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CONSTITUTIONAL TEST FOR GENDER DISCRIMINATION IN PUBLIC FACILITIES

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The description of the *Sullivan* opinion contained herein resulted from my case research in response to an inquiry regarding alleged gender based discrimination in providing public athletic facilities. In this particular instance, the male leadership of a girls softball association in a metro county claimed that the county (in particular one county commissioner) was intentionally ignoring the construction of needed facilities in his geographical area of the county because it would benefit girls/women participation. According to the softball association, on several occasions, this elected commissioner had stated that he "just doesn't want any county park money spent to benefit the girls".

To counter such perceived gender based discrimination, the softball association was looking for case examples that might clarify whether the law would indeed require gender equity in providing park and recreation facilities and programs. In particular, the inquiry referenced Title IX of the Education Amendments of 1972 as a legal basis for requiring gender equity in local park and recreation facilities.

Title IX, however, prohibits discrimination on the basis of sex "in education programs receiving Federal financial assistance." While athletics are considered an integral part of an institution's education program and are therefore covered by Title IX, this particular federal law would not necessarily apply to allegations of gender discrimination in the provision of county athletic facilities by a local park and recreation agency since this situation would not involve "education programs receiving Federal financial assistance."

However, as illustrated by the opinion of the federal circuit court in the case of *Sullivan v. City of Cleveland Heights* (6th Cir. 03/15/1989), such allegations of gender based discrimination may give rise to a federal claim based upon the Equal Protection Clause of the U.S. Constitution. (Moreover, there may be state laws or local ordinances which prohibit gender discrimination in providing public programs and facilities.)

As stated in *Sullivan*, the "proper standard for gender-based discrimination" is as follows: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives."

In *Sullivan*, plaintiff alleged that the City imposed upon her an unconstitutional classification based on gender by affording her an unequal facility for changing clothes. The specific issue was, therefore, whether "Sullivan was accorded treatment by the City of Cleveland Heights unequal to that accorded her male counterparts." If such unequal treatment existed, the court found that "the equal protection clause of the fourteenth amendment [to the U.S. Constitution] was violated unless the difference in the facilities bore a substantial relationship to an important governmental objective."

Similarly, applying these principles and reasoning to the allegations of gender discrimination by the women's softball association, the issue would be whether there is substantial evidence that "such unequal treatment existed" in the provision of athletic facilities for women in the county. If so, the county would have to show that "the difference in the facilities bore a substantial relationship to an important governmental objective" which would somehow justify unequal treatment between men and women.

FUNCTIONALLY EQUIVALENT FACILITIES?

In *Sullivan v. City of Cleveland Heights*, 869 F.2d 961 (6th Cir. 03/15/1989), plaintiff Kate Sullivan claimed her constitutional rights under the equal protection clause of the fourteenth amendment were violated because the clothes-changing facilities which were made available for her at a public hockey arena were unequal to those provided for male hockey players. The facts of the case were as follows:

> Kate Sullivan, ten years old at the time of suit, was enrolled in the City of Cleveland Heights' hockey program. The city's hockey leagues play at the Cleveland Heights Recreation Pavilion which at that time had one locker room for the home team. From 1982 to the spring of 1985 Sullivan, the only girl on the team, changed clothes in the same locker room area as the boys on her team. During an "away" game at a different facility in the spring of 1985, Sullivan's coach, Kenneth Hrabak, prompted by complaints from the boys on the team, told Sullivan that she could no longer change clothes in the same area as the boys. From that time until the filing of this suit, Sullivan changed clothes for home games in the women's restroom in the lobby area of the Cleveland Heights Recreation Pavilion some one hundred to one hundred fifty feet from the locker room. More recently, a room in the rear of the women's restroom was made available for her to change.

On November 21, 1986, Sullivan filed suit in district court against the City of Cleveland Heights and Zarnoch, director of the Cleveland Heights hockey league, alleging that they discriminated against her by not providing her with changing facilities equal to those used by the male hockey players. The federal district court granted the City's motion to dismiss the case. Sullivan appealed.

The issue before the federal appeals court was, therefore, whether the City had imposed "an unconstitutional classification based on gender" by providing Sulivan an alleged "unequal facility for changing clothes."

As cited by the federal appeals court, the Supreme Court of the United States, in *Craig v. Boren*, 429 U.S. 190, 197, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976), had "articulated the proper standard for gender-based discrimination" as follows:

> To withstand constitutional challenge, previous cases establish that classifications by

> gender must serve important government objectives and must be substantially related to achievement of those objectives.

Accordingly, the appeals court had to first determine "whether Sullivan was accorded treatment by the City of Cleveland Heights unequal to that accorded her male counterparts." If the court found "such unequal treatment existed," the question before the court would be whether "the difference in facilities bore a substantial relationship to an important governmental objective."

As described by the appeals court, Sullivan argued the following points to establish that "the clothes-changing facilities made available for her were unequal to the locker room in which the male hockey players changed clothes":

> Sullivan claims that the women's restroom and adjacent room in which she changed clothes were less secure than the locker room and were also not supervised as was the locker room. She also asserts that her bar from the locker room area and her not being afforded a nearby facility while changing clothes caused her to miss pre-game team meetings and placed her on a different status than the male hockey players, thus depriving her of the comradery of the team, and that her separation from the team negatively impacted on her psychological well-being.

The district court, however, had concluded that "Sullivan's claims of unequal treatment were without constitutional merit because the facility in which she changed clothes was substantially equal to that in which the male hockey players changed clothes." In so doing, the federal district court made the following findings of fact:

> It should be here noted that the term "locker room", as used in this case, is for the most part a misnomer, for there are no lockers in the locker room area. The hockey players merely lay their clothing and belongings on the benches provided within the locker room area. Coaches are provided with a key to the locker room area so that they may lock the door to restrict entrance while the players are on the ice.
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> There is also no indication that the plaintiff, once she has changed, is required to leave her belongings unattended or unguarded in the ladies [sic] restroom, or that she is not permitted to place her belongings in the locker room area with those of the other players. Additionally, there is no evidence that the locker room area contains any shower facilities, or if the area is equipped with shower facilities, that any of the team members use them. The Court finds that in comparing the facilities contained in the locker room to those contained in the ladies' restroom and room attached thereto, the one is the functional equivalent of the other.

> Although the plaintiff now complains that the current arrangement leaves her in a precarious position fraught with danger and lacking in supervision, the Court finds that these arrangements are entirely suitable. The plaintiff would have this Court believe that because she is required to change in the ladies' restroom at the front of the Pavilion, some one hundred to one hundred fifty feet from the locker room area, she has been banished from the ice rink, ostracized from her teammates and coaches, and generally sent forth to fend for herself against all the world without supervision or protection. The Court finds these contentions entirely without merit. In addition to changing clothes, the locker rooms are used for team meetings, both before and after the games.
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> Both Zarnoch and Hrabak, who have coached the plaintiff in the past, testified, and plaintiff did not dispute, that they were not only aware that the plaintiff was a girl, but that they made a conscious and concerted effort not to start any team meetings or engage in any activity, other than changing clothes, without the plaintiff's presence. Additionally, the ladies' restroom utilized by the plaintiff is not an isolated area. This general area also contains a ticket office, an information booth, a kitchen and refreshment area, a first aid room, a men's restroom, and a large public area used by many patrons, both male and female, as a place to put on their skates.
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> Finally, there was no evidence of any kind to establish that the Pavilion or the area described above has been the scene of any violence, assaults, or threats that would in any way endanger the safety or well being [sic] of the plaintiff. Moreover, plaintiff has neither alleged nor presented evidence of any incident which could have caused her to feel or believe that she was in any way threatened or in peril.

In the opinion of the federal appeals court, based upon the record before the district court, these findings of fact were not "clearly erroneous." Accordingly, the federal appeals court concluded that "the facility afforded to Sullivan was substantially equal to the locker room utilized by the boys on her team is correct." Having found that "Sullivan was not accorded treatment unequal to that of the male hockey players," the federal appeals court determined that it was "unnecessary to consider whether the difference in the facilities was substantially related to an important objective." The federal appeals court, therefore, affirmed the district court's dismissal of Sullivan's gender discrimination suit.

DISSENT: INFERIOR FACILITIES

One of the federal circuit court judges, however, filed dissenting opinion. In contrast to the conclusion reached by the majority, the dissenting judge would have required further proceedings to whether the difference in the facilities was substantially related to an important objective. In reaching this conclusion, the dissenting judge found that "[a] review of the record in this case shows that Sullivan was virtually left

alone to change her clothing in a female restroom, located approximately 100 to 150 feet from the boys' locker area":

> Defendant Zarnoch testified that he did not know where Sullivan dressed during the time he coached her, and Assistant Commissioner Shaw testified that "no specific supervision" for athletes is provided outside the locker area. The record shows that the changing area provided to Sullivan is easily accessible to the general public. In fact, Shaw stated that because of the past history "of acts of vandalism and smoking," the female restroom is without a door.
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> In contrast, the boys' locker room is off limits to the general public, as mandated by league rule, and the "locker room must be kept locked at all times when a Coach is not present. Finally, the hockey league rules expressly state that coaches are responsible for all children participating in the league.
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> However, despite this overwhelming evidence that Sullivan received inadequate supervision and that her changing facilities were manifestly inferior to those enjoyed by her male counterparts, the district court concluded that the defendants provided her with "functional[ly] equivalent" facilities. Given the record in this case, I am left with the "definite and firm conviction" that the district court erred in making this determination.
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> Under *Craig v. Boren*, 429 U.S. 190, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976), in order for a gender based classification to withstand constitutional scrutiny, that classification must "serve important governmental objectives and must be substantially related to the achievement of those objectives."
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> In this case, because the district court found that Sullivan was not afforded differential treatment because of her gender, the court did not address whether the differences in the facilities closely served important governmental objectives. In my view, because Sullivan was clearly disadvantaged by a sex-based classification, the defendants were required to advance an "exceedingly persuasive justification" for their actions. Since I discern no such justification from the record... I would reverse and remand for further proceedings concerning this question.