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# NATIONAL WRESTLING COACHES ASSOCIATION

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January 25, 2008

## VIA ELECTRONIC MAIL

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219 Johnson Hall  
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### **Re: University of Oregon Wrestling Team**

Dear Prof. Grier:

On behalf of the National Wrestling Coaches Association (“NWCA”) and its members affiliated with the University of Oregon (“UO”) wrestling team, this letter seeks to open a dialogue on UO’s plans for its wrestling team in 2008-09.

In summary, as we explain below, eliminating the wrestling team is not required by Title IX’s “Three-Part Test.” Specifically, eliminating wrestling does not put UO in compliance with “participation proportionality” under prong one, and the addition of baseball and elimination of wrestling are both irrelevant to the analysis of whether UO complies with prongs two or three. Because the addition of women’s lacrosse and competitive cheer ensures near-term compliance via prong two and perhaps indefinite compliance via prong three, the Three-Part Test provides no reason to eliminate wrestling. Moreover, eliminating the wrestling team moves UO into noncompliance with Title IX’s “scholarship proportionality.” Before UO follows through on its plans, therefore, we hope to explore with you – and with anyone else within the UO administration and athletic department to whom you direct us – UO’s flexibility to retain the wrestling team under the relevant Title IX standards.

In seeking to open a dialogue, we rely on UO’s obligations as a recipient of federal funds. Specifically, the Title IX regulations incorporate certain procedural provisions from the Title VI regulations, 34 C.F.R. §106.71; 45 C.F.R. §86.71, which require recipient schools like UO to provide Title IX’s “beneficiaries... and other interested persons” (*e.g.*, students, coaches, and groups like NWCA) with information regarding the provisions of the Title IX regulations. 34 C.F.R. §100.6(d); 45 C.F.R. §80.6(d). In providing that information, recipient schools 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). For its part, NWCA commits to work with you to evaluate Title IX’s regulations and their flexibility.

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Under NWCA's (and the Department of Health, Education and Welfare's) interpretation of the Title IX regulations, recipient schools such as UO must provide equal athletic *opportunity*, based on athletic *interest*, after assessing the interest of *both* genders. 40 Fed. Reg. 24,128, 24,134 (1975) (regulations "require institutions to take the interests of both sexes into account in determining what sports to offer"). By contrast, the Three-Part Test purports to create a standard for equal participation, based on enrollment, with no need for schools like UO to assess men's interests. While NWCA members undoubtedly would reserve the right to challenge eliminating UO's wrestling team as a Title IX violation, NWCA wishes to work with UO constructively to consider retaining UO's wrestling team as an alternate means of Title IX compliance.

As NWCA understands it, UO has acted to date under a misunderstanding of the Three-Part Test: namely, that UO has no choice but to cut the wrestling team because it will add men's baseball in 2008-09. By contrast, NWCA understands that the Three-Part Test would allow UO to retain wrestling for at least a few more years under "prong two" and perhaps indefinitely under "prong three," notwithstanding that UO's athletic department has a higher proportion of males than UO's full-time undergraduate student body (*i.e.*, notwithstanding that UO is not proportional under "prong one"). Contrary to what the athletic department appears to understand, therefore, the Three-Part Test does not require UO to eliminate wrestling.

In addition to the Three-Part Test, we also have heard that the athletic department considers itself to have a scholarship gap. Unlike "participation proportionality" (which depends on the gender ratio of enrolled fulltime undergraduates), "scholarship proportionality" depends on the gender ratio of intercollegiate athletes. *Compare* 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) ("measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program") *with* 44 Fed. Reg. at 71,418 ("[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments"). According to the Department of Education's most recent guidance, schools should distribute their scholarship dollars within plus or minus one percent of athletic participation. *See* Norma V. Cantu, Assistant Secretary for Civil Rights, "Dear Colleague" Letter (Jul. 23, 1998) (*enclosing* Letter from Dr. Mary Frances O'Shea, National Coordinator for Title IX Athletics, Department of Education, to Nancy S. Footer, Esq., General Counsel, Bowling Green State University (Jul. 23, 1998)). As NWCA understands it, UO already is in compliance with scholarship proportionality, and eliminating wrestling would move UO out of compliance with scholarship proportionality.<sup>1</sup>

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<sup>1</sup> Based on the most recent data (2006-07) available from the Department of Education under the Equity in Athletics Disclosure Act, UO had enrollment ratios of 47.25%-52.75% men to women, athletic participation ratios of 59.95%-40.05% men to women, and scholarship ratios of 59.78%-40.22% men to women. By adding baseball and cheer and subtracting wrestling, UO's scholarship gap will move from its current 0.17% to greater than the one percent, in violation of the Department of Education's 1998 clarification.

The next two sections explain why UO meets, and will continue to meet, the requirements for prong two and prong three. Significantly, neither prong two nor prong three depends on male athletes:

[P]arts two and three of the test... focus *only* on the underrepresented sex.

Norma V. Cantu, Assistant Secretary for Civil Rights, Cover Letter to *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, at 3 (Jan. 16, 1996) (emphasis added). Thus, contrary to the athletic department's apparent understanding, nothing in prong two or prong three requires UO to consider the addition of baseball in conjunction with the elimination of wrestling. Moreover, prongs two and three are safe harbors, every bit as much as proportionality under prong one. See Gerald Reynolds, Assistant Secretary for Civil Rights, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance*, at 2 (June 11, 2003). Thus, as the next two sections explain in more detail, nothing in the Three-Part Test requires UO to eliminate its wrestling team.

### **Prong Two: History and Practice of Expansion**

Prong two asks "whether the institution can show a history and continuing practice of program expansion?" 44 Fed. Reg. at 71,418; Department of Education, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test*, at 5 (Jan. 16, 1996) (hereinafter, "1996 Clarification"). In assessing compliance with prong two, the Department of Education considers both the addition of intercollegiate sports and increased participation on pre-existing intercollegiate sports, as well as the school's history and policies on responding to expressed interest for the creation of new intercollegiate sports. See *1996 Clarification*, at 6. As signaled above, that determination does not depend on the number of male participants or sports. See *also id.* at 5 n.2 ("Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex"). Given UO's addition of lacrosse and competitive cheer, NWCA submits that UO currently meets prong two and will continue to do so, through 2009-10 and 2010-11.

On timing, UO would need to re-assess its prong-two compliance at some point after adding competitive cheer in 2008-09. See *1996 Clarification*, at 11 ("[t]here are no fixed intervals of time within which an institution must have added participation opportunities"). Because the addition of competitive cheer will ensure prong-two compliance at least through the following year (2009-10) or two (2010-11), UO should consider that option as a way to honor and to reciprocate the commitment that UO's student wrestlers have made to UO.

### **Prong Three: Full and Effective Accommodation**

Prong three asks whether a school's present athletic program "fully and effectively accommodate[s]" the statistically underrepresented gender's interests and abilities. 44 Fed. Reg. at 71,418; *1996 Clarification*, at 9. In assessing compliance with prong three, the Department of Education considers whether there is (a) unmet interest in a particular sport; (b) sufficient ability

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to sustain a team in that sport; and (c) a reasonable expectation of competition for the team. *1996 Clarification*, at 9. Given UO's broad program and its addition of lacrosse and competitive cheer, NWCA submits that UO likely will meet prong three for some time to come.

Of course, if it wants a metric for ensuring its compliance with prong three, UO could conduct a survey pursuant to the Department of Education's March 2005 guidance on surveys under prong three. Because the National Collegiate Athletic Association has come out against the March 2005 guidance, NWCA emphasizes the flexibility that UO has under the prior Title IX guidance:

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing.... These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

*1996 Clarification*, at 10-11; *see also* 40 Fed. Reg. at 24,134 (regulations authorize a school's assessing interests and abilities "in any reasonable way it [*i.e.*, the *school*] deems appropriate") (emphasis added).<sup>2</sup> Thus, notwithstanding the contested March 2005 guidance, UO has significant latitude on how to proceed under prong three.

On timing, UO would need to assess its prong-three compliance periodically. *See 1996 Clarification*, at 11 ("[a]n institution's evaluation of interest should be done periodically"). Because UO can meet prong two for the next few years, UO would not need even to address prong-three compliance until 2010-11 at the earliest. By that time, we may have a more reliable or uniform metric for assessing athletic interests and abilities.

\* \* \* \* \*

As indicated above, the applicable Title IX regulations require a response. Before you undertake that response, however, please contact NWCA's Executive Director, Michael W. Moyer, at 717-653-8009 or me at 202-747-1790 so that we can work together informally to

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<sup>2</sup> Specifically, the preamble to the Title IX regulations provides that "paragraph 86.41(c)(i) requires institutions to select 'sports and levels of competition that effectively accommodate the interests and abilities of both sexes.' In doing so, an institution should consider[,] by a reasonable method it deems appropriate, the interests of both sexes." 40 Fed. Reg. at 24,134.

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assess all viable options. Although the regulations and dueling guidance documents are byzantine, this much is clear:

- With or without wrestling, UO does not meet participation proportionality under prong one of the Three-Part Test;
- Eliminating wrestling or adding baseball has no effect on UO's ability to comply with prong two or prong three of the Three-Part Test; and
- Eliminating wrestling, while adding baseball and competitive cheer, will move UO out of compliance with scholarship proportionality.

Under the circumstances, NWCA respectfully submits that UO has every reason at least to defer, if not to revoke, its decision to eliminate an invaluable educational resource.

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

Yours sincerely,

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Lawrence J. Joseph  
Of Counsel  
National Wrestling Coaches Association

cc: Michael W. Moyer, Executive Director, NWCA