

**BEFORE THE MONTANA DEPARTMENT  
OF LABOR AND INDUSTRY**

<hr/> <b>John Ries</b> , personally and on behalf of )	
his minor child, <b>Geah Ries; John LaBonty;</b> )	
<b>Mary K. Hovland (Burrington)</b> , personally )	Human Rights Act Case No. 9904008792
and on behalf of her minor child, )	
<b>Brook Hovland,</b> )	
Charging Parties, )	
vs. )	<i>Final Agency Decision</i>
<b>Montana High School Association,</b> )	
Respondent. )	
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**I. Procedure and Preliminary Matters**

Charging parties filed a complaint with the Department of Labor and Industry on January 20, 1999. They alleged the respondent Montana High School Association discriminated against the charging parties and against Geah Ries and Brook Hovland on the basis of sex by requiring female students to participate in sports during seasons which are different from traditional seasons. On March 24, 1999, the department gave notice the complaint would proceed to a contested case hearing, and appointed Terry Spear as hearing examiner. The parties mutually agreed to permit the department to retain jurisdiction of this case for more than 12 months after the complaint filing, and stipulated to extended discovery and hearing preparation.

This contested case hearing convened on April 3, 2000, in Lewis & Clark County, Montana, in the small courtroom, fifth floor, Federal Building, Helena, Montana. Charging parties and Brook Hovland were present with their attorneys, Peter Michael Meloy and Jennifer S. Hendricks (Meloy & Morrison). Geah Ries attended part of the hearing. Respondent was present through its designated representative, Joanne Austin, with its attorneys, Ronald F. Waterman and Sarah M. Power (Gough, Shanahan, Johnson & Waterman). The hearing examiner granted charging parties' motion to exclude witnesses. John LaBonty, Mary Kay Burrington (Hovland), John Ries, Brook Hovland, Dick Scott, Daniel Bartlett, Kathy Holt, Jeff Carroll, Linda Petlichkoff, Geah Ries, Joanne Austin, Donna Lopiano (by video deposition) and Michele Nelson (by deposition) testified in charging parties' case. George Geise, Bill Sprinkle, James Haugen, Ron Kenison, Jim Gross and Joanne Austin testified in respondent's case. The hearing examiner's exhibit

docket accompanies this decision. The hearing examiner closed the evidentiary record on April 5, 2000.

Charging parties filed a prehearing brief on March 31, 2000. Respondent filed a post-hearing brief on April 27, 2000. Charging parties filed a post-hearing brief on May 12, 2000. The hearing examiner amended the caption on August 2, 2000.

## II. Issues

The legal issues in this case are whether the current placement of the MHSA member schools' volleyball season is illegally discriminatory on the basis of sex to the detriment of charging parties and if so how to remedy any such illegal discrimination. A full statement of issues appears in the final prehearing order.

## III. Findings of Fact

### *Parties*

1. Charging Parties are John Ries, personally and on behalf of his minor child, Geah Ries, John LaBonty, and Mary K. Hovland (Burrington), personally and on behalf of her minor child, Brook Hovland. Final Prehearing Order, Sec. IV. Facts and Other Matters Admitted, No. 1.

2. John Ries is a teacher in the Butte public school district. He has been the head volleyball coach at Butte High School for 17 years. He is also the assistant track coach for girls' track<sup>1</sup> at Butte High and the middle school girls' basketball coach. He has also coached girls' basketball at the freshman and junior levels and has coached Little League softball. His daughter, Geah Ries, was a freshman at Butte High School during the 1999-2000 school year. Testimony of John Ries.

3. John LaBonty is a teacher in the Glasgow public school district and through the 1999-2000 school year,<sup>2</sup> was the Glasgow High School head volleyball coach. He coached the Glasgow volleyball team in MHSA competition for 15 years. He also coached girls' basketball at smaller member schools of MHSA before coming to Glasgow. At Glasgow, he has also coached

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<sup>1</sup> When MHSA refers to a gender specific sports program or portion of one, it does so by calling it "girls' track" or "boys' basketball." This decision uses the same terms, as they appear in the annual handbook (*See* Exhibit R111).

<sup>2</sup> LaBonty resigned his coaching position after the volleyball season of 1999.

freshman girls' basketball and junior high track (boys' and girls'). Testimony of LaBonty.

4. Mary Kay Hovland (Burrington) has been an elementary teacher in Big Fork for 24 years. She has been the head volleyball coach at Big Fork High School for 6 years. She did not coach for the 3 years before she became head coach. Before those 3 years, she was the junior varsity volleyball coach for 6 years. As an undergraduate, she played volleyball for Stanford. Testimony of Burrington.

5. Brook Hovland<sup>3</sup> is a senior at Big Fork High School. She has a grade point average in the 3.5 to 3.8 ranges. She played volleyball for Big Fork. She previously played girls' basketball and now plays tennis for the school. She has participated in team volleyball since the seventh grade. She earned All Conference honors and All State Honorable Mention this year. The week before the hearing she participated in the All State Tournament (Classes A, B and C) in Havre. The personal benefits Hovland has reaped from her participation in sports, particularly volleyball, have included improved self-esteem and confidence, learning to communicate and participate in working with others, and recognition by her school and peers. She wants to attend Stanford and, like her mother, play volleyball. She needs financial aid to accomplish this goal. Testimony of Brook Hovland.

6. Geah Ries is the daughter of John Ries. In the 1999-2000 school year, she was a freshman at Butte Public High School. She has a 3.5 grade point average. During the 1999-2000 school year, she participated in freshman basketball and junior varsity and freshman volleyball. She has been playing volleyball since fifth grade. She wants to go to college out of Montana. Testimony of Geah Ries.

7. Respondent is the Montana High School Association (MHSA), a Montana non-profit corporation authorized to do business in Montana, which regulates all aspects of extracurricular activities of high school students who are enrolled in public and member private schools within Montana. Final Prehearing Order, Sec. IV. Facts and Other Matters Admitted, No. 2; testimony of Joanne Austin.

8. MHSA consists of all public schools and those private schools within Montana that have elected to join the association. Any high school in

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<sup>3</sup> Brook Hovland now goes by the name Brook Hovland Burrington. For ease in identification, the hearing examiner will refer to her by her previous name and by "Hovland," while referring to her mother as "Burrington."

Montana with accreditation from the Office of Public Instruction is eligible to join MHSA. MHSA supervises, controls, regulates and administers athletic and other extracurricular interscholastic activities, programs, contests and tournaments in Montana. MHSA members are “AA,” “A,” “B” or “C” class schools, depending upon the number of students. MHSA schools have limited rights to engage in competition with schools that are not members. Final Prehearing Order, Sec. IV. Facts and Other Matters Admitted, No. 3; Exhibit R111; testimony of Austin.

*Witnesses*

9. Dick Scott is a member of the University of Montana Athletic Department. He was the University’s head volleyball coach for 22 years, ending this season. He has coached volleyball internationally, and coached the Men’s Junior National program in preparation for the Olympics in 1984. He has officiated high school volleyball in Montana. Former athletes he coached are now coaching in Montana high schools and in “what semblance of club [volleyball] there is” in Montana. One of his major responsibilities at the University was recruiting. Testimony of Scott.

10. Daniel Bartlett is an electrical engineer who lives in Bozeman. He is an MOA volleyball official, officiating high school volleyball in Montana, together with United States Volleyball Association (“USVBA”) club volleyball (for which he is regionally rated as an official) in Illinois, Montana, Idaho, Washington, Utah, California and Wyoming. He is the Montana representative to the Evergreen Region Board of Directors (a region of USVBA). Part of his role as a board member is to work for establishment and development of club volleyball in Montana. Testimony of Bartlett.

11. Donna Lopiano has been the Executive Director of the Women’s Sports Foundation since 1992. Before 1992, she was the Director of Women’s Athletics at the University of Texas in Austin for 17 years. Before that, she was an assistant professor and assistant athletic director for 5 years at Brooklyn College of the City University of New York. Before that she was a teaching assistant and graduate assistant at the University of Southern California. She has coached collegiate men’s and women’s volleyball, men’s and women’s basketball, field hockey and softball. She has been an international coach in softball. She has been a USVBA club volleyball coach. Her graduate studies focused on the psychosocial aspects of women in sport and athletic administration. She has served as president, member of the executive board and a commissioner of national championships for the Association for Intercollegiate Athletics for Women, the predecessor of the National Collegiate Association as a governing organization for women’s

international sports. She has spoken about seasonal placement issues in various forums at national conferences, law school classes and symposia on gender equity in sports. She has testified as an expert witness on seasonal placement in two other cases.<sup>4</sup> As an expert witness, and as a consultant to school districts, high school associations and study committees considering seasonal placement, she has investigated non-traditional season placements in several states, including Texas. Texas, like Montana, has many small schools and a long history of those small schools excelling at a sport such as girls' basketball. Testimony of Donna Lopiano.<sup>5</sup>

12. Michele Nelson worked for the National Athletic Merit Endorsement Service (NAMES) from August 1997 to November 1999. She played volleyball from grade school through college levels, and in club levels from 12 years old and under through 18 years old and under. She was a volleyball coach (club coach in Boulder, Colorado, college coach at two campuses of the University of Missouri, assistant and head coach). Her work at NAMES was as a data vendor to recruiters. She was the volleyball director for NAMES, a company providing scouting reports and information to college recruiters and providing vanity publications and products to high school players and families. Testimony of Michele Nelson.<sup>6</sup>

13. Kathy Holt is a teacher and faculty member at Montana State University, Billings campus. Her first full-time year there was 1999-2000, after 4 years as a part-time instructor. From 1991 through 1998, she was a junior varsity and varsity assistant volleyball coach at Skyview High School in the Billings public school district. She previously coached volleyball (and girls' basketball) in high schools in Oregon, including 2 years coaching at a very small school in rural Oregon and 7 years at a high school in suburban Portland. The Portland high school was comparable in size to Skyview, which had around 1,400 students. From her experience coaching high school volleyball in the traditional season in Oregon and the non-traditional season in Montana, she can compare the two. Testimony of Kathy Holt.

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<sup>4</sup> *Alston v. Virginia High School League, Inc.*, No. CIV.A.97-0095-C, U.S. Dist. Ct., W.D. Virginia, Charl. Division; *Communities for Equity v. Michigan High School Association*, Case No. 1:98-CV-479, U.S. Dist. Ct., W.D. Mich., So. Div.

<sup>5</sup> The hearing examiner ruled on MHSA's motion to strike Lopiano's testimony and the objections in the transcript of her deposition, during the hearing. "Order Denying and Granting Motions to Strike and Ruling on Deposition Objections," April 4, 2000.

<sup>6</sup> The hearing examiner ruled on MHSA's motion to strike Nelson's testimony and the objections in the transcript of her deposition, during the hearing. "Order Denying and Granting Motions to Strike and Ruling on Deposition Objections," April 4, 2000.

14. Jeff Carroll is a teacher at Billings Senior High School in the Billings public school district. He is the head volleyball coach at Billings Senior. He has coached for 23 years. He has coached football, junior high boys' and girls' basketball and high school track, in addition to volleyball. He has been the head coach at Billings Senior for 14 years. Testimony of Jeff Carroll.

15. Dr. Linda Petlichkoff is a full professor specializing in sports psychology in the kinesiology department of Boise State University. She obtained her Masters from Michigan State University and her PhD. in sports psychology from the University of Illinois in 1988. Before obtaining her higher degrees, she was a secondary school teacher and coach in Michigan. Her experiences in secondary school teaching and coaching prompted her to study why students participate in sports and why they drop out of that participation. She has coached volleyball at the high school, junior high school and college levels. She is on the national faculty of the American Sport Education program. One of her teaching areas involves the sociology of sport and the psychosocial aspects of physical activity (sports), including gender issues in sports. Testimony of Linda Petlichkoff.

16. George Geise is the sports editor for the Great Falls *Tribune*. He has held the position for 22 years. He previously worked 2-3 years for the Daily Interlake, and for newspapers in Oregon, Illinois and Wisconsin. He is intimately familiar with the importance of local sports for the Montana media. Testimony of George Geise.

17. Joanne Austin has worked for MHSAA for 14 years and has been one of the assistant directors of MHSAA since 1991. She was a member of the Ad Hoc Seasons Committee in 1995-96. She is the MHSAA administrative staff member who handles gender equity questions and issues as they arise. She is responsible for MHSAA implementation of the *Ridgeway* settlement agreement. She gives seminars and classes on gender equity issues. Testimony of Joanne Austin.

18. Bill Sprinkle is currently one of the assistant directors of MHSAA. He has coached college football, high school football and girls' track and served as the athletic director of Billings Central High School, a parochial school and member of MHSAA. In 1987, as an assistant director of MHSAA, he was the sex equity officer for MHSAA, although he had "no experience in that business." He surveyed member schools to ascertain their compliance with the *Ridgeway* settlement agreement, and assisted member schools in interpreting that agreement. Testimony of Bill Sprinkle.

19. Jim Haugen is the Executive Director of MHSА. The 1999-2000 school year was his third in that position. He was an assistant director for 20 years before becoming the Executive Director. He gave rule clinics for sports, managed tournaments, kept the archives and records and handled most of the correspondence for MHSА. He has provided historical data to the membership and the Board of Control of MHSА about the origin of seasonal placements and adoption of various sports as MHSА sanctioned sports. Testimony of Jim Haugen.

20. Ron Kenison is the Commissioner of the Frontier Conference. The conference consists of the University of Great Falls, Montana Tech, Lewis & Clark (Idaho), Carroll College, Western Montana College, Westminster (Salt Lake City), Rocky Mountain College and Northern Montana College. Testimony of Ron Kenison.

21. Calvin Moore is a school administrator with experience in Conrad, Medicine Lake, and Chester public schools. He has coached boys' basketball and girls' basketball, as well as volleyball (below the varsity level) and track. Testimony of Calvin Moore.

22. Jim Gross was the women's basketball coach at Carroll College from 1969 through 1973. He previously taught at Helena High School. He has coached track, football, basketball and golf. He was the head coach for both the boys' and girls' teams at Helena High over the years. He coached the girls' basketball team when it began. Testimony of Jim Gross.

#### *The MHSА Sports Seasons*

23. MHSА promulgates, adopts, publishes, enforces and interprets rules and regulations as it deems necessary and appropriate for interscholastic extracurricular participation in contests held at the high school level in Montana. One of the functions that MHSА governs is scheduling of the seasons for interscholastic sports. MHSА designates the first date it permits teams to practice, the first date it permits teams to compete and the dates and sites for tournaments or meets that conclude the seasons in the particular sports. For safety reasons, MHSА bars participating athletes from competition in a sport until after each athlete participates in a designated number of practices. For some of the sports, tournaments or meets at seasons' end may occur on different dates for different classes of schools, because of the various numbers of participating member schools and the structure of the competition to determine the state champions. Final Prehearing Order, Sec. IV. Facts and Other Matters Admitted, Nos. 4 and 5; Exhibit R111; testimony of Burrington.

24. The MHSA fall sports are cross-country, football, girls' basketball and soccer. All four sports commence practice at the same time (usually at or slightly before the commencement of fall academic classes) and commence competition at the same time. Typically, cross-country and soccer end in late October, while football and girls' basketball end in late November or early December. Of the fall sports, only girls' basketball requires gym time for all practices and competitions. Cross-country, football and soccer are outdoor sports. The girls' basketball season for most high schools outside of Montana and for colleges is the winter season. Exhibit R111; testimony of LaBonty.

25. The MHSA winter sports are swimming, wrestling, volleyball, and boys' basketball. The volleyball season coincides with the boys' basketball season, beginning practice in late November and competition in early to mid-December and concluding in early March. These two sports begin at or immediately after the conclusion of MHSA football and girls' basketball. State tournament dates for boys' basketball and volleyball vary slightly according to the school class involved. Seasons for swimming and wrestling begin in mid-November and end in February. Of the four winter sports, volleyball and boys' basketball require gym time for practices and competitions. Wrestling practices can take place in areas other than a gym if other suitable facilities are available within the member school. Swimming competitions and practices cannot take place in a gym. Wrestling, volleyball and boys' basketball require different configurations of gym space for practice and competition. The traditional season for volleyball is the fall season. The secondary schools in 46 states and all of the colleges across the United States and Canada use the fall season for volleyball. Final Prehearing Order, Sec. IV. Facts and Other Matters Admitted, No. 5; Exhibit R111; testimony of John Ries and LaBonty.

26. The MHSA spring sports are softball, track, tennis and golf. These sports typically commence practice in March, at or before the conclusion of boys' basketball tournaments and volleyball tournaments, and commence competition in late March, after the conclusion of the last two winter sports. The spring sports conclude their seasons during May, at or before the end of the school year. All four sports are essentially outdoor sports. Exhibit R111.

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*The Development of MHSAs Girls' Basketball and Volleyball in Montana*

27. No MHSAs season for any boys' sport is misaligned with the traditional season for that sport. Volleyball and girls' basketball are misaligned with the traditional seasons for those sports.<sup>7</sup> Testimony of Burrington.

28. MHSAs adopted girls' basketball as an approved interscholastic athletic activity in 1972. The first season occurred in the fall of the 1972-73 school year. MHSAs placed girls' basketball in the fall without giving it much study. There were no other girls' team sports in the fall. MHSAs adopted volleyball as an approved interscholastic athletic activity in 1983. The first season occurred in the winter of the 1983-84 school year. MHSAs placed volleyball in the winter without giving it much thought, in much the same way as it had decided the placement of girls' basketball. Girls' basketball was the established fall sport, and there was no winter team sport for girls. Exhibit CPI; testimony of Joanne Austin and Jim Haugen; *Ridgeway v. MHSAs*, 633 F.Supp. 1564, 1572, Finding of Fact No. 10 (D.Mont 1986).

29. On May 11, 1982, three Montana high school girls and their parents sued MHSAs, the Montana Office of Public Instruction and the high schools the girls attended. They alleged that they and other female high school students were deprived of an equal opportunity to participate in extracurricular high school athletics resulting in denial of the opportunity to develop to their full educational potential, in violation of state and federal law. They alleged discrimination in the number of MHSAs sports available, the seasons in which the sports were available, the length of sport seasons, scheduling of practices and games, access to facilities, equipment, coaching, transportation, school band and other forms of team support, uniforms, access to trainers, publicity, and other aspects of extracurricular athletics. The court certified the case as a class action. *Ridgeway v. MHSAs*, 633 F.Supp. 1564, 1566-67 (D. Mont. 1986).

30. In June 1984, the parties to *Ridgeway* agreed to dismissal without prejudice, based upon a settlement agreement. The agreement contemplated that all MHSAs member schools would participate in the gender equity plan outlined in the agreement. The parties agreed to use a facilitator to resolve the remaining issue between them--the placement of seasons for girls' basketball and volleyball. In December 1984, the facilitator recommended switching those seasons, to place both sports in their traditional seasons. The District Court adopted the recommendation and ordered the switch, giving the

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<sup>7</sup> A number of MHSAs sports in which both boys and girls participate are in non-traditional seasons.

defendants an opportunity to challenge the need for the switch before its implementation. The defendants did challenge the switch, and the District Court issued its final order in 1986. *Ridgeway v. MHSA*, 633 F.Supp. 1564, 1567-68 (D. Mont. 1986).

31. In this decision, the District Court held that the defendants had not deprived the plaintiffs of any constitutional right by the placements of the girls' basketball and volleyball seasons. *Ridgeway v. MHSA*, 633 F.Supp. 1564, 1581 (D. Mont. 1986). The court also held that gender equity in the secondary athletic programs had not been achieved, but that most areas in which equity had not been achieved were irrelevant to the seasonal placement of girls' basketball and volleyball. *Ridgeway v. MHSA*, 633 F.Supp. 1564, 1583 (D. Mont. 1986).

32. In 1987, before the Ninth Circuit's decision on appeal from the first *Ridgeway* decision, Karen Deden and her parents filed a complaint against MHSA under the Montana Human Rights Act. They alleged illegal discrimination because of the non-traditional seasons of girls' basketball and volleyball. In December 1987, the Human Rights Commission staff issued a lack of reasonable cause finding, citing the *Ridgeway* holding of no constitutional violation in the non-traditional season as the basis for dismissal of Deden's complaint. The Commission upheld the no cause finding. The thrust of the decision was that the appropriate vehicle for an attack upon seasonal placements was through *Ridgeway*. *Deden v. MHSA*, No. 8700003341.

33. After the no cause finding in *Deden*, the Ninth Circuit affirmed the *Ridgeway* decision. The Court specifically held that the district court should not have decided whether the placement of seasons violated equal protection because the issue was not properly before the court. The Ninth Circuit noted that it "expressed no opinion on its appropriate resolution in this or any other context in which seasonal placement of girls' sports may be an issue." Interested persons seeking to challenge seasonal placements no longer had to use the *Ridgeway* vehicle. *Ridgeway*, 858 F.2d 579, 589 (9th Cir. 1988).

34. By the 1986-87 school year, 128 MHSA high schools had volleyball teams: 13 AA schools, 22 A schools, 47 B schools and 46 C schools. By the 1999-2000 season, 171 MHSA high schools had volleyball teams: 13 AA schools, 24 A schools, 51 B schools and 85 C schools. From 1982 through 2000, MHSA has had between 182 to 185 members. In 1999-2000, all AA and A schools had volleyball, most B schools had volleyball and most C schools

had volleyball. Only 10 to 12 schools did not have volleyball.<sup>8</sup> Exhibit R111; testimony of Austin.

35. In 1995, MHSA created the Ad Hoc Seasons Committee, to gather information and input and make a recommendation about the girls' basketball and volleyball season placements. In October 1995, after 9 months of work, the committee voted 10 to 9 in favor of switching volleyball to the fall and girls' basketball to the winter four years later. Exhibits CPI and R106; testimony of Austin.

36. At the annual MHSA membership meeting in January 1996, the members amended the by-laws of the association to require a 2/3rds vote of the members for any change of season from the seasons established on January 1, 1996. Before adoption of this amendment, MHSA had made decisions about seasonal alignments, subject to approval of a majority of the members. Exhibit 111, p. 27 (By-Laws, Sec. 1, Article IV); testimony of Austin and Haugen.

37. Since the mid-80's MHSA has received a request to switch the girls' basketball and volleyball seasons every year. Until the change in the by-laws in 1996, the failure of each request indicated that a majority of members opposed the change. After the change in the by-laws, the failure of each request indicated that fewer than 2/3rds of the members favored the change. Testimony of Jim Haugen.

38. MHSA staff has attempted to educate its members about the seasons question. MHSA staff prepared a videotape to educate people who participated in the public forums that were part of the information gathering by the Ad Hoc Committee. The majority of MHSA members are class C and B schools, but the larger schools participate in more sports and activities. MHSA collects \$225.00 for each activity or sport in which a member participates. Thus, while more of the votes come from the smaller schools, more of the association's money comes from the larger schools, creating potential rifts among the member schools. Bill Sprinkle voted against changing the seasons

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<sup>8</sup> By way of comparison, Exhibit R111 includes the classes of MHSA schools with teams in volleyball, football, wrestling, girls' basketball and boys' basketball as follows (AA/A/B/C/Total). Note that according to the handbook, the same schools play both girls' basketball and boys' basketball. A parenthetical number following the number of teams counts schools that field a joint team drawn from their combined enrollment.

<u>Sport</u>	<u>AA</u>	<u>A</u>	<u>B</u>	<u>C</u>	<u>Total</u>
VB	13	24	51	85	173
FB	13	24	44(58)	45(59)	126(155)
W	13	23	32(33)	10(13)	78(82)
GBB	13	24	46	97(98)	180(181)
BBB	13	24	46	97(98)	180(181)

on the same committee vote where Joanne Austin voted in favor of changing the seasons. Nevertheless, the entire staff of MHSA has sought to develop a membership consensus on the seasons issue. They have not been successful to date. Testimony of Joanne Austin and Jim Haugen.

*Impact of the Winter Volleyball Season and “Non-traditional” Seasons Generally*

39. MHSA sets a date before which teams cannot practice and requires a minimum number of practices a player must participate in before playing a match. Schools must sometimes schedule volleyball practice during a weekend to provide the requisite practice opportunities before the first match of the season. In recent years, some of the girls’ basketball tournaments have overlapped the commencement of volleyball practice. As a result, volleyball players who also played girls’ basketball for teams that participate in a state girls’ basketball tournament sometimes could not participate in the first volleyball matches of the season. They could not participate in the requisite number of pre-competition practices, because they were playing the basketball tournament. Exhibit R111; testimony of Ries, Burrington and Carroll.

40. The end of the MHSA volleyball season also can overlap the beginning of practice for the spring sports, creating the same problem of completing the requisite number of practices before competition for athletes in volleyball and in softball or track. The same conflict can arise for coaches of volleyball or girls’ basketball. One year, John Ries missed a week of initial practices for track because of the overlap with the conclusion of the state AA volleyball tournament. In the spring, Carroll had players on his team who also were playing softball, and had softball practices to attend while the volleyball team was preparing for the state tournament. There is no comparable overlap for any MHSA boys’ sports. Exhibit R111; testimony of Ries, Burrington and Carroll.

41. Because boys’ basketball needs gym time for practices and home games, and wrestling needs gym time for home matches, LaBonty has limits on practice time for his volleyball team. The limits include a gym schedule dividing practice time between the basketball and volleyball teams, including varsity teams, junior varsity teams and underclass teams (sophs, frosh, and so on), in addition to times blocked out for basketball and wrestling competitions. Practice time for the volleyball teams also includes time to set up the nets before and take down the nets after practice, if basketball, wrestling or physical education class had previous use or has next use of the gym. These constraints on practice time would not exist if volleyball had its traditional fall season and girls’ basketball had its traditional winter season. Testimony of LaBonty and Holt.

42. At Billings Senior, Carroll has as many as 100 girls trying out for volleyball. The try-outs are lengthy, placing further constraints on early practices. During the season, wrestling matches, basketball games and outside events, such as the Elks' annual hoopshoot and the elementary school basketball tournaments, interrupt normal practices. Billings Senior has an auxiliary gym, but setting two courts in the auxiliary gym leaves only 5 feet between courts and is both hazardous and crowded. When wrestling mats are rolled up and left against the wall in the auxiliary gym, there is even less space and even more hazard. Some practices, usually for freshman, are in the morning before school. Testimony of Carroll.

43. Every year at Billings Senior, Carroll's volleyball team will typically have at least one 7:00 p.m. Friday match, finishing around 9:30 p.m. or 10:00 p.m., followed by a 9:00 a.m. match the next day. The players must get up by 5:00 a.m. to meet at the school for a 5:30 a.m. or 6:00 a.m. bus to the morning match. Sometimes on Saturday, a 2:00 p.m. match will follow a noon match. Since other sports do not have the same scheduling problem, the impact on the players does not simply reduce their enjoyment of participation, but also gives them the message that their sport is less important than other sports. Players ask why they suffer these scheduling constraints when wrestling and boys' basketball do not. Testimony of Carroll.

44. The experiences of LaBonty and Carroll with practice time, gym conflicts and time and scheduling constraints are typical of those of other MHSA volleyball coaches. Testimony of John Ries, Burrington and Holt.

45. MHSA volleyball has special rules to reduce the time matches take.<sup>9</sup> Reduced match time reduces the amount of playing experience the athletes obtain. The special rules result in part from conflicting requirements for gym time and in part from a policy to "get the girls home earlier." A greater reduction in match time occurs below the varsity level. A lesser reduction occurs at the varsity level. There are no comparable special rules in any boys' sport. Football does have a special time rule to shorten games that are lopsided (in classes A-B-C). Football also has rules for smaller teams (8 man and 6 man variations). Basketball has shorter quarters for sub-varsity play. Testimony of LaBonty and Sprinkle.

46. Because most volleyball teams play in the fall, volleyball equipment is less available during the MHSA volleyball season. Manufacturers produce

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<sup>9</sup> One special rule permits either team to score a point on a rally, rather than only the serving team (applicable to games 3, 4 and 5 below varsity level, applicable to game 5 at varsity level). There can also be time limits for matches.

and market volleyball shoes, uniforms and equipment to meet the peak demand. Volleyball shoes are available in limited styles and numbers, if at all, during the MHSA season. Uniforms are more expensive. Some uniform designs are no longer in stock. MHSA volleyball players and teams do not have the range of choices for their apparel and equipment that are available to players and teams playing in the traditional season. Testimony of Ries, Holt, Carroll and Geah Ries.

47. Summer volleyball clinics for high school students are equally available to players playing in traditional or non-traditional seasons. There are such clinics in Montana. However, players with a traditional season, such as players in Oregon, move from the clinics into their playing season in the fall, and retain much of what they learn in the clinics. Players in Montana with a non-traditional season must wait until winter to use what they have learned, and do not retain as much. Testimony of Kathy Holt.

48. John Ries, LaBonty and Burrington have coached volleyball players with the potential to compete at Division I colleges outside of Montana. None of those players have obtained Division I scholarships outside of Montana. One cause of the failure to obtain the scholarships is lack of club volleyball playing time. Club volleyball play, typically under the auspices of the USVBA, begins in winter and continues into spring. Club volleyball starts after the traditional school volleyball season. Club volleyball provides additional practice and competition, with additional exposure to outside competition and college recruiting. MHSA volleyball players have very limited opportunities for USVBA play, since it largely overlaps their season. Club volleyball in Montana has appeared in Missoula, Belgrade, Three Forks and Billings, among other places. At any one time, there are usually not more than two or three teams involved in any location. Because of this, in-state club volleyball opportunities are very limited, and the caliber of competition is rather low. High school volleyball players in Glasgow do not have any opportunities for “club play.” High school volleyball players in Big Fork have some limited opportunities to compete in “club play,” by finding a spot on a Kalispell club team and travelling west with that team. While the geographic location of Montana and its low population density both limit opportunities for club play, the non-traditional season also limits opportunities for club play and limits the possibilities for development of club play in Montana. Development of quality club play in Montana is impossible with the winter MHSA volleyball season. Testimony of LaBonty, Burrington and Daniel Bartlett.

49. The non-traditional seasonal placement also contributes to the second cause for the failure of sufficiently talented players to obtain Division I

scholarships outside of Montana. John Ries, LaBonty and Burrington have assisted some of their players in efforts to obtain scholarships, in and out of Montana. No out-of-state coaches have ever come to their schools to scout their players, in part because of the non-traditional season. Coaches of MHSAA volleyball teams also lack recognition with the college programs out of Montana. This lack of recognition also results in part from the non-traditional season. Major coaches' clinics for volleyball typically occur in December, January and February, after the end of the traditional season. Coaches of MHSAA volleyball teams are not free to attend clinics in the middle of their teams' playing season, and cannot cultivate contacts at clinics.<sup>10</sup> The coaches' lack of recognition then also contributes to their inability to do more to facilitate scholarship offers for their players. Testimony of John Ries, LaBonty and Burrington.

50. Brook Hovland had the volleyball ability and grades to compete for volleyball scholarships at Division I colleges outside of Montana, but found she could not compete. Division I recruiters for upper echelon schools such as Stanford and UCLA chose and committed their high school recruits in July, after the club season and before the players' senior years. Other schools (including the University of Montana) made their recruiting decisions and sought commitments from the players by October through December of the players' senior years (i.e., by the end of the players' senior seasons). Brook Hovland was in the first month of her senior season in December 1999. The University of Montana, an in-state Division I school, considered her potential based upon her junior year, and elected to offer scholarships to players from other states whose development in their senior years was already known. Hovland had no realistic opportunities for such a scholarship, because she played volleyball in the winter instead of the fall. High school players from around the nation accepted scholarships for the following year while Hovland was still playing her senior season. By the time her season ended, "the scholarships were done." Letters of intent, which commit the athlete and the college to the scholarship agreement, for Division I college volleyball are due by early February each year. Testimony of Hovland and Dick Scott.

51. Geah Ries wants to attend Stanford, or another comparable school. She wants to try for a volleyball scholarship. She hopes to be competitive for

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<sup>10</sup> The best volleyball coaches' clinic typically occurs each year at the "Final Four," the NCAA semifinals and championship games. The high caliber clinic, together with the opportunity to establish contact with college coaches and observe the best college teams, is virtually unavailable to MHSAA coaches. The MHSAA pre-competition practice period coincides with the final four. John Ries has attended one final four in 17 years. To do so, he missed a week of try-outs and practices.

such a scholarship when she is a junior or senior in high school. She is participating in this lawsuit because she hopes successful resolution of it will give her that chance, which she otherwise may not have. Testimony of Geah Ries.

52. Scott began identifying prospects for his college team as early as their freshman and sophomore years of high school. He focused on USVBA club volleyball to find out-of-state prospects. He attended club tournaments, in Las Vegas, Seattle, Denver, Portland and California. These tournaments can involve as many as a thousand teams, playing in various locations throughout the community. Each tournament offers packets of information about the players and teams. With both those packets and information from recruiting services that offer published statistics for players, Scott developed profiles of players in club volleyball. Travelling to tournaments out-of-state at least once a month, he created files on prospects. At the tournament he attended most recently before the hearing, he “whittled down” 10,000 athletes to 15 or 20 prospects. Testimony of Scott.

53. When Scott first took the head coaching job at the University in 1978, there was no MHSAA volleyball program. Almost all of his recruiting was to out-of-state players. When MHSAA adopted volleyball as a high school sport, Scott began to recruit from Montana high school players. He wanted to recruit in-state players. However, because of the short non-traditional season in Montana, Scott has continued to find most of his recruits through the club venue. Through contact with MHSAA coaches he has identified 2 to 6 in-state Division I prospects each year. His options, within his recruiting budget, were in stark contrast. He could go to Glasgow to watch one kid, or Las Vegas to watch 500 kids. The trip to Glasgow counts as one time out of an NCAA annual maximum of four times observing the “one kid.” The entire Las Vegas tournament also counts as one time out of four observing all of the participating players. Testimony of Scott.

54. At a club tournament, there may be 200 coaches from the 287 Division I schools. Montana teams almost never attend. When there, they usually appear in the California tournaments that convene during late June and July. The Montana teams are usually not competitive. Montana teams are put together shortly before the tournament, while the other teams have typically been playing through the prior club season, and often through the prior traditional interscholastic season, as teams. The teams advancing in the tournament typically play in the “main arena” (the best site of the multiple sites for play in the tournament). After the first day of play, Montana kids do not compete in the main arena. The reasons for Montana players’ poor

showing are that the players against whom they compete in the tournaments have a longer fall volleyball season, good coaches during club play and organized club programs for months before they reach the California tournaments. Daniel Bartlett attended a tournament in Davis, California in which three Montana teams competed. Evaluating the play of the Montana teams against teams from outside of Montana, Bartlett observed that it looked “like JV versus varsity.” Typical club play is so much better than MHSA play that the two cannot be meaningfully compared. Testimony of Scott,<sup>11</sup> Bartlett and Kathy Holt.

55. Scott has almost never seen out-of-state Division I coaches recruiting in Montana. He could recall three instances since the inception of MHSA volleyball of Montana athletes going to Division I volleyball programs out of state. In addition to the other disadvantages MHSA volleyball players face in seeking such scholarships, Division I schools that commit a scholarship to an MHSA volleyball player take the risk of the Montana player suffering an injury during her senior season after the college recruits her. Scott, in one instance, did recruit a Montana player, signing her in December when he would normally make his choices for out-of-state players. In the state tournament in March, his recruit injured her knee. The University could not use her in the program that year, although she attended on the scholarship as a “red-shirt.” It hurt the University’s volleyball program. Testimony of Scott.

56. In 22 years of recruiting for the University volleyball program, Scott has never recruited a volleyball player from North Dakota, South Dakota or Michigan. These are the other three states with non-traditional high school volleyball seasons. Players from those states, like Montana players, are unable to participate fully in club volleyball. Testimony of Scott.

57. *Volleyball* magazine, a national publication, covers high school and college men’s and women’s volleyball competition. In January or February, after the end of the traditional volleyball season, the magazine publishes statistics of high school players and selects high school “All-American” players. Records of high school teams of note are also covered. Because MHSA volleyball is in the middle of its non-traditional season, MHSA volleyball players and teams cannot get the kind of exposure through publication that is

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<sup>11</sup> MHSA regulations allow a coach to coach his MHSA team members “anytime, anywhere” during June 1 to July 31. The other ten months, MHSA prohibits a coach from coaching his MHSA team members on any team. R111. The best volleyball coaches in Montana are the high school coaches who cannot coach the volleyball players from their schools between August 1 and May 31. The combined effect of this rule and the non-traditional MHSA volleyball season is to hamstring the development of Montana teams competitive in club volleyball and the June/July tournaments that culminate the club season.

available to high school volleyball players in “traditional season” states. The best exposure MHSAs players and teams can obtain is publication the following year of exceptional junior varsity accomplishments. Testimony of John Ries.

58. In-state Montana colleges do recruit MHSAs volleyball players. In-state schools’ recruiters have fewer geographic obstacles to seeing those players and actually have more time (since their fall season is over when the MHSAs players are competing) to evaluate the MHSAs volleyball players. Testimony of LaBonty and Burrington.

59. Smaller colleges in surrounding states also provide scholarship opportunities for MHSAs volleyball players. Burrington had a player who, unable to interest any out-of-state Division I program, obtained a volleyball scholarship to a junior college in Sheridan, Wyoming. Some of LaBonty’s players have obtained scholarships to North Dakota colleges below Division I. North Dakota high schools have the same non-traditional volleyball season as Montana. Testimony of LaBonty and Burrington.

60. For the Montana members of the Frontier conference, and perhaps also for out of state members, it is an advantage to have MHSAs girls’ basketball and volleyball played out of season. Coaches have more opportunities to see and recruit the players. Testimony of Ron Kenison.

61. Coaches of MHSAs volleyball teams have no chance to take their players to watch college volleyball games during the MHSAs volleyball season, when the high school athletes are playing. Burrington has used a videotape of a Stanford vs. UCLA college match to motivate her players before a tournament. She could not use live play, or live televised play, to provide her players with role models and examples of play at the college level. No MHSAs boys’ sport has the same problem. Brook Hovland found that watching college volleyball during the traditional season left her frustrated. She wanted to try to do the things she saw the college players doing, not wait until her season arrived. The non-traditional season denies MHSAs volleyball players the opportunities to see and identify with college players in season. Testimony of Burrington, Hovland and Holt.

62. Videotape of college volleyball is useful, but not as good as attending actual college play. The videotape does not involve the viewers emotionally as well as the live play does. Watching in season is a more powerful way to present role models to high school volleyball players. Testimony of Pelichkoff.

63. When she was in seventh grade, Geah Ries accompanied her father to watch the NCAA volleyball final four play. She was dazzled by the matches. She wanted to go to college at one of those four schools (Stanford, Florida, Penn State and Long Beach State). Because she was out of school to see the final four, Geah missed her school's tryouts and practices. Although she eventually played with the junior high team, she missed the first match before she could make up her time lost. Testimony of Geah Ries.

64. The MHSAA non-traditional volleyball season reduces the opportunities of the participating students to further their careers in volleyball and play college volleyball (with or without scholarships) by limiting their access to club play and the concurrent opportunities to improve their play and to showcase their play and statistics. Testimony of Michele Nelson and Kathy Holt.

65. The Great Falls *Tribune* gives a high priority to high school sports across the state. The amount of coverage for volleyball depends (as for all sports) upon the *Tribune's* beliefs about how many readers are interested, how high attendance at games is, phone calls from readers and feedback at the office. The level of coverage for volleyball would change if it moved to the fall only if the interest level in the sport changed. Girls basketball has some apparent advantages in maintaining a growing level of interest and attendance. It is more familiar now to the fans. It has virtually no gym sport competition and no basketball competition with other sports. Testimony of George Geise.

66. Media coverage for girls' basketball might decrease if it moved to the winter, but it would depend upon scheduling and interest. Being the same sport as boys' basketball, both might lose some coverage. Testimony of George Geise.

67. MHSAA is not involved in obtaining scholarships for high school athletes, and has no plans to become involved under any circumstances. Testimony of Sprinkle and Haugen.

68. Montana has a shortage of qualified MOA volleyball officials. To develop and keep good officials, in volleyball or any other sport, there must be enough challenging games to maintain the interest and sharpen the skills of the officials. Testimony of Bartlett.

69. Every year, at the state AA volleyball tournament, the AA coaches vote on season placement, and vote unanimously to ask the MHSAA to move volleyball to the fall season. Testimony of Carroll.

70. MHSA has two women's sports played in non-traditional seasons. It has no men's sports played in non-traditional seasons. Non-traditional seasons for high school sports result in a number of disadvantages for the participants. They have reduced access to college scholarships and personal recognition through national publicity and awards. They have reduced access to outside amateur play in their sport, because the outside amateur sports organizations adjust their schedules to be outside of the traditional school seasons for the sports. They have reduced opportunity to identify with college role models in their sports, because college play is in the traditional season. They are at risk for loss of playing time if they transfer, since most states follow traditional seasons. If the sport is played out of season for females and in season for males,<sup>12</sup> the female players are less likely to see female coaches or officials, with whom they could identify, since established coaches and officials (mostly male) can compete for the jobs. Finally, when female teams play out of season while male teams do not, the female players are at risk of perceiving that their efforts and their teams have less value than the male players' efforts and male teams. Where schools offer students the opportunity to participate in extracurricular interscholastic sports, sound education practice is to treat men's and women's sports equally, including scheduling them in traditional seasons. Testimony of Dona Lopiano and Linda Pelichkoff.

71. Geah Ries knows that the MHSA determined that volleyball would be played in the winter season. To her, it demonstrates that volleyball does not have the importance of the boys' sports. She considers it unfair, and is part of this proceeding in the hopes of "finally" obtaining equal rights. Testimony of Geah Ries.

72. MHSA has scheduled state volleyball tournaments during spring breaks of the public schools. No other sport has a comparable event take place while schools are not in session. Testimony of Carroll.

73. If volleyball switched to a fall season, with all other MHSA sports seasons remaining the same, it would be difficult to schedule girls' basketball and volleyball. Volleyball would probably suffer if it were in direct competition for school, student and fan support with girls' basketball. Testimony of Carroll and Haugen.

74. The sound educational solution to the unequal treatment of female students who participate in MHSA sports out of the traditional seasons is to reverse the seasons of girls' basketball and volleyball, so that neither boys nor

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<sup>12</sup> Soccer as well as basketball has male teams and female teams, so the potential for such split seasons extends beyond basketball.

girls have any of their sports played out of season. Testimony of Lopiano and Petlichkoff.

75. Smaller schools may face problems with scheduling, finding enough qualified coaches and officials for both boys' and girls' basketball if the two seasons are identical. Testimony of Calvin Moore.

76. The lack of competition from boys' basketball for fans helped girls' basketball to a successful start in Montana. Jim Gross helped his players to get scholarships from Frontier Conference schools when he was coaching the girls' basketball team at Carroll. He did not see any disadvantage to his players in seeking Division I scholarships. He believes it would be an advantage to volleyball to move to the fall season, for all the same reasons it has been advantageous for girls' basketball to be in the fall--less competition for gym space, practice time, facility access, fan support and publicity. Testimony of Jim Gross.

77. The adverse impacts of reversing the seasons of girls' basketball and volleyball are largely matters of cost. Schools may have poorer attendance and lower gate receipts if girls' basketball and boys' basketball are in the same season. More officials for those games may be necessary, and difficult to find. Testimony of Jim Haugen. *See also, Ridgeway v. MHSA*, 633 F.Supp. 1564 (D. Mont. 1986) *aff'd* 858 F.2d 579 (9th Cir. 1988) for findings regarding risks of adverse impacts from reversing the seasons.

78. Roughly equal numbers of female students participate in girls' basketball and in volleyball. In 1998-99, there were 4196 students playing MHSA girls' basketball and 4419 students playing MHSA volleyball. Testimony of Jim Haugen.

79. MHSA fully supports the concept of equal opportunity for the youth of the State of Montana. It is committed to the policy that there will be no discrimination with regard to gender (among other protected classes) in activities it sponsors. Exhibit R111; testimony of Jim Haugen.

80. MHSA does not believe that facility limitations, lack of officials, lower gate receipts, scheduling difficulties or problems with the media would justify offering unequal opportunities to student athletes based on their gender. None of the problems that could result from switching girls' basketball and volleyball seasons are insurmountable. Probably volleyball would have fewer problems with a fall schedule, while girls' basketball might experience more problems with a winter schedule. Testimony of Jim Haugen.

81. MHSA contracts its tournaments by bid. At the time of hearing, contracts for the 2001-2002 school year sites for activities and sports other than girls' basketball and volleyball are already in place. The only reason that girls' basketball and volleyball are not already in place for next year is this litigation. The MHSA still believes a 4-year target date for switching the two seasons would be the most workable for the organization and the member schools. Testimony of Joanne Austin.

#### IV. Opinion

Montana law prohibits an educational institution from discrimination against students in privileges of education because of sex. §49-2-307 MCA. Montana law also requires that educational programs of state and local government agencies must be open to all persons without regard to sex, and that all state and local government agencies must perform their services without discrimination based on sex. §§49-3-203 and 49-3-205 MCA.<sup>13</sup>

MHSA has among its members all the public high schools in Montana. MHSA, though an independent entity, has board members from state government. MHSA's member schools receive state and federal funding. Overall, the nexus between MHSA, the public school districts, the school board association and OPI is sufficient to consider MHSA as a deliverer of governmental services. As such, it stands in the shoes of the state in this determination of whether it is acting in a discriminatory fashion.<sup>14</sup>

There is no requirement that schools provide students with extracurricular activities. *See generally, Hoover v. Meiklejohn*, 430 F.Supp. 164 (D.Colo.1977); *Brenden v. Independent Sch. Dist.*, 742, 477 F.2d 1292, 1297 (8th Cir.1973); *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). When schools choose to provide such activities, they must be provided to all students on an equal basis. *See, Brown, supra.*, 347 U.S. at 493, 74 S.Ct. at 691.

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<sup>13</sup> Charging parties also complained of violation of §49-2-304 MCA, discrimination in public accommodation. Neither MHSA nor its member schools fit the definition of a public accommodation: which is a "place that caters or offers its services, goods, or facilities to the general public subject only to the conditions and limitations established by law and applicable to all persons." §49-2-101(20)(a) MCA.

<sup>14</sup> "I equate MHSA and OPI with the State of Montana for purposes of determining state action in resolving these constitutional issues. *See Brenden v. Independent Sch. Dist.*, 477 F.2d 1292, 1295 (8th Cir.1973)." *Ridgeway v. MHSA*, 633 F.Supp. 1579, fn. 9 (D. Mont. 1986) *aff'd* 858 F.2d 579 (9th Cir. 1988)

MHSA governs the conditions for participation in interscholastic extracurricular sports. MHSA operates for its member schools. To prove their case, charging parties must prove discrimination in education, agency services, or both because of MHSA's non-traditional volleyball season.<sup>15</sup>

MHSA challenged the standing of the charging parties. All of the charging parties have alleged discrimination causing them harm. Any person aggrieved by any discriminatory practice the Human Rights Act prohibits may file a complaint with the department. §49-2-501 MCA. If the charging parties prove that MHSA illegally discriminated against them, then the department *shall* order MHSA to refrain from engaging in the discriminatory conduct and may prescribe conditions on MHSA's future conduct relevant to the type of discriminatory practice found. §49-2-506(1) and 1(a) MCA. The charging parties' allegations provided them with standing to present their case. If the charging parties fail to prove that MHSA illegally discriminated against them, they lose the case rather than lacking standing. §49-2-507 MCA.

The department can act only upon a finding of illegal discrimination that aggrieved the charging party. A complaint must contain the particulars of the alleged discriminatory practice, and the party filing the complaint must be affected ("aggrieved") by that practice. §§49-2-501 MCA. If the department finds the respondent "has engaged in the discriminatory practice alleged in the complaint," the department has jurisdiction to fashion remedies. §49-2-506(1) MCA. Thus, if the charging parties prevail in this case, they must necessarily have established their standing, since an element of both their complaint and their proof is that the discriminatory practice caused them injury. If their proof fails with regard to injury, the department dismisses the case, as it would with any other failure of proof. §49-2-507 MCA.

MHSA also argued that the charging parties do not suffer continuing harm, and therefore their claims are moot. None of the charging parties advanced moot Human Rights Act claims. If no longer being at risk for further discrimination rendered a claim moot, many claims presented to the department would be moot. Every former employee no longer risks further discrimination in employment. Every former student no longer risks further discrimination in education. If a former employee or former student successfully mitigated damages completely by the time of their hearing, that would not render their claim moot, either as to past damages or as to

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<sup>15</sup> Charging parties argued that MHSA had the burden to prove that scheduling volleyball and girls' basketball in non-traditional seasons was constitutional or reasonable under §49-2-307(1) MCA. Charging parties must first carry the burden of proving that this scheduling is illegally discriminatory before MHSA must rebut that proof or justify its conduct.

injunctive and affirmative relief. The charging parties sought no remedy for harm they have individually suffered, but proof of illegal discrimination against them triggers injunctive and affirmative relief against MHSA. §49-2-506(1) and 1(a) MCA. LaBonty can obtain injunctive and affirmative relief against MHSA even if he no longer coaches volleyball. Brook Hovland can obtain injunctive and affirmative relief against MHSA even if she has graduated. There is no requirement of a continuing risk of personal harm.

The charging parties have proved disparate treatment by direct evidence. Direct evidence is "proof which speaks directly to the issue, requiring no support by other evidence" proving a fact without the need of inference or presumption. *Black's Law Dictionary*, p. 413 (5th Ed. 1979). Direct evidence of discrimination establishes the violation unless the defendant responds with substantial and credible evidence either to rebut the proof of discrimination or to demonstrate a legal justification. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). Direct evidence can relate to both to the defendant's acts and to the defendant's discriminatory intention. *Foxman v. MIADS*, HRC Case #8901003997 (June 29, 1992)(race discrimination); *Edwards v. Western Energy*, HRC Case #AHpE86-2885 (August 8, 1990) (disability discrimination); *Elliot v. City of Helena*, HRC Case #8701003108 (June 14, 1989) (age discrimination).

Charging parties proved that MHSA has two women's sports played in non-traditional seasons. It has no men's sports played in non-traditional seasons. Non-traditional seasons for high school sports result in a number of disadvantages for the participants, as set forth in the findings. They have reduced access to college scholarships and personal recognition through national publicity and awards. They have reduced access to outside amateur play in their sport, because the outside amateur sports organizations adjust their schedules to be outside of the traditional school seasons for the sports. They have reduced opportunity to identify with college role models in their sports, because college play is in the traditional season. They are at risk for loss of playing time if they transfer, since most states follow traditional seasons. If the sport is played out of season for females and in season for males, the female players are less likely to see female coaches or officials, with whom they could identify. Finally, when female teams play out of season while male teams do not, the female players are at risk of perceiving that their efforts and their teams have less value than the male players' efforts and male teams. Where schools offer students the opportunity to participate in extracurricular interscholastic sports, sound education practice is to treat men's and women's sports equally, including scheduling them in traditional seasons. MHSA does not do so.

MHSA's discriminatory action is clear. Its discriminatory intention does not take the form of conscious malice toward females who play MHSA volleyball. There is no evidence of any conscious malice. Rather, the intention manifests itself in the membership's refusal to reverse the seasons for girls' basketball and volleyball. When the membership of MHSA continues to maintain non-traditional seasons for two female sports while having traditional seasons for all male sports, this disparate treatment evidences discriminatory intent. The law presumes that people intend the ordinary consequences of their voluntary acts. 26-1-602(3) MCA. The ordinary consequences of the seasonal alignments are to deny female athletes equal access to extracurricular interscholastic sports, in both volleyball and girls' basketball, illegally. *Brown, op.cit.*, 347 U.S. at 493, 74 S.Ct. at 691.

When a charging party proves a *prima facie* case by direct evidence, the respondent must prove by a preponderance of the evidence that an unlawful motive played no role in the challenged action or that the direct evidence of discrimination is not credible and is unworthy of belief. 24.9.610(5) A.R.M. MHSA failed to meet this burden. The seasonal alignment is discriminatory. MHSA cannot persuade 2/3rds of its membership to switch the seasons. The effect of the present seasonal alignment is that women have different and lesser opportunities than men in two sports--volleyball and basketball. MHSA has not proved that it is coincidental that it has aligned two female sports and no male sports outside the traditional seasons. MHSA admitted that it decided placement of the volleyball and girls' basketball seasons without much thought or study.

MHSA defended by citing *Ridgeway v. MHSA*, 633 F.Supp. 1564 (D.Mont. 1986) *aff'd* 858 F.2d 579 (9th Cir. 1988) as controlling. The same reading of *Ridgeway* appears in a law review article that calls it an example of judicial tolerance for burdening female but not male athletes with non-traditional seasons. *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT.&SPORTS L.REV. 1, 46-47 (W.1992), *citing Ridgeway op. cit.* Author Diane Heckman reported that the district court in *Ridgeway* held that women's high school basketball and volleyball seasons need not be aligned with national norms, since this factor was not relevant to the issue of inequality overall. She noted that although the Ninth Circuit affirmed Judge Lovell's decision, it first held that he should not have decided that seasons placement did not violate equal protection, since that issue was not properly before the district court. She quoted the Circuit Court's statement that it "expressed no opinion on its [seasons placement] appropriate resolution in this or any other context in which seasonal placement of girls' sports may be an issue."

*Ridgeway*, 858 F.2d at 589.<sup>16</sup> Despite this accurate report of the decisions, Heckman saw *Ridgeway* as supporting disparate season scheduling: “It is the female who bears the disadvantage when her sports schedules are not in accordance with the national norm, while the men's teams are engaged in athletic competition during the traditional seasons [FN208].” 9 U.MIAMI ENT. & SPORTS L. REV. at 46-47. Footnote 208 cited both Judge Lovell’s decision and the Ninth Circuit appeal.

MHSA and Heckman, for rather different reasons, offer the same rationale. Since the Ninth Circuit disapproved of Judge Lovell’s decision on seasons placement, and separated its decision from that issue, *Ridgeway* was not dispositive of the seasons placement issue. Heckman accurately noted that refusal to decide the seasons placement effectively left the status quo intact. By reserving the season placement issue while affirming Judge Lovell, the Ninth Circuit left untouched the non-traditional placement of volleyball and girls’ basketball. Leaving the issue for another forum preserved the status quo.

MHSA cannot avail itself of the same logic. The legal propriety of the non-traditional seasons is relevant to the issues in this case, where the discriminatory impact of a non-traditional volleyball season is the central issue of the entire case. In *Ridgeway*, the Ninth Circuit explicitly left open to the parties and others any judicial or administrative remedy available outside of that proceeding. This case is one in which the charging parties seek such a remedy.

The more forceful defense MHSA offers is reasonability. MHSA argues that the practical factors involved in the switch of volleyball and girls’ basketball militate against the switch. However, MHSA has not proved that such a switch would be unreasonable.

Since the number of participants in volleyball exceeds the number of participants in girls’ basketball, problems of facility access and scheduling cannot be appreciably worse if the seasons are reversed. Since boys’ basketball practice and girls’ basketball practice use the same gym set-up, practice time can be more efficiently used if volleyball is in the fall and girls’ basketball is in the winter. If more officials are needed, or more coaches, because the two seasons coincide, then more officials and coaches must be found and hired. The overall cost of having coaches and officials should not change simply because the seasons are reversed.

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<sup>16</sup> 9 U.MIAMI ENT. & SPORTS L. REV. at 51.

The most difficult factor to define, in analyzing the reasonability of switching the seasons, is the heavy impact upon some school districts versus the light impact upon others. For example, a school that has very limited funds and a small student population may be participating in only a few sports. Basketball, from September through March, may be the chief “draw” for the school, not simply for gate receipts and boosters, but also for a positive relationship with the community that votes on bond issues. The impact upon that school may be far more severe than the impact upon a AA school with multiple sports and activities.

Judge Lovell’s decision in 1986 in *Ridgeway* fairly presents many of the problems MHSAs and the other defendants raised. Nevertheless, small school districts are not a protected class under the Montana Human Rights Act. No doubt, the switch in seasons will create problems for many districts. Nonetheless, there is no other option available that offers any promise of fulfilling the pledge on the inside cover of the MHSAs handbook: that MHSAs fully support the concept of equal opportunity for the youth of the State of Montana; that MHSAs are committed to the policy that there will be no discrimination with regard to gender (among other protected classes) in activities it sponsors.

In fairness to MHSAs, it has been bound by its members’ reluctance to change their existing seasons. This decision is not a criticism of MHSAs staff, but simply a recognition that the time for the member schools to do the right thing voluntarily has passed. By this decision, the department does what the *Ridgeway* facilitator recommended in 1986. Then as now, the member schools chose to fight the seasonal realignment. It is time for the maneuvering to end, and the realignment to begin.

MHSAs argued that because only the volleyball seasonal alignment was at issue in this case, the decision could address no other alignment. The department has the power to require any reasonable measure to correct the discriminatory practice found. §49-2-506(1)(b) MCA. The department can require realignment of more than just the volleyball season in this case. Placing the volleyball season in its traditional season and leaving the girls’ basketball season in its non-traditional season would be unreasonable. The two girls’ sports would then be forced to compete head to head for facilities, officials, fans, publicity and participants. Given the overwhelming evidence in favor of traditional seasonal placement, the most reasonable measure is to realign both sports to their traditional season. MHSAs exercise the same control and governance over girls’ basketball as it does over volleyball and

every other MHSAsport. The appropriate respondent participated in the proceeding, and the department has jurisdiction to realign both seasons.

MHSA asked that any change in seasons be deferred for four years. Given the scheduling practices of MHSA, four years is not necessary or proper. Two school years are ample time to plan and implement the changes. Any implicit promise by MHSA to maintain the current seasonal alignment until current freshman graduate is vitiated by the illegality of the current alignment. Nevertheless, attempting now to implement the changes for the 2001-2002 season could result in too short a time for MHSA to complete the process of realignment. After it submits its initial plan for realignment, in February 2001, the department's Human Rights Bureau and the charging parties must have an opportunity to review that plan and suggest changes. A two-year period is the shortest time within which MHSA can reasonably accomplish the realignment.

## **V. Conclusions of Law**

1. The Department has jurisdiction over this case. §49-2-509(7) MCA.
2. The Montana High School Association unlawfully discriminated against charging parties because of sex in privileges of education, in providing access to educational programs of state and local government agencies and in performance of government services. §49-2-307 MCA, §49-3-203 MCA and 49-3-205 MCA.
3. Pursuant to §49-2-506(1)(a),(b) and (c) MCA, MHSA is enjoined against further illegal discrimination, and MHSA must adopt a plan to switch volleyball from winter season to fall season and girls' basketball from fall season to winter season. MHSA must simultaneously submit this plan to charging parties and the department's Human Rights Bureau by February 1, 2001. The plan must effectuate seasonal realigned by the beginning of the 2002-2003 school year, and must have action components addressing recruitment of officials and coaches and education of students, parents and communities about the switch and the reasons for it. Only after submitting such a plan may MHSA submit to the department's Human Rights Bureau (copy to charging parties) any proposals for deviation from the plan, with documented reasons for any such proposal for deviation. Charging parties may submit comments upon the action plan and any proposals for deviation, and the department's Human Rights Bureau can approve the action plan or direct amendments therein, and accept, direct amendments in or reject any proposals for deviations. The department's Human Rights Bureau must approve the final plan within one calendar year of the date of this decision.

4. Pursuant to §49-2-505(7), MCA, charging parties are the prevailing parties.

## VI. Order

1. Judgment is found in favor of **John Ries**, personally and on behalf of his minor child, **Geah Ries; John LaBonty; Mary K. Hovland (Burrington)**, personally and on behalf of her minor child, **Brook Hovland** and against the **Montana High School Association** on the charge that MHSA discriminated against them on the basis of sex by requiring female students to participate in sports during seasons which are different from traditional seasons.

2. MHSA is enjoined from further discriminatory acts and ordered to comply with Conclusion of Law No. 3.

Dated: August 11, 2000.

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Terry Spear, Hearing Examiner  
Montana Department of Labor and Industry