

C. ASK TO PLAY ON THE BOYS HIGH SCHOOL TEAM (BECAUSE THERE IS NO GIRLS' TEAM) AND BE TOLD YOU CAN'T BECAUSE OF A HIGH SCHOOL LEAGUE RULE. AND GIRLS

Taken From The

Official HANDBOOK



MINNESOTA STATE HIGH SCHOOL
1971-72

sion of both schools for a period of one calendar year from the date of the violation.

Section 6. — Physical Examinations.

- A. Prior to practicing for or participating in interscholastic athletics, each student shall submit to a physical examination by a competent physician to determine whether or not he is physically qualified to participate in such activity. If he is so qualified, the physician shall certify the fact on a form furnished by the Board of Directors. It is recommended that the physical examination be given no earlier than August 1 of the school year in which the student desires to participate.
- B. The completed form shall be placed on file in the school office or, if he is enrolled in the Athletic Accident Benefit Plan, it shall be forwarded as one of the enrollment forms and be placed on file in the League Office.
- C. No student shall be eligible to participate in interscholastic athletic activities of the League until this certificate is completed properly and filed in the appropriate office.
- D. Due to the physical exertion and emotional stress in cheerleading, the same physical examination requirements are established for cheerleaders.

Section 7. — Age.

A student representing a member school in League activities shall be under twenty (20) years of age on the date of the contest.

* Section 8. — Limitations in the Competitive Program for Boys. *

Girls shall be prohibited from participation in the boys' interscholastic athletic program either as a member of the boys' team or a member of the girls' team playing the boys' team. The girls' teams shall not accept male members.

Section 9. — Enrollment — Student Load — Attendance.

To be eligible at the beginning of a semester for participation in interscholastic activities of the League a student must be enrolled at the beginning of the semester. In applying this regulation the word "enrolled" shall have the same meaning given to it in the section on Admissions in the manual on *Uniform Child Accounting* (1955) issued by the State Department of Education. That is, enrollment shall be continuous after a student has enrolled officially in a school until he officially discontinues attending his school or transfers to another school. However, the student must attend



Gaining Sweat Equity

GIRLS PUSH FOR PLACE ON HIGH SCHOOL TEAMS

Sheri Brenden

In the spring of 1971, 17-year-old Peggy Brenden asked her school's tennis coach, Bill Ritchie, whether she could play on the team. The answer was "No." Ritchie, a newly hired math teacher and tennis coach at St. Cloud Technical High School (known as Tech), said Minnesota State High School League (MSHSL) rules prohibited her participation. He would let her practice with the team—sometimes—if there were an odd number of boys. So, at the end of each school day Brenden changed into shorts and T-shirt in the girls' bathroom and headed to the nearby tennis courts, hoping for a chance to play. Some days she got to step in as a practice partner, but many days she just walked home or hit tennis balls against the wall by herself.¹

It wasn't enough. She wanted to practice *and* compete. She wanted the same opportunity to participate on a school team as her male classmates, and she refused to take "no" for an answer. Though her school did not offer girls' interscholastic sports, Brenden would ultimately win a spot on the Tech team thanks to a groundbreaking federal lawsuit, which challenged the MSHSL and school districts to address gender inequality in high school athletics. The lawsuit, brought by the Minnesota Civil Liberties Union on behalf of Brenden and another athlete, Toni St. Pierre of Hopkins Eisenhower High School, set off a surge in girls athletics at the dawn of the Title IX era.

Tech, like all other public high schools in the state, belonged to the MSHSL, which governs sports teams, musical competitions, and special academic activities. A team that defied MSHSL rules lost its eligibility. First organized in 1916, the MSHSL did not pass a resolution to take on administering girls' interscholastic programs

until 1968. The next year, the league adopted bylaws for girls' athletics, including a rule that explicitly forbade mixed-gender athletics. Whereas previously only some sports had rules against boys and girls competing, now there would be no exceptions: "Girls shall be prohibited from participation in the boys' interscholastic athletic program either as a member of the boys' team or a member of the girls' team playing the boys' team. The girls' team shall not accept male members."²

The new bylaws for girls' athletics signaled an interest in creating girls' interscholastic teams, but schools moved at a snail's pace. The league recommended that districts begin by developing intramural and extramural programs for girls in various sports and allocating "a reasonable share of facilities, budget and personnel."³

High schools offered intramural programs with games played by girls within the same school. Extramural competition was an outgrowth of intramural programs "for girls who would enjoy an occasional, sometimes spontaneously arranged, contest with girls from another school," according to the 1971–72 MSHSL Handbook. A school was restricted to three such events per intramural sports season. In contrast, interscholastic athletic programs included coaching, practices, and multiple scheduled contests with teams from other schools. More than half of the state's high schools in the early 1970s didn't sponsor any interscholastic sports for girls.⁴



FACING: Peggy Brenden, Jan. 1972, and a page from her scrapbook (see cover). Brenden starred the section of the MSHSL handbook that prohibited girls from participating in boys' interscholastic athletics in her scrapbook. THIS PAGE: Toni St. Pierre, 1973 yearbook photo.

“THE HIGH SCHOOL SYSTEM AND LOCAL COMMUNITY DO NOT PROVIDE AN OPPORTUNITY FOR AN ADVANCED GIRL PLAYER.”

The MSHSL hired Dorothy McIntyre in July 1970 to develop girls' interscholastic athletics. McIntyre, who had been a social studies and physical education teacher at Eden Prairie High School for 11 years, was known for her interest in girls' athletic opportunities. During the 1960s, she conducted gymnastics clinics that drew hundreds of Minnesota girls. She also helped draw up guidelines for girls' interscholastic athletics. It is worth noting, however, that when she began her duties, the MSHSL board praised her patience, rather than her advocacy, stating, “We believe she will be patient and understanding in our attempt to find the proper place for girls in the competitive sports programs at the same time being extremely careful to preserve and ever improve girls physical education, intramural and extramurals.”⁵

McIntyre could see there was a long way to go to build girls' athletic programs. She later recalled, “The landscape was still pretty bare, with a scattering of school teams experimenting with some competition in various sports around the state, so we continued working, expanding our efforts and encouraging schools to develop teams as quickly as they could.”⁶

In the 1971–72 school year, MSHSL participation figures showed nearly every public high school in Minnesota offered both basketball and football teams for boys. Baseball and track were available in more than 428 of the state's 484 high schools. Cross-country running, golf, and wrestling were growing in participation numbers and were offered in more than half of Minnesota schools. In all, 171,509 boys participated in MSHSL interscholastic athletic activities, including curling, which claimed 312 participants. In contrast, only 46,003 girls participated in MSHSL athletics, and this number included extramural as well as interscholastic participants.⁷

The disparity in resources invested to serve male and female athletes was similarly wide. For example, in 1971–72 St. Cloud Tech had an athletic budget of \$26,000 designated for boys' sports. Girls' sports, in contrast, had no budget. Any expenses related to girls' athletic activities

were taken from funds intended for physical education classes. During the 1971–72 school year, Tech boys played more than a dozen matches during their spring tennis season—a season that included court time for daily practices, two paid coaches, a volunteer coach, and matches scheduled during a two-month period with travel to places as far away as Moorhead and White Bear Lake. In addition, qualifying boys' tennis team members could participate in sectional, regional, and state tournaments that the MSHSL had been organizing since 1950. Tech's fall intramural program for girls allowed them to use the school district's tennis courts to play against one another just once a week over the course of a month. Unfortunately, those events were canceled more than once due to rain.⁸

AT THE START OF HER SENIOR YEAR in September 1971, Peggy Brenden saw the clock ticking away without any hope for high school athletic competition. One day after playing tennis with her sister and brother-in-law, Sandy and Jim Tool, they discussed a junior high swimmer, Kathryn Striebel of St. Paul, who also wanted to join a boys' team. Striebel's mother, Charlotte Striebel, was fighting to give her daughter that opportunity. Jim suggested that Brenden look to the Minnesota Civil Liberties Union (MCLU) for help, and so in hopes of enlisting an advocate, Brenden sent a letter to the newly formed St. Cloud MCLU branch. The teenager knew the problem well enough to state her own case. She saw the coaching, court time, matches, and travel the boys were given at her school. There wasn't anything close for girls in any sport. On October 25, she typed her letter carefully and with urgency to Yvonne Hartz, chair of a 16-person MCLU committee based in St. Cloud:

Dear Mrs. Hartz:

Because of your interest in equal rights, I am writing to you for assistance. I am concerned with the Minnesota High School League rule which bars girls from participating [in] the boys' sports. The specific rule from the forty-ninth annual Official Handbook of the Minnesota State High School League for 1971–1972 states in Article 1, Section 8—Limitations in the Competitive Program for Boys—“Girls shall be prohibited from participation in the boys' interscholastic athletic program either as a member of the boys' team or a member of the girls' team playing the boys' team. The girls' teams shall not accept male members.”

As an avid tennis player, I have played in summer tennis tournaments for several years. On the basis of the Northwestern Lawn Tennis Association 1970 rankings, I was ranked third in girls' 18 and under division.

This past winter I was one of four girls selected from Minnesota to participate in the winter program, Junior Tennis Champions Inc. This summer I was a finalist in four Northwestern Lawn Tennis Association sponsored tournaments.

The high school system and local community do not provide an opportunity for an advanced girl player. Last year I was occasionally allowed to practice with the boys' team but felt like a second-class citizen since I was never allowed to compete interscholastically and my practice time was sporadic. Since I have unofficially played team members of my high school, St. Cloud Tech, I feel I could rank among the top three or four players.

I am interested in playing tennis but the girls' athletic program does not have adequate competition. Such cases as Kathryn Striebel, the St. Paul swimmer, are not unique. There are qualified girls throughout the state who, because of their sex, have not had the same opportunity to excel in sports as the boys have had. It is my firm belief that teams should be formed on the basis of ability, not sex.

Therefore, I am asking you as a member of Civil Liberties Union to initiate an effort to legally change the Minnesota State High School ruling.

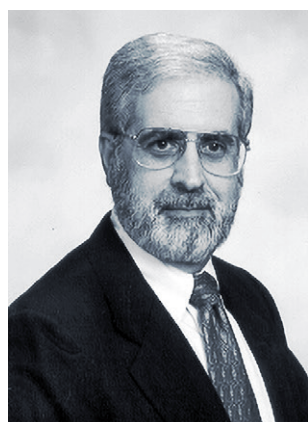
Thank you for your time and consideration.

Very truly yours,

Peggy Brenden

P.S. Please hurry. I'm a senior.⁹

On November 20, 1971, the MCLU board voted to take on Brenden's case, along with a recommendation to "request the Minnesota High School League abide by the U.S. Constitution in their regulations and change those regulations now in effect which are in violation of the Constitution and the Bill of Rights. If they do not comply, suit should be brought against the Minnesota State High School League for dis-



LEFT: Early in his career, Thomas Wexler volunteered his services to the MCLU to expand his legal experience. Brenden and St. Pierre's case was his first appearance in federal court. RIGHT: Brenden sent Wexler more information after she learned he was preparing her case.

crimination on the basis of sex in the case of Miss Peggy Brenden."¹⁰

Brenden's case then landed in the lap of Thomas Wexler. A 1966 graduate of the University of Minnesota Law School, Wexler served in the army until late 1968. He was not yet a seasoned trial attorney; one of the reasons he volunteered his services with the MCLU was to expand his legal experience. Brenden's case was the first time Wexler would appear in federal court and only the fourth complete case in his career. The MCLU initially gave Wexler just one plaintiff—Brenden. In late February, however, the MCLU board decided to expand the case upon receiving another similar request. Antoinette (Toni) St. Pierre, a Hopkins Eisenhower High School cross-country runner and skier, could not participate in high school meets because of her gender.¹¹

Rather than recruiting girls from all over the state who might want to play on a boys' sports team, Wexler felt that focusing on these two particular girls would offer a greater chance of success and accomplish the same goal.

804 6th Ave. So.
St. Cloud, Minn. 56301
January 3, 1972

Mr. Thomas Wexler
304 Title Insurance Building
Minneapolis, Minn. 55401

Dear Mr. Wexler:

I was pleased to hear that you will be preparing my case and I will try to provide you with additional information concerning my efforts to get on the tennis team at my high school, St. Cloud Tech.

In the spring, before tennis practice had started, I asked the tennis coach, Mr. Ritchie, if I could possibly play with the team. He took my request to Mr. Potter, the athletic director, who said the Minnesota State High School League ruling prevented my participation. Mr. Ritchie, in turn, explained that it was not within his power for the school's to allow me to play interscholastically because of the ruling. Mr. Ritchie did say, however, that I could practice with the team—although as I explained in my letter to the Minnesota Civil Liberties Union, my practice time was rare.

I have enclosed a copy of the letter I sent to MCLU. If you require more information please let me know. I really appreciate all your help.

Yours truly,

Peggy Brenden

"By the time the case got to me, the athletic season for their respective sports was fast upon us," Wexler recalled in 2005. "I didn't want to make it a class action. It would have taken more time, and I had a nice clean case. I had non-contact sports. And, I didn't have to deal with why should girls be allowed to wrestle or play football. That introduced new elements that would have made the case more complicated and possibly jeopardize the chance of winning it."¹²

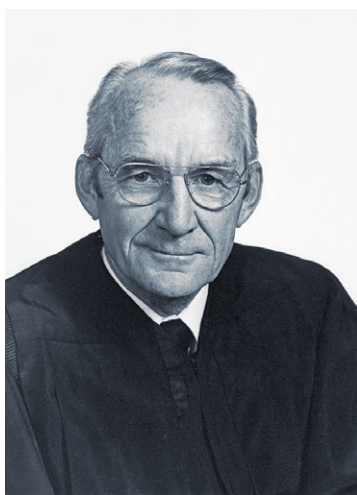
Winning this case would create a chink in the armor of the high school athletic system built for boys. The case would provide the impetus necessary to push high schools and the MSHSL to develop athletic opportunities for girls so they wouldn't continue to be confronted with similar challenges. Brenden and St. Pierre would serve as exceptions that would break the rule.

Wexler's strategy was straightforward: build the case as a violation of the Fourteenth Amendment. Forbidding these two girls, who could compete effectively, from playing on their schools' sports team was arbitrary and unreasonable. If there was no alternative available, these girls were not being given equal protection as required by the Fourteenth Amendment. At one point, Wexler consulted with Ruth Bader Ginsburg. Not yet a US Supreme Court justice, she was serving as coordinator of the ACLU's Women's Rights Project, and the ACLU had begun referring sex discrimination complaints to her. Ginsburg discussed the case with Wexler and assisted him by sharing a sex discrimination brief she had written.¹³

Brenden sues St. Cloud school district

Once the lawsuit was filed, the *St. Cloud Daily Times* announced it with a bold headline atop the front page: "Peggy Brenden Sues St. Cloud District to Play High School Sports." A few weeks later, the newspaper interviewed St. Cloud school superintendent Kermit Eastman, who summarized the case: "The issue is whether or not the rule should be permitted to stand that prohibits a girl from participating on any boys interscholastic team." The school district speculated that "reverse discrimination" could result. Eastman also noted other ramifications, including what sort of supervision, physical care, coaching, and injuries might result from mixed-gender sports.¹⁴

As is often the case in litigation, the issue became many things—whether the court should be able to overturn a MSHSL rule, whether allowing these girls to play against boys would undermine the future development of all girls' athletic opportunities, and whether mixing girls



LEFT: US District Court Judge Miles Lord heard the case of Brenden v. Independent School District 742. RIGHT: Attorney Bernhard "Pete" LeVander (1952 photo) represented the Minnesota State High School League.



and boys on sports teams would create dire problems and risks for students and their schools. Distracting as those red herrings were, Brenden asserted the main issue was that "[f]or too long, women have taken a back seat to men in athletics. From grade school on up, girls simply haven't had the chance to develop their athletic skills."¹⁵

The case's visibility was enhanced by the federal judge assigned to the matter—the Honorable Miles W. Lord. A friend of former vice president Hubert Humphrey and Minnesota senators Walter Mondale and Eugene McCarthy, Lord was nominated for a federal judgeship in 1966 by President Lyndon Johnson. Mondale described Lord as "a different kind of public servant because he listened to his own drummer." He was a maverick judge with a "Wild West approach," according to his biographer and former law clerk, Roberta Walburn. He also loved the media limelight.¹⁶

"Publicizing what you say is important," Lord explained. "It isn't so important to have something in the law books because nobody reads the law books, except other lawyers. It's important to give vent publicly to what it is you're deciding and why you are deciding it." Whatever Judge Lord decided in Brenden's case, he would not do it quietly.¹⁷

From the bench, Lord would question witnesses. Sometimes he butted heads with attorneys. "I did considerable cross-examination of the witness(es) myself," Lord admitted. "Since there was no jury there to be prejudiced, I thought it appropriate that I could ask questions as they occurred to me. Plaintiffs' counsel did not object, but the heat emanating from the defendant's table was almost palpable."¹⁸

Representing the MSHSL was Bernhard W. “Pete” LeVander, former chairperson of the Minnesota Republican Party and younger brother to former Minnesota governor Harold LeVander, who served from January 1967 to January 1971. Pete LeVander frequently defended the league against challenges to its eligibility rules. In fact, he was quite proud of his role as attorney for the MSHSL in a 1970 Minnesota Supreme Court decision—*Brown v. Wells*—which, he said, made him a celebrity in high school league circles. In that case, a boy at Roosevelt High School in Minneapolis wanted to participate in an outside hockey league while also competing on his school’s hockey team. The MSHSL said no. A Minnesota district court judge sided with the Roosevelt student. But upon appeal, the Minnesota Supreme Court asserted: “Courts should not be called upon to arbitrate the reasonableness of League rules unless objectors are prepared to demonstrate that they are not supported by reason or adopted in good conscience.”¹⁹

Pete LeVander had also run for Minnesota attorney general in 1954 against Lord, one of the founders of Minnesota’s Democratic-Farmer-Labor Party. LeVander felt Lord used “shoddy tactics” in the campaign, later writing in his memoir: “I have never had any respect for Miles Lord.”²⁰

Wexler had filed a petition for a preliminary injunction—a temporary order, in this case compelling the MSHSL to set aside its rule barring girls from boys’ teams specifically so that Brenden and St. Pierre could participate. If the injunction was granted, Brenden would be able to play official tennis matches that spring. As a senior, Brenden’s plea had immediacy and required the court to act promptly. The preliminary injunction would also give St. Pierre a chance to compete on the boys’ cross-country running and skiing teams the following school year. No other female athletes were included in Wexler’s petition.

In a pretrial conference between the attorneys and Judge Lord just 12 days before the scheduled hearing, Lord suggested that Brenden be allowed to play with the team without any formal court order. But LeVander said MSHSL rules made that impossible.²¹

The MSHSL, largely run by men and governed by representatives from boys’ sports, was not going to budge from its position: girls could not play on boys’ teams—ever, under any circumstances. Wexler later recalled, “I was impressed by the vigor of the high school league’s opposition to what to me seemed like a pretty reasonable and obvious accommodation that ought to be made. It almost seemed like there was a sense on the part of high school league officials that their system would crumble if their rules weren’t strictly enforced.”²²

THE MSHSL WAS NOT GOING TO BUDGE FROM ITS POSITION: GIRLS COULD NOT PLAY ON BOYS’ TEAMS—EVER, UNDER ANY CIRCUMSTANCES.

Before the hearing, the message Wexler heard from McIntyre, the MSHSL’s director of girls’ interscholastic sports, was: “If we let the girls get on the boys’ teams, then the school districts won’t be motivated to create equivalent systems for the girls.” Committed to building girls’ athletic opportunities, McIntyre argued that this case could derail those efforts. She stated in her deposition, “The public schools of Minnesota are charged with the responsibility of educating the masses. Our school programs cannot place emphasis on the needs of the individual to the exclusion of the needs of the group.” It was “educationally unsound” for Brenden to participate on a boys’ team. Further, stated McIntyre, “Any benefit that possibly could come to Peggy would indeed be slight compared to the widespread doubt, uncertainty and confusion that would be created by” allowing her to play tennis with boys.²³

The MCLU complaint filed on behalf of the girls stated that the MSHSL’s adherence to its gender rule would “deprive Peggy Brenden of any opportunity, like that available to male students at her school, to elevate her standards of sportsmanship and responsible citizenship and to develop comparable skills in a sport in which she desires to participate.” The complaint also noted “[that] the League’s athletic program is financed largely by public tax revenues and that the amount of such revenues expended on the boys’ program is greater than, and grossly disproportionate to, the revenues expended on the girls’ program.”²⁴

The week before the federal court hearing began on April 24, the St. Cloud School Board met and okayed a plan for girls’ sports. Superintendent Eastman made no mention of Brenden’s case and said the district had not been “rushed or pressured” into its decision. But he did note, “It seems likely that court decisions could dictate greater consideration for athletic programs for girls.” The school board authorized girls’ interscholastic programs. Eastman did not commit to a timetable for implementing a list of possible girls’ teams, stating that they would be “developed as the need arises.”²⁵

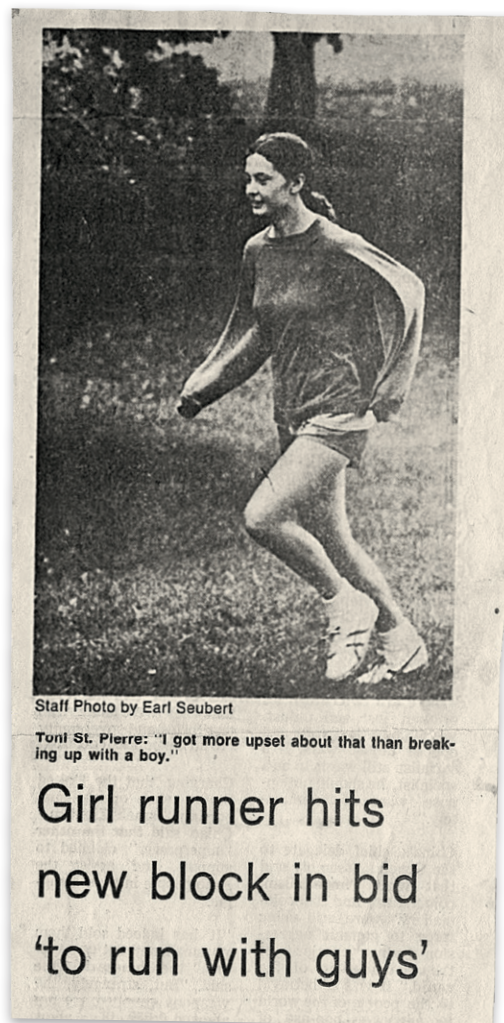
Tennis season marches on

Brenden attended team practices in the spring of 1972, but she had no place in the St. Cloud Tech lineup without a court decision. St. Pierre was a junior and still had another year of high school ahead, but Brenden's plea to play on the boys' team would become a moot issue if a decision wasn't made before the tennis season ended.

During the hearing, Wexler focused on showing that the two girls were capable athletes who were offered no equitable athletic opportunities. In contrast, much of the testimony offered by the defense wasn't about Brenden or St. Pierre, specifically. Instead, experts discussed female athletes in general, voicing worries about where girls would change clothes and who would administer first aid. Gym teachers, university professors, MSHSL officials, physiologists, high school coaches, athletic directors, and principals raised red flags about mixed-gender competition: girls might cry; they would seldom win; they wouldn't

be able to keep up with the same practice schedule; female hip development would impair their performance; and male coaches wouldn't like coaching girls. MSHSL executive director Murrae Freng "warned that boys would be allowed to play on girls' teams if girls are allowed to play on boys' teams." And, in that case, Freng said, "the physiologically superior boys' would replace the girls."²⁶

It took less than a week from the time the hearing ended for a decision to be announced. On May 1, 1972, the US District Court for the District of Minnesota held that the two high school girls who wished to take part in interscholastic boys' athletics had demonstrated they could compete effectively on those teams (tennis, cross-country running, cross-country skiing) and that their schools offered the two girls no alternative competitive programs. Thus, a rule prohibiting the girls from participating in boys' interscholastic athletic programs was "arbitrary and



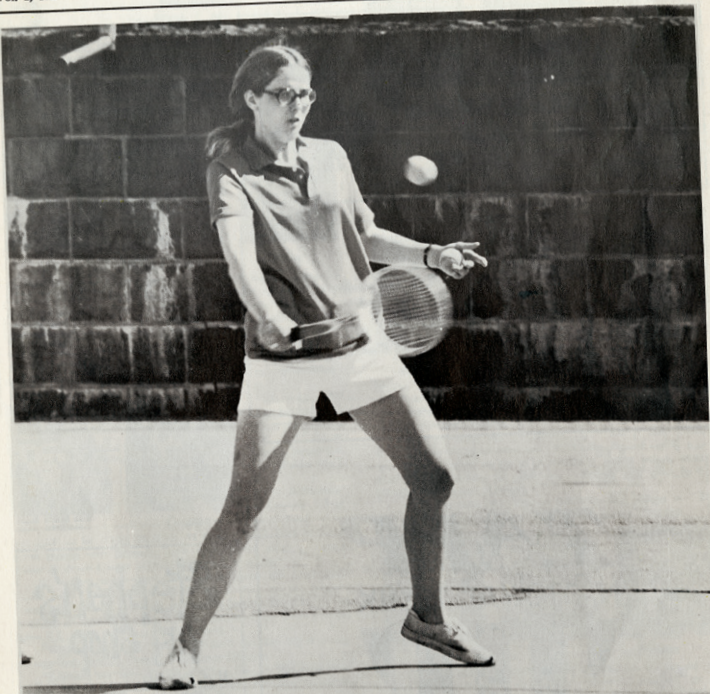
LEFT: Cover of St. Cloud Tech's newspaper, *Montage*, May 24, 1972.
RIGHT: An Oct. 1972 Minneapolis Tribune story described how a newly adopted MSHSL rule forced St. Pierre to choose between competing on her high school team or being part of the AAU.

MONTAGE

Vol. 2, No. 8

TECHNICAL HIGH SCHOOL, ST. CLOUD, MN. 56301

May 24, 1972



Peg Brenden-From Court to Court

COURT DECISION COINCIDES WITH NEW FEDERAL LAW

As Judge Miles Lord issued his decision in the *Brenden* case, Congress enacted a federal civil rights law—Title IX of the Education Amendments Act of 1972—which took effect June 23, 1972. Title IX states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” Though it had implications for a variety of issues—admissions, scholarships, financial aid, equal employment opportunities for students and professors, and student rules—it soon became linked with gender equity in sports and athletic programs.

Title IX prohibits sex discrimination and applies to all educational institutions, both public and private, that receive federal funds, including thousands of local high schools, colleges, and universities. Schools failing to comply feared the prospect of losing federal funds or facing substantial damages

and attorney fees from court cases. At first, however, no one really knew what it looked like to comply with the law. Title IX regulations were not released until 1975, and the deadline for compliance wasn’t until 1978.¹

At the University of Minnesota’s Twin Cities campus, the men’s intercollegiate sports budget was \$1.2 million in 1971–72, while women’s intercollegiate athletics received \$7,336. Without a meal allowance, teams bought loaves of white bread and bologna to make sandwiches on road trips. Graduate assistants volunteered their time to coach teams with brief game schedules. After Title IX was passed, the University of Minnesota’s budget in 1973–74 could hardly be described as “equitable,” with \$27,000 spent for women’s and \$2.2 million for men’s intercollegiate athletics.²

In 1975, University of Minnesota president C. Peter Magrath sought legislative funding specifically for women’s athletics. Upon receiving a

letter of support from Rudy Perpich, then lieutenant governor of Minnesota, Magrath replied, “I am really convinced that women’s participation in sports is a coming thing, and in fact, it is something that has already arrived at the high school level.” Thanks to a court challenge by two Minnesota high school girls, a steady tide of female athletes were arriving at colleges and universities, eager to continue their athletic dreams.³

Notes

1. Jaime Schultz, *Qualifying Times: Points of Change in US Women’s Sport* (Urbana: University of Illinois Press, 2014), 131.
2. Stanford Lehmborg and Ann M. Pflaum, *The University of Minnesota 1945–2000* (Minneapolis: University of Minnesota Press, 2001), 171–73.
3. Eloise M. Jaeger, “Breaking Barriers in Women’s Sports at the University of Minnesota,” in *Stories by Minnesota Women in Sports: Leveling the Playing Field*, ed. Kathleen C. Ridder, Jean A. Brookins, and Barbara Stuhler (St. Cloud, MN: North Star Press, 2005), 224–25.

unreasonable, in violation of the equal protection clause of the Fourteenth Amendment and application of rules as to plaintiffs could not stand.”²⁷

The school and MSHSL attorneys contended that sports participation is a privilege, not a right requiring protection. But the court stated that it had jurisdiction in the matter because, although the MSHSL is a voluntary organization, it still was authorized by Minnesota statutes and relied upon member school districts in the decision-making and rule enforcement process, which meant they were “acting under color of state law.”²⁸

The decision went on to carefully list the points it did not address:

First, this Court does not decide whether participation in interscholastic athletics is of such importance as to be fundamental in nature. . . . Second, this Court is not deciding whether sex, as a classifying fact, is suspect. . . . Third, this case does not involve a class action. It involves only the assertion of a violation of constitu-

tional rights as to two high school girls, Peggy Brenden and Toni St. Pierre. . . . Fourth, this Court is not deciding whether the League rules providing that there shall be no participation by girls in boys’ interscholastic athletic events is unconstitutional or constitutional.²⁹

The May 1, 1972, decision meant Brenden could play tennis in the final season of her high school career. Although the MSHSL immediately announced it would appeal the decision, this action did not curtail Brenden’s competition. She joined the Tech Tigers tennis team for the last month of its match schedule as the appellate process continued. She won three of her five singles matches, and her team lost only one dual match all season. Brenden earned a varsity letter.

That same spring, St. Pierre set a national record in the 800-yard run at the first girls’ state track and field meet sponsored by the MSHSL. She was unable, however, to compete with the cross-country team in the fall of 1972 because the MSHSL invoked a newly adopted rule

intended for boys, which forced St. Pierre to choose between being part of the Amateur Athletic Union (AAU)—which had provided her with coaching and competition opportunities for several years—or her high school boys' team. She chose to run with the AAU. Nonetheless, thanks to Lord's decision in the winter of 1972–73, St. Pierre did ski in multiple cross-country races for the Hopkins Eisenhower boys' team. She placed as high as fourth and fifth against tough conference competition, according to her high school coach, Pat Lanin.³⁰

Brenden and St. Pierre's lawsuit paved the way for girls all over the state to participate on their high school teams. In both large and small schools, girls asked to compete with boys. Students contacted the MCLU for help. The organization fielded requests from Jody Nolan, a Litchfield tennis player, and Margaret Phelps, a Bloomington swimmer, who both wanted to compete on their high school teams. MCLU president Matthew Stark said that the MSHSL might face a class-action suit in state court if it did not remove restrictions against girls playing on boys' teams. In January 1973, US district court judge Philip Neville issued a temporary order restraining the MSHSL from keeping a 16-year-old Edina girl—Ann Freeman—from skiing with her school's prep slalom team.³¹

High school league banks on appeal

Meanwhile, the MSHSL was banking on its appeal to overrule Lord's decision. That appeal, to the US Court of Appeals for the Eighth Circuit (a region that encompasses Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Missouri, and Arkansas), would take a while. It wasn't until January 1973 that the Eighth Circuit's three-judge panel—Donald P. Lay, Gerald W. Heaney, and Roy L. Stephenson—heard oral arguments. Two *amicus curiae* (friend of the court) briefs, one from the National Federation of State High School Associations and another for the Nebraska State School Board Association, urged the court to set aside the findings of the trial court.³²

The Nebraska brief warned the court of the broad repercussions of its decision: "A ruling allowing girls to participate on boy's teams will have an enormous impact upon the entire educational system, and the high school athletic program." Schools could be saddled with added



St. Pierre, second from left, poses with her cross-country ski teammates for the 1973 Hopkins Eisenhower yearbook.

expenses to hire female trainers or to arrange "separate health facilities." The brief's authors asserted, "Allowing a girl to participate on a boys' team would throw out of kilter a system of high school athletics."³³

The Eighth Circuit judges raised many questions during oral arguments:

Judge Lay: Are all sex-based laws unconstitutional, such as the draft?

Judge Stephenson: Is it discrimination, if there are no athletics at all for girls?

Judge Lay: Do you think that the schools will fail to meet their responsibilities to provide programs for everyone?

Judge Heaney: Couldn't we avoid damaging the girls program if we limit our opinion to the facts of this case where no program is provided to girls at all?³⁴

On April 18, 1973, the Eighth Circuit court upheld Lord's decision. The handwriting was on the wall for the entire country to see. The appeals court rejected the argument that the physiological differences between girls and boys makes it impossible for them to compete.

"There is no longer any doubt that sex-based classifications are subject to scrutiny by the courts under the [Fourteenth Amendment's] Equal Protection Clause and will be struck down when they provide dissimilar treat-

ment for men and women who are similarly situated," Justice Heaney, writing for the court, stated. He continued: Deciding whether participation in interscholastic sports is a privilege or a right is not the key question. The question is whether the two girls can be denied the benefits of activities which are provided by the state for male students: "Females, whatever their qualifications, have been barred from competition with males on the basis of an assumption about the qualifications of women as a class." Failing to provide the plaintiffs with an "individual determination of their own ability" to qualify for these teams violates the Equal Protection Clause. The contention that altering the rule will undermine girls' athletic programs was speculative and without merit. The decision stated emphatically that Brenden and St. Pierre's schools have "failed to provide them with opportunities for interscholastic competition equal to those provided for males with similar athletic qualifications. Accordingly, they are entitled to relief."³⁵

"The decision involves those two girls," said MSHSL's Freng, "but it obviously means we are going to have to redraft our rule to fit the decision. Otherwise, any girl in the same situation would have an excellent chance if she wanted to take the matter to court." With 43 yes and 3 no votes, the MSHSL governing assembly passed an emergency amendment suspending rules banning coeducational participation in sports. The suspension would remain in place "until July 1, 1974, or until such time as a new rule has been prepared and adopted."³⁶

Sports writers were appalled. "Minnesota high school girls will be permitted to go out for boys' football teams—or any other boys' team—after the State High School League officially dropped its rule banning such occurrences Friday," proclaimed Bruce Brothers, a *Minneapolis Tribune* sports columnist. Brothers warned that a "mediocre track man can now switch to the girls team if he so desires." He felt the MSHSL was "passing the buck" to school districts, which would be forced to make rules preventing such antics.³⁷

John Sherman, sports columnist for the Hopkins newspaper, lamented how "degrading" it could be to certain boys' sports to allow girls to compete. "The new rules for competition constitute a farce," he complained. Entire boys' varsity teams could try out for the girls' team. "The open play system has too many loopholes. It discriminates against girls. And worst of all, it may ruin a number of promising girls' programs."³⁸

To the contrary, girls' athletic programs rapidly expanded. From the 1971–72 school year to the 1972–73 school year, the number of schools in the MSHSL with a girls' athletic program grew from 198 to 302. By the

AFTER HIGH SCHOOL . . .

Peggy Brenden and Toni St. Pierre's passion for sport never wavered. Both competed as adults in local and national athletic events ranging from tournaments to triathlons.

BRENDEN attended Luther College in Decorah, Iowa, where she joined the women's tennis team. She played first singles and doubles for four years, winning multiple collegiate tennis tournaments. From 1977 to 1979, she was the assistant coach for the University of Minnesota women's tennis team. After graduating from the University of Minnesota Law School in 1979, Brenden practiced law and served as a worker's compensation judge for the state of Minnesota.

ST. PIERRE studied nursing at the College of St. Benedict in Collegeville and ran with the men on the St. John's University cross-country team. (St. Ben's did not yet have a team.) She worked as an obstetrical nurse in the Twin Cities. St. Pierre died of cancer in 2013 at the age of 58. Four days after she died, St. Pierre was honored, with seven others, at Minnesota Girls and Women in Sports Day at the State Capitol for her role as an advocate for girls' and women's sports.

end of the 1976–77 school year, McIntyre rolled out 11 different statewide tournaments or meets for Minnesota girls. Nationally, the number of high school girls on teams increased from fewer than 300,000 in 1970 to over one million in four years. The feared exodus of boys attempting to shift from well-established, heralded, and well-funded programs to take over the girls' nearly nonexistent teams did not come to pass.³⁹

But girls did take advantage of the chance to play on boys' teams. For example, in 1973, sophomore Margaret Chutich, now a Minnesota Supreme Court justice, decided to play singles on the Anoka boys' tennis team. She earned the second singles spot, with her brother at number one. The next year, however, when the MSHSL sponsored the first girls' state tennis tournament, Chutich joined the Anoka girls' team, and in 1975 she won the girls' state tennis tournament.⁴⁰

Brenden and St. Pierre's court challenge jump-started girls' high school athletics. Though the girls' teams were a long way from being equal, the impetus at least was in place to create girls' programs. More battles about funding and facilities would be fought, but no longer could girls be left entirely out of the game. ▣

Notes

1. Peggy Brenden, interview by author, Dec. 15, 2016.
2. Marian Bemis Johnson and Dorothy E. McIntyre, *Daughters of the Game: The First Era of Minnesota Girls High School Basketball, 1891–1942* (Edina, MN: McJohn Publishing, LLC, 2005), 258; Joel A. Rippel, et al., *Minnesota State High School League: 100 Years of Memories* (Brooklyn Center: Minnesota State High School League, 2015), 70 (hereafter, *100 Years of Memories*).
3. Dorothy E. McIntyre, “Girls, Boys, and Sports in Minnesota,” *The Bulletin* (Minnesota State High School League publication) 46, no. 4 (Dec. 1971): 1–3.
4. 1971–72 MSHSL Official Handbook (Anoka: MSHSL, 1971), 88–89; reporter’s transcript of proceedings (Apr. 26, 1971), *Brenden v. ISD 742* (Civil Action No. 4-72 Civil 201), US District Court, District of MN (filed June 14, 1972), 344.
5. Rippel, *100 Years of Memories*, 54.
6. Rippel, *100 Years of Memories*, 54.
7. Howard B. Casmey, “Report to the Minnesota State Legislature on the Minnesota State High School League,” 9, Jan. 1973, box 6, folder “Minnesota State High School League 1970–1974,” Minnesota Department of Education, Commissioner’s Office, MNHS Collections.
8. Marian Rengel and Carol Rundquist, “Girls and Hockey Bust Budget,” *Tech Montage* (St. Cloud Tech’s student news publication) 2, no. 8 (May 24, 1972): 5; Exhibit E, “St. Cloud Tech High School Tennis Schedule 1972” (Apr. 1972), *Brenden v. ISD 742*; 1972 tennis score books maintained by St. Cloud Tech coaches; Rippel, *100 Years of Memories*, 77; Brenden interview.
9. “MCLU Eyes Student Voter Eligibility as New Union Forms Here,” *St. Cloud Daily Times*, Sept. 8, 1971, 7. The MCLU is now known as the ACLU of Minnesota.
- Peggy Brenden’s scrapbook, compiled summer 1973. Brenden collected news articles, letters, and lighthearted narratives into a scrapbook that also includes her step-by-step guide, “How to play high school tennis—an instructional manual,” which begins with “A. Have a very supportive family” and ends with “Q. You may find the debate team is a less stressful alternative.”
10. “Case Report: Peggy Brenden v. Minnesota State High School League,” St. Cloud Committee of MCLU to MCLU Board of Directors, Nov. 20, 1971, box 29, folder C-8971, “Peggy Brenden v. Minnesota State High School League,” American Civil Liberties Union of Minnesota Records, MNHS (hereafter, ACLU-MN).
11. Thomas Wexler, interview by author, Nov. 10, 2005; “MCLU Board of Directors Meeting #2,” Feb. 26, 1972, box 3, ACLU-MN.
12. Wexler interview.
13. Wexler interview.
14. “Peggy Brenden Sues St. Cloud District to Play High School Sports,” *St. Cloud Daily Times*, Apr. 6, 1972, 1; “District 742 against Girl on Boys’ Team,” *St. Cloud Daily Times*, Apr. 24, 1972, 1.
15. Sylvia Lang, “Tech Senior Might Set Precedent, Wants Spot on Varsity Tennis Team,” *St. Cloud Daily Times*, Apr. 12, 1972, 32.
16. Roberta Walburn, *Miles Lord: The Maverick Judge Who Brought Corporate America to Justice* (Minneapolis: University of Minnesota Press, 2017), 51, 139.
17. Miles Lord interview by author, Mar. 8, 2006.
18. Unpublished notes compiled by Miles Lord for a possible book about the case, Nov. 12, 1985, provided to author by the Lord family.
19. Bernhard LeVander, *Call Me Pete: Memoir of a Minnesota Man*, ed. Grant Dawson (Reno, NV: Dawson Creative Ltd. Effort, 2006) [unpaginated]; *Brown v. Wells*, 181 N.W. 2d 708 (1970).
20. LeVander, *Call Me Pete*.
21. “St. Cloud May Back Girl Netter,” *Minneapolis Star*, Apr. 13, 1972, 4D.
22. Wexler interview.
23. Wexler interview; Affidavit of Dorothy E. McIntyre (Apr. 21, 1972), *Brenden v. ISD 742*.
24. Complaint (Apr. 5, 1972), *Brenden v. ISD 742*.
25. Larry Millett, “Girls Sports Plan OKd Here,” *St. Cloud Daily Times*, Apr. 21, 1972, 3.
26. Reporter’s transcript of proceedings (Apr. 24–26 and May 1, 1971), *Brenden v. ISD 742* (filed June 14, 1972); “Miss Brenden to ‘Suit’ up with Boys?” *St. Cloud Daily Times*, Apr. 25, 1972, 1.
27. *Brenden v. ISD 742*, 342 F. Supp. 1224 (1972) (Note: The appellate court opinion was 477 F.2d 1292.)
28. *Brenden*, 342 F. Supp. 1224 (1972).
29. *Brenden*, 342 F. Supp. 1224 (1972).
30. James Parsons, “Girl Runner Hits New Block in Bid ‘to Run with Guys,’” *Minneapolis Tribune*, Oct. 4, 1972, A1; Patrick Lanin, interview by author, July 13, 2018. Lanin also provided Hopkins Eisenhower cross-country ski team records from 1973. The timing of this first state meet for girls cannot be directly attributed to the court case, but it was not on the MSHSL calendar as published at the beginning of the school year.
31. “Women’s Cases Taken by MCLU,” Dec. 1973, box 20, ACLU-MN; “Suit on Girls’ Ban Threatened,” *Minneapolis Star*, Oct. 25, 1972, 3D; “Judge Allows Edina Girl to Join Ski Team,” *Minneapolis Tribune*, Jan. 24, 1973, 2B.
32. Robert C. Tucker, clerk, to US Court of Appeals 8th Cir. judges, Sept. 28, 1972, “Case No. 72-1287 Torbin H. Brenden, etc., et al. v. Minnesota State High School League,” box 25, Gerald W. Heaney Papers, MNHS (hereafter, “Case No. 72-1287”).
33. Amicus brief filed by Nebraska State School Board Association, Aug. 23, 1972, 8, “Case No. 72-1287.”
34. Oral argument notes, Jan. 8, 1973, “Case No. 72-1287.”
35. *Brenden v. Independent School District 742*, 477 F.2d 1292, US Court of Appeals, Eighth Circuit (Apr. 18, 1973).
36. Bruce Brothers, “Ruling Opens Prep Doors to Girl Athletes,” *Minneapolis Tribune*, Apr. 20, 1973, 1C; *The Bulletin* 1 (Aug. 1973): 15.
37. Bruce Brothers, “Football Opened to Prep Girls,” *Minneapolis Tribune*, Apr. 28, 1973, 1B; Bruce Brothers, high school sports column, *Minneapolis Tribune*, May 1, 1973, 3C.
38. John Sherman, “MSHSL Goes Off Deep End, and So May Girls’ Sports,” *Hopkins Sun*, May 17, 1973.
39. Rippel, *100 Years of Memories*, 61, 54; Diane LeBlanc and Ally Swanson, *Playing for Equality: Oral Histories of Women Leaders in the Early Years of Title IX* (Jefferson, NC: McFarland and Company, Inc., 2016), 105.
40. Margaret Chutich, “The Tucker Center: An Athlete’s Perspective,” in *Stories by Minnesota Women in Sports: Leveling the Playing Field*, ed. Kathleen C. Ridder, Jean A. Brookins, and Barbara Stuhler (St. Cloud, MN: North Star Press, 2005), 189–206.

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