

LAWRENCE J. JOSEPH, ESQ.

1250 Connecticut Ave, NW, Suite 200 - Washington, DC 20036

Tel: 202-747-1790 - Fax: 202-318-2254

www.larryjoseph.com

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VIA PRIORITY MAIL & EMAIL

Thomas S. Evans, Esq.
Senior Vice President and General Counsel
Office of University Counsel
Crouse Hinds Hall, Suite 513
Syracuse University
Syracuse, NY 13244

Re: Title IX – Swimming and Diving Cuts

Dear Mr. Evans:

On behalf of the Equity in Athletics, Inc. (“EIA”), this advises Syracuse University (“SU”) that its announced plans to replace its men’s and women’s swimming and diving teams with a women’s, but not men’s, ice hockey team will violate Title IX of the Education Amendments of 1972. We write now not only to offer to work with SU and its swimming-diving students, alumni, and parents to find a path to postpone those cuts, but also to put SU on notice of EIA’s legal position.

By way of introduction, EIA’s membership includes SU students, parents, and alumni associated with the swimming and diving teams that SU has scheduled to cut, as well as with teams that SU has cut in the past. Both EIA and its members recognize that SU has acted to date under the misunderstanding that its proposed cuts *comply* with Title IX and the so-called “Three-Part Test.” As explained in the enclosed complaint in *Equity in Athletics, Inc. v. U.S. Department of Education*, No. 5:07-0028-GEC (W.D.Va.), however, Title IX neither requires nor allows such cuts. Quite the contrary, *Title IX prohibits them*.

Under EIA’s (and the Department of Health, Education and Welfare’s) interpretation of the 1975 Title IX regulations, schools such as SU that receive federal funds must provide equal athletic opportunity, based on assessed interest. By contrast, the Three-Part Test purports to create a new standard of equal participation, based on enrollment. Under EIA’s view of the controlling law and regulations, a school that fields women’s softball and tennis, but not men’s baseball, and tennis and that fields women’s field hockey and volleyball, but not men’s wrestling, has no business even considering the cut of a men’s team and the addition of a women’s team with demonstrably less interest.

Neither EIA nor its SU members have any desire to sue SU. Our quarrel is with the federal standards and the federal regulators, who have misled SU and EIA’s members alike. EIA already has sued the federal regulators in the Fourth Circuit and would welcome the opportunity to do so in the Second Circuit. (As you may know, both circuits lack any circuit precedent on the Three-Part Test.) Significantly for SU’s attempt to comply with Title IX, EIA will ask the court

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, SU is steering itself toward a mirage, not a safe harbor. Put another way, we are not trying to move SU's goal post: that goal post does not exist.

Although SU undoubtedly believed that the Three-Part Test constitutes a current and valid interpretation of Title IX's implementing regulation, that is not the case. We are confident that the Second Circuit will agree for several reasons, including the following:

- **Prior Title IX Decisions Will Not Control.** As indicated above, the Second Circuit has not ruled on the Three-Part Test, and decisions from other circuits cannot control here. *Menowitz v. Brown*, 991 F.2d 36, 40 (2nd Cir. 1993). Moreover, prior extra-circuit decisions are not persuasive for several reasons discussed below: (a) they misconstrued the Department of Education's authority; (b) they improperly deferred to the Department; and (c) they did not consider the administrative record and procedural requirements that would apply if the Department or its predecessor intended to adopt the Three-Part Test as a standard for Title IX compliance.
- **The Department 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, a supervening decision of the Supreme Court ruled that agencies lacked such authority. Indeed, in April 2001, *Sandoval* 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).
- **The Three-Part Test Does Not Warrant Deference.** The decisions that uphold the Three-Part Test rest on controlling "*Chevron*" deference to the Department of Education's interpretation of Title IX. In *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001), however, a supervening decision of 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.
- **The Three-Part Test Is Procedurally Invalid.** As the enclosed complaint explains, the Three-Part Test (as subsequently reinterpreted by the Department in 1996 and 2003) purports to change a regulation that required equal opportunity, based on the genders' relative interest, into equal participation based on enrollment. Even if such a standard was substantively lawful, that change would require notice-and-comment rulemaking. *Riverkeeper, Inc. v. U.S. E.P.A.*, 475 F.3d 83, 117 (2nd Cir. 2007). The Department's predecessor recognized as much, and expressly did not take the steps required to implement such a change. Oblivious to the

fine distinctions that its predecessor made in 1979, the Department's 1996 and 2003 actions purport to create a legal requirement that the Department simply cannot create by memorandum.

- **The Three-Part Test Is Not in Effect.** 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. §1682.¹ The legislative history makes clear that such approval meant signed by the President in the *Federal Register*.² 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay). As demonstrated by the *partial* list in the margin, Congress repeatedly cited the presidential-approval requirement as the bulwark against bureaucratic overreaching.³ As the administrative record for the Three-Part Test demonstrates, the Department's predecessor 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.

- **Quotas Are Unconstitutional in Any Event.** In its one departure from Title VI, Congress included 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).

¹ 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).

² 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).

³ 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).

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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). Thus, even if the Three-Part Test is a grammatical interpretation of the Title IX regulations, it is not a lawful one: “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”).⁴

Finally, as you may know, the administrative record on the Three-Part Test surfaced in litigation against the Department initiated by the National Wrestling Coaches Association (“NWCA”), in which the Department prevailed. The government’s successful defense in *NWCA* hinged on standing, with the D.C. Circuit’s accepting the Department’s argument that NWCA did not establish redressability because NWCA did not establish that independent parties (*i.e.*, schools), not before the court, would change their actions if NWCA prevailed. *Cf. Bennett v Spear*, 520 U.S. 154, 169 (1997) (“While... it does not suffice if the injury complained of is th[e] result [of] the *independent* action of some third party not before the court, that does not exclude injury produced by determinative or coercive effect upon the action of someone else”) (citations and quotations omitted, emphasis in original). The Department will not have that argument here: either the relevant schools will publicly defer their planned cuts, or they will not be independent parties not before the court.

Like many schools before it, SU has relied on the Three-Part Test. Unlike the schools that preceded it, however, SU would face a legal challenge from a plaintiff armed with the administrative record of the Three-Part Test. We hope that SU will recognize that this is simply not SU’s fight. Instead, for the sake of its students, we urge SU to postpone the cuts to allow EIA time to establish what Title IX requires.

Recognizing that we have presented you with a lot of information, we will do everything we can to assist you in understanding EIA’s position and to work with SU and concerned students, alumni, and parents to develop a strategy that continues SU’s rich tradition of

⁴ EIA will not raise a merely *collateral* attack on the Three-Part Test. *See Miami University Wrestling Club v. Miami University*, 302 F.3d 608, 614 (6th Cir. 2002). Instead, by suing both the federal government and a relevant school or schools, EIA will *directly* attack the Three-Part Test. *Cf. Smith v. Robinson*, 468 U.S. 992, 1012 & n.15 (1984) (nothing prevents federal courts with jurisdiction over a controversy from reaching constitutional issues).

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swimming and diving. Ultimately, however, SU has the responsibility to comply with the law. As this short letter and the enclosed complaint demonstrate, SU should have serious questions whether the planned cuts indeed comply.

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

Enclosure

cc: Dr. Nancy Cantor, Chancellor, Syracuse University (via email w/o Encl.)
Dr. Eric F. Spina, Vice Chancellor & Provost, Syracuse University (via email w/o Encl.)
Dr. Daryl J. Gross, Athletic Director, Syracuse University (via email w/o Encl.)
Mr. Henry Wildhack, Assoc. Athletic Director, Syracuse University (via email w/o Encl.)