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**United States Commission on Civil Rights
Briefing on "Title IX Athletics: Accommodating Interest and Abilities"
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I am Jocelyn Samuels, the Vice President for Education and Employment at the National Women's Law Center in Washington, D.C. I appreciate the opportunity to appear before you today to discuss Title IX's requirement that the athletics interests and abilities of male and female students be equally accommodated.

Founded in the year that Title IX was passed, the National Women's Law Center has been at the forefront of virtually every major effort to secure and defend women's legal rights, particularly with regard to participation in athletics. The Center filed the first comprehensive Title IX challenge to discrimination in intercollegiate athletics; has participated in most of the subsequent federal appellate cases to consider the application of Title IX to athletics; and has filed amicus briefs or been counsel in every Supreme Court case involving Title IX. Of particular relevance here, the Center was a key participant in the efforts that led to issuance of the three-part test that has for close to 30 years governed assessments of school compliance with Title IX's participation requirements.

I would like to focus my remarks this morning on the significant and damaging flaws in the Department of Education's "Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three"¹ (hereinafter "2005 Clarification") issued without notice or opportunity for public comment on March 17, 2005. The 2005 Clarification conflicts with longstanding Department of Education policy, violates basic principles of equality under the law, and threatens to reverse the enormous progress women and girls have made in sports since the enactment of Title IX. The National Women's Law Center continues to call on the Department to rescind this harmful and unlawful Clarification.

As you know, Title IX of the Education Amendments of 1972² bars sex discrimination in federally funded education programs and activities and requires that schools provide equal sports participation opportunities to their male and female students. For almost three decades, the Department of Education's regulatory policies have provided three independent ways – the "three-part test" – for educational institutions to show that they are meeting this requirement. Specifically, a school can demonstrate compliance if it can:

- Demonstrate that intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollment; *or*

- Where the members of one sex have been and are underrepresented among intercollegiate athletes, show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; *or*
- Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.³

Frequent attacks on the three-part test have been resoundingly rejected; the test has been uniformly upheld by the nine federal appellate courts to have considered it⁴ and uniformly applied by prior Administrations. In fact, in July 2003, this Department of Education reaffirmed its commitment to applying the test and long-standing Department interpretations of it, rejecting – in the wake of a massive public outcry – recommendations made by a Department Commission on Opportunity in Athletics that would have dramatically undermined women’s rights to equal opportunity in sports.⁵

Despite this commitment, the Department’s 2005 Clarification violates long-standing and fundamental principles underlying the Department’s regulatory policies, as well as the law itself. The Clarification allows schools that are not meeting either the first or the second prong of the three-part test to show that they are nonetheless in compliance with Title IX by doing nothing more than sending a “model” e-mail survey to their female students asking about their interest in additional sports opportunities. The Department will presume that schools comply with Title IX if they administer this survey and find insufficient interest to support additional opportunities for women—even if schools get very low response rates—unless female students can provide “direct and very persuasive evidence” to the contrary. For the reasons I set forth below, this policy change effectively eviscerates the third prong’s requirement that schools show full and effective accommodation of their female students’ athletic interests.

The 2005 Clarification Violates Basic Principles of Equal Opportunity

The 2005 Clarification Impermissibly Allows Schools to Rely on Surveys Alone to Measure Compliance.

The 2005 Clarification permits schools to rely exclusively on the results of a survey to their female students to evaluate whether they have satisfied their obligation to provide equal athletics opportunities to these students. But as courts have consistently recognized, interest cannot be measured apart from opportunity. “Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience.”⁶ As a result, surveys are likely only to provide a measure of the discrimination that has limited, and continues to limit, sports opportunities for women and girls. As the First Circuit stated in its seminal decision in *Cohen v. Brown University*,

“[T]here exists the danger that, rather than providing a true measure of women’s interest in sports, statistical evidence purporting to reflect women’s interest instead provides only a measure of the very discrimination that is and has been the basis for women’s lack of opportunity to participate in sports.”⁷

Thus, basing women’s future opportunities on their responses to surveys that measure their prior lack of exposure will only perpetuate the cycle of discrimination in sports to which they have been, and continue to be, subjected. It is for these reasons that Department of Education policies that predate the 2005 Clarification require that schools seeking to show that they have satisfied the interests of their female students evaluate a host of additional factors, including:

- Requests by students and admitted students that a particular sport be added;
- Requests that an existing club sport be elevated to intercollegiate team status;
- Participation in particular club or intramural sports;
- Interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- Results of questionnaires of students and admitted students regarding interests in particular sports;
- Participation in particular interscholastic sports by admitted students; and
- Participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the school draws its students.⁸

The Department’s decision to eliminate schools’ obligation to consider these important criteria is a major disservice to female students and violates Title IX’s fundamental purpose of eradicating the discrimination to which women have consistently been subject in athletics and in other aspects of their education.

The 2005 Clarification Impermissibly Allows Schools to Restrict Their Surveys to Enrolled and Admitted Students.

The 2005 Clarification explicitly authorizes schools to survey only their enrolled and admitted students in evaluating whether they have met the requirements of the third prong of the three-part test. But this approach ignores the reality that students interested in a sport not offered by a school are unlikely to attend that school. By failing to require schools to look beyond their own campuses — to, for example, high school, community, and recreational programs in the areas from which a school typically draws its students — the Clarification allows schools to evade their legal obligation to look broadly at indicia of women’s interest in sports. Instead, the policy rewards schools with a presumption of compliance for wearing blinders — that is, for restricting their sports offerings and then claiming that they are satisfying the interests of those who are content with those restricted offerings.

The Clarification also ignores the ways in which schools typically recruit for men’s teams. Most colleges assess prospective players regionally or nationally and recruit them with scholarship offers or non-financial benefits to apply to and attend an institution. The 2005

Clarification effectively requires women to show that they can fill a new team by relying entirely on students within their schools' current student bodies – a requirement that is not imposed on men's teams.

Recognizing these realities, and as noted above, prior Department policies have long required schools seeking to comply with Prong Three to look beyond their campuses to identify the participation opportunities offered by other colleges and universities or by high schools and recreation leagues in areas from which the school draws its students. To do otherwise in assessing whether women's interests and abilities have been fully satisfied, as authorized by the 2005 Clarification, vitiates the third prong of the test and perpetuates the cycle of discrimination. Indeed, as the Fifth Circuit Court of Appeals has stated in rejecting an argument very like that embraced in the 2005 Clarification:

“The heart of this contention is that an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist. It should go without saying that adopting this criteria would eliminate an effective accommodation claim by any plaintiff, at any time.”⁹

The 2005 Clarification Authorizes a Deeply Flawed Survey Methodology.

My colleagues on the panel will address the methodological flaws in the survey authorized by the 2005 Clarification in more detail. I would like to focus on two particularly problematic aspects of the survey approach the Department has endorsed: the authorization to schools to (a) interpret a lack of response to the survey as evidence of lack of interest; and (b) presume that a young woman's self-assessment of a lack of ability to compete reflects an actual lack of ability.

Given the low rate of response to surveys in general, and the glitches often associated with e-mail communications, the authorization for schools to treat a failure to respond to the survey as a response affirmatively indicating lack of interest in additional sports opportunities is likely to lead schools to significantly underestimate the level of interest that exists on their campuses. There are numerous reasons – entirely unrelated to their interest in participating in sports – that students may fail to respond to a survey. Students may not have access to – or regularly use – university e-mail. Students may not receive an e-mailed survey if the e-mail gets caught in a spam filter, or they may delete an e-mail that looks like it might carry a virus. They may be too busy with other academic or extracurricular commitments to respond. Indeed, even if the e-mail accompanying the on-line survey states that failure to respond will be treated as evidence of lack of interest, students may delete the e-mail without reading this warning. To treat non-response as evidence of lack of interest is methodologically unsound and unfair to young women.

It also violates basic principles governing acceptable survey response rates. In one case,¹⁰ for example, a court rejected survey evidence used to argue compliance with Prong Three

of the three-part test on the grounds that the survey, which achieved only a 39 percent response rate, was not a reliable means of measuring the institution's compliance with Title IX. The court noted that NCAA guidelines warn that response rates below 60 percent "would almost always be cause for concern because almost half of those selected to represent your school did not participate in the study," and because the results "could always be called into question and challenged for their representativeness."¹¹ By authorizing schools to treat non-responses as if they were in fact responses, however, the Clarification allows the schools to create the fiction that 100% of surveyed students have responded. This fiction should not be allowed to obscure the reality that the Clarification permits schools to deny athletics opportunities to women based on *actual* response rates that would likely be rejected by any court examining the evidence.

Equally troubling is the Clarification's authorization for schools to "presume that a student's self-assessment of lack of ability to compete at the intercollegiate varsity level in a particular sport is evidence of actual lack of ability."¹² This authorization shortchanges the significant number of students who do not recognize their own potential until a coach, parent or friend encourages them to try. Moreover, as the Clarification itself recognizes, "a student may have athletic skills, gained from experience in other sports, which are fundamental to the particular sport in which the student has expressed an interest."¹³ A high school swimmer may, for example, have the skills to participate on a collegiate crew team; a former soccer player may be able to compete in track. Under longstanding Department policies that predate the Clarification, schools were expected to seek the opinions of coaches and other experts in evaluating women's abilities to compete at a varsity level. But the 2005 Clarification relieves schools of any obligation to conduct this independent assessment.

The 2005 Clarification Impermissibly Shifts the Burden to Female Students to Show Their Interest in Equal Treatment.

Under the Department policies predating the 2005 Clarification, schools had the burden of showing – and the Office for Civil Rights the burden of rigorously evaluating claims – that, despite their failure to provide equal opportunities to their female students, schools were nonetheless fully accommodating women's interests and abilities. OCR, for example, required that all educational institutions undertake evaluations of interest "periodically so that the institution [could] identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex"¹⁴ – and required that an institution justify any assertion that students were not interested in playing sports offered in the region.¹⁵ Under the 2005 Clarification, however, schools that have implemented the model survey are presumed to have complied with Title IX, unless students produce "direct and very persuasive evidence of unmet interest sufficient to sustain a varsity team."¹⁶ And although prior policies called for schools to consider sports offered in the communities from which they drew their students, the 2005 Clarification explicitly rejects the argument that "evidence that feeder high schools for the institution offer a particular interscholastic sport" is sufficient to sustain a female athlete's burden.¹⁷

This shift in the burdens – forcing women to prove that they are interested in and entitled to equal treatment – is an inversion of basic civil rights principles. It also conflicts with a key

purpose of Title IX – to encourage women’s interest in sports and eliminate stereotypes that discourage them from participating.¹⁸ It is particularly damaging for students in high school, where female students are likely to have had few or no sports opportunities that would inform their responses to an interest survey, and where students should be encouraged to try many different sports, not have their future opportunities limited by what they might have experienced or be interested in at that time.

It is also contrary to the requirement of *full* accommodation of female athletes’ interests and abilities. Opponents of the three-part test have argued that Prong Three should be read to require accommodation of the interests and abilities of female students based only on the relative levels of those interests in comparison to those of men. But this “relative interests” argument ignores the fact that a school relying on Prong Three to comply with the three-part test is, by definition, failing to offer female students equal opportunity compared to their male peers. It relies on the inaccurate and impermissible stereotype that women are inherently less interested in participation in athletics than their male counterparts. And as the First Circuit has noted, the argument “contravenes the purpose of the statute and the regulation”

because it does not permit an institution or a district court to remedy a gender-based disparity in athletics participation opportunities. Instead, this approach freezes that disparity by law, thereby disadvantaging further the underrepresented gender. Had Congress intended to entrench, rather than change, the status quo--with its historical emphasis on men's participation opportunities to the detriment of women's opportunities--it need not have gone to all the trouble of enacting Title IX.¹⁹

The 2005 Clarification Provides for Inadequate Oversight by the Department of Education.

Adding insult to injury, the 2005 Clarification does not require that the Office for Civil Rights monitor compliance to ensure that schools meet even the policy’s minimal requirements for survey use or interpret the results accurately. In fact, the 2005 Clarification explicitly states that “[w]here the Model Survey shows insufficient interest to field a varsity team, OCR will not conduct a compliance review of that institution’s implementation of the three-part test.”²⁰ In addition to drastically weakening the standards for compliance with Prong Three of the three-part test, therefore, the Clarification provides no mechanism for the Department – or anyone else, for that matter — to evaluate the impact of schools’ use of the model survey; to investigate the extent to which that survey has stalled or reduced women’s participation opportunities; or to assess the ways in which it is being implemented on campuses.

The 2005 Clarification Threatens to Perpetuate Further Discrimination Against Female Athletes

For the reasons set forth above, the 2005 Clarification creates a major loophole through which schools can evade their legal obligation to provide equal opportunity in athletics. This is deeply troubling, particularly because – despite the advances in women’s participation in sports since the enactment of Title IX – women remain second-class citizens on the playing field.

Title IX has opened the door for millions of women and girls to participate in sports. While fewer than 32,000 women participated in college sports prior to the enactment of Title IX, that number has expanded to more than 160,000 women today – over five times the pre-Title IX rate. Female participation in high school athletics has increased ten fold, from fewer than 300,000 to close to 3 million students.

These increased sports opportunities have provided immense benefits to a new generation of female athletes. Playing sports promotes responsible social behavior, greater academic success, and increased personal skills. Compared to their non-athletic peers, athletes are less likely to smoke or use drugs; have lower rates of sexual activity and teen pregnancy; have higher grades; and learn important life skills, including the ability to work with a team, perform under pressure, set goals, and take criticism.²¹

Moreover, these benefits for women have not come at the expense of men. Data show unequivocally that men's opportunities to participate in sports have grown alongside those of women.²² Arguments to the contrary simply cannot withstand analysis.²³

What the data instead confirm is that women continue to be disadvantaged in every aspect of sports participation. Although women represent 53 percent of the students at Division I universities, for example, they continue to receive only 44 percent of intercollegiate athletics participation opportunities, 34 percent of athletics operating budgets, and 33 percent of the money spent on recruitment.²⁴ Indeed, in Division I, for every dollar being spent on women's sports, almost two dollars are spent on men's athletics.²⁵ At the high school level, girls represent only 42 percent of varsity athletes, and case law demonstrates the pervasive inequities that they face when they are allowed to play. Simply put, thirty-five years after the enactment of Title IX, the playing field is far from level for our nation's young female athletes.

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In short, the Department's 2005 Clarification does a major disservice to the young women of this country. The harms it inflicts stand to stall or even reverse the progress that women have made under Title IX. Moreover, the Clarification also shortchanges schools, which will be vulnerable to legal liability if they implement methods of measuring women's interests – such as those authorized in the Clarification — that violate Title IX standards. The Department should rescind the Clarification and instead restate its commitment to enforcing the long-standing regulatory policies that truly reflect Title IX's goals and requirements. The nation's young women deserve no less.

¹ Available at <http://www.ed.gov/about/offices/list/ocr/docs/title9guidanceadditional.html>.

² 20 U.S.C. §§ 1681-87 (1988).

³ United States Department of Health, Education and Welfare, Office for Civil Rights, *Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (December 11, 1979).

⁴ See *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996); *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 288 (2d Cir. 2004); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); *Pederson v. La. State Univ.*, 213 F.3d 858, 880 (5th Cir. 2000); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273 (6th Cir. 1994); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 270 (7th Cir. 1994); *Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1046 (8th Cir. 2002); *Neal v. Bd. of Trs.*, 198 F.3d 763, 771 (9th Cir. 1999); *Roberts v. Colo. State Univ.*, 998 F.2d 824, 828-29 (10th Cir. 1993); see also *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82, 95-96 (D.D.C. 2003), *aff'd*, 366 F.3d 930 (D.C. Cir. 2004), *cert. denied*, 545 U.S. 1104 (2005).

⁵ United States Department of Education, Office for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003).

⁶ *Cohen v. Brown Univ.*, 101 F.3d at 179; see also *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d at 295 (“Interest is often a function of experience and opportunity.”).

⁷ *Cohen v. Brown Univ.*, 101 F.3d at 179.

⁸ United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test*, Jan. 16, 1996, at 10, available at <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> (hereinafter “1996 Clarification”).

⁹ *Pederson v. Louisiana State Univ.*, 213 F.3d at 878.

¹⁰ *Barrett v. West Chester Univ. of Pennsylvania.*, 2003 WL 22803477 (E.D. Pa. Nov. 12, 2003).

¹¹ *Id.* at *9 (citing NCAA guidelines).

¹² 2005 Clarification at p. 10.

¹³ *Id.*

¹⁴ 1996 Clarification at p. 11.

¹⁵ *Id.* at p. 10.

¹⁶ 2005 Clarification at p.6.

¹⁷ *Id.* at p. 6, note 10.

¹⁸ *Neal v. Bd. Of Trs.*, 198 F.3d 763, 768 & n.4 (9th Cir. 1999).

¹⁹ *Cohen v. Brown Univ.*, 101 F.3d at 180-81.

²⁰ 2005 Clarification at p. 7.

²¹ See, e.g., Carnegie Corporation, *The Role of Sports in Youth Development* 9 (March 1996); NFHS, *The Case for High School Activities* (2002) at 3, 9; The National Campaign to Prevent Teen Pregnancy, *Fact Sheet: Not Just Another Single Issue: Teen Pregnancy and Athletic Involvement* (July 2003); *The Women's Sports Foundation Report: Sport and Teen Pregnancy* (1998) at 5-7; The President's Council on Physical Fitness and Sports, *Physical Activity & Sports in the Lives of Girls* (Spring 1997); *Black Female Athletes Show Grad-Rate Gains*, The NCAA News (June 28, 1995).

²² U.S. General Accounting Office, No. 01-297, *Intercollegiate Athletics: Four-Year Colleges' Experiences Adding and Discontinuing Teams*, March 2001.

²³ The College Sports Council (CSC), which focuses on protecting men's athletics opportunities, recently issued a study purporting to show an “alarming decline in men's college athletics opportunities.” College Sports Council Longitudinal Study of NCAA Participation Data, available at <http://savingsports.org/presentation/>. Examination of that study, however, demonstrates its numerous analytical and methodological flaws. See Cheslock, J. (forthcoming), *Intercollegiate Athletic Participation and Title IX*, East Meadow, New York: Women's Sports Foundation (2007).

²⁴ National Women's Law Center, *Debunking the Myths About Title IX and Athletics* (October 2006), available at <http://www.nwlc.org/pdf/DebunkingMyths.pdf>.

²⁵ *Id.*