United States Court of Appeals, Ninth Circuit.
Arezou MANSOURIAN, et al., Plaintiffs/Appellants,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants/Appellees.
No. 08-16330.
February 13, 2009.

On Appeal from the United States District Court for the Eastern District of California, The Honorable Frank C. Damrell, Jr. presiding, Eastern District Civil Case No. 03-cv-02591-FCD-EFB

Appellants' Opening Brief

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291. The United States District Court for the Eastern District of California possessed jurisdiction over this civil rights suit under 20 U.S.C. § 1681, 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331, 1334 (3), 1334(4), 1367, 2201, and 2202. On April 23, 2008, the district court directed the entry of final

judgment against Plaintiffs-Appellants Arezou Mansourian, Lauren Mancuso, and Christine Wing-Si Ng (hereinafter "Plaintiffs"). (ER 7-28.)[FN1] That final judgment was entered on April 23, 2008. (ER 6.) Plaintiffs timely filed their notice of appeal on May 22, 2008. (ER 1-5.) Fed. R. App. P. 4(a)(1)(A).

FN1. References to "ER" are to Appellants' Excerpts of the Record, which are being filed concurrently herewith.

STATEMENT OF ISSUES FOR REVIEW

1. DID THE DISTRICT COURT ERR IN GRANTING JUDGMENT AGAINST THE PLAINTIFFS' CLAIMS UNDER 42 U.S.C. § 1983 FOR DAMAGES BASED UPON VIOLATIONS OF THE EQUAL PROTECTION CLAUSE?
(YES.)
2. DID THE DISTRICT COURT ERR IN DENYING PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT TO ADD CURRENTLY ENROLLED STUDENTS?
(YES.)
3. DID THE DISTRICT COURT ERR IN APPLYING THE NOTICE REQUIREMENT OF TITLE IX SEXUAL HARASSMENT CASES TO PLAINTIFFS' CLAIM THAT DEFENDANT VIOLATED TITLE IX BY FAILING TO PROVIDE EQUAL ATHLETIC OPPORTUNITIES?
(YES.)
4. DID THE DISTRICT COURT ERR IN HOLDING THAT NO MATERIAL ISSUE OF FACT EXISTED AS TO WHETHER ANY SUCH NOTICE WAS GIVEN IN THIS CASE?
(YES.)

STATEMENT OF THE CASE

This case is rooted in the University of California at Davis' ("UCD") long history of discriminating against women by failing to provide equal athletic opportunities to its female students, including Plaintiffs, as required by the Equal Protection Clause of the Fourteenth Amendments, as enforced through 42 U.S.C. § 1983, and Title IX of the Education Amendment of 1972, 20 U.S.C. § 1681 *et. seq*. Despite a continuing and steady growth of women's interest in sports since the enactment of Title IX, UCD has repeatedly refused to "fully and effectively accommodate" that interest as that law requires. For Plaintiffs, this case is about UCD's denial of their opportunity to fully participate in campus life at UCD because they are women. It is about the denial of their opportunity to participate in women's wrestling - an opportunity that existed for years for women at UCD - which was arbitrarily stripped away from them and never restored, and about UCD's refusal to equally accommodate women in its athletics program as a whole.

Plaintiffs filed their Complaint as a proposed class action on December 18, 2003. (ER 6407-62.) The Complaint charged that Defendant Regents of the University of California and certain officials at UCD had been and were continuing to discriminate against women in UCD's athletics program.[FN2] *(Id.)* Plaintiffs were then students at UCD who attended UCD, in significant part, because of its wrestling program. Two of the Plaintiffs were terminated from the varsity wrestling team solely because they were women; the third was never allowed to participate on the team. Plaintiffs alleged that Defendants' conduct was part of an overall failure to comply with UCD's affirmative obligations under Title IX, and also violated the Equal Protection Clause and various California civil rights and education laws.

FN2. Defendant Regents shall be referred to herein as "UCD" herein because the events of this case took place on the campus of the University of California at Davis.

On March 5, 2004, Defendants filed a motion to dismiss the Complaint on several grounds, which was denied. In December 2005, Plaintiffs filed their motion for class certification. After the motion was filed, the Court issued two separate stays of the action due to the unforeseen and serious health issues of both Defendants' and Plaintiffs' counsel.

The stay was lifted on January 26, 2007 after new counsel for Plaintiffs substituted into the action. Plaintiffs then moved to amend the Complaint to add current UCD students. The court denied this request on two bases: first, that Plaintiffs were not diligent in seeking the amendment; second, that the amendment would be prejudicial to Defendants. (ER 73-84.)

On June 5, 2007, Defendants moved for judgment on the pleadings, asking the court to dismiss a number of Plaintiffs' claims. On October 18, 2007, the district court issued a decision dismissing some of Plaintiffs' claims, and refusing to dismiss others. (ER 29-72.) Plaintiffs' § 1983 claims were among those dismissed, with the court holding that "Title IX's enforcement scheme is sufficiently comprehensive to subsume plaintiffs' section 1983 claims and demonstrate that Congress intended to preclude § 1983 claims when it enacted this statute." (ER 36:7-10.)[FN3]

> FN3. The district court also dismissed what it considered to be a Title IX claim for denial of equal treatment in athletics, finding it to be barred by the statute **of limitations under a Title VII case,** *Ledbetter v. Goodyear Tire & Rubber Co., Inc.,* 127 S. Ct. 2162, 2169 (2007). However, Plaintiffs did not assert an equal treatment claim, only an effective accommodation claim. Since Defendants did not raise a statute of limitations defense with respect to the latter claim, Plaintiffs are not briefing this issue. (ER 48:13-21:6; 51 n.12.) Plaintiffs nevertheless note that *Ledbetter* was never applicable to this case, and that it has recently been overruled by Congress with the passage of the Lilly Ledbetter Fair Pay Act of 2009. Pub. L. 111-2, 123 Stat. 5 (Jan. 29, 2009) If this Court believes that analysis of the district court's statute of limitations ruling is pertinent to the issues, Plaintiffs respectfully request leave to address it in a supplemental brief.

Defendants then filed a motion for summary judgment on Plaintiffs' Title IX equal accommodation claim, which the district court granted. (ER 7-28.) First, relying on Supreme Court Title IX sexual harassment cases that require actual notice of discrimination, "[t]he court conclude[d] that money damages cannot be awarded unless a plaintiff has given notice of and an opportunity to rectify the specific violation alleged by a Title IX plaintiff." (ER 13:2-5.) Second, the district court held that "[t]he undisputed evidence establishes that plaintiffs did not provide defendants with notice and an opportunity to cure a violation of Title IX for ineffective accommodation." (ER 20:27-21:1.)

This appeal was timely filed on May 22, 2008. (ER 1-5.)

STATEMENT OF FACTS

I. The Framework for Evaluating a Title IX Claim of Ineffective Accommodation.[FN4]

> FN4. The legal framework is included in the Statement of Facts to provide the Court with the legal context in which to understand the relevant facts.

Title IX prohibits sex discrimination in educational programs that, like UCD, receive federal funding. This broad prohibition extends to any education program or activity, including intercollegiate athletics. The regulations promulgated pursuant to Title IX require institutions to "*provide equal athletic opportunity for members of both sexes.*" 34 C.F.R. § 106.41(c) (emphasis added). (AD 4.)[FN5]

> FN5. References to "AD" are to the Addendum attached hereto pursuant to C.R. 28-2.7.

The critical aspect of that requirement 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). (AD 4.) 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) (citation omitted); *Neal v. Bd. of Trs.,* 198 F.3d 763, 767-68 (9th Cir. 1999); *Cohen v. Brown Univ. (Cohen II),* 991 F.2d 888, 897-98 (1st Cir. 1993).

In 1979, the Department of Education's Office for Civil Rights ("OCR") issued a Policy Interpretation to provide guidance on the meaning of equal athletic opportunity under an effective accommodation claim.[FN6] Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 *et seq*. (1979) (the "Policy Interpretation"). (AD 8-16.) The Policy Interpretation sets forth a three-part test for determining whether a school is in compliance with the regulatory mandate:

> FN6. The Department of Education, acting through the OCR, is the administrative agency charged with administering Title IX. *Neal,* 198 F.3d at 770 (citations omitted). The Policy Interpretation is a "considered interpretation" of the applicable regulations, and is entitled to deference by the courts. *Id*.

(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 underrepresented 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, Part VII.C.5.a. (AD 11.) The three-part test is further explained in a Clarification of Intercollegiate Athletic Policy Guideline: The Three-Part Test (hereafter "1996 OCR Clarification") issued by OCR in 1996. (AD 17-29.) A school can demonstrate compliance by meeting any one of the three prongs.

II. UCD's Athletic Program.

Defendant UCD is charged with overseeing the administration and operation of the University, including its athletics program. (ER 1204 ¶ 1; 1996-97 ¶ 4; 2004-07 ¶ 5.) 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. (ER 1204 ¶ 2; 6413:8-22.) As a state university, UCD is subject to the Fourteenth Amendment's Equal Protection Clause and thus to 42 U.S.C. § 1983. Defendants Chancellor Larry Vanderhoef, Athletic Director Greg Warzecka, former Associate Athletic Directors Pam Gill-Fisher and Lawrence Swanson, and former Associate Vice Chancellor for Student Affairs Robert Franks are or were the UCD officials responsible for implementing UCD's policies and practices during the time relevant to this action.

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

Because UCD admits that it has never provided females with athletic opportunities that are substantially proportionate to their enrollment, it is not in compliance with Prong One, the proportionality prong, of the three-part test. (ER 1205 ¶ 5; 1710-13; 2279:1-18; 2289:11-2290:8; 3181:25-3182:9; 3195:25-3196:3; 5944 ¶14.) In 1995, the number of women who would have had to have been provided with varsity opportunities to achieve a ratio proportionate to women's enrollment was 267. (ER 1961.) In 2004, UCD was still short of achieving proportionality by over 100 women's varsity opportunities. *(Id.;* AD 23-24 (explaining that a school is not in compliance with Prong One where the opportunities available for women are not proportionate and there is a "significant number" of unaccommodated women at that school, such that a "viable sport could be added").)

B. UCD's Failure to Expand Participation Opportunities for Women Athletes

UCD also fails to comply with Prong Two of the three-part test. *(See* AD 29 n.2 ("Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex.").) Between the passage of Title IX in 1972 and 1996, UCD failed to expand athletic opportunities for women at all. (ER 1207 ¶ 17; 1209 ¶ 27; 1375; 1388; 1401; 1427; 1453; 1493; 1549; 1613; 1710-13; 1961; 4132.) In 1976, UCD issued an internal report showing serious deficiencies in Title IX compliance, yet took no steps to address these deficiencies for nearly twenty years. *(See* ER 1206 ¶¶7-9; 1710-13.) In 1983, UCD dropped women's field hockey despite the fact that there were existing teams, active interest, ability, and available competition. (ER 1208 ¶¶ 19-20; 1710-13; 2324; 4541-42; 4543-51.) It also dropped women's golf. *(Id.)* Between 1989 and 1991, UCD eliminated nearly 100 women's varsity opportunities. (ER 1207-08 ¶ 18; *compare* 1710 *with* 2317.)

An internal report issued in 1991 again warned of deficiencies in Title IX compliance. (ER 1206 ¶¶7-9; 1710-13.) In 1996, when female participation rates were 20% lower than female enrollment, UCD finally added three women's varsity teams. (ER 1207 ¶ 12; 1208 ¶ 21; 1345-46; 1354-55; 1961.) Even so, the participation rates of women remained disproportionate to their enrollment by 11%. *(Id.)* Then in 2000, UCD removed all women from the varsity wrestling program (ER 1204 ¶ 4; 2644-45; 2935:9-2939:16; 2945:19-2946:18; 3027:22-3028:2; 3029:21-3030:14; 3665:14-3666:8; 3841:18-3842:21), and denied Plaintiffs' pleas, and the entreaties of their coach, for reinstatement *(see* ER 1221 ¶ 77; 2433-54).

In 2002, the participation rates of women remained disproportionate by nearly 10%. (ER 1207 ¶ 15; 1829.) The actual number of participation opportunities for women athletes at UCD dropped by approximately 60 varsity slots between 1999-2005. (ER 1209 ¶ 27; 1375; 1388; 1401; 1427; 1453; 1493; 1549; 1961.)

In fact, UCD has provided fewer, not more, opportunities for women athletes over time, even though its enrollment of women has grown. In 1999-2000, UCD had a female enrollment population of 10,446 with 424 female varsity athletes (ER 1961), yet in 2004-2005, UCD's female enrollment had soared to 12,834 but with only 368 female athletes (ER 1091:15-1092:11; 1508, 1549). The actual number of women athletes in 2005 was *less* than what it was in 1999, even though over 2, 200 more women students attended UCD in 2005 than in 1999. *(Compare* ER 1961 *with* 1561 & 1601.) UCD knew about the significant reduction in varsity opportunities for women, but did not replace the eliminated participation opportunities or expand opportunities during this time period. (ER 1210-11 ¶¶ 34-35; 1620; 1622; 1786; 1790; 1795-96; 1829; 3214:3-9; 3248:3-11; 4129:17-21; 4130:18-24; 4138:7-24; 4139:4-14; 4146:14-4147:11.)

In 2005, two years after this lawsuit was filed, UCD added women's varsity golf. (ER 1208 ¶ 22; 1601; 2053 ¶ 5; 2055 ¶ 2.b.; 2343-44; 5867.) Golf added only seven opportunities for women athletes. *(Id.)* Any of the pre-existing club teams that sought varsity status would have added considerably more participation opportunities. (ER 1212 ¶ 40; 3874:3-3875:10; 4225:24-4226:1; 5775; 5797; 5884-85)

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

UCD has also not complied with Prong Three of the three-part test: it has not fully and effectively accommodated the interests and abilities of its female students. (ER 1212 ¶ 42; 1713; 4400.) Although a report in 1991 urged UCD to conduct a survey to determine the interest and ability of women in varsity athletics, it waited 13 years to do so. (ER 1206 ¶¶7-9; ER 1208 ¶ 22; 1601; 1710-13; 2055 ¶ 2.b.) In 1996, UCD denied requests by the women's badminton and field hockey club teams to be elevated to varsity status. (ER 1212 ¶ 44; 2323-24; 2329-30; 2662-63.) Between 1995 and 2003, UCD never communicated to female students that they could seek the addition of a new women's varsity sport. (ER 1212 ¶ 45; 3263:16-3264:24; 4125:22-4127:5; 4411:6-9.) In 2003, UCD solicited and received applications for elevation to varsity status from field hockey, rugby, equestrian, bowling, and badminton club teams. The applications demonstrated strong interest, a high level of ability, and competitive opportunities at the varsity level for each sport. (ER 1211 ¶ 36; 1601; 5763-893.) UCD rejected all of these applications. (ER 1211 ¶ 37; 5763-893.)

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

1. UCD's Women's Wrestling Program.

Since 1992, when women first began wrestling at UCD, the varsity wrestling program included both men and women, each competing against their respective sex. (ER 1212-13 ¶ 46; 3369:9-3372:3; 3376:18-3377:8; 3397:19-20; 6593-610.) In 1995, UCD hired Michael Burch as a wrestling coach. (ER 1213 ¶ 47; 2874:17-25; 2875:9-22; 3397:19-20; 3369:9-3371:3; 3376:18-3377:8.) Women wrestled at UCD as varsity athletes under Coach Burch throughout his tenure. (ER 1213 ¶ 48; 2878:15-18; 3137:24-3138:2.)

UCD, including Athletic Director Warzecka, admits that Plaintiffs were varsity athletes on the wrestling roster. (ER 1217 ¶ 58-59; 1871-76; 3137:24-3138:2; 3150:10-19; 4200:23-25; 4201:12-19; 4470:15-4475:19; 4479:12-16; 4533:12-22; 4661 ¶ 6.) Women wrestlers at UCD received highly qualified coaching (ER 1213 ¶ 50; 3691:20-3692:5; 3987:21-23), wrestled women using women's freestyle rules (ER 1213 ¶ 49; 2891:11-21; 3036:11-24; 3626:15-3627:1; 3682:8-18), and received all of the benefits of varsity status including training services, medical services, and academic support services (ER 1213 ¶ 49; 2891:11-21; 3018:1-7; 3036:11-24; 3626:15-3627:1; 3658:22-3659:1; 3682:8-18; 3830:25-3831:3; 4150:25-4152:7). UCD sponsored a women's division in its annual Aggie Open wrestling tournament. (ER 1213 ¶ 51; 2372-427; 2474-77; 2896:25-2897:6; 2921:19-23.)

As members of the varsity program, women wrestlers attended practice regularly and had the same responsibilities as any male team member. (ER 1213-14 ¶ 52; 3015:1-4; 3024:7-13; 3383:17-19; 3385:19-20; 3969:13-21; 3986:1-23.) The women wrestlers were listed as varsity athletes on participation lists, roster lists, and in the Aggie Open programs. (ER 1215-16 ¶ 55; 2394-95; 2398; 2403; 2405; 4148:12-4149:9; 4462:7-23; 4469:14-4470:1; 6611-998.)

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

Plaintiffs chose to attend UCD to contribute to its strong tradition of women's wrestling. (ER 1204 ¶ 3; 3556:18-3557:5; 3558:18-3559:6; 3626:15-3627:1; 3628:15-3629:24; 3797:13-21.) Plaintiffs Ng and Mansourian were both high school wrestlers who selected Davis because it offered them the opportunity to wrestle. (ER 3628:15-3629:24; 3791:3-3793:14; 3797:13-21.) In fact, Plaintiff Mansourian selected UCD over a prestigious program that would have put her on track for acceptance at medical school, because only at UCD would she have the opportunity to wrestle. (ER 1218 ¶ 62; 3628:13-3629:24.) Plaintiffs Ng and Mansourian actively participated in the wrestling program, including regularly attending practice six days a week, receiving benefits as varsity team members, and being dedicated members of the team. (ER 1218 ¶ 61 & 63; 3656:12-3659:1; 3816:14-17; 3825:23-3826:8; 3832:15-3833:2; 3839:5-14.)

Plaintiff Mancuso also chose to attend UCD because it afforded her the opportunity to continue wrestling. (ER 1218 ¶ 64; 3541:2-11; 3556:18-3557:5; 3558:18-3559:6; 3569:9-15; 3570:22-23.) She was a highly-skilled wrestler in high school who planned to train for the Olympic team. (ER 1218 ¶ 65; 2879:1-5; 2890:5-10; 3553:8-14; 3569:19-24; 3576:19-23.) 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. (ER 1218-19 ¶ 66; 3582:24-3583:15; 3586:9-3587:5; 3596:23-3597:13.) She entered in 2001 and attended practices in the fall of 2001 along with Ng and Mansourian. (ER 1219 ¶ 67; 3580:12-25; 3582:6-8; 3588:1-13; 3590:7-3592:7.) 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. *(Id.)*

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

In October 2000, the UCD athletic department administration instructed Coach Burch to remove the women from the wrestling team. (ER 1219 ¶ 68; 2644-45; 2935:9-2939:16; 2945:19-2946:18; 3027:22-3029:2; 3029:21-3030:14;

3665:14-3666:8; 3841:18-3842:21.) Although Burch protested against this instruction, he informed the women wrestlers of the directive. *(Id.)* Burch permitted the women to continue practicing with the wrestling team. *(Id.)* Mansourian was injured during a practice in January 2001 and received assistance from a varsity trainer. (ER 1219 ¶ 69; 3677:8-12; 3678:4-25; 3845:16-20.) When the administration learned of Mansourian's use of this varsity benefit, Warzecka met with the women wrestlers and directed them not to participate in wrestling. (ER 1219 ¶ 70; 3669:24-3670:13.) He also told them that they could not participate on the wrestling team because they were a liability to UCD. (ER 1219 ¶ 71; 3082:15-18; 3085:2-9; 3592:21-3593:8.)

UCD eliminated women's varsity wrestling despite the strongest possible evidence of interest and ability in the sport, and a reasonable expectation of competition: women were participating on the team and competing in open events.[FN7] Coach Burch testified that he could have easily recruited enough women to field several women's varsity teams. (ER 1219-20 ¶ 72; 2680:16-23; 3442:16-3443:13; 4167:20-4168:4; *see supra* note 7.)

> FN7. (ER 1220 ¶ 73; 2428-32; 2455-59; 2479-81; 2498:23-2499:27; 2508-10; 2817:12-2818:4; 2822:18-2823:19; 2837:11-2838:1; 2841:24-2843:16; 2889:9-25; 3728:20-3730:13; 3733:22-3734:19; 3738:3-24; 3909:11-3910:20; 3915:23-3919:9; 3951:20-25; 4069:5-11.)

Numerous individuals with knowledge of women's wrestling agree that there was sufficient interest to field a collegiate team at UCD in 2001. (ER 1220 ¶ 74; 3742:11-3744:11; 3748:24-3749:17; 3753:18-3756:2; *see also supra* note 7.) 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. *(Id.)* Despite this interest, ability, and available competition for women wrestlers, UCD admits that it did not consider interest in women's wrestling before it removed women from the program. (ER 1220-21 ¶ 75; 2154-267; 4379:12-4380:7; 4390:5-10; 4390:23-4391:1; 4404:17-22; 4483:4-10; 4489:17-4493:14.)

In April 2001, Ng and Mansourian submitted a complaint to the OCR, charging that they had been subject to sex discrimination due to the elimination of intercollegiate athletic opportunities for women. (ER 1221 ¶ 77; 2433-54.) Subsequently, Ng, Mancuso, and Mansourian filed supplemental complaints of sex discrimination with OCR. *(Id.)* Soon after the OCR complaints were filed, UCD fired Burch for his support of women's wrestling. (ER 1221 ¶ 81; 2890:19-23; 2946:9-13; 2957:23-2958:9.)

OCR never interviewed a single plaintiff, or any other women wrestler. (ER 1221 ¶ 78; 3035:2-13; 3037:1-5; 3685:7-3686:1; 3861:2-6.) Instead, after discussions solely between UCD and OCR, OCR accepted the “voluntary resolution” of Plaintiffs'complaints that was suggested by UCD, in which UCD agreed to reinstate the women to the wrestling program. (ER 1222 ¶ 82; 1857-58; 2482-89.) However, the plan conditioned reinstatement on Plaintiffs' ability to compete against men for a varsity slot - a condition that had never previously existed. (ER 1222 ¶ 83; 1857-58.) Significantly, UCD never advised the OCR that the women wrestlers had previously only competed against other women. (ER 1222 ¶ 84; 1857-58; 4480:10-4481:20.)

In May 2001, after the wrestling season was over, the women were once again placed on the roster for the wrestling team. (ER 1222 ¶ 85; 3589:15-24; 3687:1-19.) However, that fall, UCD required the women to wrestle-off against men for a spot on the team. UCD told them that this was necessary because slots on the team were limited by roster caps, even though roster caps were intended to limit the number of men participating in order to move toward gender equity. (ER 1222 ¶¶ 86-87; 1620-22; 2512; 3688:9-17.) UCD's expert testified that forcing women to be counted within a roster cap for the men's team and to compete against men to be on the team is the effective elimination of women's opportunities. (ER 1222-23 ¶ 88; 3295:5-13; 3297:1-3298:3.) Roster caps have never been applied to any other women's team at UCD. (ER 1223 ¶ 89; 1693:23-27.)

In the fall of 2001, Plaintiffs attended wrestling practices with the rest of the team. (ER 1223 ¶ 90; 3580:12-25; 3581:15-18; 3582:6-8; 3709:9-25; 3867:17-25.) At the practices, the new coach was hostile to the women and did not

provide them with any coaching, tips, or support. (ER 1223 ¶ 91; 3594:1-14; 3598:17-3599:1; 3700:18-3701:3; 3703:5-12; 3862:17-3863:7; 3863:15:-3864:13.) Feeling unwelcome and humiliated, Mansourian stopped attending practices. (ER 1223 ¶ 92; 3709:9-3710:5; 3711:1-3712:8.) Ng wrestled off against Mancuso, who beat her. (ER 1223 ¶ 93; 3589:4-3592:7; 3869:12-20; 3870:1-12.) Mancuso then wrestled off against a male wrestler, who beat her. *(Id.)*

Plaintiffs were devastated by their dismissal from varsity wrestling. (ER 1223 ¶ 94; 3601:9-24; 3630:21-22; 3667:23-3668:20; 3843:7-3844:1.) They filed suit, requesting reinstatement of the women's wrestling program, equal accommodation of women in UCD's athletics program, and damages. UCD continues to refuse to provide wrestling opportunities to women, even though high schools girls from throughout the state continue to inquire about wrestling at UCD. (ER 1224 ¶ 95; 2455-59; 2479-81; 2432; 4515:9-15; 4516:11-4517:8; 4518:24-4519:14.)

SUMMARY OF THE ARGUMENT

Three erroneous rulings of the district court are before this Court on appeal, the first of which has been resolved by an intervening Supreme Court decision. In the first ruling, which was in response to Defendants' Motion for Judgment on the Pleadings, the district court dismissed Plaintiffs' claims under 42 U.S.C. § 1983 against all Defendants for discrimination in violation of the Equal Protection Clause on the basis that Title IX is the exclusive remedy for sex discrimination by educational institutions. On January 21, 2009, the United States Supreme Court reached the opposite conclusion in *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 2009 WL 128173 (Jan. 21, 2009), holding that Title IX does not preempt constitutional claims under § 1983, and that remedies under both statutes can be pursued. Therefore, the order of the district court dismissing Plaintiffs' § 1983 claims must be reversed.

Second, the district court erroneously denied Plaintiffs leave to amend their Complaint to add current students at UCD. The proposed amendment was limited and reasonable in light of unforeseen stays of the action, and necessary to Plaintiffs' diligent prosecution of this action. The court abused its discretion in finding that Plaintiffs had not established good cause under Federal Rules of Civil Procedure, rule 16(b) and that the proposed amendment was prejudicial under rule 15(a).

Third, the district court erroneously held that the actual notice required in Title IX sexual harassment cases seeking damages was required here and had not been provided. It concluded, therefore, that UCD was not liable for violations of Title IX in its athletics program. This holding is legally untenable. The concern in the Title IX *sexual harassment* cases on which the district court relied is not present here. That concern is ensuring that an educational institution will not be held liable for damages for the behavior of rogue employees, as opposed to its own actions. *E.g., Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-88 (1998) (funding recipient must have actual notice of teacher's sexual harassment of student to which it responds with deliberate indifference).

In this case, UCD itself is not innocent of sex discrimination while rogue employees secretly committed improper acts. Instead, UCD *itself* has been discriminating against women in its athletics program for decades. It has continually and directly failed to provide equal opportunities for its female students to participate in sports.

This case thus has nothing in common with *Gebser*. It is UCD's own actions in administering its athletics program - including dropping the women's wrestling program - that are at issue, and those actions fall far short of its affirmative obligations under Title IX's three-part test. Institutions receiving federal funds have long been on notice that they are subject to liability for their own violations of Title IX. *Pennhurst State Sch. & Hosp. v. Halderman,* 451 U.S. 1, 17 (1981); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992).

Moreover, even assuming that Plaintiffs were somehow required to show that UCD had actual notice that it was discriminating against them on the basis of sex, they met that standard. The substantial record of evidence establishes that UCD had ample notice that it was not providing Plaintiffs and its other female students with equal athletic participation opportunities. Prior to bringing suit, Plaintiffs repeatedly complained that UCD was denying them and other

women athletes at UCD the opportunity to participate fully in varsity athletics. Plaintiffs even filed complaints with, and attempted resolution through, the OCR long before they filed their Complaint in court. Moreover, all of this occurred against the backdrop of a University that repeatedly told itself over the course of decades, in internal reports and memos, that it was failing to live up to its obligations under Title IX. The district court's conclusion that the notices that Plaintiffs (and others) gave UCD were not adequate because they focused too heavily upon wrestling rather than the broader failure of UCD to provide equal accommodation to female athletes only shows the court's misunderstanding of the applicable Title IX regulations and policies. Even if notice were required - which it was not - UCD had it.

The importance of correcting the district court's errors is particularly acute in this case because the record below makes clear that UCD violated Title IX by failing to meet any prong of the three-part test for determining whether a school is providing its female students with equal opportunities to play sports. By denying Plaintiffs the opportunity to make their case, the district court's error compounds the inequities that they and other female students at UCD have faced for years and continue to face. As Plaintiffs will show on remand, UCD also violated the Equal Protection Clause by discriminating against women in its provision of educational programs and they should also be allowed to pursue those claims.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' EQUAL PROTECTION CLAIMS.

A. Applicable Standard of Review.

The dismissal of a complaint from a judgment on the pleadings is reviewed de novo. *Ventress v. Japan Airlines,* 486 F.3d 1111, 1114 (9th Cir. 2007). On a motion for judgment on the pleadings, the allegations of the complaint must be accepted as true. *Cruz v. Beto,* 405 U.S. 319, 322 (1972). "A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002) (citation omitted).

B. The District Court Erred in Dismissing Plaintiffs' § 1983 Claims for Monetary Damages Against the Individual Defendants.

In response to Defendants' Motion for Judgment on the Pleadings, the district court dismissed Plaintiffs' claims for violation of the Equal Protection Clause of the United States Constitution under 42 U.S.C. § 1983 seeking monetary damages against Defendants Vanderhoef, Warzecka, Swanson, Gill-Fisher, and Franks on the sole basis that these claims were precluded by Title IX. On January 21, 2009, however, the United States Supreme Court held in *Fitzgerald v. Barnstable* that there is no such preclusion. Specifically, the Court stated that:

Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights. Accordingly, we hold that § 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools.

Fitgerald, 2009 WL 128173, at *8. Because the district court dismissed Plaintiffs' § 1983 claims on the sole basis that such claims are precluded by Title IX, in light of *Fitzgerald,* the district court must be reversed and Plaintiffs' § 1983 claims against the individual defendants must be reinstated.

C. The District Court Erred in Dismissing Plaintiffs' § 1983 Claim for Injunctive Relief Against UCD.

In their Motion for Judgment on the Pleadings, Defendants also sought dismissal of Plaintiffs' claim for violation of the Equal Protection Clause of the United States Constitution under 42 U.S.C. § 1983 seeking injunctive relief against Defendant UCD on the sole basis that this claim was precluded by Title IX. Rather than dismissing on that ground, the

district court *sua sponte* dismissed Plaintiffs' § 1983 claim against UCD on the ground that Plaintiffs did not have standing to assert a claim for injunctive relief as they were no longer current students at UCD. (ER 61 n.15.) Plaintiffs' lack of standing, however, was the direct result of the district court's denial of Plaintiffs' motion for leave to amend to add plaintiffs who were current UCD students. As discussed *infra,* the court erred in denying Plaintiffs leave to amend to add current students. Had it not been for this error, Plaintiffs would have had standing to maintain their § 1983 claim against UCD for injunctive relief. And in light of *Fitzgerald,* UCD has no other argument on appeal that the dismissal of this claim was proper. Accordingly, Plaintiffs must be allowed to reassert their § 1983 claim against UCD for injunctive relief upon a showing of standing in the district court.

II. THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS LEAVE TO AMEND TO ADD CURRENT STUDENTS TO THE LAWSUIT.

The district court erred in denying Plaintiffs leave to amend their Complaint to add three current students as plaintiffs and proposed class representatives before the hearing on class certification and long before the close of discovery. Plaintiffs sought the amendment eight months before the close of discovery, eleven months before the dispositive motion deadline and fifteen months before trial. *(See* ER 85-91.) The court held, however, that: (1) Plaintiffs lacked good cause to modify the scheduling order because they failed to be diligent in seeking the modification, as required by Fed. R. Civ. P. 16 (ER 80:17-82:5); and (2) Plaintiffs' proposed amendments to the Complaint would be prejudicial to Defendants, even under the very liberal standards of Fed. R. Civ. P. 15 (ER 82:6-84:11). Both findings are erroneous, and are premised on a misapplication of the standards, as well as a misapprehension of the gravamen of Plaintiffs' Complaint. The court's order should, accordingly, be reversed.

A. Applicable Standard of Review

An abuse of discretion standard governs review both of a district court's denial of a request to modify a pretrial scheduling order, and of its denial of a motion for leave to amend a pleading. *Noyes v. Kelly Servs.,* 488 F.3d 1163, 1174 (9th Cir. 2007); *Johnson v. Mammoth Recreations, Inc.,* 975 F.2d 604, 609 (9th Cir. 1992). Because of the strong policy favoring leave to amend, denials of leave to amend, however, are "strictly" reviewed. *Sisseton-Wahpeton Sioux Tribe v. United States,* 90 F.3d 351, 355 (9th Cir. 1996).

B. The Court Erred in Refusing to Allow Plaintiffs to Modify the Scheduling Order.

The district court's finding that Plaintiffs lacked good cause to modify the scheduling order was based on its conclusion that Plaintiffs should have foreseen the need to bring current students into the lawsuit and their failure to do so earlier was due to a lack of diligence. (ER 80:17-82:5.) This was, however, a misapplication of Rule 16's standard which looks to the reasonable diligence of the moving party and her reasons for modification. *Johnson,* 975 F.2d at 609-10. Where the non-moving party is already on notice of the reasons for the proposed modification, good cause can be found. *Sousa v. Unilab Corp. Class II (Non-Exempt) Members Group Benefit Plan,* 252 F. Supp. 2d 1046, 1059 (E.D. Cal. 2002). Failing to understand the scope of the lawsuit and its posture as a Title IX class action seeking broad injunctive relief, the district court committed two distinct errors in finding that Plaintiffs lacked good cause.

1. The Court Misapprehended the Scope of the Original Complaint by Finding that Plaintiffs Should Have Sought Amendment Upon Receipt of Program-Wide Discovery.

The court misapprehended the scope of Plaintiffs' Complaint by finding that they should have sought to amend to include plaintiffs interested in other sports when they "discovered" evidence about discrimination involving other sports. (ER 81:9-23.) Plaintiffs' Complaint has always included a Title IX claim of ineffective accommodation, which necessarily requires a program-wide analysis of UCD's athletics program, and therefore necessarily involves other women athletes. (ER 6441:1-6443:19.)

The court found that Plaintiffs "had notice that the named plaintiffs in this action only alleged that they participated or wished to participate in a varsity wrestling program." (ER 81:17-20.) This finding demonstrates the court's error. The gravamen of the Complaint is that Defendants were refusing to equally accommodate women in athletics and exacerbated this discrimination by eliminating women's varsity wrestling opportunities. (ER 6417:17-6434:12; 6441:1-6443:19.) Plaintiffs challenged UCD's overall failure "to provide equitable athletic participation and scholarship opportunities for women, despite the athletic interests and abilities of UC-Davis female students and high school female students who will become UC-Davis students in the future." (ER 6408:20-24.) Plaintiffs sought injunctive relief on behalf of all female athletes. (ER 6409:9-24.)

The court also ignored critical allegations in the Complaint that defined the proposed class to include all women student athletes, including wrestlers.[FN8] (ER 6409:1-8.) These allegations are consistent with Plaintiffs' December 2005 class certification motion, which defined the class to compasses all female athletes. (ER 6405:22-25.) Plaintiffs' status as wrestlers did not preclude them from adequately representing a class of women athletes interested in various sports. Adding current students with a variety of athletic interests simply was consistent with the original allegations of the Complaint and with the program-wide scope of an ineffective accommodation claim.

> FN8. Notably, the pleading requirements under Rule 8 are non-technical and extremely liberal. Fed. R. Civ. P. 8(a) & (e). (*See infra* note 14.)

Indeed, as UCD repeatedly acknowledged, the court is *required* to analyze Plaintiffs' Title IX ineffective accommodation claim involving the athletics program as a whole. Title IX looks at compliance on a programmatic rather than sport-specific basis. Policy Interpretation, 44 Fed. Reg. at 71,417, Part VII. B.5. (AD 10.) Assessment is according to whether the institution's "program as a whole" is satisfactory. *Id*.; *see also id*. at 71,422, App. B, Resp. to Add'l Comments (8). (AD 15.) "Title IX protects the individual as a student-athlete, not as a basketball player, or swimmer." *Id*. at 71,422 (AD 15); *see* *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 174-75 (3d Cir. 1993) (Title IX regulations require inquiry regarding overall opportunities rather than opportunities in a particular sport). Any remedy necessarily will affect the entire student body of women athletes. *Cohen v.* *Brown Univ. (Cohen II)*, 991 F.2d 888, 897 (1st Cir. 1993).

Plaintiffs' proposed amendment sought to add new plaintiffs with the same claims against the same defendants who were suffering the same injury as the original Plaintiffs: denial of a right to equal accommodation in athletics. Indeed, proposed Plaintiff Ludwig was another wrestler. Moreover, the proposed amendments did not seek to "add" field hockey and rugby because the experience of female student athletes interested in different varsity opportunities has always been integral to the analysis in this case. The court's failure to recognize the scope of Plaintiffs' proposed class action led it to erroneously conclude that Plaintiffs did not diligently seek to modify the scheduling order.

2. The Court Ignored the Impact of Intervening Factors on Class Certification to Deny Plaintiffs a Routine Amendment to Strengthen Representation of the Class.

In refusing to modify the scheduling order, the district court also failed to recognize the impact of an unexpected stay of the case on the timing of class certification. Plaintiffs' proposed amendment merely sought to add plaintiffs and proposed class representatives who were current students at UCD to address the fact that Plaintiff Mancuso had graduated during the unforeseen delay of the case.

Plaintiffs filed their class certification motion in December 2005, while Mancuso was still a UCD student. Mancuso would have still been a current student had class certification been heard as scheduled in April 2006. (ER 75:3-20; 6102:5-8; 6405.) Shortly before the class certification hearing, however, the court stayed the action at the request of Plaintiffs' counsel, who had been diagnosed with cancer. (ER 6384-89.) The action was stayed until January 2007 to allow Plaintiffs to secure other counsel. *(Id*. & ER 76:1-23.) Mancuso graduated during the stay and before resolution of class certification. (ER 6102:5-8.)

Plaintiffs immediately advised the Court of their intent to amend the Complaint once the stay was lifted. (ER 6373:4-7.) In February 2007, Plaintiffs moved to amend their Complaint to add three current students as named Plaintiffs and proposed class representatives: Laura Ludwig, a wrestler and UCD club rugby player, as well as Jessica Bulala and Kelsey Brust, both of whom were UCD club field hockey players. (ER 6327:4-28.) Plaintiffs also sought to add allegations to reflect the continuing nature of UCD's discrimination (ER 6339:13-6340:11) and to amend the class definition to conform to the allegations and relief sought in the original Complaint and to the class definition set forth in Plaintiffs' class certification motion (ER 6324: 24-27; 6405).

Although the original Plaintiffs continued to have standing to prosecute this action and represent the proposed class, it was appropriate to seek the addition of current student once Mancuso had graduated during the unforeseen delay. Plaintiffs' counsel has a duty to protect the class, even at the precertification stage. It is routine to permit amendment of a complaint to add additional representatives where appropriate to strengthen representation. *Bromley v. Mich. Educ. Ass'n,* 178 F.R.D. 148, 156-60 (E.D. Mich. 1998) (amendment allowed to cure standing problem); *In re Cal. Micro Devices Sec. Litig,* 168 F.R.D. 276, 277-78 (N.D. Cal. 1996) (class representatives added to address court's concern over adequacy of representation).

The district court misapplied the diligence standard, finding that Plaintiffs knew before the stay that Mancuso's graduation was imminent.[FN9] Mancuso's eventual graduation, even if imminent, is not determinative of whether Plaintiffs were diligent. But for the unforeseen delay in resolution of class certification, Mancuso would have been a current student when class certification was decided. The addition of current students as plaintiffs and proposed class representatives was intended to protect the class, and did not enlarge the case in any way. These circumstances thus were good cause to modify the scheduling order. *See, e.g., Merrithew/Howell v. Park Pointe Realty, Inc.,* 2007 WL 129040, at *2 (D. Idaho Jan. 12, 2007) (finding good cause because delays were result of unforeseen circumstances).

> FN9. The district court noted testimony by Mancuso that she filed an "intent to graduate" in the Fall of 2005. (ER 79:26-28.) However, the record does not support any assumption that this action would result in a graduation date before June 2006.

The proposed amendment was limited, reasonable, and timely. Plaintiffs' proposed amendment was well before the discovery cut-off. This fact alone contrasts sharply with the cases relied on by the court below, where bad faith amendments were sought after close of discovery *See, e.g., Jackson v. Bank of Haw.,* 902 F.2d 1385, 1388 (9th Cir. 1990) (request to add new defendants and new claims fourteen months after advising defendants of intent to file amended complaint and one year after close of discovery); *Lockheed Martin Corp. v. Network Solutions, Inc.,* 194 F.3d 980, 983, 986 (9th Cir. 1999) (request to add new claims made after discovery closed); *Acri v. Int'l Ass'n of Machinists & Aeorspace Workers,* 781 F.2d 1393, 1395 (9th Cir. 1986) (finding undue delay and bad faith for plaintiffs' request to add new theory of liability at summary judgment hearing, where plaintiffs admitted delay as a "tactical choice").

The court abused its discretion in finding that Plaintiffs had not established good cause under Rule 16(b). *Kaisha v. BASF Corp.,* 2007 WL 39313, at *3 (N.D. Cal. Jan. 4, 2007) (good cause where discovery ongoing).

C. The District Court Erred in Concluding that Plaintiffs' Proposed Amendments Would Prejudice Defendants.

Once Plaintiffs have shown good cause under Rule 16, the next inquiry is whether the amendment is proper under Rule 15(a). *Johnson,* 975 F.2d at 608. When a party seeks to amend her pleading, leave shall be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). "This policy is to be applied with extreme liberality" in consideration of factors such as prejudice, bad faith, undue delay and futility of the amendment. *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1051, 1052 (9th Cir. 2003) (citation omitted). The burden of proof falls on the party opposing the

amendment. *Id*.

The district court erroneously found prejudice to Defendants. The court concluded that the addition of other female athletes would burden Defendants with defending against an entirely new theory of liability. (ER 82:6-84:3.) But this conclusion is flawed because, as explained above, Plaintiffs' ineffective accommodation claim necessarily requires an analysis of UCD's accommodation of female interest program-wide. Further, any injunctive relief would necessarily impact all women athletes at UCD.

The proposed amendment did not allege any new theories of liability or change the scope of the action; it merely would have added three current women athletes at UCD who were ready and willing to serve as class representatives. Discovery regarding the availability of opportunities in other sports had already been conducted and relied upon by experts in the case. *(E.g.,* ER 5939-68; 6108-20; 6201-39.) In addition, Defendants had eight months before the close of discovery to conduct any discovery specific to the new plaintiffs. And Defendants knew Plaintiffs' Title IX claim involved the entire athletics program. The test for allowing amendment is not whether defendants will be disadvantaged at all, but whether they would be "unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the amendments been timely." *In re Vitamins Antitrust Litig.*, 217 F.R.D. 34, 36 (D.D.C. 2003) (citations omitted); *Hartford Ins. Co. v. Socialist People's Libyan Arab Jamahirya*, 422 F. Supp. 2d 203, 206 (D.D.C. 2006).

Given the scope of the case, the discovery already conducted, and the amount of time remaining to litigate this case, the court abused its discretion in denying the motion to amend under Rule 15(a). *See Bertrand v. Sava,* 535 F. Supp. 1020, 1023 (S.D.N.Y. 1982), *rev'd on other grounds,* 684 F.2d 204 (2d Cir. 1982).

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO UCD ON PLAINTIFFS' TITLE IX CLAIM.

A. Applicable Standard of Review.

This Court reviews all grants of summary judgment de novo. *See Clicks Billiards, Inc. v. Sixshooters, Inc. (Billiards),* 251 F.3d 1252, 1257 (9th Cir. 2001) ("Viewing the evidence in the light most favorable to the nonmoving party . . . and drawing all reasonable inferences in its favor, [the Court] must determine whether the district court correctly applied the relevant substantive law and whether there are any genuine issues of material fact." (citations omitted)). The district court's interpretation of Title IX is reviewed de novo. *Neal,* 198 F.3d at 766. Summary judgment may be rendered only if all evidence shows "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(c).

All evidence submitted on behalf of the non-moving parties must be believed and all justifiable inferences must be drawn in their favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986); *Easter v. Am. West Fin.,* 381 F.3d 948, 949, 960 (9th Cir. 2004). The weighing of evidence is a jury functions not suitable for resolution on summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Soremekun v. Thrifty Payless, Inc.,* 509 F.3d 978, 984 (9th Cir. 2007).

B. The District Court Erred in Applying the Notice Requirement of Title IX Sexual Harassment Cases to Plaintiffs' Ineffective Accommodation Claim.

The district court held that Plaintiffs' claim for damages under Title IX is barred as a matter of law because Plaintiffs did not give UCD actual notice of their ineffective accommodation charge. This holding is legally and factually in error. The court's error was, in significant part, caused by its failure to recognize two distinct concepts of notice in Title IX jurisprudence - notice required under the Spending Clause to an institution of potential liability for its *own* Title IX violations when it accepts federal funds (*Pennhurst* notice), and actual notice to the institution when the acts of *third*

parties, e.g., a teacher or a student, who engaged in sexual harassment are at issue *(Gebser* notice). There is no question that UCD had *Pennhurst* notice that it was subject to liability for violations of the Title IX athletics regulations and policies. And there is no reasonable interpretation of *Gebser* that would cause it to be applied here.

1. Title IX Imposes No Actual Notice Requirements on Plaintiffs Challenging an Institution's Discrimination in its Athletics Program.

Plaintiffs seek to hold UCD liable under Title IX for its own acts in administering its athletics program. Title IX explicitly provides that "[n]o 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). (AD 1.) As the Supreme Court explained in *Pennhurst,* 451 U.S. at 17, legislation such as Title IX that is enacted pursuant to the Constitution's Spending Clause is in the nature of a contract: "in return for federal funds, the States agree to comply with federally imposed conditions." Those conditions must be clear, as there is "no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id*. In accepting federal funds, UCD accepted its obligation under Title IX not to discriminate against women in the operation of its programs. That this includes the obligation not to discriminate in athletics, as defined by the longstanding Title IX athletics regulations and policies, is not reasonably subject to dispute. Plaintiffs are not attempting to hold UCD liable for some novel theory of discrimination. Instead, they have alleged a straightforward, established claim that UCD has failed to provide equal participation opportunities in its athletics program.

Further, UCD has been on notice since *Cannon v. Univ. of Chi.,* 441 U.S. 667 (1979), that it is subject to suit under Title IX by individuals, and since *Franklin,* 503 U.S. 60, that those suits can subject it to liability for monetary damages. *See Franklin,* 503 U.S. at 75 ("Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe."); *Jackson v. Birmingham Bd. of Educ,* 544 U.S. 167, 182 (2005) ("Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when we decided *Cannon*.").

As the Supreme Court recently stated, "Title IX has no administrative exhaustion requirement and no notice provisions. Under the implied private right of action, plaintiffs can file directly in court, . . . and can obtain the full range of remedies, . . ." *Fitzgerald,* 2009 WL 128173, at *7. Thus, while the express enforcement mechanism of Title IX is an administrative procedure resulting in the withdrawal of federal funds from institutions that are not in compliance, *see* 20 U.S.C. § 1682, the implied right of action operates independently, and allows private plaintiffs to seek both injunctive relief and damages. *Id*.

2. The Actual Notice Requirement in Sexual Harassment Cases.

In *Gebser,* the Court addressed whether a school district could be held liable for a student's sexual harassment by a teacher who involved her in a secret sexual relationship. *Gebser,* 524 U.S. at 274. The student sought to hold the school district liable for the teacher's conduct by applying two alterative theories of agency liability: either *respondeat superior,* that the teacher was aided in carrying out the sexual harassment by his position of authority, irrespective of the district's knowledge of the harassment; or constructive notice, where the district knew or should have known about the harassment but failed to uncover and eliminate it. *Id*. at 282.

The Court concluded that these agency principles did not apply to attach liability to the school district for the teacher's unlawful conduct. Instead, for the district to be liable for damages for the acts of the teacher, the Court established the requirement that an authorized employee or official have actual notice of the sexual harassment and react with deliberate indifference to that harassment. *Gebser,* 524 U.S. at 290-91. Thus, in a case that seeks to hold the funding recipient liable for money damages not for its own actions, but for the acts of third parties, the recipient should only be liable for the rogue conduct of an employee if the recipient knew of the conduct and failed to address it. *Id*. at 287-91.

In *Davis ex rel. LaShonda v. Monroe County Bd. of Educ. (Davis)*, 526 U.S. 629, 639-40 (1999), the Supreme Court reaffirmed that the type of notice explained in *Gebser* is required only where - unlike here - a plaintiff seeks to hold a funding recipient liable for the independent conduct of third parties. The Court held that, as in *Gebser,* a funding recipient can be liable for "its *own* decision to remain idle in the face of known student-on-student harassment in its schools." 526 U.S. at 641 (emphasis in original).

Nothing in these decisions suggests that the difficult standard of deliberate indifference to actual knowledge of discrimination applies to situations where - as here - the funding recipient itself is intentionally violating Title IX by excluding persons from, denying benefits to, or subjecting persons to discrimination on the basis of sex in its own operation of its programs or activities. *Id*. at 640-41.

3. The District Court's Erroneous Application of *Gebser*.

That the Supreme Court in *Gebser* and *Davis* required actual notice to a funding recipient of the sexual harassment by a teacher or a student of another student and deliberate indifference to that harassment before holding the recipient liable in a suit for money damages imposes no unmet burden on Plaintiffs in this *effective accommodation* case.

First, *Gebser* notice is only required in cases of sexual harassment by a third party, because the Supreme Court concluded that agency principles are not applicable in Title IX cases. *See Davis,* 526 U.S. 629 (1999); *Reese v. Jefferson Sch. Dist.*, 208 F.3d 736, 739 (9th Cir. 2000). Plaintiffs do not seek to recover for sexual harassment by a teacher or a student.

Second, Plaintiffs do not, and need not, rely on any type of agency theory to establish UCD's violation of Title IX because Plaintiffs claim that UCD *itself* has been discriminating and continues to discriminate against women in the operation of its athletic program. UCD is fully and uniquely responsible for the level and extent of athletic opportunities it provides and decides how many opportunities to provide to its female and to its male students. It has affirmative obligations to comply with Title IX in the provision of these opportunities - obligations that it has utterly failed to meet in this case.[FN10] Thus, in cases such as this where the funding recipient itself is charged with sex discrimination, individuals bringing suit under Title IX do not have a separate obligation to inform the funding recipient of its own discriminatory conduct.

> FN10. In fact, under the 1994 Equity in Athletics Disclosure Act, UCD must annually file and make publicly available a report with the United States Department of Education detailing information about its athletics program. *See* 20 U.S.C. § 1092. In effect, as its name suggests, the law requires universities to perform an annual self-audit of many of Title IX's requirements. Among other data, UCD must report the number of females and males enrolled, and the number and gender of participants on each varsity team that it sponsors. The notion that it is not on "notice" of the gender equity, or lack thereof, in its athletics program thus is nonsensical.

The district court's reliance on Title IX's administrative process to avoid this conclusion is misplaced. As the Supreme Court recently reiterated, Title IX has no exhaustion requirement; its administrative scheme is independent of its implied right of private action. *Fitzgerald,* 2009 WL 128173, at *1, 7. The language in *Gebser* that referenced the administrative scheme simply underscored the concern with holding the funding recipient liable for acts of which it was unaware. *See Gebser,* 524 U.S. at 289-90 (implied right of action should not permit "substantial liability without regard to the recipient's knowledge").

Third, the district court never suggests that UCD somehow did not know that it was not providing equal athletic opportunities to its women students, but is instead imposing a requirement that Plaintiffs were obliged to give formal notice of that fact before they could sue for damages. This requirement goes beyond the *Gebser* standard, has no foundation in reason or precedent, and is in direct conflict with the express terms of the three-part test, which states

that a school is not in compliance if it cannot meet one of the three prongs. That is precisely the situation UCD finds itself in.

Where, as here, UCD itself is responsible for all relevant aspects of its athletics program, including the obligation to ensure its compliance with Title IX, no additional notice is required before a student may bring a private right of action for damages for the University's failure to meet its Title IX obligations. It is necessarily on notice of its own conduct. (ER 1204 ¶¶ 1-2; 1996-97 ¶ 4; 2004-07 ¶ 5; 6413:8-22.) *See generally* *Pederson v. La. State Univ.*, 213 F.3d 858, 878-83 (5th Cir. 2000) (holding university accountable for Title IX damages on equal accommodation theory).

The *Pederson* case is directly on point. It addressed whether the notice requirements in Title IX sexual harassment cases applied where the claim was a university's failure to provide equal athletic opportunities. The court held: "In the instant case, it is the institution itself that is discriminating. The proper test is not whether it knew of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity, and, as we noted above, we are convinced that they did." *Id*. at 882. This conclusion, of course, goes hand in hand with UCD's affirmative obligations to comply with Title IX's provisions. *See,* e.g., 34 C.F.R. § 106.4(a).

In this case, therefore, this Court should make clear that the district court's application of *Gebser* notice was erroneous and that its reliance on *Grandson v. Univ. of Minn.*, 272 F.3d 568 (8th Cir. 2001) is entirely misplaced. *Grandson* is neither controlling nor persuasive.[FN11] Prior to the district court's decision, *Grandson* stood alone in applying *Gebser* to an athletics case. The reason for this is evident. As *Davis* makes plain, *Gebser* applies only in sexual harassment cases seeking damages where there is a question as to whether the federal recipient itself engaged in discrimination. *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" (citation and internal quotation marks omitted)).

> FN11. In fact, a decision by the Eighth Circuit the year after *Grandson* was decided that addressed an ineffective accommodation claim under Title IX made no reference to *Grandson* or to *Gebser*. *See* *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002).

Recognizing this concept, this Court has applied *Gebser* and *Davis* only in the context of sexual harassment claims. *See, e.g., Reese,* 208 F.3d at 739. The district court's decision is also contrary to those of other courts in this Circuit. *See* *Johnson v. Clovis Unified Sch. Dist.*, 2007 WL 1456062, at *3 (E.D. Cal. May 17, 2007); *Michelle M. v. Dunsmuir Joint Union Sch. Dist.,* 2006 WL 2927485, at *4 (E.D. Cal. Oct. 12, 2006).

Finally, as established below, even if the *Grandson* case correctly stated the legal principles, it is distinguishable. Whereas *Grandson* accepted the district court's questionable determination that administrators at the defendant campus somehow were unaware of the unequal treatment of women in athletics, *Grandson,* 272 F.3d at 575-76, the evidence here plainly establishes that UCD was well aware of its obligations and of the facts giving rise to Plaintiffs' ineffective accommodation claim.

C. The Evidence Establishes That UCD Was on Notice of Plaintiffs' Ineffective Accommodation Charge.

Plaintiffs should not have to provide notice to an institution of its own Title IX violations. Even if the Court accepts the district court's holding that Plaintiffs were required to provide UCD with some sort of "notice" of its violations of Title IX, 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.

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 had direct oversight and responsibility for all aspects of its athletic program relevant to Plaintiffs' ineffective accommodation claim, including ensuring the University's compliance with Title IX. (ER 1204 ¶¶ 1-2; 1996-97 ¶ 4; 2004-07 ¶ 5; 6413:8-22.) UCD admits, as it must, that it received notice of Plaintiffs' OCR complaints. (ER 1831; *see also infra*. note 12.) The district court held that this notice was insufficient, however, because Plaintiffs' complaints related to wrestling and were not general enough. *(See* ER 21:12-13 ("the complaints allege specific acts of unequal treatment with respect to women's wrestling").) The court held that this, as a matter of law, was not enough to demonstrate that "defendants received notice and an opportunity to cure an ineffective accommodation claim." (ER 22:2-3.)

The district court's position is erroneous and should be reversed. First, the court plainly took every inference *against* Plaintiffs (the non-moving party in the summary judgment proceedings), by interpreting a direct notification of sex discrimination relating to women's wrestling as not being a notification of "ineffective accommodation." But the district court's must view all evidence in favor of the non-moving party. *Billiards,* 251 F.3d at 1257.

Second, the district court's conclusion cannot be reconciled with the applicable standards under Title IX, which require an analysis of compliance on a programmatic rather than sport-specific basis. Policy Interpretation, 44 Fed. Reg. at 71,417, Part VII. B.5. (AD 10.) *See also id*. at 71,422, App. B, Resp. to Add'l Comments (8). (AD 15.) Plaintiffs' OCR complaints about UCD's failure to effectively accommodate women in the varsity wrestling program were therefore *necessarily* a complaint that UCD was failing to effectively accommodate women in its athletics program in violation of Title IX. The distinction drawn by the district court is untenable.

Third, the record below makes clear that in addition to Plaintiffs' OCR complaints (ER 1221 ¶ 77; 2433-54), UCD was on notice of Plaintiffs' complaints of discrimination, from, among other things, Plaintiffs' meetings and attempted meetings with Defendants Warzecka, Franks, and Vanderhoef,[FN12] the involvement of state legislators, the student senate, and the media *(see* ER 1221 ¶ 76; 1831-32; 1886-88; 1889-1939; 2158-2267; 3103:5-3104:1; 4087:9-23), 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 possible legislative sanction generated by UCD's elimination of women's varsity wrestling. *(See id. & supra* note 12.)[FN13] These events raised broad questions about UCD's sex discrimination and Title IX compliance in regards to its athletic program. (*Id.*)

> FN12. (ER 1165-68 ¶ 93; 1205-6 ¶¶ 6 -11; 1620-22; 1710-13; 1778-842; 1831-32; 1883-947; 2269-74; 3103:5-3104:1; 3151:15-3152:9; 4087:9-23; 4105:15-4106:3.)
>
> FN13. When the decision by UCD to eliminate women's wrestling became public, there was a strong public backlash. (ER 1221 ¶ 76; 1886-88; 1889-1939; 2158-2267; 3103:5-3104:1; 4087:9.23.) Assemblywoman Helen Thomson threatened to withhold significant funding towards a UCD building, a protest was held, flyers and petitions were distributed, campus and statewide newspapers published news articles, and UCD's administration was contacted by concerned alumni. *(Id)*

Again, erroneously taking every inference *against* the non-moving party, the district court held that all of these notifications from Plaintiffs to UCD that it was engaged in sex discrimination in its sports program were supposedly so specific to wrestling as not to place UCD on notice of the broader issue. *(E.g.,* ER 22-25.) In fact, however, the evidence shows that UCD regarded the OCR complaints and OCR's investigation as *a program-wide* grievance. (ER 1221 ¶ 80; 1871; 4197:14-4198:5; 4199:4-9; 4202:10-13; 4203:1-9; 4204:1-8; 4204:18-20; 4377:24-4378:12.)

The district court's distinction between notices related to wrestling and broader Title IX violations is also inexplicable in light of the district court's own earlier statement that the "gravamen" of the Complaint in this case revolved around UCD's handling of its women's wrestling program. (ER 44:24-27.) Moreover, on February 2, 2007, the district court denied Plaintiffs' permission to amend their Complaint because the original Complaint related "only" to opportunities for women in the wrestling program, but the amendments would involve other sports. The district court's switches in

position leave the Plaintiffs whipsawed - on the one hand, their claims only relate to wrestling and other issues may not be raised; on the other hand, their notices to UCD of sex discrimination in sports supposedly only related to wrestling rather than to broader issues and therefore were insufficient as a matter of law to allow this case to proceed. The only consistent element to the district court's approach is that no matter what Plaintiffs said or did, they could not win.

Moreover, UCD's awareness of its program-wide noncompliance is evidenced by dozens of internal memos and official reports in which UCD admits that it is concerned about its compliance with Title IX. *(Supra* note 12.) Reports, memoranda, and emails from 1976, 1991, 1992, 1993, 1994, 1997, 1998, 2000, 2001, and 2002 acknowledge and warn of UCD's failure to comply with Title IX. *(Id.)* In 1976, UCD issued an internal report showing serious deficiencies in Title IX compliance. *(See* ER 1703.) In 1991, UCD issued a report by a committee studying compliance with Title IX in UCD athletics. (ER 1710-13.) The Report warned of "resistance within the Athletic Program to UC Davis's efforts to ensure total compliance with Title IX." (ER 1703.) The Report also revealed that "participation by females [in varsity athletics] is clearly *not substantially proportionate* to their enrollment" at UCD. (ER 1711 (emphasis in original).) In 1997, an internal committee at UCD again stated that participation levels "are not substantially proportionate to the undergraduate population of the institution. This suggests potential non-compliance with Title IX participation level requirements." (ER 1620.) In 1998, Defendant Warzecka acknowledged that a gender imbalance in the athletic department "is not a new issue." (ER 1624.) Indeed, UCD's Chief Title IX Compliance Officer admitted that he had a continuing concern about UCD's female participation rates throughout his tenure and believed UCD should be doing more to achieve Title IX compliance, stating "we could and should be doing more." (ER 1207 ¶ 16; 4095:19-4097:6; 4144:20-4145:15; 4161:24-4162:4.)

All of this evidence contradicts the district court's holding that UCD had not received enough notice to "provide some indication of the basis for the institution's non-compliance so that an institution may attempt to remedy the situation voluntarily." (ER 23:9-12.) UCD was clearly aware of its broad problem of noncompliance with Title IX. This was hardly a secret known only to a handful of women wrestlers who refused to let the world know; this was a fact that was hammered by UCD's own personnel to administrators time and time again. At a minimum, the evidence established a question of material fact that needed to be resolved by the jury. *See, e.g., Gray v. First Winthrop Corp.*, 82 F.3d 877, 881 (9th Cir. 1996) (inquiry notice is a matter for the jury).

Further, the distinction relied upon by the district court is also inconsistent with UCD's own statements throughout this litigation, which demonstrate that it knows that a complaint from women athletes about unequal accommodation is a complaint that goes to UCD's athletic program as a whole. As UCD stated in its briefing in the district court: "A claim of ineffective accommodation encompasses the entire athletic program for the underrepresented sex - not just one specific aspect." (ER 6058:28-6059:1.) Its expert also examined compliance by looking at the athletics program as a whole. (ER 5939-59.)

Finally, when this Court examines the notice requirement demanded by the district court, it becomes clear that it imposes upon ordinary students an extraordinary burden. The crux of the court's holding is not that Plaintiffs gave UCD no notice of sex discrimination, but rather that Plaintiffs' OCR complaints were insufficiently comprehensive and failed to specify the exact legal theories that would later be pursued, 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.[FN14] Especially in light of the remedial intent of Title IX, this cannot possibly be the law. Particularly 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 - the district court erred in finding that UCD was ignorant of allegations of Title IX violations and, on that basis, stamping out Plaintiffs' ineffective accommodation claim as a matter of law.

> FN14. Pleading requirements under Rule 8 are - by express congressional design - nontechnical and extremely liberal. Fed. R. Civ. P. 8(a) & (e). 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) (citation, internal quotation marks, and emphasis 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). The district court's requirement of such specificity conflicts with its earlier statement that the United States Supreme Court had "rejected applying a heightened pleading standard to discrimination claims." (ER 53:17-18 (citing *Swierkiewicz,* 534 U.S. at 511).)

IV. AFTER THE NOTICE DEFENSE IS STRIPPED AWAY, IT IS CLEAR FROM THE RECORD THAT UCD DISCRIMINATES AGAINST FEMALE ATHLETES IN VIOLATION OF TITLE IX AND § 1983.

The stakes involved in the forgoing discussion of the notice defense to Plaintiffs' Title IX claim and the dismissal of the § 1983 claims become clearer when they are placed in the broader context of this case: the record establishes that UCD has plainly not provided the opportunities to women athletes required by federal law.

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

UCD has failed to provide female students, including Plaintiffs, with an equal opportunity to participate in varsity athletics. The evidence established that UCD was not in compliance with Title IX under any of the three prongs, or (at least) that a material issue of fact existed on this point.

The three-part test should be viewed as a whole:
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., 1997 WL 1524813, at *9 (E.D. Cal. Dec. 26, 1997).

Because of the historic discrimination against females in athletics, Title IX requires "continued affirmative steps" by institutions to achieve equity, which " '[i]n most cases . . . will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels.' " *Williams,* 998 F.2d at 176 (quoting Policy Interpretation, 44 Fed. Reg. at 71,414) (AD 7).

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

UCD has conceded that it cannot rely on Prongs One or Three of the three-part 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. (ER 1205 ¶ 5; 1710-13; 2279:1-18; 2289:11-2290:8; 3181:25-3182:9; 3195:25-3196:3; 5944 ¶14.) Indeed, in 2001-2002, the very year that UCD forced women wrestlers to compete against men, UCD's female participation proportionality rates fell to their worst level since 1997, with a shortfall of 156 varsity opportunities for women. (ER 1961.) 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 accommodate the interest and ability of female students in varsity athletics in violation of Prong Three. (ER 1212 ¶ 42; 1713; 4400.) Hundreds of female students have sought varsity status at UCD, only to be rejected time and time again. UCD's own admissions establish that it has known for decades that it does not accommodate the significant interest and ability of women in athletics. *(Supra* note 12.) Thus,

the legality of UCD's conduct turns on whether UCD has established, by evidence of undisputed material facts, that it was in compliance with Prong Two and is entitled to judgment as a matter of law. 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.

2. 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 should have precluded 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, Part VII.C.5.a. (2) (emphasis added). (AD 11.) OCR's 1996 Clarification of the three-part test 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." (AD 24.) Of paramount importance is not the addition of teams, but rather whether "an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex." (AD 29 n.2.) Both parties' Title IX experts agree that an institution must expand actual participation opportunities for women every two to three years to remain in compliance with Prong Two. (ER 1962; 3200:13-18; 3216:25-3217:16; 3246:3-3247:4; 3436:4-17; 3459:17-3460:11; 3488:13-3489:5.) Both the OCR and the few courts that have addressed Prong Two have confirmed that it is a factually intensive analysis, which considers the number of students participating in athletics, as well as the developing interest and abilities of other students. (AD 24-26.) *Cohen v. Brown Univ. (Cohen I)*, 809 F. Supp. 978, 981-82 (D.R.I 1992), *aff'd,* 991 F.2d 888 (1st Cir. 1993). Court decisions 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.*, 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, Part VII.C.5.a.(2) (AD 10); *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. (ER 1207 ¶ 17; 1209 ¶ 27; 1375; 1388; 1401; 1427; 1453; 1493; 1549; 1613; 1710-13; 1961; 4132.) Additionally, even if the evidence established that UCD has expanded athletic opportunities for women, which it does not, UCD did not do so in a manner that was demonstrably responsive to the developing interest and abilities of women. UCD rejected applications for varsity status from hundreds of UCD female club sports athletes between 1995 and 2005 (ER 1211 ¶ 37; 5763-893), as well as terminated existing varsity opportunities, including Plaintiffs' (ER 1209 ¶ 27; 1375; 1388; 1401; 1427; 1453; 1493; 1549; 1961).

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

Title IX's enactment did nothing to prompt UCD to expand its women's program to ensure equity. UCD did not expand female participation opportunities from 1972 to 1996. (ER 1207 ¶ 17; 1613; 1710-13; 4132.) Instead, UCD eliminated women's golf and women's field hockey during this time period. (ER 1208 ¶ 19; 1710-13; 2324.) 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. (ER 1207 ¶ 17; 1613; 1710-13; 4132.)

UCD also did not expand actual female opportunities from 1999 to 2005. (ER 1209 ¶ 27; 1375; 1388; 1401; 1427; 1453; 1493; 1549; 1961.) 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. *(Id.)*

In the court below, 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. 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 relative to the percentage of women students. But from 1999 until 2005, that margin fluctuated (it 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. Moreover, the reason that margin improved at all between 1999 and 2005 was because UCD was using roster caps to reduce the number of men's varsity opportunities at the same time they were eliminating women's opportunities, thus improving the appearance, but not the reality, of women's athletics at UCD. As conceded by UCD's Title IX expert, reductions in the men's athletic program is not program expansion for women under Prong Two. (ER 3184:17-3185:3; 3280:8-14; 4212:16-4313:5.) *See* OCR's 1996 Clarification (AD 25) (OCR will not find compliance with Prong Two "where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone.") (AD 25.) *See* Roberts, 998 F.2d at 830. ("[T]he ordinary meaning of the word 'expansion' may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs.")

The evidence 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. (ER 1204 ¶ 4; 1210 ¶ 33; *compare* ER 1388 *with* 1401 *and* 1427; 2644-45; 2945:19-2946:18; 3206:8-3213:16; 3241:11-14; 3248:3-6.) UCD took no action to replace these eliminated participation opportunities much less engage in program expansion. Between 1998 and 2005, female enrollment added over 2,200 women to UCD. (ER 1209 ¶¶ 27 & 29; 1375; 1388; 1401; 1427; 1453; 1493; 1549; 1961; 3206:8-3212:16; 3241:11-14; 3248:3-6.) At the same time, 63 female participation opportunities were *dropped* at UCD, a drop that UCD's expert conceded was "drastic." *(Id.)* By 2005, the athletic participation rates for women were at the lowest point since 1997. (*Id.)* 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.

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

UCD's elimination of women's wrestling at a time when it was not otherwise complying with Title IX also precluded 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 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 non-compliance with Prong Two); *Roberts,* 998 F.2d at 830 (elimination of women's softball team was evidence of non-compliance with Prong Two).

UCD's contended below that its elimination of the women's varsity wrestling program was not discriminatory because Plaintiffs had the opportunity to try out for the men's wrestling team. Requiring that women compete against men in a contact sport, in order to have a varsity athletic opportunity, is hardly nondiscriminatory. 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).[FN15]

FN15. In fact, UCD's failure to create a separate women's wrestling team upon Plaintiffs' requests beginning in 2001 is a *distinct* violation of Title IX. 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 that, with respect to contact sports:
> 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.
>
> Policy Interpretation, 44 Fed. Reg. at 71,418, Part VII.C.4.a. (AD 11.) In the court below, UCD disregarded this aspect of Title IX in its entirety. Instead, it claimed 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. 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, ability and competition to sustain a viable women's wrestling team, UCD violated Title IX by refusing to field a women's wrestling team after being asked repeatedly by Plaintiffs to do so. (*See* ER 1831; 2432; 2498:23-2499:27; 2889:9-25; 3733:22-3734:19.)

Plaintiffs were varsity wrestlers who were eliminated from the wrestling program because of their sex, and were then refused the creation of a separate women's team by UCD. (ER 2512; 2935:9-2939:16; 3665:14-3666:8.) UCD eliminated equal opportunities and replaced them with discriminatory requirements for continued participation. This violates Title IX.

V. CONCLUSION

For the reasons set forth above, this Court should reverse: (1) the district court's order dismissing Plaintiffs' § 1983 claims against all Defendants; (2) the district court's order denying Plaintiffs' leave to modify the scheduling order and to amend to add current students at UCD; (3) the district court's order granting summary judgment to UCD on Plaintiffs' Title IX claim; and (4) the judgment for Defendants in this case. The case should be remanded for trial.

Appendix not available.

Arezou MANSOURIAN, et al., Plaintiffs/Appellants, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants/Appellees.
2009 WL 2444218 (C.A.9) (Appellate Brief)

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