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**VIA FEDERAL EXPRESS & EMAIL**

David B. Frohnmayer, Esq  
Office of the President  
110 Johnson Hall  
1226 University of Oregon  
Eugene, OR 97403-1226

**Re: Title IX and Oregon Wrestling**

Dear President Frohnmayer:

On behalf of the Oregon Chapter of Equity in Athletics, Inc. ("EIA-Oregon"), this letter advises the University of Oregon ("UOregon") that the planned elimination of its wrestling team violates Title IX of the Education Amendments of 1972, the implementing Title IX regulations, and constitutional equal-protection guarantees. If UOregon will not reverse its decision or extend its wrestling team, EIA-Oregon or its members will file suit to enjoin the planned cut.

By way of introduction, EIA-Oregon's membership includes students, parents, alumni and save-our-sports groups, including ones associated with the wrestling team that UOregon has scheduled to cut. Both EIA-Oregon and its members recognize that UOregon has acted to date under the misunderstanding that its proposed cut *complies* with Title IX. As explained below, however, Title IX neither requires nor allows such cuts. Quite the contrary, *Title IX prohibits them*.

Neither EIA-Oregon nor its UOregon members have any desire to sue UOregon. Our quarrel is with the "Three-Part Test" and with federal regulators, who have misled UOregon and EIA-Oregon's members alike. Significantly for UOregon's attempt to comply with Title IX, EIA's national chapter already is suing the federal Department of Education ("DOE") not only to vacate the Three-Part Test *prospectively*, but also to declare it void *ab initio* and to find that it never lawfully took effect. In essence, UOregon is steering itself to a mirage, not a safe harbor. Put another way, we are not trying to move UOregon's goal post: that goal post does not exist.

**A. Prior Three-Part Test Decisions Will Not Control.**

Although the Ninth Circuit (like seven other appellate courts) already has ruled in favor of the Three-Part Test, *Neal v. Bd. of Trustees*, 198 F.3d 763 (9<sup>th</sup> Cir. 1999), such prior decisions will not control here for at least five reasons: (a) they misconstrue DOE's authority, as made clear by supervening Supreme Court precedent; (b) they improperly defer to DOE, as made clear by supervening Supreme Court precedent; (c) they did not consider the administrative record and procedural requirements that would apply if DOE or its predecessor intended to adopt the Three-Part Test as a standard for Title IX compliance; (d) *Neal* applied the wrong level of scrutiny

under binding Ninth Circuit precedent; and (e) the Fourteenth Amendment prohibits such quota-driven cuts, as made clear by supervening Supreme Court precedent.

As explained below, all of the foregoing reasons undermine *Neal*, either by supervening Supreme Court authority or issues that *Neal* did not even consider: “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” *U.S. v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9<sup>th</sup> Cir. 2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Because it cannot *bind* EIA-Oregon, *S. Cent. Bell. Tel. Co. v. Alabama*, 526 U.S. 160, 167-68 (1999), and it plainly is wrong, *Neal* cannot control here.

#### **B. DOE Lacks Authority to Issue Disparate-Impact Requirements.**

The relevant precedents that uphold the Three-Part Test rely explicitly or implicitly on the federal agencies’ authority to issue disparate-impact regulations under the intentional-discrimination statutes like Title IX and Title VI. In *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001), however, the Supreme Court rejected as *dicta* the very authority on which the federal government previously had relied as support for agencies’ authority for such regulations under Title IX. *Compare id. with* U.S. Dep’t of Justice, *Title IX Legal Manual*, 64 & n.48 (Jan. 11, 2001) ([www.usdoj.gov/crt/cor/coord/ixlegal.pdf](http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf)). Neither DOE nor any other federal agency has the authority to issue disparate-impact standards like the Three-Part Test.

#### **C. The Three-Part Test Does Not Warrant Deference.**

The decisions that uphold the Three-Part Test rest on controlling “*Chevron*” deference to DOE’s interpretation of Title IX. *See Neal*, 198 F.3d at 770-71. In *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001), however, the Supreme Court re-established the lesser standard of “*Skidmore*” deference for regulatory regimes that (like Title IX) provide the same authority to more than one agency actor or do not flow from rulemaking. Further, as made clear by its administrative background (which the *Neal* court did not consider), the Three-Part Test is *at best* a general statement of policy, not an interpretive rule, which can claim deference only when the agency seeks to apply it. *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013-14 (9<sup>th</sup> Cir. 1987). Because DOE has not taken any final agency action to apply the Three-Part Test at UOregon, the Three-Part Test is unavailable to UOregon.

#### **D. The Three-Part Test Is Procedurally Invalid.**

For three separate and independently fatal procedural reasons, the Three-Part Test is void *ab initio* or never took effect: (1) the notice-and-comment rulemaking requirements of the Administrative Procedure Act (“APA”); (2) the presidential-approval requirements of §902, 20 U.S.C. §1682; and (3) the deliberate decision by the Department of Health, Education and

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Welfare (“HEW”) in 1979 not to follow the laying-before provisions of the General Education Provisions Act (“GEPA”). Significantly, HEW’s contemporaneous memoranda (enclosed), which HEW Secretaries Califano and Harris shared with the Congress (enclosed), demonstrate that *HEW agreed* with EIA-Oregon’s position. HEW’s contemporaneous agreement with EIA-Oregon renders irrelevant DOE’s contrary current opinions: “courts will not defer to an agency’s interpretation of a regulation that contradicts the agency’s intent at the time it promulgated the regulation.” *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers*, 486 F.3d 638, 648 (9<sup>th</sup> Cir. 2007) (citing *Gonzales v. Oregon*, 126 S.Ct. 904, 916 (2006)); *cf. Fed’l Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 499-500 (1958) (no deference for new interpretation of policy passed between agencies).<sup>1</sup>

Under the circumstances, that leaves the original Title IX regulations – adopted by notice-and-comment rulemaking, signed by President Ford, and laid before Congress – in effect. Those regulations require schools to provide equal athletic opportunity, not equal results, based on interest, not enrollment. *See* 45 C.F.R. §86.41(c)(1); 34 C.F.R. §106.41(c)(1); 40 Fed. Reg. 24,128, 24,134 (1975). Under that test, a university in Oregon that fields a women’s lacrosse team cannot fail to field a men’s wrestling team.<sup>2</sup> Moreover, the wrestling team has the procedural right to have UOregon reconsider its fate under the proper standard, which includes the assessment of relative interest. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (“right to procedural due process is ‘absolute’ [and] does not depend upon the merits of a claimant’s substantive assertions”). At the very least, therefore, UOregon should reconsider its cuts under the regulations’ interest-based, equal-opportunity standard, as distinct from the Three-Part Test’s enrollment-based, equal-participation quota.

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<sup>1</sup> Because HEW’s Policy Interpretation never took effect under GEPA or §902, it never transferred to DOE when it was formed in 1980. *See* 20 U.S.C. §3505(a) (only HEW provisions *in effect* on May 4, 1980, transferred). Consequently, DOE had no Three-Part Test to “clarify” it in 1996 (or 2003 or 2005).

<sup>2</sup> Nationally, 54,771 girls played lacrosse and 257,246 boys wrestled interscholastically in 2006-07, while no girls played lacrosse and 4,659 boys wrestled interscholastically in Oregon that year. *See* National Federation of State High School Associations, *2006-07 High School Athletics Participation Survey*, at 46, 54, 58 (2007). In the Pac-10, only three schools sponsor women’s lacrosse, while four original Pac-10 schools and a total of ten schools participate in Pac-10 wrestling. Of course, the fact that UOregon cannot lawfully cut wrestling does not mean that UOregon *should* cut any other men’s or women’s sport.

## 1. The Three-Part Test Violated the APA.

The Three-Part Test (as subsequently reinterpreted by DOE in 1996, 2003, and 2005), purports to change a regulation that required equal opportunity, based on the genders' relative interest, with an obligation to assess both genders' interests, into one for equal participation, based on enrollment, with no obligation for schools like UOregon even to assess men's interests. Even if such a standard were substantively lawful, that change would require notice-and-comment rulemaking because it would "create rights, impose obligations, or effect a change in existing law." *Hemp Industries Ass'n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1087 (9<sup>th</sup> Cir. 2003). HEW recognized as much, and expressly did not take the steps required to implement such a change. Oblivious to the fine distinctions that HEW made in 1979, DOE's serial "clarifications" in 1996, 2003, and 2005 actually create the Three-Part Test out of thin air, which DOE simply cannot do by memorandum. *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 110-111 (1995) (agencies are bound by their regulations and cannot circumvent the amendment process by making substantive changes in an informal policy).

## 2. The Three-Part Test Is Not in Effect under §902.

Like its Title VI template, Title IX provides that agencies must act by rule, regulation, or order of general applicability, and provides that such actions do not take effect until approved by the President. 42 U.S.C. § 2000d-1; 20 U.S.C. §1682.<sup>3</sup> The legislative history makes clear that such approval meant signed by the President in the *Federal Register*.<sup>4</sup> 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay); cf. *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917, 923 (6<sup>th</sup> Cir. 1985) (presidential approval "a prerequisite to [an agency memorandum's] validity as a binding general order"); *Ranjel v. City of Lansing*, 417 F.2d 321, 323 (6<sup>th</sup> Cir. 1969) (agency guidance without presidential approval "does not rise to the dignity of federal law"). As demonstrated by the partial list in the margin, to defeat the longest filibuster in U.S. history, congressional supporters repeatedly cited the presidential-approval requirement as the bulwark against

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<sup>3</sup> See, e.g., 118 Cong. Rec. 5803 (Title IX would have the same procedural protections afforded under Title VI) (Sen. Bayh). *id.* at 5808 ("These [procedural] provisions parallel Title VI of the 1964 Civil Rights Act") (fact sheet submitted by Sen. Bayh); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., at 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh).

<sup>4</sup> In 1980, the President delegated the rule-approval and enforcement authority to the Attorney General. 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250).

bureaucratic overreaching.<sup>5</sup> Where such “language was clearly the result of a compromise,” courts must “give effect to the statute as enacted.” *Mohasco Corp. v. Silver*, 447 U.S. 807, 818-19 (1980). As the administrative record for the Three-Part Test demonstrates, HEW expressly did not seek to comply with any of the applicable procedures (including presidential approval) because the Three-Part Test was neither binding nor a test for Title IX compliance.

### **3. The Three-Part Test Is Not in Effect under GEPA.**

In addition to APA’s familiar notice-and-comment requirements and §902’s presidential-approval requirement, in 1979, GEPA provided that no HEW “regulation” – defined broadly as “any generally applicable rule, regulation, guideline, interpretation, or other requirement” – would take effect until 45 days after presentment to Congress. *See* Pub. L. No. 93-380, §509(a), 88 Stat. 484, 566 (1974); Pub. L. No. 94-482, §405, 90 Stat. 2081, 2231 (1976). As the enclosures demonstrate, HEW expressly declined to lay the 1979 Policy Interpretation before Congress because it was not a “generally applicable rule, regulation, guideline, interpretation, or other requirement.” If the Policy Interpretation was not a “generally applicable rule, regulation, guideline, interpretation, or other requirement” in 1979, nothing has happened since 1979 to make it one.

### **E. Quotas Violate Title IX.**

In a significant departure from its Title VI template, Title IX includes Title VII’s restriction against preferential treatment based on imbalances with the total population, 20 U.S.C. §1681(b), which is “designed to prevent.... undue ‘Federal Government interference.... because of some Federal employee’s ideas of.... balance.’” *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206-07 (1979) (citations omitted). Although that provision allows courts and agencies to consider “statistical evidence” in a specific “hearing or proceeding,” 20 U.S.C. §1681(b), it “would be contrary to Congress’ clearly expressed intent” to allow “quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation.” *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality); *accord Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652-53 (1989). Title IX’s author and House floor manager, Oregon Rep. Edith Green, was characteristically clear in accepting the

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<sup>5</sup> *See* 110 Cong. Rec. 5256 (Sen. Humphrey); 110 Cong. Rec. 6544 (Sen. Humphrey); 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 6749 (Sen. Moss); 110 Cong. Rec. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 Cong. Rec. 7058 (Sen. Pastore); 110 Cong. Rec. 7066 (Sen. Kuchel); 110 Cong. Rec. 7067 (Sen. Kuchel); 110 Cong. Rec. 7103 (Sen. Javits); 110 Cong. Rec. 11,941 (letter from Attorney General Kennedy, inserted by Sen. Cooper); 110 Cong. Rec. 12,716 (Sen. Humphrey); 110 Cong. Rec. 13,334 (Sen. Pastore); 110 Cong. Rec. 13,377 (Sen. Allott).

floor amendment that added §1681(b): “a quota system would hurt our colleges and universities” and she “oppose[d] them” “even in terms of attempting to end discrimination on the basis of sex.” 117 Cong. Rec. 39,262 (1971) (Rep. Green). Significantly, *Neal* erred by applying intermediate scrutiny to Title IX, notwithstanding that the Ninth Circuit previously had held Title IX to be a strict-scrutiny statute. *Jeldness v. Pearce*, 30 F.3d 1220, 1227-28 (9<sup>th</sup> Cir. 1994). By creating an intra-circuit split with *Jeldness*, *Neal* cannot control on that point. *Atonio v. Wards Cove Packing Co., Inc.*, 810 F.2d 1477, 1478-79 (9<sup>th</sup> Cir. 1987) (*en banc*). Thus, even if it were a grammatical interpretation of the Title IX regulations, the Three-Part Test would not comply with Title IX.<sup>6</sup>

#### **F. Quotas Are Unconstitutional in Any Event.**

Even if DOE’s ill-considered memoranda somehow authorize quotas under Title IX, state schools like UOregon still must comply with the U.S. Constitution. Under the Equal Protection Clause and the Fifth Amendment, neither schools nor DOE can seek or authorize balance for balance’s sake: “outright... balancing [] is patently unconstitutional.” *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Truax v. Raich*, 239 U.S. 33, 36-38 (1915) (“If [rights] could be refused solely upon the ground of [class membership], the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words”). As five justices recently held, a state has no legitimate interest in a “plan... [that] relies upon a mechanical formula... on the basis of... rigid criteria.” *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S.Ct. 2738, 2794 (2007) (Kennedy, J., concurring in part and concurring in the judgment); *id.* at 2757 (plurality of four justices reject balance as a government interest).<sup>7</sup> The Three-Part

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<sup>6</sup> EIA-Oregon will argue that the Three-Part Test cannot withstand *any level of scrutiny*, *Romer v. Evans*, 517 U.S. 620, 623 (1996) (invalidating state action under rational-basis test because the “Constitution neither knows nor tolerates classes among citizens”) (interior quotations omitted), but the Three-Part Test certainly cannot survive strict scrutiny.

<sup>7</sup> EIA-Oregon may also assert claims under any applicable equal-protection guarantees of Oregon’s Constitution, the athletic department’s failure to take the matter before the full Intercollegiate Athletics Committee of the University Senate, and the athletic department’s actively recruiting students without disclosing the planned elimination, all of which raise state-law issues beyond the scope of this letter. For that reason, EIA-Oregon has not yet decided whether to sue UOregon in state or federal court. Compare *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (precluding federal-court “officer suits” to enforce state law) with 42 U.S.C. §1988(a) (authorizing plaintiffs to assert certain provisions of state law in civil rights claims under 28 U.S.C. §1343 and 42 U.S.C. §1983). While *Neal* is plainly wrong under federal law, it presumably would bind a state court even less than it would a federal court.

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Test is nothing but “outright... balancing” for the sake of “some Federal employee’s ideas of... balance.” As such, it cannot protect UOregon.

Given the gender-conscious nature of HEW’s 1979 Policy Interpretation, DOE’s clarifications, and UOregon’s actions to apply them, EIA-Oregon need not show gender-based animus to prevail. *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Nonetheless, and while it pains UOregon alumni and student members, EIA-Oregon would be compelled to explore gender-based animus on UOregon’s part, based on a string of selectively broken promises, the selective and ever-changing meritless pretexts for eliminating wrestling, and athletic department suggestions that wrestling is simply “gross.” *See Romer*, 517 U.S. at 632 (courts can infer animus when the proffered reasons do not support the action and do not serve legitimate state interests); *Navarro v. Block*, 72 F.3d 712, 716-17 (9<sup>th</sup> Cir. 1995) (citing *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 701 (9<sup>th</sup> Cir. 1990)). Significantly, all four of UOregon’s most recent, four-part pretext are either selectively applied or result directly from UOregon’s violating other provisions of Title IX’s equal-opportunity regulations. *See* 45 C.F.R. §86.41(c)(3), (7), (10) (equal athletic opportunity includes competitive schedules, facilities, and publicity); 34 C.F.R. §106.41(c)(3), (7), (10) (same). While UOregon cannot equitably or credibly fault the wrestling team for the results UOregon’s Title IX violations, it is particularly troubling that UOregon has attempted to rely on the tired and demonstrably false suggestion that wrestling is less popular than other sports. *See* note 2, *supra*; *cf.* RESTATEMENT (SECOND) OF TORTS §580A comment d (1977) (failure to correct false statements can evidence malice). Significantly, EIA-Oregon can prevail even if UOregon eventually (and credibly) settles on at least some rationales that are both true and gender neutral. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99-100 (2003) (no heightened burden in mixed-motive discrimination). Under the circumstances, a reviewing court should infer gender-based animus.

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Like many schools before it, UOregon has relied on the Three-Part Test. Unlike the schools that preceded it, however, UOregon will face a legal challenge from a plaintiff armed with the administrative record of the Three-Part Test. We hope that UOregon will recognize that this is simply not its fight. Instead, for the sake of its students, we urge UOregon to postpone the cuts to allow EIA-Oregon’s national chapter time to establish against DOE what the Title IX regulations actually require and allow. Under similar circumstances, Syracuse University recently announced that it would extend the planned elimination of its swimming team by three academic years, to honor the commitments that it had made in recruiting students to swim there, thus allowing parents and alumni the opportunity to raise funds to endow the program. Recognizing that we have presented you with a lot of information, we will do everything we can to assist you in understanding EIA-Oregon’s position. Ultimately, however, UOregon has the responsibility to comply with the law, and EIA-Oregon has the responsibility to defend its members’ rights.

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Unfortunately, UOregon's student athletes need an expeditious answer to whether the University will extend the wrestling program. As a recipient of federal education funding, UOregon has accepted the obligation to provide Title IX's "beneficiaries... and other interested persons" (*i.e.*, students, coaches, and groups like EIA-Oregon) with information on the Title IX regulations and their applicability to the relevant programs. 34 C.F.R. §§100.6(d), 106.71; 45 C.F.R. §§80.6(d), 86.71. In doing so, UOregon must make the information available in a manner "necessary to apprise such persons of the protections against discrimination assured them by [Title IX] and this regulation." 34 C.F.R. §100.6(d); 45 C.F.R. §80.6(d). Insofar as UOregon's General Counsel has declined for almost three months to respond to prior related correspondence and follow-up voicemail and email messages, EIA-Oregon submits that the circumstances require UOregon's expeditious written response. While EIA-Oregon would greatly appreciate the opportunity to discuss these issues with UOregon, unless UOregon provides a written response within ten days of this letter, EIA-Oregon intends to file an administrative complaint with the relevant federal agencies on UOregon's procedural failure to comply with the foregoing federal regulations. Further, if UOregon fails to respond or if its response does not extend the wrestling team, EIA-Oregon or its members will file suit to enjoin the planned elimination of the UOregon wrestling team. To allow UOregon the opportunity to make its own announcements, EIA-Oregon will keep this letter confidential for ten days.

Please do not hesitate to contact me – or to have anyone from your staff contact me – with any questions about this matter.

Yours sincerely,

Lawrence J. Joseph

Enclosures

cc: Melinda W. Grier, Esq., Adjunct Professor & General Counsel (via email, w/encl.)  
Patrick J Kilkenny, Director of Athletics (via email, w/encl.)