

2007

Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons Under Title IX and the Equal Protection Clause

Jane Hefferan

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Jane Hefferan, Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons under Title IX and the Equal Protection Clause, 9 VAND. J. ENT. & TECH. L. 861 (2007).

ALWD 7th ed.

Jane Hefferan, Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons under Title IX and the Equal Protection Clause, 9 Vand. J. Ent. & Tech. L. 861 (2007).

APA 7th ed.

Hefferan, J. (2007). Changing seasons, changing times: the validity of nontraditional sports seasons under title ix and the equal protection clause. Vanderbilt Journal of Entertainment and Technology Law , 9(3), 861-896.

Chicago 17th ed.

Jane Hefferan, "Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons under Title IX and the Equal Protection Clause," Vanderbilt Journal of Entertainment and Technology Law 9, no. 3 (Spring 2007): 861-896

McGill Guide 9th ed.

Jane Hefferan, "Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons under Title IX and the Equal Protection Clause" (2007) 9:3 Vand J Ent & Tech L 861.

AGLC 4th ed.

Jane Hefferan, 'Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons under Title IX and the Equal Protection Clause' (2007) 9(3) Vanderbilt Journal of Entertainment and Technology Law 861

MLA 9th ed.

Hefferan, Jane. "Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons under Title IX and the Equal Protection Clause." Vanderbilt Journal of Entertainment and Technology Law , vol. 9, no. 3, Spring 2007, pp. 861-896. HeinOnline.

OSCOLA 4th ed.

Jane Hefferan, 'Changing Seasons, Changing Times: The Validity of Nontraditional Sports Seasons under Title IX and the Equal Protection Clause' (2007) 9 Vand J Ent & Tech L 861
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I.	THE FIGHT AGAINST GENDER DISCRIMINATION IN INTERSCHOLASTIC SPORTS: TITLE IX AND THE EQUAL PROTECTION CLAUSE	865
A.	<i>Title IX and Creating Gender Equity in Athletics</i>	865
B.	<i>Equal Protection Clause: Gender Classifications and Heightened Scrutiny</i>	867
II.	FIGHTING THE SEASONAL TREND: <i>COMMUNITIES FOR EQUITY</i> <i>V. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION</i>	869
A.	<i>Overview: The Beginnings of an Epic Battle</i>	869
B.	<i>Plaintiffs' Claims: How Michigan's Nontraditional Sports Seasons Constitute Legally Inequitable Treatment</i>	870
C.	<i>MHSAA Justifications: The Legitimate Reasons for Nontraditional Sports Seasons</i>	872
1.	"Logistical Concerns:" Limitations on Facilities, Officials, and Coaches	872
2.	High School Athletes' Preference for Current Seasons	873
3.	Establishing an "Independent Identity"	874
D.	<i>Holding and Subsequent Case History</i>	875
III.	SETTING THE BAR TOO HIGH: A CRITIQUE OF THE SIXTH CIRCUIT APPROACH TO TITLE IX AND EQUAL PROTECTION LITIGATION AT THE INTERSCHOLASTIC LEVEL	878
A.	<i>Facial Gender Classifications and Intermediate Scrutiny: The VMI Doctrine</i>	879
1.	The "Exceedingly Persuasive" VMI Doctrine.....	879
2.	The Sixth Circuit's Approach.....	880
3.	Focus on the Individual's Ability to Receive Benefits, Not the Fundamental Benefit of the Opportunity to Participate	882
B.	<i>Knock-Out Punch: Are Section 1983 Claims Precluded by Title IX?</i>	884
1.	The <i>Rancho Palos Verdes</i> Line of Cases	886

2. The Circuit Split: Application of the <i>Sea Clammers/Rancho Palos Verdes</i> doctrine to Title IX ..	888
C. <i>Negative Implications of Sixth Circuit Ruling</i>	889
1. Negative Impacts on Girls' Participation in Interscholastic Athletics	889
2. Loss of Local Control over Interscholastic Athletics	891
IV. CONCLUSION.....	893
POSTSCRIPT	895

Cheers rippled through the crowd as an announcement echoed from the public address system during a track meet at a mid-Michigan high school. In metro-Detroit, players slapped hands during a tennis match. At a girls' high school soccer game on the other side of the state, players and parents celebrated as well.¹ However, the cheers were not for a high school state championship, or even for the Detroit Pistons or Redwings latest playoff victory; rather, these were cheers for the U.S. Supreme Court. On May 2, 2005, the Supreme Court announced a decision assuring that the current scheduling of high school sports seasons would remain unchanged for at least another school year.²

Yet, as in a sporting event, where one play can quickly swing momentum the opposite way, one court ruling can cause an equal reverse of fortunes. Such was the story for the Michigan High School Athletic Association (MHSAA); by the summer of 2006, the prospects of the MHSAA retaining its current scheduling of "nontraditional" sports seasons seemed about as likely as a Chicago Cubs World Series victory.³ The Sixth Circuit Court of Appeals' August 16, 2006 ruling virtually guaranteed that Michigan must move its girls' basketball and volleyball seasons, which are currently played in the fall and

1. Press Release, Michigan High School Athletic Association, An MHSAA Commentary By Communications Director John Johnson: Hearing The Cheers (May 13, 2005), available at <http://www.mhsaa.com/news/05jjcommentary.htm>.

2. *Id.* See Mich. High Sch. Athletic Ass'n v. Cmty. for Equity, 544 U.S. 1012 (2005). The current scheduling of girls' sports seasons at issue are volleyball in the winter, basketball in the fall, soccer in the spring, Lower Peninsula golf in the spring, Lower Peninsula swimming and diving in the fall, and tennis in the fall. Cmty. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805, 807 (W.D. Mich. 2001). All of these girls' sports (with the exception of girls' golf) are played in a nontraditional season, i.e., a season of the year different from when the sport is typically played. *Id.*

3. At 98 years, the Chicago Cubs currently have the longest championship drought of any major professional sports team. They have not won a World Series since 1908. Wikipedia.org, List of Major League Baseball Franchise Post-Season Droughts, http://en.wikipedia.org/wiki/List_of_Major_League_Baseball_franchise_post-season_droughts (last visited Mar. 20, 2007).

winter respectively, to be played in the traditional⁴ seasons with volleyball in the fall and basketball in the winter.⁵

In many respects, the MHSAA was fighting a losing battle from the start. Similar cases brought in other states involving nontraditional seasons for girls' athletics have been almost exclusively decided in favor of the female athletes.⁶ Currently, Michigan remains the only state to maintain nontraditional seasons for girls' volleyball⁷ and one of only two states to schedule girls' basketball outside of the traditional winter season.⁸ Within the last several years, the high school athletic associations in West Virginia, Virginia, Montana, Arizona, and South Dakota have all changed their girls' sports seasons as a direct result of actual or potential lawsuits by female athletes.⁹

Although Title IX is applicable at the elementary and secondary levels, most litigation traditionally has focused on violations of the Act at the collegiate level.¹⁰ Thus, while collegiate athletics programs have made important strides in achieving gender equality, it

4. A "traditional" season in Title IX litigation is the season when the sport is usually played at most levels. The court in *MHSAA* states, "for most sports, it is common knowledge when tradition dictates that a sport will be played." *Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 808 (W.D. Mich. 2001). For example, even those who are not sports fans would know that football is traditionally a fall sport. However, the courts in Title IX litigation only "care[] about traditional sports seasons to the extent that the traditional season [is] the most advantageous season" for the sport to be played. *Id.* at 808.

5. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006) (affirming on remand the district court holding that MHSAA's actions violated the Equal Protection Clause of the Fourteenth Amendment), *vacated*, 544 U.S. 1012 (2002).

6. See, e.g., *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 299 (2d Cir. 2004) (finding that the disparity in treatment arising from scheduling girls' high school soccer in the spring and boys' high school soccer in the fall, which deprives girls but not boys the opportunity to compete in the New York State Championships in soccer, violates Title IX); *Lambert v. West Va. State Bd. of Educ.*, 447 S.E.2d 901 (W. Va. 1994) (holding that scheduling of girls' high school basketball season outside the traditionally observed official winter season was unconstitutional under the Equal Protection Clause of the West Virginia Constitution).

7. Hope Yen, *High Court Asks 6th Circuit to Reconsider Girls Sports Season Ruling*, LAW.COM, May 3, 2005, <http://www.law.com/jsp/article.jsp?id=1115037320291>.

8. *Id.* Hawaii, which holds its girls' high school basketball state championship in the spring season, is the only other state to sanction girls' basketball in a nontraditional season. See Hawaii High School Athletic Association, Tournament Information, http://www.sportshigh.com/page_server/Sports/Basketball-Girls/Tournament/D35269A9B454EA3F20020616205213214464000000.html (last visited Mar. 23, 2007) (noting that the girls' division basketball tournament takes place in May).

9. Allison Steele, *Michigan Key Test for Girls' Sports*, WOMEN'S ENEWS, Oct. 2, 2001, <http://www.womensenews.org/article.cfm/dyn/aid/669/context/archive>.

10. See Ray Yasser & Samuel J. Schiller, *Gender Equity in Athletics: The New Battleground of Interscholastic Sports*, 15 CARDOZO ARTS & ENT. L.J. 371, 371 (1997) (stating that "[u]ntil now, Title IX has had its most profound impact on intercollegiate athletics" but that "a new battleground has emerged on the high school and middle school levels").

is widely believed that there remains "broad-based discrimination against female athletes at the lower levels of education."¹¹ This note focuses on the recent trend towards federal court enforcement of Title IX provisions at the interscholastic level. As illustrated through the landmark court case *Communities for Equity v. Michigan High School Athletic Association*, this note suggests that the Sixth Circuit's broad interpretation of the scope of discrimination claims, coupled with an excessively high standard of scrutiny for athletic association policies, could have a chilling effect on girls' sports and ultimately lead to decreased participation levels nationwide.¹²

Part I addresses the historical and legal significance of Title IX and the Equal Protection Clause of the Fourteenth Amendment as applied to female athletics. Part II then provides an overview of the landmark litigation in the continuing legal saga of *Communities for Equity v. MHSAA*, detailing the claims presented by the plaintiffs and the defenses offered by the MHSAA in justification of its policy. Part III then examines the recent trend of Title IX litigation in federal courts in light of this most recent Sixth Circuit ruling. After almost ten years of litigation, the combination of holdings in the *Communities for Equity* cases have led to both an excessively high standard of scrutiny and an overly broad applicability that ultimately may negatively impact girls' sports by decreasing female participation—the very goal Title IX seeks to ensure. Finally, Part IV addresses the immediate implications of the lawsuit and the possible options that remain for the MHSAA in response to the most recent ruling.

11. Neena Chaudhry & Marcia Greenberger, *Seasons of Change: Communities for Equity v. Michigan High School Athletic Association*, 13 UCLA WOMEN'S L.J. 1, 8 (2003). See also Jessica McRorie, *Parents Sue to Level High School Playing Fields*, WOMEN'S ENEWS, Aug. 24, 2001, <http://www.womensenews.org/article.cfm/dyn/aid/629>. "Unlike colleges and universities, which must adhere to the 1994 Equity Disclosure Act, high schools are not required to publish information on their athletic participation, staffing, revenues or expenses." *Id.* This lack of reporting results in little governmental scrutiny allowing most high-school level discriminatory practices to go "unchecked . . . until someone files a lawsuit or states pass their own statutes." *Id.*

12. See Bob Becker, *Ruling Thursday Could Change Girls Sports Landscape: District Judge to Decide on MHSAA Scheduling Plan*, GRAND RAPIDS PRESS, July 31, 2002, at E1, available at 2002 WLNR 11942312.

I. THE FIGHT AGAINST GENDER DISCRIMINATION IN INTERSCHOLASTIC SPORTS: TITLE IX AND THE EQUAL PROTECTION CLAUSE

A. Title IX and Creating Gender Equity in Athletics

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of gender by educational institutions receiving federal financial assistance.¹³ With some exceptions, Section 901(a) provides that “[n]o 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.”¹⁴ The amendment was enacted in response to evidence demonstrating massive and pervasive patterns of discrimination against women with regard to educational opportunities.¹⁵ Despite legislative efforts to limit the effect of Title IX on athletics,¹⁶ the Secretary of Health, Education, and Welfare (HEW)¹⁷ published regulations that specifically addressed the statute’s requirements in the athletic programs of educational institutions.¹⁸ Specifically, Section 106.41(c) requires equal athletic opportunity for both sexes in any interscholastic, intercollegiate, club or intramural athletic programs.¹⁹

Since the enactment of Title IX of the Education Amendments of 1972, female participation in athletics at both the high school and collegiate level has increased dramatically.²⁰ In 1971, prior to the

13. See 20 U.S.C. § 1681(a) (2000).

14. *Id.* The exceptions to Title IX are not applicable to the sports seasons cases and therefore will not be discussed in this note.

15. *McCormick, v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004); see also *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcommittee on Educ. of the House Comm. on Educ. and Labor*, 91st Cong. (1970); 118 CONG. REC. 5804 n.11 (1972) (statement of Sen. Bayh).

16. These efforts included a proposed amendment to the Act, introduced by Senator John Tower in 1974, which would have exempted “revenue producing” intercollegiate sports from Title IX’s coverage. *McCormick*, 370 F.3d at 287.

17. In 1979 HEW was split into the Department of Health and Human Services (HHS) and the Department of Education (ED). See U.S. Department of Health and Human Services, *Historical Highlights*, at <http://www.hhs.gov/about/hhshist.html>. “All educational functions were transferred to ED, and thus . . . [it is] the administrative agency charged with administering Title IX.” *McCormick*, 370 F.3d at 287 (citations omitted).

18. See 45 C.F.R. § 86 (2006); 34 C.F.R. § 106.

19. 34 C.F.R. § 106.41(c) (providing that any recipient of federal funds that operates or sponsors “interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes”).

20. See Greg Garber, ESPN.COM, *Landmark Law Faces New Challenges Even Now*, June 22, 2006, <http://espn.go.com/gen/womenandsports/020619title9.html>; National

amendment, approximately 300,000 girls played competitive high school sports nationwide.²¹ In the 2005-2006 school year, the participation level of high school girls had increased to nearly three million.²² The number of female athletes participating in intercollegiate sports in the thirty year time span since Title IX's enactment has also grown significantly. In 1971 there were roughly 30,000 female college athletes; today there are more than 150,000, and the number of women's college teams has nearly doubled.²³

While the scope of Title IX extends to the athletic department of any school district that receives federal funding, the majority of Title IX litigation has focused on intercollegiate athletics.²⁴ Despite the statistics demonstrating participation increases, equity in athletics remains an issue even at the collegiate level where most litigation has occurred.²⁵ Although high schools and middle schools are covered by the Act, relatively few cases have been tried under Title IX at those levels.²⁶ This general lack of enforcement at the lower educational levels has arguably resulted in the continuation of pervasive broad-based discrimination against female athletes at the interscholastic level.²⁷ For example, in Georgia, an Atlanta newspaper

Federation of State High School Associations, 2005-2006 NFHS Participation Survey, http://www.nfhs.org/core/contentmanager/uploads/2005_06NFHSParticipationsurvey.pdf (last visited Mar. 20, 2007) [hereinafter NFHS Survey].

21. NFHS Survey, *supra* note 20.

22. *Id.*

23. Garber, *supra* note 20.

24. *See, e.g.,* Favla v. Ind. Univ. of Pa., 7 F.3d 332 (3d Cir. 1993); State Bd. of Agric., 998 F.2d 824 (10th Cir. 1993); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993); Roberts v. Colo. Pederson v. La. State Univ., 912 F. Supp. 892 (M.D. La. 1996).

25. At the collegiate level resources for women's athletics programs continue to lag behind men's: although women constitute over 53% of the student body at Division 1 colleges, they are only 41% of the athletes, get only 32% of the recruiting dollars, and receive only 36% of the overall athletic operating budgets. National Women's Law Center, Facts on Title IX & Athletics, <http://www.aahperd.org/NAGWS/titleix/pdf/NWLCTitleIXFacts.pdf> (last visited Mar. 20, 2007).

26. In 1988 Congress enacted the Civil Rights Restoration Act which reinstated an institution-wide application of Title IX. *See* 20 U.S.C. § 1687 (2000). Under the Act, if any part of an educational institution receives federal funds, the institution as a whole must comply with Title IX's provisions. *See id.*; *see also* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 287 (2d Cir. 2004); Yasser & Schiller, *supra* note 10, at 371-72.

27. Chaudhry & Greenberger, *supra* note 11, at 8. Part of the reason for this lack of enforcement is due to the fact that data on gender equity in athletics at the elementary and secondary levels is not readily available. The Equity in Athletics Disclosure Act (EADA) which requires federally funded coeducational higher education institutions with intercollegiate varsity sports to report certain gender equity information (e.g. sports teams and participation by gender, athletic scholarship dollars awarded to male and female athletes, and revenues and expenses for men's and women's teams) is not applicable to interscholastic level programs. *See* 20 U.S.C. § 1092(g) (2000).

series stated that gender inequities in sports continue with only 36 percent of girls playing competitive sports in the state, as opposed to 64 percent of boys.²⁸ Furthermore, the paper showed that 86 percent of all legislative grants for athletic related purposes went to projects where boys' sports were the main beneficiaries.²⁹ Similarly, in Duquesne, Pennsylvania, "for every dollar the school board spent on sports, girls' sports received only a dime."³⁰ Thus, the decision in *Communities for Equity v. MHSAA* will have a profound impact in addressing this new battleground of Title IX litigation—gender discrimination in interscholastic sports.

B. Equal Protection Clause: Gender Classifications and Heightened Scrutiny

The Equal Protection Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."³¹ A person may state a claim under Title 42 of the U.S. Code, Section 1983, if that person alleges the defendant deprived him or her of a constitutional right while acting "under color" of state law.³² The Supreme Court has held that high school athletic associations are state actors and thus subject to Equal Protection Clause requirements.³³

Further, the Equal Protection Clause is violated only when there is intentional discrimination.³⁴ Thus, the key issue is the

28. Chaudhry & Greenberger, *supra* note 11, at 8 (citing Mike Fish & David A. Milliron, *Special Report: Eight-Day Series, The Gender Gap*, ATLANTA J.-CONST., Dec. 12, 1999).

29. *Id.*

30. *Id.*

31. U.S. CONST. amend. XIV, § 1.

32. 42 U.S.C. § 1983. Therefore, in order to be liable under Section 1983 for violating the Fourteenth Amendment, a defendant must be considered a "state actor." See *e.g.*, *LRL Props. v. Portage Metro Hous. Auth.*, 55 F.3d 1097, 1111 (6th Cir. 1995) ("To state a claim under the Equal Protection Clause, a [Section] 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." (quoting *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990)); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 845 (W.D. Mich. 2001).

33. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001) (holding the TSSAA's regulatory activity constituted a state action because of the "pervasive entwinement of state school officials in the structure of the association.")

34. See *Batson v. Kentucky*, 476 U.S. 79, 93 (1986) (purposeful discrimination is an essential element of an equal protection violation); *Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979) (requirements for establishing a Section 1983 claim are the same as those for establishing the underlying constitutional or statutory violations); *Int'l Brotherhood of*

defendant's intent³⁵; the plaintiffs must show that disadvantages are imposed because of, not merely in spite of, race or gender.³⁶ Since gender is a protected class, any policy that facially uses gender as a classification will trigger a presumption of discriminatory intent and a heightened level of scrutiny from the court.³⁷

Once a gender classification has been established, the burden then falls on the defendant to justify the differential treatment.³⁸ A law that discriminates on its face will trigger heightened scrutiny from the court; therefore the State's justification for the classification must be "exceedingly persuasive."³⁹ In evaluating the challenged classification, the courts look to whether the discriminatory classification serves "important governmental objectives" and uses means that are "substantially related to the achievement of those objectives."⁴⁰ Significantly, no showing of animus or intentional

Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (stating that "proof of discriminatory motive is critical" to prevailing in a disparate treatment action).

35. See *Teamsters*, 431 U.S. at 335 n.15 (explaining that civil rights laws recognize two theories of discrimination: (1) disparate treatment—intentional discrimination based upon one's membership in a protected class (e.g., race, gender); (2) disparate impact—discrimination that results from the application of a rule that is facially neutral but has discriminatory effects). Here, plaintiffs' claims are disparate treatment only; they are challenging the MHSAA's intentional differential treatment of girls, not some facially neutral rule that has the effect of harming girls. *Cmtys. for Equity*, 178 F. Supp. 2d at 848.

36. Intentional discrimination means only an intent to treat girls and boys differently, not to purposely disadvantage girls—under the disparate treatment theory there is no harmful motive requirement. *Cmtys. for Equity*, 459 F.3d at 694. See also *United States v. Virginia (VMI)*, 518 U.S. 515, 532-33 (1996); *Pederson v. Louisiana State University*, 213 F.3d 858, 881 (5th Cir. 2000) (applying same test to Title IX violations "[The university] need not have intended to violate Title IX, but need only have intended to treat women differently").

37. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (using heightened scrutiny to "smoke out" illegitimate uses" of race and to ensure that classifications are not the product of racial prejudice or stereotype and noting that classifications based on race or gender require a "close examination" of legislative purposes); *Pers. Adm'r v. Feeny*, 442 U.S. 256, 272 (1979) (finding that facially discriminatory laws that divide persons based on race necessitate heightened scrutiny because "certain classifications . . . in themselves supply reason to infer antipathy"). "Without equating gender classifications, for all purposes, to classifications based on race or national origin," when focusing on differential treatment or denial of opportunity, there is "a strong presumption that gender classifications are invalid." *VMI*, 518 U.S. at 532-33. See also *Miller v. Albright*, 523 U.S. 420, 444 (1998) (finding there is a "strong presumption that gender-based legal distinctions are suspect"); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying a heightened level of scrutiny, sometimes called "intermediate scrutiny," to statutory classifications that distinguish between males and females).

38. *Cmtys. for Equity, v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 848 (W.D. Mich. 2001).

39. *VMI*, 518 U.S. at 532.

40. *Id.* at 533. The Court stated:

discrimination is required when the defendant's classification is discriminatory on its face.⁴¹

II. FIGHTING THE SEASONAL TREND: *COMMUNITIES FOR EQUITY V. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION*

A. Overview: The Beginnings of an Epic Battle

In June 1998, an organization of parents known as Communities for Equity (CFE),⁴² in conjunction with two mothers of female student athletes, filed a federal class action lawsuit against the MHSAA alleging gender discrimination.⁴³ Claiming that the nontraditional scheduling of girls' high school sports in the state of Michigan disadvantaged their daughters, the parents alleged violations of Title IX, the Equal Protection Clause of the Fourteenth Amendment, and Michigan's Elliot-Larsen Civil Rights Act (ELCRA).⁴⁴ Specifically, they claimed that the MHSAA "schedules athletics seasons and tournaments for six girls' sports during less advantageous times of the academic year than boys' athletic seasons and tournaments, and that this scheduling . . . constitutes inequitable treatment."⁴⁵ In December of 2001, the district court held that the current scheduling of athletic seasons by the MHSAA violated the

[A] State must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine . . . [a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Id. (second alteration in original) (citations omitted) (internal quotation marks omitted).

41. *Cmtys. for Equity*, 178 F. Supp. 2d at 848-49.

42. CFE is a nonprofit organization founded by parent Diane Madsen in 1997. The organization consists of parents, students, athletes, coaches and others with a goal "to educate people about the compliance of Title IX, about gender equity in general in athletics, and to advocate for the compliance of Title IX." <http://cfe.org>.

43. *See Cmtys. for Equity*, 178 F. Supp. 2d 805.

44. In the original lawsuit, plaintiffs charged that the MHSAA discriminated by chilling girls' participation opportunities by scheduling too few state tournaments for girls' sports. Chaundry & Greenberger, *supra* note 11, at 13-14, nn.55-60 (citing CFE's Mediation Brief). The plaintiffs also claimed that MHSAA provided inferior benefits (e.g., inferior athletic tournament facilities, playing rules and promotion and publicity). *Id.* All of these claims were settled through court-ordered mediation in the summer of 2001, leaving only the inferior sports seasons claim to be litigated. *See* Kristen Boike, *Rethinking Gender Opportunities: Nontraditional Sports Season and Local Preferences*, 39 U. MICH. J.L. REFORM 597 n.7 (2006); Chaundry & Greenberger, *supra* note 11, at 13-14.

45. *Cmtys. for Equity*, 178 F. Supp. 2d at 805, 807. The girls' sports at issue include: volleyball in the winter; basketball, tennis, Lower Peninsula swimming and diving in the fall; and soccer and Lower Peninsula golf in the spring. *Id.*

Equal Protection Clause, Title IX, and ELCRA.⁴⁶ The court then ordered the MHSAA to submit a compliance plan for the realignment of seasons.⁴⁷

B. Plaintiffs' Claims: How Michigan's Nontraditional Sports Seasons Constitute Legally Inequitable Treatment

According to the plaintiffs, the current policies and practices of the MHSAA caused both psychological and generalized harms to Michigan girls.⁴⁸ The MHSAA is an incorporated, nonprofit membership organization that acts as the governing body for interscholastic sports in the state of Michigan.⁴⁹ The MHSAA is comprised of over 700 Michigan high schools, both public and private.⁵⁰ While first created under the authority of the Michigan legislature in 1972 as an official state organization, in 1995 the MHSAA's official designation was removed.⁵¹ However, this modification did not substantially change either the structure or operation of the MHSAA, or its relationship with member schools.⁵²

The MHSAA regulates interscholastic athletic competition between its member schools and sets standards for school membership and student eligibility to participate in interscholastic athletics.⁵³ The MHSAA also requires member schools to register their coaches, requires use of MHSAA-registered game officials, and issues penalties

46. *Id.* at 862.

47. *Id.*

48. *Id.* at 836-37.

49. *Cmtys. for Equity*, 178 F. Supp. 2d at 810. The MHSAA's Articles of Incorporation stated that its purpose is:

To create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with the educational values of the high school curriculums, the interest in physical welfare and fitness of the students participating therein by giving the opportunity to participate in athletics designed to meet the needs and abilities of all and to make and adopt such rules and regulations and interpretation thereof to carry out the foregoing and to further provide for the training and registering of officials and to publish and distribute such information consistent therewith and to do any and all acts and services necessary to carry out the intent hereof.

Id.

50. *Id.*

51. *Id.* at 811 (citing MICH. COMP. LAWS §§ 380.1289 (1976) and 380.11(a)(4) (2001)). The Michigan Legislature amended the School Code, removing the MHSAA's official designation, but confirmed that school districts were still authorized to "join organizations [such as the MHSAA] as part of performing the functions of the school district." Mich. Comp. Laws § 380.11a(4) (2006).

52. *Cmtys. for Equity*, 178 F. Supp. 2d at 811.

53. *Id.* For example, the "MHSAA has adopted playing rules and regulations for each of the MHSAA-sanctioned sports *Id.*

for violations of MHSAA rules and regulations.⁵⁴ Additionally, the MHSAA provides structure to interscholastic athletics throughout the state.⁵⁵ Among other things, the MHSAA schedules sport seasons, sets practice dates, determines the maximum number of games to be played, limits the scope of permissible activities outside the defined season for a sport, and sponsors state championship tournaments open only to member schools.⁵⁶

By the time the *Communities for Equity* case reached the district court in the fall of 2001, the plaintiffs' sole remaining claim alleged that the "MHSAA schedules athletic seasons and tournaments for six girls' sports during less advantageous times of the academic year than boys' athletic seasons and tournaments, and that this scheduling" of seasons constitutes inequitable gender discrimination.⁵⁷ Specifically, the "plaintiffs claim[ed] that all of these sports, with the exception of girls' golf, are played in a nontraditional season," which are disadvantageous times to play those sports.⁵⁸ As a result, the MHSAA's "scheduling of girls' sports in this manner negatively affect[ed] Michigan girls' opportunities to be recruited for college teams, to participate in national club sports and Olympic development programs, and to experience promotions like basketball's 'March Madness,' among other harms."⁵⁹ In addition to these sport-specific harms, plaintiffs also claimed that such scheduling resulted in psychological harm on girls by inflicting a "stigmatic injury," "sending

54. *Id.* at 812. "To register as an official, a person must complete an application form indicating which sports he or she will officiate, pass a written examination on MHSAA rules and regulations, and pay a registration fee." *Id.* "Member schools who violate any of the MHSAA's rules are subject to a wide range of penalties including censure, probation, bans from regular season competition and MHSAA tournaments, forfeiture, and expulsion." *Id.*

55. *Id.* at 814.

56. *Id.* The necessity of MHSAA's structure and organization is evidenced by the fact that "90 percent of high schools . . . and 60 percent of middle schools are members of MHSAA." *Id.*

57. *Id.* at 807. With respect to plaintiffs other claims of injury, the "MHSAA agreed to add two additional girls' tournaments . . . based on input from MHSAA member schools and their female athletes." Chaudhry & Greenberger, *supra* note 11, at 41 n.61 The "MHSAA also agreed to conduct the girls' basketball semi-finals and finals in the [same] facility where the boys play . . . to use its best efforts to secure first-rate fast-pitch softball facilities, to ensure its golf tournaments will consist of the same number of holes of golf for girls and boys at each level of the tournament, and to treat boys and girls equally with respect to television, radio, newspapers, and written programs produced for MHSAA tournaments." *Id.*

58. *See Cmtys. for Equity*, 178 F. Supp. 2d at 807 (stating "Lower Peninsula girls' golf is played in golf's traditional season of spring, but Plaintiffs claim that in the case of golf in Michigan, the non-traditional season of fall is far superior to the spring season, and fall is when Lower Peninsula Michigan boys play golf").

59. Chaudhry & Greenberger, *supra* note 11, at 41 n.60.

them the message that they are 'second class citizens' whose sports must be fit inscheduled around the existing boys' sports."⁶⁰

C. MHSAA Justifications: The Legitimate Reasons for Nontraditional Sports Seasons

The MHSAA countered the plaintiffs' allegations of harm by arguing "that the girls' sports at issue are scheduled in superior or equal playing seasons" that maximize female participation in athletics in the state.⁶¹ The MHSAA presented several justifications for scheduling the various sports in nontraditional seasons, but the district court ultimately rejected all of them.⁶²

1. "Logistical Concerns:" Limitations on Facilities, Officials, and Coaches⁶³

The first justification raised by the MHSAA was that serious logistical concerns existed concerning facilities, officials, and coaches.⁶⁴ The MHSAA argued that there were not enough gymnasiums, soccer fields, and pools in Michigan to schedule basketball, soccer, and swimming concurrently.⁶⁵ The combination of these seasons "would have the effect of reducing participation opportunities for both boys and girls by forcing schools to cut team size or freshman or junior varsity teams" altogether in order to provide adequate facilities.⁶⁶ Applying the heightened level of scrutiny, however, the court found that the MHSAA's evidence was insufficient to meet its burden of production and persuasion.⁶⁷ Therefore, the MHSAA failed to justify the differential treatment.⁶⁸ The court also rejected the argument

60. *Id.* See *Cmtys. for Equity*, 178 F. Supp. 2d at 815 (quoting John Roberts, the MHSSA executive director, as having written that "Boys' sports were in [MHSAA member] schools first and girls' sports, which came later, were fitted around the pre-existing boys program" (alteration in original)).

61. *Cmtys. for Equity*, 178 F. Supp. 2d at 839.

62. *Id.*

63. *Id.* at 839-42.

64. The MHSAA contends that the existing seasons are necessary based on logistical concerns to ensure "the greatest number of participation opportunities in interscholastic sports." *Id.* This can only be accomplished by "being able to sponsor freshman and junior varsity teams, larger squads, and maximum playing time for the most" students possible. *Id.*

65. *Id.* at 840.

66. *Id.*

67. *Id.*

68. The court found the evidence insufficient to demonstrate that schools have inadequate facilities since the evidence presented was "almost exclusively anecdotal." *Id.*

that other states, where athletic seasons for both genders are scheduled concurrently, had lower participation numbers than in Michigan.⁶⁹

The MHSAA also contended that there were insufficient numbers of coaches and officials in Michigan to schedule sports such as soccer and swimming concurrently for both boys and girls.⁷⁰ The court rejected this justification as well, finding once again that the evidence presented by the MHSAA was insufficient.⁷¹ Furthermore, the court noted that “[t]hirty-seven [other] states, as well as Upper Peninsula schools, are able to schedule boys’ and girls’ soccer concurrently. Presumably, the Upper Peninsula and those other states have enough officials and coaches.”⁷²

2. High School Athletes’ Preference for Current Seasons⁷³

Second, the MHSAA offered survey evidence asserting that Michigan girls and member schools prefer to play in the current seasons.⁷⁴ While the survey did purport to show that a clear majority of female students as well as member schools prefer the current seasons, the court concluded that the survey suffered from “design flaws and bias” and refused to rely upon it to establish a legitimate justification for the MHSAA’s current scheduling of sports seasons.⁷⁵ The court also noted that if the current seasons were found to violate

69. *Id.* at 841-42. “The MHSAA points to the high ranking of Michigan among the states for numbers of boys and girls participating in various sports [is] evidence that the current scheduling of seasons maximizes participation opportunities” and other states that schedule seasons concurrently have lower participation numbers because scheduling in those states “creates problems that decrease participation opportunities for students.” *Id.* at 841. The court rejected this argument finding it “circumstantial evidence that simply proves little.” *Id.*

70. *Id.* at 842.

71. Regarding the insufficient number of coaches, the court stated, “[T]he empirical evidence on this point was too sparse to make a finding that this is true. The circumstantial evidence that logistical problems could be resolved or would not exist in the first place was just as strong.” *Id.*

72. *Id.*

73. *See id.* at 844-45.

74. *Id.* at 842-44. The MHSAA commissioned Western Michigan University’s Evaluation Center to conduct the survey after the CFE filed its lawsuit. *Id.* at 842-43.

75. *Id.* at 843. The court found the survey of female students suffered from design flaws and bias because (1) “the survey listed only potential negative consequences of moving the girls’ seasons at issue” while “[n]o benefits of changing the seasons were presented; (2) only 60 of the MHSAA’s 729 member schools participated”; (3) “only one-third of the girls in [those] 60 schools were surveyed, and nearly one-third of [those] respondents participated in sports that are not played in disadvantageous seasons”; and (4) “the original, written survey responses were destroyed . . . before Plaintiffs or their expert could review them.” *Id.*

the law, they would “violate the law regardless of the preferences of the member schools.”⁷⁶ In addition, the court noted that while several accomplished female athletes testified about the disadvantages of the current seasons, the MHSAA provided no testimony of any girl or parent who favored keeping the current seasons.⁷⁷

3. Establishing an “Independent Identity”⁷⁸

Finally, the MHSAA asserted that its current nontraditional seasons give girls an “independent identity,” a benefit resulting from having their own independent athletic seasons.⁷⁹ For example, the association argued “that playing basketball in the fall rather than the traditional winter season benefits girls because they do not have to compete with boys’ basketball for attention . . . and thus receive increased recruiting opportunities and media coverage.”⁸⁰ The MHSAA offered testimony to support its assertion that having separate basketball seasons demonstrated that girls bring fans to their own games and can be successful without a boys’ team in the same season.⁸¹ However, the court instead found that separate basketball seasons sent a message that girls’ basketball programs are merely a secondary consideration of the MHSAA and must be scheduled around the boys’ programs in the regular season.⁸² The court went on to note that “[g]irls’ basketball programs . . . are just as important as boys’ programs, and girls deserve to play in the ‘regular’ season, too.”⁸³

76. *Id.* at 844. Stating that “[t]o the extent that the Court has considered preferences of the member schools . . . it has only been in the context of assuming that member schools may have had actual non-discriminatory reasons . . . for preferring certain seasons for certain sports over others,” the court again questioned the design of the questionnaire form, while also pointing out a history of the MHSAA making changes to scheduling unilaterally without regard to member preference. *Id.* at 844-45.

77. *Id.* at 843.

78. *See id.* at 845.

79. *Id.*

80. *Id.* “The concept of having an ‘independent identity’ is . . . based on the premise that boys will ‘overshadow’ girls in fan support and media coverage if boys and girls play basketball in the same season.” *Id.*

81. *Id.*

82. The court found that “separate basketball seasons sends a message that the girls’ basketball programs cannot be ‘fitted in’ to the ‘regular’ basketball season of winter.” *Id.*

83. *Id.*

D. Holding and Subsequent Case History

After reviewing all of the testimony and other evidence presented by CFE and the MHSAA, the district court held that the current scheduling of athletic seasons violated the Equal Protection Clause, Title IX, and Michigan state law (ELCRA). First, the court found that the MHSAA was a state actor, and thus subject to liability for constitutional violations under the Fourteenth Amendment.⁸⁴ Next, the court found that the scheduling of six girls' sports in nontraditional seasons constitutes gender classification, which triggers a presumption of discrimination based on gender and warrants a heightened level of scrutiny by the court. The MHSAA was then required to justify its classification by providing an "exceedingly persuasive" justification that demonstrated that the classification "serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives."⁸⁵ The court found that the MHSAA failed to meet its burden in this regard, because "none of the girls' sports at issue are scheduled in the advantageous season."⁸⁶ Additionally, the court held that while the MHSAA's justifications were "important," the discriminatory scheduling was not "substantially related to the achievement of those asserted objectives."⁸⁷ The court also found that the MHSAA's empirical

84. The court relied on the Supreme Court ruling in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 290 (2001), which found the TSSAA to be a state actor. The Supreme Court in that case considered the facts relating to the structure and role of the TSSAA in the administration of high school athletics in the state of Tennessee. The Court noted, "the nominally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is not substantial reason to claim unfairness in applying constitutional standards to it." *Id.* at 298. The court in *Communities for Equity* held that the nature and function of the MHSAA was virtually identical to that of the TSSAA, and, similarly to the TSSAA, the MHSAA was a state actor. 178 F. Supp. 2d at 847.

85. *Cmtys. for Equity*, 178 F. Supp. 2d at 848.

86. *Id.* at 850. To determine the less advantageous season, the court examined several factors. For example, the court took into account when the corresponding college season is played, the ease of recruitment for college sports, weather considerations, length of season, and the possibility for interstate competition. *Id.* at 817-39.

87. *Id.* at 850. *See id.* (explaining that "The MHSAA argue[d] that its current scheduling system maximizes high school athletic participation opportunities by creating optimal use of existing facilities, officials, and coaches [thus allowing] more teams in a sport or more spots on a team"). Additionally, the MHSAA claimed that the quality of the programs are maximized by the current scheduling as a result of better officials and coaches being able to work over two separate seasons. *Id.*

evidence in support of its justifications was “wholly insufficient.”⁸⁸ Therefore, the court concluded that the MHSAA violated the Fourteenth Amendment by its current scheduling of seasons for the sports at issue.⁸⁹

The court held that the MHSAA was also subject to liability under Title IX. First, the court found that the MHSAA had the required “controlling authority” necessary to be responsible for the scheduling of interscholastic sports in Michigan.⁹⁰ Therefore, the MHSAA had “implicitly contracted with the federal government and had notice to obey the conditions under which member schools receive federal funding.”⁹¹ Furthermore, the court found that the plaintiffs established a Title IX violation by demonstrating that the MHSAA’s sports season schedule denied Michigan high school female athletes the benefits that they would “otherwise enjoy” if they were male.⁹² Finally, the court rejected the MHSAA’s argument that Title IX claims require proof of animus or discriminatory motive on the part of the MHSAA.⁹³ According to the court, the unequal opportunities for girls resulting from the scheduling indicated that the policy was discriminatory on its face and thus violated Title IX.⁹⁴

After concluding that the MHSAA’s scheduling of girls’ sports seasons discriminated against girls and that the MHSAA cannot justify such discrimination, the district court ordered the MHSAA to submit to the court a compliance plan detailing how the association would bring its scheduling of high school sports into compliance with the law by the 2003-2004 school year.⁹⁵ In July 2002, the MHSAA

88. In the eyes of the court, the MHSAA provided only anecdotal and weak circumstantial evidence, which did not sufficiently justify forcing girls to bear all of the disadvantageous playing seasons alone to solve possible logistical problems. *Id.* at 851.

89. *Id.*

90. *Id.* at 855.

91. *Id.*

92. *Id.* The court reasoned that scheduling sports in disadvantageous seasons for one sex violates Title IX when “the resulting harms are substantial enough to deny equal participation opportunities and benefits” for that gender. *Id.* at 856.

93. According to the court, in any Title IX case, “[d]ifferent treatment can still result in equal opportunities for boys and girls, but it also may not, which is the reason for analyzing and comparing the benefits and the burdens of the differential treatment.” *Id.* at 856.

94. This part of the court’s conclusion was based on the evidence described in the findings of fact, which showed that all of the girls’ sports at issue “are subject to disadvantages,” as a result of being denied the right to play their sports in the same season that the boys do. *Id.* at 857. In the case of girls-only volleyball, they had been denied the right to play during volleyball’s traditional season, as all boys-only teams do. *Id.* at 856.

95. The court noted that the association did not have to combine seasons in any particular sport but that if it did not, girls and boys must share in the advantages and disadvantages of the resulting scheduling. *Id.* at 861-62.

submitted its plan to switch girls' golf, swimming, and tennis with the boys' seasons in those sports; girls would retain the current nontraditional seasons for basketball, volleyball, and soccer.⁹⁶ The district court rejected this plan, finding that the plan disadvantaged a much larger percentage of girls than boys and that the MHSAA chose to switch those sports that suffered the least substantial harms.⁹⁷ In addition, the court found that even if the MHSAA switched all sports other than basketball and volleyball—the two sports that the MHSAA most vigorously opposed switching—a larger percentage of girls than boys would still be disadvantaged, because these were the two most popular girls' sports.⁹⁸ Therefore, the district court ordered that the girls' basketball and volleyball seasons must be switched in order to achieve equity.⁹⁹ The MHSAA subsequently submitted a second compliance plan switching these seasons, which was approved by the district court despite objections by the plaintiffs.¹⁰⁰

The MHSAA appealed the ruling of the district court, and, on appeal, the Sixth Circuit, finding a violation of the Equal Protection Clause, affirmed the district court's decision and declined to address either the Title IX or the state law claims.¹⁰¹ The U.S. Supreme Court granted *certiorari* in 2005, only to vacate and remand the case back to the Sixth Circuit in light of a recent opinion, *City of Rancho Palos Verdes v. Abrams*.¹⁰² On August 16, 2006 the Sixth Circuit once again

96. *Id.* at 862.

97. *See* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220, at *15-16 (W.D. Mich. Aug. 1, 2002) (injunctive order and opinion).

98. *Id.*

99. *Id.* at *16. The court ordered the MHSAA to switch girls' volleyball and basketball and also to either (1) "combine all [other] sports so that both sexes play in the same season"; (2) reverse two girls' seasons with two boys' seasons; or (3) combine seasons in two sports and reverse seasons in one of the remaining sports at issue. *Id.* at *19-20.

100. *See* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 377 F.3d 504, 514 (6th Cir. 2004). In addition to switching the girls' volleyball and basketball seasons the second plan chose to switch girls' tennis and golf seasons with the boys' seasons in those sports in the Lower Peninsula and in the Upper Peninsula, switch girls' soccer to the fall. *See* Amended Compliance Plan, Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, No. 1:98-CV-479 (W.D. Mich. filed Oct. 30, 2002), available at <http://www.mhsaa.com/news/amendplan.pdf>.

101. *Cmtys. for Equity*, 377 F.3d at 514.

102. *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005). *See also* *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S. Ct. 1453 (2005). The Supreme Court vacated the Sixth Circuit's decision because the circuit court did not consider whether Title IX's statutory remedy precluded Equal Protection relief. *Cmtys. for Equity*, 544 U.S. at 1012. *Rancho Palos Verdes* addressed this issue of preclusion, holding that a remedy under 42 U.S.C. § 1983 is not available when there is a provision of express, private means of redress in the statute which is an indication that Congress intended the remedies in the substantive statute to be exclusive. *Rancho Palos Verdes*, 544 U.S. at 121.

upheld the district court's 2001 opinion that the current setup of seasons discriminates against girls in some sports.¹⁰³ The MHSAA once again appealed, asking for a rehearing *en banc* before all of the Sixth Circuit judges.¹⁰⁴ This appeal was denied,¹⁰⁵ leaving the MHSAA one final option—an appeal to the U.S. Supreme Court.¹⁰⁶ If the appeal is not heard, the significance of the Sixth Circuit decision will have a far reaching impact on Title IX litigation in interscholastic sports.

III. SETTING THE BAR TOO HIGH: A CRITIQUE OF THE SIXTH CIRCUIT APPROACH TO TITLE IX AND EQUAL PROTECTION LITIGATION AT THE INTERSCHOLASTIC LEVEL

The combination of holdings over almost ten years of litigation in the *Communities for Equity v. MHSAA* cases has led to an excessively high standard of scrutiny that is applied broadly to virtually any decision made between male and female athletic programs. By holding the MHSAA liable under both Title IX and Section 1983, the court treated the scheduling decisions as facial gender classifications, which require intermediate scrutiny by the court, thus creating a presumption of discrimination and shifting the burden to the defendant athletic association to prove a substantial governmental interest.¹⁰⁷ As one of the first major in-depth cases involving Title IX and Equal Protection compliance in interscholastic athletic programs, this case and the approach taken by the Sixth Circuit in *Communities for Equity* will most likely have major implications regarding the decisions made nationally, not just for

103. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006).

104. Press Release, Michigan High School Athletic Association, MHSAA Petition Filed In Seasons Litigation (Aug. 31, 2006), *available at* <http://www.mhsaa.com/news/enbancpetition.html>.

105. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 02-1127 (6th Cir. Dec. 7, 2006).

106. The MHSSA filed a petition for *certiorari* on January 29, 2007. See Petition for Writ of Certiorari, *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 75 U.S.L.W., No. 06-1038 (U.S. Jan. 29, 2007). According to the MHSAA's Communications director, John Johnson, the appeal will contend that the Sixth Circuit should have based its ruling on Title IX alone and not addressed violations of the Equal Protection Clause and Michigan's Elliot-Larsen Civil Rights Act, both of which place the burden of discriminatory proof on the defendant MHSAA. Joe Slezak, *Sports Seasons Case Headed Back to Supreme Court*, DEARBORN PRESS & GUIDE, Dec. 17, 2006, http://www.pressandguide.com/stories/121706/spo_20061217011.shtml.

107. *Cmtys. for Equity*, 459 F.3d at 693.

interscholastic athletics, but also quite possibly reaching into the classrooms themselves.

A. Facial Gender Classifications and Intermediate Scrutiny: The VMI Doctrine

The Sixth Circuit's holding that sports season scheduling constitutes a facial gender classification has important legal ramifications on the analysis of the possible justifications put forth by the MHSAA.¹⁰⁸ According to the Supreme Court, the establishment of a facial gender classification triggers a shift in the burden of discriminatory proof to the defendant.¹⁰⁹ The defendant must provide an "exceedingly persuasive" justification for the classification.¹¹⁰ However, despite the Sixth Circuit's holding to the contrary, while this may be an excessively high standard to meet, it is not entirely clear the MHSAA failed to satisfy even this heightened burden of proof.

1. The "Exceedingly Persuasive" VMI Doctrine

In analyzing the plaintiffs' Equal Protection argument, the district court based its analysis on the Sixth Circuit decision in *United States v. Virginia* ("VMI").¹¹¹ In *VMI*, the Court addressed the constitutionality of the Virginia Military Institute's (VMI) all-male admissions policy, ultimately concluding that the policy of admitting males was facially discriminatory and thus violated the Equal Protection Clause.¹¹² The Court found that VMI's policy denied women the opportunity to obtain the "unique educational benefit" that VMI offered to males.¹¹³ Furthermore, the Court rejected Virginia's proposed parallel program for women established by the state because it was inherently unequal and inferior to VMI.¹¹⁴

108. *Cmtys. for Equity*, 178 F. Supp. 2d at 848 ("It is undisputed that Defendant intentionally treats boys and girls differently by scheduling their interscholastic sports seasons at different times of the year.").

109. *See United States v. Virginia (VMI)*, 518 U.S. 515, 532-33 (1996).

110. *Id.*

111. *Id.*

112. The Court found the admissions policy was undeniably facially discriminatory because men were admitted to a one-of-a-kind military college, and women were not. Women, therefore, were denied the opportunity to receive the benefit of an educational model that was "not available anywhere else in Virginia." *Id.* at 540.

113. *Id.*

114. The most notable difference in Virginia's proposed parallel program, the Virginia Women's Institute for Leadership (VWIL), was in its scheduling and degree offerings. VWIL did not offer degrees or even courses in engineering or advanced math and

In finding VMI's admission policy facially discriminatory, the Court applied intermediate scrutiny, making the facial gender classification presumptively unconstitutional and shifting the burden to the state to establish an "exceedingly persuasive justification" for its gender-based classification.¹¹⁵ Under this approach, the burden of justification was entirely on the state to show at the very least that the challenged classification served "important governmental objectives" and also that the discriminatory means employed were "substantially related to the achievement of those objectives."¹¹⁶ According to the Court, the state failed to meet this burden.¹¹⁷ The Court held that separate military institutions for men and women were unconstitutional because the state did not demonstrate "substantial equality" in the "educational opportunities" for men and women.¹¹⁸

2. The Sixth Circuit's Approach

Finding that the MHSAA's scheduling decisions were made on the basis of sex (i.e., the sex of the athletes determines in which seasons they play), the district court analyzed the scheduling of the Michigan athletic seasons under VMI's standard for a facially gender-based classification.¹¹⁹ Once the court determined that the scheduling of seasons constituted a "classification" that differentiates between males and females on its face, it was not necessary for the plaintiffs to

physics. *Id.* at 526. Furthermore, the Court found that VWIL's military training employed a "cooperative" (rather than VMI's "adversative" educational method) and offered no opportunity for women to experience the unique and rigorous military training that only VMI could offer. *Id.* at 548.

115. The Court described the intermediate scrutiny to justify gender-based classifications: "Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.'" *Id.* at 532-33.

116. The VMI Court further defined its standard by explaining, "[t]he 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.* at 533.

117. *Id.* at 554.

118. *Id.* The Court found that VWIL's program as a whole was a "pale shadow" of VMI's; in making the determination, the Court examined a wide range of educational considerations including "the student body, faculty, course offerings, and facilities," as well as "funding, prestige, alumni support, and influence." *Id.* at 552-53.

119. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 848 (W.D. Mich. 2001). The court found that the MHSAA intentionally treats boys and girls differently in two ways: (1) some of the sports offered to both girls and boys (e.g., basketball and golf) are played in a different season for girls than for boys; (2) volleyball, in which the MHSAA only sanctions a girls' team, is played in a nontraditional season, yet no sport only offered to boys (e.g., football or wrestling) is scheduled in a nontraditional season. *Id.*

prove that the MHSAA had any discriminatory animus or purpose for a Fourteenth Amendment violation to be found.¹²⁰ Rather, plaintiffs only had to show that the MHSAA intended to treat girls differently than boys in scheduling their sports seasons.¹²¹ Now, under the heightened standard of review, the MHSAA had the burden of showing that scheduling team sports in different seasons based on gender “serves important governmental objectives and that the chosen scheduling is substantially related to the achievement of those objectives.”¹²² Therefore, the MHSAA had to meet its burden of establishing an “exceedingly persuasive” justification for treating girls and boys differently.¹²³

By finding that the scheduling of seasons discriminates between genders on its face, the district court and the Sixth Circuit expanded the scope of intermediate scrutiny, making virtually all gender-separate programs subject to this heightened standard.¹²⁴ However, the decision to have separate sports teams based on gender has long been recognized by the courts as a legitimate classification.¹²⁵ Once the decision to have separate teams for males and females is made, there must be some flexibility within the Equal Protection Clause analysis for decisions to be made with regard to the teams without those decisions being further classified as gender-based. Under the Sixth Circuit’s approach, any decision made in which the gender-based teams do not mirror each other will necessarily treat girls and boys differently and thus become subject to potential equal

120. *Id.*

121. *Id.* at 848-49.

122. *Id.* at 848 (quoting *VMI*, 518 U.S. at 532-33) (internal quotation marks omitted).

123. *Id.*

124. See Reply Brief of Petitioner at *1-5, *Mich. High Sch. Athletic Ass’n v. Cmty. for Equity*, 544 U.S. 1012 (2005) (No. 04-1021), 2005 WL 856035. See generally, Courtney E. Schafer, *Following the Law, Not the Crowd: The Constitutionality of Nontraditional High School Athletic Seasons*, 53 DUKE L. J. 223, 251 (2003), available at <http://www.law.duke.edu/shell/cite.pl?53+Duke+L.+J.+223>.

125. See *O’Connor v. Bd. of Educ. of Sch. Dist. 23*, 449 U.S. 1301, 1307 (1980). The Court held:

It seems . . . that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls’ programs and deny them an equal opportunity to compete in interscholastic events.

Id. at 1307. See also *Cape v. Tenn. Secondary Sch. Athletic Ass’n*, 563 F.2d 793 (6th Cir. 1977) (finding that without gender-separated teams, girls effectively could not participate in athletics).

protection claims.¹²⁶ Moreover, this approach makes it excessively easy for a plaintiff to shift the burden of proof to the defendant since any difference between boys' and girls' teams will arguably have disadvantageous consequences.¹²⁷ The Sixth Circuit standard could therefore expand to potentially expose school administrators, athletic directors, and even coaches themselves to Equal Protection claims, simply by their having made a decision regarding a gender-based team.¹²⁸

3. Focus on the Individual's Ability to Receive Benefits, Not the Fundamental Benefit of the Opportunity to Participate

Under *VMF's* standard, once the scheduling of the athletic seasons was determined to be facially discriminatory, the burden shifted to require that the MHSAA provide an "exceedingly persuasive" justification.¹²⁹ However, in rejecting the justification provided by the MHSAA, both the district court and the Sixth Circuit focused on the disadvantages incurred by individual elite female athletes, who comprise only a small percentage of Michigan's total number of female athletes.¹³⁰ The courts' analysis centered on the

126. Under the Sixth Circuit's approach potentially "every trivial detail of how men's and women's programs are implemented [could become] a constitutional case." Reply Brief of Petitioner, *supra* note 124, at *5.

127. For example, the MHSAA argues that "scheduling practice times in a shared gymnasium or assigning referees to officiate games will inevitably lead to minor differences that someone will deem as disadvantageous" but yet will never garner an "exceedingly persuasive" justification. *Id.*

128. It is argued that, if boys and girls basketball is played in the same season, [T]he over 300 coaches in the state who presently coach both the boys' and girls' teams . . . will be forced to choose which gender-based team to coach. Accordingly, half of the athletes that they presently coach will have to adjust to a different coach, who may likely be less experienced and less qualified than the present coach. If an experienced and accomplished coach opts to coach the boys' basketball team in the winter, thus causing that coach's former girls' basketball team to thereafter be coached by a less experienced and/or less qualified coach [in this circumstance, under the Sixth Circuit approach,] the school district and the coach have violated 42 U.S.C. § 1983 by denying the female student-athletes equal protection because they no longer have the benefit of the coach's experience and expertise.

Brief of Amicus Curiae Basketball Coaches Association of Michigan, Inc. at *11, *Mich. High Sch. Athletic Ass'n v. Cmty. for Equity*, 544 U.S. 1012 (2005) (No. 04-1021), 2005 WL 1334151.

129. *Cmty. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 692 (6th Cir. 2006).

130. For instance, the district court found that girls playing basketball in the fall are disadvantaged because: (1) they do not have the opportunity to participate in special events for professional teams, or in national "shoot-outs" such as the Nike and Blue Star shootouts; (2) they "do not get to participate in 'March Madness' or the excitement and publicity surrounding this time period"; (3) they must play one game a week on Thursday

impact that current MHSAA scheduling has on college scholarships, recruiting, and programs disconnected from the MHSAA. Such programs included: United States Volleyball Association matches; club swimming; the American Youth Soccer Organization; the United States Soccer Federation; the Olympic Development Program.¹³¹ However, this focus on the disadvantages associated with developing and preparing athletes for collegiate-level competition ignored the purpose and goals of the MHSAA itself.

In attempting to define *VMF*'s "substantially equal" standard, the MHSAA and various *amici curiae* assert that interscholastic athletic programs are designed not as a breeding ground for future collegiate athletes, but rather "to enhance the educational experiences" for all high school athletes, to "promote participation and sportsmanship," and "to maximize the achievement of educational goals."¹³² The MHSAA Articles of Incorporation also provide that its goals include "the interest in physical welfare and fitness of the students participating therein by giving the opportunity to participate in athletics designed to meet the needs and abilities of all."¹³³ Thus, the MHSAA recognizes that high school athletics serve a greater purpose than developing only elite level athletes; the organization seeks to provide the greatest number of athletic opportunities to all students of all abilities.

Had the Sixth Circuit focused its analysis on the overall opportunity to participate, rather than on individual benefits to female athletes, the "exceedingly persuasive" standard likely would have been satisfied.¹³⁴ The MHSAA argued that the current scheduling system maximizes opportunities for participation "by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team."¹³⁵ Statistics show that Michigan ranks as one of the highest among all states in total participation by male and female high school athletes.¹³⁶ The MHSAA contends that these high participation numbers, especially with regard to female athletes, show that the

(a school night) to avoid conflicting with football, although that game could be played on Fridays in the winter; and (4) they are less likely to make the Parade All-American lists that come out in March, because they have been "forgotten." *Cmtys. for Equity vs. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 818-20 (W.D. Mich. 2001).

131. *Id.* at 817-835.

132. Reply Brief of Petitioner, *supra* note 126, at *4.

133. *Cmtys. for Equity*, 178 F. Supp. 2d at 810 (quoting MHSAA Articles of Incorporation).

134. Reply Brief of Petitioner, *supra* note 126, at *3.

135. *Cmtys. for Equity*, 178 F. Supp. 2d at 810.

136. NFHS Survey, *supra* note 20.

current scheduling system maximizes student athletic participation and therefore promotes its goal of providing athletic opportunities to the maximum number of student athletes.¹³⁷ Furthermore, statistics suggest that states forced to schedule both sexes in the same season experience drops in participation rates as a result of the change.¹³⁸

Although the district court conceded that the MHSAA's logistical concerns were important for maintaining the maximum opportunity for participation, it ultimately held that under the *VMI* standard, the evidence failed to demonstrate that the scheduling was "substantially related" to the achievement of the objectives.¹³⁹ However, by focusing the objective on individual development of female athletes hoping to play at the collegiate level, the court ensured the MHSAA could not meet its burden under *VMI*. If the governmental objective focused broadly on maximizing female athletic participation opportunities, the MHSAA's justification for scheduling sports in nontraditional seasons could be exceedingly persuasive.

B. Knock-Out Punch: Are Section 1983 Claims Precluded by Title IX?

After the Sixth Circuit affirmed the district court's determination that the MHSAA's scheduling violated the Equal Protection Clause, the MHSAA filed a petition for *certiorari* in the Supreme Court.¹⁴⁰ However, instead of addressing the case on the

137. *Cmtys. for Equity*, 178 F. Supp. 2d at 841.

138. A report by the National Federation of High School Athletic Associations shows that:

North Dakota reported a 10.6% drop in girls' basketball participation and a 7% drop in volleyball participation; South Dakota, within two years of the change, dropped 13.1% in girls' basketball; Montana, within two years of the change, dropped 10.9% in girls' basketball and 8.1% in girls' volleyball; and in West Virginia, since the change was made in 1985-86, the number of girls and boys playing high school basketball has dropped 19.4% and 27.4% respectively.

Brief for Michigan Interscholastic Athletic Administrators Association as Amicus Curiae Supporting Petitioner at *5, *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 113 (2005) (No. 04-1021), 2005 WL 1334153 (citing Memorandum of Jack Roberts, Executive Director, National Federation of High School Athletic Associations, to Representative Counsel (November 5, 2004)).

139. *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 459 F.3d 676, 693-94 (6th Cir. 2006) (discussing the district court holding that "even if the MHSAA had sufficiently proven their point about athletic participation opportunities, 'that would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve logistical problems'"; noting that "a large gross-participation number alone does not demonstrate that discriminatory scheduling of boys' and girls' athletic seasons is substantially related to the achievement of important government objectives").

140. *Id.* at 679. In *Cmtys. for Equity v. Mich. High School Athletic Ass'n (CFE I)*, 377 F.3d 504 (6th Cir. 2004), the Sixth Circuit affirmed only on the grounds of the Equal

merits, the Court vacated the circuit court decision and remanded the case for further consideration, directing the Sixth Circuit to reconsider the case in light of *Rancho Palos Verdes v. Abrams*.¹⁴¹ The Court's order required the Sixth Circuit to consider whether Title IX provides the exclusive remedy for the alleged violations and thus precludes plaintiffs from seeking additional remedies under Section 1983.¹⁴²

Currently, federal courts disagree on whether a plaintiff asserting a Title IX claim may also assert a Section 1983 claim based on a constitutional privilege or Title IX itself.¹⁴³ The Second, Third, and Seventh Circuits have held that Congress intended Title IX to be exclusive, therefore precluding additional Section 1983 claims.¹⁴⁴ Conversely, the Sixth, Eighth, and Tenth Circuits have held that Title IX does not preclude such claims predicated on either constitutional or Title IX violations.¹⁴⁵

Protection violation. Finding that violation sufficient to mandate a change in seasons, the court did not reach the Title IX or state-law issues. *See id.* at 513.

141. Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity, 544 U.S. 1012 (2005); *Rancho Palos Verdes v. Abrams*, 544 U.S. 133 (2005).

142. *Cmtys. for Equity*, 459 F.3d 676 at 679-80. Following the grant/vacate/remand order's procedure, the result in *CFE I* must be altered:

Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.

Id. (quoting from *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (ellipsis in original)).

143. *Id.* at 689.

144. For courts precluding a plaintiff from asserting an additional claim under Section 1983 for a violation of Title IX itself or other constitutional rights, see, e.g., *Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756-59 (2d Cir. 1998) (holding that a plaintiff may not bring a Section 1983 claim based upon the violation of Title IX itself); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996) (holding Title IX preempts a claim under Section 1983 for a violation of the Fourteenth Amendment's Equal Protection Clause against school officials in their official and personal capacities); *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990) (holding that Title IX precludes Section 1983 claims based on the Fourteenth Amendment Equal Protection Clause against the school district).

145. For courts holding that Title IX does not preclude Section 1983 claims predicated on constitutional or Title IX violations see, e.g., *Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997) (holding that Title IX does not preclude claims brought under Section 1983 for a violation of either the Fourteenth Amendment or Title IX itself against university officials in their official and individual capacities); *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996) (holding that plaintiff's Section 1983 action to enforce independent constitutional rights was not barred by Title IX); *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir. 1996) (holding that Title IX does not preclude Section 1983 claims based on the Fourteenth Amendment's substantive Due Process Clause against state actors in their official and individual capacities and implying in *dicta* that Title IX would not preclude Section 1983 claims based on Title IX itself).

1. The *Rancho Palos Verdes* Line of Cases

In order to analyze the *Communities for Equity* case in light of *Rancho Palos Verdes*, the Sixth Circuit examined the line of cases leading up to that decision. The Supreme Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers* provides the basis for the Court's later decision in *Rancho Palos Verdes*.¹⁴⁶ The Court in *Sea Clammers* held that the plaintiffs could not use Section 1983 as a vehicle to enforce federal statutory laws where the acts themselves contained "unusually elaborate enforcement provisions."¹⁴⁷ Focusing on Congress's intent to provide a comprehensive enforcement scheme under the federal statute, the Court determined that the statute in question precluded private enforcement through Section 1983.¹⁴⁸ The Court has subsequently applied the *Sea Clammers* doctrine when deciding whether a federal statute precludes a plaintiff from indirectly asserting violations of that statute under Section 1983.¹⁴⁹

Several years later, the Court applied the *Sea Clammers* rule to the preclusion of a constitutional claim under Section 1983.¹⁵⁰ In *Smith v. Robinson*, the plaintiffs, parents of an eight-year-old boy with cerebral palsy, brought suit against a school district asserting violations of the Education of the Handicapped Act (EHA), Section 504 of the Rehabilitation Act of 1973, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment pursuant to Section 1983.¹⁵¹ The plaintiffs in *Smith* attempted to use Section 1983 to enforce a constitutional remedy in addition to the remedies available

146. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1 (1981). The plaintiffs in *Sea Clammers* were fisherman who worked off the coast of New York and New Jersey and brought suit under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (2000), the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1401, and 42 U.S.C. § 1983, claiming a violation of the preceding statutes as a result of damage to fishing grounds caused by polluters dumping sewage and other waste in the ocean. *Id.* at 4-5.

147. *Id.* at 13.

148. *Id.* at 20.

149. *See Wright v. City of Roanoke Redev. & Housing Auth.*, 479 U.S. 418, 423 (1987) (stating that Section 1983 provides a cause of action for violations of federal statutory rights unless "express provision or other specific evidence from the statute itself [shows] that Congress intended to foreclose such private enforcement"); *see also Suter v. Artist M.*, 503 U.S. 347, 355-56 (1992) (stating that Section 1983 may not enforce a violation of a federal statute "where Congress has foreclosed such enforcement of the statute in the enactment itself").

150. *Smith v. Robinson*, 468 U.S. 992 (1984).

151. *Id.* at 994.

under the EHA.¹⁵² The Court held that the plaintiffs' Section 1983 claim was precluded, because the constitutional claims were "virtually identical" to the statutory claim and Congress intended the statute to be the exclusive avenue through which a plaintiff should find redress.¹⁵³ Under these conditions, the Court concluded that the remedy provided under the statute subsumes the remedy for a constitutional violation under Section 1983.¹⁵⁴ The key issue, then, was whether Congress intended the statute to be the exclusive remedy through which the plaintiffs may assert their claims.¹⁵⁵

Finally, in *Rancho Palos Verdes*, the plaintiff brought suit against a municipal government after he was denied a permit to build a radio tower on his property.¹⁵⁶ The plaintiff brought claims under the Telecommunications Act (TCA), seeking damages and attorney's fees under Section 1983.¹⁵⁷ Citing the *Sea Clammers* doctrine, the Court analyzed whether Congress intended the judicial remedy expressly authorized in the TCA to "coexist with an alternative remedy available in a Section 1983 action" or whether the statute provided its own comprehensive enforcement scheme which would preclude a Section 1983 claim.¹⁵⁸ Noting that the TCA provided more restrictive remedies than remedies provided under the constitutional claim, the Court concluded that Congress intended the TCA remedies to be the exclusive relief available to a plaintiff and thus precluded relief under Section 1983.¹⁵⁹

152. *Id.* at 1009. The plaintiffs brought their Section 1983 claim against the school district for allegedly denying their son a "free appropriate public education." *Id.* at 994-95. However, the EHA due process claim did not involve the same facts or legal theories and thus would have warranted different relief. *Id.* at 1015.

153. *Id.*

154. *Id.*

155. *Id.* In analyzing this question, the Court looked closely at the legislative history of the EHA reasoning that the "carefully tailored administrative and judicial mechanisms" in the statute expressly communicated Congress' intent to preclude reliance on Section 1983. *Id.* at 1109-12.

156. 544 U.S. 113, 118 (2005).

157. *Id.* Plaintiff essentially used both statutes to enforce the violation of rights created by the TCA. *Id.* at 118.

158. *Id.* at 119-20.

159. *Id.* at 126-27. Because the administrative and judicial remedies authorized in the TCA are detailed, yet more restrictive than the remedies available under Section 1983, the Court reasoned that it would contravene Congress's intent to allow the plaintiff to recover under both statutes where Congress had provided in the TCA precisely the remedies it considered appropriate. *Id.* at 1459-62.

2. The Circuit Split: Application of the *Sea Clammers/Rancho Palos Verdes* doctrine to Title IX

Although there is a very clear split among the federal courts concerning the preclusion of Section 1983 claims by Title IX, the Sixth Circuit, relying on prior case law, claimed its approach was unaffected by *Rancho Palos Verdes*, despite the Supreme Court's order to reconsider its decision in light of the case.¹⁶⁰ The *Communities for Equity* court, in reliance on its previous decision in *Lillard*, held that Title IX does not provide plaintiffs an exclusive remedy, thus rendering the *Sea Clammers* doctrine inapplicable and ultimately allowing plaintiffs to seek remedies under Section 1983 as well as under Title IX.¹⁶¹ Acknowledging *Sea Clammers*, the court recognized that the key inquiry for the federal courts is "whether Congress intended the remedies in the substantive statute to be exclusive."¹⁶² Stating that it was bound by *Lillard*, the court went on to conclude that the *Sea Clammers* doctrine did not apply to Title IX, because Title IX is not comprehensive enough to be exclusive.¹⁶³

As the dissent points out, however, the Second, Third, and Seventh Circuits have all held that *Sea Clammers* does apply and Title IX provides an exclusive remedy.¹⁶⁴ Since the Supreme Court concluded that Title IX contains an implied damages remedy, these circuits reason that Title IX "gives plaintiffs access to the full panoply of judicial remedies."¹⁶⁵ The reliance of the Sixth Circuit on its decision in *Lillard* improperly ignores *Rancho Palos Verdes* altogether and goes against the combination of Supreme Court rulings that appear to support preclusion of Section 1983 claims by Title IX.¹⁶⁶

160. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 689 (6th Cir. 2006).

161. *Id.* at 689-91.

162. *Id.* at 684.

163. *Id.* at 689. "The *Lillard* court found that the dearth of remedies authorized in Title IX, either private or public, indicated that Congress did not intend to preclude recovery under [Section] 1983 when it enacted Title IX." *Id.* (citing *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723 (6th Cir. 1996)).

164. *Id.*

165. *Id.* (quoting *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862-63 (7th Cir. 1996)) (stating that *Waid* held "that such access indicates Congress's intent to preclude reliance on [Section] 1983").

166. *See Rancho Palos Verdes*, 544 U.S. 113 (2005) (holding that the availability of a private judicial remedy, while not conclusively establishing congressional intent to preclude Section 1983 relief, does give rise to an "ordinary inference that the remedy provided in the statute is exclusive."); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72 (1992) (allowing both compensatory and punitive damages in a private action for gender discrimination under Title IX, and holding that "Congress did not intend to limit the

Therefore, as suggested in the *Communities for Equity* dissent, “because the Supreme Court has held that Congress intended to create a private judicial remedy in Title IX, and because the non-existence of such a remedy has repeatedly given rise to finding that Congress did not intend to preclude relief sought through Section 1983,” Congress did intend for Title IX to be the “exclusive avenue” through which a plaintiff may assert a gender-based equal protection claim.¹⁶⁷ Under this approach, plaintiffs’ Section 1983 claims would be precluded, which would in turn lift the court’s intermediate scrutiny analysis of the MHSAA’s athletic season scheduling, leaving the case to be scrutinized solely under the less burdensome Title IX standard.

C. Negative Implications of Sixth Circuit Ruling

Although *Communities for Equity* and other similar organizations claim it as a victory for gender equity in women’s athletics, the Sixth Circuit’s ruling may ultimately have a far more negative impact at the interscholastic level. As the first major piece of litigation to provide an in-depth analysis of both Title IX and the Equal Protection Clause with regard to interscholastic athletics, the *Communities for Equity* decision has the potential to have a significant impact on the national level. This decision, while touted as a “victory for female athletes,” also has broader negative implications with respect to overall female athletic participation levels and loss of local control over interscholastic athletics.

1. Negative Impacts on Girls’ Participation in Interscholastic Athletics

While the Sixth Circuit affirmed the district court’s rejection of the MHSAA’s argument that evidence of high participation rates for high school sports in Michigan is due to the current scheduling system, statistics from other states show that switching seasons for girls’ sports can lead to a significant decrease in participation.¹⁶⁸ Although dismissed as circumstantial evidence,¹⁶⁹ there does seem to be a link between scheduling and logistical concerns, such as the availability of facilities and resources. In over half the states where basketball is scheduled in the same season for both boys’ and girls’

remedies available in a suit brought under Title IX”); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (finding Congress intended to create a private judicial remedy in Title IX).

167. *Cmtys. for Equity*, 459 F.3d at 704 (Kennedy, J., dissenting).

168. Becker, *supra* note 11.

169. *Cmtys. for Equity vs. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 841 (W.D. Mich. 2001).

teams, freshman and junior varsity teams have been eliminated due to a lack of facilities, coaches, and officials.¹⁷⁰ With the current scheduling of seasons, Michigan averages thirty female basketball players per school, which likely equates to three teams.¹⁷¹ This is in stark contrast to other states that schedule their girls' and boys' seasons concurrently. For example, Kentucky, Ohio and Missouri average only twenty-two players per school, which likely fields two teams rather than three.¹⁷² Furthermore, Tennessee has eighteen players per school; Oklahoma has sixteen, Alabama has thirteen, Florida has eighteen, and New York has twenty-five.¹⁷³ These numbers indicate that Michigan's nontraditional seasons give females athletes an increased opportunity to participate in high school athletics. While Michigan may be the only state left to schedule girls' basketball in the fall, it does not necessarily follow that they should have to follow the way other states do it.

Statistics also suggest that participation in volleyball could be adversely affected by a switch in seasons. "Currently in Michigan, nearly the same number of girls play basketball in the fall (21,000) as girls who play volleyball in the winter (21,500)."¹⁷⁴ However, in states where boys' and girls' basketball are played in the same season, volleyball is often not offered at all.¹⁷⁵ In Georgia, 203 of the schools that sponsor girls' basketball do not sponsor girls' volleyball, and for those schools that do offer volleyball, the season is limited to only fifteen days of competition.¹⁷⁶ As in Georgia, the number of schools that sponsor boys' and girls' basketball in the same season but do not sponsor volleyball are similar in other states as well: Oklahoma (380), Texas (238), and New Jersey (240).¹⁷⁷ While these numbers do not prove that the scheduling system causes greater participation in Michigan, they demonstrate both that Michigan's schedule does not *harm* participation rates, and that switching the girls' basketball and volleyball seasons may ultimately result in its own legal challenges.

170. Becker, *supra* note 11.

171. NFHS Survey, *supra* note 20.

172. *Id.*

173. *Id.*; see Steele, *supra* note 9 (noting which states, as of 2001, "still schedule girls' basketball and volleyball in off seasons").

174. Schafer, *supra* note 124, at 251.

175. *Id.*

176. Becker, *supra* note 11.

177. *Id.*

2. Loss of Local Control over Interscholastic Athletics

The Sixth Circuit's decision significantly expands the court's role in determining local policy issues on behalf of school districts. Traditionally, courts defer to the judgment of academic administrators in a range of areas consistent with the principle of academic independence.¹⁷⁸ Courts are usually averse to supplanting educational judgment when doing so would interfere with a school board's good faith performance of its core functions, thus giving educational organizations freedom to decide issues of local concern.¹⁷⁹ The Supreme Court has recognized that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."¹⁸⁰ Federalism concerns and an awareness of the limited judicial competence in educational administration have led to a liberal, wide-ranging grant of discretion for public educational institutions to carry out their educational missions.¹⁸¹ This discretion has led the Supreme Court on a number of occasions to affirmatively pass at an opportunity to second-guess the educational decisions of school officials.¹⁸²

Not only is local control a longstanding tradition in the United States, but it also serves important interests. For example, local

178. See, e.g., *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974).

179. See *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (holding that the State overstepped its bounds in enacting a statewide initiative which proscribed the use of busing for purposes of racial integrations and upholding the power of local school districts to challenge the plan giving them the power to independently assess the needs of its community and act accordingly).

180. *Milliken*, 418 U.S. at 741. See, e.g., *Dayton*, 433 U.S. at 410 ("[O]ur cases have . . . firmly recognized that local autonomy of school districts is a vital national tradition.").

181. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (stating the court has always been "reluctan[t] to trench on the prerogatives of state and local educational institutions"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (courts lack "specialized knowledge and expertise" in educational policy).

182. See *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002). When asked to interpret the Family Educational Rights and Privacy Act (FERPA) to determine if the federal law prohibits students from grading one another's papers, the Court acknowledged that it will "hesitate before interpreting [a federal] statute to effect such a substantial change in the balance of federalism, unless that is the manifest purpose of the legislation." *Id.* at 432. The Court stated:

We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the Court of Appeals' interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics in classrooms throughout the country. The Congress is not likely to have mandated this result, and we do not interpret the statute to require it.

Id. at 435-36.

control gives citizens an opportunity to participate in the decision-making process. In *Milliken v. Bradley*, the Court stated, "local control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"¹⁸³ However, the decision of the Sixth Circuit in *Communities for Equity* weakens local control of school districts and discourages experimentation and innovation.¹⁸⁴

This approach comes at a time when schools are being enticed with the promise of additional federal funds for developing single-sex schools. A provision of the No Child Left Behind Act of 2001 provides for the allocation of federal funds to local educational agencies for "innovative assistance programs," including "[p]rograms to provide same-gender schools and classrooms."¹⁸⁵ In support of this initiative, the Department of Education has proposed a rule permitting single-sex classrooms that would require "substantially equal," but not precisely identical, offerings.¹⁸⁶

However, if the Sixth Circuit approach is applied, many school districts may find that the risk of costly litigation relating to minor differences between all-boy and all-girl schools and classrooms would likely outweigh the prospect of receiving whatever additional funding the federal government could provide. It would be highly difficult for a school to provide an "exceedingly persuasive" justification for minor differences resulting from the administration of these types of single-

183. *Milliken*, 418 U.S. at 742.

184. See also *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). Justice Brandeis, in his dissent defending the Oklahoma Legislature which had passed a statute regulating ice manufacturing, argued that, so long as its rules were not arbitrary, the Legislature should be able to enact its own laws regardless of whether the Court thought them wise. *Id.* at 285 & n.7 (Brandeis, J., dissenting). Deciding the case during the Great Depression, Brandeis went on to encourage "experimentation" and "trial and error" to fix the economic and social situation of the United States at that time. *Id.* at 310. Brandeis articulated his view of the role of the states in this process:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id. at 311.

185. 20 U.S.C.A. § 7215(a)(23) (West 2002).

186. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 69 Fed. Reg. 11,276 (proposed Mar. 9, 2004). The regulation states that "a single-sex class for each sex, in the same subject, generally is not required," and indeed that "different results for boys and girls, in some instances, may be permissible." *Id.* at 11,279.

sex programs. Thus, to place the burden of proving an exceedingly persuasive justification for inconsequential differences (e.g., establishing school lunch menus) on school boards has the effect of diminishing the board's local authority to establish a single-gender school as an educational option for the district's students. Whether single-sex classrooms and schools are the correct option or not for public school districts, the school board should at least be given the opportunity to carry out an innovative plan without facing the Sixth Circuit's burden of justifying every minor detail in court.

IV. CONCLUSION

"Change is the only constant. Hanging on is the only sin."¹⁸⁷ This quote, taken from the district court's opinion in the *Communities for Equity* case aptly characterizes the recent trend courts are taking in their approach to addressing Title IX at the interscholastic level with regard to the scheduling of nontraditional seasons. Yet the combination of holdings in over almost ten years of litigation in the *Communities for Equity* case has led to both an excessively high standard of scrutiny and an overly broad applicability that ultimately may have negative impacts on girls' sports by decreasing overall female participation—the opposite of the very goal Title IX seeks to ensure. While Michigan's sports scheduling may be an outlier among states, its nontraditional seasons have created a system that seems to address the demands on both the state's and individual communities' limited resources (i.e., facilities, coaches, and officials) while simultaneously providing for some of the highest statewide participation levels for both male and female high school athletes in the country. Although it may not meet the needs of a minority of individual elite female athletes, overall this system appears to achieve the MHSAA's legitimate goal of maximizing athletic opportunities for all student athletes. The court in *Communities for Equity*, however, fails to focus on the benefits this system provides student athletes within the State of Michigan.

In light of the Sixth Circuit's most recent ruling denying an *en banc* review, the MHSAA's only remaining option is to appeal once again to the Supreme Court for a decision on the merits. However, if the current holding remains—finding that the scheduling of nontraditional sports seasons at the interscholastic level violates both

187. *Cmtys. for Equity vs. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 807 (W.D. 2001) (citing Denise McCluggage, U.S. race car driver, as quoted in *WOMENSPORTS*, June 1977, at 18).

Title IX and the Equal Protection Clause—it will create an excessively high burden on local school districts to justify their programs and open up a whole new battleground for discrimination litigation.

POSTSCRIPT

On April 2, 2007, as this note went to press, the United State Supreme Court denied the MHSAA's second appeal of *Communities for Equity v. Michigan High School Athletic Association*,¹⁸⁸ thus effectuating the MHSAA's proposal to change sports seasons for the following school year.¹⁸⁹ Starting with the 2007-2008 school year, six sports—most notably girls' basketball and volleyball—will switch seasons, a change that will affect roughly 70,000 female student athletes.¹⁹⁰ While the Supreme Court's denial finally ends the long-running legal battle between *Communities for Equity* and the MHSAA, it remains to be seen whether the effect of the decision on high schools' limited facilities, scheduling logistics, and coaching will impact girls' sports (especially basketball) more adversely than boys' sports or lead to even more litigation.¹⁹¹ Whatever may happen in the future, however, it is now certain that the 2007-2008 Michigan high school sports season will be a season of change.

*Jane Hefferan**

188. *Mich. High Sch. Athletic Ass'n v. Cmty. for Equity*, No. 06-1038, 2007 WL 261369 (Apr. 2, 2007).

189. Press Release, Michigan High School Athletic Association, Tracking the Sports Seasons Lawsuit—MHSAA Denied Certiorari By U.S. Supreme Court in Sports Seasons Litigation (Apr. 2, 2007), available at <http://www.mhsaa.com/news/gesuit.html> [hereinafter MHSAA Press Release].

190. Vince Ellis, *Season of Change for Michigan*, DETROIT FREE PRESS, Apr. 3, 2007, <http://www.freep.com/apps/pbcs.dll/article?AID=/20070403/SPORTS09/704030370/1048>.

Following the compliance plan ordered by the district court,

girls basketball will move from Fall to Winter; girls volleyball will move from Winter to Fall; boys golf and girls tennis in the Lower Peninsula will move from Fall to Spring; girls golf and boys tennis in the Lower Peninsula will move from Spring to Fall; and the MHSAA will offer Upper Peninsula post-season tournaments in soccer for girls in the Fall and boys in the Spring.

MHSAA Press Release, *supra* note 189.

191. See Mick McCabe, *Girls Face New Equality Hurdle—Court Decision Means Major Switches; Boys Could Overshadow the Girls' Games*, DETROIT FREE PRESS, Apr. 3, 2007, <http://www.freep.com/apps/pbcs.dll/article?AID=/20070403/NEWS05/704030373&imw=Y> (voicing concerns over the impact of the switch on girls' basketball teams).

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