IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

DAVID W. HOFFMAN as Guardian Ad Litem for JENNA HOFFMAN and JEANA HOFFMAN, minors, HOLLY NEMAC, as Guardian Ad Litem for CHELSEE NEMEC, minor, DENNIS KUHLMAN, as Guardian Ad Litem for MATEYA RAE KUHLMAN, minor, MERRI STAPP, as Guardian Ad Litem for JORDAN STAPP, minor, BARBARA HARTLEY, as Guardian Ad Litem for JENNA HARTLEY, minor, JULAYNE THORESON, as Guardian Ad Litem for MELISSA THORESON, minor, KELLY SULLIVAN, as Guardian Ad Litem for BREINN SULLIVAN, minor, PAUL MUTH, as Guardian Ad Litem for LINDSEY MUTH, minor, and DONNA MILLER, as Guardian Ad Litem for KELLY RAE MILLER,

Plaintiffs,

v.

SOUTH DAKOTA HIGH SCHOOL ACTIVITIES ASSOCIATION, STEVE BERSETH, WILLIAM O'DEA, JAMES HEINITZ, TIM CREAL, TERRY STULKEN, RONDA RINEHART, and CRAIG NOWOTNY,

Defendants.

CIV 02-4127

UNITED STATES' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Plaintiffs have filed a separate lawsuit to collaterally attack and enjoin the Consent Order entered by this Court in Pedersen and United States v. South Dakota High School Activities Association, Civil Action No. 00-4113. For the reasons set forth below, the action should be dismissed with leave to allow plaintiffs to petition to move to intervene pursuant to Rule 24 of

the Federal Rules of Civil Procedure in the Pedersen action.

FACTUAL BACKGROUND

On June 9, 2000, private plaintiffs filed a lawsuit against the South Dakota High School Activities Association ("SDHSAA"), alleging that its scheduling of girls' volleyball and basketball in nontraditional or disadvantageous seasons – when no boys' sports are similarly scheduled – discriminates against South Dakota girls in violation of the Fourteenth Amendment of the United States Constitution and Title IX of the Education Amendments of 1972 ("Title IX"). See Pedersen and United States v. South Dakota High School Activities Association, Civil Action No. 00-4113. The SDHSAA governs interscholastic athletics in South Dakota and has approximately 196 member schools. On October 17, 2000, the United States moved to intervene as plaintiff-intervenor and the Court granted its intervention on November 7, 2000. 11/7/00 Order at 3 [docket no. 25].

During November of 2000, the parties conducted discovery and also engaged in successful mediation. On December 5, 2000, the Court entered a Consent Order requiring the SDHSAA to schedule girls' basketball and volleyball during the advantageous winter and fall seasons respectively by the 2002-03 academic year and to submit a transition plan within 180 days. 12/5/00 Order at 4 [docket no. 36]. In so ruling, this Court also "retain[ed] jurisdiction of this cause for purposes of compliance with this Order and entry of such further orders or modifications as may be necessary or appropriate to effectuate this agreement as stated herein." Id. at 5. After this well-publicized ruling, the Court eventually approved a transition plan submitted by the parties on August 30, 2001. See 8/30/01 Order at 1-2 [docket no. 46].

The SDHSAA and the plaintiff-parties have worked hard over the last two years to implement the season transition plan and to ensure a smooth transition for South Dakota girls and

boys and all its member schools. These efforts included determining the format of the girls' and boys' state basketball tournaments, creating new schedules for girls' and boys' basketball programs at the junior high and high school levels and new schedules for girls' volleyball, and arranging for adequate facilities, coaches and officials. The Department of Education Office for Civil Rights conducted three technical assistance sessions on Title IX and the season transition in Sioux Falls, Pierre, and Rapid City during the week of September 24, 2001. During the week of February 11, 2002, counsel for the United States traveled to Pierre and Sioux Falls to meet with SDHSAA officials, the superintendent of the Sioux Falls School District, principals and athletic directors of large and small high schools to discuss the season transition and any potential concerns or issues. After these meetings and discussions, it became clear that the SDHSAA has spent significant time and has worked diligently with its membership over the past two years to ensure that the season transition and the implementation of the systemic injunctive relief ordered by the Court will occur in an orderly fashion and in such a way as to continue equitable extracurricular opportunities for both boys and girls in South Dakota.

Almost eighteen months after this Court entered its Consent Order in the Pedersen case, the Hoffman plaintiffs filed this separate lawsuit seeking to halt the season switch or in the alternative, to modify the Pedersen Consent Order so that the season switch will not take place for another four years. See Hoffman v. South Dakota High School Activities Association, Civil Action No. 02-4127, Complaint ¶¶ 18, 19. The Hoffman plaintiffs have also filed a motion for preliminary injunction seeking the same relief.

SUMMARY OF ARGUMENT

Plaintiffs seek to enjoin or in the alternative modify the remedial order entered by this Court in Pedersen and United States v. South Dakota High Sch. Activities Ass'n, Civil Action

No. 00-4113, a pending action. It is well settled law in the Eighth Circuit that plaintiffs cannot collaterally attack a consent order through a separate lawsuit but must file a motion to intervene in the original pending action in order to challenge the remedy. As a result, this lawsuit should be dismissed and if the Hoffman plaintiffs wish to pursue their attack on the remedy in the Pedersen case, they should seek to intervene in the Pedersen case.

ARGUMENT[1]

In Rivarde v. State of Missouri, 930 F.2d 641 (8th Cir. 1991), the Eighth Circuit set out the proper procedure for interested parties to present their complaints about an injunctive remedial order in an on-going case. There, a group of black students filed a separate action seeking to modify an existing desegregation order in a pending lawsuit. The district court dismissed the complaint and directed the plaintiffs to file a motion to intervene in the original action. 930 F.2d at 642. The Eighth Circuit affirmed the propriety of this procedure based primarily on concerns of judicial economy, efficiency and fairness. To avoid fostering multiple lawsuits over the same issues and to allow the orderly administration of court orders, the Eighth Circuit instructed parties, seeking to challenge existing remedial orders, to intervene in the original lawsuit. 930 F.2d at 643-44. Part of the reason for establishing this procedure in school desegregation cases was because these cases, unlike typical class actions, remain active cases and require the district court to retain continuing jurisdiction to monitor and effectuate the complex systemic injunctive relief. Tompkins v. Alabama State Univ., 15 F. Supp.2d 1160, 1165 (N.D. Ala. 1998). Akin to a school desegregation case, the Court here has retained jurisdiction in the

[1]Under Rule 12(b)(6), a district court must take the allegations of the complaint as true and must not dismiss the complaint unless "it appears beyond doubt that the plaintiffs can prove no set of facts demonstrating they are entitled to relief." Patentwizard, Inc. v. Kinko's, Inc., 163 F. Supp. 2d 1069, 1071 (D.S.D. 2001) (citing Krentz v.Robertson Fire Protection Dist., 228 F. 3d 897, 905 (8th Cir. 2000)).

Pedersen case to monitor the implementation of its remedial order requiring systemic injunctive relief across 196 public and private high schools in South Dakota.

Several other courts of appeals and district courts have reached the same conclusion as the Eighth Circuit and have adopted this procedure. See Hines v. Rapides Parish Sch. Bd., 479 F.2d 762, 765 (5th Cir. 1973) (dismissing separate action brought to challenge remedial order entered in different case and holding that proper course for interested parties to question remedial order is to move to intervene in original action); Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1328-29 (9th Cir. 1977) (holding that proper procedure for parents seeking to challenge remedial order is to intervene in original lawsuit); Miller v. Bd. of Educ. of Topeka Unified Sch. Dist., 667 F.2d 946 (10th Cir. 1982) (affirming dismissal of separate lawsuit seeking to challenge remedial order in pending action because they should file motion to intervene in original action); Parents Against Controlled Choice v. Bd. of Educ., Rockford Sch. Dist. No. 205, 1999 WL 7905, at *1-2 (N.D. Ill. Jan. 8, 1999) (dismissing separate lawsuit challenging on-going remedial order entered in race discrimination case because interested parties should have intervened in original lawsuit); Tompkins v. Alabama State Univ., 15 F. Supp. 2d 1160, 1167 (N.D. Ala. 1998) (holding that most appropriate course of action is to dismiss separate lawsuit challenging pending remedial order entered in race discrimination case with leave to petition to intervene in original action).

Here, the Hoffman plaintiffs expressly challenge the remedy entered in the Pedersen case and ask this Court to enjoin the season switch or at least modify the Pedersen Consent Order by delaying the season switch for four years. See Hoffman Complaint, ¶¶ 18, 19; see also, Hoffman Plaintiffs' Brief in Supp. of Prelim. Inj. at 15 ("Plaintiffs here allege that the mandatory election effect of the Association's agreement to the consent decree was illegal, unconstitutional

and the cause of physical, psychological, educational and economic damages to them.") The Pedersen Consent Order requires the SDHSAA to implement systemic injunctive relief among its 196 member schools, almost every secondary high school in South Dakota. It involves the rescheduling of the two most popular girls' sports, based on the number of participants, offered at over seventy-five percent of the member schools. Like school desegregation cases, this Court expressly retained continuing jurisdiction over the Pedersen action for the very purpose of ensuring the implementation of the systemic relief – the implementation of nondiscriminatory playing seasons, and monitoring the progress of the transition. 12/5/00 Order at 5. Accordingly, the appropriate procedure to challenge the Consent Order based on Eighth Circuit precedent is for the Hoffman plaintiffs to move to intervene pursuant to Rule 24 in the pending Pedersen action.[2] Upon the filing of a motion to intervene in the Pedersen case, the parties can then properly address the merits of such a motion under the standards required by Rule 24.

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[2]The United States also intends to oppose the Hoffman plaintiffs' Motion for a Preliminary Injunction filed on June 26, 2002. The Court may wish to set the United States' Motion to Intervene and Motion to Dismiss on an expedited briefing schedule. If the Court ultimately allows the United States limited intervention for the purpose of defending against a collateral attack to the Pedersen Consent Order and also decides to hear argument on certain pending motions, the Court could conduct a hearing on the United States' Motion to Dismiss at the same time as it conducts a hearing on the Hoffman plaintiffs' Motion for Preliminary Injunction. This would ensure an opportunity for all parties to be heard.

CONCLUSION

For the reasons set forth above, the Hoffman complaint should be dismissed with leave to petition to intervene in the Pedersen case.

Respectfully Submitted,

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DATED: July 1, 2002

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2002, I served copies of the foregoing pleading to counsel of record by first class U.S. mail, postage prepaid, addressed to:

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