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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

AREZOU MANSOURIAN, LAUREN MANCUSO, NANCY NIEN-LI CHIANG, and CHRISTINE WING-SI NG; and all those similarly situated,

Plaintiffs,

vs.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA AT DAVIS, et al.,

Defendants.

_____/

CASE NO. 2:03-CV-02591-FCD-EFB

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Time: 10:00 a.m.
Date: July 27, 2007
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I

INTRODUCTION

Plaintiffs AREZOU MANSOURIAN, LAUREN MANCUSO, NANCY NIEN-LI CHIANG, and CHRISTINE WING-SI NG filed this action, on behalf of themselves and an uncertified class, on December 18, 2003.[1] The REGENTS OF THE UNIVERSITY OF CALIFORNIA (erroneously sued as "Board of Regents of the University of California at Davis") hereafter (the "UNIVERSITY"), the Chancellor of the University of California, Davis (LARRY VANDERHOEF), the Athletic Director at the University of California, Davis (GREG WARZECKA), Associate Athletic Directors (PAM GILL-FISHER and LAWRENCE SWANSON), and former Associate Vice Chancellor, Student Affairs (ROBERT FRANKS) are named as Defendants in their individual and official capacities.

Plaintiffs assert six claims for relief: (1) violation of Title IX based on a theory that female athletes are not afforded the same opportunities as male athletes (asserted against the UNIVERSITY only); (2) violation of Title IX based on a theory that female athletes are not provided with the same opportunities for financial assistance as male athletes (asserted against the UNIVERSITY only); (3) retaliation in violation of Title IX and its interpretive regulations (asserted against the UNIVERSITY only); (4) violation of 42 U.S.C. §1983 based on an equal protection clause (asserted against the UNIVERSITY for injunctive relief and against the individual Defendants for damages); (5) violation of the California Unruh Civil Rights Act (asserted against all Defendants); and (6) a claim of violation of "public policy" based on various California statutes including Article I, section 7 of the State Constitution, Article I, section 31 of the State Constitution, and Education Code sections 221.7, 262.3, 66101, 67620 and 66252 (asserted against all Defendants).

Pursuant to Federal Rule 12(c), Defendants move to dismiss all claims as stated below.

II

FACTUAL SUMMARY

The gist of Plaintiffs' Complaint is that the UNIVERSITY effectively ended all opportunities for female students to participate in intercollegiate varsity wrestling when they were initially cut from

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[1] Plaintiff CHIANG recently voluntarily dismissed all claims.

the team in the Fall of 2000 (Ex. A, Complaint, ¶60) and then later in the Fall of 2001, when they were required to compete for a sport on the team by engaging in tryouts under the same terms and conditions as male athletes (Id. at ¶¶ 77-78).

The alleged events forming the basis of the claims began in Fall of 2000. Plaintiffs allege they participated in the wrestling program at U.C. Davis. (Id. at ¶¶ 30, 40, 48, 57.) They contend that in the Fall of 2000, Michael Burch, then the head coach of the wrestling team, told them "that Defendants had terminated all wrestling athletic participation opportunities for female students, but not for male students." (Id. at ¶¶ 59-60.) Plaintiffs refer to this alleged act as the "No Female Directive." (Id. at ¶ 60) They further allege that as a result of the purported "Directive," they lost various benefits including insurance, laundry, medical services, wrestling practice, early registration, and the opportunity to receive academic credit for wrestling. (Id. at ¶ 61.) Plaintiffs met with WARZECKA, who suggested they form a club for women wrestlers. (Id. at ¶ 63.) In April 2001, the women wrestlers filed a complaint with the United States Department of Education's Office for Civil Rights, which is the entity charged with investigating complaints of alleged violations of Title IX. (Id. at ¶ 67; Defendants' Request for Judicial Notice, Ex. E, *filed concurrently with this Motion.*) Plaintiffs contend that in June 2001, the UNIVERSITY agreed to reinstate them to the team. (Id. at ¶¶ 74-75.) In the Fall of 2001, they attended wrestling practice and were informed they would be required to compete for a spot on the team on the same terms and conditions as male athletes. (Id. at ¶¶ 75-78.)

The Office for Civil Rights ("OCR") received several complaints from the women wrestlers. (*See* Request for Judicial Notice, Ex.'s E, G.) The initial complaint was filed on April 25, 2001. Plaintiffs alleged they were discriminated against on the basis of sex because they were cut from the team. (Exhibit A, Complaint, ¶60-67; Request for Judicial Notice, Exhibit E.) In response, the UNIVERSITY advised the OCR on May 14, 2001 that the Director of Athletics had communicated with the coach of the wrestling team, telling him to add the four women students to the team roster immediately, and that the four students had been advised of this. (Request for Judicial Notice, Exhibit F.) In its letter issued to the Chancellor on May 31, 2001, the OCR stated "the OCR has learned that the allegations have been resolved by the action taken by the University to re-instate the women wrestlers to the wrestling team. OCR has therefore determined that there are no current allegations

appropriate for resolution by OCR. OCR is closing the complaint as of the date of this letter." (Request for Judicial Notice, Exhibit G.) A second complaint was filed on May 14, 2001 by NG. NG alleged claims of disparate treatment on the basis of gender in regard to the wrestling team. (Request for Judicial Notice, Exhibit H.) After completing an investigation that included a campus visit and interviews, the OCR issued its report on this and the remaining complaints on October 16, 2001. (Request for Judicial Notice, Exhibit I.) The OCR indicated it was closing the complaint due to a Voluntary Resolution Plan submitted by the UNIVERSITY in which the UNIVERSITY agreed to allow the women to participate on the team on the same terms and conditions as the male athletes. The OCR noted that: "[i]nasmuch as the University has chosen to provide an intercollegiate athletic wrestling team that is open to both men and women, it has undertaken to provide equivalent benefits, services and opportunities, as required." (Id. at p. 3)

III

THE ALLEGED "SECOND ELIMINATION" OF WOMEN'S WRESTLING WAS, AS A MATTER OF LAW, A LAWFUL ACT

Plaintiffs contend the UNIVERSITY discriminated against them by requiring that "they could only participate in wrestling as part of the men's team and only if they could beat male wrestlers using men's collegiate style wrestling rules rather than women's freestyle rules." (Exhibit A, Complaint, pp. 21:11-15, 42:3-7.) They refer to this act as the "second elimination of female wrestling athletic participation opportunities." (Id. at 21:24-22:2.) Plaintiffs cannot seek redress for this alleged "second elimination" because, as a matter of law, Defendants' policy of equal treatment was lawful.

While case law in this area is sparse, it is unanimous in concluding (directly or in dicta) that educational institutions need only allow women athletes to try out for a team -- not guarantee them a place on the roster. Fortin v. Darlington Little League, Inc., 514 F.2d 344, 351 (1st Cir. 1975) (holding that the Equal Protection clause only requires that female athletes be treated "upon the same terms and conditions available ... to all others ..."); Brenden v. Independent School Dist., 477 F.2d 1292, 1302 (8th Cir. 1973) (noting that "[t]he failure to provide the plaintiffs with an individualized determination of their own ability to qualify for positions on these teams is … violative of the Equal Protection Clause."); Lantz v. Ambach 620 F.Supp. 663, 665-66 (S.D.N.Y.1985) (holding that females

are entitled to a "right to try"); Force v. Pierce City R-VI School District, 570 F.Supp. 1020, 1031 (D. Mo. 1983) (following Lantz); Hoover v. Meiklejohn, 430 F.Supp. 164, 171 (D. Colo. 1977) ("There is no right to a position on an athletic team. There is a right to compete for it on equal terms"); Gilpin v. Kansas State High School Activities Asso., 377 F.Supp. 1233, 1241 (D. Kan. 1973) ("The plaintiff has not alleged that she has an absolute right to participate on any interscholastic team ... and the court certainly would not recognize such a right. She does, however, maintain that she has a right not to be automatically disqualified from participating in interscholastic competition based solely upon her sex, rather than upon her athletic ability"); Reed v. Nebraska School Activities Association, 341 F.Supp. 258, 262 (D.Neb. 1972) (holding the plaintiff's right was not "the right to play golf. Her right is to be treated the same as boys unless there is a rational basis for being treated differently"). An allegation that the UNIVERSITY only allowed the female wrestlers to wrestle "if they could beat male wrestlers using men's collegiate style wrestling rules" is simply an allegation of **equal** treatment not intentional discrimination. Plaintiffs' contentions that they never had to try out in prior years do not make Defendants' later actions any less lawful: "Impediments to preferential treatment do not deny equal protection." Coalition for Economic Equity v. Wilson, 122 F.3d 692, 708 (9th Cir. 1997).

Plaintiffs' contention that the "second elimination" is discriminatory is further undermined by the fact that the OCR approved of the UNIVERSITY's policy. After conducting an investigation, the OCR informed the UNIVERSITY that it was closing the female wrestlers' complaint contingent on the UNIVERSITY implementing the approved Voluntary Resolution Plan ("VRP"). (Request for Judicial Notice, Exhibit I.) The VRP contained a provision stating that:

> All men and women athletes are encouraged to compete for a position on the Wrestling Team. The coach of the Wrestling Team ("Coach") will select those athletes eligible for the Wrestling Team's final squad list who demonstrate the highest skill and competitive ability in their weight class. (Id.)

The VRP unambiguously states that the UNIVERSITY is only required to select athletes with the highest skill level -- the very allegation the Plaintiffs contend is a discriminatory policy. Thus, the "second elimination" allegation is nothing more than a contention that the UNIVERSITY acted unlawfully by implementing a policy of equal treatment of male and female students who want to wrestle. However, "the efforts [the UNIVERSITY] made in fulfilling its commitments under the

compliance agreement with OCR, preclude a finding that [it] has been deliberately indifferent to its overall compliance obligations under Title IX." Grandson v. Univ. of Minn., 272 F.3d 568, 576 (8th Cir 2001).

"Title IX does not establish a right to participate in any particular sport at the college of one's choice." Harper v. Board of Regents, 35 F.Supp.2d 1118, 1123 (C.D. Ill. 1999). **Nor** does Title IX **require** "any education institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity ...." 20 U.S.C. § 1681(b); Neal v. Board of Trustees, 198 F.3d 763, 771 (9th Cir. 1999). Further, the statutes pertain to sex discrimination do not require "reasonable accommodations" for persons who lack the appropriate qualifications. Bronk v. Ineichen, 54 F.3d 425, 429, fn 5 (7th Cir. 1995) ("it is not accommodation but equal treatment that is mandated"). Plaintiffs never had an absolute right to participate on the U.C. Davis wrestling team. They only had a right to compete for a spot on the roster on the same terms and conditions as male students -- something the complaint expressly concedes occurred. The alleged "second elimination," as a matter of law, does not allege any action "showing that [Plaintiffs] are entitled to relief." Fed. R. Civ. Pro 8(a). Accordingly, Defendants request that the Court dismiss all claims based on the "second elimination" (*i.e.* the Fall 2001 tryouts).[2]

IV

SINCE NO CONTINUING VIOLATION EXISTS, ALL FEDERAL LAW BASED CLAIMS ARE UNTIMELY

As the Ninth Circuit has observed, "a plaintiff may plead herself out of court." Weisbuch v. County of Los Angeles, 119 F.3d 778, 783 (9th Cir. 1997). Plaintiffs previously escaped dismissal via a Rule 12(b)(6) motion on the statue of limitations by relying on conclusory allegations of a

[2] Previously, the standard in a judgment on the pleading was that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The Supreme Court recently held that "after puzzling the profession for 50 years, this famous observation has earned its retirement." Bell Atl. Corp. v. Twombly, 2007 U.S. LEXIS 5901, *35 (2007). Thus, "a wholly conclusory statement of claim" coupled with the metaphysical possibility that the claim could survive on some **undisclosed** set of facts no longer suffices. (Id. at 33.) As to the Fall 2001 try-outs, Plaintiffs have only disclosed that they were treated the same as the male athletes. The conclusory characterization of the "second elimination" as discriminatory is of no consequence.

"continuing violation." A further examination of the complaint in light of the above discussion warrants a different conclusion. Once an entity discontinues an allegedly discriminatory policy, the clock starts running, even under the "pattern and practice" discrimination theory. Gifford v. Atchison, T. & S. F. R. Co., 685 F.2d 1149, 1153-54 (9th Cir. 1982).

The applicable statute of limitations for all federal law based claims asserted is one year. *See* Stanley v. Trs. of the Cal. State Univ., 433 F.3d 1129, 1136 (9th Cir. 2006) (Title IX); Silva v. Crain, 169 F.3d 608, 610 (9th Cir. 1999) (42 U.S.C. § 1983); *also see* Gatto v. County of Sonoma, 98 Cal.App.4th 744, 760 (2002) (Unruh Act). Plaintiffs seek damages in all three Title IX claims for relief based on what they call the "No female directive" issued in the Fall of 2000 (Ex. A, Complaint, ¶¶ 135, 146, 160), an alleged broken promise in June 2001 regarding reinstatement of wrestling opportunities for women (Id. at ¶¶ 74-75), the failure to renew the contract of their coach (Id. at ¶ 157), and being required to compete for a spot on the wrestling team under the same terms and conditions as male students in the Fall of 2001. (Id. at ¶¶ 75-78, 155-156.) All actions which form the basis of Plaintiffs' claims for damages in their complaint were completed by Fall 2001. The complaint was not filed until December 18, 2003.

The conclusory allegations about "continuing violations" cannot salvage the untimely claims as the complaint admits that the UNIVERSITY implemented a policy that was non-discriminatory in Fall 2001. The new policy effectively ended any purported continuing violation towards women wrestlers. All prior claims based on "discrete acts" are untimely. Since the complaint admits that the UNIVERSITY implemented a non-discriminatory policy, the continuing violations doctrine does not apply.

With respect to the retaliation claim, the alleged "directive" took place in Fall 2000, *before* the protected activity of filing an OCR complaint took place in the Spring of 2001. (Exhibit A, Complaint, ¶¶ 59-60, 153.) The only change that took place after the OCR complaints were filed was a confirmation that all students who try out for the wrestling team will be treated equally. (Id. at ¶¶ 155-156.) The failure to change *an existing policy* after a plaintiff complains does not morph a systemic discrimination claim into a systemic retaliation claim. Lever v. Northwestern Univ., 979 F.2d 552, 556 (7th Cir. 1992). More importantly, there are no allegations (conclusory or factually supported)

that the University had a *systemic* policy of retaliating against female athletes who complain about sex discrimination. EEOC v. Custom Cos., 2004 U.S. Dist. LEXIS 5950 *34-37 (N.D. Ill. 2004) (without proof of systemic retaliation Morgan bars untimely claims); Allen v. Chicago Transit Auth., 2000 U.S. Dist. LEXIS 11499 *17-18 (E.D. Ill. 2000) (noting that "there are no allegations that the CTA engaged in a pattern or practice of retaliation. The only allegations of retaliation are the incidents against individual plaintiffs"). Plaintiffs cannot bootstrap later allegedly retaliatory "individualized decisions" that had no systemic effect to allegedly pre-existing systemic discriminatory acts to extend the statute of limitations on the later acts. Cherosky v. Henderson, 330 F.3d 1243, 1247 (9th Cir. 2003).

V

PLAINTIFFS CANNOT SEEK REDRESS FOR THE NON-RENEWAL OF BURCH'S CONTRACT

Plaintiffs contend that "Defendants' termination of wrestling coach Michael Burch also constituted retaliation against Plaintiffs and not just against Coach Burch, because Mr. Burch supported women's wrestling and was willing to coach women wrestlers." (Exhibit A, Complaint, ¶ 157.) Their attempt to seek redress for an employment decision pertaining to Burch fails as matter of law to constitute a claim for retaliation under Title IX.

A. Plaintiffs Do Not Have Standing to Seek Redress For Actions Taken Against Others

Absent "exceptional situations," a plaintiff "may not seek redress for injuries done to others." Moose Lodge No. 107 v. Irvis 407 U.S. 163, 166, 92 S. Ct. 1965, 1968 (1972). The Supreme Court has determined that third party standing is proper only where: (1) the litigant has suffered an "'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute"; (2) "the litigant must have a close relation to the third party" and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 1370-71 (1991). Plaintiffs have not alleged a sufficiently close relationship to Burch to justify third party standing. Further, Burch had no "hindrance" to protect his rights as he filed his own lawsuit over this issue. (Request for Judicial Notice, Exhibit L.)

In interpreting Title IX, other courts disallowed similar, but "reversed," claims based on the standing concerns. These cases involve situations where a coach sues based on allegedly

discriminatory acts taken against students. Lowrey v. Texas A & M Univ. Sys., 117 F.3d 242, 251 (5th Cir. 1997) ("were we asked to afford Lowrey a remedy for the rights of her students, we would hold that she does not have standing to assert the rights of third persons under Title IX"); Hankinson v. Thomas County Sch. Dist., 2005 U.S. Dist. LEXIS 25576, * 7-8 (M.D. Ga. 2005) ("Plaintiff does not have standing to bring a Title IX claim on behalf of the students participating in the softball program").

B. As a Matter of Law and Sound Judicial Policy, Plaintiffs Cannot Base Their Claims on Actions Relating to Their Coach.

Even if Plaintiffs contend that they are seeking redress for injuries *done to them* resulting from Burch's departure, the retaliation claim still lacks merit. In Shaposhnikov v. Pacifica Sch. Dist., 2006 U.S. Dist. LEXIS 18330 *25, n 9 (N.D. Cal. 2006), the Northern District rejected a claim under Title IX based on actions taken against others. There, the plaintiff asserted a Title IX retaliation claim because of "defendants' 'apologetic' communications with the parents of the harassers and because one of the harassers had his suspension reduced and was placed in a 'peer helper' class." The Court found that such assertions could not form the basis of a retaliation claim noting that "[t]he Court does not agree that these actions can qualify as retaliation, as they did not involve plaintiff." (Id.) Similarly, employment actions taken against Burch did not involve Plaintiffs.

In Choike v. Slippery Rock Univ. of Pa. of the State Sys. of Higher Educ., 2006 U.S. Dist. LEXIS 49886, *38-39 (W.D. Pa. 2006), the Eastern District of Pennsylvania took a similar position. There, a coach sought relief under Title IX where allegedly discriminatory decisions to cut women's sports teams resulted in the loss of his coaching position on the cut teams. Coach Yeamans reasoned that he had a viable Title IX discrimination claim because "he has lost his coaching positions as a result of discrimination on the basis of sex." (Id. at 38.) The Court disagreed: "Yeamans' loss of coaching jobs was a mere by-product of its decisions to eliminate the women's swimming and women's water polo teams. No intentional discrimination was directed to Yeamans." (Id.) Any injuries that resulted from Burch's departure were similarly a "mere by-product" of the decision related to Burch's employment.

The Court should also be guided by other policy considerations. First, Title IX is a spending

clause statute. In crafting the scope of spending clause claims, Courts have required that the federal government clearly delineate the scope of the cause of action to state entities that accept funds from the federal government. Penhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 101 S. Ct. 1531, 1540 (1981). Thus, a state entity can only be liable for claims "if the funding recipient is on notice that, by accepting federal funding, it exposes itself to liability of that nature." Barnes v. Gorman, 536 U.S. 181, 187, 122 S. Ct. 2097, 2101 (2002). The Supreme Court has determined that the Penhurst doctrine is not violated in allowing a *direct* victim of Title IX retaliation to sue for damages. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 182, 125 S. Ct. 1497, 1509 (2005). However, Jackson cannot be interpreted as permitting claims based on secondary effects to "indirect victims." Choike, 2006 U.S. Dist. LEXIS 49886 at *38. Allowing Plaintiffs' claims based on Burch's non-renewal to proceed would mean that every time a teacher, coach or counselor is terminated and the terminated employee asserts a Title IX claim, a school could face lawsuits by dozens (or possibly even hundreds) of students who claim they were affected by the discriminatory personnel decision. Surely, federal funding recipients could not have contemplated such liability in accepting federal funds.

Second, allowing Plaintiffs to seek redress for Burch's non-renewal will create a "trial within a trial." To combat Plaintiffs' contention that Burch's contract was not renewed in retaliation for their protected activity, Defendants would be required to set forth the legitimate, non-retaliatory reasons for Burch's non-renewal -- reasons which Plaintiffs would most likely seek to dispute. Resolving this one alleged "adverse action" would necessarily require trying the entire Burch lawsuit in this case. This "trial within a trial" would unduly burden this Court and the parties and would also result in a duplication of the efforts made by the parties who have already litigated and resolved the Burch case short of trial.[3]

Plaintiffs "cannot rest [their] claim to relief on the legal rights or interest of third parties." Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975). The decision not to renew Burch's contract was one discrete act which affected only Burch's employment relationship. As a matter of standing law and the policy in favor of judicial efficacy, Defendants respectfully request the Court rule

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[3] Indeed, on January 30, 2004, the Court determined that this matter and the Burch case were not sufficiently connected to warrant consolidating them. (Request for Judicial Notice, Exhibit B, Non-Related Case Order.)

that Plaintiffs cannot seek redress for Burch's non-renewal as an "adverse action."

C. Burch's Non-Renewal Was Not a Materially Adverse Employment Action

In Burlington Northern and Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414, (2006) the Supreme Court held that in order to constitute a retaliatory adverse action, "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse." A retaliation claim does not contemplate providing redress for "petty slights or minor annoyances." (Id.) Further, the Court views the materiality requirement from the "objective" point of view of a reasonable person in the plaintiff's circumstances. (Id.) Even if Plaintiffs could seek redress for damages suffered as a result of Burch's non-renewal, such damages do not meet the materiality test.

The complaint alleges that "Coach Michael Burch informed the women that Defendants had terminated all wrestling athletic participation opportunities for female students but not for male students (the 'No Females Directive'"). (Exhibit A, ¶ 60.) Plaintiffs further contend that as a result of the "directive" they were denied the benefits given to varsity wrestlers. (Id. at ¶¶ 61-62.) They further contend that Defendants initially "refused" to rescind the alleged directive after they protested it. (Id. at ¶ 63.) Eventually, the women wrestlers were reinstated. (Id. at ¶ 74.) However, the Plaintiffs were informed they could only wrestle if they beat any competing male wrestlers. (Id. at ¶ 77.)

The complaint does not explain how the decision not to renew Burch's contract caused Plaintiffs any "material" harm. Notwithstanding the fact that Burch did not seem inclined to treat males and females equally by requiring both genders to try out for spots on the team, it is this requirement that forms the basis of Plaintiffs' allegations. Plaintiffs cannot recover on a theory that they were entitled under Title IX to a coach who gave preferential treatment to women by holding them to lower standards for making the team than the standards applied to male students.

VI

PLAINTIFFS CANNOT RECOVER PUNITIVE DAMAGES AGAINST THE UNIVERSITY UNDER TITLE IX

Plaintiffs seek punitive damages "to the extent permitted by law." (Exhibit A, Complaint, p. 55:2-3.) All claims for punitive damages under federal law are barred by Newport v. Fact Concerts, Inc. (1981) 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, an opinion in which the Supreme Court held that

punitive damages are not available against government entities under 42 U.S.C. § 1983. Other Courts have determined that Newport is equally applicable to Title IX claims. Landon v. Oswego Unit Sch. Dist. 308, 143 F.Supp.2d 1011, 1014 (N.D. Ill. 2001); Crawford by Jefferson v. School Dist. 1998 U.S. Dist. LEXIS 8064 (E.D. Pa. 1998); *also see* A.M.J. v. Royalton Pub. Sch., 2006 U.S. Dist. LEXIS 90532, *6-7 (D. Minn. 2006).

Plaintiffs' punitive damage claims under Title IX are also barred by the Barnes v. Gorman, 536 U.S. 181, 122 S. Ct. 2097 (2002) opinion. In Barnes, the Court held that "Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages." (Id. at 188, 2102.) Barnes also noted that the "Court has interpreted Title IX consistently with Title VI...." Id. at 185, 2100. Thus, Barnes' holding as to Title VI is equally applicable to Title IX. Mercer v. Duke Univ., 401 F.3d 199, 202 (4th Cir. 2005) (noting in a Title IX suit that "the Supreme Court's decision in Barnes compelled us to vacate Mercer's punitive damage award."); Frechel-Rodriguez v. P.R. Dep't of Educ., 2007 U.S. Dist. LEXIS 21020, *20 (D.P.R. 2007).

VII

PLAINTIFFS CANNOT RECOVER EMOTIONAL DISTRESS DAMAGES AGAINST THE UNIVERSITY UNDER TITLE IX

In Barnes, the Supreme Court noted that under "Title IX, which contains no express remedies, a recipient of federal funds is nevertheless subject to suit for compensatory damages, [citation], and injunction, [citation], forms of relief *traditionally available in suits for breach of contract.*" Barnes, 536 U.S. at 187, 2101 (emphasis added). In supporting this conclusion, the Supreme Court cited to the Restatement Second of Contracts. As to claims for emotional distress, the Restatement (Second) indicates that "Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353 (1981); *also see* Erlich v. Menezes, 21 Cal.4th 543, 558 (1999) ("damages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California"). The Restatement clarifies that "common examples" of cases where emotional distress damages can be recovered in a contract claim include "contracts of carriers and innkeepers with passengers and guests,

contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death." (Id., *Comments & Illustrations: Comment a.*) The Restatement adds that breaches "resulting for example in sudden impoverishment or bankruptcy" may also justify damages for emotional distress damages where "this was a particularly likely risk...." (Id.)

The gravamen of the complaint is that the Plaintiffs were not allowed to participate on the wrestling team unless they could defeat a male student to earn a sport on the roster. (Exhibit A, Complaint, p. 42.) As noted above, emotional distress damages cannot be recovered for a breach of contract absent extreme circumstances relating to matters such as impoverishment or death. Even taking all allegations in the complaint as true, nothing in the complaint meets the threshold set out in the Restatement. Jennings v. Nathanson, 404 F.Supp.2d 380, 396 (D. Mass. 2005) (interpreting Massachusetts law and noting "the showing that a plaintiff must make is quite high" to recover emotional distress in a contract claim).

In Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 119 S. Ct. 1661 (1999), Gebser v. Lago Vista Independent School Dist., 524 U.S. 274, 118 S. Ct. 1989 (1998), and Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 117 L. Ed.2d 208, 112 S. Ct. 1028 (1992) the Supreme Court authorized claims for damages under Title IX without discussing whether such available damages encompassed non-economic damages. Even assuming those cases impliedly approve of emotional distress claims under Title IX, they are reconcilable with Barnes and the Second Restatement because subjecting a student to "severe, pervasive, and objectively offensive" harassment (or being "deliberately indifferent" to severe harassment) is the type of a breach of an obligation of which "serious emotional disturbance was a particularly likely result." Thus, the standard set out by the above Title IX trilogy is perfectly consistent with a contract-type emotional distress damage standard.

VIII

PLAINTIFFS' 42 U.S.C. §1983 CLAIM IS SUBSUMED BY TITLE IX

"When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20, 101 S. Ct. 2615, 2626 (1981). There is a split in authority on whether Title IX claims pre-empt 42 U.S.C. § 1983

claims based on the same facts. Many courts have held that such claims are pre-empted. Boulahanis v. Board of Regents, 198 F.3d 633, 640 (7th Cir. 1999); Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 758 (2nd Cir. 1998) ("a § 1983 claim based on the Equal Protection Clause is subsumed by Title IX"); Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862 (7th Cir. 1996) (a plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and § 1983"); Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3rd Cir. 1990) (same); Frechel-Rodriguez v. P.R. Dep't of Educ., 2007 U.S. Dist. LEXIS 21020, *15 (D.P.R. 2007); McCarthy v. Underhill, 2006 U.S. Dist. LEXIS 25555 *9-19 (D. Nev. 2006) (finding that Title VI claims subsume § 1983 claims based on the same facts); Doe v. Town of Bourne, 2004 U.S. Dist. LEXIS 10021 (D. Mass. 2004) ("to the extent the Does pursue § 1983 claims premised on equal protection violations or on violations of Title IX, they are precluded by Title IX"); Levine v. Regents of the Univ., 2003 U.S. Dist. LEXIS 26091, *10-11 (N.D. Cal. 2003); Hendrichsen v. Ball State Univ., 2003 U.S. Dist. LEXIS 3710, *7-8 (S.D. Ind. 2003); and Henkle v. Gregory, 150 F.Supp.2d 1067, 1074 (D. Nev. 2001) ("it would be inconsistent and contrary to the above authority to allow plaintiff to pursue constitutional claims through § 1983 based on the identical facts as the Title IX claims"). Other courts have held that Title IX has no pre-emptive effect on 42 U.S.C. section 1983 claims. *See e.g.* Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1997); Seamons v. Snow, 84 F.3d 1226, 1233 (10th Cir. 1996).

This issue was recently decided by the Eastern District. In Travis v. Folsom Cordova Unified Sch. Dist., 2007 U.S. Dist. LEXIS 11566 (E.D. Cal. 2007), Judge England ruled that "Title VI is sufficiently comprehensive to evince congressional intent to foreclose a § 1983 remedy." Id. at 15. Judge England noted that Title VI has various interpretive regulations that provide administrative remedies to enforce the statute and pointed out that the Supreme Court has also found that Congress implied a private right of action. Id. at 15. The Court further noted that the Supreme Court's most recent pronouncement on the § 1983 pre-emption issue, City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 125 S. Ct. 1453, (2005), held that a more limited remedial scheme militated in favor of pre-emption. The Court correctly noted that Title VI's remedies are narrower in scope than 42 U.S.C. § 1983. Travis, 2007 U.S. Dist. LEXIS 11566 *15-16.

Judge England's reasoning is equally applicable to Plaintiffs' Title IX claims. The Supreme

Court has treated Title IX and Title VI as being virtually interchangeable and acknowledged that both statutes share the same remedial administrative scheme. Cannon v. University of Chicago, 441 U.S. 677, 694-96, 99 S. Ct. 1946, 1956-57 (1979) ("Except for the substitution of the word 'sex' in Title IX to replace the words 'race, color, or national origin' in Title VI, the two statutes use identical language to describe the benefited class. Both statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination"). Since Plaintiffs' 42 U.S.C. § 1983 claim is based on the same facts as their Title IX claim, it is pre-empted.

Plaintiffs may contend that Travis is inapplicable because they are only asserting 42 U.S.C. § 1983 claims against the individual Defendants. However, Judge England noted that the § 1983 claims against individuals are also pre-empted as "[a]llowing Plaintiffs to plead around the detailed statutory scheme created by Title VI by pleading a § 1983 claim against the defendant in his individual capacity would be inconsistent with Congress' creation of restrictions on Title VI claims." Travis, 2007 U.S. Dist. LEXIS 11566, at *16.

IX

THE UNIVERSITY IS IMMUNE TO ALL STATE LAW CLAIMS

The UNIVERSITY is an arm of the state for purposes of the Eleventh Amendment. Thompson v. Los Angeles, 885 F.2d 1439, 1442-43 (9th Cir. 1989). Accordingly, it is immune to state law claims in federal court unless the state has consented to such jurisdiction. Stanley v. Trs. of the Cal. State Univ., 433 F.3d 1129, 1133-34 (9th Cir. 2006) (holding that enactment of the Unruh Act "does not specifically consent to federal court actions"); BV Engineering v. University of California, 858 F.2d 1394, 1395 (9th Cir. 1988). All claims asserted against the UNIVERSITY based on state law must be dismissed.

X

THERE IS NO CLAIM FOR RELIEF FOR DAMAGES UNDER ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION

Article I, Sections 7 is "self-executing" and creates a private right of action "against a proper defendant for declaratory relief or for injunction." Katzberg v. Regents of the Univ. of Cal., 29 Cal.4th 300, 306-07 (2002). However, California courts have determined "there is no evidence of any

intent on the part of the voters to permit the recovery of personal injury damages as a result of a violation of the equal protection provisions of the California Constitution." Gates v. Superior Court, 32 Cal.App.4th 481, 518 (1995); *also see* Katzberg, 29 Cal.4th 329 [same as to Article I, Section 7's due process component]. Accordingly, all claims for damages based on this provision must be dismissed.

XI

TWO OF THE EDUCATION CODE PROVISIONS UNDER WHICH PLAINTIFFS SUE DO NO AUTHORIZE A PRIVATE RIGHT OF ACTION

Plaintiffs' sixth claim for relief is premised on various state statutes.

Education Code §66016 provides that:

> "It is the intent of the Legislature that opportunities for participation in intercollegiate athletic programs in the community colleges, in the campuses of the California State University, and in the campuses of the University of California be provided on as equal a basis as is practicable to male and female students. The costs of providing these equal opportunities may vary according to the type of sports contained within the respective men's and women's athletic programs. Therefore, it is also the intent of the Legislature that additional sources of revenue should be determined to provide additional funds for these equal opportunity programs."

Education Code §66030 provides that:

> (a) It is the intent of the Legislature that public higher education in California strive to provide educationally equitable environments which give each Californian, regardless of ethnic origin, race, gender, age, disability, or economic circumstance, a reasonable opportunity to develop fully his or her potential.
>
> (b) It is the responsibility of the governing boards of institutions of higher education to ensure and maintain multicultural learning environments free from all forms of discrimination and harassment, in accordance with state and federal law.

Neither Education Code § 66016 nor § 66030 provide an express legislative grant of a private right of action. *Compare with* Education Code §66292.4 (expressly authorizing a civil action for violations of the Education Code sections within *that Chapter*). "[W]hen neither the language nor the history of a statute indicates an intent to create a new private right to sue, a party contending for judicial recognition of such a right bears a heavy, perhaps insurmountable, burden of persuasion." Crusader Ins. Co. v. Scottsdale Ins. Co., 54 Cal.App.4th 121, 133 (1997); Rosales v. City of Los Angeles, 82 Cal.App.4th 419, 428 (2000) ("The fact that a remedy or penalty for violation of its

mandates was not included in the statute is a strong indication that such a right was not intended"); Vikco Ins. Servs., Inc. v. Ohio Indemnity Co., 70 Cal.App.4th 55, 62-63 (1999) (same).

The California Court of Appeal had, many years ago, adopted the three-part test used by the Restatement of Torts, Second, to determine whether a statute implies a private remedy "(1) the plaintiff belongs to the class of persons the statute is intended to protect; (2) a private remedy will appropriately further the purpose of the legislation; and (3) such a remedy appears to be needed to assure the effectiveness of the statute." Jacobellis v. State Farm Fire & Cas. Co., 120 F.3d 171, 174 (9th Cir. 1997). The key factor in the test is whether "a private right of action is *needed* to assure the effectiveness of the statute." Arriaga v. Loma Linda University, 10 Cal.App.4th 1556, 1564 (1992) (emphasis original) *superseded by statute as stated in* Blumhorst v. Jewish Family Services of Los Angeles, 126 Cal.App.4th 993, 1002 (2005). The California Court of Appeal has suggested that this test may not be valid after the California Supreme Court's decision in Moradi-Shalal v. Fireman's Fund Ins. Companies, 46 Cal.3d 287 (1988). Arriaga, 10 Cal.App.4th at 1564. To the extent the Court believes this test is still "useful for evaluating the appropriateness of a private cause of action" (*see* Jacobellis, 120 F.3d at 174), the test does not favor Plaintiffs. Plaintiffs have sued to enforce the same right under Title IX, the Unruh Act, and various Education Code sections that already authorize a private right of action. Therefore, recognizing a private right of action under these sections is wholly unnecessary.

XII

VARIOUS STATE PROVISIONS UNDER WHICH PLAINTIFFS SUE DO NOT AUTHORIZE A PRIVATE RIGHT OF ACTION AGAINST INDIVIDUALS

Even with the sections that expressly (or impliedly) authorize a private right of action, there still remains the question of whether a private right of action *for damages* exists against the individual Defendants. Recently, the California Supreme Court indicated that the mere fact that a statute creates liability against an entity does not mean that any of the entities, agents, or employees is also subject to liability under that statute. Reynolds v. Bement, 36 Cal.4th 1075, 1086 (2005) (holding that managing agents are not personally liable for wage and hour violations under the Labor Code).

In Reynolds, the Supreme Court determined that the "best indicator" to determine whether the

California Legislature intended to hold individuals liable is "the language of the provision itself." Id. at 1086. The statutes at issue in Reynolds required "an employer" to pay overtime under certain conditions and authorized a private right of action to enforce that right without specifying who could be held liable for violating that right. After reviewing the statute, applicable regulations, and common law principles, the Court concluded that "[h]ad the Legislature meant in section 1194 to expose to personal civil liability any corporate agent who 'exercises control' over an employee's wages, hours, or working conditions, it would have manifested its intent more clearly than by mere silence after the IWC's promulgation of Wage Order No. 9." Id. at 1086-88. Thus, individual liability is not presumed. Thornburg v. Superior Court, 138 Cal.App.4th 43, 52 (2006) ("[w]hen agents and employees are acting in their official capacities on behalf of their principals and not as individuals for their own advantage, their acts are generally privileged and do not give rise to liability in tort or under statutes which impose duties on their principals").

The key inquiry as to the text of the provisions at issue shows no evidence of an intent to hold individuals liable:

1. California Constitution, Article I, § 31(a) provides that "The state shall not discriminate" based on the enumerated characteristics. The "state" is defined to include various public entities without making a single reference to an individual. Cal Const, Art I § 31(f).

2. California Education Code § 220 provides that: "No person shall be subjected to discrimination on the basis of sex ... in any program or activity conducted by an educational institution that receives, or benefits from, state financial assistance or enrolls pupils who receive state student financial aid."

3. California Education Code § 221.7 provides in, pertinent part, that:

> "(a) The Legislature finds and declares that female pupils are not accorded opportunities for participation in school-sponsored athletic programs equal to those accorded male pupils. It is the intent of the Legislature that opportunities for participation in athletics be provided equally to male and female pupils.
>
> (b) Notwithstanding any other provisions of law, no public funds shall be used in connection with any athletic program conducted under the auspices of a school district governing board, or any student organization within the district, which does not provide equal opportunity to both sexes for participation and for use of facilities. Facilities and participation include, but are not limited to, equipment and supplies, scheduling of

games and practice time, compensation for coaches, travel arrangements, per diem, locker rooms, and medical services."

4. California Education Code § 66016 **(Text is set out above on page 15.)**

5. California Education Code § 66030 **(Text is set out above on page 15.)**

6. California Education Code § 66251 provides, in pertinent part, that: "It is the policy of the State of California to afford all persons, regardless of their sex ... equal rights and opportunities in the post-secondary institutions of the state. The purpose of this chapter is to prohibit acts that are contrary to that policy and to provide remedies therefore."

7. California Education Code § 66252 provides, in pertinent part, that:

"(a) All students have the right to participate fully in the educational process, free from discrimination and harassment.

(b) California's post-secondary educational institutions have an affirmative obligation to combat racism, sexism, and other forms of bias, and a responsibility to provide equal educational opportunity.

. . .

(f) It is the intent of the Legislature that each post-secondary educational institution undertake educational activities to counter discriminatory incidents on school grounds and, within constitutional bounds, to minimize and eliminate a hostile environment on school grounds that impairs the access of students to equal educational opportunity.

(g) It is the intent of the Legislature that this chapter shall be interpreted as consistent with Article 9.5 [commencing with Section 11135] of Chapter 1 of Part 1 of Division 3 of Title 2 of the Government Code, Title VI of the Federal Civil Rights Act of 1964 (42 U.S.C. Sec. 1981, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. Sec. 1681, et seq.), Section 504 of the Federal Rehabilitation Act of 1973 (29 U.S.C. Sec. 794(a)), the Federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.), the Federal Equal Educational Opportunities Act (20 U.S.C. Sec. 1701, et seq.), the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.), and the Fair Employment and Housing Act (Pt. 2.8 [commencing with Sec. 12900), Div. 3, Gov. C.], except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes."

The first five provisions make absolutely no suggestion that any individual could be held liable for damages arising from a violation of the statute. The second and third provisions do not even apply to the UNIVERSITY or its employees as they only govern elementary and "secondary" (high) schools. *See* Education Code §§ 52, 210-210.1. The fifth provision makes no direct reference to individual

liability, but does incorporate the remedies of other state and federal anti-discrimination statutes. It further states that it should be "interpreted consistently" with the cited statutes. The most pertinent statute is Title IX. Cases interpreting Title IX have consistently held that Title IX only creates liability for federal funding recipients, not individuals. Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610-11 (8th Cir. 1999); Smith v. Metropolitan Sch. Dist. Perry Twp., 128 F.3d 1014, 1019-20 (7th Cir. 1997); Bowers v. Baylor Univ., 862 F.Supp. 142, 146 (W.D. Tex. 1994); *also see* Miller v. Maxwell's Int'l, 991 F.2d 583, 587-88 (9th Cir. 1993) (no individual liability under Title VII or the ADEA); Reno v. Baird, 18 Cal.4th 640, 663 (1998) ("individuals who do not themselves qualify as employers may not be sued under the FEHA for alleged discriminatory acts"). Since none of the above-cited provisions suggest that any of the individuals may be subject to a private right of action for damages, Defendants respectfully request that the Court dismiss all claims under these statutes against all individual Defendants.

XIII

THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO DISCRETIONARY IMMUNITY

California Government Code §820.2 states:

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Government Code § 820.2 immunity applies where a public employee makes a discretionary, as opposed to a ministerial, decision. A decision is discretionary where an employee consciously balances risks and advantages of such a decision. Johnson v. State, 69 Cal.2d 782, 795 (1968). An act is said to be ministerial when it amounts "only to an obedience to orders, or the performance of a duty in which the public employee is left no choice of his own." McCorkle v. Los Angeles, 70 Cal.2d 252, 261 (1969).

To the extent any state claims survive, they are barred by discretionary immunity. The complaint alleges that "each of the individual defendants has authority over the athletic programs at UC-Davis and has participated in the discriminatory actions and decisions...." (Exhibit A, Complaint, p. 10:1-4.) The complaint goes on to allege Plaintiffs version of the events, including an alleged "no female directive" prohibiting the women wrestlers from participating on the team (Id. at 18:1-7),

discussions with WARZECKA about the matter (Id. at 18:13-20), a suggestion by WARZECKA that the women wrestlers form a club team (Id. at 18:17-20), a meeting with FRANKS (Id. at 19:16-20), Defendants' participation in a Student Senate meeting on the issue (Id. at 19:21-24), significant media publicity (Id. at 20:1-5), interactions with a member of the State Legislature who "threatened to withhold state funding" over the matter (Id. at 20:6-11), and, finally, the creation and implementation of a policy that the female wrestlers could try out for the wrestling team based on the same terms and conditions as male athletes (Id. at 21:11-15) made in conjunction with the OCR (Request for Judicial Notice, Exhibits E-K.). The allegations in the complaint and the evidence provided via judicial notice leave no room for doubt that Defendants made discretionary decisions with respect to Plaintiffs' demands after much deliberation and in light of many external factors such as legislative, administrative, and media intervention. As a matter of law, the individual Defendants are entitled to discretionary immunity as to all state law claims. Caldwell v. Montoya, 10 Cal.4th 972, 986-89 (1995) (dismissing FEHA claim via a demurrer under § 820.2).

XIV

CONCLUSION

Under section VI of the Pre-Trial Scheduling Order, Defendants are required to seek resolution of a ruling on legal issues via a pre-trial motion. A ruling on these issues will eliminate the need to address them in a later motion for summary judgment which will focus on issues of mixed law and fact.

Dated: June 4, 2007

PORTER, SCOTT, WEIBERG & DELEHANT
A Professional Corporation

By _____
George A. Acero, Attorney for Defendants, REGENTS OF THE UNIVERSITY OF CALIFORNIA, LARRY VANDERHOEF, GREG WARZECKA, PAM GILL-FISHER, ROBERT FRANKS and LAWRENCE SWANSON

MANSOURIAN v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.
United States District Court, Eastern District of California, Case No. 2:03-CV-02591-FCD-EFB

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 350 University Avenue, Suite 200, Sacramento, CA 95825.

On June 5, 2007, I served the following document(s):

MEMORANDUM OF POINTS AND AUTHORITIRS IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

XXX **BY MAIL.** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Sacramento, California.

_____ BY PERSONAL SERVICE. I caused such document to be delivered by hand to the office of the person(s) listed below.

_____ BY OVERNIGHT DELIVERY. I caused such document to be delivered by overnight delivery to the office of the person(s) listed below.

_____ BY FACSIMILE. I caused such document to be faxed to the office of the person(s) listed above with an original or copy of said document placed in the United States mail with postage thereon fully prepaid at Sacramento, California.

addressed as follows:

Kristen Galles **EQUITY LEGAL** 10 Rosecrest Avenue Alexandria, VA 22301 Facsimile: (703) 683-4636 Noreen Farrell Debra Smith **EQUAL RIGHTS ADVOCATES** 1663 Mission Street, Suite 250 San Francisco, CA 94103	James C. Sturdevant Mark T. Johnson Monique Olivier **THE STURDEVANT LAW FIRM** A Professional Corporation 475 Sansome Street, Suite 1750 San Francisco, CA 94111 Facsimile: (415) 477-2420

I declare under penalty of perjury that the foregoing is true and correct and was executed on June 5, 2007, at Sacramento, California.

Cindy Cannon