B. School Sports

ADAMS v. BAKER, 919 F. Supp. 1496 (D. Kan 1996).

THEIS, J.:

Plaintiff, Tiffany Adams ... [seeks a preliminary injunction] alleging that the defendant school district ... violated her right to equal protection by refusing to allow her to try out for the Valley Center High School wrestling team because of her gender.

... Adams is a fifteen-year-old ... freshman at Valley Center High School. [Valley Center] offers fifteen sports for student participation. Boys may participate in football, soccer, basketball, wrestling, tennis, and baseball. Volleyball, soccer, tennis, basketball, softball, and cheerleading are available for girls. There are also coed track, cross country and golf teams. The percentage of girls participating in sports at Valley Center High School over the last eight years has been roughly proportionate to the percentage of female students at the school. Female participation in sports is slightly lower than male participation if cheerleading is not counted.

Last school year, while in the eighth grade, plaintiff was a member of the Valley Center Junior High School wrestling team. Plaintiff compiled a record of five wins and three losses. Three the wins came by forfeit because some boys refused to compete against a girl in wrestling. Plaintiff lost one match to another female wrestler.

This school year plaintiff sought to try out for the high school wrestling team, but was prohibited from doing so. The only reason given for refusing to allow plaintiff's participation is her gender.

Carl Konecny was plaintiff's coach last year and is her coach again this season. Aside from the forfeits and a general apprehensiveness expressed in the coach's testimony, the record reflects no problems with plaintiff's participation on the wrestling team last season. ...

Konecny testified to problems that a male coach has with coaching a female wrestler. Konecny testified that sometimes there are enough boys at a wrestling meet that the boys must use both the boys' and girls' locker rooms. Konecny testified that treating injuries my involve touching the arms or chest area. Nevertheless, Konecny coached plaintiff last season and testified that he would be able to do so this season.

Konecny testified that he was concerned for plaintiff's safety because of a difference in lifting ability. On average, a high school boy who weighs 145 pounds can bench press over 200 pounds. Last year during the off-season, plaintiff could bench press only 120 pounds. However, there was no evidence regarding what weight plaintiff can lift now or what she would be able to do after conditioning. Furthermore, there was testimony that some boys are not as strong as others, and there was no evidence that boy's are required to demonstrate the ability to lift over 200 pounds in order to try out for the wrestling team.

Konecny testified that the sport of wrestling involves a risk of injury. He related that at a recent varsity meet, one boy bled from a cut above his eye. Another landed on

his head and was knocked unconscious. Konecny did not believe, however, that such injuries are more serious to girls than to boys.... Evidence was presented that there are over 800 girls competing in wrestling in the United states.... No boys have quit the Valley Center High School wrestling team because of female participation in the sport, although some have threatened to quit. Likewise, team members have not forfeited matches against female opponents....

Wrestling meets consist of matches between individual competitors. The decision of who wrestles whom is based on weight class. Within a given weight class, coaches try to pair up wrestlers according to their ratings. Therefore, Tiffany Adams, as a freshman wrestler, could potentially wrestle against seniors, who would have more experience. However, nothing in the record suggests that boys are not called to wrestle against more experienced competitors or that the lack of experience poses a particular danger to females. Furthermore, the coaches would endeavor to match her with an opponent of equivalent rating.

[School Superindendent Bob] Neel made the final decision not to allow plaintiff to wrestle after determining that Title IX [of the Education does not require coed participation in contact sports. Neel sent a memorandum to Howard Moon, the Valley Center High School principal, instructing him to permit only boys to wrestle at the high school, to continue efforts to form a girls wrestling program, and to encourage any girl wishing to wrestle to try out for the sports offered to girls.... Neel testified that in deciding to prohibit plaintiff from trying out, he considered several factors: parents' moral objections; the possibility of sexual harassment lawsuits; plaintiff's safety; that state law and Title IX do not require coed wrestling; and disruption of the school setting.

Neel testified that some parents had expressed moral objections to a girl wrestling on a boys team. Specifically, parents believed the sport involves' "improper touching" when between members of different genders. However, Neel acknowledged that wrestling is a sport rather than a sexual activity and that there are rules to be followed and officials present at matches to uphold those rules. Some parents were also concerned that from wrestling girls, their boys would learn to dominate women. The court finds that this is a pretextual concern and is itself based on the generalizations about the relative physical strength of males and females. ... Specifically, the belief that a boy, by competing against a female wrestler, would learn to dominate women is based on the assumption that the boy would win. ... Nevertheless, Neel testified that he did not base his decision on moral considerations.

... Neel testified that he was concerned [about sexual harassment lawsuits] because wrestling involves a great deal of physical contact. Neel considered the coach's exposure to liability. However, as stated above, wrestling is not a sexual activity. Neel admitted that a coach's duty is to teach the athlete. Furthermore, males coach females in other sports which also involve physical contact, particularly to. teach certain skills or moves, and Neel was aware of no lawsuits arising out of those situations.

Neel testified that he considered the plaintiff's safety. ... There is no evidence that plaintiff suffered more than minor injuries last season. There was testimony that because plaintiff could be competing against eighteen-year-old boys this season, she may be at greater risk of injury. However, because wrestling matches are based on weight class, plaintiff would not be wrestling boys who are significantly larger than her. Plaintiff could

potentially face an opponent who, as a senior, would be more experienced, but there is no reason to believe this would be more likely or more dangerous for a freshman girl than for a freshman boy.

... Finally, Neel testified that he believed allowing girls to participate in wrestling could lead to disruption of the school setting. However, he had no knowledge of any such disruption when plaintiff wrestled last season. Neel testified that the boys participating in wrestling had rights which should be considered. However, he admitted that among those is not the right to choose their opponents, particularly based on discriminatory reasons.

Howard Moon, the Valley Center High School principal, testified that he believed disruption of the wrestling program could result from plaintiff's participation because the boys could be embarrassed or humiliated or refuse to participate. Moon testified that a boy might be, humiliated if he lost a match to a female opponent....

Title IX of the Education Amendments Act of 1972 provides, in part, that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. Sec. 1681(a).

34 C.F.R. Sec. 106.41 deals specifically with athletic programs. Under Sec. 106.41(b), "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." Wrestling is, not surprisingly, defined as a contact sport. [Thus] Title IX does not require that Valley Center High School allow a female to try out for the boys wrestling team.

[However] Title IX does not simply limit the remedies available for equal protection violations in the context of school athletic programs. Rather, it actually defines equal opportunity, and the definition provided under Title IX is substantively different than the definition of equal protection, as set forth by the controlling case law.

... It is undisputed that the defendants seek to deny the plaintiff the opportunity to participate in wrestling on the basis of gender. A party seeking to uphold a classification based on gender carries the burden of showing an "exceedingly persuasive justification" for the classification. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Gender based discrimination is permissible only where the discrimination is "substantially related" to the achievement of "important governmental objectives." ... Defendants identified several rationales behind the decision to prohibit girls from wrestling at Valley Center High School. The reasons given were safety, fear of sexual harassment litigation, potential disruption of the school setting, student and parent objections based on moral beliefs, and a variety of inconveniences.

The court concludes that the last two rationales do not constitute "important governmental objectives" in this case. The school district certainly does not consider itself subject to every parental complaint or whim. Furthermore, it is not the duty of the school to shield students from every situation which they may find objectionable or embarrassing due to their own prejudices. The defendants also identified potential problems with coaching techniques, availability of locker room facilities and other inconveniences. However, the district's interest in avoiding such trivial problems is

hardly an important governmental objective. At any rate, according to the testimony of the defense witnesses, these problems could be overcome with minimal effort.

The court agrees that student safety is an important governmental objective.... However, the district's policy of prohibiting females from wrestling is not substantially related to that objective. The defendants' only evidence that plaintiff's safety is at greater risk because of her gender is based on generalized assumptions about the differences between males and females regarding physical strength. The evidence shows that some females are stronger than some males. The school can take into account differences of size, strength, and experience without assuming those qualities based on gender. Furthermore, there was evidence presented of injuries boys have sustained while wrestling, and it is certainly improper to subject boys to greater danger than girls. [T]he defendants' safety arguments "suggest the very sort of well-meaning but overly 'paternalistic' attitude about females which the Supreme Court has viewed with such concern."

Likewise, a school district has an interest in avoiding sexual harassment litigation. However, prohibiting female participation in activities is not substantially related to that goal. The evidence before the court stated the obvious, that wrestling is an athletic activity and not a sexual activity. There is no reason to suspect that girls who seek to join the wrestling team would be likely mistake the contact which is inherent in the sport for sexual misconduct. A school district best avoids sexual harassment litigation by acting to prevent sexual harassment rather than excluding females from participating in activities.

Finally, the court concludes that the defendants' actions are not substantially related to the goal of avoiding disruption of the school setting. According to the defense witnesses' testimony, there was no such disruption when plaintiff wrestled last year. Furthermore, the only evidence of potential disruption this year is the suggestion that some boys may quit the wrestling team if plaintiff is allowed to participate, which the court concludes does not really constitute disruption of the school setting at all. A gender-based classification simply is not necessary to keep Valley Center High School running smoothly.

...

The defendants are hereby preliminarily enjoined from denying the plaintiff, on the basis of gender, the opportunity to participate in wrestling at Valley Center High School.

Discussion:

1. *Protecting the Interests of Women?* With *Adams* compare Petrie v. Illinois High School Association 75 Ill. App. 3d 980; 394 N.E.2d 855 (Ill. App. 1979), in which Trent Petrie sought to try out for the girl's volleyball team (there being no boy's team). The court considered the case both under the Federal Equal Protection Clause and under the Illinois Constitution, which required strict scrutiny for classifications based on sex. Nevertheless, it decided against the plaintiff based on the importance of "maintaining, fostering and promoting athletic opportunities for girls":

The exclusion of girls from boys' teams was generally sought on grounds that girls, as a group, were less capable than boys at the sports involved and, in the contact sports, that they were more prone to injury. [But the] blanket prohibition placed a stigma of inferiority on girls... [N]ot all girls were of a physique making them excessively injury prone and ... no objective standards had been set forth to eliminate the more frail boys.

Here, boys were the excluded class and their exclusion was made not because they were not likely to be good enough but because they were likely to be too good to permit adequate opportunities for girls. [T]he exclusion here carries no stigma of unworthiness to the excluded class. [Other courts have pointed out that] "[a]t the high school level, the average male is objectively more physically capable than the average female. Open competition would, in all probability, relegate the majority of females to second class positions as benchwarmers or spectators." ... As the Sixth Circuit noted in the context of basketball, "were play and competition not separated by sex, the great bulk of the females would quickly be eliminated from participation and denied any meaningful opportunity for athletic involvement."

[Under] strict scrutiny test... the question is a close one. Yet there is a long-standing standing international and national tradition of having separate teams for males and females...

Although we recognize that high school girls have no general disadvantage as to balance, coordination, strategic acumen, or quickness (as distinguished from running speed), we agree that they are generally at a substantial physical disadvantage in playing volleyball.... [I]n the high school track season previous to the trial, none of the girls'State record holders in track and field "would have qualified in any event for the boys' state track and field meet." Evidence in the instant case of isolated instances of male participation upon girls' teams creating an advantage for those teams indicated the likelihood of similar results if any substantial number of males chose to participate in volleyball.

[Limiting] membership to girls is consistent with a long-standing tradition in sports of setting up classifications whereby persons having objectively measured characteristics likely to make them more proficient are eliminated from certain classes of competition. Heavier persons are prohibited from competing in lighter weight classes in wrestling and boxing. [A] system of measurement to put girls into classes whereby they would be on a physical par with males who would compete in that class would be too difficult to devise. Although systems of handicapping based on measurable prior performance such as golf or bowling scores are used, in those sports and in other individual sports, ratings can be obtained on the basis of prior performance. In team sports, however, any rating of players could only be done on a very subjective basis and would not be practical. Furthermore, even in the individual sports, a system of rating and handicapping places a premium on poor prior performance and is inconsistent with a system of full competition which boys have had for years and which girls are seeking to achieve.

> The classification of public high school athletic teams upon the basis of gender in sports such as volleyball is itself based on the innate physical differences between the sexes. It is not based on generalizations that are "archaic" nor does it represent an attitude of " romantic paternalism." Like all systems of classifications for competition, it is overbroad and underbroad in that it includes females who are athletically superior to many males and excludes males who are less well-endowed athletically than most females. However, we are convinced that it is the only feasible classification to promote the legitimate and substantial State interest of providing for interscholastic athletic opportunity for girls.
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> Schools could have varsity, subvarsity and lesser levels of varsity squads, and no doubt eventually provide the opportunity for a very substantial number of girls to compete in each sport. We must recognize, however, that public institutions have a limited amount of funds and it is common knowledge that many school districts are extremely pressed to maintain their present programs. The extra expense of having this number of squads is obvious....
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> Plaintiff... suggest[s] a means of giving boys an opportunity to play volleyball through a quota system. [V]olleyball with [gender] quotas raises the question of the proper height of the net to accommodate the general size disparities between the sexes. When volleyball with gender quotas as to players has been played for recreation, spiking by men has been barred. When it has been played professionally, the females have been relegated to the back court. Either way, the game is watered down to the detriment of females. Each position occupied by a male reduces the female participation and increases the overall disparity of athletic opportunity which generally exists. We reject a quota system as a viable method of equalizing athletic opportunity between the sexes.

The court concluded that not only could the school exclude men from the girls volleyball team, but that the school could do so even if the school did not provide a separate volleyball team for boys. Putting schools to the choice of either an integrated teams or separate but equal teams would have unacceptable consequences:

> We also deem to be unworkable a system whereby boys would be permitted to play on so-called girls' teams in schools where the combination of financial restraints and lack of interest of boys in volleyball dictates having no boys' volleyball team. The IHSA [Illinois High School Association] system of tournament play is presumably now designed to give girls the opportunity to enjoy the highly competitive play previously available only to boys. Because of the innate advantage in volleyball which many boys possess over many girls, permitting boys to play under certain circumstances would place a substantial competitive premium upon schools placing themselves in that position. It is unrealistic to assume that IHSA can plan for a fairly conducted tournament with each school free to choose whether, under their particular circumstances, boys should be allowed to compete on their "girls'" team.

Justice Craven dissented:

> Defendants here argue that boys must be excluded from the all-girl volleyball team in order to allow the girls a fair chance to compete. In support of their position, they cite statistics on the relative height, strength, and physical development of the average male and the average female of high school age. In short, their position is actually not that they are protecting girls from boys or vice versa, but rather that they are protecting weaker from stronger athletes. The fallacy in their position is revealed by the fact that, although the differences in size and strength within each sex are shown by the evidence to be greater than the differences between the averages for the two sexes, no provision has been made to protect smaller, weaker females from competition with larger, stronger females, or smaller, weaker males from competition with larger, stronger males.....
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> Surely, not even the majority here, nor society generally, would condone the exclusion of blacks from an all-white basketball team on the grounds that blacks generally are more skilled at the game than whites and might tend to dominate it. Nor would we tolerate an exclusion of Catholics from an all-Protestant high school soccer team on the grounds that Catholic elementary schools have traditionally emphasized that sport so as to give their graduates an unfair advantage.
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> Under the Equal Protection Clause, is there any justification for requiring that women be permitted to try out for (what were previously regarded as) "boys teams" without allowing boys to try out for women's teams? Is a combination of integrated and women-only teams consistent with the Constitution?

2. *The interests of women "as a whole"?* The effect of the majority position in *Petrie* is that women with above average athletic ability in a particular sport can nevertheless be denied access to men's teams in order to protect the athletic opportunities of women as a group. In O'Connor v. Board of Education, 449 U.S. 1301 (1980), Justice Stevens, sitting as Justice for the Seventh Circuit, denied an application to vacate the stay of a preliminary injunction in favor of a woman who sought a right to play on the boy's basketball team at her school. Stevens noted that "without a gender-based classification in competitive contact sports," boys might well "dominate the girls programs and deny them an equal opportunity to compete in interscholastic events." Hence "[i]f the classification is reasonable in substantially all its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case." Do you think this tradeoff is justified? Is Stevens' argument consistent with Justice Ginsburg's opinion in *United States v. Virginia*?

3. *Title IX*. As opinion in *Adams* suggests, most litigation concerning equal opportunity for women in school sports is conducted through Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681 et seq. Title IX provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C.A. Sec. 1681(a). Thus, Title IX applies not only to state actors but to private organizations that receive federal funds.

Title IX and its associated regulations attempt to solve some of the problems outlined in *Petrie* by an elaborate series of regulatory compromises that attempt to measure when a university is providing equal opportunity to female and male athletes even though it does not provide women's and men's teams for every sport.

For example, Title IX's athletic regulations, 34 C.F.R. § 106.41, provide:

> (a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
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> (b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection of 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.
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> c) Equal Opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
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> (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 for 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.
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> Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

Note carefully the balance of factors and the discretion they allow for unequal facilities and expenditures. Are these regulations consistent with the requirements of the Equal Protection Clause?