James C. Sturdevant, State Bar No. 94551
(jsturdevant@sturdevantlaw.com)
Mark T. Johnson, State Bar No. 76904
(mjohnson@sturdevantlaw.com)
Monique Olivier, State Bar No. 190385
(molivier@sturdevantlaw.com)
THE STURDEVANT LAW FIRM
A Professional Corporation
354 Pine Street, Fourth Floor
San Francisco, CA 94104
Telephone: (415) 477-2410
Facsimile: (415) 477-2420

Debra Smith, State Bar No. 147863
(dsmith@equalrights.org)
Noreen Farrell, State Bar No. 191600
(nfarrell@equalrights.org)
Angela Perone, State Bar No. 245793
EQUAL RIGHTS ADVOCATES
1663 Mission Street, Suite 250
San Francisco, CA 94103
Telephone: (415) 621-0672
Facsimile: (415) 621-6744

Kristen Galles, State Bar No. 148740
(kgalles@comcast.net)
EQUITY LEGAL
10 Rosecrest Avenue
Alexandria, VA 22301
Telephone: (703) 683-4491

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
[Sacramento Division]

AREZOU MANSOURIAN; LAUREN MANCUSO; CHRISTINE WING-SI NG; and all those similarly situated, Plaintiffs, vs. BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA AT DAVIS, Defendant	CASE NO. S-03-2591 FCD EFB **PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION SUMMARY JUDGMENT** **Date: April 25, 2008** **Time: 10:00 a.m.** **Courtroom: 2** Complaint filed: December 18, 2003 Trial Date: August 7, 2008

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUMMARY OF THE ARGUMENT 3

III. STATEMENT OF FACTS 5

A. UCD's Athletic Program. 5

1. UCD's Failure to Provide Women's Athletic Opportunities Proportionate to Women's Enrollment.. 5

2. UCD's Failure To Expand Participation Opportunities For Women Athletes.......... 5

3. UCD's Refusal to Fully and Effectively Accommodate the Interests and Abilities of Its Female Students 9

B. UCD's Elimination of Existing Women's Wrestling Varsity Opportunities. 10

1. The Elimination of the Women's Wrestling Program After a Decade of Women's Varsity Wrestling at UCD. 10

2. Plaintiffs Attendance at UCD With the Desire and Intent to Wrestle.. 10

3. UCD's Removal Women Wrestlers From the Varsity Wrestling Program.. 11

IV. ARGUMENT 14

A. UCD Has Not Met the High Standard That Limits Summary Judgment.. 14

B. The Evidence Establishes That Disputed and Undisputed Facts Exist Which Support a Finding That UCD Discriminates Against Female Athletes in Violation of Title IX, Making Summary Judgment Improper 15

1. The Legal Framework for Evaluating Effective Accommodation Claims Under Title IX. 15

2. UCD Discriminated Against Female Students, Including Plaintiffs, By Failing All Three Prongs of Title IX's Three Pronged Test for Measuring Equal Accommodation... 16

a. UCD Admits Its Failure to Satisfy Both Prong One and Prong Two of the Three-Pronged Test, Because It Has Neither Achieved Substantial Proportionality Nor Effectively and Fully Accommodated Female Interest in Athletics. 17

b. UCD Did Not Satisfy the Requirements of Prong Two Because It Has Never Had A History And Continuing Practice Of Program Expansion For Women.. 18

3. UCD Has No History or Continuing Practice of Program Expansion....... 20

a. UCD Failed to Expand Female Participation Opportunities At All From 1971 to 1996.. 20

b. UCD Did Not Expand Participation Opportunities From 1998-2005... 20

c. UCD's Theory That It Should Be "Credited" For Adding Multiple Sports In 1995-1996 Is Without Legal Support And Cannot Form The Basis For Establishing Program Expansion.. 23

d. UCD Eliminated Existing Female Participation Opportunities, Including Women's Varsity Wrestling... 25

e. The Mere Existence of Title IX Committees, Policies, and Plans Do Not Constitute a History and Continuing Practice of Program Expansion... 27

4. Assuming Arguendo That UCD Expanded Participation Opportunities for Women Athletes, It Did Not Do So in a Manner That Was Demonstrably Responsive to The Developing Interest and Abilities of Its Female Students...... 27

5. Genuine Issues of Material Fact Exist As To Whether UCD Also Violated Title IX By Failing To Establish A Separate Women's Varsity Wrestling Team..... 28

6. UCD's Conduct Constituted Intentional Discrimination, and in Any Event, Triable Issues of Material Fact Preclude Summary Judgment on This Ground..... 31

7. UCD Is Not Entitled to Summary Judgment on Notice Grounds..... 34

a. UCD Misapprehends and Misapplies Gebser's Notice Requirement.. 34

b. The Evidence Establishes That UCD Was On Notice of Plaintiffs' Ineffective Accommodation Charge... 37

V. CONCLUSION 40

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

FEDERAL CASES

Adickes v. S. H. Kress & Co.,
398 U.S. 144 (1970) 15

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 14

Bangerter v. Orem City Corp.,
46 F.3d 1491 (10th Cir. 1995) 32

Barrett v. West Chester University of Pa.,
No. 03-CV-4978, 2003 WL. 22803477 (E.D. Pa. 2003) 19, 25, 27

Bennett v. Schmidt,
153 F.3d 516 (7th Cir. 1998) 39

Cannon v. University of Chicago,
441 U.S. 677 (1979) 31, 34

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 14

Cherry v. University of Wis. System Board of Regents,
265 F.3d 541 (7th Cir. 2001) 36

Choike v. Slippery Rock University of Pa., No. CIVA 06-622,
2006 WL. 2060576 (W.D. Pa. Jul. 21, 2006) 27

Cohen v. Brown University (Cohen I),
809 F. Supp. 978 (D. R.I. 1992), *aff'd,* 991 F.2d 888 (1st Cir. 1993) 18, 19, 22, 29

Cohen v. Brown University (Cohen II),
991 F.2d 888 (1st Cir. 1993) 15, 16, 24, 25, 28

Communities. for Equity v. Mich. High Sch. Athletic Association,
459 F.3d 676 (6th Cir. 2006) 31

Cripps v. Life Insurance Co. of N. America,
980 F.2d 1261 (9th Cir. 1992) 39

Davis v. Monroe County Board of Education,
526 U.S. 629 (1999) 32, 35

Easter v. American West Financial,
381 F.3d 948 (9th Cir. 2004) 14

Favia v. Ind. University of Pa.. ("Favia I"),
812 F. Supp. 578 (W.D. Pa. 1993), *aff'd,* 7 F.3d 332 (3d Cir. 1993) 15, 26, 31

Favia v. Ind. University of Pa. ("Favia II"),
7 F.3d 332 (3d Cir. 1993) 27

Ferguson v. City of Phoenix,
157 F.3d 668 (9th Cir. 1998) 36

First Nat'l Bank of Ariz. v. Cities Serv. Co.,
391 U.S. 253, 288-89 (1968) 15

Franklin v. Gwinnett County Public Schs.,
503 U.S. 60 (1992)....................34

Frontiero v. Richardson,
411 U.S. 677 (1973) 33

Gammoh v. City of La Habra,
395 F.3d 1114 (9th Cir. 2005) 14

Gebser v. Lago Vista Independent Sch. District,
524 U.S. 274 (1998) 34, 35

Glover v. Johnson,
478 F. Supp. 1075 (E.D. Mich. 1979) 31

Grandson v. University of Minn.,
272 F.3d 568 (8th Cir. 2001) 37

Haffer v. Temple University,
678 F. Supp. 517 (E.D. Pa. 1987) 31

Haines v. Kerner,
404 U.S. 519 (1972) 39

Hunt v. Cromartie,
526 U.S. 541 (1999) 33

Jackson v. Birmingham Board of Education,
544 U.S. 167 (2005) 36, 37

Johnson v. Clovis Unified Sch. District,
No. 04-CV-6719 *AWI DLB*, 2007 WL. 1456062 (E.D. Cal. May 17, 2007)....................37

Litman v. George Mason University,
186 F.3d 544 (4th Cir. 1999) 36

Lowe v. City of Monrovia,
775 F.2d 998 (9th Cir. 1985) 33

Lyons v. England,
307 F.3d 1092, 1117 (9th Cir. 2002) 14

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 14

Michelle M. v. Dunsmuir Joint Union Sch. District,
No. 04-CV-2411 *MCE PAN*, 2006 WL. 2927485 (E.D. Cal. Oct. 12, 2006) 37

Neal v. Board. of Trustees,
198 F.3d 763 (9th Cir.1999) 16

Neal v. Board of Trustees,
No. CV-F-97-5009-REC-SMS, 1997 WL. 1524813 (E.D. Cal. Dec. 26, 1997) 17

Nissan Fire & Marine Insurance Co. v. Fritz Cos.,
210 F.3d 1099 (9th Cir. 2000) 15

O'Connor v. Board of Education,
449 U.S. 1301 (1980) 26

Orr v. Bank of America NT & SA,
285 F.3d 764 (9th Cir. 2002) 13

Pederson v. La. State University("Pederson I"),
912 F. Supp. 892 (M.D. La. 1996),
aff'd in part, rev'd in part on other grounds, 213 F.3d 858 (5th Cir. 2000) 20

Pederson v. La. State University ("Pederson II"),
213 F.3d 858 (5th Cir. 2000) 31, 32, 33, 36

Reese v. Jefferson Sch. District No. 14J,
208 F.3d, 736 (9th Cir. 2000) 37

Roberts v. Colo. State Board of Agriculture,
998 F.2d 824 (10th Cir. 1993) .....*passim*

Roberts v. U.S. Jaycees,
468 U.S. 609 (1984) 32

Self Directed Placement Corp. v. Control Data Corp.,
908 F.2d 462 (9th Cir. 1990) 39

Soremekun v. Thrifty Payless, Inc.,
509 F.3d 978, 984 (9th Cir. 2007) 14, 22

T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,
809 F.2d 626, 630 (9th Cir. 1987) 14, 15

UAW v. Johnson Controls, Inc.,
499 U.S. 187 (1991) 32

United States v. Virginia,
518 U.S. 515 (1996) 32

Williams v. Sch. District of Bethlehem, Pa.,
998 F.2d 168 (3d Cir. 1993) 16, 38

FEDERAL STATUTES & REGULATIONS

Fed. R. Civ. P. .... 8(a)&(e)

20 U.S.C. § 1681(a) 15
Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq* 40

34 C.F.R.
§ 106.4(a) 36
§ 106.41(b) 28
§ 106.41(c) 15, 23
§ 106.41(c)(1) 15

45 C.F.R § 86.41(b) 28

OTHER AUTHORITIES

Title IX of the Education Amendments of 1972; a Policy Interpretation;
Title IX and Intercollegiate Athletics,
44 Fed. Reg. 71,413 (1979) .... *passim*

OCR, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (1996) .... *passim*

I. INTRODUCTION

This case is rooted in Defendant's history, over more than thirty-five years, of failing to provide equal athletic opportunities to its female students, including Plaintiffs, as required by Title IX of the Education Amendments of 1972. Despite a continuing and steady growth of women's interest in sports over this period of time, Defendant, the Regents of the University of California ("UCD"), continually and repeatedly refused to "fully and effectively accommodate" that interest as contemplated by Title IX.[1] For Plaintiffs in particular, this case is about UCD's denial of their opportunity to participate in women's wrestling — an opportunity that existed for years for women at UCD, then was arbitrarily ripped away from them and never restored.[2]

In an effort to justify its actions, conceal its otherwise clear liability for violations of Title IX, and make a case for summary judgment, UCD has attempted to recast the history of women's wrestling and mischaracterize the status of Plaintiffs and other women wrestlers. In the face of persuasive evidence to the contrary, it contends that there never was a women's wrestling program at UCD, that the plaintiffs and other female wrestlers were not varsity athletes and that they were merely practicing with the men's wrestling team. UCD also contends that the elimination and continued denial of existing opportunities for women to participate in varsity wrestling at UCD was merely the result of the inability of the plaintiffs to beat male wrestlers, despite evidence that these unprecedented competitions for positions on the "team" were required by newly imposed pretextual "roster caps" and governed by men's rules rather than women's freestyle rules.

---

[1] The Regents shall be referred to as "UCD" because the events of this case took place on the campus of the University of California at Davis.

[2] UCD also attempts to miscast the scope of this motion. This mischaracterization of the scope of the motion is in error and cannot save UCD's motion from its substantial defects. First, although the Court previously found that Plaintiffs' unequal treatment claim under Title IX is time-barred, it does not follow that UCD's actions in removing Plaintiffs from the varsity wrestling program, refusing their request for reinstatement, and forcing all women to wrestle against men to earn a varsity wrestling position are irrelevant. To the contrary, each of these actions contributed to UCD's ongoing failure to fully and effectively accommodate its women athletes, as Title IX requires. As such, it is proper for the Court to consider them with respect to Plaintiffs' ineffective accommodation claim. Indeed, one wonders why UCD would focus so much of its efforts on claiming its version of facts around these events are "material" if they cannot be considered at all. Second, UCD incorrectly contends that Plaintiffs' ineffective accommodation claim is cabined by this Court's statement in denying UCD's motion for judgment on the pleadings that Plaintiffs "were able and ready to wrestle at UCD and that sufficient interest existed in the female student population at UCD to field a women's wrestling team." (Def's MPA at 3.) This statement was simply the basis for Plaintiffs' *standing* to assert an ineffective accommodation claim, not the legal basis for such a claim. As UCD admits, in order to demonstrate compliance with Title IX, it must demonstrate compliance with at least one of the Three Prongs. Even still, UCD may be found to violate Title IX in circumstances such as these where it eliminated women's varsity opportunities in a contact sport.

1 UCD's position not only affirms its disregard for the fundamental civil rights of its students, it highlights the
2 fundamental disputes of genuine material facts at issue in this case. At the macro level, such material facts include
3 the foundational factual issues alluded to above, i.e. whether UCD had an existing varsity women's wrestling
4 program in which women were considered varsity athletes, whether UCD eliminated that program and the
5 opportunities for women to participate in varsity sports that went with it, and whether UCD used roster caps and the
6 requirement that women compete against men, using men's rules, as pretext for eliminating these opportunities.
7 Other fundamental and disputed material facts determinative of UCD's Title IX liability in this case include the
8 question of whether UCD expanded or reduced the number of opportunities for women to participate in varsity
9 sports during the relevant time period, whether UCD had a demonstrated history and continuing practice of
10 expanding opportunities for women, and, assuming it did, whether such practice was demonstrably responsive to
11 student interest and abilities.

12 These are a mere sampling of the material issues of fact in this case, of which there are hundreds, which
13 preclude summary judgment. Separate and apart from these disputed material issues of fact, there are many
14 undisputed issues of fact which, when the law is properly applied, preclude summary judgment. For example, it is
15 undisputed that the actual number of women athletes today is *less* than what it was in 1999, even though over 2,200
16 more women students attend UCD today than in 1999. Yet UCD contends that it has a history of continuing
17 expansion of athletic opportunities for women, based upon an analysis that only looks at the addition of teams (as
18 opposed to actual opportunities) since 1996 and then gives itself "credit" for adding three teams at once, despite the
19 fact that such additions still left UCD far below proportionality and failed to represent an overall expansion of
20 opportunities over time.

21 UCD's motion for summary judgment must also be denied because the legal arguments on which it
22 depends are flawed and do not entitle UCD to judgment as a matter of law. It invents a new and unfounded
23 argument about "intentional discrimination" that is simply legally erroneous. Likewise, in an apparent effort to
24 confuse the Court, it raises the completely inapplicable and legally unsupportable argument that it has not been on
25 "notice" of its obligations under a law to which it must agree to comply in order to receive its substantial federal
26 funds. For these, and all of the reasons set forth herein, UCD's motion for summary judgment should be denied.
27 //
28

II. SUMMARY OF THE ARGUMENT

Each of UCD's contentions that it is entitled to summary judgment is without merit. The principal measure to guide the Court's analysis of UCD's conduct is referred to as the Three- Pronged Test promulgated in 1979 by the Office of Civil Rights as a policy interpretation of Title IX and embraced by courts as a basis for evaluating compliance. UCD must (1) provide female student athletic opportunities that are substantially proportionate to their enrollment; or (2) demonstrate a history and continuing practice of expanding opportunities for women that is demonstrably responsive to student interest and abilities; or (3) fully and effectively accommodate the interest and abilities of its students. Applying this analysis and considering the additional arguments that UCD makes in support of its motion, it is clear that summary judgment must be denied.

First, UCD admits utter failure with respect to Prongs One and Three. Specifically, UCD has been short of substantial proportionality by over a hundred varsity slots each year for more than thirty years. Rather than effectively and fully accommodating the interest of female students in athletics, UCD has rejected varsity applications from hundreds of women club team members since 1995 alone.

Second, UCD instead contends that it has satisfied Prong Two by having a history and continuing practice of expanding female participation opportunities that has been demonstrably responsive to the interest and abilities of female students. The evidence belies this assertion and compels the denial of this motion. Moreover, despite exhaustive research of court filings and OCR letters of findings, Plaintiffs' counsel are not aware of a single instance in which a college has successfully used a Prong Two defense. To the contrary, the defense is routinely rejected as a last ditch attempt to claim compliance when actual discrimination is facially apparent under Prong One and when many females who have been denied opportunities for years have the interest and ability to participate under Prong Three.

Compliance with Prong Two requires expansion of actual female participation opportunities. Thus, UCD's reliance on a increase in the relative percentage of women in the Athletic Department, or its purported addition of teams (as opposed to actual participation opportunities) is not determinative here where undisputed evidence in this case establishes that: (1) from 1976 to 1996, UCD did not expand female opportunities at all; and (2) from 1998-2005, a period during which UCD's female enrollment increased by 2,200 students, UCD dropped over 60 female participation opportunities, enough to field several women's varsity teams. UCD did nothing to replace these

opportunities much less expand opportunities during this period. By 2005, UCD's participation numbers were at their lowest point since 1997. UCD added women's golf in 2005 when prompted by this litigation. However, this addition did not replace eliminated female opportunities and was not responsive to developing interest and ability of women's club teams at UCD. These facts alone warrant the denial of UCD's motion in its entirety.

Third, UCD's elimination of Plaintiffs' existing female wrestling varsity opportunities at a time where it did not satisfy any of the three prongs is a further violation of Title IX. UCD's motion rests primarily on the false premise that Plaintiffs' positions were not opportunities for women but that they were members of a men's team and that they ultimately were not skilled enough to remain on the roster. This assumption is contested with an abundance of evidence that establishes that the Plaintiffs were participating as varsity athletes against other women using women's rules. UCD's imposition of the impossible requirement that the women wrestlers compete against men to remain on the team resulted in the elimination of the women's program in its entirety. This evidence further supports the denial of the motion.

Fourth, summary judgment must be denied on the additional ground that UCD was required to create a new women's varsity team even if none previously existed. Where an institution has a male team in a contact sport, it must offer also a separate women's team where there is sufficient ability and interest to sustain a team, and a reasonable expectation of competition. Plaintiffs present sufficient evidence to raise a triable issue of fact with respect to all three of these requirements to survive summary judgment.

Fifth, UCD's contention that summary judgment is proper because it did not "intentionally" discriminate against Plaintiffs misconstrues the intent requirement for Title IX. Plaintiffs need not prove that UCD specifically intended to violate Title IX, but only that UCD meant to treat its female wrestlers and other female athletes as it did. Evidence establishes that UCD intended to limit the offerings of women's sports as it did and it intended to eliminate the women's wrestling program. This is sufficient to prove intentional discrimination under equal accommodation precedent. At the very least, the evidence raises a genuine issue of material fact.

Sixth, UCD's argument that Plaintiffs did not provide proper notice under Title IX of UCD's program-wide failure to provide equal opportunities is legally untenable and, alternatively, factually disputed. UCD has not established that the notice requirements of Title IX sexual harassment cases apply to an equal accommodation case, where respondeat superior is not at issue. Even if it did apply, plaintiffs present sufficient evidence that UCD was on

ample notice that it was not providing them and its other female students equal athletic participation opportunities.

The Court should reject UCD's attempts to confuse the issues with red herrings, should deny summary judgment, and should let a jury decide the true facts and impose the appropriate remedy. For all of the foregoing reasons, UCD's motion for summary judgment must be denied.

III. STATEMENT OF FACTS

A. UCD's Athletic Program.

Defendant, the Regents of the University of California, is charged with overseeing the administration and operation of the University of California at Davis, including its athletics program. (Plaintiffs' Statement of Additional Disputed Facts In Support of Plaintiffs' Opposition to Defendant's Motion For Summary Judgment ("ADF") 1.) As an institution that receives federal funds, UCD is subject to Title IX's requirement that it provide equal athletic opportunities to its female athletes. (ADF 2.) Plaintiffs are former UCD students who wrestled in high school and attended UCD, in large part, to wrestle. (ADF 3.) In 2000, UCD ordered that all women be removed from the wrestling program solely on the basis of their gender. (ADF 4.) UCD's elimination of Plaintiffs' varsity wrestling opportunities occurred against the backdrop of UCD's long and continuous history of failing to provide adequate athletic opportunities for its female students.

1. UCD's Failure to Provide Women's Athletic Opportunities Proportionate to Women's Enrollment.

Prong One of OCR's Title IX equal accommodation test requires that the provision of opportunities for females be equal to their enrollment. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (1979) (hereinafter "Policy Interpretation"), a version of which is attached as Exh. A to Def's Appendix of Title IX Clarifications Cited In Support of MSJ. Despite decades of warnings about its failure to comply with Title IX, UCD has never provided females with athletic opportunities that are substantially proportionate to their enrollment. (ADF 6.) UCD admits this fact. (ADF 5.)

2. UCD's Failure To Expand Participation Opportunities For Women Athletes

Prong Two requires an institution to demonstrate a history and current practice of expansion of participation opportunities for women. Policy Interpretation, 44 Fed. Reg. 71,413, 71,418. Since the passage of Title IX, UCD has failed to expand female participation opportunities. (ADF 17, 27.)

Between 1971 and 1996, UCD failed to expand athletic opportunities for women whatsoever. (ADF 17.) In 1976, UCD produced a report showing serious deficiencies in Title IX compliance. (ADF 7.) Between 1976 and 1991, UCD took no steps to review its compliance with Title IX. (ADF 8.) In fact, UCD drastically eliminated opportunities during this time when the participation of women athletes was reduced by nearly 100 opportunities between 1989 and 1991. (ADF 18.) UCD also dropped women's golf and field hockey during this time period. (ADF 19.)[3]

Then in 1991, UCD issued a report by a committee instituted to study compliance with Title IX in UCD athletics ("UCD 1991 Title IX Report"). (ADF 9.) The Report warned of "resistance within the Athletic Department to UC Davis's efforts to ensure total compliance with Title IX . . ." (ADF 9.) The Report also revealed that "participation by females [in varsity athletics] is clearly not substantially proportionate to their enrollment" at UCD. (ADF 9.)

UCD administrators and staff continued to warned about a lack of compliance and falling female participation rates over the next ten years. (ADF 11.) Between 1991 and 2002, over fourteen Athletic Department memos, reports, and emails warn UCD about it serious and continuous backslides in the participation rates of women. (ADF 11.) Then in 1996, at a time when female participation rates were 20% lower than female enrollment, UCD added three women's varsity teams. (ADF 12, 21.) Even so, the participation rates of women remained disproportionate to their enrollment by eleven percent, which translates to 184 varsity opportunities. (ADF 12.)

In 1997, UCD again stated: "Total participation levels for men and female athletes are not substantially proportionate to the undergraduate population of the institution. This suggests potential non-compliance with Title IX participation level requirements." (ADF 13.) In 1998, Athletic Director Greg Warzecka acknowledged that a gender imbalance in the athletic department "is not a new issue." (ADF 14.)

In this litigation, UCD claims that it added women's indoor track in the winter of 1999. However, UCD

---

[3] A former field hockey coach recalls the elimination: "With a number of schools participating in our field hockey conference in this region during the 1980's and beyond, our conference remained active and extremely competitive at the national level. . . . Davis' decision to discontinue its women's field hockey team in 1983 in this competitive environment was very surprising to me and others in the conference. Other schools in the conference were not discontinuing their field hockey programs." (ADF 20.)

1 treated indoor and outdoor track as a combined sport. (ADF 23, 25.) Moreover, the extension of the varsity track
2 season to include indoor track did not add new opportunities for females because the same athletes who participated
3 in outdoor track participated in the indoor season and, as UCD admits, it added the men's indoor track season at the
4 same time. (ADF 25.) As such, even if the additional season counted as a new opportunity, there was no expansion
5 in the opportunities provided for females. Further, UCD's claim that it added indoor track as an additional sport
6 does not exist in UCD gender equity documents generated prior to this litigation. (ADF 26.)
7 Then in 2000, UCD removed all women, including Plaintiffs, from the varsity wrestling program, and
8 denied their pleas, and the entreaties of their coach, for reinstatement. (ADF 4, 68-67.) Yet in November 2002,
9 UCD admitted that the participation rates of its female athletes dropped further so that the participation rates of
10 women remained disproportionate by nearly ten percent. (ADF 15.) Indeed, UCD's Chief Title IX Compliance
11 Officer admitted had a continuing concern about UCD's female participation rates throughout his tenure and
12 believed UCD should be doing more to achieve Title IX compliance, stating "we could and should be doing more."
13 (ADF 16.) In 2005, three years after this lawsuit was filed, UCD added women's varsity golf, which added only
14 seven opportunities for women at UCD. (ADF 22.)
15 The actual number of participation opportunities at UCD dropped between 1999-2005, a reduction that
16 UCD's expert agrees was "drastic." (ADF 29.) As the below chart indicates, over time, UCD has in fact provided
17 less, not more, opportunities for women athletes. (ADF 27, 30, 31.)[4]
18
19
20

Year	Female enroll-ment	Female enroll-ment %	Female athlete %	% difference between female enrolment & participation	Female athletes #	Male athletes #	**Add'l females varsity opportunities to achieve proportionality**
1995-1996	9,352	52%	32% -20%		211	441	**267**
1996-1997	10,054	53%	42% -11%		348	472	**184**
1997-1998	10,118	54%	42.7%	-11.3%	383	513	**219**
1998-1999	10,596	55%	47.8%	-7.2%	426	466	**144**
1999-2000	10,446	56.6%	50.5%	-6.1%	424	416	**119**
2000-2001	11,783	56%	49.2%	-6.8%	407	420	**128**
2001-2002	12,494	56.2%	47.3%	-8.9%	361	403	**156**
2002-2003	11,331	56.4%	49.2%	-7.2%	389	401	**130**

21
22
23
24
25
26
27
28

[4] Plaintiff's expert Dr. Donna Lopiano created this chart using data submitted by UCD to OCR to track gender equity. (*See* ADF 31.)

2003-2004	11,660	55.9%	50.1%	-5.8%	371	373	**102**
2004-2005	12,834	55.34%	50.25%	-5.1%	368	363	**101**

As the chart indicates, to reach proportionality, in any given year, UCD would have had to add at least 100 additional opportunities for women athletes. (ADF 30.) In addition, the actual number of women athletes has decreased, rather than increased. (ADF 30.) In the1998-1999 school year, 426 women were participating in varsity athletics. (ADF 27.) By 2000-2001, the number had fallen to 407. (ADF 27.) In 2001-2002, the same year that women's varsity wrestling was eliminated, the number fell to 361. (ADF 27.) In 2002-2003, 389 women participated in the varsity program. (ADF 27.) In 2003-2004, the number dropped again to 371 women participants. (ADF 27.) In 2004-2005, the number dropped further to 363. (ADF 27.) Thus, between 1999 and 2005, UCD dropped a total of 63 female participation opportunities from its athletic department, enough to field several women's varsity teams. (ADF 32.)

Notably, although the number of women athletes was decreasing, women student enrollment experienced significant growth. (ADF 30.) In 1999-2000, 424 female athletes were participating, yet in 2004-2005, only 368 female athletes were participating. (ADF 30.) During this same time period, however, UCD experienced an increase of over 2,200 women students. (ADF 30.) Further, evidence suggests that UCD's participation numbers are artificially inflated. (ADF 28.) Thus, UCD claims improvement during a period in which the number of participation opportunities for women actually declined. (ADF 29.)

UCD excuses its drastic drop in participation opportunities by contending they resulted in part from the elimination of "B" teams in varsity lacrosse and water polo. UCD presents no evidence to support the contention that the lacrosse slots eliminated were B team slots and UCD concedes that it dropped the varsity water polo B teams to club status despite the existence of competition. (ADF 33.) At the same time it eliminated these varsity opportunities, UCD further reduced the varsity opportunities for females by eliminating opportunities for women wrestlers, despite their proven interest in participation. (ADF 4, 74.)

UCD knew about this significant reduction, but did not replace the eliminated participation opportunities or expand opportunities during this time period. (ADF 34, 35.) In 2003, UCD solicited applications for varsity applications and received strong applications from five existing club teams. (ADF 36.) UCD rejected each of these requests for elevation to varsity status, and instead selected golf. (ADF 37.) There was no existing women's club team and unlike all of the other applications, the golf application was actually completed by the UCD administration,

rather than any student group. (ADF 39.) It required a full year of off-campus recruitment before it could field a golf team. (ADF 38, 39.) Although UCD claimed that golf was selected to comply with a Big West Conference rule, that selection criterion was never communicated to applicants for varsity status. (ADF 38.) Golf added only seven opportunities for women athletes, whereas any of the other pre-existing club teams that applied for varsity status would have added considerably more participation opportunities. (ADF 22, 40.)

UCD's expert opined that Title IX requires institutions set forth a specific timetable for Title IX compliance. (ADF 41.) The purported equity plans to which it points largely contain warnings about non-compliance, not specific timetables or plans for increasing women's athletic opportunities. (ADF 41.)

3. UCD's Refusal to Fully and Effectively Accommodate the Interests and Abilities of Its Female Students.

If an institution does not provide substantially proportionate athletic opportunities and cannot demonstrate a history and continuing practice of expansion, its last resort is to argue that it fully and effectively accommodates the interest and abilities of its female students ("Prong Three"). Policy Interpretation, 44 Fed. Reg. at 71,418. UCD admits that it has not accomplished this at all times relevant to this case. (ADF 42.) In 1991, UCD was urged to conduct a survey of its students to determine the interest and ability of women in varsity athletics. (ADF 6.) UCD waited 13 years to do so. (ADF 43.) In 1996, UCD denied requests by the women's badminton and field hockey club teams to be elevated to varsity status. (ADF 44.)

Even as its female participation opportunities spiraled downward, UCD did not elevate any teams to varsity status. Between 1995 and 2003, UCD did not even communicate to female students that they could seek the addition of a new women's varsity sport, or the process for doing so. (ADF 45.) Nor did UCD did make any effort to survey student interest and ability on campus, or to consider the addition of another women's team, until after Plaintiffs' complaint of discrimination was filed and after the participation rates of its female athletes had plunged. (ADF 43, 41.)

In 2003, UCD received applications for elevation to varsity status from existing women's club teams in field hockey, rugby, equestrian, bowling, and badminton which demonstrated strong interest in the sports and a high level of ability in its club athletes. (ADF 36.) The applications also confirmed competitive opportunities at the varsity level. (ADF 36.) UCD rejected these applications despite its failure to achieve substantial proportionality. (ADF

37.)

B. UCD's Elimination of Existing Women's Wrestling Varsity Opportunities.

1. The Elimination of the Women's Wrestling Program After a Decade of Women's Varsity Wrestling at UCD.

Since 1992, when women first began wrestling at UCD, the varsity wrestling program included both men and women, each competing against their respective sex. (ADF 46, 49.) Women wrestlers at UCD received highly qualified coaching, wrestled using women's freestyle rules rather than men's collegiate rules, and received all of the benefits of varsity status. (ADF 49, 50.) UCD sponsored a women's division in its annual Aggie Open wrestling tournament. (ADF 51.)

In 1995, UCD hired Michael Burch as a wrestling coach. (ADF 47.) Burch was interviewed for the job by a panel that included a Afsoon Johnston, a female wrestler at UCD. (ADF 47.) Johnston asked Burch during his UCD interview whether he would be supportive of women's wrestling; he assured the panel that he would be. (ADF 47.) Women continued to wrestle at UCD as varsity athletes under the coaching of Burch throughout his tenure. (ADF 48.) As members of the team, women wrestlers attended practice regularly and had the same responsibilities as any other team member. (ADF 52.) They received coaching and attention unique to the needs of women wrestlers. (ADF 50.)

There was thus a women's varsity wrestling program at UCD. (ADF 53.) Women wrestlers received benefits attendant to varsity status, including lockers, training services, academic support services, laundry services, and varsity coaching. (ADF 54.) Club sports athletes do not receive any of these benefits. (ADF 54.) The women wrestlers were listed as varsity athletes on participation lists, roster lists, and in the Aggie Open programs. (ADF 55.) They also attended the end of the year team banquet and received honors from the coach. (ADF 56.) The NCAA certification paperwork, not required of club athletes, was required of the women wrestlers. (ADF 57.) Further, UCD admits that Plaintiffs were varsity athletes. (ADF 58.) Athletic Director Greg Warzecka testified that women were varsity athletes on the wrestling roster. (ADF 59.)

2. Plaintiffs Attendance at UCD With the Desire and Intent to Wrestle.

Plaintiffs Christine Ng, Arezou Mansourian, and Lauren Mancuso came to UCD to contribute to this strong tradition of women's wrestling at UCD. (ADF 3.) Plaintiff Ng was a high school wrestler who selected Davis

because it offered her the opportunity to wrestle. (ADF 60.) She entered Davis in 1998 and participated in the wrestling program each year until UCD eliminated the women's wrestling program. (ADF 60.) She attended practice six days a week, received benefits as a varsity team member, and considered herself part of the team. (ADF 61.)

Plaintiff Mansourian was also a competitive high school wrestler. (ADF 62.) She received early acceptance into a prestigious program at UC Riverside that would have put her on track for acceptance at medical school. (ADF 62.) She chose not to attend that UC Riverside because it did not have a wrestling program, instead attending UCD because she would have the opportunity to wrestle. (ADF 62.) Mansourian was a dedicated team member as a freshman in 2000. (ADF 63.) She received the benefits of varsity team membership, including medical assistance from trainers when she was injured. (ADF 63.)

Plaintiff Mancuso choose to attend UCD because it afforded her the opportunity to continue wrestling. (ADF 64.) She was a highly-skilled wrestler in high school who planned to train for the Olympic team. (ADF 65.) Prior to coming to UCD in 2001, she was aware of the controversy about women's wrestling, but understood that the women had been reinstated on the team. (ADF 66.) She thought that reinstatement meant that women were allowed to wrestle as they had previously, against other women. (ADF 66.) She entered in 2001 and attended practices in the fall of 2001 along with Ng and Mansourian. (ADF 67.) However, when she was forced to wrestle-off against a man in order to participate on the team, she was cut from the wrestling program. (ADF 67.)

3. UCD's Removal Women Wrestlers From the Varsity Wrestling Program.

In October 2000, the UCD athletic department administration instructed Burch to remove the women from the wrestling team. (ADF 68.) Although Burch objected to the athletic department, he informed the women wrestlers of the athletic department's directive. (ADF 68.) Burch permitted the women to continue to practice with the wrestling team. (ADF 68.) Mansourian was injured during a wrestling practice in January 2001 and sought assistance from a varsity trainer. (ADF 69.) When the administration learned of Mansourian's use of this varsity benefit, the Athletic Director met with the women wrestlers and directed them not to participate in wrestling. (ADF 70.) He also told them could not participate on the wrestling team because they were a liability to the university. (ADF 71.)

UCD eliminated women's varsity wrestling despite evidence of great interest and ability in the sport, and a

reasonable expectation of competition. (ADF 73.) The strongest indicator of interest was already present at UCD: women were participating on the team and competing in open events. (ADF 72.) Coach Burch testified that he could have easily recruited enough women to field several women's varsity teams. (ADF 72.)

Numerous individuals, including coaches and tournament organizers, with knowledge of the participation rates of high school women in wrestling agree that there was sufficient interest to field a collegiate team in 2001. (ADF 73.) Pacific University in Oregon started its varsity women's wrestling team in 2002 and has competed each year since then with a full varsity schedule. (ADF 74.) Additionally, ample intercollegiate competition for women's wrestling existed throughout UCD's competitive regions with over 40 colleges and universities fielding varsity women programs or wrestlers. (ADF 73.) Despite this interest, ability, and available competition for women wrestlers, UCD admits that it did not consider interest in women's wrestling before it directed the removal of women from the program. (ADF 75.)

In the spring of 2001, as the decision by UCD to eliminate women's wrestling became public knowledge, there was a strong public backlash. (ADF 76.) Assemblywoman Helen Thomson threatened to withhold a significant source of funding on a UCD building, a protest was held at UCD's annual Aggie Auction fundraiser, flyers and petition were distributed, both campus and statewide newspapers published news articles, and UCD's administration received emails from concerned alumni. (ADF 76.)

In April 2001, Ng and Mansourian submitted a complaint of sex discrimination with the Department of Education's Office for Civil Rights (OCR). (ADF 77.) They charged they had been subject to gender discrimination due to the elimination of intercollegiate athletic opportunities for women. (ADF 77.) Subsequently, Ng, Mancuso and Mansourian filed supplemental complaints of sex discrimination with OCR. (ADF 77.) Each of the complaints was based on the UCD's acts of sex discrimination in violation of Title IX. (ADF 77.)

After the OCR complaints were filed, OCR never interviewed a single plaintiff, or any other women wrestler. (ADF 78.) Similarly, UCD's Chief Title IX Compliance Officer, Dennis Shimek, admits that the UCD did not investigate the Plaintiffs' complaints. (ADF 79.) Nor did Shimek even speak to any of the Plaintiffs. (ADF 79.) As UCD acknowledges, the OCR investigation examined UCD's compliance with Title IX as a whole, not solely its elimination of women's wrestling. (ADF 80.) At this same time, soon after the OCR complaints were filed, UCD fired Burch for his support of women's wrestling. (ADF 81.)

1 It was in this context that UCD posed and OCR accepted a "voluntary resolution" of Plaintiffs' OCR
2 complaints. (ADF 82.) With this "voluntary resolution plan" UCD agreed to reinstate the women on the team as a
3 resolution of Plaintiffs' complaints. (ADF 82.) However, the plan conditioned reinstatement on Plaintiffs' ability to
4 compete against men for slot in the program, a condition that had never previously existed for their participation in
5 the varsity program where they had competed against women. (ADF 83.) Significantly, UCD did not advise OCR
6 that the women wrestlers had previously only competed against other women. (ADF 84.)
7 In May 2001, UCD reinstated the women to the team by placing them on the roster list. (ADF 85.) The
8 reinstatement occurred after the 2000-2001 wrestling season was over and there were no opportunities for the
9 women to participate. (ADF 85.) UCD's purported reason for requiring the women to wrestle-off against the men
10 was because the places on the team were limited by roster caps. (ADF 86.) Plaintiffs inquired whether, as females,
11 they would have to comply with a roster cap intended to limit the number of men participating in order to move
12 toward gender equity. (ADF 87.) The women were told that they would have to comply with the male roster caps.
13 (ADF 87.) UCD's expert testified that forcing women in a women's program to be counted within a roster cap for
14 the men's team and to compete against men to be on the team is the effective elimination of the women's program.
15 (ADF 88.) Other than UCD's women wrestlers, roster caps have not been applied to any women's team at UCD.
16 (ADF 89.)
17 In the fall of 2001, Mansourian, Ng and Mancuso attended wrestling practices with the team. At the
18 practices Coach Zalesky was hostile to the women and did not provide them with any coaching, tips, or support.
19 (ADF 90, 91.) Feeling unwelcome and humiliated, Mansourian stopped attending practices. (ADF 92.) Ng
20 wrestled off against Mancuso, who beat her. (ADF 93.) Mancuso then wrestled off against a male wrestler, who
21 beat her. (ADF 93.) Ng and Mancuso were not allowed to participate in the program. (ADF 93.)
22 Plaintiffs Mansourian, Ng and Manscuso were devastated by their dismissal from varsity wrestling. All
23 struggled with their remaining years at UCD without wrestling. (ADF 94.) Though Plaintiffs filed suit and
24 requested reinstatement of the women's wrestling program, UCD continues to refuse to provide wrestling
25 opportunities to women, even though high schools girls from throughout the state continue to inquire about
26 wrestling opportunities at UCD. (ADF 95.)
27 //
28

1 **IV. ARGUMENT**

2 **A. UCD Has Not Met the High Standard That Limits Summary Judgment.**

3 UCD has not met its burden on summary judgment to establish that no genuine issue of material fact exists
4 as to whether they provided equal accommodation in athletics to female students as required by law. Federal Rule
5 of Civil Procedure 56(c) states that summary judgment may be rendered only if

6 > the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving
7 > party is entitled to judgment as a matter of law.

8 All such evidence submitted must be interpreted in the light most favorable to the non-moving parties (here,
9 plaintiffs Mansourian, Ng and Mancuso). *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986); *Gammoh v.*
10 *City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005). All evidence submitted on their behalf must be believed
11 and all justifiable inferences must be drawn in their favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*,
12 475 U.S. 574, 587 (1986); *Easter v. American West Fi.*, 381 F.3d 948, 949, 960 (9th Cir. 2004). The nonmoving
13 party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.
14 *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). Unlike the non-moving party, evidence submitted by the
15 moving party that would be inadmissible at trial may not be considered on a motion for summary judgment.
16 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Orr v. Bank of Am. NT & SA*, 285 F.3d 764,
17 773 (9th Cir. 2002).

18 All "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are
19 jury functions, "not suitable for resolution or summary judgment." *Anderson,* 477 U.S. at 255; *Soremekun*, 509 F.3d
20 at 984; *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). At this stage, a
21 court must not weigh the evidence or decide the truth of the matter, but rather, determine whether there is a genuine
22 dispute for a jury to decide at trial. *Lyons v. England*, 307 F.3d 1092, 1117 (9th Cir. 2002) (citing *Glenn K. Jackson*
23 *Inc. v. Roe*, 273 F.3d 1192, 1196 (9th Cir. 2001)). "[T]he issue of material fact required by Rule 56(c) . . . to entitle a
24 party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather,
25 all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a
26 judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank of Ariz. v. Cities Serv. Co.,* 391
27 U.S. 253, 288-89 (1968); *T.W. Elec. Serv., Inc.,* 809 F.2d at 630.

28

Finally, UCD – not Plaintiffs– has "the burden of showing the absence of a genuine issue as to any material fact." *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 157 (1970); *see also Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000) (noting that the moving party has the "initial burden of production and the ultimate burden of persuasion on a motion for summary judgment"). As set forth below, UCD cannot carry this burden.

B. The Evidence Establishes That Disputed and Undisputed Facts Exist Which Support a Finding That UCD Discriminates Against Female Athletes in Violation of Title IX, Making Summary Judgment Improper.

1. The Legal Framework for Evaluating Effective Accommodation Claims Under Title IX.

Plaintiffs' claim arises under Title IX of the Education Amendments of 1972 (20 U.S.C. section 1681 *et seq*.), which provides in part:

> 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).

Title IX prohibits sex discrimination in the operation of any education program or activity, including intercollegiate athletics. The regulations promulgated pursuant to Title IX require educational institutions receiving federal funds to "*provide equal athletic opportunity for members of both sexes.*" 34 C.F.R. § 106.41(c) (emphasis added).

The critical factor in this case is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1). It is well-established that "an institution may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes." *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Cohen v. Brown Univ. (Cohen II),* 991 F.2d 888, 897-98 (1st Cir. 1993); *Favia v. Ind. Univ. of Pa.*, ("*Favia I*"), 812 F. Supp. 578, 584-85 (W.D. Pa. 1993), *aff'd,* 7 F.3d 332 (3d Cir. 1993).

In 1979, the Department of Health, Education & Welfare's Office for Civil Rights ("OCR") issued a Policy Interpretation to provide further guidance on the meaning of equal athletic opportunity under an equal

accommodation claim.[5] Policy Interpretation, 44 Fed. Reg. 71,413, 71,417, Part VII.B.5. The Policy Interpretation confirms that Title IX approaches the question of compliance on a programmatic rather than sport-specific basis. Assessment is according to whether the institution's "program as a whole" is satisfactory. *Id.* at 71,422, App. B, Resp. to Add'l Comments (8). Because of the historic discrimination against females in athletics, Title IX requires "continued affirmative steps" by institutions to achieve equity, which "'in most cases . . . will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.'" *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 176 (3d Cir. 1993) (quoting Policy Interpretation, 44 Fed. Reg. 71,413, 71,414).

2. UCD Discriminated Against Female Students, Including Plaintiffs, By Failing All Three Prongs of Title IX's Three Pronged Test for Measuring Equal Accommodation.

UCD has failed to provide female students including plaintiffs, with an equal opportunity to participate in varsity athletics. OCR's 1979 Policy Interpretation sets forth a three-pronged test with respect to such a claim, analyzing:

> (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 under-represented 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; 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.

Policy Interpretation, 44 Fed. Reg. at 71,418.

In evaluating Title IX effective accommodation claims, Courts have embraced and applied this three-pronged test and viewed it as a whole:

---

[5] The Department of Education, acting through the OCR, is the administrative agency charged with administering Title IX. *Neal v. Brd. of Ts.,* 198 F. 3d 763, 770 (9th Cir.1999) (citing Pub. L. No. 93-380, § 844, 88 Stat. 612 [sic] (1974)). The Policy Interpretation is a "considered interpretation" of the applicable regulations, and is entitled to deference by the courts. *Id.*; *Cohen II,* 991 F.2d at 896-97.

> Put another way, Part (1) provides that if institutions have not distributed athletic opportunities in numbers 'substantially proportionate' to the gender composition of their student bodies, they have presumptively violated Title IX. The rest of the test recognizes that there are circumstances under which, as a practical matter, something short of substantial proportionality will suffice to rebut the presumption that Title IX has been violated.

Neal v. Bd. of Trs., No. CV-F-97-5009-REC-SMS, 1997 WL 1524813, at *9 (E.D. Cal. Dec. 26, 1997).

Plaintiffs contend that they were entitled to the women's wrestling opportunities taken from them because UCD was not in compliance with Title IX under any of the three prongs. As the evidence presented by the parties on this motion reveals, the merits of this claim, based upon the above-described basic Title IX law, depends upon disputed issues of material fact which preclude the entry of summary judgment.

a. UCD Admits Its Failure to Satisfy Both Prong One and Prong Two of the Three-Pronged Test, Because It Has Neither Achieved Substantial Proportionality Nor Effectively and Fully Accommodated Female Interest in Athletics.

UCD concedes that it cannot rely on Prongs One or Three of the three prong test as a basis for establishing compliance with Title IX in this case. First, UCD admits, and the evidence establishes, that at all times relevant to this case, the participation rates of women in varsity athletics were short of substantial proportionality by hundreds of varsity slots. (ADF 27.) Indeed, in 2001-2002, the very year that UCD forced women to compete against men, UCD's female participation proportionality rates fell to their worst level since 1997. (ADF 27.) UCD would have needed to add 156 varsity opportunities for women to make up for this proportionality shortfall. (ADF 27.) Thus, no claim can be made that Prong One's proportionality test was satisfied.

Second, UCD also admits that it failed to fully and effectively the interest and ability of female students in varsity athletics in violation of Prong-Three. (ADF 42.) Hundreds of female students have sought varsity status at Davis, only to be rejected time and time again. Importantly, UCD's own admissions establish that the institution has known for decades that it does not accommodate the significant interest and ability of women in athletics. (ADF 10.)

Thus, this motion turns on whether UCD has established, by evidence of undisputed material facts, that it was in compliance with Prong Two of the Three Prong test and is entitled to judgment as a matter of law. As set forth below, UCD cannot establish as a matter of law that it satisfied Prong Two's requirement of having a history and continuing practice of program expansion for women during the periods relevant to

this case, much less that it acted responsively to the developing interests of its female students. To the contrary, undisputed and disputed facts support Plaintiffs' contention that UCD failed to satisfy those requirements. Summary judgment should be denied accordingly.

b. UCD Did Not Satisfy the Requirements of Prong Two Because It Has Never Had A History And Continuing Practice Of Program Expansion For Women.

The intensely factual nature of a Prong Two analysis coupled with the significant disputes in material fact precludes summary judgment here. Prong Two saves non-proportional schools from violation if they 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." Policy Interpretation, 44 Fed. Reg. at 71,418 (emphasis added). In 1996, OCR issued a clarification of the Three Part Test which provides, in part: "In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." OCR, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (1996) (hereinafter "1996 OCR Clarification"), attached as Exh. B to Def.'s Appendix of Title IX Clarifications Cited in Support of MSJ ("Title IX Appx."), at 7. Of paramount importance under Prong Two is not the addition of teams, but rather whether an institution has expanded actual participation opportunities for women. "Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex." 1996 OCR Clarification (Title IX Appx., Exh. B) at 11, n.2 (*see also*, Plaintiffs' Response to Defendant's Undisputed Material Facts ("UMF") 141, 148).

The Title IX experts on both sides of this case agree that an institution must expand actual participation opportunities every two to three years to remain in compliance with Prong Two.[6] (UMF 141.) Both the OCR and the few courts that have looked at the Prong Two analysis have confirmed that it is a factually intensive analysis, which considers the number of students enrolled and the number of students participating in athletics, as well as the developing interest and abilities of other students. 1996 OCR Clarification (Title IX Appx., Exh. B) at 7; *Cohen v. Brown University (Cohen I),* 809 F. Supp. 978, 981-82

[6] Plaintiffs' Title IX expert is Dr. Donna Lopiano. (See ADF 31.)

(D. R.I 1992) *aff'd,* 991 F.2d 888 (1st Cir. 1993). Court decisions involving this issue have not defined the permissible outer limits of non-expansion under Prong Two, but have confirmed that periods of non-expansion in excess of nine years is too long. *Cohen I*, 809 F. Supp. at 979-80, (court approval of preliminary injunction to stop elimination of team where no expansion from 1982 to 1991); *Barrett v. West Chester Univ. of Pa.*, No. 03-CV-4978, 2003 WL 22803477, at *7 (E.D. Pa. 2003) ("periods in excess of a decade are too long to constitute continued expansion"). Notably, Plaintiffs are unaware of any court decision affirming a Prong Two defense asserted by an institution.

UCD bears the burden of proof to establish compliance with Prong Two. Policy Interpretation, 44 Fed. Reg. at 71,418; *Roberts*, 998 F.2d at 830. UCD has not met its burden on summary judgment where its own documents and other admissions establish that (1) UCD did not expand opportunities for women whatsoever from 1971 to 1996, and (2) female participation opportunities actually contracted from 1997 to 2005, regardless of what teams UCD claims it added during this period, in large part because UCD eliminated existing varsity opportunities in wrestling and other sports. (ADF 17-27.) Additionally, even if the evidence established that UCD has expanded athletic opportunities for women, which it does not, it did not do so in a manner that was demonstrably responsive to the developing interest and abilities of women. In fact, the evidence demonstrates that UCD rejected application for varsity status from hundreds of UCD female club sports athletes between 1995 and 2005, as well as terminated existing varsity opportunities, including Plaintiffs'. (ADF 22, 37.)

UCD attempts to distract the Court from the inevitable consequences of this evidence by focusing its motion instead on (1) the percentage increase of women's *relative* participation in UCD's athletic program; (2) the addition of women's varsity teams between 1995 and 2005 in conjunction with a baseless crediting theory; and (3) Committees, plans, and policies purportedly related to Title IX compliance. None establish the expansion required by Prong Two.

//

//

//

//

3. UCD Has No History or Continuing Practice of Program Expansion.

a. UCD Failed to Expand Female Participation Opportunities At All From 1971 to 1996.

UCD cannot establish compliance with Prong Two as a matter of law because, among other reasons, it did not expand female participation opportunities one iota from 1971 to 1996. (ADF 17.) While UCD makes much of the existence of women's teams at UCD before the passage of Title IX, the law's enactment did nothing to prompt UCD to expand its women's program to ensure equity. UCD did not expand opportunities for 25 years. Instead, UCD eliminated women's golf and women's field hockey during this time period. (ADF 19.) UCD contends that it eliminated women's field hockey because all other teams in its conference eliminated their teams, but a sworn declaration of the coach of another women's field hockey team in UCD's conference at the time confirms the continued availability of competition from all other schools in the region's field hockey conference. (ADF 20.) Though UCD added women's soccer in 1983 after it eliminated women's field hockey, UCD admits that the addition did not result in program expansion for women. (ADF 17.)

UCD argues that Plaintiffs may not rely on its historic failure to expand opportunities to defeat summary judgment because "they will be unable to show that had any impact on them" as they were not students in the 1970's and 1980's. (Def's MPA at 23.) The argument should be rejected outright, as UCD's entire history is relevant to Prong Two regardless of the tenure of these particular plaintiffs. 1996 OCR Clarification at 7. UCD mis-cites *Pederson v. La. State Univ.("Pederson I"),* 912 F. Supp. 892 (M.D. La. 1996), *aff'd in part, rev'd in part on other grounds,* 213 F.3d 858 (5th Cir. 2000), for this argument. *Pederson I* in no way limited or modified the required analysis of history under Prong Two. Rather, the court addressed the issue of whether plaintiffs who had not established the requisite skill to compete at the varsity level could claim impact by the university's failure to provide equal varsity athletic opportunities program-wide. *Id.* at 907.

b. UCD Did Not Expand Participation Opportunities From 1998-2005.

UCD cannot prevail on summary judgment where it did not expand actual female opportunities from 1998 to 2005. (ADF 27.) Rather, UCD eliminated dozens of varsity opportunities, without replacing

them or engaging in further expansion, during a time period in which female enrollment grew by over 2,200 students. (ADF 27, 30.) Having failed to expand actual opportunities, UCD failed to satisfy Prong Two.

UCD's reliance on the relative percentage increase of women in varsity sports does not save this motion. UCD claims "expansion" because the percentage of women athletes relative to their enrollment increased between 1995 and 2005. But this fact alone tells an incomplete story and is insufficient to satisfy Prong Two's requirement of a history and continuing practice of expanding opportunities for women. In 1995, UCD was out of compliance by 20%. For a brief period, until 1999, it increased the actual athletic opportunities for women as well as narrowed the margin between the percentage of women athletes and the percentage of women students. But from 1999 until 2005, that margin fluctuated (that is improved in 2000, but then worsened in 2001, 2002, 2003 and again in 2005), and the actual number of women's athletic opportunities declined – from 426 in 1999 to 368 in 2005. The only way that the percentage of women relative to enrollment increased at all during 1999-2005 was because UCD capped the number of men's teams at the same time they were eliminating women's opportunities, thus improving the appearance, but not the reality, of women's athletics at Davis. As conceded by UCD's Title IX expert, reductions in the men's athletic program is not program expansion for women under Prong Two. (UMF 50.) As noted in the OCR's 1996 Clarification:

> 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.

1996 OCR Clarification (Title IX Appx. Exh. B) at 8.

The court in *Roberts v. Colorado State Board of Agric.* agreed: "[T]he ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentage of women participating in athletics by making cuts in both men's and women's sports programs." *Roberts*, 998 F.2d at 830.

UCD's reliance on its addition of teams similarly fails to support Title IX compliance as a matter of law. UCD asserts that it has satisfied Prong Two because it added three women's varsity sports in 1996, women's indoor

track in 1998 and women's golf in 2005.[7] As a preliminary matter, UCD's addition of three women's varsity teams in 1996 did not compensate for 25 years of non-expansion and did not bring UCD even close to substantial proportionality. (ADF 21, 22.) Moreover, UCD's contention that it added women's indoor track in 1998-1999 is disputed. UCD treats indoor and outdoor track a combined sport.[8] (ADF 23-25.) The credibility of UCD's claim that it was added as a new sport is strained by documents addressing the addition of new women's sports generated before this litigation, which make no mention of women's indoor track as a new and separate sport. (ADF 26.) Such credibility determinations are within the proper province of the jury. *Soremekun*, 509 F.3d at 984. Most importantly, UCD documents establish that the purported addition of indoor track did not actually add female participation opportunities at UCD. (ADF 25.)

The evidence thus establishes that UCD added three teams in 1996, but then rested on its laurels until prompted by this litigation to add another team in 2005. In the meanwhile, UCD dropped female participation opportunities on existing varsity teams, such as women's lacrosse, water polo and wrestling. (ADF 4, 33.) UCD contends that at least some of the drop in female participation opportunities can be explained by UCD's elimination of "B" teams on the women's varsity lacrosse and water polo teams, which was a "valid reason" in its view. Even if a drastic drop in participation opportunities could be justified under Prong Two, which Plaintiffs do not concede, the validity of UCD's reason is a factual dispute not suitable for resolution here.[9] UCD merely asserts why lacrosse slots were eliminated; it does not present any evidence to support this assertion. (ADF 33.) UCD's suggestion that water polo slots were eliminated because of lack of competition is contradicted by the declaration of water polo coach Jamey Wright, who admitted that competition existed for the "B" teams against club teams at other institution. (ADF 33.) UCD's expert agrees that the elimination of varsity opportunities is not appropriate where competition

[7] While UCD claims that it started women's golf in 2004, its own admissions indicate otherwise. Women's golf did not begin competition until the 2005-2006 school year. (ADF 22.)

[8] Rejecting the attempt to rely on purported "women's indoor track" as a team for the purposes of Prong Two is not without precedent. In *Cohen I*, the court was not impressed with and did not credit Brown for the addition of women's winter track as evidence of expansion under Prong Two, characterizing it as "a sport that merely involved providing indoor space to the existing women's track team." *Cohen I*, 809 F. Supp. at 991.

[9] Plaintiffs' Title IX Expert Donna Lopiano opined that it is normal to see a fluctuation in participation opportunities by 4-7 athletes program-wide at an institution in any given year, and that these very minimal fluctuations may be acceptable under Prong Two if made up for immediately and expanded upon. However, both the volume drop in participation rates and its continued drop over a number of years at UCD disqualifies it from relying on Prong Two. (UMF 148.)

exists for the athletes, including competition against other club teams. (UMF 156.) Moreover, even if such justification for the elimination of existing opportunities existed, it does not excuse the lack of expansion of opportunities that must be shown to satisfy Prong Two.

What is clear is that UCD took no action to replace these eliminated participation opportunities much less engage in program expansion. Between 1998 and 2005, female enrollment at UCD went from *10,596* to *12,834*, adding over 2,200 women to UCD. (*See* ADF 27.) At the same time, 63 female participation opportunities were *dropped* at UCD, a drop that UCD's expert conceded was "drastic." (ADF 29.) By 2005, the athletic participation rates for women were at the lowest point since 1997. (ADF 27.) UCD's addition of seven women's varsity golf opportunities did not compensate for the loss of several teams worth of opportunities during this period. (ADF 22.) UCD's failure to expand opportunities is determinative of the Prong Two analysis, or at the least, it is sufficient to raise a genuine issue of material fact on this motion.

c. UCD's Theory That It Should Be "Credited" For Adding Multiple Sports In 1995-1996 Is Without Legal Support And Cannot Form The Basis For Establishing Program Expansion.

The Court should also reject UCD's effort to avoid its obligation to expand opportunities under Title IX through an unprecedented "crediting" theory. UCD proposes that it be given two to three years credit for each of the three sports it added in 1995, as though it added a team in 1995, another in 1998, and another in 2001. The crediting theory does not establish compliance under Prong Two because the addition of teams, even if credited somehow, fails to remedy UCD's failure to expand opportunities during this time period.

Moreover, UCD expert Grant herself admits that she has never advanced her crediting theory before this case, and that it has no basis in Title IX regulations, OCR guidelines or case precedent. (UMF 142.) *See* 34 C.F.R. § 106.41(c), Policy Interpretation, 44 Fed. Reg. 71,413, and 1996 OCR Clarification (Title IX Appx. Exh. B), none of which provide for a Prong Two "crediting" where more than one team has been added at once. As noted by Plaintiffs' Title IX Expert, Dr. Lopiano, based on her vast experience developing Title IX regulations, and advising OCR on its Title IX interpretations and guidelines: "[T]his is not Verizon and banking minutes. There is no concept like that that has ever been contemplated byThere is no concept like that that has ever been contemplated by OCR and I think it is a patently ridiculous concept. . . It doesn't make sense logically. It's made up. . . It is inconsistent with everything [Grant] has said previously." (UMF 142.)

The crediting theory has also been flatly rejected by all courts that have considered it, and for good reason. In *Cohen II*, Brown University challenged a decision by the lower court to grant a motion for preliminary injunction to stop the elimination of two women's varsity teams on the grounds that the lower court did not sufficiently credit Brown's dramatic expansion of the women's program in the 1970's. *Cohen II,* 991 F.2d at 903. All but one of Brown's 15 women's teams were created between 1971 and 1977. *Cohen I,* 809 F.Supp. at 981. Women's indoor track was added five years later in 1982, nine years before the analysis period by the Court. In upholding the district court's decision, the Court of Appeal refused to credit Brown's rapid expansion of the women's program through the addition of fourteen women's team during a six year period:

> While a university deserves appreciable applause for supercharging a low voltage athletic program in one burst rather than powering it up over a longer period, such an energization, once undertaken does not forever hold the institution harmless. Here, Brown labored for six years to weave a broad array of new activities into the fabric of its palestrian offerings. The district court apparently believed, however, that Brown then rested on its laurels for at least twice as long. The very length of this hiatus suggests something far short of a *continuing* practice of program expansion.

Cohen II, 991 F.2d at 903.

The crediting theory was similarly rejected in *Roberts*, 998 F.2d 824, 830. The institution challenged a district court's failure to give greater weight to its dramatic expansion of women's athletic opportunities in the 1970's. *Id.* CSU added eleven teams in the1970's, with the last sport added in 1977, but the district court found that it had not demonstrated a history and continuing practice of program expansion. *Id.* The Court of Appeal rejected the argument, noting "In essence, defendant suggests reading the words 'continuing practice' out of this prong of the test." *Id.* The Court upheld the district court's decision, especially in light of the fact that women's participation opportunities declined steadily after the expansion of the program in the 1970's.

As in *Cohen* and *Roberts*, applying Dr. Grant's crediting theory here would lead to absurd results. It would, in essence, allow UCD to sit back and wait until prodded by an embarrassing disparity between women's athletic opportunities and women's enrollment, at which time it would add a few teams, still not reach proportionality, and rest on its laurels once more. This is the antithesis of the "continuing practice of program expansion" that Prong Two requires. As Dr. Lopiano noted: "We would probably see a stoppage of the addition of women's sports within the next two decades." (UMF 142.)

Even more importantly, the reason Dr. Grant's crediting theory fails is that it neglects to carefully examine whether an institution is *actually* expanding women's athletic opportunities by looking at "teams" rather than "opportunities," which is the goal of Title IX and the mandate of Prong Two. In other words, an institution cannot claim compliance with Title IX just by adding teams when it is in fact (by capping men's teams and/or reducing the sizes of other women's teams) not adding more opportunities for women. (UMF 150.) UCD offered less athletic opportunities for women in 2005 than it did in 1999. (UMF 30.) This cannot, by any stretch, be considered program expansion.

d. UCD Eliminated Existing Female Participation Opportunities, Including Women's Varsity Wrestling.

UCD's elimination of women's wrestling opportunities at a time when it was not otherwise complying with Title IX also precludes its reliance on Prong Two on summary judgment. Where an institution is not in compliance with Title IX, its elimination of existing and viable female participation opportunities is evidence that Prong Two is not satisfied and constitutes a further violation of Title IX. *See Barrett,* 2003 WL 22803477, at *7 (elimination of women's gymnastic team was evidence of violation of Title IX and non-compliance with Prong Two where institution was not otherwise in compliance with Title IX); *Cohen II,* 991 F.2d at 897-98 (elimination women's volleyball and gymnastic teams was evidence of violation of Title IX and non-compliance with Prong Two); *Roberts,* 998 F.2d at 830 (elimination of women's softball team was evidence of violation of Title IX and non-compliance with Prong Two.)

To refute this, UCD suggests a wide variety of contradictory arguments. UCD first contends it did not eliminate a women's wrestling program because Plaintiffs were not existing varsity athlete and/or they were not participating in a women's program. Ample evidence disputes both assertions. To suggest that Plaintiffs and other women wrestlers were not official varsity participants, UCD relies heavily on UCD media guides produced as promotional materials, not official statements about team status. (Response to UMF 19.) Moreover, this evidence is refuted by evidence establishing that Plaintiffs and other women wrestlers were on team rosters, competed in events and completed varsity athlete eligibility requirements. (ADF 52, 55.) UCD provided them with the benefits of varsity status, including coaching, trainers, facilities, laundry, lockers, medical insurance, and academic tutoring. (ADF 54.) OCR recognizes these as indicators of varsity participant status:

> 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. . . . . In determining participation

opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete.

1996 OCR Clarification (Title IX Appx., Exh. B) at 6.

In addition, even though ample evidence exists that Plaintiffs competed while at UCD, whether they did so is not determinative. (*Id.*) Nor is the type of competition in which they participated. Both parties' experts agree that it is acceptable for varsity athletes in a developing sport to obtain competition in open or amateur events. (UMF 156.) As an expert in *Favia v. Indiana University of Pennsylvania*, Dr. Grant "testified that it was good for student athletes to compete in championship meets no matter who sponsored them, or how prestigious they might be, and that whether or not it was the N.C.A.A. that sponsored them should not be a factor." *Favia,* 812 F.Supp. at 582. UCD's argument that Plaintiffs were not part of a women's program is belied by admissions of UCD's Athletic Director, who admitted that UCD had a women's varsity program. Ample evidence thus exists that UCD eliminated an existing women's varsity wrestling program.

UCD next contends that its elimination of the women's varsity program was not discriminatory because it sufficed to provide Plaintiffs with the opportunity to try out for the men's wrestling team. UCD argues that what Plaintiffs sought was preferential inclusion on the men's team where they lacked the necessary skills. However, as noted by the Court in denying UCD's motion for judgment on the pleadings on this point: "[T]he crux of plaintiffs' claim is that this accommodation was not effective because they were forced to compete in a contact sport against men using men's rules." (Memo. & Order [Docket # 226] at 25:27-26:2.) The facts bear this out. (*See* ADF 88, 93.) Requiring that women compete against men in a contact sport generally applicable to men, in order to have a varsity athletic opportunity, is hardly non-discriminatory. If such a policy were generally permitted there would be a substantial risk that boys would dominate the girls thereby denying them a *real opportunity* to compete. This is precisely why courts have repeatedly upheld separate but equal athletic programs under Title IX as constitutionally permissible. *See, e.g., O'Connor v. Bd. of Educ.*, 449 U.S. 1301 (1980).

UCD's cases on this point are inapposite, as all of the cases considered a different issue, that is, whether women were entitled to try out for a position on a men's team. Here, no matter how UCD bends the facts, Plaintiffs never sought such an opportunity. (ADF 49, 66.) Instead, Plaintiffs were varsity wrestlers who were eliminated from the wrestling program because of their gender, and were then refused the creation of a separate women's team

by UCD. (ADF 4, 87.) UCD eliminated equal opportunities and replaced them with discriminatory requirements for continued participation. This violates Title IX.

e. The Mere Existence of Title IX Committees, Policies, and Plans Do Not Constitute a History and Continuing Practice of Program Expansion.

UCD's last-ditch effort to establish a history and continuing practice of program expansion through the existence of Title IX committees, policies, and plans is also insufficient to support summary judgment. None of these factors constitute compliance with Prong Two where an institution has not engaged in actual expansion. *Barrett,* 2003 WL 22803477 at * 7 (the formation of a Title IX committee is insufficient under Prong Two, especially where institution ignores Title IX compliance warnings from that committee); *Favia I*, 812 F.Supp. at 585. ("You can't replace programs with promises.") *See also Choike v. Slippery Rock Univ. of Pa.,* No. CIVA 06-622, 2006 WL 2060576 (W.D. Pa. Jul. 21, 2006), at *7 ("Having a plan to ameliorate inequities is not the same as having ameliorated them.")

Here, UCD had committees that issued repeated warnings over a ten year period to UCD that it was not complying with Title IX. (ADF 11.) Despite these warning, these committees did not implement plans with specific timetables to reach Title IX compliance. (ADF 41.) Plans that fail to set forth a specific timetable for Title IX compliance are inadequate. (UMF 145.) *Favia v. Ind. Univ. of Pa. ("Favia II")*, 7 F.3d 332, 343 (3d Cir. 1993) aff'g, 812 F. Supp. 578 (W.D. Pa. 1993)) (in upholding a preliminary injunction issued by the district court, the Third Circuit noted that the institution "did not have a specific overall plan in place to achieve total compliance at any projected future date.") Moreover, whether UCD's policies regarding the addition of women's sports were adequate is disputed by evidence that suggests that they were not regularly communicated or utilized by UCD. UCD also admits that it deviated from the criteria which were supposed to govern the selection of new women's sports when it added women's varsity golf. (UMF 122.) Because UCD's committees, policies, and plans did little to ensure actual gender equity and program expansion for women, they are insufficient to establish Prong Two compliance on summary judgment.

4. Assuming Arguendo That UCD Expanded Participation Opportunities for Women Athletes, It Did Not Do So in a Manner That Was Demonstrably Responsive to The Developing Interest and Abilities of Its Female Students.

To the extent that UCD created female varsity opportunities during the period of 1997-2005, it did not create opportunities that were demonstrably responsive to UCD student interest in sports such as wrestling,

badminton, field hockey, bowling, and equestrian. (ADF 37, 39, 40.) This alone is sufficient grounds to deny summary judgment. As noted in *Cohen II*: "[A] university must design expansion in whatever form and at whatever pace to respond to the flux and reflux of unserved interests. . . . The issue of responsiveness is fact-intensive and in most instances, as here, its resolution will be within the trier's province. *Cohen II,* 991 F.2d at 903.

UCD rejected applications for varsity status from women's field hockey and badminton teams in 1995, and made no effort to expand opportunities in response to this developing interest, despite the fact that female participation opportunities spiraled downward over the next ten years. (ADF 19.) Instead, UCD rejected applications for varsity teams submitted for these same sports again in 2003, along with applications for varsity status from the women's rugby, bowling, and equestrian club teams. (ADF 37.) Then, in 2005, UCD added women's golf despite the fact that no women's golf club team existed on campus, and it had to recruit for a year in order to actually field a team. (ADF 39.) Such evidence is sufficient to raise a genuine issue of material fact as to whether UCD acted in a manner that was demonstrably responsive to developing interest and ability of its female students.

5. Genuine Issues of Material Fact Exist As To Whether UCD Also Violated Title IX By Failing To Establish A Separate Women's Varsity Wrestling Team.

Even assuming arguendo that a women's varsity wrestling program never existed at UCD, UCD violated Title IX when it failed to create a separate women's wrestling team at Plaintiffs' request. For purposes of Title IX, wrestling is a contact sport. 34 C.F.R. § 106.41(b), 45 C.F.R § 86.41(b). OCR's 1979 Title IX Policy Interpretation explains the application of the Policy Interpretation in the selection of sports by an institution, including an institution's obligations with respect to contact sports. Specifically, it provides that:

> 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.

OCR 1979 Policy Interpretation, 44 Fed. Reg. at 71418.

UCD disregards this aspect of Title IX in its entirety. Instead, it claims that it had no obligation to allow women to try out for the men's wrestling team, but did so anyway, suggesting that in doing so it exceeded its

obligations under Title IX. UCD's argument – and its conduct -- misses the mark completely. As the Policy Interpretation makes clear, because wrestling is a contact sport from which women have been historically excluded, and because, as the evidence demonstrates, there was and continues to be sufficient interest and ability to sustain a viable women's wrestling team with a reasonable expectation of intercollegiate competition, UCD violated Title IX by refusing to field a women's wrestling team after being asked repeatedly by Plaintiffs to do so.

While OCR has not provided specific guidance about how to evaluate interest and ability for the purpose of this provision, its discussion of factors to be considered in evaluating interest and ability under Prong Three is instructive. Interest factors include: (1) requests by students and admitted students that a particular sport be added; (2) participation in particular sports by admitted students; and (3) participation rates in high schools, amateur athletic associations and community sports leagues from which the institution draws its students in order to ascertain likely interest and abilities of its students and admitted students in a particular sport. 1996 OCR Clarification (Title IX Appx., Exh. B) at 9-10. OCR's ability factors include: (1) the athletic experience and accomplishments – in interscholastic, club or intramural competition – of students and admitted students interested in playing the sport; (2) opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and (3) 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. *Id.* 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. *Id.* It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team. *Id.*

OCR does provide specific guidance with respect to requirement in the Contact Sport Provision that there be a reasonable expectation of competition for the separate contact sport team. The 1990 OCR Title IX Athletics Investigator's Manual[10] clarifies that an institution must look within its normal competitive regions for the

[10] *Cohen I*, 809 F. Supp. at 988 (recognizing that the unpublished Investigator's Manual does "not carry the force of law or establish controlling standards," but concluding that it is, to some extent, an important guide "in unraveling the requirements of the athletic regulation"), see also *Roberts,* 998 F.2d at 828-30 (looking to Investigator's Manual for guidance determining the substantial proportionality test governing the effective accommodation requirement).

1 possibility of competition. OCR, Title IX Investigator's Manual (1990), (hereinafter "1990 OCR Manual") at 27[11]
2 The 1990 Manual also provides: "Institutions may be required by the Title IX regulation to actively encourage the
3 development of such competition … when overall athletic opportunities within that region have been historically
4 limited for members of one sex." (*Id.*)

5 Plaintiffs present sufficient evidence to raise a genuine issue of material fact as to interest, ability, and
6 competition for women's wrestling under these standards. Women have been competing in UCD's varsity
7 wrestling program consistently since 1992. (ADF 46, 48.) Plaintiffs were actively participating in the varsity
8 wrestling program when UCD unlawfully removed them, establishing interest and ability. (ADF 72.) Plaintiffs
9 such as Lauren Mancuso competed at a high level in the sport and came to UCD to do so as well. (ADF 65.) Coach
10 Burch testified that he could have easily recruited a team from the immediate region alone. (ADF 72.) Thousands
11 of girls and women were competing in California and nationwide. (ADF 73.) Many high school girls continued to
12 inquire about wrestling opportunities at UCD once the program was cut. (ADF 95.)

13 In this case, UCD's normal competitive region during this time period spanned the country. (UMF 6.)
14 Substantial intercollegiate competition for women's wrestling existed throughout UCD's competitive regions,
15 including national championships. (ADF 73.) Moreover, whether UCD actively encouraged the development of
16 intercollegiate competition for women wrestlers is a matter of disputed material fact. (ADF 74.) Several athletic
17 administrators admitted that they did not develop competition for women wrestlers, in sharp contrast to UCD efforts
18 to create an entirely new football conference to enable its team to play because the Big West Conference did not
19 have football. (ADF 74.)

20 Because Plaintiffs present substantial evidence confirming sufficient interest and ability to sustain a
21 women's wrestling team, and evidence demonstrating a reasonable expectation of competition, they have raised a
22 genuine issue of fact sufficient to defeat summary judgment on this ground alone.

23 //

24 //

25 //

26

27 [11] Relevant portions of which are attached as App. Ex. KKKK. Defendant's evidence in support of its motion is
appended to their Appendix of Exhibits in Support of Defendant's Motion for Summary Judgment, filed herein on
28 January 11, 2008 (Docket # 287-308). All references to these exhibits will be referenced as "App. Ex."

6. UCD's Conduct Constituted Intentional Discrimination, and in Any Event, Triable Issues of Material Fact Preclude Summary Judgment on This Ground.

UCD wrongly contends that Plaintiffs lack evidence that UCD's Title IX violations were intentional or deliberately indifferent. According to UCD, the school is insulated from liability for Title IX damages because it tried to work with OCR to resolve Plaintiffs' complaints, because it thought Plaintiffs' request to participate in wrestling was not well-founded, and because it believed there was insufficient interest to establish a women's wrestling team. (Def.'s MPA at 32-37.) None of these are grounds for judgment against Plaintiffs as a matter of law.

As an initial matter, UCD misconstrues the intent requirement for Title IX. Plaintiffs need not prove that UCD specifically intended to violate Title IX, but only that UCD meant to treat its female wrestlers and other female athletes the way it did—in other words, all that is required is that UCD behaved volitionally, as opposed to accidentally, with regard to its treatment of women athletes. *Pederson v. La. State Univ. ("Pederson II")*, 213 F.3d 858, 881 (5th Cir. 2000) (university need not have intended to violate Title IX to be held liable for damages); *Favia I,* 812 F. Supp. at 584 (in an equal accommodation case, court confirmed that "Title IX and the implementing regulations can be violated without showing a specific intent on the part of the educational institution to discriminate against women"); *see Cannon v. Univ. of Chi.*, 441 U.S. 677, 680 (1979) (plaintiff's exclusion from participation in defendant's medical program because of her sex is intentional discrimination that violates Title IX); *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n,* 459 F.3d 676, 696 (6th Cir. 2006) (proof of discriminatory animus not necessary to establish Title IX violation: "The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment that they experience …, and if girls receive unequal opportunities, Title IX has been violated"); *Haffer v. Temple Univ.,* 678 F.Supp. 517, 527, 539-40 (E.D. Pa. 1987) (finding requisite "intent" in university's explicit classification of intercollegiate athletic teams on the basis of gender; denying summary judgment; holding plaintiffs need not prove discriminatory animus to succeed on Title IX claim in action challenging gender inequity in university's intercollegiate athletic program).

Courts refer to "disparate treatment" as "intentional discrimination" because disparate treatment means an intent to treat differently. In sex segregated cases like athletics, intent is established as a matter of law because males and females are separated into different groups from the outset. Any different treatment of these segregated groups

1 constitutes sex-based disparate treatment. *Haffer,* 678 F. Supp. at 527; *Glover v. Johnson*, 478 F. Supp. 1075, 1080
2 (E.D. Mich. 1979). No evil motive is required to prove a violation. A defendant is liable even if its motive is
3 benevolent or if its intent is to "help" females. Such paternalism and archaic views of females are merely another
4 form of discrimination. *United States v. Virginia*, 518 U.S. 515, 532-34 (1996); *Frontiero v. Richardson*, 411 U.S.
5 677, 684-85 (1973); *UAW v. Johnson Controls, Inc*., 499 U.S. 187, 199 (1991) ("[w]hether an employment practice
6 involves disparate treatment through explicit facial discrimination does not depend on why the employer
7 discriminates"); *Bangerter v. Orem City Corp.,* 46 F.3d 1491, 1501 (10th Cir. 1995) (absence of malevolent intent
8 does not convert facially discriminatory policy into neutral policy with discriminatory effect).

9 Title IX's prohibitions against discrimination require that students "are not only protected from
10 discrimination, but also specifically shielded from being 'excluded from participation in' or 'denied the benefits of'
11 any 'education program or activity receiving Federal financial assistance.' [20 U.S.C.] § 1681(a). The statute makes
12 clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on
13 the basis of gender." *Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 650 (1990). Thus, a university's
14 "intentional decision not to accommodate effectively the interests of their female students by not providing sufficient
15 athletic opportunities" is intentional discrimination in violation of Title IX. *Pederson II,* 213 F.3d at 880.

16 As the Court in *Pederson* noted, for example, treatment of women based on outdated attitudes about gender
17 constitute intentional discrimination. Defendant "need not have intended to violate Title IX, but need only have
18 intended to treat women differently." *Id.*; citing *United States v. Virginia*, 518 U.S. at 533 (holding that an
19 institution's refusal to admit women is intentional gender discrimination in violation of the Equal Protection Clause
20 because, inter alia, of "overbroad generalizations about the different talents, capacities, or preferences of males and
21 females"); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984) (warning of the dangers posed by gender
22 discrimination based on "archaic and overbroad assumptions"). Just as the *Pederson II* court held a university liable
23 for Title IX damages over its protests that it never intended to violate the statute and had even invited an OCR
24 investigation into its women's athletic program, it is no defense to UCD's damages liability here that the school
25 may not have intended to discriminate against women, or that it worked with OCR in an effort to resolve Plaintiffs'
26 complaints. 213 F.3d at 880-81. Moreover, as the facts demonstrate, far from resolving the discrimination, the
27 OCR's plan compounded it by requiring plaintiffs to wrestle off against men thus effectively barring them from the
28

wrestling program. (ADF 83.)

Equally unavailing is UCD's attempt to disprove intent on grounds of the purported reasonableness of its refusal to separate the women wrestlers from the roster cap.[12] First, UCD's handling of the wrestling team roster cap is just a tiny sliver of the evidentiary pie in this case, which addresses not just UCD's treatment of women wresters but the administration of women's athletics as a whole. But more to the point, UCD's subjective and self-serving belief in the reasonableness of its conduct toward women wrestlers in particular—or, for that matter, women athletes generally—does not negate that the university acted intentionally within the meaning of Title IX. *Pederson II*, 213 F.3d at 880-82 (university's steadfast belief its women's athletic program was "wonderful" does not negate Title IX intent).

Moreover, assessing motive "is an inherently complex endeavor" that is most appropriately resolved by the factfinder at trial upon consideration of a full record. *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999). Without such a "searching inquiry" by the factfinder, "'those [acting for impermissible motives] could easily mask their behavior behind a complex web of post hoc rationalizations.'" *Lowe v. City of Monrovia*, 775 F.2d 998, 1009, (9th Cir. 1985), *amended by* 784 F.2d 1407 (9th Cir. 1986) quoting *Peacock v. Duval,* 694 F.2d 644, 646 (9th Cir. 1982)).

Finally, UCD argues at length that judgment should be entered against Plaintiffs as a matter of law due to an ostensibly insufficient interest in women's wrestling at UCD. (Def.'s MPA at 34-37.) This argument is particularly troubling not because it presents any threat to the sufficiency of Plaintiffs' claims, but because it speaks volumes about the insidious and systemic problem of sex discrimination in UCD's women's athletic program. As aptly explained by the Fifth Circuit in the *Pederson II* case:

> Appellees argue brazenly that the evidence did not demonstrate sufficient interest and ability in fast-pitch softball at LSU and that, therefore, they cannot be liable under Title IX. The heart of this contention is that an institution with no coach, no facilities, no varsity team, no scholarships, and no recruiting in a given sport must have on campus enough national-caliber athletes to field a competitive varsity team in that sport before a court can find sufficient interest and abilities to exist. It should go without saying that adopting this criteria would eliminate an effective accommodation claim by any plaintiff, at any time.

Pederson II, 213 F.3d at 878.

Nonetheless, as set forth above, Plaintiffs have presented ample evidence of interest sufficient to raise a

---

[12] UCD's claim that Plaintiffs requested a "separate roster cap" is disputed. (UMF 85.)

genuine issue of material fact to be decided by a jury. (ADF 73; UMF 156.)

The motion should be denied accordingly.

7. UCD Is Not Entitled to Summary Judgment on Notice Grounds.

UCD contends that Plaintiffs' claim for damages under Title IX is barred as a matter of law because UCD did not have notice of Plaintiffs' ineffective accommodation charge. UCD's argument is legally and factually untenable.

a. UCD Misapprehends and Misapplies *Gebser*'s Notice Requirement.

As the United States Supreme Court has made clear, where, as here, plaintiffs allege that a recipient of federal funds (*i.e.*, a university) is engaged in intentional sex discrimination in violation of Title IX, that recipient is necessarily on notice of its obligations to comply with the law as a result of receiving federal funds. No further notice is required. Additional notice has been required *only* in the context of Title IX teacher-student and student-student sexual harassment claims, because the concern in those cases is holding a university liable for acts of which it has no knowledge.

Title IX jurisprudence in this area is firmly established. In *Cannon v. Univ. of Chi.*, the Supreme Court held that a plaintiff alleging discrimination in admissions against a university had an implied right of action. In so holding, the Court noted that in enacting Title IX, Congress had two objectives: first, it "wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices." *Cannon,* 441 U.S. at 704. Then in *Franklin v. Gwinnett County Pub. Schs.,* 503 U.S. 60 (1992), the Court held that a plaintiff asserting a Title IX claim was entitled to monetary damages, finding that "the traditional presumption in favor of any appropriate relief for violation of a federal right" applies to Title IX. *Franklin*, 503 U.S. at 73. The Court flatly rejected the school's argument that it had insufficient notice of its obligations to face liability for monetary damages. Finding that Title IX "unquestionably" placed upon the school the duty not to discriminate on the basis of sex, the Court further stated, "Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe." *Id.* at 75.

Each Supreme Court case since *Franklin* to address the issue has similarly explained that Title IX itself provides sufficient notice to recipients of federal funds of their obligations under Title IX not to discriminate on the basis of sex. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), upon which UCD principally relies, is

inapposite. Plaintiff Gebser, a high school student who was sexually harassed by a teacher who involved her in a secret sexual relationship, sought damages from her school district under Title IX. *Gebser*, 524 U.S. at 274. Based on the record before it, the Supreme Court affirmed the district court's finding that the school district reasonably lacked any knowledge of the teacher's clandestine discriminatory harassment, and thus had no opportunity to initiate remedial action before the plaintiff resorted to litigation. *Id.* at 278-79. The Court held that, under the facts presented, the school district could not be held liable for Title IX damages for its teacher's unlawful conduct on a pure *respondeat superior* and constructive notice theory; there must be some evidence that an authorized employee or official actually knew or should have known of the underlying sexual abuse before Title IX damages liability attaches. *Id.* at 274-76. The Supreme Court carefully circumscribed the intended reach of its holding:

> [P]etitioners seek not just to establish a Title IX violation but to recover *damages* based on theories of *respondeat superior* and constructive notice. It is that aspect of their action, in our view, that is most critical to resolving the case.

Id. at 283.

Gebser's narrow holding—that a funding recipient is not liable for Title IX damages on a *respondeat superior* and constructive notice theory absent any evidence that it knew or should have known of an employee's underlying acts of discriminatory harassment—imposes no unmet burden on Plaintiffs in this *equal accommodations* case. Plaintiffs here do not, and need not, rely on a "*respondeat superior* and constructive notice" theory to establish UCD's violation of Title IX because UCD was fully (and perhaps even uniquely) aware of the level and extent of athletic opportunities afforded to female students. Quite unlike the school district that was oblivious to a teacher's covert abuse of a student in *Gebser*, the evidence here establishes that UCD administration officials had direct oversight and responsibility for all aspects of the women's athletic program relevant to Plaintiffs' ineffective accommodation claim, including ensuring the university's compliance with Title IX. (ADF 1,2.) Nothing further is required. (ADF 1, 2); *Gebser*, 524 U.S. at 297 ("because respondent assumed the statutory duty set out in Title IX as part of its consideration for the receipt of federal funds, that duty constitutes an affirmative undertaking that is more significant than a mere promise to obey the law").

The Supreme Court has repeatedly reaffirmed this principle. In *Davis*, 526 U.S. at 641-42, the Court stated that notice "is not a bar to liability where a funding recipient intentionally violates the statute."

1 Then in 2005, the Supreme Court again reiterated that recipients of federal funds consent to be subjected to
2 suit for alleged intentional discrimination in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). In
3 concluding that Title IX encompassed a private right of action for retaliation and rejecting defendant's "notice"
4 argument, the Court stated that recipients of federal funds "have been on notice that they could be subjected to
5 private suits for intentional sex discrimination under Title IX since 1979, when we decided *Cannon*." *Id.* at 182.
6 The Court drove its point home by stating that notice "does not bar a private damages action under Title IX where
7 the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Id.* at 183 (citations
8 and internal quotations omitted). Title IX thus "encompass[es] diverse forms of intentional sex discrimination." *Id.*
9 Where, as here, school officials had direct access to and oversight responsibility for all relevant aspects of
10 the women's athletic program including the obligation to ensure its compliance with Title IX, the university was "on
11 notice" and appropriately may be called to account for its failure to effectively accommodate women's athletic
12 interests and abilities. (ADF 1, 2.) *See generally Pederson II,* 213 F.3d at 878-83 (holding university accountable
13 for Title IX damages on equal accommodation theory).
14 The *Pederson II* case is directly on point. It addressed whether the notice requirements in Title IX sexual
15 harassment cases applied where the claim was a university's failure to provide equal athletic opportunities. The
16 court held: "In the instant case, it is the institution itself that is discriminating. The proper test is not whether it knew
17 of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the
18 basis of their sex by providing them unequal athletic opportunity, and, as we noted above, we are convinced that
19 they did." *Id.* at 882. *See also Ferguson v. City of Phoenix,* 157 F.3d 668, 677 (9th Cir. 1998) (noting the rationale
20 in *Gebser* to limit damages under a theory of respondent superior is "clearly distinguishable" where the federal
21 recipient's liability "arises from its own acts and official policies"); *Cherry v. Univ. of Wis. Sys. Bd. of Regents,* 265
22 F.3d 541, 555 (7th Cir. 2001) ("In short, when the Board accepted federal education funds under Title IX, it was
23 clearly put on notice that it may not discriminate in its programs on the basis of sex, 20 U.S.C. § 1681(a); "that if it
24 does discriminate on the basis of sex, it may be sued by a private individual. . . ."; *Litman v. George Mason Univ.,*
25 186 F.3d 544, 553 (4th Cir. 1999) (same). This conclusion, of course, goes hand in hand with UCD's affirmative
26 obligations to comply with Title IX's provisions. *See, e.g.*, 34 C.F.R. § 106.4(a).
27 This ample authority shuts the door on UCD's argument that it was not on notice that it may face liability
28

for its intentional discrimination against women in athletics. This is conduct clearly prohibited by Title IX which itself provided notice to UCD of its obligations. Having agreed to comply with Title IX, and having accepted and spent federal funding, UCD cannot now avoid the obligations to which it previously agreed by arguing that it has not been on notice of those obligations. *See Jackson*, 544 U.S. at 183-84 ("[t]he Board could not have realistically supposed that, given this context, it remained free" to violate Title IX).

UCD's reliance on *Grandson v. Univ. of Minn.*, 272 F.3d 568 (8th Cir. 2001) is entirely misplaced. *Grandson,* is neither controlling nor persuasive. Indeed, it stands alone in applying *Gebser* to a claim of intentional discrimination by a university. The reason for this is evident. As *Davis* (which *Grandson* did not even cite, let alone address) and *Jackson* (which post-dates *Grandson*) make plain – *Gebser* applies, even if stretched beyond its context of sexual harassment – only when there is a question as to whether the federal recipient itself received actual notice of the wrongful acts of third parties. *See, e.g., Gebser*, 524 U.S. at 287-88 (it is "sensible to assume that Congress did not envision a recipient's liability in damages" when the recipient "was unaware of the discrimination"); *Davis*, 526 U.S. at 643 (*Gebser* sought "to eliminate any risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions" (citations and internal quotations omitted)). Moreover, the Ninth Circuit has applied *Gebser* and *Davis* only in the context of sexual harassment claims. *See., e.g., Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d, 736, 739 (9th Cir. 2000); *see also Johnson v. Clovis Unified Sch. Dist.*, No. 04-CV-6719 AWI DLB, 2007 WL 1456062, at *3 (E.D. Cal. May 17, 2007); *Michelle M. v. Dunsmuir Joint Union Sch. Dist*., No. 04-CV-2411 MCE PAN, 2006 WL 2927485, at *4 (E.D. Cal. Oct. 12, 2006).

Moreover, whereas *Grandson* accepted the district court's questionable determination that administrators at the University of Minnesota's Duluth campus ("UMD") somehow were unaware of the unequal treatment of women in athletics, 272 F.3d at 575-76, the evidence here plainly establishes that UCD was well aware of its obligations and of facts giving rise to Plaintiffs' ineffective accommodation claim.

b. The Evidence Establishes That UCD Was On Notice of Plaintiffs' Ineffective Accommodation Charge.

As explained above, there is no additional requirement of "notice" to UCD beyond their agreement to receive federal funds which contains affirmative obligations to comply with Title IX's provisions. Even if the Court were persuaded that some sort of "notice" was required, however, evidence abounds that UCD was on notice both

of Plaintiffs' claims and of its ineffective accommodation of women athletes long before the commencement of this suit.

UCD admits, as it must, that it received notice of Plaintiffs' claims that they were not being effectively accommodated in the university's athletic program when it received Plaintiffs' OCR complaints. UCD argues, however, that because Plaintiffs' complaints related to wrestling, this cannot be notice that Plaintiffs were claiming that UCD was not effectively accommodating women athletes as a whole in violation of Title IX. This is a ridiculous and nonsensical argument, made plain by this admission by UCD: "A claim of ineffective accommodation encompasses the entire athletic program for the underrepresented sex – not just one specific aspect." (Def's MPA at 37:28-38:1.) This is, in fact, the law. Title IX approaches the question of compliance on a programmatic rather than sport-specific basis. Policy Interpretation, 44 Fed. Reg. at 71,417, Part VII. B.5. Assessment is according to whether the institution's "program as a whole" is satisfactory. *Id.* at 71,422, App. B, Resp. to Add'l Comments (8) *See Williams*, 998 F.2d at 174-75 (Title IX regulations require inquiry regarding overall opportunities rather than opportunities in a particular sport). Plaintiffs' complaint to the OCR about UCD's failure to effectively accommodate women in the varsity wrestling program is therefore *necessarily* a claim that UCD was failing to effectively accommodate women in UCD athletics program in violation of Title IX.

Here, it is beyond dispute that UCD was on notice of Plaintiffs' complaints of discrimination, from, among other things, Plaintiffs' meetings and attempted meetings with Defendants Warzecka, Franks and Vanderhoef (UMF 93), the filing of their OCR complaints (ADF 77, 80), the involvement of state legislators, the student senate, and the media (ADF 76), and the filing of both Coach Burch's and plaintiffs' civil rights complaints. In addition, UCD knew about the protests, flyers, letters, news articles and the response of Assemblywoman Helen Thomson generated by UCD's elimination of varsity wrestling opportunities for women. (ADF 76.) These events repeatedly raised broad questions about UCD's gender discrimination and Title IX compliance in regards to its athletic program. (UMF 93.)

Further, UCD acknowledged Plaintiffs' civil rights complaint to OCR and the OCR investigation process. UCD argues that it took Plaintiffs' OCR complaints to mean only that there was "an unusual set of circumstances involving women and the wrestling team," and not an overall failure of the athletic program to effectively accommodate women under Title IX. (*See* Def.'s MPA at 37:25-38:17.) In fact, the evidence shows that UCD

regarded the OCR complaints and OCR's investigation as a program-wide grievance. (ADF 80, 90.)

Moreover, UCD's awareness of its program wide non-compliance is evidenced by dozens of internal memos and official reports in which UCD admits that it is concerned about its compliance status regarding Title IX. (ADF 10.) Reports, Memorandum and emails from 1991, 1992, 1993, 1994, 1997, 1998, 2000 and 2002 acknowledge and warn of UCD's failure to comply with Title IX. (UMF 93.) In light of the vast evidence demonstrating its own awareness of non-compliance with Title IX, it is, at best, disingenuous of UCD to claim ignorance in the face of Plaintiffs' complaints. Finally, UCD's litigation position proves it knows and understands that a complaint from women athletes about unequal treatment is a complaint that goes to UCD's athletic program as a whole. UCD has, from the outset, defended this action on the basis of the sufficiency of its entire women's athletic program. (Docket # 34.). In a letter brief in September 2007 that "Title IX does not establish a right to participate in any particular sport at the college of one's choice. *Absent program wide non-compliance, a student has no cause of action merely because they cannot earn a spot on any current varsity team*." (Docket # 221 [citations and quotation marks omitted; emphasis added]. Indeed, UCD has explained in *this* motion its understanding that Title IX requires programwide compliance. (*See* Def's MPA at 37-38.)

Indeed, the Court should reject UCD's notice argument because it would impose upon ordinary students a burden to provide an unprecedented, unwarranted, and likely prohibitively high level of specificity in their OCR complaints. The crux of UCD's argument is not that Plaintiffs gave it no notice, but rather that Plaintiffs' OCR complaints were insufficiently comprehensive and failed to specify all potential legal theories for UCD's Title IX liability, such that UCD only concerned itself with wrestling team issues. To require OCR complaints to allege exhaustive facts and legal theories with such particularity would be to import into Title IX a far more burdensome standard than applies even to pleadings prepared by counsel under Rule 8 of the Federal Rules of Civil Procedure.[13]

---

[13] Pleading requirements under Rule 8 are—by express congressional design—non-technical and extremely liberal. Fed. R. Civ. P. 8(a)&(e). Complaints prepared by *pro se* litigants are held to an even more forgiving standard than those prepared by counsel. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Cripps v. Life Ins. Co. of N. Am.*, 980 F.2d 1261, 1266 (9th Cir. 1992). Exhaustive pleading is not required; indeed, "a complaint is not required to allege all, *or any*, of the facts logically entailed by the claim." *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (internal quotation marks omitted). A complaint need not even specify the precise nature of the claim asserted where the facts alleged put the defendant on notice. *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990).

Especially in light of the remedial intent of Title IX, this cannot possibly be the law.[14] *Compare* Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq*. (under Title VII, a plaintiff's Equal Employment Opportunity Commission charge need not each and every fact that combines to form basis of each legal claim). Since it is undisputed that Plaintiffs' OCR complaints asserted Plaintiffs' right to participate on the varsity wrestling team—a right that by UCD's own analysis does not exist independently of program-wide noncompliance with Title IX, UCD is barred from strategically pleading ignorance now in an effort to stamp out Plaintiffs' ineffective accommodation claims as a matter of law.

V. CONCLUSION

For each of the reasons argued herein and supported by the accompanying declarations, exhibits and other documents, Plaintiffs respectfully request that this Court deny UCD's motion for summary judgment in its entirety.

DATED: March 6, 2008 Respectfully Submitted,

EQUAL RIGHTS ADVOCATES

By: /s/ Noreen Farrell
NOREEN FARRELL
Attorneys for Plaintiffs

Respectfully submitted,

THE STURDEVANT LAW FIRM
A Professional Corporation

By: /s/ Monique Olivier
MONIQUE OLIVIER
Attorneys for Plaintiffs

Z:\417_Mansourian\Pleadings\MSJ OPPOSITION\MSJ Opp - Brief Draft-FINAL.doc

[14] That the OCR complaint form itself does not request (or even provide space for) such particularity thoroughly undermines UCD's argument to the contrary. (See ADF 77.) UCD's argument would result in a highly undesirable side effect: students would be better off proceeding directly to litigation than first taking their concerns to school officials early if there was a risk that unless they exhaustively set forth all legal theories in an OCR complaint, their claims would later be foreclosed.