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CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

DAVID W. HOFFMAN, as guardian ad litem for JENNA HOFFMAN and JEANA HOFFMAN, HOLLY NEMEC,as guardian ad litem for CHELSEE NEMEC, DENNIS KUHLMAN, as guardian ad litem for MATEYA RAE KUHLMAN, MERRI STAPP, as guardian ad litem for JORDAN STAPP, BARBARA HARTLEY, as guardian ad litem for JENNA HARTLEY, JULAYNE THORESON, as guardian ad litem for MELISSA THORESON, KELLY SULLIVAN, as guardian ad litem for BREINN SULLIVAN, PAUL MUTH, as guardian ad litem for LINDSEY MUTH and DONNA MILLER, as guardian ad litem for KELLY RAE MILLER, Plaintiffs, vs. SOUTH DAKOTA HIGH SCHOOL ACTIVITIES ASSOCIATION, STEVE BERSETH, WILLIAM O'DEA, JAMES HEINITZ, TIM CREAL, TERRY STULKEN, RONDA RINEHART, and CRAIG NOWOTNY, Defendants and UNITED STATES OF AMERICA, STEVEN PEDERSEN and CHERYL PEDERSEN, as Guardians ad Litem for MARA PEDERSEN, a minor, and SUZIE TOLZIN, as Guardian ad Litem for MICAH TOLZIN and ELIZABETH TOLZIN, Defendants-Intervenors	CIV 02-4127 MEMORANDUM OPINION AND ORDER

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction. (Doc. 12.) For the following reasons, the Motion will be denied.

BACKGROUND

On June 9, 2000, Steven Pedersen and Cheryl Pedersen, as guardians ad litem for Mara Pedersen, and Suzie Tolzin, as guardian ad litem for Micah Tolzin and Elizabeth Tolzin, filed a lawsuit seeking an order requiring the South Dakota High School Activities Association ("SDHSAA") to switch the girls' volleyball and basketball seasons. See Pedersen and United States v. South Dakota High School Activities Association, Civil Action No. 00-4113. Forty-eight states schedule high school girls' basketball during the winter and volleyball during the fall, and so does NCAA.[1] The Pedersen plaintiffs alleged that scheduling girls' volleyball in the winter and girls' basketball in the fall discriminated against South Dakota girls in violation of the Fourteenth Amendment of the United States Constitution and Title IX of the Education Amendments of 1972 ("Title IX"). Id. The Plaintiffs contended that requiring female student athletes and not male student athletes to play in non-traditional seasons causes harm by, among other things, preventing high school girls volleyball players from effectively competing for college athletic scholarships. This Court allowed the United States to intervene in the Pedersen case on November 7, 2000.

The parties successfully mediated the Pedersen case and a Stipulation was submitted to the Court in which the SDHSAA agreed to schedule girls volleyball and basketball during their traditional seasons, starting with the 2002-03 school year. On December 5, 2000, this Court approved the Stipulation and issued a Consent Order enforcing the parties' agreement. The SDHSAA submitted a transition plan to the Court which was approved on August 30, 2001. The SDHSAA and its member schools began implementing the plan to switch seasons. This included

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[1]Only Michigan still requires girls to play basketball and volleyball during the non-traditional fall and winter seasons, respectively, but a district court recently held this practice to be in violation of the Fourteenth Amendment to the United States Constitution and Title IX. Communities for Equity v. Michigan High School Athletic Assn., 178 F.Supp.2d 805 (W.D.Mich. 2001), appeal docketed, No. 02-1127 (6th Cir.Jan.30, 2002).

creating new schedules for extra-curricular activities and arranging for adequate facilities, coaches and officials.

On May 28, 2002, the Plaintiffs ("Hoffman plaintiffs") commenced this case in state court. Defendants filed a Notice of Removal to this Court on June 6, 2002. The Hoffman plaintiffs seek injunctive relief and monetary damages. They allege that the actions of the SDHSAA in switching the girls basketball and volleyball seasons effective for the 2002-2003 school year has violated their Fourteenth Amendment rights under the United States Constitution, 42 U.S.C. § 1983 and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) and the rules and regulations promulgated thereunder. In addition, the Hoffman plaintiffs allege various state law violations based on the same acts of the Defendants. The Hoffman plaintiffs filed the Motion for Preliminary Injunction on June 26, 2002.

The Pedersen plaintiffs and the United States filed motions to intervene on June 26 and July 2, 2002, respectively. The motions to intervene were granted by Order issued July 22, *nunc pro tunc* as of July 16, 2002. A hearing was held on the Motion for Preliminary Injunction July 17, 18 and 19, 2002. All parties participated in the three day hearing.

DISCUSSION

This case is not about whether it would be a better idea to delay for some years the beginning of the switch of seasons in girls' high school basketball and volleyball to the traditional seasons observed by the rest of the country. Instead, the question is whether there is a legal basis which requires that the switch of seasons be delayed. This is a determination of the request for a preliminary injunction. The request for a permanent injunction is not being determined at this time.

In considering preliminary injunctions, the Eighth Circuit in Dataphase Systems, Inc., v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1991) (*en banc*), observed: "At base, the question is whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." Thus the function of a preliminary injunction is to preserve the status quo pending a determination of the action on the merits. "The

status quo is the last uncontested status which preceded the pending controversy." Tanner Motor Livery, Ltd., v. Avis, Inc., 316 F.2d 804, 809 (9th Cir. 1963)(citation omitted). Where the relief requested, rather than preserving the status quo, completely changes it, the movant has a higher burden of proof. See, e.g., Phillip v. Fairfield Univ., 118 F.3d 131, 133 (2d Cir. 1997). Thus, "where an injunction is mandatory–that is, where its terms would alter, rather than preserve, the status quo by commanding some positive act–the moving party must meet a higher standard than in the ordinary case by showing 'clearly' that he or she is entitled to relief or that 'extreme or very serious damage' will result from a denial of the injunction." Id. When a mandatory preliminary injunction is requested, the district court should deny such relief "unless the facts and law clearly favor the moving party." Anderson v. United States, 612 F.2d 1112, 1114 (9th Cir. 1979) (quoting Martinez v. Mathews, 544 F.2d 1233, 1243 (5th Cir. 1976)). This heightened burden also applies "where the issuance of the injunction would provide the movant with substantially all the relief he or she seeks and where the relief could not then be undone, even if the non-moving party later prevails at trial." Phillip v. Fairfield Univ., 118 F.3d at 133. See also Sanborn Mfg. v. Campbell Hausfeld/Scott Fetzer Co., 997 F.2d 484, 486 (8th Cir. 1993) (burden on the movant "is a heavy one where, as here, granting the preliminary injunction will give [the movant] substantially the relief it would obtain after a trial on the merits."). Preventing this year's implementation of the season switch would provide much, but not all, of the relief requested by the Plaintiffs..

In the present case, the switching of the girls' basketball and volleyball seasons was determined in December 2000 to be in effect in the fall of 2002. As a result, the activities schedules of the 196 South Dakota member schools[2] were adjusted accordingly. Hearing testimony established this involved the adjustment of athletic events and practices, as well as rescheduling of many other extra-curricular activities and practices. As a result, with practices and events to begin in less than four weeks, the status quo now is the seasons as switched and the schedules the schools have in place for the academic year which has already started. The fact that the Hoffman plaintiffs are attempting to now change the status quo means that they now have a higher burden of proof to meet.

[2]For the 2001-2002 school year, SDHSAA had 196 member schools.

Plaintiffs delayed a long time in bringing this lawsuit. This is especially so since the time of implementation of the season switch was known since December of 2000. As early as December 18, 2000, Plaintiffs were considering a lawsuit. David Hoffman's name appears on a news release dated December 18, 2000, indicating that a meeting would be held to "discuss the potential lawsuit against the South Dakota High School Activities Association by the South Dakota Gymnastics parents and others." (Defendant's Exhibit A.) Plaintiffs counseled with four different lawyers and also sought legislative relief. The fifth law firm consulted brought his lawsuit. Some of the delay is understandable. It could be that in some instances the Plaintiffs did not like the advice they were getting from the lawyers they contacted. In any event, despite the delay, these issues should be decided on the merits, and dismissal of Plaintiff's requested preliminary injunction will not be denied on the basis of laches.

Whether a preliminary injunction should be granted involves consideration of: (1) the threat of irreparable harm to the Plaintiffs; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties; (3) the probability that the Plaintiffs will succeed on the merits; and (4) whether it is in the public interest. Dataphase, 640 F.2d at 113.

1. Threat of Irreparable Harm to the Plaintiffs

Hearing testimony indicated that some of the Plaintiffs may have to choose between participating in basketball and gymnastics because some schools will not allow a student to participate simultaneously in two sports. Liz Woodruff, a student at Chamberlain High School, and the head gymnastics coach for Chamberlain, Sherrie Kippling, said that the school prohibits students from participating in two sports during the same season. The activities director for Brandon Valley High School, Randy Marso, testified that the school board prohibits students from participating in two sports during the same season. Other schools, particularly smaller enrollment schools, not only do not prohibit such dual participation, but will accommodate such a desire. For example, Brian Field, a former athletic director, teacher and coach at Freeman High School (100 to 120 students attend the school), said that school will accommodate students who participate in two sports at once. In other schools, even though the school does not prohibit dual participation, some of the coaches discourage it. For example, Mateya Kuhlman, who will be a sophomore at Wagner High School, testified that she quit basketball in May because her coach asked her to choose between basketball

and gymnastics. The gymnastics coach at Wagner High School, Rebecca Breen, testified that some of the gymnasts on her team spoke with the basketball coach and the basketball coach did not think it would work to play both sports at the same time, so the students made a choice. In yet other schools, such as Mitchell High School, the students are not prohibited from dual participation. As an example, Jeana and Jenna Hoffman are not precluded from participating in gymnastics and basketball. They have however concluded that they should only do one or the other and they will choose basketball.

It is true that if the seasons were not switched, girls would not be faced with either having to make a choice or continuing to participate in both sports at the same time when before they had separate seasons for each sport. In either situation, it would from the participants point of view, be desirable to continue the schedules as they used to be. Desirability does not mean irreparable harm. Regarding the meaning of "irreparable harm," the Tenth Circuit aptly stated:

> The concept of irreparable harm, unfortunately, 'does not readily lend itself to definition.' Wisconsin Gas Co. v. Federal Energy Regulatory Comm'n, 758 F.2d 669, 674 (D.C.Cir.1985). Case law has provided some guidance, however, noting for example that the injury 'must be both certain and great,' id.; and that it must not be 'merely serious or substantial.' A.O. Smith Corp. v. FTC, 530 F.2d 515, 525 (3d Cir.1976). Cases have also noted that irreparable harm is often suffered when 'the injury can[not] be adequately atoned for in money,' id.; or when 'the district court cannot remedy [the injury] following a final determination on the merits.' American Hosp. Ass'n v. Harris, 625 F.2d 1328, 1331 (1980).

Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1250 (10th Cir.2001). Plaintiffs have not shown that they will suffer a serious or substantial injury, and the parties agree that an action for damages is available to the Plaintiffs. Allowing the SDHSAA to go ahead with the season switch will cause the Plaintiffs to suffer some restriction of choice, but not irreparable harm.

2. Balancing of Harms

The second area of inquiry is the state of balance between the alleged harm to the Plaintiffs and the injury that granting the injunction will inflict upon other parties it effects. The defendant SDHSAA is composed of 196 high schools in the State of South Dakota, so the harm to those 196 entities, including their students, will be considered. The schedules are in place for athletics as well

as for other extra-curricular activities and they are interrelated because of common participants as well as dates and facilities. The facilities are also contracted for other uses. Coaches are under contract and in some instances could not be switched back. Referees are under contract and everyone has planned accordingly. Finally, the female athletes are anticipating a volleyball season, not a basketball season, this fall. It is not impossible for all of this, with a great deal of effort, to be changed. The result would have some rough spots, but it could be done before volleyball practice begins on August 19, 2002. The rough spots would mean loss of optimal student opportunity for the activities. The balance of the equities is strongly in favor of the Defendants, which includes the 196 high schools and their students.

3. The Likelihood of Success on the Merits

Plaintiffs do not claim that switching the seasons to be in line with the rest of the country violates their rights, and they are not opposed to a season switch in two to four years. Rather, Plaintiffs claim that switching the seasons now rather than waiting two to four years forces the Plaintiff girls to make a choice that boys do not have to make, thus it discriminates against girls in violation of their statutory and constitutional rights. According to Plaintiffs, no boys will be forced to give up a high school sport of their choice in the middle or toward the end of their high school career after they have invested significant time and energy into that sport.

Based on the preliminary record, the Court is dubious that a constitutional claim of denial of either equal protection or due process is presented. To state a claim based on the Fourteenth Amendment, Plaintiffs must show that the Defendants treat Plaintiffs differently from boys. See United States v. Virginia, 518 U.S. 515, 532-33, 116 S. Ct. 2264, 135 L.Ed.2d 735 (1996). Once a plaintiff has demonstrated a gender classification, the burden shifts to the defendant to provide an "exceedingly persuasive" justification for the sex-based classification. Id., 518 U.S. at 533. The defendants must show that the classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Id. (citation omitted). First of all, the evidence showed that the SDHSAA does not have a rule or regulation prohibiting students from participating in two sports in the same season. In addition, Mateya Kuhlman testified that she chose gymnastics and quit basketball based on representations made by the basketball coach about the difficulty of playing both sports, not because of a school

policy disallowing her participation in both sports. Likewise, Jeana and Jenna Hoffman are not precluded by school policy from participating in gymnastics and basketball, although they may choose not to do so. No evidence was presented at the preliminary hearing regarding the other named Plaintiffs, and the Court is not aware that any of the named Plaintiffs are precluded by their schools from playing both sports. Without such evidence, the Court cannot conclude that the named plaintiffs are forced to choose between sports. On the basis of the current record, the Plaintiffs could continue to engage in both gymnastics and basketball.

Although the Plaintiffs may participate in both sports, their manner of participation would differ significantly from that of boy athletes. In order to maintain participation in the sports in which these girls have invested countless hours of hard work, they would need to compete in two sports during the winter season. Although boys are in some instances precluded from participating in two sports in one season, boys are not faced with an additional burden of having to compete in two sports during a single season in order participate in the sports in which they are already invested. The girls would most likely be faced with long days involving two practice sessions plus, of course, school. They would likely have to choose which competitions they would attend in each of their respective sports in order to accommodate their dual participation thereby missing competitive opportunities in both sports. Boys would not be not be forced to struggle with these issues. Therefore, even assuming the Plaintiffs can participate in both sports, the Plaintiffs are still treated differently than the boys.

The Defendants argue that this discrepancy in treatment does not constitute an equal protection violation. As stated earlier, a showing of differential treatment standing alone does not establish a violation the equal protection clause. See Virginia, 518 U.S. at 532-33. If the Defendants can provide an "exceedingly persuasive" justification for the distinction, then the classification can withstand an equal protection challenge. Id. Here the justification for the season switch is to remedy a constitutional wrong that has been occurring against South Dakota high school female athletes for years. The placement of basketball and volleyball in non-traditional seasons has been found in other cases to constitute a violation of both the equal protection clause and Title IX. See, e.g., Communities for Equity, 178 F.Supp.2d 805, 817-828 (W.D. Mich. 2001) (findings of fact concerning harms to Michigan girls who play basketball and volleyball in disadvantageous seasons);

Ries v. Montana High School Ass'n., Case No. 9904008792, slip op. (Mont. Dept. of Labor and Industry, Aug. 11, 2000) (administrative ruling detailing harms to girls as a result of defendant scheduling girls' basketball and volleyball during disadvantageous seasons). The Plaintiffs offered no argument distinguishing or impugning the validity these cases. Remedying an unconstitutional scheduling system would be an obligation of the SDHSAA. Failure to remedy such a situation would, and has, subjected the association to suit. Making the necessary changes to bring the schedule in compliance with constitutional requirements and the attendant circumstances thereto provide an "exceedingly persuasive" justification for the short-term disparate impact that unfortunately must be shouldered by the Plaintiffs.

The Court is also doubtful that Plaintiffs have stated a Title IX claim. Alleged Title IX violations in the area of athletics are often divided into effective accommodation claims and equal treatment claims. The SDHSAA changed the girls' volleyball and basketball seasons to equalize opportunities and to more effectively accommodate the interests of female athletes. Title IX requires that such steps be taken when inequalities exist between the sexes. Plaintiffs still have an opportunity to participate in a sport in each of the three seasons, an opportunity which is on par with that presented to the boys. If abolishing a sport does not violate Title IX, see Chalenor v. Univ. of North Dakota, 291 F.3d 1042 (8th Cir. 2002)(elimination of wrestling program did not violate Title IX), switching the seasons of a sport to comply with Title IX cannot be a violation of Title IX.

Probability for success does not require Plaintiffs to show they have a 50% chance of winning on the merits, nor does it require a mathematical certainty. In Dataphase, the Court expressly rejected equating the "probability of success" element with a requirement that the moving party "prove a mathematical probability of success at trial." Dataphase, 640 F.2d at 113. In this case, the Plaintiffs' probability of succeeding on the merits is low.

4. The Public Interest

The public has an interest in having all of its youth develop their full potentials through the education process. The implementation of the switch of season does somewhat hamper that process for those girls who wish to compete in both high school basketball and gymnastics. The number of girls so situated was not established during the three days of testimony. It was established that in

the school year 2001-2002 there were 318 girls participating in gymnastics and 3,466 girls participating in basketball. (Plaintiffs' Exhibit 1.) No figure for how many gymnasts also want to play basketball can be deduced from those statistics. In addition, we do not know how many of those who want to participate in both sports will still be able to do so. Finally, this is not a class action, so those unknown numbers cannot be considered in any event.

By comparison, there were 3,972 girls participating in volleyball in the 2001-2002 school year, together with the 3,466 in basketball. By having the seasons at non-traditional dates, each of the girls participating in volleyball and basketball in 2002-2003 will suffer some detriment if the seasons are not switched, as constitutional and Title IX violations have been found under similar circumstances. See, e.g., Communities for Equity, supra, 178 F.Supp.2d at 828 (W.D. Mich. 2001); Ries, Case No. 9904008792, supra.

The testimony established the values acquired or developed from participation in sports, with scholarships considered by the coaches and other educators to be a nice secondary bonus for the few more gifted athletes. Considering the benefits of participation with the season switch, female athletes will still be able to participate in a competitive high school sport in each of the three seasons. If in one of those seasons they can and do play both gymnastics and basketball, that is their choice in those schools which allow such a choice. In those schools which do not allow dual participation, and the record does not establish how many there are, then the athlete will have to choose, but they will still get their first choice.

It is also in the public interest that all girls in volleyball and basketball now be allowed, as was agreed in the Pedersen case, to participate in the traditional season, just as the boys have since organized sports began. On balance, the delay requested by the Plaintiffs, even though understandably desirable for the gymnasts, is an inadequate basis for changing the status quo of volleyball in the fall and basketball in the winter. This is especially so where this transition is to correct a clear inequity in girls athletics. After examining each of the four Dataphase factors,

IT IS ORDERED that the Motion for Preliminary Injunction is DENIED.

Dated this 23rd day of July, 2002.

BY THE COURT:

Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Jackie Meyerhuber
DEPUTY