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.
March 17, 2010.

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
Date of Decision: February 8,2010
Judges: Schroeder, Berzon and Shadur

Appellants' Response to Respondent's Petition for Rehearing and Rehearing En Banc

James C. Sturdevant, SBN 94551, (jsturdevant@sturdevantlaw.com), Monique Olivier, SBN 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.Noreen Farrell, SBN 191600, (nfarrell@equalrights.org), Equal Rights, Advocates, 180 Howard Street, San Francisco, CA 94105, Telephone: (415) 621-0672, Facsimile: (415) 621-6744.Kristen Galles, SBN 148740, (kgalles@comcast.net), Equity Legal, 10 Rosecrest Avenue, Alexandria, VA 22301, Telephone: (703) 683-4491, Attorneys for Plaintiffs/appellants Arezou Mansourian, Lauren Mancuso, and Christine Wing-Sing.

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INTRODUCTION

On February 8, 2010, a panel of this Court determined that after over seven years in litigation, Plaintiffs - female athletes who simply wanted an opportunity to wrestle - are entitled to their day in court against Defendants, the Regents of the University of California and certain of its officials ("UCD"), for UCD's conduct in stripping Plaintiffs of their varsity status and depriving them of equal sports participation opportunities. The panel's decision simply remands the case to the district court for trial, but UCD seeks a further delay by erroneously claiming that the decision expressed "statements" that conflict with established Title IX standards and must be revisited. (Petition for Rehearing ("PFR") 1.)

None of the issues raised by UCD demonstrates the exceptional circumstances that would warrant en banc review or panel rehearing. UCD does not argue that the decision presents any inter- or intra-circuit conflict. Indeed, it concedes that there is *no* appellate case law on the issues it argues here. Instead, UCD points to the very agency interpretation that the Court applied and argues that the Court got it wrong. Rehearing is not, however, a remedy for a party that merely does not like the outcome of a decision.

UCD's petition is framed by several fundamental misunderstandings regarding the posture of the case, the holdings of the Court, and the reach of this decision. The case came to this Court on review of an order granting summary judgment in favor of UCD on the basis that Plaintiffs were required, but failed, to give notice to UCD before seeking damages under Title IX. The Court reversed that order, and UCD does not seek review here of that determination.

Instead, UCD argues that the Court erred when it then considered and rejected UCD's own argument that summary judgment should be affirmed on the alternative ground that it was in compliance with Option Two of Title IX's three-part participation test because it proved a history and continuing practice of program expansion for female students. UCD's petition contends that the Court "held," contrary to accepted Title IX standards, that program expansion must be measured by an increase in the number of female athletes as opposed to the number of participation opportunities, thus precluding an institution from double counting, i.e., counting an athlete that plays on two teams as two participation opportunities. But this Court made no such holding. Rather the Court properly applied the Title IX standards, as to which all parties and the panel agree, and *held* that UCD was not entitled to summary judgment because it failed to prove as a matter of law on an undisputed factual record that it has a history and continuing practice of program expansion for women's athletics. (Op. 2227.)

UCD concedes that the Court properly articulated the standards (PFR 1-2), but claims that it went awry by focusing on the *number of athletes* rather than the *number of participation opportunities* when it considered and rejected UCD's claim that the addition of a new indoor track team was evidence of program expansion. As UCD acknowledges, however, this argument presupposes that a new team was actually added. (PFR 2 ("[i]f a new team is added, the opportunities created by that addition count toward Option Two compliance").) But the issue on *this* factual record was whether a new team was created or whether, as in *Cohen v. Brown Univ. (Cohen I)*, 809 F. Supp. 978, 991 (R.I. 1992), *aff'd,* 991 F.2d 888 (1st Cir. 1993), UCD was improperly attempting to claim credit for a team, and thus participation opportunities, that did not exist. The issue was not, as UCD attempts to cast it now, how to count participation opportunities if there are in fact two teams. And it certainly was not, as amici would have this Court believe, a pronouncement that an institution can never double count athletes for purposes of compliance with Title IX's participation requirements.

The issue actually presented in UCD's petition, therefore, is not the appropriate legal standard to employ, but how that standard applies to the facts in the summary judgment record. Equally important is *which version* of the facts controls. While UCD clearly wants the Court to accept its version of the facts that it "added" an indoor track team and therefore "added" participation opportunities (as is apparent from its improper recitation of *its version* of the facts both in its Answering Brief on the merits and again in the petition), the operative facts are those in which all reasonable inferences favor *Plaintiffs,* the non-moving party.

What's more, UCD does not even attempt to argue that the grounds it raises here would change the outcome of this Court's decision. That is, even if the Court gave UCD "credit" for adding indoor track, that finding would not alter the

ultimate conclusion that UCD failed to meet its burden on summary judgment.

The other arguments that UCD raises similarly do not justify review of the panel decision. Its claim that the decision conflates two parts of the three-part test is simply incorrect. Its claim that the addition of golf should be viewed as responsive to female student interest is another factual inquiry that does not raise a legal issue for this Court's reconsideration.

To the extent that UCD believes it has additional facts it can raise on its behalf at trial, nothing in the Court's decision precludes it from doing so. En banc review, however, should be reserved for fully developed legal conflicts, not the uniquely factual question this Court considered and addressed in its decision.

Plaintiffs are entitled to their day in court without further delay. The petition should be denied.

ARGUMENT

I. THE COURT'S APPLICATION OF ESTABLISHED TITLE IX STANDARDS TO THIS FACT INTENSIVE RECORD IS SOUND AND DOES NOT WARRANT EN BANC REVIEW.

A. UCD Fails to Demonstrate the Extraordinary Circumstances that Call for En Banc Review.

UCD has not and cannot demonstrate that: (1) consideration by the full court is necessary to secure or maintain uniformity of the court's decisions, or (2) the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a) & (b); 9th Cir. R. 35-1; *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc).

UCD concedes, as it must, that there is no conflict whatsoever between the panel ***4** decision and any other appellate court decision. Instead, it claims that the panel decision "contradicts" two district court decisions and agency regulations interpreting certain Title IX standards and therefore presents "an issue of exceptional importance." (PFR 1, 2.) Not only does UCD's argument reach well beyond circumstances where en banc review would be warranted, but it starts with the faulty premise that the panel decision conflicts with *any* published statutory, regulatory or other law construing the Title IX standards. There are no circumstances presented here that justify en banc review.

B. The Court Properly Considered and Ruled on UCD's Alternative Grounds for Summary Judgment.

Throughout its petition, UCD repeatedly suggests that it was inappropriate for the Court to consider and address whether UCD was entitled to summary judgment on the basis that it was in compliance with Option Two, claiming that the Court did not have the benefit of "plenary briefing." (PFR 1, 14.) But in its Answering Brief, UCD itself urged that the Court affirm summary judgment on the alternate ground that it complied with Option Two. (Appellees' Answering Brief ("AAB") 60.) In fact, although it sought supplemental briefing, UCD argued that it was in compliance with Option Two and also stated that "there is sufficient evidence in the record on which this Court may affirm the District Court's judgment in favor of Defendants other than on the notice issue." (*Id.*) There is no credible dispute that the Court had the authority to consider and address UCD's alternative ground for summary judgment.[FN1]

> FN1. Interestingly, UCD urged the Court on appeal to consider an issue - qualified immunity - that it was forced to concede neither party had the opportunity to brief in the district court. (*See* AAB 29,32-33.)

Moreover, the matter was fully briefed (with a factual record of over 5,000 pages) in the court below. Thus, this Court had the benefit of a complete factual and legal record on this issue as well as additional briefing on appeal. After a careful review, the Court held that UCD was not entitled to summary judgment on the alternative ground that it ***5** complied with Option Two of the three-part test. (Op. 2227.) As demonstrated below, that conclusion was correct and

in no way warrants rehearing.

C. The Court Properly Considered and Did Not Credit UCD's Claim on Summary Judgment that It Had "Added" an Indoor Track Team.

UCD's primary contention is that the Court, in discussing and applying Option Two of the three-part test to measure effective athletic accommodation, "made statements regarding how Title IX compliance is measured that disturb settled law and conflict with authoritative agency interpretations of Title IX." (PFR 1.) The Court did no such thing. It thoughtfully and correctly applied the law to a full factual record presented to this Court on the de novo review of a summary judgment order.

UCD's argument is based primarily on this passage:
UCD represents that it created another women's varsity team, indoor track, in 1999. The addition of indoor track, however, cannot be considered evidence of program expansion. It did nothing to expand the number of female athletes, as all the women participating in indoor track also participated in an existing varsity sport. *See* *Cohen v. Brown Univ.*, 809 F.Supp. 978, 991 (R.I. 1992), *aff'd,* 991 F.2d 888 (1st Cir. 1993) (dismissing the alleged addition of winter track as "a sport that merely involved providing indoor space to the existing women's track team").

(Op. 2229.) UCD claims that this language is a departure from settled law because it suggests that a school cannot count students who participate on two teams as separate participation opportunities for purposes of Title IX. Amici, the NCAA and a selection of colleges, take this one step further and argue that the decision lays down a rule of law that a university can never double count athletes (i.e., count an athlete who participates on two teams as two participation opportunities rather than one) for the purpose of determining compliance with Title IX's participation test.

But the Court's statement - made as part of a comprehensive Option Two analysis - does nothing of the sort. As the dense factual record demonstrates, the issue with respect to indoor track was not whether to count twice a student who participated in track and another team, but whether UCD in fact had an indoor track team, that offered any ***6** additional participation opportunities.

In order to fully understand the Court's statement, a review of its complete analysis is necessary. Tellingly, there is no dispute between the parties, or the parties and the Court, about the appropriate analysis for an effective accommodation violation under Title IX. The Title IX regulations require institutions to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). (Addendum to Appellants' Opening Brief ("AD") 4.) 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.)

Whether an institution has met its "effective accommodation" duty is determined using a three-part test drawn from the Department of Education's 1979 Policy Interpretation, 44 Fed. Reg. 71,413 *et seq.* (1979) (the "Policy Interpretation") (AD 6-16), which is further explained in a 1996 Clarification (AD 17-29). The test provides institutions three options for demonstrating compliance with Title IX. In the district court and in this Court, UCD claimed to have satisfied Option Two by proving that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of its female students.

The Court accurately set forth the legal framework in its decision. (Op. 2218-22.) Citing the 1996 Clarification, this Court noted that the focus is "on whether an institution has expanded the number of intercollegiate participation opportunities for women," but provides institutions "flexibility" in choosing which teams are added," and that the number of "participation opportunities" for women "is defined by the number of female athletes actually playing intercollegiate sports." (Op. 2221.) That is, it is the number of actual "participation opportunities" that is key. All circuit courts discussing the legal standard for Option Two are in accord. *See* *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).

***7** In assessing compliance with Option Two, the Court followed the 1996 Clarification - which UCD agrees is controlling - and reviewed both UCD's history "of adding female participation opportunities" and its "current 'plan of program expansion that is demonstrably responsive to the developing interests and abilities' of women." (Op. 2227.) It also specifically considered and applied the factors identified in the Clarification for Option Two: UCD's record of adding women's intercollegiate teams; UCD's record of increasing the number of women participants on intercollegiate teams; and UCD's affirmative responses to requests by students or others for the addition or elevation of sports. (Op. 2227-28.)

It was in this context that the Court considered - and rejected - UCD's claim that it had offered undisputed facts on summary judgment providing that it created a women's indoor track team in 1999. The record supports that finding. First, UCD's athletics personnel offered contradictory statements about when, and if, indoor track was added. (*See, e.g.,* ER 4289:2-13 (women's track coach believed indoor track season was added in 1994), 4302:6-21, 4305:20-25 (men's track coach testified that it was 1997), 4340:18-4341:2 (athletic director testified that it was 1997 or 1998).)

Second, UCD's own documents and testimony indicate that it treated indoor and outdoor track as *one sport* with an extended season. (ER 1208-09 ¶¶ 23-26, 2758-68, 4419:11-4424:5 ("they were saying that here at UC Davis, we treat it as kind of one budget, one sport"), 4306:9-10 (the season expansion was only approved if it did not require additional funds).) UCD publicized one track schedule with indoor and outdoor meets combined, and UCD's media guides treat indoor and outdoor track as one sport. (ER 4417:2-4418:2,2119-22; *see also* ER 2123-46.) UCD awarded only one grant-in-aid per athlete to cover both the indoor and outdoor season. (ER 4415:10-15, 4416:10-13.)

Third, UCD's facts at best demonstrated that the outdoor track season included some indoor track meets for some athletes because it increased the coaches' ability to ***8** recruit athletes to the existing team and it was convenient, not because it increased athletic opportunities for women. (ER 4288:11-12, 4744:1-6, 1177-79 ¶ 120; *see also* ER 4413:22-4414:1.) In fact, UCD conceded that it did not follow its formal process for adding indoor track. (ER 4286:19-4289:1, 4289:17-22; *see also* ER 4304:17-4305:16, 4306:4-4307:7, 4308:4-4309:1,4438:15-4439:12.) Instead, the coach asked the athletic director to add some indoor track meets to the outdoor track season for some athletes. (ER 4286:19-4289:22,4304:17-4305:16, 4306:4-4307:7, 4438:15-4439:12.) The athletic director agreed, on the condition that any funding came from the already existing budget. (*Id.*)

It was upon this record, then, that the panel properly concluded that UCD's purported addition of indoor track "cannot be considered evidence of program expansion" and cited to *Cohen,* noting that in that case, the district court dismissed the alleged addition of winter track as "a sport that merely involved providing indoor space to the existing women's track team." (Op. 2229.) Obviously, if indoor track was not a new team or new sport, it could not provide meaningful participation opportunities. (AD 24-26.)

Contrary to UCD's and amici's argument,[FN2] therefore, the decision does not announce a new or conflicting rule regarding duplicate counting. There simply was a factual dispute as to whether indoor track had been created as a new team offering new participation opportunities for women at UCD. In the end, what UCD really takes issue with is not a new rule of law, but the proper application of the law to the facts before the Court. This is precisely the type of issue - review of a factual record on summary judgment - that is not appropriate for en banc review.

> FN2. Amici simply restate UCD's argument. Amici also did not have the benefit of knowing any of the factual record before submitting their brief.

This is particularly the case where, as here, UCD does not contend (nor could it) ***9** that the Court's holding would be any different regardless of the outcome of any rehearing. The Court's statements with respect to indoor track were part and parcel of a comprehensive analysis of the entire history of UCD's athletics program as it pertains to participation

opportunities for women. Even if UCD were to get "credit" for the addition of indoor track, the factual record on summary judgment was that UCD *still* did not have a history of expanding opportunities.

Between 1998 and 2005, female enrollment at UCD went from 10,596 to 12,834, adding over 2,200 women to UCD. (*See* ER 1209 ¶ 27.) At the same time, 63 female participation opportunities were dropped at UCD, a drop that UCD's expert conceded was "drastic." (ER 1209 ¶¶ 27, 29.) By 2005, athletic participation for women, even including numbers for indoor track, was at the lowest point since 1997. (ER 1209 ¶ 27, 1091:18-1092:2, 1961.) It was during this time that UCD removed Plaintiffs from the wrestling team. These facts remain constant regardless of how this Court treats indoor track. Because UCD eliminated opportunities at a time when its record was at best stagnant, even under *UCD's version of the facts,* it is not entitled to summary judgment on the basis of Title IX compliance. (Op. 2230-31.) *See* AD 29 n.2; *Barrett v. West Chester Univ. of Pa.*, 2003 WL 22803477, at *7 (E.D. Pa. 2003) (elimination of women's gymnastic team was evidence of non-compliance with part two); *Cohen I*, 991 F.2d at 897-98 (elimination of women's volleyball and gymnastic teams was evidence non-compliance with part two); *Roberts*, 998 F.2d at 828-30 (elimination of women's softball team was evidence of non-compliance with part two).

Finally, UCD's claim that the decision improperly considers the relative percentages of females participating in athletics as compared to their undergraduate enrollment as part of the Option Two analysis fails. (PFR 13-14.) Although proportionality is the hallmark of the Option One test, it does not stand to reason that it is not relevant to the Option Two inquiry. All three options in the three-part test have the same goal, that institutions provide equal participation opportunities to women. Option ***10** One is essentially a statistical analysis: Does an institution provide athletic opportunities for male and female students that are substantially proportionate to their respective enrollments? An "athletic opportunity" under Option One is necessarily the same as an "athletic opportunity" under Option Two. And the 1996 Clarification specifically references the percentages of women participating in athletics as a measurement of Option Two compliance. (AD 25.) The Court properly considered the number of women students at UCD relative to the number of athletic opportunities as a measure of UCD's program expansion. Surely if the number of women enrolled at UCD dropped off sharply, UCD would claim a lesser burden in expanding women's athletics. UCD's suggestion to the contrary makes no sense.

In sum, the Court's decision does not set any higher or different bar for institutions seeking to comply with Title IX. An institution - and a court - must look at the athletic opportunities for women students overall, and must do so in the context of that particular institution's conduct.

D. There Is No Conflict with Any Appellate Decision Regarding the Court's Application of Title IX Standards.

UCD fails to identify a single appellate case that is at odds with the holding of this Court and would create an inter- or intra- circuit conflict justifying en banc review. Moreover, UCD ignores entirely the several circuit cases that discuss or apply the same Option Two legal analysis that the Court employs here. *See Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 176 (3d Cir. 1993) (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' " (quoting Policy Interpretation, 44 Fed. Reg. at 71,414 (AD 7))); *see also Roberts*, 998 F.2d at 828-30; *Neal*, 198 F.3d at 767-68; *Cohen II*, 991 F.2d at 897-98; *Barrett*, 2003 WL 22803477, at *7. The only cases upon which UCD relies for its "conflict" argument are two district court cases presenting entirely ***11** different issues and facts than are present here.

The case of *Miller v. Univ. of Cincinnati*, 2008 WL 203025 (S.D. Ohio 2008) is an unpublished district court case that considered whether a university was in compliance with Option One of the three-part test. The only evidence before the court was the university's roster statistics. Plaintiffs argued that the university should be required to count an athlete only once regardless of how many different sports she plays. *Id.* at *7. The court disagreed. The court also rejected plaintiffs' argument that track and field should be counted as one sport, rather than broken out into separate sports. Because plaintiffs offered no evidence on this point, the court relied solely upon statements from the Department of Education, rather than any evidence specific to any circumstances at the university, to reach its conclusion.

Id.

In *Biediger v. Quinnipiac Univ.,* 616 F. Supp. 2d 277 (D. Conn. 2009), the court made no finding regarding duplicated counting. In dicta, it noted that plaintiffs did "not appear likely to prevail" in the argument that the university cannot use duplicated counting. As in *Miller,* the court did not look to any evidence specific to the university's program but instead made generalized statements that indoor track, outdoor track, and cross-country are different sports. *Id.* at 295.

The difference between these cases and the case here underscores the intensely factual nature of inquiry. As the 1996 Clarification explains, the goal of the three-part test is to ensure that an institution complies with Title IX by providing meaningful athletic participation opportunities to women. (*See* AD 29 n.2.) Whether or not a team was actually added, and opportunities actually provided, is plainly a question of fact that will vary by institution. *See, e.g.,* AD 24-26; *Cohen I,* 809 F. Supp. at 981-82.

E. The Court Properly Considered and Rejected UCD's Claim on Summary Judgment that the Addition of Golf Was Responsive to the Developing Interests of Female Students.

UCD tries to foment yet another "conflict" to entice en banc review by claiming that the Court improperly discounted UCD's addition of its women's golf team in 2003. ***12** As with its indoor track argument however, the full record discloses that there was a *factual dispute* as to whether the addition of golf was, as Title IX requires, demonstrably responsive to the developing interests of female students. UCD was not entitled to the inference it seeks.

The 1996 Clarification states that the focus of an Option Two analysis "is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex." (AD 24.) UCD argues that the Court construed "developing interests" too narrowly to include only interests that already existed at UCD, instead of also considering UCD's evidence that golf was popular among high school students and had competition among other universities and an NCAA championship. (PFR 11-12.) UCD also claims that the Court improperly looked at the small size of the golf team in considering UCD's current plan of expansion. Neither contention is correct.

Again, the facts are instructive, and dispositive. In determining whether the addition of golf was demonstrably responsive to student interest, the Court noted the following: UCD had a process for adding varsity teams that is consistent with what the Title IX regulations and agency interpretations suggest is necessary. (Op. 2231.)[FN3] In 2003, it received, pursuant to that process, applications from four women's club sport teams seeking elevation to varsity status, including field hockey, which had also sought but was denied varsity status in 1995. Field hockey's application in 2003 was again denied, even though in 1995 UCD's Title IX advisory group had noted that field hockey had "strong interest from students," was "a relatively strong NCAA sport," and was "a prime candidate for addition to the ICA program in the future." (Op. 2232.) In fact, UCD rejected *all* club sport applications and instead picked golf, for which there was no club sport team and no student request for varsity status, at the behest of the men's golf ***13** coach. (*Id.*) In addition, 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. (ER 1208 ¶ 22, 1212 ¶40.)[FN4]

> FN3. UCD touted that process as being responsive to student interest because it involved having *students* submit applications for varsity status. (*See* ER 1177 ¶ 118,1179 ¶ 122.)
>
> FN4. The golf application was completed by the UCD administration. (ER 1211 ¶ 39.) A full year of off-campus recruitment was required before UCD could field a golf team. (ER 1211 ¶¶ 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. (ER 1211 ¶ 38.) UCD admitted that it deviated from its selection criteria for new sports when it added golf. (ER 1177-79 ¶ 122.)

The Court correctly applied the law to these facts in determining that UCD failed to demonstrate that the addition of

golf was demonstrably responsive to student interest. As an initial matter, UCD relies upon language regarding "developing interests" in the agency interpretation that addresses the third part of the three-part test, not Option Two. (PFR at 11; AD 27.) Moreover, the Court properly recognized that current student interest is one, but not the only, factor to consider in addressing an institution's responsiveness to allow institutions flexibility in their approach. (AD 24-26.) This Court, in fact, considered those factors. It found that although universities are free to consider applications from individuals other than students and to evaluate high school as well as current student interest, the fact that there was no student interest in varsity (or even club) golf at a time when there was significant interest in several other sports suggested that adding golf was not a response to female student interest. (Op. 2232.) The Court noted the small number of opportunities added by golf only in light of *UCD's stated priority* of improving gender equity through its varsity elevation process, not as an independent test of Option Two compliance. (Op. 2231, 2233.)

In contrast to the factually sensitive inquiry in which the Court engaged, UCD asks for rehearing to establish bright line rules that a court in addressing Option Two compliance: (1) cannot place "undue emphasis" (whatever that means) on current student interest; and (2) cannot consider the number of participation opportunities ***14** provided by the addition of a sport. (PFR 12.) Such legal rulings would only impede the accurate assessment of whether an institution's program expansion is "responsive to developing interests and abilities of the underrepresented sex." (AD 24.)[FN5]

> FN5. UCD quotes the letter that accompanied the 1996 Clarification to stress that flexibility is required, but tellingly leaves out the statement that these issues are "inherently case-and fact-specific." (PFR 13; AD 18.)

Moreover, as with UCD's indoor track issue, rehearing or review of the Court's treatment of golf would not yield a different holding. Nor would it have any legal significance beyond this case. The summary judgment record discloses that between 1976 and 1995, UCD dropped two women's sports and added only one (ER 1207-1208 ¶¶ 17-20, 1276 ¶ 116), thus failing to demonstrate a history of program expansion. Although UCD expanded opportunities for women in 1995, it then waited ten more years before adding golf during which time women's wrestling was cut, thus failing to demonstrate a history or continuing practice of program expansion. (*See* AD 26; *see also* ER 3246:3-3247:4 & 3436:4-17 (both parties' Title IX experts agree that an institution must add participation opportunities every two to three years).) Thus even if UCD is given "credit" for adding golf, the Court's holding that UCD failed to present undisputed facts to compel summary judgment in its favor would remain unchanged.

II. UCD IS LIKEWISE NOT ENTITLED TO PANEL REHEARING.

Panel rehearing is also not warranted by any of the issues raised by UCD. As demonstrated above, the Court's legal analysis was correct. To the extent that UCD is arguing that panel rehearing is justified because material facts were overlooked (PFR 14-16), UCD fails to appreciate that it is not entitled to this Court's consideration of the version of *facts favoring UCD* on review of a summary judgment motion. All of its arguments cannot prevail against that standard.

Its argument that the Court fails to "mention important undisputed summary judgment evidence" is of no moment. (PFR 14.) Similarly, its claim that the decision is ***15** internally inconsistent because it views the EADA reports differently for Option One and for Option Two is without merit. (PFR 15.) UCD conceded that it was not in compliance with Title IX by using Option One. (AAB 15-16 & n.8, 58.) That UCD listed indoor track on its EADA reports, in any event, simply begs the question in light of the full factual record as to whether UCD added indoor track as a new sport.

UCD invited the Court to affirm on the alternative ground that, as a matter of law, it complied with Option Two of the three-part test. The Court properly found that the "record before us does not contain undisputed facts showing a history and continuing practice of program expansion that is responsive to women's interests." (Op. 2233.) UCD is not entitled to rehearing because it is unhappy with that result.

CONCLUSION

Plaintiffs filed this case more than seven years ago. This panel correctly concluded that the case must be remanded for trial, a holding that UCD does not contest. Dissatisfied with the result it obtained, UCD now seeks a second bite of the apple by claiming that the Court issued a new and conflicting rule of law. But UCD has failed to identify any basis for en banc review or for panel rehearing. Its petition should be denied.

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