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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

FAX TRANSMITTAL

TO: George Stephanopoulos, Senior Advisor to the President

ORGANIZATION: The White House

PHONE NUMBER: 456-7105

FAX NUMBER: 456-2883

FROM: Leslie Thornton, Deputy Chief of Staff and
Counselor to the Secretary

PHONE NUMBER: 401-3001

MESSAGE: FYI

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/ PAGE(S) TO FOLLOW



National Association of
Elementary School Principals
1615 Duke Street
Alexandria, VA 22314-3483
Contact: June Million
703-684-3345
703-548-6021(fax)

75 YEARS OF SERVING AMERICA'S CHILDREN

For Immediate Release

SCHOOL PRINCIPALS GIVE PRESIDENT CLINTON "A" FOR EFFORT

ALEXANDRIA, VA—November 14, 1995—The National Association of Elementary School Principals (NAESP) commends President Clinton for standing up for children and their education yesterday with his veto of the short-term appropriations bill. NAESP urges the President to continue to refuse to sign legislation that will abandon America's youngest, most vulnerable, and non-voting citizens.

"Every educator in the nation should celebrate the President's veto," said Samuel G. Sava, NAESP's executive director. "It proved to us that the White House is not kidding, and that President Clinton does care about kids. We want him to know that we sincerely appreciate his strength under incredible pressure. We're proud that he has been steadfast and we urge him to continue to insist on a national budget that doesn't shortchange our children."

Established in 1921, the National Association of Elementary School Principals serves 26,000 elementary and middle school principals in the United States, Canada, and overseas.

TO: GEORGE STEPHANOPOULOS

FROM: TOM F.

Dick thought this
would be useful.

--one page follows.

Investing in America's Students and the Future: MAJOR EDUCATION PROGRAMS

(detail in thousands of dollars; total in billions)

Program	FY 1995 Approp.	FY 1996 Request	Possible Position	FY 1996 House	FY 1996 Senate Committee	Possible Additions over Senate
Raise Standards of Achievement:						
Goals 2000	\$371,870	\$750,000	\$750,000	0	\$310,000	\$440,000
Improve Basic Skills:						
Title I LEA Grants	6,689,356	7,000,000	7,000,000	\$5,555,000	6,019,398	980,602
Help Prevent Drug Abuse and Violence in Schools:						
Safe and Drug-free Schools	485,981	500,000	500,000	200,000	200,000	300,000
Build Partnerships to get Computers in Classrooms:						
Education Technology Programs	55,825	122,250	122,250	26,000	57,475	64,775
Help Youth Move from School to Careers:						
School-to-Work 1/	122,500	200,000	200,000	95,000	122,500	77,500
Assist Parents in Learning Basic Skills:						
Adult Literacy and Even Start	354,369	385,236 2/	385,000	352,024	352,024	42,976
Help Students Learn English:						
Bilingual Education	156,700	200,000	172,859	63,000	122,859	50,000
Upgrade Teacher Skills:						
Eisenhower Professional Development	251,298	735,000	485,000	50,000	275,000	210,000
Help Students go to College:						
Pell Grants	6,148,845	6,801,503	5,707,000 3/	5,697,000	5,400,000	307,000
maximum award-non add	2,340	2,620	2,620	2,440	2,440	180
minimum award-non add	200	200	200	600	200	0
Locally tailored school settings:						
Charter Schools	6,000	20,000	20,000	6,000	10,000	10,000
Raise Academic Standards for Native Americans:						
Indian Education	81,041	84,785	82,000	52,500	54,860	27,340
Assist Disabled Children Meet High Standards:						
IDEA State Grants	2,683,180	2,772,460	2,772,460	2,684,248	2,684,248	88,214
Prepare Disadvantaged Students for College:						
Federal TRIO Programs	463,000	463,000	473,000	463,000	463,000	10,000
Assist Schools with Career Preparation Programs:						
Vocational Education	1,103,618	1,178,088	1,178,088	903,919	1,002,349	175,739
Provide Enrichment for Talented Students:						
Javits Gifted and Talented Education	4,921	9,521	6,521	3,000	3,000	6,521
Other Discretionary Programs	5,580,660	5,083,599	5,272,534	4,670,156	5,272,534	0
TOTAL DISCRETIONARY in BILLIONS	\$24.6	\$26.1	\$25.1	\$20.8	\$22.3	\$2.8

Note: Numbers may not add due to rounding.

Footnotes:

- 1/ An identical amount is included in the budget for the Department of Labor.
2/ Excludes \$84 million for JTPA literacy training, which was requested under proposed legislation.
3/ Assumes the President's request policies, but uses \$962 million in surplus carryover funds.

November 13, 1995



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

FAX TRANSMITTAL

TO: George Stephanopoulos, Senior Advisor to the President

ORGANIZATION: White House

PHONE NUMBER: 456-7105

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FROM: Leslie Thornton, Deputy Chief of Staff and
Counselor to the Secretary

PHONE NUMBER: 401-3001

MESSAGE: 3/4 I

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21 PAGE(S) TO FOLLOW

Consolidation Loans

Section 4003(c) further restricts student loan borrowers' ability to obtain Direct Consolidation loans. Restricting borrower access to Direct Consolidation loans represents another failure to provide a "level playing field" for borrowers. Similar to the impact of the cap on Direct Loans, this bill tilts the market in favor of guaranteed lending and limits borrower choices. The law should be revised to allow FFEL program lenders and the federal government to compete in the Consolidation loan arena, just as it should allow competition for regular loans made while the borrower is in school. The law should allow borrowers to seek consolidation loans from both sectors and choose the loan that best meets their needs.

Administrative cost allowance

Section 4004(c) of the bill would require the Secretary to pay an administrative cost allowance (ACA) of 0.85 percent of a guaranty agency's new volume each year, and guaranty agencies would have a contractual right to ACA payments, subject to an overall cap. Under current law, the Secretary is authorized to provide the guaranty agencies with discretionary support payments to help them pay the costs of servicing outstanding loans and guaranteeing new loans. The bill would re-establish the prior mandatory nature of the ACA and deprive the Department of the authority to consider whether an agency actually needs an ACA, thus providing many guaranty agencies more federal funds unnecessarily. It is important, however, to ensure that these costs are scored as subsidy costs within the FFEL program.

"On the record" hearing requirements

Section 4004(e)(1)(B) of the bill would require "on the record" full-blown, administrative hearings in order for the Secretary to terminate a guaranty agency's agreement or take any actions to assume the functions of the guaranty agency. The length (and cost) of protracted "on the record" hearings, and their misuse by unscrupulous program participants to prolong the flow of Federal funds were the reasons why the Congress eliminated the "on the record" requirement for actions with respect to schools and lenders in the 1992 HEA reauthorization. These additional procedural requirements, applicable only to guaranty agencies, would significantly limit the Department's ability to take prompt action when there is a misuse of Federal reserve funds or when a guaranty agency's actions are contrary to the best interests of the program.

A fourth provision, section 4002(c) of the bill dealing with the funding of administrative expenses in the loan programs, appears unacceptable as well. The Budget Service can provide specific concerns regarding this provision.

**CONGRESSIONAL CONFERENCE RECONCILIATION BILL
EDUCATION PROVISIONS: IMPACT ON STUDENTS, FAMILIES, AND SCHOOLS**

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Direct Loan participation	Eliminates Direct Loans after the 1995-96 academic year	Caps Direct loans at 30% for AY 1995-96; 20% for AY 1996-97 and beyond Includes Direct Consolidation Loans as part of the numerator but excludes consolidation loans in new loan volume as part of the denominator Requires ED to use data from the preceding academic year to determine volumes for current year cap	Same as Senate bill, except cap for AY 1996-97 and beyond is 10%, and only the schools that participated in AY 1994-95 are eligible

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Administrative funds	Moves "direct" administrative costs to subsidy Reduces "indirect" administrative funds as follows: \$110M in FY96 (\$40M set aside for GA ACA expenses from 10/95 - 12/95) \$70M/yr. in FY97 thru FY02 Puts 30% limit on indirect administrative funds (we are unclear of meaning of provision)	Moves "direct" administrative costs to subsidy (Actual impact unclear) Reduces "indirect" administrative funds as follows: \$85M in FY96 + amount needed for GA ACA expenses from 10/95 - 12/95 \$85M/yr. in FY97 thru FY02	Moves "direct" administrative costs to subsidy; includes costs for activities related to origination, servicing, contractors, default collections, and write-offs; does not include costs of personnel, training, rent, printing, or other admin. costs associations with these "direct" costs For "indirect" administrative funds, same as the Senate bill
Payments to schools	Eliminates payments for origination services to schools as of 1/1/96	Eliminates payments for origination services to schools as of 1/1/96	Same as House and Senate bills
Direct Loan transition	Deletes all references to "transition to Direct Loans"	Deletes all references to "transition to Direct Loans"	Same as House and Senate bills

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Interest subsidy during grace period	Eliminates the interest subsidy during the grace period for any loan made on or after 1/1/96		Same as Senate bill
PLUS annual loan limit	Establishes annual PLUS loan limit of \$15,000 per student		Same as House bill
PLUS interest rate	Increases PLUS interest rate from T-bill plus 3.1 percentage points to T-bill plus 4 percentage points		Same as Senate bill
PLUS interest rebate	Requires lenders to rebate 0.8% of PLUS principal outstanding every 6 months		Same as Senate bill
FFEL application	Authorizes the FAFSA as the FFEL application and deletes the requirement for a separate FFEL application	Authorizes the FAFSA as the FFEL application and deletes the requirement for a separate FFEL application	Deleted - Byrd Rule

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Electronic FAFSA	Requires ED to develop an electronic FAFSA Allows GAs, lenders, and schools to use privately developed software approved by ED Allows GAs that are authorized by schools to receive FAFSA data directly from ED	Requires ED to develop an electronic FAFSA Allows GAs and lenders to use privately developed software approved by ED	Deleted - Byrd Rule

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Direct Loan cohort default rates		Requires ED to calculate cohort default rates and use for school eligibility terminations for Direct Loans similar to the requirement in FFEL Requires ED to compile data on income contingent repayment (ICR) and income sensitive repayment under both FFEL and Direct Loans for use in policy-making regarding cohort default calculations and school eligibility terminations	Same as Senate bill, except eliminates data compilation requirement and adds requirement that ED prescribe regulations for the calculation of cohort default rates for FFEL loans that are repaid under income contingent repayment (ICR) comparable to the calculation of these rates for Direct Loans repaid under ICR
State share of default costs		Includes Direct Loan schools and Direct Loan volume in the calculation of State share of default costs	Same as Senate bill

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Level playing field		Requires ED to issue regulations within 120 days of enactment that ensures that borrowers under Direct Loans have -- the same terms, conditions, eligibility requirements and benefits; be subject to the same administrative requirements for origination, payment, and processing of applications, deferments, and forbearance; and be subject to the same interest rates and same amount of fees -- as Stafford, Unsubsidized, and PLUS loans made to FFEL borrowers	Same as Senate bill

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Loan consolidation		Allows consolidation of Direct Loans into a FFEL Consolidation loan Requires all borrowers (even those with Direct Loans) to seek consolidation from an eligible FFEL lender first and either be unable to get a consolidation loan or be unable to get a consolidation loan with income sensitive repayment before a borrower is eligible for a Direct Consolidation loan (removes the current language regarding finding an FFEL consolidation loan with "terms acceptable to the borrower" that allows flexibility for the borrower) Requires ED to establish appropriate certification procedures to verify the eligibility of borrowers to consolidate under Direct Loans	Same as the Senate bill, except adds "from a lender that holds one of the borrower's loans" to the requirement that a borrower seek consolidation from an eligible FFEL lender first before the borrower is eligible for a Direct Consolidation loan (this further restricts FFEL-only borrowers from consolidating into Direct Loans)

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Loan repayment options		Requires lenders to offer ICR under FFEL; terms and conditions of FFEL ICR may have the same terms and conditions as ICR under Direct Loans	Authorizes lenders (at lender's option) to offer ICR under FFEL; requires that FFEL ICR schedules have the same terms and conditions as Direct Loan ICR, including the 25-year forgiveness (such forgiveness would be a Federal, not a lender, requirement)

PROVISIONS THAT AFFECT LENDERS AND GUARANTY AGENCIES

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Insurance Rate Paid on Defaulted Loans	Reduces insurance to lenders on loans from 98 percent to 95 percent. This provision applies to loans disbursed on or after January 1, 1996	Same as House	House
Exceptional Performer Insurance Rate	Reduces the insurance rate paid to lenders designated as "exceptional performers" from 100 percent to 95 percent. (Same as regular rate).	Same as House	House
Loan Origination Fee	The loan origination fee that lenders pay to the Department on all new loans would be reduced from 0.50 percent in current law to 0.30 percent. This provision applies to loans disbursed on or after January 1, 1996.	Increases the loan origination fee paid by lenders from 0.50 percent to 1.0 percent. This provision applies to loans disbursed on or after January 1, 1996.	Senate Except increases the loan origination fee paid by lenders from 0.50 percent to 0.80 percent rather than 1.0 percent.

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Rebate of Interest on Stafford Loans	No provision	Holders of Stafford loans (sub and non-sub) are required to pay the Secretary a fee of .025 percent of the unpaid principal amount of such loans in repayment biannually. This provision applies to loans disbursed on or after January 1, 1996.	Senate. Except the fee was increased to 0.035 percent payable semi-annually and, if practicable, the payment is to be deducted from the lenders' interest bill.
Audit Exemption	Lenders that make or hold less than \$5 million in student loans in any fiscal year are exempt from the annual audit.	Same as House	House
Definition of Eligible Lenders	The definition of eligible lenders is expanded to make the Money Store eligible to participate in the program as a lender.	Same as House	Deleted

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Use of Reserve Funds to Purchase Defaulted Loans	The amendment requires a guaranty agency to use up to 50 percent of its reserve fund to pay lender claims and hold the claims (except in certain specified situations) for 180 to <u>225</u> days before requesting reinsurance from ED. If during that period, the borrower begins making payments, the loan may be sold back to an eligible lender. If not, the guaranty agency files a claim with ED for reinsurance. The Secretary is required to pay interest that accrues on the claim amount from the time the agency pays the default claim until the agency files for reinsurance. The Secretary is prohibited from regulating the collection activity during the 180 to 225 day period. The amount of claims held during the period is considered the same as cash for purposes of calculating the agency's reserve ratio.	Same as House	House

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Administrative Cost Allowance	The House bill would abolish the ACA effective January 1, 1996. The funding would be replaced by a fee of 0.70 percent on new loan volume paid to the guaranty agencies by the lenders.	The ACA is made an entitlement payment. Each guaranty agency is given the option of receiving payment in the amount of 0.85 percent of new volume or an amount equal to 0.08 percent of the original principal amount of loans outstanding at the end of the previous fiscal year. The total amount of ACA the secretary may pay for fiscal years 1996 through 2002 may not exceed \$180 million each year.	Senate. Except each guaranty agency shall receive payment in the amount of 0.85 percent of new volume. The total amount of ACA the secretary may pay for fiscal years 1996 through 1998 may not exceed \$220 million each year and 1999 through 2002 may not exceed \$180 each year. This provision is effective January 1, 1996.
Secretary's Equitable Share of Collections on Consolidated Defaulted Loans	The secretary is required to pay a guaranty agency 25 percent of the principal and interest outstanding at the time a defaulted loan is consolidated. (Note: Currently guaranty agencies are allowed to retain 18.5 percent).	Same as House	House. Except the rate was changed to 18.5 percent of the principal, interest and collection costs outstanding at the time a defaulted loan is consolidated.

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Restrictions on Authority to Subrogate Defaulted Loans	Section 428(c)(8)(A) of the HEA authorizes the Department to require a guaranty agency to assign any defaulted loan on which reinsurance has been paid to the Department for collection, if necessary to protect the Federal fiscal interest. The bills would limit this authority and require the Department to promulgate new regulations (after negotiated rulemaking). The bills would require the Department to determine the adequacy of the agency's collection efforts before requiring the assignment of defaulted loans and would require that the agency receives "administrative due process" before assignment could be required.	Same as House	Deleted

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Removal of Power to Protect the Federal Fiscal Interest	No provision	Current law authorizes the Department to terminate its agreements with a guaranty agency if: (1) it fails to submit an acceptable management plan; (2) it has failed to improve substantially its administrative and financial condition; (3) it is in danger of financial collapse; (4) such action is necessary to protect the Federal fiscal interest; (5) such action is necessary to provide continued loan access; or (6) such action is necessary for an orderly transition to the direct loan program. The Senate bill would combine grounds (2) and (3) and eliminate grounds (4) and (6). The combination would leave the Department without an adequate remedy to deal with a guaranty agency that submitted an acceptable management plan but did not perform its obligations under the plan, until the agency was about to collapse.	House

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Designation of Successor Guaranty Agencies	No provision	Current §428(c)(9)(F) of the HEA authorizes the Department to permit the transfer of the guarantees of a terminated guaranty agency to another guaranty agency and to require the merger or consolidation of the terminated agency. The Senate bill would change the HEA to provide that, if a guaranty agency is terminated, the Department would have to choose as the successor the agency recommended by the State, unless that agency was subject to a regulatory action.	House

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Burdensome Procedural Requirements and Unnecessary Litigation	No provision	Under current law the Department has broad authority to terminate a guaranty agency's contract with other parties if the contract reflects an improper use of Federal reserve funds or provides improper benefits to an agency's officials. The Senate bill would require the Department to provide a formal hearing before exercising this authority.	House
Hearing on the Record	The bill would require the Department to provide a guaranty agency with a hearing on the record (rather than the less formal hearing provided under current law) before the Department could terminate its agreements with a guaranty agency.	Same as House	House

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Elimination of Supplemental Preclaim Payment	The one percent payment for supplemental preclaim would be abolished.	Same as House	House
Elimination of Grace Period Interest Subsidy	The House bill eliminates the subsidy of interest that accrues during the grace period on student loans made on or after January 1, 1996.	No provision	Senate
Plus Interest Rebate	The House bill would require each holder of Plus loans to pay the Secretary on June 30 and December 31 of each year an amount equal to 0.8 percent of the outstanding principal balance of such loans held on those dates. The payments must be made no later than 60 days following such date.	No provision	House. Except the amount was changed to 0.035 percent and if practicable, the payment is to be deducted from the lenders' interest bill.

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Loan Transfer Fee	Under the House proposal lenders would be required to pay the secretary a loan transfer fee of 0.20 percent of the principal amount of loans transferred.	No provision	Senate
Lender Fees to Guaranty Agencies	Each lender would be required to pay guaranty agencies a fee of 0.70 percent of the principal amount of the loans made by the lender and guaranteed by the agency on or after January 1, 1996.	No provision	Senate
Reduction of Minimum Reserve Level	Beginning in fiscal year 1996, current law requires guaranty agencies to maintain a reserve ratio of 1.1 percent. The House bill leaves the minimum reserve level at 0.9 percent for all fiscal years beginning in FY 1995 or later.	No provision	House

PROVISION	HOUSE BILL	SENATE BILL	CONFERENCE BILL
Reinsurance Rate to Guaranty Agencies Reduced	The current reinsurance rate is 98/88/78 depending upon the volume of reinsurance claims paid during the year. The House bill reduces the reinsurance rate to 96/86/76.	No provision	House
Lender-of-Last-Resort	Current law permits guaranty agencies to require two letters of denial before a student may participate in the LLR program. In addition, LLR's are required to respond to the student within 60 days of receiving an application for a loan. The House bill would permit guaranty agencies to require only one letter of denial and would require the lenders to respond within 15 days of receiving an application.	No provision	House

draft 11/16/95 sideby2.com

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, D.C. 20202

DATE: November 27, 1995

TO: Frank Holleman
Leslie Thornton
Kay Casstevens
Mike SmithFROM: Leo Kornfeld 

Attached are comparison sheets on the reconciliation bill showing the House bill, Senate bill and Conference bill.

There are four major policy-related provisions in the Conference Budget Reconciliation bill that I recommend the Administration strongly oppose:

Direct Loan program authority cap

Section 4002(a) of the bill would impose a 30% cap on direct lending (including Federal Direct Consolidation Loans) for academic year 1995-1996 (which may have already been exceeded), and a 10% cap on direct lending for academic year 1996-1997 and succeeding academic years. Only the "102" institutions that participated in direct lending in academic year 1994-1995 would be eligible to continue in this program in academic year 1996-1997 and beyond.

These highly restrictive caps are unacceptable. Forcing as many as 1,300 schools and one million borrowers to leave the direct lending program radically limits choices for both institutions and students. Direct lending is extremely popular with students and participating institutions, and competition from direct lending has forced lenders to become more cost-effective and customer-friendly -- a competitive pressure that would virtually cease under these caps. The caps on direct lending volume fail to provide a "level playing field" on which to assess fairly the merits of direct versus guaranteed lending. Instead, this bill tilts the market in favor of guaranteed lending, despite the irrefutable fact that, in order to ensure the participation of lenders, guaranteed lending must provide financial incentives that are not needed for direct lending.

Borrowers at schools eliminated from the direct lending program would be forced out of the program and forced into the Federal Family Education Loan (FFEL) program for any additional loans they needed. Thus, these borrowers would have to deal with multiple lenders, directly contrary to the goal of §485C(b) of the HEA, which predates Direct Loans and establishes a goal that each borrower should only have to deal with one lender. The caps also take away the income contingent repayment option under Direct Loans. Although the bill would authorize FFEL program lenders to offer ICR, the bill does not require them to do so. Furthermore, ICR may be unworkable in the FFEL program without the necessary statutory changes to permit disclosures of tax return information to banks, guaranty agencies, and other lenders.



R

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

DATE : June 6, 1995

TO : The Secretary

FROM : Judith A. Winston

SUBJECT : Aguilar v. Felton

This memorandum responds to your request for a brief summary of the Supreme Court's 1985 decision in Aguilar v. Felton, 473 U.S. 402 (1985), the effects that decision has had on services for private school children under Title I of the Elementary and Secondary Education Act and possible efforts to have that decision overruled.

BACKGROUND

In Felton, the Supreme Court ruled that it was unconstitutional under the Establishment Clause of the First Amendment for Title I personnel to provide instruction in religiously-affiliated private schools. The Court concluded by a 5-4 vote that a Title I instructional program in these private schools created excessive entanglement between government and religion. In the Court's view, the provision of Title I aid "in a pervasively sectarian environment" in the form of teachers would require "ongoing inspection . . . to ensure the absence of a religious message." 473 U.S. at 412. Therefore, the "program would require a permanent and pervasive state presence in sectarian schools" which, in turn, would cause excessive entanglement between public and private school officials. Id. at 413.

In the years following the Felton decision, the Department issued guidance on alternative delivery systems for providing Title I services for children attending private schools. In accordance with that guidance, Title I personnel have provided instruction for these children in other locations including public school sites, other public buildings and mobile vans parked on public property and, in some instances, on private school property. Also in accordance with guidance issued by this Department, computer-assisted instruction has been provided in private school buildings.

DISCUSSION

The Felton decision has had a significant negative impact on Title I services for private school children. In the years immediately following the decision, there was a dramatic decrease in the number of private school children participating in the

Title I program. Although the number has increased in subsequent years, the underlying problems caused by the Felton decision continue. Instead of having Title I services in their own school buildings, as public school children generally have, private school children must go to another location to receive instruction from a teacher. This creates not only logistical problems, but significantly increases costs (for such things as transportation or the purchase or rental of mobile vans). With respect to computer-assisted instruction which is provided in private schools, there is often criticism that this is not the most educationally effective method for providing Title I services. The Felton decision also at times has caused tension between public and private school officials concerning how and where Title I services should be provided for private school children.

In addition, strong arguments can be made that the Supreme Court reached the wrong legal conclusion in Felton. Title I is a broad-based program for public and private school children, and is required by statute to provide supplemental services. Title I services are provided by public employees under public supervision and no funds flow to any private school. Also, as noted by Justice O'Connor in her dissenting opinion in Felton, the Court's analysis "strongly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion. . . ." 473 U.S. at 421. In fact, the evidentiary record in the Felton case revealed no such problem of any Title I teacher ever attempting to inculcate religion in the nineteen years that Title I services had been provided in private schools in New York City. See 473 U.S. 424-25. Therefore, the program does not need the degree of on-site monitoring contemplated by the Court, and excessive entanglement should not result.

OPTIONS

The Supreme Court's decision last year in Board of Education of Kiryas Joel Village School District v. Grumet, 114 S. Ct. 2481 (1994) indicates that a majority of the Court may no longer support the Felton decision. In fact, five Supreme Court justices indicated in Kiryas Joel that Felton should be reconsidered, with four of the justices expressly stating that Felton should be overruled in an appropriate case. See 114 S. Ct. at 2498, 2505, 2515. (In Kiryas Joel, the Court decided that the creation of a special school district in New York state for serving students with disabilities of a specific religious community was unconstitutional. The school district was created in response to the Supreme Court's decision in Felton.)

In light of the statements made by the five justices in Kiryas Joel, there has been strong interest in having Felton overturned

Page Three-Memorandum to the Secretary

in an appropriate case, and this office has had discussions with Department of Justice officials on how this might be accomplished. One problem is that since Title I services are being provided in accordance with Felton there is no pending case that squarely presents the issue. Nevertheless, there are at least three possible options for raising the issue.

One possibility is filing a motion in the original Felton case at the district court level to dissolve the injunction against providing Title I services in private schools. The basis for this motion essentially would be that there has been a change in the controlling law because Felton no longer commands a majority of the Supreme Court. This approach is not likely to succeed, however, because the lower courts would be bound to follow the Supreme Court's decision in Felton, and it would not appear likely that the Supreme Court would grant review of a motion in the original case. The advantage of this approach is that it could be done quickly, and there would appear to be little to lose even if the effort was unsuccessful.

A second option is to raise the Felton issue in a pending case that presents similar issues. Although there is no pending case involving Title I services in private schools, there are cases involving closely related issues, such as the constitutionality of providing Title I services in mobile vans parked near private schools or on private school property. There are only a few pending lower court cases involving these issues, however, and there may not be an opportunity for Supreme Court review in these cases for a significant period of time. In the one recent court of appeals decision in this area, the Ninth Circuit ruled in the Department's favor on the issue of parking mobile vans on private school property. Walker v. San Francisco Unified School District, 46 F.3d 1449 (9th Cir. 1995). Although the Ninth Circuit is considering whether to rehear this case, it is not likely that plaintiffs would appeal the van issue to the Supreme Court. The issue of parking mobile vans on public streets to provide Title I services is pending in a lawsuit involving the Title I program in New York City. Committee for Public Education and Religious Liberty (PEARL) v. Secretary, United States Department of Education, No. 88 Civ. 96 (E.D.N.Y.). Although the Felton issue could be raised at an appropriate point in this case, the court could easily, and likely would, uphold the parking of mobile vans on public property without ever reaching the issue of whether Felton should be overruled.

A third option is to try to raise the Felton issue in some other case, not involving the Title I program. Although the issue might arise with respect to another Federal or state program, we have not found a good vehicle for raising the issue in this context.

CONCLUSION

The Felton decision has adversely affected the quantity and quality of Title I services for private school children. Although the Supreme Court has indicated its willingness to reconsider and possibly overrule the Felton decision, an appropriate case to raise this issue needs to be found. We recommend that the Department, in consultation with Department of Justice officials, continue to review pending cases and seek reversal of the Felton decision as soon as possible in an appropriate case.

473 U.S. 402, 87 L.Ed.2d 290

1402 Yolanda AGUILAR, et al., Appellants

v.

Betty-Louise FELTON et al.

SECRETARY, UNITED STATES DE-
PARTMENT OF EDUCATION,

Appellant,

v.

Betty-Louise FELTON et al.

CHANCELLOR OF the BOARD OF
EDUCATION OF the CITY OF
NEW YORK, Appellant,

v.

Betty-Louise FELTON et al.

Nos. 84-237 to 84-239.

Argued Dec. 5, 1984.

Decided July 1, 1985.

Taxpayers brought action for declaratory and injunctive relief challenging New York City's use of federal funds to finance programs which involved sending public school teachers and other professionals into religious and other public schools to provide remedial instruction and clinical and guidance services on the ground that it violated establishment clause. The United States District Court for the Eastern District of New York, Edward R. Neaher, J., granted defendants' motion for summary judgment and dismissed complaint, and taxpayers appealed. The Court of Appeals, Friendly, Circuit Judge, 789 F.2d 48, reversed, and certiorari was granted. The Supreme Court, Justice Brennan, held that program under which New York City used federal funds received under Title I of the Elementary and Secondary Education Act to pay salaries of public school employees who taught in parochial schools in city violated establishment clause.

Affirmed.

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the

Justice Powell, filed a concurring opinion.

Chief Justice Burger and Justice Rehnquist filed dissenting opinions.

Justice O'Connor filed a dissenting opinion in which Justice Rehnquist joined as to Parts II and III.

Justice White filed dissenting opinion
105 S.Ct. 3248.

Constitutional Law ¶84.5(4)

Schools ¶3

Program under which New York City used federal funds received under Title I of the Elementary and Secondary Education Act [Elementary and Secondary Education Act of 1965, § 101, as amended, 20 U.S.C.A. § 2701 et seq.] to pay salaries of public school employees who taught in parochial schools in city violated the establishment clause [U.S.C.A. Const.Amend. 1] since scope and duration of program would require permanent and pervasive state presence in sectarian schools receiving aid by requiring city to adopt a system for monitoring religious content of publicly funded Title 1 classes.

*Syllabus**

New York City uses federal funds received under the Title I program of the Elementary and Secondary Education Act of 1965 to pay the salaries of public school employees who teach in parochial schools in the city. That program authorized federal financial assistance to local educational institutions to meet the needs of educationally deprived children from low-income families. The city makes the teacher assignments, and the teachers are supervised by field personnel who monitor the Title I classes. Appellee city taxpayers brought an action in Federal District Court, alleging that the Title I program administered by

reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

the city violates the Establishment Clause of the First Amendment, and seeking injunctive relief. The District Court granted appellants' motion for summary judgment based on the evidentiary record in another case that involved an identical challenge to the city's Title I program, and in which the constitutionality of the program was upheld. The Court of Appeals reversed.

Held: The Title I program administered by New York City, which is similar in a number of respects to that held unconstitutional today in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267, violates the Establishment Clause. Although the program here could be argued to be distinguishable from that in *School District of Grand Rapids* on the ground that New York City has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools, the supervision would at best assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. And the program here would, in any event, inevitably result in the excessive entanglement of church and state. Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nevertheless violate the Establishment Clause owing to the interaction of church and state in the administration of that aid. Here, the scope¹ and duration of New York City's Title I program would require a permanent and pervasive state presence

1. Title I, 92 Stat. 2153, was codified at 20 U.S.C. § 2701 *et seq.* Section 2701 provided:

"In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute par-

in the sectarian schools receiving aid. This pervasive monitoring infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Moreover, personnel of the public and parochial school systems must work together in resolving various administrative matters and problems, and the program necessitates frequent contacts between the regular parochial school teachers and the remedial teachers. Pp. 3235-3239.

739 F.2d 48 (CA2 1984), affirmed.

Sol. Gen. Rex E. Lee, Washington, D.C., for appellants.

Stanley Geller, New York City, for appellees.

¹Justice BRENNAN delivered the opinion of the Court.

The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to *School District of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267, we determine whether this practice violates the Establishment Clause of the First Amendment.

I

A

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965,¹ authorizes the Secretary of Education to distribute financial assistance to local educational institutions to meet the needs of

particularly to meeting the special educational needs of educationally deprived children."

Effective October 1, 1982, Title I was superseded by Chapter I of the Education Consolidation and Improvement Act of 1981, 95 Stat. 464, 20 U.S.C. § 3801 *et seq.* See 20 U.S.C. § 3801 (current Chapter I analogue of § 2701). The provisions concerning the participation of children in private schools under Chapter I are virtually identical to those in Title I. Compare 20 U.S.C. § 2740 (former Title I provision) with 20 U.S.C. § 3806 (current Chapter I provision). For the sake of convenience, we will adopt the usage of the parties and continue to refer to the program as "Title I."

educationally deprived children from low-income families. The funds are to be appropriated in accordance with programs proposed by local educational agencies and approved by state educational agencies. 20 U.S.C. § 3805(a).² "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements ... in which such children can participate." § 3806(a).³ The proposed programs must also meet the following statutory requirements: the children involved in the program must be educationally deprived, § 3804(a),⁴ the children must reside in areas comprising a high concentration of low-income families, § 3805(b),⁵ and the programs must supplement, not supplant, programs that would exist absent funding under Title I. § 3807(b).⁶

2. The statute provides:

"A local educational agency may receive a grant under this subchapter for any fiscal year if it has on file with the State educational agency an application which describes the programs and projects to be conducted with such assistance for a period of not more than three years, and such application has been approved by the State educational agency."

See also 20 U.S.C. § 2731 (former Title I analogue).

3. In *Wheeler v. Barrera*, 417 U.S. 402, 94 S.Ct. 2274, 41 L.Ed.2d 159 (1974), we addressed the question whether this provision requires the assignment of publicly employed teachers to provide instruction during regular school hours in parochial schools. We held that Title I mandated that private school students receive services comparable to, but not identical to, the Title I services received by public school students. *Id.*, at 420-421, 94 S.Ct., at 2284-2285. Therefore, the statute would permit, but not require, that on-site services be provided in the parochial schools. In reaching this conclusion as a matter of statutory interpretation, we explicitly noted that "we intimate no view as to the Establishment Clause effect of any particular program." *Id.*, at 426, 94 S.Ct., at 2287. *Wheeler* thus provides no authority for the constitutionality of the program before us today.

4. The statute provides:

Since 1966, the City of New York has provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of those students eligible to receive funds in 1981-1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools. With respect to the religious atmosphere of these schools, the Court of Appeals concluded that "the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values." 739 F.2d 48, 68 (CA2 1984).

The programs conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services. These programs are carried out by regular employees of the public schools (teachers,

"Each State and local educational agency shall use the payments under this subchapter for programs and projects (including the acquisition of equipment and, where necessary, the construction of school facilities) which are designed to meet the special educational needs of educationally deprived children."

5. The statute provides:

"The application described in subsection (a) of this section shall be approved if ... the programs and projects described—

"(1)(A) are conducted in attendance areas of such agency having the highest concentration of low-income children...."

6. The statute provides:

"A local educational agency may use funds received under this subchapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs and projects assisted under this subchapter, and in no case may such funds be so used as to supplant such funds from such non-Federal sources. In order to demonstrate compliance with this subsection a local education agency shall not be required to provide services under this subchapter outside the regular classroom or school program."

Cite as 105 S.Ct. 3232 (1985)

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guidance counselors, psychologists, psychi-
atrists, and social workers) who have vol-
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The amount of time that each professional
spends in the parochial school is deter-
mined by the number of students in the
particular program and the needs of these
students.

The City's Bureau of Nonpublic School
Reimbursement makes teacher assign-
ments, and the instructors are su-
pervised⁴⁰⁷ by field personnel, who attempt
to pay at least one unannounced visit per
month. The field supervisors, in turn, re-
port to program coordinators, who also pay
occasional unannounced supervisory visits
to monitor Title I classes in the parochial
schools. The professionals involved in the
program are directed to avoid involvement
with religious activities that are conducted
within the private schools and to bar reli-
gious materials in their classrooms. All
material and equipment used in the pro-
grams funded under Title I are supplied by
the Government and are used only in those
programs. The professional personnel are
solely responsible for the selection of the
students. Additionally, the professionals
are informed that contact with private
school personnel should be kept to a mini-
mum. Finally, the administrators of the
parochial schools are required to clear the
classrooms used by the public school per-
sonnel of all religious symbols.

B

In 1978, six taxpayers commenced this
action in the District Court for the Eastern
District of New York, alleging that the
Title I program administered by the City of
New York violates the Establishment
Clause. These taxpayers, appellees in to-
day's case, sought to enjoin the further

7. The Court of Appeals held that the plan
adopted and administered by the City of New
York violates the Establishment Clause. 739
F.2d 48, 72 (1984). Appeals from this ruling
were taken pursuant to 28 U.S.C. § 1252. An
appeal under § 1252, however, may be taken
only from an interlocutory or final judgment
that has held an Act of Congress unconstitution-
al as applied ("i.e., that the section, by its own
terms, infringed constitutional freedoms in the

distribution of funds to programs involving
instruction on the premises of parochial
schools. Initially the case was held for the
outcome of *National Coalition for Public
Education and Religious Liberty v. Har-
ris*, 489 F.Supp. 1248 (SDNY 1980)
(PEARL), which involved an identical chal-
lenge to the Title I program. When the
District Court in PEARL affirmed the con-
stitutionality of the Title I program, *ibid.*,
and this Court dismissed the appeal for
want of jurisdiction, 449 U.S. 808, 101 S.Ct.
55, 66 L.Ed.2d 11 (1980), the challenge of
the present appellees was renewed. The
District Court granted appellants' motion
for summary judgment based upon the evi-
dentiary record developed in PEARL.

⁴⁰⁸A unanimous panel of the Court of
Appeals for the Second Circuit reversed,
holding that

"[t]he Establishment Clause, as it has
been interpreted by the Supreme Court
in *Public Funds for Public Schools v.
Marburger*, 358 F.Supp. 29 (D.N.J.1973),
aff'd mem., 417 U.S. 961, 94 S.Ct. 3163,
41 L.Ed.2d 1134 (1974); *Meek v. Pitten-
ger*, 421 U.S. 349, 95 S.Ct. 1753, 44
L.Ed.2d 217 (1975) (particularly Part V,
pp. 367-72); and *Wolman v. Walter*, 433
U.S. 229, 97 S.Ct. 2593, 53 L.Ed.2d 714
(1977), constitutes an insurmountable
barrier to the use of federal funds to
send public school teachers and other
professionals into religious schools to
carry on instruction, remedial or other-
wise, or to provide clinical and guidance
services of the sort at issue here." 739
F.2d, at 49-50.

We postponed probable jurisdiction. 469
U.S. 878, 105 S.Ct. 241, 83 L.Ed.2d 180
(1984). We conclude that jurisdiction by
appeal does not properly lie.⁷ Treating the

circumstances of that particular case") or as a
whole. *United States v. Christian Echoes Na-
tional Ministry, Inc.*, 404 U.S. 561, 563-565, 92
S.Ct. 663, 664-666, 30 L.Ed.2d 716 (1972). Be-
cause the ruling appealed from is not such a
judgment, the appeals must be dismissed for
want of jurisdiction. *Ibid.*

As we have in comparable cases, we shall
continue in this opinion to refer to the parties as

papers as a petition for a writ of certiorari, see 28 U.S.C. § 2103, we grant the petition and now affirm the judgment below.

II

In *School District of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267, the Court has today held unconstitutional under the Establishment Clause two remedial and enhancement programs operated by the Grand Rapids Public School District, in which 140 classes were provided to private school children at public expense in classrooms located in and leased from the local private schools. The New York City programs challenged in this case are very similar to the programs we examined in *Ball*. In both cases, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both cases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.

Appellants attempt to distinguish this case on the ground that the City of New York, unlike the Grand Rapids Public School District, has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools. At best, the supervision in this case would assist in preventing the Title I program from being used, intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine. Even

appellants and appellees in order to minimize confusion. See, e.g., *Kulko v. California Superi-*

where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid.

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matters. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *McCollum v. Board of Education*, 333 U.S. 203, 212, 68 S.Ct. 461, 465, 92 L.Ed.2d 649 (1948).

In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Court held that the supervision necessary to ensure that teachers in parochial schools were not conveying religious messages to their students would constitute the excessive entanglement of church and state:

"A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between

or Court, 436 U.S. 84, 90, n. 4, 98 S.Ct. 1690, 1696, n. 4, 56 L.Ed.2d 132 (1978).

Cite as 105 S.Ct. 3232 (1985)

state and church." *Id.*, at 619, 91 S.Ct., at 2114.

Similarly, in *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), we invalidated a state program that offered, *inter alia*, guidance, testing, and remedial and therapeutic services performed by public employees on the premises of the parochial schools. *Id.*, at 352-353, 95 S.Ct., at 1756-1757. As in *Lemon*, we observed that though a comprehensive system of supervision might conceivably prevent teachers from having the primary effect of advancing religion, such a system would inevitably lead to an unconstitutional administrative entanglement between church and state.

"The prophylactic contacts required to ensure that teachers play a strictly nonideological role, the Court held [in *Lemon*], necessarily give rise to a constitutionally⁴¹¹ intolerable degree of entanglement between church and state. *Id.* [403 U.S.], at 619 [91 S.Ct., at 2114]. The same excessive entanglement would be required for Pennsylvania to be 'certain,' as it must be, that ... personnel do not advance the religious mission of the church-related schools in which they serve. *Public Funds for Public Schools v. Marburger*, 358 F.Supp. 29, 40-41, *aff'd*, 417 U.S. 961 [94 S.Ct. 3163, 41 L.Ed.2d 1134]." 421 U.S., at 370, 95 S.Ct., at 1765.

In *Roemer v. Maryland Public Works Board*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d (1976), the Court sustained state programs of aid to religiously affiliated institutions of higher learning. The State allowed the grants to be used for any nonsectarian purpose. The Court upheld the grants on the ground that the institutions were not "pervasively sectarian," *id.*, at 758-759, 96 S.Ct., at 2350-2351, and therefore a system of supervision was unnecessary to ensure that the grants were not

being used to effect a religious end. In so holding, the Court identified "what is crucial to a nonentangling aid program: the ability of the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes." *Id.*, at 765, 96 S.Ct., at 2353. Similarly, in *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed.2d 790 (1971), the Court upheld one-time grants to sectarian institutions because ongoing supervision was not required. See also *Hunt v. McNair*, 413 U.S. 734, 93 S.Ct. 2863, 37 L.Ed.2d 923 (1973).

As the Court of Appeals recognized, the elementary and secondary schools here are far different from the colleges at issue in *Roemer*, *Hunt*, and *Tilton*. 739 F.2d, at 68-70. Unlike the colleges, which were found not to be "pervasively sectarian," many of the schools involved in this case are the same sectarian schools which had "as a substantial purpose the inculcation of religious values" in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 768, 93 S.Ct. 2955, 2963, 37 L.Ed.2d 948 (1973), quoting *Committee for Public Education & Religious Liberty v. Nyquist*, 350 F.Supp. 655, 663 (SDNY 1972). Moreover, our holding in *Meek* invalidating instructional services much like those at issue in this case rested⁴¹² on the ground that the publicly funded teachers were "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." *Meek, supra*, 421 U.S., at 371, 95 S.Ct., at 1766. The court below found that the schools involved in this case were "well within this characterization." 739 F.2d, at 70.⁸ Unlike the schools in *Roemer*, many

8. Appellants suggest that the degree of sectarianism differs from school to school. This has little bearing on our analysis. As Judge Friendly, writing for the court below, noted: "It may well be that the degree of sectarianism in Catho-

lic schools in, for example, black neighborhoods, with considerable proportions of non-Catholic pupils and teachers, is relatively low; by the same token, in other schools it may be relatively high. Yet ... enforcement of the Es-

of the schools here receive funds and report back to their affiliated church, require attendance at church religious exercises, begin the schoolday or class period with prayer, and grant preference in admission to members of the sponsoring denominations. 739 F.2d, at 70. In addition, the Catholic schools at issue here, which constitute the vast majority of the aided schools, are under the general supervision and control of the local parish. *Ibid.*

The critical elements of the entanglement proscribed in *Lemon* and *Meek* are thus present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message. Compare *Lemon, supra*, 403 U.S., at 619, 91 S.Ct., at 2114, with *Tilton, supra*, 403 U.S., at 688, 91 S.Ct., at 2100, and *Roemer, supra*, 426 U.S., at 765, 96 S.Ct., at 2353. In short, the scope and duration of New York City's Title I₁₄₁₃ program would require a permanent and pervasive state presence in the sectarian schools receiving aid.

This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the root of the prohibition of excessive entanglement. Agents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes. Cf. *Lemon v. Kurtzman*, 403 U.S., at 619, 91 S.Ct., at 2114 ("What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion"). In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and thus off limits in a Title I

establishment Clause does not rest on means or medians. If any significant number of the Title I schools create the risks described in *Meek*, *Meek* applies. It would be simply incredible, and the affidavits do not aver, that all, or almost all, New York City's parochial schools receiving

classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved." 739 F.2d, at 65.

We have long recognized that underlying the Establishment Clause is "the objective ... to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other." *Lemon v. Kurtzman, supra*, at 614, 91 S.Ct., at 2112. ¹⁴¹⁴See also *McCullum v. Board of Education*, 333 U.S., at 212, 68 S.Ct., at 465. Although "[s]eparation in this context cannot mean absence of all contact," *Walz v. Tax Comm'n*, 397 U.S. 664, 676, 90 S.Ct. 1409, 1415, 25 L.Ed.2d 697 (1970), the detailed monitoring and close administrative contact required to maintain New York City's Title I program can only produce "a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize." *Id.*, at 674, 90 S.Ct., at 1414. The

Title I aid have ... abandoned 'the religious mission that is the only reason for the schools' existence.'" 739 F.2d, at 70 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 650, 91 S.Ct. 2105, 2129, 29 L.Ed.2d 745 (1971) (opinion of BRENNAN, J.)).

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numerous judgments that must be made by agents of the city concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. At the same time, "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'" *Lemon v. Kurtzman*, *supra*, 403 U.S., at 650, 91 S.Ct., at 2129 (opinion of BRENNAN, J.).

III

Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate—that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.

Affirmed.

[For dissenting opinion of Justice WHITE, see *post*, p. 3248.]

Justice POWELL, concurring.

I concur in the Court's opinions and judgments today in this case and in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267, holding that the aid to parochial schools involved in those cases violates the Establishment Clause of the First Amendment. I write to emphasize additional reasons why precedents of this Court require us to invalidate these two educational programs that concededly have "done so much good and little, if any, detectable harm." 739 F.2d 48, 72 (CA2 1984). The Court has previously recognized the important role of parochial schools:

"Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools.'" *Muel-ler v. Allen*, 463 U.S. 388, 401-402, 103 S.Ct. 3062, 3067, 77 L.Ed.2d 721 (1983) (quoting *Wolman v. Walter*, 433 U.S. 229, 262, 97 S.Ct. 2593, 2613, 53 L.Ed.2d 714 (1977) (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part)).

"The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." 433 U.S., at 262, 97 S.Ct., at 2613. Regrettably, however, the Title I and Grand Rapids programs do not survive the scrutiny required by our Establishment Clause cases.

I agree with the Court that in this case the Establishment Clause is violated because there is too great a risk of government entanglement in the administration of the religious schools; the same is true in *Ball*, 473 U.S. 373, 105 S.Ct. 3216. As beneficial as the Title I program appears to be in accomplishing its secular goal of supplementing the education of deprived children, its elaborate structure, the participation of public school teachers, and the government surveillance required to ensure that public funds are used for secular purposes inevitably present a serious risk of excessive entanglement. Our cases have noted that "[t]he State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion." *Meek v. Pittenger*, 421 U.S. 349, 371, 95 S.Ct. 1753, 1766, 44 L.Ed.2d 217 (1975) (emphasis added) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 619, 91 S.Ct. 2105, 2114, 29 L.Ed.2d 745 (1971)). This is true whether the subsidized teachers are religious school teachers, as in *Lemon*, or public school teachers teaching secular subjects to parochial school children at the parochial

schools. Judge Friendly, writing for the unanimous Court of Appeals, agreed with this assessment of our cases. He correctly observed that the structure of the Title I program required the active and extensive surveillance that the City has provided, and, "under *Meek*, this very surveillance constitutes excessive entanglement even if it has succeeded in preventing the fostering of religion." 739 F.2d, at 66.

This risk of entanglement is compounded by the additional risk of political divisiveness stemming from the aid to religion at issue here. I do not suggest that at this point in our history the Title I program or similar parochial aid plans could result in the establishment of a state religion. There likewise is small chance that these programs would result in significant religious or denominational control over our democratic processes. See *Wolman v. Walter*, *supra*, 433 U.S., at 263, 97 S.Ct., at 2613 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part). Nonetheless, there remains a considerable risk of continuing political strife over the propriety of direct aid to religious schools and the proper allocation of limited governmental resources. As this Court has repeatedly recognized, there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of government. *E.g.*, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 796-797, 93 S.Ct. 2955, 2977-2978, 37 L.Ed.2d 948 (1973); *Lemon v. Kurtzman*, *supra*, 403 U.S., at 623, 91 S.Ct., at 2116. In States such as New York that have large and varied sectarian populations, one can be assured that politics will enter into any state decision to aid parochial schools. Public schools, as well as private schools,

are under increasing financial pressure to meet real and perceived needs. Thus, any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from nonrecipient sectarian groups, who may fear that needed funds are being diverted from them. In short, aid to parochial schools of the sort at issue here potentially leads to "that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz v. Tax Comm'n*, 397 U.S. 664, 694, 90 S.Ct. 1409, 1424, 25 L.Ed.2d 697 (1970) (opinion of Harlan, J.). Although the Court's opinion does not discuss it at length, see *ante*, at 3238, the potential for such divisiveness is a strong additional reason for holding that the Title I and Grand Rapids programs are invalid on entanglement grounds.

The Title I program at issue in this case also would be invalid under the "effects" prong of the test adopted in *Lemon v. Kurtzman*, *supra*.^{*} As has been discussed thoroughly in *Ball*, 473 U.S., at 392-397, 105 S.Ct., at 3227-3230, with respect to the Grand Rapids programs, the type of aid provided in New York by the Title I program amounts to a state subsidy of the parochial schools by relieving those schools of the duty to provide the remedial and supplemental education their children require. This is not the type of "indirect and incidental effect beneficial to [the] religious institutions" that we suggested in *Nyquist* would survive Establishment Clause scrutiny. 413 U.S., at 775, 93 S.Ct., at 2966. Rather, by directly assuming part of the parochial schools' education function, the effect of the Title I aid is "inevitably ... to subsidize and advance the religious mission of [the] sectarian schools,"

^{*} Nothing that I say here should be construed as suggesting that a court inevitably must determine whether all three prongs of the *Lemon* test have been violated. See, *e.g.*, *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 794, 93 S.Ct. 2955, 2976, 37

L.Ed.2d 948 (1973). I discuss an additional infirmity of the programs at issue in these cases only to emphasize why even a beneficial program may be invalid because of the way it is structured.

id., at 779-780, 93 S.Ct., at 2968-2969, even though the program provides that only secular subjects will be taught. As in *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), the secular education these schools provide goes "hand in hand" with the religious mission that is the reason for the schools' existence. 421 U.S., at 366, 95 S.Ct., at 1763 (quoting *Lemon v. Kurtzman*, *supra*, 403 U.S., at 657, 91 S.Ct., at 2133 (opinion of BRENNAN, J.)). Because of the predominantly religious nature of the schools, the substantial aid provided by the Title I program "inescapably results in the direct and substantial advancement of religious activity." *Meek v. Pittenger*, *supra*, 421 U.S., at 366, 95 S.Ct., at 1763.

I recognize the difficult dilemma in which governments are placed by the interaction of the "effects" and entanglement prongs of the *Lemon* test. Our decisions require governments extending aid to parochial schools to tread an extremely narrow line between being certain that the "principal or primary effect" of the aid is not to advance religion, *Lemon v. Kurtzman*, *supra*, 403 U.S., at 612, 91 S.Ct., at 2111, and avoiding excessive entanglement. Nonetheless, the Court has never foreclosed the possibility that some types of aid to parochial schools could be valid under the Establishment Clause. *Mueller v. Allen*, 463 U.S., at 393, 103 S.Ct., at 3065-3066. Our cases have upheld evenhanded secular assistance to both parochial and public school children in some areas. *E.g.*, *ibid.* (tax deductions for educational expenses); *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (provision of secular textbooks); *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947) (reimbursements for bus fare to school). I do not read the Court's opinion as precluding these types of indirect aid to parochial schools. In the cases cited, the assistance programs made funds available equally to public and non-public schools without entanglement. The constitutional defect in the Title I program, as indicated above, is that it provides a

direct financial subsidy to be administered in significant part by public school teachers within parochial schools—resulting in both the advancement of religion and forbidden entanglement. If, for example, Congress could fashion a program of evenhanded financial assistance to both public and private schools that could be administered, without governmental supervision in the private schools, so as to prevent the diversion of the aid from secular purposes, we would be presented with a different question.

I join the opinions and judgments of the Court.

Chief Justice BURGER, dissenting.

Under the guise of protecting Americans from the evils of an Established Church such as those of the 18th century and earlier times, today's decision will deny countless schoolchildren desperately needed remedial teaching services funded under Title I. The program at issue covers remedial reading, reading skills, remedial mathematics, English as a second language, and assistance for children needing special help in the learning process. The "remedial reading" portion of this program, for example, reaches children who suffer from dyslexia, a disease known to be difficult to diagnose and treat. Many of these children now will not receive the special training they need, simply because their parents desire that they attend religiously affiliated schools.

What is disconcerting about the result reached today is that, in the face of the human cost entailed by this decision, the Court does not even attempt to identify any threat to religious liberty posed by the operation of Title I. I share Justice WHITE's concern that the Court's obsession with the criteria identified in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), has led to results that are "contrary to the long-range interests of the country," 473 U.S., at 400, 105 S.Ct., at 3248. As I wrote in *Wallace v. Jaffree*, 472 U.S. 38, 89, 105 S.Ct. 2479, 2507, 86 L.Ed.2d 29 (1985) (dissenting opinion), "our

responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion." Federal programs designed to prevent a generation of children from growing up without being able to read effectively are not remotely steps in that direction. It borders on paranoia to perceive the Archbishop of Canterbury or the Bishop of Rome lurking behind programs that are just as vital to the Nation's schoolchildren as textbooks, see generally *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), transportation to and from school, see generally *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), and school nursing services.

On the merits of this case, I dissent for the reasons stated in my separate opinion in *Meek v. Pittenger*, 421 U.S. 349, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975). We have frequently recognized that some interaction between church and state is unavoidable, and that an attempt to eliminate all contact between the two would be both futile and undesirable. Justice Douglas, writing for the Court in *Zorach v. Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952), stated:

"The First Amendment ... does not say that in every and all respects there shall be a separation of Church and State.... Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly."

The Court today fails to demonstrate how the interaction occasioned by the program at issue presents any threat to the values underlying the Establishment Clause.

I cannot join in striking down a program that, in the words of the Court of Appeals, "has done so much good and little, if any, detectable harm." 739 F.2d 48, 72 (CA2 1984). The notion that denying these services to students in religious schools is a neutral act to protect us from an Established Church has no support in logic, experience, or history. Rather than showing the neutrality the Court boasts of, it exhib-

its nothing less than hostility toward religion and the children who attend church-sponsored schools.

Justice REHNQUIST, dissenting.

I dissent for the reasons stated in my dissenting opinion in *Wallace v. Jaffree*, 472 U.S. 38, 91, 105 S.Ct. 2479, 2507-2508, 86 L.Ed.2d 29. In this case the Court takes advantage of the "Catch-22" paradox of its own creation, see *Wallace, supra*, at 109-110, 105 S.Ct., at 2517 (REHNQUIST, J., dissenting), whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement. The Court today strikes down nondiscriminatory nonsectarian aid to educationally deprived children from low-income families. The Establishment Clause does not prohibit such sorely needed assistance; we have indeed traveled far afield from the concerns which prompted the adoption of the First Amendment when we rely on gossamer abstractions to invalidate a law which obviously meets an entirely secular need. I would reverse.

Justice O'CONNOR, with whom Justice REHNQUIST joins as to Parts II and III, dissenting.

Today the Court affirms the holding of the Court of Appeals that public school teachers can offer remedial instruction to disadvantaged students who attend religious schools "only if such instruction ... [is] afforded at a neutral site off the premises of the religious school." 739 F.2d 48, 64 (CA2 1984). This holding rests on the theory, enunciated in Part V of the Court's opinion in *Meek v. Pittenger*, 421 U.S. 349, 367-373, 95 S.Ct. 1753, 1764-1767, 44 L.Ed.2d 217 (1975), that public school teachers who set foot on parochial school premises are likely to bring religion into their classes, and that the supervision necessary to prevent religious teaching would unduly entangle church and state. Even if this theory were valid in the abstract, it cannot validly be applied to New York City's 19-year-old Title I program. The Court great-

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ly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion, and thereby demonstrates the flaws of a test that condemns benign cooperation between church and state. I would uphold Congress' efforts to afford remedial instruction to disadvantaged schoolchildren in both public and parochial schools.

I

As in *Wallace v. Jaffree*, 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), and *Thornton v. Caldor, Inc.*, 472 U.S. 703, 105 S.Ct. 2914, 86 L.Ed.2d 557 (1985), the Court in this litigation adheres to the three-part Establishment Clause test enunciated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). To survive the *Lemon* test, a statute must have both a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion. Under *Lemon* and its progeny, direct state aid to parochial schools that has the purpose or effect of furthering the religious mission of the schools is unconstitutional. I agree with that principle. According to the Court, however, the New York City Title I program is defective not because of any improper purpose or effect, but rather because it fails the third part of the *Lemon* test: the Title I program allegedly fosters excessive government entanglement with religion. I disagree with the Court's analysis of entanglement, and I question the utility of entanglement as a separate Establishment Clause standard in most cases. Before discussing entanglement, however, it is worthwhile to explore the purpose and effect of the New York City Title I program in greater depth than does the majority opinion.

The purpose of Title I is to provide special educational assistance to disadvantaged children who would not otherwise receive it. Congress recognized that poor academic performance by disadvantaged children is part of the cycle of poverty. S.Rep. No. 146, 89th Cong., 1st Sess., 4 (1965), U.S.Code Cong. & Admin.News

1965, pp. 1446, 1450. Congress sought to break the cycle by providing classes in remedial reading, mathematics, and English to disadvantaged children in parochial as well as public schools, for public schools enjoy no monopoly on education in low-income areas. *Wheeler v. Barrera*, 417 U.S. 402, 405-406, 94 S.Ct. 2274, 2277-2278, 41 L.Ed.2d 159 (1974). See 20 U.S.C. §§ 2740(a), 3806(a). Congress permitted remedial instruction by public school teachers on parochial school premises only if such instruction is "not normally provided by the nonpublic school" and would "contribute particularly to meeting the special educational needs of educationally deprived children." S.Rep. No. 146, *supra*, at 12, U.S.Code Cong. & Admin.News 1965, pp. 1446, 1457. See 34 CFR § 200.73 (1984) (Department of Education regulations implementing Title I and precluding instruction on parochial school premises except where necessary and where such instruction is not normally provided by the school).

After reviewing the text of the statute and its legislative history, the District Court concluded that Title I serves a secular purpose of aiding needy children regardless of where they attend school. App. to Juris. Statement in No. 84-238, p. 56a, incorporating findings of the District Court in *National Coalition for Public Education and Religious Liberty v. Harris*, 489 F.Supp. 1248, 1258 (SDNY 1980) (*PEARL*). The Court of Appeals did not dispute this finding, and no party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion. Indeed, the record demonstrates that New York City public school teachers offer Title I classes on the premises of parochial schools solely because alternative means to reach the disadvantaged parochial school students—such as instruction for parochial school students at the nearest public school, either after or during regular school hours—were unsuccessful. *PEARL, supra*, at 1255. As the Court of Appeals acknowledged, New York City

"could reasonably have regarded [Title I instruction on parochial school premises] as the most effective way to carry out the purposes of the Act." 739 F.2d, at 49. Whether one looks to the face of the statute or to its implementation, the Title I program is undeniably animated by a legitimate secular purpose.

The Court's discussion of the effect of the New York City Title I program is even more perfunctory than its analysis of the program's purpose. The Court's opinion today in *School District of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267, which strikes down a Grand Rapids scheme that the Court asserts is very similar to the New York City program, identifies three ways in which public instruction on parochial school premises may have the impermissible effect of advancing religion. First, "state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may 142subtly or overtly indoctrinate the students in particular religious tenets at public expense." Second, "state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public." Third, "the programs in effect subsidize^{*} the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Ante*, at 3230. While addressing the effect of the Grand Rapids program at such length, the Court overlooks the effect of Title I in New York City.

One need not delve too deeply in the record to understand why the Court does not belabor the effect of the Title I program. The abstract theories explaining why on-premises instruction might possibly advance religion dissolve in the face of experience in New York City. As the District Court found in 1980:

"New York City has been providing Title I services in nonpublic schools for

fourteen years. The evidence presented in this action includes: extensive background information on Title I; an in-depth description of New York City's program; a detailed review of Title I rules and regulations and the ways in which they are enforced; and the testimony and affidavits of federal officials, state officers, school administrators, Title I teachers and supervisors, and parents of children receiving Title I services. The evidence establishes that the result feared in other cases has not materialized in the City's Title I program. The presumption—that the 'religious mission' will be advanced by providing educational services on parochial school premises—is not supported by the facts of this case." *PEARL, supra*, at 1265.

Indeed, in 19 years there has never been a single incident in which a Title I instructor "subtly or overtly" attempted to "indoctrinate the students in particular religious tenets at public expense." *Grand Rapids, ante*, at 397, 105 S.Ct. at 3230.

143Common sense suggests a plausible explanation for this unblemished record. New York City's public Title I instructors are professional educators who can and do follow instructions not to inculcate religion in their classes. They are unlikely to be influenced by the sectarian nature of the parochial schools where they teach, not only because they are carefully supervised by public officials, but also because the vast majority of them visit several different schools each week and are not of the same religion as their parochial students.* In light of the ample record, an objective observer of the implementation of the Title I program in New York City would hardly view it as endorsing the tenets of the participating parochial schools. To the contrary, the actual and perceived effect of the program is precisely the effect intended by Congress: impoverished schoolchildren are being helped to overcome learning deficits,

the instructors do not share the religious affiliation of any school they teach in. App. 49.

* It is undisputed that 78% of Title I instructors who teach in parochial schools visit more than one school each week. Almost three-quarters of

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improving their test scores, and receiving a significant boost in their struggle to obtain both a thorough education and the opportunities that flow from it.

The only type of impermissible effect that arguably could carry over from the *Grand Rapids* decision to this litigation, then, is the effect of subsidizing "the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects." *Ante*, at 3230. That effect is tenuous, however, in light of the statutory directive that Title I funds may be used only to provide services that otherwise would not be available to the participating students. 20 U.S.C. § 3807(b). The Secretary of Education has vigorously enforced the requirement that Title I funds supplement rather than supplant the services of local education agencies. See *Bennett v. Kentucky Dept. of Ed.*, 470 U.S. 656, 105 S.Ct. 1544, 84 L.Ed.2d 590 (1985); *Bennett v. New Jersey*, 470 U.S. 632, 105 S.Ct. 1555, 84 L.Ed.2d 572 (1985).

¹⁴²Even if we were to assume that Title I remedial classes in New York City may have duplicated to some extent instruction parochial schools would have offered in the absence of Title I, the Court's delineation of this third type of effect proscribed by the Establishment Clause would be seriously flawed. Our Establishment Clause decisions have not barred remedial assistance to parochial school children, but rather remedial assistance *on the premises of the parochial school*. Under *Wolman v. Walter*, 433 U.S. 229, 244-248, 97 S.Ct. 2593, 2603-2605, 53 L.Ed.2d 714 (1977), the New York City classes prohibited by the Court today would have survived Establishment Clause scrutiny if they had been offered in a neutral setting off the property of the private school. Yet is it difficult to understand why a remedial reading class offered on parochial school premises is any more likely to supplant the secular course offerings of the parochial school than the same class offered in a portable classroom next door to the school. Unless *Wolman* was wrongly decided, the defect in the Title I

program cannot lie in the risk that it will supplant secular course offerings.

II

Recognizing the weakness of any claim of an improper purpose or effect, the Court today relies entirely on the entanglement prong of *Lemon* to invalidate the New York City Title I program. The Court holds that the occasional presence of peripatetic public school teachers on parochial school grounds threatens undue entanglement of church and state because (1) the remedial instruction is afforded in a pervasively sectarian environment; (2) ongoing supervision is required to assure that the public school teachers do not attempt to inculcate religion; (3) the administrative personnel of the parochial and public school systems must work together in resolving administrative and scheduling problems; and (4) the instruction is likely to result in political divisiveness over the propriety of direct aid. *Ante*, at 3237-3239; *ante*, at 3239-3240 (concurring opinion of POWELL, J.).

¹⁴⁷This analysis of entanglement, I acknowledge, finds support in some of this Court's precedents. In *Meek v. Pittenger*, 421 U.S., at 369, 95 S.Ct., at 1765, the Court asserted that it could not rely "on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." Because "a teacher remains a teacher," the Court stated, there remains a risk that teachers will intertwine religious doctrine with secular instruction. The continuing state surveillance necessary to prevent this from occurring would produce undue entanglement of church and state. *Id.*, at 370-372, 95 S.Ct., at 1765-1766. The Court's opinion in *Meek* further asserted that public instruction on parochial school premises creates a serious risk of divisive political conflict over the issue of aid to religion. *Ibid.* *Meek's* analysis of entanglement was reaffirmed in *Wolman* two Terms later.

I would accord these decisions the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis. But experience has demonstrated that the analysis in Part V of the *Meek* opinion is flawed. At the time *Meek* was decided, thoughtful dissents pointed out the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness. *Id.*, at 385, 95 S.Ct., at 1773 (opinion of BURGER, C.J.); *id.*, at 387, 95 S.Ct., at 1774 (opinion of REHNQUIST, J.). Experience has given greater force to the arguments of the dissenting opinions in *Meek*. It is not intuitively obvious that a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school. *Meek* is correct in asserting that a teacher of remedial reading "remains a teacher," but surely it is significant that the teacher involved is a professional, full-time public school employee who is unaccustomed to bringing religion into the classroom. ¹⁴²²Given that not a single incident of religious indoctrination has been identified as occurring in the thousands of classes offered in Grand Rapids and New York City over the past two decades, it is time to acknowledge that the risk identified in *Meek* was greatly exaggerated.

Just as the risk that public school teachers in parochial classrooms will inculcate religion has been exaggerated, so has the degree of supervision required to manage that risk. In this respect the New York City Title I program is instructive. What supervision has been necessary in New York City to enable public school teachers to help disadvantaged children for 19 years without once proselytizing? Public officials have prepared careful instructions warning public school teachers of their exclusively secular mission, and have required Title I teachers to study and observe

them. App. 50-51. Under the rules, Title I teachers are not accountable to parochial or private school officials; they have sole responsibility for selecting the students who participate in their class, must administer their own tests for determining eligibility, cannot engage in team teaching or cooperative activities with parochial school teachers, must make sure that all materials and equipment they use are not otherwise used by the parochial school, and must not participate in religious activities in the schools or introduce any religious matter into their teaching. To ensure compliance with the rules, a field supervisor and a program coordinator, who are full-time public school employees, make unannounced visits to each teacher's classroom at least once a month. *Id.*, at 53.

The Court concludes that this degree of supervision of public school employees by other public school employees constitutes excessive entanglement of church and state. I cannot agree. The supervision that occurs in New York City's Title I program does not differ significantly from the supervision any public school teacher receives, regardless of the location of the classroom. Justice POWELL suggests that the required supervision is extensive because the State must be ¹⁴²³certain that public school teachers do not inculcate religion. *Ante*, at 3239. That reasoning would require us to close our public schools, for there is always some chance that a public schoolteacher will bring religion into the classroom, regardless of its location. See *Wallace v. Jaffree*, 472 U.S., at 44-45, n. 23, 105 S.Ct., at 2484, n. 23. Even if I remained confident of the usefulness of entanglement as an Establishment Clause test, I would conclude that New York City's efforts to prevent religious indoctrination in Title I classes have been adequate and have not caused excessive institutional entanglement of church and state.

The Court's reliance on the potential for political divisiveness as evidence of undue entanglement is also unpersuasive. There is little record support for the proposition

Cite as 105 S.Ct. 3232 (1985)

that New York City's admirable Title I program has ignited any controversy other than this litigation. In *Mueller v. Allen*, 463 U.S. 388, 403-404, n. 11, 103 S.Ct. 3062, 3071-3072, n. 11, 77 L.Ed.2d 721 (1983), the Court cautioned that the "elusive inquiry" into political divisiveness should be confined to a narrow category of parochial aid cases. The concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 1366, 79 L.Ed.2d 604 (1984), went further, suggesting that Establishment Clause analysis should focus solely on the character of the government activity that might cause political divisiveness, and that "the entanglement prong of the *Lemon* test is properly limited to institutional entanglement."

I adhere to the doubts about the entanglement test that were expressed in *Lynch*. It is curious indeed to base our interpretation of the Constitution on speculation as to the likelihood of a phenomenon which the parties may create merely by prosecuting a lawsuit. My reservations about the entanglement test, however, have come to encompass its institutional aspects as well. As Justice REHNQUIST has pointed out, many of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid purpose and effect may still be invalid by virtue of undue entanglement. *Wallace v. Jaffree, supra*, 472 U.S., at 109-110, 105 S.Ct., at 2517-2518. For example, we permit a State to pay for bus transportation to a parochial school, *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), but preclude States from providing buses for parochial school field trips, on the theory such trips involve excessive state supervision of the parochial officials who lead them. *Wolman*, 433 U.S., at 254, 97 S.Ct. at 2608. To a great extent, the anomalous results in our Establishment Clause cases are "attributable to [the] 'entanglement' prong." Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U.Pitt.L.Rev. 673, 681 (1980).

Pervasive institutional involvement of church and state may remain relevant in

deciding the effect of a statute which is alleged to violate the Establishment Clause, *Walz v. Tax Comm'n*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), but state efforts to ensure that public resources are used only for nonsectarian ends should not in themselves serve to invalidate an otherwise valid statute. The State requires sectarian organizations to cooperate on a whole range of matters without thereby advancing religion or giving the impression that the government endorses religion. *Wallace v. Jaffree, supra*, 472 U.S., at 110, 105 S.Ct., at 2517 (dissenting opinion of REHNQUIST, J.) (noting that state educational agencies impose myriad curriculum, attendance, certification, fire, and safety regulations on sectarian schools). If a statute lacks a purpose or effect of advancing or endorsing religion, I would not invalidate it merely because it requires some ongoing cooperation between church and state or some state supervision to ensure that state funds do not advance religion.

III

Today's ruling does not spell the end of the Title I program of remedial education for disadvantaged children. Children attending public schools may still obtain the benefits of the program. Impoverished children who attend parochial schools may also continue to benefit from Title I programs offered off the premises of their schools—possibly in portable classrooms just over the edge of school property. The only disadvantaged children who lose under the Court's holding are those in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school. But this subset is significant, for it includes more than 20,000 New York City schoolchildren and uncounted others elsewhere in the country.

For these children, the Court's decision is tragic. The Court deprives them of a program that offers a meaningful chance at success in life, and it does so on the untenable theory that public school teachers (most of whom are of different faiths than

their students) are likely to start teaching religion merely because they have walked across the threshold of a parochial school. I reject this theory and the analysis in *Meek v. Pittenger* on which it is based. I cannot close my eyes to the fact that, over almost two decades, New York City's public school teachers have helped thousands of impoverished parochial school children to overcome educational disadvantages without once attempting to inculcate religion. Their praiseworthy efforts have not eroded and do not threaten the religious liberty assured by the Establishment Clause. The contrary judgment of the Court of Appeals should be reversed.

I respectfully dissent.



473 U.S. 373, 87 L.Ed.2d 267
SCHOOL DISTRICT OF the CITY OF
GRAND RAPIDS, et al., Petitioners,

v.

Phyllis BALL et al.

Yolanda AGUILAR, et al., Appellants,

v.

Betty-Louise FELTON et al.

SECRETARY, UNITED STATES DE-
PARTMENT OF EDUCATION,
Appellant,

v.

Betty-Louise FELTON et al.

CHANCELLOR OF the BOARD OF
EDUCATION OF CITY OF NEW
YORK, Appellant,

v.

Betty-Louise FELTON et al.

Nos. 83-990, 84-237, 84-238 and 84-239.

July 1, 1985.

For Opinions of the Court, see 105 S.Ct.
3216, 3232.

* This opinion applies also to No. 84-237, *Aguilar et al. v. Felton et al.*, No. 84-238, *Secretary, United States Department of Education v. Felton*

¹⁴⁰⁰Justice WHITE, dissenting.*

As evidenced by my dissenting opinions in *Lemon v. Kurtzman*, 403 U.S. 602, 661, 91 S.Ct. 2105, 2185, 29 L.Ed.2d 745 (1971), and *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 813, 93 S.Ct. 2955, 2982, 37 L.Ed.2d 948 (1973), I have long disagreed with the Court's interpretation and application of the Establishment Clause in the context of state aid to private schools. For the reasons stated in those dissents, I am firmly of the belief that the Court's decisions in these cases, like its decisions in *Lemon* and *Nyquist*, are "not required by the First Amendment and [are] contrary to the long-range interests of the country." 413 U.S., at 820, 93 S.Ct., at 2996. For those same reasons, I am satisfied that what the States have sought to do in these cases is well within their authority and is not forbidden by the Establishment Clause. Hence, I dissent and would reverse the judgment in each of these cases.



et al., and No. 84-239, *Chancellor of the Board of Education of the City of New York v. Felton et al.*, ante, 3232.

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HORTON'S KIDS NEWS

Horton's Kids Inc.

2144 California St. NW, #304, Washington, DC 20008

202-232-6550

Volume I

Fall 1995

Message from the Volunteers

We hope you enjoy our first-ever Horton's Kids, Inc. newsletter. We wanted to let our contributors know what we have been doing since our "Get Ready for Christmas" fundraiser at Eastern Market last December.

Horton's Kids, is still primarily a tutoring and mentoring program for Washington's disadvantaged children. We're up to about 100 children for whom we provide Tuesday night tutoring sessions at the Anacostia Public Library and Sunday afternoon educational and recreational outings. With the exception of federal holidays and a month during the summer, we pick up the children at their homes every single Tuesday and Sunday, rain or shine.

This consistency is particularly important to our children. They live in a dangerous and unpredictable part of Washington DC but no matter what, Horton's Kids volunteers will pick them up twice a week and show them the world. They come to us with their homework questions, their medical needs, and their boundless curiosity.

In addition to our regular tutoring and field trips we have implemented some new programs such as regular medical and dental check-ups, a community service program, and special tutoring sessions.

The children seem to be doing better than ever. They are smiling more, they are more confident, they are more attentive to their school work, and they are more helpful - its difficult to tell how much Horton's Kids, Inc. has had to do with their many triumphs and successes. They are incredible children and we feel honored to be part of their lives.

Thank you for your generous contribution last year. We could not have done it without you.

The Horton's Kids Volunteers

SIX CHILDREN HEAD TO PRIVATE SCHOOL

Horton's Kids sent six particularly gifted children to private schools this fall. The children are enthusiastic about the harder classes and the safer schools. This is the second year Horton's Kids has sent children to private schools. The \$15,000 tuition costs are provided through private solicitations and our annual fundraiser.

In September, Crystal Stewart started her senior year at The Field School, located in Dupont Circle. Five children are at Holy Redeemer Catholic School: Damien Griffin, Marquette Thompson, Michael Moore, Eddie Griffin and John Griffin. Two of the boys were held back a year, but they each see an advantage in changing schools. One of the boys said he was glad he didn't have to go back to his old school where "children my age light cars on fire." Another found the smaller classes, with only 25 children per grade, to be a plus. And they all love

wearing the required ties, because they think they look handsome.

Horton's Kids also helped prepare some of the children to go back to public school. In addition to our tutoring program, we offered to split uniform costs with the parents. Horton's Kids provided some of the children with paper, notebooks and pencils so they could go back to school ready to learn.

Despite the short time the children have been in private school, their behavior, attitude and academic performance has already improved. They are eager to learn and more focused. We believe these schools offer an incredible opportunity for our children. We plan to send more children to them in the future.



Antonio Jones at Anacostia Library

stitution that the information will not be disclosed to any other party except as provided under State law without the prior written consent of the parent of the student;".

SEC. 308. None of the funds made available in this Act may be used by the Office of Civil Rights of the Department of Education after December 31, 1995, to enforce title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) with respect to gender equity in intercollegiate athletic programs, except when it is made known to the Office that the Department has issued updated policy guidance to institutions of higher education which includes specific criteria ~~objective criteria~~ clarifying how such institutions can demonstrate a history and continuing practice of program expansion for members of the underrepresented sex and full and effective accommodation of the interests and abilities of the underrepresented sex.

This title may be cited as the "Department of Education Appropriations Act, 1996".

TITLE IV—RELATED AGENCIES

ARMED FORCES RETIREMENT HOME

For expenses necessary for the Armed Forces Retirement Home to operate and maintain the United States Soldiers' and Airmen's Home and the United States Naval

Note:

This provision was passed by the House as part of H.R. 2127 - the FY 96 Labor-HHS-ED appropriations bill.

It was passed after adopting a Hastert amendment substituting the word "specific" for the word "objective."

Home, to be paid from funds available in the Armed Forces Retirement Home Trust Fund, \$58,186,000, of which \$2,051,000 shall remain available until expended for construction and renovation of the physical plants at the United States Soldiers' and Airmen's Home and the United States Naval Home: *Provided*, That this appropriation shall not be available for the payment of hospitalization of members of the Soldiers' and Airmen's Home in United States Army hospitals at rates in excess of those prescribed by the Secretary of the Army upon recommendation of the Board of Commissioners and the Surgeon General of the Army.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE DOMESTIC VOLUNTEER SERVICE PROGRAMS, OPERATING EXPENSES

For expenses necessary for the Corporation for National and Community Service to carry out the provisions of the Domestic Volunteer Service Act of 1973, as amended, \$168,974,000.

CORPORATION FOR PUBLIC BROADCASTING

For payment to the Corporation for Public Broadcasting, as authorized by the Communications Act of 1934, without regard to section 396(k)(3)(B)(iii), an amount which shall be available within limitations specified by that Act, for the fiscal year 1998, \$240,000,000:

its students shall not do so in a manner which violates Subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.40 Marital or parental status.

(a) *Status generally.* A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extra-curricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activ-

ity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but oper-

ates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute non-compliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one

year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 944, Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484)

§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs and Activities Prohibited

§ 106.51 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with orga-

Description of these amendments to the Postal Contracting Manual follows:

(a) Form 7331, May 1979, Solicitation. Offer, and Award—Cleaning Services.

(c) Form 7356, May 1979,
Representations and Certifications—
Cleaning Services Contracts.

(d) Form 7360, May 1979, Biweekly Report of Contractor Performance—Cleaning Services Contracts.

(e) Form 7420, May 1979, General Provisions—Cleaning Services Contracts.

2. Section 22, Part 7, has been revised to establish uniform policy for entering into and administering cleaning services contracts.

In consideration of the foregoing, 39 CFR 601 is amended by adding the following to §601.105:

Transmittal letter	Dated	FEDERAL REGISTER publication
29	Sept. 28, 1979	44 FR

Note.—Incorporation by reference provisions approved by the Director of the Federal Register on December 3, 1971, and extended at 42 FR 29488, June 9, 1977, 43 FR 22717, May 28, 1978, and at 44 FR 31976, June 4, 1979 (corrected at 44 FR 32369, June 6, 1979).

**Assistant General Counsel Legislative
Division**

BELLING CODE 7710-12-M

45 CFR Part 86

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, (HEW) now Dept of

ACTION: Policy Interpretation.

SUMMARY: The following Policy Interpretation represents the Department of Health, Education, and Welfare's interpretation of the intercollegiate athletic provisions of Title IX of the Education Amendments of 1972 and its implementing regulation. Title IX prohibits educational programs and institutions funded or otherwise supported by the Department from discriminating on the basis of sex. The Department published a proposed Policy Interpretation for public comment on December 11, 1978. Over 700 comments reflecting a broad range of opinion were received. In addition, HEW staff visited eight universities during June and July, 1979, to see how the proposed policy and other suggested alternatives would apply in actual practice at individual campuses. The final Policy Interpretation reflects the many comments HEW received and the results of the individual campus visits.

EFFECTIVE DATE: December 11, 1979

FOR FURTHER INFORMATION CONTACT:
Colleen O'Connor, 330 Independence
Avenue, Washington, D.C. (202) 245-
6671

SUPPLEMENTARY INFORMATION:

1. Legal Background

A. The Statute

Section 901(a) of Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation, in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Section 844 of the Education Amendments of 1974 further provides:

The Secretary of (of HEW) shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.

Congress passed Section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from the jurisdiction of Title IX.

B. The Regulation

The regulation implementing Title IX is set forth, in pertinent part, in the Policy Interpretation below. It was signed by President Ford on May 27, 1975, and submitted to the Congress for review pursuant to Section 431(d)(1) of the General Education Provisions Act (GEPA).

During this review, the House Subcommittee on Postsecondary Education held hearings on a resolution disapproving the regulation. The Congress did not disapprove the regulation within the 45 days allowed under GEPA, and it therefore became effective on July 21, 1975.

Subsequent hearings were held in the Senate Subcommittee on Education on a bill to exclude revenues produced by sports to the extent they are used to pay the costs of those sports. The Committee, however, took no action on this bill.

The regulation established a three year transition period to give institutions time to comply with its equal athletic opportunity requirements. That transition period expired on July 21, 1978.

II. Purpose of Policy Interpretation

By the end of July 1978, the Department had received nearly 100 complaints alleging discrimination in athletics against more than 50 institutions of higher education. In attempting to investigate these complaints, and to answer questions from the university community, the Department determined that it should provide further guidance on what constitutes compliance with the law. Accordingly, this Policy Interpretation explains the regulation so as to provide a framework within which the complaints can be resolved, and to provide institutions of higher education with additional guidance on the requirements for compliance with Title IX in intercollegiate athletic programs.

III. Scope of Application

This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation.¹

'The regulation specifically refers to club sports separately from intercollegiate athletics. Accordingly, under this Policy Interpretation, club

Footnotes continued on next page

Accordingly, the Policy Interpretation may be used for guidance by the administrators of such programs when appropriate.

This policy interpretation applies to any public or private institution, person or other entity that operates an educational program or activity which receives or benefits from financial assistance authorized or extended under a law administered by the Department. This includes educational institutions whose students participate in HEW funded or guaranteed student loan or assistance programs. For further information see definition of "recipient" in Section 86.2 of the Title IX regulation.

IV. Summary of Final Policy Interpretation

The final Policy Interpretation clarifies the meaning of "equal opportunity" in intercollegiate athletics. It explains the factors and standards set out in the law and regulation which the Department will consider in determining whether an institution's intercollegiate athletics program complies with the law and regulations. It also provides guidance to assist institutions in determining whether any disparities which may exist between men's and women's programs are justifiable and nondiscriminatory. The Policy Interpretation is divided into three sections:

81 • **Compliance in Financial Assistance (Scholarships) Based on Athletic Ability:** Pursuant to the regulation, the governing principle in this area is that all such assistance should be available on a substantially proportional basis to the number of male and female participants in the institution's athletic program.

32 • **Compliance in Other Program Areas (Equipment and supplies; games and practice times; travel and per diem; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, and practice and competitive facilities; medical and training facilities; housing and dining facilities; publicity; recruitment; and support services):** Pursuant to the regulation, the governing principle is that male and female athletes should receive equivalent treatment, benefits, and opportunities.

★ 83 90 PI • **Compliance in Meeting the Interests and Abilities of Male and Female Students:** Pursuant to the regulation, the governing principle in this area is that the athletic interests

and abilities of male and female students must be equally effectively accommodated.

V. Major Changes to Proposed Policy Interpretation

The final Policy Interpretation has been revised from the one published in proposed form on December 11, 1978. The proposed Policy Interpretation was based on a two-part approach. Part I addressed equal opportunity for participants in athletic programs. It required the elimination of discrimination in financial support and other benefits and opportunities in an institution's existing athletic program. Institutions could establish a presumption of compliance if they could demonstrate that:

- "Average per capita" expenditures for male and female athletes were substantially equal in the area of "readily financially measurable" benefits and opportunities or, if not, that any disparities were the result of nondiscriminatory factors, and

- Benefits and opportunities for male and female athletes, in areas which are not financially measurable, "were comparable."

Part II of the proposed Policy Interpretation addressed an institution's obligation to accommodate effectively the athletic interests and abilities of women as well as men on a continuing basis. It required an institution either:

- To follow a policy of development of its women's athletic program to provide the participation and competition opportunities needed to accommodate the growing interests and abilities of women, or

- To demonstrate that it was effectively (and equally) accommodating the athletic interests and abilities of students, particularly as the interests and abilities of women students developed.

While the basic considerations of equal opportunity remain, the final Policy Interpretation sets forth the factors that will be examined to determine an institution's actual, as opposed to presumed, compliance with Title IX in the area of intercollegiate athletics.

The final Policy Interpretation does not contain a separate section on institutions' future responsibilities. However, 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. In most cases, this will entail development of athletic programs that substantially expand opportunities for

women to participate and compete at all levels.

The major reasons for the change in approach are as follows:

(1) Institutions and representatives of athletic program participants expressed a need for more definitive guidance on what constituted compliance than the discussion of a presumption of compliance provided. Consequently the final Policy Interpretation explains the meaning of "equal athletic opportunity" in such a way as to facilitate an assessment of compliance.

(2) Many comments reflected a serious misunderstanding of the presumption of compliance. Most institutions based objections to the proposed Policy Interpretation in part on the assumption that failure to provide compelling justifications for disparities in per capita expenditures would have automatically resulted in a finding of noncompliance. In fact, such a failure would only have deprived an institution of the benefit of the presumption that it was in compliance with the law. The Department would still have had the burden of demonstrating that the institution was actually engaged in unlawful discrimination. Since the purpose of issuing a policy interpretation was to clarify the regulation, the Department has determined that the approach of stating actual compliance factors would be more useful to all concerned.

81 82 83 90 PI (3) The Department has concluded that purely financial measures such as the per capita test do not in themselves offer conclusive documentation of discrimination, except where the benefit or opportunity under review, like a scholarship, is itself financial in nature. Consequently, in the final Policy Interpretation, the Department has detailed the factors to be considered in assessing actual compliance. While per capita breakdowns and other devices to examine expenditures patterns will be used as tools of analysis in the Department's investigative process, it is achievement of "equal opportunity" for which recipients are responsible and to which the final Policy Interpretation is addressed.

A description of the comments received, and other information obtained through the comment/consultation process, with a description of Departmental action in response to the major points raised, is set forth at Appendix "B" to this document.

VI. Historic Patterns of Intercollegiate Athletics Program Development and Operations

In its proposed Policy Interpretation of December 11, 1978, the Department

Footnotes continued from last page
teams will not be considered to be intercollegiate teams except in those instances where they regularly participate in varsity competition.

see 1st column next page

published a summary of historic patterns affecting the relative status of men's and women's athletic programs. The Department has modified that summary to reflect additional information obtained during the comment and consultation process. The summary is set forth at Appendix A to this document.

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

A. Athletic Financial Assistance (Scholarships)

1. *The Regulation*—Section 86.37(c) of the regulation provides:

[Institutions] must provide reasonable opportunities for such award [of financial assistance] for members of each sex in proportion to the number of students of each sex participating in . . . inter-collegiate athletics.

2. *The Policy*—The Department will examine compliance with this provision of the regulation primarily by means of a financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs. The Department will measure compliance with this standard by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. Two such factors are:

a. At public institutions, the higher costs of tuition for students from out-of-state may in some years be unevenly distributed between men's and women's programs. These differences will be considered nondiscriminatory if they are not the result of policies or practices which disproportionately limit the availability of out-of-state scholarships to either men or women.

b. An institution may make reasonable professional decisions concerning the awards most appropriate for program development. For example, team development initially may require

spreading scholarships over as much as a full generation (four years) of student athletes. This may result in the award of fewer scholarships in the first few years than would be necessary to create proportionality between male and female athletes.

3. *Application of the Policy*—a. This section does not require a proportionate number of scholarships for men and women or individual scholarships of equal dollar value. It does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their participation rates.

b. When financial assistance is provided in forms other than grants, the distribution of non-grant assistance will also be compared to determine whether equivalent benefits are proportionately available to male and female athletes. A disproportionate amount of work-related aid or loans in the assistance made available to the members of one sex, for example, could constitute a violation of Title IX.

4. *Definition*—For purposes of examining compliance with this Section, the participants will be defined as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

B. Equivalence in Other Athletic Benefits and Opportunities

1. *The Regulation*—The Regulation requires that recipients that operate or sponsor interscholastic, intercollegiate, club, or intramural athletics, "provide equal athletic opportunities for members of both sexes." In determining whether an institution is providing equal opportunity in intercollegiate athletics, the regulation requires the Department to consider, among others, the following factors:

(1) *

(2) Provision and maintenance of equipment and supplies;

(3) Scheduling of games and practice times;

(4) Travel and per diem expenses;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training services and facilities;

(9) Provision of housing and dining services and facilities; and

(10) Publicity

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity. Accordingly, this Section also addresses recruitment of student athletes and provision of support services.

This list is not exhaustive. Under the regulation, it may be expanded as necessary at the discretion of the Director of the Office for Civil Rights.

2. *The Policy*—The Department will assess compliance with both the recruitment and the general athletic program requirements of the regulation by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent, that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required; provided the overall effect of any differences is negligible.

If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors. Some of the factors that may justify these differences are as follows:

a. Some aspects of athletic programs may not be equivalent for men and women because of unique aspects of particular sports or athletic activities. This type of distinction was called for by the "Javits Amendment" to Title IX, which instructed HEW to make "reasonable (regulatory) provisions considering the nature of particular sports" in intercollegiate athletics.

Generally, these differences will be the result of factors that are inherent to the basic operation of specific sports. Such factors may include rules of play, nature/replacement of equipment, rates of injury resulting from participation,

* See also § 86.41(a) and (b) of the regulation.

* Section 844 of the Education Amendments of 1974, Pub. L. 93-380, Title VIII, (August 21, 1974) 88 Stat. 612.

* See also § 86.37(a) of the regulation.

* 86.41(c) (1) on the accommodation of student interests and abilities, is covered in detail in the following Section C of this policy interpretation.

nature of facilities required for competition, and the maintenance/upkeep requirements of those facilities. For the most part, differences involving such factors will occur in programs offering football, and consequently these differences will favor men. If sport-specific needs are met equivalently in both men's and women's programs, however, differences in particular program components will be found to be justifiable.

b. Some aspects of athletic programs may not be equivalent for men and women because of legitimately sex-neutral factors related to special circumstances of a temporary nature. For example, large disparities in recruitment activity for any particular year may be the result of annual fluctuations in team needs for first-year athletes. Such differences are justifiable to the extent that they do not reduce overall equality of opportunity.

c. The activities directly associated with the operation of a competitive event in a single-sex sport may, under some circumstances, create unique demands or imbalances in particular program components. Provided any special demands associated with the activities of sports involving participants of the other sex are met to an equivalent degree, the resulting differences may be found nondiscriminatory. At many schools, for example, certain sports—notably football and men's basketball—traditionally draw large crowds. Since the costs of managing an athletic event increase with crowd size, the overall support made available for event management to men's and women's programs may differ in degree and kind. These differences would not violate Title IX if the recipient does not limit the potential for women's athletic events to rise in spectator appeal and if the levels of event management support available to both programs are based on sex-neutral criteria (e.g., facilities used, projected attendance, and staffing needs).

d. Some aspects of athletic programs may not be equivalent for men and women because institutions are undertaking voluntary affirmative actions to overcome effects of historical conditions that have limited participation in athletics by the members of one sex. This is authorized at § 86.3(b) of the regulation.

3. *Application of the Policy—General Athletic Program Components—*a. *Equipment and Supplies (§ 86.41(c)(2)).* Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, general equipment and supplies,

instructional devices, and conditioning and weight training equipment.

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) The quality of equipment and supplies;
- (2) The amount of equipment and supplies;
- (3) The suitability of equipment and supplies;
- (4) The maintenance and replacement of the equipment and supplies; and
- (5) The availability of equipment and supplies.

b. *Scheduling of Games and Practice Times (§ 86.41(c)(3)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) The number of competitive events per sport;
- (2) The number and length of practice opportunities;
- (3) The time of day competitive events are scheduled;
- (4) The time of day practice opportunities are scheduled; and
- (5) The opportunities to engage in available pre-season and post-season competition.

c. *Travel and Per Diem Allowances (§ 86.41(c)(4)).* Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Modes of transportation;
- (2) Housing furnished during travel;
- (3) Length of stay before and after competitive events;
- (4) Per diem allowances; and
- (5) Dining arrangements.

d. *Opportunity to Receive Coaching and Academic Tutoring (§ 86.41(c)(5)).*

(1) *Coaching*—Compliance will be assessed by examining, among other factors:

- (a) Relative availability of full-time coaches;
- (b) Relative availability of part-time and assistant coaches; and
- (c) Relative availability of graduate assistants.

(2) *Academic tutoring*—Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (a) The availability of tutoring; and
- (b) Procedures and criteria for obtaining tutorial assistance.

e. *Assignment and Compensation of Coaches and Tutors (§ 86.41(c)(6)).*⁴ In

⁴ The Department's jurisdiction over the employment practices of recipients under Subpart E, §§ 86.51–86.61 of the Title IX regulation has been successfully challenged in several court cases. Accordingly, the Department has suspended enforcement of Subpart E, Section 86.41(c)(6) of the regulation, however, authorizes the Department to

general, a violation of Section 86.41(c)(6) will be found only where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, or availability.

Nondiscriminatory factors can affect the compensation of coaches. In determining whether differences are caused by permissible factors, the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition will be considered.

Where these or similar factors represent valid differences in skill, effort, responsibility or working conditions they may, in specific circumstances, justify differences in compensation. Similarly, there may be unique situations in which a particular person may possess such an outstanding record of achievement as to justify an abnormally high salary.

(1) *Assignment of Coaches*—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Training, experience, and other professional qualifications;
- (b) Professional standing.

(2) *Assignment of Tutors*—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

- (a) Tutor qualifications;
- (b) Training, experience, and other qualifications.

(3) *Compensation of Coaches*—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's coaches of:

- (a) Rate of compensation (per sport, per season);
- (b) Duration of contracts;
- (c) Conditions relating to contract renewal;
- (d) Experience;
- (e) Nature of coaching duties performed;
- (f) Working conditions; and
- (g) Other terms and conditions of employment.

(4) *Compensation of Tutors*—Compliance will be assessed by examining, among other factors, the equivalence for men's and women's tutors of:

consider the compensation of coaches of men and women in the determination of the equality of athletic opportunity provided to male and female athletes. It is on this section of the regulation that this Policy Interpretation is based.

- (b) Hourly rate of payment by nature of subjects tutored;
- (b) Pupil loads per tutoring season;
- (c) Tutor qualifications;
- (d) Experience;
- (e) Other terms and conditions of employment.

f. Provision of Locker Rooms, Practice and Competitive Facilities

(§ 86.41(c)(7)). Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Quality and availability of the facilities provided for practice and competitive events;
- (2) Exclusivity of use of facilities provided for practice and competitive events;
- (3) Availability of locker rooms;
- (4) Quality of locker rooms;
- (5) Maintenance of practice and competitive facilities; and
- (6) Preparation of facilities for practice and competitive events.

g. Provision of Medical and Training Facilities and Services (§ 86.41(c)(8)).

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Availability of medical personnel and assistance;
- (2) Health, accident and injury insurance coverage;
- (3) Availability and quality of weight and training facilities;
- (4) Availability and quality of conditioning facilities; and
- (5) Availability and qualifications of athletic trainers.

h. Provision of Housing and Dining Facilities and Services (§ 86.41(c)(9)).

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Housing provided;
- (2) Special services as part of housing arrangements (e.g., laundry facilities, parking space, maid service).

i. Publicity (§ 86.41(c)(10)).

Compliance will be assessed by examining, among other factors, the equivalence for men and women of:

- (1) Availability and quality of sports information personnel;
- (2) Access to other publicity resources for men's and women's programs; and
- (3) Quantity and quality of publications and other promotional devices featuring men's and women's programs.

4. Application of the Policy—Other Factors (§ 86.41(c)). **a. Recruitment of Student Athletes.** The athletic

recruitment practices of institutions often affect the overall provision of opportunity to male and female athletes. Accordingly, where equal athletic opportunities are not present for male and female students, compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes to determine whether the provision of equal opportunity will require modification of those practices.

Such examinations will review the following factors:

- (1) Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit;
- (2) Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program; and
- (3) Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

b. Provision of Support Services. The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

In the provision of support services, compliance will be assessed by examining, among other factors, the equivalence of:

- (1) The amount of administrative assistance provided to men's and women's programs;
- (2) The amount of secretarial and clerical assistance provided to men's and women's programs.

5. Overall Determination of Compliance. The Department will base its compliance determination under § 86.41(c) of the regulation upon an examination of the following:

- a. Whether the policies of an institution are discriminatory in language or effect; or
- b. Whether disparities of a substantial and unjustified nature exist in the benefits, treatment, services or opportunities afforded male and female

students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action * * * and may choose to undertake such efforts as affirmative action * * *

Accordingly, institutions subject to § 86.23 are required in all cases to maintain equivalently effective recruitment programs for both sexes and, under § 86.41(c), to provide equivalent benefits, opportunities, and treatment to student athletes of both sexes.

athletes in the institution's program as a whole; or

c. Whether disparities in benefits, treatment, services, or opportunities in individual segments of the program are substantial enough in and of themselves to deny equality of athletic opportunity.

C. Effective Accommodation of Student Interests and Abilities.

1. The Regulation. The regulation requires institutions to accommodate effectively the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and levels of competition available to members of both sexes.

Specifically, the regulation, at § 86.41(c)(1), requires the Director to consider, when determining whether equal opportunities are available—

Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

Section 86.41(c) also permits the Director of the Office for Civil Rights to consider other factors in the determination of equal opportunity.

Accordingly, this section also addresses competitive opportunities in terms of the competitive team schedules available to athletes of both sexes.

The Policy. The Department will assess compliance with the interests and abilities section of the regulation by examining the following factors:

- a. The determination of athletic interests and abilities of students;
- b. The selection of sports offered; and
- c. The levels of competition available including the opportunity for team competition.

3. Application of the Policy—Determination of Athletic Interests and Abilities.

Institutions may determine the athletic interests and abilities of students by nondiscriminatory methods of their choosing provided:

- a. The processes take into account the nationally increasing levels of women's interests and abilities;
- b. The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- c. The methods of determining ability take into account team performance records; and

d. The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

4. Application of the Policy—Selection of Sports.

In the selection of sports, the regulation does not require institutions

* Public undergraduate institutions are also subject to the general anti-discrimination provision at § 86.23 of the regulation, which reads in part:

"A recipient * * * shall not discriminate on the basis of sex in the recruitment and admission of

These are
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of 41(c)(1).

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to integrate their teams nor to provide exactly the same choice of sports to men and women. However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex to try out for the team or to sponsor a separate team for the previously excluded sex.

a. **Contact Sports**—Effective accommodation means that if an institution sponsors a team for members of one sex in a contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited; and

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team.

b. **Non-Contact Sports**—Effective accommodation means that if an institution sponsors a team for members of one sex in a non-contact sport, it must do so for members of the other sex under the following circumstances:

(1) The opportunities for members of the excluded sex have historically been limited;

(2) There is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team; and

(3) Members of the excluded sex do not possess sufficient skill to be selected for a single integrated team, or to compete actively on such a team if selected.

5. Application of the Policy—Levels of Competition

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in number substantially proportional to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest

and abilities of the members of that sex;

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams in intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

6. Overall Determination of Compliance

The Department will base its compliance determination under § 86.41(c) of the regulation upon a determination of the following:

a. Whether the policies of an institution are discriminatory in language or effect; or

b. Whether disparities of a substantial and unjustified nature in the benefits, treatment, services, or opportunities afforded male and female athletes exist in the institution's program as a whole;

c. Whether disparities in individual segments of the program with respect to benefits, treatment, services, or opportunities are substantial enough in and of themselves to deny equality of athletic opportunity.

VIII. The Enforcement Process

The process of Title IX enforcement is set forth in § 86.71 of the Title IX regulation, which incorporates by reference the enforcement procedures applicable to Title VI of the Civil Rights

Act of 1964.* The enforcement process prescribed by the regulation is supplemented by an order of the Federal District Court, District of Columbia, which establishes time frames for each of the enforcement steps.*

According to the regulation, there are two ways in which enforcement is initiated:

• **Compliance Reviews**—Periodically the Department must select a number of recipients (In this case, colleges and universities which operate intercollegiate athletic programs) and conduct investigations to determine whether recipients are complying with Title IX. (45 CFR 80.7(a))

• **Complaints**—The Department must investigate all valid (written and timely) complaints alleging discrimination on the basis of sex in a recipient's programs. (45 CFR 80.7(b))

The Department must inform the recipient (and the complainant, if applicable) of the results of its investigation. If the investigation indicates that a recipient is in compliance, the Department states this, and the case is closed. If the investigation indicates noncompliance, the Department outlines the violations found.

The Department has 90 days to conduct an investigation and inform the recipient of its findings, and an additional 90 days to resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between the Department and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance. Sometimes the violation is relatively minor and can be corrected immediately. At other times, however, the negotiations result in a plan that will correct the violations within a specified period of time. To be acceptable, a plan must describe the manner in which institutional resources will be used to correct the violation. It also must state acceptable time tables for reaching interim goals and full compliance. When agreement is reached, the Department notifies the institution that its plan is acceptable. The Department then is obligated to review periodically the implementation of the plan.

An institution that is in violation of Title IX may already be implementing a corrective plan. In this case, prior to informing the recipient about the results of its investigation, the Department will determine whether the plan is adequate:

* Those procedures may be found at 45 CFR 80.6-80.11 and 45 CFR Part 8.

* *WEAL v. Harris*, Civil Action No. 74-1720 (D. D.C., December 29, 1977).

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF THE GENERAL COUNSEL

THE GENERAL COUNSEL

September 8, 1995

Note to Marvin Krislov

Re: Clarification on Intercollegiate Athletic Policy Guidance: The Three-Part Test

I have enclosed the revisions to the draft Clarification on Intercollegiate Athletic Policy Guidance: The Three-Part Test. The new language is highlighted and/or underlined. The revisions to the draft were made in response to the concerns you raised recently at a meeting with OCR and OGC staff. Staff shared your concerns with me and I believe the revisions are fully and appropriately responsive.

I have also sent 1) a copy of the cover letter to be signed by Norma Cantu transmitting the draft Clarification to members of Congress and others; and 2) a copy of Norma's testimony before the Subcommittee on Postsecondary Education, Training and Lifelong Learning (House Committee on Economic and Educational Opportunities). The testimony provides important background information about the controversy over the interpretation of the Three-Part Test and some interesting charts and data about participation rates.

I am assuming, I hope correctly, that you will be able to clear this draft quickly on behalf of White House Counsel. As we previously discussed with James Costello, the Department has made a commitment to several members of Congress to issue this clarification at the beginning of the school year. We are anxious, therefore, to circulate the draft for comments next week. To facilitate your response, I would like to set up a meeting for next Wednesday to review any continuing concerns you may have and have asked my secretary to contact you for a time that is convenient. In the absence of any remaining concerns on the part of White House Counsel, you could simply call me or Steve Winnick (401-6000) to let us know the draft has been cleared.

Thanks, in advance, for giving attention to this draft. We look forward to hearing from you.


Judith A. Winston

Attachment

DRAFT 9/7

Dear Colleague:

It is my pleasure to send you the enclosed material regarding an issue which continues to be of interest to all of us--equal opportunities in intercollegiate athletics.

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. (Title IX), which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, and the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 Fed. Reg. 71413 et seq. (1979)), followed publication for notice and the receipt and review of extensive comments.

Since becoming Assistant Secretary in May 1993, I have convened four focus groups to obtain a broad spectrum of views regarding OCR's Title IX enforcement and its guidance on intercollegiate athletics. As I testified before Congress on May 9, 1995, there is widespread, bipartisan support for the goals of Title IX in the area of intercollegiate athletics. At the same time, I have concluded that clarification of existing standards relating to the obligations of colleges and universities in this area is in order.

To ensure that there is no confusion about the enclosed "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" ["the Clarification"], I would like to outline several important points about this document.

First, the objective of the Clarification is to respond to requests for specific guidance about existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics for over a decade. In preparing the enclosure, OCR is not revisiting the Title IX regulation or the Title IX Policy Interpretation. Rather, the Clarification is provided to you in draft, so that you have the opportunity to comment upon whether it provides the appropriate clarity in areas that have generated questions. I am requesting that all comments be provided to me no later than 30 days from the date of this letter. After a review and assessment of comments received, OCR will issue the Clarification in final.

Second, the Clarification is limited to an elaboration upon what is commonly referred to as the "three-part test" regarding opportunities for students to play on intercollegiate teams. This test, which has generated the majority of questions in the context of Title IX enforcement, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation. In an

**CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE:
THE THREE-PART TEST**

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX) which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued December 11, 1979 (44 Fed. Reg. 71413 et seq. (1979)).

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex; or
3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71418.

The three-part test furnishes three individual avenues for measuring compliance with the requirement to provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 Fed. Reg. 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others.

THREE-PART TEST -- Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate athletic program. In determining participation opportunities, OCR counts the number of actual athletes participating in the athletic program. The Policy Interpretation defines participants as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or

- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 Fed. Reg. at 71415.

For purposes of this determination, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. Under part d. of the above definition, any athlete who receives financial aid on the basis of athletic ability is considered by OCR to be a participant. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates.

The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment. However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality -- for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality -- the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates. OCR makes this determination on a case-by-case basis.

For example, if an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this unexpected change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal, i.e., 50 percent of the participants in its athletic program are female, its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.¹

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. There are no fixed intervals of time within which an institution must have added participation opportunities; rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and

¹ Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program.

Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still meet part two if, overall, it can show a history and continuing practice of program expansion.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution A established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution A is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. OCR would find Institution A in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

By 1980, Institution B established seven teams for women. Institution B added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution B eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. OCR would not find Institution B in compliance with part two. Institution B cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution C established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had

eight members. In 1987 and 1989 Institution C added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. OCR would find Institution C in compliance with part two because it has a history of program expansion and the elimination of the team in 1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution D started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and added another women's team expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution D agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution D is implementing a plan to add a women's team by the spring of 1997. OCR would find Institution D in compliance with part two. Institution D's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST -- Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students -- including students who are admitted to the institution though not yet enrolled -- who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation levels in club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation levels in interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its

students and admitted students in particular sport(s).² For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 Fed. Reg. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. OCR often recommends surveys because they are usually the simplest method for assessing interest. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

- the athletic experience and accomplishments in interscholastic, club or intramural competition of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the

² While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia; an institution is expected to meet the actual interests and abilities of its students and admitted students.

institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and

- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation

opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.

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June 1, 1995



Mr. George Stephanopoulos
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear George:

I read with great interest the news of your report on affirmative action to President Clinton.

I have written you earlier regarding Brown University's Title IX case and President Gregorian's testimony before the House Subcommittee on Postsecondary Education. I am enclosing another copy of that letter as well as the testimony. During the hearing he called upon the Administration to file an *amicus curie* on behalf of Brown. He also asked the Office of Civil Rights to clarify its regulations, particularly regarding the critical issue of proportionality.

I believe this case should interest the Administration. All supporters of affirmative action say they oppose quotas. Few have an opportunity to demonstrate it.

Page 37 of Judge Pettine's opinion offers that opportunity. It mandates that colleges and universities must *mirror* student enrollment as closely as possible, thereby establishing elusive, ever-changing quotas, or ratios of male and female athletes that institutions must put on their playing fields. If they do not, they will find themselves out of compliance with the law. We argue that not only is this unworkable, it is also not what Title IX requires.

By taking issue with that conclusion, the Administration could demonstrate that it indeed opposes quotas, even as it is committed, as is Brown University, to Title IX and to expanding opportunities for women in sports and elsewhere.

Sincerely yours,

Edward Abrahams

Edward Abrahams
Director

P.S. At the beginning of July, Brown is required to announce how it will comply with the judge's decision and create "substantial proportionality" between its male and female athletes, the current ratio (and nearly the best in higher education) of 57-43 having been found insufficient. I will keep you posted on Brown's proposal.

cc: Kirk O'Donnell

Enclosures

To: Ab Mihva
Chris Edley
Fr: GS
Does this request
make any sense
(B)

COLLEGES

Brown's President Asks for a Clear Policy on Title IX

By The New York Times

WASHINGTON, May 9 — Brown University's president today angrily called for clarification of the law and regulations that are meant to erase gender discrimination in college athletic programs.

A Federal judge ruled in March that Brown had discriminated against female athletes by eliminating two women's teams in 1991. The university has appealed.

Testifying at a House subcommittee hearing on the 1972 Federal law known as Title IX, Vartan Gregorian

said Brown had "serious, crucial disagreement over issues with the Office of Civil Rights" continuously evolving and shifting regulations governing Title IX, at least as they have been interpreted by a District Court judge in Providence.

"I am a frustrated university administrator who does not like bureaucracy and who does not like to be intimidated by lawyers and who would like a clear policy."

Schools can comply with Title IX by meeting one of three tests: They can insure that athletic opportuni-

ties for men and women are "substantially proportionate" to enrollment by gender; they can show a history and continuing practice of growth of their women's sports programs, or they can offer a sports program that "fully and effectively" satisfies the interests and abilities of female students.

But Gregorian told the House Subcommittee on Postsecondary Education, Training and Life-Long Learning that proportionality had become the overriding test, that Brown had been punished for making "mas-

sive" improvements in women's athletics all at once and that even study Brown had done to define student body's interests and abilities had been rejected by the court.

"The intent is so unclear that anybody can interpret it any way they want," Gregorian said. "I not tell these women, 'You participate in athletics otherwise you cause problems.' It's a Catch-22. If you create a team and don't participate you're held accountable. If you don't have the team you're held accountable on opportunity."

Norma V. Cantu, the assistant education secretary for civil rights, said that while the Civil Rights Office looks at numbers, "we don't let the numbers make decisions for us."

She added: "It is my absolute practice that each part of the three-part test is independent. If one should be used, will be used."

The hearing came one day after eight female students filed a lawsuit against the University of Syracuse, charging that its athletic program violates Title IX by asking a judge to immediately revoke women's lacrosse from varsity status.

After the hearing, several college and association heads of "non-revenue generating" men's sports — volleyball, water polo and gymnastics — spoke to the same theme.

They warned of negative effects, particularly in the United States Olympic performance, and drew two cut programs — wrestling at Princeton and swimming at U.S. Naval Academy — that alumni rallied to save by raising enough money for endowment. Even so, the universities chose to cut them. "It's not a question of money," said Carol Zaleski, the president of United States Swimming. "It's a question of numbers."

Representative David Hastert, an Illinois Republican who had been at the hearing, said he supports Title IX and that the university has "done a great deal of good."

"The unintentional consequence, though, has been a cutback of men's sports," Hastert said. "The trend across the country is to want to stop it."

LEVEL 1 - 2 OF 3 STORIES

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May 9, 1995, Tuesday

SECTION: CAPITOL HILL HEARING TESTIMONY

LENGTH: 3014 words

HEADLINE: TESTIMONY May 09, 1995 VARTAN GREGORIAN PRESIDENT BROWN UNIVERSITY
HOUSE ECONOMIC POSTSECONDARY EDUCATION, TRAINING AND LIFELONG LEARNING GENDER
EQUITY IN INTERCOLLEGIATE ATHLETICS

BODY:

Testimony

by

Vartan Gregorian

President of Brown University

before

the Subcommittee on Postsecondary

Education, Training and Lifetime Learning

May 9, 1995

2175 Rayburn House Office Building

Mr. Chairman and Members of Congress:

It is a great honor to appear before your Committee this morning.

I am mindful of the powerful role that government has played in the continuing and unfinished agenda of American democracy, especially in the realm of civil rights and ensuring equality of opportunity for all of our citizens. We, in turn, through our universities and colleges are participants in the constant re-creation of the future of America. We continue to attempt to harness the entire spectrum of our nation's potential talent to educate an enlightened citizenry, and to prepare what Thomas Jefferson once referred to as the 'aristocracy of talent' that transcends class, geography, and religion.

And I would add race, gender, and ethnicity to Jefferson's formulation. Our universities and colleges, particularly since World War II, have made major strides to democratize and nationalize access to higher education -- to create opportunities for learning, for research, for growth, for leadership.

All of us have come a long way in our efforts to ensure equality of opportunity. All of us have some distance to travel before all our citizens have an opportunity to partake in the agenda and the lofty goals of the American Democracy.

FDCH Congressional Testimony, May 9, 1995

One of the most important pieces of legislation in eradicating discrimination against women in higher education is Title IX of the Education Amendments of 1972. It prohibits gender-based discrimination in all collegiate activities, from admissions to the classroom. Athletics is not, and should not be, exempt from its non-discriminatory provisions.

Let me say at the outset that Brown University has been, is, and will remain, a firm supporter of Congress' goal in enacting Title IX. Prior to, and since its passage, Brown has worked with great urgency, consistency and steadiness to put in place policies and programs that provide fair treatment and equal opportunity for women in all facets of life at Brown, including athletics.

At Brown we take great pride in our century-old athletic program. We also take pride in our burgeoning women's athletic program. In breadth, depth, and quality, it is second to none in the country.

* First, the undisputed facts are: Brown offers 18 varsity sports for women, including among others, ice hockey, tennis, basketball, crew, field hockey, squash, swimming, cross country, lacrosse, soccer, softball, and track. Eighteen sports is more than double the national average.

* Second, Brown University had in place in 1979 -- a mere seven years after the enactment of Title IX -- a women's program with more than double the number of teams that most universities have today.

* Third, Brown women participate in the intercollegiate athletics at three times the national average. Nearly 43 percent of Brown's athletes are women. This puts the University in the top one percent of all women's intercollegiate programs in the nation. In addition, we also have intercollegiate club sports and intramural sports, both providing opportunities for women athletes across a broad spectrum of physical activities.

* Fourth, the treatment of women athletes is not an issue at Brown. There are no significant issues at Brown, as there may be elsewhere, regarding facilities, resources, recruiting scheduling, or budgeting.

In summary, even the plaintiffs in the current lawsuit against Brown have acknowledged that the Brown women's program is -- in their words -- "a model for the nation."

So why are we here?

We are here because Brown is in disagreement over crucial issues with the Office of Civil Rights' continuously evolving and shifting regulations governing Title IX, at least as they have been interpreted by a District Court Judge in Providence. Our so-called "model for the nation" program was struck down by a Federal Judge on every one of OCR's three tests in a decision that took advantage of all of the ambiguities, inconsistencies, and imprecision of the rules and guidelines. These rules and guidelines are so ambiguous, so inconsistent, and so imprecise that they leave judges with total discretion and rob institutions of any flexibility in meeting OCR's tests: proportionality, history of continuous improvement, and meeting the interests and abilities of men and women athletes.

FDCH Congressional Testimony, May 9, 1995

From my point of view the message to us is very simple:

One - Proportionality: Contrary to OCR, is not just one of three tests. It is the paramount test. It is not a "safe harbor."

Two - Historical Effort: If you move too fast and too far, it's too bad. If you had paced yourself, gone slowly, providing only incremental changes, you would have been better off.

Three - Interest and Abilities: No amount of data can offset the belief that all students are interested in intercollegiate athletics in neat, equal ratios, or at least they ought to be.

Furthermore, proportionality means that the number of female athletes actually participating must mirror the number of women enrolled in the undergraduate student body. Brown has welcomed the growth of women in its student body without regard to their interest in participating in intercollegiate athletics. Brown, which for the first time is 51% female, must have in place an athletic program which matches exactly that percentage, or apparently it loses its right to determine the size and content of its program.

Brown is mandated by its board to have balanced budgets, which it has had for the past sixteen years. Four years ago, when faced with budgetary constraints, programs across the University were trimmed and resources were directed to three institution-wide priorities: teaching, library acquisitions, and tuition assistance for needy students. As a part of these efforts, Brown's administration changed, among other things, the status of four varsity sports from unfunded to donor-funded. These included two women's teams and two men's teams, although they continue to compete at the varsity level. In addition, Brown led efforts in the Ivy League to eliminate freshmen football, which it did, a change in policy that affected 35 male athletes at the University. The only other teams eliminated at Brown were men's junior varsity teams.

While Brown, it seems, is free to eliminate freshmen football, discontinue men's junior varsity teams, and change the status of two men's teams, it cannot alter in any way two women's teams and remain in compliance with Title IX because the proportion of female athletes to their membership in the student body would be adversely impacted.

We believe that such decisions, if left standing, will establish an arbitrary numerical reference system that will force universities, pressed by constrained budgets, to eliminate men's sports in order to meet court-imposed quotas, rather than offer an athletic program that meets the respective levels of interest and abilities of both men and women to play varsity sports. As you know, this is already happening across the country.

I invite you to imagine the administrative nightmare that the proportionality test will cause. While the proportion of males and females changes from year to year, teams cannot be turned on and off like hot and cold running water. And I invite you to also contemplate the lost opportunities further cutting or capping men's teams will represent for male students, particularly those students who enjoy the camaraderie of being on a team, even if it means not getting into the game.

FDCH Congressional Testimony, May 9, 1995

Further, the second test requires institutions of higher learning to demonstrate "continuous improvement" in creating opportunities for women. As I noted earlier, following the passage of Title IX, Brown put in place a well-developed women's athletic program. By 1980, as I also mentioned, we had a women's athletic program larger than most universities today. But because we chose to undertake early, rapid expansion, our rate of increase slowed after 1980, and it was decided that we could not, therefore, demonstrate "continuous improvement." In retrospect, Brown would have been better off had it moved slowly and cynically, though, suffice it to say, Brown women would have had fewer opportunities to participate in sports.

Finally, as currently interpreted, the third test requires universities to meet any unmet interest if an institution does not meet the prevailing standards of tests one and two. On the margin, economists at Brown tell me, theoretically there will always be unmet interests, whether it be gymnastics, volleyball, skiing, or archery. But the facts are that on existing teams, Brown women have up to an estimated 100 opportunities to play intercollegiate sports which remain unfilled.

Brown and the institutions against which it competes adhere to a common set of rules. We accept students first and foremost on the basis of their academic promise. We have no athletic scholarships. Our students receive aid only on the basis of need. Gate receipts and guarantees are insignificant and television revenues are virtually non-existent in our league. Athletic programs draw from the same source of funds as faculty, financial aid, the library, and the myriad of services we offer our students. No athletic program in the schools against which we compete breaks even financially.

Under these conditions, I suggest that what is happening here is an assault against common sense. If Brown with its robust program of women's sports is not in compliance with Title IX, it is hard to imagine how any institution is today.

In conclusion, I would like to say again, Brown supports Title IX. But the government, it seems to me, must find ways to make it work. I believe that there is a rational solution to this dilemma that will facilitate progress in eliminating discrimination for women in sports. Such a solution should also permit institutions of higher learning to meet the respective interests of men and women to participate in sports fairly and equally without resorting to blunt and arbitrary measurements, such as those called for by a District Court judge and seemingly also by OCR's regulations. There are certainly more sophisticated and reliable instruments that measure overall interests and abilities, and they can and should be introduced into the equation before it is decided that an institution discriminates against women in a collegiate activity.

Robert Hutchins, former president of the University of Chicago, once said that equality and justice are the two great distinguishing characteristics of democracy. We at Brown are eager to work with this committee, with the Office of Civil Rights, and with our friends and supporters in higher education to clarify Title IX in a way that promotes both.

I would be delighted to answer any questions you may have.

LANGUAGE: ENGLISH

FDCH Congressional Testimony, May 9, 1995

. LOAD-DATE: May 9, 1995

Congress of the United States
House of Representatives
Washington, DC 20515

June 30, 1995

Ms. Norma Cantu
Assistant Secretary For Civil Rights
U.S. Department of Education
600 Independence Ave., SW
Washington, D.C. 20202

Dear Ms. Cantu:

In the wake of the May 9 Title IX hearing held before the Subcommittee on Postsecondary Education, Training and Life-Long Learning of the Economic and Educational Opportunities Committee, there is wide agreement that it is time for the Office for Civil Rights (OCR) of the Department of Education to issue a new policy interpretation.

We want to emphasize our strong support for female athletes and the increased opportunities that have been encouraged by Title IX. Sport yields numerous benefits to women and girls of all ages. However, female athletes have been denied even greater opportunities through the current application of Title IX.

We are very concerned that Title IX has been implemented in a manner that denies opportunities to men and fails to create the intended levels of increased opportunities for women. The hearing record shows that, despite OCR statements that all three prongs of the "interests and abilities" test are used to determine compliance with Title IX, the only measure really in use is the first prong, or the proportionality test.

When universities rely on proportionality, they are increasingly opting to discontinue athletic teams for men without significantly increasing opportunities for women. In this manner, they can comply with proportionality. We do not believe it was, or is, the intent of Congress that any athletic opportunities be eliminated as a result of the Title IX anti-discrimination statute.

The last policy interpretation was issued in 1979 to "provide further guidance on what constitutes compliance with the law." This was needed because regulations issued in 1975 were not giving enough guidance. It is clear that current policy interpretations have been grossly misinterpreted by the courts. In the absence of any commentary or amicus briefs filed by OCR in

cases involving its policy interpretation, it is time issues surrounding Title IX be clearly outlined.

We believe OCR should amend its policy interpretation in several ways. OCR should strengthen and use the second and third prongs of the "Interests and Abilities" test. OCR maintains there is no actual quota system in place because these two prongs are in place. However, until colleges and universities are able to use them on a widespread basis, proportionality is *de facto* the only criterion used.

A new policy interpretation must strengthen the second prong (history and continuing practice of increasing opportunities for participation) by clarifying that a university is in compliance if it has added, on average since the passage of Title IX, a sport every 3 years. This clarification ensures that universities which added sports early on will not be penalized for having acted in good faith soon after the passage of the legislation in 1972. This action does not abrogate the responsibility of institutions to continue to add sports for the under-represented gender.

The third prong (effectively accommodating the interests and abilities of the under-represented gender) should be strengthened to clarify what surveys are acceptable for measuring campus interest and ability. It is ludicrous to make universities responsible for serving the interests of students not yet at their institution, or who have no interest in attending their institution. Thus, we recommend that interests measured on college entrance exams accepted with applications to a given institution should be used in determining the interests and abilities of the student population.

Further, in consideration of the first prong (proportionality), it should be made clear that opportunity to participate must be the criterion used to compare athletic opportunity to the student population. A school should not be penalized if it offers opportunities for competition but athletes do not show up for the activities.

Finally, we believe there are other areas of the interpretation that have been catalysts for the elimination, rather than creation, of athletic opportunities. The new policy interpretation should seek to alter any current interpretation which hinders the creation of these opportunities.

By making these necessary changes in the current policy interpretation, OCR can begin a process of changing these skewed

incentives for educational institutions to eliminate, or never create, athletic opportunities. Title IX will better serve the athletes of today and the athletes of tomorrow when these changes are made.

We look forward to hearing the time schedule for these changes and the issuance of a new policy interpretation.

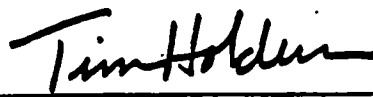
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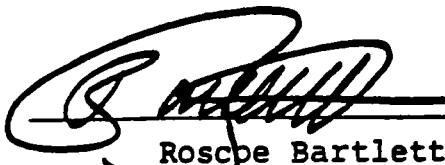

Mike Flanagan

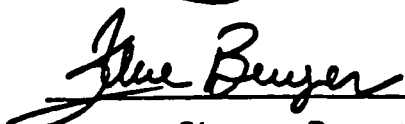

Spencer Bachus

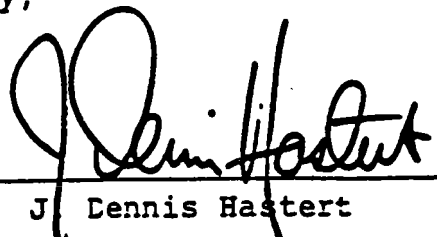

Cass Ballenger

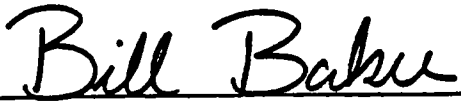

Doug Bereuter


Tim Holden

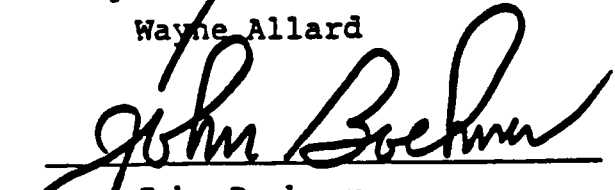

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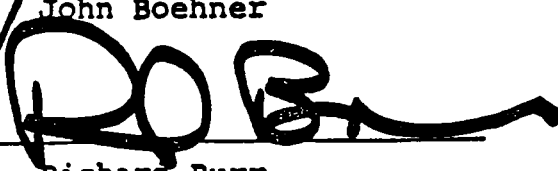

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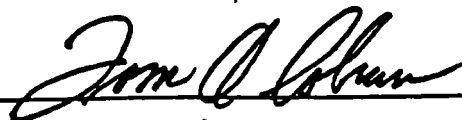

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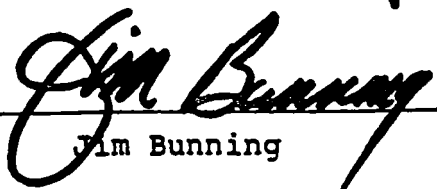

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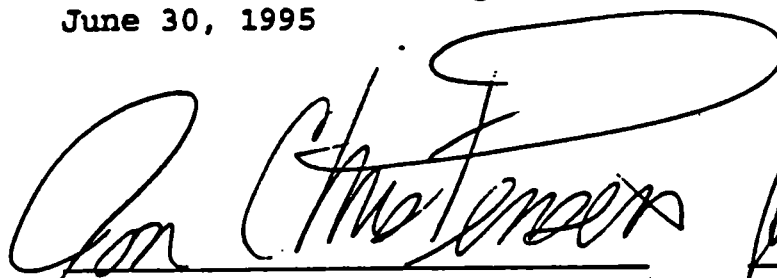

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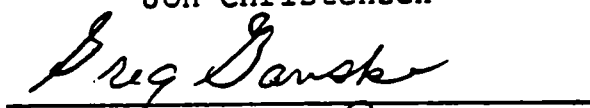

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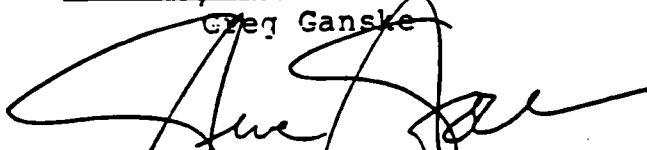

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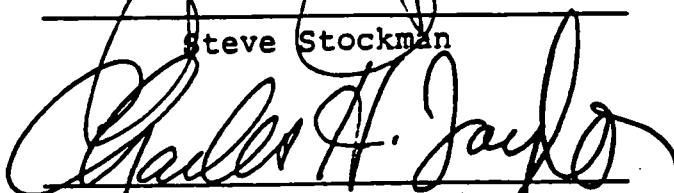
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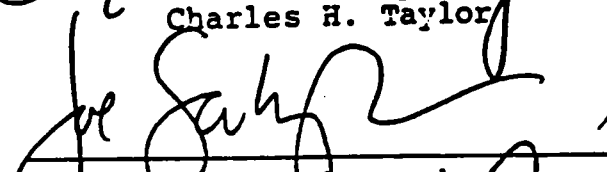
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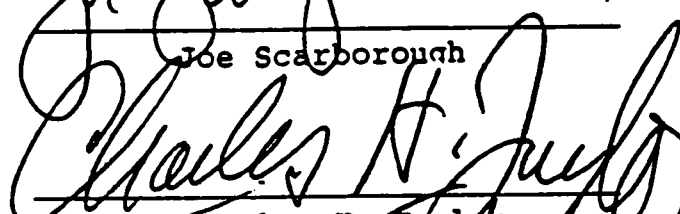
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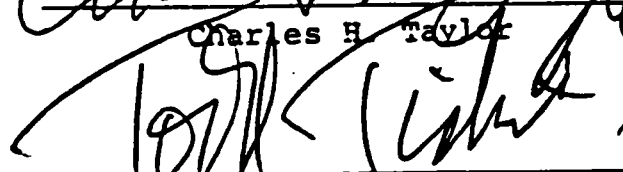
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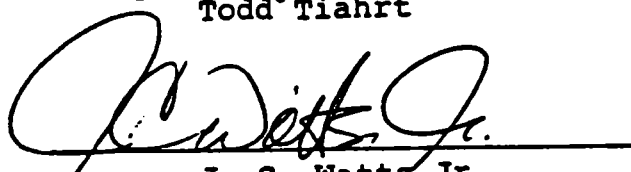
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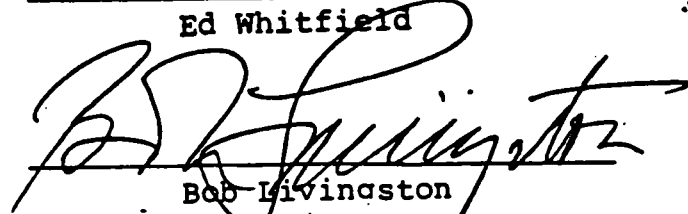
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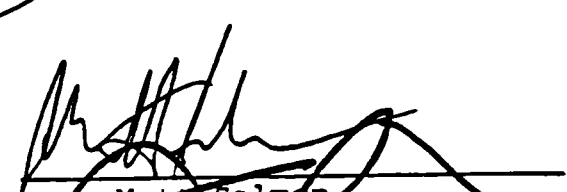
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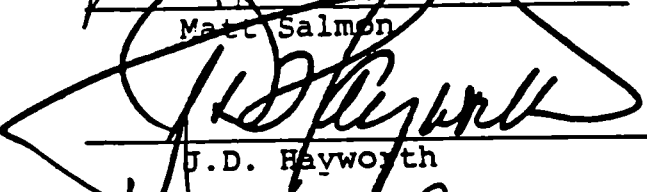
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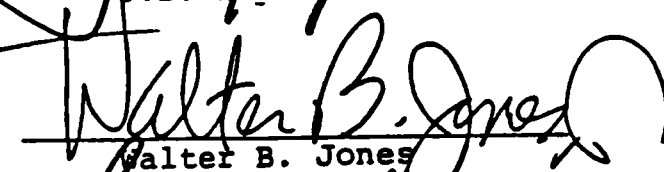
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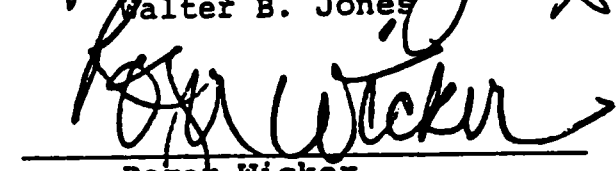
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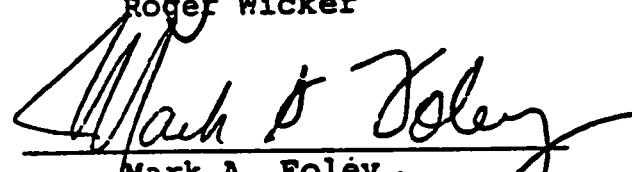
J.D. Hayworth



Walter B. Jones



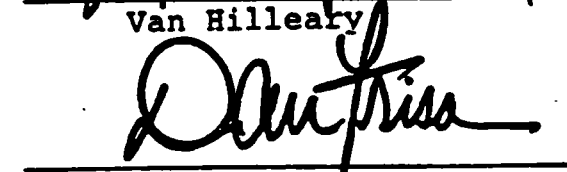
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Mark A. Foley



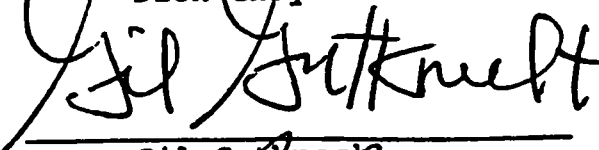
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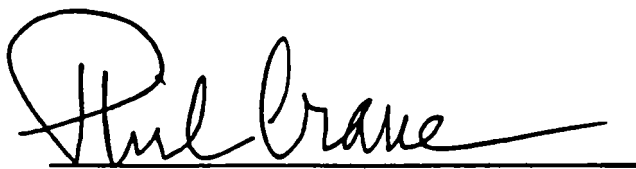
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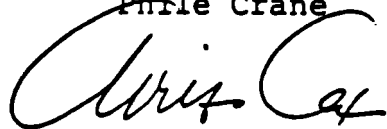
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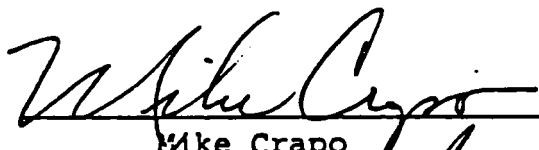
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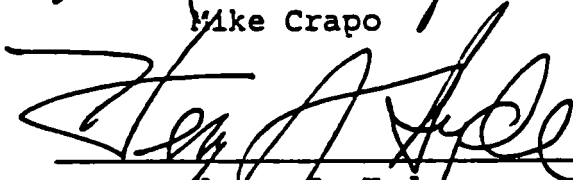
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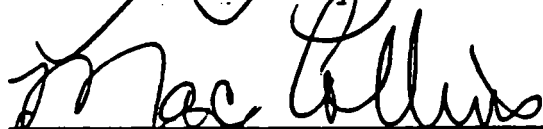
Nancy L. Johnson



Mike Crapo



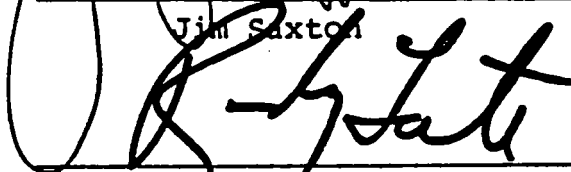
Henry J. Hyde



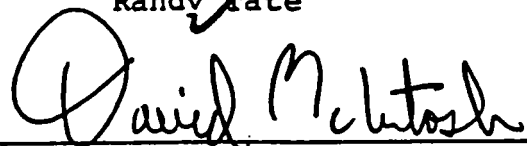
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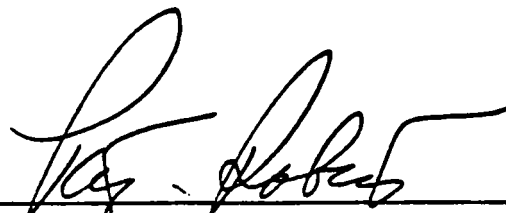
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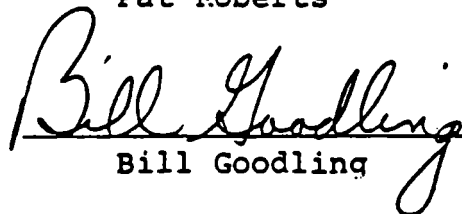
Randy Tate



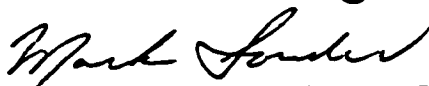
David McIntosh



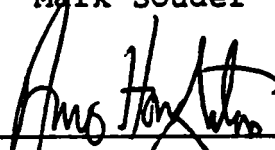
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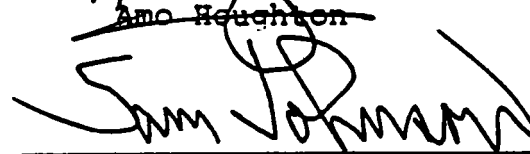
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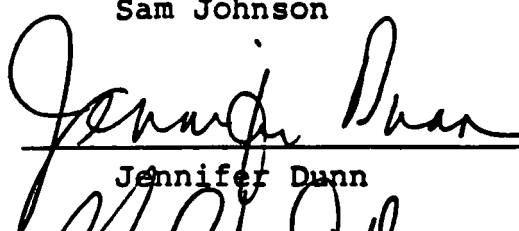
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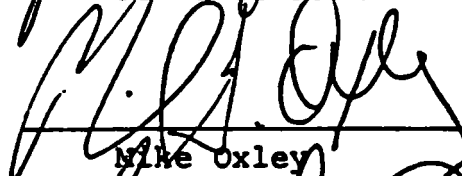
Amo Houghton



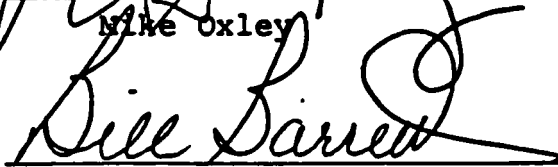
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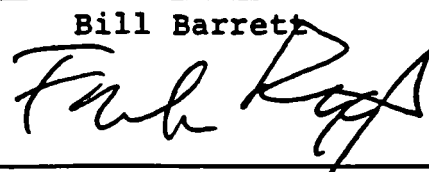
Jennifer Dunn



Mike Oxley



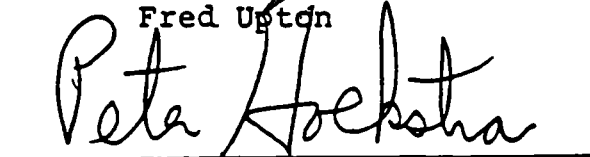
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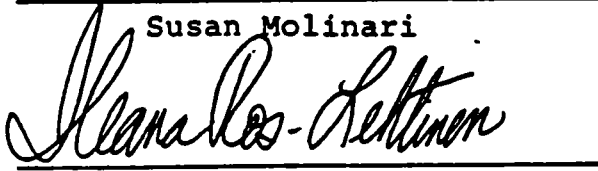
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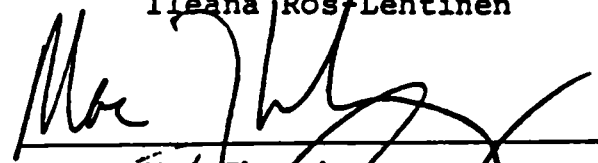

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Fred Upton

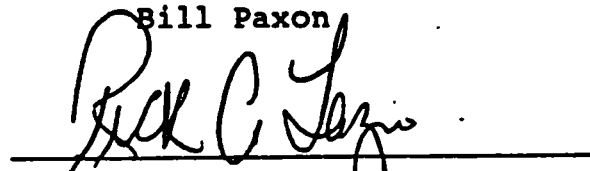

Peter Hoekstra

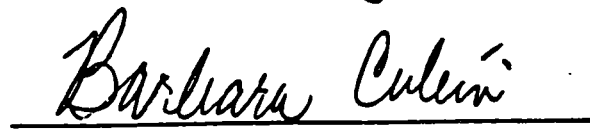

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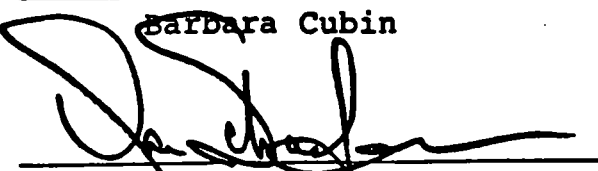

Ileana Ros-Lehtinen

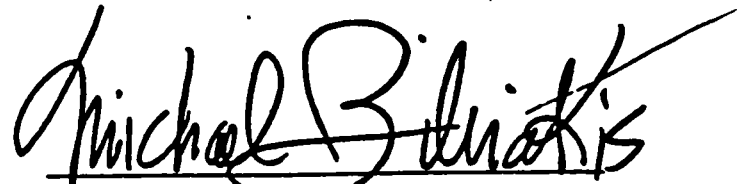

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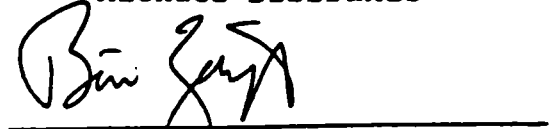

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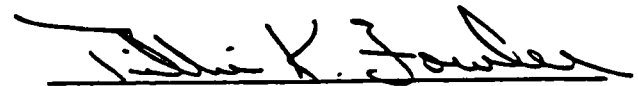

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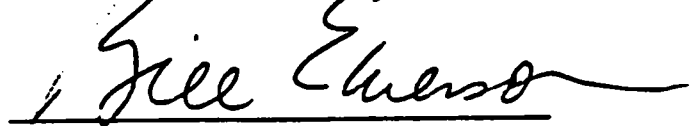

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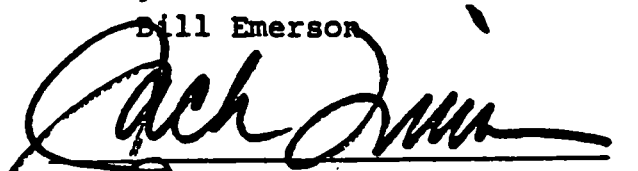

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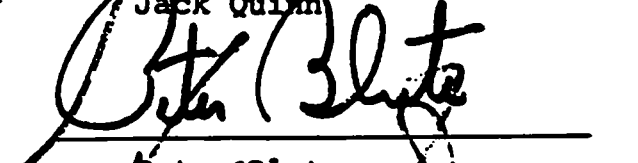

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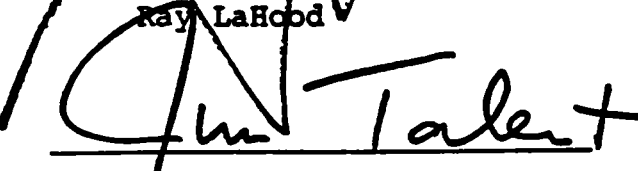

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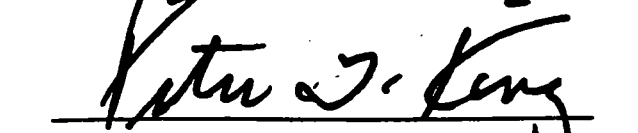

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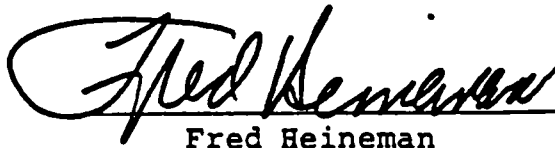

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Ray LaHood

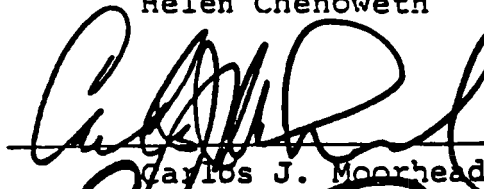

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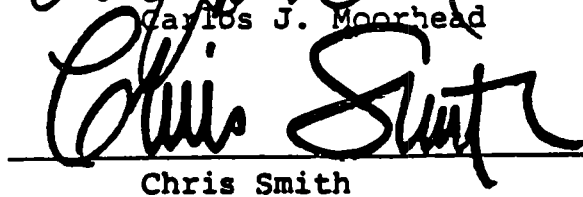

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Peter King


Fred Heineman


Helen Chenoweth

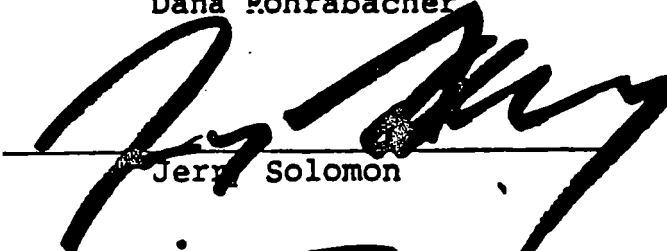

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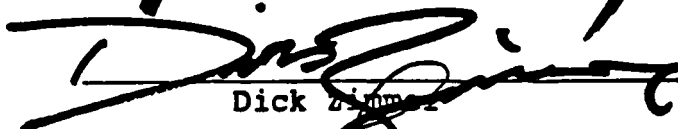

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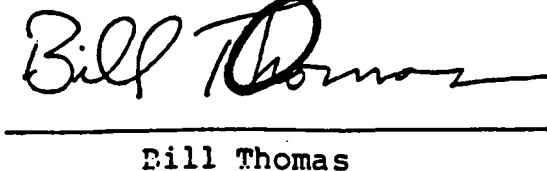

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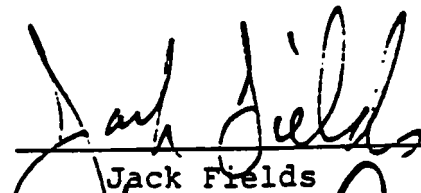

Don Manzullo


Dana Rohrabacher


Jerry Solomon

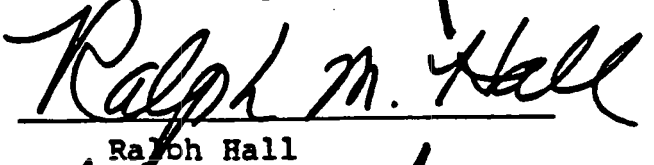

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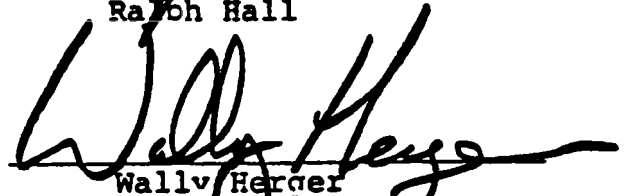

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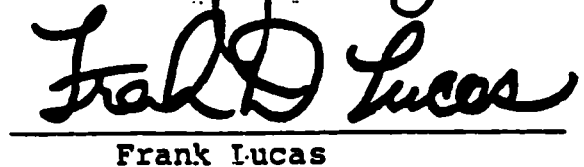

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Greg Laughlin


Bob Stump


Ralph Hall


Wally Herger


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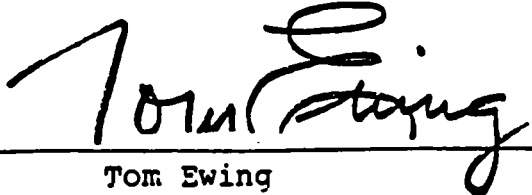

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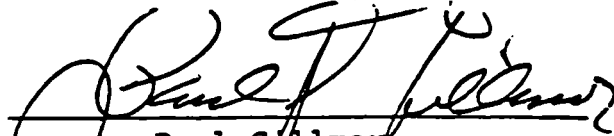

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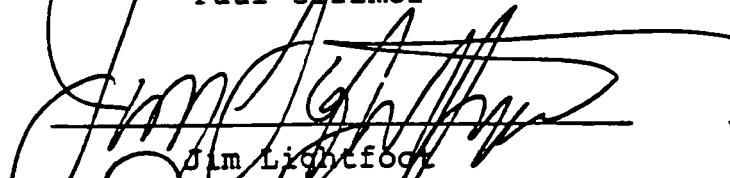

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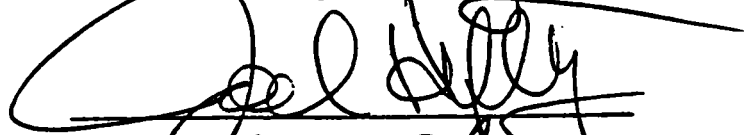

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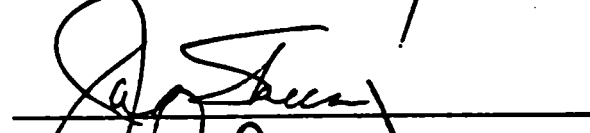

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Jim Lightfoot


Tom DeLay


Elton Gallegly

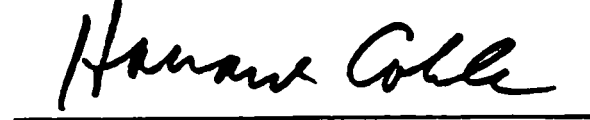

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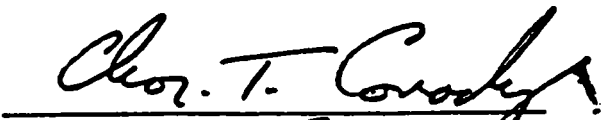

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Charlie Norwood

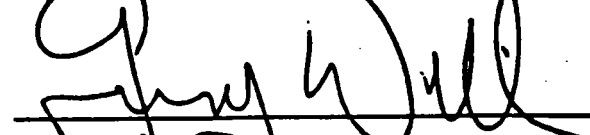

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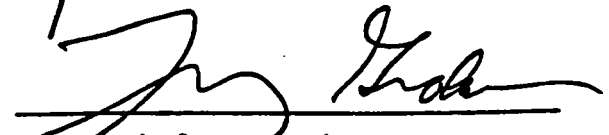

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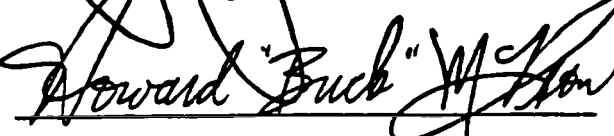

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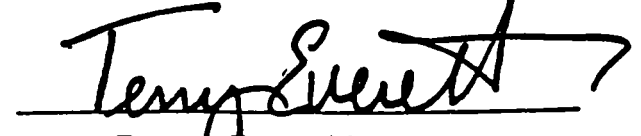

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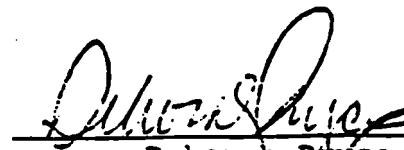

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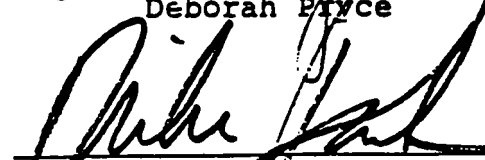

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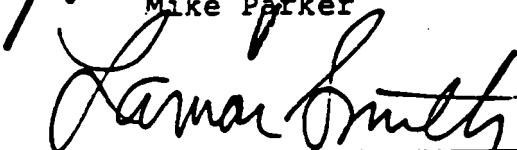

Lindsey Graham


Howard "Buck" McKeon

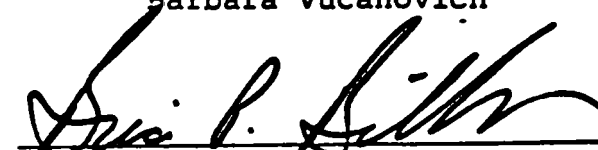

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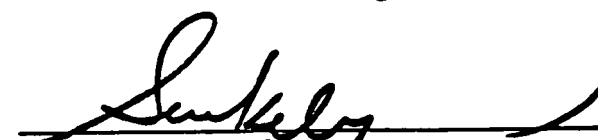

Deborah Pryce

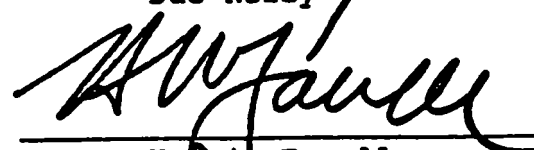

Mike Parker


Lamar Smith


Barbara Vucanovich

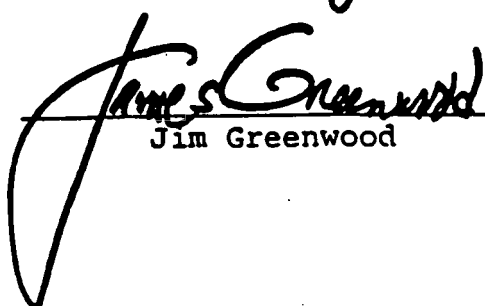

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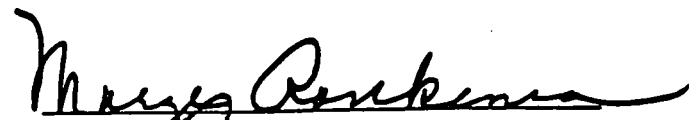

Sue Kelly

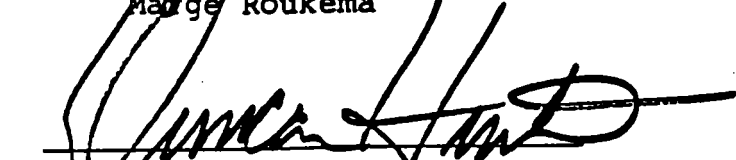

Harris Fawell

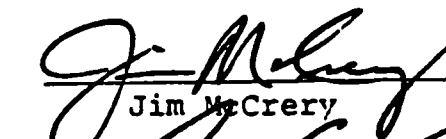

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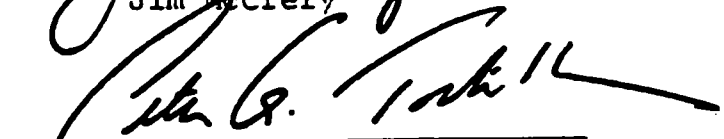

Vernon J. Ehlers


Jim Greenwood

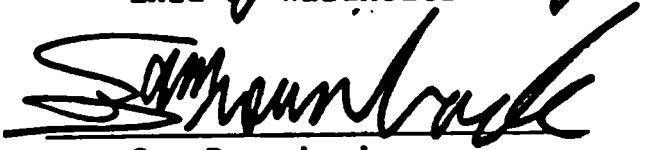

Marge Roukema


Duncan Hunter

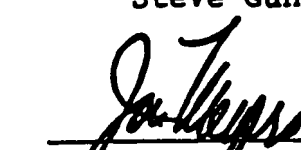

Jim McCrery


Peter Torkildsen


Enid G. Waldholtz


Sam Brownback


Steve Gunderson

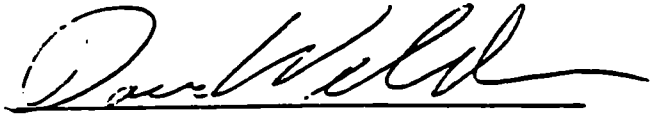

Jan Meyers


Randy "Duke" Cunningham


Joe Knollenberg



Andrea Seastrand



David Weldon



Lincoln Diaz-Balart



David Funderburk



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

The Honorable Patsy T. Mink
2135 Rayburn House Office Building
U.S. House of Representatives
Washington, D.C. 20515

AUG 24 1995

Dear Ms. Mink:

Thank you for your letter of July 21, 1995, stating your strong support of Title IX of the Education Amendments of 1972 (Title IX) and its 1979 Policy Interpretation that applies to intercollegiate athletics. I appreciate your statement of confidence regarding the enforcement of Title IX by the Office for Civil Rights (OCR) and the effectiveness of the Policy Interpretation's three-part test that is part of OCR's assessment of institutions' compliance with Title IX.

As you know, I remain committed to the enforcement of Title IX so that all students, regardless of sex, may have equal access to education programs, including athletics programs--an objective that commands widespread, bipartisan support. To assist institutions in their efforts to comply with the requirements of Title IX in the area of intercollegiate athletics, OCR will issue in the near future a statement of clarification of the three-part test contained in the Title IX Policy Interpretation. This additional guidance will be faithful to the Congressional mandate of Title IX and will not alter the standards by which compliance with Title IX is currently assessed.

I appreciate your interest in this subject and hope that you will not hesitate to contact me regarding this or any other matter of concern. I am sending a copy of this letter to the 93 members of Congress who signed your letter.

Sincerely,

Norma V. Cantú

Norma Cantú
Assistant Secretary
for Civil Rights

PATSY T. MINK
SECOND DISTRICT, HAWAII

WASHINGTON OFFICE:
2135 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-1102
(202) 225-4906
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Congress of the United States
House of Representatives
Washington, DC 20515-1102

COMMITTEE ON STEERING
AND POLICY

COMMITTEE ON BUDGET

COMMITTEE ON EDUCATION AND
ECONOMIC OPPORTUNITY

COMMITTEE ON GOVERNMENT REFORM
AND OVERSIGHT
(on leave)

July 21, 1995

Ms. Norma Cantu
Assistant Secretary for Civil Rights
U.S. Department of Education
600 Independence Ave., SW
Washington, DC 20202

Dear Assistant Secretary Cantu:

We are writing to express our strong support for Title IX of the Education Act Amendments of 1972 and the Department's Title IX regulations as applied to intercollegiate athletics. We urge the Department to reject any efforts to weaken enforcement of this law, which has expanded athletics opportunities for millions of girls and young women in our nation.

The Department's Policy Interpretation on Title IX and intercollegiate athletics, establishing a three-part test for measuring compliance has been highly effective in expanding women's opportunities to participate in intercollegiate athletics and has been consistently applied and adopted in every court decision to reach the issue.

Recently, proposals have surfaced which would weaken the three-part test, the governing standard since 1979, because of a perceived notion that enforcement of Title IX is causing reduced opportunities in men's non-revenue producing sports. We strongly urge the Department to adhere to its long-standing interpretation of Title IX and reject any efforts to weaken the three-part test.

The three-part test states that colleges and universities are in compliance if it meets any one of the three tests: if the institution 1) provides athletic participation opportunities in numbers that are substantially proportionate to enrollment by gender; 2) establishes a history and continuing practice of program expansion for members of the underrepresented sex; or 3) effectively accommodates the interests and abilities of the underrepresented sex.

This is an appropriate and in fact, minimal standard that schools must meet. This interpretation was the product of a lengthy, deliberative process in which the agency received and considered over 700 comments received during a formal public notice and comment period. These standards have been uniformly applied by the Department and the courts.

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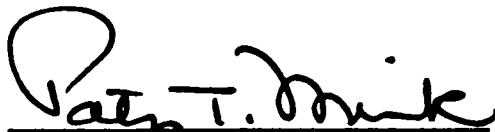
Ms. Norma Cantu
Page Two

As you stated in your testimony before the Subcommittee on Post-Secondary Education, Training and Life-Long Learning of the Economic and Educational Opportunities Committee on May 9, 1995, neither the courts nor the Department emphasize proportionality over any other part of the three-part test. Rather, those institutions which have been found in violation of Title IX have failed to comply with any one of the three prongs of this test.

Efforts to weaken the three-part test would reverse the progress made toward gender equity in intercollegiate sports and would prevent Title IX's promise of equal athletic opportunity from becoming a reality. Colleges and Universities have had 20 years to come into compliance with Title IX. It would be a tragedy to allow schools to backslide and reduce efforts to provide equitable athletic opportunities for women.

We hope the Department will not retreat from its well-settled and longstanding interpretation of Title IX, and that it will maintain its commitment to ensuring that our daughters and granddaughters receive the same opportunity to benefit from competitive sports as our sons and grandsons.

Sincerely,

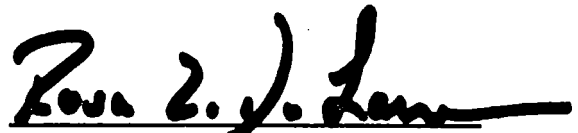

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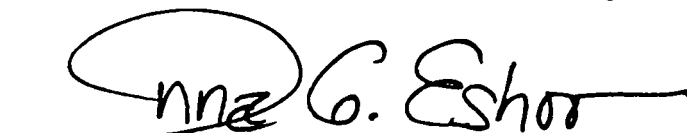

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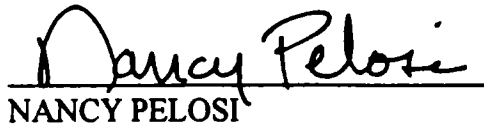

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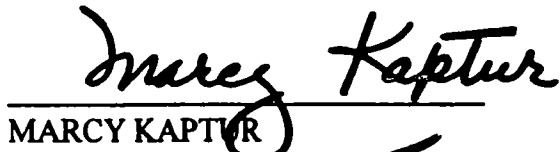

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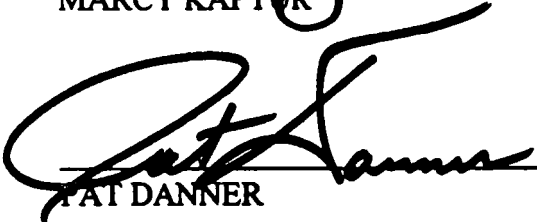

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ELEANOR HOLMES NORTON

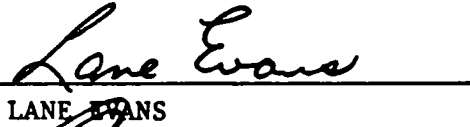

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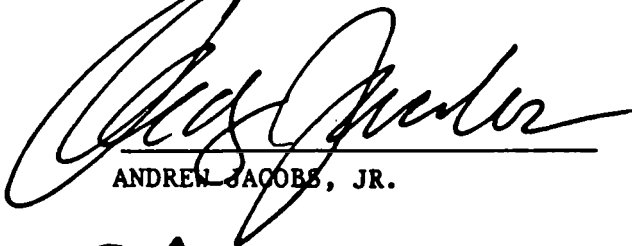

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MARCY KAPTUR


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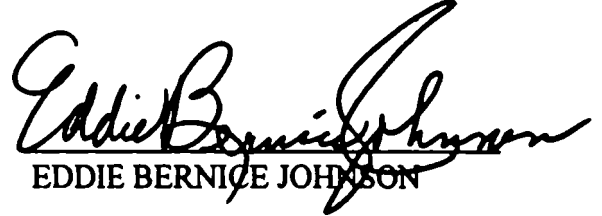

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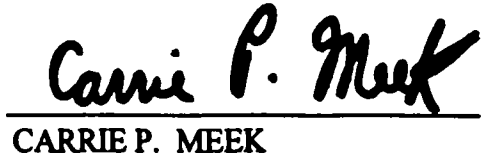

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NEIL ABERCROMBIE

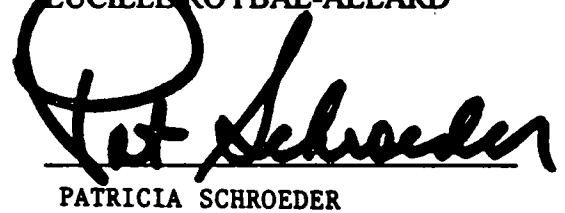

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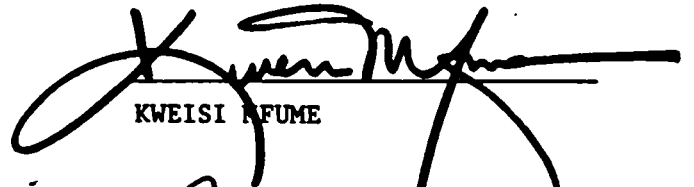

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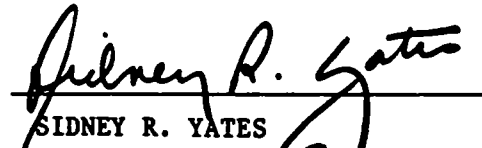

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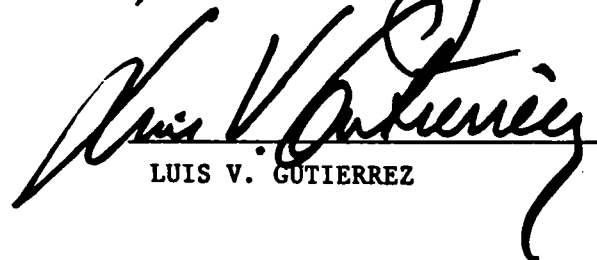

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PATRICIA SCHROEDER


KWEISI MFUME


BARNEY FRANK


SIDNEY R. YATES


LUIS V. GUTIERREZ

Maxine Waters
MAXINE WATERS

Marty Meehan
MARTIN T. MEEHAN

Martin Frost
MARTIN FROST

George Miller
GEORGE MILLER

Bart Stupak
BART STUPAK

Eva M. Clayton
EVA M. CLAYTON

Eliot L. Engel
ELIOT L. ENGEL

Dale E. Kildee
DALE E. KILDEE

Pat Williams
PAT WILLIAMS

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MAJOR R. OWENS

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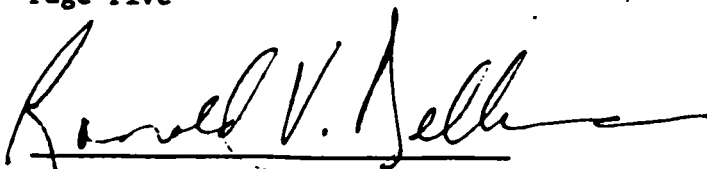
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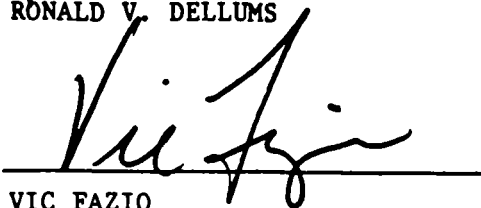
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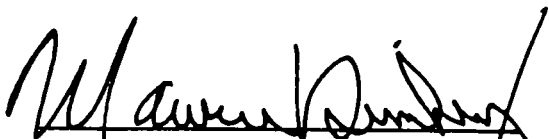
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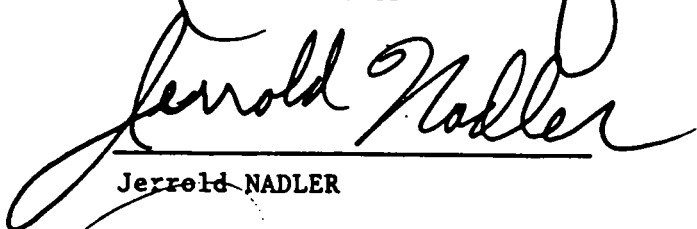
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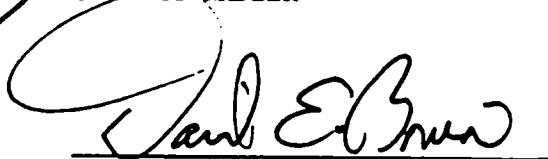
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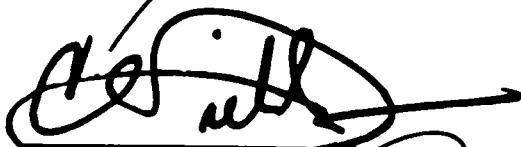
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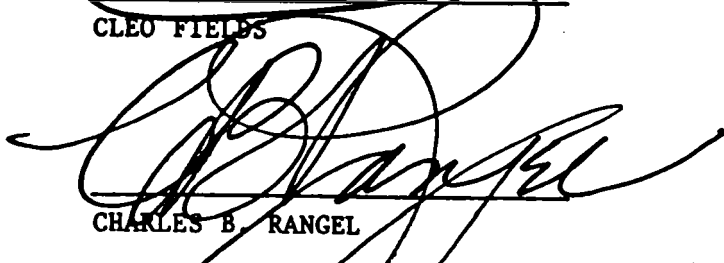
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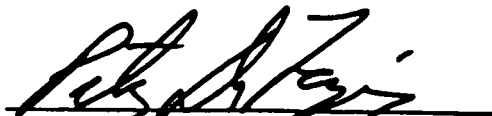
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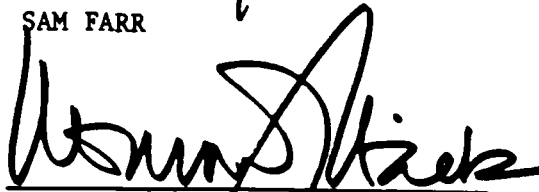
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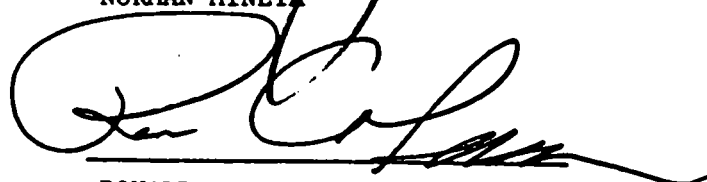
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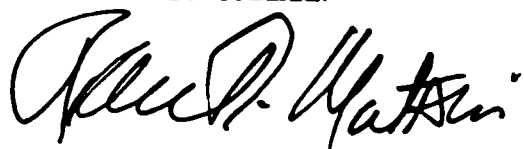
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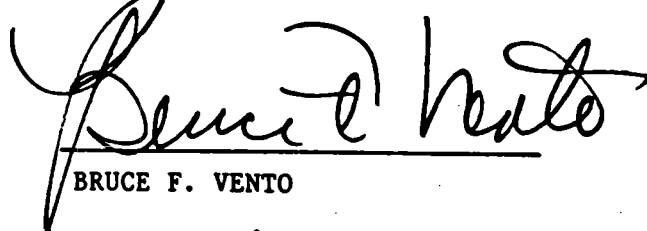
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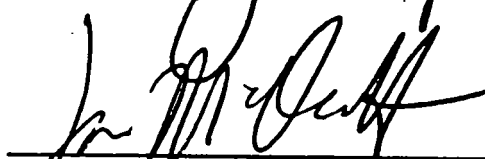
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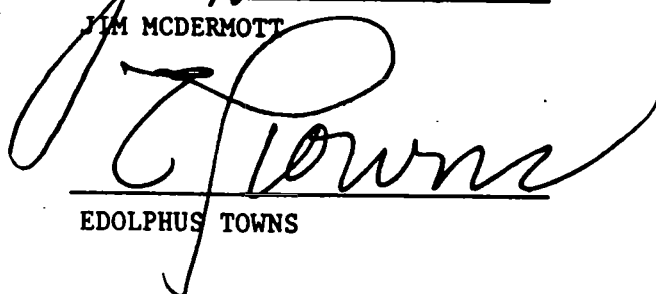
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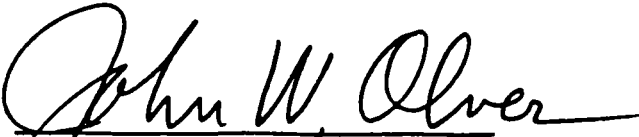
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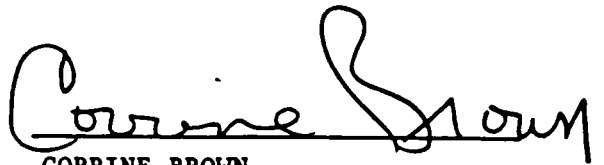
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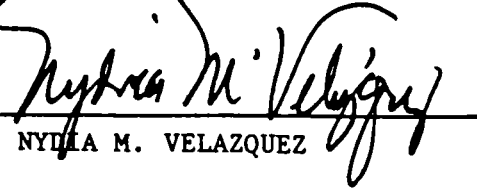
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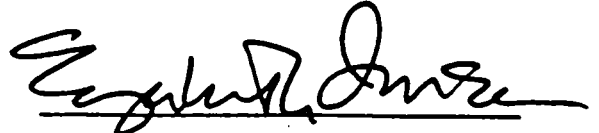
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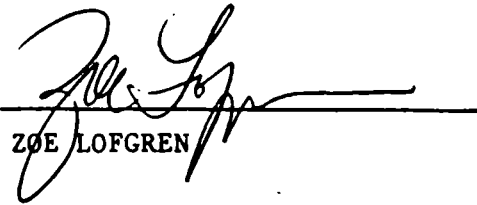
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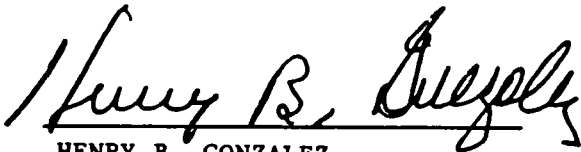
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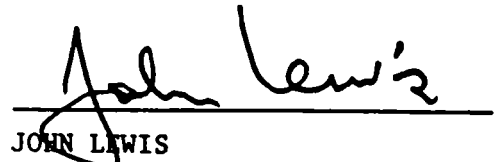
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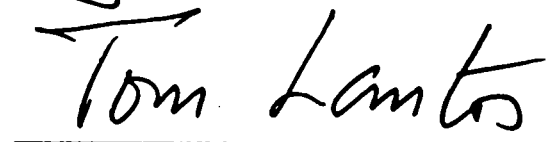
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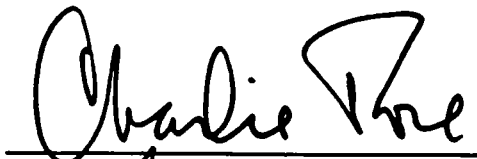
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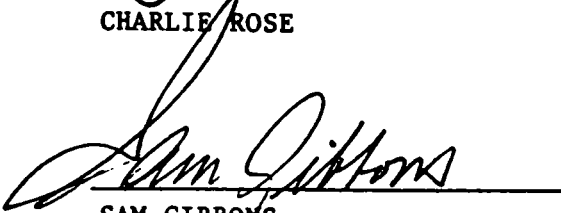
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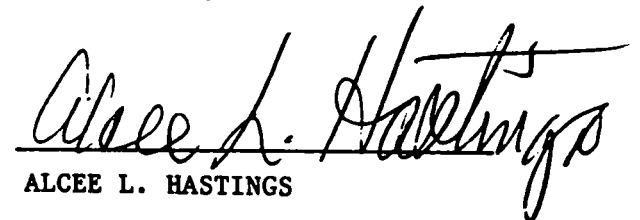
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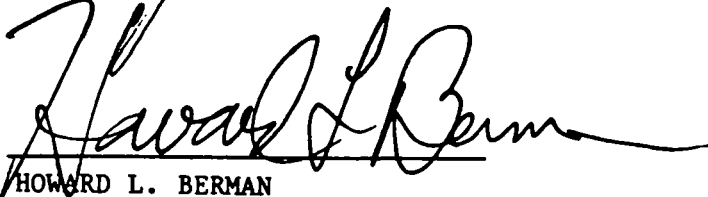
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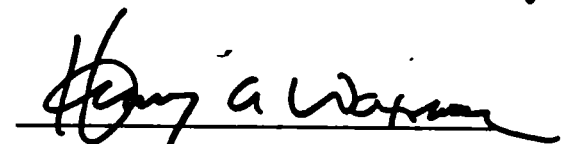
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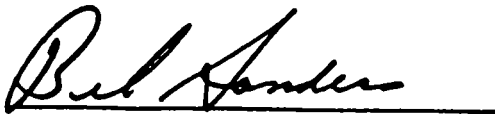
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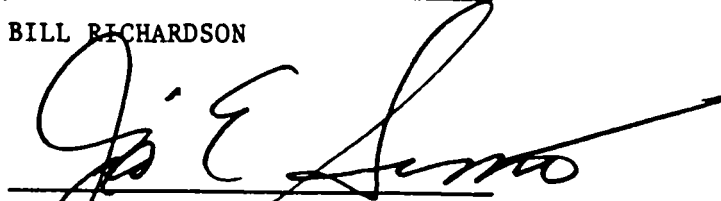
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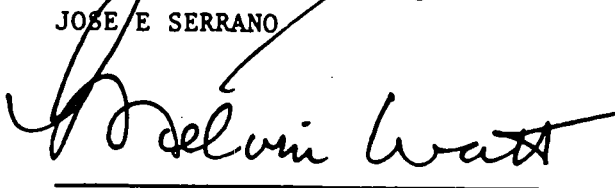
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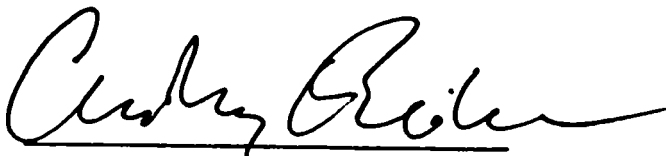
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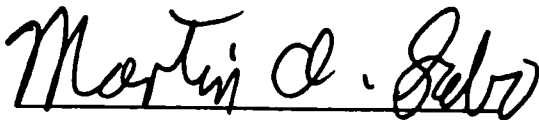
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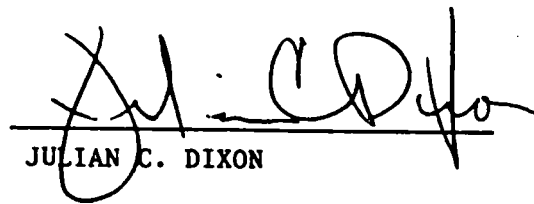
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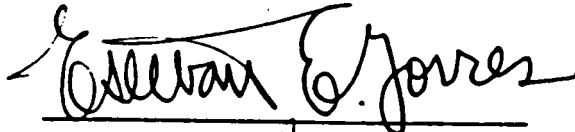
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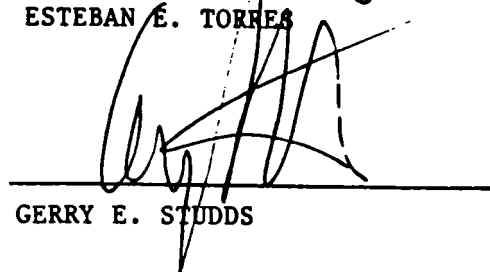
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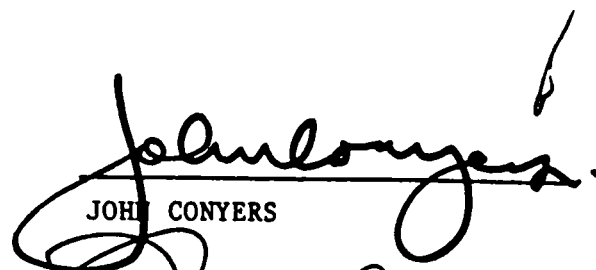
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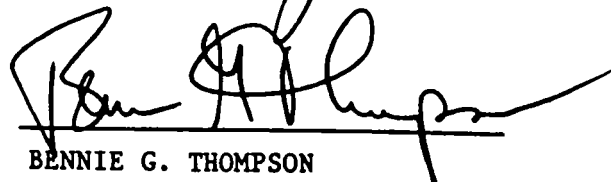
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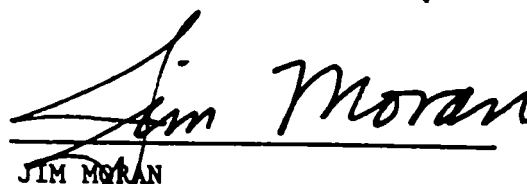
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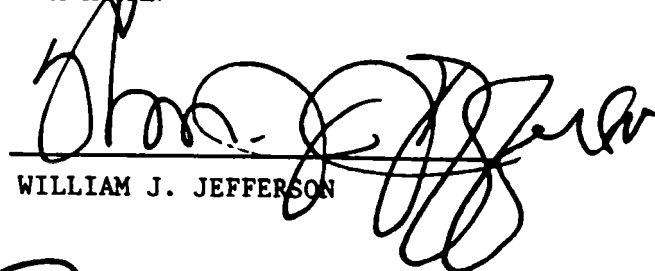
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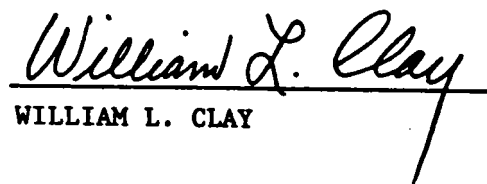
JIM MORAN



WILLIAM J. JEFFERSON



BOBBIE SCOTT



WILLIAM L. CLAY

STATEMENT OF
NORMA V. CANTÚ
ASSISTANT SECRETARY
FOR
CIVIL RIGHTS
U.S. DEPARTMENT OF EDUCATION

BEFORE THE
SUBCOMMITTEE
ON
POSTSECONDARY EDUCATION, TRAINING
AND
LIFELONG LEARNING

COMMITTEE ON ECONOMIC
AND
EDUCATIONAL OPPORTUNITIES

UNITED STATES HOUSE
OF
REPRESENTATIVES

TUESDAY, MAY 9, 1995

Mr. Chairman and Members of the Subcommittee:

Introduction

Since the passage of Title IX of the Education Amendments of 1972, there have been many gains made in the effort to ensure equal opportunities for all students; however, there is still much work to be done if we are to fulfill the promise of that landmark legislation. I appreciate having the opportunity to discuss the efforts of the United States Department of Education's Office for Civil Rights (OCR) to make that promise a reality for all.

Because this is my first opportunity to testify before this committee, I'd like to begin my remarks with a brief overview of OCR and its law enforcement work. OCR's primary responsibility is to ensure that recipients of Federal financial assistance do not discriminate against students, faculty, or other individuals on the basis of race, color, national origin, sex, disability or age. OCR addresses the real problems of real students by working with recipients to develop strong, educationally-sound remedies to problems of discrimination. We offer assistance to and, when appropriate, conduct investigations at the nation's 16,000 school districts and 3,500 colleges and universities that receive Federal funds.

As OCR moves forward with our enforcement responsibilities, it is committed to an open and meaningful dialogue on issues, such as Title IX, for which it has responsibility. In fact, in my two years as Assistant Secretary, we have met with many, many groups representing numerous constituencies and interests--all in an effort to ensure that we understand the problems that we are addressing from the many perspectives of those who are affected by our work. Aside from our frequent offers of technical assistance and participation at conferences where we hear from our constituents, we have also met with numerous groups to discuss, specifically, the Title IX standards that apply to intercollegiate athletics, and ways to ensure that Title IX enforcement is carried out in ways that are both faithful to the Congressional mandate and fair to all students and schools. [See Exhibit 1, Title IX Athletics Working Sessions Attendees]

Overview of Testimony

One of the nation's landmark civil rights laws is Title IX of the Education Amendments of 1972. This law was enacted by the Congress to eliminate sex discrimination in all aspects of American education -- in the classroom, in

course offerings, in the school workplace, and on the athletic fields. OCR is the sole federal agency charged with the responsibility of enforcing Title IX in the context of athletics, which is considered an integral part of an institution's education program and is, therefore, covered by the Title IX statute.

In seeking to ensure a level playing field for all, OCR's enforcement is faithful to the clear and unequivocal Congressional mandate of nondiscrimination in Title IX: that members of both sexes be provided equal opportunities to participate in athletics. Indeed, OCR's guiding principle in this area--and in other areas of civil rights enforcement--is to ensure that all students are afforded equal opportunities. Title IX is a basic non-discrimination requirement, intended to expand, not limit, opportunities. That is the driving force of OCR's enforcement, which is faithful to the expressed will of Congress, flexible in its dealings with colleges and universities, and fair in its protection of boys and girls.

Today, I will discuss three issues: (1) the need for Title IX--in 1972 and today; (2) OCR's role in the enforcement of this law; and (3) the way in which OCR is working to ensure equality of opportunity for all students. In my comments, I also will address several criticisms of Title IX and OCR's enforcement activities under this law. These arguments--some of which date back more than a decade--have again surfaced, and I appreciate having the opportunity today to address them. They are, briefly:

1. One allegation is that "Title IX enforcement reduces athletic opportunities for men." In fact, Title IX is intended to expand opportunities, not reduce them. Moreover, men's participation in intercollegiate sports has increased since the passage of Title IX, and participation as measured by numbers of men's non-revenue producing sports has increased in the last decade, as well.
2. Another argument that's been made is that "OCR's enforcement of Title IX amounts to an inflexible quota." This is simply not the case. OCR regulations and policy guidance do not mandate statistical balancing as the only way to achieve Title IX compliance.
3. Finally, it has been asserted that "Football is not treated as a unique sport in the enforcement of Title IX." To the contrary, OCR policy guidance mandates that it consider the unique aspects of all sports when it assesses compliance with Title IX. At the same time, no sport is exempt from Title IX. OCR is faithful to these principles in its enforcement of Title IX.

Why Title IX Was and Is Needed

Before discussing Title IX and OCR's enforcement of it in the area of athletics, I'd like to address the real needs of real students that Title IX was designed to remedy--needs that existed in 1972, and needs that exist today. Before its passage, athletic scholarships for women were rare. After winning two swimming gold medals in the 1964 Olympics, Donna de Varona was, in effect, forced to retire at the age of 17; scholarships at colleges for women in swimming did not exist. Meanwhile, her best friend, a fellow gold medalist in swimming, Don Schollander, got a full scholarship to Yale. Even by 1974--two years after the passage of Title IX--there had been little progress: it was estimated that 50,000 men were attending college on athletic scholarships that year, compared with less than 50 women.

This visible and dramatic inequality was not just limited to scholarships. At one large southwestern university, women had 10 sports and a total budget of \$200. At a Big Ten school, women received \$40,000 out of a \$6 million athletic budget. And, at an Atlantic Coast Conference school, women received \$30,000 of the \$2.2 million committed to intercollegiate athletics.

Consider, in this regard, the story of the women's crew team that won two national championships in 1974. They did it without one cent from their university's athletic department, which gave the men's crew team \$35,000 and two full-time coaches. Listen to the words of a member from that women's crew team:

"We practice at six in the morning so we won't get in the way of the men's team, and also because our volunteer coach works from 9 to 5. To compete in meets we have to borrow boats from other schools. We fund-raise with bake sales, raffles and car washes. We even resorted to a rowing marathon. We set up a swimming pool in front of the student union and rowed in two-hour shifts, 24 hours a day for one whole week. People came by and threw change into the pool. It was like begging. But the money had to be raised somehow. The university wasn't going to give it to us and we wanted to compete."

Even today, we are finding in our cases that women are being denied comparable opportunities and necessary operating, recruiting, and scholarship dollars. In addition, in recent years, OCR has investigated cases in which a school provided each of its men's teams separate, well-furnished locker rooms, while all women's teams were forced to use the same one locker room. At this

same school, men could use weight training equipment at no charge; women, on the other hand, were required to pay for this opportunity. And, in another case, a women's crew team was provided shells designed for men that were too heavy to use in practice or competitions. At that same school, there was no locker room at the boathouse available to women when men and women competed on weekends.

The story is not entirely anecdotal, however. Let us look at the statistics reflecting the participation of women at NCAA member institutions in 1971, the year before Title IX's passage, and in 1994 [see Exhibit 2, **Intercollegiate Athletics Participation by Men & Women in NCAA Member Institutions**]. Two observations are apparent: 1. Since the passage of Title IX, women have made significant strides in their participation in intercollegiate athletics. 2. Despite those gains, there is still much work to be done if the promise of Title IX is to be fulfilled.

Senator Hatch has perhaps best captured the essence of the meaning and promise of Title IX. In 1984, on the Senate floor, he observed that there were few, if any, Senators who did not want "Title IX implemented so as to continue to encourage women throughout America to develop into Olympic athletes, to develop in educational activities or in any other way within our schools of higher education."

Indeed, in the discussions surrounding Title IX, we should not lose sight of the importance of providing equal opportunity to participate in athletics. There are many benefits to participation. According to the Institute for Athletics and Education, girls who participate in sports are three times more likely to graduate from high school, 80 percent less likely to have an unwanted pregnancy, and 92 percent less likely to use drugs. Also, the health benefits are extensive. For example, studies report that women who participate in sports lower their risk of breast cancer. There are psychological benefits, as well. Women athletes have a higher level of self-esteem and confidence and a lower rate of depression than non-athletes. (Colton and Gore, *Risk Resiliency and Resistance Current Research on Adolescent Girls*, Ms Foundation, 1991). The availability of athletic scholarships dramatically increases the ability of athletes to pursue a college education and to select from a greater range of institutions. Eventually, this has implications for future employability of persons who will go on to become productive members of our society.

And then there are the important values we learn from participation in sports -- teamwork, standards, leadership, discipline, work ethics, self sacrifice, pride in accomplishment, strength of character. These values are as important to women as they are to men.

A number of former women athletes point to communication learned in sports competition as key to their upward career mobility. Ninety-three percent of women in one study agreed that women who participated in sports would be better able to compete successfully later in life. Another interesting statistic -- 80 percent of women who were identified as key leaders in their Fortune 500 companies had sports backgrounds.

Perhaps the value of non-discrimination in sports, as guaranteed by Title IX, is best exemplified by a letter I recently received from a woman in New Jersey. She said:

My concerns are not self directed, for my opportunity has long since passed. My concerns are not for my daughter, who had a very limited opportunity. My concerns are for my granddaughters and other young females whose future I have hope for.

As a child, I loved athletics and physical activity. I was talented, but my talent was not appreciated or approved of by most . . . I watched my older and younger brothers compete on school teams. It didn't matter that in the neighborhood pick-up games, I was selected before my brothers. Society dictated that I should watch, and they should compete. So at home in the backyard, I would catch as my brother worked on his curve ball, I would shag flies as he developed his batting prowess and as I recall, I frequently served as his tackling dummy.

. . . The brother I caught for, and shagged for, and served as a tackling dummy for, went on to Georgetown University on a full athletic grant. He later became Vice President of a large banking firm

So, while I rode in the backseat on the bus of opportunity during my lifetime, I want my daughter's daughter and her peers to be able to select a seat based on their abilities and their willingness to work. Don't deny them the things I dreamed of.

Title IX and Department of Education Regulations and Policy

To ensure that all people, regardless of sex, get the opportunity to "select a seat based on their abilities and their willingness to work," and in a spirit of bipartisanship, Congress passed Title IX in 1972. Following the passage of Title IX, Congress has on several occasions reaffirmed the non-discrimination

guarantee in the context of athletics. Consistently, Congress has expressed the view that intercollegiate sports, including revenue producing sports, are within the coverage of Title IX, just as Congress has rejected attempts to curtail the enforcement of Title IX. **[See Exhibit 3, History of Title IX Legislation, Regulations and Policy Interpretation.]** Notably, 21 years ago, Congress considered and rejected an amendment to the Education Amendments of 1972 that would have exempted revenue-producing sports from coverage under Title IX. Instead, Congress adopted a compromise amendment that directed the Department of Education's predecessor agency, the Department of Health, Education, and Welfare (HEW), to publish proposed Title IX regulations that contained -- and I am quoting the statutory language -- "reasonable provisions considering the nature of particular sports."

On June 20, 1974, HEW published proposed regulations, which included specific provisions for college athletics. In response to the notice of the proposed regulations, HEW received over 9700 comments, which were considered prior to publication of the final regulations.

President Ford signed the Title IX regulations on May 27, 1975. They were submitted to Congress for review pursuant to the General Education Provisions Act, and during the review, the House Subcommittee on Postsecondary Education conducted hearings. The regulations, which became effective on July 21, 1975, established a three-year transition period to give secondary and postsecondary institutions sufficient time to comply with the equal athletic opportunity requirements--a period that expired in 1978.

To complement the regulations, OCR issued a Title IX policy interpretation to provide colleges and universities with more detailed guidance on how to comply with the law. This policy interpretation was issued on December 11, 1979, after OCR reviewed more than 700 comments on a proposed interpretation issued a year earlier, and after extensive consultation with educators, athletic directors, coaches, athletic associations, civil rights groups, and education organizations. OCR also visited several colleges to obtain more information on their athletic programs and to assess how the policy would apply in actual practice to the athletic programs at individual campuses.

The Title IX policy interpretation, along with the Title IX statute and implementing regulations, have governed OCR's enforcement in this area for almost two decades, enjoying the bipartisan support of Congress and full support of the courts.

Title IX Requirements:
What They Do and Do Not Mean

The 1979 policy interpretation clarifies responsibilities under Title IX in three basic areas:

- athletic financial assistance;
- athletic benefits and opportunities; and
- accommodation of student interests and abilities.

The Title IX regulations require that the total amount of athletic financial assistance awarded to men and women be proportionate to their respective participation rates in intercollegiate athletic programs. However, disparities in awarding financial assistance may be justified by legitimate, nondiscriminatory factors. For instance, in a college or university beginning a new athletic program, institutional officials may decide it is necessary to spread the increase in scholarships over a period of time by awarding fewer scholarships during the first few years than would be necessary to create immediate proportionality between male and female athletes.

With respect to the second area -- athletic benefits and opportunities -- the compliance standard is that male and female athletes should receive equivalent benefits, treatment, services, and opportunities. Under this standard, identical benefits and opportunities are not required. Differences that result from nondiscriminatory factors are permitted. Generally, these differences will be the result of unique aspects of particular sports, such as the nature or replacement of equipment and maintenance of facilities required for competition.

Those who have argued OCR does not consider the unique aspects of football programs in its enforcement of Title IX are, simply, misinformed. For example, OCR has found that the size of the football team and the nature of the sport justify an apparent imbalance that favors the football team in the provision of medical and training facilities and services. Similarly, OCR has found a school to be in compliance with Title IX where all teams had comparable equipment replacement schedules--with the exception of sport-specific equipment in football. In that case, despite the fact that football appeared to have a higher equipment replacement rate, at least with respect to helmets and other safety equipment, OCR found no violation in terms of the provision of equipment and supplies.

Also, some legitimate disparities may be related to special circumstances of a temporary nature. For example, disparities in recruitment activity for any

particular year may be the result of annual fluctuations in team needs for first-year athletes. A violation will exist only if disparities result in the denial of equal opportunity to male or female athletes. In short, OCR's approach allows institutions flexibility in conducting their athletic programs in recognition that each athletic program differs.

With respect to accommodating student interests and abilities -- the third area -- a recipient institution will be found in compliance with Title IX if it provides men and women both (1) nondiscriminatory participation opportunities, and (2) competitive team schedules which equally reflect their abilities. A school will be found to provide nondiscriminatory participation opportunities if it meets any part of a three-part test: (1) by providing athletic participation opportunities in numbers that are substantially proportionate to enrollment by gender; or (2) by establishing a history and continuing practice of program expansion for members of the underrepresented sex; or (3) by fully and effectively accommodating the interests and abilities of the underrepresented sex. No one part of the three-part test is preferred by OCR or used exclusively by OCR over another as a method of ensuring compliance with the law. Rather, the three-part test furnishes three individual avenues for compliance.

Several important points guide OCR's enforcement of Title IX in the area of athletics. First, Federal courts across the country have consistently recognized that the standards by which OCR assesses compliance with Title IX are faithful to the will of Congress. Indeed, courts have observed that OCR's policy standards draw their essence from Title IX. Moreover, OCR's guidance in this area of Title IX enforcement:

- does not mandate numerical quotas;
- does not mandate statistical balancing;
- does not require that all teams be coeducational;
- does not require parallel teams, or that the same number of teams be provided for men and women;
- does not require that schools spend equal amounts of money on members of each sex; and
- does not mandate the sports that schools must offer.

Instead, OCR's guidance:

- does avoid any absolute requirement of numerical proportionality between the numbers of sports opportunities offered to men and women and the numbers of students, by sex;
- does recognize that different expenditures on men's and women's sports may be permissible; and
- does expressly recognize and factor into its analysis the unique nature of particular sports.

Indeed, the flexibility with which OCR carries out its enforcement of Title IX in the area of athletics is perhaps most evident when considering two, often overlooked, points. First, when a school is found to be operating in violation of this anti-discrimination statute, it is not required to achieve compliance overnight. OCR, and the courts, have demonstrated flexibility and reasonableness in the time allowed an institution to achieve compliance with Title IX. Second, and perhaps most important, OCR does not mandate that a school offer an athletics program. OCR generally does not substitute its views for the decisions of an individual institution as to which sports to offer to its male and female students and at what competitive level. OCR's role is to ensure that institutions comply with Title IX, and institutions can achieve compliance in many different ways.

Of course, I have heard the argument, as you may have, that because of budgetary constraints, compliance with Title IX means, in effect, that men's sports must be cut. In the past several years, a number of colleges and universities have experienced budgetary constraints. As a result, some have eliminated or "capped" men's teams, such as wrestling, swimming, and gymnastics.

OCR does not advocate eliminating or "capping" teams as a means for achieving compliance with the law. Nor has OCR required that men's teams be cut in order for institutions to come into compliance with Title IX. [See Exhibit 4, Title IX Athletics: OCR Enforcement Activities (FY 1989-94)]. OCR's preference is that there be equitable athletic opportunities for all students. However, individual institutions must make their own decisions about their athletics programs, including the distribution of athletic opportunities within the men's program and within the women's program. Indeed, the idea that "if women gain, men must lose" presents a false dichotomy. The federal court in the recent decision of Cohen v. Brown quoted one of the expert witnesses who stated:

I believe that philosophically in any case where you have a previously disadvantaged population that you're trying to bring up to snuff to the advantaged population, that it's a bad idea to bring the advantaged population down to the level of the disadvantaged population.

In fact, looking at the "big picture" in intercollegiate sports participation, the number of male college athletes increased since 1971, one year before the passage of Title IX. Moreover, they still account for 64 percent of all college athletes at NCAA institutions. [See Exhibit 2, **Intercollegiate Athletics Participation by Men & Women in NCAA Member Institutions**]. During the past decade, as well, there has been increased participation by men in sports other than football and basketball, i.e., or in the "non-revenue producing sports." [See Exhibit 5, **Participation in Men's NCAA Sports Other than Football and Basketball**].

Conclusion

Title IX has helped girls and women realize more of the benefits and educational opportunities afforded by athletic participation. Let us not lose sight of the fact that a year before Title IX became law, only 32,000 women participated in intercollegiate athletics. Today, that number is around 105,000. Women are participating in lacrosse, soccer, and ice hockey, in addition to the traditional sports. And, contrary to some popular thought, men's athletic participation has not decreased as institutions have moved to increase athletic opportunities for women.

While I applaud the progress that has been made, the task of providing equal athletic opportunity remains unfinished. OCR continues to find serious violations in many of its cases, as do the courts, which are ruling with increasing frequency that women are not receiving equal athletic opportunity. OCR will continue to respond to complaints, and it also will continue to work actively with many schools and associations to address problems and issues before they become the subject of complaints.

Rest assured, we will continue to enforce Title IX fairly and to help institutions comply with the law. Many colleges and universities are striving to provide equal athletic opportunity, and we will work with them to find creative and innovative practical approaches to ending sex discrimination in intercollegiate athletics.

Mr. Chairman, there is no place for discrimination in sports. Discrimination goes against the very grain of what competition is all about. In

sports we encourage and reward performance. In our history, sports have been the great equalizer, crossing all artificial social and class distinctions and barriers. We should showcase sports as a model of equality in American society.

The Department of Education considers these hearings a significant step in clarifying the way in which, since its inception, Title IX in the area of athletics has been enforced, just as it is a significant step toward highlighting the need for equal athletic opportunity for all students. With your help we will make greater strides in establishing a level playing field for all who wish to take advantage of athletic opportunity.

Thank You

Title IX--Athletics Working Sessions Attendees

Athletics Associations and Interest Groups

American Volleyball Coaches
Association

Center for the Study of Sport in
Society

College Football Association

Council of Collegiate Women
Athletic Administrators

Fund for the Feminist Majority-
-Athletics Project

National Association of Girls
and Women in Sport

National Coalition for Women
and Girls in Education

National Collegiate Athletics
Association

National Education Association

National Association of
Intercollegiate Athletics

National Federation of State
High School Associations

National Softball Coaches
Association

Trial Lawyers for Public Justice

Women's Basketball Coaches
Association

Athletic Conferences

Big Ten

Gulf South

Southern

Colleges and Universities

Southern Illinois University

University of Arkansas

University of Iowa

University of Wisconsin,
Madison

Congress

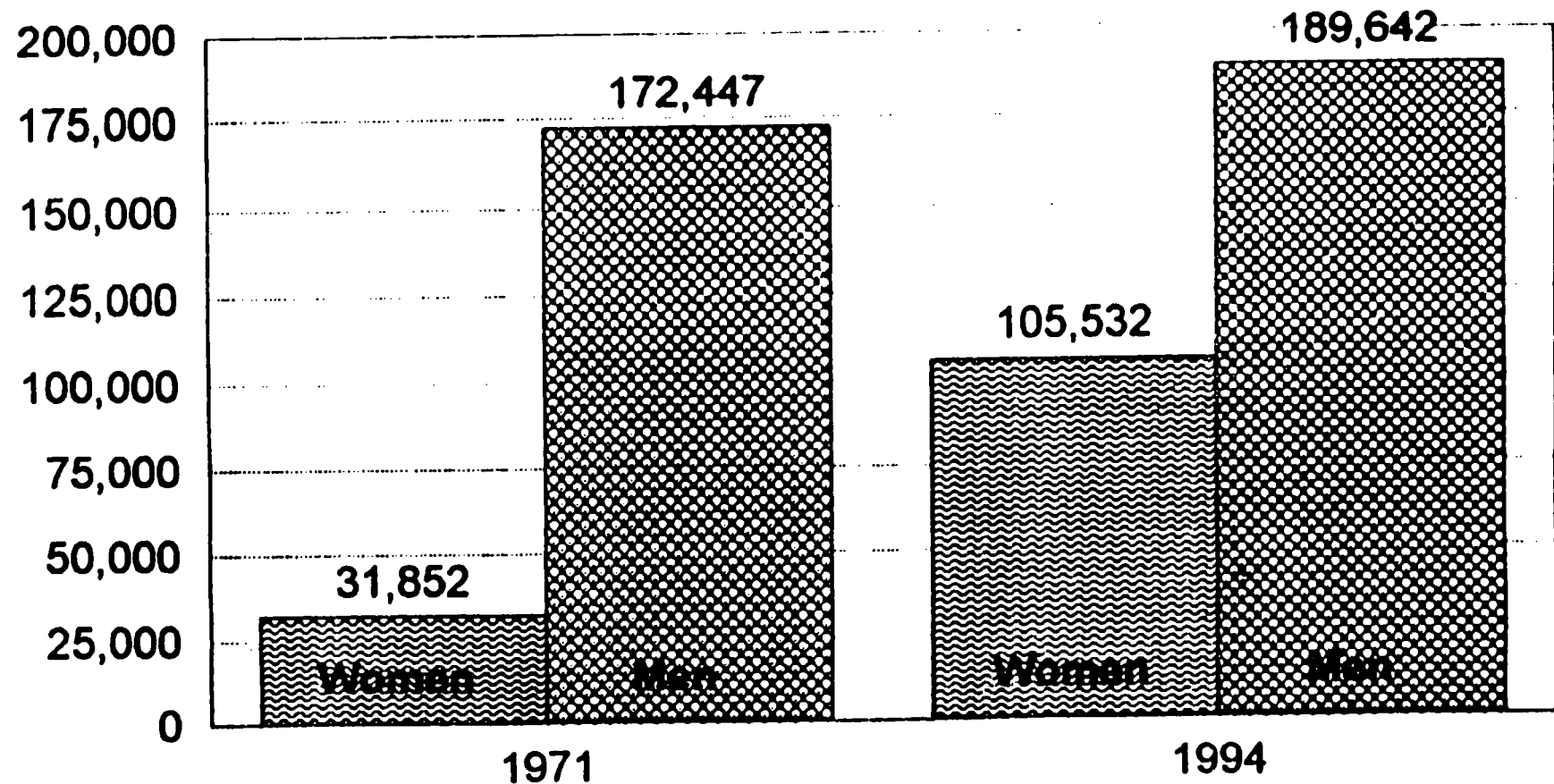
Staffer, House Subcommittee
on Commerce, Consumer
Protection and Competitiveness

Other

Private Law Firm Attorneys (3)

U.S. Department of Justice

Intercollegiate Athletics Participation by Men & Women in NCAA Member Institutions



Source: NCAA

Exhibit 2

TITLE IX ATHLETICS

History of Title IX Legislation, Regulation and Policy Interpretation

1972	Congress enacts Title IX.	Prohibits sex discrimination in any education program or activity receiving Federal financial assistance
1974	"Javits Amendment" enacted. Amendment to exempt revenue-producing sports from Title IX rejected.	HEW must issue Title IX regulation including "with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports"
1975	Bills to alter Title IX athletics coverage die in committee.	House bill (H.R. 8394) proposes to use sports revenues first to offset cost of that sport, then to support other sports Senate bill (S. 2106) proposes to exclude revenue-producing sports from Title IX coverage
1975	HEW issues final Title IX regulation [Signed by President Ford].	Includes provisions prohibiting sex discrimination in athletics and establishes a three year period to comply
1975	Congress reviews Title IX regulations and does not disapprove them.	Rejects concurrent resolutions disapproving: (1) the entire regulation (S. Con. Res. 46; H. Con. Res. 310) (2) the intercollegiate athletics provisions (H. Con. Res. 311) (3) application of regulations to intercollegiate athletics (S. Con. Res. 52)
1975 and 1977	Senate refuses to act on bills to curtail Title IX enforcement.	S. 2146 introduced on 7/21/75 to prohibit enforcement of Title IX athletics regulation to athletics where participation in those athletic activities was not a required part of the educational institution's curriculum. S. 2146 reintroduced as S. 535 on 1/31/77
1978	HEW issues proposed policy "Title IX and Intercollegiate Athletics" for notice and comment.	Presumption of compliance based on substantially equal average per capita expenditures for men and women athletes and future expansion of opportunity and participation for women
1979	HEW issues final policy interpretation on "Title IX and Intercollegiate Athletics."	Rather than relying exclusively on presumption of compliance standard, final policy focuses on institution's obligation to provide equal opportunity and details the factors to be considered in assessing actual compliance

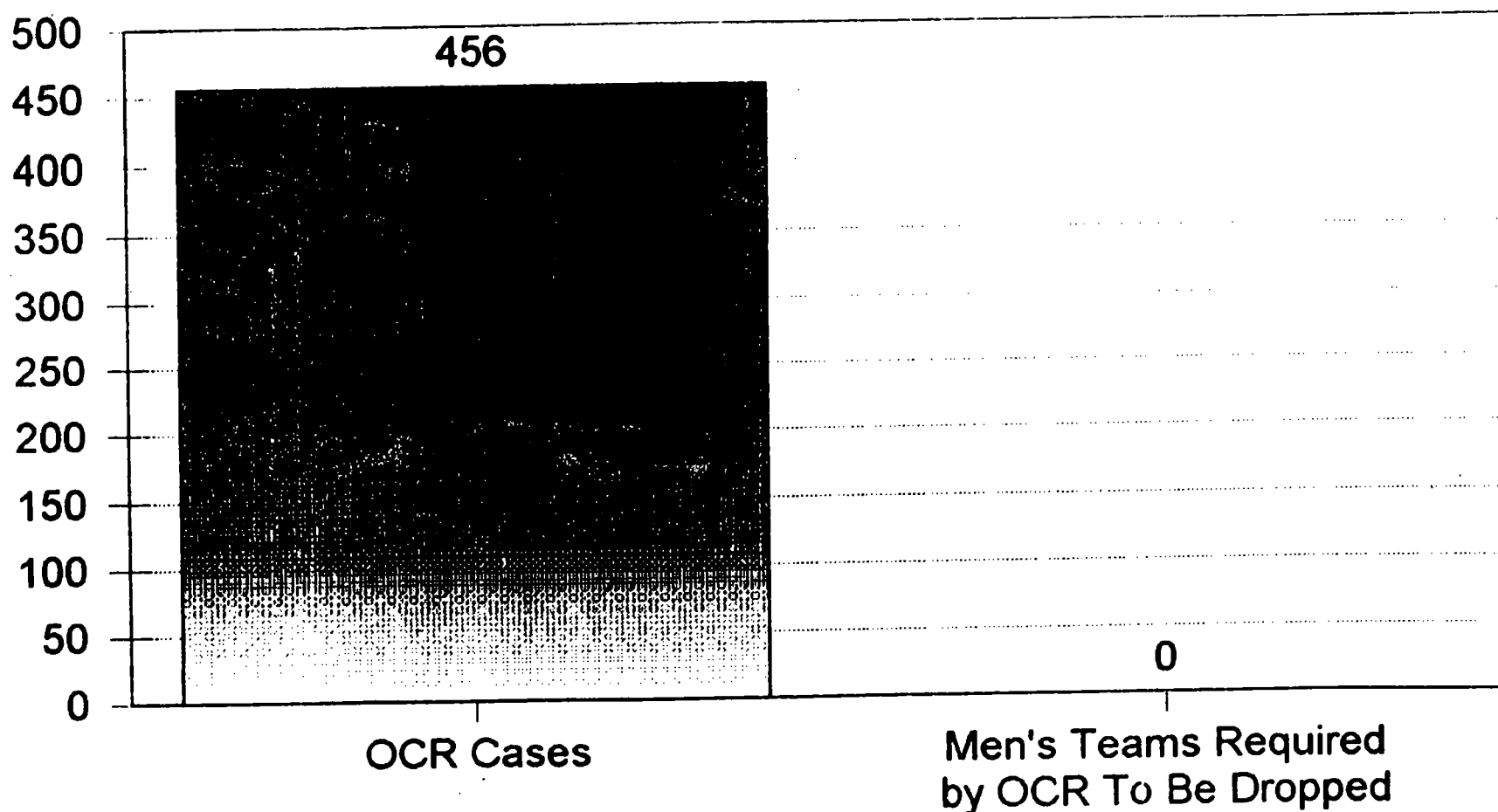
THE STORY OF TITLE IX LEGISLATION

1972	Congress enacts Title IX.
1974	"Javits Amendment" enacted. Amendment to exempt revenue-producing sports from Title IX rejected.
1975	Bills to alter Title IX athletics coverage die in committee.
1975	HEW issues final Title IX regulation [Signed by President Ford].
1975	Congress reviews Title IX regulations and does not disapprove them.
1975 and 1977	Senate refuses to act on bills to curtail Title IX enforcement.
1978	HEW issues proposed policy "Title IX and Intercollegiate Athletics" for notice and comment.
1979	HEW issues final policy interpretation on "Title IX and Intercollegiate Athletics."

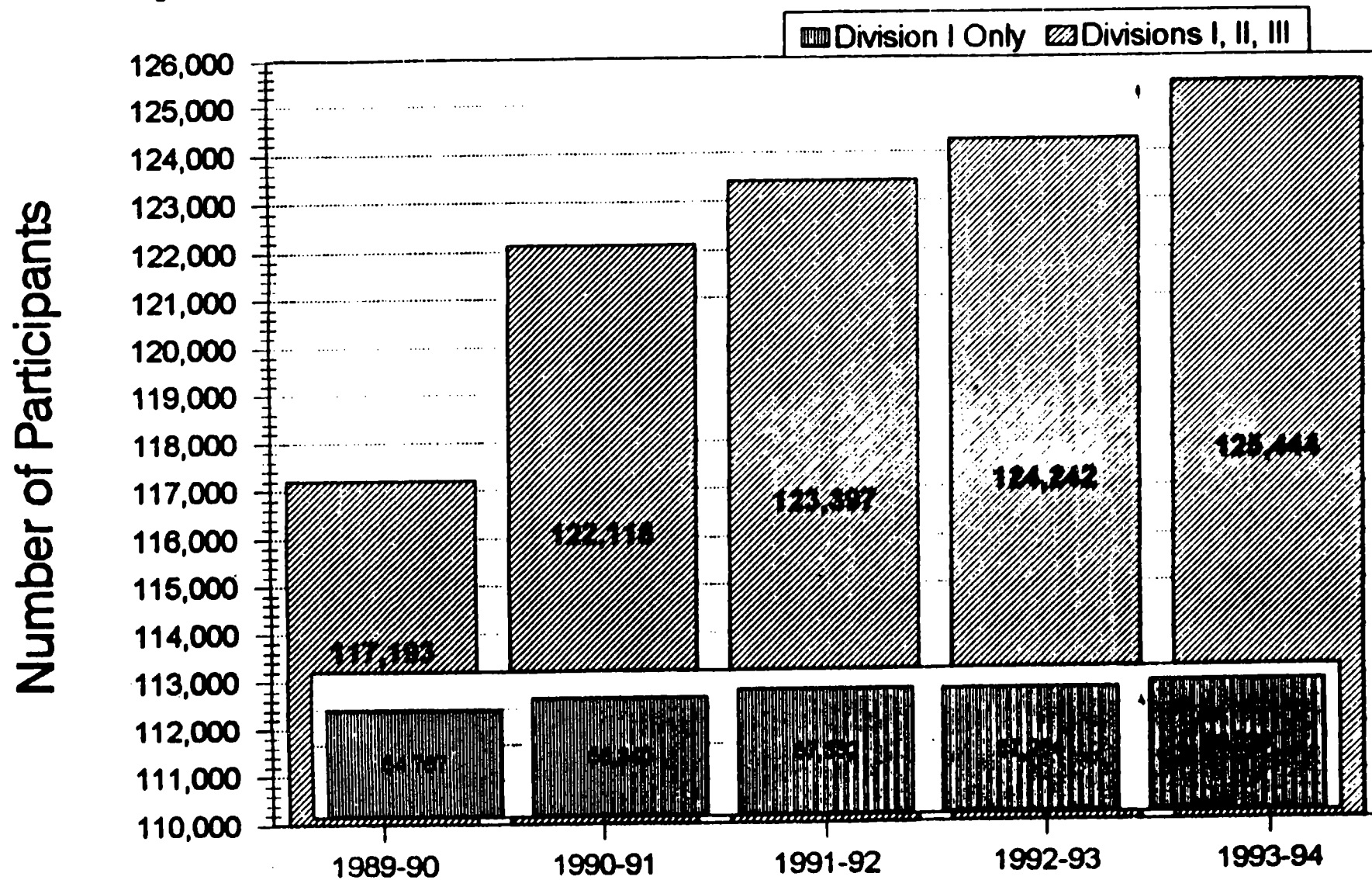
Title IX Athletics

OCR Enforcement Activities

FY 1989 - 1994



Number of Male Participants in Sports Other Than Football and Basketball



Source: NCAA

Academic Years

Exhibit 5



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

FAX TRANSMITTAL

TO: George Stephanopoulos

ORGANIZATION: _____

PHONE NUMBER: _____

FAX NUMBER: 456-2883

FROM: Frank S. Holleman III, Chief of Staff

TELEPHONE: 202-401-6143

FAX NUMBER: 202-401-2098

MESSAGE: _____

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1 **PAGE(S) TO FOLLOW**

CATHOLIC REVIEW, Aug. 23, 1995 p. 1
Archdiocese of Baltimore

Education secretary issues guidelines on religion

By Catholic News Service

WASHINGTON — U.S. Education Secretary Richard Riley finished his homework just in time when he released a set of guidelines defining what religious activities are permissible in public schools.

The set of guidelines were prompted by President Clinton's July 12 memo to Mr. Riley and Attorney General Janet Reno urging them to clarify the constitutional interpretation of religion's place in public schools.



Richard Riley

Saying that "nothing in our First Amendment converts our public schools into religion-free zones," Mr. Clinton asked that guidelines to define religious expressions that are acceptable in public schools be sent to the nation's 15,000 school districts before classes begin in the fall.

"Religion is too important in our history and our heritage for us to keep it out of our schools," Mr. Clinton wrote. "It shouldn't be demanded, but as long as it is not sponsored by school officials and doesn't interfere with other children's rights, it mustn't be denied."

The four-page outline released Aug. 17 spelled out specific ways that religious activities can in fact be a part of public schools. In an introductory letter to school superintendents, Mr. Riley called the guidelines an attempt to "find a new common ground in the growing, and at times, divisive debate about religion in our public schools."

He said he hoped the outline would "help to end much of the confusion regarding religious expression in public schools" and that it would provide "a basis for school officials, teachers, parents and students to work together."

Among the guidelines' specified types of protected religious expression were:

- Individual or group prayer and discussion "subject to the same rules of order as apply to other student activities and speech" and as long as no students were harassed.

- Before- and after-school events with religious content, as long as school officials neither encouraged nor discouraged participation.

- Teaching about religion, including the Bible or other Scripture, the history of religion, comparative religion, the role of religion in history and religious influence on art, music, literature and social studies. Schools may teach about religious holidays, but they are not to observe them, nor are they to provide religious instruction.

- Student expressions of their religious beliefs in homework, artwork and other written and oral assignments to be "free of discrim-

ination based on the religious content ... (and) should be judged by ordinary academic standards of substance and relevance."

- Student distribution of religious literature.

- Subject to applicable state laws, students' excused absence from lessons deemed objectionable on religious grounds to the student or the student's parents. Under the Religious Freedom Restoration Act, schools are legally required to excuse students unless they can prove a compelling reason to require attendance.

- Display of religious messages on items of clothing "to the same

extent that (students) are permitted to display other comparable messages," and the wearing of articles that are part of the student's religious practice, such as yarmulkes and head scarves.

- Access to school media, including bulletin boards, school newspaper and the public-address system, in order to publicize student groups of a religious nature "on the same terms as other non-curriculum-related student groups are allowed to use the school media."

- Access to school facilities "as is enjoyed by other comparable student groups."

To: George — URGENT You Read
The Education Accountability Initiative

Please call me —

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For more information: California Alliance to Reform Education, P.O. Box 191 San Ramon, CA
94583. Northern California (510) 833-2572, Southern California (714) 573-2252

FRANKURT

The Education Accountability Initiative

September 24, 1995

The people enact the following provisions applicable to kindergarten through twelfth grade public schools for the purpose of improving the education of students.

For the purpose of establishing a merit system for the teachers and for monitoring student progress, the State Board of Education shall establish optimal performance educational objectives for each grade level in English (including reading), mathematics, science and history within one year of passage hereof and systematically revise them annually thereafter. The history curriculum shall include as an integral part the study of civics, ethics and the values that define us as a nation. Machine-scored comprehensive achievement tests shall be developed and administered in the English language in all public schools at least twice in each school year thereafter in all four subject areas at all grades from one to twelve by a private vendor selected by the State Board of Education at the expense of individual districts from existing funding. End of year classroom scores shall reflect both; 1) actual level of achievement and 2) level of progress as compared to the previous test. Individual scores shall be confidential except for a student's parents and teachers. Individual classroom and school scores are public information.

To fully disclose use of all tax revenues each school district shall establish, one year following passage hereof and annually thereafter, a school resource allocation plan estimating the total revenues to be received for those students anticipated to attend each school during the following year and the amount of those resources to be allocated to each school. Each school shall prepare a budget and resource use plan identifying how all resources will be used by the school for the purpose of planning, implementing and evaluating an effective student achievement program at each school. Where a school site council exists, this plan shall be prepared with the participation of all those authorized to participate as members of the council. Each school's plan shall be available for public inspection during regular school hours in a place designated by the principal.

To establish classroom instructional accountability each school principal, one year following passage hereof and annually thereafter, shall require each teacher to: 1) identify student achievement goals in English, reading, writing, mathematics, science and history for students grouped in each classroom, 2) identify specific program implementation plans, including use of resources and materials, intended to achieve those goals set for each such group in each curricular area identified above and 3) specify how each group's progress towards achieving the goals will be evaluated.

To establish accountability for achievement in reading each first grade teacher shall, by the end of the first grade, identify those students who are reading below grade level. Second through sixth grade teachers shall prepare individual reading instructional plans for those students whose reading achievement is more than one-half grade below grade level. Said plans shall also describe how the parent(s) will assist the student with reading instruction at home.

To establish district accountability for enforcing a reading achievement policy, failure to prepare and implement a classroom/home reading instructional plan for those students who enter the second through sixth grades achieving more than one-half year below grade level shall be grounds for reducing the district's State revenues by one third the value of an average daily attendance per student so identified.

Beginning three years after the passage of this initiative, passing the 10th grade year end comprehensive achievement tests in all four subjects will be required for high school graduation. Each student may take any unpassed sections of the tenth grade comprehensive exam at each subsequent test date.

Not less than 15% of existing and future teacher salary compensation in each school district shall be paid based solely on merit evaluations and availability of teachers in the various subject areas. Evaluation shall include the performance of students on relevant assessment tests and shall not be related per se to seniority or teacher educational attainments.

A merit system for rewarding successful teachers and removing unsuccessful teachers shall be established as follows: Each teacher shall be evaluated at least once every other school year. Teacher evaluations shall include relevant assessment test results. Teacher evaluators may observe instruction and examine any instructional plans, records, and materials without notice or other restriction. A teacher shall be on probation for the first two years of employment during which the teacher can be dismissed without cause. A non-probationary teacher evaluated as unsatisfactory thereafter shall be on probation for cause for one year from such finding. Evaluation of a teacher on probation for cause shall be conducted by an evaluator other than the person or persons giving the unsatisfactory evaluation resulting in that probation. A teacher on probation for cause shall be evaluated at the end of the probationary year and shall be legally dismissed for cause at the end of that school year without further proceedings if then rated unsatisfactory. Placement on probation status for cause shall constitute all necessary notification of pending dismissal. Teacher evaluators shall be designated by each district. Selection of teacher evaluators, evaluation procedures and frequency shall not be restricted by employee union contract provisions. Each school district shall adopt evaluation policies consistent herewith within one year of passage hereof or be fined \$100 per student per year for noncompliance. The full cost of any legal challenge to a dismissal, including reasonable legal fees for the prevailing party shall be borne by the losing party.

School district employees cannot be required to pay any dues or fees to any employee union or other organization as a condition of employment.

No law, policy or labor agreement shall prohibit school districts from purchasing goods and services from private vendors.

Conviction for a felony or child abuse shall immediately and permanently ban an individual from future employment in California public schools.

Resources of school districts shall not be used to operate employee associations or unions, including but not limited to school day time, substitute teacher pay, collection of dues and funding of any salary or benefit compensation for time spent on association or union business.

General Provisions.

Implementation. The provisions of this initiative shall be implemented as rapidly as possible. Agencies of the State are prohibited from taking any action which delays implementation of this initiative or any provision thereof. Any delay in implementation shall not invalidate this initiative or any provision thereof. Provisions conflicting with labor agreements in effect upon passage hereof shall be binding upon such districts three years from passage hereof or upon expiration of said labor agreement, whichever occurs first. The Legislature shall implement this initiative through legislation consistent with the terms and purposes of this initiative.

Limitation of actions. Any action or proceeding contesting the validity of this initiative, any provision of this initiative or the adoption of this initiative shall be commenced within six months of the date of the election at which this initiative is approved; otherwise this initiative and all of its provisions shall be held valid, legal and incontestable. However, this limitation shall not of itself preclude an action or proceeding to challenge the application of this initiative or any of its provisions to a particular person or circumstance.

Severability. If any provision of this initiative or the application thereof to any person or circumstance is held invalid, the remaining provisions or applications shall remain in force. To this end, the provisions of this initiative are severable.

Series Fein
(818) 996-6146