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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.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA, et al.,

Defendants.

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

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Date: March 28, 2008

Time: 10:00 a.m.

Courtroom: 2

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I.

INTRODUCTION

At the outset this case included six claims for relief asserted by four Plaintiffs against the REGENTS OF THE UNIVERSITY OF CALIFORNIA (hereafter UNIVERSITY) and five individual Defendants. The case has been considerably narrowed via a series of motions. Plaintiffs abandoned their attempt to have the case certified as a class action. Defendants' motion to dismiss disposed of all but one claim. The sole claim for relief remaining is for alleged violation of Title IX under a theory of ineffective accommodation of athletic interests and abilities of female students at UC Davis.

This case is an attack on a women's athletic program that has long been a leader among institutions of higher education in providing and promoting equitable opportunities for female student-athletes. The basis for the remaining claim asserted by MANSOURIAN, NG and MANCUSO arises out of their participation, or attempted participation, in the wrestling program at UC Davis. During the time Michael Burch was the head wrestling coach, the few women who came out for the wrestling team were not required to earn a spot on the team roster via a hallmark of varsity athletics -- the demonstration of sufficient skill and ability to compete at the varsity level. Plaintiffs did not complain about this differential treatment; to the contrary, they insisted and continue to insist to this day that they had an entitlement to membership on the team throughout their college career *because* they are female and should not have been required to *earn* a spot on the roster as male students must do.

The focus of this motion is on the UNIVERSITY's compliance with what is known as Title IX's three-pronged test. The UNIVERSITY meets prong two of the test as it has a history and practice of continuous expansion of its women's athletic program, thus defeating Plaintiffs' ineffective accommodation claim. The claim also fails because they cannot show there was sufficient interest, ability, or expectation for intercollegiate competition to support a separate women's wrestling team. Title IX law makes it very clear that in the absence of sufficient interest, ability, or expectation of competition for an intercollegiate team, a university need not establish a new team simply because a few students make a request for one. Finally, Plaintiffs' claim fails on the issue of notice, as the complaints two of them filed with the Office for Civil Rights (OCR) focused solely on their experiences with the wrestling team -- they did not contain the wholesale attack on the entire women's

1 athletic program that Plaintiffs now attempt to mount. The narrow focus of the OCR complaints, as
2 well as the scope of the allegations set forth in the complaint filed with this Court, was one of the
3 reasons the Court denied Plaintiffs' attempt earlier this year to add new party plaintiffs who are current
4 students interested in varsity sports other than wrestling. In denying the motion to amend the
5 Complaint Judge Damrell stated:

6 "While plaintiffs may have sought to bring challenges on behalf of all women athletes at
7 UC Davis, the plaintiffs only alleged that they had experience and sought opportunities in
8 wrestling. *The factual allegations in the original complaint related only to the*
9 *opportunities available for women to participate in the UC Davis varsity wrestling*
program and plaintiffs' inability to receive the benefits of being a varsity wrestler."
(Order dated 3/20/07, Docket item 175, emphasis added.)

10 For the reasons set forth below, the UNIVERSITY requests that the Court grant summary
11 judgment in its favor on the sole remaining claim.

12 II

13 PROCEDURAL HISTORY RELEVANT TO THIS MOTION

14 This action was filed on December 18, 2003. Plaintiffs asserted six claims for relief: (1)
15 violation of Title IX based on a theory that female athletes are not afforded the same opportunities as
16 male athletes; (2) violation of Title IX based on a theory that female athletes are not provided with the
17 same opportunities for financial assistance as male athletes; (3) retaliation in violation of Title IX and
18 its interpretive regulations; (4) violation of 42 U.S.C. §1983 based on an equal protection clause; (5)
19 violation of the California Unruh Civil Rights Act; and (6) a claim of violation of "public policy" based
20 on various California statutes including Article I, section 7 of the State Constitution, Article I, section
21 31 of the State Constitution, and Education Code sections 221.7, 262.3, 66101, 67620 and 66252 . On
22 October 18, 2007 the Court issued its order on Defendants' motion for judgment on the pleadings
23 (Docket item 226), granting the motion in all respects except for one aspect of the first claim for relief.
24 Plaintiffs' first claim for relief under a theory of unequal treatment was dismissed, but the motion was
25 denied in regard to the other theory asserted in the first claim for relief (ineffective accommodation of
26 interests). As a result of this order, all remaining claims for relief have been dismissed as a matter of
27 law, including the claims asserted against the individual Defendants.

28 Faced with strong opposition to their motion for class certification and the denial of their

1 motion to add new party plaintiffs, Plaintiffs moved to dismiss their class claims earlier this year. In
2 March, 2007 NANCY CHIANG voluntarily dismissed her claims. (Docket item 178.)

3 **III.**

4 **SCOPE OF THIS MOTION**

5 In its ruling on Defendants' motion for judgment on the pleadings, the Court identified the first
6 claim for relief as stating both a theory of unequal treatment based on gender, and a theory of
7 ineffective accommodation of the Plaintiffs' athletic interests. On page 9 of its order (Docket item
8 226), the Court noted that the unequal treatment claim was based on (1) issuance of what Plaintiffs call
9 the "No Females Directive"¹ in the fall of 2000; (2) an alleged broken promise in June 2001 to reinstate
10 women to the wrestling team; (3) the failure to renew the contract of wrestling coach Mike Burch; and
11 (4) requiring women to compete for membership on the wrestling team in the fall of 2001 under the
12 same terms and conditions as male students. The Court held that all of these events were time-barred
13 and granted the motion insofar as the theory of unequal treatment is concerned. In regard to the
14 surviving theory of ineffective accommodation, the Court based its ruling on allegations in the
15 Complaint that Plaintiffs "were able and ready to wrestle at UCD and that sufficient interest existed in
16 the female student population at UCD to field a women's wrestling team." *Id.* at p. 24. This ruling
17 defines the scope of the remaining claim.

18 **IV.**

19 **STATEMENT OF FACTS**

20 **A. Varsity Intercollegiate Wrestling at UC Davis**

21 During the time period in issue in this case, UC Davis was a National Collegiate Athletic
22 Association (NCAA) Division II school. However, its wrestling team competed at the Division I level
23 because of a lack of available competition among Division II schools in its geographic area.
24 (Undisputed Material Fact (UMF) 7) UC Davis wrestles in the Pac-10 Conference. The other schools
25 that are members of the Pac-10 Conference for the sport of wrestling are Arizona State, Boise State, Cal

26
27 ¹ This moniker was coined by the attorney representing the Plaintiffs at the time the suit was filed. Plaintiffs
28 admitted in interrogatory responses that they never saw or heard anything issued by the UNIVERSITY or its employees
entitled "No Females Directive."

1 Poly, Cal State Bakersfield, Cal State Fullerton, Oregon, Oregon State, Portland State and Stanford.
 2 (UMF 8) UC Davis has not declared wrestling to be a contact sport. Accordingly, students of both
 3 genders may try out for the team. (UMF 9) The head coach of the wrestling team is solely responsible
 4 for determining which students will be awarded a slot on the team roster based on his assessment of
 5 which candidates are most skilled and qualified to participate in collegiate level wrestling at the
 6 Division I level. (UMF 10) Any student who is selected for the wrestling team must meet NCAA
 7 eligibility requirements, comply with all applicable NCAA regulations relating to wrestling, and
 8 comply with UC Davis athletic eligibility requirements. (UMF 11)

9 The UC Davis wrestling team competes in a set schedule of competition each year. The
 10 competition includes dual meets with other schools in the Pac-10 conference and participation in
 11 invitational tournaments, one or two open tournaments, and NCAA championship events (if
 12 applicable). Collegiate style wrestling rules are used in dual meets and NCAA sponsored tournaments.
 13 The wrestling team practices and competes in those events using collegiate style rules, not freestyle or
 14 folk-style rules. (UMFs 12, 14)

15 **B. Women and Varsity Wrestling at UC Davis**

16 There has never been a separate women's wrestling team at UC Davis. (UMF 15) Women's
 17 wrestling has always had an "unofficial status" on campus. This is reflected in the media guides issued
 18 by the Department of Intercollegiate Athletics. The 1996/97 wrestling media guide included a section
 19 on "women's freestyle wrestling." Two graduate students, Afsoon Roshanzamir and Jennifer Martin,
 20 were described as members of the Davis Wrestling Club, a local city freestyle club.² The description
 21 of the wrestling team in the 1996/97 media guide is devoid of any mention of women wrestlers; the
 22 focus is solely on male wrestlers. There were no women listed on the team roster in the guide. (UMFs
 23 16-18) The 1997/98 wrestling media guide described wrestling as "the only NCAA Division I *men's*
 24 sport on the UC Davis campus." (Emphasis added.) Page 11 of that year's guide states: "For several
 25 years UC Davis has had women participate in its program. Women's amateur wrestling is a new but
 26 rapidly growing sport in the U.S., with championships at the national and international level. At UC
 27

28 ² In her deposition, Ms. Roshanzamir (now known as Afsoon Johnston) testified that the "Davis Wrestling Club" was actually some members of the varsity wrestling team and "some older guys who had already graduated" who were practicing in the off-season.

1 Davis, women's wrestling has an unofficial status, but women are encouraged to participate to develop
2 their skills." The roster listed in the media guide for that year did not contain any women. (UMF 19)

3 Women are included on the roster in the 1998/99 media guide. There was nothing that would
4 signify the existence of a separate women's wrestling team, such as a separate roster for them. Women
5 continued to be described as having unofficial status. The records for the 1997/98 season which are
6 included in the 1998/99 guide do not contain any information about women. (UMF 20) The 1999/00
7 media guide continued to describe women's wrestling as having unofficial status. No women were
8 listed on the roster in the guide and there were no entries for women in the section setting forth
9 individual results for the previous year. (UMF 21) No women were included on the roster in the
10 2000/01 media guide, nor was there any reference to women in the summary of individual records. In
11 this guide, there was a reference to the "women's wrestling club program," which goes on to reiterate
12 the same language contained in previous guides about women's wrestling having unofficial status at
13 UC Davis. (UMF 22)

14 There has never been a separate budget for a purported women's wrestling team. (UMF 23)
15 There has never been a competition schedule submitted by a head wrestling coach indicating the
16 existence of a separate women's wrestling team. (UMF 24)

17 Afsoon Johnston (nee Roshanzamir) was a member of the first women's national wrestling
18 team³ in high school. She earned a place on the national team by competing against other women.
19 (UMF 26) Johnston entered UC Davis in the fall of 1990 and graduated in 1995. (UMF 27) When she
20 entered UC Davis, she advised the coach (Bob Grant) that her interest was in pursuing wrestling to
21 compete on the national level. Throughout the time she attended UC Davis, her participation in dual
22 meets⁴ was limited to an exhibition match with a female Chico State wrestler and an open meet with
23 San Francisco State. (UMF 28)

24 During Johnston's first and second year at UC Davis, she was the only woman who participated
25 with the wrestling team. In her senior year, veterinary school student Jennifer Martin trained with
26

27 ³ The women's national wrestling team is part of USA Wrestling. It is not associated with UC Davis.

28 ⁴ A dual meet is a contest between two school teams. An open meet or tournament is one where members of a
school team wrestle "unattached" to their school; anyone can compete in an open tournament.

Johnston. (UMF 29) After Burch became the head wrestling coach in 1995, Johnston continued to be the only woman who participated on the team. Johnston never participated in a match or a meet wearing a UC Davis uniform. Burch did not provide her with coaching for any national or international tournaments. Johnston considered herself to be a member of the UC Davis wrestling team only during her freshman year because after that she was a member of the USA Wrestling national team. (UMF 30) The primary focus of her wrestling activities was to train so that she could compete with the national team, not with the UC Davis team. She was not interested in being affiliated with the UC Davis team after her freshman year because doing so would adversely affect her standing on the national team. (UMF 31)

Samantha Reinis entered UC Davis in September, 1997. She participated on the wrestling team in 1998/99, but did not wrestle at all in 1999/00 and 2000/01 because of a chronic injury. (UMF 32) While she was at UC Davis, the only match or tournament that she competed in was the Aggie Open⁵. She attempted to wrestle in a tournament hosted by Southern Oregon, but could not do so because she did not have an opponent. She never competed in a UC Davis uniform. (UMF 33)

Former plaintiff Nancy Chiang entered UC Davis as a freshman in the fall of 1998. (UMF 35) Chiang was not cleared to practice with the team until well into the season because she did not obtain her required medical clearance until January 1999. (UMF 36) Chiang was not given a UC Davis uniform, nor did she ever observe a woman wrestler in one. (UMF 37) The only match or tournament she participated in during her freshman year was the Aggie Open in January 1999. Chiang wrestled against a woman from a wrestling club and was defeated. (UMF 38) The only match or tournament that Chiang participated in during her second year was the 2000 Aggie Open. She wrestled against two women, using freestyle rules and was defeated both times. (UMF 39) During that school year (1999/00), Chiang struggled with health problems that eventually deteriorated to the point where she barely attended classes. She enrolled in classes for the spring quarter, but only went to one class and

⁵ For a number of years the wrestling team held an annual open tournament called the Aggie Open. This event was primarily a fundraiser but also provided opportunities for wrestlers from other schools or clubs to compete in an open tournament (as opposed to a scheduled meet). In recent years, UC Davis has discontinued the Aggie Open wrestling tournament because it conflicted with Big West conference basketball games. (UMF)

1 then withdrew. Chiang attempted to return to UC Davis in the fall of 2000 but left again in mid-
 2 October. She did not return again and was deemed academically ineligible for intercollegiate sports as
 3 of January, 2001. (UMF 40) Chiang never participated in world wrestling championships, the Pan
 4 American Games, nor has she ever tried out for the U. S. Olympic Wrestling team. (UMF 41)

5 A student named Abby Schwartzburg is identified in the wrestling team media guide for
 6 1999/2000. Schwartzburg appeared to be participating with the team, but had not completed the
 7 necessary paperwork to do so. This came to the attention of Compliance Officer Jennifer Cardone in
 8 the spring of 2000, who in turn alerted Associate Athletic Director Pam Gill-Fisher of the issue. Gill-
 9 Fisher met with Schwartzburg and Reinis (who was also missing required paperwork) to have them
 10 complete the documentation. (UMF 42) Schwartzburg had entered UC Davis as a transfer student in
 11 the fall of 1999. She was no longer registered as a student at UC Davis as of February, 2001. (UMF
 12 43) A student named Stacey Massola trained with the UC Davis wrestling team in 1996/97 but then
 13 quit. A student named Alexis Bell participated in the wrestling program for a very short period of time
 14 (two months) in 2000/01. (UMF 44)

15 During the years Burch was the head coach of the wrestling team, there were never more than
 16 four women at any one time participating in the wrestling program. (UMF 45) Other than the pre-
 17 season practices and the try-outs (wrestle-off) that MANCUSO and NG attended in the fall of 2001 (see
 18 below), no women have tried out for the wrestling team since that time. (UMF 46) Neither Burch nor
 19 his successor, Lennie Zalesky, are aware of any NCAA Division I school that has a separate women's
 20 wrestling team. (UMF 47)

21 **C. While Plaintiffs MANSOURIAN and NG Did Participate With the Wrestling Team**
 22 **During the Years Burch was the Head Coach, They Were Not Required to Demonstrate**
 23 **the Skills Necessary to Wrestle at the Varsity Level, Nor Did They Compete at the Same**
 24 **Level as Other Members of the Team.**

25 Burch was hired as the head wrestling coach for UC Davis in 1995. He continued in that
 26 position until June 2001, at which time his contract expired and was not renewed. Lennie Zalesky was
 27 then hired as the head coach for the UC Davis wrestling team and remains in that position today.

28 A fundamental aspect of coaching is holding try-outs for walk-on (non-recruited) students who
 hope to gain a spot on a varsity team roster. (UMF 49, 109) At the collegiate varsity level, there is a

1 presumption that those student-athletes who earn a spot on the team have a skill level commensurate
2 with varsity competition. Conducting wrestle-offs (one-on-one competitions between wrestlers in a
3 weight class) is the process by which a coach determines which students in each weight class have the
4 skills and abilities necessary to compete with the other schools in the conference. (UMF 49) Coach
5 Zalesky, who has competed on the national and international level, and has coached high school and
6 collegiate wrestling, has always conducted try-outs to determine which students will be placed on the
7 team. During the pre-competition practice period, students who hope to obtain a spot on the team must
8 come to practice, engage in conditioning and weight training, and participate in drills. Shortly before
9 the competition season begins, he conducts wrestle-offs so he and the assistant coaches can determine
10 which student-athletes are the most skilled in each weight class. (UMF 51) Under Burch's leadership
11 of the wrestling team, women were not required to engage in a wrestle-off or any type of competition to
12 earn a spot on the team. Burch knew they did not have the skill necessary to compete even at the
13 lowest weight class. (UMF 48) In his opinion, none of the women had the strength or skills to compete
14 with males; specifically, he stated that they "didn't have a prayer in beating the men on this team."
15 (UMF 50) Burch did not provide the women with UC Davis wrestling uniforms. (UMF 53)

16 When asked in a deposition why the media guides did not contain any information about
17 accomplishments of women wrestlers, Burch stated that the women were not large enough to compete
18 in even the lowest weight class of 125 pounds. (UMF 52) The 1999/00 wrestling media guide contains
19 an extensive discussion about the hopes for the team that year. Coach Burch is quoted as saying this
20 was the best team he had had. The guide goes on to describe the contenders in each weight class -- the
21 description is devoid of any mention of women, even in the lightest weight class. (UMF 54) Similarly,
22 the 2000/01 media guide contains an "Outlook" section that touts the hopefuls for that year. Again,
23 there is no mention of women. Coach Burch is quoted as saying "The **guys** are hungry. They believed
24 that for the past five years we've been building. We are still building but now it is time to see some of
25 the fruits of that labor. We want to see more dual meet wins, more Pac-10 place-winners and more
26 national qualifiers this year." (UMF 55)

27 The primary types of competition engaged in by the UC Davis wrestling team are dual meets
28 (against teams in the Pac-10), invitational tournaments and post-season championships. Open

1 tournaments are attended at most only once or twice per year. Any person can compete in an open
2 tournament, whether associated with a team or not. During the time Burch was the head wrestling
3 coach, the only type of competition the women wrestlers participated in was open tournaments,
4 primarily the Aggie Open. The only exception was Reinis' attempt to wrestle in one dual meet, which
5 was thwarted because she had no competition. (UMFs 12,13,33,38, 63, 69)

6 Prior to the 1998/99 school year, UC Davis could not offer athletic scholarships to its students
7 per the rules of the conference it belonged to at the time. Thereafter, the campus moved to a different
8 conference and grants-in-aid consistent with NCAA guidelines were available to student-athletes.
9 (UMF 57) Burch submitted grant-in-aid (athletic scholarship) worksheets for 1998/99, 1999/00 and
10 2000/01. He never offered any scholarships to women via this process. (UMF 58) On May 29, 2001
11 Burch learned that his contract was not going to be renewed. Two weeks later (just shortly before he
12 departed UC Davis) he sent an e-mail to Compliance Coordinator Jennifer Cardone and attempted, for
13 the first time, to award scholarship money to MANSOURIAN, NG and MANCUSO. In light of the
14 belated submission of this request, the status of the wrestling team budget, and the fact that the request
15 was made only after Burch learned his contract would not be renewed, Athletic Director Warzecka
16 made the decision to hold the request in abeyance, pending hiring of a new coach. (UMF 59)

17 All student-athletes who participate in any manner in varsity athletics must complete certain
18 required paperwork such the NCAA Student-Athlete Statement and Drug-Testing Consent Form, and
19 the UC Davis required Academic Plan Form. Failure to submit the required paperwork means that a
20 student is not eligible to practice or compete in intercollegiate athletics. Burch did not believe the
21 women needed to complete the mandated paperwork (such as an Academic Plan Form) because the
22 NCAA does not recognize women's wrestling. (UMF 60)

23 MANSOURIAN entered UC Davis in the fall of 2000 and graduated in June 2004. (UMF 61)
24 During her first year at UC Davis (2000/2001), she observed only one other female actively
25 participating in wrestling -- CHRISTINE NG. (UMF 62) MANSOURIAN did not compete at any dual
26 meets during the 2000/2001 season. The only tournament she competed in was the Aggie Open in
27 January 2001. MANSOURIAN wrestled against two women in the tournament and lost to both. (UMF
28 63) She has never wrestled in a national wrestling tournament, has never participated in the Pan

1 American games, never tried out for the U.S. Olympic team, and never held any national or
2 international rankings as a wrestler. (UMF 64) ⁶

3 MANSOURIAN did not try out for a place on the wrestling team in the fall of 2001. On
4 October 10, 2001 she sent an e-mail to Coach Zalesky in which she stated that she had a new job and a
5 heavy class load. MANSOURIAN wrote "I have found it extremely exhausting to wrestle as well. I
6 am thinking that maybe intercollegiate wrestling is too much for me right now and that I would rather
7 be in a club (like you suggested earlier) b/c I only have time for practice about 3 times a
8 week...however, I do not by any means want to stop wrestling. I can just not commit to it as much."
9 (UMF 65)

10 NG entered UC Davis in the fall of 1998 and graduated in September 2002. (UMF 67) During
11 the three years she participated in wrestling, NG competed in only one match or tournament -- the
12 National Girls Wrestling tournament in Michigan held in the spring of 2000. Burch did not accompany
13 her to the tournament, she did not wear a UC Davis uniform while she competed, and she did not place.
14 NG signed up for the Aggie Open wrestling tournament in her freshman and sophomore years at UC
15 Davis, but no one in her weight class showed up to compete and thus she did not participate. (UMF 69)
16 During the 1998/99 season, NG was ineligible to practice or compete from the start of the season in
17 November until February 1999 because she failed to turn in an Academic Plan Form. (UMF 68)

18 NG had no desire to practice or wrestle against men; she was more interested in simply
19 working out than she was in competing. She testified during her deposition that "I guess the thing is for
20 me, like I have a fear of competing. And so I tend to avoid it when I can. So that's why I'm not exactly
21 up for competing." (UMF 70) NG has never been a member of the U.S. National Wrestling Team, has
22 never participated in the Pan American Games, and has never participated in the World Wrestling
23

24
25 ⁶ In paragraphs 85 and 86 of their Complaint, Plaintiffs allege that before the purported end of women participating
26 in wrestling at UC Davis "female wrestlers had the opportunity to participate in wrestling ... and to improve their skills to
27 such an extent that some became nationally ranked, participated in national women's wrestling tournaments, participated at
28 members of the U.S. National women's wrestling team, finished high in the Pan-American games and World Wrestling
Championships and are expected to be members of the United States Olympic team in 2004 when women's wrestling
becomes a gold medal sport for the first time. Without the benefits obtained from their participation as female wrestlers at
UC Davis, these nationally and internationally ranked female wrestlers would not likely have achieved such a high level of
success on their own." (Exhibit A, ¶¶ 85-86.) None of the Plaintiffs have ever reached such levels in wrestling.

1 Championships. She has never tried out for the U. S. Olympic team nor does she have any plans to do
2 so. (UMF 71)

3 As of the spring of her junior year (2001), NG was aware of only herself and MANSOURIAN
4 as female UC Davis students interested in wrestling. Samantha Reinis was graduating and Abbey
5 Schwartzburg had left school, as had Chiang. (UMF 72) In the fall of 2001, NG and MANSOURIAN
6 spoke to Coach Zalesky. They told him they did not have the strength or skills necessary to compete
7 against males for a place on the team. In light of these statements, he urged them to consider
8 developing their skills by participating on a wrestling club sport team. Coach Zalesky did not preclude
9 the women from trying out. NG understood that Coach Zalesky required all hopefuls to engage in a
10 wrestle-off to determine who would make the team. She participated in a wrestle-off with incoming
11 freshman Plaintiff MANCUSO, who pinned her. (UMFs 73, 82)

12 **D. MANCUSO Was Never a Member of the Wrestling Team**

13 MANCUSO wrestled in high school and competed in various high school tournaments and
14 competitions. She also once competed in the U.S. National Wrestling Championships while in high
15 school, using freestyle rules, and participated in the Aggie Open tournament in early 2001, also while
16 still in high school. (UMF 74)

17 MANCUSO entered UC Davis in the fall of 2001 and received her degree in September, 2006.
18 Her eligibility to participate in varsity athletics expired in June, 2006. (UMFs 75) MANCUSO was
19 gone from the Davis campus most of her college career. She spent her junior year (2003/04) abroad
20 studying in New Zealand and then spent November 2004 through January, 2005 traveling in New
21 Zealand and working there while she was on a planned educational leave from UC Davis. She re-
22 enrolled as a full-time student in February 2005, took classes, and then went to Ireland for a summer
23 session. MANCUSO returned from Ireland in September 2005 and attended a program in Washington,
24 D.C. from September through December 2005. (UMF 76-77)

25 MANCUSO, who was the most skilled of the Plaintiffs in regard to wrestling, admitted she
26 could not defeat any of the males who were trying out for the team in the fall of 2001 and testified that
27 she had no desire to wrestle against men at the collegiate level because "they would squash me." (UMF
28 81) Consistent with his usual practice and the agreement approved by the OCR (see *infra*), Coach

1 Zalesky held try-outs for the wrestling team in the fall of 2001 by having students in the same weight
2 class engage in wrestle-offs against each other. Coach Zalesky had MANCUSO engage in a wrestle-off
3 against NG first, as both were in the lightest weight class and comparable in their weights.
4 MANCUSO pinned NG quickly and went on to wrestle-off against a male in the same weight class.
5 The male student pinned MANCUSO within 30 seconds. (UMF 82)

6 As a result of the wrestle-offs, Coach Zalesky cut a number of students, including NG and
7 MANCUSO, as well as the male who defeated MANCUSO in the wrestle-off and several other males.
8 These students were cut because they did not have the skills and abilities to wrestle at the NCAA
9 Division I level. Coach Zalesky was allowed a roster maximum of thirty wrestlers and filled that roster
10 with the most skilled and competitive wrestlers in each weight class. (UMF 83) MANCUSO has never
11 participated in a world wrestling competition or the Pan American Games, nor has she made any effort
12 to do so. (UMF 84)

13 **E. Events in 2000/2001**

14 UC Davis Athletic Director Greg Warzecka instituted a roster management program. Under the
15 terms of the program, each men's varsity team had an upper limit on the number of student-athletes
16 who could be on the team roster. Although both sexes can try out for a place on the UC Davis wrestling
17 team, it is considered a men's sport because the NCAA only sponsors men's wrestling and thus subject
18 to roster management. The purpose of roster management, which is used for both budgetary and gender
19 equity purposes, is to limit spending on men's teams. The head coaches of all men's teams were
20 notified in writing of this requirement. (UMF 85)

21 In the fall of 2000, Burch was told via a letter from Warzecka that the limit on the size of the
22 wrestling team roster was thirty student-athletes. Burch had advised the students that because of the
23 roster management program, "it could might come down to some people who really want to be out here
24 not being able to be out here." He did not say this to the women because in his opinion, the roster cap
25 did not apply to females. (UMF 86) After receiving the letter, Burch sent an e-mail to Warzecka asking
26 him to raise the roster maximum to 32-34 spots. Warzecka agreed to increase the cap to 34. Burch
27 filled all 34 roster spots with males. (UMF 87) Warzecka did not care whether Burch had all men, or
28 men and women on the wrestling team roster so long as the total number of student-athletes did not

1 exceed the expanded maximum of 34. He considered the roster management program, including roster
 2 maximums or caps, to apply to all members of the men's team no matter what the gender of any
 3 particular athlete was. In his opinion, if women who did not have the skill necessary to earn a spot on
 4 the team were permitted to remain on a team over and above the roster cap, that would be unfair to
 5 males who were not selected for the team because they did not have the necessary skill. (UMF 88)

6 Warzecka and Burch had a discussion about the wrestling team roster in October, 2001. Burch
 7 contends that Warzecka requested he move the women to club sport status. Warzecka contends they
 8 discussed Burch's roster and his request to increase the allowable number. During the course of the
 9 discussion, Warzecka asked Burch what he was going to do with the women as they were not included
 10 on his proposed roster. Burch responded that they were not competitive, and that he did not have the
 11 time to devote to them⁷. Warzecka replied that in that case, a wrestling sport club should be formed so
 12 the women could participate in wrestling at a level that was commensurate with their skills and
 13 abilities. (UMF 89) On October 30, 2001 Burch submitted a roster of 34. None of the 34 student
 14 athletes listed were women. (UMF 90) At the end of October or early November 2000, Burch told
 15 MANSOURIAN, NG and Bell that the administration was not supportive of women's wrestling and
 16 that he had been told to take them off the team. He also told them that notwithstanding the fact they
 17 were not on the team, they could continue coming to practices, which they did. (UMF 91) Burch did
 18 not tell the women about the imposition of the roster limit or that he had not allotted any of the limited
 19 spots to them. (UMF 92)

20 **F. OCR Complaints**

21 On April 25, 2001 NG and MANSOURIAN submitted a written complaint to the OCR. They
 22 alleged they had been subject to gender discrimination because they were told they could no longer
 23 participate on the wrestling team. (UMF 93) Warzecka and Associate Athletic Directors Swanson and
 24 Gill-Fisher were notified of the existence of the complaint in early May via a memo from NG,
 25 MANSOURIAN and Reinis dated April 30, 2001. This was the first notice they had of the complaint.
 26 This was also the first complaint relating to gender issues in the intercollegiate athletic program that the
 27

28 ⁷ Burch was one of several part-time head coaches. In addition to his coaching duties, he also had obligations associated with his position as a lecturer in the Religious Studies department.

1 campus had received during Director Warzecka's employment. The campus administrators understood
2 the complaint to relate solely to the wrestling team, not to the intercollegiate athletic program as a
3 whole. (UMF 94)

4 On May 14, 2001 NG and MANSOURIAN filed a second (supplemental) OCR complaint. This
5 complaint contains a list of allegations pertaining to the wrestling program and the participation of
6 women in it. (UMF 95) On June 26, 2001 NG submitted a third complaint to OCR on behalf of
7 herself, MANSOURIAN, and MANCUSO. This complaint was based on athletic scholarships issued
8 to various members of the wrestling team, and Warzecka's response to Burch's effort to give female
9 wrestlers scholarship money only after he learned his contract would not be renewed. (UMF 96) In
10 August 2001, MANSOURIAN filed a fourth OCR complaint. This one was based on the decision not
11 to renew Burch's contract. Plaintiffs contended that decision constituted retaliation against women
12 wrestlers. (UMF 97)

13 After OCR representatives advised members of the Athletic Department administration of the
14 substance of the April 25, 2001 complaint, Associate Vice Chancellor Robert Franks conducted an
15 inquiry into the allegation made by MANSOURIAN and NG that the Athletic Director had removed
16 the women from the wrestling team roster. He spoke with a number of people regarding the allegation
17 including Warzecka, Dennis Shimek (the campus Title IX compliance officer), Swanson, Gill-Fisher
18 and Burch. As a result of his investigation, Franks concluded that Burch had submitted a roster for the
19 2000/01 season that did not include the women wrestlers and, thus, they were indeed not part of the
20 wrestling team. Burch denied removing the women from the team, as did Warzecka. It was Franks'
21 opinion that Burch had not included the women on the roster that year because there was a roster cap,
22 and he had wrestlers more qualified than the women that he wanted to use to fill the limited roster
23 spots. (UMF 98) The women had not been told of this decision. (UMF 92)

24 On May 9, 2001, Warzecka sent a letter to Burch requesting that he add NG, MANSOURIAN,
25 Reinis and CHIANG to the team roster provided they met NCAA, UC Davis, and Burch's requirements
26 for membership on the team. Burch declined to do so; accordingly, Vice Chancellor Franks notified the
27 women of the decision. When he made this offer to the women, it was Franks' understanding that if the
28 women desired to remain on the team the following year, they would have to compete for a position

1 just like any other student who wanted to be a member of a varsity team. (UMF 99) On May 14, 2001,
2 Shimek sent a letter to the OCR investigator advising her that the women had been placed on the
3 wrestling team roster for the 2000/2001 school year. As a result of this notification, the OCR closed
4 the initial complaint. (UMF 100)

5 Franks met with MANSOURIAN and NG on May 16, 2001. Plaintiffs asked if the campus
6 would consider having two roster caps for the wrestling team -- one for men and one for women.
7 Franks passed on their inquiry to Gill-Fisher, Warzecka and Shimek. (UMF 101) They consulted with
8 others, including legal counsel, to determine whether such a suggestion was feasible. The conclusion
9 was that it was not, for a variety of reasons. Of those reasons, the foremost was that as a practical
10 matter, not all students who are interested in participating in varsity athletics have the skill necessary to
11 earn a spot on the team and not all students who want to be a member of a varsity team can be
12 accommodated. Each year, the Athletic Department receives eligibility forms from many more students
13 who want to participate in intercollegiate sports than can actually be accommodated on the varsity
14 teams. There was an upper limit to the total number of student athletes who could be on the wrestling
15 team, which was the roster cap assigned by the Athletic Director. (UMF 102,105,106) Franks
16 communicated this to Plaintiffs in an e-mail. (UMF 103) Plaintiffs asked whether the campus would
17 waive the minimum number of participants necessary for a club sport team because they did not know
18 if they could come up with the ten female students who were interested in wrestling, which was the
19 minimum number of participants required for a club sport. Franks advised them via e-mail that the
20 minimum would be waived for them. (UMF 104)

21 Mr. Shimek advised the OCR that he believed a resolution could be reached that addressed the
22 issues raised by the supplemental complaint. (UMF 107) As a result, UC Davis and the OCR entered
23 into a Voluntary Resolution Plan. The campus administration chose to enter into the Voluntary
24 Resolution Plan because in its opinion, the manner in which Burch had dealt with the issue of women
25 who wanted to participate on the varsity wrestling team had created confusion. The Voluntary
26 Resolution Plan was not an admission by the campus that there had been any violation of state or
27 federal law; rather, it was a specific plan to develop wrestling as a club sport and, where warranted by
28 the eligibility and qualifications of female student-athletes, support their participation on the wrestling

1 team. The Voluntary Resolution Plan contained the following points, among others: (1) male and
 2 female students will be encouraged to compete for a position on the varsity wrestling team. The coach
 3 of the wrestling team will select those athletes eligible for the final squad list who demonstrate the
 4 highest skill and competitive ability in their weight class; and (2) the coach will recruit the best
 5 qualified wrestlers, regardless of gender, for the varsity intercollegiate (ICA) team. (UMF 108)

6 V.

7 **DURING THE TIME PERIOD IN QUESTION, UC DAVIS MET PRONG TWO OF THE**
 8 **THREE PRONGED TEST AND THUS EFFECTIVELY ACCOMMODATED THE**
 9 **INTERESTS AND ABILITIES OF ITS FEMALE STUDENTS**

10 Title IX of the Educational Amendments of 1972 holds that no person shall, on the basis of sex,
 11 be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any
 12 education program receiving federal financial assistance. 20. U.S.C. § 1681(a). The Regulation
 13 implementing Title IX as it relates to athletics is found at 34 C.F.R. Part 106: "No person shall, on the
 14 basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from
 15 another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or
 16 intramural athletics offered by a recipient [of federal funding] and no recipient shall provide any such
 17 athletics separately on such basis." Subsection (c) requires that an institution which operates or
 18 sponsors interscholastic, intercollegiate, club or intramural athletics do so in a manner that provides
 19 equal athletic opportunity to members of both sexes. In determining whether equal opportunities are
 20 available, the Director (of the Office for Civil Rights, which is primarily charged with investigating and
 21 making findings on Title IX allegations) will consider, among other factors, "whether the selection of
 22 sports and levels of competition effectively accommodate the interests and abilities of members of both
 23 sexes."

24 In 1979, the Department of Health, Education and Welfare issued a Policy Interpretation on the
 25 athletics aspect of Title IX. *See* 44 Fed. Reg. 71,413. This Policy Interpretation set forth what is
 26 referred to as the three-prong test for compliance. "A university's athletic program is Title IX-
 27 compliant if it satisfies one of the following conditions [prongs] : (1) intercollegiate level participation
 28 opportunities for male and female students are provided in numbers substantially proportionate to their

1 respective enrollments, or (2) where the members of one sex have been and are underrepresented
 2 among intercollegiate athletes, ... the institution can show a history and continuing practice of program
 3 expansion which is demonstrably responsive to the developing interests and abilities of the members of
 4 that sex, or (3) where the members of one sex are underrepresented among intercollegiate athletes, and
 5 the institution cannot show a continuing practice of program expansion such as that cited above, ... it
 6 can be demonstrated that the interests and abilities of the members of that sex have been fully and
 7 effectively accommodated by the current program.” *Neal v. Board of Trustees of the California State*
 8 *University*, 198 F.3d 763, 768 (9th Cir. 1999). The three-prong test has been universally accepted by
 9 the courts (see e.g. *Cohen v. Brown University [Cohen IV]*, 101 F. 3d 155 (1st Cir.1996)) and the courts
 10 have given substantial deference to the Department’s interpretation of its own regulations. *Roberts v.*
 11 *Colorado State Bd. Of Agriculture*, 998 F.2d 824, 828 (10th Cir. 1993). Equally accepted by the courts
 12 is the authority of the Department of Education and its Office for Civil Rights to issue Clarifications on
 13 the implementing regulation. These Clarifications, as well as OCR’s 1990 “Title IX Athletics
 14 Investigator’s Manual,” have been used by courts as sources of guidance for OCR investigators and for
 15 courts that are faced with making a determination on whether an institution is in compliance with Title
 16 IX in regard to a claim of ineffective accommodation. *Cohen v. Brown University [Cohen I]*, 809
 17 F.Supp. 978, 983-84 (D. Rhode Is. 1992).

18 The UNIVERSITY contends that as a matter of law, it is and has been during the time period in
 19 issue in this case in compliance under prong two. The 1996 “Clarification of Intercollegiate Athletics
 20 Policy Guidance: The Three-Part Test” issued by OCR provides the roadmap for determining
 21 compliance. See *Nat’l. Wrestling Coaches Ass’n. v. Dep’t. of Education*, 263 F.Supp.2d 82, 92-93
 22 (D.C. 2003). In what is commonly referred to as the “Dear Colleague” letter from Norma Cantu,
 23 Assistant Secretary for Civil Rights, that accompanied the Clarification, Cantu noted the Clarification
 24 confirmed that a school need only comply with one of the three prongs, and that prong two involves “an
 25 examination of an institution’s good faith expansion of athletic opportunities through its response to
 26 developing interests of the underrepresented sex at that institution.” She also stated “the Clarification
 27 does not provide strict numerical formulas or ‘cookie cutter’ answers to the issues that are inherently
 28 case-and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the

1 same time deprive institutions of the flexibility to which they are entitled when deciding how best to
 2 comply with the law.” The 1996 Clarification itself states as follows in regard to prong two:

3 “*There are no fixed intervals of time within which an institution must have added*
 4 *participation opportunities.* Neither is a particular number of sports dispositive. Rather,
 5 the focus is on whether the program expansion was responsive to the developing interests
 and abilities of the underrepresented sex.” (emphasis added)

6 “OCR will consider the following factors, among others, as evidence that may indicate a
 7 *history* of program expansion that is demonstrably responsive to the developing interests
 8 and abilities of the underrepresented sex: [1] an institution’s record of adding
 9 intercollegiate teams, or upgrading teams to intercollegiate status, for the
 10 underrepresented sex; [2] in institution’s record of increasing the numbers of participants
 in intercollegiate athletics who are members of the underrepresented sex; and [3] an
 institution’s affirmative response to requests by students or others for addition or
 elevation of sports.” (emphasis added)

11 “OCR will consider the following factors, among others, as evidence that may indicate a
 12 continuing *practice* of program expansion that is demonstrably responsive to the
 13 developing interests and abilities of the underrepresented sex: [1] an institution’s current
 14 implementation of a nondiscriminatory policy or procedure for requesting the addition of
 15 sports (including the elevation of club or intramural teams) and the effective
 16 communication of the policy or procedure to students; and [2] an institution’s current
 implementation of a plan of program expansion that is responsive to developing interests
 and abilities.” (emphasis added)

17 In the 1996 Clarification, the OCR provided hypothetical examples to illustrate the principles
 18 set forth in the document. One such hypothetical is:

19 “At the inception of its women’s program in the mid-1970s, Institution C established
 20 seven teams for women. In 1984 it added a women’s varsity team at the request of
 21 students and coaches. In 1990 it upgraded a women’s club sport to varsity team status
 22 based on a request by the club members and an NCAA survey that showed a significant
 23 increase in girls high school participation in that sport. Institution C is currently
 24 implementing a plan to add a varsity women’s team in the spring of 1996 that has been
 identified by a regional study as an emerging sport in the region. The addition of these
 teams resulted in an increased percentage of women participating in varsity athletics at
 the institution. Based on these facts, OCR would find Institution C in compliance with
 part two because it has a history of program expansion and is continuing to expand its
 program for women to meet their developing interests and abilities.”

26 The few courts that have addressed the issue of compliance under prong two were faced with
 27 women’s intercollegiate athletic programs that bear no resemblance to the women’s intercollegiate
 28 athletic program at UC Davis. The seminal case of *Cohen v. Brown, supra*, is illustrative. Brown

University downgraded two longstanding women's varsity teams (gymnastics and volleyball) to club status in 1991. Almost all women's varsity teams at Brown were created between 1971 and 1977. The only women's team created after that period was winter track in 1982. 908 F.Supp. at p. 981. When the District Court first ruled on the request for a preliminary injunction in 1992, it found that Brown did not meet the criteria for prong two compliance. The Court of Appeal did not disturb that finding. 991 F.2d at p. 903. In *Roberts v. Colorado State Bd. Of Agriculture, supra*, suit was filed in June 1992 after the university discontinued its women's fast pitch softball team and did not replace it with another sport. The District Court issued an injunction reinstating the team. Both the District Court and the Court of Appeal found that the university could not claim compliance under prong two because, apart from creating a women's sports program in the 1970's consisting of eleven sports and then adding women's golf in 1977, it had done nothing more to expand the program. To the contrary, Colorado had dropped three women's sports and its overall opportunities for women had decreased by 34%. In sum, Colorado had not added any new teams between 1977 and 1992 and had dropped three teams during that time.

Louisiana State University was sued for ineffective accommodation in 1994. *Pederson v. Louisiana State University*, 912 F.Supp. 892 (M.D. LA. 1996). Women's intercollegiate athletics started at LSU in 1977. Fast pitch softball was added in 1979, but was dropped following the 1982/83 season "with no credible reason given." No additional women's sports were added until 1993 when the decision was made to add fast pitch softball and soccer in the 1995 season. By the time the District Court ruled in 1996, the softball and soccer teams had been established but, per an agreement with the Southeastern Conference schools, actual competition had been delayed. LSU's prong one (substantial proportionality between intercollegiate athletic participation numbers for men and women and their respective enrollments) numbers were staggeringly disproportionate: 51% of the student body was male and 49% female, but the male athletic participation rate was 71% while the female participation rate was 29%. In addressing prong two and finding that LSU was not in compliance under that test, the Court stated "this Court finds that historically LSU has demonstrated a practice *not* to expand women's athletics at the university before it became absolutely necessary to do so." *Id.* at p. 916. Prior to the decision made in 1993, no new women's teams had been added for 14 years. In addition, although softball and soccer were added after the 1993 decision, by the time the Court ruled those teams were

1 both operating under “considerable handicaps” which called into issue the adequacy of LSU’s
2 commitment to expansion. Finally, in *Barrett v. West Chester University*, 2003 U.S. Dist. LEXIS
3 21095 (E.D. Pa. 2003), the school announced in 2003 that it was dropping women’s gymnastics and
4 men’s lacrosse. Several members of the gymnastics team sued for an injunction mandating the
5 reinstatement of the team. The university made the decision to drop gymnastics notwithstanding a
6 strong recommendation against doing so by the campus’ Sports Equity Committee which oversees Title
7 IX issues. This was one of the factors considered by the District Court in coming to the conclusion that
8 the school did not meet prong two. The school had last added a new women’s sport (soccer) in 1992.
9 Prior to that, its last addition of a women’s sport was in 1979.

10 In contrast to Brown University, LSU, Colorado State and West Chester University, UC Davis
11 has demonstrated both a history and practice of program expansion for women. UC Davis had an
12 established women’s sports program prior to the passage of Title IX. The teams in this program were
13 akin to competitive club teams that competed with comparable teams from other schools. UC Davis
14 was a founding member of the Association of Intercollegiate Athletics for Women (AIAW) which was,
15 in the 1970’s, the national governing body for women’s intercollegiate athletics. (UMF 113) To the
16 best recollection of persons who were involved in women’s athletics at UC Davis when Title IX went
17 into effect, the women’s teams that existed at that time were basketball, field hockey, swimming,
18 softball, tennis, volleyball and track/field. These teams competed under AIAW rules and, thus, were
19 considered varsity sports. Women’s gymnastics, which had previously been a club team, was added in
20 1974. Women’s cross-country, which had also previously been a club team, was added in 1977. (UMF
21 114)

22 When the NCAA agreed to sponsor championships in certain women’s sports in 1981, UC
23 Davis switched its membership in the AIAW to the NCAA, in regard to women’s intercollegiate
24 athletics. (UMF 115) The only women’s varsity sport that has been eliminated at UC Davis since the
25 passage of Title IX is field hockey. The field hockey team last competed in the 1982/83 school year. It
26 was dropped as a varsity sport because all other schools in the conference that UC Davis was in at the
27 time had dropped the sport, causing a lack of competition. There was also a decrease in interest in that
28

1 sport at the high school level. In the fall of 1983 UC Davis replaced field hockey with varsity women's
2 soccer, which was a much more popular sport at the high school and collegiate level. (UMF 116)

3 In the mid 1990's the entire University of California system was undergoing severe budget cuts.
4 These budget cuts threatened to significantly affect the intercollegiate and recreational sport programs
5 on campus. A vote was put to the student body via a referendum process in 1994 and as a result, an
6 initiative called the Student Activities and Services Initiative (SASI) was passed. The effect of the
7 SASI was to increase student fees, with the extra money being used for intercollegiate athletics,
8 intramural and club sports, recreation programs, the Equestrian Center, the Student Health Center, and
9 the Women's Resource and Research Center. (UMF 117)

10 As a result of the passage of SASI, there were funds available to expand the intercollegiate
11 athletics program. In the spring of 1995, consideration was given to adding new varsity teams for
12 women. The campus had a formal written process for evaluating information relating to new varsity
13 teams and for obtaining proposals from students or other persons who were advocating on behalf of a
14 particular sport. (UMF 118) Proponents of five sports (water polo, crew, badminton, lacrosse and field
15 hockey), all of which had existing club sport teams except badminton, submitted proposals for
16 elevation to varsity status. After receiving input from various student athlete groups, the Director of
17 Intramural and Club Sports, and the New Women's Sports Advisory Committee the Acting Athletic
18 Director (Keith Williams) recommended that women's water polo, lacrosse, and crew be elevated to
19 varsity status. These three sports became varsity sports in the fall of 1996. (UMF 119)

20 Indoor and outdoor track are two different sports. There are different requirements for them
21 under NCAA regulations. When Deanne Vochatzer, the head coach for women's track and field at UC
22 Davis started in her position in 1991, the campus only had an outdoor track team. In her opinion, the
23 lack of an indoor track team adversely affected her ability to recruit student-athletes to UC Davis.
24 Vochatzer met with the Athletic Director in order to make a proposal and to obtain authorization to
25 have women student-athletes compete in indoor track events. She received the authorization to do so as
26 long as the cost of entering such events came out of the outdoor track budget. (UMF 120) Women first
27 started competing in indoor track events in approximately 1994, but the sport was not actually
28 established as a team at UC Davis until 1999. At that time, there were a sufficient number of student-

1 athletes to meet the NCAA minimum requirements for an indoor team. The indoor track events that the
 2 women competed in prior to 1999 and continuing through today were and are all head-to-head
 3 competitions with other Division II (now Division I) teams. (UMF 121)

4 In 2003, another call was made for proposals to consider adding a new women's varsity sport.
 5 Again, this was done pursuant to a formal process with written guidelines that specifically set forth the
 6 process and the criteria used to select a new sport. Those criteria include (1) the overall impact on
 7 gender equity; (2) interest level; (3) sport sponsorship and available competition; and (4) facilities.
 8 Proposals were submitted on behalf of five women's sports: bowling, field hockey, golf⁸, horse polo
 9 and rugby. (UMF 122) Ms. Gill-Fisher chaired a committee consisting of a representative of Athletic
 10 Administration Advisory Committee, a representative of the Student Athlete Advisory Committee, and
 11 a representative of the Sports Club Council. The committee met with a representative of each sport that
 12 submitted a proposal, reviewed the written proposals, and then summarized the information. (UMF
 13 123) This information was passed on to Athletic Director Warzecka who reviewed it and made the
 14 recommendation that women's golf be added as a varsity sport. The reasons he recommended golf
 15 over the other sports proposed are (1) golf is a championship sport in the Big West Conference and per
 16 Conference rules, UC Davis was required to add sports that are already part of that conference before
 17 adding non-conference sports; (2) women's golf was offered by 451 universities nationally, which
 18 reflects the interest level in the sport; (3) the NCAA has a golf championship in all three divisions; (4)
 19 UC Davis received many inquiries from female high school students who were interested in golf; and
 20 (5) the local community had indicated a strong support of golf, including use of the El Macero Country
 21 Club in Davis. Funding for this additional team came from the intercollegiate athletics budget. In
 22 addition, start-up costs and additional funding were provided by supporters of women's golf and
 23 alumni donations. Warzecka set forth the basis for his recommendations in a memorandum to the Vice
 24 Chancellor for Student Affairs. (UMF 124) Since an NCAA championship existed for women's golf,

25
 26 ⁸ Plaintiffs have made much ado about the fact that the proposal for women's golf was prepared by Associate
 27 Athletic Director Robert Bullis, rather than by a student. There is no requirement that such proposals be submitted by a
 28 particular person. The 1996 Clarification refers to an institution's response to requests by students *or others* for addition or
 elevation of sports. Mr. Bullis supervised the sport of men's golf. There was no women's golf club team (golf club teams
 are rare because of the need for a golf course on which to play and practice), so it made sense for Mr. Bullis to submit the
 proposal. (See Exhibit G, Declaration of Robert Bullis, ¶ 2.) The fact that a proposal was submitted by Mr. Bullis has no
 importance to a prong two analysis. (Exhibit J, Declaration of Christine Grant, ¶ 15.)

1 it was not unusual to add it as a varsity sport in the absence of an existing club sport team. (UMF 125)
2 Women's golf was selected as the new varsity sport. Kathy DeYoung was appointed as the head coach
3 for the team in 2004. She spent the 2004/2005 school year developing and recruiting a team, and the
4 team started competition in the 2005/2006 school year. (UMF 127)

5 Every Court that has decided the issue of prong two compliance has made its decision based on
6 facts pertaining to the history of the women's athletic program in issue. The Courts of Appeal have
7 recognized that a determination by a District Court on the issue of whether a school is in compliance
8 under one of the three prongs is a judgment call which will not be disturbed absent a finding of
9 unreasonableness. *Cohen v. Brown University [Cohen II]*, 991 F.2d. 888, 903 (1st Cir. 1993). The facts
10 relating to the addition of new varsity sports for women at UC Davis are not in dispute. In the early
11 1970's there were seven teams. A team was added in 1974 and another in 1977. Field hockey was
12 discontinued after the 1982/83 season and replaced by soccer in the fall of 1983. Three sports were
13 added in 1996. Indoor track was added in 1999. Golf was added in 2004 and began competing the
14 following year. This pattern shows a continuing expansion of the women's intercollegiate program, and
15 is consistent with the hypothetical set forth in OCR's 1996 Clarification, particularly in regard to the
16 changes made between 1996 and 2005. While it is true new sports were not added as frequently prior
17 to 1996, the law does not require an institution to "leap to gender parity in a single bound." *Cohen v.*
18 *Brown [Cohen II]*, supra at p. 898. Plaintiffs did not enter UC Davis until 1998 at the earliest (NG) and
19 2001 at the latest (MANCUSO). To the extent they attempt to argue the campus was not in compliance
20 in the 1970's and 1980's, they will be unable to show that had any impact on them. See *Pederson*,
21 supra at p. 907 [LSU's violation of Title IX did not personally impact three of the plaintiffs.]

22 Both sides in this case have expert witnesses on the issue of whether UC Davis complies with
23 prong two. Defendant contends that based on the facts set forth above alone, the Court can determine
24 whether UC Davis complies under prong two. However, the expert's positions may assist the Court in
25 coming to a conclusion.

26 The UNIVERSITY's expert is Dr. Christine Grant. Dr. Grant served as the Women's Athletic
27 Director at the University of Iowa between 1973 and 2000. She holds a Ph.D. and a bachelor's degree
28 in physical education, and has taught extensively on the issue of Title IX and gender equity in athletics.

1 She has coached at the high school, collegiate, and international levels. (UMF 133) Dr. Grant has
2 served as the President of the Association for Intercollegiate Athletics for Women, which was the
3 governing body for women's intercollegiate athletics before the NCAA. She also served as a member
4 of the Board of Directors of the National Association of Collegiate Women Athletic Administrators
5 (NACWAA), and then as NACWAA's President between 1987 and 1989. (UMF 134) Dr. Grant has
6 received numerous awards and recognitions for her work in women's intercollegiate athletics, has
7 published extensively on the subject, and has been consulted by the Department of Education on Title
8 IX issues. She has served as and qualified as an expert on Title IX issues in numerous cases including
9 the seminal case of *Cohen v. Brown University*. (UMF 135)

10 Plaintiffs' expert is Dr. Donna Lopiano who was, until recently, the Chief Executive Officer of
11 the Women's Sports Foundation. Dr. Lopiano usually finds herself on the same side of a case as Dr.
12 Grant. Their opinions on many issues in this case are harmonious. They agree that a school has many
13 options regarding compliance with Title IX. There is nothing in Title IX that mandates that a college or
14 university have every sport available for both genders. (UMF 138) They agree there is nothing in the
15 Regulations or Clarifications pertaining to Title IX that delineates how often a school must add a new
16 sport in order to comply under prong two. (UMF 139) They both disagree with the prong two
17 hypothetical set forth in the 1996 Clarification to the extent it indicates the addition of a new team
18 every six years is acceptable for a school that is not in compliance on prong one. Grant and Lopiano
19 believe that a more reasonable span is two to three years. (UMF 139)

20 In Dr. Grant's opinion, UC Davis is in compliance under prong two because of its demonstrated
21 history and practice of program expansion. She focuses on the fact that UC Davis voluntarily added
22 three new women's varsity sports at one time in 1996 (crew, lacrosse and water polo), followed by the
23 addition of women's indoor and women's golf. This qualifies as a history of program expansion that
24 complies with prong two. (UMF 142) UC Davis was under no obligation to add three sports at one
25 time -- it could have elected to phase in each new sport every six years (if OCR's example is accepted)
26 or every three years (if the positions of Lopiano and Grant are accepted). Instead, it voluntarily
27 established the three new sports at the same time, significantly expanding participation opportunities
28 for women. Dr. Grant is of the opinion that the addition of the three sports in 1996 should be viewed

1 the same as if it had added one new sport in 1996/96, one in 1998/99, and one in 2001/02. To do
2 otherwise would have the result of penalizing prong two schools that add more than sport at once.
3 (UMF 143)

4 Lopiano rejects this approach and contends the addition of three sports at once has the same
5 effect as the addition of one sport. Her position is contrary to purpose of Title IX. If Lopiano's
6 approach is followed, schools that rely on prong two for compliance will be strongly discouraged from
7 adding more than one new women's sport at any point in time because they will lose the ability to rely
8 on the single addition of multiple sports as evidence of a history of program expansion. Instead, those
9 schools will add the new sports one at a time, spaced out over two to three year intervals, which will
10 result in the unnecessary delay of program expansion and the unnecessary loss of competitive
11 opportunities for young women, the majority of whom have only a four year window in which to
12 compete at the varsity level. (UMF 144) There is nothing in the Title IX statute, Regulation or
13 Clarification that delineates how a school can comply under prong two. To the contrary, the OCR has
14 specifically chosen to avoid a "cookie cutter" approach and instead allows flexibility. Dr. Grant's
15 approach is consistent with OCR's approach.

16 Dr. Grant also found that UC Davis has a continuing *practice* of program expansion, in
17 addition to a *history* of expansion, based on the following: (1) the campus has a formalized procedure
18 for considering proposals to add new varsity sports, including a list of the criteria used to assess the
19 proposals and the process that must be followed; (2) this procedure has been used to determine which
20 new women's sports should be added; (3) UC Davis established a Title IX Coordinator position and a
21 Title IX Workgroup in the 1980's, at a time when most universities were ignoring Title IX; (4) UC
22 Davis has had an Athletic Administrative Advisory Committee and a Coach's Advisory Committee for
23 many years indicating a commitment to broad-based input on athletics issues; (5) the campus conducted
24 self-assessments on its women's athletics program in the 1980's, even when Title IX was not being
25 enforced at all because of the *Grove City College v. Bell* case; and (6) the campus has a Title IX
26 grievance process available to students. All of these factors are indicative of an institution that is
27 dedicated to the ongoing expansion of athletic opportunities for women. (UMF 145)

28 Plaintiffs contend prong two cannot be used when a school has eliminated a team. This is not

1 correct. Per the 1996 Clarification, "in the event that an institution eliminated any team for the
2 underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing
3 whether the institution could satisfy part two of the test." One of the hypothetical examples of prong
4 two compliance in the 1996 Clarification includes a school that eliminates a team for a valid reason.
5 UC Davis eliminated women's field hockey because of a lack of competition and a lack of interest in
6 the sport at that time. Field hockey was replaced by soccer, which was much more popular with
7 students. (UMF 116) Unlike LSU, which dropped women's softball "without a credible explanation"
8 for its actions and without replacing it with another sport, UC Davis had a rationale for its actions.
9 Certain sports can decrease in popularity, which in turn leads to a lack of student interest and a
10 corresponding lack of available competition. (UMF 147) The fact that UC Davis dropped varsity field
11 hockey and replaced it with women's varsity soccer is not indicative of a failure to demonstrate
12 program expansion.

13 In a prong two analysis, another issue that must be considered is whether (notwithstanding a
14 history of program expansion) there has been a decrease in the number of participation opportunities.
15 The presence of a decrease does not preclude reliance on prong two; rather, the reason for the decrease
16 must be examined. The OCR will consider a valid reason for a decrease. (UMF 148) When first
17 approached about testifying for UC Davis, Dr. Grant noted there were fluctuations in the number of
18 women participating in intercollegiate athletics at UC Davis between 1995 and 2004 per the Equity in
19 Athletics Disclosure Act (EADA) reports. She inquired as to the reason and was satisfied with the
20 information provided which was that the campus had eliminated "B" or junior varsity water polo and
21 lacrosse teams because of lack of available competition. Dr. Grant, who has considerable experience as
22 an Athletic Director, is well aware of the problem of lack of available competition for intercollegiate
23 junior varsity teams, and was surprised to find that UC Davis maintained its JV teams for as long as it
24 did. (UMF 149)

25 The experience of the water polo team demonstrates this point. When the water polo team was a
26 club team, in addition to the "A" team, it also had a "B" or secondary team which was equivalent to a
27 JV team. After water polo became a varsity sport, it became increasingly difficult to find competition
28 for the "B" team. Other schools within UC Davis' geographic competition area were dropping their

1 junior varsity teams and junior colleges did not want to compete with a Division II team. In addition to
2 lack of competition, it became logistically challenging for the head coach try to maintain practices for
3 both teams which in turn adversely affected the quality of the coaching and experience that the student-
4 athletes were receiving. (UMF 128) At the end of the 2001 season, head coach Jamey Wright, with the
5 agreement of the leaders of the "B" water polo team, worked with the "B" team members to reestablish
6 the water polo club team and have those athletes compete at the club level where there was available
7 competition for them. As a result, the number of student-athletes on the roster for the varsity water polo
8 team changed from a number in the forties to a number in the high twenties or low thirties. In the
9 coach's opinion, the quality of the varsity experience for the members of the team increased as a result
10 of the change in the roster size, as he is able to spend more time coaching each athlete. (UMF 129)

11 Notwithstanding the fluctuations in the participation numbers, in less than one decade (1995-
12 2004), UC Davis increased women's participation in varsity sports from 32% to 50%, despite being
13 challenged by the fact that the female undergraduate population has increased at greater rates than the
14 male undergraduate population. In Dr. Grant's expert opinion, this is good progress and indicative of
15 continuous program expansion under prong two. (UMF 150)

16 In conclusion, UC Davis has exercised its right to comply with Title IX under prong two and
17 has demonstrated a continuing history of program expansion at a pace that is compliant with the statute,
18 as well as a continuing practice of expansion. Accordingly, Plaintiffs' ineffective accommodation claim
19 is without basis.

20 VI.

21 **UC DAVIS DID NOT "ELIMINATE" A WOMEN'S WRESTLING TEAM OR** 22 **OPPORTUNITIES FOR WOMEN TO TRY OUT FOR THE WRESTLING TEAM**

23 Plaintiffs claim UC Davis violated Title IX and eliminated their opportunity to participate in
24 wrestling by requiring them to try out for a spot on the team roster under the same terms and conditions
25 as male students. Their argument is based on the fact that Burch did not require MANSOURIAN or NG
26 to do so. Burch's preferential treatment of MANSOURIAN and NG did not entitle them, or
27 MANCUSO (who entered Davis after Burch departed) to a guaranteed spot on the roster for each year
28 they were undergraduate students.

1 Coach Zalesky requires hopefuls for the wrestling team to demonstrate they have the skill and
2 ability necessary to wrestle at the NCAA Division I level before they will be given a place on the team.
3 Competition is the cornerstone of intercollegiate competition -- it begins with team try-outs. The head
4 coach of an intercollegiate team has the sole responsibility of determining which students have the
5 skills necessary to earn a spot on the team. In wrestling, that determination is made by conducting
6 wrestle-offs. (UMFs 10, 49, 51, 109) Trying out for a team is an integral part of varsity athletics. Not
7 everyone who wants to be on a team can be. (UMF 109) The privilege of being a member of a varsity
8 team is earned via demonstration of the necessary skill and ability to compete at the varsity level.
9 Those who do not possess the skills at the varsity level may pursue their athletic interests at the club
10 sport level. (UMF 109) The club sport program at UC Davis is very robust. Club teams compete at
11 the Recreational, Competitive II and Competitive I levels. Recreational teams focus on instruction and
12 recreational activities on campus. Competitive II teams travel and compete against teams from other
13 schools and amateur organizations. Competitive I teams also travel and compete with teams from other
14 schools, but in a format leading up to a national championship. Similar to varsity sports, most
15 Competitive I and Competitive II club sports belong to a conference. In some sports, such as co-ed
16 cycling, the Competitive I club team is equivalent to a varsity team in regard to the level of competition
17 because it is the highest level of intercollegiate competition offered for that sport. (UMF 110,111)
18 Any enrolled student may participate in a club sport. (UMF 112) Thus, there are many participation
19 opportunities available for those who have not reached the elite level of skill that is necessary for
20 varsity intercollegiate athletics.

21 Coach Zalesky's approach to selection of team members is not only consistent with the method
22 followed almost universally by coaches whose teams exist in the highly competitive environment of
23 intercollegiate athletics but also with the Plan approved by the OCR: "The coach of the wrestling team
24 will select those athletes eligible for the wrestling team's final squad list who demonstrate the highest
25 skill and competitive ability in their weight classes." (UMF 108, Exhibit 24) The reason it was
26 necessary to put this basic premise into writing was because Burch (whom Plaintiffs hold up as their
27 champion) did not require women to try out for the team, nor did he hold them to the same standards as
28 males who wanted to wrestle. (UMF 48) In his opinion, the women were not competitive at the
intercollegiate level. (UMFs 48, 50) Burch was willing to allow them to practice and to compete in an

1 occasional open tournament, but his willingness to walk the walk rather than just talk the talk regarding
2 women ended at that point. He did not provide the women with uniforms, nor did they compete in
3 regular intercollegiate competition (dual meets) as the male wrestlers did. He did not offer the women
4 any scholarship money, except for a belated attempt to do so after he found out that his contract was not
5 going to be renewed. (UMFs 33, 37, 38, 53, 58, 59, 63, 69) When Warzecka told Burch (and the
6 coaches of the other men's teams) that they must comply with roster limits in the fall of 2000, Burch
7 did not allot any of his limited roster spots to the women, even after he was given four more spots at his
8 request. (UMFs 87, 90) The reason Burch did so is understandable; NG and MANSOURIAN did not
9 even have the skills to earn a spot on the team, no less compete against UC Davis' wrestling rivals.

10 While Burch may have been willing, prior to the enforcement of roster management, to have
11 female students on the team who could only compete at the open tournament level, Zalesky is not. The
12 UC Davis wrestling team participates in very few open tournaments. Its primary form of competition is
13 dual meets with other Pac-10 schools and the NCAA championships. Coach Zalesky would never
14 recruit or otherwise give a place on the varsity roster to a student, regardless of gender, who was solely
15 interested in participating in open tournaments. Although all wrestlers selected for the team may not
16 always compete (such as when they are red-shirting), it is his expectation that every wrestler selected
17 for the team will at some point be able to viably compete in dual meets and championships. (UMFs 12,
18 13) Those students who try out for the team but cannot demonstrate the necessary level of wrestling
19 skill are cut, regardless of their gender. (UMF 83)

20 Burch's approach to the women did not bind the campus or his replacement, nor does Title IX
21 require that a school treat females *preferentially* as opposed to *equally*. There is nothing in 34 CFR
22 106.41(b) or any case interpreting Title IX that requires a coach to place students on a varsity team
23 simply because they are female and want to participate in the sport. Title IX does not mandate that
24 women be treated preferentially, nor does it require that women who try out for a team that is also
25 populated by men be allowed to do so under differential criteria. (UMF 161)

26 The drafters of Title IX and its Regulations recognized there are differences between males and
27 females and that those differences may affect the ability of members of one sex to compete with
28 members of the other sex. 34 CFR part 106.41(b) states that schools may operate sex-segregated teams

1 for members of each sex where selection for membership on the team is based on competitive skill or
 2 where the activity involved is a contact sport. Despite the fact that OCR considers wrestling to be a
 3 contact sport, UC Davis has always allowed women to try out for the team. (UMF 9) Per subsection
 4 (b), if a school has a team for one sex but not the other and athletic opportunities for that sex have
 5 previously been limited, “members of the excluded sex⁹ must be allowed to try-out for the team offered
 6 unless the sport involved is a contact sport.” There is no requirement that members of the “excluded
 7 sex” be placed on a team simply because they are female, or because they cannot otherwise earn a spot
 8 on the team based on skill and ability. All that is required is an opportunity for a student to show that
 9 she or he has the necessary skill and ability, in the opinion of the coach, to warrant inclusion on the
 10 team. Judge Roberts of the Western District of Missouri summed it up succinctly in the context of a
 11 equal protection argument arising from a girl’s desire to try out for a boys’ middle school football team:
 12 “Nichole Force obviously has no legal entitlement to a starting position on the Pierce City Junior High
 13 School eighth grade football team, since the extent to which she plays must be governed solely by her
 14 abilities, as judged by those who coach her. But she seeks no such entitlement here. Instead she seeks
 15 simply a chance, like her male counterparts, to display those abilities. She asks, in short, only the right
 16 to try.” *Force v. Pierce City R-VI School Dist.*, 570 F.Supp.1020, 1031(D. Mo. 1983). Plaintiffs and all
 17 other wrestling team hopefuls were given the right to try.

18 There is no statutory or constitutional right to participate in college athletics or to be given a
 19 spot on a particular team simply because a student desires to participate in that sport. *Miami University*
 20 *Wrestling Club v. Miami University*, 302 F.3d 608, 615 (6th Cir. 2002); *Burrows v. Ohio High Sch.*
 21 *Athletic Ass’n*, 891 F.2d 122, 125 (6th Cir. 1989). Under Plaintiffs’ theory, they were absolutely
 22 entitled to a place on the intercollegiate wrestling team throughout their college careers because the
 23 former coach permitted them to practice with the team and because they participated in one open
 24 competition. Title IX does support their claim of entitlement. Participation in intercollegiate athletics
 25 is a privilege, not a right. *Lesser v. Neosho County Comm. College*, 741 F.Supp. 854, 861.

26 Plaintiffs also argue females should not be counted under a team’s roster cap or maximum.
 27

28 ⁹ This reference most often applies to women, not men.

1 Roster management or “capping” is used for both budgetary and gender equity purposes. (UMF 85)
2 There are no established limits on caps; rather, the decision is again left up to the institution. (UMFs
3 105, 106) While the practice of limiting the number of males on a team for gender equity purposes
4 passes constitutional muster (see *Neal v. Trustees*, supra) there is nothing in Title IX or its regulations
5 that requires a school to put otherwise unqualified women on a varsity team over and above the roster
6 maximum established for the team. Roster management is based on the understanding that there is a
7 limit to the number of students who can participate on a varsity team -- not everyone who wants to do
8 so can be a member of a varsity team. By its nature, intercollegiate athletics is not an “all comers”
9 event. The size of a team is determined by a competitive process that narrows down the squad to the
10 size that is right for the institution. (UMF 106) Athletic Director Warzecka did not care whether the
11 wrestling coach filled the roster spots with males or females, so long as he did not exceed the
12 maximum. If UC Davis allowed women who do not have the skill or ability to earn one of the roster
13 spots to be on the intercollegiate team nonetheless, it would be discriminating against males who are
14 not given a roster spot because they too lack the requisite abilities. (UMF 88)

15 Finally, to the extent Plaintiffs argue that a separate women’s wrestling team existed at UC
16 Davis and was later “eliminated”, this is simply not borne out by the facts. There has never been a
17 separate schedule of competition for women. There has never been a separate media guide for a
18 women’s wrestling team. The media guides for the wrestling team consistently described women’s
19 wrestling as having unofficial status. (UMFs 19, 20, 21, 22 24) The women never wrestled in a UC
20 Davis uniform or competed in dual meets with other members of the conference. At most, they
21 participated or attempted to participate in a fundraiser tournament once a year. (see above) The UC
22 Davis wrestling team was not a mixed varsity team as the women did not compete against other varsity
23 teams. A mixed gender team is one that has both male and female members, and both male and female
24 members of the team compete against male and female members of comparable teams from other
25 schools. (UMF 159) The situation that existed during the Burch years was that a few female students
26 participated in a very limited manner with the other members of the team, all of whom were male. That
27 limited participation did not morph into a separate team for women. Since there was no separate team,
28 there is no basis to the claim that UC Davis eliminated a women’s wrestling team.

VII.

**THERE IS NO EVIDENCE OF INTENTIONAL
DISCRIMINATION OR DELIBERATE INDIFFERENCE BY THE UNIVERSITY**

A Title IX plaintiff may not recover damages absent proof of intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 280-81, 121 S. Ct. 1511, 1516 (2001); *Ferguson v. City of Phoenix*, 157 F.3d 668, 674-75 (9th Cir. 1998).¹⁰ Since Plaintiffs have dismissed their class and injunctive claims (and only damage claims remain), they must provide sufficient evidence that any alleged Title IX violations were “intentional” in order to proceed to trial. See *Horner ex rel. Horner v. Kentucky High Sch. Ath. Ass’n*, 206 F.3d 685, 696-97 (6th Cir. 2000) (granting summary judgment on Title IX claim due to lack of evidence of intentional discrimination). In the alternative, they may prove that an educational institution is “deliberately indifferent” to a plaintiff’s Title IX rights. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290, 118 S. Ct. 1989, 1999 (1998). Deliberate indifference occurs where a defendant’s actions are “clearly unreasonable in light of the known circumstances.” *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 139 (9th Cir. 2000). There is no evidence that representatives of the UNIVERSITY acted with the intent to discriminate against Plaintiffs or that their actions were “clearly unreasonable in light of the know circumstances.”

A. The UNIVERSTIY Acted Promptly Upon Receiving Notice of the OCR Complaint and Resolved the Matter to the Satisfaction of OCR.

When the UNIVERSITY learned of the OCR complaint filed by MANSOURIAN and NG, it quickly took steps to investigate the accusations and, with the guidance of the OCR, develop a resolution. (UMFs 94-104, 107-108) The resolution did not include any finding by the OCR that the UNIVERSITY violated Title IX, and resulted in a Voluntary Resolution Plan which specifically delineated that male and female students would be encouraged to compete for a position on the intercollegiate team, and that the coach would select those students who demonstrate the highest skill and competitive ability in their weight class. (UMF 108) This Court may consider the letter issued by

¹⁰ Both *Sandoval* and *Ferguson* discuss the requirement of intentional discrimination in the context of Title VI. With one inconsequential exception, Title VI and Title IX use identical language to describe the benefited class. *Cannon v. University of Chicago*, 441 U.S. 677, 694-96, 99 S. Ct. 1946, 1956-57 (1979). Accordingly, the statutes are interpreted consistently. *Barnes v. Gorman*, 536 U.S. 181, 185 122 S. Ct. 2097, 2100 (2002).

the OCR (Defendant's Exhibit 24) and its conclusions, along with the Voluntary Resolution Plan. *Nelson v. Pima Community College*, 83 F.3d 1075, 1080 (9th Cir. 1996). In the fall of 2000 and thereafter, UC Davis complied with the Plan by having Coach Zalesky conduct try outs and select those students who demonstrate the highest skill and competitive ability for membership on the intercollegiate team. (UMFs 82-83) Compliance with a Plan approved by the OCR cannot be used as the basis for a claim of intentional discrimination. *Grandson v. Univ. of Minn.*, 272 F.3d 568, 576 (8th Cir 2001). Holding try-outs and selecting the most skilled athletes for the team is an approach that courts have recognized as valid and fair. See *Pederson v. LSU*, supra at p. 906 ["Whether the Pinedas are in that group [who make the team] depends, in part, upon the level of competition among the athletes who desire to get on the team and the subjective evaluations made by the university"]. The fact that Plaintiffs do not agree with the plan accepted by the OCR also does not equate to deliberate indifference.

B. Declination of the Request for Separate Roster Caps Was Reasonable.

UC Davis declined Plaintiffs' request to create separate roster caps for males and females on the wrestling team. This is not evidence of intentional discrimination or deliberate indifference. *Neal v. Board of Trustees of the California State University*, supra, is the Ninth Circuit's imprimatur for the use of roster management. The problem arose in this case not because of the use of roster management, but because Burch did not tell MANSOURIAN and NG in the fall of 2000 that roster management for the wrestling team was in effect and that he had not allotted any of the limited roster spots to them. (UMF 92)¹¹ The proposal posited by Plaintiffs for a "separate roster cap" for women is nothing more than a request for preferential treatment, something that is not required by law. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 708 (9th Cir. 1997) ["Impediments to preferential treatment do not deny equal protection. ... While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms"]. The UNIVERSITY considered Plaintiffs' request, researched the issue, and concluded that the request was not well founded. (UMF 102-103)

¹¹ The dispute between Burch and Warzecka about what each said, or did not say during their meeting in the fall of 2000 about the status of the women wrestlers is not material for the purpose of the sole remaining issue in this case. It is undisputed that even though they were not on the roster for that season, to some extent MANSOURIAN and NG continued to come to practices.

1 **C. There is Insufficient Interest to Establish a Women's Varsity Wrestling Team**

2 That UC Davis has not created a women's varsity wrestling team is also not evidence of
 3 intentional discrimination or deliberate indifference. The fact that a few female students were interested
 4 in varsity wrestling does not mandate that UC Davis create a team for them. As stated by the Women's
 5 Sports Foundation, "Remember, if a complaint is filed, the investigator must find if there is interest by
 6 the underrepresented sex in adding opportunities. *It is not enough for you and one or two friends to say*
 7 *you want to play soccer -- there have to be enough females interested to form a team.*" (UMF 151)
 8 The issues of interest level and available competition play a large role in Title IX compliance. Per the
 9 1979 Clarification, institutions are not required to upgrade teams to intercollegiate status or otherwise
 10 develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in the
 11 sport will be available within the school's normal competitive regions. *Federal Reg. Vol. 44, No. 239,*
 12 *p. 71418.* The 1996 Clarification states that the OCR will consider whether there is unmet interest in a
 13 sport, sufficient interest to sustain a team in the sport, and a reasonable expectation of competition for
 14 the team.

15 There have never been more than a few women who wanted to participate on the wrestling
 16 team. (UMF 45) When MANSOURIAN and NG met with Vice Chancellor Franks in the spring of
 17 2001, they asked if the campus would waive the minimum number of students required to form a club
 18 sport team (10), leading to the conclusion the interest level was low enough that even that minimum
 19 requirement could not be met. (UMF 104) The "indifference" appears to exist on the part of female
 20 students who purportedly have an interest in a varsity wrestling team. When UC Davis asked for
 21 proposals for addition of new women's varsity sports, neither Plaintiffs nor any other students or
 22 representatives submitted one on behalf of women's wrestling. (UMF 119, 122) Surveys of freshmen
 23 students conducted by UC Davis in 2004 and 2005 showed almost non-existent interest in wrestling at
 24 the intercollegiate level by female students. (UMF 132)

25 Even though wrestling is an "individual" sport (meaning that wrestlers compete on a one-on-
 26 one basis in each contest) this does not mean that a school has an obligation to establish a varsity team
 27 for just a handful of students. In *Roberts v. Colorado*, supra at fn. 10, the Court dismissed the notion
 28 that one or two students could demand the creation of a varsity team. "The Investigator's Manual

addresses and obviates the possibility that one talented softball player could force the creation of an entire team. The Manual instructs investigators ... to review ‘whether the institution failed to accommodate ‘expressed interest,’ for example, athletes of the underrepresented sex participating in a club sport express interest in intercollegiate ... competition *or sufficient numbers of individuals to form a team request that a sport be offered.*” (Emphasis in original.) Similarly, in *Pederson v. LSU*, the Court stated “the existence of one or two students with interest and ability to participate in sports likely would not constitute a basis for a claim of ineffective accommodation and thus, violation of Title IX.” *Id.* at p. 906. See also *Wieker v. Mesa County Valley School*, 2007 U.S. Dist. LEXIS 11956, *25-26 (D. Co. 2007) [summary judgment granted for school because plaintiff failed to demonstrate sufficient interest in volleyball to sustain a team].

Although a men’s wrestling team at an NCAA member school may have women wrestlers on it, the NCAA does not sponsor women’s wrestling as a sport. (UMF 1) The NCAA has identified certain sports for women as “emerging sports.” The criteria for consideration as an NCAA emerging sport are: (a) the activity in issue must meet the definition of a sport, there must be scheduled individual or team head-to-head competitions (at least five) within a defined competitive season, and standardized rules ratified by official agencies or governing bodies; (b) there must be 20 or more varsity teams and/or competitive club teams that currently exist on college campuses for the sport; (c) data must exist that demonstrates support for the sport such as collegiate or intramural sponsorship, high school sponsorship, non-scholastic competitive programs and associational and organizational support; (d) a demonstrated understanding that if the sport is identified as an emerging sport, all NCAA member institutions wishing to sponsor the sport will abide by NCAA rules and regulations; (e) a proposal setting forth suggestions for championship rules and a format for the sport must be submitted; and (f) 10 letters of support from the president or athletic directors of member institutions confirming they will sponsor the sport as an emerging sport must be submitted; the letters must be dated within one year of the submission of the proposal requesting identification as an emerging sport. Archery, badminton, equestrian, rugby, squash, synchronized swimming and team handball are emerging sports. Women’s wrestling has never been included on the list of emerging sports, nor has any organization or person

1 submitted a proposal meeting the above criteria for consideration of women's wrestling as an emerging
2 sport. (UMFs 2-4)

3 Neither the NCAA nor the NAIA offers a women's wrestling championship. (UMF 156) The
4 head coach of the wrestling team has never seen a woman compete for any of the teams that UC Davis
5 regularly competes against in its conference. (UMF 154) To the knowledge of Defendant's expert,
6 there are only approximately five women's collegiate wrestling teams in the country. Plaintiffs' expert
7 does not know what UC Davis' normal geographic competition is for the sport of wrestling, nor does
8 she know of any intercollegiate athletic conferences that sponsor women's wrestling. (UMF 153) An
9 important consideration on the issue of adding new sports is whether the sport is sponsored by a
10 conference, as that guarantees a number of scheduled matches. (UMF 126) The one collegiate
11 women's wrestling team that exists at a California college is a club team. (UMFs 155) This does not
12 constitute a reasonable expectation of intercollegiate competition at the varsity level.

13 While there has been a gradual increase in the number of female students in California who
14 participate in wrestling at the high school level, those numbers pale in comparison to high school
15 participation in other sports. For example, according to the California Interscholastic Federation
16 website, in 2001 out of a total of 271,214 female high school students, 752 participated in wrestling
17 while 4,588 high school girls participated in golf that year. In 2005, 1,230 girls participated in
18 wrestling, as compared to 5,972 in golf. (UMF 6) The decision as to which sports a school will sponsor
19 lies solely within the discretion of the administration and/or the Athletic Director. (UMF 152)
20 In the past twelve years, UC Davis has elected to add water polo, rowing, lacrosse, indoor track and
21 golf because there is sufficient interest in those sports and regular competition is available. (UMFs 119,
22 122, 123, 124) Due to the lack of sufficient interest to field a team and the lack of available regular
23 competition (as opposed to a few open tournaments), the campus has chosen not to add women's
24 wrestling as a varsity sport at this time.

25 In conclusion, the UNIVERSITY's handling of the issue of the women wrestlers does not
26 constitute intentional discrimination or deliberate indifference. UC Davis is not mandated to maintain
27 parallel sports for both sexes. "In the selection of sports, the regulation does not require institutions to
28 integrate their teams nor to provide exactly the same choice of sports to men and women. *44Fed. Reg.*

1 Vol. 44, No. 239, p. 71417-8. Intentional discrimination is demonstrated where the defendant intended
 2 to treat women differently. *Pederson v. LSU*, supra at p. 881. UC Davis treated males and females
 3 exactly the same in regard to earning a place on the varsity wrestling team. Those students who
 4 possess exemplary skills are placed on the team. Those students whose skill levels are not at the varsity
 5 level may participate at the club sport level, or chose not to wrestle at all.

6 VIII.

7 **PLAINTIFFS' CLAIM OF ENTITLEMENT TO DAMAGES IS** 8 **BARRED BECAUSE OF THEIR LACK OF NOTICE TO THE UNIVERSITY**

9 The Supreme Court has held that under Title IX, an institution receiving federal funding may
 10 not be held liable for damages unless an official of the institution who has the authority to take
 11 corrective action was given actual notice of the specific Title IX violation alleged and was deliberately
 12 indifferent to it. *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 118 S. Ct. 1989 (1998). The
 13 Title IX statute (20 U.S.C. § 1682) prohibits the OCR, as the enforcing agency, from taking action
 14 against a recipient of federal funds until the OCR has advised the recipient of its failure to comply with
 15 section 901 and has determined that compliance cannot be obtained by voluntary means. In *Grandson*
 16 *v. Univ. of Minn.*, supra, the Court upheld the dismissal of a Title IX damages claim because there was
 17 no evidence the plaintiffs gave prior notice of their complaints to university officials, that the university
 18 had a reasonable opportunity to rectify the alleged violations, or that the officials were deliberately
 19 indifferent to the allegations. In reaching its conclusion, the *Grandson* Court used the same reasoning
 20 as the Supreme Court. Recovery of damages for an alleged Title IX violation is the result of a
 21 judicially implied system of enforcement, while the OCR's authority to enforce is expressly stated in
 22 the statute. It would be unsound to allow for the recovery of damages without notice and an
 23 opportunity to rectify, while the same is required by the express wording of the statute.

24 MANSOURIAN and NG admitted in the OCR complaint they filed in late April 2001 that they
 25 had not tried to resolve their complaint through the school's internal grievance procedure. The
 26 complaint makes reference only to the wrestling team and their experience with it. (UMF 93) The May
 27 14, 2001 supplemental complaint also refers only to wrestling, as does the June 26, 2001 complaint.
 28 (UMF 95-96) A claim of ineffective accommodation encompasses the entire athletic program for the

1 underrepresented sex -- not just one specific aspect. See *Cohen v. Brown [Cohen I]* supra at p. 989
2 ["There is no rule of number of disparities that when reached constitutes a violation. Generally, the
3 determination is whether, in reviewing the program as a whole, the disparities add up to a denial of
4 equal opportunity to athletes of one sex"]; *Cohen v. Brown [Cohen II]*, supra at p. 906 ["Title IX does
5 not require institutions to find any particular number or type of athletic opportunities -- only that they
6 provide those opportunities in a nondiscriminatory fashion if they wish to receive federal funds"].
7 There is nothing in the OCR complaints filed by MANSOURIAN and NG that notified UC Davis they
8 were making an allegation that the intercollegiate athletic program fails to effectively accommodate the
9 interests and abilities of female students. There is no evidence that MANSOURIAN or NG ever
10 participated in, or attempted to participate in, any varsity sport other than wrestling. MANCUSO used
11 sponsorship via the soccer coach to gain entry to UC Davis after she was initially not accepted as a
12 student, but had no interest in participating in varsity soccer and was cut from the team before she ever
13 became a member of it. She was never a member of the varsity soccer team. (UMFs 78-80) The OCR
14 complaints contain only allegations pertaining to Plaintiffs' experiences with wrestling, which is the
15 limited extent of their involvement in intercollegiate athletics at UC Davis.

16 UC Davis would have no reason to believe a program-wide failure to accommodate claim was
17 being made. The OCR complaint filed by MANSOURIAN and NG was the first complaint Warzecka
18 and the Title IX compliance officer had received about UC Davis' athletic program. They understood
19 the complaint related solely to an unusual set of circumstances involving women and the wrestling
20 team (UMF 94) The UC Davis women's intercollegiate athletic program has received national
21 recognition for excellence. Sports Illustrated for Women named UC Davis as the best Division II
22 school for women athletes in 1999 and 2000. UC Davis has produced no less than three NCAA
23 Women of the Year winners since that program started in 1991. The Woman of the Year Award is
24 given to senior student-athletes who distinguish themselves in the area of academic achievement,
25 athletics, service and leadership. Its women athletes have many national championships, and more than
26 250 female student athletes at UC Davis have been named as All-Americans. (UMF 163) The campus
27 sponsors fourteen women's varsity teams: basketball, cross-country, golf, gymnastics, lacrosse, rowing,
28 soccer, softball, swimming/diving, tennis, indoor track, outdoor track, volleyball and water polo. (UMF

164) This is far more than the national average of 8.45.¹² In 2002, Assembly Member Thomson named Senior Associate Athletic Director Gill-Fisher her Assembly District “Woman of the Year” because of Gill-Fisher’s efforts and accomplishments in the area of women’s collegiate athletics. (UMF 165) These milestones are reflective of a women’s sports program that embodies the spirit and substance of Title IX.

In conclusion, Title IX worked as it was designed to work in this case *in regard to the allegations pertaining to the wrestling team*. Plaintiffs MANSOURIAN and NG made a specific complaint relating to the wrestling team to the OCR. UC Davis responded to the complaint and with the blessing of the OCR, devised a plan to ensure that all students understand that selection for inclusion on the varsity intercollegiate wrestling team requires competition with the other students who want to be on the team and demonstration of the requisite skills and abilities. There was no notice to UC Davis of an alleged program-wide failure of effective accommodation. Accordingly, Plaintiffs’ claim for damages is barred.

IX.

CONCLUSION

“Opportunity is the possibility of participation, not the guarantee of participation.” *Pederson v. LSU*, supra at p. 905. Plaintiffs had the possibility of participation, as did other students who were interested in being part of the varsity wrestling team. At the time they tried out for the team, Plaintiffs’ wrestling abilities had not developed to the point where they were skilled enough to compete at the Division I level. Plaintiff NG did not even have a desire to compete. Their demand for preferential treatment in the form of inclusion on the varsity team in the absence of the requisite skill is not mandated by Title IX, and UC Davis’ declination of their demand for preferential treatment is not a violation of the statute.

Plaintiffs MANSOURIAN and NG place great weight on the fact they were members of the team for a year or two during Burch’s tenure. Their participation on the team was not at all comparable to the participation level of the male members of the team. The women never wrestled in a dual meet

¹² See “Women in Intercollegiate Sport: A Longitudinal, National Study Twenty Seven Year Update (1977-2006)” by Linda Jean Carpenter and R. Vivian Acosta in conjunction with the National Association of Collegiate Women Athletic Administrators.

1 against another Pac-10 school. They never wrestled in a UC Davis uniform. They didn't use collegiate
2 wrestling rules. At most, once a year they participated in the Aggie Open fundraiser tournament. The
3 media guides do not contain any information about their wrestling records because they didn't have
4 any. They were not given scholarships. At first blush, one may think this difference would form the
5 basis for a claim by Plaintiffs that gender inequity existed. Not so. Plaintiffs have no interest in being
6 held to the same standards as the male members of the team. Instead, they want to be varsity wrestlers
7 and reap the benefits of that privilege without having to earn a spot on the team via competition with
8 other students who have the same desire. Former coach Burch's lax approach to the women, and their
9 acceptance of it, did not guarantee Plaintiffs a spot on the varsity roster throughout their college career.

10 The UNIVERSITY requests that the Court issue judgment in its favor on the sole remaining
11 claim in this case.

12 Dated: January 11, 2008

PORTER SCOTT
A PROFESSIONAL CORPORATION

13
14 By


Nancy J. Sheehan

George A. Acero

Attorney for Defendant, REGENTS OF
THE UNIVERSITY OF CALIFORNIA

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 January 11, 2008, I served the following document(s):

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

XXX **VIA ELECTRONIC-FILING** to the office of the person(s) listed below.

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 below 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
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I declare under penalty of perjury that the foregoing is true and correct and was executed on January 11, 2008, at Sacramento, California.


Cindy Cannon