

To: Nicholas B. Dirks, Chancellor
Christopher M. Patti, General Counsel
H. Michael Williams, Interim Athletic Director
Jenny Simon-O'Neill, Associate Athletic Director/ Senior Woman Administrator
Jay Larson, Associate Athletic Director, Compliance
Eileen Andrade, Head of Women's Studies, Academic Personnel & Program Coordinator
Charis Thompson, Chair, Department of Gender & Women's Studies
Christine Ambrosio, Director of Women's Resources Gender Equity Center
Bob Jacobsen, Faculty Athletic Representative
Pavan Upadhyayula, ASUC President
Sara Thacker, Director and Ombudsman
Rich Lau, Director, EEOC
Heidi Roche, Assistant Director, Compliance/Compliance Coordinator
Alicia Rowell, Senior Director of Development Campaigns, Athletic

From: Nancy Hogshead-Makar, CEO, Champion Women
Date: April 15, 2015
Re: Legal Memo, University of California Berkeley's Title IX Athletic Department Compliance

Title IX athletics compliance involves two parts; *quantitative* components and *qualitative* components. First, the law requires that schools provide women with equal opportunities to participate; schools must provide women with a team and equal scholarships. Just as important; those participation opportunities must be as educationally beneficial as those provided to men; the women must receive equal treatment as compared with the male athletes.¹

1. Equal Opportunity to Participate; Equal Quantitative Educational Opportunity

In 1979, the Department of Education announced a Policy Interpretation that created three independent ways for schools to demonstrate that students of both genders have equal opportunities to participate in sports. I've paraphrased for simplicity:

- Under Prong 1, a school can show that the percentage of male and female athletes is the same as the percentage of male and female students enrolled in the school (the proportionality test), OR;
- Under Prong 2, the school can show it has a history and a continuing practice of expanding opportunities for female students, OR;

¹ 34 C.F.R. § 106. Available at <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S41>

- Under Prong 3, the school can show it is fully and effectively meeting its female students' interests and abilities to participate in sports.²

If a school meets any one of these tests, it will be found to be providing equal athletic participation. This three-part test has been in effect for more than three and a half decades. It has been heavily litigated in courts, and has been upheld by every one of the eight federal appeals courts that has considered it.³

We've looked at the past nine years of your EADA report.⁴ Unless there is some information that is not represented in your EADA report, it appears that UC Berkeley is discriminating against its female students in its athletic offerings.

School Year	Percentage of student body participating in sports	Number of female athletes UC-B needs to add for proportionality based on unduplicated athlete total	Number of female athletes UC-B needs to add for proportionality based on duplicated athlete total	Number of unduplicated female athletes	Number of duplicated female athletes
2006	4.07%	257	257	370	370
2007	3.34%	276	306	304	356
2008	3.58%	301	319	335	370
2009	3.58%	250	255	347	385
2010	3.61%	251	261	355	388
2011	3.59%	186	186	388	460
2012	3.53%	201	207	375	446
2013	3.58%	205	205	371	443
2014	3.54%	210	216	363	465
AVG	3.60%	237	245	356	409

² A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413 (1979). Available at <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html> For ease of reading, I have substituted "female athletes" instead of the verbiage in the regulations that refers to protecting the "underrepresented gender". While a few women's colleges apply the test to men, the overwhelming majority of schools apply the test to women, as it does in UC Berkeley.

³ See Chalenor v. University of North Dakota, No. 00-3379ND (8th Cir. May 30, 2002); Pederson v. Louisiana State University, 213 F.3d 858, 879 (5th Cir. 2000); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763, 770 (9th Cir. 1999); Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 274-75 (6th Cir. 1994); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993) (Cohen I), and 101 F.3d 155, 170 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) (this case was before the First Circuit twice, first on Brown University's appeal of a preliminary injunction granted by the district court (Cohen I), and the second time after a trial on the merits (Cohen II)); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 828 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993); Williams v. School District of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993).

⁴ UC Berkeley's EADA report is available here: <http://goo.gl/E4ueOO>

\$2,306,209.66 in scholarships per year. These are important sources of funding for educational attainment that women are being denied, because they are women.

3. Equal Treatment; Equal Qualitative Educational Experience

The EADA does not provide information on the many of the metrics required for Title IX compliance, but providing educational experiences that are qualitatively equal is also important. These include equality in:

- (1) Provision and maintenance of equipment and supplies;
- (2) Scheduling of games and practice times;⁸
- (3) Travel and per diem expenses;
- (4) Opportunity to receive tutoring and assignment and compensation of tutors;
- (5) Opportunity to receive coaching, and assignment and compensation of coaches;
- (6) Provision of locker rooms, practice and competitive facilities;
- (7) Provision of medical and training services and facilities;
- (8) Provision of housing and dining services and facilities;
- (9) Publicity;
- (10) Support services; and
- (11) Recruiting.⁹

UC Berkeley should provide public disclosures about equitable treatment in all these areas as well.

4. Equal Compensation for Coaches of Women's Teams

In addition, the EADA reports on UC Berkeley's exceedingly large discrepancies in coaching compensation. In 2014, the average men's salary was \$441,698, while the average women's salary was \$147,061. In addition, the average male assistant coaching position is compensated at \$128,956. Assistant coaches to women's teams, meanwhile, earn less than half of their male counterparts, at \$58,239. This creates the obvious Equal Pay Act and Title VII concerns for coaches.

To be clear, employer-schools cannot pay a coach less because the coach is a woman or because the employee coaches women athletes. The "market rate" defense does not allow schools to split the market into two; one market for men's basketball coaches and another for women's basketball coaches. Schools can justify unequal pay if the male coach brings in more money, but only if the school provides the women's coaches with the same marketing, resources and staffing to bring in that revenue. Moreover, schools cannot discriminate in the provision of these resources to the women's teams. Similarly, if coaches are evaluated on their team's

⁸ *Parker v. Franklin County Community School Corp.*, 667 F.3d 910 (7th Cir. 2012).

⁹ 34 C.F.R. § 106. Available at <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S41>

Prong 1: UC Berkeley cannot comply with Prong 1. Although in 2014 women represented 51.83% of the student body, UC Berkeley provides them with just 40.60% of the athletic opportunities. In order to provide women with the same opportunities to participate in sports in 2014, it must add 210 female athletes or an average of 237 female athletes per year over the past nine years.⁵

Prong 2: UC Berkeley cannot comply with Prong 2, which requires a showing of a “history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex.”⁶ In the past nine years, UC Berkeley’s participation rates have fluctuated, from 370 female athletes participating in 2006 to 363 in 2014. Moreover, in 2011 UC Berkeley had a high of 388 female athletes, which has now fallen below the participation level from nine years ago. The average number of athletes over the past nine years is 356, which is lower than the current total of 363. It can’t be said that UC Berkeley can comply with Prong 2 rather than Prong 1 because it shows no recent history of adding women’s opportunities for women in its athletics offerings.

Prong 3: UC Berkeley cannot comply with Prong 3, which requires a showing that women have no unmet demand for more sports opportunities; that their interests and abilities are accommodated by the current program. To measure compliance with Prong 3, the 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 students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).⁷ Since UC Berkeley recruits nationally, the interest for sports is evaluated on the same national basis. Based on EADA data, UC Berkeley is offering less than 4% -- or just 3.54% -- of its student-body a sports experience, as compared with 60% of the typical incoming freshmen class. Given the institution’s national recruiting pool, combined with the small number of sports opportunities offered, UC Berkeley has a large percentage of students (both male and female) who would compete on a new team if offered.

Recruiting: In 2014, UC Berkeley spent \$728,939 recruiting its male athletes, and just \$325,731 recruiting female athletes. UC Berkeley must provide this type of benefit equally in its overall athletic offerings. In the off-chance that UC Berkeley does not have students ready-and-willing to play the new sports offered, money comparable to sums spent on men’s recruiting can bring them to the institution.

2. Equal Scholarship Opportunities

If UC Berkeley complied with Title IX participation opportunities and provided women with the additional 210 athletic opportunities, women would be entitled to an additional

⁵ Starting from the duplicated number of athletes, that number of athlete equals 98.

⁶ *Mansourian v. Bd. Of Regents of Univ. of Cal.*, 594 F. 3d 1095, 1108. (9th Cir. Cal. 2010) (schools must have both a history *and* continuing practice of expanding opportunities for women for Prong 2 compliance.)

⁷ A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. At 71413 (1979). Available at <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>

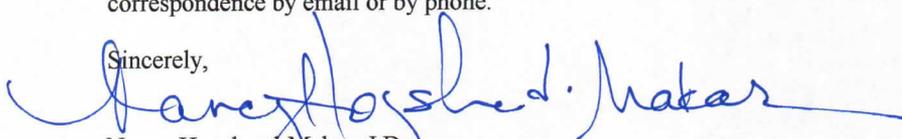
success, schools must provide the same resources to achieve that success, including recruiting resources and program presentation.¹⁰

The substantial pay inequities at UC Berkeley also raise equal treatment concerns under Title IX. Coaches are not fungible, and they directly contribute to the educational experience that the athlete receives. Women athletes have the right to the same educational opportunity, which includes receiving coaches of equal quality and competence. If the large pay discrepancies are defended on a market rate for that particular coach, it would indicate that women athletes not receiving the same quality coaching that UC Berkeley is providing to the male athletes. To remedy these enormous discrepancies, please see the attached WSF document, "*Creating Gender Neutral Coaches' Employment and Compensation Systems; a resource manual.*"¹¹

In June, Title IX celebrates its 43rd birthday. The statute, interpreting regulations and case law have been uncommonly consistent: schools are expected to provide their male and female students with equal athletic opportunities, treatment and scholarships. After almost 43 years, it is time for UC Berkeley to fully comply with Title IX.

Please let us know if we can provide further guidance. I look forward to hearing your plans to rectify the current inequalities before May 5, 2015. Please respond to this correspondence by email or by phone.

Sincerely,



Nancy Hogshead-Makar, J.D.
CEO, *Champion Women*

¹⁰ Equal Employment Opportunity Commission, "Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions" 1997. <http://www.eeoc.gov/press/10-31-97.html>

¹¹ ¹¹ Lopiano, D., "Creating gender neutral coaches' employment and compensation systems: A resource manual" (September, 1995). Women's Sports Foundation, Eisenhower Park, East Meadow, NY 11554