

# **FOLLOWING THE LAW, NOT THE CROWD: THE CONSTITUTIONALITY OF NONTRADITIONAL HIGH SCHOOL ATHLETIC SEASONS**

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## INTRODUCTION

In the fall of 2002, twins Jeana and Jenna Hoffman led their South Dakota high school basketball team to a perfect regular season.<sup>1</sup> That same school year, in the winter, the twins helped their gymnastics team finish third in the state meet.<sup>2</sup> Now, however, rather than continuing to shine in two sports and continuing to cultivate two possibilities for college athletic scholarships, the Hoffman twins must give up one of the sports to which they have devoted years of hard work.<sup>3</sup> As the result of a recent wave of constitutional challenges,<sup>4</sup> the state of South Dakota has been forced to rearrange its high school athletic scheduling.<sup>5</sup> Parents have filed suit against high school athletic associations arguing that their children are cheated out of athletic opportunities—including the ultimate prize of a college scholarship—because of the scheduling of certain interscholastic sports seasons.<sup>6</sup>

Many of the litigants are parents of volleyball players who want the volleyball season moved from the winter season to the fall season, in hopes of increasing their daughters' exposure to college coaches.

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1. Chris Solari, *Switching Seasons Will Hurt Gymnasts*, ARGUS LEADER (Sioux Falls, S.D.), Feb. 17, 2002, at C6, available at 2002 WL 20592580.

2. *Id.*

3. *Id.*

4. Chris Solari, *Change in Tradition, Girls Season Switch*, ARGUS LEADER (Sioux Falls, S.D.), Aug. 11, 2002 at A1, available at 2002 WL 20595437 (discussing challenges to girls' athletic seasons in Arizona, Michigan, Montana, North Dakota, South Dakota, and West Virginia).

5. *Id.*

6. See Solari, *supra* note 1 (“[P]arents prompted the move. Actually, the fear of lawsuits from those parents, claiming their daughters can’t be properly recruited by colleges unless the seasons are swapped.”).

What such litigation ignores, however, is that even if volleyball players would benefit from such a switch, an equal number of other athletes would suffer. The rearrangement in South Dakota, for instance, shifts girls' basketball to the winter, causing the state's female basketball players to receive less exposure to college recruiters. Worse yet, many girls like the Hoffman twins are forced to choose between two sports that did not conflict in the previous system. Thus, regardless of whether the sports seasons are rearranged or the current schedule remains in place, it is unavoidable that some girls will feel as though they are denied the opportunities and exposure that other girls receive.

This Note focuses on the constitutional implications of scheduling high school athletic seasons for girls' and boys' sports teams during different times of the academic year. This issue has recently impacted school districts in many states, affecting high school athletes of both genders. The magnitude of the impact is illustrated by the reluctance of athletic associations to switch high school athletic seasons in nearly every state in which the season scheduling has been challenged.<sup>7</sup> For example, of the five states that scheduled girls' basketball as a fall sport, and girls' volleyball as a winter sport during the 2002-03 school year, four have announced that they will reverse the seasons to match the rest of the country by the 2003-04 season.<sup>8</sup> Of the four states making changes, only one was not prompted by a lawsuit.<sup>9</sup>

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7. Jane Bos, *Michigan Will Soon Stand Alone—Four States Moving Girls Hoops to Winter*, GRAND RAPIDS PRESS, Aug. 6, 2001, at D10, available at 2001 WL 25385084. In Montana, the high school association was ordered to make the switch by the Human Rights Bureau in Montana's Department of Labor and Industry. *Id.* A suit was filed in federal court to compel South Dakota to "flop the seasons," and the sides settled out of court. *Id.* South Dakota's High School Activities Association was opposed to the switch, but was unable to fight the decision based on financial burdens. *Id.* It did not feel as though it could afford the legal battle that would have ensued. *Id.* The suit in Virginia was based on the state's split basketball and volleyball seasons. Two classes of high schools played basketball in the fall and volleyball in the winter, while basketball was a winter season and volleyball a fall season for the largest class of high schools. *Id.* This setup created problems for female student athletes whose school classification periodically switched based on enrollment, and forced them to choose between the two sports. *Id.*

8. *See id.* (noting that Montana, North Dakota, South Dakota, and Virginia will reverse seasons to align with the majority of states).

9. *See id.* (quoting a North Dakota official who stated that "[s]ome parts of our state are sparsely populated, and to lose competition from schools in different states because of different seasons would be very difficult for travel expenses").

In Michigan, however, a landmark legal battle has been initiated which will define the legal parameters for this issue in the future. The case, *Communities for Equity v. Michigan High School Athletic Ass'n*,<sup>10</sup> was recently appealed to the Sixth Circuit and is currently pending review.<sup>11</sup> This Note examines and critiques the district court's opinion in *Communities for Equity*. It demonstrates that nontraditional high school athletic seasons are not only legally permissible, but in many ways are more advantageous than traditional high school athletic seasons. As such, so long as the differences between boys' and girls' programs are negligible and justified, separate interscholastic athletic seasons do not violate the Equal Protection Clause or Title IX.

Part I of this Note outlines the legal standards that govern the issue, focusing on the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments as applied to high school athletics. Part II examines the background and rationale of the district court's decision in *Communities for Equity*. Part III then critiques the district court's rationale in light of prior case history, the established standards under Title IX and the Equal Protection Clause, and the district court's own internal inconsistency. This Part demonstrates that nontraditional sports seasons do not violate either Title IX or the Equal Protection Clause. In addition, Part III illustrates the advantages that nontraditional sports seasons provide many girls. Finally, Part IV evaluates the widespread practical and potential effects of the *Communities for Equity* decision, and presents strategies for future defenses against a claim of gender inequity based on constitutional challenges to the scheduling of high school athletics seasons.

## I. THE EQUAL PROTECTION CLAUSE AND TITLE IX AS APPLIED TO INTERSCHOLASTIC ATHLETIC PROGRAMS

Discrimination against student-athletes has long been an issue of contention in the courts. Laws that discriminate against student-athletes based on their gender implicate the Equal Protection Clause of the Fourteenth Amendment.<sup>12</sup> In addition to this constitutional provision, a specific, federal protection against gender discrimination

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10. 178 F. Supp. 2d 805 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002).

11. *Id.*

12. U.S. CONST. amend. XIV, § 1.

in educational institutions was created when Congress passed Title IX of the Educational Amendments of 1972.<sup>13</sup> Plaintiffs often allege violations of both the Equal Protection Clause and Title IX in suits involving gender discrimination in athletics.<sup>14</sup> While some courts will consider both an equal protection claim and a Title IX claim, other courts have held that Title IX provides the exclusive remedy in such cases.<sup>15</sup> This Part discusses the implications of the Equal Protection Clause and Title IX in the context of high school athletic scheduling.

#### A. *Gender-Based Discrimination and the Equal Protection Clause*

The Equal Protection Clause provides: “No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>16</sup> Only state actors may be liable for a violation of the Fourteenth Amendment,<sup>17</sup> and the Supreme Court has made clear that high school athletic associations are state actors subject to the strictures of the Equal Protection Clause.<sup>18</sup>

When evaluating an equal protection challenge to gender-based discrimination, courts subject the classification to so-called “intermediate scrutiny.”<sup>19</sup> Pursuant to intermediate scrutiny, the

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13. 20 U.S.C. § 1681(a) (2000).

14. *See, e.g.*, *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 609–10 (6th Cir. 2002); *Ridgeway v. Mont. High Sch. Ass’n*, 858 F.2d 579, 582 (9th Cir. 1988); Cynthia Lutz Kelly, *Participation in Athletic Programs: Clearing the Title IX and Equal Protection Hurdles*, in LEGAL HANDBOOK ON SCHOOL ATHLETICS 5-1, 5-10 (Nat’l Sch. Bds. Ass’n ed., 1997) (“Some courts have considered [Equal Protection] claims along with the Title IX claims; other courts have concluded that Title IX provides the exclusive remedy . . .”).

15. *See Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3d. Cir. 1993) (“[T]he constitutional claims are ‘subsumed’ in title IX, and . . . the district court, having addressed the title IX claim, properly refused to hear plaintiff’s section 1983 claim.”); Kelly, *supra* note 14, at 5–10. *But see Mercer v. Duke Univ.*, 190 F.3d 643, 648 (4th Cir. 1999) (rejecting the conclusion in *Williams* as inconsistent with the regulation).

16. U.S. CONST. amend. XIV, § 1.

17. *Rivera v. PS Group of P.R., Inc.*, 186 F. Supp. 2d 63, 68 (D.P.R. 2002) (“A plaintiff claiming an equal protection violation must show that state actors intentionally discriminated against her.”); *Boateng v. Inter American Univ.*, 190 F.R.D. 29, 32 (D.P.R. 1999) (“In general terms, Constitutional rights of individuals are only actionable against a state actor.”).

18. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 291 (2001) (“[T]he association’s regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association.”).

19. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 555 (1996) (“[A]ll gender-based classifications today warrant heightened scrutiny.” (internal quotation marks omitted)); *Hines v. Caston Sch. Corp.*, 651 N.E.2d 330, 335 (Ind. Ct. App. 1995) (“A gender-based discriminatory classification is subject to an intermediate level of scrutiny.”); Kelly, *supra* note 14, at 5-10.

discriminatory classification must serve “important governmental objectives” using means that are “substantially related to the achievement of those objectives.”<sup>20</sup> Courts focus on the “differential treatment or denial of opportunity for which relief is sought.”<sup>21</sup> Courts refuse to accept justifications that are based on archaic or overbroad generalizations about male and female interests and abilities.<sup>22</sup> No showing of animus, or intentional discrimination, is required when the defendant’s rule treats males and females differently on its face.<sup>23</sup>

### B. Title IX

Though the majority of early Title IX litigation concerned intercollegiate athletics,<sup>24</sup> Title IX made clear that the athletic department of any school district that receives any amount of federal funding for any purpose must comply with the requirements of Title IX.<sup>25</sup> Thus, regulation of interscholastic high school athletics is enforceable under the statute. In recent years, discrimination suits against interscholastic associations and organizations, as well as individual schools, have become more common.<sup>26</sup> Because lawsuits brought to compel the change of nontraditional sports seasons typically allege violations of Title IX, it is important to outline the legal background in this area before analyzing the legality of nontraditional high school athletic seasons.

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20. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (quoting *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)).

21. *United States v. Virginia*, 518 U.S. at 532–33; *see also* *Gonzalez v. Kahan*, No. CV 88-922 (RJD), 1996 WL 705320, at \*2 n.3 (E.D.N.Y. Nov. 25, 1996) (“[A] plaintiff alleging sex discrimination in violation of the Equal Protection Clause must show that the defendant discriminated against her because of her membership in an identifiable group, as opposed to characteristics of her gender personal to her.”).

22. *United States v. Virginia*, 518 U.S. at 533.

23. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 848–49 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002).

24. *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) (“Until now, Title IX has had its most profound impact on intercollegiate athletics.”).

25. *Id.* at 373–74; 20 U.S.C. § 1681(a) (2000).

26. *See, e.g.,* *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 268 (6th Cir. 1994) (alleging gender discrimination based on school’s sanctioning fewer sports for girls than for boys, and refusing to sanction girls’ interscholastic fast-pitch softball); *Ridgeway v. Mont. High Sch. Ass’n*, 858 F.2d 579, 581 (9th Cir. 1988) (seeking relief for gender discrimination based on nontraditional seasons for girls’ volleyball and basketball); *Striebel v. Minn. State High Sch. League*, 321 N.W.2d 400, 401 (Minn. 1982) (challenging, on equal protection grounds, a Minnesota statute authorizing separate seasons for high school athletic teams separated according to gender).

1. *History and Purpose.* Title IX was enacted as part of the Education Amendments of 1972 with the goal of eliminating sex discrimination in education.<sup>27</sup> Section 901(a) of the statute states 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.”<sup>28</sup> Although Title IX applies to education services generally, it also has specific provisions related to scholastic athletic opportunities. Specifically, section 106.41(c)<sup>29</sup> sets forth an equal opportunity requirement for scholastic athletic programs, 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.”<sup>30</sup> In 1988, Congress made clear that compliance with Title IX was mandatory for any educational institution that received federal funding, regardless of whether that funding was used for the program in question.<sup>31</sup>

2. *Factors which Guide the Title IX Analysis.* The ten factors that should be considered in a Title IX analysis are provided in 34 C.F.R. § 106.41(c). These factors include:

- (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) provision of equipment and supplies;
- (3) scheduling of games and practice times;
- (4) travel and per diem allowance;

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27. *Ridgeway*, 858 F.2d at 581 (9th Cir. 1988) (stating the background of Title IX in Congress); H.R. REP. NO. 92-554, at 5 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2467 (“This title prohibits discrimination on the basis of sex in education programs or activities receiving financial support from the Federal government.”).

28. 20 U.S.C. § 1681(a).

29. 34 C.F.R. § 106.41(c) (2002).

30. *Id.*

31. S. REP. NO. 100-64, at 4 (1988), *reprinted in* 1987 U.S.C.C.A.N. 1, 6 (“The Civil Rights Restoration Act of 1987 amends each of the affected statutes by adding a section defining the phrase ‘program or activity’ and ‘program’ to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance.”); Kelly, *supra* note 14, at 5-1 (stating that the passage of the Civil Rights Restoration Act of 1987 was evidence of Congress’s intent).

- (5) opportunity to receive coaching and academic tutoring;
- (6) assignment and compensation of coaches and tutors;
- (7) provision of locker rooms, practice and competitive facilities;
- (8) provision of medical and training facilities and services;
- (9) provision of housing and dining facilities and services; and
- (10) publicity.<sup>32</sup>

In *Cohen v. Brown University*,<sup>33</sup> one of the first landmark Title IX cases, a panel of the U.S. Court of Appeals for the First Circuit treated the regulations as “a non-exclusive compendium of ten factors which [the Office of Civil Rights] will consider in assessing compliance with this mandate.”<sup>34</sup> The first of these factors, effective accommodation, is the most important factor, and “an institution may violate Title IX solely by failing to effectively accommodate the interests and abilities of student athletes of both sexes.”<sup>35</sup>

The Title IX regulations’ Policy Interpretation, which was adopted by the Office of Civil Rights (OCR),<sup>36</sup> serves as a second guide for analyzing Title IX claims. The Policy Interpretation includes three major areas of compliance—athletic financial assistance, equivalence in other athletic benefits and opportunities, and effective accommodation of student interests and abilities.<sup>37</sup> The OCR Policy Interpretation provides a three-prong test for the first requirement of

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32. 34 C.F.R. § 106.41(c).

33. 991 F.2d 888 (1st Cir. 1993).

34. *Id.* at 396.

35. *Kelley v. Bd. of Trs.*, 35 F.3d 265, 268 (7th Cir. 1994) (citing *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Cohen*, 991 F.2d at 897–98).

36. The Policy Interpretation initially was adopted by the Department of Health, Education, and Welfare (“HEW”) in December 1979. Title IX of the Education Amendment of 1972: A Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979) [hereinafter OCR Policy Interpretation]; see also 45 C.F.R. pt. 86 (2002) (codifying provisions from this section of the Federal Register).

37. 34 C.F.R. §§ 106.37(c), 106.41(c)(1), 106.41(c)(2)–(10) (2002); see also Jennifer L. Henderson, *Gender Equity in Intercollegiate Athletics: A Commitment to Fairness*, 5 SETON HALL J. SPORT L. 133, 141–42 (1995) (“The Policy Interpretations include three major areas of compliance: Athletic Financial Assistance (Scholarships); Equivalence in Other Athletic Benefits and Opportunities; and Effective Accommodation of Student Interests and Abilities.”).

section 106.41(c), effective accommodation.<sup>38</sup> These three tests for participation examine (1) whether the “participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments,” (2) whether the institution can show both a history and continuing practice of expansion of programs responsive of the developing interests and abilities of the members of a traditionally underrepresented sex, or (3) whether the interests and abilities of the underrepresented sex have been “fully and effectively accommodated” by the present program.<sup>39</sup> The court in *Favia v. Indiana University of Pennsylvania*,<sup>40</sup> the first explicitly to adopt the OCR’s Policy Interpretation, assigned the burden of proof for the first factor to the plaintiff, and for the second and third factors to the defendant.<sup>41</sup> An institution must satisfy at least one of the prongs of the test in order to be found in compliance with the effective accommodation requirement of the regulations.<sup>42</sup> Though this three-prong test has been utilized primarily in the context of colleges and universities,<sup>43</sup> section 106.41(a) of the regulations also makes this test applicable to high school, or interscholastic athletics.<sup>44</sup>

Thus, when determining whether an educational institution has provided an equal opportunity to students of both sexes, the court’s

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38. OCR Policy Interpretation, *supra* note 36, at 71,418; *see also* Jill Mulderink, *Par for the Female Course: Cohen v. Brown University Mandates an Equal Playing Field in Intercollegiate Athletics*, 22 J.C. & U.L. 111, 119 (1995) (“In order for a university to comply with the Effective Accommodation requirement of the regulations, it must meet at least one prong of [a] three prong test . . .”).

39. OCR Policy Interpretation, *supra* note 36, at 71,418.

40. 812 F. Supp. 578 (W.D. Pa. 1993).

41. *Id.* at 584; *see also* Diane Heckman, *The Explosion of Title IX Legal Activity in Intercollegiate Athletics During 1992–93: Defining the “Equal Opportunity” Standard*, 1994 DET. C.L. REV. 953, 972–73 (1994) (“[T]he court utilized the three-prong analysis found in the OCR Policy Interpretation . . . [It] assigned the burden of proof as to the second and third factors.”).

42. OCR Policy Interpretation, *supra* note 36, at 71,418; *Favia*, 812 F. Supp. at 584; *see also* Mulderink, *supra* note 38 at 119–20.

43. *Williams v. Sch. Dist.*, 998 F.2d 168, 171 (3d. Cir. 1993) (“Although designed specifically for intercollegiate athletics, the *Policy Interpretation* specifically states that ‘its general principles will often apply to . . . interscholastic athletic programs which are also covered by regulation’ . . .”).

44. 34 C.F.R. § 106.41(a) (2002) (“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient . . .”).

analysis should consider the factors in section 106.41(c), as well as the three-prong test in the OCR Policy Interpretation.

## II. MICHIGAN ATTEMPTS TO HOLD OUT—*COMMUNITIES FOR EQUITY V. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION*

Numerous issues relating to scholastic athletic programs have been litigated under Title IX since its enactment. The litigation over the scheduling of girls' sports in nontraditional seasons is one of the most recent issues to be brought before the courts. This Part will review one of the latest, and most vigorously contested, of these cases.

### A. *Background—Traditional and Disadvantageous Seasons*

Of the states in which litigation has been threatened, Michigan has fought the court-ordered athletic season switch the most vigorously. The *Communities for Equity* case, initiated in June of 1998, reached the District Court of Western Michigan three and a half years later.<sup>45</sup> A suit alleging discrimination against Michigan female high school athletes was brought under the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972.<sup>46</sup> The plaintiffs, mothers of student-athletes, claimed that the Michigan High School Athletic Association (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 girls’ athletic seasons constitutes legally inequitable treatment.”<sup>47</sup>

The plaintiffs allege that the sports at issue, excepting girls’ golf, are played in nontraditional seasons, that these seasons are disadvantageous seasons for the sports, and thus the system creates inequities for female student-athletes.<sup>48</sup> Though girls’ golf is played in

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45. See *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 807 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002) (stating the legal background of the case).

46. See *Id.* (noting that state claims were also brought under the Elliot-Larson Civil Rights Act, MICH. COMP. LAWS ANN. §§ 37.2101–.2804 (West 2001)).

47. *Id.* These girls’ sports and their current seasons 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.*

48. *Id.*

the “traditional”<sup>49</sup> season of spring, plaintiffs claim that fall is a superior season for golf in Michigan.<sup>50</sup>

Whether a sports season is “traditional” is only important if the traditional season is also “the most advantageous playing season for the high school sports at issue.”<sup>51</sup> The court stated that it is legally possible for a girls’ sport to be held in a nontraditional season and a boys’ sport during the traditional season, so long as girls and boys are equally advantaged by the sports season.<sup>52</sup>

*B. Rejection of the Justifications for the Current Seasons Offered by the MHSAA*

At trial, the MHSAA put forth various justifications for scheduling these sports in nontraditional seasons, but the district court ultimately rejected all of them. The first justification raised by the MHSAA was that serious logistical concerns exist concerning facilities, officials, and coaches. The MHSAA argued that there are not enough gymnasiums, soccer fields, and pools in Michigan to schedule basketball, soccer, and swimming seasons concurrently.<sup>53</sup> Rearranging the seasons would cause a reduction in opportunities for both sexes, as schools would have to cut team sizes or eliminate freshman or junior varsity teams.<sup>54</sup> Sponsoring the greatest number of teams possible and maximizing participation opportunities are legally legitimate goals.<sup>55</sup> However, the court found that the MHSAA failed to meet its burden of production and persuasion on this point, because its evidence was “almost exclusively anecdotal” and there was insufficient evidence demonstrating that schools have inadequate facilities.<sup>56</sup> The court also rejected the argument that in other states where athletic seasons are scheduled concurrently for both genders, there are lower participation numbers than in Michigan, calling the MHSAA’s evidence “circumstantial.”<sup>57</sup>

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49. The court construed “traditional” to mean the season when the sport is usually played at most levels. *Id.* at 808.

50. *Id.* at 807. The boys’ golf season in Michigan is in the fall. *Id.*

51. *Id.* at 808.

52. *Id.*

53. *Id.* at 840.

54. *Id.*

55. *Id.* at 839.

56. *Id.* at 840.

57. *Id.* at 841.

The MHSAA contended that there are insufficient coaches in Michigan to schedule soccer and swimming concurrently. The court found that the empirical evidence on this point was “too sparse to make a finding that this [was] true.”<sup>58</sup> The court also found that the MHSAA failed to support its assertion that some schools would have problems finding “qualified” game officials.<sup>59</sup>

Second, the MHSAA offered survey evidence showing that Michigan girls and member schools prefer to play in the current seasons.<sup>60</sup> The court found that the survey suffered from “design flaws and bias,” because (1) no benefits of changing seasons were involved in the survey, (2) only sixty of MHSAA’s 729 member schools participated, (3) only one-third of the girls in those schools were surveyed, and (4) the original, written survey responses were destroyed before the plaintiffs or their experts could view them.<sup>61</sup> The court held that “a comprehensive study of the possibilities of changing seasons, as well as the advantages and disadvantages of various seasons, should have been the task of the MHSAA.”<sup>62</sup> In addition, the court noted that several student-athletes testified for the plaintiff, while the MHSAA failed to offer the testimony of any student-athletes or parents who favored the current seasons of play.<sup>63</sup>

Finally, the MHSAA claimed that its nontraditional seasons give girls an “independent identity.”<sup>64</sup> The MHSAA argued that girls benefit from their own independent athletic seasons. For example, girls’ basketball does not have to compete with boys’ basketball for attention, which results in increased media coverage and recruiting opportunities for the girls.<sup>65</sup> The MHSAA offered testimony that the separate seasons showed that girls would be successful and attract fans to the games on their own merits.<sup>66</sup> However, the court found that the separate seasons “sends a message that the girls’ basketball

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58. *Id.* at 842.

59. *Id.*

60. *Id.* at 842–43. Western Michigan University’s Evaluation Center was commissioned by the MHSAA to conduct the survey after the lawsuit was filed. *Id.*

61. *Id.* at 843.

62. *Id.* at 844.

63. *Id.* at 843.

64. *Id.* at 845.

65. *Id.*

66. *Id.* (discussing the testimony of K. McGee, girls’ basketball coach at Flint Powers High School).

programs cannot be ‘fitted in’ to the ‘regular’ basketball season of winter.”<sup>67</sup>

### C. *Legal Claims*

1. *The Equal Protection Claim.* After a review of MHSAA’s arguments, the court ruled that the MHSAA’s athletic scheduling violated the Equal Protection Clause of the Fourteenth Amendment. First, the court found that the MHSAA is a state actor, and thus subject to liability for constitutional violations.<sup>68</sup> As high school athletes are segregated according to gender, the defendants bore the burden of showing an “exceedingly persuasive” justification, where the classification “serves important governmental objectives and the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>69</sup> The court found that the MHSAA failed to meet its burden because “none of the girls sports at issue are scheduled in the advantageous season.”<sup>70</sup> Although the justifications that were offered by the MHSAA were “important,”<sup>71</sup> the discriminatory scheduling was not “substantially related” to achieving the stated objectives.<sup>72</sup> The court held that the MHSAA relied on “anecdotal and weak circumstantial evidence,” which was insufficient to support its justifications, and therefore “violated and continues to violate the Fourteenth Amendment by its current scheduling of seasons for the sports at issue.”<sup>73</sup>

2. *The Title IX Claim.* The court held that MHSAA also was subject to liability under Title IX.<sup>74</sup> The MHSAA has the required

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67. *Id.*

68. *Id.* at 846–48. The district court relied on the decision in *Brentwood Academy v. Tenn. Secondary School Athletic Ass’n*, 531 U.S. 288 (2001), in which the Supreme Court found that Tennessee’s high school athletic association was a state actor based on the Tennessee Secondary School Athletic Association (TSSAA)’s makeup and role in the administration of high school athletics in the state. *Id.* at 846 (citing *Brentwood Academy*, 531 U.S. at 298–300). The district court agreed that the MHSAA was virtually identical to the TSSAA, and thus was a state actor. *Id.* at 847.

69. *Id.* at 848.

70. *Id.* at 850.

71. Legitimate objectives included maximizing athletic participation for both sexes with more teams and openings on those teams, and maintaining the quality of the current programs with better coaches and officials able to work during both seasons. *Id.* at 850.

72. *Id.* at 850–51.

73. *Id.* at 851.

74. *Id.* The court discussed the requirements for an organization to be subject to Title IX,

“controlling authority” to schedule interscholastic sports in Michigan, and thus has “implicitly contracted with the federal government and had notice to obey the conditions under which member schools receive federal funding.”<sup>75</sup> Further, 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.<sup>76</sup> 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.<sup>77</sup> The court also rejected the MHSAA’s argument that Title IX claims require proof of animus on the part of the MHSAA.<sup>78</sup> According to the court, the unequal opportunities for girls<sup>79</sup> indicated a Title IX violation.<sup>80</sup> 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 burdens of the differential treatment.”<sup>81</sup>

#### D. Holding and Appeal

The court retained jurisdiction over the case until an appropriate remedy was enacted, and ordered the MHSAA to change its scheduling of high school athletic seasons to comply with the law by the 2003-04 academic year.<sup>82</sup> The court required that any remaining single-sex seasons in the proposed schedule must disadvantage and advantage boys and girls as a group equally.<sup>83</sup> Thus, the MHSAA was

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including receiving federal funding, or having “controlling authority” over entities that receive federal funding. *Id.* at 851–56. The MHSAA receives revenues from controlling and regulating the member schools who directly receive federal funding. *Id.* at 851.

75. *Id.* at 855; *see also supra* note 68 and accompanying text.

76. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 855 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002).

77. *Id.* at 856 (referring to OCR Policy Interpretation, *supra* note 36, at 71,416–71,418).

78. *Id.*

79. 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, and in the case of girls-only volleyball, being denied the right to play during volleyball’s “traditional” season, as all boys-only teams do. *Id.* at 857, 817–39.

80. *Id.* at 857.

81. *Id.* at 856.

82. *Id.* at 862.

83. *Id.*

not mandated to combine girls' and boys' seasons for any specific sport.<sup>84</sup> The MHSAA was required to submit a compliance plan that set forth the new schedule for athletic seasons by June 24, 2002.<sup>85</sup>

1. *Submission and Review of the Compliance Plan.* The initial compliance plan, submitted as required by the MHSAA on May 22, 2002, was soundly rejected by Judge Enslin on August 1, 2002.<sup>86</sup> This compliance plan was developed by the MHSAA after more than fifty meetings with member schools, as well as a statewide survey.<sup>87</sup> The submitted plan was the one most favored by the member schools,<sup>88</sup> which rejected swapping the volleyball and basketball seasons by a wide margin.<sup>89</sup> The plan submitted by the MHSAA was literally in

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84. The court also suggested that putting lower level freshman or junior varsity teams of both sexes into the disadvantageous season would create compliance. *Id.*

85. *Id.* at 861. The detailed compliance plan had to be submitted to the court by the summer of 2002, and the plaintiffs would get a time period in which to respond to the proposed plan. At this point, the court would decide whether the plan would bring Michigan into compliance with the law. *Id.*

86. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2002 U.S. Dist LEXIS 14220, at \*19 (W.D. Mich. Aug. 1, 2002); *see also* Press Release, MHSAA, Federal Judge Realigns Sports in Seasons Case; Executive Director John E. "Jack" Roberts Issues Statement (Aug. 1, 2002), at <http://www.mhsaa.com/news/02ruling.html> (on file with the *Duke Law Journal*) (explaining the ruling).

87. Jane Bos, *Change Seasons for Girls Sports, Court Says*, GRAND RAPIDS PRESS, Oct. 30, 2002, at A1, available at 2002 WL 101245715.

88. *Id.* Approximately 86 percent of MHSAA member high schools (649 schools) responded to the sports season survey. *See* Press Release, MHSAA, Sports Seasons Survey Results (May 22, 2002), at <http://www.mhsaa.com/news/02survey.pdf> (on file with the *Duke Law Journal*) (tracking the Sports Season Lawsuit). Of the 649 member schools responding, 42.1 percent supported the plan the MHSAA submitted on May 24. *Id.* In addition, out of 649 schools, 509 selected basketball as the one girls' sport that the school least wanted moved to a different season. *Id.* 527 of the schools also selected basketball as the one boys' sport that the school least wanted moved. *Id.* For the one sport that the school least wants to see boys' and girls' seasons combined, 492 schools, or 75.8 percent of respondents, selected basketball. *Id.*

89. Bob Becker, *Ruling Thursday Could Change Girls Sports Landscape; District Judge to Decide on MHSAA Scheduling Plan*, GRAND RAPIDS PRESS, July 31, 2002, available at 2002 WL 23818573. The MHSAA's compliance plan also noted the difficulties involved in devising a season switch.

[T]he diversity of the association's membership is so great that a change in sports seasons that might be best in one situation could be worst in another. For example: (1) While larger schools in some locations might be able to compensate for reversed or combined sports seasons because they have sufficient numbers of students, facilities and other resources, smaller schools in most locations fear that certain changes will eliminate one or more sports or levels of teams in those sports, or significantly reduce the quality of those programs; and (2) Solutions that could be considered for Lower Peninsula schools were inapplicable to Upper Peninsula schools because some of those schools schedule sports in different seasons than do schools in the Lower Peninsula.

compliance with Judge Enslin's order, which had stated that the compliance plan would be approved as long as girls and boys equally shared advantages and disadvantages.<sup>90</sup> The plan called for the seasons for girls' and boys' tennis, swimming, and golf seasons to be switched, resulting in a balance of three "disadvantaged" sports for both boys and girls.<sup>91</sup> The plan also promised to begin postseason tournaments for four new girls' sports before adding any new tournaments for boys' sports.<sup>92</sup> Not only did the new proposal meet Judge Enslin's requirements, but it also addressed the plaintiff's original request that the court require the MHSAA to "schedule the same number of male and female sports in non-traditional seasons, 'so as to allocate the benefits and burdens of playing in different seasons equally between females and males.'"<sup>93</sup>

Judge Enslin rejected the MHSAA's initial Compliance Plan, despite the fact that the plan appeared to meet the district court's requirements.<sup>94</sup> This rejection flew in the face of Judge Enslin's previous district court order, in which he held that

[t]he parties are reminded that Defendant MHSAA may design the new schedule in a number of different ways, and as long as girls and boys share the advantages and disadvantages of the new seasons equitably, this Court will approve the Compliance Plan. For example, Defendant MHSAA is not required to combine seasons of girls teams and boys teams in any particular sport, but any remaining single-sex seasons must as a group advantage and disadvantage girls and boys equally.<sup>95</sup>

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Compliance Plan of the MHSAA for the U.S. District Court (submitted May 22, 2002) [hereinafter Compliance Plan], at <http://www.mhsaa.com/news/02plan.pdf> (on file with the *Duke Law Journal*).

90. *Cmtys. for Equity*, 178 F. Supp. 2d at 862.

91. Becker, *supra* note 89; Amended Compliance Plan (submitted October 30, 2002) at <http://www.mhsaa.com/news/amendplan.pdf> (on file with the *Duke Law Journal*).

92. Bos, *supra* note 87. This would be done by adding two new tournaments each year for consecutive years, with the association choosing the sports from a list of twelve. Press Release, MHSAA, MHSAA Submits Sports Seasons Plan; Proposal Adds Four Tournaments (May 22, 2002), at <http://www.MHSAA.com/news/02complianceplan.html> (on file with the *Duke Law Journal*).

93. *Cmtys. for Equity*, 178 F. Supp. 2d at 808.

94. *Cmtys. for Equity*, 2002 U.S. Dist. LEXIS 14220, at \*19 ("The MHSAA's proposed Compliance Plan is therefore rejected as not achieving equity.").

95. *Cmtys. for Equity*, 178 F. Supp. 2d at 862.

Judge Enslen contradicted himself, ruling in his August 1 opinion that the MHSAA had to switch the girls' basketball and volleyball seasons to be in compliance.<sup>96</sup>

The MHSAA resignedly submitted an amended compliance plan to the district court on October 30, 2002.<sup>97</sup> In addition to requiring a swap of the girls' volleyball and basketball seasons, the district court had ordered the MHSAA to select one of three configurations involving other sports.<sup>98</sup> The option that the MHSAA selected in the amended compliance plan altered the scheduling of five other sports: golf, soccer, swimming, diving, and tennis.<sup>99</sup> Unsurprisingly, on November 8, 2002, the district court accepted the amended compliance plan, which was consistent with its August 1, 2002 opinion and order.<sup>100</sup> On February 27, 2003, the district court reaffirmed its November 8, 2002 decision, and accepted the MHSAA's amended compliance plan to reschedule its postseason tournaments.<sup>101</sup>

2. *The MHSAA's Appeal to the Sixth Circuit.* The February 27, 2003 affirmation of the amended compliance plan freed the MHSAA to commence the appeals process to the United States Court of Appeals for the Sixth Circuit. Previously, the MHSAA had appealed the district court's December 21, 2001 decision to the Sixth Circuit, which on May 9, 2002, granted the Association a stay in switching the seasons.<sup>102</sup> At that time, the Sixth Circuit ordered the MHSAA to proceed with the compliance plan as ordered by the district court, holding that the appeal process could begin when all issues had been

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96. *Cmtys. for Equity*, 2002 U.S. Dist. LEXIS 14220, at \*19–20. The three options that Judge Enslen gave the defendants all would have resulted in girls' basketball scheduled in the winter and girls' volleyball scheduled in the fall. *Id.*

97. Amended Compliance Plan, *supra* note 91.

98. *Cmtys. for Equity*, 2002 U.S. Dist. LEXIS 14220, at \*19–20.

99. *Id.* In Michigan's Lower Peninsula, the plan included switching golf and tennis tournaments for girls and boys, so that girls' golf was offered in the fall, boys' golf offered in the winter, boys' tennis in the fall, and girls' tennis in the spring. In the Upper Peninsula, the golf and swimming and diving tournaments will be held in the same season for boys and girls (golf in spring and swimming and diving in the winter), and soccer tournaments will be scheduled in the fall for girls and the spring for boys. *See* Amended Compliance Plan, *supra* note 91.

100. Press Release, MHSAA, Compliance Plan Accepted by District Court in Sports Seasons Case (Nov. 11, 2002), at <http://www.mhsaa.com/news/03courtplan.html> (on file with the *Duke Law Journal*).

101. *Cmtys. For Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2003 U.S. Dist. LEXIS 2872, at \*8 (W.D. Mich. Feb. 27, 2003).

102. *Cmtys. for Equities v. Mich. High Sch. Athletic Ass'n*, No. 02-1127, slip op. at 3 (6th Cir. filed May 9, 2002).

settled in the lower courts.<sup>103</sup> However, The Sixth Circuit granted the MHSAA's stay, holding that "the stay motion raises serious . . . issues concerning liability under Title IX and the Equal Protection Clause," and that the MHSAA "has articulated a variety of harms that it, its member schools, and the student athletes may suffer if it must comply with the injunction by bringing its scheduling into compliance with the district court's ruling."<sup>104</sup> The first round of the appeals process is projected to last approximately a year.<sup>105</sup> Thus, the Sixth Circuit's stay ensures that any change to Michigan high school athletic seasons is unlikely to occur before the 2004-05 school year at the earliest.<sup>106</sup>

### III. CRITIQUE OF THE *COMMUNITIES FOR EQUITY* DECISION

The district court's reasoning in *Communities for Equity* is flawed in numerous respects. The critique of this decision set forth in this Part is divided into three broad categories. First, this Part illustrates that the district court misconstrued the intent of the Policy Interpretation, that Michigan's current sports schedule comports with the Policy Interpretation, and consequently that the MHSAA does not violate Title IX. Second, this Part argues that the court incorrectly interpreted references to recruiting in the OCR Policy Interpretation. Finally, this Part argues that evidence of higher participation rates of student athletes in Michigan meets the "exceedingly persuasive justification" standard that is required to dismiss the plaintiff's equal protection challenge.

#### A. *The Court Failed to Adequately Consider the OCR Policy Interpretation of Title IX.*

In cases where sex discrimination claims have been raised under Title IX, courts have given "substantial deference" to the OCR Policy Interpretation of 1979.<sup>107</sup> The district court in *Communities for Equity*

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103. *Id.*, slip op. at 2-3; Bos, *supra* note 87.

104. *Id.*, slip op. at 2-3.

105. Press Release, MHSAA, Acceptance of Compliance Plan Reaffirmed in Sports Seasons Case (Feb. 28, 2003), at <http://www.mhsaa.com/news/03reaffirm.html> (on file with the *Duke Law Journal*).

106. Press Release, MHSAA, Sports Seasons Litigation Update (Aug. 7, 2002), at <http://www.mhsaa.com/news/03litigationupdate.html> (on file with the *Duke Law Journal*).

107. See, e.g., *Williams v. Sch. Dist.*, 998 F.2d 168, 171 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1043 (1995) ("We accord HEW's interpretation of the regulation 'appreciable deference.'"); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994) ("The Policy

misconstrued and undervalued the intent of the Policy Interpretation. Many parts of the Policy Interpretation suggest that Michigan is in compliance with the original intent of Title IX. The court stated that “the federal agency originally charged with interpreting regulations and investigating alleged violations of Title IX has noted that elements of a program’s structure like seasons of play can constitute a violation.”<sup>108</sup> However, nowhere in the pages of the Policy Interpretation referenced by the court are “seasons of play” mentioned as a specific factor that constitutes a violation. This is not one of the ten factors explicitly listed as part of the analysis in a Title IX challenge.<sup>109</sup> At most, the Policy Interpretation marginally supports the court’s statement because it permits the Director of the Office of Civil Rights “to consider other factors in the determination of equal opportunity.”<sup>110</sup> However, nothing in the Policy Interpretation indicates that separate seasons should be accorded the determinative weight that this factor was assigned by the court. In fact a reasonable reading of the Policy Interpretation leads to the contrary conclusion—that if a factor were meant to be determinative, the drafters would have explicitly made mention of this, as they did for the effective accommodation factor. As the analysis below demonstrates, a close reading of the Policy Interpretation supports the conclusion that MHSAA’s scheduling was not illegal under Title IX.

1. *Some Differences in Scheduling of Athletic Seasons Are Legally Permissible.* The Policy Interpretation notes in several places that Title IX does not require identical programs for boys’ and girls’ teams in the same sport. Referring to an equal opportunity analysis, the Policy Interpretation states that “identical benefits, opportunities, or treatment are not required, provided the overall effect of any differences is negligible,”<sup>111</sup> and “if sport-specific needs are met

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Interpretation is a ‘considered interpretation’ of the applicable regulations, and is entitled to substantial deference by the courts.”); *Cohen v. Brown Univ.*, 991 F.2d 888, 896–97 (1st Cir. 1993) (“Because this document is a considered interpretation of the regulation, we cede it substantial deference.”).

108. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 856 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002) (citing OCR Policy Interpretation, *supra* note 36, at 71, 416–18) (Dec. 11, 1979).

109. OCR Policy Interpretation, *supra* note 36, at 71,415. While “scheduling of games” is one of the ten factors, “scheduling” does not refer to the season itself, but to times of day. *Id.*

110. *Id.*

111. *Id.*

equivalently in both men's and women's programs . . . differences in particular program components will be found to be justifiable."<sup>112</sup> Presumably, this applies to the "program component" of scheduling. Thus, if the sport-specific needs—such as coaches, facilities, equipment, amount of games and practices<sup>113</sup>—are equivalent, one difference such as scheduling can be considered negligible and justified. There is no evidence that girls' teams in Michigan suffer from any "kind, quality or availability"<sup>114</sup> problems as a result of the current scheduling practices.

To reach its conclusion, the court considered evidence that girls' basketball players suffer because they do not play their state basketball tournament in March, during the "so-called" "March Madness."<sup>115</sup> However, language in the Policy Interpretation indicates that separate tournaments are legal under Title IX. In reference to athletic events, such as tournaments, the Policy Interpretation states that

differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).<sup>116</sup>

The court's findings of fact also state, "'March Madness' is the season of the year when basketball is the featured sporting event in the news media because of NCAA tournaments, and a number of promotional events promote basketball and basketball players."<sup>117</sup>

"March Madness" is officially associated with both the NCAA and the Illinois High School Association, not the MHSAA.<sup>118</sup> While

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112. *Id.* at 71,416 (explaining the "Policy" aspect of "Equivalence in Other Athletics Benefits and Opportunities").

113. These are among the factors listed in section 86.41(c) of the Department of Education's Title IX regulations, 45 C.F.R. § 86.41(c) (2002).

114. OCR Policy Interpretation, *supra* note 36, at 71,415 (giving an illustration of what will determine compliance regarding program components).

115. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 819 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002).

116. OCR Policy Interpretation, *supra* note 36, at 71,416.

117. *Cmtys. for Equity*, 178 F. Supp. 2d at 819.

118. *March Madness Athletic Ass'n v. Netfire, Inc.*, No. CIV.A. 3:00-CV-398-R, 2003 WL 22047375, at \*1 (N.D. Tex. Aug. 28, 2003). The Illinois High School Association (IHSA) has used the term "March Madness" since the 1940s to refer to the IHSA Tournament. *Id.* at \*7. In 1997, the IHSA began to refer to basketball related activities occurring at the same time as the IHSA tournament as "March Madness Experience." *Id.* In addition, in the early 1990's, the

other states specifically have chosen to associate state tournaments with “March Madness,” Michigan has not.<sup>119</sup> Thus, this finding does not specifically show that MHSAA basketball is the “featured sporting event in the news media.” In addition, there is no evidence that the MHSAA places more importance on the boys’ basketball tournament simply because it is held in the winter, or at the same time as the men’s NCAA basketball tournament. In fact, the boys’ tournament began in 1925,<sup>120</sup> before media promotion of “March Madness” even existed.<sup>121</sup> The court should have considered evidence related to the factors in the Policy Interpretation rather placing such importance on an aspect of college basketball which is not associated with the MHSAA basketball tournament.

2. *The Current MHSAA Scheduling Comports with the OCR Factors Used to Assess Compliance.* The Policy Interpretation mentions several general athletic program components that courts should consider when applying the Policy Interpretation in a Title IX evaluation.<sup>122</sup> Many of these components are more easily satisfied when girls’ and boys’ seasons are played at separate times of the year, making teams that play in separate seasons more likely to be in compliance with Title IX. For the component of “scheduling of games and practice times,”<sup>123</sup> compliance will be assessed by evaluating factors such as “(1) The number of competitive events per sport; (2) The number and length of practice opportunities; (3) The time of day competitive events are scheduled; (4) The time of day practice

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IHSA began to license “March Madness” and claimed exclusive rights to the term. *Id.* at \*8. In addition to the IHSA’s rights in “March Madness,” the NCAA has also claimed rights to “March Madness.” *Id.* at \*8–\*11.

119. The IHSA licensed the term “March Madness” to other state high school associations. *Id.* at \*8. The state licenses provided that a state high school athletic association could use the term March Madness if the name of the state preceded the term (ex. Iowa March Madness). *Id.* While approximately half of the states acquired a license to use the term, Michigan did not. The MHSAA’s letter in response to the offer stated that “the MHSAA did not use and had no intention of making future use of the term march madness.” *Id.*

120. See MHSAA, *Boys Basketball Champions, 1925–2003*, at <http://www.mhsaa.com/games/records/bbb.htm> (last visited Aug. 30, 2003) (on file with the *Duke Law Journal*) (listing yearly results of the boys’ basketball state championship games, beginning in 1925).

121. The NCAA’s use of the term “March Madness” is “generally traced to the 1982 NCAA Tournament when a CBS broadcaster, Brent Musberger, described the NCAA Tournament as ‘March Madness.’” *March Madness Athletic Ass’n*, 2003 WL 22047375, at \*8.

122. OCR Policy Interpretation, *supra* note 36, at 71,416.

123. See *id.* (presenting provisions codified in Nondiscrimination as the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 86.41(c) (1979)).

opportunities are scheduled; and (5) The opportunities to engage in available pre-season and post-season competition.”<sup>124</sup>

With separate seasons, there is an equal opportunity for girls’ and boys’ teams to enjoy many of these factors. The teams will not have to share gym time with up to six teams at a time (boys’ and girls’ freshman, junior varsity, and varsity teams). Half as many teams requiring access to the facilities ensures that there are twice as many opportunities for practices, and that practices can be held during the desired time of day. Practice time is maximized by the current basketball system in other ways. For instance, on a day when girls’ basketball games are scheduled, practice times for the boys’ teams must be reduced or eliminated, and vice versa.

Scheduling of games also will be optimized. When boys’ and girls’ basketball teams play in separate seasons, both teams are able to schedule games in the more desired evening slot. If the teams shared a season, this slot would have to be shared as well. The Policy Interpretation considers the limits that a schedule places on potential spectator appeal.<sup>125</sup> With both girls’ and boys’ basketball games played in the prime game slot, both teams are equally likely to attract fans to games, and maximize the level of fan attendance. The court declined to acknowledge that the MHSAA’s schedule increased the opportunities for fan support and attendance at games for both genders, despite the fact that this result comports with the intent specified in the Policy Interpretation.<sup>126</sup>

Another important component in the Policy Interpretation is the “opportunity to receive coaching and academic tutoring.”<sup>127</sup> This component addresses the relative availability of full-time coaches; relative availability of part-time and assistant coaches; and training, experience, and other professional qualifications of coaches.<sup>128</sup> As one of its justifications, the MHSAA argued that there was an insufficient

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124. *Id.*

125. *See id.* (specifying that making disparate event management resources available to men’s and women’s athletic programs “would not violate Title IX if . . . [doing so did] not limit the potential for women’s athletic events to rise in spectator appeal”).

126. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 818 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002) (“[T]he *only* potential advantage is the possibility that the opportunity for recruitment to play collegiate basketball may be increased . . .”) (emphasis added).

127. OCR Policy Interpretation, *supra* note 36, at 71,416; *see also* 45 C.F.R. § 86.41(c)(5) (2002) (codifying provisions from this section of the Federal Register).

128. OCR Policy Interpretation, *supra* note 36, at 71, 416.

number of qualified coaches in Michigan.<sup>129</sup> The court dismissed this justification, stating that “the empirical evidence on this point was too sparse to make a finding that this is true.”<sup>130</sup> If the MHSAA provides additional evidence showing that the schedule rearrangement will force Michigan schools to hire less qualified coaches, or that coaches who previously coached both teams will choose to coach boys’ teams, the Sixth Circuit should give this great deference in light of the OCR Policy Interpretation.<sup>131</sup> For instance, if the boys’ teams will end up with the most qualified coaches, the switch will actually render MHSAA *less* compliant with Title IX than with the current scheduling.

Separate athletic seasons also increase the likelihood of compliance with components (f) Provision of Locker Rooms, Practice, and Competitive Facilities,<sup>132</sup> and (i) Publicity.<sup>133</sup> Under the current system, at all times, both girls’ and boys’ teams practice in the same quality of facilities, and both enjoy “[e]xclusiv[e] . . . use of facilities provided for practice and competitive events.”<sup>134</sup> Additionally, with respect to publicity, there is no danger of a disparity in coverage in school papers, local papers, or attention given to one team over the other by the school. In addition, the MHSAA only contracts to televise an equal number of girls’ and boys’ sporting events.<sup>135</sup> Thus, teams in separate seasons do not have to compete for attention.

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129. *Cmtys. for Equity*, 178 F. Supp. 2d at 842 (rejecting the MHSAA’s arguments, including that an insufficient number of swimming coaches and soccer officials precluded concurrent scheduling of boys’ and girls’ seasons in those sports).

130. *Id.*

131. Such a proffer of evidence would be most appropriate should the Sixth Circuit decide to remand the case.

132. OCR Policy Interpretation, *supra* note 36, at 71,417; *see also* 45 C.F.R. § 86.41(c)(7) (codifying assessment factors).

133. OCR Policy Interpretation, *supra* note 36, at 71,417; *see also* 45 C.F.R. § 86.41(c)(10) (codifying assessment factors).

134. OCR Policy Interpretation, *supra* note 36, at 71,417.

135. *See* MHSAA, *News: Local Litigation Now a National Issue*, at <http://www.mhsaa.com/news/equity.html> (last visited Sept. 8, 2003) (on file with the *Duke Law Journal*) (“The MHSAA requires the same network televise both its boys’ and girls’ basketball tournaments and air an equal number of games for each gender.”).

*B. The District Court Gave Undue and Unfounded Emphasis to the Importance of College Scholarships and Recruiting*

1. *The References to Recruiting in the Policy Interpretation Were Not Intended to Apply to Interscholastic Athletics.* In describing the scope of the application of its Policy Interpretation, the Department of Health, Education, and Welfare (HEW) states, “[t]his Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs . . . .”<sup>136</sup> Use of the word “often” makes it clear that all of the principles do not necessarily apply to all programs.

Both of the principles most closely related to recruiting fall into this category. One such principle is “Recruitment of Student Athletes,”<sup>137</sup> a factor that the court, in reaching its conclusion that the current sports season was discriminatory towards Michigan high school athletes, weighed very heavily.<sup>138</sup> The very first sentence regarding “Application of the Policy” for “Recruitment of Student Athletes” states, “[t]he athletic recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes.”<sup>139</sup> Thus, recruiting is a factor for institutions that *are recruiting athletes*, rather than institutions, such as high schools, from which athletes are recruited. The first two factors to be considered for compliance, (1) whether coaches of male and female programs are given substantially equal opportunities to recruit, and (2) whether financial aid is made equally available to both sexes,<sup>140</sup> also obviously apply to programs that recruit athletes. In this context, it is likely that the third factor—whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionate effect upon the recruitment of students of either sex<sup>141</sup>—also was intended to apply only to the treatment of

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136. OCR Policy Interpretation, *supra* note 36, at 71,413.

137. *Id.* at 71,417.

138. *See, e.g.,* Cmty. for Equity v. Mich. High Sch. Athletic Ass’n, 178 F. Supp. 2d 805, 823–26 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002) (devoting considerable attention to the irregular season’s effect on recruitment of student athletes, in the context of girls’ volleyball).

139. OCR Policy Interpretation, *supra* note 36, at 71,417.

140. *Id.* Even if some Michigan high schools do recruit athletes, no claim was made that MHSAA schools violate the Equal Protection Clause or Title IX by discriminating against girls in recruiting. Thus, recruiting is not relevant to the case here.

141. *Id.*

prospective students by the organizations responsible for recruiting, and not to interscholastic athletics programs.

The same is true of the other main provision related to recruiting in the Policy Interpretation, which states that “institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules [that] equally reflect their abilities.”<sup>142</sup> Again, this statement, made in reference to “Levels of Competition”<sup>143</sup> applies specifically to intercollegiate competition. All of the factors guiding assessment of compliance specifically use the term “intercollegiate.”<sup>144</sup> Only colleges truly can provide the *opportunity* to participate in a college program.

2. *The District Court Incorrectly Gave Substantial Consideration to Recruiting Effects That Result from the Current MHSAA Schedule.* When deciding whether the MHSAA was a state actor, the court found that “[t]he purpose of the MHSAA [is] to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state.”<sup>145</sup> The court further held that its analysis of whether a violation occurred would be guided by the regulations promulgated under Title IX.<sup>146</sup> Thus, the court declared that its intent was to answer the question of “whether female high school athletes are denied the benefits of *school athletic programs* as a result of the scheduling system.”<sup>147</sup> However, the court elsewhere suggested that “outside, business interests, like amateur athletic clubs and colleges and universities” would be factored into its analysis.<sup>148</sup> In its statement of the case, the court implied that the school athletic programs, which the MHSAA sponsors, should be the central focus of the inquiry.<sup>149</sup> The holding of the case undermines the mission of the MHSAA, and

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142. *Id.* at 71,418.

143. *Id.*

144. *See id.* (employing the word “intercollegiate” when describing each of the three possible measures of compliance).

145. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass’n*, 178 F. Supp. 2d 805, 847 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002).

146. *See id.* at 857 (citing *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000)).

147. *Id.* (emphasis added).

148. *See id.* at 855 n.56 (internal quotation marks omitted) (downplaying the MHSAA’s interpretation that “Title IX does not assess the impact” of such interests).

149. *See id.* at 851 (“[T]he Court must decide the extent to which Defendant MHSAA exerts control over *interscholastic athletic programs of Michigan high schools.*”) (emphasis added).

instead finds that the MHSAA schedule's impact on "outside businesses," which are relevant to a small percentage of high school athletes, takes precedence over the interests of most Michigan student-athletes, coaches, administrators, and families.

Courts should not ignore the purpose and the goals of the MHSAA when considering what benefits a school athletic program should be expected to confer. The MHSAA Articles of Incorporation provide that the goals of the Association 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.*"<sup>150</sup> Therefore, the primary objective of high school athletics in Michigan is not developing and preparing athletes for collegiate-level competition. Thus, by looking beyond the "school athletic programs," and giving great weight to "outside, business interests," the court exceeded the scope of the inquiry it had set for its analysis.

The MHSAA's argument regarding Title IX does not twist the issue, but rather, it is a legitimate argument addressed to Title IX's intent. The court's analysis should have centered on whether the recipient of the federal funds, the MHSAA, discriminates within its own organization. Here, the plaintiffs claimed that female high school students are denied the benefits of *school athletic programs*.<sup>151</sup> The court's eventual holding suggests that one of the most important functions of school athletic programs is developing collegiate-level athletes.<sup>152</sup> This is contrary to the very purpose of the MHSAA, which endeavors to provide opportunities to students of all abilities. The MHSAA recognizes that high school athletic programs serve a greater purpose than catering to only the most elite level of athletes. While the claim against the MHSAA addresses Michigan high school athletic programs, a great deal of the court's analysis centers around other, disconnected programs, including participation in special events for professional or semiprofessional teams,<sup>153</sup> participation in

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150. *Id.* at 810 (quoting MHSAA Articles of Incorporation) (emphasis added).

151. *Id.* at 855.

152. *See id.* at 857 (alluding to "Findings of Fact" section, which outlined lost recruiting opportunities for female volleyball players who compete in the winter). This reference suggests that the court considered lost recruiting opportunities to be one of the "disadvantages" that female, but not male, athletes in Michigan suffer.

153. *See id.* at 818 (acknowledging "credible evidence" that female athletes were disadvantaged by not being able to participate in special events for professional or semiprofessional teams, like playing at halftime of a professional game that takes place in the

United States Volleyball Association (USAV) matches,<sup>154</sup> summer and club swimming,<sup>155</sup> and soccer programs such as the United States Soccer Federation (USSF), the American Youth Soccer Organization (AYSO), and the Olympic Development Program (ODP).<sup>156</sup>

3. *After Accepting the Significance of Evidence Related to Recruiting, the Court's Subsequent Analysis of Recruiting Effects Still Was Flawed Due to Inconsistencies in Reasoning.* Even if the court properly considered recruiting opportunities, the court's analysis of this issue was inconsistent. The court stated that the "only potential advantage" to playing basketball in the fall is the increased possibility of recruitment opportunities.<sup>157</sup> Nevertheless, it declined to concede even this factor in favor of the MHSAA, because "the MHSAA did not offer any evidence to prove that [increased opportunities for recruitment] translated into more scholarships or spots on collegiate basketball teams [for Michigan girls]."<sup>158</sup> The court dismissed the MHSAA's argument that scheduling girls' basketball in the fall is actually beneficial to recruited athletes. Testimony from Michigan high school coaches and the head coach at the University of Michigan supported this argument.<sup>159</sup> Additionally, the MHSAA showed that

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traditional season). It seems ironic that a court so concerned with whether female sports are played during traditional seasons neglects to mention that the Women's National Basketball Association (WNBA) season is in the summer (a nontraditional season for basketball), and that the MHSAA scheduling has no impact on whether girls can participate in halftime events for the league. The WNBA is an all female professional basketball league that plays during the National Basketball Association (NBA)'s offseason, from May to September. *See* WNBA, *WNBA Schedule 2003*, at <http://www.wnba.com/schedules/index.html> (last visited Sept. 11, 2003) (on file with the *Duke Law Journal*) (showing schedule of games for 2003 season).

154. *See Cmty. for Equity*, 178 F. Supp. 2d at 823 (discussing the importance of private club programs for volleyball recruiting).

155. *See id.* at 835 (discussing effect of summer swimming on participation in high school swimming programs, and recognizing MHSAA's concern that "[j]oining the [girls' and boys' high school] seasons would . . . cause a decline in club programs that rent pool space from schools").

156. *See id.* at 830 (stating that girls but not boys lose opportunities to participate in USSF, AYSO and ODP programs). In reality, the club seasons for female soccer players in Michigan are scheduled in the fall and winter, and thus do not conflict with high school soccer, and the girls' ODP program is conducted in the summer and fall as well. Girls in Michigan are able to participate in both high school soccer and ODP and club programs.

157. *Id.* at 817.

158. *Id.*

159. *Id.* at 820–21. In particular, Sue Guevara, head coach, testified that many women's college basketball coaches from around the country are able to attend the top girls' games in Michigan. Prior to October, high school games attended do not count against the contact limit of forty games instituted by the NCAA. It is also more convenient for college coaches to attend fall games because they do not have a conflict with the NCAA season, which is in the winter. *Id.*

only six of the “Mr. Basketball” title recipients have played collegiate basketball at out-of-state schools, whereas fifteen “Miss Basketball” recipients have done so.<sup>160</sup> This suggests that female basketball players enjoy additional recruiting success. The court reasoned that even if Michigan girls currently have special advantages in being recruited, if the girls played during the winter season, “they would, at the very least, be on ‘equal footing’ with Michigan boys and with girls in the rest of the country with respect to collegiate recruiting.”<sup>161</sup> This finding is inconsistent with the court’s earlier statement that it cares about traditional athletic seasons only to the extent that a traditional season is the most advantageous.<sup>162</sup> Thus, the court’s opinion admits that the current girls’ basketball season provides advantages for recruiting, but the court’s holding ultimately removes this advantage. This is puzzling, given that recruiting disadvantages were one of the plaintiffs’ main concerns.<sup>163</sup>

Additionally, the court’s findings regarding recruiting for female basketball and volleyball players are also problematic. The court’s decision implies that the wishes of volleyball players should take precedence over those of basketball players. The court found that “[t]he MHSAA high school [volleyball] season . . . disadvantages Michigan girls seeking college athletic scholarships because it occurs after the NCAA’s early signing date.”<sup>164</sup> However, if the MHSAA switched girls’ volleyball and basketball seasons, the girls’ basketball players would be affected by the timing of the signing date. Girls’ basketball players would have to sign letters of intent to compete in college before their senior year season, as volleyball players do now. It is inevitable that some athletic seasons must occur after the signing date. Giving volleyball players this particular advantage does not eliminate alleged discrimination against female athletes resulting from the scheduling of athletic seasons. The change simply will affect *different* female athletes. The result will not be that fewer athletes, or female athletes in general, are less affected by the timing of the signing date.

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160. *Id.* at 821 n.14. “Mr. Basketball” and “Miss Basketball” titles are awarded to Michigan’s top players each year. *Id.*

161. *Id.* at 820.

162. *See id.* at 808 (“In this case, the Court cares about traditional sports seasons only to the extent that a traditional season . . . happens to be the most advantageous playing season . . .”).

163. *See, e.g., id.* at 824–26 (describing recruiting disadvantages suffered by plaintiff volleyball players).

164. *Id.* at 825.

C. *Evidence of Higher Student-Athlete Participation in Michigan Shows the “Exceedingly Persuasive” Justification Necessary to Defeat an Equal Protection Challenge.*

The court rejected the MHSAA’s argument that evidence of high participation rates for high school sports in Michigan is due to the current scheduling system.<sup>165</sup> The court concluded that the participation rates were only “circumstantial evidence.”<sup>166</sup> These numbers, however, are not circumstantial evidence. They are actual counts of participants in high school sports and they offer the best opportunity to illustrate that Michigan girls, as compared to girls in other states, are equally, if not more, advantaged by Michigan’s current athletics schedule. These numbers illustrate, and the MHSAA believes, that the state is maximizing opportunities for participation by female athletes.<sup>167</sup> The MHSAA based its argument on statistics, rather than the “overbroad generalizations about the different talents, capacities, or preferences of males and females” that are prohibited by the Equal Protection Clause.<sup>168</sup>

While Judge Enslin insisted that the MHSAA switch its girls’ basketball and volleyball seasons,<sup>169</sup> the evidence shows that Michigan’s schedule maximizes participation in these sports. In more than half of the states in which both girls’ and boys’ basketball are scheduled for the same season, freshman or junior varsity squads have been eliminated.<sup>170</sup> This was done in order “to accommodate [increased] demands on facilities, coaches and officials,”<sup>171</sup> which was also one of the justifications for the current scheduling of basketball and volleyball offered by the MHSAA and rejected by the court.<sup>172</sup> With the current scheduling, Michigan averages thirty girls’ basketball players per school,<sup>173</sup> far more than in other states. For example, Missouri and Iowa average twenty-four players, Ohio

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165. *Id.* at 841–42.

166. *Id.* at 841.

167. *See* Compliance Plan, *supra* note 89 (stressing that switching seasons would involve tradeoffs, benefiting some schools but disadvantaging others).

168. *Cmtys. for Equity*, 178 F. Supp. 2d at 848 (quoting *United States v. Virginia*, 518 U.S. 515, 532–33 (1996)).

169. *See supra* Part II.D.1.

170. Becker, *supra* note 89.

171. *Id.*

172. *Cmtys. for Equity*, 178 F. Supp. 2d at 839–42.

173. Bob Becker, *Decision Misguided on Many Levels*, GRAND RAPIDS PRESS, Aug. 2, 2002, at B1, available at 2002 WL 23818869.

averages twenty-three players, Florida averages twenty-one players, Alabama and Oklahoma average fifteen players, and Tennessee averages fourteen players per school.<sup>174</sup> Judge Enslin used Kentucky to illustrate that a state can schedule boys' and girls' basketball during the same season.<sup>175</sup> However, Kentucky has only 5,950 girls playing basketball, well surpassed by the 21,000 girls playing basketball in Michigan.<sup>176</sup> Taking into account Michigan's larger size, Kentucky still averages only twenty-one players per school, which equates to two basketball teams per school, as compared to Michigan's thirty-player average and three teams per school. Further, the Kentucky girls' state basketball tournament is held earlier than the boys' state tournament.<sup>177</sup> This gives boys a longer season, and suggests that the girls are a "warm up act," while the boys enjoy the "grand finale"—two factors that the court critiqued in the Michigan system.<sup>178</sup>

With the advent of Title IX and the requirement that schools support girls' teams, many schools eliminated freshman or junior varsity basketball teams, or downsized volleyball programs and seasons.<sup>179</sup> 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).<sup>180</sup> This is not the case in other states. For example, Georgia schedules boys' and girls' basketball seasons at the same time. However, only 181 of the state's high schools that offer girls' basketball also offer girls' volleyball, and the volleyball season is limited to only fifteen days of competition.<sup>181</sup> In other states, many schools that sponsor girls' basketball do not sponsor volleyball.<sup>182</sup> Although these numbers do not *prove* that the scheduling system

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174. Becker, *supra* note 89.

175. *Cmtys. For Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220, at \*19 (W.D. Mich. Aug. 1, 2002).

176. Becker, *supra* note 173.

177. *Id.*

178. *See Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 820 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002) (observing that, in Michigan, "[t]he boys' high school basketball season is approximately three weeks longer than the girls' season"); *id.* at 836-37 (expressing concern about the psychological effects of treating girls like "second class" citizens).

179. Becker, *supra* note 89.

180. Fred Girard, *Proposal Switches Girls' Prep Seasons*, DETROIT NEWS, Oct. 31, 2002, at E1, *available at* 2002 WL 102335394.

181. Becker, *supra* note 89.

182. *See* Becker, *supra* note 173 (reporting that these schools number 380 in Oklahoma, 283 in Texas, and 240 in New Jersey).

causes greater participation in Michigan, they do show that the schedule does not harm the participation rates. Thus, they provide the exceedingly persuasive justification needed to show that the current scheduling system meets Michigan's "important" goal of maximizing participation rates.

#### IV. POTENTIAL EFFECTS OF *COMMUNITIES FOR EQUITY* AND STRATEGY FOR FUTURE STATE DEFENDANTS

The court's ruling in *Communities for Equity* is significant because it provides a starting point for the defense of a nontraditional athletics season. The stakes are high for athletes and administrators across the country. While the court's holding will most directly affect Michigan, its impact also will be felt nationwide. For instance, a favorable finding for Michigan may provide states like South Dakota that are reluctantly switching athletic seasons with a stronger, and thus less costly, defense.<sup>183</sup> In addition, this holding will affect all states that plan to add new sports or additional high school state tournaments. If state high school athletic associations plan to expand a schedule to include sports in "nontraditional seasons," these associations will need to understand what justifications are legally sufficient. A holding against scheduling athletic seasons for nontraditional athletic seasons may have a chilling effect on the sanction of new high school sports. A state that is considering offering a new sport in a nontraditional season due to preexisting use of facilities, coaches, or officials during that sport's "traditional season" may shy away from adding the sport because of the threat of potential litigation.

Next to Michigan, Hawaii stands to lose the most from a ruling against nontraditional seasons. Hawaii presently schedules boys' and girls' basketball seasons at different times of the year, and Hawaii is also the only state in which high school girls play basketball in the spring.<sup>184</sup> Though in 1999, Hawaii Governor Ben Cayetano directed the superintendent of education and high school athletic directors to

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183. See *supra* notes 1–7 and accompanying text.

184. Dave Reardon, *Spring Hoops Might Not Be Federal Case*, HONOLULU STAR-BULL., Dec. 13, 2000, <http://starbulletin.com/2000/12/13/sports/story2.html>. In Rhode Island, girls' volleyball is also played in a nontraditional sports season. *Communities for Equity, CFE v. MHSAA*, at <http://www.communitiesforequity.com/mhsaa.html> (last visited Aug. 30, 2003) (on file with the *Duke Law Journal*). Thus, this state may anticipate a legal battle to switch scheduling based on the outcome of the *Communities for Equity* case.

swap the girls' high school basketball and softball seasons to align them with college schedules,<sup>185</sup> the Hawaii High School Athletic Association (HHSAA)'s schedule remains unchanged today.<sup>186</sup> In fact, in 2000, representatives from the United States Education Department told Hawaii school officials that both nontraditional athletic seasons and different seasons for boys and girls are not necessarily violations of Title IX.<sup>187</sup> Thus, in Hawaii, girls' basketball remains a spring sport, while girls' softball is played in the winter season.<sup>188</sup> As in Michigan, rearranging these two sports in Hawaii could adversely impact almost all of the sports currently offered by the HHSAA.<sup>189</sup> In Hawaii, overlapping the baseball and softball seasons would overtax the existing facilities, as few schools have fields for both baseball and softball.<sup>190</sup> The softball teams, which require a smaller field, would have to share city parks that are used for youth softball and baseball seasons during the spring.<sup>191</sup> In addition, the HHSAA calendar is currently balanced, with five sports played in each of the three seasons. If Hawaii realigns its athletic seasons, six sports would be played in the fall, seven in the spring, and only two in the winter.<sup>192</sup> The outcome of the *Communities for Equity* case will influence whether the HHSAA retains its current schedules.

States like Hawaii, therefore, should pay close attention to the lessons that can be gleaned from the *Communities for Equity* case. The case highlights several specific areas that would strengthen the defense of a nontraditional athletic season. Any defense against a claim of a Title IX equal opportunity violation must show that the scheduling comports with the ten factors in subsection (c) of section

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185. Cindy Luis, *Cayetano Wants Season Switch*, HONOLULU STAR-BULL., Oct. 5, 1999, <http://starbulletin.com/1999/10/05/sports/story1.html>.

186. See 2003-2004 HHSAA Championships, at [http://www.hhsaa.org/page\\_server/PrepNews/Articles/7A3299077493F258F731C29448.html](http://www.hhsaa.org/page_server/PrepNews/Articles/7A3299077493F258F731C29448.html) (last visited Sept. 14, 2003) (on file with the *Duke Law Journal*) (listing the championship dates for all Hawaii high school sports, including girls' softball and basketball).

187. See Reardon, *supra* note 184 (quoting the United States Department of Education's Office of Civil Rights representatives as saying that "[t]here's nothing that says boys' and girls' basketball teams have to play at the same time as the college teams do," and that "[t]here is nothing in Title IX that says that boys and girls must play in the same season").

188. *Id.*

189. Luis, *supra* note 185.

190. *Id.*

191. *Id.*

192. *Id.*

106.41 and meets the effective accommodation test.<sup>193</sup> Other factors also will contribute to a strong defense. The first of these is testimony. While the plaintiffs in *Communities for Equity* called several former female Michigan high school athletes as witnesses, the defendants failed to call any female athletes who preferred the current sports schedule, a fact that undermined the MHSAA's assertion that Michigan girls prefer the current seasons.<sup>194</sup> Such testimony would counter the opinions of girls who feel discriminated against, and show that there is statewide support for the current system. Future defendants should learn from the court's skepticism toward testimony presented by coaches with the most successful programs in the state who favored the current system—i.e., coaches with a vested interest in maintaining the status quo.<sup>195</sup> Defendants should offer testimony of coaches and players who have experienced varying degrees of athletic success under the current system. This approach was successful in *Ridgeway*, where the defendants presented a comprehensive, independent report indicating that the current seasons were favored by a large majority of the state's players and residents.<sup>196</sup>

Athletic associations also can strengthen their defense by preparing surveys and reports to counter anticipated arguments from the plaintiffs. The *Communities for Equity* court found the defendant's survey results failed to support the MHSAA's assertion that Michigan girls prefer the current seasons because of design flaws and bias.<sup>197</sup> The court also found the survey lacked the independent analysis needed "to determine the potential benefits and detriments of moving [the] seasons."<sup>198</sup> The court was particularly concerned with the paucity of member schools and girls that were actually

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193. See *supra* notes 32–42 and accompanying text.

194. *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 843 (W.D. Mich. 2001), *appeal docketed*, No. 02-1127 (6th Cir. filed May 9, 2002).

195. See *id.* at 821:

While the Court places a good deal of weight on [the coach's] impression . . . her testimony must also be considered in light of Flint Powers' status as "one of the most successful" girls' basketball teams in Michigan whose "experiences [might be] different from the run-of-the-mill programs in the state."

(alteration in original) (citation omitted).

196. See *Ridgeway v. Mont. High Sch. Ass'n*, 858 F.2d 579, 586 (9th Cir. 1988) (stating that the report prepared by the facilitator appointed by the parties concluded that the current seasons were "favored by a large majority of Montanans, including the players," and recommended that the same seasonal structure be retained at that time).

197. *Cmtys. for Equity*, 178 F. Supp. 2d at 842–43.

198. *Id.* at 843.

surveyed.<sup>199</sup> A state that is threatened by litigation should be prepared to present a detailed survey that encompasses as many schools as possible. Additionally, athletic associations should also prepare reports outlining the negative effects of switching athletic seasons. For instance, in *Striebel v. Minnesota State High School League*,<sup>200</sup> the defendants convinced the court that there was no feasible way to accommodate boys' and girls' teams in the same season because of limited access to athletic facilities.<sup>201</sup> The HHSAA likely can use this approach successfully because it can demonstrate that Hawaii's limited amount of land and high real estate costs cause similar difficulties.

Yet another way to strengthen a defense is to present evidence that participation rates will decrease if the scheduling is changed. The MHSAA attempted to present such evidence by calling the organization's communications director to testify to participation numbers, percentages, and comparisons to other states.<sup>202</sup> Nevertheless, this testimony was disallowed as "anecdotal" and irrelevant.<sup>203</sup> Thus, a state should be prepared to offer such evidence, justify this evidence, and form a counterargument as to why it is relevant and reliable.

Finally, even the court in *Communities for Equity* acknowledged that it is legally possible for a sport to be scheduled in a nontraditional season, so long as it is the most advantageous season, and girls and boys are equally advantaged.<sup>204</sup> Therefore, arguments in defense of nontraditional athletic seasons also should make a connection between the evidence presented and the resulting

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199. *Id.* at 843 (remarking that only one-third of the girls were surveyed at sixty of the 729 member schools, of which only two-thirds had played sports in a disadvantaged season).

200. 321 N.W.2d 400 (Minn. 1982).

201. *Id.* at 402. The Supreme Court of Minnesota found the evidence "uncontroverted" that there was limited access to pools and tennis courts in many high schools, and thus "no feasible way to accommodate boys' and girls' teams in the same season existed." *Id.* Though the court acknowledged there were alternative methods for dividing athletes between two seasons, neither the current system nor the alternatives were "without disadvantages." *Id.*

202. Becker, *supra* note 173. This article suggests that Judge Enslin was heavily biased toward the plaintiffs. *See id.* ("[H]e built his response around figures presented by CFE, even though he denied the MHSAA the opportunity to present its own set of numbers and explanations for them."). Therefore, it is likely that another court would be much more willing to allow evidence of this nature.

203. *See id.* (criticizing Judge Enslin's decision in *Cmtys. for Equity*); *Cmtys. for Equity*, 178 F. Supp. 2d at 828 (labeling the evidence presented concerning any possible logistical problems stemming from traditional season play "anecdotal").

204. *Cmtys. for Equity*, 178 F. Supp. 2d at 808.

advantage for that sport's participants. Additionally, the advantages of the current or proposed schedule should be the primary theme that resonates through all arguments in defense of scheduling.

#### CONCLUSION

It is legally permissible to schedule girls' and boys' sports in separate seasons. What remains to be seen is exactly how difficult it will be to justify doing so. This Note argues that the most recent case to address the issue, *Communities for Equity*, failed to correctly analyze gender discrimination in high school sports programs, and thus articulated an incorrect and excessively restrictive standard. In the near future, courts will face the difficult task of distinguishing personal preferences from true gender discrimination in *Communities for Equity* and other cases. Such a determination should be guided by existing case law and established guidelines, such as the OCR Policy Interpretation. Additionally, courts must consider *all* of the information presented before deciding whether accommodating some girls justifies harming thousands of other student-athletes, coaches, and school and state administrators. In the end, so long as the differences between boys' and girls' programs are negligible and justified, separate interscholastic athletic seasons do not violate Title IX or the Equal Protection Clause of the Fourteenth Amendment.