

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA**

EQUITY IN ATHLETICS, INC.,)
1711 Grandin Road SW,)
Roanoke, VA 24015,)
Plaintiff,)
v.)
DEPARTMENT OF EDUCATION,)
400 Maryland Avenue, SW)
Washington, DC 20202,)
MARGARET SPELLINGS,)
SECRETARY OF EDUCATION,)
400 Maryland Avenue, SW)
Washington, DC 20202,)
in her official and individual capacity,)
STEPHANIE MONROE JOHNSON,)
ASSISTANT SECRETARY)
FOR CIVIL RIGHTS)
400 Maryland Avenue, SW)
Washington, DC 20202,)
in her official and individual capacity,)
JOHN DOES 1 to 200,)
in their official and/or individual capacity,)
JOHN DOE ENTITIES 1-200,)
and)
UNITED STATES OF AMERICA,)
Defendants.)

Civil Action No. _____

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Equity in Athletics, Inc. (“EIA”), seeks declaratory and injunctive relief based on the following allegations.

NATURE OF THE ACTION

1. EIA brings this action to protect athletic opportunities and teams at Virginia

educational institutions that receive federal financial assistance (hereinafter, “schools”) from ongoing gender-based discrimination and *ultra vires* interference by the federal defendants under the color of implementing Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681-1688 (“Title IX”).

2. Through a series of actions, the defendants United States Department of Education (“DOE”), its Secretary, its Assistant Secretary of Education for Civil Rights, their inferior officers and agents, and their respective predecessors at DOE and the former United States Department of Health, Education and Welfare (“HEW”) unlawfully revised the Title IX athletics regulation, which require schools to provide equal athletic *opportunity*, based on the genders’ *relative interests* after *assessing both genders’* interests, into a three-part test, which purports to require schools to meet one of three tests, each tied to a comparison of athletic participation to enrollment (*i.e.*, equal participation, based on enrollment). EIA challenges that three-part test – together with any and all related administrative actions in which the federal defendants have held out that test directly or indirectly to mandate or authorize schools to take actions to comply with that test (collectively, hereinafter the “Three-Part Test”) – as both substantively and procedurally unlawful. EIA seeks declaratory and injunctive relief to compel the federal defendants to comply with the civil-rights requirements of the U.S. Constitution, Title IX, and Title IX’s implementing regulations and with the rulemaking and other procedural requirements of Title IX and the Administrative Procedure Act, 5 U.S.C. §§551-706 (“APA”).

PARTIES TO THE ACTION

3. Plaintiff EIA is a not-for-profit Virginia nonstock corporation headquartered in Roanoke, Virginia. The individuals and organizations that are members of EIA and its member organizations (collectively, “EIA Members”) include, without limitation, coaches, student-

athletes, fans, booster clubs, parents, save-our-sport groups, and/or alumni affiliated with the schools listed in Paragraphs 7-12. EIA Members have educational, professional, economic, participatory, aesthetic, and spectator interests in intercollegiate and interscholastic athletics at Virginia schools, including without limitation the schools listed in Paragraphs 7-12. These interests have been harmed, continue to be harmed, and are threatened with further harm by the elimination of athletic opportunities and teams that result from schools' efforts to comply with the Three-Part Test.

4. Defendant DOE is an executive department of the United States government. Defendant Spellings is the Secretary of Education. Defendant Monroe is the Assistant Secretary for Civil Rights and a member of the Bar of the District of Columbia. Defendants Spellings and Monroe are sued in their official capacities and also in their individual capacities for actions taken under color of legal authority and for continuing actions taken by their predecessors under color of legal authority. Defendants Spellings and Monroe are not sued in their individual capacities for monetary or punitive damages. Congress has empowered the federal defendants to extend federal financial assistance to educational programs and activities. Defendant United States is the federal sovereign, sued for declaratory and injunctive relief.

5. The John Doe defendants are natural persons whose unlawful, *ultra vires*, and other actions or inactions contribute directly or indirectly to the ongoing or threatened violation of Virginia schools with Title IX, the Title IX regulations, and Virginia law. The John Doe defendants are sued in their individual capacities for declaratory and injunctive relief, not for monetary or punitive damages. To the extent that they hold public office, the John Doe defendants are sued in their individual capacities under color of law and in their official capacities. The John Doe defendants include, without limitation, the boards of visitors or other

governing bodies of any Virginia school that – upon becoming aware of facts sufficient to establish that the Three-Part Test never lawfully took effect – nonetheless persist in following the Three-Part Test and violating the Title IX regulations.

6. The John Doe Entity defendants are public or private entities, including without limitation, schools, corporations, and associations, whose unlawful, *ultra vires*, and other actions or inactions contribute directly or indirectly to the ongoing or threatened violation of Virginia schools with Title IX, the Title IX regulations, and Virginia law. The John Doe Entity defendants are sued for declaratory and injunctive relief, not for monetary or punitive damages. The John Doe Entity defendants include, without limitation, any Virginia school that – upon becoming aware of facts sufficient to establish that the Three-Part Test never lawfully took effect – nonetheless persist in following the Three-Part Test and violating the Title IX regulations.

SCHOOLS WITHIN THIS COURT’S JURISDICTION

7. EIA Members are associated with their schools in one or more of the following capacities: participating in athletics as an athlete or coach, fostering athletic education as an alumni supporter or booster of the athletic program or parent of a current student athlete; following athletic teams for the aesthetic enjoyment as a spectator; and (in the case of high school juniors and seniors) desiring to apply to attend a postsecondary school in the future to participate as an athlete. In each of these capacities, EIA Members possess the skills, abilities, and interests to continue in the foregoing capacities and desire and plan to continue their association in these capacities in future academic years. In these capacities, EIA Members are associated with Virginia secondary and postsecondary schools, including without limitation the College of William and Mary in Virginia, at Williamsburg (“W&M”); Longwood University, at Farmville (“Longwood”); James Madison University, at Harrisonburg (“JMU”); Old Dominion

University, at Norfolk (“ODU”); and Virginia Polytechnic Institute and State University, at Blacksburg (“Tech”). All of the foregoing schools accept federal funds within the meaning of Title IX, and that federal funding includes funding extended to provide real property or structures thereon, personal property, financial aide, and other purposes.

8. Under §2.2-3901 of the Virginia Code, “[c]onduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of... sex... shall be an ‘unlawful discriminatory practice’ for the purposes of [the Virginia Human Rights Act].” As set forth in more detail in Paragraphs 94-119, the Three-Part Test purports to establish equal participation, based on enrollment, in place of the Title IX regulations’ standard of equal opportunity, based on interest.

9. Under their respective enabling legislation, each of the schools listed in Paragraph 7 lacks the authority to take action “inconsistent with the laws of the Commonwealth” or otherwise contrary to law. Virginia Code §23-44 (W&M), §23-188 (Longwood); §23-164.6 (JMU); §23-49.17(A) (ODU); and §23-122 (Tech).

10. The athletic participation and sports sponsorship rates for the schools listed in Paragraph 7 in particular (Ex. 1) and those rates for Virginia secondary schools in aggregate (Ex. 2) are incorporated herein by reference. Males at Virginia schools have statistically greater interest in athletics than females at Virginia schools. As detailed in Paragraphs 121-127, therefore, the Three-Part Test violates the Title IX regulations. As a Title IX regulatory violation, compliance with the Three-Part Test in place of the Title IX regulations is an unlawful discriminatory practice under Virginia Code §2.2-3901 and thus inconsistent with the laws of the Commonwealth and otherwise contrary to law under the enabling legislation of the schools listed in Paragraph 7.

11. On September 29, 2006, JMU announced plans to cut ten intercollegiate varsity athletic teams to comply with the federal defendants' Three-Part Test. *See* Ex. 3 (JMU press release). JMU continues to believe that its planned cuts comply with Title IX and that it has no other alternate course to comply with Title IX. *See* Ex. 4 (JMU press release). Under HEW's 1975 equal-opportunity regulations, however, JMU essentially complies with Title IX (i.e., no change is necessary, except potentially to add men's lacrosse) and JMU's planned cuts of men's track, cross country, swimming, and wrestling violate the equal-opportunity regulations.

12. At all times relevant to JMU's deliberating on its plans to cut ten teams to comply with defendants' Three-Part Test, the federal defendants had actual knowledge that the Three-Part Test was procedurally invalid and not in effect under both the APA and Title IX. Notwithstanding that knowledge, the federal defendants continued to hold the Three-Part Test out as creating "obligations," publicly on DOE's internet site, in direct communications with JMU's administration, and in direct communication to JMU students. *See, e.g.,* Ex. 5 (DOE letter to JMU student). If defendants had acknowledged the procedural invalidity of the Three-Part Test publicly, JMU would have known that both federal and Virginia law prohibited is planned cuts, and JMU would not have adopted those cuts.

JURISDICTION AND VENUE

13. This case arises out of the federal defendants' violation of Sections 901 and 902 of Title IX, 20 U.S.C. §§1681, 1682, Section 4 of the APA, 5 U.S.C. §553, and the Equal Protection Component of the Due Process Clause of the Fifth Amendment. EIA's claims, therefore, raise federal questions and questions of civil rights under acts of Congress, over which this Court has jurisdiction pursuant to 28 U.S.C. §§1331, 1343(a)(3)-(4), 1361 and pursuant to 42 U.S.C. §§1983, 1988(a) and Va. Code §8.01-194.

14. The allegations raised herein constitute good cause to expedite this action under Fed. R. Civ. Proc. 57 and 28 U.S.C. §1657(a).

15. Pursuant to 28 U.S.C. §1391(b), (e), venue is proper in the Western District of Virginia, in which EIA resides and where the substantial part of JMU's planning its cuts occurred. Pursuant to this Court's standing order dated January 30, 1992, venue is proper in the Harrisonburg Division.

Standing

16. EIA Members have suffered injuries and threatened injuries in the form of cut and capped teams, which cuts and caps are fairly traceable to the Three-Part Test and redressable by its repeal. Nationwide, schools make gender-based cuts of teams because of the Three-Part Test. *See, e.g., Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 610-11 (6th Cir. 2002) (in 1999, Miami University eliminated its men's wrestling, tennis, and soccer teams to comply with the federal defendants proportionality requirements); *Boulahanis v. Board of Regents*, 198 F.3d 633, 635-36 (7th Cir. 1999) (in or about 1996, Illinois State University eliminated its men's wrestling and soccer teams to comply with the federal defendants proportionality requirements). Nationwide, schools impose gender-based caps on teams because of the Three-Part Test. *See, e.g., "Want to Try Out for College Sports? Forget It," NEW YORK TIMES*, A1 (Sept. 22, 2002) (Ex. 6).

17. For professional, economic (in the case of coaches), participatory, aesthetic, and associational reasons, EIA Members who are coaches and student-athletes currently on athletic teams desire to remain with those teams, rather than see them cut or capped, and to have the schools with which their teams compete retain or reinstate teams with which EIA Members desire to compete in future seasons. For participatory, economic (in the case of scholarship

athletes), aesthetic, and associational reasons, EIA Members who are student-athletes who have (or will have) athletic eligibility to participate in future seasons desire that teams continue to exist (and that capable club teams be elevated to intercollegiate status) in order to meet their athletic interests. For spectator, educational, and other aesthetic reasons (*e.g.*, the pleasure of providing students with opportunities), EIA Members who are fans, parents, booster clubs, or alumni or that are save-our-sport groups have supported (and desire and intend to support in each future season) and have watched and followed (and desire and intend to watch and follow in each future season) athletic teams that either will be cut or have been cut because of the Three-Part Test.

18. The Three-Part Test forces EIA Members who are coaches to engage in gender-based discrimination, and such EIA Members desire to cease such discrimination. As the direct and indirect result of the Three-Part Test, under the euphemism “roster management,” EIA Members have been forced to serve (and continue to be forced to serve) as the involuntary participants who implement defendants’ Three-Part Test by cutting teams or capping athletes solely to comply with the Three-Part Test and whose schools either would not or lawfully could not continue to require or allow such cutting or capping.

19. Public schools (including the schools listed in Paragraph 7) do not have the option of refusing federal funds (and thus seeking to avoid Title IX’s prospective reach) because the Equal Protection Clause of the Fourteenth Amendment prohibits such public schools from discriminating based on gender. Moreover, both public and private schools (including the schools listed in Paragraph 7) cannot afford to forego federal funds and so would conform their actions to the requirements of the Title IX regulations, as revised by this litigation. Even if such schools could afford to forego federal funds, §86.4(b) of the Title IX regulations imposes

ongoing obligations on such schools to comply with the Title IX regulations, even after the schools cease to accept federal funds.

20. As substantively and procedurally *ultra vires* the federal defendants' authority, the Three-Part Test unlawfully injures EIA Members by directly impairing their freedom to interact with schools to convince the schools to retain the teams. By operation of law, rescinding the Three-Part Test would restore the 1975 regulatory standard, under which schools must provide opportunity (or ration scarcity) based on relative interest, which benefits those students whose rate of athletic interest exceeds the rate of other gender's athletic interest, relative to their respective enrollment rates at a school. Particularly at schools with disproportionately high enrollment rates by gender, the defendants' Three-Part Test poses an obstacle to the other gender. Restoring the 1975 standard would put athletes of both genders on an equal footing. Of special relevance to EIA Members associated with Virginia schools, restoring the interest-based 1975 standard would eliminate the Three-Part Test's favoring of female athletic interest generally and large-roster women's sports particularly. Removing proportionality's impetus to add new, large-roster women's sports (*e.g.*, crew, equestrian) would allow schools to maintain their existing programs, without cutting, capping, or otherwise impairing men's sports or small-roster women's sports. Similarly, removing proportionality's emphasis on large-roster women's sports would restore to EIA Members on men's teams and small-roster women's teams the 1975 regulations' improved bargaining position in negotiations with their with schools to retain or establish varsity teams.

21. The schools associated with EIA Members have never been adjudged to have violated Title IX in their athletic departments. Except as specifically provided, the allegations in this Complaint refer to such schools, for which gender-conscious remedial measures such as

cutting and capping are unlawful under Title IX, the Title IX regulations, and (for public schools) the Fourteenth Amendment. Because the Three-Part Test purports to authorize such otherwise-illegal conduct by schools that continue to receive federal funds, the Three-Part Test constitutes a *per se* injury to EIA Members.

22. The Three-Part Test serves as an influential government document that causes schools to take gender-based actions (namely, cutting and capping) that they would not take but for the Three-Part Test and which they would cease taking upon the rescission of the Three-Part Test. Particularly in Virginia, where state law prohibits Title IX regulatory violations, eliminating the Three-Part Test and restoring the 1975 equal-opportunity regulatory standard would prohibit schools from disproportionately accommodating female athletic interest.

23. By their ongoing violation of the procedural requirements of Title IX and the APA, the federal defendants have maintained ongoing unlawful and *ultra vires* practices and policies, in violation of EIA Members' constitutional right to have laws enacted pursuant to bicameralism and presentment and to have substantive regulations (and amendments thereto) adopted pursuant to notice-and-comment rulemaking.

24. EIA Members have deferred filing administrative complaints against schools pursuant to the Title IX regulations because filing such complaints would be futile (*i.e.*, the federal defendants have closed their mind on the Three-Part Test's applicability to athletic opportunity and its legality as a means of accommodating athletic opportunity). If EIA prevails in this litigation and (contrary to the allegations in Paragraph 19) a school continued gender-based cutting and capping or failed to assess the interests of both genders in determining equal athletic opportunity, EIA and EIA Members would file such complaints to achieve the school's voluntary compliance with Title IX's requirements. Because the administrative-complaint

process provides a low-cost alternative to litigation, EIA and EIA Members prefer that process to litigation. Administrative complaints are a highly effective means to compel schools to comply with civil rights requirements. Approximately ninety percent of administrative complaints filed with DOE resolve within 180 days.

25. Each federal defendant has actual knowledge of the Three-Part Test's causing and continuing to cause the foregoing injuries, and each federal defendant has actual knowledge that neither HEW nor DOE ever lawfully adopted the Three-Part Test under either the APA or Title IX. Each federal defendant knowingly and purposefully continues to hold the Three-Part Test out as a Title IX obligation because each federal defendant seeks to achieve schools' compliance with the Three-Part Test's disparate-impact and affirmative-action goals. Under both the Due Process Clause of the Fifth Amendment and Title IX, EIA Members have the right to be free of such arbitrary or irrational agency action.

Judicial Review and the Inadequacy of Alternate Remedies

26. Defendant United States has waived its sovereign immunity for actions against the United States, its instrumentalities, and officers for non-monetary injunctive and equitable relief and for the entry of judgments and decrees against the United States in such actions. Defendant United States has waived sovereign immunity for this action and for the relief sought in Paragraph 147.

27. With the federal officer defendants named and served in their official and individual capacities, sovereign immunity does not shield those officers' ongoing *ultra vires* actions. As a matter of historical fact, when the states ratified the U.S. Constitution, the equitable, judge-made doctrine that allows use of the sovereign's courts in the name of the sovereign to order the sovereign's officers to account for their conduct was as least as firmly

established and as much a part of the legal system as the judge-made doctrine of federal sovereign immunity. No act of Congress limits this Court's jurisdiction to entertain an equity action against the federal officers' *ultra vires* acts. Once this Court assumes equitable jurisdiction over a challenge to the federal defendants' *ultra vires* actions, a legal remedy that subsequently materializes directly against a school does not displace this Court's equitable jurisdiction.

28. This action is not barred by the APA's "adequate-remedy bar," 5 U.S.C. §704, because that provision does not apply to the Title IX claims (which are made reviewable by statute and thus outside the adequate-remedy bar) and because the federal defendants are indispensable parties to an action directly against the schools. *See* Paragraphs 31-33. Further, EIA Members who are alumni, fans, parents, and booster clubs have no private right of action against schools under Title IX's statutory or regulatory provisions and thus have no alternate (much less adequate) remedy against schools.

29. Because this Court has jurisdiction as a threshold matter, the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, provides this Court the power to "declare the rights and other legal relations of any interested party..., whether or not further relief is or could be sought." 28 U.S.C. §2201; *accord* FED. R. CIV. P. 57 advisory committee note ("the fact that another remedy would be equally effective affords no ground for declining declaratory relief").

30. The federal defendants have consummated their decisionmaking process in concluding that, as serially amended by "clarification" in 1996, 2003, and 2005, the Three-Part Test constitutes an obligation under Title IX. If allowed to withstand substantive and procedural scrutiny by this Court, the Three-Part Test would establish schools' obligations and alter EIA Members' rights under Title IX. Particularly in Virginia, where federal regulations are state law,

the federal defendants' purported amendment of the Title IX regulations alters the legal regime applicable to schools and EIA Members.

Indispensable Parties

31. The EIA Members who face the most imminent injuries are those affiliated with the ten teams that JMU has announced it will terminate. In this action as initially captioned, EIA seeks relief only against the unlawful federal actions and inaction that purport to require or authorize JMU's planned cuts. Because EIA understands that JMU may prefer to remain outside the litigation (and provided that JMU publicly and voluntarily announces its decision to hold its planned cuts in abeyance pending the resolution of this litigation), EIA captions its initial Complaint against the most culpable parties.

32. Because the federal defendants have misled JMU as to the applicable Title IX requirements and because JMU has it within its power to hold its cuts in abeyance, JMU may not be an indispensable party. EIA files its initial Complaint without naming JMU to maximize the chances that JMU will preserve all ten teams for the college careers of the students currently participating on those teams. If EIA cannot expeditiously convince JMU to defer its cuts pending the completion of this litigation against the federal defendants, EIA will amend this Complaint to include JMU and its Board of Visitors, ensuring this Court's ability to provide complete relief.

33. In the event that the Court concludes joining the relevant schools is necessary for jurisdiction or otherwise, the federal defendants nonetheless remain indispensable parties because (a) the federal defendants claim interests relating to the subject of this action (namely, determining what Title IX requirements apply to recipients of federal funds disbursed by the federal defendants and ensuring that recipients comply with those requirements), and (b) in the absence of joining the federal defendants, any schools joined as parties would face substantial

risk of inconsistent obligations because nonmutual preclusion does not apply to the federal defendants, who would continue to consider their Three-Part Test a Title IX requirement.

Exhaustion of Administrative Remedies

34. The federal defendants have resolved and made up their individual and collective minds that they will not voluntarily repeal the Three-Part Test. Consequently, filing an administrative complaint to enforce the Title IX regulations against recipient schools would prove futile.

Timeliness of Action

35. This action is timely because (a) the federal defendants have continued to apply their unlawful regulation, thereby constituting a continuing violation; (b) the federal defendants fraudulently concealed the nature of their administrative actions; (c) the federal defendants' 2003 and 2005 "clarifications" re-opened the Three-Part Test to judicial review, (d) EIA Members between the ages of eighteen and twenty-one years have a timely action against the Three-Part Test pursuant to 28 U.S.C. §2401(a) ("The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases"); (e) EIA Members include those who have not had "actual and timely notice of the terms" of the 1996 Clarification as the quoted phrase is used in 5 U.S.C. §552(a)(1)(E); and (f) the officer defendants (and their predecessors) have continuously and are currently engaged in ongoing *ultra vires* acts, in violation of Title IX, the Constitution, and the APA, to which the statute of limitation either does not apply or has not run and to which the equitable defense of laches does not apply.

36. An agency re-opens a prior action to challenge when it changes its interpretation of that prior action. An agency "constructively re-opens" an administrative action previously

closed to judicial review when a subsequent action “changes the stakes” of the earlier action. Further, agencies have an ongoing duty to ensure that their actions are lawful, which requires that agencies revisit prior decisions to reflect new evidence and new circumstances.

37. In the 1979 Policy Interpretation, by its terms, the Three-Part Test was a tentative, nonbinding application of a tentative, nonbinding policy to consider intercollegiate participation opportunities as an “other factor” in future HEW adjudications of administrative complaints pending more than twenty years ago. The 1996 Clarification elevated (and the 2003 Further Clarification reaffirmed) the Three-Part Test as a legal obligation for all prospective Title IX compliance, thereby reopening the Three-Part Test for judicial review.

38. The federal defendants’ 1996 and 2003 clarifications purport to elevate the Three-Part Test to a “safe harbor” under which schools lawfully may cut or cap men’s teams to achieve gender proportionality with enrollment rates. By authorizing schools to violate the anti-discrimination and equal-opportunity provisions of the Overall Determination of Compliance, the Equal Protection Clause of the Fourteenth Amendment, Title IX, and the implementing Title IX regulations, these clarifications reopened the 1979 Policy Interpretation to judicial review by revealing an aspect of the Three-Part Test that was unforeseeable (or simply not present) in 1979.

39. Although the Three-Part Test in the 1979 Policy Interpretation refers to “participation opportunities,” the 1996 Clarification declares that schools must compare the gender ratio of “participants” when seeking to demonstrate gender proportionality under the Three-Part Test. Accordingly, the 1996 Clarification revealed (and the 2003 Further Clarification reaffirmed) an aspect of the Three-Part Test that was unforeseeable (or simply not present) in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

40. Although the Three-Part Test in the 1979 Policy Interpretation did not apply by its terms to interscholastic athletic programs and neither the 1995 draft clarification nor the final 1996 Clarification published any data or made any findings that discrimination even exists at the interscholastic level, the 1996 Clarification extends the scope of the Three-Part Test to interscholastic athletics. Accordingly, the 1996 Clarification revealed (and the 2003 Further Clarification reaffirmed) an aspect of the Three-Part Test that was unforeseeable (or simply not present) in 1979, thereby reopening the 1979 Policy Interpretation to judicial review.

41. Although the federal defendants and their predecessors previously memorialized and followed an interpretation of the Three-Part Test's third prong (fully accommodating the interests of the underrepresented gender) that required accommodating the underrepresented gender's interest to the same extent as the school accommodated the other gender's interest, the 1996, 2003, and 2005 clarifications changed the analysis to one based solely on the accommodation of the interests of the underrepresented gender, without regard for the degree of accommodation of the other gender. Accordingly, the federal defendants' 1996, 2003, and 2005 clarifications changed the interpretation of an aspect of the Three-Part Test, thereby reopening the 1979 Policy Interpretation to judicial review.

42. In 2002-03, beginning with DOE's chartering a federal advisory commission (the Secretary's Commission on Opportunity in Athletics) and culminating with the federal defendants' "2003 Further Clarification," the federal defendants reopened the Three-Part Test to reconsideration and issued a new final rule or order setting forth the rights and obligations of schools, students, and coaches under Title IX.

43. In the prior litigation involving the Three-Part Test, the federal defendants misrepresented the procedural history and legal status of the 1979 Policy Interpretation. Further,

the federal defendants have affirmatively misrepresented the procedural history and legal status of the 1979 Policy Interpretation in testimony to Congress, public statements, and currently on DOE's internet site. Even if the federal defendants were unaware of the 1979 procedural history described in Paragraphs 70-74, that history was served on them in 2004 in litigation in the U.S. District Court for the District of Columbia, and the federal defendants nonetheless have continued to hold out the Three-Part Test as a Title IX obligation.

44. EIA Members who have attained the age of majority in the last three years (*i.e.*, those aged between eighteen and twenty-one) have a timely cause of action against any action that accrued while such EIA Members were under the legal disability of minority.

45. The federal defendants' unlawful Three-Part Test continue to be applied to EIA Members within the statutory limitations period for actions against the United States. No statute of limitations applies to the ongoing illegal and *ultra vires* actions taken by federal officers under the color of implementing Title IX, and such officers cannot assert the affirmative defense of laches because they have suffered no judicially cognizable prejudice and their fraudulent concealment of the Three-Part Test's procedural invalidity constitutes unclean hands that prevents their resort to equitable defenses such as laches.

IRREPARABLE HARM REQUIRES INJUNCTIVE RELIEF

46. The injunctive and declaratory relief requested in paragraph 147 will redress the injuries alleged herein by eliminating the Three-Part Test and the safe-harbor provisions of the 1996 Clarification and 2003 Further Clarification, thereby restoring the statute's and regulations' protections against intentional gender-based discrimination, 20 U.S.C. §1681; 45 C.F.R. §86.41(a), and the regulations' requirement that schools provide equal opportunity (not equal participation) based on interest and abilities (not enrollment). 45 C.F.R. §86.41(c)(1).

47. Injunctive and declaratory relief are necessary to restore the rights of men and women to an equal footing in the allocation of athletic opportunities, to prevent schools from continuing to rely on the Three-Part Test after the Court declares the Test unenforceable by the federal defendants, and to prevent the loss of further athletic opportunities. EIA Members' intangible and aesthetic injuries cannot be redressed by or reduced to money damages.

48. Whether or not EIA or the Court joins schools as defendants and even if EIA prevails against such schools in declaring the Three-Part Test unlawful, injunctive relief against the federal defendants remains necessary to ensure that the federal defendants do not seek to discontinue such schools' federal funding. Because nonmutual estoppel does not apply against the federal defendants, the schools could not rely on this Court's orders against the schools to shield the schools from federal enforcement.

STATUTORY BACKGROUND

Administrative Procedure Act

49. Before an agency lawfully can issue a substantive rule, the APA requires the agency to publish a notice of proposed rulemaking in the *Federal Register*, to provide an opportunity to comment, to respond to comments, and to publish the final rule in the *Federal Register*. 5 U.S.C. §553(b)-(c). The APA exempts "interpretative rules, general statements of policy, or rules of agency... practice" from the foregoing notice-and-comment rulemaking requirements. 5 U.S.C. §553(b)(A).

50. The APA requires a new notice-and-comment rulemaking to add specific new regulatory factors to an existing substantive rule's enumeration of regulatory factors, and that requirement applies notwithstanding that the existing substantive rule allows the agency to consider "other factors" on a case-by-case basis.

51. Administrative actions constitute substantive regulations (and thus require notice-and-comment rulemaking) when they create the basis either for enforcement action or for agency action to confer benefits; create safe harbors; and/or amend or effectively amend a prior substantive rule or interpretation.

Title IX

52. Congress modeled Title IX on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§2000d-2000d-7 (“Title VI”). Like Title VI’s prohibition on racial discrimination, 42 U.S.C. §2000d, Section 901(a) of Title IX broadly prohibits intentional (*i.e.*, purposeful) gender-based discrimination in federally funded educational programs and activities. 20 U.S.C. §1681(a). For purposes of Title IX, “intentional discrimination” means discriminatory actions taken because of a person’s gender, not merely in spite of that person’s gender.

53. Unlike Title VI, Title IX incorporates the anti-quota provision from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), into Section 901(b), which states inter alia that “Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area.” 20 U.S.C. §1681(b).

54. Like Title VI’s rulemaking provision, 42 U.S.C. §2000d-1, Section 902 of Title IX authorizes and directs “each Federal department and agency... empowered to extend Federal financial assistance... to effectuate the provisions of section 1681... by issuing rules, regulations, or orders of general applicability.” 20 U.S.C. §1682. Section 902 further states that “No such

rule, regulation, or order shall become effective unless and until approved by the President.” Id.

55. Congress patterned Section 902 on Section 602 of Title VI, 42 U.S.C. §2000d-1, under which the President must publish his or her approval in the *Federal Register* before the rule, regulation, or order takes effect.

56. On November 2, 1980, President Carter issued Executive Order 12,250, 45 Fed. Reg. 72,995 (Nov. 2, 1980), which delegated to the Attorney General the presidential authority to approve rules, regulations, and orders and to coordinate the implementation and enforcement of Title IX and other civil rights legislation.

57. On June 3, 1981, the Attorney General delegated to the Assistant Attorney General in charge of the Department of Justice’s Civil Rights Division the implementation and enforcement authority (but not the authority to approve rules, regulations, and orders) that Executive Order 12,250 had delegated to the Attorney General.

Javits Amendment

58. In Pub. L. No. 93-380, §844, 88 Stat. 484, 612 (1974), Congress directed HEW’s Secretary to publish within 30 days proposed Title IX regulations, which were to “include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.” Although modified in Conference, the legislative history of this so-called “Javits Amendment” in the Senate makes clear that its requirement to publish proposed (not final) regulations was “not intended to confer on HEW any authority it does not already have under the act.” 120 Cong. Rec. 15,323 (1974). In any event, the sports-related components of the Javits Amendment does not apply by its terms to interscholastic athletics.

Civil Rights Restoration Act

59. On February 11, 1984, the Supreme Court’s decision in *Grove City College v.*

Bell, 465 U.S. 555 (1984) (*Grove City*), held that Title IX extended only to the educational programs and activities that directly received federal funds.

60. In the Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988) (“CRRA”), Congress prospectively extended the reach of Title IX to all of a school’s educational programs and activities if any of the school’s educational programs and activities received federal funds.

REGULATORY BACKGROUND

1975 HEW Regulations

61. On June 20, 1974, HEW issued proposed regulations implementing Title IX. 39 Fed. Reg. 22,228 (June 20, 1974). Regarding athletics, the proposal required schools to assess student interest in athletics. The proposed rule did not, however, require equal expenditure for each gender or for each team.

62. On June 4, 1975, HEW issued final regulations implementing Title IX. 40 Fed. Reg. 24,128 (June 4, 1975) (codified at 45 C.F.R. §§86.1-.71). HEW’s regulations regarding athletics, 45 C.F.R. §86.41, include a three-year phase-in period, 45 C.F.R. §86.41(d), which expired on July 21, 1978.

63. In the preamble to its final rule, HEW indicated that it eliminated the proposal’s requirement to assess student interest because commenters misinterpreted it as a requirement to conduct an annual student poll and to offer teams based on the result of that poll. 40 Fed. Reg. at 24,134. In eliminating that proposed requirement, however, HEW expressed its intent that schools consider the interests of both genders when determining what sports to offer. *Id.* Further, HEW disavowed an element of the proposed rule that would have required schools to make affirmative efforts to publicize opportunities available to a gender for which athletic opportunity

had been limited without discrimination because that proposed requirement would have been “affirmative action” inconsistent with 45 C.F.R. §86.3. *Id.*

64. The regulation requires schools to provide “equal athletic opportunity for members of both sexes.” 45 C.F.R. §86.41(c). The rule lists ten factors that HEW will consider “among other factors” to determine whether equal opportunities are available. *Id.* The first factor is “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes.” 45 C.F.R. §86.41(c)(1). The other nine factors include equality of facilities, equipment, and housing, scheduling of games and practice, dining services, travel, and per diems, publicity, tutors, and access to coaching. *See* 45 C.F.R. §86.41(c)(2)-(10).

65. Under the regulations as promulgated, “level of competition” refers qualitatively to the type of team offered (*i.e.*, intramural v. club v. intercollegiate/interscholastic varsity; local v. regional v. national) and “selection of sports” refers to the sport offered (*e.g.*, track and field, gymnastics, swimming).

66. HEW intended the regulations’ equal-opportunity and equal-accommodation provisions to require schools to assess the interests of both genders. HEW’s Secretary contemporaneously testified to Congress that “the interest and abilities of both sexes... obviously involves learning about those interests in one way or another.”

67. President Ford signed and approved the HEW regulation on May 27, 1975, which was published in the *Federal Register*. 40 Fed. Reg. at 24,137.

1979 HEW Policy Interpretation

68. In the months after HEW’s phase-in period expired, HEW received approximately 93 complaints against approximately 62 colleges and universities and, on December 11, 1978, HEW’s Office for Civil Rights issued a proposed “policy interpretation” as a framework for

resolving the complaints. 43 Fed. Reg. 58,070, 58,071 (Dec. 11, 1978).

69. HEW recognized that differences in athletic interests between genders could cause participation rates to differ, even at schools that provide equal opportunity. *See, e.g.*, 43 Fed. Reg. at 58,072 (“Intercollegiate athletic programs that provide equal opportunities for both sexes may offer different sports, and have different participation rates and varying competition opportunities for men and for women, because their interests and abilities may be different”).

70. Initially, HEW took the position – as expressed by its General Counsel – that the forthcoming policy interpretation must meet the procedural requirements of the General Education Provisions Act (“GEPA”) and Title IX. *See, e.g.*, Ex. 7 (“Libassi Opinion”); Ex. 8, at 1 (“If we go too far in the other direction and claim this policy statement is a ‘rule’ of general applicability[,] it would have to be approved by the President”) (“Libassi Memorandum”). Because of congressional and public interest in the issue, the HEW Secretary shared its position (including the Libassi Opinion) with Congress and the public.

71. Notwithstanding HEW’s position on the legal necessity for procedural compliance, HEW’s civil-rights staff wished to avoid the political and legal impediments and potential delay of HEW’s complying with the applicable procedural requirements. Accordingly, internal HEW stakeholders lobbied for releasing the Policy Interpretation without complying with the procedures required for HEW’s Title IX rules or orders. To further this effort, an Associate General Counsel prepared an opinion that justified not complying with those procedures. Ex. 9 (“Hamlin Memorandum”).

72. Under the Hamlin Memorandum, the Policy Interpretation is nonbinding and “failure to meet the [Policy Interpretation] compliance factors does not constitute proof that an educational institution violated Title IX,” but the then-current draft needed revisions to eliminate

the “potentially misleading and... incorrect language” that “may make it appear that this document imposes new legal requirements.” Moreover, to avoid classification as a binding rule, HEW expressly disavowed the argument that the notice and comment it provided the public on the policy interpretation satisfied the APA’s notice-and-comment rulemaking requirements.

73. One key post-Hamlin revision moves the Three-Part Test from an interpretation of “interests and abilities” under 45 C.F.R. §86.41(c)(1) to an application of a new policy adopted as an “other factor” under 45 C.F.R. §86.41(c) to consider levels of competition, including the opportunity for team competition. In addition, the post-Hamlin revision adds preamble language that the Policy Interpretation “does not contain a separate section on institutions’ future responsibilities[,]... institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available.” HEW intended this preamble language to make clear that the 1979 Three-Part Test did not alter or amend the 1975 regulations.

74. Consistent with the Hamlin Memorandum, HEW neither intended nor considered its 1979 Policy Interpretation (including the Three-Part Test) to constitute a “generally applicable rule, regulation, guideline, interpretation, or other requirement” that would bind either the agency or the public, and expressly so indicated in justifying the agency’s failure to seek President Carter’s signature and to submit the policy interpretation to Congress. HEW adopted the Hamlin Memorandum as its official interpretation of the action that HEW took in its Title IX policy interpretation. Like her predecessor with the Libassi Opinion, the new HEW Secretary shared the Hamlin Memorandum with the Congress and the public. *See, e.g.*, Ex. 10 (letters to Congress); Ex. 11 (newspaper account). On December 11, 1979, HEW issued that policy

interpretation. 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979) (“1979 Policy Interpretation”).

75. The 1979 Policy Interpretation’s guidance on “equal athletic opportunity” consists of an “Overall Determination of Compliance” and three specific sections captioned: (1) determination of interests and abilities; (2) selection of sports; and (3) selection of the level of competition.

76. The “Overall Determination of Compliance” contains the following three criteria:

(a) Whether a school’s policies are discriminatory in language or effect;

(b) Whether the school’s program as a whole includes substantial and unjustified disparities in the opportunities or treatment afforded to male and female athletes; and

(c) Whether segments of the school’s program include disparities in the treatment and opportunities that are substantial enough to deny equality of athletic opportunity.

77. With regard to assessing interests and abilities, the 1979 Policy Interpretation allows schools to assess students’ athletic interests and abilities by any non-discriminatory method, provided that:

(a) The process takes into account the nationally increasing levels of women’s interests and abilities;

(b) The methods do not disadvantage the members of the underrepresented gender;

(c) The methods of determining ability consider team performance records; and

(d) The methods are responsive to the expressed interests of students of the

underrepresented gender capable of intercollegiate competition.

78. With regard to selecting sports, the 1979 Policy Interpretation does not require schools to integrate teams or to field male and female teams in all sports. Under the 1979 Policy Interpretation, however, if a school excludes a gender from a contact sport, it must also field a team for the excluded gender if opportunities have been limited and there is sufficient interest to support a viable team with a reasonable expectation of intercollegiate competition. For a non-contact sport, the school must field a team for the excluded gender if that gender has insufficient skill to compete on an integrated team, opportunities have been limited for that gender, and there is sufficient interest to support a viable team with a reasonable expectation of intercollegiate competition.

79. The 1979 Policy Interpretation does not require schools to upgrade teams to intercollegiate status absent a “reasonable expectation” that intercollegiate competition will be available in the school’s normal competitive region. When opportunities for a gender have been limited, however, the 1979 Policy Interpretation may require the school to encourage development of competition in the region.

80. HEW used its “other factor” authority to create a new (quantitative) factor that it describes as “equal competitive opportunity” in its internal memoranda, and as “levels of competition including the opportunity for team competition” in the 1979 Policy Interpretation. As an application of HEW’s new policy to consider this new factor, the 1979 Policy Interpretation sets forth a three-part test to assess compliance with this level-of-competition component of “equal athletic opportunity”:

- (a) Whether the school provides intercollegiate “participation opportunities” in numbers substantially proportionate to enrollment;

(b) If not, whether the school can show a continuing history of expansion that is demonstrably responsive to the developing interest of the underrepresented gender; and

(c) If not, whether the school can show that the interests and abilities of the underrepresented gender are “fully and effectively accommodated.”

81. The 1979 Policy Interpretation was “designed specifically for intercollegiate athletics” but states that “its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.” 44 Fed. Reg. 71,413. HEW did not consider the Three-Part Test a “general principle” of the 1979 Policy Interpretation, and HEW did not consider the Three-Part Test to apply outside intercollegiate athletics. In the 1979 Policy Interpretation, HEW expressly did not find universal evidence of discrimination in intercollegiate athletics and did not consider any evidence at all on interscholastic athletics.

82. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1979 Policy Interpretation pursuant to 20 U.S.C. §1682 and Executive Order 12,250. *See* paragraphs 55-57.

Formation of DOE and Promulgation of DOE’s 1980 Regulations

83. The Department of Education Organization Act of 1979, Pub. L. No. 96-88, 93 Stat. 668 (Oct. 17, 1979), created defendant DOE from certain educational components of HEW, with the remaining components of HEW renamed the Department of Health & Human Services (“HHS”). 20 U.S.C. §3508(b).

84. HEW never enforced the Three-Part Test or any of the 1979 Policy Interpretation against any school, either at the collegiate or scholastic level. Instead, after issuing the Policy Interpretation, HEW began work on what became the 1980 investigator’s manual, which HEW

determined it must complete before beginning enforcement. HEW passed that task uncompleted to the new Department of Education in May 1980. Education completed the task in the summer of 1980.

85. After the creation of defendant DOE as a separate agency, the federal defendants promulgated the education-related regulations previously issued by HEW and other agencies as the Education title of the Code of Federal Regulations. 45 Fed. Reg. 30,802 (May 9, 1980). HHS, the non-Education portion of former HEW, retained its own Title IX regulations. *See* 45 C.F.R. §86.1-.71. Defendants' Title IX regulations mirror the HEW/HHS regulations, with the names of the relevant offices and departments changed (*e.g.*, replacing HEW with Education).

86. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1980 DOE regulations pursuant to 20 U.S.C. §1682 and Executive Order 12,250. *See* paragraphs 55-57.

87. Defendants prepared enforcement manuals in 1980 and 1990, but neither published them in the *Federal Register* nor sought or received approval from the Office of the *Federal Register* to incorporate them by reference in the *Federal Register*.

88. No President (before November 2, 1980) or Attorney General (after November 2, 1980) has approved the 1980 or 1990 enforcement manuals pursuant to 20 U.S.C. §1682 and Executive Order 12,250. *See* paragraphs 55-57.

1996 Clarification

89. On May 9, 1995, the House Subcommittee on Postsecondary Education, Training and Life-long Learning of the Economic and Educational Opportunities Committee held a hearing on Title IX and the Three-Part Test.

90. On June 7, 1995, 142 Members of Congress wrote the Assistant Secretary of Civil

Rights expressing wide agreement in Congress that DOE's Office for Civil Rights needed to issue a revised policy interpretation because, contrary to the legislative intent behind Title IX, the Three-Part Test was causing schools to eliminate men's athletic opportunities to achieve proportionality, without corresponding increases in women's athletic opportunities.

91. On September 20, 1995, the federal defendants issued a memorandum proposing to clarify the 1979 Policy Interpretation. "Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test" (Sept. 20, 1995) (transmitted by Letter from Norma V. Cantú, Assistant Secretary, Office for Civil Rights, Department of Education (Sept. 20, 1995)). Throughout her DOE service, Assistant Secretary Cantú was a member of the State Bar of Texas.

92. On October 2, 1995, the federal defendants published a notice in the *Federal Register* announcing the availability of the draft clarification (without publishing it) and soliciting "public comment on whether the draft Clarification provides adequate clarity in areas that have generated questions." 60 Fed. Reg. 51,460 (Oct. 2, 1995).

93. Commenters questioned whether the Three-Part Test substantively complied with Title IX and the Fourteenth Amendment and whether – even if the Three-Part Test was lawful in 1979 – whether changed circumstances between the 1970s and the 1990s required DOE to revisit the Three-Part Test.

94. On January 16, 1996, the federal defendants issued its "Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test" (Jan. 16, 1996) (transmitted by Letter from Norma V. Cantú, Assistant Secretary, Office for Civil Rights, Department of Education (Jan. 16, 1996)) ("1996 Clarification"). Education's press release announcing the 1996 Clarification characterized the 1996 Clarification as identifying "legal obligations."

95. The 1996 Clarification acknowledges receipt of comments suggesting that the

1979 Policy Interpretation “provided more protection for women’s sports than intended by Title IX” but dismissed those comments because “it would not be appropriate to revise the 1979 Policy Interpretation.”

96. Throughout Assistant Secretary Cantú’s DOE service, Assistant Secretary Cantú, the then-Secretary, DOE, and the United States knew of HEW’s positions as reflected in the Libassi Opinion and the Hamlin Memorandum. In the alternative, during that time and until those documents were served on the Assistant Secretary, Secretary, DOE, and United States in 2004, those parties were not aware of those HEW positions.

97. The 1996 Clarification asserts that the proportionality prong of the Three-Part Test is a “safe harbor” for complying with the equal opportunity provisions of the regulations, but that schools are free to choose to comply with the other two tests.

98. In the 1996 Clarification, the federal defendants stated that they will count athletes – as opposed to unfilled opportunities on teams – when they assess the proportionality of participation opportunities: “OCR [*i.e.*, the Office for Civil Rights] must, however, count actual athletes because participation opportunities must be real, not illusory.”

99. The 1996 Clarification announces the federal defendants’ position on capping: “The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.” (“Capping” means disparately placing an artificially low limit on the number of one gender’s participants on a team to achieve gender proportionality across teams.)

100. The 1996 Clarification was federal defendants’ first public announcement that the federal defendants had extended the Three-Part Test to interscholastic athletic programs. In a contemporaneous sworn statement, HEW predecessors advised the U.S. District Court for the

District of Columbia that HEW would not apply the 1979 Policy Interpretation's "interest-and-abilities" provisions to interscholastic athletics.

101. The 1996 Clarification was the federal defendants' first post-*Grove City* public announcement that the Three-Part Test applied generally to athletic departments that do not directly receive federal funds.

102. The third prong of the Three-Part Test described in the 1996 Clarification differs from that described in the federal defendants' 1980 Title IX Intercollegiate Athletics Investigator's Manual. Specifically, in 1980, the federal defendants interpreted prong three to mean that a school must accommodate the underrepresented gender's interest "to the same degree that it accommodates the interests... of the other gender." Although the 1980 manual differs from the 1975 regulations in some respects, this relative-interest interpretation of the third prong conforms to the relative-interest regulatory standard that HEW promulgated in 1975.

103. During the 1980s, the federal defendants interpreted and enforced prong three consistently with its 1980 manual, under a comparative analysis that included whether a college offered intercollegiate sports for men and women in the same proportion to the interscholastic sports in which boys and girls participated. The 1996 Clarification changed the inquiry of prong three to whether the underrepresented gender has "(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team," without considering the relative accommodation of the other gender's interest.

104. The federal defendants neither considered nor found any evidence of intentional discrimination against female athletes in issuing the 1996 Clarification. Instead, the federal defendants relied on the difference between enrollment and athletic participation to determine disparate impacts.

105. Defendants neither published the 1996 Clarification in the *Federal Register* nor sought or received approval from the Office of the *Federal Register* to incorporate the 1996 Clarification (or the September 20, 1995 draft clarification) by reference in the *Federal Register*.

106. Defendants did not issue the 1996 Clarification pursuant to any procedure that the federal defendants previously had published in the *Federal Register* pursuant to 5 U.S.C. §552(a)(1)(C).

107. No President or Attorney General has approved the 1996 Clarification pursuant to 20 U.S.C. §1682 and Executive Order 12,250. *See* paragraphs 55-57.

2003 Further Clarification

108. On July 11, 2003, the federal defendants issued “Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance” (“2003 Further Clarification”).

109. Beginning with DOE’s chartering the Secretary’s Commission on Opportunity in Athletics and ending with the federal defendants’ issuing the 2003 Further Clarification, the federal defendants reopened the Three-Part Test for reconsideration and (in the 2003 Further Clarification) issued a new and final rule or order setting forth the rights and obligations of schools, students, and coaches under Title IX.

110. In the 2003 Further Clarification, the federal defendants *inter alia* claim that the 1979 Policy Interpretation “established a three-prong test for compliance with Title IX, which [defendants] later amplified and clarified in its 1996 Clarification” and elevates the Three-Part Test’s second and third prongs to safe-harbor status, parallel with the 1996 Clarification’s elevation of the Three-Part Test’s first prong.

111. The 2003 Further Clarification “advises schools that it will aggressively enforce

Title IX standards, including implementing sanctions for institutions that do not comply.”

112. The federal defendants neither considered nor found any evidence of intentional discrimination against female athletes in issuing the 2003 Further Clarification. Instead, the federal defendants relied on the difference between enrollment and athletic participation to determine disparate impacts.

113. Defendants did not issue the 2003 Further Clarification pursuant to any procedure that the federal defendants previously had published in the *Federal Register* pursuant to 5 U.S.C. §552(a)(1)(C).

114. No President or Attorney General has approved the 2003 Further Clarification pursuant to 20 U.S.C. §1682 and Executive Order 12,250. *See* paragraphs 55-57.

2005 Additional Clarification

115. On March 17, 2005, defendants issued “Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three” (“2005 Additional Clarification”).

116. Regardless of whether defendants had knowledge of the procedural history of the 1979 Policy Interpretation prior to issuing the 1996 Clarification and the 2003 Further Clarification, they had actual knowledge of that history before they issued the 2005 Further Clarification. Notwithstanding that knowledge, the 2005 Additional Clarification holds the Three-Part Test out as creating “obligations” and allows limiting the assessment of student interest to “all... students of the underrepresented sex,” notwithstanding that the Title IX regulations required assessing the interests of both genders.

117. The 2005 Additional Clarification acknowledges that DOE and the officer defendants “do[] not enforce the Fourteenth Amendment to the U.S. Constitution” and that “because the scope of the Equal Protection Clause of the Fourteenth Amendment may differ

from the scope of the Title IX statute, this Additional Clarification does not regulate or implement constitutional requirements or constitute advice about the Constitution.”

118. Defendants did not issue the 2005 Further Clarification pursuant to any procedure that the federal defendants previously had published in the *Federal Register* pursuant to 5 U.S.C. §552(a)(1)(C).

119. No President or Attorney General has approved the 2005 Further Clarification pursuant to 20 U.S.C. §1682 and Executive Order 12,250. *See* paragraphs 55-57.

COUNT I

THREE-PART TEST UNLAWFULLY ESTABLISHES A DISPARATE-IMPACT STANDARD AND UNLAWFULLY AUTHORIZES INTENTIONAL DISCRIMINATION

120. Plaintiff EIA incorporates Paragraphs 1-119 and Paragraphs 130-146, as if fully set forth herein.

121. The Equal Protection Clause of the Fourteenth Amendment, the Equal Protection Component of the Due Process Clause of the Fifth Amendment, Title IX, and §86.41(a) of the Title IX regulations prohibit intentional gender-based discrimination and *only* intentional gender-based discrimination. As federal agencies and officers empowered to extend federal financial assistance to educational programs and activities, defendants DOE, Secretary, and Assistant Secretary have a nondiscretionary duty to promulgate rules, regulations, and orders to effectuate Title IX’s prohibition of intentional gender-based discrimination and *only* intentional gender-based discrimination. No provision of law authorizes federal agencies or officers to create (by rule or otherwise) a generally applicable disparate-impact standard or affirmative-action requirement.

122. When otherwise allowed by law, a disparate-impact or equal-opportunity standard

requires comparison with the qualified applicant pool, not the general population. Assuming *arguendo* and in the alternative to Paragraph 121 that Title IX authorizes the federal defendants to adopt such regulatory standards, the federal defendants must compare (and must require recipients of federal funds to compare) athletic opportunities to the students actually interested in participating in athletics, not to all enrolled students. When otherwise allowed by law, agencies must base affirmative-action mandates and disparate-impact standards on credible findings that systemic intentional discrimination exists in the targeted field, and the mandate or standard must include a reasonable sunset provision. The federal defendants never have found that systemic intentional discrimination exists in athletics, and the Three-Part Test does not include a sunset provision.

123. Title IX does not authorize the federal defendants to authorize schools to engage in intentional gender discrimination – such as gender-based cutting or capping – to achieve compliance with a generally applicable disparate-impact standard or affirmative-action requirement. The federal defendants constitutionally can authorize such gender-conscious remedies at a school only where necessary to remedy the effects of past gender-based intentional discrimination by that school after the school has been adjudged to have committed intentional gender-based discrimination in the provision of athletic opportunities.

124. The Three-Part Test violates the Equal Protection Clause of the Fourteenth Amendment, the Equal Protection Component of the Due Process Clause of the Fifth Amendment, Title IX, and §86.41(a) and §86.41(c)(1) of the Title IX regulations by requiring and purporting to authorize those schools where men are more interested than women in athletics (including the schools listed in Paragraphs 7-12) to discriminate against male student-athletes in one or more of the following ways:

(a) Allocate athletic participation (or limit men's participation) based on enrollment, which provides men with fewer athletic opportunities than it provides to women, vis-à-vis the genders' respective athletic interest;

(b) Continually expand athletic opportunities for women far beyond the level of opportunities provided to men, vis-à-vis the genders' respective athletic interest; and/or

(c) Fully accommodate the athletic interests of women notwithstanding that the school does not also fully accommodate the athletic interests of men.

125. In addition to the foregoing violations of constitutional, statutory, and regulatory equal-protection rights, the defendants' Three-Part Test also unlawfully interferes with the rights of both male and female athletes to be free of *ultra vires* and arbitrary government interference with their interactions with schools and particularly the rights of female athletes on traditional small-roster sports (*e.g.*, tennis, archery, fencing, and gymnastics), whose sports schools disfavor under the Three-Part Test's unlawful pressure to prefer and to field large-roster women's teams (*e.g.*, rugby, crew, and equestrian).

126. Defendants and their predecessors took the challenged administrative actions with the knowing intent to disadvantage male athletes vis-à-vis female athletes and to increase female athletic participation vis-à-vis male athletic participation. Defendants and their predecessors failed to identify (and do not have) any "important government objective" served by gender-based cutting and capping to bring athletic participation into proportion with enrollment rates.

127. Capping a male athlete off a team or cutting an entire men's team to meet an enrollment-based quota or because not enough female students elect to participate in the available opportunities violates the Equal Protection Clause of the Fourteenth Amendment (for

public schools), Title IX, §86.41(a) and §86.41(c)(1) of the Title IX regulations, and the Overall Determination of Compliance. Defendants' authorizing such capping and cutting violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment, Title IX, §86.41(a) and §86.41(c)(1) of the Title IX regulations, and the Overall Determination of Compliance.

128. If the Court interprets Title IX or the Title IX regulations to allow the Three-Part Test or to authorize such gender-based cutting or capping, then Title IX and the Title IX regulations are unconstitutional. In the event that the Court so interprets Title IX and/or the Title IX regulations, the "other relief" requested by Paragraph 147.D includes a declaration that Title IX and/or the Title IX regulations violate the Equal Protection Clause of the Fourteenth Amendment and the Equal Protection Component of the Due Process Clause of the Fifth Amendment and an injunction against the federal defendants' enforcing them in athletics.

129. For the foregoing reasons, the Three-Part Test, 1979 Policy Interpretation, 1996 Clarification, 2003 Further Clarification, and 2005 Additional Clarification are arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires*, and without observance of procedure required by law

COUNT II

THREE-PART TEST AND ITS VARIOUS "CLARIFICATIONS" UNLAWFULLY AMENDED TITLE IX REGULATIONS WITHOUT THE REQUIRED RULEMAKING

130. Plaintiff EIA incorporates Paragraphs 1-129 and Paragraphs 142-146, as if fully set forth herein.

131. Under 5 U.S.C. §553(b)-(c), agency action that amends prior substantive or interpretive rules requires notice-and-comment rulemaking, which requires publication in the

Federal Register and the agency's responding to comments as part of its final rule. Agency action that purports to make such amendments without complying with the relevant procedural requirements are of no force or effect and are void *ab initio*.

132. Neither HEW nor DOE underwent APA notice-and-comment rulemaking for the 1979 Policy Interpretation, the 1996 Clarification, the 2003 Further Clarification, or the 2005 Additional Clarification. Neither HEW nor DOE responded to the contemporaneous comments presented to the agencies during the agencies' 1978-79, 1995-96, 2002-03, and 2004-05 deliberations that the Three-Part Test violates Title IX and the Constitution, exceeds the agencies' authority, and (with respect to 1995-96 and 2002-03) failed to respond to changed circumstances since the 1970s.

133. By its original terms, the 1979 Three-Part Test did not apply prospectively to schools' future compliance, but instead served only as HEW's nonbinding proposed framework for future administrative resolution (*i.e.*, in the absence of HEW's negotiating voluntary compliance) in the nearly 100 administrative complaints pending in 1979. By purporting to elevate the Three-Part Test to a "legal obligation" for Title IX compliance in 1996 (and prospectively thereafter), the federal defendants purport to amend the 1979 Policy Interpretation itself by making it prospective and binding and purport to amend the Title IX regulations by requiring or authorizing the discrimination identified in Paragraph 124 and by changing the 1975 regulations' interest-based equal-opportunity standard to an enrollment-based equal-opportunity standard.

134. Assuming *arguendo* and in the alternative to Paragraph 133 that the original 1979 Three-Part Test initially was (or otherwise ever became) binding on the agency or the public, the original 1979 Three-Part Test purported to amend the Title IX regulations as outlined in

Paragraph 133.

135. The 1979 Policy Interpretation's Three-Part Test asks, in part, whether a school provides intercollegiate "participation opportunities" in numbers substantially proportionate to enrollment. The 1996 Clarification purports to amend the 1979 Policy Interpretation from counting "participation opportunities" (*i.e.*, spots on a team) to counting "participants" (*i.e.*, athletes on a team) when determining whether a school complies with the gender-proportionality prong of the Three-Part Test and further purports to amend the Title IX regulations by changing the equal-opportunity standard to an equal-participation standard.

136. By its terms and HEW's contemporaneous sworn testimony, the 1979 Three-Part Test did not apply at all to interscholastic athletic programs. The 1996 Clarification purports to apply some or all of the Three-Part Test to interscholastic athletics, thereby purporting to amend the 1979 Three-Part Test.

137. Contemporaneously from the 1979 Policy interpretation through the 1996 Clarification, the third prong of the Three-Part Test directed schools to assess whether they accommodated the underrepresented gender's interest *to the same extent* as they accommodated the other gender's interest (*i.e.*, to fully accommodate the underrepresented gender meant to accommodate their interests to the same extent as the other gender, consistent with the Title IX regulations). The 1996 Clarification purports to amend the third prong of the Three-Part Test to refer only to whether the schools fully accommodate the interests of the underrepresented gender, with no regard for the extent to which they accommodated the interests of the other gender (*i.e.*, the term "fully" purportedly changed from a term relative to both genders to an absolute term relevant only to one gender).

138. The Overall Determination of Compliance and §86.41(a) prohibit discrimination

and §86.41(c)(1) requires accommodating both genders interests equally. By authorizing gender-based discrimination and creating a safe harbor for the Three-Part Test's first prong in violation of the foregoing Title IX regulations and the Overall Determination of Compliance, the 1996 Clarification purports to amend the Title IX regulations and the Overall Determination of Compliance.

139. The Overall Determination of Compliance and §86.41(a) prohibit discrimination and §86.41(c)(1) requires accommodating both genders interests equally. By authorizing gender-based discrimination and creating a safe harbor for the Three-Part Test's second and third prongs in violation of the foregoing Title IX regulations and the Overall Determination of Compliance, the 2003 Further Clarification purports to amend the Title IX regulations and the Overall Determination of Compliance.

140. Sections 1 and 7 of Article I of the Constitution vests legislative authority in the Congress and requires bicameralism and presentment for the enactment of laws. The APA requires notice-and-comment rulemaking for substantive regulations, 5 U.S.C. §553, and such regulations may only implement the authority that Congress has delegated to an agency. Such congressional delegations must provide an intelligible principle by which the agency can implement the authority delegated by Congress. If Title IX authorizes the federal defendants (without following the APA or Title IX's procedural requirements) to adopt a disparate-impact affirmative-action requirement to "effectuate" a statutory prohibition against intentional gender-based discrimination, then Title IX violates constitutional separation-of-powers and non-delegation doctrines. If Title IX authorizes the federal defendants to take such actions without those required procedures, the "other relief" requested by Paragraph 147.D includes a declaration that Title IX violates the constitutional separation-of-powers and non-delegation doctrines and

an injunction against the enforcement of the Three-Part Test.

141. For the foregoing reasons, the Three-Part Test, 1979 Policy Interpretation, 1996 Clarification, 2003 Further Clarification, and 2005 Additional Clarification are arbitrary, capricious, an abuse of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires*, and without observance of procedure required by law.

COUNT III
THREE-PART TEST, ITS VARIOUS “CLARIFICATIONS,” AND DOE’S TITLE IX
REGULATIONS ARE NOT IN EFFECT

142. Plaintiff EIA incorporates paragraphs 1 through 141, as if fully set forth herein.

143. Under 20 U.S.C. §1682 and Executive Order 12,250, no rule, regulation, or order of general applicability issued by a federal agency under Title IX takes effect until approved by either the President (before November 2, 1980) or the Attorney General (after November 2, 1980) and such approval is published in the *Federal Register*.

144. Under 20 U.S.C. §3505(a), all HEW rules, regulations, and orders in effect on May 4, 1980, continue in effect at DOE until amended in accordance with applicable law. Under this provision, HEW’s Title IX regulations (45 C.F.R. §86.1-.71) continued in effect for DOE.

145. No President or Attorney General has approved the 1979 Policy Interpretation, DOE’s implementing regulations (34 C.F.R. §106.1-.71), the 1996 Clarification, the 2003 Further Clarification, or the 2005 Additional Clarification pursuant to 20 U.S.C. §1682 and Executive Order 12,250.

146. For the foregoing reasons, HEW’s 1975 regulations remain in effect for DOE, and the Three-Part Test, 1979 Policy Interpretation, 1996 Clarification, 2003 Further Clarification, and 2005 Additional Clarification have no force or effect and are arbitrary, capricious, an abuse

of discretion, not otherwise in accordance with the law, in excess of authority granted by law, *ultra vires*, and without observance of procedure required by law.

PRAYER FOR RELIEF

147. Wherefore, EIA respectfully requests that this Court enter the following relief:

A. Pursuant to 5 U.S.C. §706(2), 28 U.S.C. §§1331, 1343(a)(3)-(4), 1361, 1651(a), 2201-2202, Fed. R. Civ. Proc. 57, and the court's equitable powers, a Declaratory Judgment that:

- (i) The Equal Protection Component of the Due Process Clause of the Fifth Amendment and Title IX authorize only rules that effectuate Title IX's prohibition of intentional discrimination and do not authorize rules that create a disparate-impact standard, affirmative-action mandate, or enrollment-based participation quota;
- (ii) The Equal Protection Component of the Due Process Clause of the Fifth Amendment and Title IX prohibit the federal defendants from requiring or authorizing schools to engage in gender-based cutting or capping solely to meet a disparate-impact standard, affirmative-action mandate, or enrollment-based participation quota;
- (iii) To the extent that schools may make gender-based decisions regarding athletic opportunities, Equal Protection Clause of the Fourteenth Amendment, the Equal Protection Component of the Due Process Clause of the Fifth Amendment, Title IX, and §86.41(a) and §86.41(c)(1) of the Title IX regulations (and the parallel provisions of other agencies' regulations) require schools to use athletic interest and ability – not enrollment – as the relevant population;

- (iv) Under Equal Protection Clause of the Fourteenth Amendment, the Equal Protection Component of the Due Process Clause of the Fifth Amendment, Title IX, §86.41(a) and §86.41(c)(1) of the Title IX regulations, and the 1979 Policy Interpretation, the relevant unit of “athletic opportunity” is a spot on a team, not an athlete on a team;
 - (v) Pursuant to 20 U.S.C. §1682, the 1979 Policy Interpretation, the 1996 Clarification, the 2003 Further Clarification, the 2005 Additional Clarification, and DOE’s Title IX regulations (34 C.F.R. §106.1-.71) have no force or effect;
 - (vi) The 1996, 2003, and 2005 clarifications’ elevation of the Three-Part Test to a legal obligation and safe harbor purports to amend the substantive Title IX regulations in violation of the APA’s rulemaking requirements, thus rendering those actions void *ab initio*;
 - (vii) Defendants have a statutory obligation to terminate the federal funding of any institution that violates Title IX’s prohibition against intentional, gender-based discrimination and the federal defendants’ rules, regulations, and orders in effect pursuant to 20 U.S.C. §1682, if such schools do not agree voluntarily to cease the discriminatory conduct; and
 - (viii) Any school that has cut or capped a team to make athletic participation proportional to enrollment or to work toward achieving such proportionality constitutes a school for which opportunity for that gender have been limited, within the meaning of 45 C.F.R. §86.41(b) and any other similar regulatory or statutory provision.
- B. Pursuant to 5 U.S.C. §706(2), 28 U.S.C. §§1331, 1343(a)(3)-(4), 1361, 1651(a), 2202,

and the court's equitable powers, an Order providing that

- (i) The Three-Part Test is vacated; and
 - (ii) The 1996 Clarification, 2003 Further Clarification, and 2005 Additional Clarification are vacated;
 - (iii) The federal defendants shall remove all guidance and other documents related to the Three-Part Test from their internet sites, publications, and other forms or documents related to compliance with Title IX; and
 - (iv) The federal defendants are permanently enjoined from amending the Title IX regulations except in accordance with this Court's declaratory relief in this action.
- C. Pursuant to 42 U.S.C. §1988(b) and 28 U.S.C. §2412, award EIA its costs and reasonable attorneys fees.
- D. Such other relief as may be just and proper.

Dated: March 19, 2007

Respectfully submitted,

/s/ Thomas H. Miller

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