PACIFIC LEGAL FOUNDATION

February 8, 2011

Office for Civil Rights
Chicago Office
U.S. Department of Education
Citigroup Center
500 West Madison Street
Suite 1475
Chicago, IL 60661-7204

Re: Administrative Class Complaint filed by the National Women's Law Center Against the Chicago Public Schools, dated November 10, 2010

To Whom It May Concern:

I am an attorney with Pacific Legal Foundation. Members of the public have contacted Pacific Legal Foundation expressing their concern regarding the recent administrative complaint filed by the National Women's Law Center (NWLC) against the Chicago Public Schools (CPS) dated November 10, 2010. For the reasons that follow, Pacific Legal Foundation (PLF) believes the complaint lacks any legal basis, and the Three-Part Test policy interpretation that narrowed the methods used for demonstrating compliance with Title IX for intercollegiate sports does not apply to high schools. Moreover, because of the problems the Three-Part Test has created at the intercollegiate level, it should be revisited. I respectfully request a conference with you to discuss the serious issues raised by the NWLC's administrative complaint.

INTRODUCTION

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. For 35 years, PLF has litigated in support of the rights of individuals to be free from race- and sex-based discrimination or preferences. PLF participated as amicus curiae in nearly every major case involving racial classifications considered by the Supreme Court over the past three decades, including *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Johnson v. California*, 543 U.S. 499 (2005); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200

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(1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). PLF also participated as amicus curiae in cases before the Supreme Court involving the scope and intent of Title VII of the Civil Rights Act of 1964, including *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003); *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); and *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000). PLF has participated before the Supreme Court with respect to Title IX in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

PLF has also addressed the Supreme Court regarding the constitutional problems raised by the disparate impact theory. *See Ricci*, 129 S. Ct. 2658; *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005); *City of Cuyahoga Falls, Ohio v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *Adams v. Fla. Power Corp.*, 535 U.S. 228 (2002); and *Alexander v. Sandoval*, 532 U.S. 275 (2001).

PLF recognizes the importance of Title IX in generating equal opportunity for women athletes; however, Title IX was never intended to be, nor should it be, a mechanism to create the facade of equality through proportional athletic enrollment. By engaging the Office of Civil Rights at this stage, PLF hopes to prevent the application of the Three-Part Test to high schools receiving federal funds for education. PLF believes its litigation experience with respect to race- and sex-based discrimination and preferences, the Civil Rights Act, and the disparate impact theory, demonstrate its expertise on the matters raised by the NWLC's complaint. Thus, PLF hopes this letter, and any subsequent conferences, will assist you on the important issues of constitutional law, statutory interpretation, and public policy raised by the NWLC's complaint.

I

THE THREE-PART TEST DOES NOT APPLY TO HIGH SCHOOL ATHLETICS

The administrative complaint filed by the NWLC is based upon a misunderstanding of Title IX. According to NWLC, the Three-Part Test, developed in 1979 as a Policy Interpretation for intercollegiate sports, should now be applied to high school sports participation. But the NWLC's position is contrary to the express language of the Policy Interpretation and the purpose behind Title IX.

Congress passed Title IX pursuant to its broad Spending Clause powers. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). Title IX permits Congress to attach unambiguous conditions on state and local governments that accept federal funds for education. 20 U.S.C. §§ 1681-1682. Conditioning federal funding is Congress's way of indirectly regulating the conduct of recipient state and local governments in areas normally reserved to them, and those conditions are constitutional

only if they are unambiguous and the recipients knowingly consent to them. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Based on such unambiguous and consented-to conditions, the regulation of purely state or local government activity, like education, is outside the scope of Congress's enumerated powers.

Moreover, like Title VI of the Civil Rights Act of 1964, Title IX prohibits sex-based discrimination in certain federally funded education programs. 20 U.S.C. § 1681(a). Like Title VI, Title IX was enacted to prohibit intentional discrimination, and sought to eliminate from federally funded education all sex-based "quotas" and "percentage balances." *See* 117 Cong. Rec. 30,409, 39,262 (1971); 118 Cong. Rec. 5812 (1972).

A. Pre-1979 Regulatory Framework

1. The Javits Amendment

In 1974, Senator John Tower introduced an Education Amendment aimed at exempting revenue-producing college sports from Title IX's requirements. Regarding his Amendment's directive to the Education Commissioner to publish regulations, Senator Tower stated that it was "not intended to confer on HEW any authority it does not already have" under Title IX.[1] 120 Cong. Rec. 15,323 (1974).

2. 1975 Regulations

In 1975, HEW issued regulations to "require institutions to take the interests of both sexes into account in determining what sports to offer." 40 Fed. Reg. 24,128, 24,134 (June 4, 1975). To comply with this regulatory standard, HEW authorized institutions to assess students' athletic interests "by a reasonable method [the school] deems appropriate." 40 Fed. Reg. at 24,134. In the most prominent explanation of schools' requirements, HEW's Secretary testified to Congress that gauging the interest and abilities of both sexes necessarily required an inquiry into males' and females' different levels of desired athletic participation. *Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Cong., at 440 (1975) (Testimony of Secretary Caspar Weinberger).[2]

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[1] The Department of Education's predecessor, the Department of Health, Education, & Welfare (HEW) was divided into the Departments of Health & Human Services and Education in 1979.

[2] The U.S. Supreme Court has looked to this testimony to interpret the scope of the HEW regulations. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532-33 (1982).

B. The 1979 Three-Part Test Applies Expressly to Intercollegiate Participation Only

The Three-Part Test is used by the Office of Civil Rights (OCR) to assess whether an institution providing intercollegiate level participation is complying with Title IX. There are three methods an intercollegiate institution can use to show compliance with Title IX: (1) a quota whereby intercollegiate male and female athletic participation is proportionate to male and female enrollment rates; (2) progress toward instituting such a quota among intercollegiate athletes; or (3) fully accommodating the underrepresented sex's interest in intercollegiate athletics. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, *et seq.* (Dec. 11, 1979).

The third prong of the test originally was interpreted to incorporate the 1975 Regulation's focus on relative interests, thus defining "full accommodation" to mean accommodation to the same relative extent for each sex. *See* 43 Fed. Reg. 58,070, 58,072 (Dec. 11, 1978) ("Intercollegiate athletic programs that provide equal opportunities for both sexes may . . . have different participation rates.").[3]

C. The Three-Part Test Does Not Apply to High School Athletics

As the above framework discloses, nowhere in Title IX's regulatory history has the Three-Part Test been held to apply to high school sports. The very Policy Interpretation that gave rise to the test itself makes clear that it was not extended to govern high school sports. Indeed, its complete title is "A Policy Interpretation: Title IX and *Intercollegiate* Athletics."[4] Ignoring the express language

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[3] *See also* Memorandum from Joan Bernstein, HEW General Counsel, to Patricia Roberts Harris, HEW Secretary (Nov. 19, 1979) ("The regulation and the policy require schools to be as responsive to the athletic interests and abilities of their women students as of their men students."); *Title IX Intercollegiate Athletics Investigator's Manual* at 122 (1980) (institutions must "meet the interests and abilities of women to the same degree as they meet the interests and abilities of men," but "[d]ifferences between men's and women's programs are justifiable if they are attributable to demonstrated differences in the interests and abilities of the members of each sex," because "Title IX does not require institutions to offer the identical sports, a proportional number of intercollegiate participation opportunities, (with respect to the division by sex of the total student enrollment) or the same team competitive opportunities to men and women.").

[4] Regarding any application to high schools, it includes this vague statement:

> 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. Accordingly,

(continued...)

of the Three-Part Test, the NWLC's administrative complaint inserts the word "inter[scholastic]" for "intercollegiate." NWLC Complaint ¶ 25.

Perhaps most fundamentally, the professed legislative authority for the test is without reference to high school sports. In issuing the 1979 Policy Interpretation that established the Three-Part Test, HEW cited the Javits Amendment, discussed *supra*. *See* 44 Fed. Reg. at 71,413. Yet, the Javits Amendment directs HEW only to propose rules relating to *intercollegiate* athletics, a fact acknowledged by the 1979 Interpretation itself. *Id.* at 71,415 ("the 'Javits Amendment' . . . instructed HEW to make 'reasonable (regulatory) provisions considering the nature of particular sports' in intercollegiate athletics"). There can be no question that the express language of the Javits Amendment, and its interpretation, *does not* apply to high school sports.

With respect to the subsequent Three-Part Test "policy clarifications," the 2010 Clarification repeatedly acknowledges that the Three-Part Test is applicable only to intercollegiate athletics.[5] Moreover, according to the Department of Education, the 1996 Clarification did not enlarge the scope of the Three-Part Test to apply to high school. Defendant's Memorandum in Opposition to Plaintiffs' Motion for Leave to File Second Amended Complaint at 20-21, in the matter of *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, No. 1:02CV00072 (D.D.C. filed Nov. 12, 2002). Regardless, nothing in the policy clarifications has the administrative or legal formality necessary to apply the Three-Part Test to high school athletics.

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[4] (...continued)

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

44 Fed. Reg. at 71,413-14 (emphasis added, footnote omitted). While this language leaves open the matter of what constitutes a "general principle" and when applying general principles is "appropriate," it is expressed in terms ("*may be used . . . when appropriate*") obviously and facially less absolute than the remainder of the Interpretation.

[5] There are numerous examples throughout the 2010 Clarification that make clear that the Three-Part Test only applies to inter*collegiate* athletics. For example, Part A.3 notes that the "OCR evaluates the interests of the underrepresented sex by examining . . . participation rates in sports in high schools . . . in areas from which the institution draws its students." *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three* at 6 (April 20, 2010), *see* n.5.

II

THE NWLC COMPLAINT LACKS ANY BASIS IN LAW

A. Applying the Three-Part Test to High Schools Violates the Equal Protection Clause

It is sadly ironic that Title IX, a law passed to prevent sex-based discrimination that violates the constitutional right to equal protection of the laws, is being interpreted by some to actually require education institutions to treat students differently based solely on their sex. Some students will undeniably benefit from this disparate treatment. At the same time other students are harmed by this unequal treatment. Applying the Three-Part Test to high school athletics would compel such an unconstitutional result.

The Fifth and Fourteenth Amendments, guaranteeing equal protection of the laws, together serve as the constitutional basis for persons who seek to bring both race- and sex-based discrimination claims against government actors. As an initial matter, the disparate impact/proportionality test used by NWLC to demonstrate a Title IX violation has come under recent fire by the Supreme Court. *See Ricci*, 129 S. Ct. at 2682 (Scalia, J., concurring) ("disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes."). Similarly, with respect to the application of proportionality under the Three-Part Test, Title IX places a gender thumb on the scales, often requiring schools to evaluate the sex-based outcomes. In this respect, proportionality may violate the Equal Protection Clause.

Further, application of the Three-Part Test to high schools cannot survive an equal protection challenge. All sex-based classifications must be supported by an "exceedingly persuasive justification" *and* substantially related to the achievement of that underlying objective. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citation omitted).

Neither the Department of Education nor HEW has undertaken any kind of study or proffered even a cursory evidentiary basis to justify applying the Three-Part Test, and thus treating differently male and female athletes, in America's high schools. Although HEW's original Three-Part Test expressly did not find "the universal presence of discrimination" in intercollegiate athletics, 44 Fed. Reg. at 71,420, HEW at least undertook a skeleton study of colleges as it developed the 1979 Policy Interpretation, by examining the athletic climate at eight universities. *Id.* HEW neither solicited nor examined data on high school athletic participation, *see, e.g.*, 43 Fed. Reg. 58,070 (requesting comments only on collegiate sports), and the Department of Education has not updated its data. As such, the Department has no evidentiary basis, let alone an "exceedingly persuasive" one, to support applying the test to high schools. Its application, which by its nature effects disparate treatment of

students based solely on their sex, thus would violate the equal protection rights of the athletes and coaches who would be burdened by the unequal treatment.

The NWLC Complaint, based entirely on application of the Three-Part Test, is intrinsically flawed. First, application of the Three-Part Test raises the same equal protection concerns raised by the Supreme Court in *Ricci*. Second, neither the Department of Education, nor the OCR, has any evidence supporting the application of the Three-Part Test to high schools. Thus, by following the Three-Part Test as the complaint by the NWLC urges, male athletes would be subjected to disparate treatment without sufficiently probative evidence that the Three-Part Test is needed to combat sex discrimination. Such action would likely run afoul of the Equal Protection Clause.

III

THE 1975 REGULATIONS CONTROL IN HIGH SCHOOL ATHLETICS

Title IX is written to allow educational institutions flexibility with respect to numerical imbalances between the sexes. 20 U.S.C. § 1681(b) specifically grants education institutions the flexibility to refrain from granting a preference where evidence is based solely on statistical imbalance. *See id.* ("Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance."). Additionally, the same statute allows education institutions the tool to *consider* statistical imbalances during Title IX hearings. *See id.* ("[T]his subsection shall not be construed to prevent the consideration in any hearing or proceeding under this title of statistical evidence tending to show that such an imbalance exists."). By allowing the use of disproportionate participation rates when evaluating Title IX compliance, but explicitly allowing high schools the latitude to refrain from preferential treatment based on such proportions, Title IX ensures that high schools remain flexible to address the needs of all students desiring to participate in sports.

Because the Three-Part Test does not apply to high school athletics, *see supra*, it is the mandate of the 1975 Regulations that should control Title IX's application to high school athletics. The 1975 Regulations explicitly apply to high school athletics. 40 Fed. Reg. at 24,134. Furthermore, the 1975 Regulations allow high schools the flexibility envisioned by the drafters of Title IX. As outlined above, the 1975 Regulations directed schools to "take the interests of both sexes into account in determining what sports to offer." 40 Fed. Reg. at 24,134; *see 1975 Letter*, 40 Fed. Reg. at 52,655-56 ("athletic programs above the elementary level should . . . [d]etermine the interests of both sexes in the sports to be offered and . . . also determine the relative abilities of members of each sex"). Furthermore, schools were instructed to gauge this interest "by a reasonable method [the school] deems appropriate." 40 Fed. Reg. at 24,131. Thus, the controlling standard is one

measuring accommodation based on the relative interests of boys and girls, and not in comparison with overall enrollment.

Where scholastic sports offerings are based on interest, schools can allocate their budgets to ensure students are provided the greatest opportunity. Conversely, proportionality requires schools to allocate their athletic budgets in a manner that results only in participation that correlates to male and female enrollment. As schools have scarce resources, and cannot provide all sports to all students, proportionality necessitates cuts in athletic offerings. Instead of athletics allowing the most students to flourish irrespective of their sex, sex becomes schools' sole criterion for offering sports.

In direct contravention of 20 U.S.C. § 1681(b) and the 1975 Regulations, the NWLC's complaint envisions a rigid framework for Title IX. Indeed, the NWLC finds that a statistical imbalance in the athletic participation rates of the sexes at CPS *necessarily means* that high schools are not providing equal opportunities to both sexes. Complaint ¶¶ 10-13. But disproportionate participation rates speak only to actual participation, not opportunity. The 1975 Regulations provide the proper mechanism for determining whether CPS is complying with Title IX. By maintaining flexibility and focusing on interest, the 1975 Regulations ensure that high schools retain the ability to address the diverse issues relating to Title IX compliance.

CONCLUSION

PLF respectfully requests the Office of Civil Rights to clarify that pursuant to the controlling regulations, the NWLC has not made out a prima facie case of discrimination under Title IX. CPS should remain free to achieve Title IX compliance by any legally valid, nondiscriminatory method the school deems appropriate. PLF is very concerned about the legal allegations raised in NWLC's complaint. Application of the Three-Part Test to high schools contravenes the plain meaning of Title IX, its subsequent regulations, and raises serious constitutional questions. PLF respectfully requests a conference with you to discuss these important matters.

Sincerely,

JOSHUA P. THOMPSON
Attorney

cc: Office of Civil Rights, Washington, DC
United States Department of Education