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Phoenix, Arizona 85007

Robert R. Corbin

June 27, 1986

The Honorable Stephen D. Neely  
Pima County Attorney  
177 North Church Avenue, Suite 300  
Tucson, Arizona 85701-1117

Re: I86-068 (R86-055)

Dear Mr. Neely:

Pursuant to A.R.S. § 15-253(B), we have reviewed the opinions expressed in your letter of April 15, 1986 to Alfred C. Strachan, Associate to the Superintendent of the Amphitheater School District and concur with your conclusions that Title IX of the Educational Amendments of 1972, 20 U.S.C.A. § 1681, is not violated by denying boys an opportunity to participate in girls' volleyball or denying girls an opportunity to participate in boys' wrestling. We assume your opinion is limited to extra-curricular athletic activity and, therefore, Title IX requirements relating to course offerings are not applicable. If any course credit for extra-curricular activity is offered, the Title IX course offering requirements may be applicable. See Title IX, Pt. 36, § 86.34; 34 C.F.R. § 106.34 and 45 C.F.R. § 86-34<sup>1</sup>/

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<sup>1</sup>/Title IX, Pt 36, § 86.34; 34 C.F.R. § 106.34; and 45 C.F.R. § 86.34 state:

Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein

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The third question presented by Mr. Strachan, is whether the district may prohibit a student from participating in interscholastic activities based upon gender. The question is too broad to answer except in general terms. We concur in your opinion that prohibiting a boy from participation in a girls team in an interscholastic activity which is not a contact sport is controlled by the Equal Protection Clause of

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1/ (Continued)

by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

...

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

...

(Emphasis added.)

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the Fourteenth Amendment.<sup>2/</sup> This test can be met under two theories. First, statutes or regulations have consistently been upheld where the gender classification "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Michael M. v. Sonoma County Superior Court, 450 U.S. 464, 469, 101 S.Ct. 1200, 1204, 67 L.Ed.2d 437, 442 (1981); Petrie v. Illinois High School Ass'n, 75 Ill.App.3rd 980, 31 Ill. Dec. 653, 394 N.E.2d 855, 859 (1979); Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126, 1129 (9th Cir. 1982). Second, the courts have permitted schools to prohibit boys from participating on girls' teams to redress past discrimination against women in athletics and promote equality of athletic opportunity between the sexes. Clark, 695 F.2d at 1131; Forte v. Board of Education, North Babylon Union Free School District, 105 Misc. 2d 36, 431 N.Y.S 2d 321 (1980).

Concerning whether a girl may be prohibited from participating in a boys' team in an interscholastic activity which is a contact sport, we also concur in your opinion that the Equal Protection Clause of the Fourteenth Amendment applies. However, we revise your opinion as follows.

Lantz by Lantz v. Ambach, 620 F.Supp. 663 (D.C.N.Y. 1985) holds that a regulation denying girls the opportunity to try out for junior varsity football because of their gender violated the Equal Protection Clause. The court recognized that discrimination on the basis of gender would be upheld only where there is "exceedingly persuasive justification" and a showing that the classification serves "important governmental objectives and that the discriminatory means employed was substantially related to the achievement of those objectives." 620 F.Supp. at 665, quoting Mississippi University for Women v. Hogan, 458 U.S. 718, 723-725, 102 S.Ct. 3331, 3335-3336, 73 L.Ed.2d. 1090 (1982). While the court stated that protection of the health and safety of female students was an important

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<sup>2/</sup>Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S. Ct. 3331, 3336, 73 L. Ed. 2d 1090 (1982). 20 U.S.C.A. § 1681; Title IX of the Education Amendments of 1972, Pt 36, § 86.41; 34 C.F.R. § 106.41; 45 C.F.R. § 86.41; and Ariz. Const. art. 2, § 13 also control.

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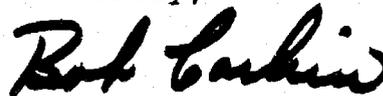
governmental objective, it found the following evidence insufficient to justify prohibiting girls from trying out for football:

[D]ata establishing that "as a general rule, senior high school students (age 15 through 18) are more physically developed, stronger, more agile, faster and have greater muscular endurance than their female counterparts" (Atty Gen'l's brief at 6-18), medical opposition to girls' participation on boys' teams in such contact sports as football (which Dr. Falls described as a "collision" sport) because of the risk of injury in such participation, and the testimony of Dr. Willie to the effect, among other points, that the present regulation enhances safety by permitting simple and uniform administration across the state.

We therefore conclude that opinions of physicians and athletic directors are likely to be insufficient to justify exclusion of females from interscholastic activities based solely upon their gender and that they may only be individually excluded on the basis of their actual abilities.

We note that providing for "separate but equal" opportunities for girls and boys to participate in sports on separate teams has generally been upheld. Clark, 695 F.2d at 1129-1130; Michigan Department of Civil Rights v. Waterford Township Department of Parks and Recreation, 124 Mich. App. 314, 335 N.W.2d 204 (1983).

Sincerely,



BOB CORBIN  
Attorney General

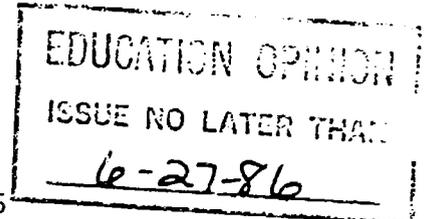
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STEPHEN D. NEELY  
PIMA COUNTY ATTORNEY  
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April 15, 1986

Mr. Alfred C. Strachan  
Associate to Superintendent  
Staff Relations  
Amphitheater Public Schools  
701 W. Wetmore Road  
Tucson, Arizona 85705

Re: Girls Participation in Boys Sports and Vice Versa

Dear Mr. Strachan:

This letter is written in response to your letters of November 19, 1985, and February 5, 1986, wherein you asked the following questions:

1. Whether the School District has violated Title IX by denying the boys an opportunity to participate in girls volleyball?
2. Whether the School District has violated Title IX by denying the girls an opportunity to participate in boys wrestling?
3. Whether the School District may prohibit a student from participation in Interscholastic Activities based upon gender?

In my opinion, the School District has not violated Title IX by denying boys an opportunity to participate in girls volleyball and denying girls an opportunity to participate in boys wrestling. Furthermore, the School District may prohibit a student from participating in Interscholastic Activities based on gender if certain conditions apply. For the reasons set forth below, I recommend that Amphitheater Public Schools follow the current high school athletic sex discrimination provisions as amended by the Legislative Council of the Arizona Interscholastic Association on January 28, 1986.

Athletics have come to be generally recognized as a fundamental ingredient of the educational process, Kelly, v. Metropolitan County Board of Education of Nashville, 293 F.Supp. 485 (USDC 1968). Consequently, it has been held that the

The United States Court of Appeals for the Ninth Circuit ruled in Clark v. Arizona Interscholastic Association, 695 F.2d 1126, (1982), that redressing past discrimination against women in athletics and promoting equality of overall athletic opportunity between the sexes constitutes an important governmental interest. The Court found that "there is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women." Clark v. Arizona Interscholastic Association, supra, at 1131. The Court concluded that "[w]hile equality in specific sports is a worthwhile ideal, it should not be purchased at the expense of ultimate equality of opportunity to participate in sports. As common sense would advise against this, neither does the Constitution demand it." Clark v. A.I.A., supra, at 1132.

The Arizona Interscholastic Association's amendments regarding girls only teams were designed "to compensate for girls' historical lack of opportunity in interscholastic activities." The Legislative Council reasoned that:

"[t]o allow boys to qualify for girls teams in these five sports would displace girls from those teams and further limit their opportunities for participation in interscholastic activities." Minutes of Legislative Council held January 28, 1986.

According to Clark v. Arizona Interscholastic Association, supra, these amendments serve to promote an important governmental interest. Furthermore, the exclusion of boys from the five sports is substantially related to the Arizona Interscholastic Association's objectives. Therefore, the amendments should withstand a Constitutional challenge.

The Arizona Interscholastic Association amendments also prohibit girls from participating in boys' wrestling. While there are cases which hold that public school regulations prohibiting mixed sex competition in football are too broad and deprive high school girls of their rights to equal protection, I have found no such authority supporting a girl's right to wrestle on a boys wrestling team. However, the Supreme Court has held that classification on the basis of gender will be upheld only where there is exceedingly persuasive justification showing that the classification serves "important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." Mississippi University for Women v. Hogan, 458 U.S. 718, 723-725, 102 S.Ct. 3331, 3335-3336, (1981).

implementation of substantially differing standards in school athletic programs for boys and girls may constitute a deprivation of equal educational opportunity and therefore be in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Dodson v. Arkansas Activities Association, 468 F.Supp. 394 (1979), Lantz by Lantz v. Ambach, 620 F.Supp. 623 (D.C.N.Y. 1985); see also McQuillan, Municipal Corporations, 3rd Ed. § 46.22A at 687. Additionally, sex discrimination in specific programs which receive federal financial assistance may violate Title IX of the Education Amendments of 1972, § 901 et. seq., 20 U.S.C.A. § 1681 et. seq..

The Arizona Interscholastic Associations' Legislative Council amended the high school athletic sex discrimination provisions in January of 1986. I have reviewed these provisions to determine whether they violate either the Fourteenth Amendment of the United States Constitution or Title IX of the Educational Amendments of 1972, Section 901 et. seq., 20 U.S.C.A. § 1681 et. seq.. In my opinion, they do not.

The Legislative Council amended Article V, Section II of the general provisions relating to discrimination to read in pertinent part:

"A school may offer volleyball only for girls and not offer volleyball for boys.

Archery, badminton, gymnastics and softball shall be offered only for girls in order to compensate for girls' historical lack of opportunity in interscholastic activities."

"A school may offer wrestling only for boys and not offer wrestling for girls. Girls are not allowed to qualify for boys teams in wrestling."

See Minutes of Legislative Council held January 28, 1986, attached hereto.

#### CONSTITUTIONAL ANALYSIS

The United States Supreme Court has determined that gender based classifications are subject to an intermediate level of scrutiny under the Equal Protection clause of the Fourteenth Amendment. Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, (1976). The Supreme Court has ruled that "to withstand scrutiny under the Equal Protection clause, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Orr v. Orr, 440 U.S. 268, 279, 99 S.Ct. 1102, 1111, (1979).

The issue here is whether the School District has an important objective in denying girls an opportunity to participate in boys wrestling and whether this denial would effect the District's objective. It has been determined that "where the governmental objective is to protect the health and safety of students, it is an important one." Lantz by Lantz v. Ambach, supra.

The School District must determine whether its objective in denying girls an opportunity to participate in boys' wrestling is to protect the health and safety of the students. I recommend that the District consult with physicians and athletic directors in making this determination. If the professionals decide that mixed sex competition in wrestling is unsafe for either male or female students, then the provisions prohibiting mixed sex competition should withstand a constitutional challenge.

#### TITLE IX ANALYSIS

Title IX of the Educational Amendments of 1972, provide that where a recipient of federal funds operates a team in a particular sport for members of one sex but operates no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered. 34 C.F.R. 106.41(b). The amendments adopted by the Legislative Council of the Arizona Interscholastic Association prohibiting boys from qualifying for girls teams in archery, badminton, gymnastics, softball and volleyball do not violate Title IX because boys have not previously been limited in their opportunity to participate in sports.

Title IX of the Educational Amendments of 1972, and the regulations which require opportunity for female students to try out for male teams, or vice versa, where there is no team for the students own sex, do not apply to contact sports such as wrestling. The Arizona Interscholastic Association's amendment concerning wrestling is therefore not in violation of Title IX. Lantz by Lantz v. Ambach, supra.

#### CONCLUSION

It is my opinion that as long as there exists an important governmental objective, the School District may offer wrestling only for boys and not offer wrestling for girls, and the School District may offer volleyball only for girls and not offer volleyball for boys.

This opinion is being forwarded to the Attorney General for concurrence, review or revision pursuant to A.R.S. § 15-253(B).

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Unless circumstances require immediate action, you should await the response of the Attorney General before acting on the opinion set forth above.

Sincerely yours,



Martha M. Durkin  
Deputy County Attorney

MMD/lw