HOUSE . . . . . No. 6921

The Commonwealth of Massachusetts

OPINIONS FROM THE HONORABLE THE JUSTICES OF THE SUPREME JUDICIAL COURT ON CERTAIN QUESTIONS OF LAW RELATING TO THE HOUSE BILL RESTRICTING THE PARTICIPATION OF GIRLS IN CERTAIN CONTACT SPORTS.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully submit their answer to the question set forth in an order adopted on November 21, 1977, and submitted to us on November 22, 1977. The order refers to House No. 6723 now pending before the House and entitled "An Act restricting the participation of girls in certain contact sports."

If enacted, the bill would add to G. L. c. 76, § 5, as most recently amended by St. 1973, c. 925, § 9A, a sentence stating that "[t]he provisions of this section shall not be construed so as to authorize the participation of girls with boys in the following contact sports teams: football and wrestling." Section 5 of G. L. c. 76, which is set forth in full in the margin,[1] provides, among other things, that no person shall be excluded on account of sex from the advantages, privileges, and courses of study in a public school of any town. We accept the conclusion implicit in the question presented to us that, if enacted, House No. 6723 by

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[1] "Every person shall have a right to attend the public schools of the town where he actually resides, subject to the following section. No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion or national origin."

its terms would permit a public school system to bar females and males from participating jointly in football and wrestling.

In its order, the House expressed grave doubt as to the constitutionality of the proposed bill in light of art. 106 of the Amendments to the Constitution of the Commonwealth, commonly known as the State equal rights amendment or State E.R.A. Article 106 of the Amendments was approved by the people at the State election held in 1976. See 1976 Acts and Resolves at 840-841. The Amendment added a sentence to art. 1 of Part I of the Constitution reading as follows: "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

The question presented to us is:

> "Would the enactment of House, No. 6723 be in violation of Article CVI of the Articles of Amendments to the Constitution of the Commonwealth in that said bill would allow discrimination against certain women by prohibiting said women from participating with men in certain contact sport teams?"

As a result of our invitation, briefs have been received from the Attorney General of the Commonwealth, jointly from the Governor's Commission on the Status of Women and the Women's Rights Project of the Massachusetts Civil Liberties Union Foundation, and by the Massachusetts Board of Education. Each brief

argues that, if enacted, House No. 6723 would be a violation of art. 106.

In any analysis of the constitutionality of legislation, the standard against which that legislation is to be tested must be determined first. The Supreme Judicial Court has indicated recently the standard which should be applied to test the constitutionality of government action when a challenge is founded on a claimed violation of art. 106. The court said in Commonwealth v. King, Mass. , (1977),[a] that under art. 106, discrimination based on sex must be subjected to the same strict judicial scrutiny that had been applied previously under equal protection principles to classifications based on race, color, creed, or national origin. Such a classification is permissible only if it furthers a demonstrably compelling interest of the State and limits its impact as narrowly as possible consistent with the purpose of the classification. Id. at [b][2]

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[a] Mass. Adv. Sh. (1977) 2636, 2655.

[b] Id. at 2654.

[2] In giving our views in Opinion of the Justices, Mass. (1977) (Mass. Adv. Sh. [1977] 1822), we did not have to indicate whether strict scrutiny and the related compelling State interest tests were applicable under art. 106 because, in our judgment, the proposed legislation concerning female students at the Lowell High School failed to meet even the equal protection standard applicable prior to the adoption of art. 106. Id. at - (Mass. Adv. Sh. [1977] at 1828-1829). See Commonwealth v. MacKenzie, Mass. , - (1975) (Mass. Adv. Sh. [1975] 2827, 2830-2831).

Courts in other States which have equal rights provisions concerning sex in their Constitutions generally have applied a strict scrutiny standard for judicial review of any challenged State action involving sex-based discrimination. See, e.g., Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 8 (1971) ("sex alone may not be used to bar a person from a vocation, profession or business"); People v. Barger, Colo. , (1976); People v. Ellis, 57 Ill. 2d 127, 132-133 (1974); Rand v. Rand, 280 Md. 508, 515-516 (1977); Commonwealth v. Butler, 458 Pa. 289, 296 (1974). Cf. Hanson v. Hutt, 83 Wash. 2d 195, 198-199 (1973). Indeed, opinions of the Supreme Courts of Washington (Darrin v. Gould, 85 Wash. 2d 859, 871 [1975]), and Pennsylvania (Commonwealth v. Butler, supra at 296) may be read as imposing an absolute prohibition against discrimination based on sex. See discussion in Rand v. Rand, supra at 512-515. A few courts have applied a less strict standard. The Constitution of Louisiana contains a prohibition against any law which "shall arbitrarily, capriciously, or unreasonably discriminate against a person because of . . . sex . . . ." La. Const. art. 1, § 3. The Supreme Court of that State, by a divided vote, has held that a statute imposing criminal sanctions on a husband for failure to support his wife is constitutional because the legislative classification was within reason. State v. Barton, 315 So.2d 289, 291 (La. 1975). See also Williams v. Williams, 331 So.2d 438, 441 (La. 1976)

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550 P.2d 1281, 1283 (Colo. 1976).

(statute providing for support order in favor of a wife, but not a husband, makes a rational sex-based classification).[3] In Texas, although a Court of Civil Appeals has adopted a strict scrutiny test under its State E.R.A. (Mercer v. Trustees, N. Forest Independent School Dist., 538 S.W.2d 201, 206 [Tex. Civ. App. 1976]), the Court of Criminal Appeals upheld a statute by determining simply that the classification was rationally related to the furthering of a legitimate State interest. Finley v. State, 527 S.W.2d 553, 555 (Tex. Crim. App. 1975). The Supreme Court of Virginia has declared, without explanation, that its constitutional prohibition against "any governmental discrimination upon the basis of . . . sex" (Va. Const. art. 1, § 11) prohibits invidious, arbitrary discrimination on the basis of sex and is no broader than the Federal equal protection clause. Archer v. Mayes, 213 Va. 633, 638 (1973). In the Archer case, the court upheld a statute which gave a woman with a child sixteen years of age or younger the right to claim an exemption from jury duty.

We believe that the application of the strict scrutiny-compelling State interest test is required in assessing any governmental classification based solely on sex. Our State equal rights amendment was adopted at a time when equal protection principles under the State and Federal Constitutions

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[3] The language of the Louisiana Constitution may justify the less strict standard applied by the Louisiana court, and special considerations under that State's community property law may explain the discrimination in the statutes considered by the Louisiana court.

required a level of judicial scrutiny greater than the rational basis test but less than the strict scrutiny test. See Opinion of the Justices, Mass. , - (1977).[d] 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.

In other jurisdictions where Constitutions have equal rights provisions concerning sex, sex-based limitations on a student's right to participate in athletics have been struck down. In Commonwealth ex rel. Packel v. Pennsylvania Interscholastic Athletic Ass'n, 18 Pa. Commw. Ct. 45 (1975), the Attorney General of Pennsylvania sought and obtained an order invalidating a provision in the by-laws of the Pennsylvania Interscholastic Athletic Association which provided that "[g]irls shall not compete or practice against boys in any athletic contest."[4] The court concluded that a female may not be "excluded solely because of her sex without regard to her relevant qualifications." Id. at 52. Although the Attorney General did not seek to invalidate the by-law as it applied to football and wrestling (id. at 48 n.2), the court voluntarily extended its order to these sports. Id. at 53. The court said that the result is the same (at least as to

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[d] Mass. Adv. Sh. (1977) 1822, 1828-1829.

[4] The by-laws applied to football, cross-country, basketball, wrestling, soccer, baseball, field hockey, lacrosse, gymnastics, swimming, volleyball, golf, tennis, track, softball, archery and badminton. Id. at 48.

females) whether or not separate teams are offered for males and females in the same sport. Id. at 52. The Supreme Court of Washington struck down an attempt by a school district to deny two fully qualified female students permission to play in interscholastic competition on a high school football team. Darrin v. Gould, 85 Wash. 2d 859 (1975). A regulation of the Washington Interscholastic Activities Association prohibited girls from participating in interscholastic contact football with boys. The State Constitution forbade discrimination based on sex. Wash. Const. art. 31, § 1. The Washington court applied a standard at least as high as the strict scrutiny test in holding that the prohibitory rule was contrary to the standards of that State's equal rights amendment. Id. at 877-878. The court found no compelling State interest and indicated that the result it reached was required "all the more so when the school provides no corresponding girls' football team on which girls may participate as players." Id. at 878.[5]

Applying less than a strict scrutiny standard, Federal courts have disapproved sex-based discrimination in circumstances involving females interested in participation in sports programs.

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[5] In Haas v. South Bend Community School Corp., 259 Ind. 515 (1972), the Indiana Supreme Court invalidated a rule of the State high school athletic association in so far as it barred male and female students from competing on the same team or against each other where the sport (golf) was a noncontact sport and no comparable program existed for females. This decision, based solely on Federal and State equal protection principles, left open the question whether separate but equal programs for females would be constitutionally acceptable.

Fortin v. Darlington Little League, Inc., 514 F.2d 344 (1st Cir. 1975) (ten-year-old girl in little league baseball). Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (high school tennis and cross-country running and skiing where there were no female teams). Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (high school soccer team limited to males). Cape v. Tennessee Secondary School Athletic Ass'n, 424 F. Supp. 732 (E.D. Tenn. 1976) (different rules for high school basketball for females). Carnes v. Tennessee Secondary School Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976) (high school baseball teams excluded females where there was no team for females). Clinton v. Nagy, 411 F. Supp. 1396 (N.D. Ohio 1974) (twelve-year-old girl excluded from football in recreational league). Gilpin v. Kansas State High School Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973) (high school cross-country team excluded females where there was no team for females). Contra, Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Pa. 1973), vacated and remanded without opinion, 497 F.2d 921 (3d Cir. 1974) (dicta, rational basis justifies exclusion of ten-year-old girl from a contact sport, baseball); Bucha v. Illinois High School Ass'n, 351 F. Supp. 69 (N.D. Ill. 1972) (prohibition of competition between sexes in high school swimming program and restrictions applicable only to female contests have rational bases).

The enactment of House No. 6723 would violate art. 106 of the Amendments to the Constitution of the Commonwealth. 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.

We have not been asked, and express no opinion, whether in particular circumstances a statute more limited in its impact would serve a demonstrably compelling State interest. In particular, we decline to express a view whether it would be permissible under art. 106 if equal facilities were available for men and women in a particular sport which was available separately to each sex. Such a question is better considered in a "concrete controversy on which decisions of constitutional law are best rested." Opinion of the Justices, Mass. , (1977).[e] An individual case involves a real, rather than a hypothetical, complainant; it furnishes specific facts on which effective constitutional analysis may be based; and it provides a vehicle for the presentation of circumstances and argument in support of the constitutionality of a statute, rule, or requirement.

Because the enactment of House No. 6723 would be unconstitutional under art. 106, we answer the question, "Yes."

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[e] Mass. Adv. Sh. (1977) 1822, 1829.

The foregoing answer and opinion is submitted by the Chief Justice and the Associate Justices, subscribing hereto on the twenty-second day of December, 1977.

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