

UCLA

UCLA Women's Law Journal

Title

Seasons of Change: *Communities for Equity v. Michigan High School Athletic Association*

Permalink

<https://escholarship.org/uc/item/55q9z7hv>

Journal

UCLA Women's Law Journal, 13(1)

Authors

Chaudhry, Neena K.
Greenberger, Marcia D.

Publication Date

2003

DOI

10.5070/L3131017772

Copyright Information

Copyright 2003 by the author(s). All rights reserved unless otherwise indicated. Contact the author(s) for any necessary permissions. Learn more at <https://escholarship.org/terms>

Peer reviewed

ESSAY

SEASONS OF CHANGE: *COMMUNITIES FOR EQUITY V. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION*

Neena K. Chaudhry¹
Marcia D. Greenberger²

ABSTRACT

This Essay was written by Neena K. Chaudhry, one of the lead attorneys from the National Women’s Law Center who served as of counsel in *Communities for Equity v. Michigan High School Athletic Association* and Marcia D. Greenberger, co-president of the Center. The authors focus on the continued legal struggle to achieve equal opportunity between males and females in athletics through the lens of the recent federal district court case *Communities for Equity v. Michigan High School Athletics*. While discussing the significance of the case, the essay addresses the benefits that accrue to women and girls from sports participation and the inequalities that persist. In addition, the authors provide an overview of Title IX’s requirements with respect to athletics.

TABLE OF CONTENTS

INTRODUCTION	1
I. WOMEN AND GIRLS HAVE GREATER OPPORTUNITIES BECAUSE OF TITLE IX, BUT THE	

1. Neena K. Chaudhry is Senior Counsel at the National Women’s Law Center. She was one of the lead attorneys from the Center who served as of counsel in *Communities for Equity v. Michigan High School Athletic Association*.

2. Marcia D. Greenberger is Co-President of the National Women’s Law Center, a nonprofit legal organization that has been working since 1972 to advance and protect women’s legal rights in a variety of areas, including education, employment, health and reproductive rights, and family economic security.

LAW'S PROMISE OF FULL EQUALITY HAS YET TO BE FULFILLED	4
II. OVERVIEW OF TITLE IX'S REQUIREMENTS IN ATHLETICS	8
A. <i>Schools Must Provide Women and Men Equal Opportunities to Participate in Athletics</i>	9
B. <i>Schools Must Equitably Allocate Athletic Scholarship Dollars</i>	10
C. <i>Schools Must Treat Men and Women Equally in All Aspects of Sports Programming</i>	10
III. <i>COMMUNITIES FOR EQUITY v. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION</i>	11
A. <i>Background</i>	12
B. <i>Extending the Reach of Title IX</i>	15
1. The Definition of "Recipient"	17
2. The "Controlling Authority" Theory	19
C. <i>The Scheduling of Girls' Sports Seasons in Nontraditional Seasons Constitutes Discrimination</i>	24
1. The Scheduling of Girls' Sports in Nontraditional Seasons Is Harmful	26
2. The Scheduling of Girls' Sports in Nontraditional Seasons Is Not Justifiable ..	30
3. Sex Discrimination in Sex-Segregated Athletics Programs Is Intentional for Purposes of Title IX and the Constitution .	33
D. <i>The Remedy</i>	36
CONCLUSION	38

INTRODUCTION

Thirty years after the enactment of Title IX of the Education Amendments of 1972,³ the nation has reason to be proud of its great strides towards ensuring that its daughters as well as its sons receive equal educational opportunities. Before Title IX, many colleges and professional institutions did not admit women or limited the number of women who could attend. Schools offered virtually no athletic opportunities for female students, and in some instances prohibited boys from taking home economics and girls from taking shop. By contrast, today, women represent more than half of the undergraduates in colleges and universities,

3. 20 U.S.C. §§ 1681-1688 (date of code edition cited).

receive just over 40 percent of athletic opportunities, and have made progress in entering many traditionally male fields, such as law and medicine.

The nation, however, has miles to go before it sleeps secure in the knowledge that true equality has been achieved. Women and girls still lag behind men in major areas of education. While now earning the majority of undergraduate degrees, women still earn fewer professional and doctoral degrees than men, receive approximately \$133 per year less in athletic scholarships than their male counterparts, lag behind in math and science, are clustered in vocational training programs that are traditionally female and lead to low-wage jobs,⁴ and throughout the educational system at every level face biased counseling and sexual harassment, which reinforce barriers to full equal education opportunity.

This Essay focuses on the legal struggle to achieve equal opportunity in athletics, the area perhaps most widely associated with Title IX, through the lens of the recent federal district court case *Communities for Equity v. Michigan High School Athletic Association* (hereinafter “MHSAA”).⁵ As a backdrop for the discussion of the Michigan case, Part I addresses the benefits that accrue to women and girls from sports participation and the inequalities that persist, despite the dramatic progress women and girls have made since their virtual exclusion from sports programs 30 years ago. Part II provides a brief overview of Title IX’s requirements with respect to athletics. Part III examines the case itself and its significance.

In addition to providing a remedy to MHSAA’s longstanding inequitable practice of scheduling girls’ sports in nontraditional seasons, the case is important jurisprudentially because: (1) it is the first to provide a comprehensive analysis of why a high school athletic association is subject to Title IX under the “controlling authority” theory, thereby broadening the range of entities subject to Title IX and analogous civil rights laws; (2) it demonstrates, through careful factual analysis, why the association’s scheduling of girls’ sports only in nontraditional seasons—

4. For more information on gender equity issues in vocational and technical education, see National Women’s Law Center, Title IX and Equal Opportunity in Vocational and Technical Education: A Promise Still Owed to the Nation’s Young Women (June 2002), available at <http://www.nwlc.org/pdf/career%20ed%20report%20for%20june%206%20press%20event3.pdf>.

5. 178 F. Supp. 2d 805 (W.D. Mich. 2001).

a practice that may seem benign at first glance—constitutes second-class treatment and therefore constitutes sex discrimination; and (3) it makes clear that given the sex-segregated nature of athletics programs, any sex discrimination is by definition intentional.⁶

The issue of what constitutes intentional discrimination is important in many respects. It has great consequences for the availability of a damages remedy, for example. It may even affect the availability of a private right of action in light of the Supreme Court's recent decision in *Alexander v. Sandoval*,⁷ which held that private citizens may sue for intentional discrimination only—as opposed to disparate impact discrimination—under an analogous civil rights statute, Title VI of the Civil Rights Act of 1964.⁸

I. WOMEN AND GIRLS HAVE GREATER OPPORTUNITIES BECAUSE OF TITLE IX, BUT THE LAW'S PROMISE OF FULL EQUALITY HAS YET TO BE FULFILLED

Title IX is the federal law that prohibits sex discrimination in all federally funded education programs and activities. Perhaps most well-known for its impact in the area of athletics, the law has opened doors for women and girls seeking the benefits and skills that sports participation provides. When Congress passed Title IX in 1972, fewer than 32,000 women competed in intercollegiate athletics.⁹ Women's sports received only 2 percent of schools' athletic budgets, and athletic scholarships for women were almost nonexistent.¹⁰ Today, the number of college women participating in competitive athletics is nearly five times the pre-Title IX rate: in 2000-01, a record number of 150,916 women competed in intercollegiate athletics, representing 42 percent of college athletes nationwide.¹¹ Title IX's impact on female ath-

6. See note 120 *infra* for the definitions of intentional discrimination (also known as "disparate treatment discrimination") and disparate impact discrimination.

7. 121 S. Ct. 1511 (2001).

8. 42 U.S.C. § 2000 *et seq.* (year)

9. United States Department of Health, Education, and Welfare, Office for Civil Rights, *Title IX of the Education Amendments of 1972; a Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, 71,419 (1979) [hereinafter *Policy Interpretation*].

10. Remarks of Senator Stevens (R-AL), 130 Cong. Rec. S 4601 (daily ed. April 12, 1984).

11. National Collegiate Athletic Association (NCAA), *Participation Statistics Report: 1982-2001*, at 54-55 (2001).

letic opportunities at the high school level has also been tremendous. Before Title IX, fewer than 300,000 high school girls played competitive sports.¹² By 2001, the number had climbed to 2.78 million.¹³

These advances in athletic opportunities have promoted responsible social behaviors, greater success in school, and enhanced personal skills among a new generation of female athletes. In addition, athletic opportunities produce significant health, academic, and emotional benefits for women and girls.¹⁴ Athletes are less likely to smoke¹⁵ or use drugs.¹⁶ Adolescent female athletes have lower rates of both sexual activity and pregnancy.¹⁷ Female student-athletes have higher grades and have higher high school graduation rates than their non-athletic peers.¹⁸ They learn important life skills, including the ability to work with a team, to perform under pressure, to set goals, and to take criticism. In addition, playing sports helps young women develop self-confidence, perseverance, dedication, and a competitive edge.

The health benefits of the regular and rigorous physical exercise provided by sports are extensive. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, breast cancer, and other health problems.¹⁹ In-

12. National Federation of State High School Associations ("NFHS"), 2001 High School Participation Survey (listing 1971 participation numbers), *available at* http://www.nfhs.org/nf_survey_resources.asp.

13. *Id.* (listing 2001 participation numbers).

14. Carnegie Corporation, *The Role of Sports in Youth Development* 9 (March 1996).

15. Twenty-five percent of high school athletes, versus 40 percent of nonathletic high school students, smoke cigarettes. NFHS, *The Case for High School Activities* (2002) at 3, 9, *available at* <http://www.nfhs.org/case.html> (92 percent of high school athletes do not use drugs; 25 percent of high school athletes, versus 40 percent of nonathletic high school students, smoke cigarettes (citing a 1998 Wyoming High School Activities Association Statewide Student Survey)).

16. Ninety-two percent of high school athletes do not use drugs. *Id.*

17. D. Sabo et al., *The Women's Sports Foundation Report: Sport and Teen Pregnancy* (1998) at 5-7; *see also* The President's Council on Physical Fitness and Sports, *Physical Activity & Sports in the Lives of Girls* (Spring 1997).

18. *See Black Female Athletes Show Grad-Rate Gains*, The NCAA News (June 28, 1995) at 2 (female student athletes graduate at a significantly higher rate than female students generally, 69 percent and 58 percent, respectively); NFHS, *The Case for High School Activities* at 3 (state-wide, three-year study by the North Carolina High School Athletic Association found that athletes had higher GPAs (2.86 vs. 1.96), lower dropout rates (.7 percent vs. 8.98 percent) and higher high school graduation rates (99.56 percent vs. 94.66 percent), than their non-athletic peers).

19. Dorothy Teegarden, et al., *Previous Physical Activity Relates to Bone Mineral Measures in Young Women*, 28 *Medicine and Science in Sports and Exercise* 105

creased fitness levels can contribute to better posture, the reduction of back pain, and the development of adequate strength and flexibility-qualities that allow girls to participate fully in their daily activities, whether vocational or recreational.²⁰ There are psychological benefits too: young women who play sports have a higher level of self-esteem, a lower incidence of depression,²¹ and a more positive body image.²²

Title IX's mandate of equality in sports is especially important for minority women and girls. Minority female athletes experience higher levels of self-esteem, are more likely to be involved in extracurricular activities, and are more likely to become leaders in their communities than minority women who do not play sports.²³ Minority female athletes also get better grades than their non-athletic peers.²⁴ In particular, black female athletes are 15 percent more likely to graduate from college.²⁵ Moreover, because minority girls are more likely to participate in sports through their schools than through private organizations, it is critical that they have equal access to school-sponsored athletics.²⁶

Despite the progress that has been made since the enactment of Title IX, and the benefits that women and girls have experienced as a result of greater opportunities, the law's promise of equal opportunity in athletics has yet to be realized. Although women are over half the undergraduates in our colleges and universities, female athletes are still just 42 percent of college varsity

(January 1996); L. Bernstein et al., *Physical Exercise and Reduced Risk of Breast Cancer in Young Women*, 86 *Journal of the National Cancer Institute* 1403 (1994); see also Marilie D. Gammon, et al., *Does Physical Activity Reduce the Risk of Breast Cancer?* (Abstract), 3 *Menopause: The Journal of the North American Menopause Society* 172 (1996).

20. The President's Council on Physical Fitness and Sports Report, *Physical Activity & Sports in the Lives of Girls* (Spring 1997).

21. Debra L. Schultz, Ms. Foundation for Women, *Risk, Resiliency, and Resistance: Current Research on Adolescent Girls* 7 (1991), citing a study by Colton and Gore; The Women's Sports Foundation, *Miller Lite Report on Women in Sports* 3 (1985).

22. Women's Sports Foundation, *Miller Lite Report on Women in Sports* 3 (1985).

23. The Women's Sports Foundation, *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 27 (1989), at 27.

24. *Id.*

25. Jerry Crowe, *Graduation Rates Fall for Most Players Colleges*, LOS ANGELES TIMES, Nov. 21, 2000, at D6.

26. Women's Sports Foundation, *The Wilson Report: Moms, Dads, Daughters and Sports* 5 (June 7, 1988).

athletes nationwide.²⁷ In fact, female participation in intercollegiate sports remains *below* pre-Title IX male participation. While 170,384 men played college sports in 1971-72, only 150,916 women played college sports in 2000-01.²⁸ Men's participation, meanwhile, has continued to increase, with 208,866 men participating during the 2000-01 season.²⁹ Furthermore, women in Division I colleges, while representing 53 percent of the student body, receive only 41 percent of the participation opportunities, 43 percent of the total athletic scholarship dollars, 32 percent of recruiting dollars, and 36 percent of operating budgets.³⁰ In Division I in 2000, for every dollar spent on women's sports, two dollars were spent on men's sports.³¹

These inequalities extend to the scholarship arena. The availability of athletic scholarships dramatically increases the ability of young women to pursue a college education and to choose from a wider range of schools. Male athletes, however, still receive the access and opportunities that athletic scholarships provide nearly *one and a half times as often* as their female counterparts, a difference that amounted to \$133 million dollars more per year in athletic scholarships for male athletes than female athletes in 2000.³² Too many colleges and universities are still not in compliance with Title IX's requirement in this area.³³

Although national data on gender equity in athletics is not as readily available at the elementary and secondary levels as it is in intercollegiate athletics,³⁴ court cases as well as anecdotal evi-

27. NCAA, *1982-2001 Sports Sponsorship and Participation Statistics Report* at 53.

28. *Id.* at 53, 165.

29. *Id.* at 53.

30. NCAA, *1999-00 Gender-Equity Report* (2002) at 20.

31. *Id.* at 19-20.

32. NCAA, *Gender Equity Report* at 8, 16, 64.

33. See National Women's Law Center, Chart, "30 Colleges and Universities Challenged by NWLC for Athletic Scholarship Violations Under Title IX," June 18, 2002, available at <http://www.nwlc.org/pdf/30Schools.pdf>; National Women's Law Center, Press Release, "Statement of Co-President Marcia D. Greenberger Lauding Settlement of All 25 Title IX Athletic Scholarship Complaints the Center Filed in June 1997," Jan. 7, 2000, available at <http://www.nwlc.org/details.cfm?id=351§ion=infocenter>.

34. The Equity in Athletics Disclosure Act (EADA), a federal law passed in 1994, requires coeducational higher education institutions that participate in a federally funded financial aid program and have intercollegiate varsity level sports teams to make available certain gender equity information about their athletics programs. 20 U.S.C. § 1092(g) (date). This information includes, but is not limited to, sports teams and participation by gender, athletic scholarship dollars awarded to male and female athletes, and revenues and expenses for men's and women's teams. By Octo-

dence strongly suggest that there is broad-based discrimination against female athletes at lower levels of education.³⁵ Female high school students are given only 42 percent of the school-sponsored opportunities to play varsity sports.³⁶ And examples of inferior treatment accorded to girls in sports abound. For instance, an Atlanta newspaper series exposed gender inequities in sports across the state of Georgia. The paper found that 64 percent of boys and 36 percent of girls play competitive sports in the state. Moreover, 86 percent of the legislative grants made for stadiums, lighting and equipment were directed to projects where the primary beneficiaries were boys' sports. Booster clubs also contributed to gender inequities. The state's top school official says she thinks that a case could be made that nearly every public high school in the state might be in violation of Title IX.³⁷

Pennsylvania provides another example. Although strapped for funds, several of the school districts in Western Pennsylvania find the money for boys' sports, but not for girls' sports. In Duquesne, for every dollar the school board spent on sports, girls received only a dime. The district also spent more on the football team than it did to maintain its school buildings. In Brownsville, of every dollar spent on athletics, only five cents goes to girls' sports, and Brownsville offers only one girls' sport—basketball.³⁸ These facts make clear the continued importance of vigorous enforcement of Title IX and its implementing policies.

II. OVERVIEW OF TITLE IX'S REQUIREMENTS IN ATHLETICS

Title IX prohibits federally funded education programs and activities from engaging in sex discrimination. It states simply:

ber 15 of each year, schools must make available to the public information for the previous year. In addition, schools are also required to report this information to the Department of Education. *Id.*

35. See, e.g., *Landow v. School Bd. of Brevard County*, 132 F. Supp. 2d 958 (M.D. Fla. 2000); Tarik El-Bashir, *Arlington Responds to Title IX Charge*, WASH. POST, Jan. 11, 2003, at D1 (describing problems at Virginia high school, including no locker rooms for girls and inferior facilities); Nanette Asimov, *Washington Girls: Softball Diamonds in the Rough*, THE S.F. CHRONICLE, May 26, 2000, at 2 (of 62 girls' softball diamonds in San Francisco, not one has a regulation dirt infield, staked bases and lined field).

36. National Federation of State High School Associations (NFHS), 2001 High School Athletics Participation Survey (2001).

37. Mike Fish and David A. Milliron, Special Report: Eight-Day Series, *The Gender Gap*, THE ATLANTA-JOURNAL CONSTITUTION, Dec. 12, 1999.

38. *Poor Districts Still Find Cash for Boys*, THE TRIBUNE-REVIEW, May 23, 2001.

No 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.

Title IX's prohibition against sex discrimination is broad, applying to most elementary and secondary schools, colleges, and universities. The law applies to every aspect of a federally funded education program or activity, including athletics.³⁹

In the realm of athletics, Title IX requires institutions to offer male and female students equal opportunities to participate in sports, to allocate scholarship dollars equitably, and to treat male and female students fairly in all aspects of athletics.⁴⁰

A. *Schools Must Provide Women and Men Equal Opportunities to Participate in Athletics*

There are three wholly independent ways schools can show that students of both genders have equal opportunities to participate in sports. Schools can show that:

1. The percentage of male and female athletes is about the same as the percentage of male and female students enrolled in the school;
2. The school has a history and a continuing practice of expanding opportunities for female students, since they are the gender that usually has been excluded from sports; *or*
3. The school is fully and effectively meeting its female students' interests and abilities to participate in sports.⁴¹

If a school can meet any *one* of these tests, it will be found to be in compliance with Title IX's participation requirements. This three-part test has been in effect for more than two decades and has been upheld by every one of the eight federal appeals courts that has considered it.⁴²

39. 20 U.S.C. § 1687 (2003).

40. For a complete explanation of Title IX's requirements in each of these areas, see National Women's Law Center, *Check It Out: Is the Playing Field Level for Women and Girls at Your School?* (September 2000), available at <http://www.nwlc.org/pdf/Checkitout.pdf>.

41. *Policy Interpretation* at 71, 418.

42. See *Chalenor v. Univer. of N.D.*, No. 00-3379ND (8th Cir. 2002); *Pederson v. La. State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000); *Neal v. Bd. of Trs. of The California State Univs.*, 198 F.3d 763, 770 (9th Cir. 1999); *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 274-75 (6th Cir. 1994); *Kelley v. Bd. of Trs., Univ. of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (Cohen I), and 101 F.3d 155, 170 (1st Cir. 1996) (Cohen II), cert. denied, 520 U.S. 1186 (1997) (This case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court (Cohen I), and the second time after a trial on the merits (Cohen II).);

As a general matter, institutions do not have to offer any particular sport; neither men nor women have a right to play on particular teams. As long as a school provides equal participation opportunities to men and women overall, it has the flexibility to decide how those opportunities should be allocated among sports or teams.⁴³

B. Schools Must Equitably Allocate Athletic Scholarship Dollars

Colleges and universities often provide athletic scholarships to student-athletes, and Title IX requires them to distribute athletic scholarship dollars equally between male and female athletes. Specifically, the percentage of total athletic scholarship dollars awarded to female athletes must be within 1 percent of the percentage of female athletes, or within one scholarship (whichever is greater), unless legitimate nondiscriminatory reasons justify a larger disparity.⁴⁴ For example, if 42 percent of a school's athletes are women, the school will be in compliance with Title IX if it provides between 41 percent and 43 percent of its total athletic scholarship dollars to those athletes.

C. Schools Must Treat Men and Women Equally in All Aspects of Sports Programming

Educational institutions must also ensure that male and female athletes are treated equally in all other aspects of their athletic programs, including, but not limited to:

- Provision and maintenance of equipment and supplies;
- Scheduling of games and practice times, including sport's season and its length;
- Travel and per diem expenses;
- Opportunities to receive coaching and academic tutoring;
- Assignment and compensation of coaches and tutors;
- Provision of locker rooms and practice and competitive facilities;
- Provision of medical and training services and facilities;
- Provision of housing and dining services and facilities;

Roberts v. Co. State Bd. of Agric., 998 F.2d 824, 828 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993); Williams v. Sch. Dist. of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993).

43. *Horner*, 43 F.3d at 275; *Roberts*, 998 F.2d at 829.

44. *Policy Interpretation* at 71,415; Letter from Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, to Ms. Nancy S. Footer, General Counsel, Bowling Green State University, July 23, 1998 (clarifying Title IX's athletic financial aid requirements).

- Publicity;
- Recruiting; and
- Provision of support services.⁴⁵

Schools need not provide the exact same benefits and opportunities to men's and women's teams, as long as their treatment of male and female athletes is equal overall.⁴⁶ In addition, booster clubs or other outside sources of support cannot be used as excuses for treating male and female athletes unequally; schools are responsible for providing male and female athletes with equal benefits and services, regardless of the source(s) of those benefits or services.⁴⁷

III. *COMMUNITIES FOR EQUITY v. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION*

The case of *Communities for Equity v. Michigan High School Athletic Association*,⁴⁸ in which parents and children successfully challenged the Michigan High School Athletic Association's ("MHSAA") discriminatory scheduling of girls' sports seasons, among other practices, is an important victory for women and girls in athletics. Not only is the case significant to the plaintiffs who fought so long and hard for equality, but it is also of great legal significance: it extends the reach of Title IX to a high school athletic association under the recently enunciated "controlling authority" theory, and it demonstrates through a careful analysis of the facts why a practice that is benign on its face—the scheduling of girls' sports only in nontraditional seasons—constitutes discrimination. Moreover, the case makes clear that in the sex-segregated context of athletics, such discrimination is by definition intentional discrimination. The latter holding is significant because the Supreme Court recently ruled that under Title VI, an analogous statute, private citizens may sue for *intentional* discrimination only, as opposed to disparate impact discrimination.⁴⁹

45. 34 C.F.R. § 106.41 (c)(2)-(10); *Policy Interpretation* at 71,415; Office for Civil Rights, Department of Education, *Title IX Investigator's Manual* 35 & n.1(1990).

46. *Policy Interpretation* at 71,415.

47. *Title IX Investigator's Manual* at 5.

48. 178 F. Supp. 2d 805 (W.D. Mich. 2001).

49. *Alexander v. Sandoval*, 121 S. Ct. 1511 (2001).

A. *Background*

In June 1998, after more than five years of urging MHSAA to treat girls equally in the provision of athletic benefits and opportunities, Plaintiffs—parents and daughters from two families and an organization named Communities for Equity (“CFE”)—filed a class action lawsuit against the association, its Executive Director John Roberts, and members of the association’s Representative Council (collectively “Defendants”).⁵⁰ CFE is a non-profit organization consisting of parents, students, athletes, coaches, and others who advocate for gender equity in Michigan schools. Plaintiffs represent a class of present and future female students enrolled in MHSAA-member schools who either play or are deterred from playing interscholastic sports due to MHSAA’s discriminatory conduct, and are adversely affected by that conduct.

MHSAA is the governing body for interscholastic sports in the state of Michigan, organized to “‘create, establish and provide for, supervise and conduct interscholastic athletic programs through the state.’”⁵¹ MHSAA’s Representative Council is the body vested with the “‘general control of interscholastic athletics.’”⁵² Its membership, while voluntary, is comprised of over 700 high schools in Michigan (90 percent of the high schools and 60 percent of the junior high/middle schools), over 80 percent of which are public and nearly all of which receive federal financial assistance. To effectuate its goals regarding the administration and regulation of interscholastic athletics throughout the state, MHSAA promulgates rules and regulations governing almost every aspect of interscholastic athletics for the particular sports it sanctions. A MHSAA-sanctioned sport is one for which MHSAA sponsors a state championship tournament and establishes rules governing the eligibility of students to participate, the number of practices and competitions, broadcast policies, the qualifications of coaches and officials, the season in which the sport is played, and permissible activities during the season and outside the season.⁵³

In their complaint, Plaintiffs alleged that the defendants discriminated against females in the provision of athletic participa-

50. *Communities for Equity*, 178 F. Supp. 2d at 807-10 (W.D. Mich. 2001).

51. *Id.* at 810 (quoting MHSAA Articles of Incorporation).

52. *Id.* at 812 (quoting MHSAA’s Constitution, art. VI, § 1).

53. *Id.* at 810-14.

tion opportunities and various athletic benefits, in violation of Title IX, the Equal Protection Clause, and Michigan's Elliott-Larsen Civil Rights Act.⁵⁴ More specifically, Plaintiffs charged that MHSAA sponsored too few state tournaments for girls' sports,⁵⁵ which had the effect of chilling girls' athletic participation opportunities, because schools are unlikely to add a sport for which there is no state tournament.⁵⁶ In addition, Plaintiffs argued that MHSAA provided inferior benefits to those girls who were given the opportunity to play: inferior athletic tournament facilities,⁵⁷ inferior playing rules,⁵⁸ inferior promotion and

54. Mich. Comp. Laws § 37.3101 *et. seq.* This Essay does not discuss the legal analysis applicable to Plaintiffs' state law claims, but rather focuses on the analyses under Title IX and the Equal Protection Clause because of their broad relevance to Title IX litigation.

55. *Communities for Equity*, 178 F. Supp. 2d at 814. Defendants count cheerleading as a sport, while Plaintiffs continue to dispute that the cheerleading sanctioned by MHSAA constitutes a sport. The Office for Civil Rights of the U.S. Department of Education, the primary agency with responsibility for enforcing Title IX, however, has stated recently: "Consistent with earlier policy statements, there is a presumption by OCR that drill teams, cheerleading and other like activities are extracurricular activities and are not considered sports or part of an institution's athletic program within the meaning of the Title IX regulation." Letter from Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office for Civil Rights, to Mr. David V. Stead, Executive Director, Minnesota State High School League (Apr. 11, 2000) (on file with author). However, OCR considers on a case-by-case basis whether a particular activity is a sport, based on factors such as whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes, and whether the team prepares for and engages in competition in the same way as other teams in the athletics program, among other things. *Id.* Even counting cheerleading as a sport, however, MHSAA still offers far fewer opportunities for girls than for boys.

56. As a result, boys are allocated 60 percent of the available interscholastic athletic participation opportunities in Michigan, even though they make up only 50-51 percent of the students. On the other hand, girls receive only about 40 percent of the athletic opportunities even though they make up 49-50 percent of the students. Girls would be underrepresented in interscholastic sports even if every school in the state offered every sport sanctioned by MHSAA. Plaintiffs' Mediation Brief at 4. *Cf. Haffer v. Temple Univ.*, 678 F. Supp. 517, 526 (E.D. Penn. 1987) (by sponsoring more women's teams, the university could increase the participation rate of females in the university's athletics program to 50, 75 or even 100 percent).

57. For example, Plaintiffs complained that MHSAA holds its girls' fastpitch softball finals on a men's slowpitch field, where the girls' diamond is not even regulation size. (Fastpitch and slowpitch softball are separate sports with different base paths, different pitch lengths, different infield sizes, and different outfield dimensions.) The boys' baseball team plays in the same park at a minor league baseball stadium with pro stands, concessions, locker rooms, restrooms, a public address system, and more, while the girls' field has no stands, dugouts, restrooms, locker rooms, or concessions.

In addition, MHSAA schedules the boys to play their state basketball finals at a major Big 10 facility, the Breslin Center at Michigan State University in Lansing, while the girls play their finals at the Rose Center at Central Michigan University in

publicity,⁵⁹ and inferior sports seasons.⁶⁰

Mt. Pleasant. The Rose Center is smaller, older, provides fewer amenities, and is of lesser quality than the Breslin Center. It is also further from the state's population centers than is Lansing. Plaintiffs wanted to have the girls' basketball tournament moved to a better facility at a more prestigious location closer to more potential fans. Plaintiffs' Mediation Brief at 11-12.

58. Plaintiffs also contended that MHSAA required girls to play some sports under rules that differ from NCAA rules or the national norm. For instance, in most of Michigan, girls play 9 holes of golf instead of 18 because golf courses are not available in the spring, the season in which MHSAA schedules them to play. Boys play 18 holes, because more golf courses are available in the fall, the season in which MHSAA schedules them to play. MHSAA could fix this disparity by scheduling boys' and girls' golf in the same season or by setting a uniform meet length, but it has not done either. *Id.* at 12.

59. For example, MHSAA provides souvenir programs of higher quality at the boys' state tournaments than at the girls' state tournaments. In addition, MHSAA has broadcast the boys' football and basketball finals on live TV for many years, but only recently started broadcasting the girls' finals. MHSAA broadcasts boys' ice hockey, team wrestling, individual wrestling, and soccer on tape-delayed cable TV, while it broadcasts only girls' volleyball and soccer on cable. Thus, more boys' sports are broadcast live and more boys' sports are broadcast on cable. MHSAA also started a "Here 4 Hoops" program with the Lansing Visitors Bureau, and works with Lansing merchants to promote the boys' state basketball tournament. The association contracts with the Great Lakes radio network to carry games and scores on Friday nights during the boys' football and basketball seasons. MHSAA does not promote girls' sports in these ways. *Id.* at 12-14.

60. Plaintiffs claimed that MHSAA discriminated against girls by scheduling six girls' sports, but no boys' sports, in nontraditional or disadvantageous seasons. A traditional season is a season of the year when the sport is typically played; for example, football is traditionally played in the fall. As the district court noted, traditional seasons are not a random occurrence, but rather develop because certain advantages result from playing particular sports in particular seasons. For example, certain outdoor sports are not played in the winter in Michigan for a reason. Therefore, whether a season is traditional or nontraditional is only relevant to the extent that a particular season results in advantages or disadvantages. The traditional playing season is one indicator that the season is an advantageous time to play the sport, but tradition is not dispositive. Likewise, the season in which the NCAA sponsors a particular sport's college season is a hallmark of a traditional and thus advantageous season, but is also not dispositive. *Communities for Equity*, 178 F. Supp. 2d at 807-08, 818 n.7.

Five girls' sports are scheduled in nontraditional seasons: (1) girls' volleyball is scheduled for winter instead of the traditional fall season; (2) girls' basketball is scheduled for fall instead of the traditional winter season; (3) girls' soccer is scheduled for spring instead of the traditional fall season; (4) girls' tennis is scheduled for fall instead of the traditional spring season; and (5) girls' swimming is scheduled for fall instead of the traditional winter season. Girls' golf, which is scheduled for the traditional spring season, is actually disadvantageous for girls because courses are more difficult to obtain in the spring. In fact, MHSAA moved boys' golf from the spring to the fall in the 1970s for this very reason. *Id.* at 12. The association's scheduling of girls' sports in this manner negatively affects Michigan girls' opportunities to be recruited for college teams, to participate in national club sports and Olympic development programs, and to experience promotions like basketball's "March Madness," among other harms. And perhaps most important, such scheduling in-

Except for the charge involving the playing seasons, all of Plaintiffs' claims were settled through court-ordered mediation in the summer of 2001. The settlement is set forth in a consent decree in which Defendants agreed to a number of positive changes for female students and athletes in Michigan.⁶¹

B. *Extending the Reach of Title IX*

Perhaps one of the greatest contributions of the *MHSAA* case is its holding that Title IX governs a high school athletic association. Whether athletic associations are covered under Title IX has emerged as a hot issue in recent years, with the courts hearing and adopting a variety of theories of coverage.⁶² Athletic associations control virtually all aspects of interscholastic athletics programs but have generally argued that they have no obligation to comply with antidiscrimination laws.

Title IX's coverage of athletic associations like MHSAA is critical to ensure gender equity in athletics. Individual schools cede control to these associations to govern their athletic programs. As a result, anyone wishing to challenge discriminatory practices by these associations cannot obtain relief from an individual school because that school alone is powerless to change the rules. Therefore, athletic associations themselves must be subject to civil rights laws to avoid the anomalous situation whereby individual schools are subject to such laws but lack the authority to change association rules, while the associations—composed of these same schools, with controlling authority over the schools' athletic programs—are not subject to these laws. Without Title IX's coverage extending to these associations,

flicts psychological harm on girls by sending them the message that they are "second-class citizens" whose sports must be fit in around the existing boys' sports. *Id.* at 7-10; Plaintiffs' Revised Trial Brief at 16-17.

61. With respect to participation opportunities, MHSAA agreed to add two additional girls' tournaments, one no later than 2003-04 and the second no later than 2004-05, based on input from MHSAA member schools and their female athletes, among other factors. *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, Consent Decree 1-5 & Exhibit No. 3.

MHSAA also agreed to conduct the girls' basketball semi-finals and finals in the facility where the boys play for, at least two years, to use its best efforts to secure first-rate fast-pitch softball facilities, to ensure that its golf tournaments will consist of the same number of holes of golf for girls and boys at each level of the tournament, and to treat boys and girls equally with respect to television, radio, newspapers, and written programs produced for MHSAA tournaments. *Id.* at 1-5 and Exhibit Nos. 1-6 & 8.

62. See cases discussed in note 86, *infra*.

schools simply would be able to evade their legal obligations; by handing over control of their athletic programs to an athletic association, schools could flout Title IX's mandates with impunity.

The district court in *MHSAA* clearly recognized this problem and addressed it by holding the athletic association subject to Title IX. The theory of coverage the district court adopted in *MHSAA* built upon existing law on the coverage of entities under Title IX.⁶³ In general, Title IX's prohibition of sex discrimination applies to "recipients" of federal funds.⁶⁴ Title IX's implementing regulations define a "recipient" of federal funds as:

any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.⁶⁵

63. The Supreme Court's decision in *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assoc.*, 531 U.S. 288 (2001), that a high school athletic association is subject to the Constitution, does not lessen the importance of holding such an association subject to Title IX. The facts necessary to prove coverage under the Constitution vary from those necessary to prove coverage under Title IX, and plaintiffs may choose to bring suit under one or both laws, depending on the relevant facts.

To be liable under the Constitution, a high school athletic association must be shown to be a "state actor," which, according to *Brentwood*, involves showing that there is a sufficiently close nexus between the athletic association and the state so that the action of the association should be treated as that of the state itself. The district court in *MHSAA* had held that the association was a state actor in a decision denying summary judgment that was issued prior to the Supreme Court's decision in *Brentwood*. At trial post-*Brentwood*, the district court confirmed its prior decision, describing the "unique and close relationship between the *MHSAA* and the State of Michigan": *MHSAA's* purpose is to regulate and control interscholastic athletics throughout the state; the association is made up of primarily public schools; its revenue is derived from gate receipts from tournaments held at member schools and broadcast fees, among other items—monies to which schools would otherwise be entitled; public school employees are elected to be on the Representative Council; some *MHSAA* employees continue to be eligible to participate in the state employee retirement system; school employees who want to serve on the Council must get approval from their principal or school district superintendent; the Michigan Superintendent of Public Instruction is an ex officio member of the Council; and *MHSAA* was statutorily authorized to oversee interscholastic athletics until 1995, when state law was amended in an apparent attempt to avoid liability, but *MHSAA's* membership and function remained unchanged. *Communities for Equity*, 80 F. Supp. 2d at 741f n.6, 743-44; 178 F. Supp. 2d at 846-47.

64. 20 U.S.C. § 1681(a).

65. 34 C.F.R. §106.2(h). The Supreme Court has accorded the Title IX regulations particular deference as an interpretation of the statute. See *Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984)

Therefore, an athletic association's coverage under Title IX will depend on whether it can be characterized as a recipient within the meaning of this regulation or otherwise deemed an entity that the statute was intended to reach.

The district court in *MHSAA* deemed the association an entity that the statute was intended to reach, holding the association subject to Title IX under the "controlling authority" theory. This legal theory of coverage has developed in recent years as courts have addressed plaintiffs' claims that athletic associations' rules or practices are discriminatory and no individual school can provide relief from the discrimination, and athletic associations' defenses that they are private, voluntary associations that do not receive federal funds and therefore may continue discriminatory conduct unchecked. The theory the district court adopted in *MHSAA* built upon existing law on the coverage of entities under Title IX.

1. The Definition of "Recipient"

A fair amount of development of the law regarding Title IX coverage predated the *MHSAA* decision. In particular, the courts and Congress affirmed the principle that even "indirect recipients" of federal funding are covered by Title IX. In *Grove City College v. Bell*, the Supreme Court confirmed the validity of the regulatory principle that the term "recipient" under Title IX includes an institution that indirectly receives federal funds.⁶⁶ Thus, the Court responded to Grove City College's argument that none of its programs directly received any federal assistance by holding that a student's receipt of federal financial aid that is used at the college constitutes federal aid to the college.⁶⁷

In passing the Civil Rights Restoration Act of 1987 ("CRRRA"),⁶⁸ Congress later overruled the Supreme Court's

66. 465 U.S. at 555 (holding that indirect receipt of federal funds through federal assistance to students triggers Title IX coverage of the college).

67. However, the Supreme Court in *Grove City* also limited Title IX's reach by narrowly interpreting the statutory "program or activity" language to apply only to those specific programs or activities within an institution that actually received federal financial assistance. Thus, under the facts of *Grove City*, only the program or activity that received the federal financial aid—e.g., the financial aid office at the college—was covered by Title IX. *Id.* at 64.

68. Pub. L. 100-259, 102 Stat. 28 (1988). While Congress in enacting the CRRRA supported the holding in *Grove City* that student receipt of federal financial assistance led to Title IX recipient status for the school attended by the student, it disagreed with the Court's holding that the financial aid program, and not the school as a whole, was covered under Title IX. Thus, the *Grove City* decision prompted a

other holding in *Grove City* — that only the specific program or activity receiving federal funds is covered by the civil rights laws. The CRRA thus expressly endorsed the longstanding definition of “recipient” adopted by the Court. Congress stated clearly its intent that the CRRA does not “change in any way who is a recipient of federal financial assistance.”⁶⁹ Therefore, the CRRA confirmed that recipients include indirect recipients and that once any part of an institution receives federal funds, the entire institution is covered by the civil rights laws.

In addition to making clear that the indirect receipt of federal funds triggers coverage, the CRRA’s legislative history indicates that Congress debated the meaning of the regulations’ terms “subunit, successor, assignee, or transferee thereof,” which are included in the definition of “recipient.” These terms were explained as “standard contract language applied to situations in which the successor, assignee, or transferee stands in the shoes of the recipient of the federal financial assistance, with like obligations and functions of the recipient.”⁷⁰ Congress demonstrated that it was aware of this part of the regulation and approved of it.⁷¹

Lower courts have relied on Title IX’s definition of recipient to hold athletic associations accountable under the statute. In *Horner v. Kentucky High School Athletic Association*,⁷² the Sixth Circuit held the Kentucky High School Athletic Association subject to Title IX because it received dues from its federally funded member schools and performed the functions of the Kentucky

strong congressional response. Within weeks of the Court’s decision, bills were introduced in Congress to overturn that aspect of the Court’s *Grove City* decision. See, e.g., H.R. 5490, 99th Cong. (1984). The CRRA was enacted into law four years later. 20 U.S.C. § 1687.

69. Report of the U.S. Senate Comm. on Labor and Human Resources, 100th Cong., 1st Sess., at 2 (1987).

70. See, e.g., H.R. Rep. No. 98-829, Pt. 2, at 32 (1984).

71. The House Report cites an example in which a City Housing Authority receives Community Development Block Grants from the federal government. If the Housing Authority then subcontracts the property rehabilitation work to a private developer, the developer would come within the “successor, assignee or transferee” clause and hence would be covered by Title VI, Section 504, and the Age Discrimination Act. The report explains, however, that indirect recipients resulting from transactions outside the purpose of the federal funds would not be covered under this provision. For example, that same Housing Authority’s payment of an electric bill does not subject the Electric Company to the nondiscrimination statutes, because the payment of the bill is unrelated to the function for which the federal funds were given to the Housing Authority.

72. 43 F.3d 265 (6th Cir. 1994).

Board of Education with respect to interscholastic athletics.⁷³ Other courts have followed suit, holding athletic associations and conferences subject to analogous civil rights statutes⁷⁴ by virtue of their indirect receipt of federal funds and their responsibilities for governing member schools' interscholastic athletic programs.⁷⁵ And at least one court has held that an athletic association is subject to Title IX because it is the "assignee" of its member schools, which are recipients of federal funds and have assigned control over their interscholastic athletics programs to the association.⁷⁶

2. The "Controlling Authority" Theory

The Supreme Court's 1999 decision in *NCAA v. Smith*⁷⁷ foreclosed one avenue of Title IX's coverage of athletic associations by holding that the NCAA's receipt of dues from its federally funded member schools is not alone sufficient to subject the association to the statute.⁷⁸ The Court held that "[a]t most, the Association's receipt of dues demonstrates that it indirectly benefits from federal assistance afforded its members."⁷⁹ But the plaintiff in *Smith* advanced two other arguments for coverage of the NCAA that are generally applicable to athletic associations: (1) the association is an assignee and hence a "recipient" within

73. While in *Horner*, the Kentucky Board of Education delegated the management of interscholastic athletics to the Kentucky High School Athletic Association pursuant to state statute, see 43 F.3d. at 272, Title IX coverage does not turn on whether the delegation of responsibility for managing an education program is by statute, or by voluntary agreement, as in the case of most athletic associations. See *Smith v. NCAA*, 139 F.3d 180, 188 (3rd Cir. 1998).

74. Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975 all prohibit discrimination under programs or activities receiving federal financial assistance. See 42 U.S.C. § 2000d *et seq.* (Title VI); 29 U.S.C. § 794 *et seq.* (Section 504); 42 U.S.C. § 6101 *et seq.* (Age Discrimination Act).

75. See, e.g., *Dennin v. Conn. Interscholastic Ath. Conference*, 913 F. Supp. 663 (D. Conn. 1996), *appeal dismissed as moot*, 94 F.3d 96 (2d Cir. 1996) (holding athletic conference subject to Section 504); *Sandison v. Mich. High Sch. Athletic Ass'n*, 863 F. Supp. 483 (E.D. Mich. 1994), *rev'd in part on other grounds*, 64 F.3d 1026 (6th Cir. 1995) (holding athletic association subject to Section 504); *Pottgen v. Miss. State High Sch. Activities Ass'n*, 857 F. Supp. 654 (E.D. Mo. 1994), *rev'd on other grounds*, 40 F.3d 926 (8th Cir. 1994) (same).

76. See *Kemether v. Penn. Interscholastic Athletic Ass'n*, 1999 WL 1012957, at *15-*16 (E.D. Pa. 1999).

77. 525 U.S. 459 (1999).

78. The National Women's Law Center filed *amicus* briefs in support of the plaintiff, Renee Smith, in both the Third Circuit and the Supreme Court.

79. *Id.* at 468.

the meaning of the Title IX because its federally funded member schools have assigned to it control over their athletics programs, and (2) regardless of whether the NCAA receives federal funds, it is covered because its federally funded member schools have ceded "controlling authority" to it over their athletics programs.⁸⁰ The Supreme Court explicitly identified these theories but declined to address their validity, leaving them to be decided by the lower courts, with the implication that the theories may have merit.⁸¹

Faced with the second of the questions the Supreme Court left unresolved in *Smith*, the district court in *Communities for Equity v. MHSAA* became one of the first courts to hold that a high school athletic association is subject to Title IX regardless of whether it directly or indirectly receives federal funds, if it exercises "controlling authority" over the athletics programs of its federally funded member schools.⁸² In so doing, the district court in *MHSAA* provides a comprehensive explanation of why high school athletic associations must be subject to Title IX to achieve Title IX's goal of prohibiting sex discrimination under federally funded education programs.

The district court in *MHSAA* first determined that, as a matter of law, the exercise of "controlling authority" over a federally funded program is itself sufficient to trigger Title IX.⁸³ The district court's legal analysis is premised on the Supreme Court's

80. NCAA v. Smith, Brief of Respondent at 10-12, 41-46.

81. NCAA v. Smith, 525 U.S. at 469-70.

82. The district court in *Kemether v. Penn. Interscholastic Athletic Ass'n*, 1999 WL 1012957 (E.D. Pa. 1999), also adopted the "controlling authority" theory but did not provide any analysis of why it is legally viable. But the Third Circuit, which has considered the "controlling authority" argument in several cases against the NCAA, has found that the NCAA does not exercise sufficient control over its federally funded members to subject it to coverage under the civil rights statutes at issue. See *Smith v. NCAA*, 266 F.3d 152 (3d Cir. 2001); *Bowers v. NCAA*, 118 F. Supp. 2d 494 (D. N.J. 2000); *Cureton v. NCAA*, 252 F.3d 267 (3d Cir. 2001).

83. The district court's reasoning supporting the viability of the "controlling authority" theory is contained in its order denying MHSAA's motion for summary judgment. In that motion, the association claimed, as it has continued to do throughout this litigation, that it is not subject to Title IX. The district court disagreed, however, holding that MHSAA may be subject to Title IX under the "controlling authority" theory and that the evidence presented a genuine issue regarding the extent to which MHSAA exerts control over interscholastic athletics. See *Communities for Equity v. MHSAA*, 80 F. Supp. 2d 729, 735 (W.D. Mich. 2000). After hearing all the evidence at trial, the court confirmed its holding that MHSAA is subject to Title IX under the "controlling authority" theory and found that in fact MHSAA did exert sufficient control to be covered by Title IX. See *Communities for Equity v. MHSAA*, 178 F. Supp. 2d 805, 851-55 (W.D. Mich. 2001).

reasoning in *Cannon v. University of Chicago*,⁸⁴ which holds that an implied private right of action exists under Title IX. In *Cannon*, the Court held that the wording and purpose of Title IX indicates it was enacted for the benefit of a particular class of people—those discriminated against on the basis of sex—and it rejected the argument that Title IX was enacted only “as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to educational institutions engaged in discriminatory practices.”⁸⁵ In addition, the Court in *Cannon* concluded that Title IX “sought to accomplish two related, but nevertheless somewhat different objectives Congress wanted to avoid the use of federal resources to support discriminatory practices; [and] it wanted to provide individual citizens effective protection against those [discriminatory] practices.”⁸⁶

In response to Defendants’ argument that only recipients of federal funds are subject to Title IX, the district court held in *MHSAA* held that “[Title IX] does not, on its face, confine the list of potential defendants to ‘recipients’ of federal funds. Instead it simply prohibits discrimination ‘under any education program or activity receiving Federal financial assistance.’”⁸⁷ The district court further held that to interpret Title IX to apply only to recipients of federal funds is “empty formalism”:

If [such] an 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.” Such a scheme would not only encourage “recipients” of federal funds to transfer control over those funds to others (because both parties could thereby avoid Title IX liability), it would allow federal funds to promote gender discrimination so long as the recipients of those funds empowered someone else to promulgate the discriminatory policies. In this Court’s view, such a formalistic interpretation is not warranted by the meaning or purpose of the statute.⁸⁸

According to the district court, “the *Cannon* decision makes it clear that Title IX was designed to prevent sex discrimination in programs that are financed by federal money (as opposed to

84. 441 U.S. 677 (1979).

85. *Id.* at 689-91.

86. *Id.* at 704.

87. *Communities for Equity v. MHSAA*, 80 F. Supp. 2d 729, 733 (W.D. Mich. 2000).

88. *Id.* at 734.

merely stopping recipients of federal resources from discriminating),” and therefore “any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.”⁸⁹

Having lost the argument that only recipients of federal funds are subject to Title IX, MHSAA tried another approach—citing a contrary federal district court holding that the “controlling authority” theory is not necessary to achieve Title IX’s goals because funding recipients already can be held liable if they fail to respond appropriately to discriminatory acts of third parties.⁹⁰ The district court in *MHSAA* rejected this argument, noting that the nature of what recipient schools need to accomplish—controlling and regulating interscholastic athletics—requires that the recipient schools cede their own ability to control many aspects of their athletics programs to the controlling entity, the athletic association. As a result, if a recipient school believes that the athletic association is illegally discriminating, it alone has no authority to stop the athletic association. An individual school’s only recourse is to stop offering an athletic program to its students; it cannot realistically offer a program without belonging to the association. As the district court in *MHSAA* held, “It is true that a ‘funding recipient may be liable if it fails to respond appropriately to the discriminatory acts of . . . third parties,’ but the law must fill the gap where the recipient has no effective way of responding appropriately because of its relationship with the third party.”⁹¹

MHSAA also argued that the “controlling authority” theory is inconsistent with the “contractual” character of Title IX, which was enacted under the Spending Clause, among other sources of congressional power, and therefore is an exercise of Congress’ power to set the terms upon which federal funds will be distributed.⁹² Specifically, MHSAA contended that because it did not enter into a contract with the federal government, and therefore could not decide whether to accept or decline funding based on

89. *Id.* at 735.

90. See *Johnny’s Icehouse v. Amateur Hockey Ass’n of Ill.*, 134 F. Supp. 2d 965, 970 (N.D. Ill. 2001).

91. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d 805, 852-53 (citing *Johnny’s Icehouse*, 134 F. Supp. 2d at 971).

92. Title IX was also enacted pursuant to Congress’ power under Section 5 of the Fourteenth Amendment to the United States Constitution. See, e.g., *Cannon*, 441 U.S. at 688 n.7 & 704 (recounting Title IX’s purposes and legislative history).

the terms of the funding, which include not discriminating on the basis of sex, it could not be subject to Title IX. The district court disagreed, holding that the “controlling authority” theory is consistent with the contractual nature of Title IX:

Congress grants federal money to states and school districts to help pay for educational programs generally, making non-discrimination conditions on the funds. When an educational program like interscholastic athletics requires a governing body like the MHSAA—a body having “controlling authority” over member schools in certain aspects of the educational program—the MHSAA accepts the conditions in which member schools must operate when it implicitly contracts with the federal government to become responsible for organization of interscholastic athletic programs funded in part by federal resources.⁹³

After concluding that MHSAA could be subject to Title IX under the “controlling authority” theory, the district court proceeded to evaluate whether MHSAA in fact exercises controlling authority over the interscholastic athletics programs of its member schools. Despite Defendants’ assertions that membership in MHSAA is voluntary, that individual schools are primarily responsible for enforcing the common rules that they themselves adopt, and that the relationship between school districts and the MHSAA is analogous to the relationship between adverse parties and an arbitrator, the district court found otherwise. The district court undertook a comprehensive review of MHSAA’s Handbook, which sets forth all the rules and regulations of the association. It found that the association’s rules governed almost every aspect of interscholastic athletics, including eligibility, registration of coaches and officials, rules for playing MHSAA sports, practice and scrimmage schedules, the number of games, publicity, sanctions for a wide variety of violations, and the sports’ seasons.⁹⁴

With respect to seasons in particular, the court found that MHSAA regulates when practice and competition may begin and must end, and the maximum number of games that may be played. Member schools cannot practice outside the dates set by the MHSAA calendar and may not participate in any competition after the end of the MHSAA season. Schools set only the practice schedule and game dates within the season set by MHSAA. In addition, MHSAA rules prohibit athletes from partici-

93. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 854-55.

94. *Id.* at 811-14; *Communities for Equity v. MHSAA*, 80 F. Supp. 2d at 737-38.

pating in both high school and club sports in the same sport in the same season, and dictate what activities are allowed outside the MHSAA-defined season. For instance, out-of-season sports activities cannot utilize school transportation, uniforms, or funds, cannot hold mandatory practices or games, and cannot involve more than three players from the same school team if the coach is also present.⁹⁵

Based on this evidence, the district court found that MHSAA exercised “controlling authority” over season scheduling, stating:

Defendant MHSAA clearly is the “controlling authority” over schools when it comes to scheduling of the sports seasons. [T]he MHSAA’s power to declare beginning and closing dates of a season and dates of championship tournaments, as well as to punish those who play the sport outside of the MHSAA-designated dates, is the power to schedule a season. No member school alone or even in concert with many other schools has the power to do this. A single school or consortium of schools, no matter how large, would still have to seek action within the MHSAA to change seasons.⁹⁶

Thus, the court held that MHSAA is subject to Title IX under the “controlling authority” theory.

C. *The Scheduling of Girls’ Sports Seasons in Nontraditional Seasons Constitutes Discrimination*

Another way in which the MHSAA decision contributes to the development of sex discrimination law is by demonstrating through a careful factual analysis why the scheduling of girls’ sports in nontraditional seasons—a practice that may seem benign on its face or may seem to be justified by practical concerns—harms girls in a variety of ways and therefore constitutes discrimination.

Under Title IX, to prove discrimination, Plaintiffs must prove that the scheduling of girls’ sports in nontraditional and/or disadvantageous seasons results in substantial harm to girls such that they are denied equality of athletic opportunity.⁹⁷ If Plaintiffs do so, then Defendants can escape liability only if they prove that their differential treatment of girls is justified by nondiscrim-

95. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 814.

96. *Id.* at 855.

97. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 856 (citing *Policy Interpretation* at 71, 413, 71, 416-71, 418).

inatory factors.⁹⁸ Under the Equal Protection Clause, there are three steps to determine whether certain actions are discriminatory. First, Plaintiffs must prove that Defendants treat high school girls differently from boys. If Plaintiffs do so, then the second part involves shifting the burden to the Defendants to justify such a gender classification by showing that it serves important governmental objectives. Third, if the Defendants can show that the classification serves important governmental objectives, they must also show that discriminatory means employed are substantially related to the achievement of those objectives.⁹⁹ The Defendants' justification must be "exceedingly persuasive":

The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.¹⁰⁰

MHSAA's different treatment of girls as compared with boys with respect to the scheduling of sports seasons is established by its explicit facial classification on the basis of sex: the scheduling of five girls' sports in seasons that are different from the boys' seasons in those sports and the scheduling of girls' volleyball in a nontraditional season when boys' sports are all played in traditional seasons. Therefore, the primary question before the court was whether this different treatment harms girls, and if so, whether it is legally justifiable.

98. *Id.* at 71, 415. The Policy Interpretation provides examples of nondiscriminatory factors that may justify differences in treatment: (1) Differences may relate to the unique aspects of particular sports, such as the rules of play, the nature/replacement of equipment, the rates of injury resulting from participation, and/or the nature of facilities required for competition in a sport such as football; (2) Differences may be because of legitimately sex-neutral factors related to special circumstances of a temporary nature, such as large disparities in recruitment activity for a particular year as a result of annual fluctuations in team needs for first-year athletes; (3) Differences may stem from activities associated with the operation of a competitive event in a single-sex sport, which creates unique demands or imbalances in particular program components - e.g., facilities may differ for men's and women's basketball if projected attendance legitimately differs; and (4) Some aspects of sports may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. 44 Fed. Reg. at 71, 415-16.

99. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 848 (citing *United States v. Virginia*, 518 U.S. 515, 532-33 (1996)).

100. *Id.*

1. The Scheduling of Girls' Sports in Nontraditional Seasons Is Harmful

The district court found that MHSAA's scheduling of six girls' sports, and no boys' sports, in nontraditional or disadvantageous seasons deprives girls of many opportunities available to boys.¹⁰¹ In its 100-page opinion, the district court discussed each girls' sport that is scheduled in a nontraditional or disadvantageous season and the resulting harms. Given MHSAA's repeated arguments that the scheduling of girls' seasons was simply due to practical or logistical concerns and did not harm girls, the district court's careful factual analysis was necessary to its finding of discrimination.

First, the court found that because of the scheduling of their seasons, Michigan girls have fewer opportunities to participate in club sports programs. For example, in basketball, volleyball, and soccer, Michigan girls are not able to participate in club sports programs to the same extent as girls in other states because their high school seasons overlap with the club seasons and MHSAA prohibits students from playing on any other team during the high school season. These reduced opportunities to play club sports disadvantage girls because recruiters often focus heavily

101. There have been several successful actions against athletic associations involving similar issues, although most of them did not result in published decisions and none is as comprehensive as the decision in *MHSAA*. See, e.g., *Pederson v. So. Da. High Sch. Athletic Ass'n*, No. 00-4113 (D.S.D.) (consent decree in which association agrees to switch girls' volleyball from winter to fall and girls' basketball from fall to winter); *Alston v. Virginia High Sch. League*, 176 F.R.D. 220 (W.D. Va. 1997) (settlement agreement following jury verdict in plaintiff's favor in which association agrees to switch girls' volleyball from winter to fall and girls' basketball from fall to winter); *Ries v. Mon. High Sch. Ass'n*, Case No. 9904008792, slip op. (Mont. Dep't of Labor & Indus. Aug. 11, 2000) (association ordered to switch girls' volleyball from winter to fall and girls' basketball from fall to winter); *Lambert v. W. Va. State Bd. of Educ.*, 447 S.E.2d 901 (W. Va. 1994) (holding that scheduling of girls' basketball in the fall violates the equal protection clause of state constitution and ordering Board to schedule girls' basketball in winter). In addition, seeing the handwriting on the wall, North Dakota voluntarily agreed to switch these seasons. See Jane Bos, *Michigan Soon Will Stand Alone; Four States Moving Girls Hoops to Winter*, The Grand Rapids Press, Aug. 26, 2001, at D10, available at 2001 WL 25385084 (reporting on North Dakota).

on the club programs¹⁰² and because girls have fewer opportunities to develop skills and simply to play.¹⁰³

Second, girls who play sports in nontraditional seasons suffer reduced opportunities to be recruited for college programs and college athletic scholarships. For example, as currently scheduled, girls' seasons in the sports of volleyball, soccer and golf occur *after* the NCAA's early signing date, a date in November when high school athletes can first commit to a college program and when the majority of players sign. Therefore, Michigan girls playing volleyball and soccer are not able to be evaluated by recruiters in their senior year of high school before first-round November scholarships are awarded, placing them at a disadvantage relative to other female athletes around the country who are playing these sports in the fall and can be evaluated before the early signing date.¹⁰⁴

In addition, Michigan girls are also disadvantaged by NCAA recruiting restrictions. For example, Michigan girls playing basketball in the fall are subject to NCAA rules regarding "quiet periods," when in-person recruiting contacts are limited to campus visits, and "dead periods," when no contacts are permitted. The quiet period runs for about 6 weeks of the current fall season, when Michigan girls are playing high school games, making on-campus visits more difficult, and there is also a dead period. There are no such restrictions during the winter season, and the "contact period," when off-campus, in-person recruiting contacts can be made is also during the winter.¹⁰⁵

102. For example, Michigan volleyball players are not able to play club volleyball until April, when their season ends, whereas players in the other 48 states that schedule girls' volleyball in the fall begin club volleyball in January. As a result, Michigan girls are less likely to be recruited at club tournaments because they are not seen by college coaches who recruit at club tournaments, and if they are seen, they are not as competitive because they have four months less experience per year than players from states that play volleyball in the fall. In addition, by not being able to participate in club volleyball until April, Michigan girls miss out on the experience of competing against a broad base of competition. By the time Michigan girls have finished their season, most of the regional and national tournaments have been filled and Michigan club teams are placed "at the very bottom of the tournament where they do not get a chance to compete at the high levels because they haven't been competing, they don't have a power rating, [and] they don't have the ranking that other teams do when they do the [seeding]." *Id.* at 823-25 (quoting Michigan college and high school volleyball coaches, both witnesses for Plaintiffs).

103. *Id.* at 823-26,

104. *Id.* at 825-26, 829-30, 832.

105. *Id.* at 822.

MHSAA argued that female basketball players are more likely to be recruited in the current fall season because college coaches are not in season and have more time to look at potential recruits. Noting that the testimony regarding the impact of the fall basketball season on recruiting conflicted, the court found that even if it were true that the current fall basketball season is advantageous in terms of recruiting, "it is undisputed that if Michigan girls played basketball 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."¹⁰⁶ Perhaps most important, the court found that girls' basketball was originally scheduled in the fall to avoid inconveniencing the boys' basketball team, and "that kind of historical stigma should be erased."¹⁰⁷

MHSAA also argued that girls benefit from playing basketball in the fall because they do not have to compete with boys' basketball for attention and therefore have an "independent identity." Plaintiffs' counsel, however, elicited from MHSAA's primary witness on this issue that the concept of an independent identity is based on the premise that boys will "overshadow" girls if they both play in the same season. Plaintiffs presented an expert witness who testified that it is better to let girls play in the same season as boys and decide how to handle any inequitable treatment rather than to protect girls from the possibility that they will be overshadowed by the boys. The district court concluded that the message sent by separate basketball seasons is that girls' basketball cannot be "fitted in" to the "regular" winter season, and that girls deserve to play in the "regular" season too.¹⁰⁸

Third, Michigan girls suffer a decreased ability to be nationally ranked or obtain All-American honors because of MHSAA's scheduling of their seasons. For example, Michigan girls who play volleyball or soccer cannot be named to All-American teams and their teams cannot participate in national polls and rankings because their seasons take place after the traditional fall season, which is when the polls and rankings are done. This lack

106. *Id.* at 820 (citing Michigan girls' high school basketball coach and University of Michigan women's basketball coach, both witnesses for MHSAA).

107. *Id.* at 817-18.

108. *Id.* at 845-46.

of recognition further disadvantages girls in terms of being recruited nationally.¹⁰⁹

Fourth, MHSAA's scheduling of girls' sports in nontraditional seasons harms girls because they are unable to participate in special events. For example, Michigan girls cannot benefit from the excitement and publicity surrounding "March Madness," a time period when the rest of the country's high schools and colleges are participating in championship basketball tournaments. Michigan girls playing volleyball cannot attend college matches as a team with their coach because MHSAA rules prohibit such a gathering from occurring out-of-season. This affects team-building opportunities and the opportunities for girls to be inspired by role models.¹¹⁰

Fifth, the scheduling of certain girls' sports in nontraditional or disadvantageous seasons results in the girls having playing seasons that is shorter than the boys'. For example, the girls' soccer season starts later than scheduled because soccer fields are often still frozen or covered with snow when the girls' season starts in the spring, so girls must try out and practice indoors. As a result, to make up postponed games, Michigan girls play three soccer games a week, as opposed to the two per week boys play in the fall. This increased number of games leads to a greater risk of injury for the girls. The girls' basketball, swimming, and tennis seasons are also shorter than the boys' seasons in these sports.¹¹¹

Sixth, scheduling girls' sports in nontraditional seasons means that girls cannot compete against teams in neighboring states because girls in those states are playing in the traditional season. Playing against teams in neighboring states can lessen travel burdens for Michigan schools that are closer to schools in other states than to Michigan schools and can help athletes learn to play against a broader base of competition.¹¹²

In addition to these disadvantages that are shared by a number of girls' sports, the court found other sport-specific disadvantages. For example, girls often must play basketball on two school nights—Tuesdays and Thursdays—because football games are always played on Fridays during the fall, whereas boys playing in the winter have games on Tuesdays and Fridays. Female volleyball players have difficulty getting volleyball shoes because

109. *Id.* at 819-20, 826, 830.

110. *Id.* at 819, 826.

111. *Id.* at 820, 829, 835-36.

112. *Id.* at 820, 827, 830.

the supply has been depleted by other high school and college teams by the time Michigan girls start their season. Girls playing golf in the spring find it difficult to obtain tee times because everyone wants to play when the weather warms up after a cold winter, whereas the boys are able to obtain tee times in the fall because many people have played all summer and put their clubs away in the fall. MHSAA clearly recognized this disadvantage because boys' golf had been scheduled in the spring, but the court found that MHSAA moved boys' golf to the fall in the 1970s so that they would have better access to courses.

Finally, the district court found that the scheduling of girls' but not boys' sports in nontraditional or disadvantageous seasons psychologically harms girls in a number of ways. The court held that such scheduling "sends the clear message that female athletes are subordinate to their male counterparts, and that girls' sports take a backseat to boys' sports in Michigan."¹¹³ It also can cause girls and boys to have drastically different perceptions of self-worth and results in girls having lower expectations for themselves. This message remains with girls throughout adulthood and extends to their careers and personal relationships, teaching them to expect discrimination and to accept it. Discriminatory treatment of girls also negatively affects boys by sending them the message that girls are inferior.¹¹⁴

2. The Scheduling of Girls' Sports in Nontraditional Seasons Is Not Justifiable

Despite MHSAA's repeated arguments that scheduling girls in nontraditional seasons was not harmful, it did not dispute much of Plaintiffs' evidence regarding harm at trial. Rather, the association provided a number of reasons for the current scheduling of girls' seasons, but the court held that none justified "providing Michigan girls with different and unequal treatment."¹¹⁵

One such reason was that limitations on facilities, coaches and officials require scheduling the sexes in separate seasons. For example, MHSAA claimed that it cannot schedule certain sports in the same season for boys and girls because there are insufficient facilities, coaches, or officials. MHSAA, however, provided no evidence to support this argument. Nor did the as-

113. *Id.* at 836.

114. *Id.* at 837-38.

115. *Id.* at 839.

sociation provide any other relevant evidence such as why girls and boys could not share a gym if they played basketball in the same season when girls' volleyball and boy's basketball currently share gym space, or if any alternatives had been considered.

In addition, the association argued that separate seasons are necessary in order to maximize participation opportunities, because limitations on facilities would force schools to cut team size or cut freshman or junior varsity teams if seasons were combined. While MHSAA pointed to the high ranking of Michigan among the states for the numbers of boys and girls participating in various sports and argued that the current seasons were responsible for its high ranking, the court found that these numbers proved nothing because many factors other than seasons influence participation numbers, like school funding or the number of schools in a state sponsoring a particular sport.¹¹⁶

Ultimately, the district court held that MHSAA offered insufficient evidence in all of the sports at issue that logistical concerns could not be resolved if both sexes played in the same season. In any event, the court held that logistical concerns would at most permit the scheduling of girls' and boys' sports in separate seasons, but such concerns do not justify placing girls but not boys in disadvantageous seasons.¹¹⁷

MHSAA also attempted to justify its current scheduling of girls' seasons by asserting that girls and member schools prefer the current seasons. In support of the claim that girls prefer the current seasons, MHSAA introduced a survey that it commissioned after this lawsuit was filed.¹¹⁸ The court found that this

116. *Id.* at 839-42.

117. *Id.* at 839.

118. Plaintiffs argued that any such surveys were not relevant as a matter of law because the preferences of the majority cannot be used as a justification to deny the civil rights of individuals and therefore the surveys should be excluded from evidence. *See, e.g.,* *Dodson v. Ark. Activities Ass'n*, 468 F. Supp. 394 (E.D. Ark. 1979) ("The association's decision to go back to half-court [basketball] may have been reached by a democratic process, at least among school administrators. That circumstance cannot save it from constitutional condemnation. The Equal Protection Clause is a limitation on governmental action, no matter how fair the process that led to it."); *see also* *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (in equal protection case alleging discrimination against the mentally retarded, court held that public opinion does not excuse discrimination); *Lucas v. Forty-Fourth General Assembly of Col.*, 377 U.S. 713, 736 (1964) (holding that public approval of apportionment scheme through referendum cannot override voting rights of individuals in equal protection case); *W. V. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that "fundamental rights may not be submitted to vote"); *Contreras v. City of Chi.*, 119 F.3d 1286, 1291-94 (7th Cir. 1997); *United States v. Yonkers Bd.*

survey suffered from a number of problems. MHSAA's attorneys provided the survey designer with the potential negative consequences of moving the girls' seasons. Presenting no beneficial consequences of changing the seasons, the survey listed these potential negative consequences and then asked girls how they felt about them. With respect to the response rate, only 60 of MHSAA's 729 member schools participated in the survey, only one-third of the girls in these 60 schools were surveyed, and almost one-third of respondents participated in sports that are not played in disadvantageous seasons. Moreover, the court found that the survey results themselves did not show great support for maintaining the current seasons: 31.3 percent said high school sports seasons should not be the same as college, 31.3 percent said they should be the same, and 37 percent had no opinion. Some of the girls who said they opposed changing seasons indicated that they responded that way because they feared boys would get better treatment and practice times if girls and boys played in the same season. Finally, MHSAA notably did not present testimony of any girl or parent who was in favor of keeping the current seasons.¹¹⁹

As for MHSAA's argument that the majority of the member schools prefer the current seasons, the court held that the member schools' preferences are irrelevant if the current seasons vio-

of Educ., 837 F.2d 1181, 1222-26 (2nd Cir. 1987); *United States v. City of Birmingham*, 538 F. Supp. 819, 828 (E.D. Mich. 1982). Plaintiffs also argued that if Defendants' scheduling of seasons discriminates against girls, then MHSAA cannot justify its actions by claiming it is simply implementing the will of its member schools because MHSAA violates its own obligation not to discriminate when it gives effect to the discriminatory attitudes of its members. *See, e.g.*, *Innovative Health Systems*, 931 F. Supp. 222 (council could not avoid liability for disability discrimination simply because voters demanded discriminatory ordinance); *Stewart B. McKinney Found. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1212 (D. Conn. 1992) (decisionmaker has duty not to allow illegal prejudices of the majority to influence decision making process; discriminatory act is no less illegal because it enjoys broad popular support; if act is committed to appease populace then it is intentional discrimination even if decisionmaker himself does not have strong views on the matter); *Gautreaux v. Chi. Hous. Auth.*, 296 F. Supp. 907, 914 (N.D. Ill. 1969) (fact that aldermen relied on public opinion surveys in making discriminatory public housing decisions was irrelevant; decisionmakers cannot "acquiesce in the sentiment of their constituents"). The district court allowed Defendants to introduce the surveys into evidence, stating that the surveys "are probative of whether the MHSAA intended to treat girls differently on the basis of their sex by providing them unequal athletic opportunities," and that the surveys address whether MHSAA meets the Title IX standard of providing athletic programs that are "equal or equal in effect." *Communities for Equity*, No. 1:98-CV-479, 2001 U.S. Dist. LEXIS 5838, at *7-*8 (W.D. Mich. 2001).

119. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 842-44.

late the law; their preferences are only relevant to the extent they shed light on actual nondiscriminatory justifications for the current scheduling. While the court criticized the form and content of the surveys used by MHSAA, its decision to give very little weight, if any, to the surveys seemed to be based on two observations: (1) that school representatives may prefer the current seasons simply for administrative convenience; and (2) MHSAA's claim that it only does what its member schools want is belied by the association's scheduling of sports seasons on several occasions without regard to survey results or its moving sports seasons without surveying member schools at all.¹²⁰

The district court's decisions regarding the surveys are important given MHSAA's heavy reliance on them to justify its actions and the likelihood that this issue will arise in similar cases. The district court's rejection of these surveys as probative evidence is significant in light of MHSAA's repeated claim throughout this case that the association acts only at the behest of its member schools. More generally, the court's disregard for the surveys sends an important message that an entity cannot justify its own discrimination by arguing that it is only implementing the will of its members.

In the end, the district court did not find any of MHSAA's purported justifications to be legitimate. The evidence overwhelmingly indicated that girls' seasons were scheduled in non-traditional or disadvantageous seasons to avoid inconveniencing the boys. As the court noted, MHSAA's own executive director admitted that "[b]oys' sports were in [MHSAA member] schools first, and girls' sports, which came later, were fitted around the pre-existing boys' program."¹²¹

3. Sex Discrimination in Sex-Segregated Athletics Programs Is Intentional for Purposes of Title IX and the Constitution

A final important aspect of the *MHSAA* case is its clarification that sex discrimination in sex-segregated athletics programs constitutes intentional discrimination, as opposed to disparate impact discrimination.¹²² The issue of whether discrimination is

120. *Id.* at 844-45.

121. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 815.

122. The civil rights laws recognize two types of discrimination: (1) discrimination that stems from disparate treatment, also called intentional discrimination, and (2) discrimination that results from the application of a facially neutral rule that has

intentional is particularly important in light of the Supreme Court's 2001 decision in *Alexander v. Sandoval*,¹²³ which involved a statute analogous to Title IX, Title VI of the Civil Rights Act of 1964. The Court's holding limited private citizens' claims under Title VI to those alleging intentional discrimination, as opposed to those alleging disparate impact discrimination. In addition, confusion exists among parties and the courts over what one must prove to show intentional discrimination.¹²⁴

Whether discrimination is intentional discrimination, as opposed to disparate impact discrimination, is important for a number of reasons, including the implications for whether a damages remedy is available or even whether a private right of action exists to challenge the discrimination. With respect to the Equal Protection Clause, the Supreme Court has held that intent is a necessary element of a Fourteenth Amendment discrimination claim.¹²⁵ Under Title IX, the Supreme Court in 1992 held that intent is a necessary element of a damages claim brought by a private party.¹²⁶ Although the issue of whether a private action under Title IX is available only in cases of intentional discrimination has not been decided by the Supreme Court, the Court has addressed the question in the context of Title VI. In *Sandoval*, the Supreme Court held that there is no private right of action to enforce Title VI's disparate impact regulations but upheld the validity of the disparate impact regulations.¹²⁷

a discriminatory impact (or discriminatory effects). See, e.g., *Pandazides v. Vi. Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994) (citing *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582 (1983) for proposition that "'intentional discrimination' is treated as synonymous with discrimination resulting in 'disparate treatment,' which contrasts with 'disparate impact'"). Plaintiffs' claims in this case are entirely disparate treatment, or intentional discrimination, claims because they are challenging MHSAA's explicitly disparate treatment of girls, not some neutral rule that happens to hurt girls.

123. 121 S. Ct. 1511 (2001).

124. Compare *Horner v. Ke. High Sch. Athletic Ass'n*, No. 97-6264, 2000 WL 287859, at *10 (6th Cir. Mar. 20, 2000) (suggesting in dicta that to show intentional discrimination, plaintiffs would have to prove that defendants knowingly violated Title IX and displayed discriminatory animus), with *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 881 (5th Cir. 2000) ("[The university] need not have intended to violate Title IX, but need only have intended to treat women differently.")

125. See *Washington v. Davis*, 426 U.S. 229, 239-41 (1976); *Personnel Administrator of Ma. v. Feeney*, 442 U.S. 256, 272-74 (1979).

126. *Franklin v. Gwinnett County Public Sch.*, 112 S. Ct. 1028, 1037 (1992).

127. *Sandoval* specifically addressed only *private actions* under Title VI and therefore does not limit administrative enforcement of the statute's disparate impact regulations.

In addressing the issue of intentional discrimination in *MH-SAA*, the first question addressed by the district court was whether *Sandoval* applied to Title IX. Despite Plaintiffs' arguments to the contrary, the district court in *MHSAA* answered the question in the affirmative, thereby ordering Plaintiffs to eliminate any disparate impact claims from their complaint. Because all of Plaintiffs' claims alleged intentional discrimination, however, nothing needed to be eliminated.

How Plaintiffs could prove intentional discrimination was hotly contested throughout the case. Defendants argued that Plaintiffs had to demonstrate that MHSAA specifically intended to hurt girls because of an animus towards them. Plaintiffs argued that they only had to show an intent by MHSAA to treat girls and boys differently, relying on a case law holding that intent was not synonymous with motive.

The district court agreed with Plaintiffs, citing to a body of law clearly indicating that MHSAA's motives for its actions were completely irrelevant, and Plaintiffs had to prove only that Defendants intended to treat girls differently from boys with respect to scheduling of their sports seasons.¹²⁸ Furthermore, the district court agreed with Plaintiffs that MHSAA's intent to treat girls differently from boys was established by its explicit scheduling of girls' and boys' sports in different seasons.¹²⁹ This holding by the court is particularly important in light of MHSAA's persistent

128. Intentional discrimination means only an intent to treat girls and boys differently, not purposely to disadvantage girls. See, e.g., *Pederson*, 213 F.3d at 881 (“[The university] need not have intended to violate Title IX, but need only have intended to treat women differently.”); see also *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (“Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates”); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1501 (10th Cir. 1995) (absence of malevolent intent does not convert facially discriminatory policy into neutral policy with discriminatory effect); *Innovative Health Systems, Inc. v. City of White Plains*, 931 F. Supp. 222 (S.D.N.Y. 1996), *aff’d* 117 F.3d 37 (2d Cir. 1997) (ordinance against group home for disabled was discriminatory on its face even though not motivated by ill will); *Lenihan v. City of New York*, 636 F. Supp. 998, 1009 (S.D.N.Y. 1985) (intentional discrimination does not require malice or animus toward females); *U.S. v. Reece*, 457 F. Supp. 43 (D. Mont. 1978) (landlord's refusal to rent to single women because neighborhood was dangerous was intentional discrimination even though not motivated by any invidious intent).

129. See, e.g., *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 848-49, 856 (citing *United States v. Virginia*, 518 U.S. 515, 530-34 (1996)); see also *Haffer v. Temple Univ.*, 678 F. Supp. 517, 527 (E.D. Penn. 1988) (“[I]ntent’ is provided by Temple’s explicit classification of intercollegiate athletic teams on the basis of gender.”) In general, the sex-segregated nature of sports programs means that any different treatment of girls and boys will be intentional.

attempts to argue that its scheduling of girls' seasons was not motivated by ill will and therefore did not constitute intentional discrimination. Given the Supreme Court's decision in *Sandoval*, and the fact that victims of discrimination cannot even air their claims in court unless the discrimination at issue is intentional, efforts of defendants like MHSAA to contend that the nature of the conduct at issue does not constitute intentional discrimination will likely continue.

D. *The Remedy*

Having concluded that MHSAA's scheduling of girls' sports seasons discriminates against girls and that MHSAA cannot justify such discrimination, the district court enjoined MHSAA from continuing its current scheduling of seasons and ordered the association to bring its scheduling of high school sports seasons into compliance with the law by the 2003-04 school year. It also ordered MHSAA to submit to the court a compliance plan by June 24, 2002. The court noted that the association did not have to combine seasons in any particular sport but that if it did not, girls and boys must share in the advantages and disadvantages of the resulting scheduling.¹³⁰

MHSAA immediately appealed, and the Sixth Circuit agreed with the Plaintiffs that the district court's order was not final until a remedy was approved. It nevertheless stayed the district court's decision to the extent it required MHSAA to comply by 2003-04.¹³¹ It, however, did not relieve MHSAA of its obligation to develop a compliance plan. In July 2002, MHSAA submitted its plan to switch girls' golf, swimming, and tennis with the boys' seasons in those sports; girls would remain in disadvantageous seasons for basketball, volleyball, and soccer.¹³²

Plaintiffs urged the district court to reject the association's plan because it disadvantages a much larger percentage of girls than boys (46.5 percent of girls versus 12.3 percent of boys).¹³³ The Department of Justice added that the sports MHSAA chose to switch were those with the least substantial harms, both quali-

130. *Communities for Equity v. MHSAA*, 178 F. Supp. 2d at 861-62.

131. *Communities for Equity v. MHSAA*, No. 02-1127 (6th Cir. May 9, 2002).

132. Defendant's Compliance Plan, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. May 22, 2002).

133. Plaintiffs' Response to Defendant MHSAA's Proposed Compliance Plan, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. July 5, 2002).

tatively and quantitatively.¹³⁴ MHSAA responded that counting the number of advantageous versus disadvantageous seasons in which each sex plays is all that is required in order to achieve equity.¹³⁵

The court agreed with both Plaintiffs and the Department of Justice, and added its own concern that MHSAA's plan moved the seasons of only individual sports and not team sports. The court noted that individual sports tend to include fewer participants and that team sports offered opportunities for cooperative play that are at the heart of the educational goals of high school athletics. In addition, the court found that even if MHSAA switched all sports other than basketball and volleyball—the two sports that MHSAA had vigorously opposed switching—a larger percentage of girls than boys would still be disadvantaged because these were the two most popular girls' sports. Therefore, the district court held that “it is simply impossible for any plan to achieve equity without switching the girls' basketball and volleyball seasons with each other.” Accordingly, recognizing that courts may order certain remedies where there exists only one remedy that would redress the unlawful violations, the court ordered MHSAA to switch girls' volleyball and basketball and also to either (1) combine all other sports so that both sexes play in the same season; or (2) reverse two girls' seasons with two boys' seasons; or (3) combine seasons in two sports and reverse seasons in one of the two remaining sports at issue. The court ordered MHSAA to notify it by October 30, 2002 regarding which option it had chosen, and it ordered MHSAA to implement this new plan in the first academic year following the lapse of the current stay issued by the Sixth Circuit.¹³⁶

134. Amicus Curiae United States' Response to Defendant's Proposed Compliance Plan, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. June 20, 2002).

135. Defendant's Compliance Plan Reply Brief, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. July 18, 2002).

136. Injunctive Order and Opinion, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. Aug. 1, 2002). The options listed are for the Lower Peninsula only because it is home to the majority of the state's population and because the Upper Peninsula has combined seasons for the sexes in golf and swimming. The district court ordered the Upper Peninsula to switch girls' volleyball and basketball and “reverse one girls' season with one boys' season in the two remaining seasons at issue – soccer and tennis – if combined seasons are kept in swimming and golf. If these combined seasons are not kept in the Upper Peninsula, two of the four seasons must be reversed, just as in the Lower Peninsula.” *Id.* at 10-12.

On October 30, 2002, MHSAA submitted a plan to the district court indicating that, in the Lower Peninsula, it had chosen to switch girls' tennis and golf seasons with the boys' seasons in those sports, and in the Upper Peninsula, it had chosen to switch girls' soccer to the fall.¹³⁷ Plaintiffs submitted a response to the court objecting to MHSAA's second proposed plan primarily on two grounds: (1) it created new harms for Upper Peninsula girls by making it impossible for them to compete in state tournaments in soccer, golf, tennis and swimming because of the scheduling of these sports in different seasons in the Upper and Lower Peninsulas; and (2) the plan still disadvantaged a much greater percentage of girls than boys, when other less harmful options were available.¹³⁸ On February 27, 2003, the district court approved this plan over Plaintiffs' objections.¹³⁹ MHSAA has indicated it will appeal the decision, so an actual remedy for the girls of Michigan will likely have to wait even longer.¹⁴⁰

CONCLUSION

Unfortunately, the Michigan case is but one example not only of the inequities girls and women continue to face in athletics, but also of the resistance to change on the part of certain institutions and athletic interests. Legal battles by educational institutions to avoid their gender equity obligations are unfortunate, not only because of the delayed justice that results for students whose chance to play or receive other athletic benefits and opportunities may never come during a critical few years, but also because educational institutions' energies should be devoted to putting funds and resources into athletics programs for male and female students rather than to paying lawyers' fees to deny or delay their educational responsibilities.

This resistance to change also has taken the form of systemic attacks on Title IX. Since Title IX's enactment in 1972, there have been many attempts to weaken its application to athlet-

137. Amended Compliance Plan, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. Oct. 30, 2002).

138. Plaintiffs' Response to MHSAA's Amended Compliance Plan, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. Nov. 7, 2002).

139. Order and Opinion, *Communities for Equity v. MHSAA*, No. 1:98-CV-479 (W.D. Mich. Feb. 27, 2003).

140. An appellate briefing schedule has been set and will run from May through July 2003. Letter from Joseph T. Sievering, Case Manager, Sixth Circuit, to Counsel (Mar. 11, 2003).

ics.¹⁴¹ In addition, male athletes whose teams have been eliminated repeatedly have sued their schools claiming that the specific Title IX policies interpreting the regulation requiring equal athletic participation opportunities, which have been in place since 1979, discriminate against men. According to these claims, the policies establish quotas by requiring schools to provide opportunities for women that are inflated beyond their interest in playing sports, which is inherently less than men's interest in playing sports. The argument then proceeds to assertions that the policies force schools to drop men's teams. Federal appellate courts have uniformly rejected these legal arguments and have upheld the Title IX athletics policies.¹⁴² More recently, opponents of the longstanding Title IX athletics policies have urged the Bush Administration's Department of Education to

141. In 1974, Congress rejected a proposal, known as the "Tower Amendment," that would have exempted from Title IX the revenue produced by revenue-producing intercollegiate athletic programs. See S. 1539, 93d Cong. 2d Sess., 536, 120 Cong. Rec. 15477 (1974). Subsequent efforts to restrict Title IX's coverage of intercollegiate athletics also failed. See H.R. 8394, 94th Cong., 1st Sess., 121 Cong. Rec. 21685 (1974) (bill amending Title IX to protect revenue produced by an athletic team from use by any other team unless the first team did not need the funds for itself); S. 2106, 94th Cong., 1st Sess., 121 Cong. Rec. 22778 (1975) (bill amending Title IX to exempt revenue-producing sports). Resolutions were later introduced in both Houses disapproving the Title IX regulations insofar as they applied to athletics. See S. Cong. Res. 52, 121 Cong. Rec. 22940 (July 16, 1975); H. Cong. Res. 311, 121 Cong. Rec. 19209 (June 17, 1975), and in their entirety, see S. Cong. Res. 46, 121 Cong. Rec. 17300 (June 5, 1975); H. Cong. Res. 310, 121 Cong. Rec. 19209 (June 17, 1975). None of the resolutions passed. See Policy Interpretation, 44 Fed. Reg. at 71413 (summarizing relevant history). The regulations thus went into effect on July 21, 1975, based on a legislative record characterized by Congress' repeated rejection of attempts to weaken Title IX's application to intercollegiate athletics and its recognition of the need to remedy sex discrimination in intercollegiate athletics. After the regulations were promulgated, the NCAA filed a lawsuit against the Department of Health, Education and Welfare seeking to invalidate Title IX's application to intercollegiate athletics, which was dismissed on jurisdictional grounds. See National Collegiate Athletic Ass'n v. Califano, 622 F.2d 1382 (10th Cir. 1980).

142. See *Cohen v. Brown Univ.*, 991 F. 2d 888 (1st Cir. 1993) (Cohen I), and *Cohen v. Brown Univ.*, 101 F.3d 155, 170 (1st Cir. 1996) (Cohen II), cert. denied, 520 U.S. 1186 (1997) (this case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court—*Cohen I*, and the second time after a trial on the merits—*Cohen II*); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); *Pederson v. Louisiana State University*, 213 F.3d 858, 879 (5th Cir. 2000); *Miami University Wrestling Club v. Miami University*, No. 99-00972 (6th Cir. Sept. 9, 2002); *Kelley v. Bd. of Trustees, University of Ill.*, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); *Chalenor v. University of N.D.*, No. 00-3379ND (8th Cir. May 30, 2002); *Neal v. Board of Trustees of The California State Universities*, 198 F.3d 763, 770 (9th Cir. 1999); *Roberts v. Col. State Bd. of Agriculture*, 998 F.2d 824, 828 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993).

change these critical policies administratively. One of the most recent challenges involves a lawsuit filed in January 2002 by the National Wrestling Coaches Association (NWCA) and other plaintiffs against the Department of Education seeking to invalidate the Title IX athletics policies, making the same claims that have been repeatedly rejected by courts to date, and also adding claims that the policies were not adopted properly.¹⁴³ The Department of Justice (DOJ) filed a motion to dismiss the NWCA's case,¹⁴⁴ and several women's and coaches' organizations, represented by the National Women's Law Center, filed an *amicus* brief supporting DOJ's motion to dismiss.¹⁴⁵ As of the time of this writing, a decision has not yet been issued in the case.

On the heels of the NWCA's case, in June 2002, the Bush Administration created a "Commission on Opportunity in Athletics," the purpose of which was "to collect information, analyze issues and obtain broad public input directed at improving the application of current Federal standards for measuring equal opportunity for men and women and boys and girls to participate in athletics under Title IX."¹⁴⁶ This Commission has submitted to Secretary Paige its final report with recommendations for major changes to the current Title IX athletics policies that would severely reduce the athletic opportunities and scholarship dollars to which women and girls are legally entitled today.¹⁴⁷ Two Commission members dissented from the Commission's final report and issued a Minority Report that addresses the continuing discrimination against female athletes and the need for strong en-

143. Complaint for Injunctive and Declaratory Relief, National Wrestling Coaches Ass'n v. United States Dep't of Ed., Civil Action No. 1:02CV00072 EGS (Jan. 16, 2002).

144. Defendant's Motion to Dismiss, National Wrestling Coaches Ass'n v. United States Dep't of Ed., Civil Action No. 1:02CV00072 EGS (May 29, 2002).

145. Brief of *Amici Curiae* National Women's Law Center, American Volleyball Coaches Association, International Women's Lacrosse Coaches Association, National Fastpitch Softball Coaches Association, Women's Basketball Coaches Association, American Association of University Women, and Women's Sports Foundation in Support of Defendant's Motion to Dismiss, National Wrestling Coaches Ass'n v. United States Dep't of Ed., Civil Action No. 1:02CV00072 EGS (June 5, 2002), available at <http://www.nwlc.org/pdf/amicusbrief.final.pdf>.

146. United States Department of Education, *About the Commission—Secretary's Commission on Opportunity in Athletics*, available at <http://www.ed.gov/initi/commissionsboards/athletics/about.html>.

147. See National Women's Law Center, *Following Submission of the Commission Report, Title IX Policies Remain in Grave Danger* (Mar. 20, 2003), available at http://www.nwlc.org/pdf/TitleIXCommissionTalkingPoints_3-20-03.pdf.

forcement of current Title IX policies.¹⁴⁸ Advocates who favor keeping existing Title IX athletics policies have launched a national campaign to save Title IX.¹⁴⁹

It is past time that educational institutions take seriously their obligation to treat girls and boys equally with respect to this important educational opportunity. Title IX and other gender equity laws must be enforced, not scaled back, to ensure that our nation's daughters and sons receive the benefits to which they are entitled. They deserve no less.

148. See *Minority Views on the Report of the Commission on Opportunity in Athletics* (February 26, 2003), available at <http://www.nwlc.org/pdf/MinorityReportFeb26.pdf>.

149. See www.savetitleix.com.

