

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

NATIONAL WRESTLING COACHES )  
ASSOCIATION, *et al.* )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
UNITED STATES DEPARTMENT OF )  
EDUCATION, )  
 )  
Defendant. )

Civil Action No. 1:02CV00072 EGS

**BRIEF OF *AMICI CURIAE* NATIONAL WOMEN’S LAW CENTER, AMERICAN VOLLEYBALL COACHES ASSOCIATION, INTERNATIONAL WOMEN’S LACROSSE COACHES ASSOCIATION, NATIONAL FASTPITCH SOFTBALL COACHES ASSOCIATION, WOMEN’S BASKETBALL COACHES ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AND WOMEN’S SPORTS FOUNDATION IN SUPPORT OF DEFENDANT’S MOTION TO DISMISS**

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## INTEREST OF *AMICI CURIAE*

*Amici curiae* (“*Amici*”) are organizations dedicated to the achievement of equal opportunities for women and girls in athletics. In furtherance of this purpose, each has an abiding interest in ensuring the proper interpretation and implementation of the statute at issue in this case, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (“Title IX”), which prohibits discrimination on the basis of sex in federally funded educational programs and activities, including athletics. *Amici* submit this brief in support of the Motion to Dismiss filed by the United States Department of Education (“DOE”) on May 29, 2002.<sup>1</sup> In particular, *amici* seek to provide this Court with additional legal arguments and a broader factual context as to why Plaintiffs do not meet the minimum requirements of Article III necessary to establish their standing—namely, that Plaintiffs cannot trace their alleged injuries to the Title IX regulations and policies they challenge.<sup>2</sup>

Descriptions of the individual *amici* organizations are set forth in Appendix A attached hereto. An unopposed motion for leave to file this brief is pending with the Court.

### INTRODUCTION

This action is one in a long line of unsuccessful cases claiming that DOE’s longstanding regulations and policies interpreting Title IX discriminate against men in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment to the Constitution.<sup>3</sup> The

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<sup>1</sup> These organizations seek to participate as *amici* at this stage of the litigation to provide this Court with information not provided by the government. If this limited role becomes insufficient to protect the interests of girls and women in equal athletic opportunities, *amici* may move to participate in this litigation as Defendant-Intervenors.

<sup>2</sup> While DOE’s arguments fully justify dismissal, the additional grounds advanced by *amici* lend further weight and support to the position presented by the government.

<sup>3</sup> Specifically, Plaintiffs challenge: (1) Title IX’s regulations, see 34 C.F.R. Part 106 (DOE Attachment B); (2) the 1979 Policy Interpretation regarding sex discrimination in athletics (in particular the three-part participation test therein) issued by the then Department of Health, Education and Welfare and later adopted by DOE, see 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,

gravamen of Plaintiffs' complaint is that Title IX's three-part test establishes quotas by requiring schools to provide opportunities for women that are inflated beyond their inherent interest in playing sports, thereby forcing schools to drop deserving men's teams. According to Plaintiffs, if Title IX's athletics regulations and policies were only changed, wrestling and other men's teams could be reinstated at colleges and universities around the country, including at the institutions named in the First Amended Complaint.<sup>4</sup>

The Department of Education, in its Motion to Dismiss, raises key infirmities in Plaintiffs' arguments—in particular, that Plaintiffs do not have standing because their alleged injuries are not redressable by this Court; that there is no private right of action against the government under Title IX or the Administrative Procedure Act because Plaintiffs have an adequate Title IX remedy against recipient institutions directly; and that Plaintiffs' claims are barred by the statute of limitations. *Amici* submit that in addition, Plaintiffs lack standing in this case because the injuries they allege were not caused by the regulations and policies they seek to invalidate. In particular: (1) the Policy Interpretation's three-part participation test does not create a quota or preferential treatment; (2) Plaintiffs' stereotypical notion that women are inherently not as interested as men in participating in athletics is legally impermissible and has been repudiated by the courts; and (3) the Title IX policies allow schools to comply with the three-part test by adding women's opportunities, as most institutions do, and do not require schools to cut men's opportunities.

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1979) (DOE Attachment D); and (3) DOE's Office for Civil Rights' 1996 Clarification of the three-part participation test, see "Dear Colleague" Letter from Assistant Secretary of Civil Rights Norma V. Cantú (Jan. 16, 1996) and United States Department of Education, Office for Civil Rights, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (DOE Attachment F).

<sup>4</sup> While Plaintiffs raise their challenge in the context of intercollegiate athletics, the Title IX regulations and policies Plaintiffs seek to invalidate apply at all levels of education, including elementary and secondary schools. See Policy Interpretation, 44 Fed. Reg. at 71,413 (noting that Policy Interpretation's principles apply to interscholastic athletic programs).

In sum, Plaintiffs cannot trace their alleged injuries to the Title IX regulations and policies at issue. Their attempt to do so is based on flawed legal arguments that have been rejected by every one of the eight federal appellate courts to consider them.<sup>5</sup>

## ARGUMENT

Plaintiffs' argument that the Title IX regulations and policies have caused schools to drop certain men's teams, such as wrestling, is based on three interconnected links: (1) the three-part test amounts to a quota; (2) this quota is premised upon the provision of inflated opportunities for women that they do not want because of their inherent lack of interest in participating in athletics; and (3) that to achieve this improper and unwarranted quota, schools must cut men's teams. As explained below, each of these elements in Plaintiffs' causality chain is without merit.

### **I. THE THREE-PART TEST DOES NOT CREATE A QUOTA OR PREFERENTIAL TREATMENT.**

Plaintiffs' assertion that the three-part test set forth in the Policy Interpretation constitutes a gender-based "quota" system in violation of Title IX and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, see First Amended Complaint at ¶ 68, is erroneous because, as courts have held: (1) the three-part test imposes no numerical requirement remotely analogous to quotas; and (2) in the unique sex-segregated world of athletics, where schools explicitly establish separate athletic opportunities for male and female students, the concept of quotas is particularly misplaced.

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<sup>5</sup> See Cohen v. Brown Univ., 991 F.2d 888 (1<sup>st</sup> Cir. 1993) (Cohen I), and Cohen v. Brown Univ., 101 F.3d 155, 170 (1<sup>st</sup> Cir. 1996) (Cohen II), cert. denied, 520 U.S. 1186 (1997) (this case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court--Cohen I, and the second time after a trial on the merits--Cohen II); Williams v. School District of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993); Pederson v. Louisiana State University, 213 F.3d 858, 879 (5<sup>th</sup> Cir. 2000); Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 274-75 (6<sup>th</sup> Cir. 1994); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 270 (7<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 1128 (1995); Chalenor v. University of North Dakota, No. 00-3379ND (8<sup>th</sup> Cir. May 30, 2002); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763, 770 (9<sup>th</sup> Cir. 1999); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 828 (10<sup>th</sup> Cir. 1993), cert. denied, 510 U.S. 1004 (1993).

The Policy Interpretation establishes a three-part test for determining compliance with the regulatory requirement that "the selection of sports and levels of competition effectively accommodate the interest and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1). The test provides schools with three options for complying with Title IX's requirement to provide equal participation opportunities. The first prong allows a school to comply by showing that the percentages of male and female athletes mirror the percentages of male and female students ("the proportionality prong").<sup>6</sup> Contrary to the sole focus of Plaintiffs' complaint, it is not the only way schools can comply with DOE's policies. The second prong of the test allows a school to comply by showing a history and continuing practice of program expansion for members of the underrepresented sex, even if equality of opportunities is not yet provided.<sup>7</sup> The third prong allows a school to comply by showing that its current program fully and effectively accommodates the underrepresented sex, even if the school is not providing opportunities to that sex in proportion to its representation in the student body.

Thus, under the three-part test, while schools may, and some do, provide athletic opportunities to male and female athletes in proportion to their representation in the student body, the third part of the test explicitly states that they need not do so, or even try to do so, if they are otherwise accommodating the interests of their female athletes. As a result, courts have repeatedly recognized that the three-part test in no way creates quotas. As the First Circuit put it,

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<sup>6</sup> The proportionality prong of the three-part test does not favor either men or women. Rather, its analysis is tied to the availability of opportunities for the underrepresented sex. While because of the unfortunate prevalence of sex discrimination against women in intercollegiate athletics, it is most often women who are underrepresented, the protection applies to men as well if they are underrepresented. Accordingly, the test is neutral and specifically designed to avoid existing discriminatory preferences for the overrepresented sex. See Cohen I, 991 F.2d at 901 n.17 (noting that Title IX does not benefit only women, but rather protects the underrepresented sex, which could be men or women depending on the circumstances).

<sup>7</sup> Prong two is an atypically generous and flexible standard for civil rights compliance. In no other civil rights remedial scheme that comes to mind are institutions considered to be in compliance with a nondiscrimination mandate by demonstrating only incremental progress towards nondiscrimination and equity, such as that allowed in this prong.



the proportionality test is merely a safe harbor for institutions that can satisfy it. See Cohen I, 991 F.2d at 897-98; accord Neal, 198 F.3d at 771, n.7 (9<sup>th</sup> Cir. 1999) (“[T]he OCR’s three-part [participation] test gives universities two avenues other than substantial proportionality for bringing themselves into Title IX compliance. . . .”); Cohen II, 101 F.3d at 170, 177 (“No aspect of the Title IX regime at issue in this case – inclusive of the statute, the relevant regulation, and the pertinent agency document – mandates gender-based preferences or quotas, or specific timetables for implementing numerical goals. . . .”); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 271 (7<sup>th</sup> Cir. 1994), (“[T]he [Title IX] policy interpretation does not . . . mandate statistical balancing. Rather the policy interpretation merely creates a presumption that a school is in compliance with Title IX and the applicable regulation when it achieves such a statistical balance. Even if substantial proportionality has not been achieved, a school may establish it is in compliance by demonstrating either that it has a continuing practice of increasing the athletic opportunities of the underrepresented sex or that its existing programs effectively accommodate the interests of that sex.”); Horner, 43 F.3d at 275 (same); Roberts, 998 F.2d at 829 (same).

Moreover, the three-part test, in operation, has underscored the vitality of each of the three prongs. Between 1994 and 1998, of the 74 OCR cases involving Title IX’s participation requirements, only 21 schools, or less than one-third, were found in compliance under the proportionality prong. Over two-thirds of the schools were found by OCR to be in compliance under part two or part three of the test. United States General Accounting Office (“GAO”), No. 01-128, Gender Equity: Men’s and Women’s Participation in Higher Education, December 2000, at 40.

Further, courts have noted the particular inapplicability of the quota charge in the athletics context. See, e.g., Neal, 198 F.3d at 770 (“Unlike most employment settings, athletic teams are gender segregated, and universities must decide beforehand how many athletic

opportunities they will allocate to each sex. As a result, determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons. Because men are not “qualified” for women’s teams (and vice versa), athletics require a gender conscious allocation of opportunities in the first instance”); see also Kelley, (“Congress itself recognized that addressing discrimination in athletics presented a unique set of problems not raised in areas such as employment and academics.”) 35 F.3d at 270. The proportionality prong, therefore, is merely a means of determining whether schools distribute sex-segregated participation opportunities fairly.

In short, the three-part test does not create—as a matter of legal interpretation or in operation—a quota or preferential treatment that causes the demise of men’s athletic teams, as alleged by Plaintiffs in this case.

## **II. Plaintiffs Rely on the Stereotypical and Legally Flawed Notion That Women Are Inherently Less Interested Than Men in Participating in Athletics.**

Plaintiffs’ complaint that the three-part test creates quotas that discriminate against men is premised on the stereotypical and consistently rejected assumption that women are inherently less interested in athletics than men, and that therefore the three-part test requires schools to provide inflated opportunities for women. See First Amended Complaint at ¶¶ 63, 65, 75.

However, as the courts have recognized, this premise is belied by the history and purpose of Title IX and is not legally permissible.

As the principal Senate sponsor of Title IX, Senator Birch Bayh, explained, Title IX was intended to be “a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.” 118 Cong. Rec. 5804 (February 28, 1972). At the heart of the debate over how best to combat sex discrimination in intercollegiate athletics

under the Title IX regulations was Congress' understanding that when athletic opportunities for women are opened, their athletic interests will be demonstrated.<sup>8</sup>

The courts that have considered arguments premised on women's lack of interest in athletics have emphatically rejected them. In Pederson v. Louisiana State University, 213 F.3d at 878, for example, the Fifth Circuit recognized the connection between the quota argument and the purported lack of women's interest in athletics advanced by Plaintiffs here, and rejected them both, stating:

[The University] argue[s] that it is improper to consider proportionality, because to do so would be to impose quotas, and that the evidence shows that female students are less interested in participating in sports than male students. The law suggests otherwise. Title IX provides that [courts] may consider disproportionality when finding a Title IX violation. . . . [The University's] hubris in advancing this argument is remarkable, since of course fewer women participate in sports, given the voluminous evidence that [the university] has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students.

In Cohen v. Brown University, after a thorough analysis of the policies challenged by Plaintiffs here, the First Circuit stated:

To assert that Title IX permits institutions to provide fewer athletics participation opportunities for women than for men, based upon the premise that women are less interested in sports than men, is . . . to ignore the fact that Title IX was enacted in order to remedy discrimination that results from stereotyped notions of women's interests and abilities.

Interest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience. The Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports.

Cohen II, 101 F.3d at 178-79. The court went on to state that:

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<sup>8</sup> See, e.g., Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. 21 (1975), at 63 (remarks of Rep. Esch: "The question I would ask is how and to what degree, can you encourage or open up the participation? If women have more encouragement to participate, more of them will participate."); Id. at 66 (remarks of Rep. Chisholm: "The fact of the matter is that women never have really had an opportunity. When you think of the Olympic gold medalist, Donna DeVarona, and the fact that there was no school that would offer her a scholarship, it is tragic. I could go into case after case.

[T]he tremendous growth in women's participation in sports since Title IX was enacted disproves Brown's argument that women are less interested in sports for reasons unrelated to lack of opportunity. . . .

. . . .

. . . 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.

Id. at 180-81 (citations omitted); accord Neal, 198 F.3d at 768 ("A central aspect of Title IX's purpose was to *encourage* women to play sports. The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships.") (emphasis in original).

The facts demonstrate that there is no shortage of interest on the part of girls and women in participating in athletics. The number of female athletes rose dramatically after the passage of Title IX and continues to grow. Women have gone from being almost totally excluded from intercollegiate athletics to having a disproportionately small but important share of athletic opportunities. When Congress passed Title IX in 1972, fewer than 32,000 women competed in intercollegiate athletics. See Policy Interpretation, 44 Fed. Reg. at 71419. In 2000-01, a record number of 150,916 women competed, nearly five times the pre-Title IX rate. However, female athletes are still only 42% of college athletes nationwide. National Collegiate Athletic Association (NCAA), 1982-2001 Sports Sponsorship and Participation Statistics Report.

Title IX has had a tremendous impact on female athletic opportunities at the high school level as well. Before Title IX, fewer than 300,000 high school girls played competitive sports. National Federation of State High School Associations (NFHS), 1971 Sports Participation Survey (1971). By 2001, the number had climbed to 2.78 million. NFHS, 2001 High School Athletics Participation Survey (2001). Thus, since 1972, when Title IX first opened up opportunities for female athletes, female participation in high school athletics has skyrocketed by more than 800%. To suggest that with close to three million girls playing sports in high school

there is not enough interest to maintain women's athletic participation in proportion to their enrollment in college is obviously nothing more than an attempt to continue an outmoded stereotype.

Largely as a result of the doors opened to female athletes by Title IX, women won a record 19 Olympic medals in the 1996 Summer Olympic Games. These successes in team sports in particular, including gold medals in basketball, soccer, softball, and gymnastics, and the women's ice hockey gold in the 1998 Winter Olympics, are a tribute to the impact of Title IX. In 2002, the first African-American ever to win a gold medal in the Winter Olympics was a woman.

Given the great benefits women and girls reap from participating in athletics, it is hardly surprising that arguments as to their lack of interest in reaping these benefits have been rejected. Athletics promote responsible social behavior, greater academic success, and increased personal skills. Carnegie Corporation, The Role of Sports in Youth Development (March 1996). Athletes are less likely to smoke or use drugs. Wyoming High School Activities Association, Student Activities Survey (1998) (Twenty-five percent of high school athletes, versus 40% of nonathletic high school students, smoke cigarettes.); NFHS, The Case for High School Activities, available at <http://www.nfhs.org/case.html> (Ninety-two percent of high school athletes do not use drugs.). Adolescent female athletes have lower rates of both sexual activity and pregnancy than their nonathletic peers. D. Sabo et al., The Women's Sports Foundation Report: Sport and Teen Pregnancy (1998); accord The President's Council on Physical Fitness and Sports Report, Physical Activity & Sports in the Lives of Girls (Spring 1997). Female student-athletes also have higher grades, are less likely to drop out, and have higher graduation rates than their nonathletic peers. See "NCAA Study on Graduation Rates," NCAA News (June 28, 1995) (Female student athletes graduate at a significantly higher rate than female students generally, 69% and 58%, respectively.); The Case for High School Activities (By a 3-1 ratio, girl athletes "do better in school, do not drop out, and have a better chance to get through college" than their nonathletic

peers.). Female athletes learn important life skills, including an ability to work with a team, to perform under pressure, to set goals and to take criticism. In addition, playing sports helps young women develop self-confidence, perseverance, dedication and the “competitive edge.”

In addition, the health benefits of regular and rigorous physical exercise provided by sports are extensive. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. Teegarden, Proulx, et al., Medicine and Science in Sports and Exercise, Vol. 28 (1996), at 105-13. Women who participate in sports significantly reduce their risk of developing breast cancer. Leslie Bernstein et al., “Physical Exercise and Reduced Risk of Breast Cancer in Young Women,” Journal of the National Cancer Institute, Vol. 86, No.18 (Sept. 21, 1994); see also Menopause, Vol. 3, No. 3 (1996), at 172-80. Increased fitness levels can contribute to better posture, the reduction of back pain and the development of adequate strength and flexibility, qualities which allow girls to participate fully in their daily activities, both vocational and recreational. The President’s Council on Physical Fitness and Sports Report, Physical Activity & Sports in the Lives of Girls (Spring 1997). Women and girls benefit psychologically as well. Young women who play sports have a higher level of self-esteem, a lower incidence of depression and a more positive body image. Colton and Gore, Risk, Resiliency, and Resistance: Current Research on Adolescent Girls, Ms. Foundation (1991); Women's Sports Foundation, Miller Lite Report, at 3 (Dec. 1985).

Title IX's mandate of equality in sports is especially important for minority women and girls. Minority female athletes experience higher levels of self-esteem, are more likely to be involved in other extracurricular activities, and are more likely to become leaders in their communities than minority women who do not play sports. Women's Sports Foundation, “Table 8,” Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students 27 (Aug. 15, 1989). Minority female athletes also get better grades than their nonathletic peers, id. -- in particular, black female athletes are 15% more

likely to graduate from college. Jerry Crowe, "Graduation Rates Fall for Most Players Colleges," Los Angeles Times, Nov. 21, 2000, at D6. And, since minority girls are more likely to participate in sports through their schools than through private organizations, they need equal access to school-sponsored athletics to receive the benefits of sports participation. See Women's Sports Foundation, The Wilson Report: Moms, Dads, Daughters and Sports 5 (June 7, 1988),

In short, Plaintiffs' argument that the three-part test causes schools to drop men's teams because it artificially inflates women's opportunities (given their purported lack of interest) must fail. Rather, the test properly recognizes Title IX's mandate that effectively accommodating women's interest means providing them with the opportunities that they have historically been denied.

### **III. Schools Can and Do Comply With the Three-Part Test by Adding Women's Opportunities Rather Than Cutting Men's Opportunities.**

Plaintiffs are simply incorrect in asserting that Title IX's three-part test forces schools to cut men's teams, such as wrestling. See First Amended Complaint ¶ 80. Courts have consistently recognized that Title IX in no way requires schools to cut men's opportunities, through cutting teams or otherwise. See, e.g., Neal, 198 F.3d at 770 (citing Horner, 43 F.3d at 375; Kelley, 35 F.3d at 269; Roberts, 998 F.2d at 830); Boulahanis v. Board of Regents, 198 F.3d 633, 638-39 (9<sup>th</sup> Cir. 1999); Cohen I, 991 F.2d at 898 n.15.

Moreover, the actual operation of the three-part test has demonstrated that the great majority of schools have expanded opportunities for men as well as women in complying with its requirements. While the rate of increase for women has been greater, given the low point from which they began, recent studies show that men's athletic opportunities have in fact increased both in terms of the absolute number of male athletes and the number of men's teams. Men's intercollegiate athletic participation has risen from 169,800 in 1981-82, to 208,866 in 2000-01. NCAA, 1982-2001 Sports Sponsorship and Participation Statistics Report. In addition, a recent

government study found that the number of men's teams increased from 1981-82 to 1998-99. GAO, No. 01-297, Intercollegiate Athletics; Four-Year Colleges' Experiences Adding and Discontinuing Teams, March 2001, at 13. That same study showed that of 948 schools that added one or more women's teams between 1992 and 2000, 72% did so without discontinuing any other men's or women's teams. Id. at 14.

Plaintiffs' claim that the decline in wrestling teams is due to Title IX's policies is especially unfounded. During the period from 1984-1988, Title IX's application to intercollegiate athletics was suspended due to the Supreme Court's decision in Grove City College v. Bell, 465 U.S. 555 (1984), which held that only parts of schools directly receiving earmarked federal funds (which intercollegiate athletics do not) are covered by Title IX. In that four-year period, when the three-part test was not in effect, colleges and universities cut wrestling teams at a rate almost three times as high as the rate of decline during the 12 years after Title IX's application to intercollegiate athletic programs was firmly reestablished through the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988), which reversed the Grove City holding. From 1984 to 1988, the number of NCAA institutions sponsoring men's wrestling teams dropped by 53, from 342 to 289. During the 12 years from 1988 to 2000, the number dropped by 55, from 289 to 234. NCAA, 1982-2001 Sports Sponsorship and Participation Statistics Report. Men's overall participation also dropped during the years that Title IX was not being enforced, declining from 201,063 in 1984-85 to 178,941 in 1987-88.

Furthermore, a number of women's sports have declined since Title IX was enacted. Yet it can hardly be said that Title IX, which has resulted in tremendous growth overall in women's athletics, is the cause of the decline of these women's teams. For example, the number of women's field hockey teams sponsored by NCAA member institutions dropped from 268 in 1982 to 239 in 2000. While 34% of NCAA member schools sponsored women's field hockey in 1982, only 23% of them sponsored the sport in 2000. NCAA, 1982-2001 Sports Sponsorship



and Participation Statistics Report. Women's gymnastics is another sport that has experienced a significant decline in recent years. The number of NCAA member schools sponsoring women's gymnastics dropped from 179 in 1982 to 90 in 2000 -- a decline of about 50%. Id. On the plus side of the ledger, many sports -- both men's and women's -- have grown significantly since Title IX's enactment. Women's crew, which had 43 teams at NCAA member institutions in 1982, dropped to a record low of 12 teams in 1991, but skyrocketed to 129 teams in 2000. Id. Softball has been another sport that has seen big gains in the past 15 years, increasing from 416 teams in 1982 to 857 teams in 2000. Id. Women's soccer has fared particularly well since 1982, when only 80 NCAA member institutions sponsored the sport. Id. In 2000, 811 NCAA schools sponsored women's soccer. Id.

Similarly, while some men's sports may have declined in recent years, others have increased. Baseball, which was sponsored by 642 NCAA members schools in 1982, was sponsored by 857 in 2000. Id. Men's basketball, sponsored by 741 NCAA member schools in 1982, was sponsored by 989 in 2000. Id. Since 1981-82, men's participation has increased in baseball, crew, football, lacrosse, squash, track and volleyball. Id. At NCAA institutions, men's cross-country, indoor and outdoor track, football, golf, lacrosse, rowing, squash, tennis, volleyball and soccer have all sustained increases in the number of NCAA member institutions sponsoring these sports since 1982. Id.

Moreover, the fact that women's athletic programs continue to lag behind men's programs on every measurable criterion--including participation opportunities, athletic scholarships, operating budgets, and recruiting expenditures--further demonstrates that Plaintiffs' attempt to identify Title IX as the cause of their alleged injuries is misplaced. In Division I, where women represent 53% of the students, they are given only 41% of the opportunities to play intercollegiate sports, 36% of athletic operating budgets and 32% of the dollars spent to recruit new athletes. NCAA, Gender-Equity Study (2000), at 20. In addition, spending on men's

sports continues to increase and dominate spending on women's sports. In Division I, in 2000, for every dollar spent on women's sports, almost two dollars were spent on men's sports. Id. at 19-20. In fact, female participation in intercollegiate sports remains below pre-Title IX male participation. While 170,384 men played college sports in 1971-1972 (Title IX was passed in 1972), only 150,916 women played college sports in 2000-01. NCAA, 1982-2001 Sports Sponsorship and Participation Statistics Report.

The availability of athletic scholarships dramatically increases young women's ability to pursue a college education and to choose from a wider range of schools. But in 2000, male athletes received the access and opportunities that athletic scholarships provide almost 1.5 times as often as female athletes. That difference amounted to at least \$133 million dollars more per year in athletic scholarships for male athletes than female athletes. NCAA, Gender Equity Study (2000).

Disparities also persist at the high school level, where female athletes have only 42% of the school-sponsored opportunities to play varsity sports. National Federation of State High School Associations (NFHS), 2001 High School Athletics Participation Survey (2001).

Although national data on the expenditures on boys' and girls' sports programs does not exist at the high school level, anecdotal evidence and court cases strongly suggest that they are not treated equally. See, e.g., Communities for Equity v. Michigan High School Athletic Ass'n, 178 F. Supp. 2d 805 (W.D. Mich. Dec. 17, 2001) (holding that association's scheduling of six girls' sports, but no boys' sports, in nontraditional or disadvantageous seasons discriminates against girls in violation of Title IX, the Fourteenth Amendment, and state law); Nanette Asimov, Washington Girls: Softball Diamonds in the Rough, The San Francisco Chronicle, May 26, 2000, at 2 (Of 62 girls' softball diamonds in San Francisco, not one has a regulation dirt infield, staked bases and lined field.).

Even if schools cannot find additional resources to comply with Title IX by adding women's teams, they have the option of finding savings in their current athletics programs to avoid cutting men's opportunities and to increase women's opportunities. For example, schools could find ways to reallocate resources within their men's programs. The resources male athletes receive are unevenly distributed, with football and men's basketball consuming 72% of the total men's athletic operating budget at Division I-A institutions, leaving other men's sports to compete for remaining funds. Daniel Fulks, Revenues and Expenses of Division I and II Intercollegiate Athletics Programs: Financial Trends and Relationships -- 1999 (NCAA 2000) ("Fulks Study"). Of the \$3.57 million average increase in expenditures for men's Division I-A sports programs from 1998-2000, 68% percent of this increase, \$2.46 million, went to football. This exceeds the entire operating budget for women's Division I sports in 2000 by over 1.69 million. NCAA, Gender-Equity Study (2000).

To the extent that the substantial funds devoted to football in particular are claimed to be justified by the revenue the sport produces, the facts do not support this assertion – 58% of Division I-A and I-AA football programs do not generate enough revenue to pay for themselves, much less any other sports. In 1999, these programs reported annual deficits averaging \$1 million and \$630,000 respectively. Fulks Study. Moreover, at the vast majority of universities, and at NCAA Division I institutions in particular, cost-cutting can be accomplished without hurting the competitiveness or revenue production of programs like football. Universities could stop funding hotel rooms for football players on nights before home games, order new uniforms less frequently, and reduce the distance traveled for non-conference competition by selecting opponents closer to home. Athletic conferences also could adopt cost reductions to assist schools in saving funds and ensuring a level playing field by, for example, limiting travel squad size, and adding sports for the underrepresented gender at the same time to ensure geographic proximity of

opponents. None of these measures would hurt the competitiveness of these programs or restrict their ability to generate revenue.

In sum, the three-part test does not require schools to cut any men's teams, and the data do not show a decline in men's participation opportunities, let alone that Title IX's policies are responsible for Plaintiffs' alleged injuries. Schools have numerous ways to increase opportunities for women without cutting men's opportunities, and many schools have done just that. Title IX simply ensures that it can no longer be only the women who suffer second-class treatment and the brunt of limited resources. Therefore, Plaintiffs' cannot trace their alleged injuries to Title IX's athletics policies, and their case must be dismissed.

## CONCLUSION

For the reasons set forth above and in DOE's supporting memorandum, Defendant's Motion to Dismiss should be granted.

Respectfully submitted,



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## APPENDIX A

### INTEREST OF THE AMICI

The *National Women's Law Center* ("Center") is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX. The Center has filed *amicus curiae* briefs in all Supreme Court cases involving Title IX, including Cannon v. University of Chicago, North Haven Board of Education v. Bell, Grove City College v. Bell, Franklin v. Gwinnett County Public Schools, and National Collegiate Athletic Association v. Smith. Most recently, the Center represented the petitioner in the landmark case of Davis v. Monroe County Board of Education. In particular, the Center has consistently sought equal opportunities for women with respect to interscholastic and intercollegiate athletics, and was counsel in the first comprehensive Title IX challenge to discrimination in intercollegiate athletics, Haffer v. Temple University. The Center has also successfully participated in the litigation of key cases involving Title IX and other laws prohibiting sex discrimination, including Brentwood Academy v. Tennessee Secondary School Athletic Association (S. Ct.), Mississippi University for Women v. Hogan (S. Ct.), United States v. Virginia (S. Ct.), Neal v. California State University (9<sup>th</sup> Cir.), Boucher v. Syracuse University (2d Cir.), Cohen v. Brown University (1<sup>st</sup> Cir.), Roberts v. Colorado State University (10<sup>th</sup> Cir.), and Sanders v. University of Texas (W.D. Tex.). The benefits and opportunities uniquely available to competitive athletes have been and continue to be disproportionately reserved for men. The Center has a deep and abiding interest in assuring equal athletic opportunity.

The *American Association of University Women*, AAUW, an organization of 150,000 members and 1,000 student affiliate members, has been a catalyst for the advancement of women for over a century. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. The AAUW has historically been involved in advancing gender equity in athletics, and has participated as *amicus* in a host of important Title IX athletics cases, including Brentwood Academy v. Tennessee Secondary Athletic Association, Boucher v. Syracuse University, Cureton v. National Collegiate Athletic Association, Neal v. Board of Trustees of the California State Universities, Smith v. National Collegiate Athletic Association, Cohen v. Brown University, Roberts v. Colorado State Board of Agriculture, and Cook v. Colgate University.

The *American Volleyball Coaches Association* consists of over 3,100 members who coach volleyball nationally and internationally at the youth, high school, college, club and Olympic levels. Because volleyball in the United States is predominantly a female sport, and is the third most popular sport for female athletes, AVCA is particularly committed to the advancement and development of women's and girls' volleyball. The organization provides a professional network for volleyball coaches through sponsorship of an annual coaches' convention that includes seminars designed to promote the game and advance the organization's legislative agenda, and through an extensive web site with free job line listings for coaching vacancies throughout the country. AVCA educates the public about issues of concern to the volleyball community through its newsletters, coaching aids, a professional journal, instructional text books, videos, and national polling and participation statistics compilations. AVCA also sponsors extensive annual award programs for female athletes and member coaches, through which more than 300 coaches and student-athletes are recognized each year.

The *Intercollegiate Women's Lacrosse Coaches Association*, IWLCA, develops among intercollegiate coaches a deep sense of responsibility in teaching, promoting, and maintaining the

growth of women's lacrosse in accordance with the highest ideals of fair play. IWLCA stimulates the development of quality leadership for women's lacrosse programs by recognizing professional contributions to the sport and keeping members informed of current coaching techniques and trends. IWLCA identifies and pursues issues relevant to women's lacrosse coaches and to the sport of women's lacrosse, and provides a forum for the discussion of matters of interest to members of the Association. IWLCA promotes cooperative efforts with other professional organizations interested in the development of women's lacrosse and women's athletics in general. During annual meetings and coaches clinics for collegiate coaches, high schools and youth coaches, Title IX and Title VII issues are regularly discussed by such guest speakers and Donna Lopiano, Debbie Brake, and Linda Carpenter.

The *National Fastpitch Softball Coaches Association*, formerly the National Softball Coaches Association, is a professional-growth organization comprised of 4,100 member high school, college, club and international fastpitch softball coaches, as well as softball players, parents of players, umpires and fans of the game. The organization was formed by college coaches who wanted a forum to discuss issues affecting the sport, as well as a way to honor outstanding performances by players and coaches. The education of its members is the primary focus of the NFCA, and its newspaper and website are used to inform and teach the membership. In addition, the NFCA offers an in-depth coaches' training program that covers all facets of the game, as well as a national convention, recruiting camps, tournaments, and an awards program that honors more than 1,000 coaches and players every year.

The *Women's Basketball Coaches Association* is a membership organization made up of 5,000 women's basketball coaches dedicated to the development of athletic opportunities for female basketball players and coaches, and to the promotion of women's basketball as an amateur sport for women and girls. To that end, the WBCA offers annual tournaments for all-star players at the high school and college level, a members' convention, and awards programs. The WBCA also serves a valuable education function through its publications and newsletters, a website that is the preeminent portal for resources on women's basketball, and a legislative alert service that offers up-to-date information on all legislative issues concerning women's basketball. The WBCA has also been at the forefront of Title IX legal issues, participating as amicus in Cohen v. Brown University.

The *Women's Sports Foundation* is a charitable educational organization dedicated to ensuring equal access to participation and leadership opportunities for all girls and women in sports and fitness. The WSF membership is made up of 100,000 high school and college students and athletes, parents, coaches, athletic administrators, and athletic referees. The organization provides a variety of advocacy, public education, and development services for members and non-members alike. For example, WSF advises students, parents and coaches about how to resolve Title IX concerns; provides attorney referrals for Title IX cases; conducts girls' sports clinics; provides gender equity counseling; sponsors grant and scholarship programs for female athletes, students, and coaches; provides national research reports and grants for research on various aspects of women's sports; and offers educational publications, videos, and conferences on a variety of topics related to athletics equity for girls and women. WSF has also advanced the development of Title IX law by participating as amicus in many important Title IX athletics cases, including Brentwood Academy v. Tennessee Secondary School Athletic Association, Cureton v. National Collegiate Athletic Association, Neal v. California State University, Smith v. National Collegiate Athletic Association, Cohen v. Brown University, Kelley v. Board of Trustees, University of Illinois, Roberts v. Colorado State University, and Cook v. Colgate University.