

# Florida Parents for Athletic Equity

June 3, 2009

Mr. Roger Dearing  
Florida High School Athletic Association  
1801 N.W. 80th Boulevard  
Gainesville, FL 32606

Mr. Leonard Ireland  
Clayton-Johnston, P.A.  
18 N.W. 33rd Court  
Gainesville, FL 32607

*Re: FHSAA Schedule Cuts Imposing Discrimination Against Female Students*

Dear Messrs. Dearing and Ireland,

On April 27, 2009, the Florida High School Athletic Association (“FHSAA”) board of directors voted to impose state-sanctioned gender discrimination by cutting regular-season athletic schedules by 20 percent for varsity contests and 40 percent for junior varsity contests, while exempting football and competitive cheerleading. The FHSAA’s proposed cuts discriminate against women in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 – 1688 (“Title IX”), and the Florida Educational Equity Act.

Under the law, high school athletics are educational programs. Florida’s schools provide funds for sports participation opportunities not for financial gain, but because they provide boys and girls, from diverse socioeconomic, racial, and ethnic backgrounds, with positive educational benefits, including higher educational aspirations, improved school attendance, increased math and science enrollment, more time spent on homework, higher enrollment in honors courses, and improvements in self-concept.<sup>1</sup> Girls and young women today face a daunting array of increasing physical health risks in addition to obesity, such as heart disease, breast cancer, osteoporosis, tobacco and drug use, unwanted teen pregnancy, sexually transmitted diseases, depression and suicide. These health risks account for much of the more than \$1 trillion spent on healthcare for

---

<sup>1</sup> See H.W. Marsh, *The Effects of Participation in Sport During the Last Two Years of High School*, 10 Soc. Sport J. 18 (1993). See generally, The Tucker Center for Research on Girls & Women in Sport (2007). *The 2007 Tucker Center Research Report, Developing Physically Active Girls: An evidence-based multidisciplinary approach*. University of Minnesota, Minneapolis, MN, available at <http://cehd.umn.edu/TuckerCenter/projects/TCRR/2007-Tucker-Center-Research-Report.pdf>

treating these issues.<sup>2</sup> The available research demonstrates that more physical activity and sports participation are fundamental solutions for many of these serious health and social problems faced by our nation's young girls.<sup>3</sup> The educational benefits of athletics must be equally made available to our male and female students in Florida.

**The FHSAA is Subject to the United States Constitution, Title IX and the Florida Educational Equity Act.**

The FHSAA is a state actor that must comply with the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution. *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288 (2001)(state high school athletic associations are state actors for purposes of Section 1983 and the enforcement of constitutional rights); *See also Communities for Equity v. Michigan High School Athletic Assn.*, 178 F. Supp. 3d 805, 847 (W.D. Mich. 2001), *aff'd* 377 F.3d 504 (6<sup>th</sup> Cir. 2004).

The FHSAA is also subject to Title IX, which provides in relevant part:

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.

20 U.S.C. § 1681(a). An association, like FHSAA, is covered by Title IX when its member schools have ceded controlling authority over their federally funded athletics programs to the organization. “Any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether that entity is itself a recipient of federal aid.” *Communities for Equity*, at 581.

In addition, the FHSAA is covered by the Florida Educational Equity Act, which prohibits gender discrimination in public education. It extends protection to students enrolled in public educational institutions that receive or benefit from either state or federal financial assistance. Fla. Stat. § 1000.05. The Florida Act lists the same factors for establishing discrimination as are set forth in 34 C.F.R. § 106.41(c)(1)-(10). The legal analysis employed in Title IX cases and its interpretive regulations is equally applicable to the Florida Act. *See e.g., Landow v. Sch. Bd. Of Brevard County*, 132 F. Supp.2d 958 (M.D. Fla. 2000).

---

<sup>2</sup> *See generally* Don Sabo et al., *The Women's Sports Foundation Report: Her Life Depends On It: Sport, Physical Activity and the Health and Well-Being of American Girls* (2004), available at [http://www.womenssportsfoundation.org/binary-data/WSF\\_Article/pdf\\_file/990.pdf](http://www.womenssportsfoundation.org/binary-data/WSF_Article/pdf_file/990.pdf) (“*Her Life Depends On It*”) (a comprehensive survey of scientific research on girls' health, sports participation, and physical activity).

<sup>3</sup> *Id.*

The regulations implementing Title IX (and by extension the Florida Act) expressly state that:

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient...

34 C.F.R. § 106.41(a). They also mandate equal treatment in specific areas, including the scheduling of games and practice times. 34 C.F.R. §106.41(c)(3). The 1979 Policy Interpretation promulgated by the Office for Civil Rights provides even more specific guidance on scheduling:

Scheduling of Games and Practice Times; Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) **The number of competitive events per sport;**
- (2) The number and length of practice opportunities;
- (3) The time of day competitive events are scheduled;
- (4) The time of day practice opportunities are scheduled; and
- (5) **The opportunities to engage in available pre-season and post-season competition.**

44 F.R. 71,411 at 71,416.

### **FHSAA's Proposed Cuts Disproportionately Affect Girls' Athletic Opportunities**

FHSAA's recent scheduling cuts violate these parameters. FHSAA does not intend to apply the cuts uniformly. Instead, it expressly exempts football, the sport with the largest number of participants. FHSAA's decision to exempt cheerleading does not make this decision equitable because (1) football has far more exempt participants than does cheerleading and (2) cheerleading, as conducted by the FHSAA, does not qualify as a sport for Title IX purposes.

Here, the FHSAA's decision to exempt only football and cheerleading discriminates against girls. The FHSAA's decision exempts a large percentage of male athletes, but just a tiny fraction of female athletes, as the data clearly prove.

- In 2007, FHSAA schools reported a total of 36,101 boys and 3 girls participated in the 534 varsity football programs in Florida (of which 486 participated in the FHSAA State Football Series).<sup>4</sup>
- In contrast, in 2008 just 4,310 girls and 201 boys participated in competitive cheerleading; 163 schools competed in the 2009 FHSAA State Competitive Cheerleading Championships, or just under 3,500 girls.
- For the 2007 – 2008 academic year, 31,791 more boys played football than girls participated in cheerleading.

As a result, the proposed cuts would dramatically affect the availability of competitive opportunities for girls, who would be disproportionately subject to the cutbacks. The exemption for football and competitive cheerleading, quite simply, shelters the competitive opportunities for tens of thousands of boys versus small number of girls thereby illegally skewing the playing field across Florida.

The Office of Civil Rights (“OCR”) has repeatedly rejected attempts by state high school athletic associations to have their cheerleading programs approved as sports for Title IX purposes. It has laid out a very detailed list of factors that must be met for an activity to qualify as a sport. FHSAA’s version of competitive cheerleading does not meet these factors.

In short, the OCR distinguishes a sport from activity by discerning the primary purpose of the activity, which must be to provide regular competitions against other teams during a similar athletic season with equal coaching, access to medical treatment and with objective benchmarks for success -- much like gymnastics or diving. Cheerleaders in Florida, by contrast, are only required to participate in four side-line events in order to qualify for the State Championships. Cheerleading has no playoff requirement, no regional competition, and no other sport in Florida abides by the same type of competitive rules. Indeed, the "rules" for cheerleading are minimal, just two pages, while other sport’s rules and regulations require books. None of the competitive cheerleading rules deal with objective judging criteria. The FHSAA has merely taken a currently-existing activity, like the band or the flag team, and attempted to transform it by re-defining cheerleading as a "sport" by providing an end-of-season competition.

### **The Effects of Budget Shortfalls Cannot Be Disproportionately Borne By Girls**

Media accounts report that the FHSAA made disproportionate cuts for financial reasons. However, even if cutting more girls’ competitive seasons would save the FHSAA and member schools money, lack of funds is not a defense to gender discrimination under Title IX. See e.g., *Roberts v. Colo. State Univ.*, 814 F. Supp. 1507, 1518 (D. Colo. 1993); *Cook v. Colgate Univ.*, 802 F. Supp. 737, 750 (N.D.N.Y. 1992).

---

<sup>4</sup> A total of 192 schools qualified to participate in postseason playoffs by placing first or second in their respective districts. While the FHSAA does not track the number of junior varsity programs, the majority of schools have JV programs.

Indeed, if schools and the FHSAA could use financial concerns as a sole reason for disparity of treatment, Title IX would become meaningless. See e.g., *Haffer v. Temple*, 678 F. Supp. 517, 530 (E.D. Pa. 1987).

In light of the law and the information available, the cuts, if not rescinded, result in violations of federal constitutional and statutory law as well as state anti-discrimination laws. A litigant challenging the proposed rule, if successful, would likely obtain a court order rescinding the rule, ordering the payment of damages, and requiring the payment of costs and attorneys' fees. Time is of the essence given the upcoming sports seasons, and the likelihood of irremediable harm to affected students.

Absent a retraction of the proposed rule this week, expect prompt legal action to protect the rights of Florida's young women. If you have any questions or need any further information, please do not hesitate to contact us. We look forward to hearing from you. Thank you very much.

Sincerely,

*Nancy Hogshead-Makar*

Nancy Hogshead-Makar  
Wayne Hogan  
Leslie Goller  
David Baron

Spokespeople for Florida's Parents for Athletic Equity

cc: All FHSAA Board Members