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Dear Colleague Letter: Athletic Activities Counted For Title IX Compliance - September 17, 2008

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UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, DC 20202- _____

The Office for Civil Rights in the United States Department of Education issues this guidance to provide State educational agencies, local educational agencies, and postsecondary institutions with information to ensure that male and female students are provided equal opportunities to participate in intercollegiate and interscholastic athletics programs consistent with *Title IX of the Education Amendments of 1972*, 20 U.S.C §§ 1681 *et seq.*, and its implementing regulations (34 C.F.R. Part 106).

This guidance represents the Department's current thinking on this topic. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations.

If you are interested in commenting on this guidance, please email us your comment at OCR@ed.gov or write to us at the following address: Assistant Secretary for Civil Rights, 400 Maryland Avenue, SW, Potomac Center Plaza, Washington, DC 20202-1100.

Dear Colleague:

SEP 17 2008

On behalf of the Office for Civil Rights (OCR) of the United States Department of Education, I am writing to provide technical assistance regarding your compliance with *Title IX of the Education Amendments of 1972 (Title IX)*, 20 U.S.C. §§ 1681 *et seq.* Specifically, this letter provides clarifying information to help institutions determine which intercollegiate or interscholastic athletic activities can be counted for the purpose of *Title IX* compliance; it does not represent a change in OCR's policy under *Title IX*.

As you are aware, *Title IX* prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance. The *Title IX* regulations governing athletics state, in relevant part:

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....

34 C.F.R. § 106.41(a). In particular, the regulations require institutions to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c).

When OCR conducts an investigation to determine whether an institution provides equal athletic opportunities as required by the *Title IX* regulations, OCR evaluates the opportunities provided by the institution's intercollegiate or interscholastic "sports." OCR does not have a specific definition of the term "sport." Instead, OCR considers several factors related to an activity's structure, administration, team preparation and competition, which are identified below, when

determining whether an activity is a sport that can be counted as part of an institution's intercollegiate or interscholastic athletics program for the purpose of determining compliance with 34 C.F.R. § 106.41(c).

Many institutions are members of intercollegiate athletic organizations, such as the National Collegiate Athletic Association and the National Association of Intercollegiate Athletics, or state high school associations that have organizational requirements, which address the factors identified by OCR. When the organizational requirements satisfy these factors and compliance with the requirements is not discretionary, OCR will presume that such an institution's established sports can be counted under *Title IX*. This presumption can be rebutted by evidence demonstrating that the institution is not offering the activity in a manner that satisfies the factors below.

When the presumption does not apply or has been rebutted effectively, OCR will evaluate an institution's activity on a case-by-case basis. In such an evaluation, OCR will consider the factors below to make an overall determination of whether the activity can be considered part of the institution's intercollegiate or interscholastic athletics program for the purpose of *Title IX* compliance.

If, after reviewing the factors in their entirety, OCR determines that an activity should not be counted under *Title IX*, an institution may ask OCR to reconsider its initial determination and may provide OCR with other evidence related to the activity's structure, administration, team preparation and competition. This approach affords recipients the flexibility to create athletics programs that are responsive to the specific interests and abilities of their particular student bodies.

In its case-by-case evaluation of whether an activity can be counted as an intercollegiate or interscholastic sport for the purpose of *Title IX* compliance, OCR will consider all of the following factors:

- I. **PROGRAM STRUCTURE AND ADMINISTRATION** — Taking into account the unique aspects inherent in the nature and basic operation of specific sports, OCR considers whether the activity is structured and administered in a manner consistent with established intercollegiate or interscholastic varsity sports in the institution's athletics program, including:
 - A. Whether the operating budget, support services (including academic, sports medicine and strength and conditioning support) and coaching staff are administered by the athletics department or another entity, and are provided in a manner consistent with established varsity sports; and
 - B. Whether the participants in the activity are eligible to receive athletic scholarships and athletic awards (e.g., varsity awards) if available to athletes in established varsity sports; to the extent that an institution recruits participants in its athletics program, whether participants in the activity are recruited in a manner consistent with established varsity sports.

II. **TEAM PREPARATION AND COMPETITION** — Taking into account the unique aspects inherent in the nature and basic operation of specific sports, OCR considers whether the team prepares for and engages in competition in a manner consistent with established varsity sports in the institution's intercollegiate or interscholastic athletics program, including:

- A. Whether the practice opportunities (e.g., number, length and quality) are available in a manner consistent with established varsity sports in the institution's athletics program; and
- B. Whether the regular season competitive opportunities differ quantitatively and/or qualitatively from established varsity sports; whether the team competes against intercollegiate or interscholastic varsity opponents in a manner consistent with established varsity sports;

When analyzing this factor, the following may be taken into consideration:

- 1. Whether the number of competitions and length of play are predetermined by a governing athletics organization, an athletic conference, or a consortium of institutions;
 - 2. Whether the competitive schedule reflects the abilities of the team; and
 - 3. Whether the activity has a defined season; whether the season is determined by a governing athletics organization, an athletic conference, or a consortium.
- C. If pre-season and/or post-season competition exists for the activity, whether the activity provides an opportunity for student athletes to engage in the pre-season and/or post-season competition in a manner consistent with established varsity sports; for example, whether state, national and/or conference championships exist for the activity; and
- D. Whether the primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities.

When analyzing this factor, the following may be taken into consideration:

- 1. Whether the activity is governed by a specific set of rules of play adopted by a state, national, or conference organization and/or consistent with established varsity sports, which include objective, standardized criteria by which competition must be judged;
- 2. Whether resources for the activity (e.g., practice and competition schedules,¹ coaching staff) are based on the competitive needs of the team;

¹ For purposes of this analysis, there is no presumption that the amount of time dedicated to competition must be equal to or greater than the amount of time dedicated to practice.

3. If post-season competition opportunities are available, whether participation in post-season competition is dependent on or related to regular season results in a manner consistent with established varsity sports; and
4. Whether the selection of teams/participants is based on factors related primarily to athletic ability.

Please keep in mind that OCR's determinations based on these factors are fact-specific. Therefore, determinations may vary depending on a school district or postsecondary institution's athletics program, the nature of the particular activity, and the circumstances under which it is conducted.

It is OCR's policy to encourage compliance with the *Title IX* athletics regulations in a flexible manner that expands, rather than limits, student athletic opportunities. By disseminating this list of factors, OCR intends to provide institutions with information to include new sports in their athletics programs, such as those athletic activities not yet recognized by governing athletics organizations and those featured at the Olympic games, if they so choose. Expanding interscholastic and intercollegiate competitive athletic opportunities through new sports can benefit students by creating and stimulating student interest in athletics, taking advantage of athletic opportunities specific to a particular competitive region, and providing the opportunity for access to a wide array of competitive athletic activities.

OCR remains available to provide technical assistance on this issue to recipients on a case-by-case basis. If you have further questions regarding the application of *Title IX* to athletics programs, or seek technical assistance, please contact the OCR enforcement office serving your state or territory. Contact information for these offices is available on the Department's website at <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

Thank you for your attention to these matters and your continued efforts to ensure equal athletic opportunities for all of our nation's students.

Sincerely,

A handwritten signature in black ink that reads "Stephanie Monroe". The signature is fluid and cursive, with the first name and last name clearly distinguishable.

Stephanie Monroe
Assistant Secretary for Civil Rights