

National Wrestling Coaches Association
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College Sports Council
1825 I Street, NW Suite 400
Washington, DC 20006
202-429-2097

June 18, 2003

The Hon. William J. Leidinger
Chief Information Officer
Assistant Secretary for Management
U.S. Department of Education
Room 4082, ROB-3
400 Maryland Avenue, SW
Washington, DC 20202

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

Dear Assistant Secretary Leidinger:

Pursuant to the Department of Education’s Information Quality Guidelines and the Data Quality Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A 153-154 (2000), we appeal the Department’s enclosed May 19, 2003 denial of our enclosed February 26, 2003 Information Quality Request concerning the above-captioned report prepared by the Secretary’s Commission on Opportunity in Athletics (Commission) and disseminated by the Department.

In his denial, the Director of Information Management makes three separate arguments why the Data Quality Act does not require the Department to correct the report: (1) page 24 of the report already discusses analyses of National Collegiate Athletic Association (NCAA) participation data by Professor Jerome Kravitz of Howard University and Mr. Corey Bray of the NCAA Research Staff, (2) the Commission report already acknowledges the extreme difficulty to obtain a data set acceptable to all parties, and (3) the Commission did not rely on challenged General Accounting Office (GAO) data in making the Commission’s recommendations to the Department. All three defenses miss the point.

Before addressing the Director of Information Management’s defenses, we stress that our Data Quality Act challenge does not address the GAO report *per se* or even the Commission’s inclusion of that flawed GAO data in the Commission report. Instead, we challenge the Department’s dissemination of a third-party report that contains false and misleading information, including that:

- From 1972 to 1998, women’s athletic participation opportunities grew from 30,000 to 157,000.
- From 1981 to 1999, the total number of college women’s teams increased by 66 percent.
- From 1981 to 1999, half of men’s sports (13 of 26) experienced a net loss, with wrestling experiencing the greatest decline (171 teams).

As indicated in our Information Quality Request, these data overstate the gains in women’s athletic opportunities and understate the losses in men’s opportunities during key periods relevant to Title IX. Specifically, the Commission report masks the loss of hundreds of men’s teams during the 1980s and 1990s with the illusory “growth” that resulted when 134 schools with hundreds of pre-existing teams migrated into the survey population. This illusory growth is precisely the same dubious accounting

allegedly practiced by Enron and MCI: masking operating losses with false growth fueled by merger and acquisition.

Even worse, the Commission report spreads the misperception that the so-called Three-Part Test created significant increases in athletic opportunities for women, when in fact most increases occurred when the Three-Part Test was not in force.¹ That misperception incorrectly suggests that repeal of the Three-Part Test would threaten the continued growth of women's opportunities. As such, the misperception serves as a barrier to repeal of the Three-Part Test's perverse incentive to cut and cap men's opportunities in the name of eliminating gender discrimination.

With that background, we turn to the Director of Information Management's three defenses: none bears any relevance to our challenge. First, he argues that page 24 of the Commission report discusses NCAA participation data presented by Professor Kravitz and Mr. Bray. As both men pointed out during their testimony, the NCAA data provide an improper basis on which to judge aggregate growth in participation because the NCAA grew by more than 200 schools during the survey period (1981-1999). The GAO report purports to correct that flaw by including participation data not only from the NCAA, but also from the second largest athletic association, the National Association of Intercollegiate Athletics (NAIA). As indicated in our Information Quality Request, however, the GAO report has the same flaw: 134 schools migrated into the NCAA-NAIA population during the survey period. Nothing in the Commission report alerts the reader that, just like the NCAA data, the GAO data are misleading. Indeed, by addressing the flaws of the NCAA data, but not the virtually identical flaws of the GAO data, the Commission report actually creates the false impression that the Commission assessed the GAO data and found it acceptable.

Further, although the Commission report addresses some failings of the NCAA data on page 24 in its discussion of Finding 4 of Question 1, the report's more prominent Background section includes a highly misleading chart based solely on NCAA data (page 13), without any qualification or caveat. As demonstrated by the enclosure, the Commission chart (Chart 1 in the enclosure) suggests that women's opportunities have grown dramatically, but that men's opportunities also have grown. In Chart 2 we superimpose the missing data on the growth of the NCAA membership over the survey period, and in Chart 3 we normalize the data to show participation *per NCAA member*. By following this standard statistical methodology, we demonstrate that women's opportunities have not grown as dramatically as suggested by Title IX's mythology and that men's opportunities in the NCAA have decreased by more than 20%. As we note in our Information Quality Request, moreover, the women's participation data does not include the hundreds of women's teams that participated in the Association for Intercollegiate Athletics for Women (AIAW) at times when the NCAA and NAIA did not include women's teams. A true accounting, therefore, would include all of the AIAW teams that existed in 1981, further flattening the rate of growth of women's opportunities since 1981.

¹ Although Title IX was enacted in June 1972, the Three-Part Test was not issued until December 1979. Pub. L. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (June 23, 1972); 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979). Further, between February 1984 and March 1988, the Supreme Court's *Grove City* decision rendered both Title IX and the Three-Part Test inapplicable to athletics. See *Grove City College v. Bell*, 465 U.S. 555 (1984). Indeed, Title IX arguably ceased to apply to athletics in August 1982, when an appellate court so ruled against the Department in the *Grove City* litigation. See *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), *aff'd* 465 U.S. 555 (1984).

The Hon. William J. Leidinger
Chief Information Officer
June 18, 2003
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In his second defense, the Director of Information Management notes that the Commission report identifies the extreme difficulty in obtaining a data set acceptable to all parties. Leaving aside that statistics should not be a popularity contest, the Commission's acknowledged difficulties should have put the Department on notice not to disseminate the Commission report without a thorough pre-dissemination review, as the Data Quality Act requires. *See* 67 Fed. Reg. 8452, 8459 (Feb. 22, 2002). To the contrary, however, the Department began disseminating the Commission report immediately upon its presentation to the Department by the Commission. Further, as with the first defense, by acknowledging its extreme difficulties in agreeing on data sets, citing flaws with the NCAA data, and republishing the GAO data without caveat, the Commission report inaccurately suggests that the GAO data are free from controversy.

Finally, in his third defense, the Director of Information Management suggests that the Commission report escapes Data Quality Act review because the Commission did not rely on the GAO data in making recommendations to the Department. In making this claim, he cites a provision of the Department's Information Quality Guidelines that requires the Department to identify the source and shortcomings of "administrative and program data" before relying on such data for decision-making purposes. We agree that the Data Quality Act would require the Department to assess the objectivity of the data in the Commission report before the Department relies on the report for decision-making. So too would the Administrative Procedure Act and simple common sense. But the Data Quality Act requires more. Specifically, for third-party information (such as the Commission report), the Department must conduct pre-dissemination review and provide a process for the interested public to seek and obtain timely corrections. Pub. L. No. 106-554, § 515(a), (b)(2)(B); 67 Fed. Reg. at 8459. Given that the Department disseminates the Commission report directly via its Internet site and the Department's Education Publications Center disseminates it via email, facsimile, mail, and several toll-free telephone numbers, the Commission report is subject to the Data Quality Act. *See* 67 Fed. Reg. at 8454 ("agency dissemination of such [third-party] data requires that the information adhere to the agency's information quality guidelines").

In summary, the Department did not need to disseminate the Commission report. Indeed, in our February 26, 2003 Information Quality Request, we cautioned against the Department's doing so without a thorough Data Quality review, just as we cautioned against the Commission's relying on the GAO data in our September 26, 2002 comments to the Commission. Although the Commission operates outside the Data Quality Act, the Department does not. Having elected to disseminate the Commission report, therefore, the Department has subjected the information contained in that report to the rigors of the Data Quality Act.

For all the foregoing reasons, the Department must correct the Commission report. Please do not hesitate to contact us at the numbers above with any questions concerning this appeal.

Sincerely,

Michael W. Moyer
Executive Director
National Wrestling Coaches Association

Eric Pearson
Chairman
College Sports Council

Enclosures

Information Quality Appeal
National Wrestling Coaches Association and College Sports Council

Chart 1: NCAA Participation (Commission Report, 13)

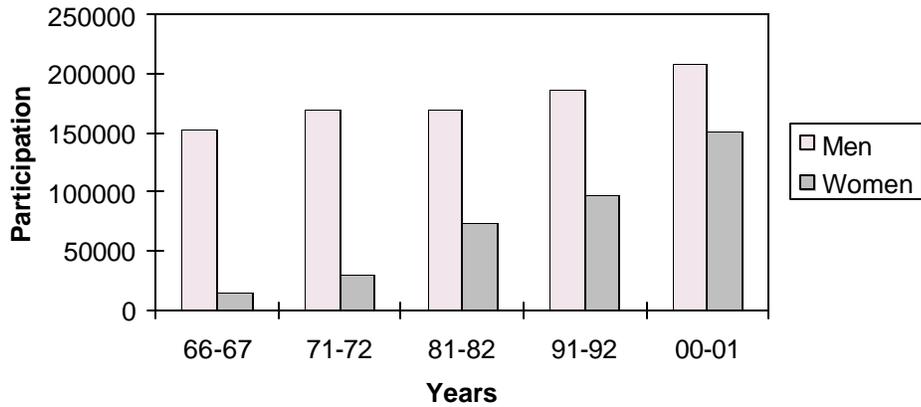


Chart 2: NCAA Participation vs. Membership

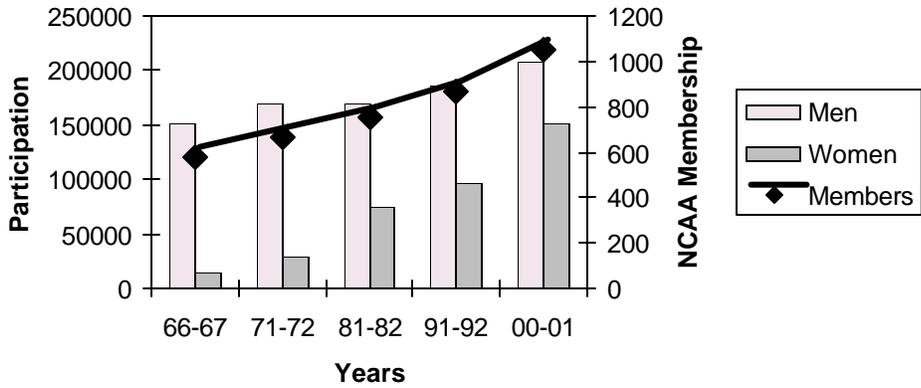
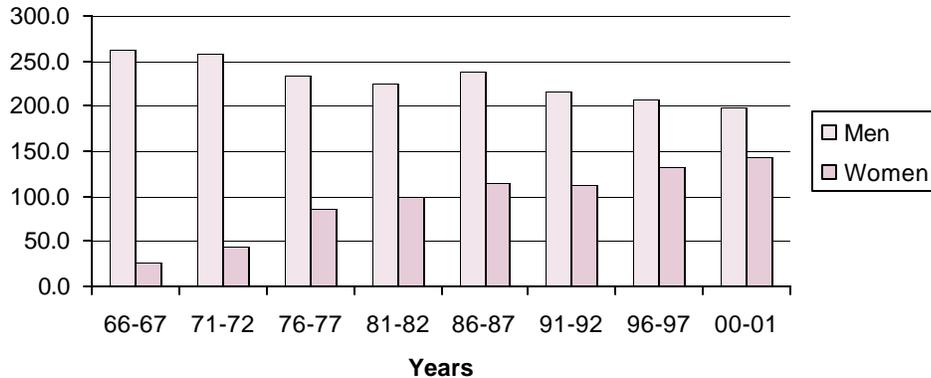


Chart 3: Participation Per NCAA Member





UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE CHIEF INFORMATION OFFICER

Michael W. Moyer
Executive Director
National Wrestling Coaches Association
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Manheim, PA 17545

MAY 19 2003

Eric Pearson
College Sports Council
1825 I Street, NW Suite 400
Washington, DC 20006

Dear Mr. Moyer and Mr. Pearson:

This letter is in response to your February 26, 2003 Information Quality Request (Feb. 26 letter) regarding "Open to All: Title IX at Thirty: Report of the Secretary's Commission on Opportunity in Athletics." We have carefully reviewed your correction request and the reasons for the correction. For the reasons stated below, we have determined that no correction is warranted.

In your request, you indicate that the Commission's Report does not comply with the Department's Information Quality (IQ) Guidelines because it (1) fails to document the shortcomings and limitations of data cited in the report, (2) fails to use representative or complete survey populations, and (3) fails to identify conflicting information and to caution against inappropriate conclusions. In particular, you indicate that the Commission's Report "relies" on General Accounting Office (GAO) reports from December 2000 and March 2001, that do not account for schools that have joined the NCAA or NAIA since 1981, or schools that may have joined the NCAA or NAIA after the Association for Intercollegiate Athletics for Women (AIAW) disbanded in 1983. Taken together, you indicate that these inaccuracies overstate the gains in women's sports opportunities since 1981 and understate the losses in men's sports opportunities over the same period. You ask that the Department either conduct or commission a demographic analysis of changes in men's and women's sports opportunities, or at least qualify the Commission report to note the shortcoming of this data, either through a revised publication or errata sheets.

The IQ Guidelines require that for third-party data, the Department "identify the source of the information and any shortcoming or limitations of the data if we rely upon it for decision-making purposes." (emphasis added) Guidelines at 6. In this case, the GAO reports are only two of the many sources of information that was collected by the Commission as it developed recommendations for the Secretary. The Commission's Report uses the data from the GAO reports essentially as background information on the changes in athletic participation by men and women since Title IX was enacted. The substance and cumulative weight of the citations to the GAO data in the Commission's Report is, at most, a general statement in support of Title IX and its gains for women's sports, which is something you do not contest in your February 26, 2003 letter. ("We dispute the foregoing data not to deny the great gains

Page 2 – Messrs. Moyer and Pearson

in women's sports, but to stress that women made these gains before the Three Part Test was issued in December 1979." Feb. 26 letter at 3.)

The Commission's Report also examines and presents other data that place the data from the GAO reports in a broader context. For example, in the "Findings" section, the Commission's Report cites numbers on participation provided by Jerome Kravitz, a consultant and professor at Howard University, as well as testimony from Corey Bray of the NCAA, who commented on overall participation of men and women in NCAA championship sports. As explained on page 24 of the Report, "[t]he Commission found that it is extremely difficult to obtain a set of data that is accepted by all parties." Thus the Commission's Report, taken in its totality, presents data from several perspectives on the opportunities for men and women to participate in sports both before and after Title IX was enacted. The data in the GAO reports were only some of the information that was collected and reported, and do not, in and of themselves, form the basis for the recommendations of the Commission.

In sum, no correction to the Commission Report is warranted because the Commission did not rely on the GAO report data in making its recommendations to the Department.

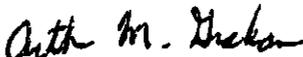
Procedures for Appeal

If you are not satisfied with this decision, you may appeal to the Department's Chief Information Officer within thirty (30) calendar days of receipt of the Department's decision. This administrative appeal must include a copy of the initial request, a copy of the Department's decision, and a letter explaining why you believe the Department's decision was inadequate, incomplete or in error.

This appeal information should be provided to the Department's Chief Information Officer (OCIO) at the following address:

The Chief Information Officer
U.S. Department of Education
Re: Information Quality Appeal
Room 4082, ROB-3
400 Maryland Avenue, SW
Washington, DC 20202

Sincerely,


Arthur M. Graham
Director, Information Management

National Wrestling Coaches Association
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February 26, 2003

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

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

Dear Mr. Graham:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Potential Impacts of the Commission Report’s Inaccuracies

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

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

Arthur M. Graham
Director, Information Management
February 26, 2003
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the opponents of reform have stated repeatedly on national television, in newspapers, in their *amici curiae* brief in our lawsuit, and in testimony to the Commission that men's opportunities have increased, while women's opportunities have increased even more, during the 1980s and 1990s. They imply that more popular men's sports have increased to balance out the decline in men's Olympic sports. If disseminated by the Department, the Commission report will exacerbate the misperception that the Three-Part Test created significant increases in women's sports opportunities, when in fact most gains occurred when the Three-Part Test was not in force. Conversely, the Commission report will further exacerbate the misperception that men's opportunities increased during the 1980s and 1990s, when in fact men lost more than 1,000 teams since 1981.

Conclusion

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

Sincerely,

Michael W. Moyer
Executive Director
National Wrestling Coaches Association

Jamie V. Moffat
Executive Director
College Sports Council

Enclosure

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

September 26, 2002

Dear Commissioners:

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

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

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

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

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

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

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

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

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

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

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

Factual Misconceptions about Opportunities in Intercollegiate Athletics

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

Sincerely,

Michael Moyer
Executive Director
National Wrestling Coaches Association

Eric Pearson
Chairman
College Sports Council