

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

EQUITY IN ATHLETICS, INC.,)
)
Plaintiff,)
)
v.) Civil Action No. 5:07-CV-0028-GEC
DEPARTMENT OF EDUCATION, *et al.*,)
)
Defendants.)

PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

Table of Contents i

Introduction.....1

I. Relevant Facts Are Not Genuinely in Dispute1

II. This Court Has Jurisdiction over EIA’s Claims2

 A. Subject-Matter Jurisdiction and Authority for Requested Relief.....2

 B. Standing against University and Federal Defendants2

 1. Direct Injuries3

 2. Authorization of Otherwise-Illegal Conduct4

 3. Equal-Protection and “Unequal-Footing” Injuries6

 4. Procedural Injuries7

 C. Judicial Review of Title IX Rules and Orders7

 D. Federal Sovereign Immunity.....8

 E. Exhaustion of Administrative Remedies9

 F. Eleventh Amendment Sovereign Immunity.....10

 1. Damages versus Injunctive and Declaratory Relief.....10

 2. Continuing Violations.....11

III. EIA Is Entitled to Summary Judgment on the Merits.....12

 A. Decisions from Other Circuits Do Not Control.....12

 B. Three-Part Test Does Not Warrant Deference.....13

 1. Multi-Agency Delegations13

 2. Title IX’s Mere “Effectuation”14

 3. HEW’s Deference Non-Transferable.....15

 4. “Javits Amendment”15

 5. Policy Statements16

 6. Deference Inappropriate for Lack of Statutory and Regulatory Notice.....17

 C. Three-Part Test Is Substantively Unlawful.....18

 1. Title IX Prohibits Gender-Based Quotas and Disparate Treatment.....19

 2. DOE Lacks Authority for Disparate-Impact Standards.....20

 3. Quotas Are Unconstitutional in Any Event21

 D. Three-Part Test Is Procedurally Invalid.....23

 1. Three-Part Test Violated APA Rulemaking Requirements23

 2. The Three-Part Test Is Not in Effect under §902.....27

 3. The Three-Part Test Is Not in Effect under GEPA27

 E. JMU’s Elimination of the Ten Teams Violated Title IX and the Equal Protection Clause29

1.	JMU Substantively Violated JMU's and DOE's View of the Law	30
2.	JMU Substantively Violated EIA's View of the Law	32
3.	JMU Procedurally Violated EIA's View of the Law	32
	Conclusion.....	33

INTRODUCTION

Pursuant to FED. R. CIV. P. 56(a), plaintiff Equity in Athletics, Inc. (“EIA”) moved for partial summary judgment and filed a supporting memorandum (“Pl.’s Mot. Summ. J.” and “Pl.’s Memo.”) against all defendants on the applicable legal standards (Counts I, II, and III) and against the James Madison University (“JMU” or “University”) defendants on liability for the 2007-08 academic year (Count IV). The federal defendants associated with the Department of Education (“DOE”) and JMU separately oppose EIA’s motion (“DOE Opp’n” and “JMU Opp’n,” respectively). Here, EIA replies to the arguments raised by DOE and JMU.

In several respects the defendants do not respond to issues that EIA raised in its motion. Even a *pro se* litigant waives arguments if they fail to respond. *Hummer v. Dalton*, 657 F.2d 621, 626 (4th Cir. 1981); *accord Riddle v. Baber*, 2005 WL 2605545, at 1 (W.D. Va. 2005); FED. R. CIV. P. 56(e)(2); *Stephenson v. Cox*, 223 F. Supp. 2d 119, 121 (D.D.C. 2002). For the reasons set forth in this reply and EIA’s memorandum, EIA respectfully requests partial summary judgment.

I. RELEVANT FACTS ARE NOT GENUINELY IN DISPUTE

Because the parties have cross-moved for dispositive relief, with the defendants moving under FED. R. CIV. P. 12(b) and EIA moving under FED. R. CIV. P. 56(a), the evidentiary standards differ for the cross motions. In opposing JMU’s motion to dismiss, EIA attacked the validity of the data that JMU filed with its motion. *See* Pl.’s Memo. at 54 & n.31. EIA does not understand that it is necessary to move to strike that facially inadequate data with respect to EIA’s motion for summary judgment. The unsworn statement of counsel plainly fail to qualify as data at all, much less the type of rebuttal data contemplated by FED. R. CIV. P. 56(e)(2).

DOE claims that its Three-Part Test interprets §86.41(c)(1) of the regulations, whereas EIA submits that the Three-Part Test constitutes an “other factor” that HEW interjected pursuant

to §86.41(c). Certainly, elsewhere in the 1979 Policy Interpretation (*e.g.*, recruiting, administrative support), HEW expressly grounded criteria on §86.41(c)'s "other factor" authority. 44 Fed. Reg. at 71,417. With respect to the Three-Part Test, moreover, HEW expressly grounded that section of the Policy Interpretation on both §86.41(c) and §86.41(c)(1). *Id.* Because the Three-Part Test lives within the heading "level of competition," rather than selection of sports, however, EIA submits that the Three-Part Test cannot rest solely on §86.41(c)(1) authority because it could only be used to elevate from club to varsity, and never to add.

II. THIS COURT HAS JURISDICTION OVER EIA'S CLAIMS

Both DOE and JMU challenge EIA's standing. *See* DOE Opp'n at 2-8; JMU Opp'n at 11. As explained in Section II.B, *infra*, these arguments lack merit. In addition, both DOE and JMU assert their respective forms of sovereign immunity. *See* DOE Opp'n at 9-13; JMU Opp'n at 6-8. As explained in Sections II.C-II.D and II.F, *infra*, respectively, these arguments lack merit. Finally, DOE indirectly asserts that EIA and its members failed to exhaust administrative remedies, without rebutting EIA's direct argument that exhaustion is not required and would be futile in any event. *Compare* DOE Opp'n at 3 with Pl.'s Memo. at 26-27. Notwithstanding the defendants' jurisdictional challenges, nothing prevents this Court's reaching the merits.

A. Subject-Matter Jurisdiction and Authority for Requested Relief

The defendants do not challenge that this case falls within this Court's statutory subject-matter jurisdiction under 28 U.S.C. §1331, §1343(a)(3)-(4). Although the parties cannot confer jurisdiction on this Court by consent, this Court's statutory subject-matter jurisdiction is plain.

B. Standing against University and Federal Defendants

Both DOE and JMU challenge EIA's standing, although DOE's standing challenge is broader. For its part, JMU merely questions EIA's standing to seek scholarship-related damages

for parties not before the Court. JMU Opp'n at 11. JMU is wrong, because EIA has women members in the class to be benefited, which is enough for standing purposes.¹

While “standing is not dispensed in gross” so that standing to challenge one government action would automatically provide standing to challenge other, discrete government actions, *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), standing doctrine has no nexus requirement outside taxpayer standing. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978). Thus, “once a litigant has standing to request invalidation of a particular agency action, it may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 & n.5 (2006) (interior quotations omitted).

For its part, DOE relies primarily on *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004) (“*NWCA I*”), and a subsequent suit brought by the same parties (and two others), *College Sports Council v. v. Dep't of Educ.*, 465 F.3d 20 (D.C. Cir. 2006) (“*NWCA II*”). Because DOE rejected EIA’s undisputed facts with respect to the pleadings in *NWCA I* and *NWCA II*, EIA will file them with the Court via a motion for judicial notice.

1. Direct Injuries

With respect to its direct injuries, EIA does not face a heightened showing on redressability because, whatever DOE causes, this Court can redress without concern about third-party causal chains. DOE does not even address the controlling case of *Int'l Union v.*

¹ EIA puts forward its female members’ scholarship damages in the alternative to EIA’s arguments on the validity of the Three-Part Test. If DOE has the authority to promulgate and complied with applicable procedures in promulgating its participation-proportionality regime, DOE also has done so for its scholarship-proportionality regime.

Brock, 477 U.S. 274, 284 (1986), under which plaintiffs have standing to challenge federal guidelines that govern federal benefit programs. *See* Pl.’s Memo. at 14. DOE bemoans that plaintiffs did not come to DOE first by way of an administrative complaint, but DOE’s enforcement director advised an EIA member that the Three-Part Test would control, Second Am. Compl. Ex. 5, and DOE does not even attempt to rebut the controlling *McCarthy* and *Houghton* decisions cited in Section II.E, *infra*, for the proposition that DOE’s merits stance in this litigation demonstrates the futility of exhausting administrative remedies.

2. Authorization of Otherwise-Illegal Conduct

DOE does not directly respond to EIA’s arguments that the Three-Part Test authorizes conduct that would be illegal absent the Three-Part Test, other than perhaps to argue that the Test does not create a quota. DOE Opp’n at 5. Put simply, that “confuses standing with the merits.” *Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1092 (10th Cir. 2006); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005); *In re Columbia Gas Systems Inc.*, 33 F.3d 294, 298 (3rd Cir. 1994); *cf. Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir. 2001). But “standing in no way depends on the merits of the plaintiff’s contention that particular conduct is illegal.” *McConnell v. FEC*, 540 U.S. 93, 227 (2003). Instead, the standing inquiry assume a plaintiff’s merits view when analyzing standing. *Southern Cal. Edison Co. v. F.E.R.C.*, 502 F.3d 176, 180 (D.C. Cir. 2007) (“in reviewing the standing question, the court... must therefore assume that on the merits the [plaintiffs] would be successful in [their] claims”); *Tyler v. Cuomo*, 236 F.3d 1124, 1133 (9th Cir. 2000) (“[w]hether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits”). With respect to

redressability, the standing inquiry asks “will this litigation help the plaintiff if he or she is *right?*” Under DOE’s approach, all losing plaintiffs would lose for lack of standing.

In its response to EIA’s allegations that the Three-Part Test violates the Fourteenth Amendment, DOE explains its view that there is no *First Amendment* violation here because the Three-Part Test does not preclude the affected club teams from associating together. DOE Opp’n at 18-19. EIA does not allege that the Three-Part Test facially violates the First Amendment or that teams in general have a First-Amendment associational right to team status. Instead, EIA alleges that, as applied at JMU with specific emphasis only on men’s and women’s swimming and track, the Three-Part Test severed what Ms. Chapman and this Court described as “one big family” of male and female athletes, Slip. Op. at 19, associating on those three teams for educational purposes. See Pl.’s Memo. at 46 & n.27. EIA respectfully submits that those First Amendment injuries not only trigger strict scrutiny but also provide standing for a facial challenge to the Three-Part Test. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (“Overbreadth attacks have also been allowed where the Court thought rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent associations”) (citing cases).

Significantly, the *NWCA I* litigation failed (in that court’s view) to establish standing by the authorization of otherwise-illegal conduct because the plaintiff did not challenge the regulations, which that court viewed as possibly authorizing some injurious third-party conduct. *NWCA I*, 66 F.3d at 939-40. The *NWCA II* litigation cured that by alleging that, if Title IX or the regulations allow the Three-Part Test, then Title IX and the regulations are unlawful. Unfortunately for those plaintiffs, however, that victory on standing came too late because the *NWCA II* court decided that *NWCA I* somehow had already decided the merits. *NWCA II*, 465

F.3d at 23 (“statutory and constitutional issues raised in this case have been conclusively settled by this court in *NWCA*”); *but see NWCA I*, 366 F.3d at 947 (“[o]ur holding today thus does not prevent appellants from obtaining review of their claims on the merits, when raised in a judicially reviewable case or controversy”). Like *NWCA II*, the complaint here adequately pleads the authorization of otherwise-illegal conduct, Second Am. Compl. ¶145, which (because it is not frivolously offered) suffices to establish standing.

3. Equal-Protection and “Unequal-Footing” Injuries

EIA argues that, contrary to *NWCA I*, “unequal footing” injuries apply in third-party standing contexts. Pl.’s Memo. at 17-18. Under the unequal-footing doctrine, a party such as an applicant, bidder, or competitor alleges that the application, bidding, or competitive process is skewed against him, which constitutes an injury distinct from his failure to get the desired position, contract, or other benefit. If the requested relief would reform that process, that provides redress enough, so that he need not show that, but for the challenged conduct, he would obtain the benefit. DOE disingenuously suggests that President Clinton redressed the plaintiffs’ substantive injury. DOE Opp’n at 6. In the *Clinton* litigation, the plaintiffs were not purchasing their facilities from President Clinton, which would be the analog to requiring EIA to prove that teams would be reinstated by the requested relief. Instead, overturning the line item veto would restore their statutory “bargaining chip” that President Clinton had vetoed. *Clinton v. City of New York*, 524 U.S. 417, 433 (1998). The point of the *Clinton* litigation is that it demonstrates, contrary to *NWCA I*, that the unequal-footing injury applies to third-party injuries. *Accord Bras v. California Pub. Util. Comm’n*, 59 F.3d 869, 873 (9th Cir. 1995).

Here, for example, restoring the interest-based regulations over the enrollment-based Three-Part Test would obviously help track, swimming, and wrestling assert their interest-based

equal protection rights. But gymnastics, archery, and fencing also would benefit by removing the irrational benefit afforded large-roster women's teams over small-roster women's teams under the Three-Part Test. Similarly, "[w]hile... 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." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (citations and quotations omitted, emphasis in original). Removing that the federal coercion vis-à-vis schools with help EIA members' negotiating position with their schools.

4. Procedural Injuries

Significantly, procedural injuries like those asserted by EIA relax the showings that a plaintiff must make on redressability and immediacy. Pl.'s Memo. at 19. Again, DOE attacks EIA's standing by arguing the merits (*i.e.*, DOE argues that EIA does not have procedural standing because EIA's procedural arguments are wrong). DOE Opp'n at 7-8. As DOE's counsel should know, that is not how courts evaluate standing. *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) ("standing is gauged by the specific common-law, statutory or constitutional claims that a party presents").

C. Judicial Review of Title IX Rules and Orders

EIA demonstrated that §903 provides for judicial review, Pl.'s Memo. at 18-23, which not only waives sovereign immunity in its own right but also makes the covered agency actions (namely, Title IX rules, regulations, and orders of general applicability) "reviewable by statute." *Id.* For agency action "reviewable by statute," §704's adequate-remedy bar does not apply by its own terms, 5 U.S.C. §704, which triggers the APA waiver of sovereign immunity. 5 U.S.C. §702. DOE responds to by citing *NWCA I* and the Fourth Circuit's decision in *Jersey Heights*

Neighborhood Ass'n v. Glendening, 174 F.3d 180, 191-92 (4th Cir. 1999). DOE Opp'n at 10. With regard to the latter, the answer is easy: *Glendening* challenged an approval by Maryland and Federal Highway Administration ("FHWA") officials of a bypass project on race-based grounds under Title VI. As such, the FHWA action was not an "order of general applicability" and so fell outside of Title VI's provisions for judicial review of federal agency action. By contrast, *NWCA I* was *dicta* (because the plaintiffs lacked standing) and is contrary to a unanimous *en banc* decision from the D.C. Circuit. *See* Pl.'s Memo. at 20-21. Similar to *Glendening*, *NWCA I* was premised on non-enforcement cases that do not present orders of general applicability.

NWCA I relies on a prior decision by the same judge, *Washington Legal Found. v. Alexander*, 984 F.2d 483, 488 (D.C. Cir. 1993) ("*WLF*"). *WLF* found Title VI nonenforcement unreviewable, but also found All Writs Act jurisdiction to consider an agency's unreasonable delay in finalizing a proposed agency rule or order under Title VI. Such All Writs Act review presupposes and protects courts' future jurisdiction over the final agency action by authorizing review of agency delay. *See Telecomm. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 74-75 (D.C. Cir. 1984). As such, *WLF* could not have *held* final agency action unreviewable under the adequate-remedy bar. Quite the contrary, by relying on the All Writs Act to preserve future jurisdiction over the eventual rule or order, *WLF* strongly suggests the opposite: namely, that when the agency finally does issue its rule, regulation, or order of general applicability, judicial review will be available.

D. Federal Sovereign Immunity

Without a page citation, DOE claims that EIA argues that the Declaratory Judgment Act waives sovereign immunity. DOE Opp'n at 9. If EIA argued that, it was error, but EIA cannot

locate that argument. Instead, EIA argued that “§1331 and the Declaratory Judgment Act, 28 U.S.C. §§2201-2202 (“DJA”) allows judicial review against agency officers.” Pl.’s Memo. at 25 (citing *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). The difference is that suits against agency officers for the type of conduct alleged here to not implicate sovereign immunity under the *Ex parte Young* officer-suit doctrine.²

Assuming *arguendo* that Title IX’s judicial review provision does not altogether displace §704’s adequate-remedy bar, EIA puts forward two additional bases for APA review, notwithstanding §704. First, to the extent that (as EIA and JMU understand) the regulations are not enforceable in a private action, then EIA has no alternate remedy for those claims, much less an adequate remedy. On this, DOE suggests that it is untenable because only JMU can provide the required relief. DOE Opp’n at 11. But courts can compel agencies to enforce their regulations, and a compelled DOE likely could get JMU’s attention. Second, citing several controlling cases, EIA demonstrates that systemic relief is available under the APA. *See* Pl.’s Memo. at 21-22 (citing cases). DOE offers nothing to rebut these authorities.

E. Exhaustion of Administrative Remedies

EIA argued that DOE’s briefing of the merits against EIA in this proceeding renders futile the exhaustion of administrative remedies. Pl.’s Memo. at 26-27. Although DOE fails to respond (and thus waives this issue), DOE’s responding would have been futile because the Supreme Court’s decision in *McCarthy v. Madigan*, 503 U.S. 140, 148 (1992) (citing and quoting *Houghton v. Shafer*, 392 U.S. 639, 640 (1968)) controls. Pl.’s Memo. at 26-27.

² DOE complains about substitution of the current office holders in their individual capacities under color of law. DOE Opp’n at 12-13. EIA will address that concern by filing a motion to substitute.

F. Eleventh Amendment Sovereign Immunity

Citing its Eleventh Amendment immunity from suit in federal court, JMU acknowledges or (by negative inference) suggests that EIA may sue for damages and injunctive relief under the Title IX statute and for prospective injunctive and declaratory relief under the *Ex parte Young* officer-suit doctrine, and even for money damages under for constitutional violations that were clearly established at the time that the JMU defendants acted. JMU Opp'n at 6-12. But, JMU argues, EIA cannot sue for anything else. *Id.*

Before this Court resolves these issues, it first must resolve two threshold issues:

- Do the Title IX regulations and Three-Part Test exceed the scope of the statutory prohibition, as JMU and EIA understand, or do they interpret the statute, as DOE argues?
- Are DOE's regulatory guidance (*i.e.*, the clarifications and "dear colleague" letters) procedurally invalid as EIA argues or valid as DOE and JMU argue?

The answers to these questions will drive how the Court analyzes EIA's claims against JMU. If the regulations or the Three-Part Test exceed the statutory prohibition, then EIA cannot enforce those provisions against JMU *under Title IX*. On the other hand, if EIA loses its procedural claims against DOE's Title IX memoranda, then EIA's alternate relief (namely, compliance with DOE's Title IX memoranda) comes into play.

1. Damages versus Injunctive and Declaratory Relief

JMU argues correctly that the *Ex parte Young* doctrine does not empower EIA to assert state-law claims in federal court against an arm of the Commonwealth of Virginia. JMU Opp'n at 7 (*citing Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984)). Unfortunately for JMU, however, federal law allows EIA to rely on state law for the elements of EIA's equal-protection claims under §1983. *See* 42 U.S.C. §1988(a); Pl.'s Memo. at 7-8 (*citing Scott v.*

Vandiver, 476 F.2d 238, 242 (4th Cir. 1973) and *Jenkins v. Averett*, 424 F.2d 1228, 1231 (4th Cir. 1970)). Because Virginia's Human Rights Act makes it discriminatory and unlawful to violate the Title IX regulations, VA. CODE §2.2-3901 (“[c]onduct that violates any... federal statute or regulation governing discrimination on the basis of... sex... shall be an ‘unlawful discriminatory practice’ for the purposes of this chapter”), EIA essentially can sue under the Title IX regulations indirectly through 42 U.S.C. §1988(a) and the Equal Protection Clause. As such, it does not matter significantly whether EIA can enforce the regulations against JMU under Title IX or against the Visitors under §1983.

Similarly, although JMU also correctly argues that qualified immunity could shield some damages claims against individual-capacity defendants unless the constitutional violation was clearly established when those defendants acted, JMU Opp’n at 8, that will not help JMU at this stage of the proceedings because JMU violated the Three-Part Test in 2007-08 by over-cutting male athletes such that JMU eliminated a viable men’s team with a squad size less than the amount of athletes by which men were the underrepresented gender in that year. Facts, ¶¶34-36. Because that action violated clearly established law, the JMU defendants cannot evade liability under qualified immunity. Similarly, JMU’s \$643,000 gap in scholarship proportionality (Facts, ¶¶34-37) violates clearly established law at the time JMU acted, assuming *arguendo* that EIA loses on its procedural arguments under Title IX, GEPA, and the APA.

2. Continuing Violations

Although EIA argued that JMU is engaged in ongoing violations of Title IX and the Fourteenth Amendment, Pl.’s Memo. at 29-30, JMU observes that “EIA ... apparently concedes that there is no on-going violation of federal law with respect to athletic opportunities.” JMU Opp’n at 7. Specifically, EIA contends that the opportunities to participate in JMU’s athletic

department disproportionately, intentionally, and illegally favor women, when compared to athletic interest, which is the only appropriate measure under both Title IX and the Equal Protection Clause.

III. EIA IS ENTITLED TO SUMMARY JUDGMENT ON THE MERITS

DOE defends the Three-Part Test's substantive and procedural validity (Counts I, II, and III), but does not weigh in on the lawfulness of JMU's decision to eliminate ten athletic teams (Count IV). *See* DOE Opp'n at 13-21. By contrast, JMU argues that the Three-Part Test's validity under Counts I, II, and III does not apply to JMU and, instead defends only Count IV. *See* JMU Opp'n at 8-11.³ EIA respectfully submits that the Court must grant summary judgment against both defendant groups on Counts I, II, and III, and against JMU on Count IV as to the 2007-08 academic year.

A. Decisions from Other Circuits Do Not Control

EIA argues that extra-circuit decisions cannot control this litigation, Pl.'s Memo. at 30-33, which EIA argues applies particularly strongly where those extra-circuit decisions failed even to consider a laundry list of issues that EIA raises. *Id.* at 30-31 (*citing Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004)). DOE acknowledges the former as "axiomatic" but faults EIA for challenging those decisions only on procedural issues, while "never counter[ing] the merits and reasoning of those decisions, which are sound and should be followed here." DOE Opp'n at 17 n.10. EIA respectfully disagrees that it has failed to counter

³ JMU's procedural gambit is risky because DOE has moved to excise itself from this litigation on jurisdictional grounds (namely, standing and sovereign immunity). DOE Opp'n at 2-13. If DOE succeeds, that would leave JMU without a defense as to Counts I, II, and III. Indeed, JMU (by not defending these counts) will have waived them.

those decisions' merits, as reiterated in this section. Indeed, EIA respectfully submits that it is DOE's talismanic invocation of these cases, without countering EIA's new arguments, that demonstrates why this Court generally should *not* follow those cases.⁴

B. Three-Part Test Does Not Warrant Deference

EIA argues that the Three-Part Test does not deserve deference for a variety of reasons, which DOE seeks to rebut. *Compare* Pl.'s Memo. at 33-40 *with* DOE Opp'n at 14-17. Because DOE either ignores or inadequately rebuts EIA's arguments, this Court owes the Three-Part Test no deference. Moreover, DOE offers nothing of substance to rebut EIA's claim that the Three-Part Test did not transfer and the DOE regulations never took effect, Pl.'s Memo. at 35-36, 46-47, which means that DOE does not interpret *its* regulations here. To the contrary, DOE continues to operate under the HEW regulations (but not the Three-Part Test) that continued in effect when DOE was formed. *See* 20 U.S.C. §§3505(a), 3508(b). As such, the deference a court might owe an agency interpreting its own regulations, DOE Opp'n at 14-15, does not apply here.

1. Multi-Agency Delegations

EIA demonstrated that Congress expressly amended the Title IX bill from a statute that delegates authority exclusively to HEW into a statute that delegates authority equally to all funding agencies and that such multi-agency delegations do not warrant deference. Pl.'s Memo. at 34-35. EIA also expressly noted that multiple agencies with *no* delegated authority cannot re-

⁴ EIA relies on these extra-circuit cases in one respect: namely, that switching the regulations from equal participation, based on enrollment, back to equal opportunity, based on interest, will reverse the momentum in the quota-based elimination of non-revenue men's sports (such as men's gymnastics, track, cross country, archery, swimming, and wrestling) and the quota-based replacement of small-roster women's sports (such as women's gymnastics, archery, and fencing) with large-roster sports.

delegate their pooled authority on DOE. *Id.* at 35 n.22 (nothing plus nothing equals nothing). Nonetheless, DOE argues that “federal agencies” have “recognized that among [them] ... the Department of Education is the main enforcement agency.” DOE Opp’n at 15. EIA respectfully submits that the vote of its powerless peers does nothing to augment DOE’s power. But even if agency heads had any authority that they could delegate to DOE, they have no power to delegate authority except as conferred by statute or to subordinate officers within their agencies. 5 U.S.C. §301(a). In sum, DOE’s sister agencies have no authority to transfer to DOE, and could not transfer it to DOE if they had any authority.

2. Title IX’s Mere “Effectuation”

EIA argued that, unlike delegations like those in *Chevron*, Title IX merely directs agencies to effectuate the ban on intentional discrimination in §901(a). Pl.’s Memo. at 35. The issue is similar to the one that the Supreme Court faced recently in *Ricci*, where the Court had to weigh a statutory ban on intentional discrimination versus a desire not to run afoul of a statutory ban on disparate-impact discrimination. *See Ricci v. DeStefano*, 129 S.Ct. 2658, 2675 (2009). In *Ricci*, the ban on intentional discrimination trumped the disparate-impact discrimination issue. *Id.* The difference here, of course, is that DOE’s interpretation is just that, an agency interpretation, which cannot stand up to the statutory ban on intentional discrimination: “no deference is due to agency interpretations at odds with the plain language of the statute itself.” *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989), *abrogated by statute on other grounds*, PUB. L. NO. 101-433, 104 Stat. 978 (1990). “Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.” *Id.* Because it allows precisely what Congress enacted Title IX to prohibit, the Three-Part Test cannot claim deference.

3. HEW's Deference Non-Transferable

EIA explained at length why HEW's Title IX authority did not transfer to DOE when DOE and HHS were formed out of the former HEW. Pl.'s Memo. at 35-36. In response, DOE cites only *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 287 (2nd Cir. 2004), for the proposition that “[a]ll educational functions were transferred to [DOE].” See DOE Opp’n at 16. Significantly, *McCormick* addresses none of the arguments that EIA raised on this point. *But see North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 517 n.4 (1982)). The *North Haven* footnote explains why DOE defended that litigation on *certiorari*, after the HEW-HHS-DOE split. Because nothing of substance hinged on whether HEW, HHS, or DOE defended the Title IX regulations on appeal, this Court can disregard the Supreme Court’s “fleeting footnote.” See *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512-13 & n.9 (2006) (disregarding remarks made “[e]n passant” and in “fleeting footnote[s]” when “our decision did not turn on that characterization, and the parties did not cross swords over it”). Since DOE offers nothing of substance to refute EIA’s argument that HEW’s authority was no greater than that of any other agency (Section III.B.1, *supra*) and did not transfer to DOE in any event (this section), it seems clear that DOE cannot lay claim to any “special” interpretive authority here.

4. “Javits Amendment”

EIA cited the so-called Javits Amendment’s plain text and its legislative history to show that it delegated no interpretive authority to HEW, much less to DOE. Pl.’s Memo. at 36-37. DOE responds that “[t]he Javits Amendment *did nothing* to alter” “fundamental point that Title IX granted HEW the authority to publish regulations governing recipient’s athletic programs and activities.” DOE Opp’n at 16 (emphasis added); *see also* 120 Cong. Rec. 15,323 (1974 (Senate bill did “not... confer on HEW any authority it does not already have”); Conf. Rep. 93-1026,

reprinted in 1974 U.S.C.C.A.N. 4271 (adopting Senate’s rulemaking provision). EIA agrees.

In acknowledging that the Javits Amendment added nothing, DOE necessarily rejects the deference found by courts that premised that deference on the Javits Amendment. *See Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993); *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 288 (2nd Cir. 2004); *Kelley v. Board of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994); *Neal v. Bd. of Trs.*, 198 F.3d 763, 770 (9th Cir. 1999); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 828 (10th Cir. 1993). While the decisions that DOE foregoes directly represent only approximately half of the decisions that improperly defer to DOE, they implicitly represent the entire body of “Title IX” law if one includes not only these decisions but also the decisions that rely on these decisions.

5. Policy Statements

EIA argued that general statements of policy, as distinct from interpretive rules, are not entitled to deference until the future agency action that applies the general statement of policy. Pl.’s Memo. at 38-39. DOE does not respond and so concedes the point, which DOE presumably considers irrelevant because DOE claims that the Three-Part Test is an interpretive rule. See DOE Opp’n at 19 (discussing “interpretive rules such as the Three-Part Test”). Previously, in opposing EIA’s request for interim relief, DOE claimed that “The Policy Interpretation and subsequent clarifications *do not state whether a violation of the regulations has occurred*; instead, this determination is made on a *case-by-case basis* in DOE’s investigative letters of findings and other compliance documents.” DOE Opp’n at 45 (July 12, 2007) (docket item #27). Consistent with HEW’s “Hamlin Memorandum,” Second Am. Compl. Ex. 11, at 4 (“failure to meet the [Policy Interpretation] compliance factors does not constitute proof that an educational institution violated Title IX”), DOE’s former position had retreated from “interpretive-rule”

status. Given the degree of changed DOE positions in this litigation alone, EIA does not understand how the Court can consider the Three-Part Test as a consistent agency interpretation.

As EIA explained, status as a “general statement of policy” means that the agency remains free to exercise its discretion, without establishing a “binding norm.” Pl.’s Memo. at 38 (citing *Burroughs Wellcome Co. v. Schweiker*, 649 F.2d 221, 224 (4th Cir. 1981)). Further, and contrary to “interpretive rules,” an agency can change the policy statement without a rulemaking. See *Paralyzed Veterans of America v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); (changing an interpretive rule requires a rulemaking, even though the original interpretation did not require a rulemaking); accord *Alaska Prof’l Hunters Ass’n, Inc., v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999); *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997). Given DOE’s serial clarifications, EIA respectfully submits that DOE treats its Policy Statements as just that (“general statements of policy), not as interpretive rules. Of course, if that is so, DOE is not entitled to deference and JMU cannot rely on the Policy Statement because DOE has not yet applied the Policy Statement to JMU.

6. Deference Inappropriate for Lack of Statutory and Regulatory Notice

EIA argues that the education nexus would require express notice from Congress of the intent to alter the federal-state balance and that that applies doubly in the administrative context here where the non-binding 1979 Policy Interpretation suddenly became the 1996 legal obligation. Pl.’s Memo. at 39-40 (citing *inter alia Wyeth v. Levine*, 129 S.Ct. 1187, 1201-04 (2009) and *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521-22 (1989)). DOE fails to respond to the first half – about notice from Congress – but counters the second half by noting that *Wyeth* and *Bock Laundry* “deal with agency regulations that were required to go through notice and comment rulemaking.” DOE Opp’n at 16 n.8. *Bock Laundry* (which EIA introduced

with a “*cf.*” signal) concerned FED. R. EVID. 609, but DOE is even more seriously mistaken on *Wyeth*, which concerned language in a *Federal Register* preamble, not a in a rule required to go through notice-and-comment rulemaking.

A preamble to a regulation is an interpretive rule. *See, e.g., Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1394 (9th Cir. 1995) (“it is plausible to find that the preamble is merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act”); *Fertilizer Institute v. U.S. E.P.A.*, 935 F.2d 1303, 1309 (D.C. Cir. 1991) (because “EPA’s preamble passage represents the agency’s attempt to interpret the meaning of a statutory provision,” “the rule is interpretative”); *Nat’l Family Planning & Reproductive Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 239 (D.C. Cir. 1992) (“[t]he rule, but not the preamble, was subject to notice and comment”); *cf. Colacicco v. Apotex, Inc.*, 432 F.Supp.2d 514, 534 (E.D. Pa. 2006) (holding that the “Preemption Preamble” at issue in *Wyeth* “is an interpretive rule”). Contrary to DOE’s argument, the *Wyeth* rulemaking was part regulation and part preamble, and the Supreme Court held that notice is required for unannounced changes in preambles. *Wyeth*, 129 S.Ct. at 1201-04. That the 1979 Policy Interpretation and 1996 Clarification were all preamble, no regulation, hardly helps DOE.

C. Three-Part Test Is Substantively Unlawful

EIA argues that the Three-Part Test violates the Title IX regulations, Title IX itself, and the Fourteenth Amendment. Pl.’s Memo. at 40-46. DOE disagrees. The following three sections rebut DOE’s arguments, which are based entirely on extra-circuit precedent that failed even to consider most of the issues that EIA raises. Significantly, the nexus with education – a traditional state concern – works against DOE. Any proffered interpretation that “would effect a drastic alteration of the existing allocation of responsibilities between States and the National

Government in the operation of the Nation's schools" provides clear indication that courts must "hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation." *Owasso Independent School Dist. No. I-011 v. Falvo*, 534 U.S. 426, 432 (2002). In reviewing these issues, therefore, this Court should consider these issues without regard to extra-circuit precedent.

1. Title IX Prohibits Gender-Based Quotas and Disparate Treatment

Consistent with its Title VI template, Title IX sought to eliminate all "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." 117 Cong. Rec. 30,409, 39,251 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972). Indeed, Title IX went even further than Title VI by incorporating Title VII's no-quota provision, 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). Predictably, DOE has used this stringent no-quota provision to justify quotas. DOE Opp'n at 17-18. Properly understood, §901(b) looks to the qualified applicant pool of all athletes, not to all undergraduates. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989) ("nonsensical" to measure alleged discrimination by comparing participation in specialized pursuits with general population); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 996 (1988) (plurality) ("statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value"); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 332 (4th Cir. 2001) ("disparity does not, by itself, constitute discrimination"). Moreover, to the extent that Title IX would allow looking to an irrelevant population, the Three-Part Test still would be unconstitutional because "[s]tatutes creating permanent irrebuttable presumptions have long been disfavored under the Due Process

Clauses of the Fifth and Fourteenth Amendments.” *Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

In any event, the Supreme Court’s recent decision in *Ricci v. DeStefano*, 129 S.Ct. 2658, 2675 (2009), puts to rest the idea that disparate-impact provisions (even statutory ones) displace intentional-discrimination statutes. Significantly, *Ricci* arises under Title VII, which serves as Title IX’s template in pertinent part, and which the Supreme Court often looks to evaluate Title IX issues where the two statutes are similar. *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992). What Congress failed to achieve by disparate-impact legislation, DOE cannot even attempt by disparate-impact regulation much less a disparate-impact memorandum.

2. DOE Lacks Authority for Disparate-Impact Standards

EIA argues that DOE lacks authority to impose disparate-impact standards like the Three-Part Test. Pl.’s Memo. at 41-43. DOE first argues that the Three-Part Test is no such thing, DOE Opp’n at 17, but it obviously is. A disparate-impact standard finds violation without intent, which is precisely what the Three-Part Test does. Moreover, and what’s worse, the Three-Part Test sets an irrebuttable presumption, which is disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments. *Vlandis*, 412 U.S. at 446.

DOE notes – correctly but also irrelevantly – that *Sandoval* did not reach the question whether Title VI authorized disparate-impact regulations to implement that intentional-discrimination statute. *See* DOE Opp’n at 18. Before *Sandoval*, the federal government had relied on *Guardians Ass’n v. Civil Serv. Comm’n* and *Alexander v. Choate* for the proposition that federal agencies may adopt disparate-impact regulations. *See* U.S. Dep’t of Justice, Title IX Legal Manual, 64 & n.48 (Jan. 11, 2001) (*excerpted at* docket item #17, Ex. T) (*pre-Sandoval* Title IX Manual). In rejecting that position, the Court noted that neither *Guardians* nor *Choate*

held that agencies have such authority and noted that such a holding would present “considerable tension with the [*Bakke* and *Guardians* decisions] that [the statute] forbids only intentional discrimination.” *Sandoval*, 532 U.S. at 281-82. Thus, the 2001 *Sandoval* decision casts a cloud on the pre-2001 authorities on which DOE relies by withdrawing their supporting legal authority.

While *Sandoval* merely withdrew those decisions’ underlying support, the 2009 *Ricci* decision directly holds that (whether or not DOE has authority to adopt disparate-impact standards) those regulatory standards cannot excuse or displace violations with the statutory prohibition against intentional discrimination. *Ricci v. DeStefano*, 129 S.Ct. 2658, 2675 (2009); *see also Connecticut v. Teal*, 457 U.S. 440, 453-57 (1982) (under Title VII, reaching a presumptively nondiscriminatory statistical “bottom line” does not excuse discrimination used to attain that bottom line). For all the foregoing reasons, EIA respectfully submits that DOE lacks statutory authority for the Three-Part Test.

3. Quotas Are Unconstitutional in Any Event

EIA argues that quotas such as the Three-Part Test are unconstitutional, even if Title IX allows them. Pl.’s Memo. at 31-33, 43-46. DOE replies semantically that “[t]it is no such thing,” but primarily rests on its prior briefing. DOE Opp’n at 17-18. The point is that prong one is indisputably a quota, and prong one drives the other two prongs. Moreover, even if *each* of a multi-part test cannot be overturned, that does not mean that the unambiguously illegal parts survive scrutiny. *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988); *MD/DC/DE Broadcasters Ass’n v. F.C.C.*, 253 F.3d 732, 734 (D.C. Cir. 2001). Given that prong one drives prongs two and three, however, EIA respectfully submits that prong one’s status as a quota means that this Court must vacate all three prongs.

DOE also argues that *Sandoval* concerned disparate-impact regulations, and the Three-

Part Test (again) is no such thing. DOE Opp'n at 18. DOE is wrong on both counts. First, as explained in Section III.C.2, *supra*, the Three-Part Test plainly is a disparate-impact regulation. Second, *Sandoval* rendered unenforceable agency rules not grounded in the statute. See JMU Opp'n at 2-5.⁵ To the extent that Title IX, Title VI, or any other statute does not prohibit certain conduct, an implied private right of action to enforce that statute will not include actions to enforce an agency regulation more broad than the statutory prohibition. *Sandoval*, 532 U.S. at 281-82. EIA contends that Title IX (the statute) prohibits only intentional, gender-based discrimination, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005), and it would be "absurd" to contend otherwise. *Sandoval*, 532 U.S. at 282 & n.2. Thus, while *Sandoval* involved a disparate-impact regulation, its principle holding extends to any type of regulation (e.g., an equal-opportunity regulation) more broad than the underlying statutory prohibition. Contrary to DOE's suggestion that it is inapposite, DOE Opp'n at 18, *Sandoval* is controlling.

DOE does not and cannot respond to EIA's demonstration that – for all of their extra-circuit Title IX decisions – remarkably few even considered much less reached constitutional issues. Pl.'s Memo. at 31-33. In large part, that likely flows from the fact that – under both strict and intermediate scrutiny – quota compliance is not a sufficient government interest to support the underlying discrimination. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S.Ct. 2738, 2757 (2007) (rejecting balancing as a compelling interest) (plurality); *id.*

⁵ How the Court characterizes 45 C.F.R. §86.41(c)(1) will drive a portion of the Court's analysis. For example, if that regulation merely interprets the Title IX statute, then will weigh against (but not preclude) certain forms of judicial review against DOE, but will mean that EIA can enforce that regulation against JMU. Conversely, if the regulation exceeds the statute, that would facilitate EIA's judicial review against DOE (because EIA would lack an adequate remedy to enforce the regulations) but weigh against EIA's ability to enforce regulatory violations against JMU.

at 2794 (rejecting “plan... [that] relies upon a mechanical formula... on the basis of... rigid criteria”) (Kennedy, J., concurring in part and concurring in the judgment). Significantly, EIA is not attempting to apply Parents Involved and its strict-scrutiny for racial discrimination to gender discrimination under the Equal Protection Clause. EIA is arguing that the underlying interest (quota compliance) does not qualify to support either gender or racial discrimination.

D. Three-Part Test Is Procedurally Invalid

EIA argues that the Three-Part Test violated APA’s notice-and-comment requirements for rulemaking, and thus is void *ab initio*, and that the Three-Part Test violated Title IX’s presidential approval requirements and the General Education Provisions Act’s laying-before procedures, and thus never took effect. Pl.’s Memo. at 46-52. The next three subsections address DOE’s meager responses to these independently fatal procedural flaws of the Three-Part Test.

1. Three-Part Test Violated APA Rulemaking Requirements

Through serial amendment via purported interpretation, the Three-Part Test changes the regulation from equal interest-based opportunity to equal enrollment-based participation. Pl.’s Memo. at 47-50. DOE defends its revisions by citing to *Chen Zhou Chai v. Carroll*, 48 F.3d 1331 (4th Cir. 1995), and the *NWCA*, *Cohen*, and *Roberts* litigation. DOE Opp’n at 19-20.⁶

⁶ With respect to *Cohen* and *Roberts*, DOE argues that the prong-one “safe harbor” appeared in those cases before the 1996 Clarification. *Id.* at 20. Those courts did not consider the procedural validity of the Three-Part Test (namely, if the Test is a safe harbor, was it validly promulgated?) or HEW’s contemporaneous interpretation that “failure to meet the [Policy Interpretation] compliance factors does not constitute proof that an educational institution violated Title IX.” Second Am. Compl. Ex. 11, at 4. Similarly, they did not consider that the Policy Interpretation “does not contain a separate section on institutions’ future responsibilities[,]... institutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available.” 44 Fed. Reg. at 71,414. In essence, based on issues

(Footnote cont'd on next page)

“There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure of its own invention” in place of the statutorily mandated procedures. *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764-65 (1969) (“rule-making provisions of that Act, which the Board would avoid, were designed to assure fairness and mature consideration of rules of general application”); *see also* Pl.’s Memo. at 47-48 n.28 (agencies cannot make up rulemaking procedures of their own). “[I]t is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment.” *Syncor Intern. Corp.*, 127 F.3d at 95. The reason, moreover, is not good policy such as giving the public a voice, but the Constitution:

[T]he crucial distinction between [substantive rules] and the other two techniques [i.e., interpretive rules and policy statements] is that a substantive rule modifies or adds to a legal norm based on the agency’s own authority. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking.

Id. Without express compliance with the procedural terms of the congressional delegations that authorize agency rulemaking, the agency would be engaged in lawmaking without bicameralism and presentment. *See also* U.S. CONST. art. I, §1 (“All legislative Powers [vested] in a Congress”); *Loving v. U.S.*, 517 U.S. 748, 771 (1996). Although Congress lawfully can delegate, agencies cannot lawfully usurp.⁷

DOE’s citation to the *NWCA* litigation, DOE Opp’n at 19, is understandable, but

(Footnote cont’d from previous page.)

and materials that they did not consider, *Cohen* and *Roberts* are wrongly decided with respect to the safe-harbor issue.

⁷ DOE suggests that its memo-making procedure somehow not only approximates but also constitutes notice-and-comment rulemaking. DOE Opp’n at 16-17. But the DOE process omitted a key component: the requirement that the agency respond to comments, 5 U.S.C. §553(c), without which the entire proceeding is merely window-dressing.

demonstrably not controlling or even relevant because the *NWCA* plaintiffs lacked standing (and thus cannot control on the merits, Pl.'s Memo. at 3). In addition, the *NWCA I* rulemaking-related *dicta* violates the controlling decisional law in the D.C. Circuit. *See* Pl.'s Memo. at 49. It is difficult to know what DOE means by citing *Chen Zhou Chai*, which concerned an anomalous situation where regulations duly promulgated via notice-and-comment rulemaking in July 1990 superseded not only the prior interim regulations (promulgated in June 1980) but also an interpretive rule or general statement of policy, promulgated in January 1990 to supplement the then-extant interim rule. *Chen Zhou Chai*, 48 F.3d at 1340. Consistent with both the notice of proposed rulemaking and the final rulemaking, the July 1990 rule superseded the interim rule. *See* 53 Fed. Reg. 11,300 (1988) (“[t]he rule modifies the proposed rule published on August 28, 1987 ... and the interim rule published on June 2, 1980”); 55 FR 30,674, 30,675 (1990) (same).

The suggestion that the January 1990 supplement to the superseded interim rule would survive is as frivolous as suggesting that a sub-lease would survive the term of the underlying lease. Moreover, the situation here and in the usual course is precisely the reverse: namely, an agency promulgates a regulation pursuant to notice-and-comment rulemaking, which it subsequently amends via “interpretation” without notice-and-comment rulemaking. *See, e.g., Jerri’s Ceramic Arts, Inc. v. Consumer Product Safety Comm’n*, 874 F.2d 205, 208 (4th Cir. 1989); *Hemp Industries Ass’n v. Drug Enforcement Admin.*, 333 F.3d 1082, 1091 (9th Cir. 2003) (“[a]n agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning”).

The parties agree that the test for requiring a rulemaking includes whether the agency action creates new rights or obligations, but disagree on whether the Three-Part Test does so. DOE deems it a “legal obligation” for schools to meet one of the three parts of the Three-Part

Test, Facts, ¶7, and wrote JMU students to advise that the Three-Part Test had created three alternate but otherwise-exclusive means of complying with the equal-opportunity regulation. Second Am. Compl. Ex. 5; *see also General Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) (“cases likewise make clear that an agency pronouncement will be considered binding as a practical matter if it either appears on its face to be binding”) (“*GE*”); *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (“the entire Guidance ... reads like a ukase[:]. It commands, it requires, it orders, it dictates”). Significantly, in *GE*, the agency had provided two presumptive means of conducting the required risk assessment, but kept open the possibility of using “unconventional methods” beyond those two methods. *GE*, 290 F.3d at 383. Notwithstanding this purported non-binding aspect (which is not present with the Three-Part Test), the D.C. Circuit easily found that the policy “binds applicants and the Agency” by limited the discretion down to those methods. *GE*, 290 F.3d at 384.

As in *Jerri’s Ceramic Arts*, the suggestion that the Three-Part Test “does not ‘command performance’ is simply incredible.” *Jerri’s Ceramic Arts*, 874 F.2d at 208. Indeed, the Supreme Court has held that agencies cannot, by serial interpretations first create a safe harbor and then later make that safe harbor an exclusive means of complying with the underlying provision:

this original version of the cost-justification rule was nothing more than a safe harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the § 4(f)(2) exemption. It was not until 1979 that this regulatory safe harbor was transformed into the exclusive means of escaping classification as a subterfuge.

Betts, 492 U.S. at 171-172, *abrogated on other grounds by statute*, PUB. L. NO. 101-433, 104 Stat. 978 (1990). EIA respectfully submits that it is “simply incredible” to argue either that the first the creation and then the exclusivity of the Three-Part Test safe-harbor provisions did not command compliance and thus require notice-and-comment rulemaking.

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

EIA argues that Title IX's presidential-approval requirement for "rules, regulations, and orders of general applicability" applied to the 1979 Policy Interpretation and that failure to comply with that provision renders the 1979 Policy Interpretation without lawful effect. Pl.'s Memo. at 50-52. In particular, EIA argued that cases suggesting that this provision does not apply to "guidelines" (as distinct from rules or orders) engage in a *non sequitur* because issuing non-rule guidance is an order. *Id.* at 52 (citing *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238 n.7 (1980)). Nonetheless, DOE doubles down on its losing hand by simply re-citing the same two extra-circuit, district-court cases, one unpublished. DOE Opp'n at 20.

Standard Oil cites §551(6)'s definition of "order" as the "whole or a part of a final disposition ... of an agency in a matter other than rule making" for the proposition that, while an administrative complaint is an "order" (and thus within the definition of "agency action") under the definition of "agency action," it is nonetheless not "*final* agency action" reviewable under 5 U.S.C. §704. *Standard Oil*, 449 U.S. at 238 n.7 (quoting 5 U.S.C. §551(6), alterations and emphasis in *Standard Oil*). Viewed this way, and accepting *arguendo* the reasoning that the Three-Part Test is mere guidance and not a rule, the agency action that produces the Three-Part Test is nonetheless an "order." Because that order applies generally (rather than to a particular proceeding), that order requires presidential approval before it takes effect. 20 U.S.C. §1682. Because it never received that approval, the 1979 Policy Interpretation was not in effect on May 4, 1980, and did not transfer from HEW to DOE. As such, the 1996 Clarification invented the Three-Part Test out of thin air as a legal obligation, which an agency cannot do.

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

EIA argues that the General Education Provisions Act ("GEPA") required HEW to

submit the 1979 Policy Interpretation to Congress before the 1979 Policy Interpretation could take effect, and that HEW's intentional failure to submit the 1979 Policy Interpretation to Congress renders the 1979 Policy Interpretation without lawful effect. *See* Pl.'s Memo. at 52; Facts, ¶5; Second Am. Compl. Ex. 12 (letter from HEW Secretary to chairs and ranking members of relevant House and Senate committees to explain HEW's non-submittal of 1979 Policy Interpretation) (referencing and transmitting the "Hamlin Memorandum"). DOE argues that GEPA did not apply "because the Three-Part Test is not a 'regulation' as that term is defined in [GEPA, but instead a] clarification of a regulation, namely 34 C.F.R. § 106.41(c)(1)" and that "the Test itself does not have a legally binding effect." DOE Opp'n at 20-21 (*citing* 20 U.S.C. §1232(a)).

DOE's facile rejection of "regulation" status ignores the breadth of GEPA's use of that term: "any generally applicable rule, regulation, guideline, interpretation, or other requirement that ... is prescribed by [DOE or HEW] and ... has legally binding effect in connection with, or affecting, the provision of financial assistance under any applicable program." 20 U.S.C. §1232(a). As HEW's General Counsel explained, "[t]he 1974 House Report on section 431(d) indicates that this provision would apply to any 'piece of paper [which is] intended to be binding on the public,'" and "[i]t is not the intention of the Committee that the choice of descriptive words in the new language should be interpreted in an *exclusionary* manner." Second Am. Compl. Ex. 1, at 5-6 (*citing* House Rept. No. 93-805, at 73 (1974)) (General Counsel's emphasis). Similarly, he explained that the Senate report "cautioned against any attempt to 'shield' 'something that would ordinarily be considered of a regulatory nature' from Congressional consideration by giving it a different label, *id.* at 7 (*citing* Sen. Rept. No. 94-882, at 108 (1976), and concluded that the "legislative history, taken as a whole, indicates that

Congress intended section 431(d) to be liberally construed in favor of coverage and wanted close questions as to whether a particular document came within its scope to be resolved in favor of coverage.” *Id.* As explained above, “binding” is a flexible term in administrative law and includes not only expressly binding but also implicitly binding. *CropLife America v. EPA*, 329 F.3d 876, 883 (D.C. Cir. 2003) (agency’s press release can constitute a sufficiently binding position to qualify as final agency action).⁸

E. JMU’s Elimination of the Ten Teams Violated Title IX and the Equal Protection Clause

Although EIA demonstrated that JMU fails to comply with Title IX and the Fourteenth Amendments, Pl.’s Memo. at 29-30 (ongoing violations), 52-58 (violations for 2007-08), JMU argues that “EIA apparently concedes that the University currently is complying with both Title IX and the Constitution.” JMU Opp’n at 10.

JMU apparently misunderstands EIA’s rationale for seeking partial summary judgment only with respect to 2007-07. First, there has been no discovery in this case, and EIA (and probably even JMU) do not yet have the correct participation and scholarship data for 2008-09. Given the representations that JMU made about being proportional in 2007-08, and the extent to which JMU missed proportionality that year, it seem prudent to wait not only until the data are available but also until this Court resolves the threshold issues (*e.g.*, if there is no Three-Part Test to meet, EIA would seek different discovery than if this Court upholds the Three-Part Test). Moreover, with respect to 2007-08 at least, JMU has violated not only the EIA view of the law

⁸ When an agency adopts a sufficiently inflexible position (*e.g.*, a position that forecloses the future exercise of discretion), courts refer to that position as having the “force of law,” even if the agency adopted that position via flawed procedures that render the agency action void *ab initio*. *CropLife America*, 329 F.3d at 883.

(*i.e.*, equal opportunity, based on interest) but also the DOE-JMU view of the law (*i.e.*, equal participation, based on enrollment, plus scholarship proportionality). As such, summary judgment is appropriate with respect to 2007-08.

1. JMU Substantively Violated JMU's and DOE's View of the Law

It is undisputed that JMU had a participation-proportionality gap of 2.0% (17 males) and a scholarship-proportionality gap of 11.94% (\$1.313 million to women to bring scholarship gap within the 1.0% baseline). Facts, ¶¶34-36; Third Supplemental Joseph Affidavit, ¶¶6-9; Norma V. Cantú, DOE Assistant Secretary for Civil Rights, Dear Colleague Letter (July 23, 1998). Given the roster size for the men's team with the smallest cost and squad size and strongest equal-protection argument (cross country), JMU did not meet the prong-one safe harbor that it set out to meet because its participation-proportionality gap exceed the size of the men's cross-country team that JMU eliminated. *See* Office of Civil Rights, U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: Three-Part Test*, at 4-5 (Jan. 16, 1996). Similarly, by disproportionately eliminating non-scholarship male athletes on the ten teams, without making corresponding adjustments to its scholarship distribution, JMU significantly underfunded its women athletes (or overfunded its men athletes). Indeed, reinstating the men's cross-country team would have secured supplemental sports-sponsorship rebates under the "Revenue Distribution Plan" of the National Collegiate Athletic Association ("NCAA") (docket item #26, Ex. 3), while at the same time alleviating \$288,000 in JMU's unlawful (in DOE's view) scholarship gap. Third Supplemental Joseph Affidavit, ¶9.

JMU defends its disparate funding of men's and women's scholarships by citing NCAA caps on scholarships and the need to "fund the scholarships of the former athletes on the discontinued teams." JMU Opp'n at 4, 10. It is undisputed, however, that NCAA regulations are

no defense to disparate scholarship funding, 45 C.F.R. §86.6(c), or that the portion of JMU's \$1.313 million gap for 2007-08 attributable to athletes from the discontinued teams was no more than \$13,500 (*i.e.*, one percent of the gap). Nothing required JMU to maintain such high levels of funding for its few men's teams that NCAA limits prevented JMU from comparably funding its women's teams.

To the extent that equity enters into this Court's analysis, EIA respectfully submits that this Court should consider JMU's attributing its inequitable scholarship funding on the few athletes from discontinued teams that divided up to \$13,500. In any event, JMU was under no obligation to eliminate any teams. JMU Opp'n at 3 ("prior to its recent restructuring of its athletic program, the University was in full compliance with the Title IX statutory provisions"); DOE Opp'n at 3 ("[n]either the Department nor the Three-Part Test dictated that JMU demote ten teams"). But to save approximately \$500,000, JMU incurred a \$1.313 million shortfall in scholarship funding. That JMU attempted to qualify for a safe harbor, but failed, leaves JMU exposed to liability because, as an entity seeking to qualify under a safe harbor, JMU bears the burden of proving that its gender-conscious actions (which otherwise presumptively violate Title IX) nonetheless meet the terms of the safe harbor. *U.S. v. Abdi*, 342 F.3d 313, 317 (4th Cir. 2003); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57-58 (2005). Because JMU failed comply with even its own view of the law, the Court should enter summary judgment for EIA on Count IV with respect to 2007-08. Moreover, because JMU acted based on gender, but failed to qualify for the intended safe harbors, nothing shields JMU's statutory violations. Because JMU violated the statute, its arguments regarding the Title IX regulations' enforceability are inapposite.

2. JMU Substantively Violated EIA's View of the Law

In the prior section, EIA referred to JMU's attempts to comply with regulatory safe harbors that EIA argues do not exist, either because they were void *ab initio* or never took lawful effect, and in any event are substantively unlawful and *ultra vires* DOE's authority. If EIA loses all of arguments against the Three-Part Test, the Court should evaluate JMU's conduct under the federal regime in the prior section. By contrast, if EIA prevails on any of its substantive or procedural attacks to the Three-Part Test, the Court should evaluate JMU's Title IX and equal-protection violations under the Title IX regulatory and statutory regime discussed in Section II.F.2, *supra*. In assessing JMU's actions, moreover, this Court should apply strict scrutiny, both because the First-Amendment associational nexus and because—consistent with the Title VI template – Congress intended Title IX as a strict-scrutiny statute.

3. JMU Procedurally Violated EIA's View of the Law

Noting that state or federal law can create a legal interest sufficient to confer due-process protections, EIA outlined several theories under which its members would have property interests based in contract and in quasi-contract, both as principals and as third-party beneficiaries to JMU's contracts with federal government agencies. Pl.'s Memo. at 55-58. JMU responds by citing two cases in which the student-athlete was held not to have rights at all, either because his ability to play was tied to athletic-association eligibility (*Spath*) or because his entitlement to receive scholarships was time-limited and he had no expectation to continuation (*Conrad*). See JMU Opp'n at 10 (*citing Spath v. Nat'l Collegiate Athletic Ass'n*, 728 F.2d 25, 28 (1st Cir. 1984) and *Conard v. University of Washington*, 834 P.2d 17, 21-26 (Wash. 1992)). Although *Spath* includes a somewhat specious equal-protection claim, neither *Spath* nor *Conrad* includes an applicable federal contractual relationship making the plaintiffs third-party

beneficiaries. *See also Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (protected property interests include all benefits to which there is a “legitimate claim of entitlement”). Neither Mr. Spath nor Mr. Conrad has a “legitimate claim of entitlement,” whereas all of EIA’s members have such claims under the Title IX regulations with which JMU has agreed to comply for EIA members’ benefits.

CONCLUSION

WHEREFORE, plaintiff EIA respectfully asks this Court to grant partial summary judgment in its favor and allow EIA appropriate discovery with respect to JMU’s violations with respect to 2008-09 and subsequent years.

Dated: October 2, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October 2009, I electronically filed the foregoing “Plaintiff’s Memorandum in Opposition to Defendants’ Motions to Dismiss and in Support of Plaintiff’s Motion for Partial Summary Judgment” with the Clerk of the Court using the CM/ECF system, which I understand to have caused service of Susan K. Ullman on behalf of the federal defendants and service of John F. Knight and William E. Thro on behalf of the University defendants. In addition, I understand that Messrs. Knight and Thro will provide notice to their co-counsel within Virginia’s Office of the Attorney General.

/s Lawrence J. Joseph

Lawrence J. Joseph