IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WRESTLING COACHES ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:02CV00072 EGS
UNITED STATES DEPARTMENT OF EDUCATION,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS

Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, defendant United States Department of Education respectfully moves this Court for an order dismissing this action for lack of subject matter jurisdiction. The grounds in support of this motion are set out more fully in the attached memorandum.

Dated: May 29, 2002

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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REGULATIONS

PRELIMINARY STATEMENT

Title IX of the Education Amendments of 1972 prohibits sex discrimination in education programs or activities that receive federal financial assistance. The Department of Education's (DOE's) regulation implementing Title IX, which has remained in effect since 1975, prohibits discrimination in athletic programs offered by recipients of federal funds, and requires recipients, if they offer athletics, to provide equal athletic opportunity, benefits, and treatment for members of both sexes. To assess whether recipients provide equal opportunity to participate in athletics, the DOE considers, among many other factors, whether the recipient meets any of the following three options: (1) the recipient provides athletic participation opportunities to each sex in numbers substantially proportionate to enrollment, (2) the recipient has a continuing history of expansion of athletic programs for the underrepresented sex, or (3) the recipient has fully and effectively accommodated the interests and abilities of the underrepresented sex.

Plaintiffs, four unincorporated associations and one nonprofit corporation who purport to represent not only individual athletes, but also staff, alumni, contributors, spectators, and others with an interest in sports, bring this action on behalf of their members to challenge the manner in which DOE has implemented Title IX on myriad procedural and substantive grounds. First Amended Complaint for Declaratory and Injunctive Relief (hereinafter "Am. Compl."), ¶¶ 1, 5-8. Plaintiffs allege that they have ongoing professional, aesthetic, economic, participatory, and spectator interests that "have been harmed (and continue to be harmed) by the elimination of intercollegiate men's sports opportunities and teams that result from institutions' efforts to comply with USDE's unlawful Title IX rules." Id., ¶ 8, see also id., ¶¶ 5-7, 48-52. To redress these alleged injuries, plaintiffs seek a declaratory judgment that the implementing regulations and subsequent guidance regarding the application of those regulations violate Title IX, the

Administrative Procedure Act, and the equal protection component of the Due Process Clause of the Fifth Amendment. Plaintiffs also seek an order vacating both the regulations implementing Title IX and the subsequent guidance, and requiring the agency to promulgate new rules pursuant to a judicially imposed schedule that are consistent with plaintiffs' interpretation of Title IX.

For the reasons set out below, plaintiffs' claims must be dismissed for lack of subject matter jurisdiction. As a threshold matter, plaintiffs lack standing to maintain this action because the relief that plaintiffs seek (i.e., invalidation of the DOE's interpretation of Title IX), even if it were to be granted in all respects, cannot and will not redress the injuries about which plaintiffs complain. If, as plaintiffs claim, educational institutions have eliminated athletic teams for one sex (or alternatively reallocated resources from one sex to another) as part of an effort to comply with Title IX (and its accompanying regulations and guidance), only those institutions are in a position to reinstate the teams in question. It is speculative, at best, if not entirely improbable, that an order by this Court invalidating DOE's interpretation of Title IX would have any substantial impact on decisions by educational institutions to add or eliminate athletic teams. Even if the Court were to enter such an order, educational institutions receiving federal funds would remain subject to Title IX's prohibition of discrimination on the basis of sex. Title IX's prohibition against intentional discrimination may be enforced not only by the federal government, but also through a private cause of action by an injured party against the recipient. Because the interpretation of Title IX challenged by plaintiffs in this case has been endorsed and adopted by seven federal circuit courts of appeals, a contrary decision by this Court would not necessarily affect the legal interpretation of Title IX applied by courts in private litigation. In these circumstances, plaintiffs cannot demonstrate any substantial likelihood that educational

institutions would risk liability to private parties (e.g., female athletes) by adding or reinstating men's athletic teams and thereby increasing athletic opportunities for male athletes. Because the relief plaintiffs seek cannot redress the injuries about which they complain, this Court lacks subject matter jurisdiction over this action.

Plaintiffs' claims are also barred by the doctrine of sovereign immunity both because they are outside the scope of the limited waiver of sovereign immunity contained in the Administrative Procedure Act (APA) and because they are time-barred. The APA, which provides the only avenue through which plaintiffs may sue the federal government in an action such as this, authorizes judicial review of final agency action only in circumstances where "there is no other adequate remedy in a court . . . ." 5 U.S.C. § 704. As stated above, Title IX's prohibition against intentional discrimination may be enforced through a private cause of action by the injured party against recipients of federal funds. Plaintiffs' remedy against the recipient institutions is not only "adequate" but superior to any remedy available in this action because, without joinder of the educational institutions involved (which are the only entities in a position to reinstate intercollegiate sports teams as plaintiffs seek), there is no means by which the courts can redress the injury about which plaintiffs complain. Because plaintiffs have an adequate remedy in a court against recipients of federal funds for any injury they may have suffered as a result of intentional discrimination by those recipients, the APA does not authorize judicial review.

Even if plaintiffs had standing to maintain this action and even if their claims were otherwise within the scope of the APA, plaintiffs' claims would nonetheless be time-barred insofar as they challenge actions taken by DOE and its predecessor prior to January 16, 1996. As

set out below, the general six-year statute of limitations in 28 U.S.C. § 2401(a) applies to claims brought under the APA. Plaintiffs here seek to assert a facial APA challenge to the validity of a regulation that was originally promulgated in 1975 and subsequently recodified in 1980, and a Policy Interpretation which was adopted and published in the Federal Register in 1979. Because plaintiffs failed to file a complaint within six years after their cause of action first accrued, their substantive and procedural challenges to a regulation and Policy Interpretation published more than twenty years ago are barred by the applicable statute of limitations.

For all of the reasons outlined above, this action should be dismissed for lack of subject matter jurisdiction.

BACKGROUND

A. Title IX

Title IX was enacted as part of the Education Amendments of 1972, Pub. L. 92-318, §§ 901-905, 86 Stat. 373-375 (June 23, 1972). Section 901, which is patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, broadly proscribes discrimination based on sex in federally assisted educational programs and activities. With certain exceptions not at issue here, Section 901 provides that: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a).

Section 902 of the statute "authorize[s] and direct[s]" each agency empowered to extend federal financial assistance to any education program or activity "to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of

general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682. The statute further provides that "[n]o such rule, regulation, or order shall become effective unless and until approved by the President." Id.

Two years after Title IX was enacted, Congress provided further direction regarding the implementation of the statute to the Secretary of Health, Education, and Welfare ("HEW"). In the Education Amendments of 1974, Congress expressly required that the regulations promulgated by the Secretary of HEW to implement Title IX "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Pub. L. 93-380, § 844, 88 Stat. 484, 612 (Aug. 21, 1974).

B. HEW's 1975 Implementing Regulation

On June 20, 1974, the Secretary of HEW published proposed regulations implementing Title IX in the Federal Register, and provided an opportunity for public comment over a period which spanned nearly four months. 39 Fed. Reg. 22228, 22231 (June 20, 1974) (Attachment A hereto). HEW received over 9,700 comments on the proposed rule and, after consideration of those comments, published a final rule implementing Title IX on June 4, 1975. 40 Fed. Reg. 24128 (June 4, 1975) (Attachment B hereto) (codified at 45 C.F.R. Part 86). As required by section 902 of the statute, the final regulation was approved by President Ford on May 27, 1975, and became effective on July 21, 1975. 40 Fed. Reg. at 24128, 24137.

The implementing regulations, insofar as pertinent here, prohibit discrimination in athletic programs offered by a recipient of federal funds; however, they explicitly authorize recipients to operate or sponsor separate teams for members of each sex subject to certain

conditions. 45 C.F.R. § 86.41(a). The regulations also require recipients to provide equal athletic opportunity for members of both sexes, and specify ten factors which may be considered in determining whether equal opportunities are available. Id., § 86.41(c). The first of those factors, which is the one at issue here, is "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." Id., § 86.41(c)(i). To allow time for affected educational institutions to come into compliance, the regulation provided for a three year "adjustment period" which expired on July 21, 1978. Id., § 86.41(d).

C. The 1979 Policy Interpretation

Several months after the expiration of the initial three year adjustment period, the Secretary of HEW published a Proposed Policy Interpretation in the Federal Register and solicited public comment. 43 Fed. Reg. 58070 (Dec. 11, 1978) (Attachment C hereto). The proposal stated that HEW had already "received 93 complaints alleging that more than 62 institutions of higher education were not providing equal athletic opportunities for women." Id. at 58071. It went on to describe the purpose of the proposed Policy Interpretation as follows:

> This policy interpretation is designed to provide a framework within which those complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements of the law relating to intercollegiate athletic programs. Id.

Following publication of the proposed Policy Interpretation, HEW received over 700 comments. In addition, "HEW staff visited eight universities during June and July 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses." 44 Fed. Reg. 71413 (Dec. 11, 1979) (Attachment D hereto). Based on the

public comments received and the results of the on-campus visits, HEW published a final Policy Interpretation in the Federal Register on December 11, 1979. Id. The agency described the purpose of the Policy Interpretation as follows:

> By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

Id.

In summarizing the major principles in the Policy Interpretation, the agency provided a further explanation of the functions and purposes that it was intended to serve:

> The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory.

Id. at 71414 (emphasis added).

With respect to the opportunity for individuals of each sex to participate in intercollegiate athletic programs, the Policy Interpretation provides the following guidance to assist institutions in determining how the agency will assess whether disparities which may exist between men's and women's athletic programs are "justifiable and nondiscriminatory":

> Compliance will be assessed in any one of the following ways:
>
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been or are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id.

D. The Department of Education Organization Act

Section 201 of the Department of Education Organization Act ("Organization Act"), Pub. L. 96-88, 93 Stat. 669, 671 (Oct. 17, 1979), which established the United States Department of Education (DOE), became effective on May 4, 1980. 20 U.S.C. § 3411; E.O. 12212, 45 Fed. Reg. 29557 (May 2, 1980). The Organization Act transferred all of the functions of the HEW's Office for Civil Rights relating to educational programs covered by the Act to the Office for Civil Rights of the newly created Department of Education. 20 U.S.C. §§ 3413(a) and 3441(a)(3). In addition, the Organization Act provided that, "[i]n carrying out any function transferred by this Act, the Secretary, or any officer or employee of the Department, may exercise any authority available by law . . . to the official or agency from which such function was transferred . . . ." 20 U.S.C. § 3471(a); see also 20 U.S.C. § 3507 (references in other laws "shall be deemed to refer to the Secretary, official, or other component of the Department to which this Act transfers such functions").

The Organization Act also expressly provides that "[a]ll orders, determinations, rules, [and] regulations" which "have been issued . . . or allowed to become effective by the President,

[or] any Federal department or agency or official thereof, . . . in the performance of functions, which are transferred under this Act to the Secretary or the Department, and [] which are in effect at the time this Act takes effect, *shall continue in effect* according to their terms until modified, terminated, superseded, set aside or revoked in accordance with the law by the President, the Secretary, or other authorized official . . . ." 20 U.S.C. § 3505(a) (emphasis added). Consequently, by operation of law, all of the HEW's determinations, rules, and regulations regarding Title IX which were in effect on May 4, 1980 remained in effect when the Department of Education was created.

In a final rule implementing the Organization Act, the DOE established a new Title 34 in the Code of Federal Regulations which "recodifies certain regulations of the former Department of Health, Education, and Welfare, and lists the other regulations that are transferred to the Department of Education under the Department of Education Organization Act and will ultimately be recodified in Title 34." 45 Fed. Reg. 30802 (May 9, 1980). The regulation implementing Title IX was recodified without substantive change in 34 C.F.R. Part 106. Id. at 30955-30965. The regulation governing athletics, which is found at 34 C.F.R. § 106.41, is identical in all respects to the original HEW regulation except that it refers to the Assistant Secretary of Education rather than the Director of HEW's Office for Civil Rights. The regulation governing athletics has remained in effect without any substantive change since that time.

E. The 1996 Clarification

The DOE did not publish any further guidance regarding the regulation pertaining to athletics until 1995. On September 20, 1995, the DOE publicly released a letter from Norma V. Cantu, who was the Assistant Secretary for Civil Rights of the Department of Education at that

time. The letter, which was addressed "Dear Colleague," enclosed a draft clarification of the intercollegiate athletics policy guidance that had been issued by HEW in 1979. (A copy of the letter and draft Clarification is annexed as Attachment E hereto). It stated that the Department was seeking comments only as to whether the Clarification "provides appropriate clarity in areas that have generated questions." Id. at 1. The letter was circulated to over 4,500 interested parties. See Attachment F hereto, at 1. In addition, the DOE published a Notice in the Federal Register announcing the availability of the draft clarification. 60 Fed. Reg. 51460 (Oct. 2, 1995). After receipt of public comments, the DOE released a final version of the clarification on January 16, 1996. See Attachment F.

The letters transmitting both the draft and final versions of the Clarification emphasized several points. First, both stated that the agency's objective was "to respond to requests for specific guidance about existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics." Attachment E, at 1; Attachment F, at 1. Similarly, both emphasized that DOE is "not revisiting the Title IX regulation or the Title IX Policy Interpretation." Attachment E at 1; see also Attachment F at 1 ("it would not be appropriate to revise the 1979 Policy Interpretation").

Second, both focused exclusively on the guidelines set out in the HEW's 1979 Policy Interpretation that had been "used to determine whether students of both sexes are provided nondiscriminatory opportunities to participate in athletics." Attachment F at 1. In that regard, both addressed the guidance in the 1979 Policy Interpretation regarding the methods used to assess whether disparities which may exist between men's and women's athletic programs are "justifiable and nondiscriminatory." As the transmittal letters note, during the intervening years,

these guidelines had come to be known as the "Three-Part Test." Attachment E, at 1; Attachment F at 1.

Third, as the letter enclosing the draft Clarification emphasized, it was drafted to be "consistent with [Office of Civil Rights] and federal court decisions" construing Title IX. Attachment E, at 2. "Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities." Id. In that regard, the Clarification "confirms that institutions need to comply only with any one part of the three-part test to provide non-discriminatory participation opportunities for individuals of both sexes." Attachment F, at 2.

ARGUMENT

I. BECAUSE PLAINTIFFS' ALLEGED INJURIES ARE NOT REDRESSABLE BY THIS COURT, PLAINTIFFS LACK STANDING TO MAINTAIN THIS ACTION

As the Amended Complaint reflects, the plaintiff organizations do not allege any direct or indirect injury to the organizations themselves. Instead, they allege that the interests of their members have been harmed. Am. Compl., ¶¶ 4-8. Even if plaintiffs were able to demonstrate that they are "membership organizations" with a "discrete, stable group of persons with a definable set of common interests," Fund Democracy, LLC, v. Securities and Exchange Commission, 278 F.3d 21, 25-26 (D.C. Cir. 2002), they would have standing to bring this action only if their "members would otherwise have standing to sue in their own right . . . ." Id. at 25.[1] Because plaintiffs' members do not have standing to pursue the claims asserted in this action, plaintiffs cannot satisfy this threshold requirement.

[1] In addition to establishing that their members would otherwise have standing to sue in their own right, plaintiffs also must establish that the interests they seek to protect "are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires participation of individual members in the lawsuit." Fund Democracy LLC, 278 F.3d at 25.

The "irreducible constitutional minimum of standing" requires that plaintiffs demonstrate (a) an "injury in fact" which is "concrete and particularized," (b) that the injury is "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court," and (c) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992), quoting in part Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41-42, 43 (1976). "This triad . . . constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 103-104 (1998). "[A] deficiency on any one of the three prongs suffices to defeat standing." US Ecology, Inc. v. United States Department of the Interior, 231 F.3d 20, 24 (D.C. Cir. 2000).

Plaintiffs lack standing here because they cannot establish that the judgment they seek would redress the injuries they have identified. "Redressability examines whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff." Florida Audobon Society v. Bentsen, 94 F.3d 658, 663-663 (D.C. Cir. 1996) (en banc). In this action, plaintiffs seek a declaratory judgment that the DOE's Title IX rules and associated guidance are unlawful and have no force and effect, an order vacating the rules and an order staying enforcement of certain provisions. Compl., Prayer for Relief. To satisfy the redressability component of standing, plaintiffs would have to allege (and ultimately prove) that it is "likely," as opposed to merely "speculative," that a judgment invalidating the DOE's Title IX rules and associated guidance would redress their injuries.

An "adequate examination" of redressability therefore requires that the court first "identify the components of [plaintiffs'] alleged harm." Freedom Republicans, Inc. v. Federal Election Commission, 13 F.3d 412, 416 (D.C. Cir. 1994), cert. denied 513 U.S. 821 (1994). In that regard, plaintiffs may not rely solely on allegations that the government violated a legal requirement. "[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984); University Medical Center of Southern Nevada v. Shalala, 173 F.3d 438, 441 (D.C. Cir. 1999) ("[A]lleged illegality without an injury-in-fact does not satisfy standing requirements."). Similarly, "[t]he mere violation of a procedural requirement does not authorize all persons to sue to enforce the requirement." Fund Democracy LLC, 278 F.3d at 27. "In order to make out a constitutionally cognizable injury, plaintiff must demonstrate that the allegedly deficient procedures implicate distinct substantive interests as to which Article III standing requirements are independently satisfied." Freedom Republicans, 13 F.3d at 416.

Here, the only "distinct substantive interest" identified by plaintiffs is that their members "have been harmed (and continue to be harmed) by the elimination of intercollegiate men's sports opportunities and teams that result from institutions' efforts to comply with USDE's Title IX rules." Am. Compl., ¶ 8, see also id., ¶¶ 5-7, 48-52. Their complaint is not that the DOE *directly* eliminated any intercollegiate men's sports opportunities or teams through its own actions. Instead, they allege that educational institutions - - who are not parties to this case - - caused their injuries in an effort to comply with the DOE's Title IX rules.

"[I]ndirectness of injury, while not necessarily fatal to standing, 'may make it substantially more difficult to meet the minimum requirement of Art. III: To establish that, in

fact, the asserted injury was the consequence of the defendants' actions, *or that prospective relief will remove the harm.*'" Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. at 44-45 (emphasis added), quoting in part Warth v. Seldin, 422 U.S. 490, 505 (1975). As the Supreme Court explained in Lujan v. Defenders of Wildlife:

> When . . . a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction - - and perhaps on the response of others as well. The existence of one or more of the essential elements of standing depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume to control or to predict . . . .

504 U.S. at 562 (emphasis by court).

Thus, to satisfy the minimum requirements of Article III, plaintiffs must demonstrate that it is "likely," and not merely "speculative," that the prospective relief they seek (invalidation of DOE's interpretation of Title IX) will result in the removal of the harm they have identified (elimination of intercollegiate men's sports opportunities and teams). If plaintiffs are unable to do so, their injuries would not be redressed by a favorable judgment and their claims must be dismissed for lack of standing. Steel Company v. Citizens for a Better Environment, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

For the reasons set out below, plaintiffs have not and cannot demonstrate any likelihood that a favorable judgment in this action would have any substantial impact on decisions by educational institutions regarding which sports to include in their athletic programs. Even if this Court were to declare DOE's policies and/or regulations to be invalid and unenforceable,

educational institutions would still be subject to Title IX's prohibition of discrimination based on sex in any federally funded educational program or activity, including intercollegiate athletics.

Moreover, educational institutions would remain subject to private suits under Title IX because the requirements of Title IX may be enforced not only by the federal government, but also through a private cause of action by the injured party directly against educational institutions that are recipients of federal funds. Gebser v. Lago Vista Independent School District, 524 U.S. 274, 281 (1998); Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 65 (1992); Cannon v. University of Chicago, 441 U.S. 677 (1979). Unlike the DOE, the plaintiffs in such private lawsuits (e.g., female athletes) would not be constrained by this Court's judgment concerning the correct interpretation of Title IX. That is particularly true in this case given the fact that plaintiffs' interpretation of Title IX - - i.e., that Title IX prohibits an educational institution from capping or eliminating athletic teams as part of an overall effort to create equal athletic opportunities for students of both genders - - has been rejected by every federal circuit court of appeals that has considered the questions plaintiffs raise. Cohen v. Brown University, 991 F.2d 888, 898 n.15 (1st Cir. 1993); Cohen v. Brown University, 101 F.3d 155, 185-186 (1st Cir. 1996), cert. denied 520 U.S. 1186 (1997); Williams v. School District of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993), cert. denied 510 U.S. 1043 (1994); Pederson v. Lousiana State University, 213 F.3d 858, 878 (5th Cir. 2000); Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 275 (6th Cir. 1994), appeal after remand, 206 F.3d 685 (6th Cir.), cert. denied 531 U.S. 824 (2000); Kelley v. Board of Trustees, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied 513 U.S. 1128 (1995); Boulahanis v. Board of Regents, 198 F.3d 633, 637 (7th Cir. 1999), cert. denied 530 U.S. 1284 (2000); Neal v. Board of Trustees of California State

Universities, 198 F.3d 763, 771 (9th Cir. 1999); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 830 (10th Cir. 1993), cert. denied 510 U.S. 1004 (1993).

Consequently, even if this Court were to declare DOE's regulations and policies to be invalid and unenforceable, educational institutions would not necessarily be relieved of the restrictions to which plaintiffs object. To the contrary, these institutions would remain subject to private suits under Title IX. Moreover, regardless of the outcome of this action, the legal standards applied in such private suits would be governed by the numerous (and in most cases, controlling) decisions of the various courts of appeals. Under these circumstances, plaintiffs cannot demonstrate that it is "likely," as opposed to "speculative," that these institutions would alter their conduct based on a judgment by this court invalidating the agency's interpretation of Title IX, but leaving intact contrary decisions by the courts of appeals.

Plaintiffs' claims here are plainly distinguishable from a challenge to a government action which authorizes or permits "third party conduct that allegedly caused a plaintiff injury, *when that conduct would otherwise have been illegal*." E.g., Animal Legal Defense Fund v. Glickman, 154 F.3d 426, 442 (D.C. Cir. 1998) (en banc), cert. denied 526 U.S. 1064 (1999) (emphasis added); America's Community Bankers v. Federal Deposit Insurance Corporation, 200 F.3d 822, 827 (D.C. Cir. 2000); Bristol-Myers Squibb Co. v. Shalala, 91 F.3d 1493, 1499 (D.C. Cir. 1996). In such a case, invalidation of the government's action would redress a plaintiff's injury by rendering the third party's conduct illegal. Here, in contrast, plaintiffs challenge government action which permits third party conduct (elimination of sports teams) that seven courts of appeals have already declared to be *legal* in any event. Under these circumstances, invalidation of the government's action would not alter the effects of the decisions by the courts of appeals

construing Title IX. Thus, even assuming that "Marquette might bring back its wrestling program if the law changed," as plaintiffs allege, Compl., ¶51, the "law" in the Seventh Circuit would remain the same regardless of the outcome of this case.

Moreover, plaintiffs' speculation regarding what Marquette or any other university "might" do "if the law changed" is exactly the type of speculation the D.C. Circuit has held insufficient to establish standing. For example, in Freedom Republicans the D.C. Circuit dismissed for lack of standing a challenge to the Federal Election Commission's alleged failure to enforce Title VI against the Republican Party and its delegate allocation system. The D.C. Circuit held that the plaintiffs had not established that a possible judicial response would redress their injuries because it would have been "pure speculation" to attempt to predict the potential impact of the threat of withdrawal of all federal funding (which according to the complaint was in excess of $10,000,000) on the Republican Party's decision making. See Freedom Republicans, 13 F.3d at 417 & n. 6.

Similarly, in US Ecology, Inc., v. United States Department of the Interior, a private company sued the U.S. Department of Interior for its allegedly unlawful rescission of a decision to approve the transfer of a plot of land to the State of California which would enable the company to develop a facility on the site as a licensee for the State of California. The D.C. Circuit held that the injury of the private company was not redressable by a favorable court decision because the company could not demonstrate that the State of California - - which was no longer a party - - would accept title to the land from the federal government and proceed with the plaintiff's development contract. See US Ecology, Inc. v. United States Department of the Interior, 231 F.3d at 21, 24-25.

Finally, in University Medical Center v. Shalala, a hospital challenged its allegedly unlawful exclusion by the Secretary of Health and Human Services from a list of entities eligible for drug discounts from drug manufacturers. The D.C. Circuit held that the plaintiff's injury in losing drug discounts was not redressable by a favorable court decision where, even if the court granted declaratory relief that the government unlawfully delayed in placing the hospital on the list of entities eligible for discounts, retroactive discounts would be available only if third party manufacturers could be persuaded to pay them. See University Medical Center v. Shalala, 173 F.3d at 441.

In each of these cases, the court could not predict nor had the plaintiffs established how third parties would respond to a favorable decision for the plaintiffs and thus had failed to demonstrate that the requested relief would redress plaintiffs' injuries. This fatal flaw is also present in this action because neither plaintiffs nor the Court can predict what effect, *if any*, a favorable court ruling in this case would have on decisions by educational institutions regarding what sports to include in their intercollegiate athletic programs, particularly in light of these institutions' continuing susceptibility to private suits under Title IX and the wealth of judicial authority which has rejected plaintiffs' interpretation of Title IX.

In sum, the judgment sought by plaintiffs in this case would not and could not redress plaintiffs' injury. Accordingly, plaintiffs lack standing to pursue their claims, and this action must be dismissed for lack of subject matter jurisdiction.[2]

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[2] For similar reasons, plaintiffs have failed to allege facts which would establish the requisite causal link between the injuries they have identified and the actions they challenge here. Universities' decisions regarding how to structure athletic programs, and how to allocate resources between sports and other academic programs, and among athletic teams, are made based on a multitude of factors, and often have a long-term impact. Even if educational

II. PLAINTIFFS' CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY

"Under settled principles of sovereign immunity, 'the United States, as sovereign, is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" United States v. Dalm, 494 U.S. 596, 608 (1990), quoting United States v. Testan, 424 U.S. 392, 399 (1976) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). "A necessary corollary of this rule is that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." Block v. North Dakota, 461 U.S. 273, 287 (1983).

As set out below, plaintiffs' claims here fail to satisfy two of the limitations imposed by Congress on the waiver of sovereign immunity found in the Administrative Procedure Act, 5 U.S.C. § 701 et seq. (APA). First, the APA's waiver of immunity does not apply where, as here, plaintiffs already have an adequate remedy in a court against the recipient institutions. Second, plaintiffs' claims are plainly barred by the applicable statute of limitations insofar as they challenge a regulation and Policy Interpretation adopted more than twenty years ago. Consequently, this action must be dismissed for lack of subject matter jurisdiction.

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institutions have eliminated or capped the number of participants on men's wrestling teams based in whole or in part on Title IX, as plaintiffs allege, it does not follow that there is any necessary causal link between the institutions' actions and any action taken by the DOE. Indeed, given the fact that seven circuit courts of appeals have held that educational institutions may eliminate a team as one means of developing an athletic program that complies with Title IX's requirements, educational institutions' actions may instead be traceable to the decisions of the various courts of appeals construing Title IX.

A. Because Plaintiffs Have An Adequate Remedy In A Court Against Recipient Institutions, The Administrative Procedure Act Does Not Authorize Judicial Review

Although section 702 of the APA, 5 U.S.C. § 702, waives sovereign immunity for certain types of claims, a determination of "[w]hether § 702 of the APA justifies district court jurisdiction over [plaintiffs'] case depends on whether [plaintiffs'] claims fall under any of the limitations on the APA's waiver of sovereign immunity." Transohio Savings Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 607 (D.C. Cir. 1992). Of particular importance here, "[t]he APA excludes from its waiver of sovereign immunity . . . claims for which an adequate remedy is available elsewhere . . . ." Id. In that regard, section 704 of the APA provides that "[a]gency action made reviewable by statute and final agency action for which there is *no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). As discussed below, the D.C. Circuit has repeatedly held that, where an injured party has an adequate remedy against a recipient of federal funds to redress claims of unlawful discrimination, section 704 operates to preclude a remedy against the funding agency under the APA. Because plaintiffs here have an adequate remedy against recipients of federal funds to redress any injury they may have suffered as a result of intentional discrimination by those recipients, their claims under the APA are barred.

In the seminal case of Council of and for the Blind of Delaware County Valley, Inc., v. Regan, 709 F.2d 1521 (D.C. Cir. 1983) (en banc), the plaintiffs brought suit to "challenge the way in which the Office of Revenue Sharing handles complaints that funds it distributes in block grants are being used in an illegally discriminatory manner." Id. at 1523. The Court, sitting *en banc*, concluded that the Revenue Sharing Act authorized an express cause of action against

recipients of revenue sharing funds, but did not authorize any express or implied cause of action against the government. Id. at 1525-1531. Turning to the plaintiffs' claims under the APA, the court held that, because Congress had provided an adequate remedy against state or local governmental recipients of federal funds to redress the plaintiffs' claims of discrimination, the APA does not provide a cause of action against the federal government. Id. at 1531-1533.

Subsequently, in Women's Equity Action League v. Cavazos, 906 F.2d 742 (D.C.Cir. 1990) (hereinafter "WEAL"), the plaintiffs brought suit against the Secretary of Education and several other federal agencies seeking judicial review of the "procedures government agencies use to enforce civil rights prescriptions controlling educational institutions that receive federal funds." Id. at 744. The court held, first, that there is no implied right of action against the federal government under either Title VI or Title IX to redress discrimination by recipients of federal funds. Id. at 748-750. As the Court explained, "an overarching, broad-gauged suit against the federal monitors that bypasses the discriminatory recipients is inconsistent with a legislative compromise 'conducive to implication of a private remedy against a [particular] discriminatory recipient,' but not 'to implication of a private remedy [directly and broadly] against the Government.'" Id. at 750, quoting in part, Cannon v. University of Chicago, 441 U.S. at 715 n.15.

The court in WEAL next addressed the plaintiffs' claims under the APA. Citing the Supreme Court's decision in Cannon v. University of Chicago, the court reaffirmed that the plaintiffs "have implied rights of action against federally-funded institutions to redress

discrimination proscribed by Title VI and Title IX." 906 F.2d at 750.[3] The court then concluded that the implied rights of action under Title VI and Title IX "are of the same genre as the one held sufficient to preclude the APA remedy" in Council of and for the Blind. Id. at 751. The court found the remedy to be adequate based in part on its conclusion that "Congress considered private suits to end discrimination not merely adequate but in fact the proper means for individuals to enforce Title VI and its sister antidiscrimination statutes." Id. Finally, the court rejected the plaintiffs' contention that individual actions against discriminators "cannot redress the systemic lags and lapses by federal monitors about which they complain," reasoning as follows:

> Suits against the discriminating entities may be more arduous, and less effective in providing systemic relief, than continuing judicial oversight, of federal government enforcement. But under our precedent, situation-specific litigation affords an adequate, even if imperfect, remedy. So far as we can tell, the suit targeting specific discriminatory acts of fund recipients is the only court remedy Congress has authorized for private parties, situated as plaintiffs currently are.

Id. at 751.

The D.C. Circuit subsequently reaffirmed the conclusions reached in WEAL in Washington Legal Foundation v. Alexander, 984 F.2d 483 (D.C. Cir. 1993) (hereinafter "WLF").

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[3] In Alexander v. Sandoval, 532 U.S. 275 (2001), the Supreme Court held that there is no private right of action to enforce disparate impact regulations promulgated under section 602 of Title VI. The Court held that a private right of action exists only to enforce claims of intentional discrimination under Title VI. Being that "Title IX was patterned after Title VI of the Civil Rights Act of 1964," Cannon, 441 U.S. at 694, it necessarily follows that a private right of action under Title IX exists only to assert a claim for intentional discrimination under that statute. Thus, to the extent plaintiffs allege that recipients have engaged in intentional discrimination on the basis of sex, plaintiffs have a private right of action against recipients. Because the crux of plaintiffs' claim here is that recipients have engaged in "intentional gender discrimination," including "gender-conscious" cutting or capping of men's teams, plaintiffs have a private right of action under Cannon against the schools that allegedly cut their wrestling teams.

In WLF, a nonprofit organization and seven white college and law students brought an action against the Secretary of Education, alleging that the DOE's interpretation of Title VI violated the statute by permitting federally funded institutions to offer some scholarships only to minority students. As in this case, the plaintiffs in WLF sought declaratory relief and an injunction requiring DOE to issue and enforce regulations prohibiting the alleged discriminatory acts about which the plaintiffs complained. Id. at 485. The court affirmed a judgment dismissing the plaintiffs' complaint, finding its prior decision in WEAL controlling:

> Appellants concede that they have an implied right of action under Title VI against the individual colleges and law schools to redress any discrimination they have allegedly suffered. As in *WEAL*, that alternative remedy operates in this case, by force of 5 U.S.C. § 704, to preclude a remedy under the APA. . . . Appellants are therefore left to their alternative remedy, and may pursue actions under Title VI against their respective individual institutions.

Id. at 486.[4]

The D.C. Circuit's decisions in WEAL, WLF, and Council of and for the Blind, are controlling here. With one exception not pertinent here,[5] Title IX provides that agency action

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[4] Notably, the D.C. Circuit also dismissed the WLF plaintiffs' allegations that the Department had abdicated its statutory duty to enforce Title VI. The court reasoned that the plaintiffs had failed to allege that the Department had found any federally funded institution to be in violation of Title VI on the basis of its minority scholarship program and refused to act on it. 984 F.2d at 488. Plaintiffs' claim here suffers from the same infirmity. As in WLF, there is no allegation here that the Department has made findings of discrimination against funding recipients and failed to act on them. Accordingly, even if plaintiffs' interpretation of the law is correct, they have not alleged how they have been injured by any alleged abdication by the Department, and so their abdication claim (Compl., Count IV) should be dismissed.

[5] Title IX explicitly authorizes judicial review of an "action, *not otherwise subject to judicial review*, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 902 . . . ." 20 U.S.C. § 1683 (emphasis added). Since there is no claim here that the DOE has taken any action to terminate or refuse to grant or continue financial assistance against any plaintiff in this action, or even that it has made "a finding of failure to comply," this exception has no application in this case.

taken pursuant to section 902 of the Act (20 U.S.C. § 1682) "shall be subject to such judicial review *as may otherwise be provided by law* for similar action taken by such department or agency on other grounds." 20 U.S.C. § 1683. Thus, under the express terms of Title IX, the actions challenged here are reviewable by this Court only if *another* statute authorizes judicial review of similar actions.[6]

Accordingly, plaintiffs are entitled to judicial review of their claims only as and to the extent authorized by the APA. As the D.C. Circuit held in WEAL and WLF, however, the APA does not authorize judicial review where, as here, plaintiffs have an implied private right of action against educational institutions to redress any injuries they have allegedly suffered. For the reasons set out in Point I above, plaintiffs' remedy against the recipient institutions is not only adequate, but superior to those available in this action, because the relief plaintiffs seek in this case would not redress the injuries about which they complain. Instead, plaintiffs can achieve the reinstatement of a particular team or other athletic opportunity only in an action directly against the educational institutions involved. Because plaintiffs have an adequate remedy at law against recipients of federal funds to redress any injury they may have suffered as a result of intentional discrimination by those recipients, section 704 operates to preclude a remedy against the government under the APA.

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[6] As the D.C. Circuit held in WEAL, there is no implied right of action against the federal government under Title IX to redress discrimination by recipients of federal funds. WEAL, 906 F.2d at 748-750.

B. Plaintiffs' Challenges to the 1980 Regulation and the 1979 Policy Interpretation Are Barred By The Statute of Limitations

The waiver of immunity in the APA, by its terms, does not "affect[] other limitations on judicial review . . . ." 5 U.S.C. § 702. Moreover, the APA expressly creates an exception to the provisions authorizing judicial review where other "statutes preclude judicial review . . . ." 5 U.S.C. § 701(a). Consequently, claims under the APA are subject to the general six year statute of limitations contained in 28 U.S.C. § 2401(a). James Madison, Ltd. v. Ludwig, 82 F.3d 1085, 1094 (D.C. Cir. 1996), cert. denied 519 U.S. 1077 (1997); Impro Products, Inc. v. Block, 722 F.2d 845, 850 (D.C. Cir. 1983), cert. denied 469 U.S. 931 (1984); Polanco v. USDEA, 158 F.3d 647, 652 (2d Cir. 1998).[7] Because the statute of limitations is a term of the United States' consent to be sued, the "failure to sue the United States within the limitations period is not merely a waivable defense[;] [i]t operates to deprive federal courts of jurisdiction." Dunn-McCampbell Royalty Interest v. National Park Service, 112 F.3d 1283, 1287 (5th Cir. 1997).

Section 2401(a) provides, in pertinent part, that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a). Plaintiffs challenge three discrete actions taken by the DOE and its predecessor HEW: (a) the regulation implementing Title IX, which was promulgated by HEW on June 4, 1975, and subsequently recodified by DOE without substantive change in 1980, Compl., ¶¶ 22-25, 37-38; (b) the Policy Interpretation published by the HEW on

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[7] Plaintiffs' constitutional claims are likewise subject to the general six year statute of limitations. Alaska Legislative Council v. Babbitt, 15 F.Supp. 2d 19, 24 (D.D.C. 1998), aff'd on other grounds, 181 F.3d 1333 (D.C. Cir. 1999); see Block v. North Dakota, 461 U.S. at 282 ("A constitutional claim can become time-barred just as any other claim can.").

December 11, 1979, Compl., ¶¶ 28-35; and (c) the Clarification of Intercollegiate Athletic Guidance issued on January 16, 1996. Compl., ¶¶ 42-47.

Plaintiffs' challenges to the first two of these three actions are plainly time-barred, as plaintiffs' right of action first accrued outside the six year limitation period. The regulation itself was promulgated by HEW 27 years ago, and recodified by DOE 22 years ago. Similarly, the Policy Interpretation first challenged by plaintiffs in 2002 was published by HEW in 1979, more than 22 years ago. Plaintiffs' right of action first accrued when they first had a right to bring a suit challenging the regulation and associated Policy Interpretation. Mason v. Judges of the United States Court of Appeals, 952 F.2d 423, 425 (D.C. Cir. 1992), cert. denied 506 U.S. 829 (1992); Impro Products, Inc. v. Block, 722 F.2d at 850.

Such a right, to the extent it exists at all, plainly accrued long before 1996. Plaintiffs allege that the regulation and Policy Interpretation adopted by DOE more than two decades ago are: (a) substantively invalid because they assertedly conflict with both Title IX and equal protection principles (see Compl., Counts I, II, and IV) and (b) procedurally invalid (Compl., Counts V and VI). "On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register." Dunn-McCampbell Royalty Interest, 112 F.3d at 1287. Consequently, plaintiffs' claims are plainly time-barred insofar as plaintiffs seek to assert a direct challenge to either the regulation itself or the associated Policy Interpretation. See Professional Drivers Council v. Bureau of Motor Carrier Safety, 706 F.2d 1216, 1217 n. 2 (D.C. Cir. 1983) ("A direct, substantive challenge to these rules is not timely."); Public Citizen v. Nuclear Regulatory Commission, 901 F.2d 147, 152 n. 1 (D.C. Cir. 1990), cert. denied 498 U.S. 992 (1990) ("[A] procedural challenge to agency action must be brought within

the statutory review period or be forever barred.") ; Wind River Mining Corporation v. United States, 946 F.2d 710, 714 (9th Cir. 1991) ("If a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision. Similarly, if the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision."); Cedar-Sinai Medical Center v. Shalala, 177 F.3d 1126, 1129 (9th Cir. 1999) ("[A] cause of action challenging procedural errors in the promulgation of regulations accrues on the issuance of the rule."); Alaska Legislative Council, 112 F.Supp.2d at 24 (claim that statute violates equal protection principles accrued when Congress first enacted it).

While the statute of limitations would thus bar any direct challenge to the substantive validity of either the 1980 regulation or the 1979 Policy Interpretation, it "does not foreclose a subsequent examination of a rule where properly brought before this court for review of *further* [agency] action applying it." Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), cert. denied, 361 U.S. 813 (1959) (emphasis added). "To sustain such a challenge, however, the claimant must show some direct, final agency action *involving the particular plaintiff* within six years of filing suit." Dunn-Campbell Royalty Interest, 112 F.3d at 1287 (emphasis added); Alaska Legislative Council, 112 F.Supp. 2d at 24 (same); Wind River Mining Corporation, 946 F.2d at 716 ("[A] substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger."); see, Edison Electric Institute v. Interstate Commerce Commission, 969 F.2d 1221, 1229 (D.C. Cir. 1992) (principle that party may challenge an agency's statutory authority when an agency applies the rule against it is inapplicable where agency did not apply the challenged rule

to any particular carrier). Since plaintiffs here do not allege that DOE has taken any action at all within the past six years against any particular plaintiff, or even against a member of one of the plaintiffs, they cannot sustain an as-applied challenge to rules and policies adopted more than two decades ago.[8]

Plaintiffs seek to circumvent the six year limitations period in 28 U.S.C. § 2401 in two ways. First, they allege that DOE "re-opened" the 1979 Policy Interpretation, and made it subject to renewed judicial challenge when the agency adopted a Clarification of that policy in 1996. Compl., ¶¶ 53-57. "The reopener doctrine allows judicial review where an agency has - - either explicitly or implicitly - - undertaken to 'reexamine its former choice.'" National Mining Association v. United States Department of the Interior, 70 F.3d 1345, 1351 (D.C. Cir. 1995), quoting in part Public Citizen v. Nuclear Regulatory Commission, 901 F.2d at 151. As the D.C. Circuit has explained:

> [J]udicial review of a long-standing regulation is not barred when an agency reopens an issue covered in, or changes its interpretation of, that regulation; *e.g.*, if an agency in the course of a rulemaking proceeding solicits comments on a pre-existing regulation or otherwise indicates its willingness to reconsider such a regulation by inviting and responding to comments, then a new review period is triggered. *Ohio v. EPA*, 838 F.2d

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[8] On May 14, 2002, plaintiffs amended their Complaint to allege, based on general statistics in a report published by the General Accounting Office, that DOE has initiated "hundreds of administrative enforcement actions and investigations at institutions where athletic participation rates did not match enrollment rates by gender, but where no student had alleged discrimination," and that DOE had "negotiated settlements with such institutions that reduced male participation opportunities." First Amended Complaint, ¶ 48. In fact, DOE has not initiated hundreds of administrative enforcement actions and investigations where no student or other individual or organization has alleged discrimination. Nonetheless, even assuming the truth of these claims for purposes of defendant's motion to dismiss, this generalized allegation about unspecified enforcement actions taken at unspecified times against unspecified "institutions" (none of which are alleged to be plaintiffs in this action, see Am. Compl., ¶¶ 4-8) plainly fails to identify any "final agency action involving the particular plaintiff within six years of filing suit." Dunn-Campbell Royalty Interest, 112 F.3d at 1287.

> 1325, 1328-29 (D.C. Cir. 1988). But when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review. *Massachusetts v. ICC*, 893 F.2d 1368, 1372 (D.C. Cir. 1990). Nor does an agency reopen an issue by responding to a comment that addresses a settled aspect of some matter, even if the agency had solicited comments on unsettled aspects of the same matter.
>
> * * *
>
> "The 'reopening' rule of *Ohio v. EPA* is not a license for bootstrapping procedures by which petitioners can comment upon matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency had re-opened the issue."

Kennecott Utah Copper Corporation v. United States Department of the Interior, 88 F.3d 1191, 1213 (D.C. Cir. 1996) (quoting in part American Iron & Steel Inst. v. EPA, 886 F.2d 390, 398 (D.C. Cir. 1989), cert. denied 497 U.S. 1003 (1990)).

As the text of the 1996 Clarification makes clear, DOE did not "re-open" either the 1980 regulation or the 1979 Policy Interpretation when it published the Clarification. In that regard, DOE plainly did not "solicit[] comments on a pre-existing regulation or otherwise indicate[] its willingness to reconsider" either the regulation or the Policy Interpretation. To the contrary, the agency's letter of September 20, 1995 which transmitted a draft of the Clarification for comment stated as follows:

> To ensure that there is no confusion about the enclosed "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" ["the Clarification"], I would like to outline several important points about this document.
>
> First, the objective of the Clarification is to respond to requests for specific guidance about existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics for over a decade. In preparing the enclosure, [the Office of Civil Rights] *is not revisiting the Title IX regulation or the Title IX Policy Interpretation*. Rather, the Clarification is provided to you in draft, so that you have the opportunity to comment upon whether it provides the appropriate clarity in areas that have generated questions.

Attachment E, at 1 (emphasis added). Thus, DOE clearly and explicitly stated that it was not willing to reconsider the underlying regulation and Policy Interpretation, and that it was seeking comment solely with respect to the "clarity" of the draft Clarification.

In the agency's subsequent letter transmitting the final Clarification, it once again reiterated that it had solicited comments solely about "whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX," and that the "objective of the Clarification is to respond to requests for specific guidance about *existing standards* that have guided enforcement of Title IX in the area of intercollegiate athletics." Attachment F at 1 (emphasis added). Notwithstanding the limited scope of both the Clarification and the request for comments, some of the commenters "suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX." Id. In response to these comments, the agency reiterated its view that "it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped [the agency's] consideration of these comments." Id.

As the D.C. Circuit has repeatedly held, "when the agency merely responds to an unsolicited comment by reaffirming its prior position, that response does not create a new opportunity for review." Kennecott Utah Copper Corporation, 88 F.3d at 1213; Massachusetts v. Interstate Commerce Commission, 893 F.2d 1368, 1372 (D.C. Cir. 1990); Public Citizen v. Nuclear Regulatory Commission, 901 F.2d at 150; American Iron & Steel Institute v. USEPA, 886 F.2d at 398. Because DOE here simply responded to unsolicited comments by reaffirming

its prior position, plaintiffs' contention that the agency "re-opened" either the regulation itself or the 1979 Policy Interpretation is wholly without merit.

In a final effort to revive their time-barred claims, and reopen the 1979 Policy Interpretation to judicial review, plaintiffs allege that, on October 20, 1995, the National Wrestling Coaches Association (NWCA) petitioned the DOE to amend or repeal the "Three-Part Test" (Compl., ¶¶ 73-74), and the "1996 Clarification summarily denied these Petitions." Id., ¶ 75. As a general rule, "[a] claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition." Edison Electric Institute v. Interstate Commerce Commission, 969 F.2d at 1229, quoting Public Citizen v. Nuclear Regulatory Commission, 901 F.2d at 152. In contrast, untimely procedural challenges to a regulation or other agency action cannot "be revived by simply filing a petition for rulemaking requesting rescission of the regulations and then seeking direct review of the petition's denial." Natural Resources Defense Council v. Nuclear Regulatory Commission, 666 F.2d 595, 602 (D.C. Cir. 1981). As the court explained in NRDC, a contrary rule "would permit procedural challenges to be brought twenty, thirty, or even forty years after the regulations were promulgated. No greater disregard for the principle of finality could be imagined." Id.; see also Public Citizen, 901 F.2d at 152 ("[O]ur holding is supported by this circuit's long-standing rule that although a statutory review period permanently limits the time within which a petitioner may claim that an agency action was procedurally defective, a claim that agency action was violative

of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency's regulations, and challenging the denial of that petition."). Thus, even if plaintiffs had petitioned the agency to amend its rules, as the Complaint alleges, such a petition could not provide a basis for reviving plaintiffs' time-barred procedural challenges to the 1980 regulation and the 1979 Policy Interpretation. See generally Compl., Counts V and VI.

But plaintiffs' "petition" allegations suffer from an even more fundamental flaw. The "Petitions" referenced in the Complaint actually consist of comments submitted by NWCA in response to the draft Clarification circulated by DOE in 1995. See Attachments G and H. In those comments, the NWCA generally criticizes both the draft Clarification and the Three-Part Test set out in the 1979 Policy Interpretation on various grounds, and concludes that the agency's policies are contrary to Congressional intent related to Title IX. The NWCA's comments do not contain any explicit "petition" to amend or repeal the regulations implementing Title IX. Instead, the NWCA states that "If you do not clarify [the Policy Interpretation and Clarification] in a manner which permits male sports programs and athletes to survive, we will be forced to seek additional hearings and remedial legislation." Attachment G, at 5.

As set out above, the D.C. Circuit has repeatedly held that such unsolicited comments do not trigger a renewed right of judicial review. Kennecott Utah Copper Corporation, 88 F.3d at 1213; Massachusetts v. Interstate Commerce Commission, 893 F.2d at 1372; Public Citizen v. Nuclear Regulatory Commission, 901 F.2d at 150; American Iron & Steel Institute v. USEPA, 886 F.2d at 398. Moreover, the court has considered and rejected a contention closely analogous

to that made by plaintiffs here - - specifically, that unsolicited comments challenging the validity of an agency's action should be treated as a "petition" for rescission of the action, thereby creating a new opportunity for judicial review. Edison Electric Institute v. Interstate Commerce Commission, 969 F.2d at 1229-1230.

In Edison Electric, the ICC made clear that a particular proceeding was to be limited in scope to "ministerial and methodological issues" concerning the implementation of certain rules and that comments submitted in that proceeding "may not properly include substantive issues regarding the propriety of the rules themselves." Id. at 1229. Despite the notice, the claimants submitted comments that made brief arguments challenging the ICC's authority to order a rate rollback, and urged the court to treat those comments as a petition for rulemaking. The court rejected that request explaining that the ICC "plainly designated . . . the proper docket in which to file substantive comments regarding the [rule], and barring extreme arbitrariness, we defer to the agency's decision regarding the management of its own docket." Id. at 1230.

Plaintiffs' suggestion that the NWCA's comments should be treated as a "petition" should be rejected for the same reason here. DOE made clear that it was not revisiting the 1979 Policy Interpretation, and sought comments solely on the question of whether the draft Clarification provided "the appropriate clarity in areas that have generated questions." Attachment E at 2. Under these circumstances, the agency had no reason to scrutinize the comments submitted to determine if one or more of them might be viewed as a "petition" to amend its rules.

CONCLUSION

For the foregoing reasons, defendant's motion to dismiss should be granted, and this action should be dismissed for lack of subject matter jurisdiction.

Dated: May 29, 2002

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NATIONAL WRESTLING COACHES ASSOCIATION, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:02CV00072 EGS
UNITED STATES DEPARTMENT OF EDUCATION,	)	
Defendant.	)	

ORDER

Upon consideration of defendant's motion to dismiss, and the memoranda filed in support thereof and in opposition thereto, it is hereby

ORDERED that defendant's motion is GRANTED, and it is

FURTHER ORDERED that this action is dismissed for lack of subject matter jurisdiction.

Dated: _____, 2002

_____
UNITED STATES DISTRICT JUDGE

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