

GIRL BANNED FROM PRIVATELY SPONSORED BOYS BASKETBALL TOURNAMENT

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In the case of *Perkins v. Londonderry Basketball Club*, 196 F.3d 13 (1st Cir.1999), plaintiff Stacey Perkins alleged that defendant Londonderry Basketball Club (LBC) violated the Fourteenth Amendment of the United States Constitution when it refused to allow her to play in a youth basketball tournament because of her gender.

The Fourteenth Amendment of the Constitution provides, in pertinent part that "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The equal protection clause, however, applies only to action by state government or officials (including political subdivisions), and those significantly involved with them. Accordingly, to establish a federal constitutional claim for denial of equal protection in this particular instance, Perkins had to demonstrate that LBC's private practices were "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." See *Fortin a Darlington Little League Inc.*, 514 F.2d 344 1st Cir. 1975/.

The federal court in the *Perkins* case described below found no "cogent justification for LBC's same-sex tournament rule, which effectively deprived Stacey Perkins of an opportunity to play in the youth basketball tournament."

Despite characterizing "what has occurred as extremely lamentable," the federal circuit court noted that "regulation of private entities like LBC normally is accomplished through statutes, not through the Constitution." As a result, the federal appeals court held that "[Perkins'] constitutional claim fails for want of state action." In so doing, the federal court noted that Perkins could pursue available state law claims for gender discrimination in the New Hampshire courts.

#### FACTS OF THE CASE

As described by the federal circuit court of appeals, the facts of the case were as follows:

Stacey Perkins is a 10-year-old female with an affinity for the sport of basketball. She resides in Seabrook, N.H., a community which has no competitive "all-girls" basketball league for Stacey's age group. At the start of the 1997-1998 season, [Perkins] seized the only realistic opportunity for a girl of her age to compete and joined the Red Devils," a mixed-gender team that plays in the Seabrook Recreational League (SRL). In March 1998, [Perkins] was one of two girls selected to play on the SRL's twelve-member All-Star team.

The scene now shifts from Seabrook to Londonderry, N.H. (the town), where basketball has proven to be a popular pastime. In the 1980s, Arthur Psaedas, the town's recreation director, ran a youth basketball program on his own time. As demand increased, however, Psaedas could not keep pace, and several community groups banded together in 1990 to form LBC (a voluntary, nonprofit organization that enjoys taxexempt status under 26 U.S.C. Sec 501(c) (3). In furtherance of its mission to provide basketball opportunities for the town's young people, LBC manages single-sex boys' and girls' teams for third through eighth graders. To cap the season, it sponsors a one-week annual tournament (really two tournaments, because LBC splits it into separate brackets for boys and girls).

LBC solicits donations to support its activities. The annual tournament constitutes its most substantial fundraising event: registration fees, ticket sales, and souvenir sales le.g., T shirts all generate revenues. LBC and the Town's Recreation Commission have a modest interlock: Two members of LBC's five-member board of directors happen to serve as members of the Recreation Commission, and Commission members often assist as volunteers at the tournament by keeping score, running the clock, and the like.

LBC uses the town's public school gymnasium for league and tournament play. Gym time is allocated by Psaedas, who holds a yearly meeting for that purpose with user representatives and Town officials. Like other groups that use the Town's facilities, LBC pays a mandatory security fee to a private service but pays no rent.

Beginning in 1996, the town adopted sanctioning requirements in an effort to prioritize requests for extra-curricular use of school gyms. Evidence makes clear that the town's goal in adopting these requirements was to bring competing groups together and thus lessen the burden on municipal facilities. LBC sought and gained the town's imprimatur under the sanctioning requirements.

As part of an allocation process, each group that aspires to gym use is required to submit a request for dates to the town's School District. Because Psaedas has been handling these submissions for many years, he knows the needs of the basketball, soccer, volleyball and other leagues and automatically furnishes information to the School District on behalf of LBC and other similarly situated private groups. Although non-sanctioned groups may use the gyms, sanctioned groups receive priority. Moreover, Psaedas occasionally has moved adult groups to different time slots to accommodate LBC's tournament-related needs.

There are other points of contact between LBC and the Town: LBC holds meetings in school buildings, distributes flyers regarding tryout schedules through the schools, and relies on Psaedas to inform it when the School District cancels its programs. The most salient contact point is financial: LBC from time to time contributes money to the town's schools for scholarships, travel,

uniforms, basketball equipment and court maintenance. Between 1991 and 1998, these donations amounted to \$22,000. In the event LBC were to dissolve, its charter provides that all its assets would be distributed to the town.

The SRL arranged for its All-Star team to play in LBC's tenth annual "boys" tournament. The schedule called for the team to play its first game on March 24, 1998. But LBC opted to apply its policy of "separate and equal" brackets, which contained no provision for mixed-gender play, even where, as in this case, a child's community offered no single-sex team on which she could compete. In accordance with the policy (which LBC defends as an attempt to maximize the participation of both sexes), LBC informed Stacey's coach that girls would not be allowed to participate in its boys' tournament.

Perkins sued LBC alleging equal protection violations under the Fourteenth Amendment. LBC moved for summary judgment. The district court granted the motion as to the Fourteenth Amendment holding that LBC's conduct did not constitute state action. Perkins appealed.

#### PRIVATE PARTY "STATE ACTION"?

As noted by the federal appeals court, "the public/private dichotomy remains embedded in our constitutional jurisprudence."

This dichotomy distinguishes between state action, which must conform to the prescriptions of the Fourteenth Amendment, and private conduct, which generally enjoys immunity from Fourteenth Amendment strictures. "State action," of course, includes action not only by states, but also by their political subdivisions (e.g., cities and towns.., [In determining the] line of demarcation between public and private action, [the Supreme Court has] directed lower courts to take a case-by-case approach, sifting facts and weighing circumstances so that the non-obvious involvement of the State in private conduct can be attributed its true significance.

In this particular instance, the court noted that there was no direct "state action" because "LBC is not structurally an arm of municipal government." On the other hand, the court acknowledged that actions by a private entity could become "state action" if the private entity:

- (1) assumes a traditional public function when it undertakes to perform the challenged conduct, or
- (2) an elaborate financial or regulatory nexus ties the challenged conduct to the State, or
- (3) a symbiotic relationship exists between the private entity and the State.

As characterized by the court, the specific issue under each of these three tests (i.e., traditional public function test, nexus test, and symbiosis test) was 'whether private actors have aligned

themselves so closely with either state action or state actors that the undertow pulls them inexorably into the grasp of the Fourteenth Amendment."

#### TRADITIONAL PUBLIC FUNCTION TEST

On appeal, Perkins argued that LBC had "assumed a traditional public function" because "LBC took over the task of operating the youth basketball program from the town's recreation director." The appeals court rejected this argument. In so doing, the court noted that "private sponsorship of youth basketball existed in Londonderry well before LBC's formation." Moreover, the court found "Psaedas never ran a youth basketball program in his capacity as recreation director."

According to the federal appeals court, "[the] public function analysis is designed to flush out a State's attempt to evade its responsibilities by delegating them to private entities."

In order to prevail on such a theory, a plaintiff must show more than the mere performance of a public function by a private entity; she must show that the function is one exclusively reserved to the State. Government customarily involves itself in many types of activities, but few of those activities come within the State's exclusive preserve... IT)he administration of an amateur sports program lacks the element of exclusivity and therefore is not a traditional public function... Neither the conduct nor the coordination of amateur sports has been a traditional governmental function.

As a result, the appeals court held that LBC's conduct did not constitute "state action" under the traditional public function test because LBC's basketball program, like most youth sports programs, was not "not exclusively governmental."

#### NEXUS TEST

In order to prevail under the second "nexus" test for state action, the appeals court noted that "a plaintiff must show a close nexus between the State and the challenged action of the private entity so that the action of the latter may be fairly treated as that of the State itself."

Such a nexus requires more than the State's passive acquiescence in, or mere approval of, the challenged conduct. Rather, the plaintiff must show that the State has exercised coercive power or has provided such significant encouragement, either overt or covert, that the challenged conduct fairly can be attributed to the State.

This inquiry is a targeted one, with the challenged conduct at the hub of the analytical wheel. Thus, the focal point is the connection between the State and the challenged conduct, not the broader relationship between the State and the private entity. Extensive regulation, without more, cannot establish the necessary nexus. Indeed, even when the State has conferred monopoly status on a private entity courts will not find state action on a nexus theory absent a snug

relationship between the grant of monopoly power and the challenged conduct itself.

Applying this "nexus analysis" to the facts of the case, the federal appeals court found the town's "sanctioning requirements and the reserved power to regulate the use of school gymnasium" as well as "provision of generic benefits /such as the rent-free use of facilities)" did not constitute state action. In so doing, the appeals court found no evidence of such a "snug relationship" in which "the town exercised coercive power over, or significantly encouraged, LBC's promulgation of the same-sex tournament rule or its decision to ban Perkins from tourney participation."

### SYMBIOSIS TEST

Finally, the appeals court considered whether "LBC and the Town enjoyed a symbiotic relationship, sufficient to establish state action." As described by the court, the symbiosis test "requires an evaluation of whether the government has so far insinuated itself into a position of interdependence with the private entity that it must be recognized as a joint participant in the challenged activity."

A true symbiosis is predicated on interdependence and joint participation... [The symbiosis test for "state action" considers] the extent to which the private entity is (or is not) independent in the conduct of its day-to-day affairs... [T]he circumstances surrounding a private entity's use of public facilities warrant careful attention. In this regard, courts long have recognized that a municipality's mere provision of recreational fora (such as athletic facilities) does not give rise to state action. If, however, a municipality rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation.

On appeal, Perkins had contended that "the Town's sanctioning requirements and control over scheduling constitute impermissible rationing and, thus, joint participation." The appeals court, however, found no evidence of a symbiotic relationship in which the Town excluded competing groups from the use of Town facilities and conferred "monopoly status" on LBC. On the contrary, the court found no evidence that "other youth basketball programs have been deterred from attempting to secure sanctioning or to obtain gym time." As characterized by the court, "the most that can be said is that LBC took advantage of an opportunity that the Town made available to all organizations of its type."

Conduct that involves no more than seizing a widely available opportunity offered by the State will not justify a finding of impermissible rationing... [T]he record reflects that both sanctioned and non-sanctioned groups actually use the gyms.

Although sanctioned groups theoretically receive priority in scheduling, this fact alone, without proof of adverse effects, does not amount to the type of rationing that constitutes state action... [F]acility-use decisions, in and of themselves, did not significantly involve the state in [the athletic conference's] gender policy...

[T]he Town's gyms are used primarily for school purposes and, after hours, are frequented by an array of other groups (e.g., volleyball teams, men's basketball teams/, including but not limited to LBC.

On appeal, Perkins had also contended LBC was "not independent in the conduct of its everyday affairs." The appeals court, however, found "[t]he Town simply is not involved to any meaningful degree in those myriad activities" conducted by LBC.

Sanctioning by the Town does not evince an insinuation of the Town into LBC's ordinary course of day-to-day business; instead, sanctioning represents the Town's attempt to administer its own resources for the benefit of its residents. In all events, LBC's purview is not confined to the one-week life span of tournament play. Rather, it administers and coordinates teams of youngsters throughout a lengthy season and performs all the pre-season preparation that such an undertaking invariably entails... While two LBC directors serve as members of the Recreation Commission, and Commission members assist at the annual one-week tournament by performing menial tasks, such discrete incidents of assistance do not constitute municipal involvement in the daily management of LBC's affairs.

Accordingly, the appeals court found "no significantly probative evidence that the Town and the private entity have become so joined at the hip that a symbiotic relationship persists." Rather the court described the relationship between the Town and LBC as "the coordination of efforts that often characterizes the operation of private youth groups at public schools." As a result, the federal appeals court determined "the facts do not warrant a finding of joint participation to the degree needed to sustain a claim of state action." The federal circuit court of appeals, therefore, affirmed the lower court's determination that Perkins had failed to demonstrate that LBC's conduct constituted the necessary "state action" to establish a federal constitutional claim based on a denial of equal protection.