

40 years after Title IX became law, new gender issues arise in athletics

By the New York State
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Keeling Pilaro is a 14-year-old boy who likes to play field hockey. His bid to remain the lone male player on his school's varsity field hockey team has required athletic officials on Long Island to wrestle with how to apply decades-old legal standards to new kinds of gender issues in interscholastic sports.

Pilaro spent many years in Ireland, where, as in other parts of Europe, field hockey is commonly played by both males and females. In the United States, field hockey is predominantly a female sport, although the U.S. Olympic field hockey team is male.

After Pilaro's family moved to the Southampton school district in Suffolk County, he sought to play on the girls' junior varsity field hockey team. Regulations of the state's commissioner of education permit a boy to participate in a female sport for which there is no male team, but only when the boy's participation will not have a "significant adverse effect upon the opportunity of females to participate successfully in interschool competition in that sport." (Notably, the "significant adverse effect" standard does not apply when a girl wishes to play on a boys' team.)

Southampton school officials applied to the athletic group with jurisdiction over public school competition in Suffolk County – Section XI of the New York State Public High School Athletic Association (NYSPHAA). Section XI's Mixed Competition Committee allowed Pilaro to play on the 2010 junior varsity team as a seventh grader and on the 2011 varsity team as an eighth grader.

Playing the "attack" position during the 2011 season, Pilaro scored 10 goals and had eight assists. This was despite being small compared to other players; he currently stands 4 feet, 8 inches tall and weighs approximately 85 pounds. Southampton finished the regular season with an 8-6 record in their division, but lost in the first round of the playoffs.

At the conclusion of the 2011 season, Southampton asked Section XI to authorize Pilaro to participate in field hockey in the fall of 2012. This time, the request was denied by Section XI's Mixed Competition Committee and its Appeals Committee on the grounds that his participation in the sport created a significant adverse effect on female participants. The district appealed to the Section XI Athletic Council.

Everyone agreed that Pilaro's size was not an impediment to other (i.e., female) players' participation in field hockey. The issue before the Athletic Council was

whether it was proper for the Mixed Competition Committee to bar Pilaro from participating on the grounds that his skills were so advanced as to have a significant adverse effect on other players.

Southampton presented a statistical analysis of Pilaro's "success" to show that he was not having a "significant adverse effect" on the girls, including the fact that the majority of his goals came against teams ranked

lower in the standings. The district argued that Pilaro's presence on the field did not deprive classmates of the opportunity to play and that he was not viewed as the best player on his team. As a well-known field hockey coach, Nancy Cole, put it, "He's not the LeBron James of field hockey."

Ultimately, the Athletic Council reversed the committee's decision, and Pilaro will be able to play the sport that he loves in the fall.



Keeling Pilaro, left, will be able to play on a girls' field hockey team again next year. (AP Photo)

Cases of males seeking to play on female teams have been rare since Congress enacted Title IX in 1972. The law was intended to preserve and expand the opportunities of girls and young women to participate in school and collegiate sports, and the protection it affords to male athletes is open to interpretation. One federal court has held that Title IX allows males to play on female athletic teams. In *Gomes v. Rhode Island Interscholastic League*, a federal court in Rhode Island found a school district's policy excluding male athletes violated Title IX and the Equal Protection Clause of the U.S. Constitution, and ordered the district to allow a boy to play volleyball on a girls' team.

In New York, the "significant adverse effect" standard has been codified in commissioner's regulations, which are refer-

enced in anti-discrimination provisions of the state Education Law. So when these cases arise, regional NYSPHAA officials must make judgments regarding whether a given male athlete's playing abilities will have a "significant adverse effect" on female players.

Until Pilaro's case arose, athletic sections across the state and the commissioner of education had analyzed these cases with a presumption against permitting male students to participate on female teams. Section XI's struggle with the Pilaro appeal is understandable given how a state court ruled when a male player sought to play on

a female team more than 30 years ago. In *Forte v. North Babylon Union Free School District*, Suffolk County Supreme Court denied a male student the opportunity to participate on a girls' volleyball team. The court's analysis included statistics on male and female participation on sports teams. The court noted that, during the 1977-78 school year, Section XI had 604 boys participating in 17 varsity sports compared to only 383 girls competing in 12 varsity sports. The court said that denying the male student the opportunity to participate on a girls' team was a "discernible and permissible means toward redressing disparate treatment of female students in scholastic athletic programs."

Different statistics influenced Section XI officials when they made their final decision regarding Pilaro. Southampton showed that during the 2011-12 school year, Section XI offered more female varsity sports than male varsity sports. The total number of varsity student athletes was almost equal, with 2,107 females and 2,111 males participating.

In Southampton schools, the numbers were even more indicative of openness to female athletes. While the high school's student body was 53 percent male, 53 percent of the school's fall student athletes

were female. These numbers demonstrated a marked improvement in athletic opportunities since Title IX was enacted.

Statewide statistics also demonstrate gains. According to NYSPHAA, 225,217 females participated in high school athletics in New York State in 2011. That was 46 percent of all student-athletes.

The effort that both Pilaro and the Southampton school district had to exert to persuade Section XI officials to allow Pilaro to play field hockey raises questions about whether legal standards developed decades ago are well-suited to the various athletic participation issues that schools are dealing with in the 21st century. Forty years have passed since Title IX was originally enacted to remedy disparate treatment of male and female athletes, and there have been dramatic examples of progress. For instance, Annie Park, a junior in the Levittown public schools, won the Nassau County boys' golf championship in May. She defeated 134 golfers, 133 of whom were boys. She beat the second place finisher, a two-time reigning boys champion, by six strokes.

The opportunity to compete is a closely held American value. Therefore, it is fitting that the same laws and rules that protect the interests of Annie Park in being a competitor were interpreted by Section XI as accommodating the desire of Keeling Pilaro to play field hockey. Schools and other governmental institutions have a strong interest in preserving the fundamental goal that Congress sought when it passed Title IX. "The idea is a simple one," the U.S. Supreme Court explained in the 1995 case *Miller v. Johnson*. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class."

This "equal protection" guaranty is the Constitutional underpinning of Title IX, and it is blind to gender. It is time to re-examine the presumption against male participation in female sports. Although the standard for denying a male such an opportunity remains the presence of a "significant adverse effect" on female players, it is the duty of school and athletic officials to ensure that such an adverse effect is present before denying an athlete the opportunity to compete.

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