some point in the game. For example, there is bodily contact between baseball players when one player slides into a base and another player attempts to tag the player out. There is substantial bodily contact between soccer players as they fight for the ball, jump for the ball or attempt to kick the ball. Similarly, volleyball players are often in physical contact as players on both sides of the net jump simultaneously for the ball and attempt to hit it over.
cally been denied. By deferring to such a justification, the Williams court established that this policy will generally withstand scrutiny under Title IX and the Pennsylvania ERA in the Third Circuit.

Male athletes are, thus, effectively foreclosed from asserting a right to participate on any all-female team in the Third Circuit. Therefore, the challenge for schools and interscholastic athletic associations is to find alternatives ensuring that both sexes are given an equal opportunity to compete in athletics. Several courts and commentators have proposed that athletes be selected solely based on athletic ability.\textsuperscript{175} Given the physiological differences between the sexes, that approach could result in displacement and constriction of athletic opportunities for female athletes.\textsuperscript{176}

Relief for male athletes who wish to participate in a sport offered only to females may not be available after the Third Circuit's decision in Williams. A majority of courts concur that neither Title IX nor various constitutional provisions give excluded male athletes a right to participate on a female team. Thus, a male athlete interested in participating in a sport offered only to females must look to alternatives, such as other school districts or leagues to satisfy his desire to compete in that sport.

\textit{Renee Forseth}

\textit{Walter Toliver}\textsuperscript{**}


\textsuperscript{176} Croudance & Demaris, supra note 175, at 1457.

\textsuperscript{**} B.S., 1991, University of Pennsylvania; J.D., 1994, Villanova University School of Law. Walt Toliver is an Associate at the Law Firm of Bradley & Bradley.