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Casenote: Turn to face the Change: The Sixth Circuit Court of Appeals Requires Michigan High School Athletic Association to Change Scheduling Practices Because of Gender Discrimination in Communities for Equity v. Michigan High School Athletic Ass'n., Inc

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Casenote: Turn to face the Change: The Sixth Circuit Court of Appeals Requires Michigan High School Athletic Association to Change Scheduling Practices Because of Gender Discrimination in *Communities for Equity v. Michigan High School Athletic Ass'n., Inc*[1]

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I. INTRODUCTION

Recently, there has been an array of legal challenges to the scheduling of sports seasons by high school athletic associations.[2] These challenges are based

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[1] Court decision of Communities for Equity v. Michigan High School Athletic Association. Cmtys. for *Equity v. Mich. High Sch. Athletic Ass'n*., 377 F.3d 504 (6th Cir., 2004).

[2] *See Sixth Circuit Court of Appeals Finds for Communities for Equity, at http://www.communitiesforequity.com/mhsaa.html*, (last visited Feb. 27, 2005) ("The high school athletic associations in West Virginia, Virginia, Montana, Arizona and South Dakota have all changed their athletic seasons after being sued. Alaska and North Dakota changed their seasons voluntarily."); *See also* Neena K. Chaudhry, Marcial D. Greenberger, *Seasons of Change: Communities for Equity v. Michigan High School Athletic Association*, 13 UCLA WOMEN'S L.J. 1, n. 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."). The South Dakota High School Athletic Association filed a consent decree where

on the argument that traditional schedules discriminate based upon gender.[3] One

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they agreed to switch girls' volleyball from winter to fall and girls basketball from fall to winter. *See* Pederson v. So. Da. High Sch. Athletic Ass'n, No. 00-4113 (D.S.D.). The Virginia High School League reached a settlement agreement to switch girls' volleyball from winter to fall and girls' basketball from fall to winter after court awarded a jury verdict for plaintiffs. *See* Alston v. Virginia High Sch. League, 176 F.R.D. 220 (W.D. Va. 1997). A Montana federal court also ordered girls' volleyball and basketball to swap seasons. *See* Ries v. Mon. High Sch. Ass'n, Case No. 9904008792, slip op. (Mont. Dep't of Labor & Indus. Aug. 11, 2000). A federal court in West Virginia held that the scheduling of girls basketball in the fall violated Equal Protection. *See* Lambert v. W. Va. State Bd. of Educ., 447 S.E.2d 901 (W. Va. 1994).

[3] *Sixth Circuit Court of Appeals Finds for Communities for Equity, at http://www.communitiesforequity.com/mhsaa.html*, (last visited Feb. 27, 2005). Communities for Equity asserted:

> The Court stated that even if MHSAA had done so, it MIGHT only justify different seasons but could NEVER justify ALWAYS putting the girls and NEVER the boys in the bad season. But that is exactly what MHSAA does --each and every time it schedules boys and girls in a different season, it assigns the girls to the inferior season. THAT IS DISCRIMINATION.

Id.

particular legal battle concerning athletic scheduling is currently being fought in Michigan.[4] The result of this litigation may have an impact on high school athletic associations nationwide.[5] The Michigan based group, comprised mostly of parents of female athletes, Communities for Equity ("CFE") has brought their challenge in federal court to athletic scheduling in Michigan.[6] The Michigan

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[4] *See generally* Cmtys. for Equity, 377 F.3d 504 (detailing Sixth Circuit decision detailing legal battle).

[5] The resulting litigation, where the Sixth Circuit Court of Appeals grants relief to the plaintiffs, represents the last federal circuit to recognize high school athletic associations as state actors. *See* Josiah N. Drew, *The Sixth Circuit Dropped the Ball: An Analysis of Brentwood Academy v. Tennessee Secondary School Athletic Ass'n in Light of the Supreme Court's Recent Trends in State Action Jurisprudence*, 2001 B.Y.U.L. REV. 1313, 1322 (identifying Sixth Circuit as only federal circuit court of appeals reluctant to identify high school athletic associations as state actors prior to 2001).

[6] Communities for Equity is described as "an organization of parents and high school athletes that advocates on behalf of Title IX compliance and gender equality in athletics." *See* Cmtys. for Equity, 377 F.3d 504, 506. For further description of CFE see Communities for Equity Homepage, *available at* http://www.communitiesforequity.com/about.html, (hereinafter CFE homepage)(last visited Feb. 12, 2005)

High School Athletic Association ("MHSAA"), is the group responsible for scheduling high school athletics in Michigan, and is currently defending the action in the federal courts.[7]

In the many states where litigation over sports season scheduling has been threatened, Michigan has been the most vigorous in its defense.[8] The parties to

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> Communities for Equity (CFE) is a Michigan-based, multi-issue, volunteer-driven, advocacy organization that serves as a voice for female athletes. CFE works together with policy makers, schools, community organizations, and the public to improve current middle school and high school athletic programs. Most importantly, CFE strives to improve the quality of life for all athletes in the state of Michigan. As the organization's guiding mission, CFE supports equity in Michigan athletics through advocacy and by providing educational resources to female athletes, their parents, and schools in order to assist in the enforcement of and/or compliance with the laws and policies requiring athletic equity.

Id.

[7] *See Cmtys. for Equity*, 377 F.3d 504, 506 (recounting background information from litigation).

[8] *See* Courtney E. Schafer, Note*, Following the Law, Not the Crowd: The Constitutionality of Nontraditional High School Athletic Seasons*, 53 DUKE L.J.

the litigation are currently awaiting word as to whether the case will be heard by the nation's highest Court.[9] The result of this litigation could potentially lead to the uniform change of athletic seasons in all U.S. high schools to align with collegiate athletic schedule.[10]

223, 231 (observing that Michigan has fought seasons switch more than any other state).

[9] *See* S. Ct. docket no. 04-1021 Response due April 1, 2005, *at http://www.supremecourtus.gov/docket/04-1021.htm*. For further details on Supreme Court's consideration of present case, see *Sports Litigation Moves to U.S. Supreme Court*, *at http://mhsaa.com/news/supreme.htm*, Nov. 16, 2004 (suggesting MHSAA will petition the U.S. Supreme Court)

[10] *See Sixth Circuit Court of Appeals Finds for Communities for Equity, at http://www.communitiesforequity.com/mhsaa.html*, (last visited Feb. 27, 2005)

> This brings the total number of states that hold (or will hold within the next two years) girls volleyball in the fall and girls basketball in the winter, the same as the NCAA, to 47. Only three states – Michigan, Hawaii and Rhode Island – schedule girls' basketball and volleyball in off or "nontraditional" seasons.

Id.

The litigants who brought the challenge are parents of the student-athletes, most of these athletes being female volleyball players.[11] These parents would like the seasons changed so their daughters will have more exposure to college recruiters and more of an opportunity to receive the "ultimate prize" of a college scholarship.[12] Another claim made by plaintiffs is that by not scheduling their basketball playoffs during March, they are denied the opportunity to compete in "March Madness," by all accounts the most exciting time of the year for a basketball player.[13] In sum, the plaintiffs argue that girls in Michigan are always

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[11] *See* Schaffer supra note …, at 223 ("Many of the litigants are parents of volleyball players who want the volleyball season moved from the winter season too the fall season, in hopes of increasing their daughters' exposure to college coaches.").

[12] *See* Courtney E. Schafer, Note*, Following the Law, Not the Crowd: The Constitutionality of Nontraditional High School Athletic Seasons*, 53 DUKE L.J. 223 ("Parents have filed suit against high school athletic associations arguing that their children are cheated out of athletic opportunities – including the ultimate prize of a college scholarship – because of the scheduling of certain interscholastic sports seasons.").

[13] *See* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n, 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff'd*, 377 F.3d 504 (6th Cir., 2004) (discussing supreme importance of March Madness to all high school basketball players).

assigned to the "inferior season."[14] There are those that disagree with Communities for Equity ("CFE")[15], and go so far as to claim that nontraditional seasons for girls and boys sports may be more advantageous than traditional high

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[14] *See Sixth Circuit Court of Appeals Finds for Communities for Equity, at http://www.communitiesforequity.com/mhsaa.html,* (last visited Feb. 27, 2005) (claiming MHSAA failed to justify always putting girls in the "inferior" seasons for sports). CFE, in its statement, further suggests that the MHSAA should stop spending money on appeals that should be going towards kids' athletic programs. *See id*. CFE further proposes that the MHSAA should "practice what they preach in their sportsmanship campaign, "Be a good winner and a GOOD LOSER." *See id*.

[15] *See* Courtney E. Schafer, *supra* note 8 (citing disagreements with district court's assessment of harm experienced by female athletes in Michigan). There are also those who believe that gender should never be a basis for disparate treatment of those similarly situated. *See* Laura Fortney, Public Single-Sex Elementary Schools: "Separate but Equal" in Gender Fifty Years Following Brown v. Board of Education, 35 U. Tol. L. Rev. 857, 886 (2004) ("Additionally, gender should never play a role in fostering stereotypical notions. We cannot allow archaic philosophies of gender to foster stereotypes and thinking."). Others believe that the strain placed upon individuals in Michigan will result in more harm than the current scheduling of sports seasons. *See* Jeff Peek, Traverse City: Record Eagle, *Schedule Switch Just won't be 'Fair'*, *available at http://www.gtherald.com/2004/aug/1jeffcol.htm*, Aug. 1, 2004.

school athletic seasons.[16] Agree or disagree, it is fact that in the very least, the girls in Michigan, from the time that each sport girls sport was introduced, have had to work around the boys schedule, and the boys' seasons have never worked around the girls.[17]

The two parties to this suit are the Michigan High School Athletic Association ("MHSAA")[18], and Communities for Equity ("CFE").[19] This note

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[16] *See* Schafer, *supra* note 8, at 225 ("[n]ontraditional high school athletic seasons are not only legally permissible, but in many ways are more advantageous than traditional high school athletic seasons.").

[17] *See State Board Favors Gender Equity Court Ruling, at http://www.michigan.gov/ptinterfriendly/0,1687,7-140--98962--,00.html*, (Aug. 11, 2004) ("When the girls were added, you didn't see any of the boys seasons being adjusted or directed to be equitable. Unlike every other state, Michigan's girls' seasons have been adjusted to fit around the boys' seasons. There is no equity or accommodation for the girls.").

[18] *See About the MHSAA*, *at http://www.mhsaa.com/about/index.htm,* (last visited Feb. 27, 2005). The MHSAA, in a statement of purpose, explains:

> The MHSAA is a private, not-for-profit corporation of voluntary membership by over 1,800 public and private senior high schools and junior high/middle schools which exists to develop common rules for athletic eligibility and competition. No government funds or tax dollars support the MHSAA, which was the first such

will track their legal battle over the sports seasons in Michigan, and critique the recent Sixth Circuit decision affirming a district court ruling for CFE.[20] Part two of this note will focus on the facts of *Communities for Equity*, and the current state of litigation in the case.[21] Part three of this note will focus on the background of the pertinent law in the case, including a survey of constitutional challenges to gender based discrimination under the Equal Protection Clause of

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> association nationally to not accept membership dues or tournament entry fees from schools. Member schools which enforce these rules are permitted to participate in MHSAA tournaments, which attract approximately 1.6 million spectators each year.

Id.

[19] *See* Communities for Equity Homepage, *available at http://www.communitiesforequity.com/about.html*, (hereinafter CFE homepage) (last visited Feb. 12, 2005) (discussing CFE's role as advocate for female athletes and their desire to see "equitable opportunity and treatment in school-sponsored athletics").

[20] *See* Cmtys. For Equity v. Michigan High Sch. Athletic Ass'n., 377 F.3d 504, 515 (2004)(affirming decision of lower court).

[21] For a summary of the facts, arguments, and procedural background of Cmtys. for *Equity v. Michigan High Sch. Athletic Ass'n*., see *infra* notes 20-43 and accompanying text.

the 14th Amendment of the U.S. Constitution.[22] Part four will include an analysis of the Sixth Circuit's decision in the case, and a critique of their analysis.[23] In part five, I will conclude by accessing the impact of the decision of the circuit court, suggesting that the U.S. Supreme Court should vacate the Sixth Circuit's judgment and offer a modest resolution to the current litigation.[24]

II. FACTUAL AND PROCEDURAL BACKGROUND OF *COMMUNITIES FOR EQUITY*

In 1997, The Communities for Equity ("CFE") brought a suit against the Michigan High School Athletic Association ("MHSAA"), claiming that their

[22] For background information on the concept of equal protection and how it applies to male and female high school sports, see *infra* notes 44-11 and accompanying text.

[23] For analysis of how Equal Protection jurisprudence should be applied in the present case, see *infra* notes 112-171 and accompanying text.

[24] For a discussion the impact of this decision will have on high school athletic associations and Equal Protection jurisprudence see *infra* notes 171-209 and accompanying text.

scheduling of girls sports in nontraditional seasons violated Equal Protection.[25] CFE also brought challenges under Title IX and Michigan state law.[26] CFE was joined by individual student-athletes as plaintiffs who represented all student-athletes in a class action.[27] Plaintiffs claimed injury due to the MHSAA's scheduling of girls sports in "the less advantageous season," with repect to the

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[25] The girls sports that MHSAA scheduled in "nontraditional" seasons were volleyball in the winter instead of in the fall, basketball in the fall rather than the winter, golf in the spring rather than the fall, soccer in the spring rather than the fall, swimming and diving in the fall rather than the winter, and tennis in the fall rather than the spring. See Communities for Equity Homepage, *available at http://www.communitiesforequity.com/about.html*, (hereinafter CFE homepage) (last visited Feb. 12, 2005) (discussing different sports scheduled in nontraditional seasons and injury to student-athletes by MHSAA maintaining their scheduling procedures). CFA argues that the student-athletes' greatest injury by the scheduling system is "lessening their ability to be recruited for and obtain college scholarships." *See id*.

[26] *See* Cmtys. For Equity v. Michigan High Sch. Athletic Ass'n., 377 F.3d 504, 506 (6th Cir. 2004)(reviewing the district court's holding in the case).

[27] *See* CFE homepage, *available at http://www.communitiesforequity.com/mhsaa.html*, (describing suit by CFE and individuals as "CFE's class action lawsuit against the Michigan High School Athletic Association").

seasons in which the boys play.[28] The six sports in question this case are girls basketball, girls volleyball, girls soccer, girls golf, girls swimming and diving, and girls tennis.[29] The injuries claimed by CFE vary from sport to sport, but they mostly center on the nontraditional season limiting the girls' exposure to the

[28] *See* Cmtys. for Equity, 337 F.3d at 506 (explaining that girls have played in less advantageous season because of the way that high school athletics developed in Michigan).

[29] *See* Cmtys. For Equity v. Michigan High Sch. Athletic Ass'n., 377 F.3d 504, 506 (listing different sports that CFE challenge on the basis of their season having a discriminatory effect).

recruiting process, reducing their chances for obtaining scholarships, and limiting their ability to compete in interstate competition.[30]

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[30] *See* CFE homepage, *available at* *http://www.communitiesforequity.com/mhsaa.html*,

> **Sport-Specific Harms Resulting From MHSAA's Current Scheduling of Six Girls' (But No Boys') Teams in Non-Traditional and/or Inferior Seasons**
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> **Volleyball in Winter Rather Than Fall**
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> The out-of-season placement of girls' volleyball in the winter (i.e., from December to March), while the rest of the nation plays the sport in its traditional fall season, disadvantages Michigan girls in the following ways:
>
> - *By lessening their ability to be recruited for and obtain athletic scholarship offers.* Because the volleyball season in Michigan has yet to begin, college coaches cannot evaluate Michigan girls prior to the NCAA's early letter of intent signing date in mid-November, which is when the majority of high school athletes commit;
> - *By restricting their opportunities to play in the amateur or private club programs on which college volleyball recruiting is heavily focused*. Because MHSAA rules prohibit athletes from participating on club teams during their high school seasons,

Michigan girls are unable to play club volleyball until mid-March at the earliest, while girls in other states can do so beginning in January. As a result, teams from outside of Michigan fill most of the regional and national club tournament spots, and if any openings exist, the teams comprised of Michigan girls are relegated to a lower tournament seeding due to their comparative lack of experience;

- *By limiting their chances to play against a broad base of competition and develop adequate technical skills*. Over a four-year span, the shortened club volleyball season described above causes Michigan girls to possess an average of 16 months less competitive training and experience than the girls in 48 other states;
- *By virtually ensuring that they will not achieve All-American honors and that their high school teams are excluded from national rankings;*
- *By depriving them of opportunities for interstate competition.* Girls' volleyball teams in cities located near Michigan's borders are not able to compete against teams in those bordering states, even though such teams are in many cases closer to other Michigan schools;
- *By making it difficult for them to find specialized shoes and other equipment.* Because volleyball is not played in Michigan until after

all of the college and high school teams across the country have finished their seasons, Michigan girls often face depleted store inventories;

- *By preventing them from being able to attend college volleyball matches as a team with their coach.* Because MHSAA prohibits such gatherings from taking place outside of the girls' high school season (which, in Michigan, means precisely when every college volleyball match is being held), Michigan girls' volleyball players are denied contemporaneous role models.

Basketball in Fall Rather Than Winter MHSAA's scheduling of girls' basketball in the nontraditional fall season disadvantages Michigan girls:

- *By reducing their college recruitment and scholarship opportunities.* Girls' basketball players in Michigan face NCAA recruiting restrictions that Michigan boys and the girls(and boys) in nearly every other state do not, including "quiet periods" which limit many of the dates that college coaches can recruit and make on-campus visits;
- *By denying them an equal opportunity to obtain national team rankings or be selected for individual All-American honors;*
- *By preventing them from participating in many prestigious national and club basketball tournaments, as well as other special*

exhibitions or "shoot outs." Because these tournaments and exhibitions are geared around the season in which the rest of the country's high schools play basketball, Michigan girls not only receive less national attention and recognition, but cannot be seen by college recruiters at such events;

- *By depriving them of the chance to play basketball during "March Madness."* Because their seasons have ended in December, Michigan girls (but not boys) are unable to benefit from all of the publicity and excitement generated at that time of year by the basketball tournaments being held at the national collegiate and high school levels. Instead, girls' basketball players in Michigan are forced to play while the public's attention is devoted almost exclusively to boys' football;
- *By preventing interstate competition.* Michigan girls, but not boys, are prevented from competing against the basketball teams in other states who play in the traditional winter season;
- By causing them to lose additional skill development, practice and coaching time. Michigan girls have a high school basketball season that is approximately three weeks shorter than the boys' season.

Golf in Spring Rather Than Fall The placement of lower peninsula girls' golf in the spring harms Michigan's female golfers:

- *By causing them to have only three years of experience and golf scores on which to be evaluated by college recruiters, because their senior season starts after the national letter of intent signing date in November;*
- *By giving them less access to golf courses than their male counterparts who play in the fall.* Michigan girls face increased competition from the general public for tee times in the spring that the boys do not ;
- *By forcing them to play when the State's golf courses are in poor physical condition.* Michigan girls, but not boys, are more likely to practice and play on frozen, muddy and/or ungroomed courses;
- *By denying them the benefit that Michigan boys possess of going straight from extended summer play into their high school golf season.* The fact that Michigan girls do not have the same ability to achieve and maintain low golf scores further lessens their chances of being recruited for a spot on college golf teams.

Soccer in Spring Rather Than Fall MHSAA's scheduling of high school girls' soccer in the spring, while boys play soccer in the fall, harms Michigan girls as follows:

- *By significantly diminishing their opportunities for college recruitment.* Since college soccer scholarships are awarded in November, *before* the girls' soccer season starts, Michigan girls

have no chance to be seen and evaluated by recruiters during their senior year;

- *By depriving them of opportunities to participate in club soccer programs.* The club soccer season in Michigan takes place in the spring, while the girls are already playing for their high school teams;
- *By preventing them from participating in the regional and national youth soccer tournaments, as well as Olympic development camps, that are tied to the spring club season;*
- *By denying them an equal opportunity to play in elite camps or shoot-outs, to obtain national team rankings, or be selected for individual All-American honors;*
- *By denying them the ability to play soccer against schools in bordering states such as Ohio and Indiana (whose girls' seasons are in the fall);*
- *By causing them to face inclement weather conditions that boys' soccer players do not*. In the spring, Michigan's soccer fields are often frozen and/or snow-covered at the start of the season, forcing the girls inside for practice and team tryouts. Because the regular season is also likely to begin later than as originally scheduled, girls may be compelled to play as many as three matches per week (and thereby increase their risk of injury) in order to make up for those games that were postponed due to the weather.

Swimming & Diving in Fall Rather Than Winter The placement of lower peninsula girls' swimming and diving in the fall disadvantages Michigan girls:

- *By denying them the ability that boys have of going straight from their high school swimming and diving seasons to national, Olympic development and/or open amateur meets.* Instead, Michigan girls face a four-month gap in competition prior to these important events;
- *By causing them to miss some U.S. Swimming Club competitions altogether;*
- *By giving them fewer opportunities to practice and compete.* Michigan girls have a swimming and diving season in the spring that is two weeks shorter than the boys' winter season.

Tennis in Fall Rather Than Spring MHSAA's scheduling of girls' tennis in the nontraditional fall season (i.e., until mid-October) harms Michigan girls:

- *By limiting their opportunities to practice and compete in preparation for national amateur and/or Olympic development programs.* Michigan girls are prevented from playing competitive high school tennis during the months leading up to the United States Tennis Association's summer tournament circuit, which is

Pretrial litigation occupied nearly three and a half years.[31] The case was finally decided in a federal court in favor CFE in 2001.[32] The district court ordered an injunction against MHSAA from continuing its practice of scheduling

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> where college coaches evaluate play. Michigan boys, by contrast, are better prepared for the USTA circuit because they play tennis in the sport's traditional spring season;
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> - *By causing them to lose further skill development and coaching time, since the girls' tennis season is approximately 20 days shorter than the boys' season;*
> - *By forcing Michigan girls, but not boys, to make the adjustment to playing college tennis in a different season;*
> - *By preventing them from attending college tennis matches together as a team.* Unlike their male counterparts, Michigan's female tennis players are denied same-gender college role models as a result of the inferior season in which they are scheduled to play.

Id.

[31] *See* CFE homepage, *available at* *http://www.communitiesforequity.com/mhsaa.html*, (last visited Mar. 17, 2005) (noting that there was "nearly three and a half years of pre-trial litigation").

[32] *See generally* Cmtys. for Equity v. Michigan High School Athletic Ass'n, 178 F. Supp. 2d 805 (W.D. Mich 2001), *aff'd*, 377 F.3d 504 (6th Cir., 2004) (finding for CFE an Equal Protection, Title IX and Michigan state law grounds).

girls' sports in nontraditional[33] seasons.[34] The court also required that the MHSAA submit a Compliance Plan that is to be implemented only at the satisfaction of the district court.[35] After some initial amendments, the district

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[33] The definition of what is "traditional" and "nontraditional" is a point of some debate. The MHSAA argues that the schedule of events before the litigation is "traditional," and that "traditional" should be defined from the perspective of Michigan practice, not a national consensus of states or a collegiate schedule. *See* John E. "Jack" Roberts, What Is "Traditional," *at http://www.mhssa.com/news/00jacktraditional.html*, Dec. 14, 2004 (suggesting that collegiate athletic schedule is not "traditional"). Roberts contends that what colleges do is not "traditional" in many states, and what colleges do is not "traditional in Michigan. *See id*. For a discussion of the meaning of "traditional" as the court used it in the Communities case, *see supra* notes 101-111 and accompanying text.

[34] *See id*. at 862 ("The Court will enjoin Defendant MHSAA from continuing its current scheduling of interscholastic athletics seasons in Michigan.").

[35] *See id*. (discussing court retaining jurisdiction over the case to review the appropriateness of remedy proposed in Compliance Plan); *see also MHSAA Submits Amended Compliance Plan In Sports Case, at http://www.mhsaa.com/news/03compliance.html*, Oct. 31, 2002 (detailing particulars of compliance plan); The text of the original compliance plan can be found at *http://www.mhsaa.com/news/02plan.pdf*; The text of the Amended

court accepted the compliance plan.[36] The Sixth Circuit expressed some reservations about the compliance order.[37] MHSAA later appealed the District Court's ruling to a three justice panel of the Sixth Circuit Court of appeals, who

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Compliance Plan can be found at *http://www.mhsaa.com/news/amendplan.pdf*, last visited Mar. 17, 2005.

[36] *See* Compliance Plan Accepted By District Court in Sports Seasons Case, *at http://www.mhsaa.com/news/03courtplan.html*, Nov. 11, 2002 (describing how district court accepted compliance plan). The plan provided for Lower Peninsula Golf and Tennis tournaments to be rescheduled, girls tennis and boys golf from Fall to Spring, and boys tennis and girls gold from Spring to Fall. *See id*.

[37] *See id*.

> [T]he Sixth Circuit stated, ". . . it is clear the stay motion raises more serious appellate issues concerning liability under Title IX and the Equal Protection Clause." The decision also states, ". . . the defendant (MHSAA) has articulated a variety of harms that is, its member schools, and the student-athletes may suffer if it must comply with the injunction by bringing its scheduling into compliance with the district court's ruling . . . ." The first round of the Circuit Court appeals process is expected to take approximately one year, delaying the implementation of any District Court's ordered plan until at least the 2004-2005 school year.

See id.

decided to affirm the judgment of the lower court, specifically on Equal Protection grounds.[38] The Sixth Circuit Court felt that it was unnecessary to comment on Title IX issues, because the MHSAA's Equal Protection violation was sufficient grounds to affirm.[39] The Sixth Circuit has decided not to reopen the case en banc, in front of a thirteen judge panel, and this leaves MHSAA only

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[38] *See* Cmtys. For Equity v. Michigan High Sch. Athletic Ass'n., 377 F.3d 504, 515 (6th Cir., 2004) (Affirming decision of lower court on Equal Protection grounds); *see also* MHSAA Statement On Sixth Circuit Court of Appeals Decision In Sports Seasons Case, *available at http://www.mhsaa.com/news/04appealstatement.htm*, Jul. 27,2004 (noting that it was 3 judge panel that decided appeal). The MHSAA filed an appeal with the Sixth Circuit to have the case heard by the court en banc, which would entail having all 13 justices hearing the case at the same time. See Representative Counsel Authorizes Continued Appeals, Development Of Court-Ordered Rescheduling In Sports Seasons Litigation, *available at http://www.mhsaa.com/news/05authappeal.htm*, Aug. 4, 2004 (suggesting how MHSAA planned on petitioning Sixth Circuit to hear case en banc, in front of full panel of 13 Justices). The Sixth Circuit decided to deny the MHSAA's petition for appeal. *See Sports Seasons Litigation Moves To U.S. Supreme Court*, *at http://www.mhsaa.com/news/supreme.htm*, Nov. 16, 2004.

[39] See id. at 506 (declaring Equal Protection relief sufficient, and concluding that analysis of Title IX to be unnecessary).

one more avenue to seek relief.[40] Currently, the MHSAA is waiting to see whether or not the Supreme Court of the United States wishes to make its final determination on the matter.[41]

CFE challenged the MHSAA's scheduling of girls sports in nontraditional seasons as violating the "Equal Protection Clause of the Fourteenth Amendment

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[40] *Sports Litigation Moves to U.S. Supreme Court*, *at http://mhsaa.com/news/supreme.htm*, Nov. 16, 2004 (suggesting MHSAA will petition the U.S. Supreme Court).

[41] The MHSAA's Representative counsel has, however, approved a "contingency calendar" which is the realignment of the sports seasons in compliance with the District Court's order in case the Supreme Court decides not to vacate the ruling of the lower courts. *See Representative Counsel Approves Contingency* Calander, *at http://www.mhsaa.com/news/gesuit.html*, (Dec. 10, 2004) (noting accepted "contingency plan" is same as amended plan accepted in September 2004).

> Under the court-ordered rescheduling, the girls basketball and volleyball seasons would switch, with basketball moving to the winter and volleyball to the fall. The golf and tennis seasons in the Lower Peninsula would switch, with boys golf and girls tennis moving from fall to spring; and girls golf and boys tennis moving from spring to fall. In the Upper Peninsula , MHSAA soccer tournaments must be offered in the fall for girls, and in the spring for boys.

See id.

to the United States Constitution, Title XI of the Educational Amendments of 1972, and Michigan's Elliot-Larsen Civil Rights Act."[42] The District Court found the scheduling of these seasons to violate all three challenges, but the Sixth Circuit Court of Appeals affirmed the lower court's judgment solely on Equal Protection grounds, which is why the Equal Protection analysis will be the focus of this note.[43]

III. LEGAL BACKGROUND

A. State Action

[42] *See id*. (detailing challenges brought by plaintiffs against MHSAA).

[43] *See id*. at 513("We therefore affirm the district court's grant of relief to CFE on the Equal Protection claim."). The sixth circuit also noted that they need not decide the case on the Title IX grounds or state law challenges because the Fourteenth Amendment violation of Equal Protection was sufficient to invalidate MHSAA's scheduling procedures. *See id*. at 506. The decision of the Sixth Circuit was backed by the State Board of Education in Michigan. *See* State Board Favors Gender Equality Court ruling, *at http://www.michigan.gov/mde/0,1607,7-140--98962--,00.html*, (Aug. 11, 2004) (proclaiming issue to be "gender discrimination" and accommodation for girls sports seasons).

An entity or individual must be considered a "state actor" before it can be charged with a Fourteenth Amendment Equal Protection violation.[44] The Constitution does not provide any protection against private conduct, no matter how "unfair" or "egregious," unless that action can be traced back to some form of state action.[45] The leading authority in determining state action when considering high school athletic associations is the U.S. Supreme Court decision of *Brentwood Academy v. Tennessee Secondary School Association*.[46] The *Brentwood* Court asserted that, historically, there has been no single "necessary

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[44] *See id*. at 510 ("An entity or individual charged under §1983 with a *Fourteenth Amendment* violation must be a "state actor.").

[45] *See* Drew, supra note 5 at 1314 ("[N]either the Constitution or any of its amendments provides any protections against private conduct no matter how unfair or egregious that conduct may be unless that action can be traced to some source of state action.").

[46] 531 U.S. 288 (2001). *Brentwood* centered around the Tennessee Secondary School Athletic Association ("TSSAA"), which, similar to the MHSAA, was "incorporated to regulate interscholastic competition among public and private secondary schools." *See id*. The issue concerned whether the TSSAA engaged in state action when it enforced one of its rules against a member school. *See id*. *Brentwood* was also a case from the Sixth Circuit, where the Appeals court decided that a high school athletic association was not a state actor. See 180 F.3d 758 (6th Cir. 1999), aff'd 377 F.3d 504 (6th Cir., 2004).

action" sufficient to attribute state action to an individual or entity, but instead a variety of factors that must be considered.[47]

In *Brentwood*, the Court expressed two requirements for whether or not an individual or entity will be considered a state actor.[48] The plaintiff must first and most importantly establish "pervasive entwinement" of state school officials in an organization.[49] Secondly, there must be a "close nexus between the state and the challenged action."[50]

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[47] *See Brentwood*, 531 U.S. at 295-96 (discussing possibility of private action as being attributable to state action). The Court explained:

> From the Range of circumstances that could point towards the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.

Id. at 295-96.

[48] *See generally id*.

[49] *See id*. at 291 (discussing "pervasive entwinement" requirement). This is also referred to as the "pervasive entwinement" test. See Michael A. Culpepper, note, *A Matter of Normative Judgment: Brentwood and the Emergence of the "Pervasive Entwinement" Test*, 35 U. RICH. L. REV. 1163, 1165 (2002) (discussing test for pervasive entwinement).

The *Brentwood* court held that a secondary school association is a state actor subject to a constitutional challenge for its rule enforcement on one of its member schools because of the "pervasive entwinement of state officials in the structure of the association."[51] The Court suggested that "pervasive entwinement" will exist when public officials play a substantial role in the administration of an organization.[52]

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[50] *See id*. at 295 (discussing "close nexus" requirement).

[51] *See Brentwood*, 531 U.S. 288, 291 ("We hold that the association's regulatory activity may and should be treated as state action owning to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way."). *Id*. The Court acknowledged that the assessment of the existence of state action should be a "fact-bound inquiry." See id. at 298.

[52] *See id*. at 299 (noting public school officials comprise large percentage of TSSAA's voting members).

> [T]he Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling. There would be no recognizable Association, legal or tangible, without the public school officials, who do not merely control but overwhelmingly perform all but the purely ministerial acts by which the Association exists and functions in practical terms.

Id. The Court found it important to also note, for further evidence of entwinement, that TSSAA ministerial employees were treated like state

The Court suggested a two part examination of athletic associations in question in order to determine entwinement.[53] The first was an examination of the relationship of the private actor to the state "from the bottom up."[54] Court's should measure the association's ability to exist independently from public control to evaluate entwinement under this prong.[55] The second examination considered the relationship between the association and the state from "the top

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employees because they are given the option to participate in the state retirement program. *See id*. at 300.

[53] *See id*. at 298-302 (discussing dual part analysis); *See also* Michael A. Culpepper, note, *A Matter of Normative Judgment: Brentwood and the Emergence of the "Pervasive Entwinement" Test*, 35 U. RICH. L. REV. 1163, 1180-81 (2002) (analyzing two part examination employed by Court).

[54] *See Brentwood*, 531 U.S. at 298-300 (evaluating composition of association's makeup); *see also* Culpepper, *supra* note 49 at 1180 ("This approach analyzed the composition of the Association's membership. For the Court, this examination resembled a numbers game: because public schools comprised eighty-four percent of the Association's membership, the Association would fail to exist without public control.").

[55] *See id*.

down."[56] A "top down" analysis should examine administrative personnel and procedures.[57]

The *Brentwood* Court concluded that the private character of the association was outweighed by the "pervasive entwinement" of the association and the public school system."[58] Until *Brentwood*, the Sixth Circuit court of appeals was the only federal appeals court that did not consider its state high

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[56] *See Brentwood*, 531 U.S. at 300-02 (evaluating top down analysis); *see also* Culpepper, *supra* note 49 at 1180-81 ("Second, the Court took a "top down" approach, examining the administrative personnel and procedures.").

[57] *See id*.

[58] *See id*. at 293 ("The normally private character of the [TSSAA] is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it."). The *Brentwood* Court continued to note that the TSSAA is not an association of private individuals acting on their own, but the majority of its members are public schools, and that interscholastic athletics play an "integral part" in public education. *See id*. at 299. Since public education is funded by the state, and many of the individuals involved in the decision-making of the association are state employees, the TSSAA should be distinguishable from an independent state actor. *See id*. at 300. Finally, the Brentwood court noted that private schools comprise only 16% of the total membership of the TSSAA, and this minority is all that prevents the total "entwinement" of the TSSAA and the public schools. *See id*.

school athletic association a state actor.[59] Currently, all of the federal circuits consider high school athletic associations state actors, whose actions are subject to Equal Protection challenges.[60]

B. Equal Protection Challenges to Gender Based Discrimination

The standard for review that the both the district court and Sixth Circuit court of appeals used to evaluate *Communities for Equity* was the intermediate scrutiny standard set forth in *United States v. Virginia* (hereinafter *VMI*).[61] The Equal Protection Clause of the United States Constitution proclaims: "No state shall make or enforce any law which shall . . . deny to any person the equal

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[59] *See* Drew, *supra* note 5 at 1314 ("Every federal circuit and every state's highest court that has ever entertained the issue of whether state high school athletic associations are state actors has nodded in the affirmative."). Drew also suggests that the Sixth Circuit's holding in Brentwood set off a "tremor" in a usually stable area of state action law. *See id*. at 1315.

[60] *See id*.

[61] See Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n, 377 F.3d 504 (ensuring that it "serves important government objectives and that this scheduling is substantially related to the achievement of those objectives") (citing [VMI]); *See* also United States v. Virginia, 518 U.S. 515 (1996) (challenging admission policies at Virginia Military institute).

protection of the laws."[62] Equal Protection is the term associated with "the 14th Amendment guarantee that the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances."[63]

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[62] U.S. Const. amend. XIV, 1. The amendment also guarantees that no state shall abridge the privileges or immunities of the citizens of the United states and ensures that the government will not "deprive any person life, liberty, or property, without due process of law." *See id.* 42 U.S.C. § 1983 also provides:

> [E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Colombia, subjects, or causes to be subjected any citizen of the United States or any other person within the jurisdiction thereof to the depravation of any rights, privileges, ot immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress . . . .

See 42 U.S.C. § 1983.

[63] Black's Law Dictionary (8th ed. 2004); *See generally* Baxstrom v. Herold, 383 U.S. 107, 111, 86 S.Ct. 760, 763 (1966)("Equal Protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made."); *see also* Michael M v. Superior Court, 450 U.S. 464, 477-78 (1981) (discussing Equal Protection violations in gender discrimination). The Court explained:

In order for an entity to be liable for a violation of Equal Protection, they must be a state actor.[64] Traditionally, state action may only be attributed to a private entity if it is found that there is a "close nexus" between the state and the challenged action, so that it may be fair to treat the seemingly private actor as the State itself.[65] This has commonly been referred to as the "nexus test."[66]

> The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born. . . . By contrast, while detrimental gender classifications by government often violate the Constitution, they do not always do so, for the reason that there are differences between males and females that the Constitution necessarily recognizes.

Id. at 477-78.

[64] *See* LRL Props. Portage Metro Hous. Auth., 55 F.3d 1097,1111 (6th Cir. 1995) ("To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.").

[65] See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974) ("But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.") (citing Moose Lodge NO. 107 v. IRVIS, 407 U.S. 163, 176. The court has also stated, with respect to the nexus

Recently, the Supreme Court has developed a pervasive entwinement analysis, to deal with entities like high school athletic associations.[67] Under this analysis, the Court has held high school athletic associations state actors subject to Equal Protection Challenges.[68]

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requirement in determining state actors, that "[t]he true nature of the State's involvement may not be immediately obvious, and detailed inquiry may be required in order to determine whether the test is met." See Burton v. Wilmington Parking Authority, 365 U.S. 715.

[66] *See* Shelly v. Kramer, 334 U.S. 1, (1948) (holding sufficient nexus between state influence on private entity to constitute racial discrimination); *See also* Josiah N. Drew, The Sixth Circuit Dropped the Ball: An Analysis of Brentwood Academy v. Tennessee Secondary School Athletic Ass'n in Light of the Supreme Court's Recent Trends in State Action Jurisprudence, 2001 B.Y.U. L. REV. 1313, 1317-18 (explaining "nexus test"). "Under this test, the Supreme Court measures the quantity and quality of a governmental entity's encouragement, coercion, and direction aimed at a private entity." *See id.*

[67] For discussion of pervasive entwinement analysis, *see supra* notes 44-60 and accompanying text.

[68] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001) ("the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way."); *But see* Brentwood Acad. v. Tenn.

Under gender-based Equal Protection analysis, there are three steps to determine whether state actions are discriminatory.[69] First, the plaintiff must prove disparate treatment.[70] Second, defendants must justify their action as serving important government objectives.[71] Lastly, if defendants have successfully asserted an important government objective, defendants must prove that the means used are "substantially related to achieving those objectives.[72]

Secondary Sch. Athletic Ass'n, 531 U.S. 288, 291 (2001) (Thomas, Justice Dissenting) ("We have never found state action based upon mere 'entwinement' . . . [u]ntil today."). Justice continues to assert that the majority's holding in this case "not only extends state-action doctrine beyond its permissible limits but also encroaches upon the realm of individual freedom that the doctrine was meant to protect." *See id*.

[69] *See* Neena K. Chaudhry, Marcial D. Greenberger, Seasons of Change: Communities for Equity v. Michigan High School Athletic Association, 13 UCLA Women's L.J. 1, 25 (summarizing factors in Equal Protection determination).

[70] *See id*. ("Plaintiffs must prove that Defendants treat high school girls differently from boys.").

[71] *See id*. ("[T]he second part involves shifting the burden to the Defendants to justify such a gender classification by showing that it serves important governmental objectives.").

[72] *See id*. ("[I]f 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.").

When challenging gender-based discrimination on the basis of Equal Protection, courts use what is commonly referred to as an intermediate level review, or intermediate scrutiny.[73] Intermediate scrutiny is not a static level of review, and is subject to variation depending upon the discriminatory classification.[74]

The current Supreme Court case that is the controlling law on gender discrimination is *VMI*.[75] The *VMI* analysis requires that the discriminatory gender-based classification must serve "important government objectives" using means that are "substantially related to the achievement of those objectives."[76]

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[73] *See* Grutter v. Bollinger, 539 U.S. 306, 356 (2003) ("[VMI] involved sex discrimination, which is subjected to intermediate not strict, **scrutiny.").** The Court proceeded to compare gender discrimination with race discrimination. *See id*. The Court pointed out that a state actor is given more leeway on questions of sex discrimination under intermediate scrutiny than they would in situations of race discrimination where the court applies strict scrutiny. *See id.*

[74] *See id*. There are varying levels of intermediate scrutiny. *See id*.

[75] *See* 518 U.S. 515 (1996).

[76] *See* 518 U.S. at 533. The Court declared:

> The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' "The justification must be

The Court in *VMI* also mandated that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."[77] *VMI* raised the bar of review on gender-based discrimination very close to that of strict scrutiny.[78] When considering gender-based challenges,

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> genuine, not hypothesized or invented *post hoc* in response to litigation.

See id.

[77] *See id*. at 531. The Court in VMI required such "skeptical scrutiny" of state action "denying rights or opportunities based on sex" in response to "a long an unfortunate history of sex discrimination." See *id*.

[78] *See* Stephen A. Delchin, *United States v. Virginia and Our Evolving "Constitution": Playing Peek-a-Boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121 (suggesting that *VMI* standard of heightened intermediate scrutiny is in fact equivalent to strict scrutiny); *see also* Toni J. Ellington, Sylvia K. Higashi, Jayna K. Kim, & Mark M. Murakami, *Justice Ruth Bader Ginsberg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 701 (suggesting *VMI* level of scrutiny as indistinguishable from strict scrutiny). Delchin observed:

> Prior to VMI, the accepted standard of review for gender classifications was "intermediate scrutiny." Following VMI, speculation continues as to what is the appropriate standard of review. Some commentators have said that the VMI standard is

courts require plaintiffs to show that the discrimination came because of "her membership in an identifiable group," and not her individual female characteristics.[79] Courts also will not accept state justifications based upon generalizations or stereotypes about male and female interests and abilities.[80] The *VMI* court, however, asserted that physical differences in the sexes will remain "enduring" when considering equal protection analysis.[81]

> really strict scrutiny, the highest standard of review the Court can apply. For purposes of this article, the VMI standard of review is referred to as the "exceedingly persuasive justification" standard.

See id.

[79] *See* Gonzalez v. Kahan, No. CV 88-922 (*RJD*), 1996 *WL 705320, at 2 n.3* (E.D.N.Y. Nov. 2, 1996) ("[A] plaintiff alleging sexual discrimination in violation of the Equal Protection Clause must show that the defendant discriminated against her because of her membership in an identifiable group, as opposed to characteristics of her gender personal to her.").

[80] *See VMI*, 518 U.S. at 533 ("And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."); See also *See* Courtney E. Schafer, Note*, Following the Law, Not the Crowd: The Constitutionality of Nontraditional High School Athletic Seasons*, 53 DUKE L.J. 223, 227 (suggesting that courts will not accept justifications based upon "archaic" generalizations about male and female interests or abilities).

[81] *See id*. at 533 ("Supposed 'inherent differences' are no longer accepted as a ground for race or national origin classifications. Physical differences between

The Court has not required a discriminatory intent when considering state action a violation of the Equal Protection Clause.[82] It is sufficient to show disparate treatment resulting from state action involving facially gender-biased classifications in order to invoke an Equal Protection challenge.[83]

C. Title IX

The Sixth Circuit decided not to comment on Title IX in its consideration of *Communities for Equity*, but it is worth briefly outlining here because most challenges in sports seasons cases involve Title IX.[84] Also, the CFE relied

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men and women, however, are enduring: 'The two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both.'") (citing *Ballard* v. *United States*, 329 U.S. 187, 193, 91 L. Ed. 181, 67 S. Ct. 261 (1946)).

[82] *See* Gary J. Simson, *Separate but Equal in Single Sex Schools*, 90 CORNEL L. REV 443, n. 77 (2005) (noting that Equal Protection Clause requires only the result of disparate impact on those similarly situated). This approach is very close to the approach The Court took when it considered race-based classifications under Equal Protection. *See id*.

[83] *See Cmtys.,* 377 F.3d 504, 513 (acknowledging discriminatory classification as sufficient evidence of intent so no "evil" motive must be proven).

[84] *See* Schafer, *supra* note 8 at 227 (asserting that these types of challenges usually involve Title IX).

heavily on Title IX to support their argument for the change in sports seasons, so I will briefly access it here.[85]

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[85] *See CFE v. MHSAA*, *at http://www.communitiesforequity.com/mhsaa.html,* (last visited Feb. 28, 2005)

> According to CFE, this is a violation of Title IX, which mandates equitable scheduling, including access to "prime time," which covers prime days, times, and seasons. MHSAA has placed six girls' sports in non-traditional or disadvantageous seasons, but does not require boys to play any sports in non-traditional seasons. As a result, girls are harmed in ways that boys are not, including:
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> - Limited opportunities for college athletic scholarships and opportunities to play college sports (whether on scholarship or not);
> - Limited opportunities for interstate competition, especially for Michigan's Upper Peninsula schools in interstate conferences;
> - Less recruitment opportunities as a result of NCAA recruiting restrictions that limit the ability of women's college basketball coaches to recruit during the fall, but not the winter. This means that colleges outside Michigan cannot evaluate or contact Michigan girls during much of the fall season even though Michigan girls are virtually the only ones playing basketball at that time;

Title IX of the 1972 Civil Rights Act[86] "has been interpreted to require, among other things, that educational institutions receiving federal funds ensure equal opportunity for both sexes to participate in interscholastic, intercollegiate,

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- Less scholarship opportunities, due to the fact that the National Letter of Intent dates for high school athletes to sign for their college scholarships, occur before Michigan girls even start their senior seasons in volleyball and soccer;
- Less national attention and recognition. Girl athletes in Michigan miss the opportunity to be named to the All-American teams and their schools aren't in the national rankings because their sports are scheduled in different seasons;
- Limited opportunities to play club, USA, AAU, USSF, AYSO, or Olympic Development Programs because they are geared around the seasons in which other states play.

Id.

[86] Title IX is codified at 20 U.S.C. §1681. Title IX states in relevant part that "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 . . ." *Id.* at § 1681(a).

and intramural athletics."[87] The department of Education Office of Civil Rights has listed ten factors that are considered in making a determination of whether or not an institution is compliant with Title IX.[88] The first factor is commonly

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[87] Patrick N. Findlay, comment, *The Case for Requiring a Proportionality Test to Assess Compliance with Title IX in High School Athletics*, 23 N. IL. U. L. REV. 29 (2003).

[88] The ten factors for consideration are:

> *Equal opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
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> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;
>
> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;

referred to as "the accommodation of interests test."[89] This test is particularly important because an institution may be guilty of a Title IX violation simply for failing to "accommodate [effectively] the interests and abilities of student athletes of both sexes."[90] Although most of the litigation concerning Title IX are centered around college athletics, Title IX is also certainly applicable to high school athletics.[91]

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(9) Provision of housing and dining facilities and services;

(10) Publicity.

34 C.F.R. § 106.41(c)(2002).

[89] *See* Findlay, *supra* note 87 at 30 (noting that "accommodation of interests test" is topic of much debate).

[90] *See id*. (quoting Boulahanis v. Bd. of Regents, 198 F.3d 633, 635 (7th Cir. 1999)).

[91] *See* Findlay, *supra* note 87 at 30 (asserting "[m]ost of the attention paid to Title IX compliance has come through litigation against colleges and universities"). Findaly asserted that "additional energy" should be spent in order to achieve equality in high schools. *See id.* See also Lynne Tatum, comment, *Girls in Sports: Love of the Game Must Begin at an Early Age to Achieve Equality*, 12 SETON HALL J. SPORTS L. 281 (2002)("During the three decades since Title IX was passed, equality in women's sports has made great strides, but still has miles to go. While the primary focus has historically been on intercollegiate level sports, recent cases have addressed high school sports and the athletic associations that typically control them.")

The language of the Title IX statute states that it applies to any education program or activity "receiving Federal financial assistance."[92] It is unclear whether Title IX may, however, be applied to "any entity that exercises controlling authority over a federally funded program . . . regardless of whether that program is a recipient of federal aid."[93] The "controlling authority" theory has been identified by the Supreme Court.[94] The Supreme Court, however, felt it declined to evaluate this theory and left it to the lower courts to decide its merits.[95]

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[92] 20 U.S.C. §1681(a).

[93] *See Cmyts. for Equity*, 178 F. Supp. 2d 805, 851, *aff'd*, 377 F.3d 504 (6th Cir., 2004) (discussing reasoning why Title IX applied to entities with controlling authority over federally funded programs), *aff'd*, 377 F.3d 504 (6th Cir., 2004).

[94] *See* NCAA v. Smith, 525 U.S. 459, 465 (discussing possibility of theory of "controlling authority). In Smith, plaintiff attempted to bring a Title IX claim against the NCAA itself. *See generally id*. The Court chose not to decide whether or not to bind the NCAA to Title IX challenges under controlling authority" theory. *See id*. *See also* Chaudhry, *supra* note 2 at 20 ("The Supreme Court explicitly identified these theories but declined to address their validity . . . .").

[95] *See* Smith, 525 U.S. at 459 (court declining to decide issue of controlling authority); *see also* Chaudhry, *supra* note 2, at 20 ("[L]eaving them to be decided by the lower courts, with the implication that they may have merit).

Several district courts, under the instruction of the Supreme Court, have recently advanced this innovative argument.[96] The district court in Michigan held that Title IX could be applicable to entities exercising controlling authority over an organization receiving government funds.[97] The district court went through a multipart logical analysis from controlling precedent that led them to the conclusion that the "controlling authority" rule could subject an entity that did not expressly receive federal funding.[98] They did, however admit that there was no

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[96] *See* Tatum, *supra* note 94 at 282 ("Several district courts have recently applied Title IX requirements to athletic associations that exercise controlling authority over school sports, possibly paving the way for broader application of the statute in the future.").

[97] *See* Cmtys. for Equity, 80 F. Supp 2d 729, 734-35 *aff'd*, 377 F.3d 504 (discussing applicability of Title IX to entities with controlling authority over federally funded programs).

[98] *See id*. at 734 (expounding upon multipart theory in support of controlling authority theory). The district court first observed that the language in Section 902 does not confine the list of potential defendants to "recipients" of federal funds. *See id*. Rather, it simply prohibits discrimination "under any education program or activity receiving Federal financial assistance." *See id*. Secondly, the Supreme Court has made it clear that Title IX "did not simply ban discrimination by recipients of federal funds; it provides a remedy for individuals who have been discriminated against on the basis of sex in the operation of programs receiving federal aid." *See* Cannon v. Univ. of Chicago, 441 U.S. 677, 691-92.

Supreme Court or Sixth Circuit precedent that expressly authorized the "controlling authority" theory.[99] This is most likely why the Circuit Court of Appeals, when issuing their decision in *Communities for Equity*, chose not to reach the implications of Title IX.[100]

D. Traditional Seasons

A major theme that runs through all high school scheduling litigation and discussion is the question of what "traditional seasons" actually means in high school sports.[101] What have come to be known as "traditional seasons" for high school sports did not develop simply out of random coincidence, most developed

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[99] *See Cmtys. for Equity*, 80 F. Supp. 2d, 734-35 *aff'd*, 377 F.3d 504. ("[The court] must acknowledge that prior Supreme Court and Sixth Circuit precedent has implied that Title IX is only triggered if the defendant is a 'recipient' of federal money.").

[100] *See* Cmyts. for Equity, 377 F.3d 504, 507 (seeing no reason to deal with Title IX or state law issues).

[101] For an illustration of the discourse concerning "traditional seasons" see any scholarly work pertaining to high school athletic associations and gender-based challenges to athletic scheduling. *See* Schafer, *supra* note … (discussing "traditional seasons" in high school sports); *see also* Chaudry, *supra* note … (discussing "traditional" in terms of high school athletic scheduling).

out of practical decisions.[102] For the purist, the "traditional" season is that in which the sport has always been played.[103] Another idea of the term "traditional"

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[102] *See id*. (explaining why seasons became scheduled as they did). The court observes that the weather is a major factor that prohibits outdoor activities from being played in places with colder winters like Michigan. *Id*. The court also alludes to other, "more subtle," reasons why sports are scheduled in their traditional seasons, and says that these reasons are perhaps less obvious to the casual observer, but the court did not elaborate. *Id*.

[103] *See* John "Jack" Roberts, *What is Traditional?*, *at http://www.mhsaa.com/news/00jacktraditional.html*, (Dec. 14, 2000) (suggesting what is traditional for collegiate athletics is not "traditional" season in which sport has always been played in Michigan*); See also Seasons Survey Announced*, *at* http://www.mhsaa.com/news/survey.html, (Sept. 14, 1998)("A survey to determine the preferences of its member schools regarding the placement of sports seasons has shown that the status quo is preferred by a four-to-one margin in results announced . . . by the Michigan High School Athletic Association."). It is not only the member schools surveyed who disagree with the change, but the female athletes as well. *See* WMU News, *But what do the girls think?*, *available at http://www.wmich.edu/wmu/news/2001/0103/0001*, (Mar. 9, 2001); *But see* Chaudhry, *supra* note 69 at 32 (noting flaws in survey). The survey was compiled by MHSAA attorneys, only listing the potential negative consequences of the season change then asked the girls about it. *See id*.

is that it is synonymous with the schedule currently in place at the collegiate level.[104]

Many of the states whose seasonal scheduling has been challenged have been reluctant to make the change.[105] Statistics show that the female athletes themselves were opposed to the change, and preferred to stay in the seasons that they know as "traditional".[106] The district court in its *Communities for Equity*

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[104] *See About CFE*, *at http://www.communitiesforequity.com/about.html*, last visited Mar. 17, 2005) (suggesting NCAA seasons as optimal seasons for high school athletics as well).

[105] *See* Schafer, supra note 8 at 224 (discussing states that have expressed reluctance to athletic seasons change). Schafer explains:

> "[O]f the five states that scheduled girls' basketball as a fall sport, and girls' volleyball as a winter sport during the 2002-03 school year, four have announced that they will reverse the seasons to match the rest of the country by the 2003-04 season. Of the four states making challenges, only one was not prompted by a lawsuit.").

Id.

[106] *See* WMU News*, But what do the girls think?, available at http://www.wmich.edu/wmu/news/2001/0103/0001-227.html*, (Mar. 9, 2001) ("Most female high school athletes in Michigan who responded to a Western Michigan University survey did not favor moving girls' seasons."). The survey

decision, asserted that the determination of whether a sports season is traditional or not is only important if the traditional season is also "the most advantageous season for the high school sport at issue."[107] The district court suggests that

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was administered to 1,131 female athletes from 60 high schools across the state of Michigan in order to obtain their opinions about the potential change in the seasons. *See id*. WMU believes this study is only one of two of its kind to document girls' opinions about the potentially changing seasons. *See id*. The study found that less than a third of the female athletes studied favored the seasons change, and that opposition to the realignment was strongest among those who would be affected by change. *See id*. Many of the girls surveyed expressed concern about the possible attention that would be diverted from their sport if it was moved to the boys season. See id. There was also concern over the availability of facilities for practices and games if the girls and boys had to share time. *See id*. Those who conducted the study noted that the sample surveyed corresponded closely in size and geographic distribution of the member schools of the MHSAA. *See id*. These findings were found suspect by the district court in its Communities for Equity opinion. *See* Chaudhry, *supra* note 69 at 32.

[107] See Schaffer supra note 5 (discussing meaning of "traditional") (citing Cmty. For Equity, 178 F.Supp. 26 805,808, *aff'd*, 377 F.3d 504 (6th Cir., 2004)). The district court pointed out that much had been said about what a "traditional" season is, and what a "non-traditional" season is. *See id*. "For most sports, it is common knowledge when tradition dictates when a sport will be played. Ask almost any women or man on the street when organized football, on any level, is

simply because girls play a sport in a season that is "non-traditional" and boys play in a season that is "traditional," it does not necessarily break the law so long as both the girls and boys are equally situated and advantaged in the sports they play.[108]

Many other states have, when faced with the threat of litigation, have abandoned their "traditional seasons," in favor of those that are non-discriminatory.[109] While alignment with NCAA seasons is not mandatory, it is

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played, and that person is sure to know that football is a fall sport." *Id*. The court suggests that this is not what they care about in *Communities for Equity*. *See id*. Their real concern is what season is the most advantageous, and the idea of the season being "traditional" is only relevant with respect to that concern for the court. *See id*.

[108] See Cmtys. for Equity, 178 F. Supp. 2d 805, 808, *aff'd*, 377 F.3d 504 (6th Cir., 2004) (suggesting real issue before court being "advantage" and not "traditional" alignment of seasons).

[109] See CFE Website, *Sixth Circuit Court of Appeals Finds for Communities for Equity*, *at http://www.communitiesforequity.com/mhsaa.html*, (last visited Mar. 16, 2005)("This brings the total number of states that hold . . . girls volleyball in the fall and girls basketball in the winter, the same as the NCAA, to 47. Only three states -- Michigan, Hawaii and Rhode Island -- schedule girls' basketball and volleyball in off or 'non-traditional' seasons.").

the current trend.[110] Depending on current litigation, full alignment with NCAA sports scheduling may become compulsory in the near future.[111]

IV. LEGAL REASONING IN COMMUNITIES FOR EQUITY

A. Narrative Analysis

In *Communities for Equity*, the Sixth Circuit addressed several issues raised by CFE concerning the district court's order to switch the sports seasons.[112] This analysis focuses on the Sixth Circuit's evaluation of the MHSAA's scheduling of girls' and boys' sports as a violation of the Equal Protection Clause

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[110] *See id*.

[111] *See About CFE*, *at http://www.communitiesforequity.com/about.html*, last visited Mar. 17, 2005) (suggesting NCAA seasons as optimal seasons for high school athletics as well).

[112] *See* Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n, 377 F.3d 504, 506 (mentioning Equal Protection Clause of U.S. Constitution, Title IX of Educational Amendments of 1972, and Michigan's Elliot Larsen Civil Rights Act).

of the U.S. Constitution.[113] The Sixth Circuit did not disagree with CFE's Title IX or state law claims, however, the appeals court felt it sufficient to decide this case on the basis of Equal Protection grounds and did not chose to comment on these other claims.[114]

The court asserted that the standard of review for an appeal based upon a constitutional challenge, is as question of law, and will be evaluated to be de novo.[115] The court further declared that the district court's findings of fact will be accepted in the record unless they are determined to be "clearly erroneous."[116]

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[113] See id. at 510-13 (evaluating equal protection analysis and agreement with district court that MHSAA's scheduling procedures are a violation of U.S. Constitution).

[114] *See id*. at 506 ("[W]e [affirm] the judgment of the district court with regard to the plaintiffs' Equal Protection claim, thus finding no need to reach the Title IX and state-law issues.").

[115] See Cmyts. For Equity, 377 F.3d at 510 ("Questions of constitutional interpretation are issues of law, which we review de novo.") (citing Ammex, Inc. v. United States, 367 F.3d 530, 533 (6th Cir. 2004). A review de novo is a determination of the law with high deference to the record below. *See id*.

[116] *See* Cmtys. for Equity, 377 F.3d at 510 ("The district court's findings of fact, on the other hand, will not be set aside unless they are determined to be clearly erroneous.") (citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 519 (6th Cir. 2003).

The first element of an Equal Protection challenge that must be established is disparate treatment, or harm to a plaintiff.[117] In this case the CFE had to prove real harm by the MHSAA's scheduling of the sports seasons.[118] The Sixth Circuit characterized the issue in *Communities for Equity* as the scheduling of athletic seasons by the MHSAA of six girls sports.[119] The court found that although girls have been forced to play in these non-traditional seasons, no boys program has ever been forced to play in a season that is considered less advantageous.[120] The court attributed the current scheduling structure where girls play in the less

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[117] *See* Chaudrhy, *supra* note 69 at 25 (Suggesting first step is disparate treatment of both genders).

[118] See id. at 26-30 (recounting all harm experienced by plaintiffs); *see also* Cmtys. for Equity, 377 F. 3d 506-09 (recounting many harms experienced by female athetes in Michigan).

[119] More specifically, the six girls sports at issue are basketball, soccer, golf, swimming, diving and tennis. *See id.* Not including golf, all of these sports are played in seasons that the court agreed are "non-traditional" or non-advantageous. *Cmtys*., 377 F.3d at 506. Although golf is played in the spring, the typical season for golf, the boys play in the fall which the Sixth Circuit agreed is more advantageous. *Id*.

[120] *See id*. ("No boys' sports are scheduled in non-advantageous seasons."); see also CFE v. MHSAA, *at http://www.communitiesforequity.com/mhsaa.html*, (last visited Feb. 28, 2005) ("each and every time it schedules boys and girls in a different season, it assigns the girls to the inferior season.").

advantageous season to the "way high school athletics has developed in Michigan."[121] The Court also observed that an MHSAA spokesman admitted that the girls sports were "fitted around" the pre existing boys programs.[122]

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[121] *See id*. *See* also John E. Roberts, *What is "Traditional?", at http://mhsaa.com/news/00jackseasons.html* (Dec. 14, 2000) (suggesting "traditional" is variable in meaning). "Tradition is the statements, beliefs, legends, customs passed from one generation to the next." *Id*. "Traditions may vary with countries and they may vary within regions of the same country." *Id*.

[122] In an article written by MHSAA's executive director Jack Roberts, entitled Sports & Their Seasons, published in 1990, Roberts claimed that the boys programs were MHSAA member schools first, and that the girls programs that came later on were fit around the existing scheduling structure. *See* Cmtys. 377 F.3d at 506. In 2000, Roberts again authored an article entitled *Sports & Their Seasons*, omitting any mention of how the boys sports joined the MHSAA first and that the girls sports, that came later, were designed to fit around the boys. See John E. "Jack" Roberts, Sports & Their Seasons, *at http://www.mhsaa.com/news/00jackseasons.html*, (Dec. 14, 2000). In the 2000 version of the article, Roberts suggests that the member schools of the MHSAA are the ones that call the shots, not the MHSAA itself. *See id*. He continued to assert that since the member schools are the ones who "call the shots," that they should also be the ones who are in the best position to make a decision about "[scheduling] sports in order to maximize the availability of facilities, coaching personnel and officials." *See id*.

1. Harm to Female Athletes in Michigan

The Court proceeded to address the specific and general harms experienced by the girls because of the scheduling differences.[123] The court observed that in basketball, Michigan female student-athletes are disadvantaged because they are denied the opportunity to compete in "March Madness," they have a decreased ability to become nationally ranked or obtain All-American honors, and that the current scheduling structure disadvantages these female athletes in terms of recruiting.[124] In volleyball, the court concluded that

[123] See Cmtys. 377 F.3d 506-09 (providing overview of district court's interpretation of harm experienced by female athletes in Michigan). The Sixth Circuit suggested that the list of harms included in their court decision constituted only a "fraction of the harms that the district court found are experienced by female athletes in Michigan because of MHSAA's scheduling . . . ." See id. at 509.

[124] *See id*. at 509. Michigan is only one of two states in the entire nation that does not schedule girls basketball in the winter. *See id*. Scheduling girl's basketball in the winter allows them to have their playoffs during what has been traditionally called "March Madness." *See id*. March Madness has traditionally been associated with men's and women's college basketball, but high school basketball has also embraced the name for their playoffs. *See id*. The specific harm experienced by the girls by not having March Madness cited by the court are the

MHSAA's scheduling harmed the girls by playing in the winter having a direct conflict with participation of national amateur tournaments, which is where colleges focus the bulk of their recruiting efforts.[125] The court concluded that

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"anger" that the girls experience being one of only a pair of states that do not hold their playoffs during March Madness and the loss of the "excitement" of playing in the calendar month of March. See id.

[125] *See id*. Volleyball, in Michigan, is held in the winter and not the fall, and like basketball, Michigan is one of only two states in the nation to have this unique scheduling time. *See id*. The focus of collegiate volleyball recruiting programs is on amateur an club teams, rather than on high school programs. *See id*. Two of the prominent amateur or club associations are the United States Volleyball Association ("USAV"), and the Amateur Athletic Union ("AAU"). *See id*. These amateur leagues have their players participate from January through June or July, and have multi-state competitions that provide a forum for individual athletes to showcase their talents to college recruiters against a national talent pool. See id. The MHSAA has a rule that "prohibits students from playing on any team other than a school team during the MHSAA defined season in that sport." See id. Because girl's volleyball takes place in the winter, it does not end until well into the amateur league season, and this scheduling conflict prevents female volleyball players with talent enough to compete in these amateur leagues from full participation in them. See id. By the end of the MHSAA season most regional and national tournaments have been filled by non-Michigan teams, and therefore the teams from Michigan will be excluded from participation in them because of

girls' soccer in the spring was disadvantageous to the fall because the girls ran a greater risk of injury and they had less of a chance at being considered for scholarship compared to the boys.[126] In golf, the boys' season was moved from the spring to the fall in 1970 for the express reason that this move would allow them better access to golf courses.[127] When girls golf came along, the MHSAA decided to schedule it in the spring, the season that was previously determined to be inferior when they scheduled the men's, and this, the court concluded was

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space constraints or they will face the penalty of being seeded at the very bottom of one of these tournaments where "they do not get the chance to compete at the high levels . . . ."

[126] *See id*. Because the girls play in the spring, the field is often frozen for the earlier part of the season. *See id*. This often forces the girls to spend the first several weeks indoors, and delays the start of scheduled play. *See id*. Traditionally, girls have to play three soccer matches per week in order to make up for the lost time at the beginning of the season, whereas the boys only have to play two. *See id*. The more intense schedule creates a greater risk of injury to the girls, "something that the boys do not have to face." *See id*. On the recruitment front, college scholarships are awarded for soccer in November and April. *See id*. Recruiters are not able to see the girls on the field as seniors before awarding their first round of scholarships, which places them at a disadvantage to the boys, who have a full four seasons of exposure. *See id*.

[127] *See id*.

unequal treatment on its face.[128] The court also found that seasons for girls' swimming and tennis were less advantageous than the boys, but to a lesser degree than the sports previously mentioned.[129] The court further noted that the harm experienced by female athletes in Michigan transcended their specific harm experienced in each sport.[130] Whenever girls are treated differently from boys they receive a psychological message that they are of less value than the boys, and

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[128] The court also found that there was inequality in recruiting similar to the situation found with the girls soccer program. *See id*. The NCAA letter of intent signing date for golf is in early November. *See id*. Therefore, Michigan boys have the advantage of having four years of sport participation as opposed to girls who only have three at the height of the recruiting season, when student-athletes are signing their letters of intent. *See id*.

[129] *See id*. at 508-09. The Court found that the winter season is more advantageous than the fall for swimming and diving. *See id*. It is a disadvantage because Michigan boys are able to go straight from high school into club tournaments, whereas girls have a gap in competition once their season has ended. *See id*. In tennis, the USTA summer tennis tournament circuit starts in the summer, directly after the spring season. *See id*. The boys have the advantage of "practice, competition, and coaching before participating in the circuit and are better prepared for the summer circuit, where college coaches watch play . . . ." *See id*.

[130] *See id*.

this could be psychologically damaging, according to the court.[131] The Sixth Circuit admitted that the harms enumerated in this opinion constituted only a fraction of the harm experienced by female athletes in Michigan because of the scheduling of the seasons.[132]

2. MHSAA as a State Actor and Pervasive Entwinement

Once the court recognized the harm experienced by the plaintiffs, they established the MHSAA as a state actor.[133] In order to establish the MHSAA as such, the court relied on the *Brentwood* analysis.[134]

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[131] *See id*. at 509.

> In addition to sport-specific harms, the district court found that the scheduling of seasons harmed Michigan girls in ways that could be generalized across all sports. For example, "when girls are treated unequally as compared to boys, girls receive the psychological message that they are 'second-class' or that their athletic role is of less value than that of boys.

Id.

[132] *See id*. (advising reading district court's decision for full description of harm).

[133] *See id*. at 511-12 (establishing MHSAA as a state actor); see also LRL Props. V. Portage Metro Hous. Auth., 55 F.3d 1097, 1111 (6th Cir. 1995) (requiring all entities subject to 42 U.S.C. § 1983 equal protection challenges to be state actors).

The *Communities for Equity* Court considered the MHSAA to be sufficiently similar to the association in *Brentwood*, for the MHSAA to pass as a state actor.[135] In order to emphasize the factual similarities between the associations in *Brentwood* and *Communities for Equity*, the court observed, among other things, that MHSAA's statement of purpose is "virtually identical" to that of the TSSAA.[136] Taking direction from the *Brentwood* court, the Sixth Circuit employed Justice Souter's principles of "pervasive entwinement" in order to establish the MHSAA as a state actor.[137]

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[134] For a discussion of the *Brentwood* analysis and pervasive entwinement see *supra*, notes 44-60 and accompanying text.

[135] *See* Cmtys. for Equity, 377 F.3d at 511-12 (discussing similarities between MHSAA and TSSAA).

[136] The MHSAA's statement of purpose is "to create, establish and provide for, supervise and conduct interscholastic athletic programs throughout the state." See Cmtys. 377 F.3d at 511. The court also noted that earlier in the CFE/MHSAA litigation, before *Brentwood* was overturned by the Supreme Court, that MHSAA argued that "the nature and function of the MHSAA is virtually identical to that of the MHSAA." *See id*. at 512.

[137] *See* Drew, *supra* note 5 at 1336-37 (describing nexus test applied to MHSAA).

First, the court observed the MHSAA's ability to exist independently from public control.[138] Like the TSSAA, the MHSAA's leadership is "dominated" by "public school teachers, administrators, and officials . . . ."[139] Also, the bulk of the MHSAA's revenue comes from ticket sales for state championship tournaments, which feature, to a large majority, member public schools.[140] Essentially, these acknowledgments were sufficient to find entwinement from the "bottom up," between the MHSAA and the state.[141] As was the case in *Brentwood* Court noted, without membership of the public schools in the MHSAA "[t]here would be no recognizable association, legal or tangible."[142]

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[138] Justice Souter referred to this analysis as the relationship of the private actor to the state from "the bottom up." See Brentwood Acad. v. Tenn. Secondary Sch. Ass'n, 531 U.S. 228, 298-300.

[139] *See Cmtys. for Equity*, 377 F.3d at 511. In 2000-2001, seventeen of the 19 members of the MHSAA Representative Council were either employees or representatives of public schools or public school districts. See Cmtys. for Equity, 178 F. Supp. 2d 805, 812 (2001) (noting makeup of MHSAA's Representative Council), aff'd, 377 F.3d 504 (6th Cir., 2004).

[140] *See id.*

[141] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298-300 (2001) (discussing "bottom up" entwinement analysis).

[142] *See id*. at 300.

Secondly, the court examined the MHSAA's administrative personnel and procedures.[143] The fact that MHSAA member public schools have overwhelming representation in MHSAA leadership once again becomes relevant to this inquiry.[144] Furthermore, MHSAA employees who began gainful employment before 1988, were and continue to be eligible to participate in the state's retirement program, similar to the TSSAA structure.[145] These observations were sufficient to satisfy the entwinement requirement from "the top down."[146] Taking all of the similarities into account between the MHSAA and TSSAA, the *Communities for Equity* court found that the MHSAA had failed to distinguish

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[143] *See* Cmtys. for Equity, 377 F.3d at 511 (detailing MHSAA's administrative personnel and procedures in relation to that of TSSAA). This is referred to by Justice Souter as an analysis of entwinement from "the top down." *See* Brentwood, 531 U.S. 288, 300300.

[144] *See* Cmtys. for Equity, 377 F.3d at 511 (noting leadership of MHSAA is largely comprised of public school representatives).

[145] *See id*. ("MHSAA employees who had state teaching certificates were, until January of 1988, considered state employees and were therefore eligible to participate in the state's retirement system. Employees who started working for MHSAA before January of 1988 continue to be members of the state employees' retirement system.").

[146] A sufficient involvement with the state in the association and its procedures is sufficient to satisfy this requirement. See *Brentwood*, 531 U.S. 288, 300-02.

itself sufficiently from the TSSAA, and was sufficiently entwined with the state to be considered a state actor for the purposes of this litigation.[147]

3. Equal Protection

After establishing the MHSAA as a state actor, the *Communities for Equity* court proceeded with their equal protection analysis.[148] The Sixth Circuit applied the Equal Protection test given by the U.S. Supreme Court when it last considered an equal protection challenge to sexual discrimination in *VMI*.[149] The MHSAA bore the entire burden to prove that their scheduling procedures served "important governmental objectives" and that this scheduling was "substantially related to those objectives," in order to comport with *VMI*.[150] The *Communities for Equity* court was also careful to mention that *VMI* required the MHSAA's justifications be "exceedingly persuasive."[151]

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[147] *See id*. at 512

[148] *See Cmtys. for Equity*, 377 F.3d at 512-13 (evaluating equal protection claim).

[149] *See* Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n, 377 F.3d 504, 513 (suggesting heightened VMI standard is correct test for this situation). For a detailed description of the *VMI* standard, see *supra* notes 61-83 and accompanying text.

[150] *See id*. at 512 (summarizing MHSAA's arguments for equal protection).

[151] *See id*. at 512 (highlighting "exceedingly persuasive requirement promulgated by *VMI* court).

The *Communities for Equity* court considered three Equal Protection arguments of the MHSAA in defense of their scheduling scheme, en route to its conclusion that the association's action was unconstitutional.[152] The MHSAA's first argued that their scheduling decisions were made in order to maximize participation in athletics by both sexes through the "optimal use of existing facilities."[153] The MHSAA claimed that "optimal use" of existing facilities by adherence to current scheduling procedures promoted maximum participation in athletics by all athletes.[154] The Sixth Circuit noted the lower court's reasoning

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[152] *See id*. at 512-513 (discussing equal protection issues in case at bar).

[153] *See Cmtys*., 377 F.3d at 512 (discussing facilities, personnel, and time concerns). The district court in its analysis, referred to this subject as "Logistical Concerns." See *Cmtys. for Equity*, 178 F. Supp. 2d 805, 839, *aff'd*, 377 F.3d 504 (6th Cir., 2004).

[154] *See id*. at 512. The court summarized MHSAA's argument as follows:

> MHSAA asserted that the scheduling decisions were designed in order to maximize girls' and boys' participation in athletics, arguing that the scheduling system maximizes opportunities for participation 'by creating optimal use of existing facilities, officials and coaches, thereby permitting more teams in a sport or more spots on a team.

Id.

when rejecting this claim by the MHSAA.[155] Although logistical concerns were important, the court asserted that the MHSAA failed to demonstrate that "discriminatory scheduling was 'substantially related' to the achievement of [its] asserted objectives."[156] The court thought it unfair to force only the female athletes to play in non-advantageous seasons in order to fulfill the state's logistical need.[157]

The second Equal Protection argument advanced by the MHSAA that the court grappled with is that of sheer maximum participation.[158] The MHSAA produced evidence, in the form of statistics, which showed that more Michigan girls participated in high school athletics than most states that meet the

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[155] *See id*. at 512 (discussing district court's analysis of optimal use of existing facilities argument by MHSAA).

[156] *See id*. The district court felt that the MHSAA had relied upon "weak circumstantial" evidence which was insufficient to carry its burden. *Id*.

[157] *See id*. at 512 ("[it] would not justify forcing girls to bear all of the disadvantageous playing seasons alone to solve the logistical problems."). *Id*.

[158] *See id*. (discussing gross participation argument advanced by MHSAA). The MHSAA suggested that their seasons have come to be set a certain way in order to maximize total participation by Michigan students. *Id*. The district court recognized the goal of "[e]nsuring the greatest number of participation opportunities for children in interscholastic sports" as a "legally legitimate goal." See Cmtys., 178 F. Supp. 2d at 839, *aff'd*, 377 F.3d 504 (6th Cir., 2004).

requirements of VMI.[159] The appeals court rejected this argument, asserting that a "large gross participation number" alone does not demonstrate that discriminatory scheduling of the seasons is "substantially related to the achievement of important government objectives."[160] The court felt that the MHSAA had a viable argument here, however their evidence failed overcome the stringent requirements of *VMI*.[161]

The third, and final, Equal Protection argument advanced by the MHSAA was their lack of a discriminatory intent when compiling its scheduling procedures, which they argue would exempt their action from being a

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[159] The MHSAA repeated this maximum participation argument on appeal, relying on statistics that show Michigan having a greater number of females participating in athletics than "most states that satisfy the requirements of *VMI*." *Cmtys*., 377 F.3d 504, at 513. The MHSAA also called the accommodation of twice as many teams, games and participants an "unavoidable consequence of separate teams." *Id*.

[160] *See id*. at 513. (dismissing MHSAA's maximizing participation argument). The court felt that the evidence of large gross participation failed to justify not only separate seasons for the girls and boys, but it failed even more to justify a system that results in the girls "bearing all of the burden" of playing during the disadvantageous seasons. *Id*.

[161] *See id*. at 513.

constitutional violation.[162] The court dismissed this argument, stating that the MHSAA has confused "intentional discrimination" with "intent to treat two groups differently – with an intent to harm."[163] The court concluded that an "evil" or "discriminatory" motive was not necessary in order to have state action be deemed a violation of the requirements of *VMI*.[164] The MHSAA argued that the court should have been guided, on the issue of intentional discrimination, by the precedent from the Supreme Court case *Hernandez v. New York*.[165] This line

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[162] *See id*. at 513 ("MHSAA also contends that it cannot be liable under the *Equal Protection Clause* because there is no evidence that MHSAA acted with discriminatory intent."). The MHSAA pointed out that "there is no evidence that MHSAA . . . scheduled . . . sports seasons because of 'sexual stereotypes' or as a result of any discriminatory purpose or intent." *Id*.

[163] *See id*. at 513 (evaluating MHSAA's intent argument).

[164] *See id*. at 513 (assessing MHSAA's intent argument made to Sixth Circuit). The court quickly reasserted that an Equal Protection analysis under the *VMI* standard for gender discrimination requires MHSAA to show that its disparate treatment of boys and girls "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id*. (citing *VMI*). MHSAA's action constituted disparate treatment through a "facially gender-biased" classification which evidenced an intent to treat the two groups differently. *See id*. at 513.

[165] 500 U.S. 352 (requiring discriminatory intent when gender based classification is facially neutral). Hernandez dealt with the question of whether a prosecutor

of cases requires a showing of intentional discrimination on behalf of the state actor in order to find an Equal Protection violation.[166] The *Communities for Equity* court quickly distinguished itself from *Hernandez*.[167] Since the facially gender-based classification had a disparate effect on one gender over another, the court concluded that the lack of some evil intent did not preclude the MHSAA's scheduling practices from an Equal Protection challenge.[168]

4. *The Holding in Communities for Equity*

After considering these constitutional defenses made by the MHSAA, the Sixth Circuit rejected them and affirmed the relief granted to CFE on their Equal

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issued preemptory jury challenges based upon ethnicity. See id. The court held that in order for there to be an equal protection violation, there had to be proof of purposeful discrimination. See id. at 359.

[166] *See id*. at 363-64 ("Once the prosecutor offers a race-neutral basis for his exercise of peremptory challenges, "the trial court then [has] the duty to determine if the defendant has established purposeful discrimination.").

[167] *See* Cmyts., 377 F.3d at 513 ("Hernandez v. New York . . . [is] inapposite because [it involves] facially neutral classifications, rather than gender-based classifications.").

[168] *See id*. at 513 (declaring it sufficient to show disparate impact of facially gender-based classifications) (citing *VMI*).

Protection Claim.[169] In its conclusion, the court asserted that the MHSAA's justifications for its scheduling procedures were not "exceedingly persuasive" as is required by *VMI's* heightened standard for gender-based classifications.[170] The court was careful to limit its holding in *Communities for Equity*, granting CFE relief only on Equal Protection grounds, and chose not to elaborate on this decision to limit the holding.[171]

B. Critical Analysis

1. Is *Title IX a Necessity in High School Athletics*?

The *Communities for Equity* Court chose to set aside the Title IX and state law issues brought by CFE, and decided the case on Equal Protection Grounds

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[169] *See id*. at 513 ("We . . . affirm the district court's grant of relief to CFE on the Equal Protection claim.").

[170] *See id*. ("In sum, we do not find that the MHSAA's justification for its scheduling practices is 'exceedingly persuasive' in meeting the heightened standard required by *VMI* for the gender-based classifications."); *See also* United States v. Virginia, 518 U.S. 515, 531 ("Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.").

[171] *See* Cmtys. for Equity, 377 F.3d 504, 507 (affirming on Equal Protection grounds only).

only.[172] This was, perhaps, because the Supreme Court has yet to determine whether an entity that exercises "controlling authority" over a federally funded program is subject to Title IX.[173] Under the current law, an entity may be subject to Title IX if they are a "recipient" of federal funding.[174] The Sixth Circuit was permitted by the Supreme Court to rule on the "controlling authority" issue, according to *NCAA v. Smith*.[175] Instead, the court of appeals found a way to grant relief to CFE without implicating Title IX.[176]

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[172] *See Cmtys. for Equity*, 377 F.3d 504, 506 ("[W]e AFFIRM the judgment of the district court with regard to the plaintiffs' Equal Protection claim, thus finding no need to reach the Title IX and state-law issues.").

[173] *See* NCAA v. Smith, 525 U.S. 459; *see also* Chaudhry, *supra* note 69 at 20 (observing that Supreme Court recognized controlling authority theory but has not accepted it).

[174] *See* Chaudhry, *supra* note 69 at 17-18 (explaining meaning of term "recipient" as it pertains to Title IX). The Supreme Court has recognized that a "recipient" under Title IX includes and institution that indirectly receives federal funds. *See id*. citing Grove City Coll. V. Bell, 465 U.S. 555 (finding federal aid to students triggers Title IX applicability to universities).

[175] *See* NCAA v. Smith, 525 U.S. 459 (leaving viability of "controlling authority" theory to lower courts as it applies to Title IX).

[176] The Appeals court decided the case specifically on Equal Protection grounds. *See* Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n, 377 F.3d 504, 506 (6th Cir., 2005)

The *Brentwood* decision has had an impact on how plaintiffs will pursue claims of gender discrimination at the high school athletic level.[177] After *Brentwood*, every circuit court of appeals now considers high school athletic associations state actors for the purposes of Equal Protection.[178] Plaintiffs who wish to bring Title IX claims against high school athletic associations will certainly only be able to advance this argument as far as an appeals court is willing to accept it.[179] However, if the same relief can be reached through an Equal Protection challenge, and athletic associations can be held constitutionally accountable for gender discrepancies, perhaps finding a way to invoke Title IX is unnecessary.[180] It is clear that the "controlling authority" theory is going to remain a topic for debate in the district courts, unless the Supreme Court decides

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[177] A plaintiff with a gender discrimination claim in the post-Brentwood world may find it more advantageous to advance an argument based upon Equal Protection rather than Title IX, now that these associations are considered state actors. *See Brentwood*, 531 U.S. 288, (recognizing TSSAA as state actor for Equal Protection purposes).

[178] *See id*.

[179] *See* NCAA v. Smith, 525 U.S. 459 (instructing lower courts to decide issue of "controlling authority").

[180] See Cmtys. for Equity, 377 F.3d 504 (exemplifying case where plaintiffs obtained relief based upon Equal Protection against high school athletic association).

to evaluate its merits at some point in the future.[181] If The Court does decide to hear the appeal of *Communities for Equity*, it will likely take the route of the Sixth Circuit, and only rule on Equal Protection.[182] A danger for the Supreme Court in deciding the idea of "controlling authority" in Title IX, is that it would then, necessarily, have to subject the NCAA to Title IX as well.[183]

2. *Applying Pervasive Entwinement Test Clearly applied to MHSAA*?

The Communities for Equity court relied on solid precedent in order to find that the MHSAA was a state actor.[184] It was clear from *Brentwood* that it is

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[181] *See* S. Ct. docket no. 04-1021 Response due April 1, 2005, *at http://www.supremecourtus.gov/docket/04-1021.htm*.

[182] *See Cmtys. for Equity*, 377 F.3d 504, 506 (forming their decision only on Equal Protection grounds).

[183] *See* Chaudhry, *supra* note … at 19-20 (noting Supreme Court hesitant to apply "controlling authority" theory to NCAA).

[184] The Communities for Equity court relied on *Brentwood* which instructed that high school athletic associations were state actors for Equal Protection purposes. *See* Cmtys. for Equity, 377 F.3d at 510-512. The fact that every other federal circuit before Brentwood was already in accord with the Brentwood opinion reinforced the Sixth Circuit's opinion on state action in Communities for Equity. *See* Drew, *supra* note 5 at 1322 ("Prior to the Sixth Circuit's Brentwood decision,

the desire of the Supreme Court that high school athletic associations be considered state actors.[185] What is not so clear is the application of Brentwood's "pervasive entwinement" state action test in *Communities for Equity*.[186] The court employed the test of "pervasive entwinement" in order to find the MHSAA a state actor.[187] What is not so clear is the application of the entwinement test, as laid out by Justice Souter.[188] Justice Gilman, writing for the Sixth Circuit, mentioned "pervasive entwinement" and between the MHSAA and the state, as well as a "close nexus between the State and the challenged action," separately, but appeared to justify them together in his decision.[189] This language harkens back to the "nexus test" of determining state action, that Justice Souter seemingly

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all other federal circuits held that high school interscholastic athletic associations were state actors.").

[185] See *Brentwood*, 531 U.S. 288, 302 (acknowledging sufficient entwinement between TSSAA and state to hold TSSAA state actor).

[186] *See id*. at 510-12 (analyzing state action under entwinement theory).

[187] *See* Cmtys. decision (holing sufficient nexus between …) ; *see also* Drew, supra note … at 1317-18 (explaining nexus test).

[188] *See* Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n, 531 U.S. 288, 298-302 (evaluating entwinement between private actor and state from "bottom up" and "top down").

[189] *See Cmtys. for Equtiy*, 377 F.3d 504, 511-12 (evaluating entwinement and nexus together).

replaced in *Brentwood*.[190] Moreover, there is no mention of Justice Souter's deliberate use of "bottom up"/"top down" breakdown of pervasive entwinement that made the *Brentwood* decision so coherent.[191] This lack of following the form leaves the decision in *Communities for Equity* starting with a solid foundation of precedent, and reaching a necessary result, but incomplete in its analysis.[192]

When reconciling *Communities for Equity* with *Brentwood*, finding that the MHSAA was a state actor was a necessary result.[193] If state athletic associations were not state actors, it would expand the authority of the several states, arming them with the power to discriminate based upon gender through athletic associations, and compromise constitutional protections that are enjoyed

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[190] The court simply comes out and says "[w]e therefore conclude that the MHSAA is so entwined with the public schools and the state of Michigan (which is explained), and that there is 'such a close nexus between the State and the challenged action,' (citation omitted) that the MHSAA should be considered a state actor."). Perhaps they are two sides of the same coin, or perhaps the entwinement itself is sufficient to prove any action by an entity with pervasive entwinement has a sufficient nexus to establish the entity as a state actor? It is just unclear.

[191] *See id*. (displaying absence of language used by Justice Souter in *Brentwood*).

[192] *See id*.

[193] The similarities between the MHSAA and TSSAA required the Sixth Circuit to hold the MHSAA a state actor for Equal Protection purposes.

by those students and schools that participate in high school athletic programs.[194] Hopefully, the Supreme Court on appeal will give federal courts more guidance on how to significantly distinguish and apply the "pervasive entwinement" test.[195]

V. IMPACT

Prior to the court of appeals decision in *Communities for Equity*, critics noted that the Sixth Circuit was the lone absenter in recognizing high school athletic associations as state actors.[196] Critics believed that this reluctance to recognize state athletic associations as state actors could "unduly expand" state authority and "trample" individuals' constitutional protections.[197] The Sixth

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[194] *See* Drew, *supra* note 5 at 1315 (suggesting that holding state athletic associations not to be state actors would unjustly expand state power with respect to individual constitutional protections).

[195] S. Ct. docket no. 04-1021 Response due April 1, 2005.

[196] *See* Drew, *supra* note 5 at 1332 (highlighting Sixth Circuit as only holdout in recognizing high school athletic associations as state actors).

[197] *See id*. at 1315 (claiming failure to recognize high school athletic associations as state actors amplifying state powers while marginalizing individual constitutional protections).

Circuit's decision in *Communities for Equity* effectively lays these concerns to rest.[198]

In a literal sense, if the plaintiffs get the relief that they request, then, most notably, girls volleyball would move from the spring to the fall, girls basketball would move from the fall to the spring, among other changes in order to comply with the order of the district court.[199] The scope if this decision, however, will

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[198] See Cmtys. for Equity, 307 F.3d 504 (granting relief to CFE and recognizing MHSAA as state actor).

[199] *See* John E. "Jack" Roberts, *Sports and Their Seasons*, *at http://www.mhsaa.com/news/00jackseasons.html* (Dec. 4, 2000) (noting changes to "traditional" seasons of sports that plaintiffs request).

> If plaintiffs get what they ask for, all high school seasons would be like college seasons, with this result:
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> *Boys Lower Peninsula golf would move from the fall to the spring;
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> *Girls tennis would move from the fall to the spring;
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> *Girls Lower Peninsula swimming would move from the fall to the winter;
>
> *Girls basketball would move from the fall to the winter;
>
> *Girls volleyball would move from the spring to the fall;
>
> *Girls soccer would move from the spring to the fall.

Id.

have a much larger impact than shifting athletic seasons in the state of Michigan.[200] It will mark the accord of all of the Federal Circuit Courts of Appeals in recognizing state athletic associations as state actors, subjecting them to Equal Protection challenges.[201]

As the *Communities for Equity* litigation comes closer to its inevitable conclusion, we can see the sun metaphorically setting on the relevance term "traditional season" as it has been known to litigation of this kind.[202] A movement can be detected away from what is "traditional" or "sentimental" in high school athletic scheduling towards what is "advantageous" and "non-discriminatory."[203] Courts currently care about traditional seasons only to the extent that they also happen to be the most advantageous season for the participation of the student-athlete.[204]

There are still those that contend that the "status quo" in athletic scheduling should be maintained because this sentiment is the consensus among

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[200] It will represent the accord of all of the Federal Circuits in recognizing high school athletic associations as state actors, thus subjecting them to Equal Protection challenges.

[201] *See* Drew, *supra* note 5 at 1332 (noting after Brentwood all federal circuits now recognize high school athletic associations as state actors).

[202] *See* Cmtys. for Equity v. Mich. High School Athletic Ass'n, 377 F.3d 504 (using term "traditional" in its analysis).

[203] *See id.*

[204] See id. at 808.

those involved in Michigan.[205] Others feel that the impracticality in the short term of reconfiguring the athletic seasons should prohibit a required change as mandated by the federal courts.[206] The change may place a strain on smaller schools with fewer resources to accommodate a sudden shift in athletic scheduling.[207]

Equal Protection, however, is blind to this reasoning, and the satisfaction of the requirements pronounced in *VMI* involves a sacrifice in the short term in order to serve the noble interest of greater gender equality in the future, and this is what the *Communities for Equity* decision is working towards.[208] This decision's

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[205] *See* Seasons Survey Announced, *at http://www.mhsaa.com/news/survey.html*, (Sept. 14, 1998)(" A survey to determine the preferences of its member schools regarding the placement of sports seasons has shown that the status quo is preferred by a four-to-one margin in results announced . . . by the Michigan High School Athletic Association.").

[206] *See* Jeff Peek, Traverse City: Record Eagle, *Schedule Switch Just won't be 'Fair'*, available at http://www.gtherald.com/2004/aug/1jeffcol.htm, Aug. 1, 2004 (accessing negative impact sports season adjustment will have in Michigan).

[207] *See* John E. Roberts, *Sports and Their Seasons*, *at http://www.mhsaa.com/news/00jackseasons.html* (Dec. 4, 2000) (noting exclusion of students from certain activities if seasons are changed due to facility limitations).

[208] *See* United States v. Virginia, 518 U.S. 515 (1996) (heightening scrutiny standards for gender discrimination evaluation).

importance cannot be understated. Since Michigan was the last state to discriminate in their scheduling procedures on the basis of gender, this effectively marks the theoretical end of unequal treatment in scheduling practices by high school athletic associations in our Nation.[209] Communities for Equity is not merely a case about volleyball, or about uniformity among the states in athletic scheduling; it is a case about an age-old practice of gender discrimination. Just because the practice has been accepted for years, does not make it right.

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[209] *See* CFE, Sixth Circuit Court of Appeals Finds for Communities for Equity, *at http://www.communitiesforequity.com/mhsaa.html*, (last visited Mar. 16, 2005) ("Michigan was the last state to discriminate against female athletes in this way.").