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

AREZOU MANSOURIAN; LAUREN MANCUSO; and CHRISTINE WING-SI NG,

Plaintiffs,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.

Defendants.

CASE NO. S-03-2591 FCD EFB

PLAINTIFFS' TRIAL BRIEF

Courtroom: 2
Judge: Hon. Frank C. Damrell, Jr

Complaint filed: December 18, 2003
Trial date: April 26, 2011

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I. INTRODUCTION

Arezou Mansourian, Lauren Mancuso, and Christine Wing-Si Ng (hereafter "Plaintiffs") were denied their right to a full and equal public education by the University of California at Davis ("UCD"). These committed women wrestlers participated in high school wrestling and chose to attend UCD because its prestigious women's varsity wrestling program that would allow them to participate at the national and intercollegiate level, just as other UCD female students had before them. Indeed, UCD had offered women's wrestling opportunities for years, producing several nationally and even internationally acclaimed female wrestlers.

Arezou Mansourian declined admission to the University of California, Riverside's medical program in order to wrestle at UCD. Chris Ng wanted to wrestle because of the confidence it gave her for other facets of her life. Lauren Mancuso was a wrestling powerhouse who planned to wrestle at UCD to prepare her for 2004 Olympics. All three women had such passion for wrestling that they fought significant barriers to wrestle at high school. All three looked forward to continuing this life-enhancing part of their educational experience at UCD.

Unfortunately, after Plaintiffs arrived at UCD they were subjected to long-standing sex discrimination in Defendants' varsity athletic program. For decades, Defendants had a policy of denying women an equal opportunity to participate in the educational program of varsity athletics. Although Defendants lawfully separated its varsity athletic opportunities by sex (*i.e.*, men's basketball & women's basketball), it unlawfully failed and refused to allocate those opportunities in a nondiscriminatory manner. Defendants had long offered hundreds of opportunities to male students, but had never added enough opportunities to female students to reach equity or to meet women's already existing and developing interests. Defendants exacerbated this program-wide discrimination when it reduced women's opportunities in the late 1990s and early 2000s and when it eliminated women's wrestling opportunities entirely, without replacing them, yet retained opportunities for men.

While Plaintiffs and other female students sought for access to varsity athletic participation opportunities, Defendants did not listen. Instead, they spent millions of dollars to start offering athletic scholarships, to move UCD's athletic program from NCAA Division II to Division I, and to

build massive new facilities (such as a $30 million football stadium). Rather than creating equal opportunity, Defendants focused on their own dreams of moving UCD into "big time" athletics.

In 2003, Plaintiffs Mansourian and Mancuso were female students at UCD who wanted to participate in women's wrestling but were barred from doing so by Defendants' discriminatory policies. Plaintiff Ng was a recent graduate who had unsuccessfully fought Defendants' discrimination to no avail. All three women wanted equal access to educational athletics for themselves and for all of UCD's female students. All wanted UCD to add athletic opportunities for women, including wrestling. All wanted to hold UCD accountable for its discrimination so that no other women would be subjected to it. Defendants' refusal to restore wrestling or any other opportunities for women triggered this legal action.[1]

Plaintiffs allege and will demonstrate at trial that Defendants' longstanding discriminatory policies violate Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*., and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as enforced through 42 U.S.C. § 1983.

Plaintiffs will prevail on their Title IX claim because UCD: (1) stipulates or otherwise agrees through undisputed facts that it does not offer female students opportunities to participate in varsity athletics in numbers substantially proportionate to their enrollment, (2) cannot establish a history and continuing practice of athletic program expansion that is demonstrably responsive to the developing – or already existing – athletic interests of its female students, and (3) stipulates or otherwise agrees through undisputed facts that it does not fully and effectively accommodate the athletic interests and abilities of its female students.[2] Unfortunately, UCD has never provided

[1] When Plaintiffs filed this action, they primarily sought injunctive relief on behalf of a class of all female students who were denied equal access to varsity athletics at UCD. Plaintiffs were denied leave to amend the complaint to add additional plaintiffs. Plaintiffs maintain claims for declaratory relief to vindicate their cause and money damages to remedy the harm they endured.

[2] Defendant UCD's stipulation with respect to Prongs One and Two were filed with the Court in the Joint Pretrial Statement and Plaintiffs believe these unamended stipulations remain operative. Plaintiffs plan to seek clarification regarding the omission of this filed stipulation in the Court's latest Amended Pretrial Conference Order. (Dkt. 549.) Regardless, however, of whether a stipulation is on file, undisputed facts establish UCD's failure to comply with Prongs One (Dkt. 549, § III Undisputed Facts (hereinafter "UF") ¶ 21 & Appendix A thereto) and Prong Three (UF ¶¶ 22-25).

women with the equity required by law, despite longstanding interest and ability. Notably, Defendant Regents of the University of California ("Regents") has the burden of proof on the one issue to which it has not already conceded noncompliance. No school has ever met this burden. Nor can Defendant Regents here.

Plaintiffs will prevail on their Equal Protection Claim because the Individual Defendants are high ranking UCD officials who had direct responsibility for or direct involvement in operating UCD's athletic program and in ensuring gender equity at the university. Instead of providing that equity, the Individual Defendants have chosen to discriminate on the basis of sex in the allocation of varsity athletic participation opportunities and in offering varsity wrestling opportunities to men but not women. The sex discrimination is clear and indisputable. It is facially apparent in the disparate allocation of athletic opportunities (as reported by UCD to the Department of Education) and in its refusal at the same time to provide opportunities at all for women in wrestling. Thus, the trial of Plaintiffs' Equal Protection Claim will turn on whether the Individual Defendants can demonstrate an "exceedingly persuasive justification" for their disparate treatment of male and female students. To-date, the Individual Defendants have failed to provide any justification, let alone an exceedingly persuasive reason.

Finally, as this Court has already held, the Individual Defendants cannot escape responsibility for their actions through qualified immunity. Plaintiffs' constitutional right to be free from sex discrimination in education was and remains well settled. It has been 30 years since the Supreme Court told the Mississippi University for Women that it could not offer nursing school opportunities only to women (not men) and nearly 20 years since the Ninth Circuit held that that the Equal Protection Clause may be violated when athletic opportunities are unequal or when there is inequality in opportunity in a given sport. Yet, the Individual Defendants willfully ignored these constitutional mandates and, despite numerous complaints and public outcry, refused to provide Plaintiffs and other female students the opportunities they deserved – and to which they were legally entitled. The Individual Defendants' actions deprived Plaintiffs of their right to a public university experience on the same terms offered to men, and thus deprived Plaintiffs of a full and equal public education.

II. STATEMENT OF FACTS

Defendants Regents, Vanderhoef, Franks, Warzecka, and Gill-Fisher cultivated a systemic discriminatory policy that did not expand female intercollegiate[3] athletic opportunities responsive to interest and that excluded women from their fair share of those opportunities. Defendants' long history of discriminating against women and Plaintiffs in the provision of intercollegiate participation opportunities will speak for itself at trial.

A. The Parties.

Plaintiffs Ng, Mansourian, and Mancuso were three young women who wrestled in high school and came to UCD to join a long tradition of women wrestling at the intercollegiate level. For Plaintiffs, wrestling was a formative part of their scholastic experience, and one that developed their strong work ethic and tenacity as young adults. Ng entered UCD in 1998 and graduated in 2002. (UF ¶ 6.) Mancuso entered UCD in 2000 and graduated in 2004. (UF ¶ 7.) Mancuso entered UCD in 2001 and graduated in 2006. (UF ¶ 8.)

The Individual Defendants were/are high ranking officials at UCD. Defendant Vanderhoef was the chancellor of the entire university who was responsible for all UCD's programs (including athletics) and for UCD's compliance with civil rights laws. (*See* UF ¶ 10.) Defendant Warzecka is UCD's athletic director. (UF ¶ 12.) He runs the daily operation of UCD's athletic programs and makes the ultimate decisions about which programs it will offer. (*Id.*) Defendant Gill-Fisher has spent nearly her entire adult life at UCD. (UF ¶ 13.) She was a UCD student and has worked at UCD since graduation. She was the associate athletic director and the senior woman administrator, responsible for ensuring gender equity. (*Id.*) Given her 40 years in the program, she carried great weight and influence over its direction. Defendant Franks was the assistant vice chancellor with direct responsibility over UCD's athletic program. (UF ¶ 11.) He participated in strategic decisions about the athletic department and was personally involved in making or ratifying many of the decisions relevant to this legal action. (*See id.*)

[3] "Intercollegiate" refers to varsity and junior varsity teams, as opposed to club or intramural teams, which do not receive coaching or athletic scholarships and other benefits listed in the regulations. *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 962 n.2 (9th Cir. 2010).

B. Historic Discrimination in UCD's Athletic Program.

While this suit was brought in 2003 by women wrestlers, its history begins decades before. UCD's record confirms that while UCD started sponsoring men's intercollegiate teams in 1909, it took several decades for the first woman's team to be added. After the passage of Title IX, UCD added no opportunities for women until it added soccer in 1983 (while simultaneously ending field hockey.)[4] Plaintiffs will also present evidence that UCD dropped women's golf around the same time. Yet, throughout the 1970's, UCD women expressed interest in or participated in intercollegiate bowling, rifle, badminton, and synchronized swimming. Over 30 years later, none of these sports have been promoted to varsity status. Throughout the 1980's, more women created competitive club sports teams in water polo, equestrian, and crew. The former varsity field hockey players also set up a club team of their own. Women also continued to participate in badminton and bowling.[5] Despite this large, existing evidence of women's interest in competitive, intercollegiate athletics, UCD failed to add new varsity opportunities for women throughout the 1970's, 1980's, and early 1990's.

At trial, Plaintiffs will establish that in 1991, Defendant Pam Gill-Fisher and other UCD administrators evaluated UCD's gender equity compliance for the first time since 1976. The evaluation concluded that UCD did not provide women with substantially proportionate athletic participation opportunities and that its record "cannot be termed a demonstrably responsive process of program expansion … particularly when female participation relative to male participation has been decreasing over the past three years." The committee also noted "resistance within the Athletic Department to UC Davis's efforts to ensure total compliance with Title IX." Meanwhile, UCD eliminated over 100 women's opportunities between 1989 and 1991.

Even though UCD recognized that it was not complying with Title IX and was not allocating

[4] Plaintiffs will show that Defendants added women's cross country in 1971, but anticipate that Defendants will claim this sport was actually added at a later date. Plaintiffs will establish that regardless of when this sport was added, UCD's own records reflect that this sport did not add opportunities.

[5] Exhibit A attached hereto reflects the level of participation of women in club sports at UCD from 1981, when UCD began to record this data through 1999.

athletic participation opportunities equitably, Plaintiffs will demonstrate that the situation worsened. In 1992, an associate athletic director warned of a "backslide in compliance," and in 1993, UCD's acting athletic director noted that the ratio of women participating had decreased slightly in recent years. Nevertheless, UCD took no action to replace (let alone expand) women's opportunities until 1995. By that time, UCD's gap between female enrollment and female athletic participation was 20%. (*See* Ex. B., attached hereto.)[6]

Despite UCD's woefully inadequate record on gender equity and despite 20 years of unmet women's interest, UCD added only three new women's sports (crew, water polo, and lacrosse). (UF ¶ 23.) Even after the addition of these sports, UCD's participation gap exceeded 11%. (*See* Ex. B.) Yet, UCD refused to promote other club sports that wanted varsity status, and it failed to devise a plan to add them over time despite their knowledge of the continued disparity. Plaintiffs will prove that after this one-time addition, UCD stopped taking any affirmative steps to address its longstanding, systemic, program-wide discrimination against female students in the allocation of varsity athletic participation opportunities.

In 1994, Congress passed the Equity in Athletics Disclosure Act ("EADA"), which required schools that offered intercollegiate athletics to submit participation reports each year, beginning in October 1996 (for the 1995-1996 school year). Each and every year thereafter, UCD continued to allocate participation opportunities through the sports it decided to offer and the sex to whom it decided to offer those sports. And each year, it reported those choices on its EADA reports. Those reports glaringly show UCD's discrimination.

C. Defendants Continued Its Practice of Non-Expansion With The Elimination of Female Participation Opportunities, Including Wrestling.

Shortly after its one-time addition of sports, UCD not only failed and refused to add athletic opportunities for women, but started to backslide again, eliminating 63 women's opportunities. At the same time, women's enrollment at UCD grew by more than 2,200 students. As a result, UCD's participation gap grew even more. UCD's participation gap exceeded 100 opportunities in the years

[6] Exhibit B is an excerpt of facts undisputed by Defendants (UF ¶ 21) reflecting the athletic participation and enrollment figures UCD by gender starting in 1995.

prior to 2003.

In fall 2000, Plaintiffs will establish that Defendants exacerbated this growing inequity by ordering the elimination of all women's wrestling opportunities. Defendant Warzecka expressly ordered wrestling coach Mike Burch to eliminate all women wrestlers from the program. He did not order the removal of any men … just women. Burch submitted new participation lists under protest, duly noting that "the women have been removed per your request." Defendant Warzecka's order was discriminatory on its face and became the start of UCD's facially discriminatory policy to prevent women from wrestling at the varsity level. Plaintiffs Mansourian and Ng were among the women removed from the program.

Defendants admit that women were varsity athletes in the wrestling program before their removal. (UF ¶¶ 30-41.) They practiced and sometimes competed under the guidance of the varsity coach. (*Id*.) They were required to satisfy all of the academic and other requirements of varsity athletes. (*Id*.) They appeared on official team lists. (*Id*.) They were entitled to all the benefits of varsity status, including medical insurance, trainers, facilities, lockers, laundry services, and academic counseling. (*Id*.)

At trial, Plaintiffs will prove that the women wrestlers tried to convince Defendant Warzecka to reinstate the women's wrestling program. He refused and insisted that to continue to wrestle, they should do it on their own or start a club. Notably, he did not demote or eliminate the male wrestlers in the same way. The women researched starting a club (despite the demotion), but realized they would lose the benefits of varsity status, including highly qualified coaching. They tried again for reinstatement, but were again refused.

Defendants' elimination of women's wrestling provoked massive protests, not just among the male and female wrestlers, but among the student body as a whole and the state legislature. Finally, in late May, 2001, faced with this outcry, Defendants promised to "reinstate" women's wrestling. Defendants, however, did not reinstate women's wrestling on the same terms and conditions in which it had previously existed. Instead, women wrestlers were required to compete against men, using men's rules, for spots on the men's team. Defendants have never subjected any other women's team to this requirement. They only applied this new tactic to the women wrestlers in order to

ensure that women's wrestling at UCD was eliminated.

Plaintiffs will prove at trial that in devising this scheme, Defendants threw both equity and safety out the window. The women wrestlers were substantially smaller than the male wrestlers – by more than 25 pounds in the case of Christine Ng. While male wrestlers compete in weight classes with other males who weigh within 4-7 pounds, UCD ordered the women to compete against males up to 30 pounds heavier. The male wrestlers were Division I, Pacific 10 Athletic Conference athletes. They, thus, were not just larger, stronger, heavier male wrestlers; they were among the best wrestlers in the nation. Defendants knew that no woman – not even the best women wrestlers in the world – could beat the best male wrestlers. Defendants depended upon this fact, because they never intended the women to make the men's team. Plaintiffs will provide testimony of UCD's own trainers and doctor stating that women could not beat men at such levels due to genuine biological differences. Plaintiffs will also submit testimony of UCD's coaches that women in their sports could not earn spots on the men's teams. Plaintiffs will present evidence to establish that sports are sex segregated in order to ensure that women are given the opportunity to participate.

UCD's wrestle-off requirement was merely a restatement of its policy to exclude women from wrestling. Plaintiffs Mansourian, Ng, and Mancuso were all removed from the wrestling program again before competitions even began. Neither Plaintiffs nor any other female student has ever been allowed to participate in wrestling at UCD again.

As Defendants pursued other costly endeavors for the athletic department, providing female students an equal chance to play remained the lowest of Defendants' priorities, as it has for decades. When Plaintiffs filed this action in 2003, Defendants still discriminated against female students, still allocated too few athletic opportunities to women, and still failed and refused to offer any women's opportunities in wrestling. Defendants failed to take any steps to add new sports or to replace the more than 60 women's opportunities it had cut in the preceding years. Defendants continued to deny Plaintiffs the equal opportunity to participate in sports, including the equal opportunity to participate in wrestling, up through their respective graduations from UCD.

III. SUMMARY POINTS OF LAW

Plaintiffs will prevail on their Title IX claim against Defendant Regents and will prevail on

their Equal Protection Claim against Individual Defendants Vanderhoef, Franks, Warzecka, and Gill-Fisher for the reasons set forth below.

A. Plaintiffs Will Prevail on Their Title IX Claim.

Plaintiffs will prevail on their Title IX claim because UCD discriminates against female students in the allocation of athletic participation opportunities and because it eliminated the educational opportunity for females (but not males) to participate in wrestling. Plaintiffs' case will rely on undisputed facts, stipulations, judicial admissions, and other evidence presented at trial. Law of the case, including factual findings regarding participation and enrollment figures and the status of women wrestlers as varsity team members by the Ninth Circuit in *Mansourian v. Regents of the University of Cal., supra*, 602 F.3d 957, will also compel a judgment in favor of Plaintiffs at trial.

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

Nearly thirty years before this suit was filed, Title IX was enacted to prohibit institutions that received federal financial assistance from discriminating on the basis of sex. 20 U.S.C. § 1681(a). Title IX's mandate applies to all educational programs and activities at institutions that receive federal funds, including intercollegiate athletics. 20 U.S.C. § 1687. Congress intended that it be interpreted broadly in order to best achieve its purpose. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S. Ct. 1912 (1982); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S. Ct. 1946 (1979). A private right of action to enforce Title IX is well settled. *Cannon*, 441 U.S. at 709.

Title IX was passed to address rampant sex discrimination in athletics.[7] In order to assure the

[7] In 1971, over 3 million boys competed in interscholastic athletics in the United States. Meanwhile, less than 300,000 girls had the opportunity to participate in interscholastic athletics. The high school athletic participation numbers are from the National Federation of High School Athletic Associations, which annually tracks high school participation in each state. *See* http://www.nfhs.org/Participation/HistoricalSearch.aspx (use drop-down menu title "Year," and select "1971-72") (last visited May 5, 2011). The NCAA lobbied against Title IX at the collegiate level, despite the fact that in 1971 only 31,852 women participated in intercollegiate athletics as compared to 172,447 men did so. Similarly, women received only 2% of college athletic budgets in 1971and virtually no athletic scholarships. The college athletic participation numbers are from the United States Department of Education publication, "Achieving Success Under Title IX," http://www2.ed.gov/pubs/TitleIX/part5.html (last visited May 5, 2011). For the scholarship information, *see* United States Department of Education publication, "The Secretary of Education's Commission on Opportunity on Athletics: Open to All, Title IX at Thirty" (Feb. 28, 2003), found at http://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf (last visited May 5, 2011).

elimination of this discrimination as soon as possible, the Title IX regulations impose affirmative obligations on schools to evaluate their own actions and policies, to take the remedial actions necessary to end sex discrimination, to eliminate the effects of sex discrimination, and to "take affirmative action to overcome the effects of conditions which resulted from limited participation." 34 C.F.R. § 106.3.

In addition to the foregoing affirmative obligations, the United States Department of Health, Education, & Welfare ("HEW") issued interpreting regulation in 1975, including two regulations that specifically address athletics. 34 C.F.R. §§ 106.37 & 106.41(c).[8] The Ninth Circuit has affirmed the importance and purpose of these regulations, stating "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in … colleges." *Neal v. Bd. of Trustees*, 198 F.3d 763, 767 (9th Cir. 1999) (citing *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3rd Cir. 1993)). It has further recognized that "male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field." *Neal*, 198 F.3d at 767.

The importance of quickly leveling that playing field is reflected in the Title IX athletics regulation's mandate that elementary schools comply with their athletics obligations within one year of the effective date of the Title IX regulations (by July 1976) and that high schools and colleges "comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation" (by July 1978). 34 C.F.R. § 106.41(d). Since then, the Office for Civil Rights ("OCR") of HEW (and then the Dep't of Educ. ("DOE")) has issued extensive guidance to help schools comply with the law.[9] The 1975 OCR Guidance expressly

[8] HEW published the original Title IX regulations at 45 C.F.R Part 86. However, when Congress created the Department of Education, authority over education issues was transferred from HEW to DOE and the regulations were republished at 34 C.F.R. Part 106. Dept. of Educ. Organization Act, Pub.L.No. 96-88, 93 Stat. 669 (1979), codified at 20 U.S.C. § 3401-3510.

[9] The Ninth Circuit has considered the Title IX regulations and OCR's interpretations of them and have given them substantial deference. *Mansourian*, 602 F.3d at 965 (and citations therein). Plaintiffs, either jointly with Defendants or by separate request, seeks judicial notice of this guidance, which includes:

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warned schools that, "The adjustment period is not a waiting period. Institutions must begin now to take whatever steps are necessary to ensure full compliance as quickly as possible. (1975 OCR Guideline at 4.)

The 1979 Policy Interpretation divides Title IX athletics obligations into three separate categories:

(1) allocation of athletic participation opportunities (whether a student has an opportunity to play sports at all), 34 C.F.R. § 106.41(c)(1)

(2) allocation of athletic benefits (whether students who already play sports are treated equally and provided similar benefits), 34 C.F.R. § 106.41(c)(2)-(10)

(3) allocation of financial assistance based upon athletic skill (whether schools allocate athletic scholarship money equitably), 34 C.F.R. § 106.37(c)

1979 Policy Interpretation, 44 Fed. Reg at 71414; *see also Cohen v. Brown Univ.* (*Cohen II*), 991 F.2d 888, 896 (1st Cir. 1993)*; Roberts v. Colo. State Univ.*, 814 F. Supp. 1512, 1510-11 (D. Colo.), *aff'd in relevant part*, 998 F.2d 824 (10th Cir. 1993); *Favia v. Ind. Univ. of Pa*. (*Favia I*), 812 F. Supp. 578, 584-85 (W.D. Pa.), *aff'd*, 7 F.3d 332 (3rd Cir. 1993).

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(1) the 1975 publication of the "Elimination of Sex Discrimination in Athletic Programs, Memorandum from Director of Office of Civil Rights to Chief State School Officers, School Superintendents, and College/University Presidents" (Sept. 1975), available at http://www.eric.ed.gov/PDFS/ED119583.pdf (last visited May 5, 2011) (the "1975 OCR Guidance")

(2) the 1976 publication of Competitive Athletics in Search of Equal Opportunity (Sept. 1976), 40 Fed. Reg. 52655 (Nov. 11, 1975), and available at http://www.eric.ed.gov/PDFS/ED135789.pdf (last visited May 5, 2011) (the "1976 OCR Guidance")

(3) the 1979 publication of its Title IX of the Education Amendment of 1972: A policy Interpretation; Title IX and Intercollegiate Athletics 44 Fed. Reg. 71413 (Dec. 11, 1979), available at www.ed.gov/about/offices/list/ocr/docs/t9interp.html (last visited May 5, 2011) (the "1979 Policy Interpretation")

(4) the 1996 publication of its Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), available at http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html#two (last visited May 5, 2011) (the "1996 OCR Clarification")

(5) the 2010 publication of OCR's "Dear Colleague" letter regarding part three of the three part test (April 20, 2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (last visited May 5, 2011) (the "2010 OCR Guidance")

Plaintiffs' Title IX claim alleges that UCD discriminated against them on the basis of sex by failing to allocate athletic participation opportunities in an equitable manner and by providing males but not females with an opportunity to participate in varsity wrestling. Such participation claims are particularly important because having the opportunity to participate "lies at the core of Title IX's purpose." *Cohen II*, 991 F.2d at 897. Courts recognize that Title IX's affirmative obligations will in most cases "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 1979 Policy Interpretation, 44 Fed. Reg. at 71,414).

The 1979 Policy Interpretation outlined several ways for determining whether a school provides such equal opportunity, including an analysis of

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
>
> (3) Where the members of the one sex are under-represented 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.

1979 Policy Interpretation, 44 Fed. Reg. at 71418. This analysis is commonly referred to as the "Three Part Test." *See, e.g.*, *Neal*, 193 F.3d 765. Title IX's intent requirement does not require a discriminatory animus. A plaintiff need only establish that the institution made a decision to treat women differently in the provision of athletic opportunities.[10]

[10] In other words, all that is required is that UCD behaved volitionally, as opposed to accidentally, with regard to its treatment of women athletes. *Pederson v. La. State Univ.* (*Pederson II*), 213 F.3d 858, 881 (5th Cir. 2000) (university need not have intended to violate Title IX to be held liable for damages). Thus, a university's "intentional decision not to accommodate effectively the interests of their female students by not providing sufficient athletic opportunities" is intentional discrimination in violation of Title IX. *Pederson II*, 213 F.3d at 880; *Favia I*, 812 F. Supp. at 584; *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 696 (6th Cir. 2006) (proof of discriminatory animus not necessary to establish Title IX violation: "if girls receive unequal opportunities, Title IX has been violated"); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 527, 539-40 (E.D. Pa. 1987) (no discriminatory animus required; requisite "intent" in university's explicit

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2. UCD Did Not Comply With Title IX Through Prongs One or Three.

UCD has stipulated, or otherwise agrees through undisputed facts, that it was not in compliance with Prong One or Prong Three during the time period relevant to this case.

Undisputed participation and enrollment figures establish that UCD did not comply with Title IX through Prong One. This data proves that UCD did not provide women participation opportunities that were substantially proportionate to their enrollment for the period of 1995 to 2005. Indeed, in 2001-2002, the year that UCD forced women to compete against men in wrestling, UCD's female participation ratios fell to their worst level since 1997. (UF ¶ 21 & Appendix A thereto; *see also* Ex. B, hereto.) When Defendants eliminated women's wrestling, UCD would have needed to add 156 varsity opportunities for women to make up for its proportionality shortfall. (*Id.*)

UCD were also not in compliance with Prong Three. UCD consistently failed to elevate numerous club teams throughout its history. (UF ¶¶ 23-25.) Between 1995 and 2005, UCD rejected applications for varsity status from women club athletes in field hockey, badminton, rugby, horse polo, and bowling, thereby denying intercollegiate status to hundreds of interested women on campus. (*Id.*) These facts reflect a flagrant disregard of women's interest in intercollegiate athletics.

Given Title IX's passage some thirty years before Plaintiffs were UCD students, the law's affirmative obligations, and its call for immediate compliance, UCD's failings with respect to Prongs One and Three are telling. Moreover, as set forth below, UCD cannot establish Prong Two, a failing on which this case against UCD will turn.

3. UCD Cannot Prove Compliance with Prong Two of the Three Part Test.

Under Part Two of the "Three Part Test," Defendant has the burden of proving that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of the under-represented sex. 1979 Policy Interpretation, 44 Fed. Reg. at 71,418; *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993). The 1996 Clarification makes clear that Part Two two requires an examination of both

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classification of intercollegiate athletic teams on the basis of gender).

(1) the entire history of an institution's athletic program and (2) the extent of an institution's continuing practice of program expansion. The Ninth Circuit has emphasized that "[h]istory" and "continuing practice" constitute two separate inquiries. *Mansourian*, 602 F.3d at 969. In addition, an institution that eliminates existing opportunities without otherwise replacing and expanding opportunities cannot claim compliance under Prong Two. 1996 OCR Clarification at 7-8; *see also Mansourian*, 602 F.3d at 971.

Defendant cannot meet these burdens.

i. UCD Cannot Demonstrate a History of Program Expansion for Women.

In addition to the foregoing legal framework, under "history of program expansion," courts must examine:

(a) an institution's record of adding intercollegiate teams or upgrading teams to intercollegiate status; and

(b) an institution's record of increasing the numbers of participants in intercollegiate athletics; and

(c) an institution's affirmative responses to requests by students or others for addition or elevation of sports

1996 Clarification at 7-8.

The Ninth Circuit has held that Prong Two focuses primarily on increasing the number of women's athletic opportunities rather than increasing the number of women's teams: "'OCR will assess whether past actions of the institution have expanded *participation opportunities* for the underrepresented sex …' (emphasis added)." *Mansourian*, 602 F.3d at 969 (citing 1996 OCR Clarification at 5). Moreover, Part Two must be read with Title IX's immediate mandates in mind. OCR did not intend schools to casually add new sports at sporadic and distant intervals. Schools were required to add all sports for which interest and ability existed by 1978. Thereafter, schools were required to add new sports for women as soon as their interests and abilities developed. At UCD, those interests and abilities already existed and were never met. Over its 30-year history, those interests have continued to develop, but as set forth herein, UCD has never "caught up" with its legal obligations. No school has successfully defended an action by relying on Part Two. Defendant Regents cannot do so here either.

UCD cannot prove compliance with Part Two because, among other things:

(a) UCD failed to meet the 1978 deadline for athletic compliance set forth in 34 C.F.R. § 106.41(d);

(b) UCD failed to add more women's sports by 1978 despite existing and developing unmet interest and ability;

(c) UCD failed to expand female participation opportunities throughout the 1970s, 1980s, and early 1990s despite existing and developing unmet interest and ability and existing competitive club sports teams;

(d) UCD eliminated women's varsity field hockey in 1983 despite the existence of a viable team with existing competition;

(e) UCD eliminated women's golf at some point before 1991;

(f) UCD delayed adding women's crew, water polo, and lacrosse until the mid 1990s despite the existence of competitive club sport teams with competitive schedules as early as 15 years before;

(f) UCD failed to add additional women's sports throughout the 1990s despite existing interests, existing competitive sport clubs, and existing requests for varsity status during that time period;

(g) UCD failed to add all sports that sought varsity status in 1995 or to put a plan in place to promptly add them over time;

(h) UCD eliminated over 60 women's athletic participation opportunities in the years between 1999/2000 and 2001/2002;

(i) UCD eliminated women's opportunities in wrestling;

(k) UCD failed to replace the eliminated women's varsity athletic participation opportunities at any time before the filing of this action;

(l) Even after the filing of this action, UCD failed and refused to add all the women's sports that sought varsity status in 2004;

(m) Even after the filing of this action, UCD failed and refused to reinstate women's wrestling;

(n) UCD failed to expand its athletic opportunities for women over the past 35 years to catch up with the opportunities already provided to men or with the already existing, and developing, athletic interests of its female students; and

(o) UCD failed to develop or implement a plan to address the unmet interests and abilities of female students.

UCD cannot establish a "history" of program expansion based on these facts that Plaintiffs

will prove at trial. The Court has rejected UCD's effort to excise this portion of its discriminatory history from consideration in its Prong Two defense, finding that UCD's *entire* history is relevant. As set forth below in greater deal, and recognized by the Ninth Circuit in its evaluation of undisputed participation and enrollment numbers, UCD's one time expansion in 1995 did not come close to carry UCD's burden of establishing a history of expansion. *Mansourian*, 602 F.3d at 993. One positive step is simply not enough claim a history of expansion, especially given a nine-year gap in expansion after the 1995 teams were added.

ii. UCD Cannot Demonstrate a Continuing Practice of Program Expansion that Is Demonstrably Responsive to the Developing Interests of Its Female Students.

Plaintiffs will also establish that UCD fell far short of Prong Two's requirements after 1995 and thus had no continuing practice of expansion. As the Ninth Circuit has made clear, the Court must evaluate both whether UCD had a continuing practice of expansion and if there was expansion, whether expansion was responsive to developing interests and abilities. *Mansourian*, 602 F.3d at 969; 1996 OCR Clarification at 5-6. UCD must satisfy both. It fails on both fronts.

Under "continuing practice of program expansion," courts must examine

(a) an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students and

(b) an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities

1996 OCR Clarification at 2.

UCD cannot claim a continuing practice of program expansion where Defendants failed to establish a means by which existing club sport teams could request varsity status. When Defendants finally asked for proposals in 1995, five club sport teams presented proposals. (UF ¶¶ 22-23.) When Defendants were forced to ask for more proposals after the filing of this action, four more club teams submitted proposals. (UF ¶ 24.) Yet, Defendants rejected all of them and instead decided to add women's golf, a sport for which no club existed and which no female student requested. (UF ¶ 25.) UCD's athletic administration filled out the golf proposal itself. (UF ¶ 24.)

Additionally, UCD did not meet the requirement that an institution have a remedial plan in

place to expand women's opportunities. 1996 OCR Clarification at 2. UCD failed to create an expansion plan to meet the 1978 Title IX athletics deadline. It failed to create an expansion plan during the 1980s or 1990s. When UCD finally added three teams in 1995, it subsequently failed to institute a plan to add other female sports teams as a continuous practice. Its failure to create concrete steps towards future compliance is especially notable here where its one-time expansion did not compensate for 25 years of non-expansion and did not bring UCD close to substantial proportionality.

After its one-time expansion, UCD engaged in roster management of men's teams, which sole function is to contract men's teams. Yet, UCD's roster management cannot be relied upon as evidence of program expansion for women in this case. *Mansourian*, 602 F.3d at 971 (citing 1996 OCR Clarification). Roster management efforts are thus irrelevant to Prong Two's requirement of expansion for females.

As a result of Defendants' refusal to implement a plan for program expansion, the number of female participation opportunities fell 17% after 1999, even as the number of women enrolled at the university had grown by 19%. (*See* Ex. B, hereto.) UCD's own expert called the drop "drastic." As noted by the Ninth Circuit: "There were four varsity participation opportunities for every hundred female students in 2000, but only three in 2006." *Id*. at 970; *see generally Ollier v. Sweetwater Union High Sch. Dist*., 604 F. Supp. 2d 1264, 1272-73 (S.D. Cal. 2009) (holding that a school did not comply with Prong Two where school experienced fluctuations up and down in their female participation numbers rather than continuous expansion and where school dropped 50 participation opportunities in the five years before suit was filed).

Plaintiffs will present the testimony of Donna Lopiano, a highly respected Title IX expert, so esteemed that UCD sought her advice when first faced with public outrage over its removal of women wrestlers. Dr. Lopiano will offer importance guidance on Prong Two, including her opinion based on her many years of experience as a Title IX expert and applicable law, that while it is normal to see a fluctuation in participation opportunities of 4-7 athletes program-wide at an institution in any given year, these minimal fluctuations may be acceptable under Prong Two only if made up for immediately and expanded upon. Both the volume drop in participation rates and its

continuous contraction disqualifies UCD from relying on Prong Two.

Based on participation and enrollment figures, the Ninth Circuit concluded that UCD eliminated women's varsity athletic opportunities "in the context of a women's athletics program that was, at best, stagnant." *Mansourian*, 602 F.3d at 971. This finding of the Ninth Circuit should be conclusive here and compel a finding that UCD violated Title IX. *See Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993); *Cohen v. Brown Univ*. (*Cohen III*), 101 F.3d 155 (1st Cir. 1996).

Finally, Defendants will be unable to prove that they expanded in a manner that was demonstrably responsive to developing interests and abilities. For example, Plaintiffs will show that Defendants failed to survey students and prospective students for interest until after this case was filed. Moreover, it is undisputed that UCD rejected numerous applications for varsity status from women club athletes between 1995 and 2005. (UF ¶¶ 23-25.)

In sum, UCD never caught up with the unmet athletic interests of its female students. It never established a plan to continuously expand athletic opportunities to meet those interests. And it never took steps to assess those interests (until after the filing of this action). From 1995 to 2005, UCD entirely failed to expand women's opportunities. To the contrary, they reduced opportunities in existing sports and eliminated women's wrestling.

4. UCD Cannot Rely on Prong Two Where It Reduced Women's Athletic Participation Opportunities and Eliminated All Women's Opportunities in Wrestling.

In the early 2000's, Defendants eliminated all women's opportunities in the sport of wrestling and eliminated women's athletic opportunities in other sports, resulting in an overall decline in women's athletic participation opportunities of over 60 athletes. (*See* Ex. B.)

That Defendants' actions deprived Plaintiffs and other women female participation opportunities in intercollegiate wrestling will be established at trial. To refute this, UCD will likely suggest a wide variety of erroneous arguments.

For example, UCD may claim that Plaintiffs must prove its elimination of a separate women's team or a woman's program in order to prevail on Title IX liability. However, as this Court has found, UCD's compliance with Title IX must be assessed on a program-wide basis and is not dependent on the actions taken with respect to wrestling specifically. (Dkt. 549.)

To the extent Defendants assert Plaintiffs lacked standing or injury, Plaintiffs need only be students interested in intercollegiate participation opportunities to be affected by UCD's Title IX violation.[11] *Pederson II*, 213 F.3d at 869-71 (finding that a student need only show "that she is able and ready to complete for a position on an unfielded team" to establish injury). The evidence will establish that Plaintiffs Ng, Mansourian, and Mancuso meet that standard.

Although not necessary, Plaintiffs have already established much more than mere interest in intercollegiate athletic opportunities. (UF ¶¶ 23-25.) For nearly 9 years, UCD offered women students the opportunity to participate in varsity wrestling. (UF ¶¶ 27-41.) In the early 2000's, Defendants eliminated varsity women's wrestling opportunities in their entirely. (UF ¶ 43.) As noted by the Ninth Circuit: "By requiring women to prevail against men, the university changed the conditions under which women could participate in varsity wrestling in a manner that foreseeably precluded their future participation." *Mansourian*, 602 F.3d at 970 n.18. Defendants have failed and refused to add or reinstate women's wrestling despite demands that they do so.

Because Defendants eliminated a women's sport shortly before this action was filed, they cannot rely on prong two of the Three-Part Test. *See Barrett v. West Chester Univ. of Pa.*, 2003 WL 22803477, at *7 (E.D. Pa. Nov. 12, 2003) (elimination of women's gymnastic team was evidence of violation of Title IX and non-compliance with Prong Two where institution was not otherwise in compliance with Title IX); *Cohen II*, 991 F.2d at 897-98 (elimination women's volleyball and gymnastic teams was evidence of violation of Title IX and non-compliance with Prong Two); *Roberts*, 998 F.2d at 830 (elimination of women's softball team was evidence of violation of Title IX and non-compliance with Prong Two.)

Defendants apparently realize this, because they now claim that they didn't "really" offer women's wrestling opportunities or that the women who participated were somehow not worthy of varsity status. Defendants' rewriting of history fails on many levels because (1) the women

[11] Plaintiffs anticipate that Defendants will also argue they must prove evidence of interest, ability, and competition in wrestling. Plaintiffs have filed a motion *in limine* that seeks to exclude this evidence and argument related to interest, ability, and competition in women's wrestling as a misrepresentation of the applicable standing standard.

wrestlers met the definition of varsity participants for purposes of Title IX, (2) the women wrestlers participated in varsity wrestling to the same extent as most of the male varsity wrestlers, and (3) the women wrestlers participated in varsity wrestling to the same extent as athletes whom Defendants count as varsity in other sports. (UF ¶¶ 30-41.) They were no different than the varsity female crew members, lacrosse players, or swimmers who practiced alongside their male counterparts (even if they were not in the top tier who actually competed in matches) and who received the same benefits and coaching as their male counterparts, but who also competed only against other women.

The 1979 Policy Interpretation identifies those students who qualify as varsity athletes by defining the "participants" as those

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, *e.g.*, coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport; or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

1979 Policy Interpretation, 44 Fed. Reg. at 71415.

The 1996 OCR Clarification further expounds on this definition by stating that participants also include:

(1) those athletes who do not receive scholarships (*e.g.*, walk-ons);

(2) those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds; and

(3) those athletes who practice but may not compete.

1996 OCR Clarification at 4.

The women wrestlers who participated in UCD's women's wrestling program easily fall within this definition. They received varsity coaching, attended practices, received varsity benefits and access to varsity facilities and services. (UF ¶¶ 27-41.) They were subject to the same rules as other varsity athletes. (*See id.*) They were included on official team lists and counted on EADA

Reports as varsity athletes. (*Id*.) Notably, the 1996 OCR Clarification definition includes athletes who are walk-ons and those who do not complete.[12] This definition is entirely consistent, as Plaintiffs will establish at trial, with the manner in which UCD counts all of its other varsity athletes. Various UCD witnesses acknowledge that there are students of varying skills on men and women's teams. Its mockery now of Plaintiffs' skill level is suspect, where there is no indication that UCD evaluated the skill level of other females in its intercollegiate program. UCD's selective critique of Plaintiffs' abilities is nothing more than a blatant degradation of Plaintiffs and a post ad hoc justification for removing women from the program, and a discriminatory one at that.

Accordingly, because Defendants contracts its opportunities for women, including the complete elimination of varsity women's wrestling, Defendants cannot claim Prong Two compliance.

B. Plaintiffs Will Prevail on Their Equal Protection Claim.

Plaintiffs will present evidence at trial establishing that Defendants Vanderhoef, Franks, Warzecka, and Gill-Fisher (the "Individual Defendants") violated Plaintiffs' equal protection rights by denying them the opportunity to wrestle on the basis of their gender at a time when they were also failing to provide equal athletic opportunities program-wide. This evidence will demonstrate that Defendants engaged in this facially apparent and systemic discrimination for decades and that this discrimination harmed Plaintiffs throughout their years at UCD.

To prevail at trial, Plaintiffs must show that Individual Defendants intentionally created a classification based on sex. This burden is easily satisfied: the Individual Defendants stripped Plaintiffs of their varsity status based on gender and continued to deny them varsity wrestling opportunities all the while depriving equal participation opportunities for women program-wide. The only way the Individual Defendants would be able to defeat Plaintiffs' claim is to prove an exceedingly persuasive justification for this sex-based classification, that the classification serves an

[12] Additionally, both Plaintiffs' and Defendants' experts agree that that it is acceptable for varsity athletes in a developing sport to obtain competition in open or amateur events. In a another case, UCD's expert testified that "it was good for student athletes to compete in championship meets no matter who sponsored them, or how prestigious they might be, and that whether or not it was the NCAA that sponsored them should not be a factor." *Favia*, 812 F. Supp. at 582.

important governmental objective, and that its means are substantially related to the achievement of those objectives. The Individual Defendants will not be able to meet this burden.[13] The record will compel a finding of liability as to each Individual Defendant.

1. The Legal Framework for Equal Protection Claims.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution states that

> No state shall ... deny to any person within its jurisdiction the equal protection of the law.

U.S. Const. amend, XIV, § 1.

This Clause is enforced through 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439, 105 S. Ct. 3249 (1985).

The Equal Protection Clause applies whenever a state actor discriminates on the basis of sex or otherwise treats males differently from females. The standard of liability for Plaintiffs' Equal Protection Claim is set forth in Supreme Court and Ninth Circuit cases that addressed schools' unwillingness to provide certain types of educational programs to one sex and other forms of sex discrimination in education. *United States v. Virginia*, 518 U.S. 515, 532-33, 116 S. Ct. 2264 (1996) (women denied access to all-male military educational program); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331 (1982) (male denied access to all-female nursing program); *Oona v. McCaffrey*, 143 F.3d 473, 474-75 (9th Cir. 1998) (peer sexual harassment in schools).

Indeed, the law is well-established in the area of school athletics. Where a university decides

[13] Individual Defendants may also attempt to argue that they are entitled to qualified immunity. The Court has, however, already conclusively resolved this issue. (Dkt. 509.)

"to sponsor intercollegiate athletics as part of its educational offerings, this program 'must be made available to all on equal terms.'" *Mansourian*, 602 F.3d at 974 (quoting *Haffer v. Temple Univ.*, 678 F. Supp. 517, 525 (E.D. Pa. 1998)). The Ninth Circuit has recognized that not only must "overall athletic opportunities … be equal" to satisfy the Equal Protection Clause, but that "denial of an opportunity in a specific sport, even when overall opportunities are equal, can be a violation of the equal protection clause." *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126, 1130-31 (9th Cir. 1982); *see Hoover v. Meiklejohn*, 430 F. Supp. 164, 170 (D. Colo. 1977) (noting that the standard under the Equal Protection Clause "should be one of comparability, not absolute equality," where male and female teams are given "substantially equal support" for "substantially comparable programs"); *Leffel v. Wis. Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) ("the defendants may not afford an educational opportunity to boys that is denied to girls"). The availability of this constitutional claim to challenge gender-based decisions in high school and college athletics is also well-settled. *See, e.g., Haffer*, 678 F. Supp. at 526-27 (and cases cited therein); *Brenden v. Indep. Sch. Dist.*, 477 F.2d 1292 (8th Cir. 1973) (striking regulation barring girls from competing against boys in certain sports); *Cmtys. for Equity*, 459 F.3d at 693-95 (affirming district court judgment for Plaintiffs on Plaintiffs' Equal Protection and Title IX claims challenging high school athletic association's decision to change scheduling of female athletes seasons); *Alston v. Va. High Sch. League, Inc.*, 144 F. Supp. 2d 526, 533-34, 538 (W.D. Va. 1999) (denying defendants' motion for summary judgment on plaintiffs' section 1983 claims in case involving schedule change for women's teams but not men's teams.)

In fact, the Ninth Circuit and other circuits have repeatedly affirmed that there is an important government interest in promoting equality of opportunity and in redressing past discrimination against women in athletics, even if this means decreasing opportunities for men. *Clark*, 695 F.2d at 1131 (holding that the policy of excluding boys from a girls high school volleyball team did not violate the Equal Protection clause because it was a permissible means of attempting to promote equality of opportunity for girls in Arizona interscholastic sports and redressing past discrimination; noting in dicta that boys would have an "undue advantage" if allowed to compete against women for positions on the volleyball team); *Neal*, 198 F.3d at 769-72 (rejecting

constitutional challenge brought by male wrestlers whose team was eliminated by school attempting to achieve gender equity); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) (holding that men's rights not violated when institution eliminates a male team to achieve gender equity in compliance with Title IX).

Under this standard, Defendants must prove that their different treatment of males and females "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." In addition, Defendants' reasons for their sex discrimination must be "exceedingly persuasive." *Miss. Univ. for Women*, 458 U.S. at 724. Defendants cannot meet this burden.

2. The Individual Defendants Violated Plaintiffs' Constitutional Right to Be Free from Sex Discrimination under the Equal Protection Clause.

i. Defendants' Policies Were Facially Discriminatory.

Defendants Vanderhoef, Franks Warzecka, and Gill-Fisher were high-ranking UCD officials responsible for UCD's athletic program who are/were state actors who acted under color of law for all purposes relevant to this action. (UF ¶¶ 10-13.) Accordingly, they are subject to liability under this statute for their violation of the Equal Protection Clause. Plaintiffs will readily meet their initial burden at trial to establish that the Individual Defendants intentionally created a sex-based classification that deprived them of equal protection. The Individual Defendants' discriminatory policy is facially apparent in its disparate allocation of athletic opportunities (as reported by UCD to the Department of Education) and in its refusal to provide opportunities for women in wrestling. This policy deprived Plaintiffs and other women an equal opportunity to participate in athletics, including in wrestling.

Specifically, the Individual Defendants lawfully segregated students in to male and female athletic teams because of their inherent biological differences, but they then unlawfully allocate those opportunities in favor of males. The Individual Defendants themselves decided which sports UCD would offer to the members of which sex (*i.e.*, men's basketball and women's basketball). The Individual Defendants then dictated the number of opportunities in each sport. Their decision to allot women fewer of those sports opportunities constitutes facial discrimination. A university must

make its athletic program available to all on equal terms. *Mansourian,* 602 F.3d at 974 (quoting *Haffer*, 678 F. Supp. at 525). *Haffer v. Temple University, supra,* is directly on point. The court there denied defendants' motion for summary judgment on an equal protection claim brought by female students who alleged that defendants offered men more intercollegiate athletic opportunities than female opportunities proportionate to enrollment, and thus deprived women of an equal opportunity to participate. 678 F. Supp. at 523.

Plaintiffs will establish the extension of this discriminatory policy to Plaintiffs and other women wrestlers. The Individual Defendants removed women from the roster based on their gender in 2000 without justifying this decision, as they must. Although the Individual Defendants may attempt to convince this Court that Plaintiffs' removal were the result of the actions of a rogue coach, there is no dispute that the Individual Defendants knew the women were removed, ratified that decision, and then continued to deny Plaintiffs the opportunity to wrestle by, among other things, imposing the newly concocted requirement that women must wrestle men for a varsity spot. The Ninth Circuit concluded that this requirement necessarily precluded the future participation of women in varsity wrestling. *Mansourian*, 602 F.3d at 970 n.18. UCD continued to deprive Plaintiffs of wrestling opportunities, as women competing against women, through their graduation and the filing of this suit.

While Defendants offer the same opportunities to males and females (*e.g.*, men's and women's basketball, men's and women's tennis, men's and women's swimming, men's and women's water polo), they have failed and refused to offer women the opportunity to participate in wrestling at a time when they were not ensuring equity program-wide. This decision constitutes sex discrimination on its face. The Ninth Circuit has recognized that not only must "overall athletic opportunities … be equal" to satisfy the Equal Protection Clause, but that "denial of an opportunity in a specific sport, even when overall opportunities are equal, can be a violation of the equal protection clause." *Clark,* 695 F.2d at 1130-31.

ii. The Individual Defendants Were Responsible for Creating and Maintaining Discriminatory Policies.

Because Defendants operate a sex segregated and facially discriminatory athletic program,

they are liable for their disparate treatment of the men's and women's programs (*i.e.*, the disparate allocation of opportunities) if they cannot carry their burden of proof on the reasons for their discrimination. Plaintiffs do not have to show malicious or nefarious intent by the Individual Defendants in order to prevail. They only have to show that the Individual Defendants were those who made or ratified the facially discriminatory decisions that created the facially discriminatory athletic program. *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009) (quoting *Kwai Fun Wong v. United States*, 373 F.3d 952, 966 (9th Cir. 2004)).

The Individual Defendants are responsible for this discrimination because they either made the discriminatory decisions themselves (Defendants Warzecka and Gill-Fisher) or they ratified them (Defendants Franks and Vanderhoef). Defendants have already admitted that all of the Individual Defendants have the delegated authority to make decisions relating to the UCD athletic department. (*See* UF ¶¶ 10-13.) Those were the daily responsibilities of Defendants Warzecka and Gill-Fisher. (UF ¶¶ 12-13.) Defendants have also admitted that Defendants Vanderhoef and Franks had direct control and supervision over the athletic department. (UF ¶¶ 10-11.) In this case, Plaintiffs ask the Court to hold them liable for their direct participation in the discriminatory decisions, for their ratification of those decisions, and for their refusal to use their authority to reverse those decisions despite repeated requests that they do so.

iii. The Individual Defendants Offer No Justification for Their Discrimination, Much Less an Exceedingly Persuasive One.

Finally, the Individual Defendants have not offered a justification for their failure to ensure that women have equal opportunities to participate in intercollegiate athletics, or their exclusion of women from the wrestling program. Nor do they contend that the elimination of the women's intercollegiate wrestling opportunities at UCD served an important governmental objective. Similarly, Defendants have failed to show that these discriminatory practices are substantially related to any purportedly important government objectives. Indeed, the Individual Defendants cannot justify the elimination of female wrestling opportunities where they were eliminating (rather than adding) female opportunities elsewhere in the program.

3. The Individual Defendants Cannot Establish Qualified Immunity From Suit.

To the extent that the Individual Defendants intend to raise the defense of qualified immunity at trial, they will not be able to meet their burden of proof. This is especially true in light of the Court's prior rulings on this issue: "Determining whether officials are owed qualified immunity involves two inquiries: (1) whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right; and (2) if so, whether the right was clearly established in light of the specific context of the case." *al-Kidd*, 580 F.3d at 964 (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

In its ruling on the qualified immunity defense raised in the Individual Defendants' motion for summary judgment, this Court held:

> At the time of the alleged discriminatory conduct in this case, the law, as set forth by the United States Supreme Court and the Ninth Circuit, was clear that the Equal Protection Clause of the Fourteenth Amendment creates the right to be free from purposeful discrimination in education by state actors. *Mississippi Univ. for Women*, 458 U.S. at 731; *Oona, R.S.*, 143 F.3d at 476 (holding that it was clearly established well prior to 1988 that the Equal Protection clause proscribed any purposeful discrimination by state actors on the basis of gender). More specifically, as early as 1982, the Ninth Circuit recognized that the Equal Protection Clause may be violated when overall athletic opportunities are unequal as well as when there is inequality in opportunity in a given sport. *Clark*, 695 F.2d at 1130-31 (acknowledging the Equal Protection right, but holding that the discrimination in favor of an all girls volleyball team was substantially related to an important governmental interest).

(Dkt. 509 at 32:25-33:12.)

These legal findings will be determinative at trial. The Court's holding that Plaintiffs alleged a constitutional right that was clearly established precludes the Individual Defendants from relying on the qualified immunity defense at trial.

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IV. CONCLUSION

Plaintiffs respectfully requests the Court's careful consideration of the law of the case, undisputed facts, stipulations, judicial admissions, and other evidence presented at trial, which will support a judgment in favor of Plaintiffs on their Title IX and Equal Protection claims.

DATED: May 5, 2011

Respectfully submitted,

THE STURDEVANT LAW FIRM
A Professional Corporation

EQUAL RIGHTS ADVOCATES

DUCKWORTH PETERS LEBOWITZ OLIVIER LLP

EQUITY LEGAL

By: /s/ *Noreen Farrell*
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EXHIBIT A

Club Sport Participation Numbers (as reflected in Plaintiffs' Trial Exhibit 391): Sport Club Participation Waivers

	Number of Club Sport Athletes			Percentage of Club Sport Athletes	
	Female	Male	Total	Female	Male
1981-1982	354	487	841	42.1%	57.9%
1982-1983	342	505	847	40.4%	59.6%
1983-1984	365	649	1,014	36.0%	64.0%
1984-1985	408	725	1,133	36.0%	64.0%
1985-1986	352	969	1,321	26.6%	73.4%
1986-1987	477	847	1,324	36.0%	64.0%
1987-1988	533	882	1,415	37.7%	62.3%
1988-1989	444	815	1,259	35.3%	64.7%
1989-1990	449	869	1,318	34.1%	65.9%
1990-1991	551	932	1,483	37.2%	62.8%
1991-1992	525	839	1,364	38.5%	61.5%
1992-1993	468	792	1,260	37.1%	62.9%
1993-1994	566	838	1,404	40.3%	59.7%
1994-1995	556	691	1,247	44.6%	55.4%
1995-1996	537	627	1,164	46.1%	53.9%
1996-1997	294	720	1,014	29.0%	71.0%
1997-1998	417	644	1,061	39.3%	60.7%
1998-1999	434	671	1,105	39.3%	60.7%

Women's Club Sports (as reflected in Plaintiffs' Trial Exhibit 391): Sport Club Participation Waivers

1. Aikido
2. Alpine Ski
3. Amis
4. Archery
5. Badminton
6. Bowling
7. Bujinkan Ninpo
8. By-Cycle Tour
9. Chinese Kung Fu
10. Comp. Karate
11. Crew
12. Cycling
13. Dos Pares Eskrima
14. Equestrian
15. Equestrian Drill Team
16. Fencing
17. Field Hockey
18. Frisbee
19. Goju-Kai Karate Do
20. Gymnastics
21. Hapkido
22. Horse Polo
23. Ice Hockey
24. JKA Shotokan
25. Judo
26. Ju-Do-Kai (Jujitsu)
27. Kendo Karate
28. Kenpo Karate
29. Kru Kan Tae Kwon Do
30. Non-Classical Kung Fu
31. Lacrosse
32. Nordic Ski
33. Raquetball
34. Rifle
35. Rodeo
36. Roller Hockey
37. Rugby
38. Ryu Kyu
39. Sailing
40. Shorin Ryu Karate
41. Soccer
42. Squash
43. Surf Club
44. Synchronized Swimming
45. Table Tennis
46. Tae Kwon Do-Traditional
47. Tae Kwon Do-Competitive
48. Tennis
49. Triathlon
50. Uechi Ryu
51. UMAF Tae Kwan Do
52. Volleyball
53. Wallyball
54. Water Polo
55. Water Ski

EXHIBIT B

Athlete Participation Numbers in EADA Reports by Sport

	1995-1996	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005
Male Enrollment #	8,582	8,882	8,593	8,683	7,997	9,273	9,756	8,756	9,191	10,186
Female Enrollment #	9,352	10,054	10,118	10,596	10,446	11,783	12,494	11,331	11,660	12,834
Total Enrollment	**17,934**	**18,936**	**18,711**	**19,279**	**18,443**	**21,056**	**22,250**	**20,087**	**20,851**	**23,020**
Men's Sports										
Baseball, Men's	48	49	56	44	41	43	40	36	34	33
Basketball, Men's	19	22	22	18	20	21	20	18	13	17
Cross Country, Men's	27	35	33	29	20	22	22	21	18	16
Football, Men's	132	130	160	135	114	117	115	116	106	103
Golf, Men's	17	18	19	21	15	13	12	12	10	10
Soccer, Men's	27	28	30	32	31	33	27	30	29	29
Swimming and Diving, Men's	26	22	26	32	32	31	30	30	28	31
Tennis, Men's	17	14	19	16	15	14	13	15	13	12
Track and Field, Men's (Indoor)				17	15	15	17	16	18	19
Track and Field, Men's (Outdoor)	86	82	74	48	49	48	48	47	42	40
Water Polo, Men's	19	32	28	36	26	29	29	27	25	25
Wrestling, Men's	23	40	46	38	38	34	30	33	35	33
Total Male Participants:	***441***	***472***	***513***	***466***	***416***	***420***	***403***	***401***	***371***	***368***
Unduplicated Count				***426***	***384***	***386***	***373***	***368***	***338***	***336***
Difference:				*40*	*32*	*34*	*30*	*33*	*33*	*32*
Women's Sports										
Basketball, Women's	14	17	13	16	17	16	16	18	19	13
Cross Country, Women's	20	23	30	29	20	23	22	23	18	16
Golf, Women's (5)										
Gymnastics, Women's	22	23	17	23	21	20	19	24	19	23
Lacrosse, Women's (2) (6)		30	37	40	35	29	25	22	21	22
Rowing, Women's (2)		66	82	78	72	77	67	66	73	59
Soccer, Women's	24	22	21	28	33	32	26	32	25	30
Softball, Women's	21	20	24	25	23	21	22	25	22	22
Swimming and Diving, Women's	19	22	29	38	35	35	28	33	36	38
Tennis, Women's	12	12	16	12	12	12	12	14	11	12
Track and Field, Women's (Indoor)				22	21	23	18	26	28	27
Track and Field, Women's (Outdoor)	63	59	61	57	67	59	59	60	58	54
Volleyball, Women's	16	19	12	17	15	17	19	16	16	16
Water Polo, Women's		35	41	41	49	43	28	30	27	31
Wrestling					4					
Total Female Participants:	***211***	***348***	***383***	***426***	***424***	***407***	***361***	***389***	***373***	***363***
Unduplicated Count				***389***	***384***	***369***	***329***	***344***	***333***	***322***
Difference:				*37*	*40*	*38*	*32*	*45*	*40*	*41*
Total Overall Participants	**652**	**820**	**896**	**892**	**840**	**827**	**764**	**790**	**744**	**731**
Male Enrollment %	**48%**	**47%**	**46%**	**45%**	**43%**	**44%**	**44%**	**44%**	**44%**	**44%**
Male Athletic Participation %	**68%**	**58%**	**57%**	**52%**	**50%**	**51%**	**53%**	**51%**	**50%**	**50%**
Female Enrollment %	**52%**	**53%**	**54%**	**55%**	**57%**	**56%**	**56%**	**56%**	**56%**	**56%**
Female Athletic Participation %	**32%**	**42%**	**43%**	**48%**	**50%**	**49%**	**47%**	**49%**	**50%**	**50%**
Difference	20%	11%	11%	7%	6%	7%	9%	7%	6%	6%