IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

COMMUNITIES FOR EQUITY, *et al.*, Plaintiffs v. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, *et al.*, Defendants	Case No. 1:98-CV-479 Hon. Richard Alan Enslen

AMICUS CURIAE UNITED STATES' RESPONSE TO DEFENDANT'S COMPLIANCE PLAN

After conducting a two-week bench trial, this Court found that defendant MHSAA's scheduling of high school girls' sports seasons during disadvantageous seasons violated the U.S. Constitution, Title IX of the Education Amendments of 1972 ("Title IX"), and state law. Communities for Equity v. Michigan High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 862 (W.D. Mich. 2001). In so holding, the Court stated: "The history of girls' sports lends a belief that girls' seasons were originally put in the seasons that they were for impermissible reasons, and they simply have not been moved because of inertia or out of concern for the inconveniences that boys' programs would face." Id. at 861. Consequently, on December 17, 2001, the Court issued an order requiring defendant MHSAA to submit a compliance plan detailing a new schedule for high school athletic seasons consistent with the law. 12/17/01 Judgment at 2 [docket no.

529].

After having six months within which to formulate a remedial plan, MHSAA filed, on May 22, 2002, a plan that, on its face, fails to cure the specific violations of law found by the Court. In short, the proposed Compliance Plan would perpetuate sex discrimination by requiring more than three times as many girls as boys to play in disadvantageous seasons and by addressing only sports, with the exception of boys' golf, offered by less than half of MHSAA's member schools. For the reasons set forth below, the Court should reject defendant's proposed Compliance Plan and require MHSAA to submit a revised Compliance Plan in accordance with the principles outlined herein.

DISCUSSION

Well-settled precedent and this Court's own mandate establish the standards by which to assess defendant's proposed plan. The Supreme Court has explained that a remedial decree "must closely fit the constitutional violation." United States v. Virginia, 518 U.S. 515, 547 (1996). Indeed, the remedy "must be shaped to place persons unconstitutionally denied an opportunity or advantage in 'the position they would have occupied in the absence of [discrimination].'" Id. (quoting Milliken v. Bradley, 433 U.S. 267, 280 (1977) (internal quotation marks omitted)). The remedy must also "'eliminate [so far as possible] the discriminatory effects of the past' and ['bar like discrimination in the future.'" Id. (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)). Having violated the Equal

Protection Clause and Title IX, MHSAA must cure these violations by showing that Michigan female and male high school athletes "share the advantages and disadvantages of the new seasons equitably." 178 F. Supp. 2d at 862.

(a) Both a quantitative and qualitative assessment of MHSAA's proposed Compliance Plan illustrates that the Plan does not cure the identified constitutional and statutory violations.

Just as the Supreme Court in Virginia rejected the remedial plan concerning the Virginia Women's Institute for Leadership because it was not substantially equivalent to the Virginia Military Institute, 518 U.S. at 554, this Court should reject MHSAA's proposed compliance plan as a matter of law because it fails to offer Michigan female athletes the substantially same opportunities as Michigan male high school athletes receive. Two ways to assess whether the Compliance Plan proposed by defendant allocates the advantages and disadvantages of the playing seasons among male and female athletes are: (1) by comparing the number of boys and girls and the number of member schools affected by the disadvantageous seasons; and (2) by analyzing the degree of disadvantage that results from playing out of season for the sports at issue.

First, MHSAA's proposed Compliance Plan leaves over forty percent of the female athletes still playing out of season as opposed to only twelve percent of male athletes, according to the 2001 high school participation survey released by the National Federation of High School Associations.

Girls Currently Playing Out of Season		**Boys Currently Playing Out of Season**	
Basketball	20,379	None	
Golf	3664		
Soccer	12,191		
Swimming	6652*		
Volleyball	21,572		
Tennis	9008		
Total	73,646	Total	0
61.3% of all female athletes		0.0% of all male athletes	

* Participation numbers from 1999-2000 academic year

Girls Playing Out of Season Under MHSAA's Proposed Plan		**Boys Playing Out of Season Under MHSAA's Proposed Plan**	
Basketball	20, 379	Golf	8321
Soccer	12,191	Swimming	4149
Volleyball	21, 572	Tennis	7875
Total	54,142/119,290	Total	20,345/167,268
45.4% of all female athletes		12.2% of all male athletes	

See National Federation of State High School Associations, 2001 High School Participation Survey http://www.nfhs.org/Participation/Sports%20Participation%2701-FINAL.pdf. In short, MHSAA's remedial plan puts together the combination of seasons that continues to subject significant numbers of female athletes, and far fewer male athletes, to disadvantageous seasons.

Furthermore, MHSAA's proposed Compliance Plan switches the seasons for two of the three boys' sports (golf excepted) offered by the fewest number of member schools. See Defendant's Compliance Plan, Exh. C at 3 (showing summary of survey results that indicates the number of schools that offer golf, swimming and diving, and tennis). While over 85 percent of MHSAA member schools offer basketball and volleyball for girls, less than 50

percent of the MHSAA member schools offer swimming and diving and tennis for boys and girls. Put simply, MHSAA's proposed plan guarantees that the sex discrimination concerning the placement of athletic seasons will continue to occur at a majority of the schools.

Second, the proposed Compliance Plan does not cure the significant and substantial harms found by the Court. For example, MHSAA's proposed Compliance Plan further ensures that three of the five most popular girls' sports both within Michigan and nationally amongst high school girls -- basketball, volleyball and soccer -- remain out of season for Michigan high school girls. See National Federation of State High School Associations, 2001 High School Participation Survey, at http://www.nfhs.org/Participation/Sports%20Participation%2701-FINAL.pdf (noting that basketball, volleyball and soccer respectively are the first, third and fifth most popular sports nationally for girls based on participation numbers and that volleyball, basketball and soccer are the first, second and fifth most popular girls' sports within Michigan based on participation numbers); see also Def.'s Compliance Plan, Exh. B at 7 (MHSAA admitting that the two of three most popular sports for girls are basketball and volleyball). In contrast, MHSAA's previous sports schedule and proposed remedial plan both keep the six most popular boys' sports in Michigan -- football, basketball, track, baseball, soccer and wrestling -- within the advantageous season for each sport.

In its December 2001 decision, the Court found "several remarkable" harms resulting from the placement of girls' basketball and volleyball in disadvantageous seasons. With respect to basketball, the Court found that female athletes cannot participate in interstate competition, 178 F. Supp. 2d at 820; special professional or semi-professional events during the traditional winter season, id. at 818; and special basketball camps or national tournaments, id. at 820. With respect to volleyball, the Court found that Michigan girls miss out on 16 months of competitive training and experience over the course of their high school careers because they cannot participate in club volleyball until late spring while girls in the other 48 states begin competition and training during the winter. Id. at 825. Michigan girls also cannot participate in interstate competition for volleyball. Id. at 827.

The Court made findings concerning several other harms to girls who play basketball and volleyball in Michigan. Playing out of season eliminates the girls' opportunity to participate in All-American and national rankings. Id. at 819-20 (basketball); id. at 826 (volleyball). For basketball, female athletes cannot take part in the media attention and celebration surrounding March Madness, the time period during which the rest of the country's high schools and colleges conduct championship tournaments for male and female athletes. Id. at 819. For volleyball, the NCAA signing date in November occurs before Michigan girls have even started their senior season of

competition unlike the 48 other states. This puts Michigan girls at a severe disadvantage with respect to collegiate recruiting. Id. at 825.

Most significantly, the Court found that MHSAA presented "no evidence to indicate why facilities problems would prohibit rescheduling of girls' volleyball from the winter to the fall, particularly if it were switched with girls' basketball." Id. at 827 (emphasis added); see also id. at 840-41 (noting that there was evidence at trial left unrefuted by MHSAA "that girls and boys can play basketball in the same season with little difficulty, if any, if girls' volleyball is moved to the fall season"); id. at 841 (noting that defendant's own witness, former athletic director and assistant principal James Glazier, testified that there would be no problem at his former or current school if girls' basketball and volleyball were switched).[1]

In summary, the most significant harms that result from defendant's discriminatory scheduling practices as found by the Court are not even addressed, much less cured, by defendant's proposed remedial plan, because the plan ignores basketball and volleyball. Stated differently, MHSAA's proposed Compliance Plan does not place Michigan female athletes in the position they would have occupied absent the discrimination, nor does it ensure

[1]The Court further found that girls "were originally scheduled to play basketball in the fall to avoid inconveniencing the boys' basketball team, and that kind of historical stigma should be erased." 178 F. Supp. 2d at 818. MHSAA's proposed remedial plan does not address the historical stigma of placing the two most popular girls' sports in disadvantageous seasons.

that Michigan female and male athletes share the advantages and disadvantages of the new seasons equitably. The proposed Compliance Plan also does not provide any assurance that MHSAA will bar like discrimination in the future; indeed, MHSAA expressly reserves the right to change sports seasons in response to its member schools' preferences and agrees to notify the Court of any action only if the six girls' sports at issue in this case are implicated. Def.'s Compliance Plan at 7.

(b) The sanctioning of additional sports for girls does not cure the discrimination that stems from scheduling girls in disadvantageous seasons.

MHSAA expressly ignores the Court's mandate to remedy MHSAA's discriminatory scheduling practices by concluding that, in its opinion, students will be better off "not by changing seasons but instead by initiating new opportunities for girls." Def.'s Compliance Plan at 7. As the Supreme Court has stated, however, the remedy must directly address or relate to the constitutional violation. 518 U.S. at 547. Adding more girls' sports does not remedy the discrimination that female athletes face as a result of MHSAA's scheduling practices. As this Court has previously noted, MHSAA's efforts to be pro-active in gender equity in some areas of interscholastic sports "is not relevant to the fact that the MHSAA has acted contrary to the law requiring gender equity in [the scheduling of sports seasons]." 178 F. Supp. 2d at 861.

Even if sanctioning new sports was relevant to the issue at hand, MHSAA's proposal simply maintains the status quo and

commits MHSAA to undertake actions to which it has already agreed. First, MHSAA has already agreed to sanction two sports teams for girls as part of the Consent Decree it signed in this case. Second, MHSAA proposes to add four new girls' sports over the first two years of the proposed Compliance Plan, after which it may initiate an unspecified number of new boys' sports. Def.'s Compliance Plan at 7. Thus, at the end of the three years, MHSAA will have added more sports for girls and boys without any effect on the current discriminatory scheduling practices. Stated differently, although both girls and boys may be playing more sports, MHSAA's proposed Compliance Plan ensures that girls will still bear the burden and discrimination of disadvantageous seasons.

(c) The Court should reject the proposed Compliance Plan and order defendant to submit a revised remedial plan.

The Court should reject the proposed Compliance Plan because it fails to remedy the significant and substantial harms identified by the Court in its December 2001 decision. MHSAA presented no evidence at the liability phase, nor offered any legitimate explanation during this remedial phase other than conclusory statements and its members' "preference," as to why the two most popular girls' sports should be played during disadvantageous seasons. The Court has already explained that, if the scheduling of seasons violates the law, the member schools' preferences do not matter. 178 F. Supp. 2d at 844. A majority vote cannot convert a discriminatory policy into a non-

discriminatory one "no matter how fair the process that led to it." Dodson v. Ark. Activities Ass'n, 468 F. Supp. 394, 398 (E.D. Ark. 1979)).[2]

Accordingly, given the extensive quantitative and qualitative harms set forth above and the inadequacy of defendant's proposed plan to address them, the Court should require defendant to submit a revised remedial plan that either (1) eliminates any athlete, male or female, from playing in disadvantageous seasons,[3] or (2) if defendant desires to maintain

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[2]To the extent MHSAA is relying on its members' preferences as a basis for arguing that switching girls' volleyball and basketball is not feasible, its position is belied by the fact that 48 other states with greater and lesser populations than Michigan and with greater and fewer numbers of facilities, coaches and officials are able to conduct and schedule girls' and boys' basketball during the winter season and girls' volleyball during the fall season.

[3]The Court has stated that defendant is not required to conduct girls' and boys' teams in a particular sport concurrently. 178 F. Supp. 2d at 862. The Court held, however, that MHSAA presented little, if any, evidence supporting the conclusion that basketball, tennis, soccer, golf, and swimming and diving must be held in separate seasons for girls and boys. Id. at 827 (no evidence that facilities would be a problem if girls' basketball and volleyball switched); id. at 831 (lack of specific evidence to show that logistical concerns prohibit conducting girls' and boys' soccer in the same season); id. at 831 and 833 (no evidence that "logistical difficulties would pose a problem in scheduling boys' and girls' golf at the same time"); id. at 833 (anecdotal evidence presented of logistical problems in combining girls' and boys' swimming into one season "was insufficient," and if these problems did exist, no evidence that these problems would not have solutions); id. at 836 (no evidence "that both sexes playing tennis in the same seasons would create logistical problems); id. at 840-41 (cataloging the lack of evidence concerning the number of gymnasiums, soccer fields and pools in Michigan; noting that MHSAA did not even put on any evidence regarding how boys and girls cannot play tennis or golf

separate seasons for certain boys' and girls' sports, ensures substantial equality for male and female high school athletes by allocating the burdens of disadvantageous seasons equitably.[4]

CONCLUSION

For the reasons set forth above, the Court should reject defendant's proposed Compliance Plan and instead (1) require that defendant promptly submit a revised plan in accordance with the principles described above; and (2) set forth a timetable for the parties to respond to the revised remedial plan, to take discovery if appropriate, and for a hearing.

Respectfully submitted,

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in the same season; and noting that there was evidence by defendant's own witnesses "that girls and boys can play basketball in the same season with little difficulty, if any, if girls' volleyball is moved to the fall season."); id. at 842 (lack of evidence to find that defendant could not schedule boys' and girls' soccer and swimming concurrently because of the insufficient number of coaches and officials); id. at 861 (noting that MHSAA's argument that lack of resources requires separate seasons for the five sports was "not proved to the Court's satisfaction").

[4]Defendant has several ways to achieve this objective. However, a remedy that maintains separate seasons and cures the substantial harm found by the Court without switching girls' basketball and volleyball may lead to a remedy that penalizes popular boys' sports, such as football or basketball, unnecessarily.

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CERTIFICATE OF SERVICE

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