AN EQUAL PLAYING FIELD: THE POTENTIAL CONFLICT BETWEEN TITLE IX & THE MASSACHUSETTS EQUAL RIGHTS AMENDMENT

Christopher Marquis*

Abstract: In 2012 the Department of Education received a complaint claiming that the Massachusetts Interscholastic Athletic Association’s (“MIAA”) policy of allowing boys to try out for girls’ field hockey constituted a violation of Title IX. This federal statute prohibits discrimination in educational institutions on the basis of sex. This Note looks at the common roots of Title IX and the decision of the Massachusetts Supreme Judicial Court that allowed boys’ participation in field hockey. It then examines Title IX as it applies to the MIAA field hockey policy and determines that the Massachusetts Policy does not, in and of itself, create a violation. This Note further suggests that even if the policy did violate Title IX, policy implications suggest that using Title IX to invalidate another provision designed to promote gender equality is unwise. Finally, this Note identifies a number of gender-neutral alternatives to deal with the legitimate problems posed by the participation of boys in what are traditionally girls’ sports.

Introduction

In the 2010 Western Massachusetts field hockey Division I title game a forward for South Hadley High School collided at full speed with the opposing goaltender, Corey Hedges, scoring the winning goal.1 What differentiated this play from many others in field hockey is that the forward who scored the goal was an eighteen-year-old male named Ben Menard.2 In addition to playing field hockey, Ben Menard


2 Id.
also played varsity ice hockey and lacrosse. Not only did he score the game’s winning goal, but he also turned into one of the best players in the history of Western Massachusetts field hockey. Corey Hedges, an eighteen-year-old female, on the other hand, suffered a concussion on the play, which resulted in severe headaches for six months.

Although many states do not permit boys to play on girls’ field hockey teams, the Massachusetts Equal Rights Amendment (“ERA”) requires the state’s sports teams allow boys to try out for girls’ teams. The ERA states that “equality under the law shall not be denied or abridged on account of sex . . . .” and the Massachusetts Supreme Judicial Court has interpreted this as requiring a strict scrutiny analysis to classifications based on sex, determining that any other level of analysis would negate the purpose of the amendment in light of federal equal protection law. Strict scrutiny, the most rigorous type of constitutional examination, requires a state action to be narrowly tailored to achieve a compelling governmental interest.

Ben Menard and Corey Hedges represent the perfect storm of concerns that have led other states to ban the participation of boys on girls’ field hockey teams. By the time they hit adolescence, physiological differences between boys and girls in areas such as speed, size, and strength can give boys an advantage in certain athletic competi-

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4 Id.

5 Cullity, supra note 1.

6 Mass. Const. pt. 1, art. I (“Equality under the law shall not be denied or abridged because of sex, race, color or national origin.”); Attorney Gen. v. Mass. Interscholastic Athletic Ass’n (MIAA), 393 N.E.2d 284, 290 (Mass. 1979) (holding that an absolute ban on boys participating in girls’ sports where there was no corresponding boys team violated the Massachusetts Equal Rights Amendment).

7 Mass. Const. pt. 1, art. I; Opinion of Justices to the House of Representatives, 371 N.E.2d 426, 428 (Mass. 1977). Since Federal Equal Protection law applies an intermediate scrutiny analysis to laws which classify on the basis of gender, if the same level of analysis was given to the Massachusetts Equal Protection Amendment it would not provide any additional legal protection to gender classifications. See Opinion of Justices to the House of Representatives, 371 N.E.2d at 428.


9 See MIAA, 393 N.E.2d at 293 (noting defendant’s argument that sex based exclusions in sports were necessary to protect players’ safety); Petrie v. Ill. High Sch. Ass’n, 394 N.E.2d 855, 861 (Ill. App. Ct. 1979) (noting that the physical differences between adolescent boys and girls give boys an advantage in sports).
tions. Opponents of boys playing in girls’ sports argue that allowing such participation would lead to boys dominating the sport. They also argue that boys’ participation in girls’ sports raises safety concerns and could lead to reduced opportunities for athletic participation by girls.

This debate recently came to a head when the United States Department of Education, Office for Civil Rights (“OCR”) received a complaint filed against the Massachusetts Interscholastic Athletic Association (“MIAA”). The complaint claims violations of Title IX of the Education Amendments of 1972 (“Title IX”). Specifically, the complaint alleges that “girls on the mixed gender teams are being displaced from full participation and girls on the opposing teams are in the unfair position of being dominated or placed at greater risk of injury by the physical prowess of the male athlete.” In short, this argument alleges that male participation in traditionally female sports reduces athletic opportunities for girls and violates the effective accommodation regulations of Title IX. Title IX, among other provisions, requires that schools take steps to meet the athletic interests of members of both sexes. This allegation sets up an interesting conflict between two laws designed to protect gender equality.

10 See Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977) (“[T]he evidence in this case has shown that males as a class tend to have an advantage in strength and speed over females as a class and that a collision between a male and a female would tend to be to the disadvantage of the female.”); MIAA, 393 N.E.2d at 293 (“No doubt biological circumstance does contribute to some overall male advantages.”); CAMBRIDGE ENCYCLOPEDIA OF HUMAN GROWTH AND DEVELOPMENT 249–50 (Stanley J. Ulijaszek et al. eds., 1998) (“[S]ex differences in motor performance become marked during adolescence, such that few girls perform as well as average boys in many strength, power and speed tasks in later adolescence.”); ELLEN W. GERBER ET AL., THE AMERICAN WOMAN IN SPORT 426, 429, 450 (1974).

11 See Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 178 (3d Cir. 1993); MIAA, 393 N.E.2d at 294.

12 Cullity supra note 1 (“While boys potentially can displace girls from high school teams or rob them of playing time, there are also safety concerns in contact sports such as field hockey, as the Menard-Hedges collision highlights.”); see Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 294.


15 Complaint, supra note 13, at 5.

16 See id.

17 34 C.F.R. § 106.41(c)(1) (2012) (“Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes . . . .”); Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and
The Department of Education ("DOE") regulations under Title IX require schools to allow women to try out for most athletic teams, even many traditional men's teams.\textsuperscript{19} Contact sports, including field hockey, are exempt from the tryout requirement.\textsuperscript{20} While precedents largely indicate that Title IX does not require that boys be allowed to try out for girls' field hockey teams, the complaint filed with the OCR begs the question of whether the law actually bans boys from participating through the application of Title IX regulation's effective accommodation provision.\textsuperscript{21}

This Note uses field hockey as a case study to demonstrate that MIAA policy allowing boys to try out for traditional girls’ sports as mandated by the Massachusetts ERA does not violate Title IX. Furthermore, this Note suggests that the Massachusetts ERA and Title IX both are designed to further the same goals and that it is inconsistent to use Title IX to invalidate a more protective gender equality law that does not eliminate measures to ensure the safety and competitiveness

\textsuperscript{18} See Mass. Const., pt. I, art. I; MIAA, 393 N.E.2d at 296 (holding that an absolute ban on boys participating in girls’ sports where there was no corresponding boys team violated the Massachusetts ERA); 34 C.F.R. § 106.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."); Legislative Research Council, Report Relative to the Equal Rights Constitutional Amendment, S. 1537 at 23 (Mass. 1972); Kate Cruikshank, The Art of Leadership: A Companion to an Exhibition from the Senatorial Papers of Birch Bayh 41–45 (2007).

\textsuperscript{19} 34 C.F.R. § 106.41(b). Although the regulation does not apply specifically to women on its face, one of the stipulations for protection is that "opportunities for members of that sex have previously been limited." \textit{Id.} This regulation makes it very difficult for men to successfully use Title IX to require they be allowed to try out for women’s teams.; \textit{see} Williams, 998 F.2d at 175 (finding that the question of limited athletic opportunities should be considered generally rather than specifically for each sport).

\textsuperscript{20} 34 C.F.R. § 106.41(b) ("[M]embers of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For 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."); \textit{see} Kleczek v. R.I. Interscholastic League, Inc., 768 F. Supp. 951, 955–56 (D.R.I. 1991) (finding that the major activity of field hockey involves bodily contact).

\textsuperscript{21} \textit{See} Williams, 998 F.2d at 174 (holding that 34 C.F.R. § 106.41(b) does not preclude a school from maintaining a sport for one sex only); \textit{Kleczek}, 768 F. Supp. at 955–56 (holding that field hockey is a contact sport within the meaning of 34 C.F.R. § 106.41(b), and thus boys did not have to be allowed to try out); 34 C.F.R. § 106.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes."); Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,417–18 ("In 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.").
of female athletes, but only requires that such measures be gender-neutral. Part I examines the requirements placed on athletic programs that receive federal funding by Title IX as well as the historical and policy justifications for Title IX and the Massachusetts ERA. Part II explores the interplay between the two laws and how the complaint is likely to be resolved. Part III argues that this application of the Massachusetts ERA does not violate Title IX, but rather, the amendment is aligned with the broader goals of the federal law. Additionally, it argues that as a matter of policy, Title IX should not be used to invalidate a particular application of a state ERA. Finally, Part IV urges the use of alternative, non-gendered methods for protecting the safety and competitiveness of female sports such as placing restrictions on physically superior players or increasing the use of teams comprised of players from multiple schools.

I. Federal & State Protections of Sexual Equality & Their Application to Athletics

In the early 1970s, government at both the federal and state levels pushed to prevent discrimination against women as part of the women’s rights movement. Following on the heels of legislation that expanded protections for racial minorities in the 1960s and 1970s, leaders in the women’s rights movement scored legislative victories by passing federal and state laws that attempted to end sex discrimination. These laws included Title IX (“the Title”)—the federal law addressing sex discrimination in education—and the Massachusetts ERA.

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A. Title IX & Its Protections for Women in Athletics

When Congress passed the Civil Rights Act of 1964, it prohibited discrimination on the basis of religion, race, color, or national origin, but most of its provisions did not apply to discrimination based on sex. Recognizing the gap in policy, President Johnson included protections against discrimination of women in Executive Order 11,375 in 1967. After its implementation, women’s rights advocates began using the executive order to combat discrimination in hiring practices at educational institutions.

Senator Birch Bayh introduced Title IX as an amendment to the Higher Education Act of 1965 during the Act’s 1971 reauthorization. The Title intended to provide equal opportunities for women in education. In order to accomplish this goal, Title IX states 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.”

The statutory language of Title IX does not directly discuss athletic programs, but school athletics have become its most well-known

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25 See 42 U.S.C. §§ 1981–2000. The one major provision of the Civil Rights Act that does address sexual discrimination is Title VII, which prevents discrimination by employers on the basis of sex, as well as race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a). This provision may have included sex in an effort to defeat the entire bill by dissuading some of its supporters. Michael Evan Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 Duq. L. Rev. 453, 453 (1980).


27 Valentine, supra note 26, at 1–2.

28 118 Cong. Rec. 5802–03 (1972); Cruikshank, supra note 18, at 45. Senator Bayh was simultaneously involved in a number of women’s rights causes, including the attempt to pass the Equal Rights Amendment to the United States Constitution. See Cruikshank, supra note 18, at 43, 45.

29 See 118 Cong. Rec. 5808. In his speech on the Senate floor, Senator Bayh said:

We are all familiar with the stereotype of women as pretty things who go to college to find a husband, go on to graduate school because they want a more interesting husband, and finally marry, have children, and never work again. The desire of many schools not to waste a “man’s place” on a woman stems from such stereotyped notions. But the facts absolutely contradict these myths about the “weaker sex” and it is time to change our operating assumptions.

Id. at 5804.

Most of the statute’s applicability to athletics results from the Department of Health, Education and Welfare’s regulations enforcing the provision. The DOE’s regulations that attempted to clarify its interpretation of the law state that:

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

Two regulations govern how Title IX is applied to athletics. The first key component, the “Equal Opportunity” provision, requires that a recipient of federal funds “shall provide equal athletic opportunity for members of both sexes.” The regulation lists ten factors to determine if the school is providing equal opportunities. The first, and most influential, factor requires effective accommodation of athletic interest. The DOE provides that schools may use “any non-discriminatory meth-

31 Id. § 1681; see, e.g., Biediger v. Quinnipiac Univ., 691 F.3d 85, 90–91 (2d Cir. 2012) (finding Quinnipiac had violated Title IX by “failing to afford equal participation opportunities in varsity athletics to female students”); Mercer v. Duke Univ., 190 F.3d 643, 648 (4th Cir. 1999) (recognizing a cause of action for a female student who had been allowed to try out for the university’s football team and was then discriminated against and excluded from participation); Cohen v. Brown Univ., 991 F.2d 888, 891 (1st Cir. 1993) (upholding a preliminary injunction requiring Brown to reinstate its women’s volleyball and gymnastics teams pending resolution of Title IX claims).

32 See 20 U.S.C. § 1681; 34 C.F.R. § 106.41 (2012). The Department of Health, Education and Welfare, is the predecessor to the current Department of Education and hereinafter, both are referred to as the “DOE.”

33 34 C.F.R. § 106.41(a).

34 See id. § 106.41(b), (c). These regulations were implemented pursuant to the authority granted to the DOE by Title IX to implement and enforce its provisions. See 20 U.S.C. § 1681.

35 See 34 C.F.R. § 106.41(c).

36 Id. The ten listed factors are:

(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) and Publicity.

37 See id.
ods” to assess athletic interest. The DOE then employs a three-part test to determine if the institution is effectively accommodating the interests and abilities of athletes of different sexes.

The DOE’s test provides three possible methods of compliance. Institutions may demonstrate that opportunities are distributed in a proportional way, that athletic programs are continually expanding in response to the interest of members of an underrepresented sex, or that the interests of the members of an underrepresented sex have been fully accommodated by the school’s programs. The three-part test, by its terms, refers only to intercollegiate athletics. This test and its applicability to intercollegiate athletics has been the source of most Title IX litigation.

The second provision, the “Contact Sports Exemption,” governs single sex teams and directly impacts field hockey and other girls’ contact sports such as lacrosse and basketball. The regulations per-

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38 Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,417 (Dec. 11, 1979).
39 Id. at 71,418. The three-part test is:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

40 Id.
41 Id.
42 Id.
43 See, e.g., Biediger, 691 F.3d at 94; Cohen, 991 F.2d at 897.
44 34 C.F.R. § 106.41 (b) (2012). The regulation states:

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

Id.
mit single sex teams where the selection of players is based on competitive skill or the activity is a “contact sport” as defined by the regulations.\textsuperscript{45} Unless, however, there is both a male and a female team or a sport is a “contact sport,” a school must allow a member of an underrepresented sex to try out for a single sex team.\textsuperscript{46}

Field hockey, traditionally a girl’s sport, provides an apt comparison for considering the application of the rule.\textsuperscript{47} For the purposes of discussing high school field hockey, there are two key points to consider.\textsuperscript{48} First, based on case law, an underrepresented sex is one that has been underrepresented in the school’s athletics as a whole rather than in a particular sport.\textsuperscript{49} Therefore, the provision typically does not apply to men because they have generally not been underrepresented in athletics.\textsuperscript{50} Additionally, courts have interpreted the Contact Sports Exemption to apply to field hockey.\textsuperscript{51} As a result, under current interpretation of the law, field hockey is exempt from the provisions that require an underrepresented sex be allowed to try out.\textsuperscript{52} These interpretations mean that Title IX does not require that boys be allowed to try out for a girls’ field hockey team.\textsuperscript{53}

B. State Equal Rights Amendments & Their Applicability to Athletics

In 1976, Massachusetts voters amended the state constitution to include that “[e]quality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.”\textsuperscript{54} Nineteen other states adopted similar provisions.\textsuperscript{55} Legislators modeled such amendments after either the proposed federal ERA or the Equal Pro-

\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{48} See Williams, 998 F.2d at 174; Kleczek, 768 F. Supp. at 956.
\textsuperscript{49} See Williams, 998 F.2d at 174; Kleczek, 768 F. Supp. at 955.
\textsuperscript{51} Kleczek, 768 F. Supp. at 955–56; see Williams, 998 F.2d at 173.
\textsuperscript{52} See Williams, 998 F.2d at 174; Kleczek, 768 F. Supp. at 956.
\textsuperscript{53} Kleczek, 768 F. Supp. at 956; see Williams, 998 F.2d at 174.
\textsuperscript{55} GLADSTONE, supra note 22, at 3–6. States which passed ERAs during this time period were Alaska, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Virginia, and Washington. Id.
tection Clause of the Fourteenth Amendment. These changes were largely passed during the time the federal ERA was up for ratification. The passage of these provisions served both as support for the federal measure as well as a way to ensure protection at the state level.

By analyzing classifications based on sex under strict rather than intermediate scrutiny, equal protection amendments are commonly interpreted to provide greater protection against sexual discrimination than those protections offered by the Fourteenth Amendment. For example, the Massachusetts Supreme Judicial Court requires the use of strict scrutiny for classifications based on sex, noting that:

Our State equal rights amendment was adopted at a time when equal protection principles under the State and Federal Constitutions required a level of judicial scrutiny greater than the rational basis test but less than the strict scrutiny test. To use a standard in applying the Commonwealth’s equal rights amendment which requires any less than the strict scrutiny test would negate the purpose of the equal rights amendment and the intention of the people in adopting it.

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56 Id. The proposed federal Equal Rights Amendment stated “[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” H.R.J. Res. 208, 92d Cong. (1972); see e.g. Colo. Const. art. II, § 29 (1973) (“Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions because of sex.”); Haw. Const. art. I, § 3 (1972) (“Equality of rights under the law shall not be denied or abridged by the State on account of sex.”); Md. Const. art. 46 (1972) (Equality of rights under the law shall not be abridged or denied because of sex.”). The Equal Protection Clause reads: No State shall “deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1; see e.g. Conn. Const. art. I, § 20 (1974) (“No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex.”) (emphasis added); Haw. Const. art. I, § 5 (1978) (“No person shall be . . . denied the equal protection of the laws . . . because of race, religion, sex, or ancestry.”) (emphasis added); La. Const. art. I, § 3 (1974) (No person shall be denied equal protection of the laws.”). Some states such as Hawaii have provisions modeled after both. Haw. Const. art. I, §§ 3, 5.

57 Gladstone, supra note 22, at 3.

58 Id.


60 Opinion of Justices to the House of Representatives, 371 N.E.2d 426, 428 (Mass. 1977) (citation omitted).
Strict scrutiny requires a state action based on a suspect classification such as race to be narrowly tailored to achieve a compelling governmental interest.\(^{61}\) Intermediate scrutiny, the constitutional analysis at the federal level for gender classifications, is less rigorous.\(^ {62}\) It requires that the classification be substantially related to achieving an important governmental interest.\(^ {63}\) A number of other states have applied strict scrutiny to their own equal rights amendments as an added protection for women’s rights.\(^ {64}\)

These provisions have been used, in Massachusetts and elsewhere, to allow girls to play in boys’ contact sports such as football.\(^ {65}\) Under Title IX, football is considered a “contact sport” and is thus exempt from that statute’s requirement that girls be allowed to try out.\(^ {66}\) Still, the exacting scrutiny provided by state equal rights amendments requires a different result.\(^ {67}\) In Massachusetts, the Supreme Judicial Court held that a bill banning girls from participating in football and wrestling:

would violate art. 106 of the Amendments to the Constitution of the Commonwealth [ERA]. The absolute prohibition in the proposed legislation cannot survive the close scrutiny to which a statutory classification based solely on sex must be subjected. A prohibition of all females from voluntary participation in a particular sport under every possible circumstance serves no compelling State interest.\(^ {68}\)

Thus, states applying strict scrutiny to sex based classifications strike down prohibitions on girls trying out for boys’ teams, stating the ban lacks a compelling government interest.\(^ {69}\)

Massachusetts, however, has taken the exacting scrutiny for gender classifications one step further by requiring that boys be allowed to try out for girls’ sports teams where the school does not field a


\(^{63}\) Craig 429 U.S. at 197.

\(^{64}\) See Barger, 550 P.2d at 1283; Ellis, 311 N.E.2d at 101.


\(^{66}\) 34 C.F.R. § 106.41(b) (2012).

\(^{67}\) See Opinion of Justices to the House of Representatives, 371 N.E.2d at 429; Darrin, 540 P.2d at 893; 34 C.F.R. § 106.41(b).

\(^{68}\) Opinion of Justices to the House of Representatives, 371 N.E.2d at 429–30.

\(^{69}\) See id.; Darrin, 540 P.2d at 893.
male team in that sport. It is this step that sets up the conflict highlighted by the complaint against the MIAA filed with the OCR. In Attorney General v. Massachusetts Interscholastic Athletic Association, the court struck down a MIAA regulation which prohibited boys from trying out for girls’ field hockey teams. The decision held that the Massachusetts ERA also protected men and viewed the prohibition against their participation in girls’ sports as a form of affirmative action which did not meet the rigor of strict scrutiny.

Title IX and state equal right amendments were both introduced to prevent discrimination against women. Massachusetts expanded upon this purpose by subjecting any gender classification, even those designed to protect women, to strict scrutiny. The question then becomes whether the result of that strict scrutiny, that boys must be allowed to try out for girls’ sports teams, creates a conflict with Title IX.

II. Title IX, the Massachusetts ERA, & Boys’ Participation in Girls’ Sports

The analysis of boys’ participation in girls’ sports under Title IX hinges on two key provisions of the statute, the “Contact Sports Exemption” and the “Effective Accommodation” provision. The “Contact Sports Exemption” requires a recipient of federal funds to permit members of the opposite sex to try out for single sex teams under certain conditions. The “Effective Accommodation” provision requires that a recipient of federal funds take steps to meet the athletic interests of its students.
If the Contact Sports Exemption applied in the context of boys’ participation in girls’ field hockey, there would be no conflict between Massachusetts law and Title IX as both would reach the same result of allowing boys to try out for girls’ field hockey. Since it does not, Massachusetts law is the sole basis for requiring boys in the state to receive an opportunity to participate in girls’ field hockey. If female athletes are being displaced by male athletes, Massachusetts law could conflict with the “Effective Accommodation” provision of Title IX.

A. Why Title IX Does Not Require That Boys Be Allowed to Try Out for Girls’ Sports

The DOE’s Contact Sports Exemption applies to all schools receiving federal funding that sponsor a particular sport for one sex but not for the other. The exemption requires schools to allow members of the excluded sex to try out for the particular sport if that sex’s athletic opportunities have previously been limited. The requirement, however, does not apply if the sport at issue is a “contact sport.” Specifically, these regulations state that

where a recipient [of federal funds] operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport.

Courts that have addressed this regulation have found that boys do not constitute a sex for which athletic opportunities have previously been limited and thus are ineligible for protection. For example, in Mularadelis v. Haldane Central School Board, a New York district court

82 See MIAA, 393 N.E.2d at 296; 34 C.F.R. § 106.41(b).
83 34 C.F.R. § 106.41(b).
84 Id.
85 Id.
86 Id. (emphasis added).
held that the requirement that athletic opportunities have been previously limited was not sport specific. Rather, the regulation, applied to the sex’s athletic opportunities at the school as a whole. The court looked at the construction of the regulation, noting that the first part of the regulation uses specific and narrow language in referring to a “particular sport.” The second part of the regulation, however, uses more general language about athletic opportunities without reference to opportunities on an individual sports level. The court determined that if the DOE had meant the athletic opportunity had been limited for a sex in a “particular sport,” the regulation would have said so.

Courts in New Hampshire and the United States Court of Appeals for the Second Circuit have followed New York’s interpretation in Mularadelis. In Williams v. School District, a boy sued his school district to allow him to play on the girls’ field hockey team. He claimed violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment. In its decision, the Second Circuit adopted the Mularadelis court’s interpretation of the Contact Sports Exemption. The court added that if the athletic opportunities were evaluated on the level of the individual sport, “there could never be a situation in a non-contact sport in which a team was limited to a single sex without a corresponding team for the other sex because, by definition, the opportunities in that particular sport will be limited for the excluded sex.” The court then noted that eliminating single sex teams in all situations where there is no corresponding team for the other gender would override the regulation’s purpose of allowing single sex teams in certain situations. In adopting this interpretation, the court rejected the interpretation of the Federal District Court of Rhode Island in Gomes v. Rhode Island Interscholastic League. In Gomes, the district

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88 427 N.Y.S.2d at 462.
89 Id.
90 Id.
91 Id.
92 Id.
93 See Williams, 998 F.2d at 174; Mularadelis, 427 N.Y.S.2d at 462.
94 Williams, 998 F.2d at 170.
95 Id.
96 Id. at 174; Mularadelis, 427 N.Y.S.2d at 462.
97 Williams, 998 F.2d at 174.
98 Id.
court interpreted the athletic opportunity as applying to the individual sport, in that case volleyball.\textsuperscript{100}

Additionally, under Title IX, even if a boy who wanted to play field hockey could show that male athletic opportunities had previously been limited, he would also run into the regulation’s Contact Sports Exemption.\textsuperscript{101} The exemption does not require schools to allow members of the opposite sex to try out for a team if that sport is a “contact sport.”\textsuperscript{102} A contact sport is defined, by the regulations, as a sport “the purpose or major activity of which involves bodily contact.”\textsuperscript{103} Although the regulation lists a number of contact sports, it neglects to name field hockey specifically.\textsuperscript{104} In *Kleczek v. Rhode Island Interscholastic League, Inc.*, however, a federal district court in Rhode Island held that field hockey was a contact sport.\textsuperscript{105} The court considered that the rules of field hockey prohibited bodily contact, but simultaneously looked at requirements that the players wear protective equipment and testimony conceding that players do come into contact with each other.\textsuperscript{106} This led the court to believe that such contact was inevitable.\textsuperscript{107} As a result, the court considered field hockey to be a “contact sport” within the meaning of the regulations.\textsuperscript{108}

In *Williams*, the court considered the same issue and noted some of the same factors as the *Kleczek* court.\textsuperscript{109} It added that physical contact did not have to be sanctioned under the sport’s rules to be a ma-

\textsuperscript{100} *Gomes*, 469 F. Supp. at 664. Although the First Circuit has not addressed this interpretation of the regulations, a number of courts have criticized this interpretation and, although there is a limited amount of case law, the majority of courts to have addressed this issue seem to reject the *Gomes* approach. See *Williams*, 998 F.2d at 174; *Kleczek*, 768 F. Supp. at 955. The decision of the district court in *Gomes* was also stayed after the First Circuit found that the appellant had shown a probability of success on the merits. *Gomes v. R.I. Interscholastic League*, 604 F.2d 733, 735 (1st Cir. 1979); *Kleczek* 768 F. Supp. at 955. The court, however, vacated the decision as moot because the field hockey season had ended and the plaintiff was set to graduate by the time the appeal was heard. *Gomes*, 604 F.2d at 736; *Kleczek*, 768 F. Supp. at 955.

\textsuperscript{101} 34 C.F.R. § 106.41(b) (2012); see *Williams*, 998 F.2d at 174; *Kleczek*, 768 F. Supp. at 955.

\textsuperscript{102} 34 C.F.R. § 106.41(b); see *Williams*, 998 F.2d at 174; *Kleczek*, 768 F. Supp. at 955.

\textsuperscript{103} 34 C.F.R. § 106.41(b).

\textsuperscript{104} Id. The sports referenced by the regulation are boxing, wrestling, rugby, ice hockey, football, and basketball, but the list is not exhaustive. *Id.*

\textsuperscript{105} 768 F. Supp. 955–56.

\textsuperscript{106} *Id.* at 956 (“[S]everal types of contact are inherent in a field hockey game including the ball hitting players’ shins, lifted balls, and lifted sticks that hit other parts of the body, and head on collisions.”).

\textsuperscript{107} *Id.*

\textsuperscript{108} *Id.*

\textsuperscript{109} *Williams*, 998 F.2d at 173; see *Kleczek*, 768 F. Supp. at 956.
The court noted that if contact had to be sanctioned by the sport to qualify as a “contact sport,” then the “purpose” and “major activity” parts of the regulation would be duplicative. The Williams court looked favorably upon the Kleczek opinion that field hockey is a contact sport, but held only that the record in the case did not support summary judgment in favor of the proposition that field hockey was not a contact sport. In light of this case law, it can be fairly stated that Title IX does not require that boys be allowed to try out for girls’ teams, and that boys seeking to play girls’ field hockey must look to other sources of law to reach their goal.

B. The Massachusetts ERA & Boys Trying Out for Girls’ Sports

In Massachusetts, although Title IX’s criteria regarding athletic opportunity is determined on the factual circumstances surrounding the specific school, boys are unlikely to demonstrate that their athletic opportunities have previously been limited. Historically, boys have had greater opportunities in athletics than girls and traditional boys’ sports in Massachusetts often have larger rosters than girls’ teams. Massachusetts, however, allows male field hockey players living in the state to play field hockey in high school notwithstanding Title IX. In Attorney General v. Massachusetts Interscholastic Athletic Association, the Massachusetts Supreme Judicial Court addressed the issue of whether the MIAA rule prohibiting boys from participating in girls’ sports violated the Massachusetts Constitution. It held that a categorical ban on male participation in girls’ high school sports violated the state’s

110 Williams, 998 F.2d at 173.
111 Id.
112 See id. at 173–74.
113 See id.; Kleczek, 768 F. Supp. at 956; Mularadelis, 427 N.Y.S.2d at 462; 34 C.F.R. § 106.41(b) (2012).
114 See Williams, 998 F.2d at 175; Mularadelis, 427 N.Y.S.2d at 462; Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,419 (Dec. 11, 1979).
115 Williams, 998 F.2d at 175 (“[I]t would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys’ athletic programs to the exclusions of girls’ athletic programs in high schools as well as colleges.”); Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,419. See generally 2011–2012 MIAA, 2011–12 Sports Participation by School (2012), http://www.miaa.net/gen/miaa_generated_bin/documents/basic_module/MemberSchoolParticipation201112.pdf [hereinafter School Participation] (showing participation statistics for members of both sexes in all sports at every MIAA member school, noting particularly the large size of football rosters).
116 See MIAA, 393 N.E.2d at 296.
117 Id. at 285–86.
equal rights amendment. The court’s decision made clear that under the Massachusetts ERA, players cannot be barred from participating in a sport because of their sex.

In coming to that conclusion, the unanimous opinion applied a strict scrutiny analysis requiring that state action be narrowly tailored to achieve a compelling governmental interest, and specifically rejected a number of asserted justifications for the gender division. First, the court rejected the assertion that sex served as a proxy for functional differences arising out of biology. The justices held that the differences between the sexes were not sufficiently clear-cut to justify using sex as a proxy. They noted that using sex as a proxy could possibly be justified if all boys athletically surpassed all girls, yet the court rejected this premise because of the increasing number of female athletes whose athletic abilities outstrip those of males.

Next, the justices rejected the argument that the gender classification protected the physical safety of the female players from potential injuries caused by male participants. They noted that previous decisions allowing women to play in men’s sports implicitly rejected this justification. Furthermore, the court stated that “[a]ny notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics is a cultural anachronism unrelated to reality.” The need to protect female athletes from male participants in their sports is based on stereotypical assumptions and the court in required a closer fit.

Finally, the justices dismissed the argument that the gender division was necessary to protect girls’ participation in sports. The

\[118 \text{ Id. at 296.}\]
\[119 \text{ Id.}\]
\[120 \text{ Id. at 291, 296; see Johnson v. California, 534 U.S. 499, 505 (2005); Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984); Korematsu v. United States, 323 U.S. 214, 215 (1944).}\]
\[121 \text{ MIAA, 393 N.E.2d at 293.}\]
\[122 \text{ Id.}\]
\[123 \text{ Id.}\]
\[124 \text{ Id. at 293–94.}\]
\[125 \text{ Id. at 294. The court pointed to Opinion of Justices to the House of Representatives, which held that girls had to be allowed to try out for boys’ football, as evidence that protecting girls from competing with boys was not a sufficient justification under the Massachusetts ERA. MIAA, 393 N.E. 2d at 294; Opinion of the Justices to the House of Representatives, 371 N.E.2d 426, 429–30 (Mass. 1977).}\]
\[126 \text{ MIAA, 393 N.E.2d at 294 (quoting Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977)).}\]
\[127 \text{ Id.}\]
\[128 \text{ Id. at 294–96.}\]
court held that this was an unnecessary use of a disfavored classification, namely a gender classification, when better, less offensive, alternatives existed. The court found that even if boys had an advantage in certain sports that would allow them to swamp female participation, it would not justify a categorical exclusion in all sports. Some sports, such as gymnastics, swimming, and riflery, may even offer advantages for female participants, in which case there would be no need to exclude males to protect female participation.

The opinion further suggested other classifications not based on gender that might more appropriately protect female participation. The suggestions included classifications for participation based on height, weight, and speed rather than gender in order to admit males who would not dominate competition. Alternatively, the court suggested sports could use a handicapping approach, which would inhibit the ability of the most gifted players to dominate play. Finally, it noted that if boys’ participation interest in a sport became so great that it threatened to wash out female opportunities, creating a separate boys’ team could solve the problem. Unlike Title IX which does not require boys to play on girls’ teams due to the Contact Sport Exemption, the Massachusetts Supreme Judicial Court’s interpretation of the state’s ERA does require that boys be provided an opportunity to play. In doing so, however, Massachusetts may run afoul of a different component of Title IX, namely the “Effective Accommodation Provision.”

C. Title IX Provision That Could Actually Require Gender Divisions in Athletics

The complaint filed with the OCR that Massachusetts is violating Title IX by allowing boys to play girls’ field hockey is likely to be decided on the basis of the Effective Accommodation Provision of Title IX.
Potential Conflict Between Title IX & the Massachusetts ERA

Title IX’s Effective Accommodation Provision requires that recipients of federal funding “provide equal athletic opportunity for members of both sexes.” The complainants argue that if boys play on traditional girls’ teams, they displace girls from their usual spots on the team because of physiological differences. The complainants argue that displacing girls from sports teams reduces the athletic opportunities for women, which could create a violation of the Effective Accommodation Provisions of the Title IX regulations.

The athletics programs of high schools must operate within the structures provided by Title IX. Thus, the DOE’s so-called “Three-Part Test” applies to both high school and intercollegiate athletics in determining if athletic interests are being effectively accommodated, even though its terms only refer to intercollegiate athletics. Title IX applies to all recipients of federal funding, therefore local school districts fall under that umbrella. Since the three-part test applies to high school athletics in determining whether they are effectively accommodating students of both genders, schools in Massachusetts must comply with one of the three parts.

The most common avenue educational institutions use to comply with the Effective Accommodation Provisions of Title IX is to meet the substantially proportionate opportunities provision of the three part test. The DOE has stressed that the test does not require exact
proportionality of opportunities. Instead, the three-part test allows for reasonable fluctuations that occur as the result of varying interests from year to year.

By expanding beyond the requirements of Title IX, Massachusetts could run afoul of the Effective Accommodation Provision of Title IX if boys displace girls in sufficient numbers that the opportunities for boys and girls are no longer substantially proportionate. For example, concerns were raised by the defendants in MIAA that if boys were not banned from girls’ sports that they would eventually come to overtake all the positions on the girls’ teams. If such a concern were to come to fruition, clearly the athletic interests of girls would not be accommodated as they would then have no opportunities for meaningful athletic participation even if there were nominal “girls” teams. The complaint filed with the DOE follows a similar argument, claiming that the MIAA policy allowing boys to try out for girls’ teams displaces girls from participation and therefore the athletic interests of girls are not effectively accommodated.

These concerns, however, are largely overblown as the participation of boys in girls’ sports is a rarity with a limited impact on the ability of girls to participate in high school athletics in Massachusetts.

III. Why Massachusetts’ Law Regarding Boys Playing in Girls’ Sports Does Not Violate Title IX

The application of the Massachusetts ERA that allows boys to try out for girls’ sports does not constitute a violation of Title IX. Boys’

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147 Clarification, supra note 146.
148 See id.
149 See Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,418; Clarification, supra note 146.
150 See 34 C.F.R. § 106.41(c)(1); Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,418; Clarification, supra note 146.
152 See Biediger, 691 F.3d at 93; Williams, 998 F.2d at 175; 34 C.F.R. § 106.41(c) (2012); Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,418; Letter from Norma V. Cantu, Assistant Sec’y of Civil Rights to Colleagues (Jan. 16, 1996), available at http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.
153 See 34 C.F.R. § 106.41(c)(1); Complaint, supra note 13, at 5; Cullity, supra note 1.
154 See Survey, supra note 50, at 1. See generally School Participation, supra note 115 (showing participation of boys in girls’ sports).
participation in girls’ sports only violates Title IX if it causes the participation opportunities of girls to be disproportionately less than that of boys. Based on the level of current male participation in girls’ sports, that is not the case. Furthermore, even if the application of the ERA was found to violate Title IX, this would be an undesirable outcome as a matter of policy. The inherent irony of using one statute designed to promote equality for women to invalidate a state provision aimed at the same purpose, counsels against such an application.

This is especially true in that the ERA interpretation is arguably more protective of women’s equality than the framework in which Title IX operates.

A. Application of Title IX’s Substantial Proportionality Requirement to Field Hockey

Title IX requires recipients of federal funds to provide equal athletic opportunities for members of both sexes. One of the dominant factors in considering if this requirement is met is whether the sports the school sponsors and participation in those sports effectively accommodates the interests of both sexes. A primary method of meeting the effective accommodation provision is by showing substantially proportionate athletic opportunities. Although it is permitted in Massachusetts, boys’ participation in field hockey in Massachusetts is rare.

Responses to the MIAA participation survey showed that in 2011, there were 7,980 field hockey players in 215 schools playing un-

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155 See Attorney Gen. v. Mass. Interscholastic Athletic Ass’n (MIAA), 393 N.E.2d 284, 296 (Mass. 1979); Clarification, supra note 146.
157 See Survey, supra note 50, at 1; Clarification, supra note 146.
158 See 118 Cong. Rec. 5804 (1972); Gladstone, supra note 22, at 3; Legislative Research Council, supra note 18, at 24, 46–47.
159 See 118 Cong. Rec. 5804; Gladstone, supra note 22, at 3; Legislative Research Council, supra note 18, at 46–47.
162 34 C.F.R. § 106.41(c) (2012).
163 Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,418; Letter from Norma V. Cantu, Assistant Sec’y of Civil Rights to Colleagues, supra note 152; see, e.g., Biediger, 691 F.3d at 95; Cohen, 991 F.2d at 897–98.
164 Survey, supra note 50, at 1.
der the MIAA.\textsuperscript{165} Of those 7,980 players, only thirty were boys.\textsuperscript{166} Assuming that every one of those boys took a spot that would otherwise have been allocated to a girl, this displacement only amounts to .01\% of the total girls’ participation in sports in Massachusetts and .3\% of the participation in field hockey.\textsuperscript{167} This miniscule proportion does not interfere with substantial proportionality.\textsuperscript{168} Instead, these numbers easily fit within the periodic fluctuations in participation that do not constitute a violation.\textsuperscript{169}

Even individual schools do not show evidence that boys’ participation in field hockey has swamped athletic opportunities for females, and in fact, in some instances the participation has been balanced out by girls participating in boys’ contact sports.\textsuperscript{170} The schools with the most male field hockey players in 2011 were Assabet Valley Regional Technical High School, Case High School, and Montachusett Regional Vocational Tech, each with four male players.\textsuperscript{171} At Assabet Valley, the imposition of boys playing in girls’ field hockey was in fact balanced out by the corollary requirement of the Massachusetts ERA that girls be allowed to try out for boys’ sports.\textsuperscript{172} During the 2011–2012 school year, three girls participated on the boys’ lacrosse team and one on the boys’ football team.\textsuperscript{173} Title IX would not have required that the girl be allowed to try out for the football team and likely would have reached the same result for lacrosse.\textsuperscript{174} At Montachusett a similar story is true with two girls participating in wrestling and one in ice hockey.\textsuperscript{175} Of the 373 schools under the MIAA umbrella, only eighteen had boys participating in field hockey with eighteen of the thirty players playing at six schools.\textsuperscript{176}

\textsuperscript{165} Id.
\textsuperscript{166} Id.
\textsuperscript{167} Id.
\textsuperscript{168} See Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,418; Clarification, supra note 146.
\textsuperscript{169} See Clarification, supra note 146.
\textsuperscript{170} See generally School Participation, supra note 115 (showing participation statistics for members of both sexes in all sports at every MIAA member school).
\textsuperscript{171} Id. at 6, 22, 70.
\textsuperscript{172} Opinion of Justices to the House of Representatives, 371 N.E.2d at 429–30; School Participation, supra note 115, at 6.
\textsuperscript{173} School Participation, supra note 115, at 6.
\textsuperscript{175} School Participation, supra note 115, at 70.
\textsuperscript{176} See Survey, supra note 50, at 1 (showing thirty boys participating in field hockey within the 373 MIAA members schools). See generally School Participation, supra note 115 (showing participation of boys in field hockey in every school in Massachusetts).
Thus, allowing boys to participate in girls' field hockey does not, in and of itself, violate the substantial proportionality requirement.\textsuperscript{177} The number of female participants displaced, if any, is very small.\textsuperscript{178} Therefore, boys’ participation in field hockey alone cannot be considered to be a violation of the Effective Accommodation Provision of Title IX.\textsuperscript{179}

It is also worth recognizing that while the OCR complaint is against MIAA, the association has a very small role in determining what opportunities are present at an individual school.\textsuperscript{180} The MIAA only sets the rules and policies that govern high school sports throughout the state.\textsuperscript{181} The decisions about which sports to offer and how athletic funds are to be spent are left to individual school districts.\textsuperscript{182} Thus, the MIAA does not make the decisions that would ultimately impact participation opportunities for girls.\textsuperscript{183} Its policies such as allowing boys’ participation in girls’ sports only have incidental and limited effects on how female athletes are accommodated.\textsuperscript{184}

\textsuperscript{177} Title IX of the Education Amendments of 1972, 44 Fed. Reg. at 71,418; Clarification, \textit{supra} note 146. See generally \textit{School Participation, supra} note 115.

\textsuperscript{178} \textit{School Participation, supra} note 115 (showing thirty boys participating in field hockey at eighteen schools).

\textsuperscript{179} See \textit{Clarification, supra} note 146.

\textsuperscript{180} See 34 C.F.R. § 106.41(c) (2012). See generally MIAA, \textit{Rules and Regulations Governing Athletics: A Handbook for Principals and Coaches of Schools That Are Members of the Massachusetts Interscholastic Athletic Association 7} (2011), available at http://www.miaa.net/contentm/easy_pages/view.php?sid=38&page_id=88 [hereinafter \textit{Handbook}] (implementing a number of rules and regulations on MIAA member schools but not placing requirements on factors which may impact effective accommodation). The only rules in the handbook that specifically relate to gender are those which establish what sports are offered for boys and girls and the rule requiring that boys and girls be allowed to try out for opposite sex teams. See \textit{Handbook, supra}, at 32, 40.

\textsuperscript{181} Reply Brief for Defendants, \textit{supra} note 151, at 15 (“The MIAA and MIAC exist for the purposes of overseeing interscholastic competition, not for local policy determinations.”).

\textsuperscript{182} See \textit{id}. (“[U]ltimate control of schools and school programs lies in the local community, with the School Committee and the administration, and ultimately with the voters of the community.”); \textit{Handbook, supra} note 180, at 32–33. See generally \textit{School Participation, supra} note 115 (showing wide differences in sport offerings among the MIAA member schools).

\textsuperscript{183} See 34 C.F.R. § 106.41(c); Reply Brief for Defendants, \textit{supra} note 151, at 15; \textit{Handbook, supra} note 180, at 32.

\textsuperscript{184} See Reply Brief for Defendants, \textit{supra} note 151, at 15; \textit{Survey, supra} note 50, at 1; \textit{Cullity, supra} note 1.
B. Policy Rationales for Interpreting the Massachusetts Equal Rights Amendment as Consistent with Title IX

The history of Title IX and the Massachusetts ERA are closely linked.\textsuperscript{185} Both provisions are products of the women’s rights movement.\textsuperscript{186} They share common political and intellectual proponents and are both aimed at providing expanded opportunity and equality for women within their respective scopes.\textsuperscript{187} As such, there is an inherent irony in using the language and interpretive regulations of Title IX to invalidate an interpretation of a state equal rights amendment that is consistent with the overarching goals of both laws.\textsuperscript{188}

Title IX and the Massachusetts ERA were both advanced during the women’s rights movement in the 1970s.\textsuperscript{189} Senator Birch Bayh, initially introduced the federal legislation as an amendment to a higher education bill and was a chief proponent of the legislation.\textsuperscript{190} In addition to acting as the chief supporter of Title IX, Senator Bayh was also involved in promoting the Equal Rights Amendment that Congress passed in 1972.\textsuperscript{191}

Many of the equal rights amendments, including Massachusetts’ ERA, that were added to state constitutions during this time period are closely related to the national ERA and mimic its language.\textsuperscript{192} The passage of the state amendments was largely meant as a show of soli-

\textsuperscript{185} See Cruikshank, supra note 18, at 45; Valentine, supra note 26, at 2; Committee to Ratify the Massachusetts State Equal Rights Amendment, A Report on the History and Impact of the Massachusetts Equal Rights Amendment 24 (1975) [hereinafter ERA Report]; Legislative Research Council, supra note 18, at 45–46.

\textsuperscript{186} See Valentine, supra note 26, at 1; ERA Report, supra note 185, at 39.

\textsuperscript{187} See Cruikshank, supra note 18, at 45; ERA Report, supra note 185, at 24; Legislative Research Council, supra note 18, at 45–46.

\textsuperscript{188} See MIAA, 393 N.E.2d at 296; 34 C.F.R. § 106.41(c) (2012); Legislative Research Council, supra note 18, at 45–46.

\textsuperscript{189} Valentine, supra note 26, at 1; ERA Report, supra note 185, at 39.

\textsuperscript{190} 118 Cong. Rec. 5802–08 (1972); Cruikshank, supra note 18, at 45.

\textsuperscript{191} See Proposed Amendment to the Constitution of the United States, 86 Stat. 1523 (1972); Amicus Curiae of Birch Bayh in Support of the Petitioner at 1, 3–4, Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (No. 02-1672). The Amendment passed both houses of Congress in 1972 and was ratified by thirty-five states, falling just short of the thirty-eight required to become an amendment to the Constitution. Cruikshank, supra note 18, at 45.

\textsuperscript{192} Gladstone, supra note 22, at 1–2. For example, the federal Equal Rights Amendment adopted by Congress and sent to the states for ratification read, “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex,” while the Massachusetts version reads, “Equality under the law shall not be denied or abridged because of sex . . . .” Mass. Const. pt. 1, art. I; Proposed Amendment to the Constitution of the United States, 86 Stat. 1523.
darity with the larger federal efforts.\textsuperscript{193} These amendments were
designed with the aim of protecting women from discriminatory treat-
ment.\textsuperscript{194} This goal is entirely consistent with the goals of Title IX.\textsuperscript{195}

Not only are the purposes the same, Title IX and the Massachu-
setts ERA also achieve many of the same goals.\textsuperscript{196} Both prohibit dis-
crimination against women in sports.\textsuperscript{197} They both allow women to try
out for sports teams when the sport is not a contact sport.\textsuperscript{198} Given the
similar goals of both laws, it would be inconsistent to allow a small dif-
ference of interpretation with a limited impact to undermine the en-
tire system of protection afforded by the Massachusetts ERA or that of
any state which applies a strict scrutiny approach to sexual classifica-
tions.\textsuperscript{199}

Furthermore, it is well established that states may offer greater
protections for the civil liberties of their citizens than those afforded
by the federal Constitution.\textsuperscript{200} With respect to Massachusetts’ ERA, it
is arguably more protective of sexual equality than the federal Equal
Protection Clause or Title IX.\textsuperscript{201} The Massachusetts ERA requires that
classifications based on sex be subjected to a more rigorous examina-
tion than is required by the United States Supreme Court.\textsuperscript{202} The Su-
preme Court, however, only applies intermediate scrutiny to laws that

\textsuperscript{193} Gladstone, supra note 22, at 3.
\textsuperscript{194} Id.
\textsuperscript{195} See 118 Cong. Rec. 5804; Cruikshank, supra note 18, at 43, 45.
\textsuperscript{197} Mass. Const. pt. 1, art. I; 20 U.S.C. § 1681 (2006); Opinion of Justices to the House of Representa-
tives, 371 N.E.2d at 429–30 (“A prohibition of all females from voluntary partici-
pation in a particular sport under every possible circumstance serves no compelling state
interest.”).
\textsuperscript{198} See Opinion of Justices to the House of Representatives, 371 N.E.2d at 429–30; 34 C.F.R. § 106.41(b).
\textsuperscript{200} Pyle v. Sch. Comm., 667 N.E.2d 869, 872 (Mass. 1996) (“Our legislature is free to
grant greater rights to the citizens of this Commonwealth than would otherwise be pro-
tected under the United States Constitution.”).
\textsuperscript{201} Mass. Const. pt. 1, art. I; 20 U.S.C. § 1681; see Palmore v. Sidoti, 466 U.S. 429, 432
(1984) (stating that beneficial racial classifications are “more likely to reflect racial preju-
dice than legitimate public concerns”); Craig v. Boren, 429 U.S. 190, 197 (1976) (applied
intermediate scrutiny to classifications based on sex under the federal Equal Protection
Clause); Korematsu v. United States, 323 U.S. 214, 216 (1944) (stating that classifications
based on race are inherently suspect and subject to the most rigid scrutiny); Opinion of
Justices to the House of Representatives, 371 N.E.2d at 428 (applying strict scrutiny under the
Massachusetts ERA to sexual classifications as protection beyond the Federal Equal Protec-
tion Clause).
\textsuperscript{202} Craig, 429 U.S. at 197; Opinion of Justices to the House of Representatives, 371 N.E.2d at
428.
utilize gender classifications, such as Title IX. Since Title IX operates within the federal intermediate scrutiny regime, it is arguably less protective of women’s equality than the Massachusetts scheme that applies strict scrutiny. As such, it would be highly improper for a law designed to protect women’s equality to be used to invalidate a scheme aimed at the same goal that offers even greater protections.

Although Massachusetts arguably offers greater protection against gender discrimination, this approach is not without negative consequences for girls. The story of Ben Menard and Corey Hedges stands as a reminder that although the Massachusetts ERA’s application to field hockey may be good policy, there are certain countervailing factors that may need to be addressed. The goal of promoting gender equality through the use of vigorous examination of all sex-based classifications is a strong protection, but does come with costs. Physiological differences between males and females that make the average male bigger, stronger, and faster than his female counterpart, may give a boy an inherent advantage while playing field hockey.

These advantages may allow boys to dominate play, as Ben Menard did for South Hadley, or increase the potential for injury to female opponents, such as the concussion suffered by Corey Hedges. Thus,

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203 Craig, 429 U.S. at 197.
204 Mass. Const. pt. 1, art. I; 20 U.S.C. § 1681 (2006); Craig, 429 U.S. at 197; Opinion of Justices to the House of Representatives, 371 N.E.2d at 428. Strict scrutiny is the level of analysis that is used for analyzing some of the most invidious governmental intrusions into the lives of individuals. See Griswold v. Connecticut, 381 U.S. 479, 497–98 (1965) (requiring a compelling governmental interest for encroachments on fundamental liberties protected by substantive due process); Korematsu, 323 U.S. at 216 (applying strict scrutiny to racial classifications). The federal courts use it to evaluate potential violations fundamental liberties as well as racial classifications analyzed under the Fourteenth Amendment Equal Protection Clause. See Griswold, 381 U.S. at 497–98; Korematsu, 323 U.S. at 215.
206 See Reply Brief for Defendants, supra note 151, at 7–8, 10, 12; see also Palmore, 466 U.S. at 432–33; Craig, 429 U.S. at 197; Korematsu, 323 U.S. at 215; Opinion of Justices to the House of Representatives, 371 N.E.2d at 428.
207 Cullity, supra note 1.
208 See MIAA, 393 N.E.2d at 296; Cullity, supra note 1.
209 Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977) (“[T]he evidence in this case has shown that males as a class tend to have an advantage in strength and speed over females as a class and that a collision between a male and a female would tend to be to the disadvantage of the female.”); MIAA, 393 N.E.2d at 293 (“No doubt biological circumstance does contribute to some overall male advantages.”); Cambridge Encyclopedia of Human Growth and Development, supra note 10, at 249–50; Gerber, supra note 10, at 426, 429, 450.
210 Cullity, supra note 1.
there are strong policy reasons for finding alternative methods to protect safety and participation opportunities without blanket prohibitions on boys’ participation in field hockey.211

IV. NON-GENDERED MEANS OF PROTECTING THE SAFETY & COMPETITIVENESS OF MIXED-GENDER SPORTS

Eliminating gender divisions in high school athletics raises valid concerns regarding the negative impacts of male participation in women’s sports.212 Male participation may increase the potential for injury to female participants and could lead to male domination of sports where females were formerly competitive.213 Although these concerns are valid, they do not justify blanket gender divisions.214 Such gender segregation is paternalistic and carries an inherent presumption that female participants need protection from male competition.215 A better approach would be to use classifications based on physical characteristics and an increased emphasis on multi-school teams.216

A. The Need to Ensure the Safety & Competitiveness of Girls’ Sports

Allowing boys to participate in girls’ sports poses challenges that are of great concern and deserve an adequate solution.217 Chief among

211 Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 293; 118 Cong. Rec. 5804 (1972).
212 Williams v. Sch. Dist., 998 F.2d 168, 178 (3d Cir. 1993) (noting the school district’s argument that if boys are allowed on the girls’ team and able to play, more girls will be unable to participate); Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977) (“[A] collision between a male and a female would tend to be to the disadvantage of the female.”); Attorney Gen. v. Mass. Interscholastic Athletic Ass’n (MIAA), 393 N.E.2d 284, 293–94 (Mass. 1979) (addressing argument that there is a connection between the presence of male athletes on a team and injury to females and that female participation could be swamped by boys in their sports).
213 See Williams, 998 F.2d at 178; Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 294.
215 See MIAA, 393 N.E.2d at 294 (“Any notion that young women are so inherently weak, delicate or physically inadequate that the state must protect them from the folly of participation in vigorous athletics in [sic] a cultural anachronism unrelated to reality.”) (quoting Hoover, 430 F. Supp. at 169).
217 See Williams, 998 F.2d at 178; Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 294; The Young Athlete, The American Academy of Orthopaedic Surgeons (July 2007),
these concerns are safety and competitiveness. Boys are on average, bigger, stronger, and faster than girls and this can increase the risk of injury for females playing sports with males. From professional to youth sports, head injuries, such as the concussion suffered by Corey Hedges, have become an increasing concern. Concussions can result in serious short and long-term symptoms. Repeated concussions can even lead to serious permanent conditions like Chronic Traumatic Encephalopathy ("CTE"), which can cause Parkinson’s disease, depression, and suicidal tendencies. The deaths of a number of professional athletes who suffered from CTE have highlighted the concern in recent years. High school athletes are not immune to CTE either. For example, a seventeen-year-old football player from Springhill, Kansas died hours after his homecoming game after a number of concussive hits to the head that had resulted in CTE.
Head injuries are not the only concern.\textsuperscript{226} Other more traditional sports injuries such as broken bones, sprains, and torn muscles and ligaments can result from high school athletics and these threats are magnified in mixed gender sports due to the physiological disadvantages for female participants.\textsuperscript{227} In light of these grave health consequences, schools must take serious steps to protect the safety of their student athletes.\textsuperscript{228}

Ensuring that female athletes remain competitive within their chosen sport is essential.\textsuperscript{229} Title IX requires that athletes be afforded a real opportunity to compete and not just an “illusory” opportunity to participate.\textsuperscript{230} If male athletes came to dominate field hockey, the female participants, even if not displaced from the team, would be denied an effective opportunity to be competitive in the sport.\textsuperscript{231} Being relegated to sitting on the bench does not promote the goals of Title IX, the Massachusetts ERA, or gender equality generally.\textsuperscript{232}

B. Alternative Means of Addressing the Policy Concerns Arising from Boys’ Participation in Field Hockey

Addressing safety and competitiveness concerns in states that allow male participation in female sports should be done in ways other than following strict gender divisions.\textsuperscript{233} Alternative methods include
placing restrictions on participants on the basis of physical characteristics and increasing the use of multi-school teams.\textsuperscript{234}

1. Physical Restrictions on Participation

One possibility for ensuring a safe and competitive environment for participants in high school athletics is placing limits on participation based on the physical characteristics of the athletes.\textsuperscript{235} Physical restrictions on the most gifted athletes in a sport would reduce injuries and increase competition by eliminating or handicapping players who could dominate on the basis of their size, strength, and athleticism.\textsuperscript{236}

Physical restrictions could take two forms.\textsuperscript{237} First, players either with or without certain physical characteristics could be excluded, for example those who were over a certain height, weight, strength, or speed threshold.\textsuperscript{238} Although such criteria are inexact proxies for athletic ability in a particular sport, the fact that these limitations are not based on a facial gender classification would help them survive constitutional scrutiny.\textsuperscript{239}

These restrictions are likely to disproportionately impact men due to the physiological differences in size and strength between men and women.\textsuperscript{240} Nevertheless, such restrictions are preferable because they would not constitute a blanket prohibition on male participation.\textsuperscript{241}

\begin{itemize}
\item \textsuperscript{234} See Hoover, 430 F. Supp. at 169; Brief for Plaintiffs-Appellants at 42, Attorney Gen. v. Mass. Interscholastic Athletic Ass’n, 393 N.E.2d 284 (Mass. 1979) (No. SJC-1650); Cooperative Teams, supra note 216, at 1–2.
\item \textsuperscript{235} See MIAA, 393 N.E.2d at 295; Pa. Interscholastic Athletic Ass’n, 334 A.2d at 843; Brief for Plaintiffs-Appellants, supra note 234, at 42.
\item \textsuperscript{236} See Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 295; Pa. Interscholastic Athletic Ass’n, 334 A.2d at 843; Brief for Plaintiffs-Appellants, supra note 234, at 42; Young Athlete, supra note 217.
\item \textsuperscript{237} See MIAA, 393 N.E.2d at 295; Brief for Plaintiffs-Appellants, supra note 234, at 42; Holmes, supra note 13.
\item \textsuperscript{238} See Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 295; Pa. Interscholastic Athletic Ass’n, 334 A.2d at 843; Brief for Plaintiffs-Appellants, supra note 234, at 42.
\item \textsuperscript{239} MIAA, 393 N.E.2d at 290; see Washington v. Davis, 426 U.S. 229, 242 (1976) (a facially neutral law having a differential impact, absent a showing of discriminatory purpose, must only be reasonably related to a legitimate governmental interest).
\item \textsuperscript{240} See Hoover, 430 F. Supp. at 169 (“[T]he evidence in this case has shown that males as a class tend to have an advantage in strength and speed over females as a class.”); MIAA, 393 N.E.2d at 293 (“No doubt biological circumstance does contribute to some overall male advantages.”); Cambridge Encyclopedia of Human Growth and Development, supra note 10, at 250; Gerber, supra note 10, at 426, 429, 450 (1974).
\item \textsuperscript{241} See Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 290; Pa. Interscholastic Athletic Ass’n, 334 A.2d at 843; Brief for Plaintiffs-Appellants, supra note 234, at 42.
\end{itemize}
Smaller, slower, weaker men would be able to participate while bigger, faster, stronger women would be barred.\textsuperscript{242} The result would promote a safe and competitive environment without using a strict gender division.\textsuperscript{243}

In the alternative, the state could place restrictions on participants who exceed certain physical criteria.\textsuperscript{244} In field hockey, for example, athletically dominant players could be handicapped by restricting how close they can get to the opposing goal.\textsuperscript{245} Additional restrictions and penalties for incidental contact with other players could also be implemented.\textsuperscript{246} Such rules have already been proposed in Massachusetts, but the proposals have been designed to apply only to boys, regardless of their physical ability.\textsuperscript{247} Implementing such rules on a gender-neutral basis, however, would prevent both conflicts with the state Equal Rights Amendment and avoid reinforcing gender stereotypes.\textsuperscript{248}

Despite its advantages, restricting players based on physical attributes has certain practical limitations on the abilities of both boys and girls to participate in sports.\textsuperscript{249} Specifically, individuals with superior physical characteristics in certain sports, such as height or weight, might be barred from playing certain sports.\textsuperscript{250} By limiting their opportunities to play and showcase their athletic talent, these restrictions could limit the abilities of those players to earn college scholarships, thus preventing them from pursuing higher education and earning a college degree.\textsuperscript{251}

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\item \textsuperscript{242} See Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 290; Pa. Interscholastic Athletic Ass’n, 334 A.2d at 843; Brief for Plaintiffs-Appellants, \textit{supra} note 234, at 42.
\item \textsuperscript{243} See Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 290; Pa. Interscholastic Athletic Ass’n, 334 A.2d at 843; Brief for Plaintiffs-Appellants, \textit{supra} note 234, at 42.
\item \textsuperscript{244} See Holmes, \textit{supra} note 13.
\item \textsuperscript{245} See id.
\item \textsuperscript{246} See id.
\item \textsuperscript{247} Id.
\item \textsuperscript{249} See \textit{Hoover}, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 290; \textit{Pa. Interscholastic Athletic Ass’n}, 334 A.2d at 843; Brief for Plaintiffs-Appellants, \textit{supra} note 234, at 42.
\item \textsuperscript{250} \textit{Hoover}, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 290; \textit{Pa. Interscholastic Athletic Ass’n}, 334 A.2d at 843; Brief for Plaintiffs-Appellants, \textit{supra} note 234, at 42.
\item \textsuperscript{251} See Alfred C. Yen, \textit{Early Scholarship Offers and the NCAA}, 52 B.C. L. Rev. 585, 586 (2011) (“These young recruits are, of course, very highly regarded athletes with special talent to offer universities.”).
\end{itemize}
\end{footnotesize}
2. Increased Use of Multi-School Teams

One option to avoid the negative impacts of implementing restrictions in high school sports on the basis of physical characteristics is increasing the use of multi-school teams.252 Currently, the MIAA allows such teams only in very limited circumstances when a school does not have sufficient players on its own to field a team.253 By loosening these restrictions, schools could more effectively pool together players to create all male teams in traditionally girls’ sports, or teams made up of the most physically gifted players who would be unable to play under the physical restrictions proposed earlier.254

Multi-school teams would allow schools to pool resources and players.255 Pooling the best players on multi-school teams has two benefits.256 First, by increasing the overall talent of top teams, it becomes less likely that boys would have a distinct advantage over their competition.257 Second, selecting players for top pooled teams is likely a more exact proxy for athletic ability than objective physical criteria.258 This is due to the fact that coaches would have an incentive to remove physically superior players from the school’s team in order to make the joint team more competitive.259 Schools could share coaching and equipment expenses, providing financially reasonable opportunities for the greatest number of students.260

The MIAA should allow schools to eschew the traditional school based teams where necessary and partner with surrounding schools to field teams that can operate effectively without utilizing gender stereotypes.261 These teams can promote safe and competitive environments

\[ \text{252 See Cooperative Teams, supra note 216, at 1–2.} \]
\[ \text{253 Id. at 1–4.} \]
\[ \text{254 See id. at 1–4.} \]
\[ \text{255 See Letter from Ken Slentz, to Subcommittee on State Aid, 3–4 (Apr. 20, 2012), available at http://www.regents.nysed.gov/meetings/2012Meetings/April2012/412sad2.pdf [hereinafter Slentz Letter] (discussing the benefits of regional school districts); see also Cooperative Teams, supra note 216, at 1–2.} \]
\[ \text{256 See Cullity, supra note 1.} \]
\[ \text{257 Id.} \]
\[ \text{259 See id.} \]
\[ \text{260 See Reply Brief for Defendants, supra note 151, at 16; Slentz Letter, supra note 255, at 3–4.} \]
\[ \text{261 See} \text{ Hoover, 430 F. Supp. at 169; MIAA, 393 N.E.2d at 293; Cooperative Teams, supra note 216, 1–2; Slentz Letter, supra note 255, at 3–5.} \]
while meeting the needs of their students.\textsuperscript{262} This multi-school system would meet the goals of both Title IX and the Massachusetts ERA.\textsuperscript{263} The multi-school system would provide meaningful opportunities for the maximum number of female athletes while also promoting a safe environment.\textsuperscript{264} Best of all, it does so in a gender-neutral manner that does not rely on paternalistic protections or outdated stereotypes of women as the “weaker sex.”\textsuperscript{265} In doing so, this system protects gender equality in Massachusetts and defends against the possible negative consequences of boys’ participation in girls’ sports.\textsuperscript{266}

\textbf{Conclusion}

Despite reaching different results on the issue of boys playing in girls’ sports, Title IX and the Massachusetts ERA are laws with a common history and goal. Both laws attempt to promote gender equality, but have different methods of accomplishing that goal. The MIAA policy allowing boys to try out for girls’ field hockey does not, in and of itself, create a violation of Title IX. Furthermore, given their shared intellectual foundation and goals, Title IX should not be used to promote gender segregation and reinforce gender stereotypes by invalidating an interpretation of a state ERA. Instead, potentially injurious consequences of allowing boys to play in girls’ sports should be controlled through non-gendered alternatives such as restrictions based on the physical characteristics of players or the increased use of multi-school teams.

\textsuperscript{262} See MIAA, 393 N.E.2d at 293; Cooperative Teams, supra note 216, 1–2.
\textsuperscript{264} See MIAA, 393 N.E.2d at 293; Letter from Norma V. Cantu, Assistant Sec’y for Civil Rights to Colleagues, supra note 152; Cullity, supra note 1.
\textsuperscript{265} See MIAA, 393 N.E.2d at 294; 118 Cong. Rec. 5804 (1972).
\textsuperscript{266} See Mass. Const. pt. 1, art. I; MIAA, 393 N.E.2d at 294; 118 Cong. Rec. 5804.