IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SILVANA COOK, on behalf of her minor daughter; SHARI ROBINSON, on behalf of her minor daughter; ERNESTINE BREWER, on behalf of her minor daughter; SCOTT PIRIE, on behalf of his minor daughter; GRETCHEN GOODLET, on behalf of her minor daughters; OMAR PASOLODOS, on behalf of his minor daughter;

Plaintiffs.

v.

FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION,

Defendant.

Case No.: 03:09-cv-547-J-32HTS

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This case involves serious allegations of intentional discrimination against female student athletes by the Defendant Florida High School Athletic Association (FHSAA) in violation of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, two federal laws enforced by the United States. Plaintiffs' allegations include the following. FHSAA has mandated 20% varsity and 40% sub-varsity reductions in the number of games permitted for all sports except football and cheerleading in the two coming school years. By exempting football, FHSAA has privileged the most popular sport for boys, involving 36,101 boys. Though FHSAA also exempted cheerleading, this activity involves only 4,310 girls and 201 boys and may not

even qualify as a sport under Title IX's criteria. Even if cheerleading qualifies as a sport, FHSAA has nonetheless exempted 32,000 more boys than girls, thereby subjecting almost all of the 95,741 female athletes in Florida (95%) to these reductions while exempting over a quarter of the 131,247 male athletes (28%) from the reductions. Plaintiffs notified FHSAA that its conduct violated Title IX and the Equal Protection Clause, but FHSAA chose to proceed regardless, exacerbating existing inequalities in the number of weeks FHSAA affords football (23 weeks) relative to the majority of girls' sports (15 weeks).

These allegations clearly establish claims of intentional discrimination under Title IX and the Equal Protection Clause. Both claims also have a substantial likelihood of success on the merits. For these reasons and those set forth below, the United States urges this Court to deny FHSAA's Motion to Dismiss and to grant Plaintiffs' Motion for a Preliminary Injunction.

INTERESTS OF THE UNITED STATES

This case poses questions regarding the proper interpretation and application of Title IX and the Equal Protection Clause to a state high school athletic association's rules for athletic programs throughout the State of Florida. The United States has an interest in ensuring these two federal laws are interpreted and applied correctly given its responsibility for enforcing both.

The United States Department of Education promulgates regulations interpreting and enforcing Title IX. 34 C.F.R. Pt. 106. Under Title IX and its implementing regulations, no individual may be discriminated against on the basis of sex in any interscholastic athletic program of an institution covered by Title IX. 34 C.F.R. § 106.41(a). The United States Department of Justice, through its Civil Rights Division, coordinates the implementation and enforcement of Title IX by the Department of Education and other executive agencies. Exec.

Order No. 12,250, 45 Fed. Reg. 72,995 (Nov. 4, 1980); 28 C.F.R. § 0.51 (1998). The United States' enforcement efforts include participating in Title IX athletics cases as amicus curiae and plaintiff-intervenors. See, e.g., Communities for Equity v. Mich. High Sch. Athletic Ass'n, 459 F.3d 676, 703 (6th Cir. 2006); Pedersen & United States v. S.D. High Sch. Activities Ass'n, CA: 00-4113 (D. S.D. 2000).

The United States Department of Justice also has significant responsibilities for the enforcement of the Civil Rights Act of 1964, which prohibits Equal Protection violations on the basis of sex, see Title IV, 42 U.S.C. § 2000c-6, and the Attorney General may intervene in any lawsuit in federal court seeking relief from a denial of equal protection under the Fourteenth Amendment. 42 U.S.C. § 2000h-2. The United States thus has an interest in the orderly development of the law regarding both Title IX and the Equal Protection Clause.

STATEMENT OF THE CASE

On June 16, 2009, six parents, filing on behalf of their student athlete daughters who attend FHSAA member schools, sued FHSAA under Title IX, the Equal Protection Clause, and 42 U.S.C. § 1983. Plaintiffs claim that FHSAA's new Policy 6 intentionally discriminates against female athletes by denying them equal opportunities with respect to game scheduling. Their complaint contains a similar claim under the Florida Educational Equity Act (FEEA).

Plaintiffs also filed a Motion for a Temporary Restraining Order ("TRO Motion") on June 19, 2009, and a Motion for a Preliminary Injunction ("PI Motion") on June 22, 2009, supported by affidavits from three of the parents. This Court bypassed the TRO Motion and set an evidentiary hearing on the PI Motion for July 17, 2009. This Court ordered FHSAA to file any response to the PI Motion by July 8, 2009, with any supporting evidentiary materials, and

authorized Plaintiffs to file an optional reply by July 14, 2009. On July 1, 2009, FHSAA filed a Motion to Dismiss arguing that Plaintiffs pled a disparate impact claim under Title IX, the Equal Protection Clause, and the FEAA. On July 8, 2009, FHSAA filed an Opposition to the PI Motion (Opposition), supported only by an Affidavit from Samuel Hester, the Associate Executive Director and Chief Administrative Officer of FHSAA (Hester Affidavit).

SUMMARY OF ARGUMENT

The Court should deny FHSAA's Motion to Dismiss with respect to Plaintiffs' Title IX and Equal Protection claims because accepting the factual allegations in the Complaint as true, Plaintiffs adequately pled an intentional discrimination claim under both federal laws. Both the Title IX and Equal Protection claims also have a substantial likelihood of success on the merits. FHSAA's Motion to Dismiss and its Opposition to Plaintiffs' PI Motion misconstrue Plaintiffs' claims as alleging only disparate impact discrimination. Interpreted appropriately, these claims establish that FHSAA's new Policy 6 constitutes an intentional, overall denial of equal game opportunities to female athletes under Title IX and that this practice cannot survive intermediate scrutiny under the Equal Protection Clause. Even assuming FHSAA's asserted goals of achieving consistent game reductions and providing financial help to FHSAA member schools are important objectives, FHSAA fails to provide an exceedingly persuasive justification that new Policy 6 – which inconsistently and intentionally limits the game opportunities of almost all female athletes while sparing over a quarter of all male athletes – substantially advances either goal. The United States therefore urges this Court to preliminarily enjoin this policy because the irreparable harm to Plaintiffs caused by these reductions outweighs any potential threat to FHSAA inherent in maintaining the game schedules of the last school year. The preliminary

injunction also serves the public interest in enforcing civil rights laws.

ARGUMENT

I. PLAINTIFFS' TITLE IX CLAIM SHOULD NOT BE DISMISSED AND HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

In both its Motion to Dismiss and its Opposition to Plaintiffs' PI Motion, FHSAA challenges the sufficiency of Plaintiffs' allegations and argues that Plaintiffs have pled only a disparate impact claim under Title IX. The United States first explains why Plaintiffs have adequately pled an intentional discrimination claim under Title IX with respect to FHSAA's Motion to Dismiss. This explanation also applies to FHSAA's Opposition to Plaintiffs' PI Motion. The United States then explains why Plaintiffs' Title IX claim has a substantial likelihood of success on the merits by refuting the additional arguments in the Opposition.

A. FHSAA's Motion to Dismiss Plaintiffs' Title IX Claim Should be Denied

When deciding a Rule 12(b)(6) motion to dismiss, the district court must "limit[] its consideration to the pleadings and exhibits attached thereto." Grossman v. Nationsbank, N.A., 225 F.3d 1228, 1231 (11th Cir. 2000). Federal Rule of Civil Procedure 8(a)(2) requires that the complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). This requirement serves to "give the defendant fair notice of what the claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). To survive a motion to dismiss, the complaint's factual allegations must be taken as true "even if doubtful in fact" and "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (internal parentheses omitted). Meeting this threshold "do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."

Id. at 570. Because the Title IX allegations in Plaintiffs' Complaint more than satisfy these legal standards, this Court should deny FHSAA's Motion to Dismiss Plaintiffs' Title IX claim.

1. Plaintiffs Pled an Intentional Discrimination Claim Under Title IX

FHSAA characterizes Plaintiffs' Title IX claim as alleging only that new Policy 6 has a disparate impact on female athletes, not that it constitutes intentional discrimination. See Def.'s Mot. to Dismiss at 4. This characterization ignores allegations in the Complaint that provide fair notice that their Title IX claim is one of intentional discrimination. See Compl. ¶¶ 3, 37, 56, 57, 60, 61; Twombly, 550 U.S. at 555. These paragraphs provide the requisite "short and plain statement" of a plausible claim entitling Plaintiffs to relief. Fed. R. Civ. P. 8(a)(2); see Twombly, 550 U.S. at 570. For example, paragraph 61 states: "The unequal, disparate treatment of female athletes, as detailed above, demonstrates Defendant's *intentional* and conscious decision to discriminate on the basis of sex and to not comply with its Title IX obligations." Compl. ¶ 61 (emphasis added). This paragraph refutes FHSAA's contention that Plaintiffs did not allege that FHSAA acted with an intent to discriminate. See Def.'s Mot. to Dismiss at 5.

Plaintiffs' Complaint notifies FHSAA of the precise nature of their intentional discrimination claim under Title IX. Title IX's 1975 Regulations make clear that the statute's nondiscrimination provision, 20 U.S.C. § 1681(a), applies to interscholastic athletics and requires the "provi[sion] [of] equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c); see Compl. ¶¶ 32, 33. The Department of Education's 1979 Policy Interpretation clarifies that an evaluation of equality of opportunity with respect to the scheduling of games must consider "the equivalence for men and women of: (1) the number of competitive events per sport[,]" among other factors. 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979). As the Complaint

explains, FHSAA's new Policy 6 intentionally denies female athletes equal treatment and benefits with respect to scheduling games and practice times, and this denial violates FHSAA's Title IX duty to provide equal opportunity in athletics. Compl. ¶¶ 3, 32, 33, 36, 37, 38.

The 1979 Policy Interpretation and regulation, 34 C.F.R. § 106.41(c)(3), on which Plaintiffs rely "clearly aim to enforce § 901's [Title IX's] ban on intentional sex discrimination by demanding equal opportunity in athletics." Barrett v. West Chester Univ. of Pa., No. 03-CV-4978, 2003 WL 22803477, at *13 (E.D. Pa. Nov. 12, 2003). Therefore, "Plaintiffs' claim of intentional discrimination permits a private right of action to enforce th[is] regulation." Id. (rejecting Sandoval challenge to plaintiffs' claim to enforce 34 C.F.R. § 106.41c because the section "serve[s] to prohibit intentional sex discrimination").[1]

2. Plaintiffs Alleged Facts Demonstrating FHSAA's Discriminatory Intent

To establish a violation of Title IX and its implementing regulations, Plaintiffs must show only that FHSAA intended to treat women differently in crafting Policy 6's exemptions, not that FSHAA acted with a discriminatory motive or harbored animus against female athletes. See, e.g., Pederson v. La. State Univ., 213 F.3d 858, 881 (5th Cir. 2000) ("[The university] need not have intended to violate Title IX, but need only have intended to treat women differently."); Favia v. Ind. Univ. of Penn., 812 F. Supp. 578, 584 (W.D. Pa. 1993); Haffer v. Temple Univ., 678 F. Supp. 517, 539-40 (E.D. Pa. 1987). Despite FHSAA's assertions to the contrary, Plaintiffs' Title IX claim is supported by several alleged facts that would demonstrate that new

---

[1] Contrary to FHSAA's argument, see Def.'s Mot. to Dismiss at 3-4, even if the Supreme Court's holding with respect to Title VI in Alexander v. Sandoval, 532 U.S. 275 (2001), applies to Title IX, Sandoval is no bar to Plaintiffs' claim to enforce Title IX and this implementing regulation because this claim is not a disparate impact claim. See id. at 284 ("We do not doubt that regulations applying [Title VI's statutory] ban on intentional discrimination are covered by the cause of action to enforce that section [of the statute].").

Policy 6 is gender-based on its face, or, at the very least, reflects the requisite discriminatory intent by FHSAA in adopting the policy. See Def.'s Mot. to Dismiss at 5; Compl. ¶¶ 47-53; see also infra Sections II.A.2 & II.A.3. For example, Plaintiffs allege that new Policy 6 "expressly excludes boys' football, the sport in which the most boys participate," Compl. ¶ 48, and that "by exempting boys' football from this reduction, FHSAA discriminates on the basis of sex in violation of Title IX." Id. ¶ 56; see also id. ¶ 57 (FHSAA treats "boys' football players as a special, privileged class of athletes.").

In addition, Plaintiffs allege that the cheerleading exemption is not equal to the football exemption because OCR has not determined that cheerleading is a sport in Florida under its Title IX guidelines and that neither FHSAA nor its member schools conduct cheerleading in a way that would satisfy these guidelines. Id. ¶ 49. Even if cheerleading were to qualify as a sport under Title IX, Plaintiffs contend that new Policy 6 nonetheless intentionally discriminates against girls because it exempts almost nine times as many male athletes as female athletes from the 20% varsity and 40% sub-varsity reductions. Id. ¶¶ 50, 51. As a result, Plaintiffs claim that new Policy 6 "discriminates against girls by subjecting almost all of them but only some boys to its reductions." Id. ¶ 51.

Plaintiffs also include three factual allegations regarding FHSAA's history and decision-making regarding new Policy 6 that would demonstrate intentional sex-based discrimination by FHSAA. First, Plaintiffs claim that FHSAA previously discriminated against female athletes in 2002 by exempting boys' football from a 20% reduction in the number of competitions for all other sports. Compl. ¶ 52. Second, FHSAA allegedly has been discriminating against female athletes by providing boys' football with a total of 23 weeks of coaching, practices, and

competitions, while allowing only a total of 15 weeks for "the majority of girls' sports." Id. ¶ 53. The new Policy 6 exacerbates this alleged preexisting discrimination by reducing girls' "already shortened interscholastic opportunities additionally . . . by up to 40%." Id. ¶ 58. Third, although Plaintiffs allegedly told FHSAA that its new Policy 6 would violate Title IX and asked FHSAA not to proceed with the policy, FHSAA refused. Id. ¶ 60. This refusal or "failure to apply its new Policy 6 to all male and female sports uniformly or to exempt an equitable number of female athletes from its restrictions constitutes sex discrimination in violation of Title IX." Id. ¶ 57.

The factual allegations set forth above, which must be assumed to be true, support a "plausible" claim of intentional discrimination under Title IX. Twombly, 550 U.S. at 570. Accordingly, FHSAA's Motion to Dismiss should be denied with respect to the Title IX claim.

B. Plaintiffs' Title IX Claim Has a Substantial Likelihood of Success

In the Eleventh Circuit, the party seeking a preliminary injunction must demonstrate: (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered absent an injunction; (3) that the threatened injury to the movant outweighs the injury the proposed injunction may cause to the opposing party; and (4) that the proposed injunction would serve the public interest. Schiavo ex rel. Schindler v. Schiavo, 403 F.3d 1223, 1231 (11th Cir. 2005). When deciding whether to grant a motion for a preliminary injunction, "a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunctive proceeding.'" Levi Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985

(11th Cir. 1995) (citation omitted). To grant a preliminary injunction, the court "need not find that the evidence positively guarantees a final verdict in plaintiff's favor." Id.[2]

There is a substantial likelihood that Plaintiffs' Title IX claim will succeed on the merits because FHSAA's three counter-arguments in its Opposition to Plaintiffs' PI Motion should be rejected, and FHSAA fails to offer any justification for exempting football and cheerleading. First, FHSAA reiterates the argument from its Motion to Dismiss that Plaintiffs pled a non-viable claim of disparate impact under Title IX because they failed to allege that FHSAA adopted new Policy 6 with discriminatory intent. Def.'s Opp'n at 6-8. The Court should reject this argument for the reasons given above in Section I.A and the additional reasons stated below in Sections I.B.1-2 and II.B.1-3 with respect to the PI Motion. Second, FHSAA mistakenly argues that Title IX requires only a sport-by-sport comparison of the number of games scheduled. Id. at 10-11. Lastly, FHSAA unpersuasively contends that new Policy 6 is gender-neutral because football and cheerleading are open to both sexes. Id. at 11. Furthermore, even after the Court directed FHSAA to file any supporting evidence with its Opposition, see Order of June 24, 2009, C.A. No. 3:09-cv-547, FHSAA's Opposition and the attached Hester Affidavit failed to deny or refute key factual allegations raised in the Complaint. Moreover, FHSAA's public records confirm the number of girls and boys allegedly affected by new Policy 6 in Plaintiffs' Complaint. Compare numbers alleged in Compl. ¶¶ 50, 51 with FHSAA.org, 2007-2008 Sports Participation Survey, http://www.fhsaa.org/programs/participation/2007_08.asp (last visited July 14, 2009).

---

[2] Because these standards apply to both Plaintiffs' Title IX and Equal Protection claims, the United States' Brief first addresses whether the Title IX claim is likely to succeed on the merits in Section I.B, then whether the Equal Protection claim is likely to succeed on the merits in Section II.B, and finally if Plaintiffs meet the remaining three requirements for a preliminary injunction in Section III.

1. Statistics Regarding Unequal Game Opportunities for Female Athletes Are Relevant Evidence Supporting Plaintiffs' Title IX Claim

FHSAA argues that Plaintiffs' Title IX claim is unlikely to succeed on the merits by recasting the claim as one of disparate impact and then citing several cases for the proposition that private individuals may not bring a disparate impact claim under Title IX. See Def.'s Opp'n at 6-7 (citing cases); see also Def.'s Mot. to Dismiss at 3-4 (citing the same cases). These cases fail to establish that Plaintiffs' Title IX claim is unlikely to succeed because Plaintiffs have pled an intentional discrimination claim under Title IX. See Compl. ¶¶ 3, 27-39, 47-53, 54-61. Though Plaintiffs have not pled a disparate impact claim under Title IX, the statute makes clear that courts may consider "statistical evidence tending to show that . . . an imbalance exists with respect to the participation in, or receipt of the benefits of, any [athletic] program or activity by the members of one sex" "in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area" when evaluating whether Title IX has been violated. 20 U.S.C. § 1681(b). Thus, Plaintiffs' allegations that new Policy 6 exempts nearly nine times as many boys than girls from its reductions, Compl. ¶¶ 50, 51, (which FHSAA has not refuted and its own public records confirm[3]), is *relevant* evidence that is likely to establish FHSAA's intentional denial of equal game opportunities on the basis of sex in violation of Title IX. See Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993).

[3] FHSAA's public records reporting participation numbers by sport and sex for the 2007-08 school year confirm Plaintiffs' numerical calculations. FHSAA.org, 2007-2008 Sports Participation Survey, http://www.fhsaa.org/programs/participation/2007_08.asp (last visited July 14, 2009).

2. There is a Substantial Likelihood that Plaintiffs' Allegations of Intent Will Establish a Title IX Violation

In its Opposition, FHSAA again argues that Plaintiffs have not "alleged that FHSAA acted with intent to discriminate against female athletes by adopting revised Policy 6." Def.'s Opp'n at 7. Plaintiffs have made this allegation sufficiently, see supra Sections I.B.1-2, and in the Title IX athletics context, Plaintiffs must establish only that FHSAA intended to treat women differently when it adopted new Policy 6, not that FSHAA acted with a discriminatory motive or harbored animus against female athletes. See, e.g., Pederson, 213 F.3d at 881; Favia, 812 F. Supp. at 584; Haffer, 678 F. Supp. at 539-40. FHSAA's attempts to dispute that new Policy 6 constitutes intentional discrimination, Def.'s Opp'n at 10-11, will most likely fail because "[i]n the athletics realm of Title IX, intent is found on the face of most decisions." Barrett, 2003 WL 22803477, at *11-*12 (citing and discussing Title IX athletics cases in which courts found athletics-related decisions reflected intentional discrimination).[4]

FHSAA's failure to deny, let alone refute with evidence, four key factual allegations in Plaintiffs' Complaint renders the success of the Title IX claim all the more likely. First, FHSAA does not dispute, and its records confirm, that its new policy exempts nearly nine times as many boys as girls. See Compl. ¶¶ 50, 51. Second, FHSAA does not dispute that it exempted only football from a similar reduction in games in 2002 or that it has provided the majority of girls' sports only 15 weeks of coaching, games, and practices, while granting football 23 weeks. See

[4] See, e.g., Neal v. Bd. of Trustees of Cal. State Univs., 198 F.3d 763, 772 n.8 (9th Cir. 1999). In Neal, the court explained that athletics decisions are gender-based: "Unlike most employment settings, athletic teams are gender segregated, and universities must decide beforehand how many athletic opportunities they will allocate to each sex. As a result, determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons." Id. (emphasis in original).

id. ¶¶ 52, 53. Both facts are confirmed by FHSAA's public records.[5] Third, FHSAA does not dispute Plaintiffs' allegation that cheerleading fails to qualify as a sport under Title IX's criteria. See id. ¶ 49.[6] Lastly, FHSAA does not dispute that Plaintiffs notified it that new Policy 6 violated Title IX when it chose to proceed with implementing the policy. See id. ¶ 60. This last point is particularly significant because courts have considered whether "defendants were already on notice of their potential Title IX violations when they made their [disputed] decision" in determining if their decisions reflected intentional discrimination. Barrett, 2003 WL 22803477, at *12 (citing Pederson, 213 F.3d 858 at 880).[7] All of these uncontested allegations, several of which FHSAA's records confirm, increase the likelihood that Plaintiffs will prevail in proving a Title IX violation.

3. An Overall, Not a Sport-By-Sport, Comparison Is Appropriate

FHSAA urges denial of the preliminary injunction on the grounds that "male and female athletes are not treated differently under revised Policy 6." Def.'s Opp'n at 10. This argument is

---

[5] FHSAA's records confirm its 2002 decision to exempt football from a 10% across-the-board reduction in games. See News Release, FHSAA, Bd. Approves Football Classification Proposal, Sub-class in 2A (Nov. 25, 2002), *available at* http://www.fhsaa.org/news/2002/; compare 2002-03 FHSAA Handbook Policy 4, at 86-98, *available at* http://www.fhsaa.org/rules/handbook/ with 2003-04 FHSAA Handbook Policy 4, at 54-65, *available at* http://www.fhsaa.org/rules/handbook/. Although Plaintiffs allege it was a 20% reduction, FHSAA's records confirm the alleged exemption of football from the 2002 reductions that reduced the number of games from 28 to 25. See Compl. ¶ 52. FHSAA's records also confirm that the majority of sports in which girls participate receive 15 or fewer weeks and that football receives 23 weeks. See http://www.fhsaa.org/rules/handbook/0809_handbook.pdf, at 96-104; 2008-09 FHSAA Calendar Important Dates, *available at* http://www.fhsaa.org/calendar/2008_09.htm.

[6] FHSAA uses the word "sport" to refer to cheerleading one time, Def.'s Opp'n at 11, but does not deny Plaintiffs' allegations that OCR has not determined that cheerleading in Florida is a sport under Title IX's criteria or that the operation of cheerleading in Florida qualifies as a sport under these criteria. See Compl. ¶ 49. Nor has FHSAA presented any evidence that it does.

[7] See infra discussion at Section II.A.1 regarding a defendant's prior knowledge of the consequences of its contemplated actions.

premised upon a mistaken assumption that compliance with the Title IX obligation to provide equal opportunity with respect to game scheduling requires only that "girls and boys be treated equally on a sport by sport basis with respect to the number of competitive events." Id. at 11. Defendant cites the 1979 Policy Interpretation and a district court case for this assumption, but neither supports this argument. See id. at 10-11 (citing 44 Fed. Reg. at 71,416 and Landow v. Sch. Bd. of Brevard County, 132 F. Supp.2d 958 (M.D. Fla. 2000)). In Landow, the court compared the boys' baseball program to the girls' softball program because the plaintiffs "alleged disparities between" these two sports and "claim[ed] that these disparities violat[ed] [Title IX]." Id. at 959. The court found a Title IX violation in part because of inequities relating to practices and games, id. at 963, but the case did not establish that compliance with 34 C.F.R. § 106.41(c)(3) requires only a sport-by-sport comparison. If anything, because softball and baseball are not the same sport, the court's analysis in Landow supports looking across sports to evaluate equality.

With respect to the 1979 Policy Interpretation, FHSAA argues that the following sentence requires only a sport-by-sport comparison: "Compliance will be assessed by examining, among other factors, the equivalence for men and women of: (1) the number of competitive events per sport." 44 Fed. Reg. at 71,416. While compliance must consider the number of games in a given sport, this does not mean that compliance is achieved as long as the number of games for the female and male teams of the same sport are equivalent, as FHSAA suggests. See Def.'s Opp'n at 11. The fact that new Policy 6 reduces the number of games equally for the sports that have both female and male teams does not end the inquiry. See Compl. Ex. A. Were this not the case, a recipient could privilege any sport that had only a male

team by scheduling a high number of games while affording sports with only female teams low numbers of games because there would be no sport-by-sport comparison to make across gender lines. The sentence in the 1979 Policy Interpretation invoked by FHSAA did not intend this absurd result.

When read in its entirety, the 1979 Policy Interpretation requires an "overall" comparison of girls' and boys' equal athletic opportunities to determine compliance with Title IX. See, e.g., 44 Fed. Reg. at 71,415, 71,416, 71,417, 71,418 (using "overall" throughout).[8] Courts accord the 1979 Policy Interpretation substantial deference when evaluating Title IX claims.[9] Assessing equality with respect to "Other Athletic Benefits and Opportunities," id. at 71,415, which include the scheduling of games, id. at 71,416, requires comparing "the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes[,]" and "compliance" demands that "compared program components [be] equivalent, that is, equal or equal in effect." Id. at 71,415. Though compliance does not require "identical benefits, opportunities, or treatment" with respect to game scheduling, it does require that "the *overall* effects of any differences [be] negligible." Id. (emphasis added).

Once the overall game opportunities for both sexes have been compared, and "[o]verall determination of compliance" with 34 C.F.R. § 106.41(c) considers "a. [w]hether the policies of

---

[8] Cf. Dolan v. Postal Service, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase [in a statute] depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

[9] See, e.g., Cohen, 991 F.2d at 895, 896-97 (according deference to Department of Education's interpretation of Title IX, including its 1979 Policy Interpretation); McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 288-90 (2d Cir. 2004) (same); Chalenor v. Univ. of N.D., 291 F.3d 1042, 1047 (8th Cir. 2002) (same); Neal, 198 F.3d at 770, 771 (according deference to OCR's 1996 Clarification and associated letters clarifying athletics requirements).

an institution are discriminatory in effect; or . . . "c. whether disparities in benefits, . . . opportunities in individual segments of the program are substantial in and of themselves to deny equality of athletic opportunity." 44 Fed. Reg. at 71,417. Here, there is a strong basis on which to conclude both that new Policy 6 is "discriminatory in language [and] effect" and that it constitutes an overall, "substantial" denial of equal game opportunities on the basis of sex, id., because it exempts an overwhelmingly male sport with the most male participants as well as nearly nine times as many boys as girls from the game reductions. See Compl. ¶¶ 50-51. For these reasons, Plaintiffs have a strong likelihood of succeeding on the merits of their Title IX claim.

4. The Fact that Football and Cheerleading Are Not Single Sex Does Not Negate the Likelihood of Plaintiffs' Title IX Claim Succeeding

FHSAA argues that the exemptions are gender-neutral because "both sports are open to each gender" and FHSAA's Bylaws allow girls to join boys' athletic teams in a sport lacking a girls' team. Def.'s Opp'n at 11 (citing *Handbook*, Article 9.6). The fact that football is currently open to girls and included three female participants (i.e., 0.0083% of the 36,101 football players), see Def.'s Mot. to Dismiss at 2, neither negates nor mitigates the "substantial" inequality between the number of boys and girls who are afforded their full game schedule as a result of the football and cheerleading exemptions. See 44 Fed. Reg. at 71,417. The new policy nonetheless denies female athletes equal benefits and treatment by subjecting almost all of them (95% of them) to the policy's reductions, while exempting 28% of the male athletes from these reductions. See Compl. ¶ 50. Though three girls participated in football across the State, for virtually every school in Florida, the practice is that football is an exclusively male sport. The existence of female football players and male cheerleaders also does not negate FHSAA's intent

to discriminate because FHSAA had non-discriminatory choices that it declined even after Plaintiffs notified FHSAA that its new policy would violate Title IX. See Compl. ¶ 60.

While focusing on unpersuasive arguments for denying the preliminary injunction, FHSAA fails to offer any justification for exempting football and cheerleading.

II. PLAINTIFFS' EQUAL PROTECTION CLAIM SHOULD NOT BE DISMISSED AND HAS A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

FHSAA's Motion to Dismiss Plaintiffs' Equal Protection claim should be denied because Plaintiffs adequately allege that FHSAA's new Policy 6 constitutes intentional discrimination, not just disparate impact discrimination, in violation of the Equal Protection Clause. Plaintiffs' Equal Protection claim also has a substantial likelihood of success on the merits because FHSAA fails to offer an exceedingly persuasive justification that its asserted goals of consistency in game reductions and financial help to its member schools, even if important, are substantially related to a policy that applies those reductions in an inconsistent and discriminatory way on its face, when both goals could be achieved through a non-discriminatory policy of game scheduling.

A. Plaintiffs' Equal Protection Claim Should Not Be Dismissed

The legal standards for evaluating whether a complaint satisfies the requirements of Rule 8(a)(2) to survive a Rule 12(b)(6) motion, which are set forth above, apply equally to Plaintiffs' Equal Protection claim. Under these standards, Plaintiffs adequately pled an intentional discrimination claim under the Equal Protection Clause. Plaintiffs' factual allegations demonstrate that new Policy 6 is not gender-neutral, but rather gender-based; therefore, this Court should review it under intermediate scrutiny. Even if this Court were to conclude that FHSAA's new Policy 6 is gender-neutral, as FHSAA argues, Plaintiffs have alleged sufficient

facts demonstrating that FHSAA acted with discriminatory intent in adopting new Policy 6. Thus, this Court should deny FHSAA's Motion to Dismiss Plaintiffs' Equal Protection claim.

1. Plaintiffs Adequately Pled Intentional Discrimination by FHSAA in Support of Their Equal Protection Claim

FHSAA asserts that Plaintiffs "fail[ed] to allege discriminatory intent in more than a conclusory fashion" and "erroneously relie[d] on allegations of disparate impact for its Equal Protection claim." Def.'s Mot. to Dismiss at 8. To the contrary, Plaintiffs provided "fair notice" that their claim involves intentional sex discrimination in violation of the Equal Protection Clause. Twombly, 550 U.S. at 555; see Compl. ¶¶ 21, 63-69, 74. For example, paragraph 65 alleges that "by choosing to treat male and female athletes differently and by inequitably reducing the number of competition[s] for females by up to 40%, [FHSAA] intentionally discriminates on the basis of sex and deprives female student-athletes of their rights to equal protection secured by the Fourteenth Amendment." Id. ¶ 65. These paragraphs, delineating the specific nature of the intentional discrimination, are not mere "threadbare recitals of a cause of action's elements." Ashcroft v. Iqbal, 129 S.Ct. 1937, 1940 (2009).

FHSAA argues that "the only factual allegations relevant to the Equal Protection claim worthy of consideration" are those in paragraphs 47-53 and that these paragraphs merely allege that new Policy 6's football exemption "has a disparate impact on female athletes." Def.'s Mot. to Dismiss at 8. For the reasons stated above in Section I.A.2, the allegations stated in these paragraphs, taken as true, plausibly establish intentional discrimination. See Twombly, 550 U.S. at 570. In addition, Paragraph 68 alleges that Plaintiffs notified FHSAA that its new Policy 6 constituted sex discrimination in violation of the Fourteenth Amendment and that FHSAA nonetheless refused to rescind the policy. Compl. ¶ 68. These same factual allegations,

particularly the notice Plaintiffs gave to FHSAA, also refute FHSAA's argument that Plaintiffs failed to allege facts showing that FHSAA adopted new Policy 6 "because of its" adverse effect upon females. Def.'s Mot. to Dismiss at 8. This is not a case where the FHSAA "simply realized or otherwise could have guessed" how the football and cheerleading exemptions would affect female student athletes. Pryor v. Nat'l Collegiate Athletic Ass'n (NCAA), 288 F.3d 548, 564 (3rd Cir. 2002) (discussing how these circumstances bear on defendant's intent). Here, "based on the face of the [C]omplaint and all reasonable inferences thereto," FHSAA intended to privilege male athletes over female athletes. See id.

In this respect, this case is akin to Pryor, in which the Third Circuit reversed a Rule 12(b)(6) dismissal of plaintiffs' Title VI and § 1981 claims in so far as they rested on allegations of purposeful discrimination, not deliberate indifference. See id. at 564-67.[10] In Pryor, the plaintiffs alleged that the NCAA purposefully discriminated against black students when it adopted Proposition 16 because it already knew as a result of various studies that Proposition 16 would effectively "screen out" or reduce the percentage of black athletes who would qualify for athletic scholarships. Id. at 564. The Third Circuit held that these allegations adequately stated a claim for purposeful discrimination to survive a motion to dismiss. Id. at 565-66. Moreover, like the defendant in Pryor, FHSAA is asking this Court to distinguish between FHSAA's "'awareness' and its 'purpose' at the pleading stage, even though issues involving state of mind (e.g., intent) are often unsuitable for a Rule 12(b)(6) motion to dismiss." Id. at 565; cf. Baum v. Great W. Cities, Inc., 703 F.2d 1197, 1210-11 (10th Cir. 1983) ("Questions of intent, which

[10] Title VI's ban on intentional race-based discrimination is co-extensive with the coverage of the Equal Protection Clause. See Sandoval, 532 U.S. 275 at 307-308, 312 n. 22.

involve intangible factors including witness credibility, are matters for consideration of the fact finder after a full trial.").

2. New Policy 6 Is Not Gender-Neutral

FHSAA argues that new Policy 6 is gender-neutral because the exempted activities of football and cheerleading are open to members of both sexes, and all other male and female teams of the same sport (e.g., boys' soccer and girls' soccer) or similar sports (e.g., baseball and softball) have the same number of games under the policy's reductions. Def.'s Mot. to Dismiss at 2, 9. FHSAA relies in part on Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), for this argument. Def.'s Mot. to Dismiss at 7-8. Feeney does not support this contention.

Feeney established two questions for evaluating whether a statute that is gender-neutral on its face and has an adverse disparate impact on women violates the Equal Protection Clause.

> The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert of [sic] overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. See Arlington Heights v. Metropolitan Housing Dev. Corp., supra. In this second inquiry, impact provides an "important starting point," 429 U.S., at 266, 97 S.Ct., at 564, but purposeful discrimination is "the condition that offends the Constitution." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554.

442 U.S. at 274.

Though new Policy 6 does not use the terms boys and girls on its face, it is indeed gender-based under Feeney's first question. In Feeney, the challenged statute provided all veterans who qualified for state civil service positions a lifetime preference over nonveterans in consideration of appointments. Id. at 259. In determining that the veteran's preference was gender-neutral on its face, the Court relied upon two factors that are not present in the current

case. First, the female plaintiff in Feeney conceded that the statute was neutral on its face. Id. at 274. Second, the Court relied upon the district court's findings that the preference served legitimate goals and was not enacted in order to discriminate against women. Id. at 274-75. The Court found that almost every state and the federal government granted some type of hiring preference to veterans on the historically accepted justification that such preferences recognize veterans' sacrifice, ease their transition back to civilian life, and encourage people to serve in the military. Id. at 261, 264-65. Here, the Plaintiffs have not conceded that new Policy 6 is gender-neutral. Additionally, unlike in Feeney, there is no evidence that almost every state athletic association privileges football by exempting it from any reductions in playing time that apply to all other sports, nor would there be any legitimate, widely accepted justification for doing so as there was for the veteran preferences.

In addition, the statute in Feeney did not single out a special subset of veterans for an additional preference, but simply gave a hiring preference to all veterans. Had FHSAA subjected all athletes (regardless of their sex) to the 20% varsity and 40% sub-varsity reductions, its policy could perhaps have been treated as gender-neutral on its face, like the veterans preference and the gender-neutral state high school athletic association policy challenged in Horner v. Kentucky High School Athletic Association, 43 F.3d 265 (6th Cir. 1994).[11] In Horner, the court held that the policy, which did not sanction a sport unless at least 25% of member schools indicated a willingness to participate, did not violate the Equal Protection Clause because the 25% rule applied to all sports regardless of sex, and the plaintiffs had not shown that

[11] This would not necessarily render FHSAA's conduct compliant with the Equal Protection Clause or Title IX, considering Plaintiffs' claims of prior and ongoing discrimination by FHSAA against female athletes with respect to a similar football exemption in 2002 and the unequal number of weeks that FHSAA provides to the majority of girls' sports relative to football. See Compl. ¶¶ 52-53, 58, 67.

the policy was issued because of its adverse impact on female athletes. Unlike the 25% across-the-board sanction rule or the across-the-board veterans preference, new Policy 6 is not gender-neutral under Feeney's first question because FHSAA chose to privilege 36,000 boys by exempting a virtually all male sport (99.99% male) from the reductions without making equitable exemptions for female athletes. See Compl. ¶¶ 48-51. Because this policy is not gender-neutral, the Court should subject it to intermediate scrutiny. See infra Section II.B.

3. Even if this Court Concludes that New Policy 6 Is Gender-Neutral, Plaintiffs Alleged Sufficient Facts Under Feeney's Second Question

Even if this Court determines that new Policy 6 is gender-neutral under Feeney's first question, Plaintiffs' allegations adequately establish that the "adverse effects" of new Policy 6 on girls reflects purposeful discrimination under Feeney's second question. 442 U.S. at 274. As the Court in Feeney explained, "[i[n this second inquiry, impact provides an 'important starting point.'" Id. (citation omitted); see Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 487 (1997) ("the impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions"). Here, the impact of FHSAA's new Policy 6 is stark. Taking the facts as true, FHSAA exempted almost nine times as many boys as girls (nearly 32,000 more boys) and subjected 95% of female athletes to the cuts, while exempting 28% of male athletes. Compl. ¶¶ 50-51; see Feeney, 442 U.S. at 279 n.25 ("[W]hen the adverse consequences of a law upon an identifiable group are [] inevitable . . . , a strong inference that the adverse effects were desired can reasonably be drawn.").

To determine whether purposeful discrimination "was a motivating factor [behind this stark impact] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266

(1977). "Possible indicia of discriminatory intent include a clear pattern of disparate impact, unexplainable on grounds other than race [or sex]; the historical background of the challenged decision or the specific events leading up to the decision; procedural or substantive departures from the norm; and the legislative or administrative history of the challenged statute." Parks v. City of Warner Robins, Ga., 43 F.3d 609, 617 (11th Cir. 1995) (analyzing gender-neutral government action under the Equal Protection Clause).

Plaintiffs' Complaint includes historical allegations, which FHSAA neither denies nor refutes, that reflect FHSAA's discriminatory purpose. For example, FHSAA exempted football from similar game reductions in 2002 and provides only 15 weeks of games and practices to the majority of girls' sports while according football 23 weeks, Compl. ¶¶ 52, 53, facts confirmed by their own records.[12] By contrast, the historical background in Feeney did not reflect a discriminatory purpose because the definition of "veterans" had always been gender-neutral dating back to 1884 and inclusive of women who had served in the military. 442 U.S. at 265, 275. The veterans preference in Feeney is also distinguishable from new Policy 6 because the former could be fully explained on gender-neutral grounds, while here it is difficult, if not impossible, to explain FHSAA's exemptions on gender-neutral grounds when FHSAA had the clear option to adopt an equitable policy and was specifically urged by Plaintiffs to do so. See Compl. ¶ 57. Furthermore, the notice FHSAA had that new Policy 6 violated the Equal Protection Clause when FHSAA nonetheless chose to proceed with the policy is demonstrative of purposeful discrimination. This kind of knowledge goes far beyond a mere awareness of the

---

[12] See supra note 5; see also Arlington Heights, 429 U.S. at 267 ("The historical background of the decision is one evidentiary source, particularly if it reveals a series of official actions taken for invidious purposes.").

consequences of a neutral policy that was insufficient to establish purposeful discrimination in Feeney, 442 U.S. at 277-78, and more closely resembles the alleged knowledge of the defendant in Pryor, 288 F.3d at 565, which was deemed sufficient.[13] All of these indicia of discriminatory intent are sufficient to withstand a motion to dismiss.[14]

B. Plaintiffs' Equal Protection Claim Likely Will Succeed on the Merits

FHSAA opposes the PI Motion with respect to the Equal Protection claim on the basis of the same "disparate impact" argument raised in its Motion to Dismiss. Def.'s Opp'n at 9-10. The Court should reject this argument for the reasons given in Section II.A above. FHSAA also argues that its policy is gender-neutral because football and cheerleading are open to both sexes, and only a sport-by-sport comparison is required. Id. at 10-11. These are the same arguments raised against the Title IX claim, and they should be rejected for the reasons set forth in Sections I.B.3 and I.B.4 above. If this Court rejects these arguments by finding either that new Policy 6 is indeed gender-based under Feeney's first question or that it reflects purposeful discrimination under Feeney's second question, the Court should subject new Policy 6 to intermediate scrutiny.

---

[13] The Third Circuit distinguished Feeney from the facts in Pryor noting that:

> "[A]s shown by the complaint, this is not a case where the NCAA simply realized or otherwise could have guessed that Proposition 16 would have had a disparate impact on black athletes. . . . Rather, this is a case where, based on the face of the complaint and all reasonable inferences thereto, the NCAA at least partially intended to reduce the number of black athletes who could attend college on an athletic scholarship by adopting the heightened academic requirements of Proposition 16.

Pryor, 288 F.3d at 564.

[14] FHSAA's argument that "the more appropriate analysis is whether males and females are given the opportunity to play a particular sport," Def.'s Mot. to Dismiss at 9, lacks support and misapprehends the Equal Protection claim in this case. Plaintiffs are not complaining about female access to a particular sport, but rather a special exemption for 36,000 boys. Compl. ¶ 50.

In its Opposition, FHSAA fails to establish an "exceedingly persuasive justification" for the gender-based classification inherent in its new Policy 6. United States v. Virginia, 518 U.S. 515, 532-33 (1996). This burden is met only by showing that the classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" Id. at 533 (citation omitted). "The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." Id.

FHSAA asserts that it proposed and ultimately adopted new Policy 6 "[i]n an effort to maintain a consistent approach [with respect to reductions in athletics programs] and to assist schools in making difficult decisions regarding financial reductions." Hester Affidavit ¶ 8; see also id. ¶ 7; Def.'s Opp'n at 4. Even assuming this Court finds that maintaining a consistent approach to reductions is an important objective, there is no substantial relationship between this goal and the new Policy 6 because its football and cheerleading exemptions render what would have been consistent, uniform reductions for all athletes entirely inconsistent. In addition, while helping member schools make difficult choices about financial cuts to their athletics program is arguably an important objective, there is little likelihood that FHSAA will be able to establish a substantial relationship between this goal and new Policy 6 in an exceedingly persuasive manner. This objective could have been achieved in a variety of ways that did not privilege 32,000 more male athletes over female athletes, and FHSAA offers no justification for its choice to exempt football and cheerleading. See, e.g., Compl. ¶ 57.

In sum, Plaintiffs' Equal Protection claim is quite likely to satisfy either of Feeney's questions, and new Policy 6 is unlikely to survive intermediate scrutiny. Consequently, there is a substantial likelihood that Plaintiffs' Equal Protection challenge will succeed on the merits.

III. Plaintiffs Satisfy the Three Remaining Requirements for a Preliminary Injunction

Because Plaintiffs also satisfy the three remaining requirements for a preliminary injunction, see Schiavo, 403 F.3d at 1231, this Court should grant their PI Motion.

A. Plaintiffs Will Suffer Irreparable Harm in the Absence of a Preliminary Injunction

The United States agrees that Plaintiffs' daughters and female athletes in Florida will be irreparably harmed if this Court does not preliminarily enjoin new Policy 6 prior to deciding this case on the merits. See Pls.' Mem. in Supp. of PI Mot. at 2, 4, 13-14. Given that schools are already scheduling games subject to the 20% varsity and 40% sub-varsity reductions, these girls will lose the opportunity to compete in up to 40% of their expected contests and the associated benefits of competition, including athletic scholarships, setting records, and developing athletic skills, if new Policy 6 is not enjoined. See id. at 13. Plaintiffs correctly point out that a reduction in contest participation for two school years, as new Policy 6 requires, will significantly deprive girls of their expected junior high and high school experiences, which are limited to roughly six years. See id. at 13-14. Moreover, if this Court issues the preliminary injunction but ultimately rules against Plaintiffs, it still will be possible to eliminate scheduled games to comply with the reductions. By contrast, if the Court denies the PI Motion, but Plaintiffs later prevail after the athletic seasons start, it will be difficult, if not impossible, to insert additional games into existing schedules. See Pls.' PI Motion at 3.

Based on similar allegations of irreparable harm, courts have issued preliminary injunctions in Title IX athletics cases. See, e.g., Cohen, 991 F.2d at 904-905; Barrett, 2003 WL 22803477, at *13-14; Favia, 812 F. Supp. at 583-84. The United States urges this Court to follow this precedent and to reject FHSAA's baseless argument that the impact of new Policy 6 is the same harm that equally impacts girls and boys alike throughout Florida, see Def.'s Opp'n at 11, in light of the grossly unequal numbers of boys and girls exempted under new Policy 6.

B. The Threatened Injury Outweighs the Potential Harm to FHSAA

The United States agrees with Plaintiffs that the harm to them outweighs the potential harm to FHSAA because the association can achieve the same goal of scheduling fewer games by simply having their member schools do so equitably. FHSAA's argument that a "chaotic" athletic system will ensue if the injunction is issued lacks support. Def.'s Opp'n at 12. If former Policy 6's maximum numbers of games were maintained this year, schools could still address their financial difficulties by scheduling fewer games or taking other cost-saving measures. Issuing the preliminary injunction would assist member schools by giving FHSAA the impetus to develop policies that conform to federal law and that assist member schools to comply as well.

C. The Public Interest Will Be Served by the Preliminary Injunction

Promoting compliance with Title IX and preventing a violation of constitutional rights clearly serve the public interest. See Barrett, 2003 WL 22803477, at *15 ("Promoting compliance with Title IX serves the public interest."); Favia, 812 F. Supp at 585 ("The public has a strong interest in prevention of any violation of constitutional rights."); Cohen v. Brown Univ., 809 F. Supp. 978, 1001 (D.R.I. 1992) ("[T]he public interest will be served by vindicating a legal interest that Congress has determined to be an important one."). FHSAA claims that the

public interest is served by allowing it to address the financial crisis in Florida's educational system. Def.'s Opp'n at 12. While the autonomy of FHSAA is important, "the public interest demands that [FHSAA] comply with federal law." See Barrett, 2003 WL 22803477, at *15 (rejecting similar "autonomy" argument). Certainly the public interest would not be served if all the member schools in Florida proceeded to operate their athletic programs in violation of federal law based on the issuance of new Policy 6.

Conclusion

For the above stated reasons, the Court should deny FHSAA's Motion to Dismiss and grant Plaintiffs' Motion for Preliminary Injunction.

Respectfully submitted,

/s/ Emily McCarthy
LORETTA KING
Acting Assistant Attorney General
Civil Rights Division
AMY I. BERMAN
EMILY MCCARTHY (D.C. Bar. 463447)
IRIS GOLDSCHMIDT (D.C. Bar. 435491)
Educational Opportunities Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Ave., NW
Patrick Henry Building, Suite 4300
Washington, D.C. 20530
Tel: (202) 514-4092
Fax: (202) 514-8337
iris.goldschmidt@usdoj.gov
emily.mccarthy@usdoj.gov

Dated: July 14, 2009