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College Sports Council
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202-429-2097

February 26, 2003

Arthur M. Graham
Director, Information Management
Office of the Chief Information Officer
U.S. Department of Education
Room 4060, ROB-3
400 Maryland Avenue, SW
Washington, DC 20202

**Re: Information Quality Request
“Open to All: Title IX at Thirty,” Report of the Secretary’s
Commission on Opportunity in Athletics**

Dear Mr. Graham:

Pursuant to the Department of Education’s Information Quality Guidelines and the Data Quality Act, the College Sports Council and the National Wrestling Coaches Association (NWCA) request that the Department not disseminate the report completed today by the Secretary’s Commission on Opportunity in Athletics without first acknowledging and correcting the report’s statistical errors.

By way of background, the Council is a growing coalition representing the interests and ideals of intercollegiate athletics and presently including the College Swimming Coaches Association of America, the College Gymnastics Association, the NWCA, and the United States Track Coaches Association. To protect these interest and ideals, the Council and the NWCA sued the Department seeking repeal of the 1979 “Three-Part Test” and its 1996 amendments. Because our lawsuit prompted the Secretary of Education to convene the Commission on Opportunity in Athletics, we have a compelling interest in a fair, unbiased, and – most of all – accurate Commission report. Unfortunately, the draft-final Commission report released by the *Chronicle of Higher Education* contains many statistical errors, errors that we cautioned the Commission against in our comments filed on September 26, 2002 (enclosed). Now that the Commission has produced a report bearing these same errors, we have no alternative but to request that the Department not disseminate the report without first correcting its errors, through either a revised publication or errata sheets. See Information Quality Guidelines, at 9.

Report’s Failure to Follow the Department’s Data Quality Guidelines

As set forth in detail below, the Commission report does not comply with the Department’s Information Quality Guidelines because it (1) fails to document the shortcomings and limitations of its cited data, Data Quality Guidelines, at 6, 8; (2) fails to use representative or

complete survey populations, *id.* at 7-8; and (3) fails to identify conflicting information and to caution against inappropriate conclusions, *id.* Taken together, these inaccuracies overstate the gains in women's sports opportunities since 1981 and understate the losses in men's sports opportunities over the same period. To correct these departures from the Department's Information Quality Guidelines, the Department preferably will conduct or commission a demographic analysis of changes in men's and women's sports opportunities. If such an analysis is not feasible, the Department at least must qualify the Commission report to note the shortcomings of its data before the Department disseminates the Commission report.

By relying on a General Accounting Office (GAO) report dated December 2000, the Commission report inaccurately suggests that women's participation increased by over 400 percent since 1972.

A GAO report from 2000 estimated that from 1972 to 1997-98, in schools belonging to the [National Collegiate Athletic Association (NCAA)] and the National Association of Intercollegiate Athletics (NAIA), women's athletic participation opportunities grew from 30,000 to 157,000.

Report, at 22. If (as stated), the GAO report counts only NCAA and NAIA participation, it would understate women's participation in 1972 because it would omit participation at some of the 278 institutions that belonged to the Association for Intercollegiate Athletics for Women (AIAW) in 1971-72. Further, NCAA data suggest that the NCAA alone had 29,977 women participants in 1972. *See NCAA, 1982-2001 Sports Sponsorship Participation Report*, at 165 (Feb. 2002). Finally, as set forth in more detail below, the NCAA and NAIA grew significantly over the survey period. As a result, the 157,000 participants in 1997-98 represent significantly more schools than the 30,000 participants in 1972. Nevertheless, the GAO and the Commission failed to determine whether any of the schools that joined the NCAA or NAIA after 1972 had pre-existing women's teams in 1972. By looking only to the NCAA and NAIA in 1972, the cited GAO data (and thus the Commission report) fail to count all of the women participants in 1972. Consequently, these reports overstate the increases in women's participation since Congress enacted Title IX in 1972.

Similarly, by relying on a second GAO report dated March 2001, the Commission report inaccurately quantifies the increase in women's teams since 1981:

From 1981 to 1999, the total number of college women's teams increased by 66 percent.

Report, at 6. The report repeats the same information in the textual summary of Finding One under Question One. *See Report*, at 25-26 ("Between 1981 and 1999 the number of college women's teams rose by two-thirds"). Two factors account for the inaccuracy here: (1) the growth of the NCAA-NAIA from 1981 to 1999, and (2) migration of AIAW teams to the NCAA

and NAIA in the 1980s. First, as the GAO report implicitly acknowledges, the NCAA and NAIA together grew by 134 schools between 1981 and 1999.¹ As a consequence, simply because these 134 schools did not belong to either the NCAA or NAIA in 1981, the GAO incorrectly counts as “new” any pre-existing teams that migrated into the NCAA or NAIA when these 134 schools joined after 1981. Second, and more perhaps significant, the GAO report does not address the women’s teams that were in the AIAW in 1981, but not in either the NCAA or NAIA in 1981. After the AIAW disbanded in 1983, most of these women’s teams eventually would have migrated into the NCAA and NAIA. Once again, these two factors combine to understate the number of women’s teams in 1981, and thereby to overstate the growth in women’s teams since 1981.

Finally, by relying on the March 2001 GAO report, the Commission report inaccurately states that only half of men’s sports have experienced a net loss since 1981 and understates the amount of teams lost during that period:

For men, half (13 of 26) of men’s sports experienced a net loss [between 1981-82 and 1998-99], with wrestling experiencing the greatest decline (171 teams).

Report, at 23. Here again, many of the 134 schools that joined the NCAA and NAIA after 1981 already had men’s teams in 1981. Accordingly, many of the men’s sports that the GAO report claims to have grown during the 1980s and 1990s actually declined over that period. Pre-existing teams that migrated into the NCAA and NAIA after 1981, however, mask these losses. Similarly, for the thirteen sports that the GAO report acknowledges lost opportunities, migrating teams mask the actual magnitude to the losses. To accurately state what the Commission report attempts to state, the Commission (or the Department) first must quantify the men’s teams that existed at these 134 “new” schools in 1981.

Potential Impacts of the Commission Report’s Inaccuracies

We dispute the foregoing data not to deny the great gains in women’s sports, but to stress that women made these gains before the Three-Part Test issued in December 1979. By contrast,

¹ In 1981-82, NCAA had 787 members, NAIA had 515 members, and 117 were in both the NCAA and NAIA. U.S. General Accounting Office, *“Intercollegiate Athletics: Four-Year Colleges’ Experiences Adding and Discontinuing Teams,”* at 32 (March 2001). The GAO’s 1981-82 survey included 1,185 schools (787 + 515 – 117). Similarly, in 1998-99, NCAA had 1,041 members, NAIA had 339 members, and 61 were in both NCAA and NAIA. *Id.* The GAO’s 1998-99 survey covered 1,319 schools (1,041 + 339 – 61).

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the opponents of reform have stated repeatedly on national television, in newspapers, in their *amici curiae* brief in our lawsuit, and in testimony to the Commission that men's opportunities have increased, while women's opportunities have increased even more, during the 1980s and 1990s. They imply that more popular men's sports have increased to balance out the decline in men's Olympic sports. If disseminated by the Department, the Commission report will exacerbate the misperception that the Three-Part Test created significant increases in women's sports opportunities, when in fact most gains occurred when the Three-Part Test was not in force. Conversely, the Commission report will further exacerbate the misperception that men's opportunities increased during the 1980s and 1990s, when in fact men lost more than 1,000 teams since 1981.

Conclusion

For all the foregoing reasons, we request that the Department correct the Commission report before disseminating it. Please do not hesitate to contact us at the numbers above with any questions concerning our information correction request.

Sincerely,

Michael W. Moyer
Executive Director
National Wrestling Coaches Association

Jamie V. Moffat
Executive Director
College Sports Council

Enclosure

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**Joint Statement of the National Wrestling Coaches
Association and the College Sports Council to the
Commission on Opportunity in Athletics**

September 26, 2002

Dear Commissioners:

The Commission's charter directs you to "collect information, analyze issues, and obtain broad public input directed at improving the application of current Federal standards for measuring equal opportunity" under Title IX. In that important and complicated undertaking, the National Wrestling Coaches Association (NWCA) and the College Sports Council (the Council) focus you on several prominent fallacies and offer our views on the most pressing issues facing the Commission.

By way of background, the Council is a growing coalition representing the interests and ideals of intercollegiate athletics. At present, Council members include the NWCA, the College Swimming Coaches Association of America, the College Gymnastics Association, and the United States Track Coaches Association. The NWCA and Council are plaintiffs in the lawsuit filed by coaches, student-athletes, and alumni against the 1979 "Three-Part Test" and the January 16, 1996 memorandum purporting to clarify that test. In addition to the Council's members, several sports groups have gone on record as supporting our lawsuit, including USA Wrestling, USA Gymnastics, and US Diving.

**Legal Misconceptions About Title IX,
the Three-Part Test, and Our Lawsuit**

Opponents of reform have characterized our lawsuit as an attack on Title IX and have argued that the Three-Part Test is part of Title IX. Perhaps as a result, on June 28, 2002, the *Washington Post* reported that the lawsuit "ask[s] a federal court to invalidate Title IX." Similarly, on the July 4, 2002 *Newshour with Jim Lehrer*, a co-president of the National Women's Law Center stated that "in fact, the wrestlers' case tries to set aside the 1975 regulations issued under the Ford Administration." Given this confusion about even the most basic background "facts," it is important to describe what our lawsuit challenges, and what it does not.

Title IX is a statute, enacted by Congress in 1972, that prohibits intentional gender-based discrimination in federally funded educational programs. Title IX also directs federal agencies (such as the Department of Education) to issue regulations, rules, and orders to effectuate that prohibition. In 1975, the Department's predecessor issued, and President Ford signed,

regulations that require schools to provide “equal athletic opportunity for members of both sexes,” which includes an inquiry on “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes.” Those regulations also allow the Department to consider “other factors.” Finally, in 1979, the Department’s predecessor adopted a Policy Interpretation that – along with many other things – includes the Three-Part Test as a factor that it intended to consider in its regulatory (not statutory) inquiry into the equality of athletic opportunity when it reviewed the merits of the 92 complaints then pending before it.

If, instead, the Department’s predecessor had intended the Three-Part Test to apply prospectively, beyond those 92 complaints, it would have needed first to amend the regulations and then to obtain President Carter’s signature in order for the amended regulations to supplant the regulations signed by President Ford. It took neither of these statutorily required actions. Consequently, the Three-Part Test is neither the statute nor the regulation, but instead remains an *ad hoc* factor designed to address 92 instances of alleged discrimination that took place more than 20 years ago.

Our lawsuit challenges only the Three-Part Test and the subsequent 1996 “Clarification” of the Three-Part Test. Thus, contrary to the assertions of the National Women’s Law Center and the *Washington Post* article, we are not challenging the 1975 regulations or Title IX. Indeed, we are trying to *enforce* both, which together provide for equal opportunity based on interest and prohibit intentional gender-based discrimination. In marked contrast, the post-Clarification Three-Part Test provides for equal participation based on enrollment and purports to authorize gender-conscious cutting and capping solely to achieve a numerical quota (the enrollment ratio of men and women at a particular school).

If we prevail in our lawsuit, therefore, the regulations will continue to require schools to provide student-athletes of both genders with equal athletic opportunity based on interest. Indeed, an *unchallenged* part of the 1979 Policy Interpretation will continue to require schools to “take into account the nationally increasing levels of women’s interests” when assessing interest. At any school where men and women are equally interested in intercollegiate athletic competition, therefore, a victory in our lawsuit will not affect the school’s obligations. Where either gender has a higher interest in intercollegiate athletics, however, the school must provide athletic opportunities in proportion to the respective levels of interest.

Thus, schools will need to assess interest, potentially looking to a variety of factors such as high school athletic participation rates, student demographics, students’ eligibility to participate in sports, the genders’ respective participation rates in alternate extracurricular activities, and the regional or national character of the market from which the school draws its students. For example, the time commitments associated with many extracurricular activities correlate against having time to participate in intercollegiate athletics. Schools cannot punitively limit the athletic opportunities of one gender because students of the other gender freely choose to participate in alternate extracurricular activities. Consequently, the gender ratios for the entire student body cannot and do not accurately predict interest in intercollegiate athletics any more than they predict interest in dance or music. Although proportionality with enrollment ratios may be easy to measure, administrative convenience cannot justify discrimination.

Notwithstanding that the original 1975 Title IX regulations allowed a school to assess interest by a “reasonable method [it] deems appropriate,” schools want and need a deterministic model to ensure that they do not discriminate against either men or women. Thus, it is imperative that the Commission and the Department provide schools with guidance on “safe harbor” methods for measuring interest in intercollegiate athletic competition. The easiest solution is to survey incoming students, either directly during orientation or indirectly through the background information provided with the standardized SAT and ACT tests. To adjust for students who either lose or gain interest during the course of their education, schools could supplement that data by correlating students’ answers with their subsequent participation. If you find this issue either highly divisive or statistically complex, however, the Commission could recommend that the Secretary of Education commission an independent, peer-reviewed analysis by professional demographers. In similar regulatory contexts, Congress and federal agencies often seek the assistance of the National Academy of Sciences (NAS) to analyze complicated technical issues in a professional and impartial way.

Factual Misconceptions about Opportunities in Intercollegiate Athletics

In its annual report for 1981-82, the National Collegiate Athletic Association (NCAA) began reporting women’s sports participation and the number of women’s teams offered. Perhaps as a result, the readily available data published by both the NCAA and the U.S. General Accounting Office (GAO) report on athletic opportunities start with 1981-82 and end with the most recent data available. For example, the most frequently cited reports by the NCAA and GAO cover 1981-82 to 2000-01 and 1981-82 to 1998-99, respectively.

Proponents of proportionality have drawn unsupportable inferences from these reports to mischaracterize how intercollegiate athletic opportunities changed during the 1980s and 1990s. These opponents of reform – particularly the National Women’s Law Center and the Women’s Sports Foundation – have stated repeatedly on national television, in newspapers, in their *amici curiae* brief in our lawsuit, and in testimony to this Commission that these statistics show that men’s opportunities have increased, while women’s opportunities have increased even more. Thus, they argue, some men’s sports have declined, but more popular men’s sports have flourished, so that 21% more men now participate on 14% more teams.

Whether intentionally or not, these arguments are statistically flawed. Indeed, they are contradicted by the very data on which they rely. As the March 2001 GAO study and the respective NCAA annual reports make clear, the NCAA had 787 member schools in 1981-82 and 1,041 by 1998. Because its membership grew by 32% during the 1980s and 1990s, the NCAA spread the reported 21% more male athletes and 14% more men’s teams over 32% more schools. In other words, there were *fewer* male athletes and *fewer* male teams per school in 1981-82 than in 2000-01.

Presumably because many of the 250-plus new NCAA member schools migrated from the National Association of Intercollegiate Athletics (NAIA), the March 2001 GAO looks at changes in participation in both the NCAA and the NAIA from 1981-82 to 1998-99. Here again, however, the survey included 1,185 schools in 1981-82, but 1,319 schools in 1998-99, for a 134-

school (11%) increase. As with the NCAA report, therefore, the GAO report's modest 5% "increase" in men's participation was spread over 11% more schools, for a net loss of participation per school.

Moreover, many of the "new" NCAA-NAIA participation opportunities came from independent, religious, or junior-college athletic associations and brought their pre-existing teams with them. So, for example, many of 85 "new" baseball teams reported by GAO came from schools that joined the NCAA or NAIA after 1981-82, but already had an intercollegiate baseball team in 1981-82 in another athletic association (*e.g.*, the National Junior College Athletic Association). Any credible analysis of changes in athletic opportunities must consider whether schools that joined the survey population brought pre-existing teams with them when they joined. Further, it makes little sense to count schools founded after 1981-82 as having "added" a team. They added a school, and the team came with it.

In addition to papering over the decline in men's athletic opportunities, the opponents of reform also *over-report* the gains in women's opportunities. First, as with the men's illusory gains, some of the women's gains simply reflect the fact that the survey had more schools in the end year than in the baseline year. Second and more importantly, according to its 1979-80 handbook and directory, the Association for Intercollegiate Athletics for Women (AIAW) had 825 member schools in 1979. Together, these schools fielded, for example, 795 basketball teams and 703 volleyball teams.

Some, but not all, of these AIAW teams may have migrated into the NCAA or NAIA between 1979-80 and 1981-82. Others undoubtedly remained in the AIAW past 1981-82. When these pre-1981 AIAW holdovers joined the NCAA or NAIA, the NCAA and GAO reports would incorrectly count their teams as "new." We note this not to deny the great gains in women's sports since Congress enacted Title IX in 1972 or the Ford administration issued its regulations in 1975, but to stress that women made these gains before the Three-Part Test issued in 1979.

The factual discrepancies underlying much of the testimony submitted to the Commission take on heightened significance under Section 515 of Public Law 106-554, which requires agencies such as the Department to issue new Information Quality Guidelines. According to the Office of Management and Budget (OMB), these Guidelines will "provide policy and procedural guidance . . . for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." If the Commission's report contains the obvious statistical fallacies outlined above, the Information Quality Guidelines likely will prevent the Department from relying on the Commission's report to support regulatory action. Consequently, to avoid wasting your efforts as individual Commissioners and the efforts of the many honest public presenters, the Commission must evaluate carefully the information on which it bases its report. To ensure that its report is not rendered irrelevant by reliance on invalid statistics, the Commission must assure itself of the validity of the information on which it relies.

Conclusion

The legal misconceptions will cure themselves as our lawsuit progresses. The factual ones (namely, whether enrollment rates predict athletic interest and whether men's athletic opportunities have declined) are central to the Commission's charter. On the first, it seems easy enough to survey student interest. If, however, you believe the situation calls for information that commands the respect of all parties, we suggest you recommend that the Department commission a study by the NAS on methods schools can use to determine interest in intercollegiate athletic competition. Finally, given the rampant mis-use of statistical information on even the straightforward question of whether men's opportunities have decreased, we urge the Commission to carefully review the testimony it receives.

If students of either gender experience institutionalized discrimination during their college years, we have failed as educators. Our students' civil rights and our own educational ideals are too important to trust to special-interest groups, lobbying firms, sound-bite debating points, and million-dollar media campaigns.

Please do not hesitate to contact us at the numbers above with any questions concerning our joint statement.

Sincerely,

Michael Moyer
Executive Director
National Wrestling Coaches Association

Eric Pearson
Chairman
College Sports Council