
Leveling the Playing Field of High School Athletics - Communities for Equity v. Michigan High School Athletic

Joseph Hodal

Follow this and additional works at: <https://via.library.depaul.edu/jslcp>

Recommended Citation

Joseph Hodal, *Leveling the Playing Field of High School Athletics - Communities for Equity v. Michigan High School Athletic*, 1 DePaul J. Sports L. & Contemp. Probs. 63 (2003)
Available at: <https://via.library.depaul.edu/jslcp/vol1/iss1/8>

This Notes and Comments is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal of Sports Law by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

**LEVELING THE PLAYING FIELD OF HIGH SCHOOL ATHLETICS
COMMUNITIES FOR EQUITY V. MICHIGAN HIGH SCHOOL ATHLETIC**

Joseph Hodal

INTRODUCTION

“Change is the only constant. Hanging on is the only sin.” [EN 1]

The quote above, taken from the court’s written opinion in *Communities for Equity v. Michigan High Sch. Athletic Ass’n*, gets to the heart of many of the struggles that female high school athletes have recently endured in states throughout the country. [EN 2] However, claims based on violations of the Equal Protections Clause of the Fourteenth Amendment of our Federal Constitution, as well as Title IX of the Education Amendments of 1972, have provided female athletes with the opportunity to obtain the recognition that male athletes have been receiving for years. [EN 3] In 1998, Diane Madsen, Jay Roberts-Eveland, and the *Communities for Equity* ("Plaintiffs") brought a federal lawsuit on behalf of their minor children against the Michigan High School Athletic Association ("MHSAA or Defendants") alleging that Defendants discriminated against female athletes. Originally, Plaintiffs alleged discrimination in several forms. However, the sole remaining contention by Plaintiffs centered on alleged discrimination due to MHSAA's scheduling of athletic seasons and tournaments for six girl's sports. According to Plaintiffs, the girls' athletic seasons and tournaments were scheduled during disadvantaged times of the year. [EN 4]

Prior to litigation it should have been apparent to the MHSAA that it was fighting a losing battle. Similar cases brought in other states involving female athletics, girls’ basketball in particular, had unmistakably gone in favor of the complaining female athletes. Nevertheless, the disagreement went to trial and the court reiterated the fact that many, if not all of the lower forty-eight states, scheduled female sports akin to traditional seasons. [EN 5] A further inquiry into the court's decision in *Communities* signifies that the court was accurate in determining that Defendant was a state actor and that it violated (1) the Equal Protections Clause of Fourteenth Amendment, (2) Title IX, and (3) provisions of Michigan’s Elliot-Larsen Civil Rights Act ("ELCRA"). Essentially the court makes a ruling in favor of the Plaintiffs but leaves the changes up to the Defendant. In accord with traditional notions of federalism, the court refrains from designating exactly how the new seasons should be scheduled. The following analysis will focus on the Equal Protection and Title IX allegations and the kind of rippling effect this case might have on other issues involving gender equality and society in general.

II. BACKGROUND

A. Parties

On June 26, 1998, Plaintiffs Diane Madsen, Joy-Roberts Eveland, and the *Communities for Equity* brought suit against the Michigan High School Athletic Association. [EN 6] Ms. Madsen, a school teacher and president of Plaintiff *Communities for Equity* ("CFE or Plaintiff"), filed suit on behalf of her three minor daughters, Katie, Kristi, and Kelsey Madsen. [EN 7] Ms.

Eveland, the vice president of the CFE, filed suit on behalf of her two daughters, Kele and Brianna who were both minors at the time the lawsuit was filed. [EN 8]

CFE was formed in 1997 by parents and student athletes to:

educate people about the compliance of Title IX, about gender equity in general in athletics, and to advocate for compliance of Title IX. CFE works toward this goal by distributing a ‘parental tool kit’ for parents and students to learn about Title IX, and by speaking to groups throughout Michigan. [EN 9]

CFE also advocates its position with various parties, including the MHSAA “to whom CFE complained about the current scheduling of seasons for girls.” [EN 10]

The lawsuit has been certified as a class action. Madsen, Eveland, and CFE represent a class of all present and future female students enrolled in MHSAA member schools participating in interscholastic athletics or deterred from participating because of Defendant MHSAA's allegedly discriminatory conduct. They represent all who are adversely affected by MHSAA's conduct. [EN 11]

Defendant is an incorporated membership organization that acts as the governing body for interscholastic sports in the state of Michigan. [EN 12] The MHSAA is comprised of over 700 Michigan high schools, both public and private. [EN 13] The MHSAA was first created under the authority of the Michigan Legislature in 1972. In 1995 the MHSAA's official designation was removed when the School Code was revised. However, the modification did not substantively change the operation of MHSAA. [EN 14]

The MHSAA regulates interscholastic competition between member schools. It sets standards for school membership and eligibility of students to participate in interscholastic athletics and has adopted rules and regulations for each MHSAA sanctioned sport. The MHSAA also requires its members to use MHSAA-registered game officials, and also designates penalties for violations of any MHSAA rules. [EN 15] The MHSAA is composed of nineteen voting members, fourteen of which are elected by member schools. [EN 16] The MHSAA schedules seasons, prescribes when practice may begin, when competition may begin, when competition must end, and the maximum number of games to be played. [EN 17]

B. History of the Inequities

Girls' basketball was not a MHSAA sanctioned sport until the early 1970s. Prior to 1971 many girls' teams played in the winter. However, shortly thereafter the MHSAA adopted a rule that allowed girls to play basketball at any time during the year since MHSAA had not yet established a MHSAA sponsored tournament. [EN 18] In the fall of 1973, the first MHSAA girls' basketball tournament was held, and soon after the MHSAA's newly-constituted Basketball Coaches Committee voted to keep boys' basketball in the winter and place girls' basketball in the fall. [EN 19] Prior to the 1971-72 school year, boys' golf was originally scheduled in the spring but later moved to the fall to obtain “better use of courses on Saturdays.” However, when considering whether to move the girls' season to the fall, the vote was defeated by the MHSAA's committee of coaches. [EN 20]

In 1981, the Representative Council decided to schedule boys' and girls' soccer together in the fall. [EN 21] Defendant's decision was based on a survey of schools, as well as an interest

in providing a financial advantage to schools conducting boys and girls sports during the same season. However, when surveyed, sixty schools requested separate soccer seasons for the sexes, eighteen requested combined seasons, and the remaining 500 schools had no preference. [EN 22] As a result of the survey the Representative Council determined that, beginning in 1982-83, a boys' soccer tournament would be held in the fall and the girls' soccer tournament would be held in the spring. [EN 23] In May 1990, the MSHAA recognized that girls' participation opportunities in the winter season were lacking, and therefore took a step towards remedying the inequity by changing Lower Peninsula girls' swimming and diving from the fall season to the winter. [EN 24] At this time the MHSAA was aware that it could be held legally liable if girls' sports seasons were found legally inequitable. Therefore, proposals were made to study the seasons in part to keep the MHSAA in a position of choosing its future voluntarily rather than being forced to fight legislated or court-ordered changes in the future if something were not done soon. [EN 25] The comprehensive study of sports seasons included:

- (1) switching girls' and boys' Lower Peninsula swimming seasons by year 2000;
- (2) combining boys' and girls' golf into a single coed program by the year 2000 (and possibly doing the same with tennis); and
- (3) switching girls' volleyball and basketball seasons by the year 2000. [EN 26]

None of these changes had been implemented prior to the litigation.

C. Sport-Specific Facts and decisions by the Court

1. Girls' Basketball

The court determined that, there are a number of disadvantages to playing basketball in the fall and that girls were originally scheduled to play basketball in the fall only to avoid inconveniencing the boys' basketball team. [EN 27] During the 1999-2000 school years, 19,760 girls played basketball for MHSAA member schools and the MHSAA scheduled the girls' basketball state championship tournament in the fall. [EN 28] Regulations set August 13 as the first day for practice, August 27 as the first date for contests, and the end of the season as December 1, which is contrary to the girls' basketball season in the forty-eight other states and the NCAA. [EN 29] The boys' basketball season was scheduled for the winter, beginning on November 12, and ending on March 23. The boys' season is two weeks longer than the girls' season. [EN 30]

2. Girls' Volleyball

The court found that the MHSAA's scheduling of girls' volleyball in the winter was non-traditional since forty-eight other states scheduled girls' volleyball for the fall. [EN 31] In 1999-2000, 20,943 girls played volleyball for MHSAA member schools, the largest number of participants in an MHSAA's girls' sport. [EN 32] The girls' volleyball state championship tournament is scheduled in the winter. [EN 33] During the 2001-2002 school year, the first practice date was set for November 15, the first contest date set for December 8, and the season's end on March 16. [EN 34]

3. Girls' Soccer

In 1999-2000, 11,921 girls played soccer for MHSAA member schools. [EN 35] For 2001-2002, MHSAA set the first practice date as March 11, the first contest date as March 22, and the end of the season as June 15. [EN 36] The MHSAA girls' soccer tournament is in the spring, whereas the NCAA schedules women's soccer in the fall. [EN 37] However, there does not appear to be one clear season in which high school girls play soccer across the nation, for a number of states employ a number of different scheduling mechanisms for soccer. [EN 38]

4. Lower Peninsula Girls' Golf

The Court found that in Michigan, fall is the more advantageous season for playing high school golf. [EN 39] The MHSAA schedules the Upper Peninsula boys and girls golf state championship tournament in the spring. [EN 40] For 2001-02, MHSAA set the first practice date for Lower Peninsula girls' golf as March 11, the first contest date as March 14, and the end of the season as June 1. This places Lower Peninsula girls' golf in the spring season. [EN 41] The MHSAA schedules the Lower Peninsula boys' golf state championship tournament in the fall, while the NCAA schedules men's golf in the spring. [EN 42] For 2001-2002, MHSAA set the first practice date for Lower Peninsula boys' golf as August 9, the first contest date as August 13, and the end of the season as October 20. [EN 43]

5. Lower Peninsula Girls' Swimming and Diving

The Court found that the winter swimming season has advantages over the fall. [EN 44] The MHSAA schedules the Lower Peninsula girls' swimming and diving state championship tournament in the fall. [EN 45] For 2001-02, the MHSAA set the first practice date for Lower Peninsula girls as August 13, the first contest date as August 25, and the end of the season as November 17, which puts the Lower Peninsula girls' swimming and diving season in the fall. [EN 46] The MHSAA schedules the swimming and diving state championship tournaments in the winter for Upper Peninsula boys and girls. [EN 47] The entire season for both boys and girls in the Upper Peninsula is placed by the MHSAA in the winter. [EN 48]

6. Girls' Tennis

After reviewing the evidence, the Court found that spring is the more advantageous playing season for tennis. [EN 49] In addition, Defendant presented no evidence indicating that both sexes playing tennis in the same season would create logistical problems, which had been the strongest basis for Defendant's argument. [EN 50] In 1999-2000, 8,759 girls played tennis for MHSAA member schools. [EN 51] For 2001-02, MHSAA set the first practice date as August 13, the first contest date as anytime after the first practice, and the end of the season as October 20. This places girls' tennis in the fall. [EN 52] MHSAA schedules the boys' tennis state championship tournament in the spring, the same time that the NCAA schedules women's and men's tennis. [EN 53] For 2001-2002, MHSAA set the first practice and contest dates for boys' tennis as March 11 and the end of the season as June 1. [EN 54]

III. ANALYSIS

A. According to the court, the current scheduling causes psychological and generalized harms to Michigan girls.

Plaintiffs made several contentions relating to the images being conveyed by scheduling the girls' sports in less advantageous times. The court agreed with Plaintiffs' argument that the scheduling "sends the clear message that female athletes are subordinate to their male counterparts, and girls' sports take a back seat to boys." [EN 55] The court heard the testimony of both parties' witnesses and determined that the scheduling was in fact causing various psychological harms to young female athletes. The court heard testimony from several of the Plaintiffs' daughters including Kristi Madsen who stated that "[the scheduling] hurts girls self-esteem." [EN 56] The court supported its ruling by stressing that "girls playing sports outside of their traditional seasons have difficulties obtaining current season equipment for the sport." The court also reasoned that "[g]irls also have a diminished opportunities for recognition in national athletic publicity and rankings," and "that girls are denied opportunities to participate in events like basketball's "March Madness." [EN 57] These arguments become insignificant, however in lieu of fact that the seasons are harmful to girls simply because MHSAA schedules some girls' sports, but no boys' sports, (emphasis added) in non-traditional seasons. Although it seems that the court may have stretched the evidence a bit concerning the actual harm being done to female athletes, the court was able to determine that the motive behind the scheduling was to avoid any conflicts with the more popular boys' sports. Nonetheless, Plaintiff's arguments relating to fewer opportunities at national recognition, less opportunity to play out of state schools, fewer opportunities to gain access to current equipment were found much more persuasive than the Defendant's justifications.

B. MHSAA's justifications for scheduling of the seasons were insufficient

Defendant presented to the court several reasons, or justifications, for the current scheduling of the athletic seasons. The court however, did not find any legal justification for any of Defendant's arguments. Several of Defendant's arguments were legitimate. However upon a determination that Defendant was in fact a "state actor" it became apparent to the court that Defendant's actions were illegal under the U.S. Constitution. MHSAA had the burden of proving that the scheduling was not less advantageous to girls. Since Defendant could not provide the statistical data necessary to disprove plaintiffs' claims, it was unable to meet its burden. Defendant's first contention was that the scheduling related to various logistical concerns. Defendant provided that,

[I]t cannot schedule basketball, soccer and swimming concurrently for boys and girls because there were insufficient gymnasiums, soccer fields, and pools in Michigan. . . [combining fields] would have the effect of reducing participation opportunities for both boys and girls by forcing schools to cut team size or cut freshman or junior varsity teams. [EN 58]

Defendant presented what otherwise may have been a very important argument. However, Defendant bore the burden of both production and persuasion on this point and therefore was not able to present sufficient evidence necessary to convince the court. [EN 59]

Defendant also argued that the current system maximizes participation opportunities. However, Defendant's proof was insufficient because it was unable to provide the court with any type of data to support maximized participation. Defendant next argued that the officials and coaches are limited in number, especially in sports such as tennis, golf, and soccer. However, the argument faltered again because Defendant lacked sufficient empirical data as proof. The Court argued that, "the empirical evidence on this point was too sparse to make a finding that this is true. The circumstantial evidence that logistical problems could be resolved or would not exist is strong." [EN 60] In one respect it may not have been fair for the court to compare Michigan's scheduling with the schedules of several other states because so many sports were at issue. Nevertheless, according to the court, "[t]hirty-seven states, as well as Upper Peninsula schools, are able to schedule boys' and girls' soccer concurrently. Presumably, the Upper Peninsula and those other states have enough officials and coaches." [EN 61] Furthermore, MHSAA was not able to present sufficient empirical evidence in support of its contention. The Court rejected MHSAA's evidence regarding its contention that Michigan girls and schools preferred the current seasons. Similarly, since the MHSAA failed to offer the testimony of any girl or parent who was in favor of keeping the current season, MHSAA's arguments carried no weight in the eyes of the court. [EN 62]

Finally, Defendant attempted to argue that the current seasons gave Michigan girls an "independent identity" from the boys' sports. [EN 63] Unfortunately for the Defendant the court accepted no legal justification with this argument. Conversely the court agreed with the testimony of Dr. Linda Bunker who testified that, "it is better preparation for adulthood for girls to recognize this and decide for themselves how they will handle situations that they view inequitable." [EN 64]

C. MHSAA was found to be "state actor" and thus failed to meet its burden and therefore violated Plaintiff's Equal Protection rights.

Similar to this case, the Supreme Court of the United States had recently found the Tennessee Secondary School Athletic Association ("TSSAA"), to be a "state actor." The Supreme Court considered the facts relating to the structure and role the TSSAA had in the administration of the high school athletics in the state of Tennessee. [EN 65] There, the Supreme Court noted that,

The nominally private character of the TSSAA is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is not substantial reason to claim unfairness in applying constitutional standards to it. [EN 66]

The MHSAA is similar to the TSSAA. Both are required to implement interscholastic sports schedules and competition rules. Since the MHSAA is comprised of public school officials acting together under the "auspices of the MHSAA," it too should be designated as a state actor. [EN 67] Regardless of the fact that several of the arguments made by either party were unimpressive, the deciding factor is that,

The role that the MHSAA has assumed, and particularly the power that it has been given to fulfill that role, leaves this Court with the firm conclusion that there is no substantial reason to claim unfairness in applying constitutional standards to it. [EN 68]

MHSAA has been found by the court to be a state actor and now the question becomes whether MHSAA has treated boys different from girls in scheduling the high school sports. According to the court, “Once Plaintiffs have established a gender classification, the burden of justifying the classification shifts to Defendant, and the justification must be ‘exceedingly persuasive.’” [EN 69] The court follows the typical intermediate scrutiny analysis applied in cases where gender was the suspect class at issue. Defendants

[m]ust show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about different talents, capacities, or preferences of males and females. [EN 70]

The court's analysis relies on the undisputed fact that Defendant intentionally treats boys and girls differently by scheduling interscholastic sports seasons at different times of the year. Girls are treated differently from boys in two ways, (1) some of the sports that girls are offered that are at the same time as boys are played in different seasons than the boys play, e.g., basketball and golf, and (2) none of the boys sports are offered during non traditional seasons whereas, several of the girls sports are. [EN 71]

Defendants have the burden of not only proving that the scheduling serves some important governmental objective,” but also that the chosen scheduling is “substantially related to the achievement of those objectives.” [EN 72] It was here that the court distinguished the present case from cases where the law was found to be facially neutral. In cases involving facially neutral laws the Plaintiffs, would only have had the burden of either proving a discriminatory purpose, or a disparate impact. [EN 73] Here, Defendant's justifications must be “exceedingly persuasive.” Defendant presented various arguments, several of which were logistics-based. However, while Defendant's assertions may have been important government objectives, Defendant was not able to support them with any type of empirical evidence, and therefore they were not found to be “substantially related” to Defendant's purpose. [EN 74] In addition, motive is not taken into consideration by the court. Therefore, the burden was on Defendant to prove that their justifications were “exceedingly persuasive.” By not being able to provide sufficient empirical evidence, Defendant's scheduling was found to be a violation of the Equal Protection Clause of the Fourteenth Amendment.

D. MHSAA violated Title IX by scheduling athletic seasons and tournaments for girls' during nontraditional and less advantageous time of the academic year

The court found Defendant subject to Title IX by virtue of “its controlling authority over interscholastic Athletics in Michigan.” [EN 75] First, Plaintiffs must establish that Defendant is

subject to Title IX and to do this the court must find the extent to which Defendant has control over interscholastic athletic programs in Michigan. By determining that Defendant has controlling authority over the scheduling of interscholastic sports seasons in Michigan, Defendant will then be subject to all of the non-discrimination requirements under Title IX. [EN 76] Defendant unsuccessfully attempts to argue that because they don't receive federal funds that it could not be liable under Title IX. [EN 77] However, the court refuses to accept Defendant's unsupported interpretation of case law involving similar situations, "If Defendant's interpretation prevailed, Title IX would prohibit 'recipients' of federal funds from discriminating on the basis of sex, but would allow entities that controlled those funds to discriminate so long as those entities were not themselves 'recipients.'" [EN 78] The court goes on to further reiterate the findings in Johnny's Icehouse, by providing that, "controlling authority liability under Title IX is not necessary to achieve the purposes of Title IX. . . [and] 'controlling authority' liability is not authorized by Title IX." [EN 79] Defendant unsuccessfully argued that they should merely be found to be an agent of the recipient. The court provided that "the recipient [the MHSAA school] becomes like an agent and the controlling entity like a principal [Defendant] in the relationship." [EN 80] The court correctly determined that by participating in the MHSAA sponsored events, the Schools cede authority. If a recipient school believes that an athletic association is illegally discriminating, that one school alone has no authority or ability to stop the athletic association, unless it can convince a sufficient number of other schools and those schools together would be able to change Defendant's actions. [EN 81] The court's reliance on this "controlling authority" mini-analysis becomes essential to understanding how the court addresses the problems as they relate to Title IX. Here they concluded that "this 'controlling authority' theory is consistent with the contractual nature of liability under Title IX." [EN 82] As a result, Defendant is a "controlling authority" and therefore it must comply with all requirements under Title IX.

The court rightfully concluded that the Plaintiffs established that Defendant's current scheduling violates Title IX. This part of the court's analysis focuses on the premise that Plaintiff need only prove that Defendant intended to treat girls' differently than boys. It did not have to prove that:

the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. . . . The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience by being placed in different athletic seasons, and if girls receive unequal opportunities, Title IX has been violated. [EN83]

The issue was "whether female high school athletes are denied the benefits of school athletic programs as a result of the scheduling system of Defendant MHSAA that they would otherwise enjoy if they were male." [EN84] The court determined that Defendant had violated Title IX.

E. Remedies for Plaintiff

The Court ruled in favor of Plaintiff, finding that Defendant's scheduling of girls' athletics violated the Equal Protections clause of the 14th Amendment, Title IX, and state civil-rights laws. The court then ordered Defendant to bring its scheduling of the seasons into compliance by the 2003-04 school years. It was required to submit a Compliance Plan by June 24, 2002, which detailed changes to be made in compliance with the court's ruling. [EN85] Plaintiffs and

the United States will be given an opportunity to respond to Defendant's proposed changes. [EN86]

IV. CONCLUSION

This year marks the thirtieth anniversary since the advent of Title IX, and not surprisingly its impact on females has been similar to that of the nineteenth amendment. The decision by the court in *Communities* should be commended because it held fast to traditional notions of federalism by enabling Defendant the opportunity to correct its own wrong. Although the court ruled in the Plaintiff's favor, it restrained itself from invoking any harsh penalties on Defendant, and in doing so the court stayed within the bounds of its traditional powers.

Moreover, the court sheds light on the fact that although Defendant did not intend to harm female athletes, they did in fact intend to treat them differently. It is for this reason that the court was able to make such a favorable ruling on behalf of the Plaintiffs. Certainly, not all female high school athletes will go on to play collegiate or professional athletics. However, the court's ruling will prove to be a much greater victory for females in future progress towards achieving equality. The fact is that female athletes were being short-changed in the state of Michigan and the only way to address these problems was through the courts. In states throughout the country, successful suits had been brought by females in similar situations. In many of those states, young athletes, both male and female, are able to compete on equal grounds for a chance to play and learn beyond high school. In addition, the decision by the court indicates that society is making strides toward gender equality. The decision sends a message to administrators and similar associations throughout the country that unequal treatment of males and females will not be tolerated.

Nevertheless, this court's decision should send a strong message to society in that changes need to occur quickly. The effect of Title IX and decisions like the court's in *Communities* is exemplified by the recent influx of women into top athletic administrative positions. In July of 2002, DePaul University made a very significant decision, and named Jean Lenti Ponsetto its new athletic director. Ponsetto has benefited immensely from the opportunities afforded to female athletes by way of Title IX. Ponsetto, a twenty-year veteran of college coaching and athletic administration, is one of just twenty-two female athletic directors amongst NCAA division I schools. According to Ponsetto,

[Title IX] has opened the gym doors to more female student athletes and encouraged women athletes to pursue careers as coaches and athletic administrators. . . . Since Title IX was enacted in 1972, the number of women participating in college sports has increased five fold and number of high school girls laying varsity sports has grown to one in 2.5 from one in twenty-seven, according NAWCAA. [EN 87]

Ponsetto is just one of the many who have benefited from Title IX and decisions like *Communities*. The court's determination in *Communities* should only increase opportunities for females who plan on following career aspirations, which previously may have been improbable. Hopefully many of today's young female athletes will continue to fight the battle to achieve gender equality.

[EN 1] See *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 178 F. Supp.2d 805 (W.D. Mich. 2001).

[EN 2] See *Id.*; *Alston v. Virginia High Sch. League*, 176 F.R.D. 220 (W.D. Va. 1997).

[EN 3] 20 U.S.C. §1681 (Title IX).

[EN 4] *Communities*, 178 F. Supp. at 807. The scheduling of girls' sports at issue involves volleyball in the winter, basketball in the fall, soccer in the spring, Lower Peninsula golf in the Spring, Lower Peninsula swimming and diving in the fall, and tennis in the fall.

[EN 5] *Id.* at 818. In 1998, Michigan was the only state which did not schedule girls' basketball during the winter season.

[EN 6] *Id.* at 809.

[EN 7] *Id.*

[EN 8] *Id.*

[EN 9] *Id.*

[EN 10] *Communities*, 178 F. Supp. at 818.

[EN 11] *Id.* at 810.

[EN 12] *Id.* MHSAA's purpose is as follows: To create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state consistent with the educational values of high school curriculums, the interest in physical welfare and fitness of the students participating therein by giving the opportunity to participate in athletics designed to meet the needs and abilities of all and to make and adopt such rules and regulations and interpretation thereof to carry out the foregoing and to further provide for the training and registering of officials and to publish and distribute such information consistent therewith and to do any and all acts and services necessary to carry out the intent thereof.

[EN 13] *Id.* at 811.

[EN 14] *Id.*

[EN 15] *Id.* at 812.

[EN 16] *Id.*

[EN 17] *Communities*, 178 F. Supp. at 815. Ninety percent of high schools in the state of Michigan and sixty percent of the junior high/middle schools are members of MHSAA.

[EN 18] *Id.*

[EN 19] *Id.*

[EN 20] *Id.* at 816.

[EN 21] *Id.*

[EN 22] *Id.*

[EN 23] *Communities*, 178 F. Supp. at 816.

[EN 24] *Id.*

[EN 25] *Id.*

[EN 26] *Id.*

[EN 27] *Communities*, 178 F. Supp. at 817.

[EN 28] *Id.*

[EN 29] *Id.*

[EN 30] *Id.* at 818.

[EN 31] *Id.* at 822.

[EN 32] *Id.*

[EN 33] *Id.* at 823.

[EN 34] *Id.*

[EN 35] *Id.* at 828.

[EN 36] *Id.*

[EN 37] *Id.*

[EN 38] *Id.*

[EN 39] *Id.* at 831.

[EN 40] *Id.*

[EN 41] *Id.*

[EN 42] *Id.*

[EN 43] *Id.*

[EN 44] *Id.* at 833.

[EN 45] *Id.*

[EN 46] *Id.*

[EN 47] *Id.*

[EN 48] *Id.*

[EN 49] *Id.* at 836.

[EN 50] *Id.*

[EN 51] *Id.*

[EN 52] *Id.*

[EN 53] *Id.*

[EN 54] *Id.*

[EN 55] *Id.* at 837.

[EN 56] *Id.* at 838.

[EN 57] *Id.*

[EN 58] *Id.* at 840.

[EN 59] *Id.*

[EN 60] *Id.* at 842.

[EN 61] *Id.*

[EN 62] *Id.* at 843. MHSAA asserts that, based on a survey that it commissioned Western Michigan University's Evaluation Center to conduct after this lawsuit was filed, Michigan girls prefer to play in the current season. The court found that the survey suffers from design flaws and bias, some of which is reviewed by the court.

[EN 63] *Id.* at 845. (“boys will ‘overshadow’ girls in fan support and media coverage if boys and girls play basketball in the same season.”).

[EN 64] *Id.* at 846.

[EN 65] *Id.* at 846. See *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

[EN 66] *Communities*, 178 F. Supp. at 846.

[EN 67] *Id.* at 847.

[EN 68] *Communities*, 178 F. Supp. at 848. See *Brentwood Academy*, 531 U.S. at 298.

[EN 69] *Communities*, 178 F. Supp. at 848.

[EN 70] *Id.* See also *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

[EN 71] *Communities*, 178 F. Supp. at 848.

[EN 72] *Id.*

[EN 73] *Id.* at 849. The court briefly differentiates the present case from cases involving what was considered a facially neutral law, or one that treats men and women equal on its face. See *United States v. Virginia*, 518 U.S. at 532-33; *Washington v. Davis*, 426 U.S. 229 (1976); *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994).

[EN 74] *Id.* at 847. MHSAA's purpose to the scheduling was to satisfy problems arising out of facilities shortages, coaching and officiating problems, and also an attempt to create an “independent identity” for female athletes in the state.

[EN 75] *Id.* at 851. Section 901(a) of Title IX of the Education Amendments of 1972 provides, with exceptions not applicable here, that “[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..” 20 U.S.C. § 1681(a) (2001).

[EN 76] *Id.*

[EN 77] *Id.* Defendant cites Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Illinois, 134 F.Supp.2d 965 (N.D. Ill.2001).

[EN 78] *Communities*, 178 F. Supp. at 852 (citing *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 80 F.Supp.2d 729, 733 (W.D. Mich.2000)).

[EN 79] *Id.* (citing Johnny's Icehouse, 134 F.Supp.2d 965).

[EN 80] *Id.* at 853.

[EN 81] *Id.*

[EN 82] *Id.* at 855. The MHSAA is not an indirect recipient of federal funds, because it does not receive dues from the coffers of member schools, which has been the basis for Title IX liability for other state high school athletic associations. . . . But the MHSAA receives revenues to which member schools would otherwise be entitled, like tournament receipts, souvenir sales, and broadcast fees, and it operates tournaments largely using public facilities and public employees.

[EN 83] *Id.* at 856-57. Court relies on *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000). There, it was clear that LSU was providing unequal athletic opportunities for its female students, for example, by only sponsoring new sports for women that administrators considered more feminine sports by refusing to sponsor fast-pitch softball because the women might get hurt.

[EN 84] *Id.* at 857.

[EN 85] *Id.* at 862. The court further provides 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 season of girls' teams and boys' teams in any particular sport, but any remaining single-sex seasons must as a group advantage and disadvantage boys and girls equally. In addition, nothing prevents Defendant MHSAA from utilizing various other scheduling mechanisms designed to treat males and females alike, such as putting freshman and/or junior varsity teams of both sexes into disadvantageous season while putting varsity teams of both sexes into the advantageous season.

[EN 86] *Communities*, 178 F. Supp. at 862.

[EN 87] *Id.*