



October 10, 2017

Mr. David Stead
Executive Director
Minnesota State High School League
2011 Freeway Boulevard
Brooklyn Center, MN 55430-1735

VIA EMAIL dstead@mshsl.org
AND FIRST-CLASS MAIL

Re: Forthcoming Lawsuit Regarding MSHSL's Discrimination
Against Boys Who Seek to Compete in Competitive Dance

Dear Mr. Stead:

We are attorneys with the Pacific Legal Foundation (PLF), a non-profit legal foundation that represents individuals pro bono in cases where the government violates their constitutional rights. PLF's track record of nine victories in the United States Supreme Court, as well as countless victories in appellate courts, district courts, and state courts, speaks for itself: PLF is dedicated to enforcing the Constitution's protections for individual liberty and has the institutional expertise to vindicate our client's rights in courts at every level. For the reasons explained below, we respectfully request that MSHSL rescind its discriminatory classification of dance as a girls-only sport. If we do not hear from you by November 3, 2017, we will presume MSHSL is determined to continue its discriminatory policy and we will take the appropriate legal action on behalf of our client.

Kaiden Johnson

We currently represent Kaiden Johnson, a sophomore at Superior High School in Superior, Wisconsin. Kaiden has danced competitively for nine years. His decision to pursue dance instead of a traditional "boy sport" has led to years of bullying, teasing, and loneliness. Nevertheless, Kaiden persevered because dancing is his passion. He explains: "When you dance, it's basically a story. I just love being able to express

myself—to show *my side* of the story.”¹ Dancing allows Kaiden to feel “liberated” and “free.”

As a freshman last year, Kaiden tried out for, and made, Superior High School’s varsity dance team. Despite being the only boy on the team, Kaiden was embraced by both his teammates and coaches. He put his heart into the team, practicing with them for twelve hours per week in preparation for the Minnesota State High School League (MSHSL)-sanctioned Lake Superior Conference Dance Championship.² Kaiden had met his goals, and felt like he belonged.

MSHSL’s sex-based discrimination

This past December at the Lake Superior Conference Dance Championship, Kaiden was ready to join his teammates on stage. He practiced his routines. He donned his costume. He felt the same nerves that many student athletes feel when they are about to compete in their first high school sport. But then one of his teammates informed him that MSHSL judges would not allow him to compete with the team, because he is a boy.³ As Kaiden explains, he “felt useless. All that work I put in was wasted.”⁴ Once again, Kaiden was made to feel like he didn’t belong. He was again being bullied for choosing to dance, but this time by MSHSL.

The MSHSL officials who denied Kaiden the opportunity to compete were following MSHSL bylaws which designate dance as a girls-only sport.⁵ The officials were following the rules adopted and maintained by MSHSL. By choosing to prohibit boys

¹ Pacific Legal Foundation, *Kaiden Johnson — Teen Dancer Kicked Out of Competition for Being a Boy*, YouTube (October 10, 2017), https://www.youtube.com/watch?v=ZQ9CJT2k_ek.

² As you are aware, because of its proximity to Duluth-area schools, Superior High School primarily competes in the Lake Superior Conference, a Minnesota athletic conference governed by MSHSL’s eligibility rules.

³ 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/>.

⁴Pacific Legal Foundation, *supra*, note 1.

⁵ MSHSL Bylaw 412.00.

from dancing MSHSL is denying Kaiden, and hundreds of Minnesota boys, the opportunity to participate in a sport they love.⁶

MSHSL violated Kaiden's rights under the Fourteenth Amendment to the United States Constitution

As you are undoubtedly aware, "MSHSL acts under color of state law when enforcing its eligibility rules."⁷ MSHSL is therefore required to act in accordance with the Fourteenth Amendment to the United States Constitution which guarantees all individuals "the equal protection of the laws."⁸ Under the Equal Protection Clause, any state action which discriminates on the basis of sex is presumptively illegal and will be upheld only if it survives intermediate scrutiny.⁹

To withstand intermediate scrutiny, a sex-based classification "must serve important governmental objectives and must be substantially related to achievement of those objectives."¹⁰ The party "seeking to uphold a statute that classifies individuals on the basis of their sex must carry the burden of showing an 'exceedingly persuasive justification' for the classification."¹¹ This justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."¹²

⁶ We have been in contact with Minnesota families who are prepared to stand with Kaiden if MSHSL continues its discriminatory policy.

⁷ *H.R. ex rel. S.R. v. Minnesota State High School League*, No. CIV. 13-16 DSD/JJK, 2013 WL 147416, at *3 n.3 (D. Minn. Jan. 14, 2013) (citing *Brenden v. Indep. Sch. Dist.* 742, 477 F.2d 1292, 1295 (8th Cir. 1973)).

⁸ U.S. Const. amend XIV, § 1.

⁹ *United States v. Virginia*, 518 U.S. 515, 531-34 (1996).

¹⁰ *Craig v. Boren*, 429 U.S. 190, 199 (1976).

¹¹ *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); see also *Craig*, 429 U.S. at 199-204 (invalidating state law that allowed women to purchase 3.2% alcohol beer at age eighteen but prohibited men from doing so until age twenty-one because it was not substantially related to an important government purpose).

¹² *Virginia*, 518 U.S. at 533 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)).

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MSHSL's classification of dance as a girls-only sport is quintessentially a judgment about the different talents, capacities, and preferences of boys and girls. Some boys prefer dance to football, and there is no reason to prohibit them from participating in their chosen sport except for outdated stereotypes about who should be competing in which sports. Such stereotypes have no place in state-sponsored policy. As such, designating dance as a girls-only sport does not further any important government objective and is not likely to survive a constitutional challenge.

It is unfortunate that in 2017 such blatant sex-based discrimination would be perpetuated by an institution organized to teach our children how to play fairly and by the rules. The rules that MSHSL has adopted perpetuate insidious sex-based stereotypes, lending credibility to Kaiden's bullies by suggesting that girls, but not boys, should dance. You make the fact that dance is a girls-only sport a self-fulfilling prophecy.¹³

Future course of action

The objective of this letter is to put MSHSL on notice that its classification of dance as a girls-only sport is unconstitutional, both on its face and as-applied, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Your classification expressly discriminates on the basis of sex, and critically does so without justification. And by denying Kaiden Johnson the opportunity to compete on this basis, MSHSL has violated his right to equal protection of the laws. Thus, Kaiden has an actionable civil rights claim against MSHSL and its officials pursuant to 42 U.S.C. § 1983.

Kaiden is willing to forego litigating his constitutional injury if MSHSL rescinds its discriminatory policy. For Kaiden's sake, the sake of the Minnesota families who have contacted Pacific Legal Foundation, and the sake of all Minnesota children who wish to be treated equally, we respectfully request that MSHSL end its discriminatory policy. There is simply no justification for perpetuating discrimination against boy dancers.

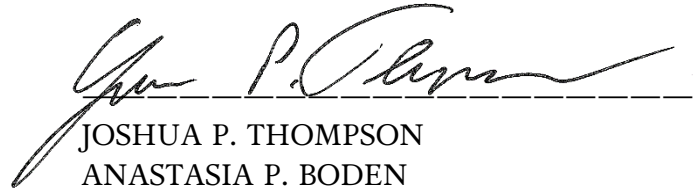
If we do not hear from you by November 3, 2017, we will presume that MSHSL wishes to continue its discriminatory policy. At that time we will pursue all available options

¹³ See *Hogan*, 458 U.S. at 730-31.

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for vindicating Kaiden's constitutional rights, as well as the rights of current and future Minnesota students.

Sincerely,



JOSHUA P. THOMPSON
ANASTASIA P. BODEN
Attorneys

cc: MSHSL Board of Directors:

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