2009 WL 2444221 (C.A.9) (Appellate Brief)
United States Court of Appeals, Ninth Circuit.

Arezou MANSOURIAN, et al., Plaintiffs-Appellants,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants-Appellees.

No. 08-16330.
April 24, 2009.

On Appeal from the United States District Court for the Eastern District of California, Honorable Frank C. Damrell, Jr., Case No. 2:03-CV-02591-FCD-EFB

Appellees' Answering Brief

Porter Scott, A Professional Corporation, Nancy J. Sheehan, SBN 109419, 350 University Ave., Suite 200, Sacramento, California 95825, Tel: 916.929.1481, Fax: 916.927.3706, Attorney for Defendants-Appellees.

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JURISDICTIONAL STATEMENT

Defendants/Appellees Regents of the University of California, Lawrence "Larry" [sic] Vanderhoef, Greg Warzecka, Pam Gill-Fisher, Robert Franks and Lawrence Swanson agree with Appellants' statement of jurisdiction.

STATEMENT OF ISSUES

1. THE HOLDING IN *FITZGERALD V. BARNSTABLE* CONTROLS ON THE ISSUE OF WHETHER A CLAIM UNDER 42 U.S.C. § 1983 MAY BE MAINTAINED CONCURRENTLY WITH A CLAIM UNDER TITLE IX. HOWEVER, PLAINTIFFS' §1983 CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS AND THE DOCTRINE OF QUALIFIED IMMUNITY.

2. DID THE DISTRICT COURT ABUSE ITS DISCRETION IN DENYING PLAINTIFFS LEAVE TO AMEND THEIR COMPLAINT? (NO)

3. DID THE DISTRICT COURT PROPERLY RULE THAT A PLAINTIFF IN A TITLE IX ATHLETICS INEFFECTIVE ACCOMMODATION CASE MUST PROVIDE NOTICE OF HER ALLEGATION AND AN OPPORTUNITY TO CURE AS A PREREQUISITE TO FILING A SUIT FOR DAMAGES? (YES)

4. DID THE DISTRICT COURT PROPERLY GRANT SUMMARY JUDGMENT IN FAVOR OF DEFENDANT UCD ON THE GROUND THAT THE NOTICE GIVEN BY PLAINTIFFS WAS LIMITED TO ISSUES PERTAINING TO THEIR EXPERIENCES IN REGARD TO WRESTLING AND THUS DID NOT PROVIDE NOTICE THEY WERE ASSERTING AN INEFFECTIVE ACCOMMODATION CLAIM? (YES)

STATEMENT OF THE CASE

A. Introduction

Well before Title IX of the Educational Amendments of 1972 was enacted, the University of California, Davis (UCD) had an established intercollegiate athletic program for its female students. UCD's intercollegiate athletic program is rooted on traditional notions of athletics at the varsity level, including competition for spots on the team roster and the right of the coach to select those student-athletes who demonstrate the highest level of skill and ability to compete in the sport in issue. This case arises from Plaintiffs' belief that they were entitled to a spot on the wrestling team *because* they are female, whether or not they possessed the skill and ability to compete at the intercollegiate level. While Plaintiffs and their **amici** describe this case in terms of a large-scale athletic accommodation claim that has broad-reaching consequences, in reality it involves events unique to fewer than five former UCD students.

B. Procedural History

Plaintiffs sued the Regents of the University of California and the Chancellor, Athletic Director, Associate Athletic Directors and former Vice Chancellor for Student Affairs at UCD, claiming Defendants denied them equal athletic participation opportunities and financial assistance in violation of Title IX, retaliated against them, violated 42 U.S.C.§ 1983 by treating them disparately on the basis of gender, and violated various state statutes. The factual allegations in the Complaint were based almost exclusively on events relating to wrestling. (ER 6416-6430).[1] "Class Plaintiffs" Mansourian and Mancuso sought to represent a class consisting of "all present and future female students at UC Davis who are denied equal athletic participation opportunities and scholarships in women's wrestling by Defendants' discriminatory actions." (ER 6435).

Plaintiffs filed a motion for class certification in December 2005 (ER 6390-6404). Defendants opposed the motion on April 4, 2006, raising a number of arguments including the bar of the statute of limitations and the fact that the Plaintiffs' eligibility to participate in intercollegiate sports had expired or was about to expire, which affected their standing as proposed class representatives. (SER 00368-00408). On the day Plaintiffs' reply brief was due, the attorney representing them at the time (Ms. Galles) filed a motion to stay the action due to her health issues. (ER 6384-6389). Defendants filed a response to the motion, responding to claims made by Ms. Galles that she had not had sufficient time to engage in discovery. (SER 00354-00367). On April 18, 2006 the District Court issued an order staying the case. Judge Damrell set a status conference for June 16, 2006 in order to give Ms. Galles time to find substitute or additional counsel. The parties were ordered to file a joint status report by June 6, 2006. (SER 00352-00353). The date of the status conference was later continued to July 28, 2006. (SER 00350-00351).

Ms. Galles did not comply with the Court's order to file a joint status report. Instead, she filed another motion to extend the stay. (SER 00346-00349). Defendants filed a response asking that the Court go forward with the status conference as scheduled so that the parties could determine how much more time Ms. Galles needed to find other counsel. (SER 00342-00345). Judge Damrell issued an order requiring Ms. Galles to submit either a substitution or a motion to withdraw by August 18, 2006. (SER 00341). Plaintiffs' current counsel filed a notice of appearance on August 18th. (SER 00337-00339).

Several months after Plaintiffs' new counsel appeared in the case they filed a motion to amend the complaint to add current students as plaintiffs and to expand the scope of the litigation to include claims regarding field hockey and rugby. The Court denied the motion, finding that Plaintiffs had not been diligent in seeking leave to file an amendment and that the proposed amendment would be prejudicial to Defendants because it changed the scope of the litigation. (ER 73-84). After the motion was denied Plaintiffs took the motion for class certification off calendar and asked that the class claims be dismissed. (SER 00127-00129).

Defendants filed a motion for judgment on the pleadings on June 5, 2007 (SER 00130-334). After requesting and receiving supplemental briefing (SER 00017-00026; 00001-00016), the Court granted the motion on all claims for relief except the claim of ineffective accommodation under Title IX (ER 29-72). As a result, there were no claims remaining against the individual Defendants.

Defendant UCD filed a motion for summary judgment on the remaining claim. The motion addressed the merits of the claim (that UCD complied with Title IX under prong two of the three part test and thus was not required to add a women's intercollegiate wrestling team). It also raised the issue of Plaintiffs' failure to provide UCD with notice of their allegation of systemic noncompliance with Title IX in regard to the women's athletic program as a whole. (ER 6017-6061). The Court granted the motion on the notice issue only, finding it to be dispositive. (ER 7-28).

STATEMENT OF FACTS

A. Women and Intercollegiate Wrestling at UCD

UCD is a member of the National Collegiate Athletic Association (NCAA). Its intercollegiate wrestling team competes at the NCAA Division I level. (ER 4659-4660:9; 5984:7-9; 6024:21-24). The team competes with other schools in the Pac-10 Conference, using collegiate wrestling rules. The competition consists of dual meets[2] against other Pac-10 schools, invitational tournaments and post-season championship contests. UCD has not declared wrestling to be a contact sport. Thus, pursuant to 34 C.F.R. § 106.41 students of both genders may try out for the team. The head coach of the wrestling team has

the sole discretion to select team members. (ER 6025:2-14; 5984:10-5985:19; 4659-4661:2; 4670-4674).

Although Plaintiffs' claims have been largely based on the myth that UCD eliminated a women's wrestling team, in fact there was never a separate women's wrestling team at UCD. (ER 6025:16-6026:16; 5985:20-21; 5986:3-5987:7; 4661:3-8; 4667:23-27; 4683:24-28; 4693:23-4694:2; 4694:27-4695:2). Over the years a few female students were permitted to practice with the wrestling team in furtherance of their goal of competing in open tournaments[3] or on the USA national women's team, rather than against other schools in the Pac-10. (ER 6026:17-6027:9; 5987:14-5988:12; 4928; 4929:21-23; 4930:10-24; 4931:3-13; 4932:14-25; 4933:3-18; 4934:15-4936:6; 4938:9-21; 4938:25-4939:20; 4941:4-18).

Michael Burch was the coach of the UCD wrestling team between 1995 and 2001. His approach to the women wrestlers was consistent with his belief that they did not have the skills required for competition at the level engaged in by the intercollegiate team. Burch allowed the few women who were interested in wrestling the extraordinary opportunity of access to the team's facilities and to work out with the team without requiring them to compete for a spot on the team, roster as males had to do. There were no schools in the Pac-10 that had women's wrestling teams;[4] thus in order to participate in a dual meet the women would have had to wrestle against men in their weight class. By their own admission, they did not have the skill or strength necessary to do so. The women never wore a UCD uniform in the few open tournaments they participated in. Burch never attempted to offer athletic scholarships to the women until the spring of 2001, and did so only after he learned that his contract would not be renewed for the following year. The material he submitted for the team media guides referred only to goals and accomplishments of male wrestlers. Women's wrestling was described in the guides as having "unofficial status." (ER 6026:17-6028:25; 6029:27-6030:22; 5984:26-5985:17; 5988:13-19; 5988:23-5989:8; 5990:9-5992:19; 5993:5-8: 5994:2-8; 4661:16-4662:9; 4670-4671; 4672:16-26; 4673-4674; 4695:1-17; 4770:2-8; 4771:17-20; 4772:17-4774:16; 4775:4-7; 4793:24-4795:7; 4822:4823:8; 4824:17-20; 4825:22-4826:10; 4827:23-4828:11; 4891:23-4893:5; 4899:8-11; 4946:17-19; 4947:21-4948:10; 4949:9-4951:1; 4952:9-12; 4967:22-4968:5; 4968:13-4969:7; 4974:1.4-4975:4; 4976:5-4977:8; 5010; 5011:25-5012:1; 5023:9-5024:11; 4665:22-4666:2; 4667:21-4668:10; 5009; 5020:10-22; 5025-5026; 5027:10-13; 5028:7-5029:22; 5030:16-22; 4954:13-24; 5191-5193; 4900:8-16; 4982:19-4983:12; 4985:19-24; 4700; 4777:16-24; 4789:1-6; 4799:6-24; 4816:22-24; 5694-5734; 4953:11-25; 6547-6548).

B. Plaintiffs' Participation in Wrestling at UCD

Plaintiff Mansourian participated in wrestling in her freshman year. Her participation was limited to attending practices and the Aggie Open[5] tournament. In the fall of 2001 she notified the new coach (who had replaced Burch) that participating on the wrestling team was too exhausting for her because of other demands on her time and that she preferred to wrestle at the club sport[6] level. (ER 6030:23-6031:9; 5992:27-5993:8; 5993:12-20; 4899:22-24; 4890:6; 4891:23-4893:5; 4898:1-14; 4925:1-11; 5237-5238; 4673:9-13).

Plaintiff Ng participated in wrestling for three years at UCD. During that time she went to only one off-campus tournament. She did not compete on behalf of UCD at that event nor did Burch accompany her to the tournament. Although she professed to be a varsity wrestler, Ng confessed in her deposition that "...I have a fear of competing. And so I tend to avoid it when I can. So that's why I'm not exactly up for competing." (ER 6031:10-6032:2; 5993:23-5994:12; 4966:14-21; 4973:21-24; 4667:21-4668:2; 4697:22-4698:5; 4968:13-4969:7; 4974:14-4974:14-4976:8; 4977:21-4978:7; 4981:7-15).

During the time Plaintiffs Mansourian and Ng were enrolled as undergraduates a few other women occasionally participated in wrestling by coming to practice or competing in the Aggie Open tournament. Their limited participation ended due to failure to submit required paperwork, academic ineligibility, or because they voluntarily quit. (ER 6027:10-6028:14; 5988:13-5990:4; 4946:17-19; 4944:18-4945:20; 4947:21-4948:10; 4949:9-4951:1; 4952:9-12; 5009; 5013:22-25; 5014:13-5015:23; 5023:9-5024:11; 4667:21-4668:10; 5020:10-22; 5027:10-13).

C. Roster Management and Burch's Choices on Filling the 2000/2001 Team Roster

As part of its commitment to gender equity in athletics, *VCD* uses a roster management program for its men's teams. Although students of both sexes can try out for a place on the wrestling team, the campus considers it to be a men's team because the NCAA does not sponsor women's wrestling as an intercollegiate sport and because no women have ever qualified to regularly participate in intercollegiate wrestling against males. Thus, the wrestling team is subject to the roster management program. (ER 6033:14-20; 5996:24-5997:4; 4677:23-27; 4678:21-4679:21; 5173; 4700; 4798:12-23).

In the fall of 2000 Athletic Director Warzecka advised Burch that the roster for the wrestling team was limited to 30 spots. Burch negotiated an increase to 34 spots and then filled them all with males. He did not believe any of the women could actually compete on the team, and as a result, was of the opinion that they should not be counted towards the roster limit. Warzecka did not care whether roster spots were filled with males or females so long as Burch did not exceed the roster limit. He disagreed with Burch's position on the application of the roster limit to women. Allowing women who could not otherwise earn a spot on the intercollegiate team to be members would be unfair to males who were not selected for membership because they also lacked the necessary skill. (ER 6033:14-6034:5; 5997:5-5998:3; 4800:1-18; 4801:6-4802:7; 5175-5176; 4803:7-4804:9; 4805:11-21; 4807:8-25; 4679:22-4680:19).

Burch did not tell Ng and Mansourian[7] that he had not allotted any of the roster spots to them. Instead, in November, 2000 he told them the Athletic Department administration did not support women's wrestling and required him to remove women from the team. Even though they were not on the roster Burch allowed the women to continue to practice with the team for several more months. (ER 6034:6-19; 5998:4-13; 4806:3-19; 5178-5179; 4901:14-4904:1; 4907:3-10; 4923:5-10; 4986:8-24; 4901:14-4906:13; 4986:8-4990:22; 4994:7-16; 4998:18-4999:20; 4801:24-4802:7; 4804:10-4805:19; 4806:9-4810:13).

D. O.C.R. Complaints and Investigations

In April 2001 Ng and Mansourian filed a complaint with the Office for Civil Rights of the Department of Education (OCR) in which they alleged they had been subject to discrimination because they could no longer participate on the wrestling team. The complaint did not make reference to the overall women's athletic program at UCD; it was restricted to Plaintiffs' experience with the wrestling team. (ER 6034-6035; 5998:15-5999:3; 4991:19-4992:2; 5201-5208; 4910:12-16; 4911:1-19; 4912:5-8; 4724:22-4725:5; 4728:1-17; 4916:1-12; 4917:18-4919:1; 4995:20-4996:6; 4997:3-16; 5164; 4681:3-22; 4662:10-28; 4699:22-4700:7; 4702:24-4703:10; 4728:1-17; 4730:22-4731:7; 4731:12-4732:2). In May they filed a supplemental OCR complaint setting forth a list of allegations pertaining to the wrestling team. Again, there was no reference to the athletic program as a whole or to female student-athletes in general. In June and August Plaintiffs filed two more OCR complaints, each of which addressed a specific issue pertaining to their experience with the wrestling team (Burch's attempt to give them scholarships after he was told of his non-renewal and their claim that Burch's non-renewal was an act of retaliation against them). (ER 6035; 5999:3-14; 4920:21-4921:7; 4922:5-22; 4924:1-12; 5002:11-24; 5211-5212; 5228-5231; 5233-5234).

The Vice Chancellor for Student Affairs at UCD conducted an investigation shortly after he received the first OCR complaint. He concluded that Burch had (1) allotted the spots on the team roster to males because they were more qualified than the women; (2) failed to tell the women they weren't on the roster; and (3) allowed the women to continue to practice with the team notwithstanding the fact he had not allotted a roster spot to them. Burch denied removing the women from the team as did Warzecka, who noted that the coach is the person solely responsible for tilling the roster. The Vice Chancellor chose to resolve the issue by leaving the women on the team for the remainder of the 2000/2001 school year. If they were interested in participating on the team the following year, they could compete for a roster spots as males were required to do. (ER 6035-6036; 5999:15-6000:12; 4732:3-4733:9; 4681:23-4682:9; 5166; 4726:19-4727:2; 5199; 5214-5215; 5914-5915).

The campus worked with the OCR to resolve the complaints. It entered into a Voluntary Resolution Plan that confirmed UCD supported the development of wrestling as a club sport for those students (male and female) who did not have the skills necessary to compete at the intercollegiate level. It also supported the participation of any woman who, by reason of her eligibility and qualifications, was selected for inclusion on the intercollegiate team. The Plan set forth clear criteria for inclusion on the intercollegiate team. Both men and women were encouraged to try out. The coach of the team would select those athletes who demonstrate the highest skill and competitive ability in their weight class. OCR closed the case, finding that no violation of Title IX had occurred. (ER 6036:21-6037:5; 6001:19-6002:12; 4727:3-28; 5184-5185; 5156-5162).

Ng and Mansourian asked the Vice Chancellor whether UCD would consider having separate roster "caps" for males and females on the wrestling team. The campus considered the request and concluded it was not feasible, as there is an upper limit to the number of students who can be accommodated on every intercollegiate team. Plaintiffs then asked if UCD would waive the minimum number of students needed to form a club sport (ten) so that they could form a wrestling club sport team. UCD agreed to do so. (ER 6036:5-20; 6000:12-6001:7; 6001:14-19; 4733:10-20; 4703:11-21; 5171; 4735:22-28; 4736:25-4737:9; 4831; 4840:18-4841:19; 4892:20-4893:5).

E. Try-Outs in the Fall of 2001

Lennie Zalesky replaced Burch as the head wrestling coach. Consistent with the practice he had followed during his many years of intercollegiate-level coaching and with the terms of the Voluntary Resolution Plan, Zalesky held try-outs for the team in the fall of 2001 by having students in the same weight class "wrestle-off against each other. Ng and Mancuso wrestled off against each other, with Mancuso prevailing. Mancuso then wrestled off against a male in her weight class. She was pinned. As the result of the wrestle-offs Zalesky cut a number of students including Ng, Mancuso and males who also did not have the necessary skills. Mansourian did not try out for the team. (ER 6028:27-6029:11; 6031:3-9; 6032:3-11; 6032:25-6033:10; 5990:13-5991:4; 5993:12-20; 5994:20-27; 5996:6-21; 6002:9-12; 4671:10-27; 4672:16-4673:8; 5095; 5097:15-22; 5098:2-12; 5099:25-6000:25; 5104:21-5105:9; 4707:22-4710:5; 4718:14-23; 4777:16-24; 4789:1-15; 4816:22-24; 4670:23-4671:27; 5238; 4673:9-13; 5000:23-5001:24; 5003:14-20; 5004:22-5005:20; 4672:16-4673:8; 5038; 5061:21-5062:4; 5063:4-8; 5063:24-5064:20; 5065:1-5066:7; 4672:16-4673:8; 4838:25-4839:20; 4675:6-14).

F. UCD Complied With Title IX Under Prong Two

UCD agrees that it receives federal funding and thus is required to comply with Title IX regarding athletic opportunities. It also agrees that OCR uses the three-prong test set forth on pages 6-7 of Appellants' brief to assess whether an institution is in compliance with Title IX regulations. Throughout the time period in issue UCD was in compliance under prong two of the test.[8] Prong two is satisfied when an institution can demonstrate a history and practice of athletic program expansion that is demonstrably responsive to the developing interest and abilities of the underrepresented sex (usually females). If an institution is in compliance under any one of the three prongs, a Title IX ineffective accommodation claim against it will fail.

As of the time Title IX was enacted UCD had intercollegiate teams for women in seven sports. Later in that decade it added women's teams in gymnastics and cross-country. In 1983 UCD replaced women's field hockey with women's soccer, due to a decrease in available competition in field hockey. (ER 6041:14-6042:2; 6003:23-6004:23; 4739:22-4740: 23; 4700:17-4701:10; 5075: 5077:13-5079:7; 5082; 5084:15-18; 5085:12-17; 5086:7-5089:8; 5090:18-5092:4).

The budget situation at UCD in the early 1990's was grim. After passage of a student referendum that resulted in more funding for intercollegiate sports, consideration was given to adding new women's teams. UCD used a formalized process to select the new sports consisting of solicitation of proposals, review of the proposals by various committees, and a recommendation by the Athletic Director. Proposals were submitted on behalf of water polo, badminton, field hockey, lacrosse and crew. Women's intercollegiate water polo, lacrosse and crew were added in 1996 as the result of this process. (ER 6042:3-19; 6004:24-6005:19; 4725:16-4726:7; 4701:11-23; 4731:8-11; 5240-5253).

Indoor and outdoor track are different sports. Women started competing in indoor track events in 1993, but the sport was not officially established at UCD until 1999. (ER 6042:20-6043:3; 6005:19-6006:6; 4743:22-4745:7; 4682:27-4683:20).

In 2003 another call for proposals was made. Proposals were submitted on behalf of bowling, field hockey, rugby, horse polo, and golf.[9] Golf was selected as the new women's intercollegiate sport in 2004, with competition starting in 2005. (ER 6043:4-6044:4; 6006:7-6007:23; 4684:1-4686:9; 4703:22-4704:3; 4689:22-4690:25; 5255-5260; 5262-5263; 5763-5893; 5896-5903). The growth of UCD's women's intercollegiate program demonstrates the requisite history of program expansion under prong two.[10]

There have been fluctuations in the number of women participating in intercollegiate sports over the years. The changes were due to external factors such as a decrease in local competition or natural attrition. As an example, there are often fluctuations in the sport of rowing because it relies primarily on non-recruited athletes. (ER 6046-6047; 6007:24-6009:6; 4747:23-4748:18; 4750:22-475126).

UCD has also demonstrated a practice of program expansion, as required under prong two. This is established by the fact it created a Title IX Officer position on campus many years ago; it has a Title IX grievance process available to students; it regularly conducts self-assessments on compliance; and it has established various committees showing a commitment to broad-based input on athletic issues. (ER 6046:16-27; 6012:4-18; 4714:8-4715:9; 5240-5253; 5255-5260; 5919-5929; 5939-5959).

SUMMARY OF ARGUMENT

Plaintiffs Ng and Mansourian participated on the intercollegiate wrestling team to a limited extent prior to the imposition of roster management. By their own admission, they did not have the skills necessary to compete against the team's Pac-10 opponents. The women came to practices and wrestled against other women in an occasional open tournament but did not compete in matches between UCD and other Division I teams. The roster management program was implemented in the fall of 2000. It imposed an upper limit or cap on the number of members on each men's intercollegiate team. While Burch was willing to allow the women to attend practice and be part of the team when there was no limit on the number of student-athletes who could be on the team, once he was restricted to 34 wrestlers he did not want to allot any roster spots to the women because, in his opinion, they were not competitive at the intercollegiate level. Unfortunately, rather than notifying the women of the reason he did not want to give any of his limited roster spots to them, Burch falsely told them the Athletic Department administrators wanted them removed from the team.

Ng and Mansourian were knowledgeable about Title IX and the OCR complaint process. Based on their erroneous belief that UCD administrators were responsible for their exclusion from the team, they filed complaints with the OCR demanding that they be given "the same opportunity to wrestle as a male." The complaints triggered an investigation, which in turn led to a written clarification that male and female students would be judged by the coach under the same criteria for the purpose of determining which students would be selected for the intercollegiate wrestling team. The complaint process worked in the manner envisioned by the drafters of the Title IX regulations as the issue was resolved at the lowest possible level.

Plaintiffs were told in the spring of 2001 that UCD would not establish a separate roster cap for women on the wrestling team. They were also told of the criteria that would be used to determine which students would be given a spot on the team roster. In the fall of 2001, those criteria were used by Coach Zalesky to select members of the wrestling team. Ng and Mancuso competed for a spot on the team but were not selected because, in the opinion of the coach, they did not have the necessary skills to wrestle against the team's opponents. Mansourian chose not to try out for the team.

The lawsuit filed by Plaintiffs more than two years after Ng and Mancuso were not selected for the team focused almost exclusively on events pertaining to their experience with wrestling at UCD and their contention that the campus had an obligation to either establish a separate wrestling team for women or to use different criteria for selection of women for the team. Three years into the case and well after the scheduling order had been issued, Plaintiffs attempted to amend the complaint to widely expand its scope and to bring in current students as new plaintiffs. By that point the parties had engaged in extensive discovery based on the allegations in the original complaint; Plaintiffs had filed a motion for class certification and Defendants had filed an opposition to it; and Defendants had done significant preparation work on a motion for summary judgment. The District Court properly exercised its discretion and denied the motion to amend as untimely.

By way of Defendants' motion to dismiss, the District Court correctly found that the equal protection claim asserted in the complaint was time-barred. After that ruling the sole issue remaining was a Title IX ineffective accommodation claim based on Plaintiffs' contention that they were ready and able to wrestle at the intercollegiate level, and that sufficient interest in intercollegiate wrestling existed among UCD's female students to field a women's intercollegiate team. The United States Supreme Court has held that prior notice and a concomitant opportunity to cure is an essential prerequisite before a school can be held liable for damages under Title IX. The District Court properly granted summary judgment on this one remaining claim, finding that Plaintiffs had failed to comply with the notice requirement established by *Gebser v. Lago Vista Independent School District* because the complaints they filed with OCR related solely to their allegation that they were treated unequally in regard to the manner in which members of the wrestling team were selected. The complaints did not

include allegations that UCD was not in compliance with Title IX in regard to athletic opportunities provided to its female students, that the interests and abilities of the female students were not being met, or that UCD had to add a women's wrestling team in order to increase the number of female participants in intercollegiate athletics. Thus, the *Gebser* notice requirement was not met.

In 2007 the District Court dismissed the section 1983 claim asserted against UCD and the individual Defendants based on the holding in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.,* 453 U.S. 1 (1981). This year the Supreme Court confirmed that a claim under 42 U.S.C. § 1983 can be asserted concurrently with a claim under Title IX. *Fitzgerald v. Barnstable,* 129 S. Ct, 788 (2009). The ruling in *Fitzgerald* does not require that the section 1983 claims be reinstated. The individual Defendants are entitled to a finding of qualified immunity, and the claim for injunctive relief against UCD is time-barred.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY DENIED THE MOTION TO AMEND THE COMPLAINT

More than three years after the suit was filed Plaintiffs made a motion to amend the complaint to add current students as plaintiffs. Plaintiffs also sought to greatly expand the scope of the suit by adding allegations pertaining to the sports of field hockey and rugby. The District Court properly denied the motion, finding that Plaintiffs failed to demonstrate the good cause required by F.R.C.P. 16 and that Defendants would be prejudiced by the late amendment. (ER 73-84).

A. Applicable Standard of Review

In their motion to amend Plaintiffs erroneously applied the standard relating to relief under F.R.C.P. 15. The law is clear that once a scheduling order has been entered, F.R.C.P. 16 governs a proposed amendment of the pleadings. *Johnson v. Mammoth Recreations,* 975 F.2d 604, 608 (9th Cir. 1992). Parties seeking relief under Rule 16 must demonstrate good cause for the amendment, including diligence. A District Court's ruling on a motion to amend will not be disturbed absent a clear abuse of discretion. The reviewing Court must be firmly convinced the decision lies beyond the pale of reasonable justification under the circumstances. *Id*. at pp. 607, 609; *Harman v. Apfel,* 211 F.3d 1172, 1175 (9th Cir. 2000).

B. Plaintiffs Were Not Diligent In Moving To Amend

Plaintiffs rely heavily on the fact that the case was stayed from April 2006 to late January 2007. They argue that but for this "unforeseen delay" at least one of the Plaintiffs (Mancuso) would still have been a current student as of the time the motion for class certification was set to be heard. While it is true the nine month stay was triggered by a request from Plaintiffs' counsel because of medical issues, the lack of diligence on which the District Court made its ruling preceded the request for the stay.

Well before they filed the motion for class certification (in December 2005) or the motion to amend (in January 2006) Plaintiffs were aware they were in danger of not having current student status at the time the motions were heard by the District Court. Mansourian had graduated in June 2004. Ng had graduated in 2002. Plaintiff Nancy Chiang, who was still a party at the time,[11] left UCD in the fall of 2000. Mancuso had filed a notice of intent to graduate in the fall of 2005, and actually did graduate in June 2006. (ER 6160:10-25; 6253-6254; 6258; 6250; 6265; 6275-6276; 6282). The District Court relied on Plaintiffs' awareness of these dates in reaching the conclusion they had not acted diligently in seeking to amend their complaint. (ER 79:13-80:16).

Plaintiffs offered no justification as to why they had not moved to add new students as parties prior to the imposition of the stay in April 2006. The District Court concluded the motion to amend was triggered by recognition on the part of Plaintiffs' new counsel that they would be facing an uphill battle in regard to class certification. (ER 80:17-81:8; 84:4-11). Defendants had argued that the existing Plaintiffs lacked standing to serve as class representatives because they had graduated or would graduate shortly, and because their athletic eligibility had expired. Defendants also argued their claims were barred by the statute of limitations. (SER 00395; 00400-00404). The District Court described the motion for leave to amend as an attempt to take a "second bite at the apple" as the proposed amendment specifically addressed deficiencies raised in Defendants' opposition to the motion for class certification. (ER 80:17-81:8; 84:4-11).

The primary reason for seeking leave to amend was not to "protect the class" as Plaintiffs argue on page 30 of their appellate brief, but rather to attempt to save what likely would be a losing motion for class certification. This does not qualify as "good cause" under Rule 16. *Bromley v. Mich. Educ. Ass'n* and *In re Cat. Micro Devices Securities. Litigation,* cited by Plaintiffs on page 30 of their brief, are inapposite at neither case addresses the diligence standard of Rule 16.

C. The Proposed Amended Complaint Would Have Significantly Expanded the Scope Of The Litigation

The proposed amended complaint would have greatly expanded the scope of the three-year old litigation because it added allegations pertaining to sports other than wrestling. Plaintiffs had been aware of the information on which they based the proposed amendment for years, as the result of discovery. (ER 81:9-82:5). Under such circumstances, the District Court properly denied the motion. *AmerisourceBergen Corp. v. Dialysis West, Inc.,* 465 F.3d 946, 953 (9 Cir. 2006) (delay of fifteen months between discovery of information used for amended pleading and motion justified denial, since opposing party would have to "scramble" to deal with new facts in the eight months that discovery would remain open).

Plaintiffs' contention that the "proposed amendment did not allege any new theories of liability or change the scope of the action" is belied by a comparison of the allegations in the original complaint and those in the proposed amended complaint. The four original Plaintiffs did not allege they participated in, or wanted to participate in, any sport but wrestling. (ER 6411: ¶ 9-6413: ¶ 12). The factual allegations in the original complaint focused exclusively on events pertaining to women wrestlers during the 2000/2001 school year. (ER 6416: ¶ 24-6430: ¶ 89). There is no reference to field hockey, rugby, or events involving those sports. Plaintiffs did not disclose any field hockey or rugby players on their Rule 26 witness list. (ER 6164:5-7). All of the expert witnesses disclosed by Plaintiffs in June 2005 related to wrestling. (ER 6164:24-6165:2). Class Plaintiffs sought to represent "the class of all present and future female students at UC-Davis **who are denied equal participation opportunities and scholarships in women's wrestling** by Defendants' discriminatory actions." (ER 6435: ¶ 108, emphasis added). The injunctive relief sought was reinstatement of athletic participation opportunities for women **in the sport of wrestling.** (ER 6460, emphasis added).

The proposed amended complaint sought to add Kelsey Brust, Jessica Bulala and Laura Ludwig as plaintiffs.[12] They were not UCD students in 2000/2001. Ludwig entered UCD in 2004, Bulala in 2005 and Brust in 2006. Ludwig wanted to compete in intercollegiate rugby or wrestling. Bulala and Brust wanted to compete in intercollegiate field hockey. (ER 6324-6359). The class included in the proposed amended complaint was not limited to women who wanted to participate in intercollegiate wrestling but rather encompassed "the class of all present and future female students at UC Davis **who are denied an equal opportunity to participate in varsity intercollegiate athletics** and/or to receive financial assistance because of their sex." (ER 6324, 6343, emphasis added). The proposed amended complaint alleged that UCD had violated Title IX by failing to establish intercollegiate teams in field hockey and rugby, an allegation that was not raised in the original complaint. (ER 6343-6345, 6346-6357). The relief sought by the proposed amended complaint included "reinstating women's varsity wrestling **and establishing other varsity athletic opportunities for women at UC** Davis...." (ER 6358, emphasis added).

A defendant is justified in relying on the allegations stated in a complaint to determine the claims being made against it. *Pickern v. Pier 1 Imports (U.S.) Inc.*, 457 F.3d 963, 968 (9th Cir. 2006). The District Court properly found that the scope of the proposed amended complaint changed the face of the *Mansourian* litigation, and that UCD would be prejudiced by an amendment at that late date. (ER 82:6-84:3). Its decision was well-reasoned, and does not constitute an abuse of its discretion. Accordingly, it should be upheld by this Court.

II.

THE CLAIMS UNDER 42 U.S.C. § 1983 WERE PROPERLY DISMISSED, NOTWITHSTANDING THE HOLDING IN *BARNSTABLE V. FITZGERALD*

Defendants agree the Supreme Court recently resolved a split among the Circuits and held that Title IX does not preclude a concurrent claim under 42 U.S.C.§ 1983. *Fitzgerald v. Barnstable,* 129 S. Ct. 788 (2009). Although the District Court came to a different conclusion in ruling on Defendants' motion to dismiss, the *Fitzgerald* opinion is not the end of the analysis. This Court may uphold the dismissal on any basis fairly supported by the record. *Romano v. Bible,* 169 F.3d 1182, 1185 (9th Cir. 1999).

Defendants also agree with Plaintiffs' statement of the standard for review of this claim.

A. The Section 1983 Claim Is Barred By The Statute of Limitations

In ruling on the motion to dismiss filed by all Defendants, the District Court concluded Plaintiffs were asserting both unequal treatment and ineffective accommodation claims. (ER 37:20-24). Although Plaintiffs now deny making an unequal treatment claim,[13] a review of the factual allegations in the complaint leads to the inescapable conclusion that the "heart" of their claim was that they were treated in an unfair manner on the basis of their gender in regard to their experience with the intercollegiate wrestling team. This claim is based on a number of discrete events, most of which occurred during the 2000/2001 school year. (ER 6416: ¶ 24-6430: ¶ 89). In *Cherosky v. Henderson*, 330 F.3d 1243 (9th Cir. 2003), this Court held that a plaintiff cannot circumvent the bar of the statute of limitations by arguing that discrete acts were part of an alleged policy or practice of discrimination which continued throughout the period in issue. *Cherosky* noted that the limitations on the continuing violation doctrine set forth in *Nat'l Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 110 (2002) apply with equal force to civil rights laws other than Title VII, the statute in issue in that case. *Cherosky, supra,* at 1246 n.3.

Since the District Court held that the section 1983 claim was preempted by the Title IX claim it did not rule on whether the section 1983 claim was time-barred. (ER 61-66). However, its ruling that the Title IX unequal treatment claim was barred by the statute of limitations applies with equal force to the section 1983 claim made against UCD and the individual Defendants.

The fourth claim for relief alleges that Defendants violated the Equal Protection Clause of the Fourteenth Amendment. In order to assert a section 1983 claim Plaintiffs must plead and prove that Defendants intentionally discriminated against them on the basis of their gender. *Sischo-Nownejad v. Merced Cmty College Dist*. 934 F.2d 1104, 1111 (9th Cir. 1991). Plaintiffs contend that "each of the individual defendants participated in or otherwise had authority over and approved the discriminatory decisions made and actions taken that deny Plaintiffs of their right to equal protection." The claim incorporates by reference the preceding paragraphs in the complaint, all of which pertain to specific incidents involving women wrestlers. (ER 6411-6430; 6449-6451).

The statute of limitations for a section 1983 claim is controlled by the forum state's limitation for a personal injury claim. Prior to January 1, 2003, the California statute of limitations for personal injury claims was one year. After that date the statute was lengthened to two years. *Jones v. Blanas,* 393 F.3d 918, 927 (9 Cir. 2004). The proper analysis is whether the suit was timely filed based on the limitation in effect at the time the claim ripened. *Maldonado v. Harris,* 370 F.3d 945, 954 (9th Cir. 2004); *Stanley v. Board of Trustees of the California State University,* 433 F.3d 1129, 1134-35 (9th Cir. 2006).

Based on the allegations in the complaint and the OCR complaints, the District Court held that the last alleged discrete discriminatory act took place in October 2001 when Plaintiffs' OCR complaints were resolved. The one year statute of limitations started running at that time. It expired in October 2002. (ER 48:25-49:6). Plaintiffs did not file their suit until December 18, 2003, more than a year after the statute expired. (ER 6407). The 2003 change in the statute of limitations does not save the claim as it was already time-barred by the effective date of the statutory amendment. *Maldonado, supra* at 955.

B. The Section 1983 Claim Against The Individual Defendants Is Barred By The Doctrine Of Qualified Immunity

Defendants raised the affirmative defense of qualified immunity in their answer to the complaint. (SER 00434). That issue was never briefed to the District Court because it disposed of the section 1983 claim via the doctrine of preemption. Reinstating the section 1983 claims against the individual Defendants because of the holding in *Fitzgerald* would be a waste of judicial resources, as the record provides more than sufficient grounds for a finding of qualified immunity.

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Where there is no dispute as to the discretionary nature of the act(s) in question, the analysis of a qualified immunity defense involves two steps: (1) a determination of whether the plaintiff has alleged a constitutional violation, and (2) a determination of whether the right in issue was clearly established as of the time of the alleged violation. *Saucier v. Katz,* 533 U.S. 194 (2001); *Crawford v. Carroll,* 529 F.3d 961, 977 (11th Cir. 2008). The Ninth Circuit has, at times, added a third step of inquiring whether the official's action was reasonable, or has merged that issue with the second step. *Inouye v. Kemna,* 504 F.3d 705, 712 n.6 (9 Cir. 2007). The Supreme Court recently clarified that analysis of the *Saucier* elements need not be done in a strict "step one, step two" order. *Pearson v. Callahan,* 129 S. Ct. 808, 818 (2009). The question of whether a defendant is entitled to qualified immunity is one of law for the court to decide. *Elder v. Holloway,* 510 U.S. 510, 516 (1994).

The Equal Protection Clause of the Fourteenth Amendment holds that no state actor may deny another person equal protection of the law. It prohibits governmental decision-makers from treating differently "persons who are in all relevant respects alike." *Nordlinger v. Hahn,* 505 U.S. 1, 10 (1992). Stated another way, the Equal Protection Clause requires that all persons similarly situated be treated alike. *Jackson Water Works v. Public Utilities Comm'n,* 793 F.2d 1090, 1092 (9th Cir. 1992). It is undisputed that women at UCD were given an equal opportunity to try out for a spot on the men's wrestling team. Those students (both male and female) who did not have the skill necessary to compete at the Division I level were not selected for the team. (ER 6036:21-6037:5; 6001:19-6002:12; 4727:3-28; 5184-5185; 5156-5162). There is no "clearly established law" holding that female students who want to be part of a men's team must compete only against other women, or that a school must provide any other type of preferential treatment to them in regard to earning a place on the roster.

Plaintiffs contend that they do not have an equal shot at making the team because of the difference in strength between men and women, and thus UCD should have either created a separate category for them on the men's team or started a separate women's intercollegiate team. Neither is required by the Equal Protection Clause or by Title IX. "Title IX does not establish a right to participate in any particular sport in one's college and there is no constitutional right to participate in intercollegiate or high school athletics." *Gonyo v. Drake University,* 837 F. Supp. 989, 994 (S.D. Iowa 1993); Miami *University Wrestling Club v. Miami University,* 302 F.3d 608, 615 (6th Cir. 2002). The law is clear that the school retains the sole discretion to determine which sports it will sponsor. *Cohen v. Brown University (Cohen III),* 879 F. Supp. 185, 208 (D. R.I. 1995). ["Of course, institutions do retain discretion when met with requests for the creation of a new team or the upgrading of an existing team. They need not upgrade or create a team where the interest and ability of the students are not sufficiently developed to field a varsity team."] The mere fact that a few female students are interested in a sport does not require the establishment of a team for them. *Cohen v. Brown University (Cohen II),* 991 F.2d 888, 898 (8th Cir. 1993); *Roberts v. Colorado State Board of Agriculture,* 998 F.2d 824, 830 n.10 (10th Cir. 1993). Further, there is no requirement that a school provide the same sports for women as it does for men or vice versa. *44 Fed. Reg. No. 71413, p. 71417-71418.*

The Title IX regulations state that if an institution sponsors a team for members of only one sex in a particular sport and previous athletics opportunities have been limited for the other sex, members of the other sex must be allowed to try out for the team unless the sport in question is a contact sport. 34 C.F.R. § 106.41(b). It is this opportunity to try out- not a guaranteed spot on the team- that the law protects. *Force v. Pierce City R-VI School Dist.,* 570 F.Supp. 1020, 1031 (W.D. Mo. 1983). In *Force,* a girl wanted to try out for the boys' football team. The school precluded her from doing so solely because of her gender. The Court held that she had the right to try out, but no constitutional entitlement to a place on the team if she didn't have the necessary skill. "Nicole Force obviously has no legal entitlement to a starting position on the Pierce City Junior High School football team, since the extent to which she plays must be governed solely by her abilities, by those who coach her. But she seeks no such entitlement here. Instead, she seeks simply a chance, like her male counterparts, to display those abilities. She asks, in short, only the right to try." *Ibid.* Defendants in this case provided Plaintiffs "with the right to try" by deeming wrestling at UCD to be a non-contact sport and by allowing both men and women to vie for the limited roster spots. There is no evidence UCD or any of the individual Defendants acted with the intent to treat women who yearned to be on the intercollegiate team any differently than men who had the same desire, and thus no basis for a finding of violation of the Equal Protection Clause. *Lee v. City of Los Angeles,* 250 F.3d 668, 687 (9th Cir. 2001).

The record also does not support a finding that the individual Defendants acted unreasonably in regard to the events in issue. Mansourian and Ng's experiences with the wrestling team during Burch's tenure differed from those of intercollegiate athletes in general. They were not required to compete for a place on the team or with the team's opponents. Burch's willingness to carry them as part of the team waned when he was required to comply with roster management. His unwillingness to tell Plaintiffs that he did not want to use any of his limited roster spots for them created confusion and a belief on the part of Ng and Mansourian (and later Mancuso) that they were entitled to a place on the wrestling team year after year simply because they had practiced with the team previously. Defendants and the OCR cleared up any confusion caused by Burch's actions by entering into the Voluntary Resolution Plan which clarified the process used to determine membership on the intercollegiate wrestling team. The process treats all students who hope to obtain a place on the team equally. Those who do not make the team have the opportunity to participate in wrestling by joining the club sport team. OCR issued a letter to UCD stating it considered the matter closed because of the implementation of the Plan. There was no finding that UCD violated Title IX.[14] (See p. 12-14, above). The OCR is charged with investigating Title IX violation claims. (See *McCormick v. Sch. Dist Of Mamaroneck*, 370 F.3d 275, 285-291 (2nd Cir. 2004) for discussion of history of Title IX statute and regulations and *Neal v. Board of Trustees*, 198 F.3d 763, 770 (9th Cir. 1999) regarding deference given to administrative agency charged with enforcing Title IX.) Defendants were justified in complying with a Plan that OCR had approved and in relying on the Title IX regulation pertaining to non-contact sport teams when it held try-outs for the wrestling team in the fall of 2001. *Vasquez v. De La Rosa*, 414 F. Supp.2d 124, 133 (D.P.R. 2006) This reliance cannot form the basis for a claim that they knowingly violated an established right.

Even if this Court should determine that OCR and/or the regulations do not comply with constitutional requirements, Defendants are entitled to qualified immunity because there was no clearly established law on how a school should handle competition among men and women for spots on an intercollegiate wrestling team. Most of the jurisprudence addressing the issue of intercollegiate wrestling has revolved around the question of whether a men's wrestling team may be eliminated for purposes of Title IX compliance. (See *Neal v. Trustees* and *Miami University Wrestling Club v. Miami University, supra)*. Defendants are not aware of any case that requires the coach of an intercollegiate wrestling team to hold sex segregated try-outs using different wrestling rules. A government official is "not expected to anticipate the law's development or its possible application to a unique situation." *Warner v. Graham*, 845 F.2d 179, 182 (8th Cir. 1988). Coach Zalesky's approach of selecting members of the team based on their demonstrated skills and competitive ability is one used almost universally by coaches of all teams at the intercollegiate level. If the Equal Protection Clause requires something else, that was certainly not evident based on existing case law. "For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such concrete and factually defined context to make it obvious to all reasonable government actors, in defendant's place, that what he is doing violates federal law." *Crawford, supra* at 978.

To the extent this Court views the equal protection claim more broadly (e.g. whether the campus complied with Title IX in regard to opportunities for women in athletics under prong two of the three-part test), the fact that two of the nation's leading experts on Title IX (Plaintiffs' expert Dr. Lopiano and Defendants' expert Dr. Grant) have conflicting opinions on that point is evidence that the law is far from clear or settled. (ER 6044:5-6046:15; 6009:17-6012:3; 4707-4719; 5939-5959; 5095; 5103:19-5104:14; 5102:8-13; 5108:14-20; 5109:15-5110:9; 5111:14-5112:17; 5121:11-23; 5122:23-5123:13; 5124:4-15; 5127:13-5128:4; 5131; 5132:10-22).

In sum, Defendants Larry Vanderhoef, Robert Franks, Greg Warzecka, Pam Gill-Fisher and Larry Swanson are entitled to qualified immunity on the section 1983 claim that was asserted against them.

C. Reinstatement of The Section 1983 Claim For Injunctive Relief Against UCD Is Not Justified Because That Claim Is Moot

Plaintiffs argue the District Court erred in dismissing the section 1983 claim against UCD on the basis of lack of standing. They contend the District Court should have granted their motion to amend the complaint to add current students who would have had standing to assert an injunctive relief claim. As set forth in section I, *supra,* the Court did not abuse its discretion in denying the motion to amend. Thus, there is no reason to allow Plaintiffs to re-assert the section 1983 claim for injunctive relief against UCD because none of them have standing to assert the claim for injunctive relief. They have all graduated from UC Davis and thus could not benefit from "reinstatement of athletic participation opportunities for women [at UC Davis] in

the sport of wrestling."

In conclusion, while the Supreme Court came to a different conclusion than the District Court on the issue of preemption, the holding in the *Fitzgerald* case does not warrant reversal of the lower Court's rulings.

III.

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF UCD.

The only claim that survived UCD's motion to dismiss was the allegation of violation of Title IX under an ineffective accommodation theory. Specifically, the District Court found that Plaintiffs had sufficiently alleged that "they were able and ready to wrestle at UCD and that sufficient interest existed in the female student population at UCD to field a women's wrestling team." (ER 51:1-52:25). When the case reached the summary judgment stage the question before the Court was whether a triable issue of material fact existed on that claim. UCD argued in its motion for summary judgment that Plaintiffs' failure to notify the campus they were attacking the women's athletic program as a whole barred their ineffective accommodation claim for damages. The notice that had been given via the OCR complaints related only to their unique experiences with the wrestling team, which was couched in terms of an unequal treatment claim. (ER 6053:1-6060:13).

The notice issue had been previously raised in the motion for judgment on the pleadings. (ER 54-55; SER 00010). Since there was no way for Defendant to know in advance of the ruling on the motion for summary judgment whether the District Court would agree with its position, UCD also argued the merits of the ineffective accommodation claim. (ER 6022:19-6023:11; 6024:5-17; 6037:7-6052:28). The District Court granted the motion, finding that Plaintiffs failed to give UCD notice and an opportunity to cure the alleged ineffective accommodation claim. (ER 7-28). In so holding, Judge Damrell noted that this was an issue of first impression in this Circuit. The lower court's ruling is consistent with the remedial nature of Title IX and a well-established body of jurisprudence, and should be upheld by this Court.

Defendants agree that the standard of review for this claim is *de novo* review by this Court.

A. The Remedial Nature of Title IX

Recipients of federal funding may not deny anyone the benefit of or the right to participate in educational programs or activities on the basis of sex, nor may a recipient discriminate on the basis of sex in regard to such programs or activities. 20 U.S.C. § 1681. "Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies with the authority to provide financial assistance are entrusted to promulgate rules, regulations and orders to enforce the objectives of [20 U.S.C.] § 1681. see 8 1682, and these departments or agencies may rely on 'any...means authorized by law' including the termination of funding, to give effect to the statute's restrictions." *Davis v. Monroe County Bd. Of Education,* 526 U.S. 629, 639 (1999).

Consistent with the mandate of section 1682, the Secretary of Health, Education and Welfare[15] promulgated regulations implementing Title IX in regard to intercollegiate athletics. *National Wrestling Coaches Ass'n v. Department of Education,* 366 F.3d 930, 933 (D.C. Cir. 2004). The regulations include 34 C.F.R. §106.71, which states that the procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are adopted and incorporated by reference into the Title IX regulations. This comes as no surprise, as courts have found that Title VI and Title IX are very close in nature. *Cannon v. University of Chicago,* 441 U.S. 677, 694 (1979). During a Congressional discussion about Title IX prior to its passage Senator Bayh "lauded the enforcement procedures available under the former [Title VI] and 'their great effectiveness and flexibility.' " *Id.* at 704 n. 40 (1979).

The procedural provisions that apply to Title IX enforcement start at 34 C.F.R. §100.6. They emphasize Congress' intent to have complaints of alleged non-compliance investigated and remediated at the lowest possible level. Section 100.6 (a) requires the federal agency charged with enforcement of Title IX to work with the recipients of federal funds to seek their compliance with the statute. It also requires the agency to provide assistance and guidance to recipients to help them comply

voluntarily with the regulation. Any person who believes Title IX has been violated may file a complaint with the Department of Education (D.O.E.). The D.O.E. investigates such complaints via its Office for Civil Rights. If the investigation confirms a violation, the D.O.E. must advise the recipient of this fact "and the matter will be resolved by informal means whenever possible." 34 C.F.R. § 100.7(b), (c). Section 100.8, which addresses the procedure to be used in order to effectuate compliance, again emphasizes that a failure or threatened failure to comply with Title IX should be corrected by informal means whenever possible. In the event the drastic measure of termination of federal funding is justified, the regulation states that there must be a determination that voluntary compliance cannot be secured.

B. The District Court Properly Followed The Holding In *Grandson v. University of Minnesota*

The District Court relied on the holding in *Grandson v. Univ. of Minn.*, 272 F.3d 568, 575 (8 Cir. 2001) in reaching its decision on the motion for summary judgment. *Grandson* is well-reasoned and consistent with the goals of Title IX and the established body of case law holding that a recipient of federal funding cannot be held liable for claims of which it has no notice. A complaint against the University of Minnesota was submitted to the OCR in 1996, prior to the filing of the *Grandson* suit. The complaint alleged that the University did not effectively accommodate the athletic interests and abilities of its female students; that it failed to provide females with proportional financial aid; and that it failed to provide female athletes with other benefits attendant to intercollegiate athletics. *Id*. at 572. The University and the OCR entered into an agreement to resolve the claims. As a result of compliance with the agreed-upon terms, OCR ceased its monitoring of the University three years later.

Grandson filed suit in 1997 seeking injunctive relief and compensatory damages for the financial support she would have received as a member of the intercollegiate soccer team had the University not allegedly discriminated on the basis of sex. Three months later, a group of female students ("the Thompson plaintiffs") filed a second action on behalf of themselves and a purported class, seeking injunctive relief in the form of an order requiring the University to increase participation opportunities for women and add another NCAA Division I team. *Ibid*. The District Court struck the class allegations as futile, and dismissed Grandson's claim because she had failed to comply with the notice requirements of *Gebser v. Lago Vista Indep. Sch. Dist*. 524 U.S. 274 (1998).

The Eighth Circuit upheld the dismissal. It noted that this was the first Title IX athletics case where a class action was brought after an OCR complaint was made against the athletic program as a whole; where the plaintiffs sought injunctive relief over and above that a compliance plan that OCR found to be fully adequate; and where plaintiffs sought damages for alleged programmatic deficiencies that had been voluntarily resolved by the University. *Id*. at 573. The Court stated "We read *Gebser* as requiring that an implied private action for systemic Title IX relief must likewise take a back seat to an agency proceeding that has led to satisfactory voluntary compliance." *Id*. at 574. In *Gebser*, the Supreme Court noted that the express remedy set forth in Title IX "operates on an assumption of prior notice of alleged discrimination to the funding recipient and an opportunity to rectify any violation voluntarily." *Grandson, supra* at 575 (citing *Gebser*, at 288). The *Grandson* court concluded that when a plaintiff seeks monetary damages for a specific alleged Title IX violation, "*Gebser* requires prior notice to a University official with authority to address the complaint and a response demonstrating deliberate indifference to the alleged violation." *Id*. at 576.

Plaintiffs argue that UCD's acceptance of federal funding is sufficient to constitute notice that it will be held liable for a claim of intentional discrimination on the basis of sex. They rely on the holding in *Pennhurst State School v. Halderman*, and a sentence in *Fitzgerald* which states "Title IX has no administrative exhaustion requirement and no notice provisions." While it is true the Supreme Court made that statement, it did so in the context of determining whether the preemption doctrine bars a section 1983 claim brought concurrently with a Title IX claim. The Supreme Court did not discuss 34 C.F.R. §100.6-100.10 or 34 C.F.R. § 106.71 in *Fitzgerald*, nor was the question of whether the plaintiff gave the school district sufficient notice before the Court. UCD does not dispute that in exchange for accepting federal funds it is obligated to comply with Title IX (see *Pennhurst, supra*, at 17). However, that "contractual" agreement alone is not sufficient to provide the notice required to be given before a recipient can be held liable for damages. To hold otherwise would render the Title IX regulations moot and encourage students and their attorneys to file costly and extended litigation with the hope of receiving monetary compensation and large attorney's fee awards, rather than work with the school to address the perceived issues.

Plaintiffs and their amici claim that if *Grandson* is followed enforcement of Title IX will rest "solely in the hands of students,

many of whom are only children" and that "violations will go largely ignored." They contend that students are generally ignorant of Title IX and its enforcement mechanisms. This argument is undermined by the fact that the Plaintiffs in this case filed not one, but four complaints with the OCR. In this case, the failure to give adequate notice of the ineffective accommodation claim was not the result of ignorance on the part of the Plaintiffs in regard to Title IX. Their OCR complaints focused solely on wrestling issues because that is all they were interested in at the time they filed the complaints. The issue of alleged ineffective accommodation of the interests of UCD women undergraduates as a whole came to the forefront in Plaintiff's case only after the District Court dismissed their unequal treatment claims as untimely and their state court claims on other grounds. Nor do Plaintiffs or amici explain why it is easier for "children" such as Plaintiffs to deploy the resources necessary to file a federal lawsuit than it is for them to initiate a complaint process.

Four years ago the Supreme Court emphasized the importance of notice in Title IX athletics cases in *Jackson v. Birmingham Board of Education,* 544 U.S. 167, 181 (2005). "Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient [of federal funds] has received 'actual notice' of the discrimination." (citing to *Gebser).* The notice requirement is not onerous, nor does it hold students or other complainants to an unreasonably high standard. It may be satisfied by a formal OCR complaint, or something as informal as a call to the Athletic Director. Either way, the student or other person complaining must let the institution know whether their complaint is a systemic one or limited to their specific situation. This notice gives the institution an opportunity to look into the issue and take remedial action if warranted. The outcome of the OCR complaints filed by Plaintiffs demonstrates the wisdom of the notice requirement. The Voluntary Resolution Plan put to rest any confusion that may have existed about how members of the UCD intercollegiate wrestling team are selected. As in the *Grandson* case, Plaintiffs' claim for damages should "take a back seat to an agency proceeding that has led to satisfactory voluntary compliance."

Plaintiffs describe *Grandson* as an outlier opinion[16] and instead urge this Court to follow the holding in *Pederson v. Louisiana State University,* 213 F.3d 858 (5th Cir. 2000). The *Pederson* case is distinguishable in many aspects. The attitude and actions of LSU's athletic administration towards women's athletics was chauvinistic and backwards. The disparity between male and female student population and athletic participation was very significant. Males comprised only 51% of the undergraduate population, but 71% of its intercollegiate athletes. In comparison, women comprised 49% of the undergraduates but only 29% of the intercollegiate athletes. *Id.* at 878. The District Court in *Pederson* found that the situation at LSU in regard to intercollegiate athletics was the result of "arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics which created the by-product of resistance to change." *Id.* at 880. The Court of Appeals agreed, and noted other evidence supporting a finding of intentional discrimination including the fact that the Athletic Director referred to women student-athletes as "honey," "sweetie" and "cutie" and said he would "love to help a cute girl like you" to one of the plaintiffs. The Athletic Director also stated that soccer was a "more feminine sport" that deserved consideration for intercollegiate status because female soccer players "would look cute running around in their soccer shorts." The Senior Woman's Athletic Administrator slot, a position defined by the NCAA as the most senior woman in an athletic department, was occupied by a low level male employee of LSU. *Id.* at 881. LSU did not even try to justify its actions; instead it argued that holding and following archaic values does not equate to intentional discrimination.

The issue in *Pederson* was not whether the notice given by the plaintiffs was adequate, but whether the evidence supported a finding that LSU intentionally discriminated against women. LSU relied on *Gebser* to support its argument that it was either ignorant of or confused by Title IX and thus could not be found to have intentionally discriminated. The Court of Appeals found that *Gebser* and the other cases requiring a showing of deliberate indifference actually supported the claim against LSU because it acted with deliberate indifference to the rights of female students. *Id.* at 882. "The proper test is not whether it knew of or is responsible for the actions of others, but is whether Appellees intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity, and, as we noted above, we are convinced that they did. Our review of the record convinces us that an intent to discriminate, albeit it one motivated by chauvinist notions as opposed to one fueled by enmity, drove LSU's decisions regarding athletic opportunities for its female students." *Id.* at 882.

In comparison, there is no evidence that UCD was either deliberately indifferent to the issues pertaining to the women wrestlers or that it intentionally discriminated against them on the basis of gender. The campus cooperated with the OCR, and worked out an agreement that clearly delineated the criteria for membership on the intercollegiate wrestling team. The denial of Plaintiffs' request that they be allowed to be part of the intercollegiate team over and above the roster maximum or that in the alternative, UCD establish a separate women's intercollegiate wrestling program for them, was neither unreasonable nor discriminatory. Allowing women who could not earn a roster berth via skill to be part of the intercollegiate team would result

in discrimination against males who also did not have the necessary skill. There was insufficient interest and local competition to justify the establishment of a separate women's wrestling team. The NCAA does not sponsor women's wrestling, nor is it on that agency's list of "emerging sports." Neither the NCAA nor the National Association of Intercollegiate Athletics offers a women's wrestling championship. During the time period in issue, the only local source of possible intercollegiate competition for women wrestlers was Menlo College in California and Pacific University in Oregon. Those schools are not members of the Pac-10 conference and UCD does not compete against them. During the years Burch was at UCD, there were never more than four women at any one time participating in wrestling on campus. Neither Plaintiffs nor any other person had ever submitted a proposal that women's wrestling be sponsored as an intercollegiate sport at UCD. (ER 5982:22-5983:21; 5990:3-4; 6006:12-14; 6014:10-22; 4651-4653; 4674:9-17; 4684:1-10; 4717:24-4718:4; 4776:12-16).

The fact that UCD made the decisions referenced above is not sufficient to establish intentional discrimination. As recognized in *Jackson* and by this Court in *Lovell v. Chandler*, 303 F.3d 1039, 1058 (9th Cir. 2002), there must either be facial discrimination or a deliberate act designed to violate the law, such as retaliatory conduct. Neither exists here.

C. The District Court Properly Concluded That Plaintiffs' OCR Complaints Did Not Place UCD on Notice Of Their Ineffective Accommodation Claim

This case is a mirror image of *Grandson*. Ms. Grandson attempted to sue for damages arising from her specific experience with the soccer team. She unsuccessfully attempted to use prior complaints relating to the women's athletic program as a whole for purposes of *Gebser* notice. Here, Plaintiffs unsuccessfully attempted to use their OCR complaints, which related solely to their claim they were treated differently than male wrestlers, to serve as notice that they were attacking the women's athletic program as a whole and seeking damages for alleged failure to adequately accommodate the interests of all women students. The April, 2001 OCR complaint filed by Ng stated "There has [sic] been females on the wrestling team for the past five years. This year, after the first month of practice, the Athletic Directors told us that we were no longer allowed to be on the team." The complaint went on to provide specifics of the alleged actions of the Athletic Department administrators. Ng concluded "I want and deserve the same opportunity to wrestle as a male does [sic]. The Athletic Administration will not allow me to wrestle, nor any other female, and I strongly believe it is due to my sex." The complaint is devoid of any reference to women's participation in other sports at UCD, or the women's OCR complaint. Again, the allegations related solely to the wrestling team and her perception that women were treated unequally. (ER 5211-5212). That complaint was followed by two others, each of which focused exclusively on Plaintiffs' complaints about the wrestling team. (ER 5224-5231; 5233-5234). None of the complaints referenced the overall athletic program. Campus administrators understood the complaints to relate solely to the wrestling team, not to the intercollegiate athletics program as a whole (ER 6059:16-20; 5988:23-5989:3; 4681:3-22; 4662:10-28; 4702:24-4703:10; 4728:1-17; 4731:12-4732:2).

There is no evidence that OCR's investigation of the complaints spanned beyond issues pertaining to wrestling. (ER 23:15-27:3). The campus worked with OCR to devise a resolution that would clarify the requirements for membership on the wrestling team. In closing its investigation, OCR stated "As indicated above, wrestling is a contact sport and thus is exempt from any requirement that an intercollegiate athletic team include both men and women. Inasmuch as the University has chosen to provide an intercollegiate athletic wrestling team that is open to both men and women, it has undertaken to provide equivalent benefits, services, and opportunities, as required. OCR has determined that, contingent on implementation of the VRP, the issues raised by this complaint are resolved." (ER 6001:19-6002:8; 5155-5162). The District Court properly found the OCR complaints did not put UCD on notice that Plaintiffs were raising a claim of ineffective accommodation. Rather, the clear message from the OCR complaints was that they were making a claim of alleged unequal treatment in regard to wrestling. (ER 20:10-22:3).

Plaintiffs' argument that publicity about the women wrestler's claims sufficed as notice of an ineffective accommodation claim is without merit. They point to evidence relating to newspaper coverage of protests relating to their allegation that Mr. Warzecka removed them from the wrestling team and to the involvement of a member of the State Assembly. The newspaper coverage did nothing more than notify the campus that Plaintiffs believed they were entitled to be part of the wrestling team over and above the roster limit. The involvement of the member of the State Assembly in the fray did not give the campus notice of anything other than the fact that she and her chief of staff accepted the Plaintiffs' claims at face value and chose to champion their cause for a short period of time. It is worth noting that less than a year later, that same Assembly member recognized Ms. Gill-Fisher as her Assembly District "Woman of the Year" because of Gill-Fisher's efforts and

accomplishments in women's collegiate athletics. (ER 6016:5-10; 6016:5-10; 5145; 5146:2-4; 5147:20-5148:16; 5149:7-10; 5150:7-5151:21; 5195-5197). Neither public debate nor politics qualify as sufficient notice. *Grandson, supra,* 576.

Similarly, internal campus documents pertaining to UCD's Title IX compliance efforts from as far back as 1976 do not constitute sufficient notice. The Title IX athletic regulation allows an institution to choose its method of compliance under the three-part test. These are flexible standards, not hard and fast requirements. The drafters purposely chose to use amorphous terms such as "substantially proportionate" in regard to prong one compliance, and "history and continuing practice of expansion" in regard to prong two compliance. Without a bright-line test to follow, it is not surprising administrators at schools that take Title IX seriously engage in internal discussions about whether the standards are being met and whether there is room for improvement. If courts allow documents reflecting such discussions to be used as de facto notice of an alleged violation even in the absence of a specific complaint by a student, it will have a chilling effect on a school's willingness to engage in open and robust discussion on the issues of compliance and continued improvement of its athletics program.

In conclusion, Defendants urge this Court to adopt the reasoning of the Eighth Circuit, follow the holding in *Grandson,* and affirm the ruling of the District Court in granting summary judgment.

D. In The Event This Court Disagrees With the District Court On The Issue Of Notice, the Case Should Be Remanded To The Lower Court For a Ruling On The Remaining Issues Raised In The Motion For Summary Judgment

Plaintiffs ask this Court to reverse the ruling on the motion for summary judgment and return the case to the District Court for trial. Defendants urge the Court to uphold the rulings made by the District Court, and to dismiss the section 1983 claim on the basis of qualified immunity and the bar of the statute of limitations.

The issue of notice was only one of four arguments raised in the motion for summary judgment. (ER 6017-6061). The remaining arguments were (1) UCD complied with Title IX under prong two of the three part test, based on its history and practice of program expansion; (2) UCD did not eliminate the opportunity for women to try out for the wrestling team, nor did it eliminate a "women's wrestling team"; and (3) there was no evidence of intentional discrimination on the basis of gender. (ER 6037-6058). The lower court did not rule on these arguments because it decided the case solely on the notice issue. (ER 7-28). While it is true this Court reviews a grant of summary judgment *de novo,* appellate courts routinely remand a case to the lower court for a decision on an issues it had an opportunity to address, but did not. *Fitzgerald v. Barnstable, supra,* 798 ("Ordinarily, 'we do not decide in the first instance issues not decided below.").

It is particularly appropriate for this Court to send the case back to the District Court if it reverses on the notice question, as the issue of whether a school complies with Title IX's three part test is a judgment call for the trial court that will not be disturbed on appeal absent a finding of unreasonableness. *Cohen v. Brown University (Cohen II), supra,* at 903. UCD contends it complied with the three part test under prong two. OCR's 1996 Clarification of the three part test does not provide strict numerical formulas or "cookie cutter" answers to questions that are inherently unique to each school in question. The 1996 Clarification states the following in regard to prong two compliance:
"There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to the developing interests and abilities of the underrepresented sex." (Addendum to Defendants' brief, p. 20).

Only a handful of courts have decided the issue of whether a college or university complies with Title IX under prong two. In each of those cases, the athletic program in issue bore no resemblance to the women's program at UCD. *See e.g. Cohen v. Brown (Cohen III), supra; Roberts v. Colorado State Bd. Of Agriculture, supra; Pederson v. LSU, supra*. UCD had an established women's intercollegiate sports program prior to the passage of Title IX. The campus was a founding member of the Association of Intercollegiate for Women, which was the governing body for women's intercollegiate athletics before the NCAA agreed to include women in 1981. (ER 6041; 6003:23-6004:3; 4700:17-4701:3; 4739:22-28; 4740:1-10). Over the years, UCD has consistently expanded its women's program by adding new sports in response to the developing interests and abilities of its female students. It discontinued field hockey as an intercollegiate sport in 1983 because of a lack of local competition and declining interest, but immediately replaced it with women's soccer, a much more popular sport. (ER

6041-6042; 6004:15-23; 4701:4-10; 4740:16-23). The elimination of a team does not per se negate compliance under prong two; the 1996 Clarification states that the circumstances surrounding the elimination must be taken into consideration. (Addendum to Defendants' brief, p. 21). In 1996 UCD added three new sports for women all at once. (ER 6042:3-19; 6004:24-6005:19; 4725:16-4726:7; 4701:11-23; 4731:8-11; 5240-5253). The campus contends that adding three sports at the same time demonstrates a continuing history of program expansion for women, and that the concurrent addition of three sports benefitted women more than stringing the expansion out over six to nine years by adding one new team at a time. Several years later UCD added women's indoor track as a separate sport. (ER 6042:20-6043:3; 6005:19-6006:6; 4743:22-4745:7; 4682:27-4683:20). In 2003 it started the process again for proposals for the addition of another women's sport. Golf was selected as the result of that process. (ER 6043:4-6044:4; 6006:7-6007:23; 4684:1-4686:9; 4703:22-4704:3; 4689:22-4690:25; 5255-5260; 5262-5263; 5763-5893; 5896-5903).

Plaintiffs contend the addition of three sports in 1996 is no different than the addition of one sport, and that the passage of time between the 1996 expansion and the addition of golf in 2003 disqualifies UCD from relying on prong two. Plaintiffs also contend that, contrary to the express language of the 1996 OCR clarification, a school may never rely on prong two if there are downward fluctuations in the participation numbers for women. Finally, in their quest to recover damages, Plaintiffs rely heavily on events that took place at UCD in the 1970's and 1980's, years before they attended the school. The District Court is better suited to rule in the first instance on the arguments made by each side and to rule on evidentiary issues, in the event this Court believes reversal is appropriate.

Should this Court choose to review the entire motion for summary judgment *de novo,* there is sufficient evidence in the record on which this Court may affirm the District Court's judgment in favor of Defendants other than on the notice issue. *Valdez v. Rosenbaum,* 302 F.3d 1039, 1043 (9th Cir. 2002); *see also Sicor Ltd. v. Cetus Corp.,* 51 F.3d 848, 860 n.17 (9th Cir. 1995). ("[W]e may affirm a summary judgment on any ground finding support in the record, whether or not relied upon by the trial court."). However, in the event the Court takes that approach Defendants request an opportunity for supplemental briefing in order to elucidate the points raised below but not considered by the District Court in its ruling.

V.

CONCLUSION

The District Court did not abuse its discretion in denying Plaintiff's motion to amend the complaint. The motion was filed well after the time for amending the pleadings had expired, and was little more than a futile attempt to overcome insurmountable problems that had been indentified in Defendants' opposition to their motion for class certification. The Supreme Court has ruled that a section 1983 claim may be concurrently maintained with a Title IX claim. That ruling does not affect the outcome of this case, as the individual Defendants are shielded from liability under the doctrine of qualified immunity, and the section 1983 claims against them and UCD are barred by the statute of limitations.

Finally, the District Court correctly applied the *Gebser* notice requirement to the Title IX claim and found that Plaintiffs' OCR complaints did not alert the campus to their claim that the women's athletic program as a whole failed to accommodate the interests and abilities of all female undergraduates. The notice requirement does not stifle compliance with Title IX. Rather, it provides an opportunity for students and their schools to engage in meaningful discussion about perceived or actual inequities and for the school to take remedial action if necessary. Plaintiffs did not receive the outcome they sought from the OCR process, which was a berth on the intercollegiate wrestling team notwithstanding their lack of ability to earn one based on skill. This does not amount to gender discrimination or form the basis of a lawsuit. Title IX does not require a school to give preferential treatment to women who want a place on a men's team or to provide separate teams for each gender in each sport sponsored. All that is required is an equal chance to try out for a team. Plaintiffs were given that opportunity.

Defendants ask that judgment in their favor be affirmed. In the event this Court disagrees with the District Court on the notice issue, Defendant Regents of the University of California requests remand so that the District Court may rule on the remaining issues raised in its motion for summary judgment.

Appendix not available.

Footnotes

1 ER refers to Appellants' Excerpts of the Record. SER refers to Appellees' Supplemental Excerpts of the Record

2 A dual meet is a contest between two teams.

3 This refers to a tournament that is open to anyone who signs up, whether or not they are a university student.

4 At one point in time there was one woman on the Stanford University wrestling team who wrestled against a male from anther school during one dual meet. She did not compete regularly against other Pac-10 schools.

5 The Aggie Open was an annual fundraising event. It was open to anyone, whether or not they were a student.

6 Club sport teams compete with club teams from other schools. The level of skill necessary to compete at the club level is usually less than that required for intercollegiate competition, and the demands on club sport athletes' time is less than the demand placed on intercollegiate athletes.

7 Plaintiff Mancuso did not enter UCD until the fall of 2001.

8 Although for a number of the years at issue UCD had more female than male intercollegiate athletes, it has not sought to claim compliance under the proportionality test of prong one because there has been a substantial predominance of women (approximately 56% during the time in issue) in the undergraduate population.

9 Notably, neither Plaintiffs nor any other person submitted a proposal on behalf of women's wrestling.

10 The 1996 Clarification issued by the OCR provides several hypotheticals designed to provide guidance to schools on compliance under prong two. One of the hypotheticals involves a school (Institution C) that had seven women's sports at the inception of its women's program in the mid-1970's. It added another team in 1984 and upgraded a club team to varsity status in 1990 in response to a request by the club and NCAA surveys showing a significant increase in participation in that sport at the high school level. The school had a plan to add another varsity sport for women in 1996. OCR stated "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 in response to their developing interests and abilities." (Addendum to Appellees' Brief, p. 21)

11 Chiang voluntarily dropped out of the case in March 2007.

12 Brust, Bulala and Ludwig later filed a Title IX suit of their own. That litigation has been identified by Judge Damrell as related to this case. See Appellees' Request for Judicial Notice.

13 See footnote 3 of the A.O.B. The complaint asserts that Plaintiffs Ng and Mansourian were part of the UCD wrestling program and that they were later removed from it via an event they call the "No Females Directive." Plaintiffs further alleged Defendants treated female wrestlers less favorably than male wrestlers because males were given the opportunity to wrestle and were not subject to the "No Females Directive." (ER 6411: ¶ 9; 6413:¶ 12; 6417: ¶ 30; 6423: ¶¶ 57-59; 6442: ¶ 130). Such allegations are consistent with an athletics unequal treatment claim. *Pederson v. LSU,* 213 F.3d 858, 865 n.4 (5th Cir. 2000)

14 In paragraph 72 of their District Court complaint Plaintiffs allege that "OCR concluded that UC-Davis had discriminated against the women wrestlers by issuing the No Females Directive." This is not true. See E.R. 5156-5162.

15 The Office for Civil Rights of the Department of Education subsequently took over as the federal agency responsible for Title IX enforcement, including investigation of complaints.

16 They argue the Eighth Circuit has not followed its own opinion, citing to *Chalenor v. University of N.D.*, 291 F.3d 1042 (8th Cir. 2002). The issue in *Chalenor* was whether a university violates Title IX by eliminating a men's team in order to comply under prong one. The issue of notice was not raised in that case.