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Dear Ms. Worthy, Ms. Eros and Mr. Stephens:

We are writing in response to your letter of October 6, 1993 requesting the opinion of this Office on the following question:

> Do the current volleyball and basketball seasons for girls in West Virginia secondary schools: a) constitute discrimination on the basis of gender; or b) constitute denial of equal protection of the laws, or c) both?

The short answer to this question is that the current situation whereby girls in West Virginia schools play basketball in the fall and volleyball in the winter, seasons that are non-traditional and are opposite those played by the overwhelming majority of the members of the National Federation of State High School Associations, violates equal protection of the law pursuant to the fourteenth amendment to the United States Constitution and Article III, section 10 of the West Virginia Constitution and violates the civil right of equal opportunity in public accommodations established in the West Virginia Human Rights Act.

As has become our practice, we note that the question presented comes to us in the abstract. Inasmuch as we render opinions in the abstract without argument representing diverse points of view, we are constrained to approach matters conservatively. Courts may construe facts and argument differently and apply them to the law in a fashion not contemplated by an abstract opinion.

Our analysis of this matter follows.

EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Initially, we note that you have provided information that West Virginia is one of only five states with inverted girls' interscholastic basketball seasons and is one of only six states with inverted girls' volleyball seasons. The border states of Pennsylvania, Ohio, Kentucky and Maryland all schedule girls' basketball and volleyball during the traditional seasons. The Commonwealth of Virginia has a two-tier approach to girls' basketball with teams playing in both the fall and winter.

Equal protection of the law is implicated when a state law based classification treats similarly situated persons differently. The different treatment must be a product of state action.

The requirement of state action initially raises the threshold question whether the Secondary Schools Activities Commission (hereinafter referred to as "SSAC") is a state actor. This question is easily answered in the affirmative. The SSAC was legislatively created and endowed with legislatively delineated powers to provide services in supervising interscholastic athletics. The SSAC's rules are legislatively subject to the prior approval of the West Virginia Board of Education, which is constitutionally charged with the duty of exercising general supervision over our state's educational system. See W. Va. Code § 18-2-25 (1988 Repl. Vol. & 1993 Cum. Supp.); Bailey v. Truby, 174 W. Va. 8, 16-17, 321 S.E.2d 302, 311-12 (1984).

Furthermore, the West Virginia Supreme Court in addressing a gender-based discrimination claim acknowledged that the SSAC was a state actor. In Israel v. Secondary Schools Activities Comm'n, 182 W. Va. 454, 388 S.E.2d 480 at 484 n.4 (1989), the Court commented that "every court that has considered the question whether associations like the SSAC are state actors have found that these organizations are so intertwined with the state that their acts constitute state action."

It has long been recognized that in analyzing equal protection issues, the United States Supreme Court has resorted to a three-tier level of review. Laws that create suspect classifications such as race, national origin or alienage or that impinge upon fundamental rights such as voting or travel, are subject to the highest level of scrutiny known as "strict scrutiny." In order to survive constitutional analysis, suspect classifications must be shown to be necessary to promote compelling state interests. Courts show little deference to legislatures in this area of review. See City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976); Weidner, "The Equal Protection Clause: The Continuing Search for Judicial Standards," 57 U. Det. J. Urb. L. 867, 868 (1980).

Laws that do not adversely affect fundamental rights nor involve suspect classifications receive the lowest level of review. Such laws need only be rationally related to a legitimate state goal or interest in order to survive constitutional review. In applying this "rational basis" test, the courts have generally shown tremendous deference to legislatures. See McDonald v. Bd. of Election Commr's, 394 U.S. 802, 809 (1969).

A middle-tier or intermediate level of scrutiny has also developed for classifications that are gender or illegitimacy-based. This level of review for gender-based classifications was set forth in Craig v. Boren, 429 U.S. 190 (1976). The United States Supreme Court found that in order to withstand a constitutional equal protection challenge "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." Craig, 429 U.S. at 197. This intermediate standard of review is perhaps the most difficult to analyze as it has not been as clearly developed as either the "strict scrutiny" or "rational basis" tests. For instance, in Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 731 (1982), the state had to show "exceedingly persuasive justification for a challenged gender-based classification."

The intermediate level of scrutiny also known as the "substantial relation" test involves an analysis of two important factors. First, the importance of the governmental objective underlying the classification must be examined. Second, the relationship between the classification and the objective must be examined. See Craig, 429 U.S. at 197.

Some general guidelines can be gleaned from the case law. Important governmental objectives generally deemed acceptable to pass intermediate scrutiny include assuring the health, safety and welfare of citizens and compensating for past wrongs. See, e.g., Califano v. Webster, 430 U.S. 313 (1977); Craig, 429 U.S. at 197. Classifications for administrative convenience will not generally pass muster. Classifications that reinforce stereotypes, reflect archaic and overbroad generalizations, emanate from paternalistic notions, or have a stigmatizing effect generally do not survive intermediate level scrutiny. Mississippi Univ. for Women, 458 U.S. 718, 725 (1982); Orr v. Orr, 440 U.S. 268, 283 (1979); Califano v. Goldfarb, 430 U.S. 199, 216-17 (1977). The recitation of benign redress of past discrimination does not protect the state actor.

The West Virginia Supreme Court has recently recognized that under the intermediate level of scrutiny for gender-based discrimination the courts generally have found that under certain circumstances it is constitutionally acceptable for the public schools to maintain separate sports teams for males and females so long as they are "substantially equivalent." See Israel, 182 W. Va. at 459, 388 S.E.2d at 484-85.

The Court in Israel noted that it is well-established that equal protection principles prevent schools from excluding females from males' athletic teams in the absence of a corresponding girls' team. Israel, 182 W. Va. at 458, 388 S.E.2d at 484 n.5. Indeed, there is a wealth of case law in this area. See, e.g., Brenden v. Independent Sch. Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (enjoining enforcement of rule prohibiting females from playing on male teams in noncontact sports); Morris v. Michigan State Bd. of Educ., 472 F.2d 1207 (6th Cir. 1973) (enjoining enforcement of high school rule forbidding females from playing on all-male tennis team); Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117 (E.D. Wis. 19978) (striking rule denying females opportunity to qualify for competition with male students on high school interscholastic varsity baseball team); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977) (striking rule limiting participation on soccer team to males); Carnes v. Tennessee Secondary Sch. Athletic Ass'n, 415 F. Supp. 569 (E.D. Tenn. 1976) (striking rule prohibiting two female high school students from playing tennis on male team); Gilpin v. Kansas State High Sch. Activities Ass'n, 377 F. Supp. 1233 (D. Kan. 1973) (striking rule prohibiting males and females from competing on same athletic team in interscholastic contest); Reed v. Nebraska Sch. Activities Ass'n, 341 F. Supp. 258 (D. Neb. 1972) (enjoining enforcement of rule prohibiting females from participating with or against males in golf and basketball); Haas v. South Bend Community Sch. Corp., 289 N.E.2d 495 (Ind. 1972) (striking rule prohibiting females from playing on all male golf team); Commonwealth ex rel. Packel v. Pennsylvania Interscholastic Athletic Ass'n, 334 A.2d 839 (Pa. 1975) (striking rule forbidding females from competing with or practicing against males in any athletic contest); Darrin v. Gould, 540 P.2d 882 (Wash. 1975) (striking school district rule forbidding females to play on high school football team).

Further, the West Virginia Supreme Court has recognized that courts have generally upheld rules which prohibit males from trying out for a female team in the absence of a corresponding boys' athletic team. The Court noted that the case law finds the practice acceptable as a means of promoting equality of opportunity to females in interscholastic sports and of redressing past discrimination. Again, there is a substantial amount of case law on this issue. See Clark v. Arizona Interscholastic Ass'n, 695 F.2d 1126 (9th Cir. 1982), cert. denied, 464 U.S. 818 (1983) (rule excluding males from female volleyball team permissible under the equal protection clause of the Fourteenth Amendment); Kleczek v. Rhode Island Interscholastic League, Inc., 768 F. Supp. 951 (D.R.I. 1991) (rule excluding boys from girls' field hockey team permissible; decided on both statutory and constitutional grounds); Petrie v. Illinois High Sch. Ass'n, 394 N.E.2d 855 (Ill. App. Ct. 1979) (excluding males from female volleyball team acceptable under Fourteenth Amendment and state constitution); B.C. v. Board of Educ., Cumberland Regional Sch. Dist., 531 A.2d 1059 (N.J. Super. Ct. App. Div. 1987) (rule excluding boys from girls' field hockey team permissible; decided on statutory and

constitutional grounds); Mularadelis v. Haldane Cent. Sch. Bd., 427 N.Y.S.2d 458 (App. Div. 1980) (excluding males from female volleyball team permissible; decided on statutory and constitutional grounds); Forte v. Board of Educ., N. Babylon Union Free Sch. Dist., 105 Misc. 2d 36 (N.Y. Sup. Ct. 1980) (rule excluding male from participating on all-girl power volleyball team permissible under state statutory challenge); but see Gomes v. Rhode Island Interscholastic League, 469 F. Supp. 659 (D.R.I.), vacated as moot, 604 F.2d 733 (1st Cir. 1979) (males may not be excluded from female volleyball team when only one team exists; decided on Title IX and Fourteenth Amendment grounds); Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n, Inc., 393 N.E.2d 284 (Mass. 1979) (exclusion of boys from girls' teams prohibited under strict scrutiny as mandated by state's equal rights amendment).

Our Court has also recognized that the concept of "separate but substantially equivalent" sports for males and females have been justified by a variety of reasons including physical and psychological differences between males and females, the promotion of athletic opportunities for women and to prohibit men from dominating certain sports. Cases cited by the Court included Clark, Hoover, Gilpin, Carnes and Haas all noted above.

The present situation is wholly guided by our Court's analysis of the "substantially equivalent" requirement in the area of interscholastic sports in the Israel case. In Israel the court reversed the trial court's denial of declaratory and injunctive relief on the basis of gender discrimination. Ms. Israel was a high school student who brought a gender discrimination claim against the SSAC and the county board of education after she was refused the opportunity to play on the boys' high school baseball team. The high school had a girls' softball team. The SSAC Rules provided that if a school had separate teams in the same or related sports for boys and girls during the school year, the girls may not participate on the boys' teams and boys may not participate on girls' teams. Ms. Israel was not allowed to play on the baseball team because to do so would place the school in violation of the SSAC Rules and exclude it from tournament play.

The West Virginia Supreme Court declared that pursuant to constitutional equal protection principles "mere superficial equivalency" would not suffice in the area of interscholastic sports. Israel, 182 W. Va. at 459, 388 S.E.2d at 485. Based upon that guiding declaration, the Court found that the games of baseball and softball were not substantially equivalent. Israel, 182 W. Va. at 459, 388 S.E.2d at 485. In this regard, our Court is arguably stricter in construing the equality aspect of interscholastic sports.

The Court found that the rules of the two games are different, the equipment used is different and the skill level is different in that baseball is played at a more vigorous pace. While the Court agreed with the SSAC that in providing girls' softball it was promoting more athletic opportunities for females, it found that the purpose did

not satisfy the equal protection mandate of substantial equivalency. Israel, 182 W. Va. at 459, 388 S.E.2d at 485.

Our review leads us to the conclusion that the inverse schedules violate equal protection in that it is "mere superficial equivalency."

The facts that you have provided us, and upon which we depend in our analysis, include the representations that girls in West Virginia's secondary schools play basketball in the fall and volleyball in the winter; that these playing seasons are directly opposite those played by the majority of the members of the National Federation of State High School Associations; that the boys play basketball during the traditional or winter season; and that West Virginia is one of only five states with inverse girls' basketball seasons and one of only six states with inverse girls' volleyball seasons.

The SSAC Legislative Rules effective as of July 20, 1992 provide in part for basketball that "organized team practice for girls will begin on Monday of week 7 and Monday of week 20 for boys. The first contest for girls may be played on Wednesday of week 9 and Tuesday of week 24 for boys." Secondary School Activities Commission Legislative Rules § 127-3-21.2. The SSAC rules also provide that for girls' volleyball "organized team practice will begin on Monday of week 22 and the first contest may be played on Wednesday of week 24." Secondary School Activities Commission Legislative Rules § 127-3-31.2.

The 1992-93 National Sports Participation Summary which the Secondary School Activities Commission prepared to report on state-wide participation by boys and girls in high school sports demonstrates that boy participants in the 143 SSAC member high schools number 21,915 compared to 9,779 female participants. The West Virginia member high schools offered 906 sports teams for boys and only 612 sports teams for girls. Only 78 of the 143 high schools or 53 percent offered volleyball for female athletes. Thus, in 47 percent of the member high schools in the State of West Virginia, girls have no opportunity to participate in interscholastic sports during the winter season.

Pursuant to the SSAC Sports Participation Summary for the 1992-93 school year, 49 percent of the student population in West Virginia's SSAC member high schools were female. However, females were offered only 36 percent of the athletic opportunities in high schools when cheerleading is counted as a sport. Excluding cheerleading, which is formally listed as an activity, not a sport, the percent of athletic opportunities for females drops to 31 percent.

It cannot be disputed that boys have had, and continue to have, greater overall athletic opportunities. It is also recognized that athletics are a part of the overall constitutional mission to provide a thorough and efficient education for the children of West Virginia. Pauley v. Kelly, 162 W. Va. 672, 705-06, 255 S.E.2d 859, 877 (1979).

While our opinion rests on equal protection principles, we would be remiss if we did not consider congressional action in this area. In 1972 Congress enacted Title IX of the Education Amendments of 1972 after lengthy consideration and much debate. Title IX was enacted to assure equality in educational programs or activities receiving federal funds. 20 U.S.C. § 1681 (1972). Despite the fact that the Act itself does not specifically address athletics and there was no testimony at the hearings regarding athletic discrimination, it has been athletics that has been much of the focus of Title IX. When the United States Department of Health, Education and Welfare announced that the federal regulations would include athletics, the Department was virtually flooded with communication on the issue. The tremendous amount of public interest prompted Secretary Casper Weinberger to state at the press conference announcing the release of the Title IX Regulations that he had not realized that athletics was the "single most important subject in the United States today." Staton, "Sex Discrimination and Public Education," 58 Miss. L. J. 323, 339 (1988). The issue of gender-bias in interscholastic athletics generated such interest that in addition to the draft and final regulations, the Department of Health, Education & Welfare ("HEW") also released draft and final policy interpretations. Wong & Ensol, "Sex Discrimination and Athletics; A Review of Two Decades of Accomplishments and Defeats," 21 Gonz L. Rev. 45, 359 (1986).

The final regulation of HEW banned gender discrimination in interscholastic and intramural athletics, but allowed separate gender teams for most sports under the notion of the "separate but equal" perspective. 34 C.F.R. § 106.41(a). We acknowledge the case of Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564 (D. Mont. 1986), aff'd., 858 F.2d 579 (9th Cir. 1988), later proceeding, 749 F. Supp. 1544 (D. Mont. 1990), but find it distinguishable and not controlling. Ridgeway involved a wholesale challenge of widespread sex discrimination permeating all aspects of high school athletics in Montana. The parties entered into a settlement agreement that was adopted by the court and provided for the use of a court monitor for overseeing changes in Montana interscholastic athletics. As part of settlement of a great many factors in favor of the plaintiffs which resulted in substantial changes resulting in increased opportunity for female high school athletes and increased equity at all levels, the parties agreed to submit the issue of seasonal structure of girls' sports to the special monitor. The special monitor, after considerable study, concluded that the seasonal structure was disadvantageous to girls but that the inequities could be addressed without an immediate structural change in light of all the conditions existing in Montana high school athletics including the increase in the number and quality of girls participating since the inception of the lawsuit. The court adopted the conclusion of the special monitor and continued to retain jurisdiction. The settlement by the parties, the use of a court monitor and the continuing jurisdiction of the court over Montana high school athletics distinguish the case from the present situation. Moreover, the federal court did not have the benefit of a Montana state court opinion such as we do with Israel.

Title IX was the impetus for change and had a tremendous impact on female participation in interscholastic sports. The National Federation of State High School Associations has reported a six-fold increase in female interscholastic athletic participation over the first decade of implementing Title IX. Gaedelmann et al., "Sex Equity in Physical Education and Athletics," in Handbook for Achieving Sex Equity Through Education, 324 (S. Klein ed. 1985). The increase was in part prompted by extensive litigation. See generally, "National Values and Community Values Part I: Gender Equity in the Schools," 21 J. Law & Educ. 185-193 (Spring 1992); "Where the Boys Are: Can Separate Be Equal in School Sports?" 58 So. Ca. L. Rev. 1425 (1985); "Boys Muscling in on Girls' Sports," 53 Ohio St. L. J. 891 (1992).

The Title IX Regulations list ten specific factors that must be considered in determining whether separate teams are in fact equal. The factors are:

(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 of 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.

34 C.F.R. 106.41(c) (emphasis added).

The West Virginia Department of Education has published a technical assistance document to assist county school personnel in meeting their Title IX requirements and has commented on the ten factors. As to the scheduling factor, the Department of Education has

stated that "schedules for 'prime time,' right after school practices and games should accommodate both female and male teams equally." As to the provision of locker rooms, practice and competitive facilities, the Department of Education has stated that "locker rooms, toilets, practice and competitive facilities should be comparable for female and male teams. For example: - A school which has one gymnasium must provide for its use by members of both sexes on a non-discriminatory basis." As to publicity, it was said that "schools are responsible for supporting equal publicity efforts for athletic teams of both sexes, which includes releases to the press and pep rallies." West Virginia Department of Education, Complying with Title IX in Physical Education and Athletics at 13 (rev'd 1991).

Further, it should be noted that West Virginia Board of Education Policy 4200 declares the support of the State Board for the concept of equal educational opportunity to all students and employees. The rationale for Policy 4200 is stated as follows:

> The West Virginia Board of Education supports the concept of Equal Educational Opportunity for all students as being essential to education in the public schools of our State.
>
> Continued public attention has been focused on the concept of equal educational opportunity as it applies to female students. This attention has resulted in the passage of legislation by Congress and in dramatic changes in institutions and industries.
>
> Thus, there is a continued need for schools to place a greater emphasis on an area long neglected - the provision of equal opportunities for females.

Title 126 Legislative Rules, Board of Education § 126-82-2.1.

Policy 42 also includes several rules as to athletics that are important to our consideration of this matter.

> 3.4 Extracurricular Activities - Members of both sexes, regardless of their race, color, religion, handicapping condition, age or national origin, must be granted equal access to extracurricular activities. In order to insure equal access for all students in extracurricular activities the following criteria are adopted:
>
> 3.4.1. In athletic programs, where selection of participants is based on competitive skill, except for interscholastic football and wrestling, which are considered contact sports in West Virginia, schools must provide separate noncontact sport teams for males and females or a single noncontact sport team open to both sexes.

3.4.2 Schools should conduct annual surveys among students to determine those activities in which students desire to participate, for the purpose of insuring that all students are given equal access to extra-curricular activities.

3.4.3 If separate teams are offered, a school may not discriminate on the basis of sex in providing equipment, supplies, transportation, etc. However, equal aggregate expenditures are not required.

3.4.4 Where in the past, athletic opportunities for female students have been limited, schools must take affirmative action to inform members of that sex of the availability of equal opportunities and provide support and training to enable them to participate.

3.5. Facilities - Generally, all school facilities must be available without discrimination on the basis of sex. However facilities such as locker rooms, toilets and showers for males and females must be comparable. For example:

3.5.1. A school which has one gymnasium must provide for its use by members of both sexes on a non-discriminatory basis, including prime time.

3.5.2. A school which has one track and field facility available for a limited number of hours must provide for its use by members of both sexes on a non-discriminatory basis.

Title 126 Legislative Rules, Board of Education §§ 126-82-3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4, 3.5.1, 3.5.2.

The SSAC has regularly and routinely voted against the switch of girls' basketball to the normal and traditional season. We observe that the SSAC's resistance to the efforts of Ms. Israel and St. Marys High School to permit her to try out for the St. Marys High School boys' baseball team protracted litigation which generated the decision by the Supreme Court that came only after Ms. Israel had graduated from high school and was unable to benefit personally from her efforts. The Charleston Gazette, Saturday, April 27, 1985, Section 3B.

You have advised us and we rely upon the representation that the primary justifications for requiring girls in West Virginia to play basketball out-of-kilter with the boys' season, and both basketball and volleyball out-of-sync with the rest of the nation is a professed difficulty in scheduling gym time for practice and competition, shortages of officials, and shortages of coaches.

As the first factor in the intermediate level of scrutiny regards the importance of the governmental objective underlying the classification, these justifications simply do not meet constitutional equal protection muster. Rather, they are justifications that go strictly to administrative ease and convenience.

As to the second factor of measuring the relationship between the classification and the objective on justification, there simply is not a sufficient nexus to justify the dissimilar treatment. We observe that the situation is analogous to sex discrimination charges relating to the requirement that girls' teams play basketball according to "girls" rules which make for a much slower-paced, half-court game. In Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394 (E.D. Ark. 1979), the plaintiff challenged a "girls" rules basketball requirement on the grounds that it impeded her ability to play teams from other states and impeded her ability for recruitment and scholarship opportunities. The same claims are made here. The Court found no justification for the "girls" rules and concluded that equal protection principles had been violated. The Court noted that "Arkansas boys are in a position to compete on an equal footing with boys elsewhere, while Arkansas girls, merely because they are girls, are not." Dodson, 468 F. Supp. 394 at 398. It seems to us that the same reasoning applies here.

Less restrictive alternatives can easily be imagined which promote the same goals in a nondiscriminatory fashion. If scheduling and personnel shortages are indeed the reality, why is it that the girls must play in the off or non-traditional seasons? It is easy to imagine the uproar that would result if boys' teams were required to play in the off-season and thereby prevented from playing teams in other states and impeded in scouting and recruitment for college scholarships. The public outcry that might result would probably be no less if there were a requirement that the boys' and girls' teams take yearly turns in playing in the off-season.

Considering the issue in this way, it is easy to conclude that the present system of having girls compete during a season different from the boys' season, and different from the traditional and national norm perpetuates an attitude that the development of athletic skills, the opportunity for competition and the opportunity for out-of-state scouting and recruitment is more important for boys. The system is thus subject to criticism as being a byproduct of an archaic and outmoded way of thinking about women which is no longer legally acceptable in practice. It has the unintended effect of stigmatizing girls as second-class citizens in interscholastic athletics. Indeed, it may be characterized as paternalistic and as contrary to the concept that education is this nation's most powerful equalizing agent for opportunity. The law requires more than this. Under the law, as plainly delineated in Israel, the inverse system for girls' basketball and volleyball will not likely pass muster as "substantially equivalent."

WEST VIRGINIA EQUAL PROTECTION

Article III, Section 10 of the West Virginia Constitution, contains our state version of equal protection. Israel, 182 W. Va. at 461, 388 S.E.2d at 487. The scope and application of West Virginia's principles of equal protection are "coextensive or broader than that of the fourteenth amendment to the United States Constitution." Israel, 182 W. Va. at 461, 388 S.E.2d at 487, citing Robertson v. Goldman, 179 W. Va. 453, 369 S.E.2d 888 Syl. Pt. 3 (1988). With respect to claims of gender discrimination, the West Virginia Supreme Court of Appeals adopted the intermediate level of scrutiny approach. It held that a "gender-based classification challenged as denying equal protection under Article III, Section 10 of our constitution can be upheld only if the reclassification serves an important governmental objective and is substantially related to the achievement of that objective." Israel, 182 W. Va. at 461-62, 388 S.E.2d at 487-88.

Accordingly, the analysis is coextensive to the equal protection analysis under the federal Constitution. For the same reasons that the inverse seasons are unconstitutional under the federal Constitution as discussed above, they also violate our State equal protection constitutional standard.

THE WEST VIRGINIA HUMAN RIGHTS ACT

In the West Virginia Human Rights Act, our Legislature has declared that "it is the public policy of the state of West Virginia to provide all of its citizens . . . equal access to places of accommodations. . . . Equal opportunity in the area of . . . public accommodations is hereby declared to be a human right or civil right of all persons without regard to race, religion, color, national origin, ancestry, sex, age, blindness or handicap." W. Va. Code § 5-11-2 (1990 Repl. Vol. & 1993 Cum. Supp.). Further, it has been found by the Legislature that to deny the right of equal access to places of public accommodations for these reasons is "contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society." W. Va. Code § 5-11-2 (1990 Repl. Vol. & 1993 Cum. Supp.).

The Legislature provided a broad definition of the term "place of public accommodations." It means "any establishment or person . . . including the state, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private." W. Va. Code § 5-11-3(j) (1990 Repl. Vol. & 1993 Cum. Supp.).

The threshold question regarding whether the SSAC is a person and/or a "place of public accommodations" under the Human Rights Act was answered affirmatively by the Court in Israel v. Secondary Schools Activities Comm'n, 182 W. Va. at 463, 388 S.E.2d at 480, 488 (1989).

In Israel, the SSAC had argued that participation in interscholastic athletics is limited only to secondary school students who meet age, residency and academic requirements, and is therefore not open to the general public.

The Court rejected the SSAC argument on several grounds. It was noted that the SSAC regulate interscholastic athletics and has a direct impact on the public school system. All of the activities have general public interest through open spectator invitation to the athletic event which is generally conducted at a public facility. The SSAC was also created and endowed by the Legislature with the power to supervise athletics. Finally, it receives membership dues from public schools and a percentage of gate receipts from athletic events. Israel, 182 W. Va. at 463, 388 S.E.2d at 489-90.

The Israel case was the first time our Court had the opportunity to address a claim of gender bias in interscholastic athletics under the Human Rights Act. The Court noted the lack of definitive rules and regulations of the Human Rights Commission in the area. The Court then concluded that a reasonable approach to claims of gender discrimination in interscholastic sports is to extend constitutional equal protection principles to the Act. Israel, 182 W. Va. at 464, 388 S.E.2d at 490.

We have analyzed, under equal protection principles, the situation whereby girls must play both interscholastic basketball and volleyball in the off-seasons pursuant to mandated classifications of the SSAC and concluded that it fails to meet constitutional requirements. The same standard applies under a Human Rights Act analysis, and we need not repeat the reasoning.

We thank you for the opportunity to offer our analysis and opinion as to the law in this matter.

Sincerely,

DEBORAH L. McHENRY
MANAGING DEPUTY ATTORNEY GENERAL

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