IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DAVID W. HOFFMAN as Guardian Ad Litem for JENNA HOFFMAN and JEANA HOFFMAN, minors, HOLLY NEMAC, as Guardian Ad Litem for CHELSEE NEMEC, minor, DENNIS KUHLMAN, as Guardian Ad Litem for MATEYA RAE KUHLMAN, minor, MERRI STAPP, as Guardian Ad Litem for JORDAN STAPP, minor, BARBARA HARTLEY, as Guardian Ad Litem for JENNA HARTLEY, minor, JULAYNE THORESON, as Guardian Ad Litem for MELISSA THORESON, minor, KELLY SULLIVAN, as Guardian Ad Litem for BREINN SULLIVAN, minor, PAUL MUTH, as Guardian Ad Litem for LINDSEY MUTH, minor, and DONNA MILLER, as Guardian Ad Litem for KELLY RAE MILLER,

Plaintiffs,

v.

SOUTH DAKOTA HIGH SCHOOL ACTIVITIES ASSOCIATION, STEVE BERSETH, WILLIAM O'DEA, JAMES HEINITZ, TIM CREAL, TERRY STULKEN, RONDA RINEHART, and CRAIG NOWOTNY,

Defendants.

CIV 02-4127

UNITED STATES' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Over a year and a half after the entry of the well-publicized order requiring the South Dakota High School Activities Association to switch the girls' basketball and volleyball seasons to the advantageous winter and fall seasons respectively, plaintiffs have filed a separate lawsuit

to enjoin the season transition set to take place in less than eight weeks for every secondary and junior high school in South Dakota, or in the alternative, delay the season switch for four additional years. In short, plaintiffs seek to collaterally attack the consent order entered in Pedersen and United States v. South Dakota High School Activities Association, Civil Action No. 00-4113, and ask this Court to enjoin the season switch so as to maintain the current discriminatory scheduling system. For the reasons set forth below, plaintiffs' motion for a preliminary injunction should be denied.

FACTUAL BACKGROUND

On June 9, 2000, the Pedersen plaintiffs filed a lawsuit against the South Dakota High School Activities Association ("SDHSAA"), alleging that its scheduling of girls' volleyball and basketball in nontraditional or disadvantageous seasons – when no boys' sports are similarly scheduled – discriminates 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"). See Pedersen and United States v. South Dakota High School Activities Association, Civil Action No. 00-4113. By requiring female student athletes and not male student athletes to play in disadvantageous seasons, the discriminatory scheduling causes harm by limiting girls high school, club, and collegiate participation opportunities and benefits and relegates female athletes to second-class status.[1]

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[1]A non-traditional or disadvantageous season is defined by "a season of the year different from when the sport is typically played, and that the nontraditional season is a disadvantageous time of the year to play the sport, causing inequities for [the discriminated class]." Communities for Equity v. Michigan High Sch. Athletic Ass'n, 178 F. Supp2d 805, 807 (W.D. Mich. 2001); appeal docketed, No. 02-1127 (6th Cir. Jan. 30, 2002). In what season most high schools play or when the NCAA schedules a particular sport may be one factor establishing what constitutes the advantageous season for a sport. Id. at 818 and n. 7. For example, "[a]sk almost any woman or man on the street when organized football, on any level, is played, and that person is sure to know that football is a fall sport." Id. at 808. Here, the fact that 48 states schedule

The SDHSAA governs interscholastic athletics in South Dakota and has approximately 196 member schools, almost every secondary school in South Dakota. Approximately 3403 girls participate in interscholastic basketball, 3501 girls participate in interscholastic volleyball, and 314 girls participate in gymnastics. National Federation of High Schools 2001 High School Athletics Participation Survey available at http://www.nfhs.org/Participation/Sports%20Participation%2701-FINAL.pdf. One hundred and eighty-two (182) member schools maintain girls' basketball programs, 150 member schools offer girls' volleyball teams, and 29 schools offer girls' gymnastics. Id.

On October 17, 2000, the United States moved to intervene as plaintiff-intervenor in the Pedersen case and the Court granted its intervention on November 7, 2000. 11/7/00 Order at 3 [docket no. 25]. During November of 2000, the parties conducted discovery and also engaged in successful mediation. On December 5, 2000, the Court entered a Consent Order requiring the SDHSAA to schedule girls' basketball and volleyball during the advantageous winter and fall seasons respectively by the 2002-03 academic year and to submit a transition plan within 180 days. 12/5/00 Order at 4 [docket no. 36]. In so ruling, this Court also "retain[ed] jurisdiction of this cause for purposes of compliance with this Order and entry of such further orders or modifications as may be necessary or appropriate to effectuate this agreement as stated herein." Id. at 5. The Court approved a transition plan submitted by the parties on August 30, 2001. See 8/30/01 Order at 1-2 [docket no. 46].

The SDHSAA and the plaintiff-parties in the Pedersen case have worked hard over the

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interscholastic basketball and volleyball for girls during the winter and fall seasons respectively and that the NCAA schedules men's and women's basketball during the winter season and women's volleyball during the fall season are factors demonstrating that the advantageous season for playing basketball is the winter, Communities for Equity, 178 F. Supp.2d at 818, and the advantageous season for volleyball is the fall, id. at 822.

last two years to implement the season transition plan and to ensure a smooth transition for South Dakota girls and boys and all its member schools. These efforts included determining the format of the girls' and boys' state basketball tournaments, creating new schedules for girls' and boys' basketball programs at the junior high and high school levels and new schedules for girls' volleyball, and arranging for adequate facilities, coaches and officials. The Department of Education Office for Civil Rights conducted three technical assistance sessions on Title IX and the season transition in Sioux Falls, Pierre, and Rapid City during the week of September 24, 2001. During the week of February 11, 2002, counsel for the United States traveled to Pierre and Sioux Falls to meet with SDHSAA officials, the superintendent of the Sioux Falls School District, principals and athletic directors of large and small high schools to discuss the season transition and any potential concerns or issues. It has become clear that the SDHSAA has spent significant time and has worked diligently with its membership over the past two years to ensure that the season transition and the implementation of the systemic injunctive relief ordered by the Court will occur in an orderly fashion and in such a way as to create equitable extracurricular opportunities for both boys and girls in South Dakota.

Prior to the 1999-2000 academic school year, forty-four (44) states conducted girls' basketball in the winter and volleyball in the fall. Besides South Dakota, two additional states -- Virginia and Montana -- will switch girls' basketball and volleyball to the traditional advantageous seasons. See Alston v. Virginia High Sch. League, Inc., Civil Action No. 97-0095 (W.D. Va.) (Settlement agreement following jury verdict in plaintiffs' favor); Ries v. Montana High Sch. Ass'n, Case No. 9904008792, slip op. (Mont. Dep't of Labor & Indus. Aug. 11, 2000) (administrative ruling finding that defendant's scheduling of girls' basketball and volleyball during the disadvantageous fall and winter seasons respectively violated the state constitution

and requiring defendant to switch seasons) (Attachment 1). In light of this successful litigation and the fact that Montana and South Dakota were switching the girls' basketball and volleyball seasons, the North Dakota High School Activities Association voluntarily agreed to switch the playing seasons for girls' basketball and volleyball. Communities for Equity, 178 F. Supp.2d at 818 n.6; (see also Attachment 2) (2002-03 Calendar for the NDHSAA showing the scheduling of girls' volleyball during the fall season and basketball during the winter season). Only Michigan[2] still requires girls to play basketball and volleyball during the nontraditional, disadvantageous fall and winter seasons respectively but a district court recently held this practice in violation of the Fourteenth Amendment of the U.S. Constitution and Title IX. See Communities for Equity, 178 F. Supp.2d at 817-828.

Almost eighteen months after this Court entered its Consent Order in the Pedersen case, the Hoffman plaintiffs filed a separate lawsuit in state court seeking to halt the season switch and retain the prior discriminatory scheduling system, or in the alternative, to modify the Pedersen Consent Order so that the season switch will not take place for another four years. See Hoffman v. South Dakota High School Activities Association, Civil Action No. 02-4127, Complaint ¶¶ 18, 19.

SUMMARY OF ARGUMENT

Plaintiffs should not be granted injunctive relief because they cannot meet the standards entitling them to a preliminary injunction. First, plaintiffs cannot demonstrate irreparable harm because a remedy at law is adequate to cure any alleged harm resulting from the switching of girls' basketball and volleyball to the traditional, advantageous playing seasons and because plaintiffs' significant delay in seeking the injunction undercuts any argument that urgent action is

[2]Hawaii conducts interscholastic girls' basketball during the spring.

needed to protect plaintiffs' rights. It is well settled law that the absence of irreparable harm constitutes sufficient grounds to deny a preliminary injunction. Second, the balancing of equities weighs against plaintiffs because the SDHSAA will suffer significant prejudice if the season switch is enjoined after almost two years of preparing every secondary high school in South Dakota for the transition and because South Dakota girls have made athletic decisions in reliance on the Pedersen Consent Order and will also not be able to participate in interstate competition for basketball and volleyball with North Dakota, Montana, Nebraska or Iowa.

Third, the fact that every lawsuit to challenge the practice of discriminatory scheduling in girls' basketball and volleyball has been successful, including a jury verdict and two bench rulings, demonstrates that the Hoffman plaintiffs will not likely succeed on the merits of their claim. Fourth, the public interest weighs in favor of ending a discriminatory practice that violates the U.S. Constitution and federal law, not in maintaining a system that denies South Dakota high school girls equal educational opportunities.

ARGUMENT

The Eighth Circuit set forth the standard for granting a preliminary injunction in Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc). The four factor test provides that the issuance of a preliminary injunction involves the consideration of:

> (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on the other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Id.; see also, Yankton Sioux Tribe v. United States Army Corps of Engineers, 83 F. Supp.2d 1047, 1060 (D.S.D. 2000) (setting forth the same four-prong test for a preliminary injunction). While no single factor is dispositive, a movant must at a minimum show the threat of irreparable

harm. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1472 (8th Cir. 1994). A failure to do so is fatal to a party's claim for a preliminary injunction. Dataphase Systems, 640 F. 2d at 114 n. 9.

A. Plaintiffs have failed to demonstrate irreparable harm.

Plaintiffs will not suffer any harm by participating in interscholastic athletics under the new scheduling system. The gist of plaintiffs' claim is that the new interscholastic athletic schedule beginning this fall will limit and deny high school girls equal opportunity. Hoffman Complaint ¶¶ 9, 11, 12 (claiming that new schedule will limit girls' opportunities to participate in athletic and academic extracurricular activities or family and church activities). In truth, the remedy instituted in the Pedersen case will mean that South Dakota girls will now receive the same educational opportunities as boys and likewise must face the same choices concerning extracurricular activities that boys must make. For example, South Dakota boys currently decide whether to participate in basketball or wrestling during the winter season or whether to participate in interscholastic sports and academic extracurricular activities at the same time. With the season switch of girls' basketball and volleyball, girls in South Dakota will now decide whether to participate in cross country track or volleyball and other extracurricular activities in the fall, for example, instead of cross country track and basketball and extracurricular activities. Plaintiffs have presented no evidence that girls will have any less opportunities than boys under the new athletic schedule. Nor can they because switching the girls' basketball and volleyball seasons and eliminating the discriminatory scheduling of girls' athletic seasons means that boys and girls are similarly situated and treated the same with respect to choices of extracurricular activities or educational opportunities.[3] Stated simply, girls and boys are treated equally under

[3]The plaintiffs seek to keep the prior discriminatory scheduling system because they assert that they prefer the scheduling of girls' basketball in the nontraditional fall season. As a result, it would be disingenuous for plaintiffs to argue at a later date that they were damaged

the new athletic schedule.

The other harms alleged by plaintiffs concerning facilities usage and practice time because boys and girls will be playing basketball at the same time is simply not true. Plaintiffs' Brief in Supp. of Mot. for Prelim. Inj. at 6. Boys already share facilities and practice time with girls' volleyball. Assuming arguendo that plaintiffs' claim were true that schools will now schedule more early morning or evening practices, both boys and girls will be subjected to these schedules. To the extent a student does not want to attend an early morning practice or evening practice, this is the choice of that student and his or her family but it is not the result of discrimination practiced by the SDHSAA or the local school district. Likewise, the decision to spend time with family or participate in church activities over participating in interscholastic athletics, Hoffman Complaint ¶¶ 9e-g, 11, 12, are all decisions that South Dakota high school boys face. Thus, there is no harm and no discrimination because girls must make the same decisions concerning how to balance school-sponsored extracurricular activities with family and church activities that boys make. Plaintiffs have failed to allege any dissimilar treatment.

To the extent plaintiffs then alternatively allege harm resulting from the *actual transition* of the seasons as opposed to playing under the new season, any alleged harm found by the Court is cured by money damages. Plaintiffs claim that the elimination of the prior discriminatory system will require a small group of South Dakota girls to choose for one year[4] between

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financially or emotionally as a result of playing under the prior scheduling system.

[4]Juniors and seniors in high school at the time the season switch was announced in December of 2000 were not affected by the transition. Freshman were given ample notice that in two years the athletic seasons for basketball and volleyball would change and that they should take that into account when considering which interscholastic athletic activities they might want to participate. Sophomores were also on notice that for one year, they would not be able to participate in both high school basketball and gymnastics. This transition period, thus, balanced both the need to eliminate the discriminatory scheduling system as quickly as possible while also

participating in basketball or gymnastics during the winter season and that this choice will result in the loss of scholarship opportunities, potential collegiate financial aid and emotional distress. See Hoffman Complaint ¶ 17. These harms, to the extent that they may occur, are all remedied with money damages as plaintiffs concede in their prayer for relief. Id. ¶ 20. Indeed, the Supreme Court has held that loss of earnings or damage to reputation does not constitute irreparable injury for purposes of a preliminary injunction. Sampson v. Murray, 415 U.S. 61, 89 (1974).

> "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm."

Id. at 90 (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)); see also Adam-Mellang v. Apartment Search, Inc., 96 F.3d 297, 300 (8th Cir. 1996) (holding that loss of income does not constitute irreparable injury for purposes of a preliminary injunction because there is an adequate remedy at law). Here, any alleged injury to the plaintiffs in terms of lost collegiate financial aid or time and energy spent participating in certain athletic or

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accommodating the needs of female students presently attending high school in South Dakota. See Ries v. Montana High School Association, Case No. 9904008792, slip. op. at 26-27 (finding that delaying the season switch of girls' basketball and volleyball for four years "is not necessary or proper," finding that the court must balance the need to eliminate the discriminatory practice as quickly as possible with the time needed to undertake the season transition by the member schools, and holding that a two year time period achieved these objectives, and consequently, ordering realignment by the 2002-2003 academic year). To have delayed a season switch for four academic school years rather than two would have also put much more strain on the elementary and junior high "feeder" programs for the affected sports because the young girls would have had no incentive at all to participate in conflicting sports. The optimal transition period of two years allows for a faster recovery time for the elementary and junior high and recreational programs feeding into interscholastic high school sports.

extracurricular activities can be compensated for by monetary relief.[5]

The absence of irreparable harm here is further demonstrated by the Hoffman plaintiffs eighteen month delay in filing their lawsuit to enjoin the season switch. Plaintiffs had knowledge of the Pedersen Consent Order requiring the season transition as early as December of 2000 but waited until May 29, 2002 to challenge the Consent Order. Steven Barrett, Parents of Gymnasts Cry Foul Over Girls Sports Season Switch, RAPID CITY JOURNAL, December 11, 2000 (Goeman and Hoffman discussing "where and when a lawsuit should be filed" in response to the Pedersen Consent Order) (Attachment 3). After ultimately filing the lawsuit, plaintiffs then waited almost a full three weeks before notifying the Court by letter that counsel had nearly completed its brief in support of a motion for a preliminary injunction and asking the Court to set a schedule for the motion. This significant delay in filing a lawsuit and pursuing a preliminary injunction further undercuts any argument that plaintiffs will suffer irreparable harm from the season transition. See Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc., 182 F.3d 598, 603 (8th Cir. 1999) (affirming denial of motion for preliminary injunction because delay in moving for injunction "belies any claim of irreparable injury"); see also Citizens and Landowners Against Miles City/New Underwood Powerline v. United States Dep't. of Energy, 513 F. Supp. 257, 264 (D.S.D. 1981) (denying preliminary injunction because plaintiffs waited two years before filing lawsuit and waited another two months after filing complaint to seek emergency relief); Costello v. McEnery, 767 F. Supp. 72, 78 (S.D.N.Y. 1991) (denying motion for preliminary injunction in civil rights case because plaintiff's one-year delay in filing lawsuit established "an insufficient

[5]One of the plaintiffs, Jeana Hoffman, publicly explained that she and her twin sister will not face lost scholarship opportunities with respect to gymnastics because she and her sister want to play basketball in college not gymnastics. Plaintiffs' Brief in Supp. of Mot. for Prelim. Inj., Tab 5. Thus, any money damages that the Hoffman twins would seek would stem from their inability to participate in interscholastic gymnastics during their junior and senior years.

showing of irreparable harm to justify issuance of a preliminary injunction").

The Hoffman plaintiffs assert that the eighteen month delay in challenging the Pedersen Consent Order was because they attempted a "political approach" first and then upon that failing, they pursued legal options but had difficulty obtaining an attorney because of financial reasons. Goeman Aff. ¶¶ 7c and 7d ("For one reason or another each of said lawyers declined to take the case."). While plaintiffs assert that attorneys declined to take the case mainly because of litigation costs, the United States questions whether the attorneys approached by plaintiffs declined the case because their review of constitutional and federal law revealed that it was not likely to succeed on the merits. Moreover, plaintiffs' April 26, 2002 press release reveals that one month before filing this action, plaintiffs had retained counsel and that "[t]he group has been doing research and raising money for several months." (Attachment 4 at 1) (emphasis added). If the group had been raising money and conducting research for "several months" prior to April, plaintiffs have no excuse for the delay in filing the lawsuit two and a half months before the season transition and in seeking a preliminary injunction six weeks before the season transition. South Dakota girls and the SDHSAA and its member schools have been severely prejudiced by this delay as set forth in more detail below.[6]

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[6]The doctrine of laches may also apply to bar plaintiffs' claim for injunctive relief. To claim laches, a defendant must show three factors: "(1) a delay in asserting a right or claim; (2) that the delay was not excusable; and (3) that there was undue prejudice to the party against whom the claim was asserted." Citizens and Landowners Against Miles City/New Underwood Powerline v. United States Dep't. of Energy, 513 F. Supp. 257, 264 (D.S.D. 1981). Here, plaintiffs have waited over eighteenth months after notice of the Pedersen Consent Order before taking any action. As set forth above, in section A, supra, there is no excuse for the significant delay. Finally, substantial harm and prejudice will result to both South Dakota girls and the SDHSAA and its member schools if the Pedersen Consent Order is enjoined or delayed as set forth fully in section B.

The Hoffman plaintiffs contend that laches should not apply because their suit raises constitutional questions, concerns the public interest, and includes minors as plaintiffs. These arguments are unpersuasive for the following reasons. First, as noted below in section C,

B. The prejudice and harm that will result to South Dakota girls and the member schools of the SDHSAA if the season switch is enjoined far outweighs any harm to the Hoffman plaintiffs.

In balancing the equities, the harm against South Dakota high school female athletes and the prejudice to the SDHSAA and its member schools far outweighs the harm alleged by the small number of girls represented by the Hoffman plaintiffs. Plaintiffs are wrong when they suggest that "[a]ll an injunction does is to essentially continue the status quo" and characterize that the SDHSAA must only do some "paperwork" to change the seasons. Plaintiffs' Brief in Supp. of Mot. for Prelim. Inj. at 6. First, the status quo has changed since December 2000. Both Montana and North Dakota have changed its seasons and will conduct girls' basketball in the traditional winter season and volleyball in the traditional fall season during the 2002-03 academic school year. (Attachment 5) (2002-03 Calendar for Montana High School Association showing scheduling of girls' basketball during the winter season and girls' volleyball during the fall season). By the time the South Dakota season transition will take effect in eight weeks, all neighboring states will now utilize the same athletic schedule for girls' basketball and volleyball and gymnastics. If the Court were to halt the season transition, South Dakota girls would lose their ability to participate in interstate competition with neighboring states.

Second, the status quo in South Dakota has changed as well. It will take much more effort than simply drafting new paperwork to abort the switch of seasons. The SDHSAA and its member schools have taken the last two years to develop new schedules for high schools and junior highs all across the state, to obtain state tournament facilities, to prepare facilities and to

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plaintiffs' case does not involve constitutional questions because they have no viable claim of discrimination. Second, the Pedersen case and the season switch affects all South Dakota girls who are minors. Thus, all parties in the Pedersen case have been and continue to take into account the interests of high school girls in South Dakota and the public interest.

coordinate officials and coaches for the new athletic seasons. Most importantly, however, young girls have relied on the well-publicized season switch for the last two years and have made decisions about which sports to participate in based on this fact. Group Files Lawsuit Over Seasons Switch, RAPID CITY JOURNAL, May 1, 2002 (Patrick Breen of Wagner stating that his daughter stopped "going out for basketball" once the season switch was announced because his daughter also participated in gymnastics and she had to make a choice between the two) (Attachment 6). Finally, delaying the season transition continues this discriminatory treatment of South Dakota female athletes and perpetuates the constitutional violation.

Stated simply, the significant prejudice and harm that would occur to South Dakota high school girls and the SDHSAA member schools if the season transition were enjoined at this late juncture far outweighs the alleged harm that might occur to the small group of plaintiffs bringing this separate action. The Court should not overlook the fact that plaintiffs' only evidence attached to their motion for a preliminary injunction was from a parent who concedes that his children are not harmed by the season transition. Goeman Aff. ¶ 6 ("Although none of his children are adversely affected by the season switch consent decree Affiant has been one of the most active persons trying to organize an attack on the action even though Affiant's children are not affected.").

C. *Every lawsuit brought to challenge the nontraditional, disadvantageous seasons for basketball and volleyball has succeeded.*

The Hoffman plaintiffs are not likely to succeed on the merits of their claim that the remedy entered in the Pedersen case is unconstitutional and violates Title IX. In essence, plaintiffs claim that playing girls' basketball during the winter and volleyball during the fall is discriminatory. This claim fails because the Pedersen Consent Order treats similarly situated

boys and girls equitably by now scheduling both girls' and boys' sports during the advantageous and traditional seasons for each sport.

Specifically, to state a claim based on the Fourteenth Amendment, plaintiffs must show that the SDHSAA treats boys and girls differently. United States v. Virginia, 518 U.S. 515, 532-33 (1996). Once plaintiffs have demonstrated a gender classification, the burden shifts to the defendant to provide an exceedingly persuasive justification for the sex-based classification. Id. at 533. The defendant 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). "The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Id.

To state a claim under Title IX, plaintiffs must also show that boys and girls are treated differently. See Pedersen v. La. State Univ., 213 F. 3d 858, 881 (5th Cir. 2000). Title IX prohibits discrimination on the basis of sex in educational programs and activities by recipients of federal financial assistance, and directs the Department of Education to promulgate regulations that effectuate this anti-discrimination goal. 20 U.S.C. §§ 1681, 1682; Javits Amendment, § 844 of the Education Amendments of 1974, Pub. Law 93-380 Title VIII (Aug. 21, 1974). As directed by Congress, the Department of Education has promulgated regulations applying Title IX to interscholastic athletics:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a) (emphasis added). Practices such as disadvantageous playing seasons

violate Title IX when the resulting harms are substantial enough to deny equal participation opportunities and benefits in athletics to students of one sex. See OCR Policy Interpretation, 44 Fed. Reg. 71413, 71418 (1979).

Prior to entering the Pedersen Consent Order, it is undisputed that the SDHSAA treated boys differently from girls in two ways. First, girls played basketball, one of the most popular sports based on participation numbers offered to both boys and girls, in a different season than boys who played in the traditional, advantageous winter season. Second, volleyball, a sport with no corresponding boys' team, was conducted in the nontraditional winter season while boys' sports such as football or wrestling were offered in their traditional seasons. Playing in these disadvantageous seasons – when no other boys' sport was similarly scheduled – limited the girls' high school, club, and collegiate participation opportunities and benefits. See e.g. Communities for Equity, 178 F. Supp.2d at 817-828 (findings of fact concerning harms to Michigan girls who play basketball and volleyball in disadvantageous seasons); Ries v. Montana High Sch. Ass'n, Case No. 9904008792, slip op. (Mont. Dep't of Labor & Indus. Aug. 11, 2000) (administrative ruling detailing harms to girls as a result of defendant scheduling girls' basketball and volleyball during the disadvantageous fall and winter seasons respectively).

The Hoffman plaintiffs seek to defend and reinstate this discriminatory scheduling system based on the justification that these seasons "have been in effect for 20 years or more" in South Dakota. See Plaintiffs' Brief in Support of Prelim. Inj. at 4. But "simply doing things the way they've always been done is not an 'important government objective,' if indeed it is a legitimate objective at all." Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394 (E.D. Ark. 1979) (holding different rules for girls' and boys' basketball unconstitutional because requiring girls to play half-court or six-on-six instead of full-court or five-on-five left girls at a severe disadvantage

to their male counterparts). This scenario would fail to constitute a government objective if to do things the way they have always been done continues a constitutional violation.

The Hoffman plaintiffs also point to the existence of an OCR letter, dated July 15, 1998, concerning the Sioux Falls School District and the scheduling of playing seasons as evidence that they will succeed on their Title IX claim. Plaintiffs' Brief in Support of Mot. for Prelim. Inj. at 5 and 14. Plaintiffs are wrong. The OCR letter is not dispositive of the claims here and does not supercede the subsequent Consent Order approved by the Court in Pedersen. First, the OCR investigation only concerned a single school district in South Dakota and was not a state-wide investigation. Indeed, OCR determined that the SDHSAA, and not the Sioux Falls School District, scheduled interscholastic playing seasons for South Dakota. As a result, OCR did not take any action against the Sioux Falls School District and require them to change the two girls' seasons because if the school district did change seasons when no other school district in the state did, the school district would forego in-state competition. Plaintiffs' Brief in Supp. of Mot. for Prelim. Inj. Tab 7 at 3.

Second, OCR determined that there was no jurisdiction against the SDHSAA because the state attorney general's office advised OCR that the SDHSAA was not a state agency. Plaintiffs' Brief in Supp. of Mot. for Prelim. Inj. Tab 7 at 4. The legal landscape has changed since the drafting of that letter. In 2001, the Supreme Court held that state athletic associations are state actors. See Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001).[7] Third, the contents of the letter are based on a 1996-97 OCR investigation of a single

[7]It is unclear, and of no moment, why the jurisdictional finding centered around the question of state action when the proper jurisdictional analysis for Title IX involves determining whether the recipient receives federal financial assistance. The July 15, 1998 letter did not make a finding concerning whether the SDHSAA received federal financial assistance.

school district in South Dakota which did not include information from all high schools in the district. Plaintiffs' Brief in Supp. of Mot. for Prelim. Inj. Tab 7 at 2 (noting that Roosevelt High School provided scholarship information while "coaches from other teams did not provide [athletic financial assistance] information regarding their athletes.").

In short, the Hoffman plaintiffs are not likely to succeed on the merits of their claim because they cannot show that the new scheduling system required by the Pedersen Consent Order treats boys and girls differently. Nor can they because switching girls' basketball and volleyball to their advantageous seasons cures the harm caused by the prior discriminatory scheduling system. It is beyond peradventure that every court or jury to deal with this issue has reached the same conclusion.

D. The public interest favors eliminating discrimination not perpetuating discrimination.

The public interest mandates enforcement of federal civil rights laws and the United States Constitution. See Valley v. Rapides Parish Sch. Bd., 118 F.3d 1047, 1056 (5th Cir. 1997) (finding that the "public interest would be undermined if the unconstitutional actions of the Board were allowed to stand."). Consistent with this interest, the SDHSAA is under court order to eliminate discriminatory scheduling practices and provide equal educational opportunities to all students regardless of sex. Plaintiffs' requested relief to enjoin the season switch and reinstate the prior discriminatory scheduling system would frustrate these mandates and would deny South Dakota girls equal educational opportunities.[8]

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[8]In the section of its memorandum discussing the public interest, the Hoffman plaintiffs mischaracterize the evidence presented at trial in the case against the Michigan High School Athletic Association (MHSAA) on the issue of scheduling girls' interscholastic athletics during disadvantageous seasons when no boys' sport are similarly scheduled. Plaintiffs' Brief in Support of Prelim. Inj. at 18. The Hoffman plaintiffs assert that the district court did not hear testimony from any student but only accepted testimony from experts. Id. In fact, the plaintiff-parties had six students testify about the discriminatory effects of disadvantageous seasons. See

E. The Hoffman action should be dismissed with leave to petition to intervene in the pending Pedersen action.

On June 20, 2002, the Court ordered the parties to address, inter alia, "the effect of the Consent Order in CIV 00-4113 has on the Plaintiffs' request for a preliminary injunction in this case." The United States filed a motion to dismiss on July 1, 2002, arguing that the Hoffman case should be dismissed with leave for plaintiffs to petition to intervene in the existing Pedersen case. In short, the existence of the pending action precludes plaintiffs' lawsuit according to Eighth Circuit caselaw. See Rivarde v. State of Missouri, 930 F.2d 641 (8th Cir. 1991).

In their brief, the Hoffman plaintiffs raise this Court's decision in United States ex rel Yankton Sioux Tribe v. Gambler's Supply, Inc., 925 F. Supp. 658 (D.S.D. 1996) (holding that settlement agreement bars separate lawsuit on res judicata grounds), to argue that plaintiffs' lawsuit should not be barred. In so doing, plaintiffs assert that the Hoffman and Pedersen cause of actions are not identical. This is incorrect. The Hoffman action seeks to reverse the result reached in the Pedersen case. The underlying claims are identical. Ultimately, the Hoffman plaintiffs simply seek to overturn the Court's approval of the Pedersen Consent Order.

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178 F. Supp.2d at 819 n. 9 (Kristi Madsen); id. at 819 n. 10 (Kelsey Madsen); id. at 825 (Kele Eveland and Breanna Eveland); id. at 829 n. 31 (Angie Anrianse); and id. at 832 (Breanne Hall).

CONCLUSION

For the reasons set forth above, the Hoffman plaintiffs' motion for a preliminary injunction should be denied.

Respectfully Submitted,

JAMES E. MCMAHON
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DATED: July 3, 2002

CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2002, I served copies of the foregoing pleading to counsel of record by first class U.S. mail, postage prepaid, addressed to:

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