APPENDIX

TITLE IX HISTORY AND INTERPRETATION

The portion of Title IX relevant to this case 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.

20 U.S.C. §1681(a). The U.S. Supreme Court has held that an implied private right of action exists to allow private individuals to serve as "private attorneys general" to enforce the law. *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). Title IX applies to *all* educational programs and activities at institutions that receive federal funds, including intercollegiate athletics. 20 U.S.C. §1687.

From the beginning, Congress intended Title IX to cover sex discrimination in athletics and directed the U.S. Department of Health, Education, & Welfare ("HEW," the predecessor to DOE) to issue regulations to eradicate it. 20 U.S.C. §1682, as amended by Pub.L.No. 93-380, §844, 88 Stat. 612 (1974) (the "Javits Amendment"). HEW published draft regulations for public comment in 1974. 39 Fed. Reg. 22,227 (June 20, 1974). After receiving nearly 10,000 comments, HEW issued final Title IX regulations in 1975. 40 Fed.Reg. 24,128 (June 4, 1975). Congress formally reviewed those regulations before they went into effect, holding six days of hearings[1] . *Sex Discrimination Regulations: Hearings Before the House Subcomm. on Post-Secondary Education of the House Comm. on Ed. & Labor, 94th Cong. 1st Sess.* (1975). Members of the House and Senate engaged in extensive discussions about the regulations and offered many resolutions and amendments to reject or change them, particularly as they related

[1] Under the General Education Provisions Act in effect at the time, Congress had the opportunity to review, comment upon, and decide whether the Title IX regulations reflected statutory intent. If they did not, Congress had 45 days to pass concurrent resolutions rejecting them in whole or in part as "inconsistent with the Act." Pub.L. 93-380, 88 Stat. 567, as amended 20 U.S.C. §1232(d)(1).

to athletics. Congress ultimately rejected each and every attempt to disapprove or modify the regulations and the law itself. *North Haven,* 456 U.S. at 531-532 (summarizing history of challenges to Title IX and its regulations); *Haffer v. Temple University*, 524 F.Supp. 531, 534, 535 (E.D.Pa. 1981)(discussion of rejected attempts to modify Title IX). *See also* Title IX legislative history chart from Galles & Samuels, "In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity," 14 Marq. Sports Law Rev. 1, 40-47 (Fall 2003). The final regulations went into effect in July, 1975. They are now located at 34 C.F.R. Part 106.[2]

Because of this unique history, courts give the Title IX regulations and OCR's policy guidelines even greater deference than that mandated under *Chevron v. NRDC*, 467 U.S. 837 (1984); *Martin v. OSHA*, 499 U.S. 144, 150 (1991)("[W]e presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers"). *North Haven,* 456 U.S. at 522. All eleven of the U.S. Circuit Courts of Appeals that have considered the Title IX athletics regulations - and OCR's interpretation of them - have given them substantial deference.[3] Moreover, the Supreme Court repeatedly has denied certiorari

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[2] The original Title IX regulations were published at 45 C.F.R. Part 86. However, when authority over education issues was transferred from HEW to the newly created Department of Education, the regulations were republished at 34 C.F.R. Part 106. Dept. of Ed Organization Act, Pub.L.No. 96-88, 93 Stat. 669 (1979), codified at 20 U.S.C. §§3401-3510. See in particular Section 3441(a)(3), as described in *North Haven*, 456 U.S. at 517 n. 4.

[3] *NWCA v. Dept. of Education*, 263 F.Supp.2d 82 (DDC 2003), aff'd 366 F.3d 930 (D.C.Cir. 2004), cert. denied 545 U.S. 1104 (2005); *Cohen v. Brown University*, 991 F.2d 888, 895 & 899 (1st Cir. 1993)(Cohen I) & *Cohen v. Brown University*, 101 F.3d 155, 172-173 (1st Cir. 1996)(Cohen II), *cert. denied*, 520 U.S. 1186 (1997); *McCormick v. School Dist. Mamaroneck*, 370 F.3d 273, 288 (2nd Cir. 2004); *Williams v. School Dist. of Bethlehem,* 998 F.2d 168, 170-171 & 175 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994), *Favia v. Indiana University of Pennsylvania*, 812 F.Supp. 578, 584-585 (W.D.Pa. 1993), aff'd 7 F.3d 332 (3rd Cir. 1993); *Equity in Athletics v. Dept. of Education*, 504 F.Supp. 88, 102-105 (W.D.Va. 2007), aff'd 291 2008 WL 4104235 (4th Cir. 2008); *Pederson v. Louisiana State University*, 213 F.3d 858, 877-879 (5th Cir. 2000); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265, 273

petitions that challenged OCR's interpretations. *NWCA v. Dept. of Education,* 545 U.S. 1104 (2005)*; Cohen v. Brown University,* 520 U.S. 1186 (1997)*; Williams v. School Dist. of Bethlehem,* 510 U.S. 1043 (1994)*; Roberts v. Colorado State Bd. of Ag. (aka Colorado State Univ.),* 510 U.S. 1004 (1993). In sum, it is universally accepted that OCR's various athletic policy interpretations and policy guidelines apply to cases such as this one.

TITLE IX REGULATIONS AND OCR POLICY INTERPRETATIONS

Two Title IX regulations apply specifically to athletics: 34 C.F.R. §106.37(c) (athletic scholarships)[4] and § 106.41 (accommodation and treatment). The latter states, in relevant part:

> (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....
>
> (c) Equal Opportunity. A recipient which operates or sponsors interscholastic, interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.

In determining whether a school provides equal opportunity in athletics OCR considers, among other things:

> *1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes*

& 274-275 (6th Cir. 1994); *Miami Univ. Wrestling Club v. Miami University of Ohio*, 302 F.3d 608, 615 (6th Cir. 2002); *Kelley v. Bd. of Trustees of the Univ. of Illinois*, 35 F.3d 265, 270-272 (7th Cir. 1994), *cert. denied* 513 U.S. 1128 (1995); *Boulahanis v. Bd of Regents of Illinois State University*, 198 F.3d 633, 637-639 (7th Cir. 1999); *Chalenor v. Univ. of North Dakota*, 292 F.3d 1042, 1046-1047 (8th Cir. 2002); *Gonyo v. Drake University*, 879 F.Supp. 1000, 1003 & 1006 (S.D. Iowa 1995); *Neal v. Bd. of Trustees of the California State Universities*, 198 F.3d 763, 770-772 (9th Cir. 1999); *Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 828 (10th Cir. 1993), *cert. denied* 510 U.S. 1004 (1993).

[4] "To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics." 34 C.F.R. §106.37(c)(1)

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
9) Provision of housing and dining facilities and services
10) Publicity

Section 106.41(c)(1) addresses whether a school provides equal participation opportunities for females to make sure that they are able to participate at all. Sections 106.41(c)(2)-(10) address whether a school provides female athletes who already have opportunities with the same benefits provided to male athletes. *Cohen I,* 991 F.3d at 896*; Roberts,* 814 F.Supp. at 1510-1511; *Favia,* 812 F.Supp. at 584-585.

Section 106.41(d) gave colleges three (3) years – until July 1978 – to reach *full* compliance with Title IX's athletic mandates. Notably, the three-year deadline was the *outer limit* for compliance, because the regulation obligated schools to proceed "as expeditiously as possible but in no event later than three years from the effective date of this regulation" (elementary schools had only one year). 34 C.F.R. §106.41(d).[5]

To help schools reach this deadline and to explain their obligations under the law, OCR prepared and sent to all state school officers, school superintendents, and college/university presidents the following publications (in addition to the final Title IX regulations themselves): (1) Elimination of Sex Discrimination in Athletic Programs (September 1975) (the "1975 OCR

[5] "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." The effective date of the regulation was July 21, 1975. 34 C.F.R. §106.1.

Memo") (Pl. Ex. 18); and (2) Competitive Athletics in Search of Equal Opportunity (September 1976) (the "1976 OCR Guidance"). 40 Fed. Reg. 52655 (Nov. 11, 1975).

The 1975 OCR Memo highlighted that the three-year adjustment period of 34 C.F.R.§ 106.41(d) was *not* a waiting period. Schools were required "to begin now to take whatever steps are necessary to ensure full compliance as quickly as possible." 1975 OCR Memo at 4. Schools were required to evaluate their entire athletics programs, determine which sports students wanted to play, and develop plans to effectively accommodate those interests and abilities by July 21, 1976. OCR required that the plans "be fully implemented as expeditiously as possible and in no event later than July 21, 1978." *Id.* at 6.

The 1976 OCR Guidance explained that if a school could not comply immediately,

> it must be able to justify its use of the adjustment period by being able to demonstrate that there are real barriers or obstacles to achieving immediate parity for students of both sexes and that the institution is taking steps with *specific timetables* for their implementation to overcome these barriers....Appropriate actions during the adjustment period might include training staff, revising existing programs, rescheduling training and contests, and constructing or remodeling facilities.

1976 OCR Guidance at 15.

The Guidance emphasized the importance of having each school's chief executive officer and athletic administrators substantially involved in the evaluation of the athletic program and the development of remedial plans in order to establish the right climate. *Id.* at 6. It also provided more than 100 pages of step-by-step guide for assessing and reaching compliance by the deadline.

Despite the universal dissemination of this information, few schools reached full compliance by the July 1978 deadline, and OCR was swamped with Title IX athletics complaints. Accordingly, OCR published additional guidance in the form of a draft policy on

"Title IX and Intercollegiate Athletics" in the Federal Register at 43 Fed. Reg. 58,070 (1978). After receiving more than 700 comments, OCR issued a final policy interpretation a year later at 44 Fed. Reg. 71,413 et seq. (Dec. 11, 1979)(the "1979 Policy Interpretation") (Pl. Ex. 7). OCR later also developed a 1990 Title IX Investigators Manual. OCR intended the publication to further explain the meaning of "equal opportunity" within the context of a sex-segregated program like athletics. 44 Fed. Reg. at 71,414.

The 1979 Policy Interpretation divides Title IX athletics obligations into three areas:

(1) participation opportunities (i.e. whether a student has an opportunity to play sports at all) 34 C.F.R. 106.41(c)(1);

(2) treatment and benefits (whether students who already play sports are treated equally) 34 C.F.R. 106.41(c)(2-10); and

(3) financial assistance (whether schools allocate athletic scholarship money equitably) 34 C.F.R. 106.37(c).

44 Fed.Reg at 71,414. Title IX legal claims arise from these three, distinct subject areas. *Cohen v. Brown University,* 991 F.2d 888, 896 (1st Cir. 1993); *Roberts v. Colorado State Board of Agriculture,,* 814 F.Supp. 1507, 1510-1511 (D. Colo.),), *aff'd* 998 F.2d 824 (10th Cir. 1993); *Favia v. Indiana University of PA,* 812 F.Supp. 578, 584-85 (W.D.Pa.), *aff'd,* 7 F.3d 332 (3d Cir. 1993). The obligation to provide equal athletic participation opportunities is particularly important, because having the opportunity to participate at all "lies at the core of Title IX's purpose." *Cohen*, 991 F.2d at 897. Whether or not a school treats female athletes equitably in other is irrelevant if it does not provide them an equal opportunity to participate in the activity. *Id.*

The cases cited above, which were brought in the early 1990s and received wide attention, showed that colleges had yet to comply with Title IX. Congress responded to this ongoing problem by passing the Equity in Athletics Disclosure Act ("EADA") in 1994. 20

U.S.C. §1092(g). The EADA requires colleges to collect detailed information about their athletic programs that can be used to measure Title IX compliance. This data includes the numbers of male and female undergraduate students, the numbers of male and female athletes in each sport, the numbers of coaches provided to each team, and the allocation of resources within the athletic department. Colleges must collect the data annually and make a report of it available to OCR and to anyone who requests it. The first EADA reports were due in October, 1996. *See* QU EADA reports at Pl. Exs. 1, 4, and 26. *See also* summary of QU's EADA participation data on chart, Pl. Ex. 5.[6]

OCR responded to the problem by publishing in 1996 a detailed clarification of the athletic participation requirements of 34 C.F.R. 106.41(c)(1) and the 1979 Policy Interpretation (the "1996 Clarification") (Pl. Ex. 7). The 1996 Clarification reaffirms the 1979 Policy Interpretation's "three-part-test" and gives clear direction and examples concerning its application. The 1996 Clarification remains the standard for analyzing athletic participation claims, and courts universally give it the same deference as the Title IX regulations and the 1979 Policy Interpretation.

[6] The NCAA also gathers similar data from schools. Its materials expressly direct its members not to count cheerleaders. Pl. Ex. 7 at p.2.