

Golden Gate University Law Review

Volume 8

Issue 3 *Women's Law Forum*

Article 2

January 1979

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Recommended Citation

Donna J. Hitchens, *A Litigation Strategy on Behalf of the Outstanding High School Female Athlete*, 8 Golden Gate U. L. Rev. (1979).
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A LITIGATION STRATEGY ON BEHALF OF THE OUTSTANDING HIGH SCHOOL FEMALE ATHLETE

Donna J. Hitchens*

In a society whose concept of femininity emphasizes the desirability of physical weakness and behavioral passivity, the role of an accomplished athlete is considered incompatible with the female role. This fact is damaging both to the individual girl or woman and to society. Education and athletics are important socializing forces. As a result, the prevalence of sex-based discrimination in school athletic programs serves to perpetuate existing sex role stereotypes and sex-based inequality by denying girls and women the opportunity and encouragement to develop their physical and athletic abilities.¹

Despite the pervasiveness of sex discrimination in athletics and its limitation on opportunities for young women to develop athletically, there are many highly skilled and competitive female athletes in California high schools. It is not unusual for one of these girls,² whose skill level is comparable to that of the boys' team in her sport, to be barred from participation on the boys' team if her school has a girls' team in the same sport. The rationale advanced to support this separate but equal policy is that the girls' athletic program will suffer if all of the most highly skilled girls participate on boys' teams.

This article will consider the interest of the majority of high school girls to have a separate and evolving girls' athletic program

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1. For a discussion of the history of athletic opportunities for women and the interrelationships between athletics, sex discrimination and the socialization process, see *THE AMERICAN WOMAN IN SPORT* 179-222 (E. Gerber, J. Gelshin, P. Berlin & W. Wyrick eds. 1974) [hereinafter cited as E. Gerber ed.]; K. DeCROW, *SEXIST JUSTICE* 330 (1974); Crase, *A New Dimension in Education: Girls' and Women's Sports*, 59 NAT'L A. OF SECONDARY SCH. PRINCIPALS BULL. 104, 107-08 (Nov., 1975); Gilbert & Williamson, *Sport is Unfair to Women, Part 1*, 38 SPORTS ILLUSTRATED 88 (1973); Note, *Sex Discrimination and Intercollegiate Athletics*, 61 IOWA L. REV. 420, 420-29 (1975) [hereinafter cited as Note, *Sex Discrimination*].

2. The use of the word "girl" is not meant to be condescending but rather is used in order to be consistent with language in statutes, interscholastic athletic association rules, and court opinions. It is also used to distinguish the issues addressed in this article from problems faced by college and professional female athletes.

as well as the desire of highly skilled female athletes to participate on teams that offer opportunities consistent with their exceptional skill level and ability. This author concludes that a lawsuit brought on behalf of an outstanding high school female athlete should be founded upon the theory that she should be allowed to qualify for the male team in her sport because the athletic opportunities available to her on a girls' team are not equal to those available to her male counterparts. This approach focuses on the equality of available athletic opportunities rather than on the question of whether separate athletic teams are legally permissible.

In advancing the strategy to support this approach, this article is divided into four parts: first, an explanation of the organization of interscholastic athletics in California; second, a discussion of public policy considerations in formulating a litigation strategy; third, an analysis of the available legal theories for litigating the right of the exceptional female athlete to qualify for a male team; and fourth, a discussion of the practical considerations in implementing the suggested litigation strategy.

I. INTERSCHOLASTIC HIGH SCHOOL ATHLETICS IN CALIFORNIA

The California Interscholastic Federation (CIF) is the organization that directs, controls and administers high school athletics in California. Membership in CIF is open to all public and private high schools in the state.³ CIF is governed by a Federated Council, which is responsible for setting the policies and rules by which interscholastic competition within the state is conducted.⁴ CIF member schools are required to conduct all interscholastic sports teams pursuant to CIF rules.⁵

Rule 200 of the CIF by-laws⁶ contains the provisions relevant

3. See CIF CONST. arts. 1 & 2 (copies of the CIF Constitution and by-laws may be obtained by writing to California Interscholastic Federation, 470 S. Patterson Avenue, Santa Barbara, California 93111). Membership in CIF is dependent upon the payment of dues and the approval of the CIF Section within which the school is located.

4. Of approximately 32 voting members on the Council, only one member is female. She represents the CIF Girls' Sports Advisory Committee. See CIF by-laws art. 1, § 104.

5. The Federated Council has the power to suspend or bar a school from participation in league competition. If a school is suspended, other schools are forbidden to compete with its teams. See generally CIF CONST. art. 4, § 44 and CIF by-laws art. 7. A school, therefore, faces severe penalties if it allows a female to participate on a male team in violation of CIF rules.

6. CIF by-laws art. 2, § 200 [hereinafter cited as CIF Rule 200] provides:

to the participation of girls on a school's athletic teams. It states that where a school provides only one team in a particular sport, girls must be allowed to qualify for that team. If, however, a school provides a boys' team and a girls' team in the same sport, girls are not allowed to qualify for the boys' team.

Prior to the 1976-1977 academic year, high school girls were allowed to participate on boys' teams when they could qualify, even if there was a girls' team in the same sport. As a result of the new rules, girls who had participated on boys' teams in previous years were not allowed to participate on those same teams in 1976-1977. Not surprisingly, some of the girls affected by the rule change were outraged. After considerable pressure from parents and coaches, CIF added subsection (e) to allow girls to con-

Only students regularly enrolled in public and private CIF member schools, grades 9-12, shall be permitted to participate in the California Interscholastic Federation. Interscholastic sports teams composed of boys and/or boys and girls shall be conducted in accordance with these by-laws. Girls' interscholastic sports teams shall be conducted in accordance with these by-laws, including certain additional rules and modifications pertaining to girls' sports teams and mixed sports teams. Schools shall designate the type of team for each sport according to the following:

(a) *Student Team*. Whenever the school provides only a team or teams for boys in a particular sport, girls are permitted to qualify for the student team(s).

(b) *Boys' Team*. Whenever the school provides a team or teams for boys and a team or teams for girls in the same sport, girls shall not be permitted to qualify for the boys' team(s) in that sport, nor shall boys be permitted to qualify for the girls' team(s) in that sport.

(c) *Girls Team*. Whenever the school provides only a team or teams for girls in a particular sport, boys shall not be permitted to qualify for the girls' team in that sport unless opportunities in the total sports program for boys in the school has been limited in comparison to the total sports program for girls in that school. Permission for boys to qualify for a girls' team must be secured through petition by the school principal to the State CIF Federated Council.

(d) *Mixed Team. (Coed)*. Whenever the school provides a mixed or coed team in a sport in which the game rules designate either a certain number of team participants from each sex or contains an event that designates a certain number of participants from each sex, boys shall not be permitted to qualify for the girls' positions on the mixed team nor shall girls be permitted to qualify for the boys' positions on the mixed team.

(e) These limitations are binding upon all CIF Sections, although not intended to prohibit any student from qualifying for a high school team on which he or she has previously competed.

tinue participating on teams on which they had participated in the past.⁷

The original change in the CIF rule, which precluded girls from qualifying for boys' teams, appears to have been a response to Title IX of the Education Amendments of 1972.⁸ The regulations promulgated pursuant to Title IX⁹ became effective on July 21, 1975, and provide in pertinent part that "[n]o 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 . . . athletics offered by a recipient."¹⁰

The requirements of this general provision are limited, however, by a later provision which allows a school to sponsor separate teams "where selection . . . is based upon competitive skill."¹¹ Title IX specifically allows a school to deny a female athlete the opportunity to qualify for a boys' team when there is a girls' team in the same sport regardless of her skill level or the competitive level of the girls' team. The requirements of CIF Rule 200 have, since 1976, been fashioned exactly the same as those of the Title IX regulations.¹²

As a result of CIF Rule 200, the exceptional female athlete attending a California high school that has both a boys' and girls' competitive team in her particular sport is limited to participating on the girls' team. This is true even though: (1) her skill level is comparable to that of members of the boys' team and far exceeds that of members of the girls' team; (2) there is a lack of equality between the two teams in crucial areas such as training, game schedules, experience of the coaching staff, and the skill level required for membership on the team; and (3) other girls who attend schools that do not sponsor a girls' team in that particular sport participate in the boys' league. Thus, the individual

7. See Minutes of the CIF Federated Council Meeting, October 8-9, 1976, at 6 & 7. (A copy of the Minutes is on file at the office of the Golden Gate University Law Review.)

8. Education Amendments of 1972, Title IX, § 901, 20 U.S.C. § 1681(a) (1976) 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."

9. 45 C.F.R. § 86.41 (1977).

10. *Id.* § 86.41(a).

11. *Id.* § 86.41(b).

12. For a discussion of reliance upon Title IX to justify CIF Rule 200 and other rules like it, see notes 55 & 56 *infra* and accompanying text.

female athlete who is denied the opportunity to qualify for a male team¹³ is denied the opportunity to develop fully her athletic potential solely because of her sex. This is a serious disadvantage for an athlete who wishes to compete for athletic scholarships on the collegiate level, desires a career as a professional athlete, or has the potential to participate in international competition.

II. PUBLIC POLICY CONSIDERATIONS: FORMULATING A STRATEGY

The prevalence of state interscholastic association regulations similar to CIF Rule 200 has created considerable controversy in both the legal and athletic professions. For the most part, this controversy centers on the so-called "separate but equal" model. The opposition adheres strongly to the belief that separate teams can never be equal and that such teams are premised upon a presumption of the inferiority of female athletes.¹⁴ On the other hand, the supporters predict that abolition of the separate but equal doctrine will adversely affect the development of girls' and women's athletics.¹⁵

Both the National Affiliation for Girls' and Women's Sports (NAGWS)¹⁶ and the Association for Intercollegiate Athletics for Women (AIAW)¹⁷ have taken firm positions in favor of separate teams for males and females.¹⁸ Inherent in this position is the

13. Where the male team involved qualifies as a "contact sport," there are special considerations and issues involved which are not relevant in the context of a "non-contact" sport. In such situations, the age of the females desiring to participate, the possibility of physical danger to girls, and the close bodily contact between boys and girls during play are factors that may be taken into consideration. *Compare Magill v. Avonworth Baseball Conference*, 364 F. Supp. 1212, 1216 (W.D. Pa. 1973) (baseball is a contact sport and girls would be endangered physically if allowed to compete with boys), *aff'd on other grounds*, 516 F.2d 1328 (3d Cir. 1975), *with Fortin v. Darlington Little League, Inc.*, 514 F.2d 344, 350-51 (1st Cir. 1975) (in the 8-12 year old age group, baseball related injuries are no more likely for girls than boys). For statutory distinctions based on whether a sport is a contact sport, see Title IX Regulations, 45 C.F.R. § 86.41(b) (1977).

14. See, e.g., *Weber, Boys and Girls Together: The Coed Team Controversy*, 1 WOMENSPORTS 53, 56 (Sept., 1974); Comment, *Sex Discrimination in High School Athletics*, 57 MINN. L. REV. 339, 369 (1972).

15. See, e.g., *Ritacco v. Norwin School Dist.*, 361 F. Supp. 930 (W.D. Pa. 1973), and *Bucha v. Illinois High School Ass'n*, 350 F. Supp. 69 (N.D. Ill. 1972).

16. NAGWS is an affiliate of the American Alliance for Health, Physical Education and Recreation (AAHPER) and sets policies and standards for girls and women in school sports. See *Hogan, Here Come the Carpetbaggers*, 1 WOMENSPORTS 49 (Sept., 1974) for a discussion of the development of separate female athletic associations and the recent interest of formerly all male organizations in female athletes.

17. AIAW is an affiliate of AAHPER and controls women's intercollegiate athletics.

18. The NAGWS position paper appears in *Sports Programs for Girls and Women: A DGWS Position Paper*, 45 J. HEALTH, PHYSICAL EDUC. RECREATION 12 (April, 1974)

view that allowing females to compete on male teams will impede the development of girls' and women's teams and inevitably lead to the requirement that males be allowed to qualify for female teams. It is feared that positions for girls and women in competitive athletics will be eliminated as a result. Female athletes and physical educators have also expressed the fear that girls' and women's athletics will be forced to conform to a "male model"¹⁹ of competitive athletics with control by males and the National Collegiate Athletic Association.

The issue raised by the conflict surrounding the separate but equal model of competitive athletics is how to balance the interests of those concerned about the overall development of girls' and women's athletics with the interests of the exceptional female athlete. Both positions regarding the separate but equal model suffer from significant inherent weaknesses.

The position supporting the model tends to dwell on separateness, assuming that equality exists or will be forthcoming in the near future. The supporters further assume that those holding the pursestrings, that is, school officials, are committed to equality of opportunity in athletics. The sacrifice of the exceptional female athlete represents an inherent weakness in the separate but equal model. Many women coaches believe that forcing the exceptional high school female athlete to stay with the girls' team advances the stature of female athletics.²⁰ As a psychological phenomenon, this may or may not be true. It is equally likely that having a truly outstanding athlete on a team has a discouraging impact on other team members. If one athlete performs on a level that the other team members think is beyond their potential, and if the exceptional athlete is credited with the team's victories, other team members may well see their participation as insignificant, no matter how hard they try to improve their skill level.

On the other hand, if the exceptional high school female athlete is allowed to participate on the boys' team, the opportu-

[hereinafter cited as JOPER]. The AIAW position was expressed in the form of a resolution passed in November, 1973, and is reported at 45 JOPER 79 (March, 1974).

19. The "male model" of competitive athletics is seen as dehumanizing to student athletes because it emphasizes winning at all costs. It is also seen as burdened with conflicts and corruption. For a more expansive discussion of the negative repercussions of male control and the "male model," see Hult, *Equal Programs or Carbon Copies?*, 47 JOPER 24 (May, 1976). See also Hogan, *supra* note 16.

20. See discussion at 60 Cal. Op. Att'y Gen. 326 (1977).

nity may then develop for several girls to come into the limelight on their own team. Other team members in turn may find that they contribute to the team's performance and thereby will be encouraged to increase their own skill level. The misplaced assumption of equality, the sacrifice of the exceptional female athlete, and the possible detriment to team members from having the exceptional athlete on their team, combine to form a substantial challenge to endorsement of the separate but equal approach to opportunities for girls in high school athletics.

The abolition of the separate but equal model is also fraught with difficulties. The concerns of women coaches and physical educators that such a position would impede the development of female athletics are not unfounded. If the separate but equal doctrine is legally abolished, it will eliminate any designation of girls' teams and boys' teams in high school athletics. Therefore, all students will be allowed to qualify for whatever teams a high school sponsors. There is little doubt that, given the historical lack of encouragement and opportunity for high school girls to develop their athletic abilities,²¹ the vast majority of students qualifying for competitive teams will be male.²² Another possible result of repealing separate but equal rules is that a school board might conclude that only one competitive team in any given sport is necessary. The likely effect of such an action would be that only one or two girls would have an opportunity to compete.

Commentators have proposed various schemes to balance the interests of exceptional female athletes against those of girls' and women's athletics in general.²³ If implemented, these proposals would result in providing equality of athletic opportunity for all female students. For example, one of these proposals would have mixed male-female teams with a certain number of positions reserved for males and a certain number reserved for females.²⁴

The problem with this and with most of the suggested alternatives is that they all require the sanction of state interscholastic

21. See E. Gerber ed., *supra* note 1; K. DECROW, *supra* note 1; Crase, *supra* note 1; Gilbert & Williamson, *supra* note 1; Note, *Sex Discrimination*, *supra* note 1.

22. Several states responded to Title IX by opening all of their competitive teams to both boys and girls. It resulted in male domination of the interscholastic program. See discussion of this point at 60 Cal. Op. Att'y Gen. 326, 330 n.4 (1977).

23. A number of proposals are discussed in Comment, *Sex Discrimination in Interscholastic High School Athletics*, 25 SYRACUSE L. REV. 535, 556-66 (1974).

24. *Id.* at 562-63.

associations and high schools, which to date has not been forthcoming. While a court might declare certain practices to be in violation of the law, it is unlikely that it would order specific relief of the sort suggested by the commentators.²⁵ *Hoover v. Meiklejohn*²⁶ provides an example of a court's hesitation to fashion a specific remedy. The court declared unconstitutional an athletic association rule which prohibited girls from playing soccer. The court noted that the athletic association had several alternatives:

They may decide to discontinue soccer as an interscholastic athletic activity; they may decide to field separate teams for males and females, with substantial equality in funding, coaching, officiating and opportunity to play; or they may decide to permit both sexes to compete on the same team. Any of these actions would satisfy the equal protection requirements of the Constitution. What the defendants may not do is to continue to make interscholastic soccer available only to male students.²⁷

The court did not specify which remedy should be adopted.

Because of the separate but equal doctrine embodied in CIF Rule 200, the public policy considerations in attacking the rule, and the hesitation of the courts to fashion a specific remedy, the best strategy for an attorney representing the interests of the exceptional high school female athlete is an approach which concentrates on equality, rather than on separateness. The only way to protect the interests of most female athletes is to seek a provisional remedy which requires that exceptional female athletes be allowed the opportunity to qualify for a male team until such time as the athletic opportunities available to males and females are, in fact, equal.²⁸ This position assumes, of course, that in

25. Where the remedy to a constitutional problem necessitates the development of a plan or program, the courts tend to see this as a legislative function and are hesitant to order the implementation of a specific plan. See, e.g., *White v. Weiser*, 412 U.S. 783 (1973) (reapportionment); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (school desegregation).

26. 430 F. Supp. 164 (D. Colo. 1977).

27. *Id.* at 172. The application of both statutory and case law to the athletics context has affirmed the view that when substantially equal athletic opportunities are provided for males and females, sex-integration of athletic teams is not required. See discussion at notes 39-43 *infra* and accompanying text.

28. A guide for determining equality of opportunities is provided in the Title IX regulations, 45 C.F.R. § 86.41(c) (1977), which state in part:

(c) *Equal opportunity.* A recipient which operates or spon-

almost all situations a showing of inequality of athletic opportunities is possible. The advantage of this position is that it avoids a direct attack on or an endorsement of the separate but equal doctrine; it seeks to provide for the needs and skill level of the exceptional high school female athlete without inhibiting the development of girls' athletics generally. Further, this approach seeks a provisional remedy which provides time for those concerned about the future of girls' and women's athletics to develop their own model.

The obvious disadvantage of this position is that it advances the needs of the few rather than the interests of female athletes in general. However, it is not antagonistic to strategies, such as public pressure and lawsuits, which are available for promoting the overall development of girls' and women's athletics. Pressuring school districts and interscholastic associations to be more responsive to the needs of female athletes for increased financing, availability of a greater variety and number of sports, and improvement of the coaching for female athletes is consistent with the strategy advanced herein, which emphasizes equality.

III. LEGAL CONSIDERATIONS

This section explores and evaluates the various legal theories available for pursuing the rights of the exceptional high school female athlete, keeping in mind the strategy developed in the previous section. Specifically, the issue addressed is whether there is legal support for the position that until such time as equal

sors 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.

athletic opportunities are, in fact, available in the high schools, an exceptional female athlete must be allowed the opportunity to qualify for the male team in her sport.

A. FEDERAL STATUTORY GROUNDS: TITLE IX

Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational programs receiving federal financial assistance.²⁹ The regulations implementing Title IX require that a female be allowed to try out for a boys' team only when there is no girls' team in a specific sport, athletic opportunities for girls have been limited in the past, and the sport is not a contact sport.³⁰

The Title IX regulations do not require that the girls' and boys' teams be equal before an exceptional female athlete can be denied the opportunity to qualify for the boys' team. The regulations require only that the overall athletic opportunities for both sexes be equal.³¹ Title IX, therefore, provides no specific remedy for the exceptional female athlete in California.³²

B. EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS UNDER THE UNITED STATES CONSTITUTION

The majority of cases challenging sexually discriminatory practices in school athletic programs have been brought under the theory that such practices constitute a violation of the equal protection clause of the fourteenth amendment.³³ It could hardly

29. See notes 8-11 *supra* and accompanying text.

30. 45 C.F.R. § 86.41(b) (1977). This subsection lists the following as contact sports: boxing, wrestling, rugby, ice hockey, football and basketball.

31. 45 C.F.R. § 86.41 (1977).

32. Even if it could be shown that a school did not provide equal opportunity in athletics as required by Title IX, there would still be numerous problems in attempting to bring an action under Title IX. For example, a school has until July, 1978, to comply fully with the athletic provisions of the regulations. *Id.* § 86.41(d). Moreover, it is not clear whether there is a private right to sue under Title IX. Compare *Cannon v. University of Chicago*, 559 F.2d 1063, 1073 (7th Cir. 1976) cert. granted, 98 S. Ct. 3142 (1978) (No. 77-926) (no individual right of action inferred from Title IX), with *Piasek v. Cleveland Museum of Art*, 426 F. Supp. 779, 780 n.1 (N.D. Ohio 1976) (private right of action allowable under Title IX). Finally, if the athletic program itself does not receive federal financial assistance, it may not be covered by Title IX. See 45 C.F.R. § 86.11 (1977); Note, *Sex Discrimination*, *supra* note 1, at 459-62.

33. U.S. CONST. amend. XIV, § 1 provides, in pertinent part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." A prerequisite to invoking the equal protection guarantee of the fourteenth amendment is a showing that the rules regulating participation on athletic teams by sex are administered under color of state law. The rules of state athletic associations have been held to constitute state

be disputed that considerable confusion exists as to the standard of review to be applied in determining whether a sex-based classification constitutes a denial of equal protection.³⁴ However, the standard applied in the majority of the cases involving sex discrimination in athletics is that enunciated in *Reed v. Reed*:³⁵ "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"³⁶

The application of the *Reed* standard to cases in which both a male and female athletic team were provided in the same sport has resulted in girls being denied the opportunity to participate on the boys' team. Two reported federal cases dealing directly with this issue, *Ritacco v. Norwin School District*³⁷ and *Bucha v. Illinois High School Association*,³⁸ seem to stand for the proposition that the separate but equal doctrine is justifiable when applied to distinctions based on sex in the area of athletic competition. Both courts found validity in the argument that allowing competition between the sexes would lead to male domination of both girls' and boys' teams. Neither of these cases addressed the issue of whether the programs provided were, in fact, substantially equal.

It is difficult to ascertain how much inequality of teams a court might require before finding a violation of the equal protection clause. The United States Supreme Court, by affirming *Vorchheimer v. School District of Philadelphia*,³⁹ has made it

action. *Brenden v. Independent School Dist.* 742, 477 F.2d 1292 (8th Cir. 1973); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978); *Gilpin v. Kansas State High School Activities Ass'n*, 377 F. Supp. 1233 (D. Kan. 1974); *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1972).

34. For a more complete discussion of the standards used in equal protection cases, particularly in relation to sex discrimination in athletics, see Stroud, *Sex Discrimination in High School Athletics*, 6 *Ind. L.F.* 661, 662-76 (1973); Note, *Sex Discrimination, supra* note 1, at 440-46 (1975); Comment, *Title IX's Promise of Equality of Opportunity in Athletics: Does It Cover the Bases?*, 64 *Ky. L.J.* 432, 436-45 (1975). With respect to the various standards applied to sex-based classifications, see *Craig v. Boren*, 429 U.S. 190 (1976); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971); and Weckstein, *Judicial Standards for Determining Sex Discrimination*, 18 *INEQUALITY IN EDUC.* 58 (1974).

35. 404 U.S. 71 (1971).

36. *Id.* at 76, quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

37. 361 F. Supp. 930 (W.D. Penn. 1973).

38. 351 F. Supp. 69 (N.D. Ill. 1972).

39. 532 F.2d 880 (3rd Cir. 1976), *aff'd per curiam*, 430 U.S. 703 (1977). Although *Vorchheimer* was affirmed because of an equally divided vote of the Supreme Court, it is

clear that the validity of the separate but equal doctrine is not conditioned on absolute equality. In *Vorchheimer*, the Third Circuit Court of Appeals held that admission requirements based on sex at a public academic high school did not offend the equal protection clause.⁴⁰ The court found it significant that there was both a boys' and girls' academic high school, attendance at either of the schools was voluntary, the educational opportunities offered at the two schools were *essentially* equal, and the school system was otherwise co-educational. The essential equality noted by the court was that "[t]he academic facilities are comparable, with the exception of those in the scientific field where [those at the boys' school] are superior."⁴¹

Several recent cases confronting the issue of a high school girl's right to compete on boys' teams in "contact" sports have provided some guidance concerning the level of equality required by the equal protection clause. In *Hoover v. Meiklejohn*,⁴² the court observed:

Separate soccer teams for males and females would meet the constitutional requirement of equal opportunity if the teams were given substantially equal support and if they had substantially comparable programs. There may be differences depending upon the effects of such neutral factors as the level of student interest and geographic locations. Accordingly, the standard should be one of comparability, not absolute equality.⁴³

While pointing out that the question of whether separate girls' teams would present an equal protection problem was not before the court, the language of *Leffel v. Wisconsin Interscholastic Athletic Association*⁴⁴ tends to support the idea of separate but equal teams but implies that the teams must in fact be comparable.⁴⁵

safe to assume that the ninth vote would not have changed the result. It was Justice William H. Rehnquist's.

40. *Id.* at 888.

41. *Id.* at 882.

42. 430 F. Supp. 164 (D. Colo. 1977).

43. *Id.* at 170.

44. 444 F. Supp. 1117 (E.D. Wis. 1978).

45. The court noted that the plaintiffs did not question whether separate teams for boys and girls, with comparable support and funding, are permissible under the fourteenth amendment. It then went on to comment that "[s]everal other courts have dealt with this problem and have approved of the concept of 'separate but equal' teams for male and female high school students." *Id.* at 1121.

*Yellow Springs Exempted Village School District v. Ohio High School Athletic Association*⁴⁶ involved a situation in which two young women students had qualified for the boys' basketball team at their high school. They were excluded from the team because of their sex, and a girls' basketball team was created. The governmental objectives proffered to support the rule which excluded these students from the boys' team were the prevention of injury and the increase of athletic opportunities available to female students.⁴⁷ The court found the rule to be a violation of substantive due process. The court recognized that the students had a protected liberty interest in freedom of choice in matters of education and that the exclusionary rule created a conclusive presumption that the girls were athletically inferior to boys. Holding that such a presumption was unconstitutional in that it could be rebutted by an individualized determination, the court stated:

[S]chool girls who so desire, must be given the opportunity to demonstrate that the presumption created by the rule is invalid. They must be given the opportunity to compete with boys in interscholastic contact sports if they are physically qualified.⁴⁸

The court also observed that separate teams were only satisfactory if they satisfied due process standards, and that they could not be used "as an excuse to deprive qualified girls positions on formerly all boy teams, regardless of the sport."⁴⁹

There are no reported federal cases in which the plaintiff requested either a finding of inequality between a male and female team in the same sport or an order that until such time as equality existed between boys' and girls' teams, exceptional

46. 443 F. Supp. 753 (S.D. Ohio 1978).

47. *Id.* at 758. CIF has asserted that "the important governmental objective served by Regulation 200 is that of promoting and insuring equal opportunity for girls to participate in high quality athletic programs in high schools." 60 Cal. Op. Att'y Gen. 326, 329 (1977). Several courts have found this argument persuasive in the equal protection context. See, e.g., *Ritacco v. Norwin School Dist.*, 361 F. Supp. 930 (W.D. Pa. 1973); *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1972).

Some courts have failed to find a substantial relationship between the goal of protecting girls' sports programs and rules which discriminate against females. See, e.g., *Carnes v. Tennessee Secondary School Athletic Ass'n*, 415 F. Supp. 569 (E.D. Tenn. 1976). The court in *Carnes*, however, did not address the issue of whether it is a denial of equal protection to prohibit girls from participating on boys' teams if the school offers a girls' team in the same sport.

48. 443 F. Supp. at 758.

49. *Id.*

female athletes should have the opportunity to qualify for the boys' team. The above cases, however, provide support for posing the issue of equality and for arguing that the objective of maximizing the athletic opportunities for high school girls does not justify a separate but equal rule when the girls' team is not, in fact, equal to the boys' team.

C. EQUAL PROTECTION UNDER THE CALIFORNIA CONSTITUTION

The significant difference in bringing a cause of action pursuant to the California equal protection guarantee,⁵⁰ as opposed to federal provisions, is that in California sex is a suspect category⁵¹ and education is a fundamental interest.⁵² Therefore, a strict scrutiny standard would be applied by a court in determining whether CIF Rule 200 denies the exceptional female athlete the equal protection of the law. The defendant would bear the burden of showing a compelling state interest for denying females the opportunity to qualify for male teams and that the sex-based classification used is necessary to further the state's purpose. Presumably, a defendant could not meet this burden, especially considering the fact that girls have been allowed to participate on boys' teams in the past and may still be allowed if there is no girls' team available.

50. CAL. CONST. art. 1, § 7 provides:

- (a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.
- (b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked.

51. *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); *Boren v. Department of Employment Dev.*, 59 Cal. App. 3d 250, 130 Cal. Rptr. 683 (1976).

52. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). Although athletic participation in itself may not be considered a fundamental interest, it could be argued that athletic opportunities are an integral part of a child's overall educational experience. See *Brenden v. Independent School Dist.* 742, 477 F.2d 1292 (8th Cir. 1973), in which the court held that "discrimination in high school interscholastic athletics constitutes discrimination in education." *Id.* at 1298.

According to a statement which accompanies the CIF Constitution and by-laws entitled "Underlying Principles in California School Athletics," by John J. Klumb:

School athletics under approved and properly supervised regulations can provide major educational benefits to participating pupils. Some of these follow: developing a *physical well-being*; learning *imposed and self-discipline* vital to adult life; providing a wholesome *release of physical energy*; learning *loyalty* to a team, a group, or a cause; acquiring *emotional control* during times of stress; and gaining an appreciation for lifelong *physical fitness*.

Id. at 1 (emphasis in original).

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While there is a solid basis for challenging CIF Rule 200, in 1977 the California Attorney General issued an opinion in which he concluded that the rule does not violate the California Constitution's equal protection clause.⁵³ Nevertheless, the attorney general noted that

there is contradictory evidence of whether there is a demonstrable, substantial relationship between the governmental objective and the classification which prohibits girls from playing on boys' teams, and that the determination of this issue is a close question. Under such circumstances, we suggest that it might be appropriate for C.I.F. to adopt a permissive rule which would allow each school district to determine whether this particular rule is necessary for its district program.⁵⁴

Perhaps the most serious flaw in the attorney general's opinion is its reliance on the mandates of Title IX and California Education Code section 41 to justify the conclusion that there is a compelling state interest in protecting the girls' athletic program.⁵⁵ When Title IX has been raised as a defense to an attack upon an athletic association rule that discriminates against girls in other states, it has been rejected.⁵⁶ As the court in *Leffel* observed, "[t]he enactment of Title IX did not remove the problem of sex discrimination from constitutional concern; congressional enactments cannot preempt provisions of the Constitution."⁵⁷

Although there is not a reported California case on point, some guidance can be gleaned from cases in states which have passed a state Equal Rights Amendment (ERA). *Commonwealth of Pennsylvania v. Pennsylvania Interscholastic Athletic Association*⁵⁸ presented a fact situation which is almost exactly the same as that now existing in California: a state interscholastic athletic association had promulgated a by-law similar to CIF Rule 200 which prohibited girls from competing or practicing against boys in athletic contests. The suit was brought by the attorney general on behalf of all high school girls, directly attack-

53. 60 Cal. Op. Att'y Gen. 326 (1977).

54. *Id.*

55. *Id.* at 334. The Attorney General's Opinion actually refers to CAL. EDUC. CODE § 92, ch. 802, § 1, 1975 Stats. 1827 (current version at CAL. EDUC. CODE § 41 (West 1978)).

56. See, e.g., *Yellow Springs Exempted Village School Dist. v. Ohio High School Athletic Ass'n*, 443 F. Supp. 753 (S.D. Ohio 1978); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978).

57. 444 F. Supp. at 1120.

58. 334 A.2d 839 (Pa. Commw. Ct. 1975).

ing the interscholastic association rule. In finding the rule violative of the Pennsylvania ERA, the court stated:

[E]ven where separate teams are offered for boys and girls in the same sport, the most talented girls still may be denied the right to play at that level of competition which their ability might otherwise permit them. For a girl in that position, who has been relegated to the "girls' team," solely because of her sex, "equality under the law" has been denied.⁵⁹

The court ordered the Pennsylvania Interscholastic Athletic Association to permit girls to practice and compete with boys in interscholastic athletics.⁶⁰

In *Darrin v. Gould*,⁶¹ a state interscholastic athletic regulation prohibited the female plaintiffs from participating on the high school football team. The court noted that the plaintiffs were fully qualified for team membership and denied the opportunity to participate solely because of their sex, in violation of the state's equal protection guarantees and the state's ERA. The court rejected the argument that the risk of injury and possible disruption of the girls' program presented a compelling state interest which justified the sex-based classification.⁶²

If the equal protection provision of the California Constitution is interpreted similarly to the state ERA's in the cases just discussed, then a favorable context for bringing an action on behalf of the exceptional female athlete is available. There is, however, a certain risk in bringing such an action. It is possible that a court, in applying the compelling state interest test, would be inclined to rule that the separate but equal doctrine is invalid as applied to high school athletics. This is a significant risk if a conscious decision has been made not to attack the separate but equal doctrine but to seek a provisional ruling that would allow the exceptional female athlete to qualify for the boys' team until girls' and boys' athletics are, in fact, equal. Although the risk may be unavoidable, it at least cautions the attorney to very careful pleading.⁶³

59. *Id.* at 842.

60. *Id.* at 843.

61. 85 Wash. 2d 859, 540 P.2d 882 (1975).

62. *Id.* at 875, 540 P.2d at 892-93.

63. See discussion in Part IV of this article, *infra*.

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D. CALIFORNIA STATUTORY GROUNDS: EDUCATION CODE SECTION 41

California also has a statute which prohibits sex discrimination in school-sponsored athletic programs. Section 41 of the California Education Code provides, in part, that

no public funds shall be used in connection with any athletic program conducted under the auspices of a school district or community college governing board or any student organization within the district, which does not provide equal opportunity to both sexes for participation and for use of facilities. Facilities and participation include, but are not limited to, equipment and supplies, scheduling of games and practice time, compensation for coaches, travel arrangements, per diem, locker rooms, and medical services.⁶⁴

The strong language requiring equal opportunities in athletic programs is modified by subsection 41(c) which states that “[n]othing in this section shall be construed to require a school district or community college to require competition between male and female students in school-sponsored athletic programs.”⁶⁵

Subsection (c) creates an obvious problem in basing an action upon Education Code section 41. It appears specifically to preclude the type of relief that would be sought on behalf of the

64. CAL. EDUC. CODE § 41(b) (West 1978).

65. *Id.* § 41(c).

Two important changes in the provisions of section 41 took place between the time it was introduced and its final adoption. As originally introduced, the bill excluded subsection (c) and included a provision “that incentives and encouragements be offered to females to engage in competitive sports.” Cal. S.B. 1213 (1975). This subsection was deleted by amendment in the Assembly. Cal. S.B. 1213, *as amended* Aug. 12, 1975. A further amendment by the Assembly added subsection (c), which ensures that a school is not forced to require athletic competition between males and females. Cal. S.B. 1213, *as amended* Aug. 20, 1975. This final provision appears to endorse the separate but equal doctrine for athletic programs in California.

The deletion of language requiring schools to encourage competitive athletics for females is unfortunate but not necessarily detrimental to a showing that the opportunities currently being provided for females are not equal to those being provided for males. It may mean that in evaluating the opportunities being offered, a court will measure the programs against the current interest and need being expressed by female athletes, as well as their ability. This is the interpretation that has been given to the equality of opportunity requirements of Title IX. 45 C.F.R. § 86.41(c)(1) (1977). See also U.S. OFFICE FOR CIVIL RIGHTS, DEP'T OF HEALTH, EDUCATION AND WELFARE, *Memorandum, Elimination of Sex Discrimination in Athletic Programs* (1975). Although such a showing could be difficult in a situation in which it is being argued that schools are not fulfilling the needs of female athletes, it would not inhibit a showing that where two teams are provided in a specific sport, they are unequal.

exceptional female athlete. Neither the statute itself nor its legislative history clarifies the type of relief a court may order for a violation of section 41. It seems implicit in the wording of the statute that the relief ordered would be limited to findings of inequality, and orders directing a school to take action to ensure equality. The statute is internally inconsistent in that it states an intent to assure females equal opportunities and then eliminates any provisional relief for an individual athlete who is caught up in a system where the opportunities provided are not yet equal.

IV. PRACTICAL CONSIDERATIONS

In evaluating the legal theories available for advancing the rights of the exceptional high school female athlete, it becomes apparent that each state and federal ground upon which such a claim might be based is accompanied by significant weaknesses or risks. If a case presents a very clear and dramatic picture of inequality between the boys' and the girls' teams, the equal protection clause of the fourteenth amendment may present the best available alternative. The problem with basing such a claim upon the equal protection provisions of the fourteenth amendment is the lack of standards for determining the degree of inequality necessary to support such a claim. While Title IX offers some guidance on what constitutes equality, it does not require a school to allow an exceptional female athlete to qualify for a boys' team, and it does not require that a boys' and girls' team in the same sport be equal.

If a fact situation does not lend itself to a fourteenth amendment claim, the attorney should consider a combination of the California Constitution's equal protection guarantee and Education Code section 41.⁶⁶ Although the state grounds upon which such an action may be brought are more favorable than the fed-

66. In addition to the equal protection provisions of the California Constitution and Education Code section 41, an attorney attacking CIF Rule 200 on behalf of an exceptional female athlete should also consider other state grounds. For example, article 1, section 8 of the California Constitution provides: "A person may not be disqualified from entering or pursuing a . . . profession . . . because of sex." For a plaintiff who has an interest in a career as a professional athlete, this provision may provide strong support for arguing the unconstitutionality of Rule 200.

Another possible argument may be based on Education Code section 51500, which states that "[n]o teacher shall give instruction nor shall a school district sponsor any activity which reflects adversely upon persons because of their . . . sex." CAL. EDUC. CODE § 51500 (West 1978). Although there are no relevant reported decisions interpreting this section, it can certainly be argued that CIF Rule 200 reflects adversely upon the exceptional female athlete solely because of her sex.

eral grounds, they are not free of problems. The equal protection provision of the California Constitution is the most favorable to the exceptional female athlete because it requires application of the compelling state interest standard of review. The risk, however, in basing an action upon the state equal protection provisions is that, in applying the compelling state interest test, the court may declare the separate but equal doctrine in athletics unconstitutional, which would be an undesirable result.

While Education Code section 41 expresses an intent to assure equal athletic opportunities for high school girls and defines factors to be considered in determining equality, it specifically prohibits forcing a school to allow girls to participate on a boys' team. The argument may be made, however, that the equality of athletic opportunity required by section 41 does not now exist as to the plaintiff, nor will it exist for a number of years. Therefore, subsection 41(c)'s prohibition of forcing a school to permit a girl to participate on a boys' team, if applied to the plaintiff, would constitute a denial of equal protection, as she would be prohibited from participating on the boys' team solely because of her sex.

Regardless of the legal approach chosen, careful pleading is essential to maintaining the delicate balance between the rights of the majority of female athletes and those of the few exceptional female athletes. The following recommendations should be considered at the initial drafting stages. There should be no allegation that the separate but equal doctrine is unconstitutional. The argument that an outstanding female athlete must be allowed to qualify for the boys' team until the girls' team offers her an equal opportunity assumes that the doctrine is constitutional. CIF Rule 200 should be challenged only as it is applied to the individual plaintiff and her sport. If the case is brought as a class action or attacks all sports, it invites a more sweeping remedy than might be desired. Thus, the pleadings should concentrate on the abilities and situation of the individual plaintiff.

A tight factual case should be presented, including information on the plaintiff's skills and potential, as well as a very detailed comparison of the opportunities and training available from participation on the boys' and girls' teams. This comparison should not merely focus on competitive skill levels but should include any differences in the nature of the game played, time spent in practice, salary and experience of coaches, number of competitive games, financing, facilities, equipment, and publicity.

If an action based on the strategy proposed is successful, it is probable that both the CIF and the individual high school will be hesitant thereafter to prohibit the exceptional female athlete from qualifying for a male team. The risk in this approach is that the CIF will not voluntarily revise its practices. But this risk seems worth the effort when compared to the danger of having the separate but equal model declared constitutionally invalid.

V. CONCLUSION

Equality of athletic opportunity is important and worth pursuing in spite of the risks. However, awareness of potential problems and a cautious approach are crucial to protecting the right of all female students to develop their athletic skills and to have the opportunity to participate in competitive athletics.