

# Legal Aspects of Interscholastic Athletics Unique to Michigan

*prepared by the*



**michigan high school athletic association**

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## Table of Contents

<b>Page</b>	
1	Foreword
2	<b>PART I – The Role of the Michigan High School Athletic Association</b>
2	A. Relationship to Schools
3	B. Statutory Provisions
	1. Michigan
	2. Federal
4	C. Articles of Incorporation
4	D. Key Michigan Attorney General Opinions
4	1. August 11, 1977
4	2. August 3, 1978
5	3. August 8, 1978
5	4. April 8, 1986
6	E. Key Case Law Involving MHSAA
6	1. <u>Berschback</u>
7	2. <u>Cardinal Mooney</u>
7	3. <u>Kirby</u>
8	4. <u>Sandison</u>
9	5. <u>McPherson</u>
9	6. <u>Frye</u>
10	7. <u>Reid</u>
10	8. <u>Breighner</u>
11	F. Other Key Cases Affecting the MHSAA and Leagues
	1. <u>Attorney General v. Jackson Public Schools</u>
	2. <u>Christensen</u>
	3. <u>Brentwood</u>
	4. <u>Euverard</u>
12	<b>PART II – Sports Seasons</b>
12	A. Federal Court (1973)
12	B. Federal Agencies
13	C. Federal Courts (1998-2007)
16	<b>PART III – Miscellaneous</b>
15	A. State Action
15	B. “Good Samaritan” Law
17	C. Insurance Requirements
18	D. Drugs/Dietary Supplements
	1. Public Act 31(1990)
	2. Public Act 187 (1999)
	3. Public Act 215 (2006)
	E. Hazing
19	F. Title IX Compliance
	1. “Proportionality” vs. Student Interest
	2. Competitive Cheer as a Sport
22	G. Gender-Specific Teams
23	H. Changing Language
23	I. Consistent Strategy



## Foreword

General courses in legal aspects of athletics cannot be specific to every level of sports in every state. Therefore, the Michigan High School Athletic Association offers this publication as a supplement to any publication or course of study that intends to discuss legal aspects of interscholastic athletics with an audience of practitioners of school sports in Michigan.

John E. Roberts  
MHSAA Executive Director

# LEGAL ASPECTS OF INTERSCHOLASTIC ATHLETICS UNIQUE TO MICHIGAN

## I. THE ROLE OF THE MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION

### A. RELATIONSHIP TO SCHOOLS

1. The Michigan High School Athletic Association, Inc., is a **voluntary association** of public and nonpublic schools. The association has no direct authority to discipline individual students, coaches or other school representatives.
2. The MHSAA is a **joint enterprise of schools**. The association helps administer rules jointly agreed upon by the membership, and the association is an arbitrator when disagreements occur among members.
3. **The membership has adopted**
  - a. a **Constitution** which governs the association, not local programs; and
  - b. **policies and procedures** that serve as
    - (1) entrance requirements for MHSAA sponsored and conducted postseason tournaments and
    - (2) baseline requirements for regular season competition for schools which wish to participate in MHSAA tournaments.

These adoptions have centralized some coordination and control within the Representative Council, Executive Committee and staff of the MHSAA. This is inevitable in any association. It is why associations are formed: to do what individual members cannot. But it is also the nature of an association that its leaders cannot do for long what its members don't find serves their needs.

4. **Schools use the MHSAA to**
  - a. review and revise the best practices for interscholastic athletics;
  - b. interpret the intent of previously adopted policies and procedures;
  - c. waive previously adopted policies and procedures when they fail to serve their intended purposes in a particular case; and
  - d. investigate and mediate disputes between members regarding those policies and procedures.



## B. STATUTORY PROVISIONS

1. MICHIGAN — At no time has any state statute created, empowered or restricted the Michigan High School Athletic Association, which is a voluntary, private, not-for-profit corporation of Michigan.
2. FEDERAL — The Amateur Sports Act of 1978 states that an amateur sports organization which conducts competition which is restricted to high school students has exclusive jurisdiction over such competition. The United States Olympic Committee and national governing bodies for particular sports do not have authority to interfere with high school sports programs; by law, they have the obligation to minimize conflicts with school sports.

This legislation was revisited by the U.S. Congress in 1998, and none of the changes made then affected the autonomy of schools and their statewide organizations to administer multi-sport interscholastic programs without interference from the USOC and national single-sport governing bodies.

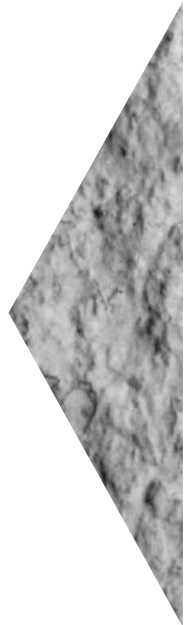
## C. ARTICLES OF INCORPORATION

The MHSAA was first incorporated in 1972. Its purpose, as amended June 8, 2005, states:

“To create, establish and provide for, supervise and conduct interscholastic tournaments throughout the state consistent with educational values of high school curriculums, to make and adopt rules and regulations and interpretations for such tournaments, to provide assistance in the training of coaches, athletic directors and officials, as well as the registering of officials, to publish and distribute such information consistent therewith, and to do any and all acts and services necessary to carry out the intent hereof.”



## NOTES



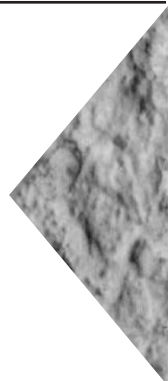
**D. KEY MICHIGAN ATTORNEY GENERAL OPINIONS**

1. Opinion No. 4795 dated August 11, 1977:
  - a. Participation in interscholastic athletics is deemed a privilege and not a part of the educational function of the school district.
  - b. If interscholastic contests are among schools of a single school district, the supervision and control of those contests are the responsibility of that school district's board of education; and if interscholastic contests are among schools of more than one school district, the boards of education of the involved school districts may agree among themselves as to the rules that would control the contest and each board of education would be responsible for the adoption of such rules and for their enforcement in its own schools.
  - c. To that end, boards of education of school districts could join in an association and voluntarily could adopt the rules of the association; but the enforcement of such rules would be the responsibility of each board of education as to its own schools.
  - d. Boards of education could provide in their rules that interscholastic contests engaged in by their respective schools be refereed by officials certified by the association.
  - e. Boards of education may elect to participate in statewide interscholastic tournaments sponsored by the association, and to that end it is necessary that each school district sign an Adoption Resolution annually adopting the rules and regulations of the MHSAA as their own and agreeing to the primary enforcement of same.
2. Attorney General Opinion No. 5346 dated August 3, 1978:
  - a. Nothing prevents a board of education from joining the MHSAA and voluntarily adopting and enforcing the rule which prohibits coaches from working with more than three players at one time outside the high school season.



**NOTES**

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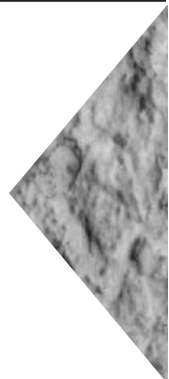




3. Attorney General Opinion No. 5348 dated August 8, 1978:
  - a. The MHSAA is a private, nonprofit corporation and not an agency or instrumentality of the state; and, as a private, nonprofit corporation, the MHSAA may engage in any conduct or activity not prohibited by law or beyond the purpose as stated in its articles of incorporation.
  - b. Sponsorship of high school tournament games is within the Association's stated corporate purpose; and nothing legally prohibits the MHSAA from establishing and collecting fees for the right to broadcast games.
4. Attorney General Opinion No. 6352 dated April 8, 1986 confirmed the reasoning of Opinion No. 4795 (above)
  - a. The MHSAA is not an agency or instrumentality of the state.
  - b. Tournaments sponsored by the MHSAA are private corporate activities of the Association.
  - c. Public high schools may participate in such tournaments.
  - d. The MHSAA may establish whatever conditions and requirements it sees fit for participation in these tournaments.
  - e. Whether violations involve athletic contests between high schools within the same district or between different school districts, each board of education which has adopted the rules as its own is ultimately responsible for their enforcement in its schools.
  - f. While a school district is not bound by the decisions rendered by the MHSAA regarding rule violations, the MHSAA may condition eligibility for and participation in its tournaments on compliance with its rule and its determinations concerning rules violations and the penalties to be imposed upon school districts for violation of the rules.
  - g. Hearings before the executive committee or representative council of the MHSAA regarding possible rules violations, held pursuant to the Association's due process procedure, are not subject to the provisions of the Open Meetings Act.



## NOTES







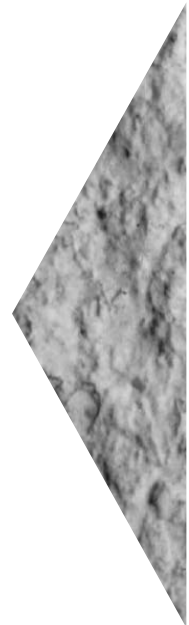
**E. KEY CASE LAW INVOLVING MHSAA**

1. Berschback v. Grosse Pointe Schools, 154 Mich App 102, 397 NW2d 234 (1986).
  - a. Athletic cases, at least in the Michigan system, are not moot with the passage of time as they involve issues of significant public importance and are capable of repetition.
  - b. Under traditional equal protection analysis where classifications do not involve a suspect class or a fundamental right, once legitimate regulatory purposes have been identified, the only question remaining is whether the rule makers reasonably believe that use of the challenged classification would promote that purpose. Therefore, a rule will be upheld against an equal protection challenge if it contains a classification rationally related to a legitimate governmental interest.
  - c. Participation in interscholastic athletics does not constitute an exercise of a fundamental right.
  - d. The right to a public education does not create a right to participation in interscholastic sports such that participation in interscholastic sports is a protected interest which may be abridged only through due process of law. Since there is no property or liberty interest in participation in interscholastic sports, there exists no due process right to a hearing or opportunity for review before the MHSAA.
  - e. The courts are not the proper forum for making or reviewing decisions concerning the eligibility of students in interscholastic athletics; therefore, change of eligibility rules and the application of those rules must be through the political rather than the judicial process.





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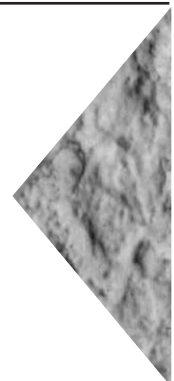
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2. Cardinal Mooney High School v. The Michigan High School Athletic Association, Inc., 437 Mich 75, 468 NW2d 21 (1991).
    - a. Regulation V, Section 4(C) is a valid restitutive provision reasonably designed to rectify the competitive inequities that would inevitably occur if schools were permitted without penalty to field ineligible athletes under the protection of a temporary restraining order pending the outcome of an ultimately unsuccessful legal challenge to one or more eligibility rules.
    - b. Compliance with MHSAA rules on the part of a student athlete is an appropriate and justifiable condition of the privilege of participation in interscholastic athletics under the auspices of the MHSAA.
    - c. The MHSAA may have valid reasons for declining to permit case by case exceptions to its uniform age eligibility rule, and the interest of uniformity and predictability justify even-handed application of Regulation V, Section 4(C).
    - d. In light of the unique issues of competitive equity in the area of eligibility rules for athletic contests, Regulation V, Section 4(C) is a valid regulation which neither infringes on the authority of the courts nor improperly restricts access to the judicial system.
  3. Kirby v. The Michigan High School Athletic Association, Inc., 459 Mich 23 (1998), 585 N.W. 2nd 290 (1998)
    - a. While the Association exercises no independent authority over schools or students during regular-season competition, the MHSAA has authority to deal reasonably with situations outside its rulebook as they arise during the MHSAA postseason tournaments.
    - b. The Association's rule to not advance teams who have been defeated in MHSAA tournaments by opponents who used ineligible players has a rational basis, and its handling of the matter also serves to maintain the integrity of the tournament process.
    - c. Schools agree, for the purpose of having orderly competition, to let the MHSAA set the rules and govern the postseason tournaments sponsored by the Association. Such an agreement is analogous to the consent given by a party entering arbitration, who agrees in advance to be bound by any ruling that is within the scope of the arbitrator's authority.

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4. Sandison v. The Michigan High School Athletic Association, Inc., 64 F.3d 1026 (6th Cir. 1995).
    - a. Regulation V, Section 4(C) prevents dismissal of an appeal based upon mootness.
    - b. Non-waivability of maximum age rule is neutral with the respect to a disability when neutrally applied by the Association.
    - c. Neither the Rehabilitation Act nor the Americans With Disabilities Act requires either waiver or non-application of a neutral age rule.
    - d. Nineteen year old high school students held back due to learning disabilities were not “otherwise qualified” to participate in interscholastic sports. Thus, the state high school athletic association’s rule prohibiting students who turn 19 years old before September 1st of the school year from playing interscholastic sports does not violate the Rehabilitation Act nor ADA as the age regulation was necessary and waiver of the regulation was not a reasonable accommodation because waiver would fundamentally alter the sports program.
    - e. It places an undue burden to require high school coaches to determine whether individual factors render a student’s age an unfair competitive advantage. It is unreasonable to call upon coaches and physicians to make these near impossible determinations.
    - f. There is a significant peculiarity in trying to characterize the waiver of the age restriction as a “reasonable accommodation” of the plaintiffs’ learning disability. Ordinarily, an accommodation of an individual disability operates so that the disability is overcome and the disability no longer prevents an individual from participating. In this case, although playing high school sports undoubtedly helped plaintiffs’ progress through high school, the waiver of the age restriction is not directed at helping them overcome learning disabilities; the waiver merely removes the age ceiling as an obstacle.
    - g. Sandison did not rule on whether the MHSAA is a public entity covered by Title II.
    - h. Sandison held that the MHSAA is not covered by Title III of the ADA because the MHSAA is not a place to which a disabled individual alleges unequal access.

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5. McPherson v. The Michigan High School Athletic Association, Inc., 119 F.3d 453 (6th Cir. 1997).
- a. Graduation from high school does not render a case moot in view of Regulation V, Section 4(C). Regulation V, Section 4(C) is the lynch pin of appellate practice in reviewing injunctions in athletic settings.
  - b. The Eight Semester Rule is a neutral rule as is the Age Rule.
  - c. The MHSAA's determination that a rule may sometimes be waived under some circumstances does not mean that the rule is not necessary to the successful functioning of the sports program.
  - d. There is no principled distinction between the nature and purpose of the Age Limit Rule and the Eight Semester Rule that could lead to the conclusion that the former is necessary while the latter is not. The purpose served by the two rules is largely the same.
  - e. Requiring a waiver of the Eight Semester Rule under the circumstances presented in McPherson would work a fundamental alteration in Michigan high school sports programs.
  - f. Requiring a waiver would impose an immense financial and administrative burden on the MHSAA by forcing it to make near impossible determinations about a particular student's physical and athletic maturity.
  - g. It is unclear how the MHSAA could ever be expected to sort out the legitimate request for waiver from those based on a desire to gain an unfair advantage. In short, requiring the MHSAA to grant waivers under these circumstances would be to require it to take on an immense administrative burden. This necessarily means that the plaintiff's requested accommodations are not reasonable.
6. Frye v. The Michigan High School Athletic Association, Inc., Unpublished (6th Cir. 1997). Adopted the reasoning of McPherson and stands for the proposition that results in the McPherson would be no different if the student, instead of graduating, simply did not return to school to finish high school.



## NOTES

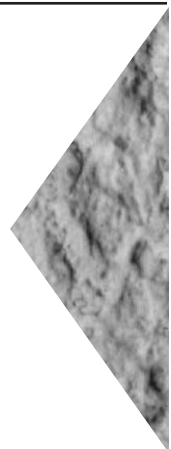




7. Reid v. Kenowa Hills Public Schools, 261 Mich App 17 (2004)
  - a. Extracurricular activities are not non-core courses in which a student enrolled in a private school that does not offer the non-core classes may have a statutory right to enroll.
  - b. There is a legal distinction between physical education classes that are educational requirements and extracurricular interscholastic athletic activities that are not required by the state's educational system.
  - c. Participation in interscholastic athletics is a privilege, not a right. Compliance with MHSAA rules is an appropriate and justifiable condition of the privilege of participating in interscholastic athletics under the auspices of the MHSAA.
  - d. The MHSAA enrollment regulations is neutral on its face and in its application and serves legitimate governmental purposes.
  - e. There is no religious discrimination or equal protection violation resulting from enforcement of the enrollment regulations of the MHSAA.
  
8. Breighner v. Michigan High School Athletic Association, Inc, 471 Mich 217 (2004)
  - a. The MHSAA is a private, self-regulated, non-profit corporation with a wholly voluntary membership. It has no authority over schools or students. The member schools remain free to join other athletic organizations instead of or in addition to the MHSAA.
  - b. The MHSAA is financially subsidized neither by nor through a government authority.
  - c. The MHSAA is not a creation of either state or local government.
  - d. The MHSAA is not an agency of any governmental organization.
  - e. The MHSAA is not a public body subject to the Michigan Freedom of Information Act.



## NOTES



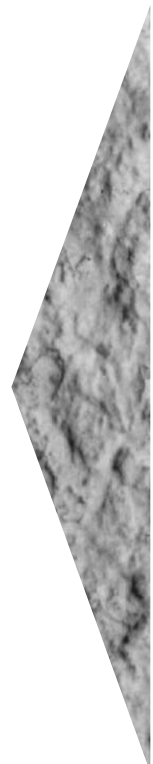


## F. OTHER KEY CASES AFFECTING THE MHSAA AND LEAGUES

1. Attorney General v. Jackson Public Schools, 143 Mich App 634 (1985). Interscholastic athletics are not a necessary element of any school's activity, and those activities are not an integral and fundamental aspect of the educational process in view of the fact that those activities are optional and non-essential and provisions have been made to waive fees for students who cannot afford to pay.
2. Christensen v. Michigan State Youth Soccer Association, 218 Mich App 37, 533 NW2d 638 (1996). When a private association has provided reasonably effective means of resolving controversies, and there is no evidence of fraud by the association, courts should not interfere with orderly governing of the association.
3. Brentwood Academy v. Tennessee Secondary School Athletic Association, 127 S. Ct. 2489 (2007). The association's anti-recruiting rule does not infringe upon free speech rights, but discourages precisely the sort of conduct that could lead to exploitation, distort competition between high school teams and foster an environment in which athletics are prized more highly than academics; any one of which detract from a high school sports league's ability to operate "efficiently and effectively."
4. Lowery v. Euverard, 497 F3d 584 (2007). The authority of school officials does not depend on the consent of students. Abstract concepts like team morale and unity are not susceptible to quantifiable measurement, yet they may be a basis of team membership. Common-sense conclusions do not require substantial evidentiary support. Students' regular education is not impeded by dismissal from a team, nor is the right to express an opinion. When players voluntarily go out for a team they implicitly agree to accept the coach's authority.



## NOTES



## **II. SPORTS SEASONS**

### **A. FEDERAL COURT (1973)**

On Oct. 1, 1973, in the case of Committee to Ensure Equal Opportunity in High School Athletics v. Michigan High School Athletic Association, the U.S. District Court for the Eastern District of Michigan, Southern Division, dismissed a complaint alleging schools' scheduling of basketball and swimming seasons in the fall violated Title IX of the 1972 Education Amendments and the Due Process and Equal Protection Clauses of the 14th Amendment of the U.S. Constitution. The Court determined:

1. Because plaintiffs were not deprived of any property interest, the due process claim must be dismissed.
2. There is no requirement in the law that a given organization contain any particular proportion of any group of people and that the MHSAA had sought the input and approval of schools before scheduling its first tournaments in each sport.
3. There is a rational basis for schools' scheduling of girls seasons at different times than boys (better utilization of facilities and more publicity for girls).
4. Title IX has not been held to preclude scheduling boys and girls seasons so as not to clash, thus no cause of action is stated under Title IX.

### **B. FEDERAL AGENCIES**

1. In 1973, 1975 and 1992, the Michigan Department of Civil Rights dismissed for no cause of action under Title IX cases brought by groups which challenged the sports seasons schedule of high schools in Michigan.
2. In 1984, the Office of Civil Rights issued a Statement of Findings that concluded the scheduling of seasons in Michigan ...
  - “does not necessarily result in discrimination against females;”
  - “has not presented any problems in scouting or recruiting females” in volleyball and basketball; and
  - “does not result in a denial of females of an equal opportunity to be scouted or recruited.”

The 1984 Statement of Findings also concluded ...

- “different lengths of sports' seasons do not necessarily result in discrimination on the basis of sex;”
- smaller crowds for girls contests “cannot be attributed to the Association's rules, regulations, or guidelines;”
- “the decline in popularity of field hockey cannot be attributed to the rules of the Association;”
- “The Association is not a recipient of Federal financial assistance” and “since the Association is not a recipient, it is under no obligation to monitor its members' compliance with Title IX;” and
- “school districts can operate interscholastic athletic programs within the rules of the Association and in compliance with the requirements of Title IX.”



**C. FEDERAL COURTS (1998-2007)**

Communities for Equity v. MHSAA is a class action lawsuit filed June 26, 1998, in the U.S. District Court for the District of Michigan, Western Division. Plaintiffs' complaint made many allegations, among which is that the MHSAA's failure to align interscholastic sports seasons with intercollegiate seasons violates state and federal statutes. The lawsuit sought to have the girls volleyball season of Michigan high schools moved from the winter to the fall and to have the sports seasons for five other sports be conducted at the same time for girls as they are for boys in Michigan.

A bench trial was held in September/October of 2001, the result of which was a finding in favor of the plaintiffs on Dec. 17, 2001. The District Court made a factual determination that some seasons are more advantageous than others for conducting high school sports and ordered the MHSAA to submit a plan that would place as many boys sports as girls sports in disadvantaged seasons. A subsequent order mandated that the plan include changing girls basketball from fall to winter and girls volleyball from winter to fall.

In February of 2003, the District Court approved a compliance plan that ordered the seasons of girls volleyball and girls basketball to be exchanged, as well as the seasons for boys and girls in Lower Peninsula golf, in Lower Peninsula tennis and Upper Peninsula soccer.

In July of 2004, the U.S. Court of Appeals for the Sixth Circuit upheld the lower court's decision that the sports season alignment of Michigan schools violated the equal protection clause of the 14th Amendment to the U.S. Constitution. The Court of Appeals did not address plaintiffs' Title IX or state law claims.

On May 2, 2005, the United States Supreme Court vacated the Sixth Circuit's holding and remanded the case for reconsideration in light of a recent decision by the Supreme Court in a federal communications matter that appears to stand for the proposition that plaintiffs may not bring suit under the 14th Amendment when there is a comprehensive federal statute with jurisdiction over the subject matter. Oral argument before the Sixth Circuit Court of Appeals occurred March 14, 2006

On Aug 16, 2006, the Sixth Circuit issued a divided opinion on the issue of remand and then affirmed the District Court's rulings of December 2001. On Aug. 30, defendants filed a petition for rehearing, or rehearing **en banc**, citing the division of the three-judge panel and inconsistencies on key issues between that ruling and previous decisions of the Sixth Circuit, other federal circuits and the U.S. Supreme Court. On Dec. 7, 2006, an order was filed denying the petitions for en banc rehearing.

A petition for a Writ of Certiorari was denied by the U.S. Supreme Court on April 2, 2007.

While the findings of fact of the District Court are unpopular and the conclusions of law of the District Court and Court of Appeals differ from the holdings of other Courts of Appeals, the result of this case presently stands for the following propositions, among others:

1. By ceding authority of interscholastics athletics to an organization that does not receive federal funds (MHSAA), schools that do receive federal funds create Title IX authority over the non-recipient.





- 2. The remedies of Title IX are not comprehensive enough to preclude a plaintiff from also making an athletic gender discrimination claim under the 14th Amendment.

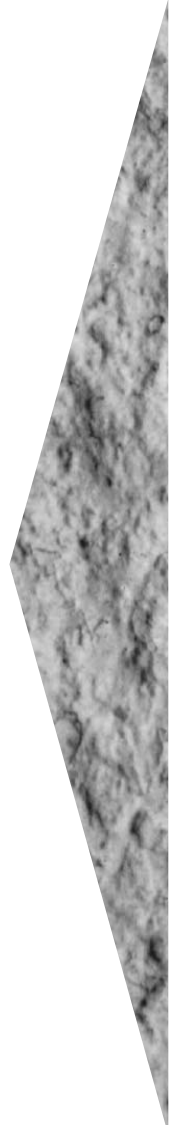
Note: In early 2009, the US Supreme Court held unanimously in Fitzgerald v. Barnstable School Committee (No. 07-1125 St. Ct. January 21, 2004) that Title IX does not preclude action under Section 1983 of the US Constitution, thus resolving the split in the federal circuits and confirming this point.

- 3. If plaintiffs allege that there is difference in treatment between males and females, and defendant's fail to prove an "exceedingly persuasive justification" for the different treatment, the result is an intended and illegal discrimination. Plaintiff's have no burden of proof.
- 4. Males and females must share equally in the advantageous and disadvantageous sports seasons, as determined by the court:  
basketball - winter; golf -fall; soccer - fall; swimming & diving - winter;  
tennis - spring; volleyball - fall



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### **III. MISCELLANEOUS**

#### **A. STATE ACTION**

1. In 1986, the Michigan Court of Appeals held the MHSAA's actions, for purpose of the Fourteenth Amendment claim, are state actions since it is composed to a large extent of public school members.
2. Subsequently, in a series of decisions, the Sixth Circuit of the United States Court of Appeals parted with other federal circuits in holding that voluntary, private organizations are not state actors even if they interact regularly with or are composed of public entities.
3. The United States Supreme Court issued a 5-4 decision in Brentwood Academy v. Tennessee Secondary School Athletic Association et al (531 US 288, 121 S Ct. 924, 148 L. Ed. 2d 807 (Feb. 20, 2001)) in which the majority held that the Association's regular activity is state action. Among the bases for the majority opinion are:
  - a. The TSSAA is comprised mostly of public schools from within a single state.
  - b. There is "pervasive entwinement" of public institutions and public officials in the TSSAA's composition and workings. The entwinement is "bottom up" (only 16% of the TSSAA membership is private schools) and it is "top down" (state board members sit ex-officio on the Association's governing bodies and TSSAA employees participate in the state retirement system).


The decision was limited to the TSSAA. The Supreme Court held that an independent inquiry would be necessary to determine whether or not state high school associations were state actors and for what purposes.

#### **B. "GOOD SAMARITAN" LAW**

In May of 1987, an amendment to Public Act 17 of 1963 was signed into law to relieve certain persons from civil liability when rendering emergency care. Here are pertinent portions:

Sec. 1 (1) A physician, registered professional nurse, or licensed practical nurse who in good faith renders emergency care at the scene of an emergency, where a physician-patient relationship, registered professional nurse-patient relationship, or licensed practical nurse-patient relationship did not exist before the advent of the emergency, shall not be liable for civil damages as a result of acts of omissions by the physician, registered professional nurse, or licensed practical nurse in rendering the emergency care, except acts or omissions amounting to gross negligence or willful and wanton misconduct.

(2) A physician who in good faith performs a physical examination, without compensation, upon an individual to determine the individual's fitness to engage in competitive sports and who has obtained a statement signed by the individual or, if the individual is a minor, the parent or guardian of the minor, that the person signing the statement knows that the physician is not necessarily performing a complete physical



examination and is not liable for civil damages as a result of acts or omissions by the physician in performing the examination, except acts or omissions amounting to gross negligence or willful and wanton misconduct or which are outside the scope of the license held by the physician, or a physician, registered professional nurse, or licensed practical nurse who in good faith renders emergency care, without compensation, to an individual requiring such care as a result of having engaged in competitive sports shall not be liable for civil damages as a result of acts or omissions by the physician in performing the physical examination or acts or omissions by the physician, registered professional nurse or licensed practical nurse in rendering the emergency care, except acts or omissions amounting to gross negligence or willful and wanton misconduct and except acts or omissions which are outside the scope of the license held by the physician, registered professional nurse, or licensed practical nurse. The subsection shall apply to the rendering of emergency care to minors even if the physician, registered professional nurse, or licensed practical nurse does not obtain the consent of the parent or guardian of the minor before the emergency care is rendered.

(3) A physician, physician's assistant, registered professional nurse, or licensed practical nurse who in good faith **renders emergency care without compensation** to an individual requiring emergency care as a result of having engaged in **competitive sports** is not liable for civil damages as a result of acts or omissions by the physician, physician's assistant, registered professional nurse, or licensed practical nurse in rendering emergency care, except acts or omissions amounting to gross negligence or willful and wanton misconduct and except acts or omissions that are outside the scope of the license held by the physician, physician's assistant registered professional nurse, or licensed practical nurse. This subsection applies to the rendering of emergency care **to a minor even if** the physician, physician's assistant, registered professional nurse, or licensed practical nurse **does not obtain the consent of the parent or guardian** of the minor before the emergency care is rendered.

As used in this section:

- (a) "Competitive sports" means sports conducted as part of a program sponsored by a public or private school which provides instruction in grades kindergarten through 12 or a charitable or volunteer organization. Competitive sports does not include sports conducted as a part of a program sponsored by a public or private college or university.
- (b) "Licensed practical nurse" means an individual licensed to engage in the practice of nursing as a licensed practical nurse under article 15 of the public health code. Act No. 368 of the Public Acts of 1978, being sections 333.16101 to 333.18838 of the Michigan Compiled Laws.
- (c) "Physician" means an individual licensed to practice medicine or osteopathic medicine and surgery under article 15 of Act No. 368 of the Public Acts of 1978.
- (d) "Registered professional nurse" means an individual licensed to engage in the practice of nursing under article 15 of Act No. 368 of the Public Acts of 1978.

**The effect is that the liability of medical authorities who volunteer their services to the interscholastic athletic program is less than that of medical authorities who are paid for their services. Donating medical services saves money for schools and saves liability concerns for medical authorities.**

## C. INSURANCE REQUIREMENTS

Prior to 1996 when the School Code was rewritten, Section 1522 of the School Code of 1976 allowed a board of education to require a fee from participants in interscholastic programs for the cost or a portion of the cost for medical care or insurance for the protection of pupils. However, the section very specifically stated that a pupil could not be barred for participation because of the inability to pay the fee. The section read:

- (4) A board may require a fee from participants in interscholastic athletic programs for the cost or a portion thereof of medical care, mutual benefit programs or insurance programs to ensure protection for pupils. A pupil shall not be barred from participation in interscholastic athletic activities because of inability to pay the fee.

Prior to the repeal of this section, it was considered likely, but not absolutely certain, that a school district would not be permitted to require proof of health insurance as a pre-condition of students' participation in interscholastic athletics. The question of insurance could have been asked and probably should have been asked of participants' families, but participation should not have been denied to those students who were without insurance.

That would appear to be the wisest counsel today. And if there are one or more students who cannot provide proof of insurance, it would be prudent for the school district to send home literature which describes how the family might purchase protection for their unprotected children on a voluntary basis directly from an insurance administrator or how the family might participate in a program purchased by the school.

At no cost to MHSAA member high school and junior high/middle schools, the MHSAA purchases a policy that provides a \$250,000 layer of excess accident medical benefits, payable after a deductible of \$25,000 per claim. Only eligible student-athletes are covered. The *MHSAA Handbook* provides additional details of coverage.

The MHSAA is not involved in claims which do not reach the \$25,000 deductible or in medical expenses beyond \$275,000 per claim, but **school districts could reduce the potential of litigation brought on behalf of participants who are uninsured or who suffer injuries with expenses beyond \$275,000 by encouraging or providing such coverage.**

**School districts can further reduce their potential liability by assuring that all of their junior high/middle schools are members of the MHSAA and thus covered under the MHSAA-purchased insurance plan.**

#### **D. DRUGS/DIETARY SUPPLEMENTS**

1. Public Act 31 of 1990 – In 1990, the Michigan Legislature enacted Public Law 31 which requires athletic service providers – including both educational and recreational athletic facilities – to post notice that warns that any person who uses or knowingly possesses and androgenic anabolic steroid violates Michigan law and is punishable by imprisonment and fine.
2. Public Act 187 of 1999 – Michigan public school employees and volunteers are prohibited from promoting or supplying dietary supplements with claims of enhanced athletic performance as a result of a bill signed into law Nov. 23, 1999.

The new law - designated Public Act 187 on Nov. 30, 1999 - covers androstenedione and creatine and any compounds labeled as performance enhancing.

While the substances are legal and may still be obtained by students through their parents, the new law should help protect schools from the ethical, health and liability issues that may evolve as the long-term effects on adolescents become known. It may provide an early wake-up call to students, parents and others that the health effects of these substances are unknown, especially as they might affect growing boys and girls.

Violations are punishable by up to 90 days in jail and/or a \$500 fine.

3. Public Act 215 of 2006 – The Michigan Legislature enacted this law which requires each public school's board of education must include in its local code of conduct that a student's use of performance-enhancing substances that are listed by the Department of Community Health shall be deemed a violation and subject to penalties prescribed by that local board of education. The Department of Community Health will adopt the list of banned drugs of the National Collegiate Athletic Association.

#### **E. HAZING**

Public Acts 111 and 112 of 2004 prohibit and penalize hazing, which is defined as an intentional, knowing or reckless act by a person who acted alone or with others that was directed against an individual and that person knew or should have known would endanger the physical health or safety of the individual, and that was done for the purpose of affiliation with, participation in, or maintaining membership in any organization. The laws do not apply to an activity that was normal and customary in an athletic program sanctioned by the educational institution. Because there is so much left open to legal interpretation by the language of these laws, coaches must take precautions with team leadership early and often to ensure that nothing approaching the broadest interpretations of hazing occurs when the coach is, or might be, aware.

If the violation results in physical injury, the person is guilty of a misdemeanor punishable by imprisonment for not more than 93 days, a fine of not more than \$1,000, or both. A violation resulting in impairment of a body function would be a felony resulting in imprisonment of up to five years and a fine up to \$2,500, or both. A violation resulting in death of the person hazed would be punishable by up to 15 years imprisonment and a maximum fine of \$10,000 or both.



## F. TITLE IX COMPLIANCE

The spirit of the implementing regulations for Title IX promulgated by the US Department of Health, Education and Welfare in July 1975 is that the interests and abilities of female (and male) students should be assessed and accommodated:

“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;”

- 34 CFR S. 106.41(C)

The spirit of the September 1975 Memorandum of the US Department of Health, Education and Welfare to Chief State School Officers, Superintendents of Local Education Agencies and College and University Presidents is that the interests and abilities of female (and male) students should be assessed and accommodated:

“ . . . educational institutions operating athletic programs above the elementary level should . . .

- (2) Determine the interests of both sexes in the sports offered by the institution . . .

- (3) Develop a plan to accommodate effectively the interests and abilities of both sexes,”

The spirit of the 1976 HEW Manual Competitive Athletics: In Search of Equal Opportunity is to evaluate (not dictate) and to accommodate (not duplicate):

“(Title IX) does not require colleges to duplicate their men’s program for women or to offer exactly the same sports in exactly the same fashion for both women and men . . . Rather, it requires overall equal athletic opportunity, with specific athletic offerings being determined primarily by the interests and abilities of female and male students.” (Page 1)

The spirit of the December 1979 Policy Interpretation of HEW for athletics was that the interests and abilities of female (and male) students should be assessed and accommodated:

*“Compliance in Meeting Interests and Abilities of Male and Female Students:* Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be equally effectively accommodated.”

- Federal Registered/Vol. 44, No. 239, p. 71414

The spirit of the Title IX Athletics Investigators Manual published in 1990 by the Office for Civil Rights of the US Department of Education is not to mandate the male model of sports programs but evaluate interests and accommodate them even if females’ interests differ:

“Institutions are not required to offer the same sports or even the same number of sports to men and women . . . Institutions are required to provide equal opportunity to participate and to equally effectively accommodate the athletic interests and abilities of men and women.” (PP. 10 & 11)

In the realm of interscholastic athletics, this spirit is advanced when local and state leaders listen both to high school girls and boys and design programs that they want and will support, even if they are different for girls and boys.

1. “Proportionality” vs. Student Interest

Since Title IX has become law, the Office for Civil Rights has issued a series of memos – in 1979, 1996, 2003 and 2005 – which advance a “three prong test” to assess whether an institution (1) offers opportunities for sports participation that are proportionate to the enrollments for each gender, or (2) has established a history and ongoing practice of increasing opportunities for the under-represented gender, or (3) has fully accommodated the athletic interests of the under-represented gender.

That it has required three clarifications is testimony to how difficult OCR was making things; and as a result, most institutions took refuge in the first prong – “proportionality” – because it was the simplest and most straightforward to measure, a “safe harbor” no matter how badly it affected students.

In 2003, the Commission on Opportunity in Athletics issued 25 recommendations to the Secretary of the US Department of Education, including a number that were critical of OCR’s policy that tended to cause schools to default to the proportionality test. Among the recommendations related to this that were adopted without dissent:

- The Office for Civil Rights should make clear that cutting teams in order to demonstrate compliance with Title IX is a disfavored practice.
- The designation of one part of the three-part test as a “safe harbor” should be abandoned in favor of a way of demonstrating compliance with Title IX’s participation requirement that treats each part of the test equally. In addition, the evaluation of compliance should include looking at all three parts of the test, in aggregate or in balance, as well as individually.

A number of the other adopted recommendations were designed to make compliance clearer and easier under the second and third tests as a way to reduce reliance on the more easily quantified proportionality test that had evolved into the “only” test.

One of the results of the 2003 Commission recommendations was the development and dissemination in 2005 of a simpler web-based survey model, which was criticized by some observers, but had been designed in response to input that the 1996 “clarification” had been so ambiguous that institutions “could not determine when compliance had been achieved under Prong Three.”

On April 1, 2010, the US Civil Rights Commission found that the Department of Education’s 2005 model survey provides “the best method available for achieving compliance under prong three.” The Commission recommended that “the regulations be revised to explicitly take into account the athletic interests of both sexes rather than just the interests of the under-represented sex, restoring Title IX to its original goal of providing equal opportunity for individuals of both sexes.”

But on April 20, a “Dear Colleague letter” from the assistant secretary for Civil Rights of the US Department of Education provided another clarification, this one titled



“Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three,” withdrawing the 2005 clarification and all related documents accompanying it, including the “User’s Guide to Student Interest Surveys Under Title IX” and the related documents issued by the Department in March of 2005.

This latest clarification replaces the model survey with 12 pages of factors to be considered when assessing student interest, all of which is open to interpretation and evaluation and will likely have the result of discouraging schools’ use of the third prong and their reliance again on only the first prong (proportionality) to assure Title IX compliance.

2. Competitive Cheer as a Sport

In 1975, those charged with Title IX policymaking promulgated the following:

“. . . drill teams, cheerleaders and the like . . . are not a part of the institution’s ‘athletic department’ within the meaning of the regulation.”

- US Department of Health, Education and Welfare, September 1975

The policy may have been justified at one time, but it is out of date and out of step with the modern world where sideline cheerleading has become highly athletic and competitive and in many places has evolved to its own, self-reliant and focused sport.

Such is the case, for example, in Michigan where the sport of competitive cheer draws as many participants and twice the spectators as high school gymnastics and skiing combined and has been deemed by the participants, their schools, their leagues and the Michigan High School Athletic Association to be a sport.

Correctly so, the Office for Civil Rights has permitted high schools to make the determination that competitive cheer is a sport.

“This material tends to support in several ways the characterization of MHSAA-sanctioned competitive cheerleading as a Title IX sport in that it specifies the season of sport, identifies the eligibility requirements and standardized judging criteria used by registered officials, notes the availability of some state and conference championships and scholarship monies, and certifies that this activity is recognized as a sport by MHSAA and interscholastic athletics conferences within Michigan.”

- OCR Letter to MHSAA, Oct. 18, 2001

Neena Chaudhry, senior counsel for the National Women’s Law Center, concurred in the ESPN.com Timeout Chat Show on June 19, 2002:

“Cheerleading could be considered or counted as a sport if the cheerleading team’s primary purpose is to compete.”

In Michigan, that is the sole purpose of girls competitive cheer.

On Aug. 1, 2002, the US District Court in Kalamazoo, MI ordered competitive cheer to be included in the calculation of female participants in high school athletics in Michigan.

In Michigan, there is no rational argument for the proposition that MHSAA girls competitive cheer is not a sport.

## G. GENDER-SPECIFIC TEAMS

### 1. Girls on Boys Teams

The Michigan School Code states:

**380.1289 Participation of female pupils in interscholastic athletic activities.**

Sec. 1289. Female pupils shall be permitted to compete for a position in all interscholastic athletic activities. If a school has a girls' team in an interscholastic athletic activity, a female shall be permitted to compete for a position on any other team for that activity. This subsection shall not be construed to prevent or interfere with the selection of competing teams solely on the basis of athletic ability.

**History:** 1976, Act 451, Imd. Eff. Jan. 13, 1977;—Am. 1994, Act 416, Eff. Mar. 30, 1995;—Am. 1995, Act 289, Eff. July 1, 1996.

### 2. Boys on Girls Teams

The Michigan High School Athletic Association *Handbook* stipulates that “Boys may not participate on a girls team in MHSAA-sponsored postseason meets and tournaments.”

This policy is consistent with federal regulations adopted to enforce Title IX of the Education Amendments of 1972 which allow separate athletic programs if such promote and protect athletic opportunities for the gender whose overall athletic opportunities have been more limited historically than the other gender. See 34 C.F.R. See 106.41(b) (2004).

The MHSAA is consistent with many judicial decisions in many states, for example, Cape v. Tennessee Secondary School Athletic Association 563 F.2d 793 (1977); Gomes v. Rhode Island Interscholastic League 604 F 2d 733 (1979); Petrie v. Illinois High School Association 394 NE 2d 855 (1979); Forte v. Board of Education of North Babylon Free School District 431 NYS 2d 321 (1980); Clark v. Arizona Interscholastic Association 464 US 818 (1983); and Bukowski v. Wisconsin Interscholastic Athletic Association, an unpublished decision in District VI of the Wisconsin Court of Appeals (No. 2004CV472, Nov. 30, 2006).

During the regular season, the MHSAA honors the following options available to schools which desire to preserve an interscholastic team that consists of girls only.

- (a) Schools may break contracts with schools which submit eligibility rosters for contests which include boys; and tournament management may exclude teams which include boys. Schools should clearly indicate on school contracts that contests are “girls competitive cheer,” or “girls volleyball,” or “girls gymnastics,” etc.
- (b) Officials may require a forfeit by any school which refuses to play girls only in a contest. Schools should clearly indicate on officials contracts that contests are “girls competitive cheer,” or “girls volleyball,” or “girls gymnastics,” etc.
- (c) Leagues and conferences may establish league/conference meets and schedules for girls teams only and exclude teams which include boys.

## H. CHANGING LANGUAGE

Thirty-five years ago, on the heels of Proposition 13 in California which began property tax reform and the school finance revolution, the language of athletic administrators intended to marry athletics to academics. We used words like “essential” and “integral” and “co-curricular” as we promoted athletics as a basic part of the school curriculum which should be supported by the operational budgets of school districts, rather than by fundraisers, concessions, donations, pay-for-play, advertisements, sponsorships and gate receipts. That was the language we thought was necessary when the battle was over funding. That battle continues.

Meanwhile, a second battle front has occurred with those who claim the language of the first battle confirms their point of view that they have the right to participate in athletics even though, for example, they are home schooled or are too old as a result of a disability that delayed their progress through school.

Athletic codes should be reviewed and revised locally to remove language that overstates the case for and contradicts the legal status of interscholastic athletics. **In Michigan, legally, interscholastic athletics may be educational, but they are not a part of the required curriculum of schools nor are they an extension of any curriculum course. No student has a right to participate in extracurricular interscholastic competitive athletics, and we should not use language that suggests otherwise. Legally, interscholastic athletics are not curricular, or even co-curricular; they are extra-curricular.** (See Reid v. Kenowa Hills Public Schools and [p. 10] and Attorney General v. Jackson Public Schools [p. 11]).

## I. CONSISTENT STRATEGY

There are five strategic principles that can lower the number of legal challenges. They are not difficult in concept, but they require persistent care and attention on the part of leadership.

1. Train staff. Provide philosophical foundations. When staff can articulate the history and rationale behind an organization's policies and procedures, constituents are more understanding of adverse rulings. Background helps people recognize the problems that were solved by a rule and the problems that could return in its absence.
2. Listen attentively. Don't rely solely on committees and other established mechanisms for gathering information. Create situations that allow staff to hear about concerns, arrange other situations that permit creative thinking to address those concerns, and organize still other situations that will vet proposed solutions. As big issues emerge, think of all stakeholders and constituents as a "committee of the whole" for extended discussions of key topics. Take them draft after draft of the emerging solutions. Give them "ownership" of the final product.
3. Communicate aggressively. Announce changes in policies and procedures in every form of media – publications, broadcasts, videos, Web site - to every type of stakeholder and constituent – school boards, superintendents, principals, athletic directors, coaches, counselors, students, parents, media – and do so multiple times. Sending out a memo or two and thinking everyone will get the word is insufficient.
4. Respond proactively. That is, be accessible, immediately or by prompt return correspondence or calls. When possible, have a real person – not a recording – answer the phone. Assure those with questions or concerns that they have the organization's full attention, that you are attempting to gain a complete factual understanding, and that you will provide all procedural options. Let them see that they are dealing with informed, involved people, not a buck-passing bureaucracy.
5. Defend Unceasingly. Stand up for the organization when it is right, not merely when it is popular or convenient. Giving up on "little issues" creates uncertainty, which can lead to more problems. If the organization is unwilling to enforce a given rule, rescind it. Otherwise, stand by it in a fair and consistent manner, and deal with the consequences. Sometimes, that means you have to face a judge, a hearing examiner or a legislative committee. If so, prepare thoroughly, and articulate the organization's purposes and principles at every opportunity. Pursue every avenue of appeal to support the policies the organization has adopted through its democratic procedures. Those who challenge these policies and procedures must know any battle they start will be a long one. Ultimately, if you lose, make the necessary adjustments and move on with positive leadership that will infect the organization with a “can do” attitude. Either way, you will have done your best to protect the values that make the organization special.



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