No. 02-1127

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COMMUNITIES FOR EQUITY, *et al.*,

Plaintiffs-Appellees

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISMISS

RALPH F. BOYD, JR.
Assistant Attorney General

DENNIS J. DIMSEY
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section - PHB, 5012
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
(202) 514-4757

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

RULES AND REGULATIONS: **PAGE**

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-1127

COMMUNITIES FOR EQUITY, *et al.*,

Plaintiffs-Appellees

v.

MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISMISS

INTEREST OF THE UNITED STATES

This case poses questions regarding the proper interpretation and application of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, and the state action doctrine of the Fourteenth Amendment to a state high school athletic association that sets rules for athletic programs throughout the State of Michigan. The Civil Rights Division of the Department of Justice has been participating as amicus in the district court as well as in this Court in connection with Michigan High School Athletic Association's (MHSAA's) prior request for interlocutory appeal. The Department of Education promulgates regulations interpreting and enforcing Title IX. 34 C.F.R. Pt. 106. The Department of Justice coordinates the

enforcement of Title IX by executive agencies. Exec. Order No. 12,250, 3 C.F.R. 298 (1981); 28 C.F.R. 0.51. The United States also has appeared as amicus in cases involving similar questions about the application of Title IX to the National Collegiate Athletic Association. See *NCAA* v. *Smith*, 525 U.S. 459 (1999), and *Cureton* v. *NCAA*, 198 F.3d 107 (3d Cir. 1999).

STATEMENT OF THE CASE

1. In June 1998, parents of female student-athletes and an organization of parents and students sued MHSAA[1] under Title IX, the Equal Protection Clause of the Fourteenth Amendment, and 42 U.S.C. 1983, alleging that MHSAA discriminates against female athletes and curtails their opportunities to participate in athletics by, among other things, requiring girls to play sports in non-traditional seasons, failing to sanction additional sports for girls, and setting shorter athletic seasons for some girls' sports compared to boys' sports. The complaint also contains a claim under Michigan's Elliot-Larsen Civil Rights Act, which prohibits discrimination in the provision of a public service or public accommodation.

2. Since September 2000, the United States has actively participated as amicus in this case. At the United States' urging, the parties submitted to mediation, which culminated in the settlement of all claims except for the

---

[1] MSHAA regulates interscholastic athletics in Michigan. It is comprised of over 700 public and private secondary schools, and includes virtually all public secondary schools in the State. Its responsibilities include promulgating eligibility and competition rules and disciplining member schools for rule violations. MHSAA is governed by a Representative Council, consisting of 14 elected members, all of whom are employed by member schools.

remaining issue of whether "MHSAA schedules athletic seasons and tournaments for six girls' sports during less advantageous times of the academic year than boys' athletic seasons and tournaments, and that this scheduling of girls' athletic seasons constitutes legally inequitable treatment." *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 807 (W.D. Mich. 2001). Both the parties and the United States presented evidence at the eight-day bench trial as well as submitted post-trial briefs on this single issue.

3. On December 17, 2001, the district court issued its decision, holding that MHSAA's girls' athletic schedules in volleyball, basketball, soccer, swimming and diving, tennis, and golf violated the Fourteenth Amendment, Title IX, and provisions of the state civil rights law. *Id.* at 861-862 (corrected order issued on Dec. 21, 2001). With respect to the Fourteenth Amendment claim, the court held that MHSAA was a state actor, pursuant to *Brentwood Academy* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001); that MHSAA intentionally treats boys and girls differently by scheduling their seasons for different times of the year; and that MHSAA failed to show that this different treatment serves an important governmental interest. 178 F. Supp. 2d at 846-849. The court also found that MHSAA is subject to Title IX because it had "controlling authority" over the high schools' sports schedules. *Id.* at 855. The court further made detailed factual findings concerning how the girls' sports, unlike the boys' sports, are played in seasons that disadvantage the student-athlete with respect to, *inter alia*, college recruiting opportunities, skills development, and overall playing experience. See

id. at 817-836; see also *id*. at 836-839.

4. The district court ordered MHSAA to submit, by May 24, 2002, a remedial plan for alleviating the different treatment of male and female athletes. *Id*. at 861-862. After plaintiffs and the United States comment on MHSAA's proposal, the court would then decide on an appropriate compliance plan. *Id*. at 862.

5. In addition to appealing the district court's liability finding, MHSAA moved to stay the remedy portion of the litigation in the district court. Both plaintiffs and the United States opposed that motion. At the February 15, 2002, hearing on the stay motion, the district court denied that motion both orally and in a written order.

ARGUMENT

I

THE DISTRICT COURT'S ORDER SOLELY FINDING LIABILITY IS NOT A FINAL APPEALABLE ORDER UNDER 28 U.S.C. 1291

The final judgment rule, embodied in 28 U.S.C. 1291, provides that interlocutory orders entered by a trial court may not be reviewed by a court of appeals until the trial court enters a final judgment resolving all issues in a case, leaving the district court nothing to do but execute the judgment. See *Cunningham* v. *Hamilton County*, 527 U.S. 198, 204 (1999). Here, MHSAA seeks to appeal the district court's order that found defendant in violation of the Fourteenth Amendment, Title IX, and Michigan's Elliot-Larsen Civil Rights Act and required

defendant to submit a proposed remedial plan. This is not a final order, appealable under 28 U.S.C. 1291, because it does not end the litigation and the question of the appropriate remedy remains to be determined.

Indeed, this Court has held that such an order requiring a party to submit a remedial plan does not constitute a final appealable order under Section 1291. For example, in *Groseclose* v. *Dutton*, 788 F.2d 356, 359, 361 (6th Cir. 1986), the Court granted the plaintiffs' motion to dismiss because the district court order, requiring defendants to submit a plan to remedy the unconstitutional conditions at a state penitentiary, was not a final appealable order under Section 1291. Similarly, in *Bradley* v. *Milliken*, 468 F.2d 902, 902-903 (6th Cir.), cert. denied, 409 U.S. 844 (1972), the Court held that an order requiring the parties to submit a desegregation plan was not a final appealable order under Section 1291 or an interlocutory order appealable under Section 1292(a)(1). Accord *Henrietta D.* v. *Giuliani*, 246 F.3d 176, 180-182 (2d Cir. 2001); *Jackson* v. *Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980, 989 (10th Cir. 1992); *Navarro-Ayala* v. *Hernandez-Colon*, 956 F.2d 348, 350 (1st Cir. 1992); *Balla* v. *Idaho State Bd. of Corr.*, 869 F.2d 461, 464-465 (9th Cir. 1989); *Sherpell* v. *Humnoke Sch. Dist. No. 5*, 814 F.2d 538, 539-540 (8th Cir. 1987); *Hoots* v. *Pennsylvania*, 587 F.2d 1340, 1346-1347 (3d Cir. 1978); *Beare* v. *Briscoe*, 498 F.2d 244, 245 n.1 (5th Cir. 1974); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring) (denying petition for certiorari because the district court had not determined the appropriate remedy and consequently had not reached a final judgment).

Proceeding to briefing on the merits at this stage, moreover, will needlessly delay this litigation and waste judicial resources because this Court will likely revisit this case once a remedial plan is adopted. As the D.C. Circuit stated in *Franklin* v. *District of Columbia*, 163 F.3d 625, 629 (D.C. Cir. 1998), "To hold that defendants in injunction actions must immediately appeal orders finding only that they are liable would * * * erode the long-standing policy against piecemeal litigation."

II

THE DISTRICT COURT'S ORDER IS NOT APPEALABLE UNDER 28 U.S.C. 1292(a)(1)

A district court order requiring parties to submit a remedial plan may be appealable under 28 U.S.C. 1292(a)(1), which provides appellate jurisdiction over interlocutory orders granting injunctions, only if the order requiring the plan clearly contains other injunctive relief or specifies the nature, requirements, and extent of the relief to be afforded by the plan submitted. See *Groseclose* v. *Dutton*, 788 F.2d 356, 359-360 (6th Cir. 1986); *Jackson* v. *Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980, 988 (10th Cir. 1992). The order in this case does not meet either condition and, therefore, Section 1292(a)(1) does not apply.

First, this Court has repeatedly recognized that an order directing a party to submit a remedial plan does not constitute an injunction under 28 U.S.C. 1292(a)(1). See *Groseclose*, 788 F.2d at 360; *Reed* v. *Rhodes*, 549 F.2d 1050, 1051 (6th Cir. 1976); *Bradley* v. *Milliken*, 468 F.2d 902, 902-903 (6th Cir. 1972). An

order that neither prohibits nor requires anything other than the submission of a plan, as in this case, cannot be deemed as providing injunctive relief. See *Spates* v. *Manson*, 619 F.2d 204, 210 (2d Cir. 1980); *Hart* v. *Community Sch. Bd.*, 497 F.2d 1027, 1030 (2d Cir. 1974) ("[W]ithout any 'injunction' other than the direction to file the plan, the decision is not appealable at that time."). To qualify as an "injunction" under Section 1292(a)(1), the order must grant part of the ultimate, coercive relief sought; thus, a declaration of liability without providing any coercive relief is not appealable under 1292(a)(1). See *Booher* v. *Northern Ky. Univ. Bd. of Regents*, 163 F.3d 395, 397 (6th Cir. 1998) (order holding university's Sexual Harassment Policy was facially unconstitutional but not requiring or forbidding any party from doing any certain act was not appealable under 1292(a)(1) because it did not provide any injunctive relief); *Henrietta D.* v. *Giuliani*, 246 F.3d 176, 182 (2d Cir. 2001) (order declaring liability and appointing magistrate to monitor and compel compliance with the judgment was not appealable); *Mercer* v. *Magnant*, 40 F.3d 893, 896 (7th Cir. 1994) ("Only orders awarding relief on the merits, or effectively foreclosing some element of relief, may be appealed as injunctions."); cf. *National Am. Ins. Co.* v. *CenTra, Inc.*, 151 F.3d 780, 784-785 (8th Cir. 1998) (order that required divestiture and directed parties to submit proposals for an orderly divestiture acted as an injunction to prevent the defendants from disposing their stock).

As this Court stated in *Reed*, 549 F.2d at 1051, the prohibition against discrimination is "already imposed by the Constitution"; thus, an order directing

defendants to assist in developing a remedial plan "does not compel defendants to perform any particular act, except to participate in the formulation of a remedial plan" and such an order does not amount to an appealable injunction, pursuant to Section 1292(a)(1). See also *Hendrickson* v. *Griggs*, 856 F.2d 1041, 1044 (8th Cir. 1988) ("[I]t is not enough [for appellate jurisdiction under 1292(a)(1)] if the order simply commands the state 'to make a start, largely planning,' toward compliance.").[2]

Nor does the second qualification for appellate jurisdiction under Section 1292(a)(1) apply. The district court order did not outline in detail the nature and content of the remedy. Instead, the court determined that the constitutional and statutory rights of female student-athletes had been violated and gave MHSAA and plaintiffs input in formulating an appropriate remedy by ordering MHSAA to propose a remedial plan and allowing the plaintiffs an opportunity to comment on the proposed plan. Although the district court opined about switching particular seasons, 178 F. Supp. 2d at 827, 831, 841, the order expressly states that "MHSAA may design the new schedule in a number of different ways," "MHSAA is not required to combine seasons of girls' teams and boys' teams in any particular

---

[2] Although the district court's decision states that it will "enjoin" MHSAA "from continuing its current scheduling of interscholastic athletics seasons in Michigan," it did not impose such an injunction that would take immediate effect. 178 F. Supp. 2d 862. Instead, it stated that the court would "retain jurisdiction over this case to order that an appropriate remedy be adopted in a Compliance Plan to be submitted by Defendant MHSAA." *Ibid.* Moreover, the "Judgment and Injunctive Order," does not enjoin MHSAA's current seasons schedule.

sport[,]" and "nothing prevents Defendant MHSAA from utilizing various other scheduling mechanisms designed to treat males and females alike." *Id*. at 862. MHSAA thus could propose any number of approaches to remedy the violations found by the district court.

The order in this case is similar to the order in *Groseclose*. In *Groseclose*, 788 F.2d at 360, the district court found that the totality of the conditions for death row inmates amounted to cruel and unusual punishment and "suggested that a classification system may help to alleviate these concerns." This Court found that such an order was not appealable under Section 1292(a)(1) because, although the district court suggested a classification system, it "refused to order the implementation of such a system, and instead left to defendants the solution to the problems caused by such non-classification." *Ibid*. According to the Court, defendant could propose to remedy some or all of the conditions identified by the district court to alleviate the constitutional violations; thus, the defendant could choose from "a variety of alternatives" in its remedial plan and that belied any assertion that the district court order specified the nature and content of the remedial plan. *Id*. at 360-361.

Other courts have also found that when the trial court "merely made specific recommendations as to how [a statutory or constitutional violation] * * * might be corrected" but directed the defendant to propose a remedial plan, such an order does not fall within Section 1292(a)(1). See *Spates*, 619 F.2d at 207, 210 (order that listed 14 books or sets of books that magistrate felt were "necessary" in a

prison law library was not a final order because the order "also indicated that even these items were not strictly necessary, asking that the plan specify which books would be added to the library"); see also *Jackson*, 964 F.2d at 989 (order allowing parties "significant discretion" to prepare and implement a plan was not a final order under 1292(a)(1)); *Hendrickson*, 856 F.2d at 1044 (order finding that new legislation may have been the State's "'most direct solution,'" but also stating "that 'this [was] only one of several ways to meet the state's federal obligations[,]'" was not appealable under 1292(a)(1)).

Even if the district court order specifies to a limited extent the content of the plan to be submitted, appellate jurisdiction does not exist where the order, read in its entirety, directs the defendant to formulate a plan for the district court's approval. See *Sherpell* v. *Humnoke Sch. Dist. No. 5*, 814 F.2d 538, 539-540 (8th Cir. 1987); *Hoots* v. *Pennsylvania*, 587 F.2d 1340, 1350 (3d Cir. 1978) ("The guidelines supplied by the district court for the defendants to follow in preparing the plan were mere generalities."); *Hart*, 497 F.2d at 1029 (order requiring parties to submit a desegregation plan "to take account of the 'six basic elements in successful school integration'" was not appealable under 1292(a)(1)). Cf. *United States* v. *Alabama*, 828 F.2d 1532, 1537-1538 & n.16 (11th Cir. 1987) (order requiring desegregation plan in higher education was appealable where district court had "already 'substantially prescribed' the remedial plan" by spelling out the offensive policies and practices that must be abolished and ordering that the proposed plan be "consistent 'with the findings and the * * * reasonable inferences

* * * flowing from the court's memorandum of opinion'"), cert. denied, 487 U.S. 1210 (1988); *Board of Educ.* v. *Dowell*, 375 F.2d 158, 162 (10th Cir.), cert. denied, 387 U.S. 931 (1967) (order that directed school board "to prepare and submit a [desegregation] plan substantially identical to that set out" in a plan previously prepared by a court-appointed panel of experts was a final order).

Here, appellate jurisdiction may not be invoked merely because the district court ordered that a remedial plan be in place by the 2003-2004 academic year. Specifically, the order provides: "The Court will order that Defendant MHSAA bring its scheduling of the seasons of high school sports into compliance with the law by the 2003-2004 school year. Defendant MHSAA will be ordered to submit a Compliance Plan consistent with this Opinion by May 24, 2002, detailing a new schedule for sports seasons that complies with the law." 178 F. Supp. 2d at 861. Similar to the compliance date in the order in *Hendrickson*, the date in the district court's order was simply meant to provide "guidance" for MHSAA in preparing its remedial plan. See 856 F.2d at 1045. Indeed, as the Eighth Circuit stated in *Hendrickson*, a district court can address the remedy issue only after it has had an opportunity to consider the defendant's remedial plan and the plaintiffs' comments on the proposed plan. *Ibid.*

The inclusion of the goal of having a remedial plan in effect by the 2003-2004 academic year in the district court's order is also virtually identical to the order at issue in *Hart*, 497 F.2d at 1029, in which the district court provided that "[t]he parties will have until March 1, 1974 to submit such a detailed

[desegregation] plan to be placed in operation by September, 1974." The Second Circuit concluded that that language did not order the desegregation of schools by September 1974 but "simply directed that the [proposed] plans to be submitted by March 1, 1974 should so provide." *Id*. at 1031. Reading the 2003-2004 date in context with the rest of the district court's order – which emphasized that MHSAA was free to choose how it wanted to bring its seasons' schedule in compliance with the law and that the plaintiffs and United States would have the opportunity to comment on MHSAA's proposal – it cannot be disputed that the purpose of the 2003-2004 date was to provide a reasonable time frame for the parties to develop an appropriate remedial plan. See 178 F. Supp. 2d at 862. In sum, the district court's "procedural and substantive guidance merely ensure that a plan comporting with the law will be developed * * * [and appellate jurisdiction] should not be invoked on the basis of the district court's directions for the efficient formulation of a legal plan." *Sherpell*, 814 F.2d at 540 (order requiring participation of a bi-racial committee in developing a plan to eliminate the racial atmosphere in schools was not appealable).[3]

---

[3] The other exceptions to the final judgment rule, Federal Rule of Civil Procedure 54(b) and 28 U.S.C. 1292(b), also do not apply because those provisions require the district court to enter final judgment with respect to a discrete issue or certify the order for interlocutory appeal, respectively. This was neither sought by defendants nor done by the district court in this case. Moreover, the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) – permitting interlocutory review of collateral orders that conclusively determined a disputed question, resolved an important issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from final

(continued...)

CONCLUSION

For the above stated reasons, the Court should grant plaintiffs-appellees' motion to dismiss.

Respectfully submitted,

RALPH F. BOYD, JR.
Assistant Attorney General

DENNIS J. DIMSEY
TERESA KWONG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section – PHB 5012
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-4757

[3](...continued)
judgment – is inapplicable because the district court's liability finding is not separate from the merits of the action and would be reviewable after final judgment is entered. Cf. *Mahaley* v. *Cuyahoga Metro. Hous. Auth.*, 500 F.2d 1087, 1090 n.3 (6th Cir. 1974) (order requiring preparation of a plan to provide nondiscriminatory, low-cost housing was a final appealable order within the meaning of 28 U.S.C. 1291 under *Cohen* because, *inter alia*, there was a serious question of the district court's jurisdiction), cert. denied, 419 U.S. 1108 (1975).

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2002, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISMISS were served by Federal Express, next-day mail, on:

William M. Azkoul
161 Ottawa Avenue, N.W.
Suite 111-A
Grand Rapids, MI 49503

Carole Bos
Bos & Glazier
300 Ottawa Avenue, N.W.
Suite 800
Grand Rapids, MI 49503

Edmund J. Sikorski
3300 Washtenaw Avenue
Suite 240
Ann Arbor, MI 48104

I further certify that on February 28, 2002, two copies of the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION TO DISMISS were served by first-class mail, postage prepaid, on:

H. Rhett Pinsky
Pinsky, Smith, Fayette, & Hulswitt
1515 McKay Tower
Grand Rapids, MI 49503

Philip Cohan
Robin Bohnenstengal
Piper, Marbury, Rudnick & Wolfe
1200 Nineteenth Street, N.W.
Washington, D.C. 20036

Kristen Galles
Equity Legal
10 Rosecrest Avenue
Alexandria, VA 22301

Marcia D. Greenberger
Neena Chaudhry
The National Women's Law Center
11 Dupont Circle, Suite 800, N.W.
Washington, D.C. 20036

_____

Teresa Kwong
Attorney