



STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. AJ05SB-0493

NATIONAL ORGANIZATION FOR WOMEN,
ESSEX COUNTY CHAPTER, JUDITH S.
WEISS, PRESIDENT; GILBERT H.
FRANCIS, DIRECTOR, DIVISION ON
CIVIL RIGHTS,

Complainants,

- vs -

LITTLE LEAGUE BASEBALL, INC.;
PETER J. McGOVERN; HOWARD W. GAIR;
HENRY BURKE; HARRY FOGLE; DR.
CREIGHTON J. HALE; L. M. McCONNELL
and ROBERT STIRRAT,

Respondents.

FINDINGS,
DETERMINATION AND ORDER .

New Jersey State Library

APPEARANCES:

GEORGE F. KUGLER, JR., Attorney General,
State of New Jersey

By: BERTRAM P. GOLTZ, JR., Deputy Attorney General
For the Complainants

MESSRS. McNERNEY, PAGE, VANDERLIN & HALL

By: WILLIAM VANDERLIN, ESQ.

and

MESSRS. MALFITANO, CLAUDAT & KEALY

By: ANTHONY MALFITANO, ESQ.
JOSEPH KEALY, ESQ.
For the Respondents.

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BY THE DIRECTOR:

A public hearing in the above captioned matter was held before Sylvia B. Pressler, Esq., a Hearing Examiner for the Division on Civil Rights, on August 9, September 20, October 24, October 25, and November 5, 1973. On November 7, 1973, the Hearing Examiner dictated a report to the Director containing Recommended Findings of Fact and Conclusions of Law.

In accordance with Rule 13:4-13.1 of the Division's Rules of Practice and Procedure, copies of the Hearing Examiner's report were served on respective counsel. Objections to the Hearing Examiner's report were filed in the Division on November 27, 1973 by Anthony F. Malfitano, Esq. and O. William Vanderlin, Esq. on behalf of the respondents. Also, a letter of comments directed to these objections was filed in the Division on January 29, 1974 by Deputy Attorney General Bertram P. Goltz, Jr. on behalf of the complainants.

Having given careful and independent consideration to the entire matter before me, including the transcript of the proceedings, the objections of respondent counsel, and the letter of comments of the Deputy Attorney General, I concur in the Findings of Fact and Conclusions of Law recommended by the Hearing Examiner and adopt them as my findings of fact and conclusions of law and make the same a part of this Order as though they were set forth herein, with the sole clarification being that, I find the Order, as set forth herein, shall affect Little League Baseball, Inc. only with respect to its operations in this State.

I further find, in accordance with the Recommended Findings of Fact and Conclusions of Law of the Hearing Examiner and



contrary to the written objections of respondent counsel, that: The motion to amend the complaint for the purpose of adding the Director of the Division as a complainant made by counsel for the complainant, and granted by the Hearing Examiner, was proper under the terms and conditions of N.J.S.A. 10:5-16 and N.J.A.C. 13:4-6.3.

A further amendment to the complaint directed by the Hearing Examiner and without objection by either complainant's or respondent's counsel properly designating that the name of the respondent corporation be changed from Little League, Inc. to Little League Baseball, Inc. is also proper as authorized by Statute.

The Division on Civil Rights has jurisdiction to entertain and dispose of the complaints herein because Little League Baseball, Inc., and all local baseball leagues and teams chartered by Little League Baseball, Inc., are places of public accommodation as defined in N.J.S.A. 10:5-5 (l).

The respondents policy of excluding all girls between the ages of 8-12 from participation with boys of that same age group in the playing of little league baseball constitutes sex discrimination in the denial of accommodations, advantages, facilities and privileges of a place of public accommodation to females in violation of N.J.S.A. 10:5-12 (f) as amended by L. 1970, C. 80.

The respondent has not borne its burden of proving that it is a place of public accommodation which is in its nature reasonably restricted exclusively to individuals of one sex and, consequently, its policy of sex discrimination does not fall within the purview of the exception provided for in N.J.S.A. 10:5-12 (f) which permits sex discrimination in those certain places of public



accommodation which have such a reasonably restrictive nature.

The hearing in this matter was conducted in a fair and orderly manner without prejudice or bias directed toward either party and the Hearing Examiner's acceptance, evaluation and weight of testimony and evidence during the proceedings was completely proper and within the scope of the role of a Hearing Examiner.

In determining the contents of the within Order, I have attempted to construct provisions which are necessary to protect the rights guaranteed to females under the New Jersey Law Against Discrimination, giving due consideration to the administrative needs of the respondent.

It is therefore on this 30th day of January, 1974 hereby ORDERED that:

1. The complaint against the individual respondents, Peter J. McGovern; Howard W. Gair; Henry Burke; Harry Fogle; Dr. Creighton J. Hale; L. M. McConnell and Robert Stirrat, as recommended by the Hearing Examiner without objection by either counsel, be dismissed and that, therefore, the only respondent in this matter shall be Little League Baseball, Inc.

2. The respondent, Little League Baseball, Inc., shall cease and desist from the doing of any act prohibited by the New Jersey Law Against Discrimination.

3. The respondent, Little League Baseball, Inc., shall immediately change any and all of its policies, written and unwritten, in regard to the exclusion of girls between the ages of 8-12 from participation in little league baseball and to grant to girls of this age group all of the advantages, accommodations, privileges and facilities heretofore restricted exclusively to boys



of those ages, including, but not limited to: the right to apply for membership on a team, the right to be considered for membership based solely on skill and performance criteria, the right to play in practice, exhibition, regular-season, post-season and championship games.

4. The respondent, Little League Baseball, Inc., shall, through its local leagues or through whatever other methods utilized, advertise for membership in the Little League in a manner which clearly states that all children between the ages of 8-12 shall be eligible to participate in little league baseball regardless of sex. Further, all written notices, posters, ads, leaflets, etc. shall have the title,

"GIRLS AND BOYS".

All of the letters of the above title shall be of the same size type and the word order shall be in accordance with the word order stated herein.

5. The respondent, Little League Baseball, Inc., shall send, as soon as possible, but no later than fourteen (14) days from receipt of this Order, notices to all of the Little League Baseball teams within this State, through their coaches and managers indicating that such teams shall consider for membership all children between the ages of 8-12 regardless of sex and based solely on the criteria heretofore utilized in the consideration of boys for membership.

6. Little League Baseball, Inc., and its affiliated local Little Leagues shall not create, sponsor, authorize or sanction any sex-segregated athletic teams or leagues for children under the age of 13 years within which games substantially similar



to baseball are played, including, but not limited to softball.

7. In order to assure compliance with this Order, Little League Baseball, Inc. shall submit to the Division on Civil Rights for approval for a period of five (5) years, any and all new or modified criteria and/or rules prior to their promulgation and adoption which in any way affect the requirements for participation membership or other accommodation, facilities, advantages or privileges of Little League Baseball, Inc.

Further, for this same time period, Little League Baseball, Inc. will also submit on a yearly basis, commencing with June 1, 1974, a statistical summary of the number of male and female participants playing on each team chartered by Little League Baseball, Inc. in New Jersey.

8. Little League Baseball, Inc. will inform each local league in writing of the terms of this Order and Little League Baseball, Inc. will further inform each local league that any violation of the provisions herein will result in the revocation of such league's charter by Little League Baseball, Inc.

It is further understood that any violation of the provisions of this Order by a local league or team therein shall constitute a violation by Little League Baseball, Inc. and such penalties and/or relief as may be granted as a result of such a violation shall apply to both the offending local league or team, and Little League Baseball, Inc.

9. The Division hereby retains jurisdiction for the purposes of enforcement of this Order and for the purposes of issuing any Supplemental Orders herein.

DATED:

January 30, 1974


GILBERT H. FRANCIS, DIRECTOR
DIVISION ON CIVIL RIGHTS

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NO. AJ05SB-0493

NATIONAL ORGANIZATION FOR WOMEN,
ESSEX COUNTY CHAPTER, JUDITH S.
WEISS, PRESIDENT; GILBERT H.
FRANCIS, DIRECTOR, DIVISION ON
CIVIL RIGHTS,

Complainants,

- vs -

LITTLE LEAGUE BASEBALL, INC.;
PETER J. McGOVERN; HOWARD W. GAIR;
HENRY BURKE; HARRY FOGLE; DR.
CREIGHTON J. HALE; L. M. McCONNELL
and ROBERT STIRRAT,

Respondents.

SUPPLEMENTAL
FINDINGS,
DETERMINATION AND ORDER

APPEARANCES:

GEORGE F. KUGLER, JR., Attorney General
State of New Jersey

By: BERTRAM P. GOLTZ, JR., Deputy Attorney General
For the Complainants

MESSRS. McNERNEY, PAGE, VANDERLIN & HALL

By: WILLIAM VANDERLIN, ESQ.

and

MESSRS. MALFITANO, GLAUDAT & KEALY

By: ANTHONY MALFITANO, ESQ.
JOSEPH KEALY, ESQ.
For the Respondents



It appearing that the Findings, Determination and Order was issued in this case on January 30, 1974, and it further appearing that said Findings, Determination and Order failed to include certain provisions which are pertinent to this matter, and it further appearing that the prior Order, specifically Paragraph 9, provides for the issuance of Supplemental Orders therein:

It is, therefore, on this 31st day of January, 1974, that the Findings, Determination and Order of the Director of the Division on Civil Rights in this matter be and is hereby Supplemented with the following:

1.(a) In the event that the notices sent by Little League Baseball, Inc. to the local Little League Baseball teams as provided for in the paragraph numbered 5 of the Findings, Determination and Order shall be received by any such team after commencement of the period of registration for participants, such period of registration shall be extended for a period of time equivalent to the time from the commencement of such registration to the receipt of the notification.

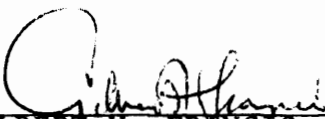
(b) In the event that any Little League Baseball team shall have concluded its registration prior to receipt of the above referenced notice sent by Little League Baseball, Inc., said team shall re-open registration for a time period equal to the previous registration and shall advertise such new registration period in the same manner as that which was previously utilized.

(c) The above requirements, however, shall not preclude this Division from notifying any local league or team chartered by Little League Baseball, Inc. of the provisions of this Order and said provisions shall take effect upon such notifi-



cation.

2. Little League Baseball, Inc. shall comply with the provisions of the paragraph numbered 8 of the Findings, Determination and Order within forty-five (45) days of the issuance of same.


GILBERT H. FRANCIS, DIRECTOR
DIVISION ON CIVIL RIGHTS

DATED: January 31, 1974



STATE OF NEW JERSEY
DEPT. OF LAW AND PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DOCKET NUMBER DJ05SB-0493

NATIONAL ORGANIZATION FOR WOMEN, ESSEX :
COUNTY CHAPTER, JUDITH S. WEIS, :
PRESIDENT, :

Complainant, :

-v- :

LITTLE LEAGUE BASEBALL, INC., PETER J. :
McGOVERN, HOWARD W. GAIR, HENRY BURKE, :
HARRY FOGLE, DR. CREIGHTON J. HALE, :
L. M. McCONNELL and ROBERT STIRRAT, :

Respondents. :
----- :

November 7, 1973
1100 Raymond Boulevard
Room 324
Newark, New Jersey

HEARING OFFICER: MRS. SYLVIA PRESSLER.

A P P E A R A N C E S:

For the Complainant: GEORGE F. KUGLER, ATTORNEY GENERAL,
By: BERTRAM P. GOLTZ, JR., DEPUTY ATTORNEY
GENERAL.

For the Respondents: WILLIAM VANDERLIN,
And ANTHONY F. MALFITANO.

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E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
HE-2	An Article.		3

1 MRS. PRESSLER: Gentlemen, do
2 either of you wish to make a statement by way of
3 closing? Mr. Malfitano?

4 MR. MALFITANO: No.

5 MRS. PRESSLER: Mr. Goltz?

6 MR. GOLTZ: No.

7 MRS. PRESSLER: Simply as a
8 procedural matter to tie up the ends, as I was
9 reviewing the transcript and the exhibits I noted
10 that there was substantial cross-examination of
11 Dr. Hale on an article called, "Motor Performance
12 and Growth by Harold E. Jones", in which there were
13 references made to the charts and text and in order
14 to preserve the record and contribute to its
15 clarity, I am going to ask that the copy which I
16 was given so I can follow the testimony, be marked
17 as a Hearing Examiner's exhibit; that will be HE-2.

18 (At which time the document
19 was marked Hearing Examiner's Exhibit 2 by
20 the reporter.)

21 MRS. PRESSLER: I should say
22 at the outset that because I regard this as an
23 important case, not only from the point of view of
24 the litigants but from the point of view of the
25 public, I think I would have preferred to have been

1 able to take the time to present my recommended
2 findings of fact and conclusions of law by way of
3 a as polished a written document as I could prepare.
4 On the other hand I have personal time limits which
5 makes that not feasible and perhaps while the
6 hearing is fresher in my mind, the findings can,
7 unpolished, at least be based on clearer recollections.

8 This complaint was filed
9 by the National Organization for Women, Essex
10 County Chapter, Judith S. Weis, President, Complainant,
11 against Little League, Inc., Petter J. McGovern,
12 Howard W. Gair, Henry Burke, Harry Fogle, Dr.
13 Creighton J. Hale, L. M. McConnell and Robert
14 Stirrat.

15 The individually named
16 respondents are officers, committee members and
17 other executive functionaries of the National
18 Organization. There was never a stipulation as
19 to their office holding or committee membership
20 nor any other proofs with respect to their status.

21 I really do not see that
22 these respondents as individuals belong in the
23 case, the case is being tried against the National
24 Organization, and in view of the lack of proofs
25 with respect to the individual respondents, I am

1 going to recommend dismissal of the complaint as
2 against them.

3 The gravamen of the complaint
4 is that the National Organization and the local
5 league which it charters, are places of public
6 accommodation as defined by the New Jersey Law
7 against discrimination, N.J.S.A. 10:5-1, et sec,
8 that they operate in the State of New Jersey and
9 are subject to the New Jersey Law against discrimina-
10 tion.

11 And further that they have
12 in fact discriminated by excluding girls from
13 participation in the activities, both of the local
14 leagues and the National League and more particularly
15 that the chartered local leagues are required by
16 National Rule and Regulation to exclude girls.

17 The complaint goes on to
18 cite and allege that the National Rule which
19 excludes girls from participating in the Little
20 League, deprives them of the advantages, facilities
21 and privileges of a public accommodation in violation
22 of the New Jersey Law against discrimination.

23 A couple of procedural matters.
24 It is clear and I still find from Exhibit C-1, the
25 official rules, that the proper name of the National

1 Organization is not Little League, Inc., as stated
2 in the complaint, but Little League Baseball, Inc..
3 And I see absolutely no prejudice in directing now
4 an amendment to the complaint to properly designate
5 the National Organization.

6 Mr. Malfitano, do you concur?

7 MR. MALFITANO: No objection.

8 MRS. PRESSLER: All right,
9 thank you. And at the opening of the hearing there
10 was a motion made that the complaint be further
11 amended to add as a complainant, Gilbert H. Francis,
12 Director of the Division, by way of a directive
13 complaint as expressly authorized by statute, and
14 that motion was granted as well. I think it is
15 extremely useful that the complaint be a Director's
16 complaint, in order to avoid the problem, if any,
17 which might arise from the standing of the corporate
18 plaintiff, the National Organization for Women,
19 I should add however that there was no objection
20 made to the standing of the National Organization
21 for Women to bring this complaint, however, the
22 stand in question is in effect obviated by a
23 decision of the Director on Director's complaint.

24 Now, a further procedural
25 statement. As to the jurisdiction of the Division

1 over Little League Baseball, Inc., which I should
2 further add is a federally chartered organization
3 with its main headquarters in Williamsport,
4 Pennsylvania.

5 There has been no objection
6 made to the exercise by the Division of inpersonum
7 jurisdiction over the National Organization. Much
8 to the contrary there has been complete and full
9 participation by the National. Any inpersonum
10 jurisdictional objection was of course thereby
11 waived by the participation of the National Organi-
12 zation on the defense of the action, so that it
13 is of course clear that the Division does have
14 inpersonum jurisdiction over the National and
15 certainly with respect to those of the local leagues
16 which are in New Jersey and are chartered by
17 the National.

18 Now, first question, whether
19 or not the Little League Baseball, Inc., and its
20 chartered local leagues, are indeed public
21 accommodations within the intent of the statute.
22 That determines the subject matter jurisdiction of
23 the Division.

24 There has not in fact been
25 any substantial kind of objection to the proposition

1 that Little League is a public accommodation. At
2 the very outset of the hearing I think Mr. Malfitano,
3 and properly so, concurred that the real issue was
4 whether or not there was a reasonable relationship
5 between the facility and sex. However, aside from
6 that, I have no problem at all finding that Little
7 League is in fact a public accommodation.

8 This Division has held many
9 times and its holdings have been affirmed, clarified,
10 amplified by the Appellate Courts of this State
11 to the effect that the hallmark of a public
12 accommodation is a facility which issues a public
13 invitation to a class which is not limited by any
14 of the characteristics upon which discrimination
15 may not be based, that is the public at large is
16 invited.

17 The Little League handbook
18 which I have already referred to as C-1 in evidence,
19 makes it perfectly clear that the invitation to
20 participate is given to all boys in all communities
21 which have Little League's operating, that there is
22 significant public support for the local Little
23 League operation, both by way of making public
24 facilities available for the issuing of the invitation,
25 the handbook itself says that, and I am reading from

1 Page 6, "Proper notification of the registration,
2 time and place must be made through normal channels,
3 schools, et cetera."

4 There was proof that at least
5 in one New Jersey local Little League, Roosevelt-
6 Millstone, the schools are used significantly for
7 purposes of recruitment of Little League players.

8 There is also evidence of
9 public financial support, again there was proof
10 that the Roosevelt governing body provides a small
11 amount of money, I think it is a matter of general
12 knowledge of which I can take judicial notice that
13 public parks, playgrounds are used for Little
14 League activity.

15 There has been no objection
16 by the respondent to the conclusion that Little
17 League is a public accommodation based upon the
18 fact of geographical location, the issue has been
19 before me from time to time as to whether or not
20 the language, "place of public accommodation",
21 as used by the statute, would exclude as a public
22 accommodation, membership organizations which do
23 not have a specific pinpointable geographical area,
24 and I have held before that membership organizations
25 which do not function in a given unmoveable place,

1 are nevertheless clearly public accommodations,
2 if they offer advantages, facilities to the public,
3 such as Little League of course does, and if the
4 invitation to join is a public one, as the Little
5 League one is, as to the offering of privileges,
6 facilities and accommodations, I think it is clear,
7 based on this record as to what Little League offers,
8 it offers the opportunity to play in organized
9 baseball to children of the appropriate age, it
10 offers character building, I should further point
11 out that perhaps in that regard, that is the non-
12 athletic offerings of Little League, its motto
13 which appears on the back of the pamphlet, reads
14 as follows: "From the rank of boys who stand now
15 on the morning side of the hill will come the
16 leaders, the future strength and character of the
17 nation." One hopes that girls would not be excluded
18 from the future strength and character of the nation
19 and the opportunity to be leaders in that regards.

20 Before proceeding further,
21 I think it is important that the record show my
22 findings with respect to the structure of the Little
23 League operation, I think that is quite important.

24 What has been demonstrated,
25 and I so find, is that the National Organization,

1 the actual respondent here, Little League Baseball,
2 Inc. operates in effect as the administrative and
3 executive direction of the National Little League
4 Program which actually consists of local Little
5 Leagues which I take it, or at least in New Jersey
6 generally incorporate as nonprofit corporations
7 under Title 15. They may use the name "Little
8 League" and hold themselves out as members of the
9 National if they are chartered and chartering is
10 annually, so that the actual program is conducted
11 throughout the country by the local Little Leagues,
12 subject of course always to the supervision and
13 direction of the National.

14 The structure as I understand
15 it, divides boys into three age groups, eight to
16 twelve, thirteen to fifteen and sixteen to eighteen.
17 The thirteen to fifteen and sixteen to eighteen
18 are senior leagues and are not really the essence
19 of the program. There has been no proof with
20 respect to the senior leagues, and I want it clear
21 now that all of my findings relate to the major
22 category of Little League involvement which is the
23 eight to twelve year olds, that is the heart of
24 the program.

25 The structure of the locals,

1 and of course whenever I refer to the locals and
2 the structure of locals I mean as required or
3 approved or under the direction of the National,
4 is as I have gathered to divide the children,
5 the boys into major league on the one hand and
6 minor or farm league on the other hand.

7 As I understand it, when boys
8 register they are given some kind of a tryout where-
9 by there can be, in Dr. Hale's words, "A visual
10 evaluation of the skill and performance." Boys
11 of better skill are placed in the majors, boys
12 who are not skillful are nevertheless given an
13 opportunity to play by being put on minor league
14 or farm teams.

15 There was a great deal of
16 testimony by Dr. Hale with respect to categorization
17 or assignment of children to teams by playing ability,
18 so that the superior players play with each other,
19 the average players play with each other, the
20 inferior players play with each other.

21 I have referred to Dr. Hale
22 and I will refer here after in much greater detail
23 to his testimony. He submitted an affidavit, R-1
24 in evidence, in which on Page 14 he suggests and
25 I quote, "Many leagues in the Little League Program

1 do not allow participation by all applicants, but
2 only those of the greatest skill."

3 There was no oral testimony
4 with respect to that, I had understood from
5 Dr. Hale that one of the prides of Little League
6 was that every child who signed up was given an
7 opportunity to play. There is nothing before me
8 to suggest now which in fact is actually the case.
9 If there is in fact some local governingship of
10 this matter by the local leagues, then both in
11 fact are the case.

12 Now, having found that Little
13 League is a public accommodation, one would
14 naturally assume that being a public accommodation,
15 it could not discriminate on any of the bases set
16 forth in the statute, including of course sex.
17 The defense of Little League to this action is
18 based on the exception stated in 10:5-12 which
19 reads, the pertinent portion, as follows. "Provided
20 however that nothing contained herein shall be
21 construed to bar any place of public accommodation
22 which is in its nature reasonably restricted
23 exclusively of individuals to one sex, and which
24 shall include but not be limited to any summer camp,
25 day camp, resort camp, bath house, swimming pool,

1 gymnasium, comfort station, day care clinic,
2 hospital, school, educational institution, et
3 cetera."

4 Now, Mr. Malfitano and again
5 properly so, made clear at the outset that the
6 initial defense of Little League was that the
7 athletic program which it offers is one which
8 "is in its nature reasonably restricted exclusively
9 to individuals of one sex". The theory, the factual
10 theory upon which the Little League relied in
11 attempting to show the reasonable relationship to
12 ones sex, was based at least up until the last
13 day of the hearing, on the thesis that if girls
14 between the ages of eight and twelve are permitted
15 to compete with boys of that age, they will suffer
16 the risk of greater injury as a class than boys
17 do. That was the essence of the defense.

18 I should state further by
19 the way that I think there is no question that the
20 burden of proving the reasonable relationship,
21 that is of proving the defense is on the respondent,
22 and the issue before me at this juncture is whether
23 or not the respondents bore the burden of proving
24 their legal theory of defense by their factual thesis
25 of the physical inferiority of girls between ages

1 of eight to twelve and the need for their protection
2 physically by not permitting them to play on the
3 same team with boys of that age.

4 The element of the psychological
5 reasonable relationship came in at the very end
6 of the case and I will address myself to that
7 hereafter, I am dealing now with the major thesis
8 of the increased risk of injury or that girls
9 will suffer more accidents than boys as a class.

10 In support of this theory,
11 the respondent relied exclusively, this theory,
12 on the testimony of Dr. Creighton J. Hale. And I
13 should note at the outset that he is a named
14 respondent and therefore not without interest.

15 Aside from that, he is by
16 his own testimony vice-president, a Vice-President
17 of the National and its Director of Research. He
18 is a physiologist holding a Ph.D. from the New York
19 University School of Education and he said
20 physiology, there was some question as to whether
21 or not his studies were of a primarily scientific
22 orientation or of a physical education orientation,
23 I don't think that that problem is too significant,
24 he obviously has been dealing with the physiological
25 aspects of athletics during his entire working career,

1 and describes himself also as having a specialty
2 of Sports Medicine. I am not entirely sure in my
3 own mind if one who is not an M.D., as Dr. Hale
4 is not, can be a specialist in Sports Medicine.
5 At least it was his testimony that it was a field
6 that cuts across various disciplines, however, I
7 find initially and continued to find that he is
8 certainly qualified as an expert in physiology.

9 I mention his interest
10 because that of course effects the weight of his
11 testimony.

12 Dr. Hale testified extensively
13 on direct and cross-examination that girls between
14 the ages of eight and twelve are physically inferior
15 to boys of that age and this inferiority will
16 necessarily result in girls sustaining, as a class
17 of course, a higher incidence of injury playing
18 with boys than if they played on all girl teams,
19 to which he apparently had no objection.

20 There are various aspects of
21 this physical inferiority which he pointed to and
22 upon which his entire premise is based. First,
23 girls of that age are inferior in bone strength;
24 second, girls are--girls of that age are inferior
25 to boys of that age in muscular strength and next

1 that girls of that age are inferior to boys of
2 that age in reaction and movement time.

3 Now, there were some other
4 opinions on the difference between boys and girls,
5 I am going to deal with them quickly because I
6 don't think that they are of any moment.

7 His affidavit, to which I have
8 already referred, stated, Page 12, Paragraph 17 of
9 the affidavit, "While there is a division in
10 medical opinion, there is substantial body of
11 professional belief that cancerous lesions may be
12 produced by traumatic impact upon female breast
13 tissue."

14 He admitted during the course
15 of his testimony that that was a hypothesis only
16 for which there was no actual medical fact and I
17 disregard that, I don't think that there has been
18 any support for the affidavit statement, certainly
19 not in his own testimony, and that certainly was
20 disputed as anything beyond pure hypothesis by the
21 medical experts of the State.

22 He also said that the kinds
23 of injuries resulting from baseball playing are
24 frequently dental and hence cosmetic, and that it
25 was more important to protect girls from cosmetic

1 injury, for social reasons, then boys.

2 I regard that as entirely
3 gratuitous, it has nothing to do with safety. I
4 disregard that.

5 Now, coming to the heart
6 of his testimony. I think it would be more orderly
7 if I compared his testimony with the testimony of
8 the State's experts in the various fields, covered
9 by Dr. Hale.

10 With respect to bone and
11 muscular strength, the State's expert was Dr.
12 Joseph Torg, a highly qualified orthopediatric
13 orthopedist with additional subspecialty in Sports
14 Medicine as an M.D. The reaction and movement
15 time testimony was countered by Dr. Halmouth,
16 an experimental psychologist holding a Ph.D.
17 Degree and who is now a professor of psychology
18 at Trenton State College. And I have spent a
19 great deal of time reviewing the transcripts of
20 the medical testimony, a great deal of the substance
21 of the testimony was unfamiliar to me and I wanted
22 to understand it as well as I possibly could.

23 I have also reviewed all of
24 the exhibits which relate to the testimony, and
25 it is my finding that the respondents did not bear

1 the burden of proving that girls between the ages
2 of eight and twelve are incumbered by physiological
3 inferiorities which would prevent them from
4 successfully competing with boys in the game of
5 baseball.

6 I am further persuaded by
7 a heavy preponderance of the evidence that that
8 in fact is not so and that there is no substantial
9 physiological different relative to athletic
10 performance between girls ages eight and twelve
11 on the one hand, and boys eight to twelve.

12 Now, I will state with
13 specificity the reasons for my findings. Bone
14 strength, we will deal with that first. It is
15 useful I think to define what is meant by bone
16 strength and I think that Dr. Torg was most helpful
17 in that regard.

18 Defining bone strength is
19 the ability of bone to withstand stress without
20 failure, that is how much stress can you apply to
21 a bone before there is a fracture.

22 Dr. Hale concluded, it was
23 his opinion that girls between the ages of eight
24 and twelve have significantly less bone strength
25 than boys. He broke bone strength up into the

1 various categories of in effect fractures resulting
2 from different kinds of stresses, namely torsional
3 strength, cleverage strength, compressive breaking
4 load, breaking load, breaking moment, tensile
5 breaking load and apparently this related both to
6 long bones and vertebral bones.

7 His essential theory as a
8 theory, without getting into fact, is that these
9 isolated factors, if his theory was correct of
10 the lesser bone strength, were so significant, each
11 taken by itself as to substantially contribute to
12 his expectation of greater injury. I have a problem
13 with this whole theory. Both Dr. Torg and Dr.
14 Halmouth testified that individual isolated factors
15 are not of the importance proportionally as the
16 whole animal, and when you're dealing with questions
17 of performance, whether athletic or otherwise,
18 you fall into grave error by attempting to evaluate
19 or predict performance based on one single physical
20 or physiological characteristic or even several.

21 Both of them testified that
22 if you're talking about a prediction of overall
23 athletic performance or actually the factors
24 involved in an overall athletic performance, you
25 must consider the totality of the physical and

1 psychological factors, training, exercise, coordina-
2 tion, agility, motivation, each of them listed
3 the package of factors and I am persuaded by them
4 that it is the package of factors which is much
5 more significant than any one of these individual
6 things, such as torsional strength of cleverage
7 strength or the like.

8 It was also the testimony
9 of Dr. Halmouth and Dr. Torg that when you look
10 at the totality of factors, certainly there is no
11 appreciable significant difference between eight
12 and twelve, based on sex, but I do want to deal
13 with Dr. Hale's testimony in detail on the specific
14 factors because I do not think that I can accept
15 his testimony even that there is a substantial
16 difference on the specific factors.

17 I think his theory was
18 wrong, that is I accept the totality theory of
19 the State's experts. I also accept the State's
20 experts refuting of the conclusions drawn by
21 Dr. Hale on the individual aspects, which brings
22 me back to bone strength.

23 Dr. Hale's opinion with
24 respect to the inferiority of child females bones,
25 was based exclusively on a series of laboratory

1 studies done in Japan in the early '60's, collected
2 in a volume which I gather was edited by Yamada,
3 in any case the book is called "Strength Of
4 Biological Materials" and it's referred to through-
5 out the affidavit and the testimony.

6 I was wrong when I said
7 exclusive, he also referred to a study of skiing
8 accidents. And I will get to that, that was
9 adults.

10 Now, as I understand Dr.
11 Hale's testimony, the Japanese studies were
12 performed on compact bones, that is bones which
13 had been removed from the body, cadavers presumably,
14 preserved in some medically approved fashion, that
15 the bodies from which the bones were taken were
16 persons ages eighteen through eighty, and that the
17 function purpose of the laboratory experiment was
18 to divide these bones to male and female by age
19 decades and apply different types of stresses and
20 measure the failure point.

21 These studies show that with
22 respect to these bones, the bones of females as
23 a class had a, and I don't know if it is lower
24 breaking point or higher breaking point, but they
25 failed under less stress than the male bones.

1 Now, Dr. Hale knows of no
2 studies done with en vivo bones, that is bones in
3 the body, nor any studies done with compacted bones
4 with persons under the age of eighteen, nor have
5 any studies, other than the skiing study, on
6 compacted bones other than the Japanese studies.

7 The reason he said firmly
8 that bones of girls eight to twelve have less
9 strength than boys was by extrapolating the
10 information or the conclusions of the Japanese
11 studies backwards down to childhood. If the
12 extrapolation method is not valid, then there is
13 no support for Dr. Hale's thesis that bones of
14 girls eight to twelve are of significantly or
15 appreciably more strength than boys. And I am
16 satisfied from Dr. Hale's own testimony, to say
17 nothing of Dr. Torg's testimony, that the extrapo-
18 lation method is not valid in this instance.

19 Dr. Hale agreed with the
20 dictionary definition of what extrapolation is,
21 and the important part of that definition going
22 from the known to the unknown or predicting from
23 the known to the unknown where there is a continuity
24 in the basic assumptions.

25 Now, the essential continuity

1 would be that immature bones, the bones of children,
2 are essentially the same quality, character and
3 other physiological aspect of adult bones. He could
4 not support the continuity theory and I now rely on
5 his own testimony.

6 He testified, I am not sure
7 if he was referring only to torsional stress factors
8 or to all fractures, I don't think he made it clear,
9 he did however testify that torsional fractures
10 were the primary kind of fractures sustained in the
11 playing of baseball, so let me rely on that, that
12 a torsional stress fracture results from three
13 causes or there are three factors in producing that
14 kind of fracture, and angle of stress, the degree
15 of the pressure, the duration of the application
16 of the stress.

17 Now, he says that female
18 bones and girls bones will break sooner if all of
19 these factors are the same, than male bones and
20 the reason he says is because male bones are
21 denser than female bones. Then we discussed, and
22 he testified as to bone density which now becomes
23 the only significant difference in the strength
24 between male bones and female bones, according to
25 his testimony, and at least with respect to torsional

1 fractures.

2 Bone density, he testified,
3 the amount of perportional calcium in the bone,
4 there are five factors he testified which he knew
5 which govern bone density, diet, obviously a non-
6 sex differentiated factor; heredity, the same;
7 freedom of disease, the same; two final factors,
8 exercise and the production of male hormone
9 testosterone.

10 There is of course nothing
11 physiologically different in the amount of exercise
12 that boys or girls get or can get or can perform.
13 He was revealing in his testimony on exercise
14 though, he thought boys had the advantage in this
15 factor and I quote. "In our culture we have set
16 up many more activity program for boys than girls.
17 It has been part of our society to provide more
18 physical activity for boys than for girls."

19 So that if boys have the
20 advantage from the point of view of exercises, one
21 of the factors in bone density is sociologically,
22 it certainly is not physiologically, however, we
23 come to the fifth factor, male hormone.

24 He was most clear that it
25 is the production of the male hormone, testosterone,

1 which is the most significant factor in determining
2 bone density. It does not start appreciably until
3 male puberty which he put it somewhere between
4 thirteen and fourteen, and he testified, and this
5 of course is what is so significant, that in making
6 his extrapolation of bone strength, he did not
7 take hormonal production of males into account at
8 all.

9 Now, if bone strength is
10 so dependent or appreciably dependent on the
11 production of male hormone, I do not see how
12 there can be continuity backwards in accordance
13 with the definition of extrapolation, which fails
14 to take into account the one significant variable.

15 Now, Dr. Torg, and as I
16 said I found him highly qualified, testified that
17 he was aware of the kind of extrapolation made by
18 Dr. Hale, he was familiar with the Japanese studies,
19 he believed and I accept that, that there is and I
20 think he used the expression "world of difference
21 both between compact bones and bones *en vivo*," as
22 a matter of fact my recollection of his testimony
23 was the main thing of compact bones is they are
24 invascular and the fact that there is no blood
25 supply, results both in their decomposition no matter

1 how carefully preserved and in other physiological
2 consequences, simply makes them noncomparable.
3 He also thought there was a world of difference
4 between mature bones and immature bones and he was
5 quite careful in defining that, of course not by
6 age but rather the completion of the conversion
7 of cartilage into boney structure which really
8 doesn't happen completely until age seventeen or
9 eighteen.

10 What he said about the
11 extrapolation method, and I quote, "I would say
12 that it would be absolutely erroneous, wrong and
13 incorrect to extrapolate from the bones of an
14 adult cadaver to the bones of a living skeletal
15 immature children."

16 He said that doing that was
17 comparing oranges and cantaloupes and I say again
18 that I think that Dr. Hale's own testimony
19 demonstrated the fallacy of his approach.

20 Dr. Torg's testimony of course
21 was not simply to criticize the method of Dr. Hale,
22 he had his own independent opinion with respect
23 to the relative bone strength of boys and girls.
24 He felt certainly also that testosterone was the
25 important critical factor and there was no appreciable

1 difference until age thirteen. Before age thirteen,
2 it was his conclusion that the difference in bone
3 strength, if any in children, was on an individual
4 basis and not by male and female classifications.

5 What he did testify to is
6 that if there is any advantage in the ages of
7 seven to seventeen, girls have it because their
8 bones mature more quickly, but he was quite quick
9 to say, if you want to relate this factor to
10 athletic performance, you make a mistake, you deal
11 with all the factors.

12 I should also add the skiing
13 reports that Dr. Hale also relied on were reports
14 dealing with skiing accidents in adults, for the
15 same reason not supportive of his theory as to
16 children.

17 He also suggested that females
18 may have more skiing accidents because they ski
19 less and are less expert and that accidents may
20 be relative to skill, not only because of an
21 inherent weakness in female bones which apparently
22 seems to be documented on the adult level in any
23 case.

24 MR. GOLTZ: May I request a
25 brief recess before we go on?

1 (At which time a short recess
2 was taken.)

3 MRS. PRESSLER: All right,
4 another problem with Dr. Hale's testimony and that
5 was first his inability to suggest what the actual
6 degree of difference was in bone strength, assuming
7 his theory was correct, and I find that it isn't.
8 And also his inability to relate a degree of
9 difference to athletic performance on the playing
10 field, and certainly in this regard the totality
11 theory of Dr. Torg has significantly greater appeal.

12 So for all of these reasons
13 I don't find that the alleged bone strength
14 difference supports the theory that there would be
15 a greater risk of injury to girls than boys in
16 co-educational Little League Baseball.

17 The testimony with respect to
18 the bone strength was that the area of injury would
19 be fracture sustained sliding into base and certainly
20 a girl isn't going to slide less or more hard if
21 she is playing on an all girls team than if she
22 is playing on a co-educational team.

23 Skull and other kinds of
24 bone injuries, if you're hit by a pitched ball,
25 the theory of Dr. Hale being that boys pitch faster

1 and harder than girls, but he did testify that he
2 himself had developed a helmet to protect batters
3 and that he felt that that helmet would offer the
4 same degree of protection to girls as it does to
5 boys. The other aspect of injury in which bone
6 strength was relevant was in fielding a ball, and
7 I suppose the theory is that the ball hit by a
8 boy would be hit harder and faster than the ball
9 hit by a girl, but that also does not explain why
10 a girl would have greater risk of injury than a
11 boy who has no greater bone strength than she did.

12 All of this takes me to a
13 point which perhaps I should have made sooner, that
14 even Dr. Hale admitted that such differences as
15 he felt there were, were by class and that there
16 would be substantial overlapping between the
17 classes, and the question naturally arises that
18 if these risks are serious enough to exclude girls
19 from participation in the sport with boys, how can
20 you justify permitting boys who are within the
21 area of the overlap on these qualities if they
22 are so poor, how do you protect them from playing
23 with the superior ballplayers, and the answer of
24 course of Dr. Hale was that children are assigned
25 to teams by skill and it simply could never happen

1 that the large, strong boy who was a terrific
2 pitcher, pitching at seventy miles an hour, and I
3 think he used the expression where the ball comes
4 at you like a bullet, simply would not be pitching
5 against the small, weak boy. Well obviously then
6 he would not have to pitch against the small, weak
7 girl.

8 The point is that individual
9 children can be protected by team assignments if
10 they are girls or boys, just as individual boys are
11 not protected by team assignment.

12 But to go back to the
13 specific testimony of Dr. Hale, on muscular strength,
14 he relied on one fact with respect to muscular
15 strength and that is that boys have more muscle
16 fibers numerically than girls, and the importance
17 of general strength was how hard you can throw,
18 how hard you can pitch and whether you are going to
19 be the one that is greater or lesser injured in
20 a collision of players.

21 Dr. Torg agreed that males
22 from birth have a greater number of muscle fibers.
23 He did not however feel that the number of muscle
24 fibers was determinative of general muscular
25 strength.

1 Dr. Torg felt that there were
2 a number of other physiological factors relative to
3 determining muscular strength, such as the length
4 of the fibers and the extent of the development of
5 the fibers, but what he did say of course is that
6 the number of muscle fibers, he did not believe could
7 control either a determination of physical strength
8 or the ability to play baseball, and that the athletic
9 performance on the baseball field was more significant-
10 ly a factor of coordination, training, conditioning,
11 experience, motivation, agility, all non-sex
12 determinates.

13 So much for his muscular
14 strength, except perhaps to add that in terms of
15 mass, it seems to be pretty well established that
16 while there is no significant difference between
17 boys and girls between ages eight and ten, there
18 is a significant difference in weight and height
19 between ages ten and twelve and girls have the
20 advantage.

21 The third area dealt with
22 by Dr. Hale was reaction time, his theory being
23 that boys have faster reaction time than girls
24 and therefore can protect themselves better by
25 jumping out of the way of a pitched ball and by

1 being able to avoid injury when a ball takes a
2 bad hop in fielding.

3 According to Dr. Hale there
4 are two aspects of total time. As a matter of
5 fact the total time was suggested by Dr. Halmouth,
6 it was Dr. Hale who said there was reaction time
7 and movement time. These are apparently physiological,
8 psychological functions determined in very simple
9 laboratory tests. Reaction time is the time that
10 it takes for a person to get the message of a
11 stimulus and the laboratory tests are apparently
12 always based on very simple messages by very simple
13 stimuli, and movement time is the time it takes to
14 respond to a predetermined stimulus.

15 Dr. Hale in his movement time
16 theory relied upon three sources, Hotchkins,
17 Havlock Ellis, Bellis. These are set forth with
18 particularity both in his testimony and in his
19 affidavit. His own testimony failed to show first
20 that there is a difference between girls and boys
21 age eight to twelve in reaction and movement time
22 and second he failed to show that if there were a
23 difference, it was so related to performance on
24 the baseball field by class as to require the
25 conclusion that girls as a class would be disadvantaged

1 playing with boys as a class because of a slower
2 reaction time.

3 First as to his sources.

4 Bellis. He testified as to that. The report of
5 Bellis was based on testing a hundred and fifty
6 people aged four to sixty, twenty in classifications.
7 And it was his testimony, number one, that the
8 sample was too small.

9 Number two, that reaction time
10 continues to improve in both males and females
11 until about age twenty. The Bellis report in the
12 age group we are interested in was four to ten and
13 eleven to twenty. In the age group four to ten,
14 the average of the male tested was 7.3 and of the
15 girls 5.4. In the eleven to twenty, the average
16 age of the males tested was eighteen and the girls
17 16.3.

18 Dr. Hale made clear I agree
19 that had males of an average age of 7.3 been tested
20 against girls of an average age of 5.4, they would
21 have tested faster since this is an improving
22 quality until age twenty.

23 Bellis' test, by Hale's
24 testimony, was not fair and not reliable. Hotchkins
25 tested children age six and persons age twelve to

1 fifty-four. There was no appreciable differene in
2 age six. A difference began to show at age twelve
3 and one Hotchkins test that I will get to later,
4 and the only way in which Dr. Hale was able to
5 assume that children between eight and twelve showed
6 a sex variation by class, by saying that if there
7 isn't any at six and it starts at twelve, then he
8 extrapolated again and said somewhere between
9 six and twelve it starts to develop.

10 His third source was Havlock
11 Ellis. Havlock Ellis apparently for his conclusionary
12 statements on the superiority of male reaction
13 time, relied upon the researches of someone named
14 Gilbert. Dr. Hale did not know who Gilbert was,
15 other then that he came from the Yale Psychological
16 Laboratory and that he must have a good reputation
17 if that is his professional connection, because
18 people from that source have good professional
19 reputations.

20 He did not know what the
21 Gilbert study showed, he did not know what the
22 Gilbert data was or had no personal acquaintance
23 himself with Gilbert at all.

24 The Havlock Ellis summary
25 or conclusion based on Gilbert was that boys were

1 rather quicker. That when discrimination and
2 choice are involved in addition to simple reaction,
3 the sexual difference diminishes and girls are
4 almost as quick, and that boys had a slight
5 superiority.

6 Dr. Hale agreed that almost,
7 rather than slight, are not words of any scientific
8 quantification. The accelerated brake studies
9 also dealt with adults and not children. So far as
10 I am concerned Dr. Hale had no reliable source for
11 his conclusion on reaction and movement time as
12 it relates to children eight to twelve, boys or
13 girls.

14 Now, we compare Dr. Hale's
15 testimony with the testimony of Dr. Halmouth, the
16 State's expert. And again I am very much impressed
17 with the approach of Dr. Halmouth, similar to the
18 approach of Dr. Torg, namely a single physiological
19 characteristic cannot be determinative, it is the
20 entire totality of all physical, psychological,
21 experiential factors which determine so complex a
22 thing as a complete coordinated performance on
23 the baseball field. However, when you go into to
24 detail into Dr. Halmouth's testimony on reaction
25 time, one comes to the conclusion or I come to the

1 conclusion and I find that simple reaction time
2 is irrelevant to the ultimate question of how
3 fast a child is going to jump out of the way of
4 a pitched ball and for these reasons I accept
5 Dr. Halmouth's testimony and I should add that
6 he has done independent researches in performance
7 related to response to stimuli. He has done his
8 own independent research in that which I find
9 weighty.

10 His testimony was that when
11 you talk about reaction time, there are three
12 things you talk about, simple reaction time,
13 movement time and choice reaction time. Dr. Hale
14 never referred to choice reaction time at all.
15 Simple reaction time is the laboratory situation
16 where you measure how fast a subject gets a
17 response to a specific stimulus. Movement time
18 is how fast he performs a predetermined movement.
19 Total time is from beginning to end, they both
20 agree that there isn't very much correlation,
21 although there is some relation between total
22 movement time on the one hand and either reaction
23 time or movement time on the other hand.

24 Now, the choice reaction time
25 which Dr. Hale does not refer to is when you start

1 to get complex, and choice reaction time as I
2 understand from Dr. Halmouth is the speed with
3 which one response where the stimulus is not
4 single or predetermined, in where the manner of
5 the response is not single or predetermined, namely
6 as Havlock Ellis said when you introduced the
7 element of choice and judgement, and I am satisfied
8 from Dr. Halmouth's testimony that choice reaction
9 time, which is the only one of these things which
10 could be relevant in terms of actual performance
11 on the baseball field, is number one, not related
12 to simple or not correlated to simple or movement
13 time, and number two, that there is no appreciable
14 sex difference between children of eight to twelve
15 in terms of choice reaction time.

16 Now, Dr. Halmouth's opinion
17 that there was no appreciable difference was
18 based on his knowledge of not of his own observation,
19 but also on the literature. He knew of two studies
20 which tested choice reaction time, that is a much
21 more complex situation. One of them peculiarly
22 enough was our very same Gilbert who had been
23 apparently according to Dr. Halmouth, mischaracter-
24 ized by Havlock Ellis.

25 Gilbert did studies of

1 children between six and seventeen, choice reaction
2 time, the conclusion being that during these ages,
3 during this period of time at some ages boys
4 were so slightly ahead and at some ages girls were.
5 Boys had the advantage at ages seven, nine and ten
6 and girls at six, eight and twelve.

7 The other study on choice
8 reaction time was by Noble, a source not referred
9 to by Dr. Hale. The Noble study concluded that
10 prior to adolescence there was no consistent
11 sexual difference. Between ages nine to thirteen
12 girls had the slight advantage, between ages fourteen
13 and fifteen boys had a slight advantage.

14 Now, what Dr. Halmouth said
15 however was that these laboratory results simply
16 are not translatable to, or reliable in predicting
17 actual avoidance of injury on the baseball field,
18 and that is because you're talking about what he
19 referred to as infinitely complex reactions, this
20 is the pitched ball situation, the bad hop situation,
21 and what he said was that once performance in this
22 regard is based not on laboratory results of reaction
23 time, simple reaction time, but maturity, intelligence,
24 agility, general muscular coordination, motivation,
25 practice.

1 He also feels that at this
2 age, the difference was between individuals and
3 not on a classification basis.

4 Now, in this regard I think
5 and really that Dr. Hale would agree, because
6 although he testified a great deal about these
7 laboratory experiments, some of which he knew more
8 about than others, he was asked, have you ever
9 conducted studies to measure by time unit the
10 reaction time of a boy forty-six feet away from
11 a ball when it is pitched, and of course the
12 significance of forty-six foot is the distance
13 between home plate and the mound, and Dr. Hale's
14 response was that that could not be tested because
15 there was too many variables, exactly what Dr.
16 Halmouth said that when you take the complicated
17 actual situation, it is not testable, all of the
18 other aspects of personality and physiology play
19 a role.

20 So again I think that Dr.
21 Hale's thesis of the situation of one simple
22 laboratory function, is wrong, as a thesis, and I
23 think his facts are wrong based on the further
24 explanation of the materials by Dr. Halmouth.

25 Now, having dealt with the

1 aspects of bone strength, muscular strength,
2 reaction time, breast cancer, cosmetic injuries,
3 I address myself to whether or not there were
4 any other alleged physiological differences which
5 would result in girls as a class having predictably
6 greater incidences of injury if they play with boys.

7 There were two other aspects
8 of Dr. Hales testimony that I want to refer to.
9 He introduced on rebuttal, the report of the
10 American Association of Health, Physical Education
11 and Recreation, which is the Department of The
12 National Education Association compiled in 1958
13 which was apparently a youth fitness test, fifty-
14 eight hundred children were tested. I am not sure
15 by the way if the testimony shows that an equal
16 number of boys and girls were tested.

17 There were a number of
18 different exercises which boys and girls were asked
19 to perform. The highest percentile of boys ages
20 ten to seventeen was generally showed that the best
21 boy out of the eighty-five hundred, performed better
22 than the best girl out of the eighty-five or forty-
23 two hundred and fifty girls, however it is clear
24 from these as well that there is a substantial
25 amount of overlap and of course it is the overlap

1 which is so significant.

2 The particular tables which
3 Dr. Hale referred to as I have said starts at age
4 ten, which is half of the Little League age. And
5 I don't know what the studies were as to eight to
6 ten year olds and I don't know if there was a
7 test at all given to eight to ten year olds. I
8 don't find the differences significant, I should
9 say that at the outset, because of the high degree
10 of the overlap.

11 What I think is most
12 significant however is that this report was apparently
13 done when there was a decision made on the
14 national level that we were as a nation lacking
15 in physical fitness and that physical fitness
16 starts in childhood and the purpose of these tests
17 apparently were to see just what average levels
18 children reached. Apparently there was no follow-up
19 since 1958 for the purpose of determining whether
20 or not the physical fitness programs which began
21 on a national impetus basis at that time had their
22 desired results and whether the girls were performing
23 better then they had in 1958 as a result of all
24 this physical fitness education, or if the boys
25 were or if they were performing more equally.

1 Considering the purpose of
2 this 1958 test and the subsequent physical programs,
3 I don't think it is too reliable as to what the
4 situation would be now.

5 I also think the test in
6 very much with Dr. Hale's statement that boys
7 perform better because in our society we provide
8 more physical education for boys or physical
9 opportunities so they get more exercise. If girls
10 were similarly treated in terms of activity programs,
11 I think there is very substantial doubt based on
12 the physiological evidence, at least up until age
13 thirteen, that there would be any significant
14 difference at all.

15 Of course the answer is
16 that you have to start somewhere reversing the
17 trend, there is absolutely no reason that I can
18 think of why girls as a class, as a matter of
19 national policy or public attitude, should be
20 treated any differently than boys with respect
21 to being afforded opportunities for exercise
22 and physical fitness improvement.

23 Dr. Hale I think may have
24 expressed what I think is a basic bias against
25 the capabilities of girls of that age, eight to

1 twelve, as compared with boys.

2 In Paragraph 20 of his
3 affidavit on Page 14 the treatise follows.

4 "Many leagues in a Little League Program do not
5 allow participation by all applicants but only
6 those of the greatest skill. Necessarily should
7 females be permitted to participate, only those
8 with abilities comparable to boys would be
9 accepted to play."

10 Now, it seems to me that
11 he has admitted right there that there are girls
12 with comparable abilities. If they are of
13 comparable abilities, one naturally assumes as
14 he did admit, that they would have comparable
15 ability to avoid injury. Avoidance of injury in
16 the athletic sense does seem to be a function of
17 skill and ability and he so suggested at some
18 point.

19 But what he goes on to say
20 is. "I believe that this in turn would have a
21 negative effect upon the formation or continuation
22 of girls athletic programs which overactive
23 advertisement for large number of participants by
24 the removal of the best of them from girls programs,
25 those programs would tend to become less viable.

1 Also with the best female athletes not there as
2 a spur, fewer programs for girls would be formed."

3 Now, I have the most enormous
4 difficulty understanding why there should be any
5 difference between boys and girls, if you're talking
6 about a league program which does not permit
7 participation by all applicants, then why would
8 not the programs for inferior boy athletes fail
9 just as much for those of an inferior girl athletes.

10 I am absolutely persuaded that Dr. Hale has an
11 approach towards children, I say this gratuitously
12 I must add, which constitutes a basic bias between
13 girls and boys, what they can do athletically,
14 what they can perform athletically and what they
15 ought to be doing and performing athletically.

16 That bias has no place in our law, it is by policy
17 contradictory to the law, it is not physiologically
18 supportable. I am and I should say this, perfectly
19 satisfied from all of the testimony that once
20 adolescence is over, that once there is complete
21 physical maturation as a physiological matter,
22 males have a significant strength advantage. That
23 as a result of physiological factors, hormonal
24 production, it does not compel the conclusion that
25 that strength difference is a difference which

1 applies equally to childhood, and that was Dr. Hale's
2 thesis which I must reject, and I think the medical
3 testimony requires me to.

4 Now, on the final day of
5 hearing, the respondent produced Dr. Johnson by
6 way of sir-rebuttal. The proffer was that it would
7 be his testimony that children between the ages
8 of eight and twelve require structured opportunities
9 for association with their own sex. Of course
10 Dr. Johnson went much further, he feels that the
11 children require opportunities for association
12 exclusively with their own kind, whatever that
13 kind may be, racial, religious, et cetera.

14 I ruled that the evidence
15 was not admissible for two reasons, first it came
16 to light and was not proper sir-rebuttal and
17 second that it was not appropriate in terms of
18 the legislative mandate, however, I permitted it
19 to be offered for purposes of preserving the record,
20 having done that the State put on its psychological
21 witness for the same purpose.

22 I still do not believe that
23 the psychological evidence is admissible. The
24 evidence, very interesting and I am sure would have
25 been very interesting to the Legislature when it

1 made its determination to include sex as a
2 characteristic upon which there can be no
3 discrimination.

4 I have no doubt that there
5 are lots of respectable psychologists who would
6 conclude that there is a lot of psychological
7 comfort in the birds of a feather theory. Maybe
8 there is. The necessary extension of that is
9 that white children should be with white children,
10 on a structured basis, and black children with
11 black children and Jewish children with Jewish
12 children. The whole concept is one which is
13 contrary to the public policy of this State,
14 namely that when you talk in terms of public
15 accommodations, at least to that extent we
16 encourage what is our stated national legislative
17 policy, if not constitutional dictated legislative
18 policy for integration on every level of society.

19 I don't think that it is
20 within my competence to find that there is an
21 acceptable psychological reason to maintain
22 discrimination of any kind on any level in any
23 public accommodation, and that is why I refuse to
24 allow as admissible the testimony of Dr. Johnson,
25 however, if this matter is appealed, the Appellate

1 Court may disagree with me and I make findings
2 therefore in the event that this evidence should
3 at some point be deemed admissible.

4 The difference in theory
5 between Dr. Johnson and the State's expert,
6 Dr. Gioncotti, I think can be pretty simply
7 stated. Dr. Johnson finds what he describes as
8 a tendency of children between the ages of eight
9 and twelve to seek comfort in their own kind. He
10 thinks that since they seek comfort, that their
11 mental health is improved by affording those kind
12 of opportunities.

13 I don't think he relates
14 what he observes as a tendency to questions of
15 social attitudes and parental training, which are
16 contrary to the stated law of this State, and
17 this country for that matter.

18 The question is, and I think
19 this was the import of Dr. Gioncotti's testimony,
20 do we perpetuate patterns and as Dr. Johnson would
21 have us do, cater, pander to patterns which have
22 probably outgrown their utility on a psychological
23 basis as well as being contrary to stated law, or
24 do we take those steps which are designed to
25 break those patterns.

1 Now, the pattern of sex
2 discrimination is one which is very much entrenched
3 in the American way of life. The Legislature of
4 this State has now declared that sexual discrimina-
5 tion is illegal. I do not believe that a public
6 accommodation can therefore continue to cater to
7 and pander to public attitudes which are unlawful.
8 That is what Dr. Johnson would have us do.

9 I am also satisfied from
10 Dr. Gioncotti's testimony that it would be condusive
11 to the ultimate mental health, both of males and
12 females, if their integration, in the structured
13 situation at least, were promoted as soon as
14 possible and at the earliest possible age.

15 I am certainly not going to
16 make a judgment on the reliability of his theory
17 that part of the general problem of male mental
18 health or lack of the results from the stresses
19 or burdens created by societies insisting from
20 the earliest stages that they are superior to
21 girls, woman, and therefore must perform in a
22 superior manner. It certainly has its appeal,
23 I think however the important thing is for us to
24 consider the other side of the coin as well, and
25 that is that girls need not be regarded or regard

1 themselves as inferior.

2 It is clear from Dr. Gioncotti's
3 testimony that children should be provided with
4 every opportunity, I think what he said was
5 every opportunity in which an individual child
6 can succeed should be available to that child.

7 Now, if a boy can't succeed
8 in baseball, maybe he doesn't join Little League.
9 If a girl can succeed in baseball, there is
10 absolutely no reason why she should not, and the
11 sooner I think little boys begin to realize that
12 there are many areas of life in which girls are
13 their equal and that it is no great shame, no
14 great burden to be bested by a girl, then perhaps
15 as Dr. Gioncotti has suggested, we come that much
16 closer to the legislative ideal of sexual equality
17 as well as to relieving a source of emotional
18 difficulty for men.

19 I can't accept Dr. Johnson's
20 testimony. He said, well, you have integration
21 is important, segregation is important, you have
22 integration in the public schools, don't take
23 away this island of maleness. It's simply not
24 open to me to decide that on a psychological basis.

25 Little League has been as I

1 gather a monumentally successful endeavor, a
2 household word throughout the country. Dr. Hale
3 has testified that there are two million boy
4 participants, I suppose one might say that Little
5 League is as American as hot dogs and apple pie.
6 I am perfectly satisfied that there is absolutely
7 no basis and to the contrary why that piece of
8 public Americana should be withheld from girls.

9 I don't think there is any
10 other organized baseball situation for girls and
11 there is no reason why girls shouldn't play baseball
12 with boys, no physiological reason at all, if
13 they are good enough. And I don't mean to suggest
14 that all girls are as good as all boys, just as
15 obviously all boys are not of equal competence.

16 I am satisfied, I will say
17 it just once more because I think this is the
18 essence of it on the physiological and psychological
19 basis. I am satisfied that between the ages eight
20 and twelve, performance differences are on an
21 individual basis, not on a sexual class basis.
22 The weak boys can be protected now by Little League,
23 so can the weak girls. The strong girls will have
24 an opportunity to play with strong boys.

25 Now, in terms of the relief.

1 Ordinarily the Director enters the order as he
2 sees fit, directing the relief should he agree
3 with the Hearing Examiner's findings of fact and
4 conclusions of law.

5 I say again that Little
6 League Baseball, Inc., federally chartered
7 organization has submitted to the jurisdiction
8 of the New Jersey Division on Civil Rights and I
9 therefore see no legal impediment why the order
10 should not run with respect to the National
11 Organization and require the National Organization
12 to make those changes in its rules and policies
13 which will permit girls to freely participate with
14 boys on a voluntary basis.

15 Now, I am completed,
16 concluded, is there anything which I have not
17 addressed myself that either of the attorneys
18 would care to raise?

19 MR. GOLTZ: I don't think so.

20 MRS. PRESSLER: Mr. Malfitano?

21 MR. MALFITANO: No.

22 MRS. PRESSLER: Now, on a
23 procedural basis, it is my understanding of the
24 rules of the Division that any objections to the
25 Hearing Examiner's findings must be made within ten

1 days.

2 I will direct that the
3 transcript of these oral findings be prepared with
4 all possible expedition and sent by certified
5 mail to Mr. Goltz and Mr. Malfitano.

6 I think in all fairness we
7 should commence the running of the ten days from
8 the date of receipt of the transcript of these
9 findings.

10 I was remiss in saying and
11 should have said at the outset that I wish to
12 compliment both attorneys on what I regard to be
13 one of the very best prepared, thoroughly prepared
14 cases which it has been my privilege to hear as
15 a Hearing Examiner, very impressive work of the
16 attorneys.

17 Secondly, the transcript was
18 much better than usual also, however, there are
19 some errors in the transcript, just a few which I
20 think may go to sense rather than just obvious
21 typos. In the event the matter is appealed, I would
22 ask both attorneys to confer with each other on
23 corrections of the transcript. When they have
24 agreed upon that, and it is purely a mechanical
25 process, if they would send their stipulation on it

1 to me to certify that that it is also my agreement,
2 then that should become also a part of the record
3 of the case.

4 Let me say also for the
5 record I made a few notations, I didn't bother with
6 what were obvious typos but only with those things
7 that might have gone to the sense of the statements.

8 MR. GOLTZ: Do you wish us
9 to do that if that includes after you have entered
10 your ruling?

11 MRS. PRESSLER: I guess so.
12 I don't know of course if the respondents intend
13 to appeal.

14 MR. MALFITANO: I am pretty
15 certain they will.

16 MRS. PRESSLER: In that case
17 I think we all have an obligation to present the
18 Appellate Courts with as accurate a transcript as
19 we can.

20 (At which time the hearing
21 was adjourned.)

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