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.
February 22, 2010.

Appeal from a Summary Judgment U.S.D.C. for the Eastern Dist. of Cal. No. 2:03-cv-02591-FCD-EFD Hon. Frank C. Darmell, District Judge
Date of Decision: February 8, 2010
Judges: Schroeder, Berzon and Shadur

Appellees' Petition for Rehearing and Rehearing En Banc

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***1** I. RULE 35(b) STATEMENT

The panel's opinion decided an appeal from a summary judgment in an action that contends the University of California at Davis ("University") denied plaintiffs equal athletic participation opportunities in violation of Title IX, 20 U.S.C § 1681. The panel reversed the district court on the ground on which the lower court had granted summary judgment-whether plaintiffs were required to give the University notice of their Title IX contentions and an opportunity to cure. This petition does not challenge that ruling.

The panel also, however, decided a point that the district court had not reached-whether the University's athletic program complied with Option Two of the alternative three part test by which schools can establish compliance with Title IX's "effective accommodation" obligation. Defendants (collectively "Appellees" or "University") had urged the panel to remand that issue if it reversed on the notice ground. (Appellee's brief "AB" 57-60) Alternatively, the University requested an opportunity to submit supplemental briefing if the panel elected to review the issue. (AB 60-61) In deciding the issue without the benefit of either a district court decision or plenary briefing, the panel made statements regarding how Title IX compliance is measured that disturb settled law and conflict with authoritative agency inter-

pretations of Title IX.

In assessing the University's compliance under Option Two, the panel held that the addition of women's indoor track did not constitute program expansion because it did not result in an increase of the *number* of female athletes. [Op. 18] This holding contradicts existing case law as well as authoritative agency interpretations. Agency interpretations of Title IX-***2** which the panel recognized command deference [Op. 9 n.9]-are clear that it is expansion of participation *opportunities* that matter under Option Two, as opposed to the expansion of the number of athletes. If a new team is added, the opportunities created by that addition count toward Option Two compliance even if the roster for the new team is filled in whole or in part with athletes who also participate in another sport. By focusing on the number of athletes rather than the number of opportunities, the panel disregarded the impact of the addition of indoor track on the University's compliance under Option Two. Similar discrepancies between the panel's standards and standards previously articulated appear in the Opinion and are discussed further below.

En banc review is necessary because the conflict between the Title IX standards the panel announced and previously articulated standards is an issue of exceptional importance. All schools that receive federal funding must comply with Title IX on an ongoing basis. These institutions rely on authoritative agency interpretations and the small body of case law on Title IX in developing their programs. Certainty and predictability about which standards control is, therefore, essential. Accordingly, Appellees petition for rehearing en banc *[see* Part III, *supra]* or panel rehearing *[see* Part IV, *supra]*.

II. BACKGROUND PERTINENT TO PETITION

Prior to Title IX's enactment in 1972, the University had an established women's intercollegiate sports program that included basketball, field hockey, swimming, softball, tennis, volleyball and track/field teams. It was a ***3** founding member of the Association for Intercollegiate Athletics for Women, which was the national governing body for women's intercollegiate athletics in the 1970s. (Excerpts of Record "ER" 4739:22-4740:23; 4699:22-4701:3)

The University added women's gymnastics as an intercollegiate team in 1974, and women's cross-country in 1977. In 1983, it replaced its field hockey team with varsity women's soccer in response to other schools in its conference dropping field hockey, the growth in popularity of women's soccer and a parallel decline in popularity of field hockey. (ER 4699:22-4701:10; 5075:13-5079:7) In 1996, the University added women's water polo, lacrosse and crew as varsity sports. Women's indoor track was added in 1999, followed by women's golf in 2003. (ER 4724:22-4726:7; 4743:22-4745:7;4677:22-28 ;4682:27-4683:5; 4683:14-4685:7; 5262-5263)

The University's intercollegiate wrestling team competes at the NCAA Division I level with other schools in the Pac-10 Conference. (ER 4659-4661:9). Since no schools in the Pac-10 have separate women's wrestling teams, a female athlete on the wrestling team would have to compete against a male in her weight class in Conference competition. (ER 4659-4661:7)

Between 1995 and 2000, University wrestling coach Michael Burch allowed a handful of women to work out with the wrestling team and receive other benefits associated with varsity status. (Op. at 4; ER 1143:4-7; 1148:5-9; 1152:20-24; 1154:18-25). As a result of roster management, the size of the wrestling team was limited to 34 spots for the 2000/2001 school year. Burch filled the spots with male wrestlers; the women were not selected because they did not have the skills to compete at the Division I level. (ER4677:23-27; 4678:21-4679:24; 4768, 4803:7-24; 4805:18-21; 4808:13-***4** 25) Two of the women filed a complaint with the Department of Education's Office for Civil Rights ("OCR"). OCR investigated and entered into a resolution plan with the University that included a provision that students of both genders may try out for the wrestling team, and that the coach would select for membership on the team those students who demonstrated the highest level of skill and competitive ability in their weight class. (ER 4724:22-4725:5; 4726:13-4727:23; 5155-5159) The following fall Plaintiffs Ng and Mancuso tried out for the team but were not selected. Plaintiff Mansourian did not try out. (ER 4670:22-4671:9;4672:16-4673:5; 4965, 5003:14-18;

5005:12-25; 4888; 4925:8-11; 5238)

Plaintiffs sued the University and several University officials. Their claims included an assertion that the University failed to provide "effective accommodation," a Title IX concept that is governed by a test that provides universities three alternative measures to demonstrate compliance. *See* Op. 8-10).

The university moved for summary judgment on the grounds *inter alia* that (1) plaintiffs were required, but had failed, to provide the University pre-suit notice of their claimed Title IX violation and an opportunity to cure it, or (2) undisputed facts established that the University complied with the Option Two test for establishing effective accommodation. That test focuses on "whether past actions of the institution have expanded *participation opportunities* for the underrepresented sex ..." (Op. 17) The district court granted summary judgment on the first ground without reaching the second ground, involving the Option Two test.

The University fully briefed the notice issue on appeal. But, citing ***5** *Fitzgerald v. Barnstable,* 129 S.Ct. 788, 798 (2009) ("Ordinarily, 'we do not decide in the first instance issues not decided below."), the University argued that if the Court reversed on the notice issue, it should remand the question of whether the University had established its compliance with Option Two. (AB 57-59) Alternatively, the University requested that, if the Court elected to review the Option Two question *de novo,* it should request supplemental briefing on the issue. (AB 59)

The panel elected to review the Option Two issue, but did not request supplemental briefing on it. It held that the University's addition of a varsity indoor women's track team was not evidence of program expansion because the addition "did nothing to expand the number of female athletes, as all the women participating in indoor track also participated in an existing varsity sport." Op. 18. The panel also stated "[t]he Option Two analysis focuses primarily, but not exclusively on increasing the number of women athletes rather than increasing the number of women's teams." (Op. 17.) After applying similar standards to the University's addition of a women's golf team in 2003, the panel held the summary judgment could not be affirmed on the alternative ground that the University complies with Title IX's effective accommodation duties.

As a result of this decision, one of the leading public universities in the world-and a pioneer in intercollegiate women's athletics-has been publicly branded a potential Title IX violator based on an analysis of the Option Two issue that the district court did not reach and the University did not fully brief on appeal because of the district court's narrow ruling. Given the exceptional importance of the issue and the conflict with previously settled law noted ***6** below, this conclusion is worth a second look.

III. THE COURT SHOULD REHEAR EN BANC THE PANEL'S TITLE IX OPTION TWO ANALYSIS TO RESOLVE THE CONFLICT THE ANALYSIS INJECTS INTO PREVIOUSLY SETTLED LAW

Title IX of the Educational Amendments of 1972 holds that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program receiving federal financial assistance. 20 U.S.C. § 1681(a).

The Title IX concept of "effective accommodation" is derived from a Department of Education ("DOE") regulation that bases compliance in part on whether "the selection of sports and levels of competition effectively accommodates the interests and abilities of members of both sexes." *See* 34 C.F.R. § 106.41(c)(1). (Op. 8) Whether a funding recipient has met its "effective accommodation" duty is determined using a three part test drawn from the OCR's 1979 Policy Interpretation, 44 Fed. Reg. 71,413 (Dec 11, 1979). (Op. 9) The test is further explained in a 1996 OCR Clarification. (*Id.);* (Addendum to AB, pp. 14-25).

The test gives universities three options for demonstrating compliance: (1) showing the number of women in intercollegiate athletics is proportionate to their enrollment, (2) proving that the institution has a "history and practice of

program expansion" for the underrepresented sex; or (3) where the university cannot satisfy either of the first two options, establishing that it nonetheless "fully and effectively accommodates" the interests of women. (Op. 9; 44 Fed. Reg. 71,418) As the panel noted [Op. 9 n. 9], the courts give ***7** substantial deference to the DOE's 1979 Policy Interpretation and its 1996 Clarification in applying this three-part test.

In the 1996 Clarification, the OCR provided hypothetical examples to illustrate the principles stated in the document. One such hypothetical is:
At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently 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.

In the district court, the University sought summary judgment in part on the ground that it had established compliance under Option Two because it showed a history and practice of program expansion very similar to the hypothetical noted above. Although the court did not reach that issue, the panel reviewed it and held the University had not established Option Two compliance. The panel held the University's 1999 addition of a women' s indoor track team was not evidence of program expansion because the new team "did nothing to expand the number of female athletes, as all the women ***8** participating in indoor track also participated in an existing varsity sport." (Op. 18)

This conclusion conflicts with well established law. "Participation" is determined based on the number of roster spots that student-athletes fill on each team and not-as the panel stated-by the number of athletes in the athletic program as a whole. Accordingly, each available spot is counted as a "participation opportunity." A student-athlete who participates in three sports is counted three times for participation purposes.

This principle is as old as Title IX and was first set forth in the 1979 Policy Interpretation, which defined participants on a team-by-team basis and contained no exclusion for an individual who had been counted as part of another team. *See* 44 Fed. Reg. at 71415. The 1996 Clarification likewise focused on "participation opportunities": "In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory *participation opportunities* through program expansion." (Addendum to AB, p. 20) (emphasis added); *see alo* Addendum to AB, p. 24, n2).

Lest there were any doubt, the Clarification plainly stated that it is the number of roster spots, not the number of athletes participating, that count: "In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates. (Addendum to AB, p. 19).

Based on that plain statement, which is entitled to deference [Op. 9 n. 9], two recent cases have rejected arguments that each athlete should be counted only once even if she plays multiple sports. In ***9***Miller v. University of Cincinnati,* 2008 WL 203025, at *7 (S.D.Ohio, Jan. 22, 2008), the district court, relying upon the Clarification, held: "Plaintiffs' argument depends on using the unduplicated count of athletes, that is, counting an athlete only once, regardless of how many different roster spots that athlete occupies on different teams. Plaintiffs offer no authority for using the unduplicated count and, to the contrary, the Department of Education prescribes the duplicated count." (*Id.*) The court added:
Plaintiffs assert that the University also incorrectly reports the number of male and female athletes by counting indoor track and field, outdoor track and field, and cross-country as separate sports. The Department of Education has established this format, however....The current Department of Education reporting of "All Track Combined," http://ope.ed.gov/athletics/InstDetail.asp, does not change that approach. Thus, it is proper for the University to count an

athlete who competes on the cross-country team, indoor track team and outdoor track team as competing on three separate teams. *Id.*

In *Biediger v. Quinnipiac University,* 616 F.Supp.2d 277, (D.Conn. 2009), the court employed a similar analysis in the preliminary injunction context, stating "the plaintiffs do not appear likely to prevail in their arguments that Quinnipiac cannot 'triple count' its women track athletes .... Cross country, indoor track, and outdoor track have separate NCAA championships and are, at their heart, different sports." *Id.* at 295.

Moreover, the Equity in Athletics Disclosure Act (EADA), 20 U.S.C. § 1092(g) similarly requires institutions to report participation numbers on a team by team basis as part of an annual report that must be filed with the DOE. 20 U.S.C. § 1092(g)(1)(B)(i). Although not identical, the regulations ***10** implementing the EADA define the term "participants" in a manner that is similar to the Policy Interpretation. 34 CFR §668.47(b)(3).

Educational institutions across the country understand and report participation on this basis. The panel's holding injects a serious conflict into that previously settled understanding. The exceptional importance of this issue cannot be understated. The opinion raises doubt about a previously settled manner in which schools nationwide have been determining their Title IX compliance. The Court should grant rehearing en bane to settle this issue *before* it roils the operations of our nation's schools.

The district court case cited by the panel, *Cohen v. Brown Univ.,* 809 F. Supp. 978, 991 (D.R.I. 1992), *aff'd* 991 F.2d 888 (1st Cir. 1993), does not support its conclusion that addition of the indoor track team should not be counted toward Option Two compliance. On the contrary, in *Cohen,* the district court acknowledged winter track was added 10 years prior to the commencement of the litigation, but concluded the university had failed to establish the requisite program expansion because the only previous expansion occurred in the 1970's. This decision was issued four years before the 1996 Clarification. Accordingly, in its second decision on this case in 1996, the First Circuit focused its attention on the number of participants on each team (without discounting multiple sport athletes). *Cohen,* 101 F.3d at 173.

The panel made further errors that have broad significance in its analysis of the University's 2003 addition of a golf team. The panel discounted the addition on the grounds that "the fact that there were no women currently attending the University who were interested enough in golf to participate at the club level or to request varsity status suggests that the addition of golf instead ***11** of field hockey, bowling, horse polo or rugby was not 'demonstratively responsive' to the interests of current female students." (Op. 21) The panel said the golf addition was not expansion because "the University's selection of golf, which added only seven participation opportunities for women, was at odds with its stated priority of taking a significant step toward overall gender equity. Elevating horse polo, rugby or field hockey would have added far more female varsity athletes." (Op. 22)

The definition of "developing interests" is not so narrow as construed by the panel. The 1996 Clarification states: "Developing interests include interests that already exist at the institution. [footnote omitted]." Addendum to AB, p. 20). "[I]nclude" is not the same as "are" or "limited to." While an Option Two analysis should consider interests expressed on campus, in the Clarification OCR was clear that such interests are not the only factor: "In addition [to campus based interests], OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its student in order to ascertain likely interest and ability of its students and admitted students in particular sport(s)." (Addendum to AB, p. 23).

Consistent with this approach, three examples of acceptable program expansion that OCR provided include the addition of sports based in whole or in part on national trends or surveys. (See: Discussion of "Institution C": adding a team based on a request and an NCAA survey showing increased high school participation in the sport; "Institution E": adding sport based on nationwide survey of most popular sports, and "Institution F": adding a sport based on survey of current and admitted students and a regional survey of most ***12** popular sports). (Addendum to AB, p. 21-22). In *Cohen,* the First Circuit also held that a university may consider interests from outside the campus to inform its pro-

gram expansion. 991 F.2d at 898 ("For example, so long as a university is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender, and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise, benchmark two is satisfied...").

The panel made no mention of the factors considered by Athletic Director Warzecka in recommending the addition of golf over other proposed sports, which included numerous expressions of interest in golf from high school students, the existence of an NCAA championship, and the vast number of universities that offered women's golf which provided sources for competition. (ER 4677:22-27; 4784:1-4685:6; 5262-5263)

The panel's undue emphasis on campus interest conflicts with the principles previously articulated by OCR. The same is true of the panel's statement that the University should have added a sport with a greater number of roster spots than golf. Option Two only requires continuous expansion that is responsive to the developing interests and abilities of the underrepresented sex. It does not require that expansion be achieved by adding the sport with the largest roster or by elevating an existing club team. The fact that addition of a large roster sport may boost proportionality compliance under Option One is not a consideration for Option Two compliance because the two tests are distinct *alternatives.*

The panel's analysis of the golf expansion conflicts with one of the most important precepts of Option Two. As Norma Cantu, Assistant Secretary for ***13** Civil Rights, emphasized in a letter that accompanied the 1996 Clarification, Option Two affords a university broad flexibility to decide how best to comply with the law: "the Clarification does not provide strict numerical formulas or 'cookie cutter' answers... Such an effort would not only belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law." (Addendum to AB, p. 15. The Clarification also recognizes that an institution may heed the views of its coaches and other leaders: "OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others: ...interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports; ..." (*Id.* p.23).

As the Clarification recognizes, to achieve Title IX's salutary goals schools must be free to expand athletic programs by choosing sports that are viable, have sufficient local intercollegiate competition, and respond to expressions of interest. The addition of golf in 2003 is an example of this. The panel's opinion, by contrast, encourages universities not to be truly "responsive" or innovative, but rather to look to roster size only when considering the addition of a new sport. That shadow that the panel's opinion casts over Title IX flexibility adds to the exceptional importance of the issues presented, and warrants rehearing en banc.

Finally, the panel's opinion creates further conflicts and confusion because it conflates Option Two with the other alternative Options for establishing compliance. Option Two is not measured against the relative percentages of females participating in athletics as a percentage of their ***14** undergraduate enrollment, as the panel erroneously suggested. (Op. 18). This statistical assessment relates to a proportionality determination under Option One. Option Two, by contrast, is based on steady progress in a university's offerings for the underrepresented sex. As the First Circuit explained in *Cohen,* "[t]he second and third parts of the accommodation test recognize that there are circumstances under which, as a practical matter, something short of this proportionality is a satisfactory proxy for gender balance. For example, so long as a university is continually expanding athletic opportunities in an ongoing effort to meet the needs of the underrepresented gender, and persists in this approach as interest and ability levels in its student body and secondary feeder schools rise, benchmark two is satisfied and Title IX does not require that the university leap to complete gender parity in a single bound." *Cohen,* 991 F.2d at 898.

Because there are relatively few decisions applying an Option Two analysis, the panel's erroneous conflation of the Option One and Two analyses poses a problematic risk of unsettling the law in this area. This is another reason why rehearing en banc is warranted.

IV. THE PANEL SHOULD REHEAR THIS MATTER TO FURTHER CONSIDER ITS OPTION TWO ANALYSIS

At a minimum, the panel should grant rehearing to clarify some of the above points. Due to the lack of plenary briefing on the issue, the Court did not have before it many of the above points. Nor does the opinion mention important undisputed summary judgment evidence, such as the evidence explaining that the fluctuations in the number of female participants was ***15** connected directly to the elimination of junior varsity or “B” program for water polo years after other institutions had taken that action and available competition for that team had gradually disappeared, or the fact that the 1996 Clarification expressly recognizes that a school can still comply with Option Two even if it eliminates a sport. (ER 4747:22-4748:22; Addendum to AB, p. 21)

The opinion also is internally inconsistent. For example, the panel relied upon the reports submitted by the University under the EADA in concluding there was data demonstrating the University could not satisfy the substantial proportionality prong. Thus, the panel implicitly accepted the well established version of “participation” in that portion of the decision discussing the notice issue. (Op. 14) The EADA reports list male and female athletes as participants for each team on which they competed (including both indoor and outdoor track). The panel's later conclusion that the addition of indoor track does not constitute program expansion because the student-athletes already participate in another sport is internally inconsistent with its reliance upon the traditional notion of “participation” as contained in the EADA reports.

When all of the undisputed evidence is considered, against the correct legal standards, the University's program compares favorably to the example OCR gave in its 1996 Clarification of a compliant program. *See* example quoted pp. 6-7, *ante.* But regardless of what the panel concludes about the propriety of summary judgment on this issue, the panel should at least consider whether any of the above noted points warrant modification of the opinion-irrespective of whether the modification changes the outcome.

***16** There are only a few cases that have conducted a thorough Option Two analysis, and the points of law discussed above are central to how many educational institutions measure Title IX compliance. Because these points are important to the operations of the entire University of California system, as well as that of many other schools, the University appreciates this opportunity to present the above points, which were not fully covered in the briefing in this appeal. The University respectfully requests that the panel consider whether these points warrant further rehearing or any modification of the opinion.

V. CONCLUSION

The petition should be granted.

Arezou MANSOURIAN, et al., Plaintiffs-Appellants, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants-Appellees.
2010 WL 1232003 (C.A.9) (Appellate Brief)

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