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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

NO. CIV. 2-03-02591-FCD-EFB

Plaintiffs,

v.

MEMORANDUM AND ORDER

BOARD OF REGENTS OF THE
UNIVERSITY OF CALIFORNIA at
DAVIS; LAWRENCE "LARRY"
VANDERHOEF; GREG WARZECKA; PAM
GILL-FISHER; ROBERT FRANKS;
and LAWRENCE SWANSON,

Defendants.

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This matter is before the court on defendants' motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) filed on June 5, 2007. Plaintiffs oppose defendants' motion. The court heard oral argument on the motion on July 27, 2007 and allowed the parties to submit supplemental briefing addressing new arguments raised at the hearing. Based upon the submissions of the parties and the arguments made by counsel, and for the reasons set forth below, defendants' motion

1 for judgment on the pleadings is GRANTED in part and DENIED in
2 part.

3 **BACKGROUND**¹

4 Plaintiffs Arezou Mansourian ("Mansourian"), Lauren Mancuso
5 ("Mancuso"), and Christine Wing-Si Ng ("Ng") (collectively
6 "plaintiffs")² are former female wrestlers at the University of
7 California, Davis ("UCD"). (Pls.' Compl. [Docket #1]
8 ("Compl."), filed Dec. 18, 2003, at 5-7.) Plaintiffs filed this
9 action on behalf of themselves and a putative class on December
10 18, 2003. Plaintiffs named as defendants in their individual and
11 official capacities the following parties: the Regents of the
12 University of California ("UCD"); the Chancellor of the
13 University, Larry Vanderhoef; the Athletic Director at the
14 University, Greg Warzecka; Associate Athletic Directors of the
15 University, Pam Gill-Fisher and Lawrence Swanson; and former
16 Associate Vice Chancellor, Student Affairs, Robert Franks
17 (collectively, the "individual defendants"). (Compl. at 2.)

18 In the 1990s, varsity wrestling at UCD included both women
19 and men. (Id. at ¶ 82.) Female wrestlers at UCD received high
20 quality coaching, wrestled under women's freestyle rules rather
21 than men's collegiate rules, and received the various benefits of
22 varsity status. (Id. at ¶¶ 82, 85.) Some of UCD's female
23 wrestlers went on to national and international acclaim after
24 having trained at and received the benefits of wrestling at UCD.

25
26 ¹ The following facts are primarily derived from
plaintiffs' complaint filed December 18, 2003.

27 ² Plaintiff Nancy Nien-Li Chiang ("Chiang") voluntarily
28 dismissed all claims in this action on June 12, 2007. (Mem. &
Order [Docket #195], filed July 12, 2007).

1 (Id. at ¶¶ 85-87.)

2 Plaintiffs participated in high school wrestling and chose
3 to attend UCD because it offered them the opportunity to
4 participate in wrestling while in college. (Compl., ¶¶ 9-11, 24-
5 51.) Mansourian and Ng filled out the NCAA and UCD paperwork
6 necessary for intercollegiate athletics, completed the weight
7 certification requirements for intercollegiate wrestling, and
8 participated in UCD's wrestling program for about 2 years. (Id.
9 at ¶¶ 27-30, 46-50, 55-59.) As varsity wrestlers, plaintiffs
10 received benefits such as medical and athletic training services,
11 laundry services, academic tutoring services, strength and
12 conditioning coaching, wrestling coaching, insurance, access to
13 the weight room, and access to varsity facilities. (Id. at ¶¶
14 33, 51, 58.) Mancuso was recruited to wrestle for UCD and
15 awarded an athletic scholarship. (Id. ¶ 39.) She enrolled,
16 filled out the necessary paperwork, and received the required
17 certifications to participate in intercollegiate wrestling. (Id.
18 at ¶¶ 40-42.) Shortly thereafter, however, defendants eliminated
19 women from UCD's wrestling program, and Mancuso was denied her
20 scholarship. (Id. at ¶¶ 59-60.)

21 During the 2000-2001 academic year, defendants eliminated
22 wrestling athletic participation opportunities for female, but
23 not male, students (the "No Females Directive"). (Id. at ¶¶ 60-
24 62.) Plaintiffs and then-wrestling coach Michael Burch protested
25 this decision. Plaintiffs met with and/or complained to
26 defendants, asserting that the No Females Directive constituted
27 illegal sex discrimination. Defendants ignored the complaints.
28 (Id. at ¶¶ 63-69.) Plaintiffs filed a complaint with the Office

1 for Civil Rights of the United States Department of Education
2 ("OCR") in the Spring of 2001. (Id. at ¶ 67.) Defendants later
3 agreed to rescind the No Females Directive and to allow women to
4 participate in wrestling. (Id. at ¶ 70-74.)

5 Plaintiffs, including newcomer Mancuso, enrolled at UCD for
6 the 2001-2002 academic year in reliance upon defendants' promised
7 reinstatement of female wrestling participation opportunities.

8 They filled out their NCAA and UCD eligibility paperwork,
9 completed the weight certification requirements for varsity
10 wrestling, and were deemed eligible. (Id. at ¶ 75.)

11 Unfortunately, plaintiffs returned to a wrestling team with a new
12 coach who did not support women wrestlers and failed to coach
13 them or treat them like the male wrestlers. (Id. at ¶¶ 75-76.)

14 Defendants informed plaintiffs that to participate in wrestling
15 they would have to be part of a mixed gender team and would have
16 to beat the men at their weight class under men's collegiate-
17 style rules, even though the women had previously only

18 participated as part of a women's wrestling program (not a mixed
19 gender team) using international freestyle wrestling rules. (Id.

20 at ¶ 77.) Plaintiffs again complained, but defendants refused
21 and continue to refuse to remedy the situation and to provide
22 women's wrestling opportunities. (Id. at ¶¶ 75-79.) As a
23 result, to date, no women are allowed to participate in UCD
24 wrestling. (Id.)

25 As a result of defendants' actions, plaintiffs could not
26 attend wrestling practice, could not use the wrestling facilities
27 or weight room, lost their laundry benefits, lost their insurance
28 they received as wrestling athletes, were banned from receiving

1 instruction from the UCD coaching staff, and were denied athletic
2 training and other medical benefits they received as UCD
3 wrestlers. (Id. at ¶ 61.) Plaintiffs also lost the academic
4 credit associated with UCD wrestling athletes, and were denied
5 early class registration. (Id. at ¶ 62.)

6 Subsequently, plaintiffs brought this action and alleged six
7 claims for relief: (1) violation of Title IX for failure to
8 provide equal athletic opportunities for women; (2) violation of
9 Title IX for failure to provide equal athletic financial
10 assistance to women; (3) retaliation in violation of Title IX;
11 (4) violation of 42 U.S.C. § 1983 based on the Equal Protection
12 clause of the U.S. Constitution; (5) violation of the California
13 Unruh Civil Rights Act; (6) violation of public policy based upon
14 violations of the California Constitution and the California
15 Education Code. (Id. at 35-53). Defendants filed a motion to
16 dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on
17 March 5, 2004. (Defs.' Mot. to Dismiss [Docket #13-15], filed
18 March 5, 2004.) The court denied the motion on May 6, 2004.
19 (Mem. & Order [Docket #25], filed May 6, 2007.)

20 Unfortunately, throughout the course of this litigation,
21 both defendants' and plaintiffs' counsel have suffered illnesses.
22 In October 2005, both parties stipulated to an extension of
23 deadlines due to defendants' lead counsel's illness, which made
24 her unavailable to travel to depositions over the following two
25 months. (Stipulation [Docket #57], filed Oct. 28, 2005.) On
26 April 14, 2006, one week before plaintiffs' motion for class
27 certification was to be heard by the court, plaintiffs' counsel
28 filed an ex parte motion to stay and extend scheduling based upon

1 plaintiffs' counsel's serious health issues. (Ex Parte Mot. to
2 Stay [Docket #117], filed Apr. 14, 2006.) The court granted
3 plaintiffs' motion, and thereafter, on June 6, 2006, the parties
4 stipulated to extend the stay and related scheduling matters.
5 (Order [Docket #125], filed Apr. 18, 2006; Stipulation to Extend
6 Stay and Related Scheduling Matters [Docket #130], filed June 6,
7 2006.) On July 21, 2006, plaintiffs moved to extend the stay in
8 order to find new counsel because of plaintiffs' counsel's
9 serious medical condition, which the court granted. (Motion to
10 Extend [Docket #134], filed July 21, 2006; Order [Docket #137],
11 filed July 24, 2006.) On August 18, 2006, Monique Oliver filed a
12 notice of appearance on behalf of plaintiffs. (Docket #140,
13 filed Aug. 18, 2006.) On August 23, 2006, and October 19, 2006,
14 the parties stipulated to extend the stay based upon the
15 appearance of new counsel in this matter. (Docket #141, 147.)

16 On February 2, 2007, plaintiffs filed a motion to amend the
17 complaint to add new plaintiffs, who would also be class
18 representatives, and related allegations. (Pls.' Mot. to Amend
19 [Docket #158], filed Feb. 2, 2007.) The court denied plaintiffs'
20 motion. (Mem. & Order [Docket #175], filed Mar. 20, 2007.)
21 Subsequently, by stipulation of both parties, the class claims in
22 this action were dismissed on June 12, 2007. (Mem. & Order
23 [Docket #195], filed June 12, 2007.) Defendants filed the
24 instant motion on June 5, 2007. (Docket #188.) At oral
25 argument, plaintiffs' counsel conceded that plaintiffs no longer
26 seek injunctive relief. However, plaintiffs do claim that they
27 are entitled to monetary and punitive damages for defendants'
28 denial of educational benefits, lost scholarship money, and the

1 humiliation, emotional distress, and related harm caused by
2 defendants' sex discrimination. (Id. at 55-56.)

3 **STANDARD**

4 Rule 12(c) of the Federal Rules of Civil Procedure provides,
5 in relevant part, that "[a]fter the pleadings are closed but
6 within such time as not to delay the trial, any party may move
7 for judgment on the pleadings." Fed. R. Civ. Proc. 12(c).

8 Moreover, Rule 12(h)(2) of the Federal Rules of Civil Procedure
9 provides in relevant part that a defense of failure to state a
10 claim upon which relief can be granted, may be made by motion for
11 judgment on the pleadings. Fed. R. Civ. Proc. 12(h).

12 When considering a motion for judgment on the pleadings
13 presenting a defense of failure to state a claim upon which
14 relief can be granted, a court should employ those standards
15 normally applicable to a motion to dismiss for failure to state a
16 claim upon which relief can be granted pursuant to Rule 12(b)(6)
17 of the Federal Rules of Civil Procedure. See Enron Oil Trading &
18 Transp. Co. v. Walbrook Ins. Co., Ltd., 132 F.3d 526, 528-29 (9th
19 Cir. 1997); 5B Wright & Miller, Federal Practice and Procedure,
20 Civil § 1368 at 515-16 (3d ed. 2007). On a motion to dismiss,
21 the allegations of the complaint must be accepted as true. Cruz
22 v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give
23 plaintiff the benefit of every reasonable inference to be drawn
24 from the "well-pleaded" allegations of the complaint. Retail
25 Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963).
26 Thus, the plaintiff need not necessarily plead a particular fact
27 if that fact is a reasonable inference from facts properly
28 alleged. See id.

1 Nevertheless, it is inappropriate to assume that the
2 plaintiff "can prove facts which it has not alleged or that the
3 defendants have violated the . . . laws in ways that have not
4 been alleged." Associated Gen. Contractors of Calif., Inc. v.
5 Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983).
6 Moreover, the court "need not assume the truth of legal
7 conclusions cast in the form of factual allegations." United
8 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
9 Cir. 1986).

10 Ultimately, the court may not dismiss a complaint in which
11 the plaintiff has alleged "enough facts to state a claim to
12 relief that is plausible on its face." Bell Atlantic Corp. v.
13 Twombly, 127 S.Ct. 1955, 1974 (2007). Only where a plaintiff has
14 not "nudged [his or her] claims across the line from conceivable
15 to plausible," is the complaint properly dismissed. Id. "[A]
16 court may dismiss a complaint only if it is clear that no relief
17 could be granted under any set of facts that could be proved
18 consistent with the allegations." Swierkiewicz v. Sorema N.A.,
19 534 U.S. 506, 514 (2002) (quoting Hudson v. King & Spalding, 467
20 U.S. 69, 73 (1984)).

21 In ruling upon a motion to dismiss, the court may consider
22 only the complaint, any exhibits thereto, and matters which may
23 be judicially noticed pursuant to Federal Rule of Evidence 201.
24 See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th
25 Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United
26 States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

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1 **ANALYSIS**

2 **I. Title IX**

3 Alleged violations of Title IX in the area of athletics are
4 typically divided into claims of either equal treatment or
5 effective accommodation. Pederson v. Louisiana State Univ., 213
6 F.3d 858, 865 n.4 (5th Cir. 2000). This division arises from
7 regulations promulgated by Title IX. Id. Claims under an equal
8 treatment theory "derive from the Title IX regulations found at
9 34 C.F.R. §§ 106.37(c) 106.41(c)(2)-(10), which call for equal
10 provision of [] athletic benefits and opportunities among the
11 sexes." Boucher v. Syracuse Univ., 164 F.3d 113, 115 n.2 (2d
12 Cir. 1999). Claims brought under an effective accommodation
13 theory stem from the implementing regulations that provide:

14 in determining whether equal athletic opportunities for
15 members of both sexes are available, the Office of
16 Civil Rights of the Department of Education (the office
17 charged with enforcement of Title IX) will consider,
among other factors, "[w]hether the selection of sports
and levels of competition effectively accommodate the
interests and abilities of members of both sexes."

18 Pederson, 213 F.3d at 865 n.4 (citing Boucher, 164 F.3d at 115
19 n.1; 34 C.F.R. § 106.41(c)(1)).

20 As clarified by both arguments made at hearing and the
21 supplemental submissions of the parties, plaintiffs are asserting
22 claims against defendant UCD under both an unequal treatment
23 theory and an ineffective accommodation theory. Defendant UCD
24 moves for judgment on the pleadings as to both theories.

25 **A. Unequal Treatment Claims**

26 Pursuant to an "unequal treatment" theory, plaintiffs seek
27 damages arising out of the No Females Directive issued in the
28 fall of 2000; an alleged broken promise in June 2001 to reinstate

1 the female wrestling program at UCD; the failure to renew the
2 contract of their wrestling coach; and requiring females to
3 compete for membership on the UCD wrestling team under the same
4 terms and conditions as male athletes in the fall of 2001.
5 Plaintiffs contend that these were discriminatory acts made by
6 defendant pursuant to a "policy and practice" of discrimination,
7 and as such, these allegations establish a "continuing violation"
8 of federal law. (Pl.'s Opp'n, filed July 13, 2007, at 5.)
9 Conversely, defendant asserts that plaintiffs merely allege a
10 series of discrete acts. (Def.'s Reply to Pl.'s Opp'n ("Reply"),
11 filed July 20, 2007, at 4-6.) According to defendant UCD, the
12 last discrete act occurred on October 16, 2001 with the
13 resolution of plaintiffs' OCR complaint, and thus, plaintiffs'
14 claims tolled in October 2002. Id. at 5.

15 **1. Discrete Acts**

16 "A discrete retaliatory or discriminatory act 'occurred' on
17 the day that it happened." National R.R. Passenger Corp. v.
18 Morgan, 536 U.S. 101, 110 (2002). Where a discrete act is the
19 basis for a discrimination claim, the timely filing period begins
20 to run from that date. Id. Such acts "are not actionable if
21 time barred, even when they are related to acts alleged in timely
22 filed charges." Id. at 113.

23 In Morgan, the Supreme Court found that, with regard to the
24 applicability of the continuing violation doctrine, the term
25 "practice" does not convert related discrete acts into a single
26 unlawful practice for the purposes of timely filing. 536 U.S.
27 101, 111 (2002). The Court defined a "discrete act" of
28 discrimination as one that constitutes a separate, actionable

1 unlawful employment practice that is temporally distinct. Id. at
2 114. In the employment context, the Court pointed to
3 "termination, failure to promote, denial of transfer, [and]
4 refusal to hire" as examples of such discrete acts. Id. The
5 Court held that the cause of action accrued when the discrete,
6 unlawful action occurred, and that "a new violation does not
7 occur, and a new charging period does not commence, upon the
8 occurrence of subsequent nondiscriminatory acts that entail
9 adverse effects resulting from the past discrimination." See
10 Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162,
11 2169 (2007) (discussing the Court's holding in Morgan and other
12 related cases).

13 Subsequently, the Supreme Court has reiterated that the
14 current effects of discriminatory conduct "cannot breathe life
15 into [that] prior, uncharged conduct." Id. In Ledbetter, a
16 female retiree sued her former employer under Title VII and the
17 Equal Pay Act for alleged sex discrimination reflected in
18 negative evaluations, which resulted in her receiving lower
19 paychecks than her male counterparts. Id. at 2163-64. The
20 plaintiff argued that each of the paychecks she received
21 constituted a new, actionable discriminatory act. Id. at 2169.
22 The Court rejected this argument, holding that the actionable
23 discrete conduct occurred when the pay decision was made, not
24 when a paycheck was issued pursuant to that allegedly
25 discriminatory decision. Id. at 2175-76.

26 In this case, the heart of plaintiffs' Title IX claims based
27 upon an unequal treatment theory stems from discrete acts taken
28 against three women wrestlers over roughly a year's time.

1 Plaintiffs claim that defendant UCD first blatantly excluded them
2 from the wrestling program and then failed to give them a fair
3 opportunity to obtain a position on the team by requiring them to
4 compete against men, using men's rules. These claims are akin to
5 a claim of termination and failure to hire or promote in the
6 employment context. As such, they are appropriately
7 characterized as discrete acts. Plaintiffs further claim that
8 the discriminatory acts continued because they were unable to
9 wrestle each and every day that they were students at UCD.
10 However, this inability was merely the *effect* of defendant's
11 prior, allegedly discriminatory conduct. As set forth in
12 Ledbetter, the current effects of discriminatory conduct "cannot
13 breathe life into [that] prior, uncharged conduct." 127 S. Ct.
14 at 2169.

15 The rationale applied by the Ninth Circuit in Cherosky v.
16 Henderson is similarly applicable to this case. 330 F.3d 1243
17 (9th Cir. 2003). In Cherosky, current and former employees
18 brought suit against the United States Postal Service under the
19 Americans with Disabilities Act, challenging the denial of their
20 requests to wear respirators while on duty. Id. at 1244-45. The
21 Ninth Circuit found that the heart of the plaintiffs' complaint
22 stemmed from the individualized decisions to deny the plaintiffs'
23 requests and, as such, were discrete acts. Id. at 1247.
24 Similarly, in this case, the gravamen of plaintiffs' complaint
25 stems from individualized decisions by defendant regarding the
26 UCD wrestling program, which affected each individual plaintiff.
27 As such, these decisions are discrete acts.

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1 Plaintiffs contend that the reasoning of Morgan, Ledbetter,
2 and Cherosky does not apply in this case because each of those
3 cases arose out of an employment relationship between the
4 plaintiffs and the defendants. (Pls.' Supp. Mem., filed Aug. 10,
5 2007, at 7-9.) The crux of plaintiffs' argument is that because
6 Title VII claims arise in the employment context, the Supreme
7 Court's holdings in Morgan and Ledbetter should not control the
8 analysis of plaintiffs' Title IX unequal treatment claims.³

9 Plaintiffs' argument is unpersuasive. Title VII and Title
10 IX are sufficiently analogous that the "discrete discriminatory
11 acts" analysis prescribed in Morgan applies to the unequal
12 treatment claims brought by plaintiffs in this case. Both Title
13 VII and Title IX address sex discrimination, and the legislature
14 has emphasized the close relationship between the two.
15 Specifically, the House Report on Title IX explicitly referenced
16 the relationship between Title VII and Title IX:

17 Title VII . . . specifically excludes educational
18 institutions from its terms. [Title IX] would remove
19 that exemption and bring those in education under the
equal employment provision.

20 Education Amendments Act of 1972, Pub. L. No. 92-318, 1972

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23 _____
24 ³ Plaintiffs, citing Gebser v. Lago Vista Indep. School
25 Dist., assert that under Title IX, courts "have a measure of
26 latitude to shape a sensible remedial scheme that best comports
27 with the statute." 524 U.S. 274, 284 (1998). This motion does
28 not raise issues regarding remedies, and thus, plaintiffs'
reliance on Gebser in this context is misplaced. While Gebser
demonstrates the "manifest" difference between Title VII and
Title IX in terms of available remedies, the Court's analysis in
Gebser did not address the analytical framework for assessing a
Title IX claim on the merits. Id.

1 U.S.C.C.A.N. (86 Stat. 253) 2462, 2512.⁴ The purposes that
2 Titles VII and Title IX are both intended to serve, eliminating
3 discrimination and providing protection against it, suggest that
4 Title VII's analytical framework with respect to discrete acts
5 should be applied to a Title IX claim for sex discrimination.
6 See Mabry v. State Bd. of Community Colleges & Occupational
7 Educ., 813 F.2d 311, 316 n. 6 (10th Cir. 1987) ("Because Title
8 VII prohibits the identical conduct prohibited by Title IX, i.e.,
9 sex discrimination, we regard it as the most appropriate analogue
10 when defining Title IX's substantive standards"), cert.
11 denied, 484 U.S. 849 (1987); see also Patricia H. v. Berkeley
12 Unified School Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993)
13 ("As the Supreme Court acknowledged in [Franklin], a student
14 should have the same protection in school that an employee has in
15 the workplace.").

16 Further, the Ninth Circuit's decision in Cherosky reinforces
17 the conclusion that the Morgan Court's significant restriction of
18 the continuing violations doctrine applies outside the Title VII
19 context.⁵ 330 F.3d at 1246. "Although Morgan involved Title VII
20 of the Civil Rights Act of 1964, the Supreme Court's analysis of
21 the continuing violations doctrine is not limited to Title VII
22 actions. *It applies with equal force to the Rehabilitation Act*
23 *and to actions arising under other civil rights laws.*" Id.

24
25 ⁴ On the day Title IX was enacted, Senator Bayh stated,
26 "this amendment [applies] Title VII's widely recognized standards
of equality of employment opportunity to educational
institutions." 118 Cong. Rec. 5807 (1972).

27 ⁵ In restricting the continuing violations doctrine, the
28 Court applied the "discrete discriminatory acts" analysis.
Morgan, 536 U.S. at 122.

1 (emphasis added); see e.g., RK Ventures, Inc. v. City of Seattle,
2 307 F.3d 1045 (9th Cir. 2002) (applying Morgan's rationale in an
3 action brought pursuant to 42 U.S.C. § 1983); Kaster v. Safeco
4 Ins. Co. of Am., 212 F. Supp. 1264 (D. Kan. 2002) (applying
5 Morgan's rationale to the Age Discrimination in Employment Act).

6 Therefore, plaintiffs' claims under the unequal treatment
7 theory arise out of a series of discrete acts and do not arise
8 out of a continuing violation of federal law.

9 **2. Pattern and Practice**

10 Alternatively, plaintiffs argue that the Court's holding in
11 Morgan does not apply to their case because they are alleging a
12 pattern or practice theory of the type explicitly excluded from
13 the Court's analysis and opinion in Morgan. 536 U.S. at 115 n.9.
14 Defendant contends that, while evidence of such a claim can
15 support an individual's claim of discrimination, the pattern or
16 practice method of proof cannot apply to a private, non-class
17 cause of action. Whether individual plaintiffs can rely on a
18 pattern or practice method of proof is an issue that has not been
19 addressed by the Ninth Circuit.

20 "A pattern or practice case is not a separate and free-
21 standing cause of action, . . . but is really 'merely another
22 method by which disparate treatment can be shown.'" Celestine v.
23 Petroleos de Venezuela SA, 266 F.3d 343, 355 (5th Cir. 2001)
24 (citing Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1219 (5th Cir.
25 1995)). Specifically, a pattern or practice theory of
26 discrimination carries with it a different method of proof than
27 an individual claim of discrimination. See Int'l Brotherhood of
28 Teamsters v. United States, 431 U.S. 324, 334-40; Lowery v.

1 Circuit City Stores, Inc., 158 F.3d 742, 759 (1998) (overruled on
2 other grounds). In these cases, typically, the government
3 (either through the EEOC or the Attorney General) or a plaintiff
4 class charges systematic discrimination against a protected
5 group. Lowery, 158 F.3d at 759; see Bacon v. Honda of Am. Mfg.,
6 Inc., 370 F.3d 565, 575 (6th Cir. 2004); Celestine, 266 F.3d at
7 355 (5th Cir. 2001). The plaintiff bears the initial burden of
8 demonstrating a prima facie case by a preponderance of the
9 evidence that the defendant's standard operating procedure
10 included discriminatory practices. Teamsters, 431 U.S. at 336.
11 "At this initial 'liability' stage, the [plaintiff] is not
12 required to prove that any particular employee was a victim of
13 the pattern or practice; it need only establish a *prima facie*
14 case that such a policy existed." Lowery, 158 F.3d at 760
15 (citing Teamsters, 431 U.S. at 360). Once such a prima facie
16 case is established, the burden shifts to the defendant to
17 demonstrate that the plaintiff's showing is either inaccurate or
18 insignificant. Id. If the defendant fails to rebut the
19 plaintiff's case "the resulting finding of a discriminatory
20 pattern or practice gives rise to an inference that all employees
21 subject to the policy were its victims and are entitled to
22 appropriate remedies." Id. at 759 (citing Teamsters, 431 U.S. at
23 362). Such a finding justifies an award of prospective relief,
24 but if individual relief is sought, the plaintiff must
25 demonstrate that the individual employees were actual victims of
26 the policy. Id.

27 Although plaintiffs no longer assert class claims or seek
28 prospective injunctive relief, they assert that they may still

1 press a pattern or practice theory of relief. "The Supreme Court
2 has never applied the Teamsters method of proof in a private,
3 non-class suit." Id. at 761. "Rather, the Court has noted that
4 there is a 'manifest' and 'crucial' difference between an
5 individual's claim of discrimination and a class action alleging
6 a general pattern or practice of discrimination." Id. (quoting
7 Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876
8 (1984). Where the government or plaintiff class must first
9 litigate the common question of whether there was a
10 discriminatory policy, individual plaintiffs must litigate "the
11 discrete question of whether the employer discriminated against
12 that plaintiff in a specific instance." Id. (citing McDonnell
13 Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

14 Pattern or practice class-action suits also differ from
15 individual, private discrimination suits because of the "nature
16 of remedies." Id. Pattern or practice class-action suits
17 typically seek to cure systemic discrimination and the harm
18 suffered by the group subjected to that discrimination. Id.
19 Therefore, plaintiffs typically seek injunctions for broad
20 relief, and the "need for such remedies can be determined without
21 referring to matters such as the qualifications of a particular
22 employee." Id. Conversely, in an individual discrimination
23 case, the plaintiff generally seeks damages specific to the
24 individualized harm inflicted upon him, such as reinstatement,
25 hiring, back-pay, or damages. Id. "Such remedies typically
26 require the examination of the circumstances surrounding a single
27 employment action involving the plaintiff." Id.

28 /////

1 Because a pattern or practice theory of recovery is focused
2 on establishing a policy of discrimination and not on individual
3 decisions affecting specific plaintiffs, "it is inappropriate as
4 a vehicle for proving discrimination in an individual case."
5 Bacon, 370 F.3d at 575; see Celestine, 266 F.3d at 356 (holding
6 that the pattern and practice method of proof was inapplicable to
7 an individual claim of discrimination "given the nature and
8 purpose of the pattern and practice method of proof").
9 Therefore, the court holds that the pattern or practice method of
10 proof set forth in Teamsters and excluded from the Court's
11 analysis in Morgan is not available to individual plaintiffs. As
12 such, plaintiffs' claims based upon unequal treatment that stem
13 from discrete acts by defendant UCD are not exempt from the
14 timely filing analysis set forth in Morgan and Ledbetter.

15 3. Applicable Statute of Limitations

16 Defendant UCD moves for judgement on the pleadings as to
17 plaintiffs' Title IX unequal treatment claims on the basis that
18 they are barred by the statute of limitations. Title IX, 20
19 U.S.C. § 1681 et seq., does not specify a limitations period.
20 When Congress fails to specify a statute of limitations for a
21 federal claim for relief, courts must apply the most closely
22 analogous statute of limitations under state law. Reed v. United
23 Transp. Union, 488 U.S. 319, 323 (1989). The Ninth Circuit has
24 not considered the issue under Title IX; however, the other
25 federal appellate courts that have considered the issue are in
26 accord that a Title IX claim is most closely analogous to a
27 common law action for personal injury. Doe v. Howe Military
28 School, 227 F.3d 981, 987 (7th Cir. 2000); M.H.D. v. Westminster

1 Schools, 172 F.3d 797, 803 (11th Cir. 1999); Lillard v. Shelby
2 County Bd. of Educ., 76 F.3d 716, 729 (6th Cir. 1996); Egerdahl
3 v. Hibbing Community College, 72 F.3d 615, 618 (8th Cir. 1995);
4 Bougher v. University of Pittsburgh, 882 F.2d 74, 77-78 (3d Cir.
5 1989). Moreover, in Taylor v. Regents of the University of
6 California, 993 F.2d 710, 712 (9th Cir. 1993), the Ninth Circuit
7 came to the same conclusion with respect to a Title VI claim. In
8 light of this authority, and the fact that Title IX is to be
9 construed consistently with Title VI,⁶ the court applies
10 California's statute of limitations for personal injury actions
11 to plaintiffs' Title IX claims.⁷

12 In California, an aggrieved party must commence an action
13 for personal injury caused by an alleged wrongful act or neglect
14 within two years of the act. Cal. Code Civ. Proc. § 335.1. The
15 two-year limitations period is a fairly recent development.
16 Before 2003, the limitations period for personal injury claims
17 was one year. Cal. Code Civ. Proc. § 340(3), repealed. Section
18 335.1 became effective January 1, 2003. This amendment impacts
19 this case, which was filed December 18, 2003.

21 ⁶ Since Title IX has identical statutory language to
22 Title VI, except for the substitution of the word "sex" in Title
23 IX to replace the words "race, color, or national origin" in
24 Title VI, the Supreme Court has interpreted both statutes
interchangeably. Cannon v. University of Chicago, 441 U.S. 677,
694-99 (1979).

25 ⁷ Plaintiffs' argument to the contrary, based on one
26 Northern District of California decision, is unavailing. Kramer
27 v. Regents of the University of California, 81 F. Supp. 2d 972
28 (N.D. Cal. 1999) (applying California's three-year statute of
limitations for actions "upon a liability created by statute" to
ADA and Rehabilitation Act claims). In the Title IX context, it
is contrary to the weight of the authority described above, most
particularly Taylor.

1 A legislative extension of the statute of limitations period
2 will extend the limitations period of an actionable claim if the
3 extension occurs *before* the claim for relief becomes time barred
4 under the old limitations period. Douglas Aircraft Co. v.
5 Cranston, 58 Cal. 2d 462, 465 (1962). On the other hand, once a
6 claim is time barred it will not be revived by the extension to
7 the applicable limitations period unless the legislature
8 expressly declared that the amendment of the limitations period
9 applied retroactively. Bartman v. Estate of Bartman, 83 Cal.
10 App. 3d 780, 787-78 (1978). Such an expression of retroactivity
11 was made here only for victims of the terrorist attacks of
12 September 11. Cal. Code Civ. Proc. § 340.10(b).

13 Plaintiffs' first claim for relief alleges that defendant
14 UCD violated Title IX by failing to provide equal athletic
15 opportunities. Specifically, plaintiffs allege that defendant
16 (1) chooses "to make fewer athletic participation opportunities
17 to female students than to male students;" and (2) intentionally
18 discriminates against female students by only providing male
19 students with the opportunity to wrestle and by issuing the No
20 Females Directive. (Compl. ¶¶ 129-30). Viewing the complaint in
21 the light most favorable to plaintiffs, their first claim for
22 relief alleges both (1) an ineffective accommodation theory; and
23 (2) an unequal treatment theory under Title IX. As set forth
24 above, plaintiffs' unequal treatment claims stem from discrete
25 discriminatory acts by defendant. The last discrete
26 discriminatory act alleged by plaintiffs occurred, at the latest,

27 /////

28 /////

1 in October 2001, when their OCR complaint was resolved.⁸ The
2 statute of limitations then in effect was one year, and thus,
3 plaintiffs' claims were required to be filed no later than the
4 Fall of 2002. Therefore, plaintiffs' first claim for relief for
5 unequal treatment is barred by the statute of limitations, and
6 defendant UCD's motion with respect to this claim is GRANTED.⁹

7 Plaintiffs' second claim for relief alleges that defendant
8 UCD violated Title IX by failing to provide equal athletic
9 financial assistance by offering athletic scholarship funding to
10 male students and by intentionally discriminating against female
11 students by choosing to make less athletic financial assistance
12 available. In order to allege a claim under Title IX with
13 respect to scholarships, the plaintiff must be a member of a
14 varsity team. See Pederson, 213 F.3d at 872 (finding that
15 "[s]tanding to challenge effective accommodation does not
16 automatically translate into standing to challenge the treatment
17 of existing varsity athletes" with respect to claims for unequal
18 treatment in scholarship opportunities). At the latest,
19 plaintiffs were members of the varsity team in the Fall of 2001.
20 The statute of limitations then in effect was one year, and thus,
21 plaintiffs' claims were required to be filed no later than the
22 Fall of 2002. Therefore, plaintiffs' second claim for relief for

23
24 ⁸ Here, the existence of plaintiffs' OCR complaints may
25 be judicially noticed by this court. See e.g., Pavone v.
26 Citicorp Credit Services, 60 F. Supp. 2d 1040, 1045 (S.D. Cal.
27 1997). The truth of the allegations contained therein, however,
is not subject to judicial notice. See Southern Cross Overseas
Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410,
427 (3d Cir. 1999).

28 ⁹ The court addresses the viability of plaintiffs'
ineffective accommodation claims, *infra*.

1 unequal treatment is barred by the statute of limitations, and
2 defendant UCD's motion with respect to this claim is GRANTED.

3 Plaintiffs' third claim for relief alleges that defendant
4 UCD retaliated against plaintiffs. Specifically, plaintiffs
5 allege four "retaliatory" acts, the last of which occurred in the
6 Fall of 2001: (1) defendant instituted the No Females Directive
7 in the Fall of 2000; (2) defendant reneged on the promise to
8 remedy the No Females Directive in the Fall of 2001; (3)
9 defendant did not renew Michael Burch's contract in mid-2001; and
10 (4) defendant allowed the female wrestlers a chance to wrestle
11 against the male wrestlers for a position on the men's wrestling
12 team in the Fall of 2001.¹⁰ Again, the statute of limitations
13 then in effect was one year, and thus, plaintiffs' claims were
14 required to be filed no later than the Fall of 2002. Therefore,
15 plaintiffs' third claim for relief for retaliation is barred by
16 the statute of limitations, and defendant UCD's motion with
17 respect to this claim is GRANTED.¹¹

18
19 ¹⁰ Again, plaintiffs allege that this retaliation resulted
20 in a policy of discrimination. (Compl. ¶ 150). As set forth
21 above, however, the heart of plaintiffs' complaint relates to
22 these discrete acts against the individual plaintiffs. (Compl.
23 ¶¶ 151-57). Plaintiffs have cited no authority for the
24 proposition that an ineffective accommodation claim can be raised
25 through a retaliation claim.

26 ¹¹ Plaintiffs argue that this court should follow the
27 rationale in its prior Memorandum and Order, filed May 6, 2004,
28 which found that plaintiffs' claims, as alleged, were timely and
which directed the parties to further brief the statute of
limitations issues on a motion for summary judgment. Since that
order, there have been substantial changes in this litigation,
namely the dismissal of class allegations. Moreover, the
parties' arguments and submissions have further clarified the
legal theories advanced by plaintiffs. The court's prior order
reflected its analysis of plaintiffs' ineffective accommodation
claim, as set forth infra. The court did not specifically

(continued...)

1 **B. Ineffective Accommodation**

2 In their first claim for relief, plaintiffs allege that
3 defendant UCD violated Title IX by "choosing to make fewer
4 athletic participation opportunities to female students than to
5 male students." (Compl. ¶ 129). The court construes that by
6 this allegation, plaintiffs are alleging an ineffective
7 accommodation claim. Defendant argues that plaintiffs'
8 ineffective accommodation claim should be dismissed because
9 plaintiffs (1) alleged insufficient facts to support standing for
10 an ineffective accommodation claim; (2) failed to give s notice
11 of their claims; and (3) cannot assert a claim for damages based
12 specifically upon the lack of opportunity to wrestle.¹²

13 **1. Standing**

14 Defendant UCD contends that plaintiffs have not alleged
15 sufficient facts to set forth an ineffective accommodation claim.
16 Specifically, defendant contends that (1) plaintiffs failed to
17 allege that there was sufficient interest and ability among
18 females at UCD to field a women's wrestling team; (2) plaintiffs
19 have failed to allege that there was a reasonable expectation of
20 intercollegiate competition in women's wrestling; and (3)
21 plaintiffs were allowed to try out for the wrestling team on an
22 equal basis with male students.

23 /////

24
25 ¹¹(...continued)
26 address plaintiffs' unequal treatment claims. However, to the
27 extent that this order is inconsistent with the court's
Memorandum and Order, filed May 6, 2004, the court reconsiders
that Order. Fed. R. Civ. Proc. 54(b).

28 ¹² Defendant does not argue that plaintiffs' ineffective
accommodation claims are barred by the statute of limitations.

1 The allegations in the complaint adequately demonstrate that
2 there was sufficient interest and ability among females at UCD to
3 field a team. The complaint contains allegations that in the
4 early 1990s UCD began providing wrestling opportunities to female
5 students, including a women's division in the university's annual
6 "Aggie Open" wrestling tournament. Some of UCD's female
7 wrestlers went on to national and international acclaim after
8 having trained at and received the benefits of wrestling at UCD.
9 Plaintiffs chose to attend UCD because of that history and
10 because of the promise of opportunities to participate in
11 wrestling at UCD. Mansourian, Chiang, and Ng filled out the NCAA
12 and UCD paperwork necessary for intercollegiate athletics,
13 completed the weight certification requirements for
14 intercollegiate wrestling, and participated in UCD's wrestling
15 program for about 2 years. Mancuso similarly fulfilled the NCAA
16 and UCD requirements and attended UCD in order to wrestle.
17 Plaintiffs also allege that there are nearly 1,000 female
18 students who participate in wrestling at California high schools,
19 and there are other female students who participate in wrestling
20 at California community colleges. As such, viewing the
21 allegations in the light most favorable to plaintiffs and drawing
22 all reasonable inferences therefrom, plaintiffs allege that they
23 were able and ready to wrestle at UCD and that sufficient
24 interest existed in the female student population at UCD to field
25 a women's wrestling team.

26 With respect to defendant's assertion that plaintiffs have
27 failed to allege with particularity that there is a reasonable
28 expectation of intercollegiate competition, defendant asks this

1 court to impose too heavy a burden on plaintiffs at this stage in
2 the litigation. On a motion challenging the sufficiency of the
3 pleadings, plaintiffs are not required to plead specific facts
4 establishing a prima facie case of ineffective accommodation.
5 Swierkiewicz, 534 U.S. at 510-11. Rather, all that is required
6 is a plain statement of the facts sufficient to give the
7 defendant notice of the claims against it. Id. at 514. In
8 Swierkiewicz, the Court of Appeals had affirmed the district
9 court's dismissal of a case brought by an employee against his
10 former employer under Title VII and the ADEA because the
11 plaintiff failed to allege the elements of a prima facie case of
12 discrimination in his complaint. Id. at 509-10. The Supreme
13 Court reversed the dismissal, holding that pursuant to Federal
14 Rule of Civil Procedure 8(a), a complaint requires only a "short
15 and plain statement of the claim showing that the pleader is
16 entitled to relief" in order to survive a motion to dismiss. Id.
17 at 510-11. The Court rejected applying a heightened pleading
18 standard to discrimination claims. Id. at 511. Even if
19 plaintiffs have not specifically alleged a reasonable expectation
20 of intercollegiate competition, plaintiffs have complied with
21 Rule 8(a) and given sufficient notice to defendant of the basis
22 for their claims. Therefore, defendant's motion to dismiss on
23 this basis is without merit.

24 Finally, defendant contends that plaintiffs do not have
25 standing to bring an ineffective accommodation claim because they
26 allege that they were able to compete with men on an equal basis
27 for a position on the wrestling team. However, the crux of
28 plaintiffs' claim is that this accommodation was not effective

1 because they were forced to compete in a contact sport against
2 men using men's rules. At this stage in the litigation, viewing
3 the allegations in the light most favorable to the plaintiffs,
4 the court cannot find as a matter of law that defendant's
5 proffered opportunity constituted an effective accommodation.

6 Therefore, defendant's motion for judgment on the pleadings
7 with respect to plaintiffs' ineffective accommodation claim on
8 the grounds that plaintiffs lack standing to sue is DENIED.

9 **2. Notice**

10 Defendant UCD asserts that plaintiffs' ineffective
11 accommodation claim must fail because plaintiffs "have not
12 alleged that they gave defendant notice or opportunity to remedy
13 any purported systemic non-compliance with Title IX." (Defs.'
14 Reply to Pls.' Supp. Brief. at 5, filed August 17, 2007.)
15 Defendant cites Grandson v. Univ. of Minn., 272 F.3d 568 (8th
16 Cir. 2001), in support of their assertion. Id. In Grandson, the
17 Eighth Circuit affirmed dismissal of similar damage claims
18 without leave to amend because the complaint made "no allegation
19 of prior notice of their complaints to appropriate UMD officials,
20 no allegation of deliberate indifference by such officials, and
21 no allegation they had afforded UMD a reasonable opportunity to
22 rectify the alleged violations." Grandson, 272 F.3d at 575.

23 Plaintiffs allege that they filed a complaint with the OCR
24 in the Spring of 2001. (Id. at ¶ 67.) Contrary to defendant's
25 assertions, under the Rule 12(b)(6) standard, this allegation
26 reasonably supports the inference that plaintiffs did provide
27 notice to defendant of their ineffective accommodation claim.

28 /////

1 Defendant requests that the court take judicial notice of
2 letters and reports from the OCR relating to plaintiffs'
3 complaints. Rule 201 permits a court to take judicial notice of
4 an adjudicative fact "not subject to reasonable dispute," in that
5 the fact is either "(1) generally known within the territorial
6 jurisdiction of the trial court or (2) capable of accurate and
7 ready determination by resort to sources whose accuracy cannot
8 reasonably be questioned." Fed. R. Evid. 201(b). The court can
9 take judicial notice of matters of public record, such as
10 pleadings in another action and records and reports of
11 administrative bodies. Emrich v. Touche Ross & Co., 846 F.2d
12 1190, 1198 (9th Cir. 1988). Here, the existence of plaintiffs'
13 OCR complaints may be judicially noticed by this court. See
14 e.g., Pavone v. Citicorp Credit Services, 60 F. Supp. 2d 1040,
15 1045 (S.D. Cal. 1997). The truth of the allegations contained
16 therein, however, is not subject to judicial notice. See
17 Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping
18 Group Ltd., 181 F.3d 410, 427 (3d Cir. 1999). Because the court
19 cannot take judicial notice of the content of the OCR documents,
20 the court cannot determine whether plaintiffs provided defendant
21 with notice of their OCR complaint. Moreover, none of the
22 proffered documents includes plaintiffs' complaint to the OCR;
23 rather, the only relevant documents contain the OCR's
24 characterizations and descriptions of plaintiffs' complaint. The
25 accuracy of the OCR's conclusions is a factual dispute that must
26 be resolved on summary judgment or at trial.

27 /////

28 /////

1 Therefore, defendant's motion for judgment on the pleadings
2 on the basis that plaintiffs provided insufficient notice of
3 their ineffective accommodation claim is DENIED.¹³

4 **3. Damages**

5 Finally, defendant argues that plaintiffs' ineffective
6 accommodation claim must fail because the damages they seek are
7 too speculative. (Defs.' Reply at 5-7, filed August 17, 2001.)
8 Specifically, defendant argues that plaintiffs cannot assume that
9 they would have been able to wrestle at UCD if it had been in
10 compliance with Title IX.

11 This case is analogous to the Fifth Circuit's decision in
12 Pederson, 213 F.3d 858, where the court found that plaintiffs,
13 female soccer players, had standing to sue for damages under an
14 ineffective accommodation theory. In Pederson, the plaintiffs
15 alleged that Louisiana State University discriminated against
16 females by ineffectively accommodating female students in the
17 provision of teams and facilities for intercollegiate
18 competition. 213 F.3d at 863. The court held that under an
19 ineffective accommodation theory, the injuries to a plaintiff
20 "resulted from the imposed barrier - the absence of a varsity
21 team for a position on which a female student should be allowed
22 to try out." Id. at 871. Therefore, so long as a plaintiff
23 alleged that she was willing and able to compete for a position
24 on that team, the injury and resulting damages were not unduly

25
26 ¹³ For the purposes of this motion and because plaintiffs
27 have made sufficient allegations with respect to defendant's
28 argument, the court assumes, without deciding, that Title IX
requires that a plaintiff give a defendant notice and an
opportunity to respond.

1 speculative such that plaintiffs' claims should be dismissed on
2 the pleading. Moreover, the court held that to the extent "LSU
3 violated the individual rights of the plaintiffs by failing to
4 accommodate effectively the interests and abilities of female
5 students" and to the extent such violations caused actual
6 damages, the plaintiffs were entitled to be compensated for those
7 damages. Id. at 875.

8 In this case, viewing the allegations in the light most
9 favorable to plaintiffs and drawing all reasonable inferences
10 therefrom, plaintiffs allege that they suffered actual damages
11 because of the absence of a varsity team, specifically a
12 wrestling team, for a position on which a female student should
13 be allowed to compete. Therefore, based upon the rationale of
14 the Fifth Circuit in Pederson, plaintiffs' claim for damages are
15 not unduly speculative.

16 Defendant relies primarily on National Wrestling Coaches
17 Association v. Department of Education, 366 F.3d 930 (D.C. Cir.
18 2004), in support of its assertion that plaintiffs' claim must
19 fail because damages are too speculative. However, the facts in
20 National Wrestling Coaches are distinguishable from the facts in
21 this case. In National Wrestling Coaches, the plaintiffs
22 represented athletics organizations that supported college
23 wrestling. Id. at 933. These organizations asked the court to
24 declare Title IX's three-part test invalid because it allegedly
25 encouraged universities to cut male wrestling programs. Id. at
26 936-37. The court reasoned that "[e]ven if the court invalidated
27 the department's three-part test, schools might nevertheless
28 continue to eliminate or cap men's wrestling teams in order to

1 comply with Title IX or the 1975 regulations or for some other
2 unrelated reason. Save for their speculation about 'better
3 odds,' appellants would be no better off than they are under the
4 department's current policies." Id. at 944. Therefore, the
5 court found that plaintiffs lacked standing because they failed
6 to show that their alleged injury could be redressed by
7 invalidating the challenged policy. Id.

8 Conversely, in this case, plaintiffs seek monetary and
9 punitive damages for injury resulting from lost opportunities
10 while they were students at UCD. Plaintiffs allege actual
11 injury, including lost educational opportunities, increased
12 education expenses, and emotional distress, all arising from
13 defendant's alleged violations of Title IX. As such, plaintiffs
14 have sufficiently demonstrated that the monetary relief sought in
15 this case would sufficiently redress their alleged injury.
16 Therefore, defendant's reliance on National Wrestling Coaches is
17 misplaced.

18 Thus, defendant's motion for judgment on the pleadings
19 regarding plaintiffs' ineffective accommodation claim based upon
20 an unduly speculative claim for damages is DENIED.

21 **C. Punitive Damages**

22 Defendant UCD argues that plaintiffs' claims for punitive
23 damages under Title IX must be dismissed because they are not
24 permitted under federal law. In discussing the available
25 remedies under Title IX and by comparison, Title VI, the Supreme
26 Court has found that "[a] funding recipient is generally on
27 notice that it is subject not only to those remedies explicitly
28 provided in the relevant legislation, but also to those remedies

1 traditionally available in suits for breach of contract." Barnes
2 v. Gorman, 536 U.S. 181, 187 (2002) (citing Franklin v. Gwinnett
3 County Pub. Sch., 503 U.S. 60, 76 (1992)). The Court has also
4 noted that "punitive damages, unlike compensatory damages and
5 injunction, are generally not available for breach of contract."
6 Id. (citations omitted). Therefore, the Court has held that
7 "Title VI funding recipients have not, merely by accepting funds,
8 implicitly consented to liability for punitive damages." Id. at
9 188. It is well established that Title IX is modeled after Title
10 VI and is interpreted and applied in the same manner. See id. at
11 185; see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S.
12 274, 286 (1998). As such, because the Supreme Court has found
13 that punitive damages may not be awarded in private suits under
14 Title VI, it follows that they may not be awarded in private
15 suits under Title IX. See id. at 185-90; see also Mercer v. Duke
16 Univ., 401 F.3d 199, 202 (4th Cir. 2005) (stating that punitive
17 damages are not available under Title IX); Frechel-Rodriguez v.
18 Puerto Rico Dept. of Educ., 478 F. Supp. 2d 191, 198-99 (D.P.R.
19 2007) (same); Hooper v. North Carolina, 379 F. Supp. 2d 804, 811
20 (M.D.N.C. 2005) (same); Alston v. North Carolina A & T Univ., 304
21 F. Supp. 2d 774, 784 (M.D.N.C. 2004) (same). Moreover, this
22 conclusion is supported by the Supreme Court's "traditional
23 presumption against imposition of punitive damages on government
24 entities." Vermont Agency of Natural Res. v. United States ex
25 rel. Stevens, 529 U.S. 765, 784-85 (2000); Newport v. Fact
26 Concerts, Inc., 453 U.S. 247, 262-63 (1981).

27 Plaintiffs contend that punitive damages are not unavailable
28 for Title IX claims as a matter of law. However, plaintiffs

1 wholly fail to address the Supreme Court's analysis in Barnes.
2 The only cases cited by plaintiffs in support of their position
3 are cases that pre-date the Court's decision in Barnes by at
4 least five years. Such sparse analysis is unpersuasive in light
5 of the Supreme Court's ruling in Barnes and the decisions of
6 subsequent courts that have addressed this issue.¹⁴

7 Therefore, defendant's motion for judgment on the pleadings
8 regarding plaintiffs' claims for punitive damages under Title IX
9 is GRANTED.

10 **D. Emotional Distress Damages**

11 Defendant UCD also argues that plaintiffs' claims for
12 emotional distress damages under Title IX must be dismissed
13 because they are not permitted under federal law. Specifically,
14 defendant contends that relief under Title IX is limited to the
15 forms of relief traditionally available in suits for breach of
16 contract and that, absent extreme circumstances, emotional
17 distress damages are not normally recoverable in contract claims.
18 However, defendant fails to cite any case law to support its
19 position that emotional distress damages are not recoverable in
20 an ineffective accommodation claim under Title IX. Rather,
21 defendant acknowledges that the Supreme Court has implicitly
22 approved of damages claims for emotional distress in sexual
23 harassment claims brought pursuant to Title IX. Davis v. Monroe

24
25 ¹⁴ Plaintiffs also contend that it is improper for this
26 court to consider the viability of remedies on a motion for
27 judgment on the pleadings. This contention is without merit.
28 The treatise cited by plaintiffs in support of their argument
does not support their assertion. Further, partial judgment on
the pleadings serves to expedite the litigation and narrow the
claims for discovery and trial.

1 County Bd. of Educ., 526 U.S. 629 (1999); Gebser, 524 U.S. 274;
2 Franklin, 503 U.S. 60. Defendant simply argues that those cases
3 are inapplicable because the alleged breach of a duty to provide
4 equal accommodation in athletic programs is not sufficiently
5 severe to justify the award of emotional damages.

6 At this stage in the litigation, in the absence of any
7 authority on point, the court cannot find as a matter of law that
8 plaintiffs are not entitled to emotional distress damages.

9 Therefore, defendant's motion for judgment on the pleadings
10 regarding plaintiffs' claims for emotional distress damages is
11 DENIED.

12 **II. 42 U.S.C. § 1983**

13 Plaintiffs bring claims under 42 U.S.C. § 1983 against the
14 individual defendants for monetary damages based upon alleged
15 violations of the Equal Protection Clause.¹⁵ Defendants argue
16 that plaintiffs' § 1983 claim must be dismissed because it is
17 subsumed by Title IX. Alternatively, plaintiffs claim that their
18 section 1983 claim can coexist with their Title IX claims.

19 There is presently a split in circuit authority as to
20 whether Title IX subsumes a claim under § 1983. Compare Bruneau
21 v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 758 (2d Cir.
22 1998) ("[A] § 1983 claim based on the Equal Protection Clause is
23 subsumed by Title IX), and Waid v. Merrill Area Pub. Sch., 91
24 F.3d 857, 862 (7th Cir. 1996) (holding that a plaintiff may not
25

26 ¹⁵ Plaintiffs brought this claim against defendant UCD for
27 injunctive relief only and against the individual defendants for
28 all available remedies. Because plaintiffs conceded that they
are no longer seeking injunctive relief, plaintiffs' § 1983
claims against defendant UCD are DISMISSED.

1 claim that a single set of facts leads to causes of action under
2 both Title IX and section 1983), and Pfeiffer v. Marion Ctr. Area
3 Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990) (same), and Travis
4 v. Folsom Cordova Unified Sch. Dist., 2007 U.S. Dist. LEXIS 11566
5 (E.D. Cal. 2007) (holding that "Title VI is sufficiently
6 comprehensive to evince congressional intent to foreclose a §
7 1983 remedy"), with Crawford v. Davis, 109 F.3d 1281, 1284 (8th
8 Cir. 1987) (holding that Title IX has no preemptive power over
9 section 1983 claims), and Seamons v. Snow, 84 F.3d 1226, 1233
10 (10th Cir. 1996) (holding that plaintiff has independent rights
11 under Title IX and under § 1983), and Lillard v. Shelby County
12 Bd. of Educ., 76 F.3d 716, 722-23 (6th Cir. 1996) (holding that a
13 § 1983 claim seeks to enforce distinct and independent
14 substantive due process rights).

15 Section 1983 does not create substantive rights, but
16 provides the procedural framework for a plaintiff to bring suit
17 for violations of federal rights. "Section 1983 supplies a cause
18 of action to a plaintiff when a person acting under the color of
19 state law deprives that plaintiff of any 'rights, privileges, or
20 immunities secured by the Constitution and laws of the United
21 States.'" Bruneau, 163 F.3d at 756 (citing 42 U.S.C. § 1983).
22 However, § 1983 does not provide a remedy for violations of all
23 federal statutes. "When the remedial devices provided in a
24 particular Act are sufficiently comprehensive, they may suffice
25 to demonstrate congressional intent to preclude the remedy of
26 suits under § 1983." Middlesex County Sewerage Auth. v. Nat'l
27 Sea Clammers Ass'n, 453 U.S. 1, 20 (1981). While the Ninth
28 Circuit has not decided the specific issue of whether § 1983

1 claims are subsumed by Title IX, it has recognized that federal
2 statutes may preclude a § 1983 remedy if they are sufficiently
3 comprehensive. See, e.g., Dittman v. California, 191 F.3d 1020,
4 1028 (9th Cir. 1999); Dep't of Educ. v. Katherine D., 727 F.2d
5 809, 820 (9th Cir. 1983). The court agrees with the reasoning
6 of the Second Circuit in Bruneau that, under the Sea Clammers
7 doctrine, Title IX's enforcement scheme is sufficiently
8 comprehensive to subsume plaintiffs' section 1983 claims and
9 demonstrate that Congress intended to preclude § 1983 claims when
10 it enacted this statute. See Bruneau, 163 F.3d at 756-57.

11 Title IX's administrative enforcement scheme is complex and
12 designed to ensure compliance with its mandates. Id. at 756.
13 Under the enforcement scheme, injured persons can file a
14 complaint with the Department of Education ("DOE"), see 34 C.F.R.
15 § 100.7(b) (1997), and the DOE must then investigate the
16 allegations. Id. § 100.7(c); Bruneau, 163 F.3d at 756. The DOE
17 may also periodically conduct its own compliance reviews without
18 a complaint. Id. § 100.7(a); Bruneau, 163 F.3d at 756. If the
19 DOE concludes that a complaint has merit or discovers violations
20 stemming from its own reviews, the DOE will notify the
21 institution and attempt to reconcile the situation through
22 informal means. Id. § 100.7(d); Bruneau, 163 F.3d at 756. If
23 the DOE is unsuccessful, it may ultimately terminate federal
24 funding to the institution after an administrative hearing. Id.
25 § 100.8; Bruneau, 163 F.3d at 756. As such, Title IX provides a
26 comprehensive administrative remedial scheme.

27 Further, in addition to the robust administrative remedial
28 scheme, the Supreme Court has held that Title IX provides

1 individuals with a private cause of action. See Cannon v. Univ.
2 of Chicago, 441 U.S. 677, 709 (1979). "Once in court, the Title
3 IX plaintiff has access to a full panoply of remedies including
4 equitable relief and compensatory damages." Bruneau, 163 F.3d at
5 756 (citing Franklin, 503 U.S. 60, 73-76 (1992)). The fact that
6 Title IX provides a private remedy in the courts provides further
7 support for Congress' intent to subsume a section 1983 remedy
8 with Title IX.

9 Therefore, given Title IX's administrative and judicial
10 remedies, the court adopts the rationale of the Second Circuit
11 and finds that it was Congress' intent "that a claimed violation
12 of Title IX be pursued under Title IX and not § 1983." Bruneau,
13 163 F.3d at 757; see Pfeiffer, 917 F.2d at 789; Travis, 2007 U.S.
14 Dist. LEXIS 11566 at *15-16 (holding that Title VI precludes
15 claims brought pursuant to § 1983 arising from the same facts).

16 Plaintiffs contend that Title IX does not provide a remedy
17 for constitutional rights and thus, it cannot subsume a claim for
18 violation of their rights to equal protections. In support of
19 their assertion, plaintiffs cite the decisions from the Sixth,
20 Eighth, and Tenth Circuits, which have carved out an exception to
21 the Sea Clammers doctrine for constitutional rights. See
22 Crawford, 109 F.3d at 1284; Seamons, 84 F.3d at 1233; Lillard, 76
23 F.3d at 722-23. Generally, these Circuits reasoned that although
24 the claims may arise from the same factual basis, the Equal
25 Protection clause gives rise to distinct and independent
26 substantive due process rights separate and apart from those
27 rights protected by Title IX.

28 /////

1 Plaintiffs' argument is unpersuasive. In Sea Clammers, the
2 Supreme Court focused on the available remedies in deciding
3 whether a claim under § 1983 was precluded by a federal statutory
4 scheme. 453 U.S. at 13, 20. The constitutional right exception
5 focuses on the nature of the underlying right, an inquiry not
6 focused upon by the Court in Sea Clammers. Rather, in Smith v.
7 Robinson, the Supreme Court found that the Education of The
8 Handicapped Act ("EHA") provided a sufficiently comprehensive
9 enforcement scheme, such that it demonstrated Congress' intent to
10 preclude a claim under § 1983 for an alleged Equal Protection
11 Clause violation. 468 U.S. 992, 1013¹⁶ ("We conclude, therefore,
12 that where the EHA is available to a handicapped child asserting
13 a right to a free appropriate public education, *based either on*
14 *the EHA or on the Equal Protection Clause of the Fourteenth*
15 *Amendment*, the EHA is the exclusive avenue through which the
16 child and his parents or guardian can pursue their claim.")
17 (emphasis added). Therefore, the court finds that there is not
18 an exception to the Sea Clammers doctrine based upon plaintiffs'
19 assertion of a constitutional right.

20 Plaintiffs also argue that their § 1983 claim cannot be
21 subsumed by their Title IX claim because their § 1983 claim is
22 pressed against different defendants, the individual defendants,
23 not UCD. Plaintiffs misconstrue the doctrine of preemption. See
24 Boulahanis v. Bd. of Regents, 198 F.3d 633, 640 (7th Cir. 1999).

25
26 ¹⁶ Congress subsequently amended the EHA to explicitly
27 provide that the EHA is not the exclusive remedy. 20 U.S.C. §
28 1415(f). However, this subsequent amendment to statute does not
modify the analysis of the Supreme Court and its clear indication
that there is not a constitutional exception to the Sea Clammers
doctrine.

1 Through the enactment of Title IX and its remedial scheme,
2 Congress created a regime "for the redress of sex discrimination
3 in athletic opportunities at federally-funded institutions." Id.
4 That regime need not include the ability to press claims against
5 both the institution and the individuals involved. Id. Rather,
6 "[t]he fact that individual claims are not available under Title
7 IX means that Congress has chosen suits against institutions as
8 the means of redressing such wrongs." Id. (citing Sea Clammers,
9 435 U.S. at 20); see also Waid v. Merrill Area Pub. Sch., 91 F.3d
10 857, 862 (7th Cir. 1996) ("Congress intended to place the burden
11 of compliance with civil rights law on educational institutions
12 themselves, not on the individual officials associated with those
13 institutions."); Travis, 2007 U.S. Dist. LEXIS 11566 at *16
14 ("Allowing Plaintiffs to plead around the detailed statutory
15 scheme created by Title VI by pleading a § 1983 claim against
16 [the defendant] in his individual capacity would be inconsistent
17 with Congress' creation of restrictions on Title VI claims.").
18 As such, plaintiffs' argument that their § 1983 claim is not
19 subsumed by Title IX because it is asserted against the
20 individual defendants, not UCD, is without merit.

21 Therefore, because plaintiffs' § 1983 claim is subsumed by
22 Title IX, defendant's motion for judgment on the pleadings
23 regarding plaintiffs § 1983 claim is GRANTED.

24 **III. State Law Claims**

25 Finally, defendants argue that plaintiffs' state law claims
26 against them should be dismissed because they are immune from
27 suit. Plaintiffs conceded at oral argument that Eleventh
28 Amendment immunity applies to bar their state law claims against

1 UCD. The individual defendants contend that they are immune from
2 suit based upon the discretionary immunity accorded public
3 employees pursuant to California Government Code § 820.2.¹⁷

4 Section 820.2 provides immunity to a public employee for
5 injuries resulting from "his act or omission where the act or
6 omission was the result of the exercise of the discretion vested
7 in him, whether or not such discretion be abused." Cal. Gov't
8 Code § 820.2 (West 2007). Generally, "a discretionary act is one
9 which requires the exercise of judgment or choice." Kemmerer v.
10 County of Fresno, 200 Cal. App. 3d 1426, 1437 (1988). However,
11 California courts have not set forth a definitive rule which
12 resolves every case. Id. Rather, the California Supreme Court
13 has adopted an analysis that relies on the "policy considerations
14 relevant to the purpose of granting immunity to the governmental
15 agency whose employees act in discretionary capacities." Id.
16 (internal citations omitted).

17 Immunity is reserved for those basic policy decisions
18 which have been expressly committed to coordinate
19 branches of government, and as to which judicial
20 interference would thus be "unseemly." Such areas of
21 quasi-legislative policy-making are sufficiently
sensitive to call for judicial abstention from
interference that might even in the first instance
affect the coordinate body's decision-making process.

22 Barner v. Leeds, 24 Cal. 4th 676, 685 (2000) (emphasis added).

23 "Immunity applies only to *deliberate and considered* policy
24 decisions in which a conscious balancing of risks and advantages

25
26 ¹⁷ Defendants assert numerous arguments in support of
27 their assertion that plaintiffs' state law claims against them
28 should be dismissed. However, as set forth *infra*, because the
court finds that discretionary immunity applies to defendants'
alleged conduct, the court does not address the merits of those
arguments.

1 took place." Caldwell v. Montoya, 10 Cal. 4th 972, 981 (1995)
2 (internal quotation omitted). As such, the California Supreme
3 Court has drawn a distinction "between the 'planning' and
4 'operational' levels of decision-making." Johnson v. State, 69
5 Cal. 2d 782, 795 (1968).

6 The California Supreme Court has also noted that in order
7 for § 820.2 immunity to apply, a decision by the public employee
8 need not be "a *strictly careful, thorough, formal, or correct*
9 *evaluation.*" Caldwell, 10 Cal. 4th at 983 ("[C]laims of improper
10 evaluation cannot divest a discretionary policy decision of its
11 immunity."). The Caldwell court reasoned that "[s]uch a standard
12 would swallow an immunity designed to protect against claims of
13 carelessness, malice, bad judgment, or abuse of discretion in the
14 formulation of policy." Id. at 983-84.

15 A fair reading of the complaint reveals allegations that the
16 individual defendants made actual, conscious, and considered
17 collective policy decision. See id. at 984. Plaintiffs allege
18 that "each of the individual defendants has authority over the
19 athletic programs at UC Davis and has participated in the
20 discriminatory actions and decisions" set forth in the complaint.
21 (Compl. ¶ 21). As such, plaintiffs have alleged that the conduct
22 was within the scope of the individual defendants' duties.
23 Plaintiffs also allege that they spoke or tried to speak to
24 various individual defendants regarding reinstatement of women's
25 wrestling, but defendants either refused to change their policies
26 or refused to meet with them. (Compl. ¶¶ 63-64). This
27 allegation reveals that the individual defendants were at least
28 aware and informed of plaintiffs' opposition to their decisions.

1 Further, plaintiffs allege that each of the individual defendants
2 was "instrumental in the decision to eliminate wrestling
3 participation and scholarship opportunities for female students."
4 (Compl. ¶ 22). As such, plaintiffs have alleged that defendants
5 made actual, conscious decisions relating to the alleged
6 discriminatory conduct.

7 Moreover, plaintiffs' allegations demonstrate that the
8 alleged discriminatory decisions made by the individual
9 defendants were policy decisions. Plaintiffs allege that the No
10 Females Directive issued by the individual defendants denied "the
11 then-current female wrestlers and all future female wrestlers the
12 many benefits obtained by these female alumni from participating
13 in wrestling at UC Davis." (Compl. ¶ 88). As such, the
14 allegations in the complaint allege that defendants' conduct
15 resulted in a wide-spread effect, not only to the plaintiffs, but
16 also to all future female wrestlers. Plaintiffs' allegations
17 also describe the public response to the individual defendants'
18 decisions. The media supported plaintiffs, writing articles in
19 newspapers and attending the 2001 Student Senate meeting.
20 (Compl. ¶ 70). A member of the California state assembly
21 expressed her concerns about the individual defendants' decision
22 to eliminate women's athletic participation opportunities and
23 threatened to withhold state funding if the decision was not
24 reversed. (Compl. ¶ 71). Thus, it is clear from the face of the
25 complaint that the elimination of a female wrestling program is a
26 "sensitive" issue with "fundamental policy implications."
27 Caldwell, 10 Cal. 4th at 983.

28 /////

1 Plaintiffs contend that the court cannot find that § 820.2
2 immunity applies to the individual defendants at the pleading
3 stage because the allegations in the complaint do not reveal the
4 process by which defendants made their decision and thus, do not
5 establish a considered decision. However, the Supreme Court of
6 California rejected this argument in Caldwell. 10 Cal. 4th at
7 983. In Caldwell, the court upheld defendants' demurrer based
8 upon § 820.2 immunity where board members allegedly voted to
9 replace the superintendent based upon improper motives of race
10 and age. Id. at 976. The court held that the complaint need not
11 disclose a "strictly careful, thorough, formal, or correct
12 evaluation." Id. at 983. Rather, the court found that the
13 application of § 820.2 immunity could be decided at the pleading
14 stage where "a fair reading of the complaint" demonstrate that
15 the defendant's conduct "involved an *actual* exercise of
16 discretion." Id. In this case, as set forth above, plaintiffs'
17 allegations demonstrate that the conduct by defendants
18 constituted "actual, conscious, and considered" collective policy
19 decisions. Id. at 984.

20 Finally, plaintiffs assert that defendants' actions were
21 operational decisions, not policy decisions. In support of this
22 assertion, plaintiffs argue that defendants' actions contravened
23 existing policies established under the California Education Code
24 and Title IX. However, the policies at issue in this case are
25 not those set forth by the legislature, but rather, the policies
26 of the University, as promulgated by the individual defendants.
27 Plaintiffs' complaint alleges that defendants' actions had a
28 wide-spread effect at UCD by eliminating athletic opportunities

1 for women. Such conduct is not the mere implementation of an
2 already established policy, but the creation of a new, allegedly
3 discriminatory policy. As such, plaintiffs' assertion that
4 alleged conduct of defendants were operational decisions is
5 without merit.

6 Therefore, because a fair reading of plaintiffs' complaint
7 reveals allegations that the individual defendants made actual,
8 conscious, and considered collective policy decisions, the
9 individual defendants are entitled to immunity pursuant to 820.2.
10 Thus, defendants' motion for judgment on the pleadings regarding
11 plaintiffs' state law claims¹⁸ is GRANTED.

12 **CONCLUSION**

13 For the foregoing reasons, defendants' motion for judgment
14 on the pleadings is GRANTED in part and DENIED in part.

15 (1) Defendant UCD's motion for judgment on the pleadings
16 regarding plaintiffs' first claim for relief under
17 Title IX based upon a theory unequal treatment is
18 GRANTED.

19 (2) Defendant UCD's motion for judgment on the pleadings
20 regarding plaintiffs' first claim for relief under
21 Title IX based upon a theory of ineffective
22 accommodation is DENIED.

23
24 ¹⁸ The Supreme Court has explicitly found that § 820.2
25 provides immunity against a public policy tort. Caldwell, 10
26 Cal. 4th at 984. Moreover, § 820.2 immunity will only fail to
27 apply to basic policy decision where there is a "clear indication
28 of legislative intent that statutory immunity is withheld or
withdrawn" in a particular case. The court has found nothing in
the Unruh Civil Rights Act which clearly evinces such an intent.
See id. at 987-88 (finding that FEHA did not carve out an
exception to immunity through the phrase "[e]xcept as otherwise
provided by statute").

1 (3) Defendant UCD's motion for judgment on the pleadings
2 regarding plaintiffs' second claim for relief under
3 Title IX is GRANTED.

4 (4) Defendant UCD's motion for judgment on the pleadings
5 regarding plaintiffs' third claim for relief for
6 retaliation in violation of Title IX is GRANTED.

7 (5) Defendant UCD's motion for judgment on the pleadings
8 regarding plaintiffs' claims for punitive damages under
9 Title IX is GRANTED.


10 (6) Defendant UCD's motion for judgment on the pleadings
11 regarding plaintiffs' claims for emotional distress
12 damages under Title IX is DENIED.

13 (7) The individual defendants' motion for judgment on the
14 pleadings regarding plaintiffs' claims brought pursuant
15 to 42 U.S.C. § 1983 is GRANTED.

16 (8) Defendants' motion for judgement on the pleadings
17 regarding plaintiffs' state law claims is GRANTED.

18 IT IS SO ORDERED.

19 DATED: October 18, 2007

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22 
FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE
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