

109TH CONGRESS  
2D SESSION

# H. RES. 735

Expressing the sense of the House of Representatives that the “Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—part Three”, issued by the United States Department of Education without notice or opportunity for public comment on March 17, 2005, is inconsistent with longstanding Department policies and fundamental principles of equality, is a disservice to our Nation’s young women, and should be withdrawn by the Department of Education.

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## IN THE HOUSE OF REPRESENTATIVES

MARCH 16, 2006

Ms. WOOLSEY (for herself, Mr. SHAYS, Ms. SOLIS, Mrs. JOHNSON of Connecticut, Mrs. CAPPS, Mr. BOEHLERT, Mr. GEORGE MILLER of California, Mr. SIMMONS, Ms. PELOSI, Mr. PETERSON of Minnesota, Ms. BALDWIN, Ms. MOORE of Wisconsin, Mr. AL GREEN of Texas, Ms. MCCOLLUM of Minnesota, Mr. FARR, Mr. BROWN of Ohio, Ms. MATSUI, Ms. WATSON, Ms. MILLENDER-MCDONALD, Mr. NADLER, Ms. SLAUGHTER, Mr. FRANK of Massachusetts, Mr. CAPUANO, Mr. OLVER, Mr. LEWIS of Georgia, Mr. CARDIN, Ms. HERSETH, Ms. BEAN, Mr. KUCINICH, Ms. WASSERMAN SCHULTZ, Mr. GRIJALVA, Ms. DEGETTE, Mrs. MALONEY, Mr. CONYERS, Ms. HOOLEY, Mr. CASE, Ms. SCHAKOWSKY, Mrs. TAUSCHER, Ms. ROYBAL-ALLARD, Ms. JACKSON-LEE of Texas, Ms. ZOE LOFGREN of California, Mr. SABO, Mrs. CAPITO, Mr. OWENS, Mr. VAN HOLLEN, Mr. PAYNE, and Mr. DAVIS of Illinois) submitted the following resolution; which was referred to the Committee on Education and the Workforce

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## RESOLUTION

Expressing the sense of the House of Representatives that the “Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—part Three”, issued by the United States Department of Education without notice

or opportunity for public comment on March 17, 2005, is inconsistent with longstanding Department policies and fundamental principles of equality, is a disservice to our Nation's young women, and should be withdrawn by the Department of Education.

Whereas title IX of the Education Amendments of 1972 prohibits educational institutions that receive Federal funding from discriminating on the basis of sex, including in their athletics programs and activities;

Whereas prior to 1972 and the enactment of title IX, virtually no college or university offered athletic scholarships to women, fewer than 32,000 women participated in collegiate sports, and women's sports received only 2 percent of funds spent on college athletics programs;

Whereas as a result of title IX, women's opportunities to participate in and benefit from collegiate athletics programs have grown dramatically, such that there are now nearly 160,000 women competing on intercollegiate teams;

Whereas despite the gains engendered by title IX, discriminatory barriers to women's participation in sports remain, and women receive only about 43 percent of the opportunities to play intercollegiate sports, 38 percent of athletic operating budgets, and 33 percent of the funds spent to recruit new athletes;

Whereas the Department of Health, Education, and Welfare issued "Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics" in 1979 (later adopted by the Department of Education) ("1979 Policy Interpretation") that allows educational institutions to comply with title IX's requirement that they provide equal sports participation opportunities

for their male and female students in one of three independent ways: by providing participation opportunities for male and female students in numbers substantially proportionate to their respective full-time enrollments, by showing a history and continuing practice of program expansion responsive to the interests and abilities of the under-represented sex, or by fully and effectively accommodating the interests and abilities of members of the under-represented sex;

Whereas the Office for Civil Rights of the Department of Education in 1996 issued a “Clarification of Intercollegiate Athletics Policy Guidance” (“1996 Clarification”) that set out specific examples and additional advice to guide educational institutions in meeting the standards of this “three-part test;”

Whereas the 1979 Policy Interpretation and the 1996 Clarification provide educational institutions with ample and fair guidance on compliance with title IX and provide flexibility to the institutions so that they may determine for themselves how best to comply with the law;

Whereas two out of three educational institutions have complied with the three-part test under the second or third part of the test;

Whereas the three-part test has been deferred to by every Federal appellate court—nine of nine—that has considered it;

Whereas the three-part test has been supported by every Department of Education since its adoption in 1979;

Whereas the most recent affirmation of the three-part test came on July 11, 2003, when the Office for Civil Rights of the Department of Education issued the “Further

Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance” (“Further Clarification”) which reaffirmed that the three-part test is flexible and fair, specifically incorporated the factors and examples set forth in the 1996 Clarification, and pledged to aggressively enforce title IX standards;

Whereas the 2003 Further Clarification followed the Department’s establishment of a Commission on Opportunity in Athletics, which Commission made recommendations for changes to the title IX athletics policies that would have seriously weakened title IX’s protections and resulted in significant losses in participation opportunities and scholarships to which young women are legally entitled;

Whereas the recommendations made by the Commission on Opportunity in Athletics triggered massive public opposition and generated thousands of communications to the Department, the White House, and the Congress supporting the maintenance of the then-current title IX athletics policies without change;

Whereas the 2003 Further Clarification represented the Department’s rejection of the Commission’s recommendations;

Whereas the Department, without notice or opportunity for public input, issued an “Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—part Three” on March 17, 2005 (“Additional Clarification”), which allows schools to demonstrate full accommodation of women’s athletic interests under the third part of the three-part test solely by conducting an e-mail survey and further allows schools to treat a lack of response to the survey as a lack of interest in playing additional sports;

Whereas the Additional Clarification is inconsistent with the 1996 Clarification and with basic principles of equity under title IX because it, among other problems (1) permits schools to use surveys alone, rather than the multiple factors set forth in the 1996 Clarification, as a means to demonstrate full accommodation of women's athletic interests, (2) conflicts with a key purpose of title IX—to encourage women's interests in sports and eliminate stereotypes that discourage them from participating, (3) allows schools to restrict surveys to enrolled and admitted students, thereby permitting them to evade their legal obligation to measure interest broadly, (4) authorizes a flawed survey methodology, including by allowing schools to count non-responses as evidence of lack of interest in additional sports opportunities, (5) shifts the burden to female students to show that they are interested in and entitled to additional participation opportunities, and (6) makes no provision for the Department of Education to monitor schools' implementation of the survey or its results;

Whereas for these reasons, the Additional Clarification makes it easier for colleges and universities to evade their legal obligation to provide equal opportunity in sports and violates the Department's 2003 commitment to strongly enforce long-standing title IX standards;

Whereas for these reasons, the Additional Clarification is likely to be found to violate the standards of title IX as explained in relevant court cases; and

Whereas for these reasons, the Additional Clarification threatens to reverse the enormous progress women and girls have made in sports since the enactment of title IX and to slow, if not stop, efforts to address the continuing

discrimination to which female athletes are still subject:  
Now, therefore, be it

1       *Resolved*, That it is the sense of the House of Rep-  
2 representatives that—

3           (1) the March 17, 2005, “Additional Clarifica-  
4 tion” violates the spirit and intent of the mandate  
5 of title IX of the Education Amendments of 1972 to  
6 provide equal opportunities in athletics and changes  
7 prior Department of Education policies and long-  
8 standing title IX law;

9           (2) the Department of Education should with-  
10 draw the March 17, 2005, “Additional Clarifica-  
11 tion,” leaving intact the standards of the 1996 Clar-  
12 ification, which standards anticipate the use of a  
13 multiplicity of tools and analyses to demonstrate  
14 compliance under the third part of title IX’s three-  
15 part test; and

16           (3) the Department of Education should honor  
17 its 2003 commitment to enforce the standards of  
18 longstanding title IX athletics policies, including the  
19 1996 Clarification.

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