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# Irrebuttable Presumption Doctrine: Applied to State and Federal Regulations excluding Females from Contact Sports

Elizabeth J. Henley
*University of Dayton*

# NOTES

**IRREBUTTABLE PRESUMPTION DOCTRINE:** APPLIED TO STATE AND FEDERAL REGULATIONS EXCLUDING FEMALES FROM CONTACT SPORTS—*Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*, 443 F. Supp. 753 (S.D. Ohio 1978).

## I. INTRODUCTION

Since the early part of this decade, state high school athletic association rules barring females from participation in various interscholastic sports have been invalidated at both the state[1] and federal[2] level. The recent federal district court decision in *Yellow Springs Exempted Village School District Board of Education v. Ohio High School Athletic Association*[3] conforms to this trend by requiring equal opportunity for females in state high school athletics. Judicial invalidation of these discriminatory regulations has generally been based on one of the various state laws prohibiting sex discrimination[4] or on the equal protection clause of the fourteenth amendment to the United States Constitution.[5] In contrast, the court in *Yellow Springs* found that an Ohio High School Athletic Association rule, by creating an irrebuttable presumption of female nonqualification, violated the due process clause of the fourteenth amendment.[6] Moreover, the court extended its decision beyond the challenged state regulation to find that 45 C.F.R. section 86.41(b),[7] a federal administrative guideline for providing equal athletic opportunity in public schools, violates the due process clause of the fifth amendment to the United States Constitution[8] to the extent that it authorizes the exclusion of females from

1. *E.g.*, Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975); Commonwealth v. Pennsylvania Interscholastic Athletic Assoc., 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975).

2. *E.g.*, Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Reed v. Nebraska School Activities Assoc., 341 F. Supp. 258 (D. Neb. 1972).

3. 443 F. Supp. 753 (S.D. Ohio 1978).

4. *See* cases cited note 1 *supra.*

5. *See* cases cited note 2 *supra.*

6. U.S. CONST. amend. XIV § 1 provides that: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

7. See note 17 *infra.* An unusual aspect of the court's consideration of 45 C.F.R. § 86.41(b) is that the constitutionality of this regulation was not raised by the parties. For this reason it is questionable whether the appellate court will review this part of the decision.

8. U.S. CONST. amend. V provides in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law."

contact sports. *Yellow Springs* is the first recorded decision to consider the constitutionality of this federal regulation.

This casenote will examine both findings of the court, each of which break new judicial ground in the area of sports. The distinctions in methodology and effect between an equal protection analysis and a due process analysis will be discussed in order to compare the two different approaches to invalidation of sexually discriminatory athletic rules. Then the specific language of 45 C.F.R. section 86.41(b) and related sections[9] will be examined in reviewing the *Yellow Springs* court's decision that this federal regulation is unconstitutional.

## II. FACTUAL BACKGROUND

In 1974 two female students qualified for positions on an interscholastic basketball team in a school within the jurisdiction of the Yellow Springs School Board. However, their membership on the team violated an Ohio High School Athletic Association rule prohibiting females from participating in contact sports.[10] Noncompliance with this regulation would have excluded the basketball team from interscholastic competition and might have resulted in the suspension of the school from the state athletic association. To avoid such consequences, the board of education excluded the girls from the team and created a separate girls team on which they could participate. Subsequently, the board brought a class action suit against the athletic association and various "State defendants,"[11] alleging that the regulation violated both the equal protection clause and due process clause of the fourteenth amendment.

## III. DECISION OF THE COURT

The fourteenth amendment states that "No state shall . . . deprive any person of life, liberty, or property, without due process of law."[12] One of the liberty interests protected by the due process clause is freedom of choice in matters of "education and the acquisition of knowledge."[13] Relying on this principle, the court in *Yellow Springs* determined that the athletic regulation which arbitrarily excluded girls

9. 45 C.F.R. §§ 86.41(a), (c) (1976).

10. Ohio High School Athletic Association (O.H.S.A.A.) Rule 1 § 6: "In all contact sports (Football, Wrestling, Ice Hockey and Basketball) team members shall be boys only."

11. Other defendants included the Ohio Board of Education, the Ohio Department of Education, and two of its officers: the Superintendent of Public Instruction, and the Director of Health, Physical Education, and Recreation.

12. U.S. CONST. amend. XIV § 1.

13. 443 F. Supp. at 760 (*citing* Meyer v. Nebraska, 262 U.S. 390, 400 (1923)).

from interscholastic teams in contact sports denied them the freedom of choice in a protected interest.[14]

The court recognized, however, that deprivation of liberty is allowed if based upon a sufficiently important governmental interest. Two possible governmental interests underlying the arbitrary exclusion of girls from contact sports were considered by the court: maximization of female athletic opportunities and prevention of injuries.[15] Although recognizing the legitimacy of these goals, the court determined that the approach of the rule to both these possible interests was predicated upon an irrebuttable presumption that girls are athletically inferior to boys. Because this conclusive presumption is not universally true, and could be rebutted if girls were given an opportunity to compete with boys, the court found that the presumption denied girls a protected liberty interest without due process of law. Due process requires that a girl be given the procedural opportunity to show whether or not she is qualified. The court invalidated the athletic regulation based on this unconstitutional presumption and determined that girls who are qualified must be allowed to compete with boys in interscholastic sports.[16]

The Yellow Springs School Board argued that the athletic association rule not only violated the fourteenth amendment, but that it also conflicted with 45 C.F.R. section 86.41(b).[17] The school board interpreted this federal regulation as permissive, allowing each school to decide whether to permit girls to compete with boys in contact sports.[18]

14. 443 F. Supp. at 760.

15. *Id.* at 758. Neither of these state goals were argued by the defendants. The thrust of their defense was the O.H.S.A.A. Rule 1 § 6, although it prohibits mixed teams in contact sports, does not preclude separate teams. Accordingly, defendants argued that O.H.S.A.A. Rule 1 § 6 does not conflict with 45 C.F.R. § 86.41(b); as contended by the plaintiffs. Defendants Motion for Summary Judgement at 6-7, Yellow Springs exempted Village School Dist. Bd. of Educ. v. O.H.S.A.A., 443 F. Supp. 753 (S.D. Ohio 1978) [hereinafter referred to as Defendant's Motion for Summary Judgment]. *See* notes 17-20 *infra* and accompanying text for plaintiff's contentions.

16. 443 F. Supp. at 760.

17. 45 C.F.R. § 86.41(b) provides that, despite the general admonition against sex discrimination in athletics announced in 45 C.F.R. § 86.41(a),

> [A] recipient may operate or sponsor teams for members of each sex where selection for such teams is based on competitive skill or the activity involved is a contact sport. However, where a recipient oprates 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 purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of the major activity of which involves bodily contact.

18. Complaint at 6-12; Plaintiff's Motion for Summary Judgment at 8-11(a), Yellow Springs Exempted Village School Dist. Bd. of Educ. v. O.H.S.A.A., 443 F.

Because the state regulation absolutely prohibited girls from participating in contact sports, the school board contended that this rule conflicted with the federal regulation, and that under the supremacy clause of the United States Constitution[19] the permissive federal regulation superseded the compulsory state regulation.[20] The court stated that it was unnecessary to decide the validity of this supremacy clause argument because the federal regulation, to the extent that it authorized schools to deny qualified girls from competing in contact sports with males, violated the due process clause.[21]

## IV. EQUAL PROTECTION OR IRREBUTTABLE PRESUMPTION?

The underlying policy in invalidating athletic classifications based on sex is that eligibility to play a sport must be based upon individualized determinations. Courts have generally invalidated sexually discriminatory athletic rules through the equal protection analysis.[22] A review of the factors involved in both equal protection and due process analyses illustrates why the latter is a more effective method for invalidating sex-based classifications such as the athletic regulation considered in *Yellow Springs.*

### *A. The Equal Protection Analysis*

The equal protection clause does not require that there be absolute equality under the laws.[23] It does require that a law treat alike all persons who are similarly situated with respect to the purpose of the statute.[24] The government often must classify citizens into groups and, on the basis of the classification, treat one group differently from another.[25] In deciding whether this different treatment violates the equal protection clause, the Supreme Court has developed different standards of review. Where a statute discriminates against a category drawn by race[26] or national origin,[27] the classification is considered

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Supp. 753 (S.D. Ohio 1978) [hereinafter cited as Complaint and Plaintiff's Motion for Summary Judgment].

19. U.S. CONST. art. VI, cl. 2 provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

20. Complaint at 13-14; Plaintiff's Motion for Summary Judgment at 12-16.

21. 443 F. Supp. at 761.

22. *See* note 2 *supra.*

23. Reed v. Reed, 404 U.S. 71, 75-76 (1971).

24. Yick Wo v. Hopkins, 118 U.S. 356, 368 (1886).

25. Walters v. City of St. Louis, 347 U.S. 231, 237 (1954).

26. Loving v. Virginia, 388 U.S. 1 (1967).

27. Oyama v. California, 332 U.S. 633 (1948).

"suspect" and will be subject to strict judicial scrutiny.[28] Strict scrutiny will also be applied where the classification affects a fundamental constitutional right.[29] Under the strict scrutiny standard the burden is on the state to show that the classification is necessary for the accomplishment of compelling state interest. Where fundamental rights or suspect classifications are not in issue, the minimum rationality test is applied. Thus, the legislative classification will be upheld unless it is shown to be patently arbitrary and to bear no rational relationship to a legitimate government interest.[30]

Because the Supreme Court has not found sex to be a suspect classification,[31] and because education is not considered a fundamental right,[32] the strict scrutiny test has been applied in only a few decisions concerning sexual discrimination in school athletics.[33] Relying on the less strict minimum rationality test, many courts have upheld sexually discriminatory athletic rules.[34]

Judicial approval of sex-based classifications based on the minimum rationality test has been the subject of much criticism.[35] Some state courts[36] and federal courts[37] have recognized that discrimination based on sex operates in the same manner as discrimination based on the suspect classifications of race and national origin. Like the latter classifications, sex is an immutable, visible characteristic

28. *See* Regents of Univ. of Cal. v. Bakke, 98 S. Ct. 2733, 2749 (1978).

29. *See* Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Shapiro v. Thompson 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

30. *See e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970) (ceiling on welfare funds that could be received by any one family did not impermissibly discriminate against large families); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday Blue Laws did not discriminate in favor of certain types of businesses).

31. Frontiero v. Richardson, 411 U.S. 677 (1973) (only four Justices concurred in declaring that sex is a suspect classification).

32. San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

33. Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973); Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1974).

34. Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), *aff'd* 516 F.2d 1328 (3d Cir. 1975) (classification rational on basis that competition with boys would expose girls to injury); Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973) (purpose of encouraging girls to compete in their own class sufficient for sex-based classification); Bucha v. Illinois High School Assoc., 351 F. Supp. 69 (D.C. Ill. 1972) (physical and psychological differences between the sexes justified exclusion of girls from boys' swimming team).

35. *See, e.g.*, Kanowitz, *Constitutional Aspects of Sex-Based Discrimination in American Law*, 48 NEB. L. REV. 131 (1968).

36. Sail'er Inn Inc. v. Kerby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971); *see* Commonwealth v. Daniel, 430 Pa. 642, 243 A.2d 400 (1968); Pittsburg Press Co. v. Pitssburg Comm'n on Human Relations, 4 Pa. Commw. Ct. 448, 287 A.2d 161 (1972). *aff'd on other grounds*, 413 U.S. 376 (1973).

which results in widespread stereotyping and disregard for individual ability.

Reacting to this criticism, the Supreme Court has chosen to follow a middle route between strict scrutiny and minimum rationality in sexual discrimination cases. In *Reed v. Reed,*[38] the Court invalidated a sex-based classification because it did not have a "fair and substantial relation to the object of the legislation, so that all persons in similar circumstances shall be treated alike."[39] Five years later the Court adopted a somewhat stricter standard of review in *Craig v. Boren,*[40] in which a specific standard for sex-based classifications was articulated. "Classifications by gender must serve important government objectives and must be substantially related to the achievement of those objectives."[41]

If the court in *Yellow Springs* had decided the issue on equal protection grounds, it probably would have used the standard set by *Craig v. Boren*, the Supreme Court's most recent pronouncement which explicitly refers to sex-based classifications. The *Yellow Springs* court, however, did not choose to apply an equal protection standard or to engage in a complicated analysis of state goals and their relationship to the sex-based classifications. Instead it invalidated the athletic regulation as an unconstitutional irrebuttable presumption. By using this basis for invalidation, the court followed such Supreme Court decisions as *Stanley v. Illinois,*[42] *Vlandis v. Kline,*[43] and *Cleveland Board of Education v. La Fleur.*[44]

### B. *The Irrebuttable Presumption Analysis*

Although the equal protection clause and the irrebuttable presumption doctrine are both utilized in striking down unconstitutional statutory classifications, significant differences exist between these two methods of judicial review. An irrebuttable presumption is one that is neither necessarily nor universally true of all members of the class

37. *See, e.g.,* Wisenfeld v. Secretary of Health, Education and Welfare, 367 F. Supp. 981 (D.N.J. 1973) *aff'd*, 420 U.S. 636 (1975); United States v. York, 281 F. Supp. 8 (D. Conn. 1968).

38. 404 U.S. 71 (1971).

39. *Id.* at 76.

40. 429 U.S. 190 (1976).

41. *Id.* at 197.

42. 405 U.S. 645 (1972) (Illinois statute irrebuttably presumed that unwed fathers are unfit parents).

43. 412 U.S. 441 (1973) (Connecticut statute irrebuttably presumed that non-resident students at time of application to state university remained non-residents).

44. 414 U.S. 632 (1974) (mandatory maternity leave regulation irrebuttably presumed that pregnant teachers are physically unfit to teach).

which it encompasses, but which nevertheless precludes an individual from presenting contrary proof.[45] If the irrebuttable presumption is invalid as to but one person, than that person has been denied his right to a fair hearing guaranteed by the due process clause of the fourteenth amendment.[46] Applying this reasoning, the Supreme Court invalidated a mandatory maternity leave regulation in *La Fleur* on the basis that the rule was predicated on an irrebuttable presumption that all teachers beyond the fourth month of pregnancy are physically incapable of teaching.[47]

Viewed in this light, the irrebuttable presumption doctrine is relatively simple compared to the complexities involved with the various equal protection tests, and thus it is a more efficient means of invalidation. Irrebuttable presumption as a method of statutory analysis, however, has been subjected to two strong criticisms. These arguments, even if plausible as general propositions, are inapplicable to situations in which the irrebuttable presumption analysis is used to invalidate gender-based athletic regulations.

The foremost criticism is that the irrebuttable presumption doctrine is actually an attack on lawmaking itself.[48] That is, because practically all laws contain classifications which are not universally true, the irrebuttable presumption doctrine could be used indiscriminately to strike down legislation.[49] A statute capable of passing the most stringent equal protection test could nevertheless be invalidated using an irrebuttable presumption analysis.[50] Justice Rehnquist, strongly dissenting in *La Fleur*, envisioned invalidation of such laws as those prescribing age limits for voting, marriage, drivers' licences and the purchase of alcholic beverages.[51]

This indiscriminate invalidation argument is weakened by other factors involved in an irrebuttable presumption analysis. Such an

45. 4 WIGMORE, EVIDENCE § 1358 (Chadbourne rev. 1972); *see* Keeton, *Statutory Presumptions—Their Constitutionality and Legal Effect,* 10 TEX. L. REV. 34 (1931).

46. *See, e.g.,* Bell v. Burson, 402 U.S. 535 (1971) (revocation of drivers' licenses); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (summary termination of welfare benefits); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (pretrial garnishment of wages).

47. *See* note 45 *supra.*

48. *See, e.g.,* 412 U.S. at 462 (dissent, C.J. Burger); Comment, *Some Thoughts on the Emerging Irrebuttable Presumption Doctrine,* 7 IND. L. REV. 644 (1974); Comment, *Constitutional Law: The Irrebuttable Presumption—An Alternative to Equal Protection,* 14 WASHBURN L.J. 141 (1975); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?,* 72 MICH. L. REV. 800 (1974).

49. *See* cases and authorities cited note 48 *supra.*

50. Note, *An Inquiry Into the Use of the Irrebuttable Presumption Doctrine as a Due Process Standard,* 7 COLUM. HUMAN RIGHTS L. REV. 365, 385-86 (1975).

51. 414 U.S. at 658-59.

analysis requires individual determination only when it is a reasonable alternative to the arbitrary classification.[52] Because the Supreme Court has recognized administrative efficiency as a valid state goal,[53] a presumption would probably be upheld if individual determinations would create burdensome administrative problems. And if such an interest is joined with another valid state interest, such as protection of public health and welfare, then it is even more probable that the presumption would be upheld.[54]

Considering these factors, it is highly unlikely that statutes such as those prescribing age requirements would be invalidated through the use of the irrebuttable presumption analysis. Overwhelming administrative problems and the government's interest in insuring that only mature, responsible people exercise certain rights and privileges would outweigh the need for individualized determinations. Furthermore, any standard established to test each person's qualifications would likely be as arbitrary as the age requirement.[55]

On the other hand, an athletic association rule excluding female students from participation in interscholastic contact sports is appropriately subject to an irrebuttable presumption analysis. Permitting qualified females to participate would create no greater administrative problems than those which already exist. Individual, objective determinations are made for males; such determinations could just as easily be made for females. Although the state has an interest in protecting the health and welfare of female athletes, it also has a similar interest in protecting male athletes. Even weak and handicapped[56] boys are at least given a chance to qualify. Thus, determination on an individual basis for both sexes is a reasonable alternative to a regulation which arbitrarily excludes all females.

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52. 412 U.S. at 452.

53. *Id.* at 451; 405 U.S. at 656.

54. Note, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to La Fleur,* 62 GEO. L.J. 1173, 1200 (1974).

55. For example, the eighteen year old voting requirement is arguably based upon two presumptions: 1) persons below this age are financially dependent and don't actually have a "stake" in the election outcome, and 2) those under this age are not sufficiently politically informed to make a rational decision at the polls. The first presumption might be easily rebutted by proof of employment or financial responsibilities. But attempting to test a nebulous concept such as politicial awareness would be extremely difficult and the test itself would necessarily be subjective and arbitrary.

56. Section 504 of the Rehabilitation Act of 1973 was designed to eliminate discrimination on the basis of handicap in any federally funded program or activity. 29 U.S.C. § 794 (1976). If a recipient offers athletics or similar programs, it must provide qualified handicapped students an equal opportunity to participate in those programs. 45 C.F.R. § 84.37(c)(1) (1977). HEW's official interpretation of this regulation provides: "Students who have lost an organ, limb, or appendage but who are otherwise qualified, may not be excluded from contact sports . . . ." 43 Fed. Reg. 36035 (1978).

A second criticism of the irrebuttable presumption analysis is that invalidation of a statute on that basis may simply result in a reenactment of the presumption in a modified form.[57] The statute could be modified by merely placing the burden of proof on the individual to show that the presumption is invalid as applied to him or her.[58] If the statute were invalidated on an equal protection basis, however, the court would have to hold that there existed no rational relationship between the statute and a legitimate state interest, thus resulting in total invalidation of the statute.[59]

The possibility of reenacting the presumption may be of some significance in situations where proof of qualification is not generally required. In *La Fleur* the mandatory leave regulation could merely be modified to include a provision requiring the teacher to demonstrate her physical capability, although nonpregnant teachers are presumed to be physically qualified. Similarly, in *Stanley v. Illinois*,[60] where the Supreme Court invalidated a statute which conclusively presumed that unmarried fathers are unfit parents for child custody purposes,[61] the state could still require proof of parental competency from unmarried fathers, but not from married fathers. It is possible that the revised statutes in both of these situations could be attacked on equal protecton grounds.[62]

In athletics there is, in effect, a presumption that no one is qualified because all prospective participants must prove their abilities before team membership is granted. Therefore, invalidating a sexually discriminatory regulation on an irrebuttable presumption basis merely places females on the same footing as males; members of both sexes must qualify before they can participate. An irrebuttable presumption of nonqualification is merely altered to a rebuttable one which applies to males as well as females. Invalidation on equal protection grounds would be no more complete because females would still be required to prove their capabilities in order to become team members.

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57. *See* Note, *supra* note 54, at 1199.
58. *Id.*
59. *Id.*
60. 405 U.S. 645 (1972).
61. *Id.*
62. These statutes would be similar to the one invalidated on due process grounds by the Supreme Court in Frontiero v. Richardson, 411 U.S. 677 (1973). The statute there provided that spouses of male members of the armed services are presumed to be dependent for the purposes of obtaining increased benefits, while female members of the same service must prove that their husbands are actually dependent for over one half of their support in order to receive the same benefits.

## V. 45 C.F.R. SECTION 86.41(b) AND TITLE IX

Perhaps the most controversial aspect of female participation in athletics is in the area of contact sports. Stereotypical views of women are not really challenged by the notion of a woman competing against a man in a mannerly round of golf, but the vision of a woman "suiting up" for football shatters traditional concepts of femininity. Therefore, it is not surprising that some courts have permitted the exclusion of females from contact sports.[63] Nevertheless, a fairly substantial number of courts have granted injunctions enabling the challenging female to participate in a particular contact sport,[64] and other courts have totally invalidated athletic regulations excluding females from participation.[65] The court in *Yellow Springs* not only invalidated the athletic regulation, but also found that 45 C.F.R. section 86.41(b) is unconstitutional to the extent that it authorizes a recipient of federal aid to exclude females from contact sports.

Subsection (b) of 45 C.F.R. section 86.41 is one of the numerous regulations implementing Title IX of the Education Amendments of 1972.[66] Generally, Title IX was designed to eliminate sexual discrimination in any educational program or activity. Senator Birch Bayh, the sponsor of Title IX stated that it is "an important first step in the effort to provide the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want."[67]

Paradoxically, section 86.41(b), a regulation implementing Title IX, violates this legislative intent and is itself subject to a due process challenge because it permits a sex-based classification. This regulation authorizes separate teams for each sex "where selection for such teams is based upon competitive skill or where the activity involved is a contact sport."[68] Section 86.41(b) further provides that if only one team is provided in a particular sport, and the sport had previously been limited to one sex, members of the excluded sex "must be allowed to try out for the team offered unless the sport involved is a contact sport."[69]

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63. *E.g.*, Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), *aff'd*, 516 F.2d 1328 (3d Cir. 1975).

64. *E.g.*, Carnes v. Tennessee Secondary School Atheletic Assoc., 415 F. Supp. 569 (E.D. Tenn. 1976); Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974).

65. *E.g.*, Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Gilpin v. Kansas State High School Activities Assoc., 377 F. Supp. 1233 (D. Kan. 1974); Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975); Commonwealth v. Pennsylvania Interscholastic Athletic Assoc., 18 Pa. Commw. Ct. 45, 334 A.2d 839 (1975).

66. 20 U.S.C. §§ 1681-1686 (1978).

67. 118 CONG. REC. S5808 (1972).

68. 45 C.F.R. § 86.41(b) (1976).

69. *Id.* For the complete text of this provision see note 17 *supra.*

Traditionally, females have been excluded from contact sports. Regardless of the legislative intent of Title IX, the plain meaning of section 86.41(b) is that educational institutions may continue to arbitrarily exclude females from participating in contact sports with males.[70]

Given this construction, the *Yellow Springs* court correctly found that 45 C.F.R. section 86.41(b) violated the due process clause. But considering the hostility toward the irrebuttable presumption analysis,[71] the question whether this regulation could withstand an equal protection challenge should also be considered.

According to the *Craig v. Boren*[72] test it must be shown that this regulation serves an important government goal and that there is a substantial relationship between this objective and the regulation. One of the most compelling governmental interests which could be asserted is the prevention of injuries. The *Yellow Springs* court found that the regulation was based upon a presumption of general female inferiority in athletics. Other false premises also underlie the government's approach to this interest. These are: 1) that all women are more susceptible to injuries than men at the same levels of ability;[73] and 2) that all contact sports are physically more dangerous than non-contact sports.[74] Both premises are rebuttable. Women generally have a lighter weight and bone structure than men, but there are widespread individual exceptions. Neither is it necessarily true that such physiological differences

70. Other provisions of section 86.41 are more in the spirit of Title IX. Section 86.41(a) states the general policy prohibiting sexual discrimination in athletics and specifically provides that "no recipient shall provide any such athletics separately on such basis." 45 C.F.R. § 86.41(a) (1976). Section 86.41(c) requires that a recipient provide equal athletic opportunity to members of both sexes and lists numerous factors that will be considered in determining if this requirement has been met. 45 C.F.R. § 86.41(c) (1976). This list includes such items as equipment, supplies, locker rooms, training facilities, and medical services.

Probably the most important of these factors under section 86.41(c) is "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of the members of both sexes." The importance of the requirement of accomodating interests and abilities is indicated by HEW's position that separate teams may be required even in contact sports if both boys and girls are sufficiently interested. Office for Civil Rights, Dep't of HEW, *Memorandum on Elimination of Sex Discrimination in Athletic Programs* at 6 (Sept. 1975).

Nevertheless, the contact sports exception, even when construed in conjunction with the interests and abilities requirement does authorize a school to totally exclude girls from contact sports. If only a few girls are interested in a sport, a school would not be required to form a separate team for them, and neither must the school permit them to participate on the boys' team.

71. *See* notes 48-52, 57-59 and accompanying text *supra*.

72. *See* note 41 and accompanying text *supra*.

73. Cox, *Intercollegiate Athletics and Title IX*, 46 GEO. WASH. L. REV. 34, 48, 60 (1974).

74. *Id.* at 60.

result in more injuries because a woman may possess other qualities, such as superior speed or coordination, which compensate for these differences. Furthermore, non-contact sports can be as dangerous as contact sports. For example, a non-contact sport such as down-hill ski racing can result in crippling injuries.[75]

Considering the overinclusiveness of these underlying assumptions, the correlation between gender and ability to participate in contact sports may be too weak to withstand an equal protection attack. The problem with 45 C.F.R. section 86.41(b) is that it authorizes a complete deprivation of an opportunity. Although this regulation encourages the development of separate teams, the only contact sports teams available in most schools are the boys' teams. In situations where no girls' team existed, courts have had little difficulty in finding that the exclusion of girls from the boys' team is a denial of equal protection.[76] The basis of these decisions is not that girls have a constitutional right to participate in a particular sport, but that the state, having provided an athletic opportunity for males, may not deny this opportunity to females.[77] Because 45 C.F.R. section 86.41(b) authorizes total exclusion of females from contact sports, this regulation violates the equal protection clause.

## VI. CONCLUSION

Opportunties for women have traditionally been restricted by irrebuttable presumptions in many spheres of life. In the last decade several such presumptions have finally been extinguished, and it is now generally accepted that women must be free to pursue the interests lifestyles and careers of their choosing. Thus, on a practical level, the *Yellow Springs* court's invalidation of a gender-based athletic regulation on a due process basis is merely further recognition that overbroad generalizations concerning females should no longer be tolerated. Whether a due process or an equal protection analysis is used, a regulation arbitrarily denying girls the opportunity to participate in interscholastic contact sports cannot withstand a constitutional attack.

As it is presently written, 45 C.F.R. section 86.41 is confusing and inconsistent. Although this regulation was designed to provide equal opportunity in athletics, subsection (b) specifically provides that females may be excluded from contact sports whether or not a separate

75. *Id.*

76. *E.g.,* Leffel v. Wisconsin Interscholastic Athletic Assoc., 444 F. Supp. 1117, 1122 (E.D. Wis. 1978); Hoover v. Meiklejohn, 430 F. Supp. 164, 170-71 (D. Colo. 1977); Gilpin v. Kansas State High School Activities Assoc., 337 F. Supp. 1233, 1242 (D. Kan. 1974).

77. *See* note 76 *supra.*

female team exists, and whether or not the exclusion accomodates the interests and abilities of females. Consideration of the constitutionality of this regulation was unnecessary to the decision, but the *Yellow Springs* court recognized that this regulation authorized discriminatory athletic rules such as O.H.S.A.A. rule 1 section 6.[78]

The *Yellow Springs* court, by restricting its finding to the contact sports exception of subsection (b) of 45 C.F.R. section 86.41, left intact the remaining provisions of this subsection. Elimination of the contact sports provision allows girls to participate on separate teams and requires that they be permitted to try out for any noncontact or contact sport previously limited to boys.[79] Invalidation of this one provision should maximize female athletic opportunities,[80] create con-

78. The defendants in *Yellow Springs* contended that O.H.S.A.A. Rule 1 § 6 complied with 45 C.F.R. § 86.41(b). *See* note 15 *supra.* Recently, in Leffel v. Wisconsin Interscholastic Athletic Assoc., 444 F. Supp. 1117 (E.D. Wis. 1978), defendants unsuccessfully urged that an exclusionary athletic rule could not be constitutionally attacked because it was in full compliance with 45 C.F.R. § 86.41(b). The court ruled that the federal regulation did not displace the fourteenth amendment as the basis for constitutionality. *Id.* at 1122.

79. Where only a girls' team exists, boys could be excluded because their provisions athletic opportunities have not been limited. *See* note 17 for the complete text of 45 C.F.R. § 86.41(b).

80. One argument directed against requiring male teams to be open to females is that if qualified females must be permitted to participate on male teams, then the reverse must also be allowed, possibly resulting in male dominance of all athletic programs. Therefore, in order to maximize female athletic opportunities, females should be excluded from male teams. For a fuller discussion *see,* Comment, *Sex Discrimination in Interscholastic High School Athletics,* 25 SYRACUSE L. REV. 535, 544 (1974).

Although recognizing the legitimacy of advancing female athletic opportunities as a state interest, a number of courts have noted that this is an irrational basis for barring women from men's teams. One court dismissed this justification on the basis that there are presently few women's programs in existence that need to be protected from a male take-over. Haas v. South Bend Community School Corp., 259 Ind. 515, 523, 289 N.E.2d 495, 500 (1972). The rationale is also overbroad. If only a boys' team exists, excluding girls does not maximize athletic opportunities for girls, but acts to totally bar qualified girls from participating. Gilpin v. Kansas State High School Activities Assoc., Inc., 377 F. Supp. 1233, 1243 (D. Kan.1974). To actually maximize female athletic opportunities, qualified girls must be allowed to participate on boys teams if no girls' team of equal quality exists, and boys may be excluded from those teams traditionally limited to girls. *See,* Hoover v. Meiklejohn, 430 F. Supp. 164, 170 (D.Colo. 1977).

Because *Yellow Springs* was decided on an irrebuttable presumption basis, it may be more subject to the claim that boys must be able to participate on girls' teams. That is, if a presumption of female nonqualification is unconstitutional, then a presumption of male "overqualification" must also be unconstitutional and, therefore, boys must be allowed on girls' teams. This conclusion is not necessarily true. As in an equal protection analysis, state interest is a factor in an irrebuttable presumption analysis. *See* notes 53-54 and accompanying text *supra.* Underlying an irrebuttable presumption of "overqualification" is the state's interest in maximizing female athletic opportunities. Thus, if allowing boys on girls' teams would greatly decrease girls' par-

sistency between the requirements of subsection (b) and the accomodation of interests and abilities requirement of subsection (c),[81] and bring 45 C.F.R. section 86.41(b) within constitutional bounds.

*Elizabeth J. Henley*

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ticipation, then the presumption could be upheld. Even if this irrebuttable presumption is not upheld, those boys who try out for the girls' teams may still be excluded if they are overqualified. This is so because the irrebuttable presumption doctrine only requires that an individual be given a chance to rebut the presumption. *See* notes 57-58 and accompanying text *supra*.

81. *See* note 70 *supra*.