



PACIFIC LEGAL FOUNDATION

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COMPLAINANTS

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The Pacific Legal Foundation (PLF) is a nationwide non-profit that preserves and advances the American ideals of individualism and liberty, establishing a rule of law under which every person is secure in their inalienable rights to live responsibly and productively in pursuit of happiness.

Miranda Lynch
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RECIPIENT

Mr. David Stead
Executive Director
Minnesota State High School League
Brooklyn Center, Minnesota 55430-1735

PRELIMINARY STATEMENT

1. This Complaint is filed by PLF and Miranda Lynch¹ pursuant to Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1981, *et seq.*, and the

¹ The Pacific Legal Foundation attorneys signing this complaint represent Miranda Lynch and have authority to file this complaint on her behalf.

regulations and policies promulgated thereunder. *See* 34 C.F.R. § 106 *et seq.* Title IX prohibits discrimination on the basis of sex in federally funded education programs and activities.

2. As detailed in the allegations below, information obtained by PLF from Miranda Lynch, the mother of Superior High School student Kaiden Johnson, as well as information obtained through PLF's own research, indicate that the Minnesota State High School League (MSHSL) approved and continues to operate a policy that permits only one sex to participate in an extracurricular activity in violation of 34 C.F.R. § 106.34(b)² in the following ways:
 - a. Classifying students by sex without adequate justification; specifically:
 - i. Classifying students by sex based upon impermissible stereotypes concerning the interests and abilities of boys and girls; and
 - ii. Failing to articulate an important objective of either improving educational achievement of its students through an overall established policy to provide diverse educational opportunities, or of meeting the particular, identified educational needs of its students; and
 - iii. Failing to ensure that offering single-sex extracurricular activities is substantially related to the achievement of the program's objectives;
 - b. Failing to provide a substantially equal coeducational alternative to the single-sex extracurricular activity; and
 - c. Failing to conduct an evaluation to ensure that the program does not rely on overly broad generalizations about the different talents, capacities, and preferences of either sex, or that the separation of students by sex is substantially related to the achievement of the program's objective.
3. PLF and Miranda Lynch request that the Office for Civil Rights investigate MSHSL to determine whether the single-sex extracurricular activity adopted and enforced by MSHSL is in compliance with Title IX and remedy any unlawful conduct.³

² As explained below, Dance Team must be classified as an extracurricular activity under Department of Education regulations. But even if it was classified as "athletics" under Department regulations, it may not be limited to a single sex because it is neither a contact sport nor is the restriction to girls based on an inherent competitive skill or advantage of a particular sex. *See* 34 C.F.R. § 106.41.

³ PLF attorneys sent MSHSL a warning letter informing it about the unconstitutionality of restricting dance team eligibility to a single sex. *See* Letter from Joshua Thompson,

JURISDICTION

4. OCR is responsible for ensuring compliance with Title IX and receiving information about, investigating, and remediating violations of Title IX and its implementing regulations and guidelines in the region. 34 C.F.R. §§ 106.71, 100.7.
5. Neither PLF nor Miranda Lynch has filed this complaint with any other agency or institution.
6. The discrimination identified is ongoing and is part of a continuing policy or practice. Accordingly, this complaint is timely.
7. MSHSL is an indirect recipient of federal financial assistance through its member schools which receive direct federal financial assistance. *See Grove City College v. Bell*, 465 U.S. 555, 564 (1984). MSHSL administers and enforces the eligibility rules for all Minnesota high schools that receive federal financial assistance. MSHSL has been investigated by OCR in the past. It is therefore prohibited from discriminating on the basis of sex by Title IX and must comply with Department of Education regulations.

OPERATIVE LAW

8. Title IX provides in relevant part that:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

9. The Department of Education's Title IX regulations require with respect to single-sex extracurricular activities in a coeducational school that:

Each single-sex class or extracurricular activity is based on the recipient's important objective

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or

Senior Attorney, Pacific Legal Foundation, to David Stead, Executive Director, Minnesota State High School League (October 10, 2017), <https://pacificlegal.org/wp-content/uploads/2017/10/Stead-Letter-10.10.17-1.pdf>. To date, MSHSL has not responded to that letter. No other attempt to resolve these allegations with the institution has been undertaken by either PLF or Ms. Lynch.

extracurricular activity is substantially related to achieving that objective;
or

(B) To meet the particular, identified educational needs of its students,
provided that the single-sex nature of the class or extracurricular activity
is substantially related to achieving that objective.

34 C.F.R. § 106.34(b)(1)(i)(A)-(B).

10. Justifications for single-sex extracurricular activities may not “rely on overly broad generalizations about the different talents, capacities, or preferences of either sex.”

34 C.F.R. § 106.34(b)(4)(i).

11. A single-sex extracurricular activity must be implemented “in an evenhanded manner,” student enrollment must be “completely voluntary,” and there must be a “substantially equal” coeducational extracurricular activity.

34 C.F.R. § 106.34(b)(1)(ii)-(iv).

12. Any program that includes a single-sex extracurricular activity must be evaluated by the recipient at least every two years “to ensure that single-sex classes or extracurricular activities are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex and that any single-sex classes or extracurricular activities are substantially related to the achievement of the important objective for the classes or extracurricular activities.”

34 C.F.R. § 106.34(b)(4).

13. If Dance Team is considered a sport instead of an extracurricular activity, Title IX regulations require that “No person shall, on the basis of sex, be excluded from participation in ... any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.”

34 C.F.R. § 106.41(a).

14. An exemption for the general prohibition on single-sex athletics exists “where selection for such teams is based upon competitive skill or the activity involved is a contact sport.”

34 C.F.R. § 106.41(b).

ALLEGATIONS

15. The Minnesota State High School League is a non-profit corporation that is a voluntary association of public high schools. The league is comprised of high schools whose governing boards have delegated their control of extracurricular activities to MSHSL. *See* Minn. Stat. § 128C.01. MSHSL governs interscholastic athletic and fine arts competitions for Minnesota-region participating high schools. MSHSL has approximately 500 member schools. It oversees athletics and fine arts competitions for more than 200,000 students annually. MSHSL also oversees more than 4,500 registered contest officials and judges.⁴
16. In order to join MSHSL, a school must adopt the Constitution, Bylaws, Rules, and Regulations of MSHSL, which are published in MSHSL's Official Handbook.⁵ The handbook establishes the eligibility rules for participation in interscholastic and fine arts competitions for MSHSL member schools.
17. Specifically, Bylaw 412 "identifies the MSHSL Sponsored Activities for girls' [sic] and the activities that are available for either sex."⁶
18. Under MSHSL Bylaw 412.00, Dance Team is offered only for girls.⁷
19. Historically, the Department of Education has considered dance an extracurricular activity that is regulated under 34 C.F.R. § 106.34 and not as an athletic program that is governed by 34 C.F.R. § 106.41.⁸
20. Indeed, in a 2000 letter to MSHSL from OCR, OCR explained that while individual classification of an activity must be done on a case-by-case basis, it presumes that activities like drill team and cheerleading are not "sports" for purposes of 34 C.F.R. § 106.41.⁹

⁴ *See* Minnesota State High School League, *About the Minnesota State High School League*, <https://www.mshsl.org/mshsl/aboutmshsl.asp?page=1>.

⁵ *See* <http://www.mshsl.org/mshsl/publications/code/forms/MembershipForms.pdf?ne=77>.

⁶ <http://www.mshsl.org/mshsl/MSHSLParticipationFactSheet.pdf>.

⁷ <https://www.mshsl.org/mshsl/Publications/code/handbook/400%20Bylaws.pdf?year=2016>.

⁸ *See* Peter E. Holmes, U.S. Department of Education, Office for Civil Rights, "Letter to Chief State School Officers, Title IX Obligations in Athletics," September 1975, <https://www2.ed.gov/about/offices/list/ocr/docs/holmes.html>.

⁹ Letter from Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office of Civil Rights, United States Department of Education, to David V. Stead, Executive Director, Minnesota State High School League (Apr. 11, 2000).

21. In a subsequent letter issued one month later, OCR told MSHSL that, with respect to its April 11, 2000 letter, “the term cheerleading . . . includes both competitive and sideline cheer; other like activities would include all extracurricular activities similar to drill teams and cheerleading, such as danceline, skateline, and pep squads.”¹⁰
22. Because Dance Team is an extracurricular activity for purposes of Title IX, MSHSL must articulate an “important objective” before excluding boys from the extracurricular activity. 34 C.F.R. § 106.34(b)(1)(i); *see also United States v. Virginia*, 518 U.S. 515, 533 (1996). To date, MSHSL has failed to articulate an important government objective for its prohibition on boys participating on the dance team.
23. Title IX regulations recognize only two important objectives that can justify a recipient’s single-sex extracurricular activity. The single sex extracurricular activity must either be part of an “established policy to provide diverse educational opportunities;” or, be designed to “meet the particular, identified educational needs of its students.” *See* 34 C.F.R. § 106.34(b)(1)(i)(A)-(B). Neither justification could plausibly apply to MSHSL’s decision to exclude boys from Dance Team.
24. Based on news reports, officials with the Minnesota High School Dance Team Association believe that this rule is “outdated and needs to change.” However, those officials also believe that MSHSL continues to perpetuate the sex discrimination in dance because, “[i]t’s a part of gender equity, schools have a girl’s dance team that counts as one of the girl sports to balance boy sports.”¹¹
25. Yet, MSHSL’s Bylaw 412.00 concedes that “Girls’ Dance Team, in its current form, may not rise to the level of a gender equity activity for the purpose of Title IX.” *See also Biediger v. Quinnipiac University*, 691 F.3d 85, 102-05 (2d Cir. 2012) (participation in competitive cheerleading could not be counted towards Title IX balancing).
26. Because MSHSL affirmatively rejects compliance with Title IX’s gender equity goals as a basis for excluding boys from participating in dance, and has failed to articulate any other important government objective, it likely relies on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Virginia*, 518 U.S. at 533. Not only are such sex-based stereotypes

¹⁰ Letter from Mary Frances O’Shea, National Coordinator for Title IX Athletics, Office of Civil Rights, United States Department of Education, to David V. Stead, Executive Director, Minnesota State High School League (May 24, 2000).

¹¹ Nikki Davidson, *Nikki’s Notebook: Title IX Rule Keeps Boys Off Dance Team* (May 7, 2017), <http://www.fox21online.com/2017/05/07/nikkis-notebook-title-ix-rule-keeps-boys-off-dance-team/>.

offensive, but they violate both Title IX and the Fourteenth Amendment to the United States Constitution. *Id.* at 531-34.

27. Neither Pacific Legal Foundation nor Miranda Lynch are aware of any evidence that MSHSL conducted an individualized assessment of student needs, or that it has an overall established policy to improve educational achievement by offering a diversity of extracurricular options.
28. Neither Pacific Legal Foundation nor Miranda Lynch are aware of any research that MSHSL considered or conducted demonstrating that single-sex dance would achieve important educational objectives.
29. Neither Pacific Legal Foundation nor Miranda Lynch are aware of any substantially similar coeducational extracurricular alternatives that MSHSL provides to boys as required by 34 C.F.R. § 106.34(b)(1)(iv).
30. Neither Pacific Legal Foundation nor Miranda Lynch are aware of any documentation concerning periodic evaluations undertaken by MSHSL that its sex-based extracurricular activity “are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex” as required by 34 C.F.R. § 109.34(b)(4).

RELIEF REQUESTED

31. Pacific Legal Foundation and Miranda Lynch request that:
 - a. OCR investigate MSHSL to determine whether it is in compliance with Title IX and its implementing regulations.
 - b. OCR order MSHSL to take all necessary steps to remedy any unlawful conduct identified in OCR’s investigation, as required by Title IX and its implementing regulations.
 - c. If any violations are found, that OCR secure assurances of compliance with Title IX from all MSHSL’s member schools.
 - d. OCR monitor any resulting agreements with MSHSL and/or individual schools to ensure full compliance with Title IX.
32. If your investigation substantiates that, as we have alleged, the MSHSL Dance Team classification is premised on unlawful sex stereotypes, MSHSL should not be permitted to invent new objectives for the program post hoc in order to justify its continuation. The only sufficient remedy would be to cease the sex separation altogether and revert to a fully coeducational structure. In addition, MSHSL

should be required to conduct remedial training in sex equality in education that comports with the requirements of Title IX and the Constitution.

Respectfully submitted,



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