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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

NO. CIV. S 03-2591 FCD EFB

MEMORANDUM AND ORDER

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

Defendants.

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This matter is before the court on a motion for summary judgment, pursuant to Federal Rule of Civil Procedure 56, filed by defendants Board of Regents of the University of California, Davis, Lawrence Vanderhoef ("Vanderhoef"), Greg Warzecka ("Warzecka"), Pam Gill-Fisher ("Gill-Fisher"), and Lawrence Swanson ("Swanson") (collectively "defendants" or "UCD"). Plaintiffs Arezou Mansourian ("Mansourian"), Lauren Mancuso

1 ("Mancuso"), and Christine Wing-Si Ng ("Ng") (collectively
2 "plaintiffs")¹ oppose the motion. For the reasons set forth
3 below,² defendants' motion is GRANTED.

4 **BACKGROUND**³

5 In the 1990s, varsity wrestling at UCD included both women
6 and men. (DRAF ¶ 53.) Plaintiffs Mansourian, Mancuso, and Ng
7 are former female wrestlers at UCD. (DRAF ¶ 3.) In 2000, UCD
8 ordered that all women be removed from the wrestling program.
9 (DRAF ¶ 4.)

10 Subsequently, plaintiffs filed a number of complaints with
11 the U.S. Department of Education's ("DOE") Office for Civil
12 Rights ("OCR"). Plaintiff Ng filed the first complaint on April
13

14 ¹ Plaintiff Nancy Nien-Li Chiang voluntarily dismissed
15 all claims in this action on June 12, 2007. (See Mem. & Order
(Docket #195), filed July 12, 2007.)

16 ² Because oral argument will not be of material
17 assistance, the court orders these matters submitted on the
18 briefs. E.D. Cal. L.R. 78-230(h).

19 ³ Unless otherwise noted, the facts contained herein are
20 undisputed. (See Pls.' Response to Defs.' Stmt. of Undisputed
21 Facts ("PRUF"), filed Mar. 6, 2008.) Where the facts are
disputed, the court recounts plaintiffs' version of the facts.
(Defs.' Response to Pls.' Stmt. of Additional Disputed Facts
("DRAF"), filed Mar. 31, 2008.)

22 The court notes that both parties filed motions to strike
23 and numerous objections, objecting to various aspects of evidence
submitted in support of and in opposition to the motion for
24 summary judgment. (See Pls.' Mot. to Strike (Docket #320), filed
Mar. 6, 2008; Pls.' Opp'n to Judicial Notice (Docket #323), filed
25 Mar. 6, 2008; Pls.' Objections to Evidence (Docket #338), filed
Mar. 6, 2008; Defs.' Objections to Evidence (Docket #344), filed
26 Mar. 31, 2008; Defs.' Mot. to Strike (Docket #348), filed Mar.
31, 2008; Pls.' Objections to Evidence (Docket #366), filed Apr.
27 17, 2008.) Except where otherwise noted herein, the court finds
the parties' objections irrelevant to the motion, as the court
28 does not rely upon the subject evidence in rendering its
decision. As such, the parties' motions to strike are DENIED and
the objections of both parties are OVERRULED as moot.

1 25, 2001, alleging "[t]he Athletic Administration will not allow
2 me to wrestle, nor any other female, and I strongly believe it is
3 due to my sex." (PRUF ¶ 93; Defs.' Ex. GGG, filed Jan. 11, 2008,
4 at W46.)⁴ Plaintiff Ng filed a second supplemental complaint
5 with the OCR on May 14, 2001, which included allegations that UCD
6 "recruits 'student-athletes' for its wrestling program but
7 prohibits such recruitment of females," "prohibits females from
8 participating in regularly scheduled competition," "denies women
9 wrestlers the use of the 'intercollegiate training room,'" and
10 "denies women wrestlers the services of its athletic trainers."
11 (PRUF ¶ 95; Defs.' Ex. HHH, filed Jan. 11, 2008, ¶¶ 1-4.) On
12 June 26, 2001, plaintiff Ng submitted a third supplemental
13 complaint on behalf of herself and plaintiffs Mansourian and
14 Mancuso. (PRUF ¶ 96.) This complaint alleged the "UC-Davis
15 athletic department granted the male members of the wrestling
16 team the scholarships awarded by wrestling coach, Mike Burch in
17 June 2001, but not to the females." (Defs.' Ex. KKK, filed Jan.
18 11, 2008, at W419.) Finally, plaintiff Mansourian filed a fourth
19 supplemental complaint on August 13, 2001, alleging the "firing
20 [of Mike Burch] was in retaliation against him and us, because he
21 fought to keep us on UCD's intercollegiate wrestling team."
22

23 ⁴ Plaintiffs object to defendants' Exhibit GGG as
24 improperly authenticated and hearsay. (See Pls.' Objections to
25 Evidence at 39:6-8 (Docket # 338), filed Mar. 6, 2008.) However,
26 because plaintiffs also submitted this evidence, (Pls.' Ex. A:80
27 (Docket #330-2), filed Mar. 6, 2008), it is self-authenticating,
28 Orr v. Bank of Am., 285 F.3d 764, 777 n.20 (9th Cir. 2002);
Alexander Dawson, Inc. v. N.L.R.B., 586 F.2d 1300, 1302 (9th Cir.
1978). Moreover, the court considers the evidence not for the
truth of the matters asserted, but rather for the effect they had
on UCD (i.e. notice). United States v. Payne, 944 F.2d 1458,
1472 (9th Cir. 1991). Plaintiffs' objection is overruled.

1 (Defs.' Ex. LLL, filed Jan. 11, 2008, at W417.)

2 Following an investigation by the OCR, UCD posed and the OCR
3 accepted a voluntary resolution plan. (DRAF ¶ 82.) The plan
4 required UCD to permit female athletes to try out for the
5 wrestling team. (DRAF ¶ 83.) Plaintiffs Ng and Mancuso
6 subsequently competed for a spot on the wrestling team, but
7 neither plaintiff was given a spot on the team. (DRAF ¶ 93.)

8 On December 18, 2003, plaintiffs filed the instant action on
9 behalf of themselves and a putative class, asserting six claims
10 for relief: (1) violation of Title IX based on unequal
11 opportunities; (2) violation of Title IX based on unequal
12 financial assistance; (3) retaliation in violation of Title IX;
13 (4) violation of 42 U.S.C. § 1983; (5) violation of the
14 California Unruh Civil Rights Act; and (6) violation of public
15 policy. Defendant filed a motion to dismiss pursuant to Federal
16 Rule of Civil Procedure 12(b)(6) on March 5, 2004. (Defs.' Mot.
17 to Dismiss (Docket #13-15), filed Mar. 5, 2004.) The court
18 denied the motion on May 6, 2004. (Mem. & Order (Docket #25),
19 filed May 6, 2004).

20 Unfortunately, both defendants' and plaintiffs' counsel
21 suffered illnesses throughout the course of the litigation. As a
22 result, both parties stipulated to extend deadlines and to stay
23 proceedings. In August 2006, plaintiffs obtained new counsel.
24 (Notice of Appearance (Docket #134), filed Aug. 18, 2006.) The
25 parties submitted a joint status report on January 19, 2007, and
26 active litigation resumed. (Joint Status Report (Docket #154),
27 filed Jan. 19, 2007.)

28 /////

1 On February 2, 2007, plaintiffs' filed a motion to amend the
2 complaint to add new plaintiffs and allegations. (Pls.' Mot. to
3 Amend (Docket #158), filed Feb. 2, 2007.) The court denied the
4 motion on March 20, 2007.⁵ (Mem. & Order (Docket #175), filed
5 Mar. 20, 2007.) The parties thereafter stipulated to dismiss the
6 class claims. (Mem. & Order (Docket #195), filed June 12, 2007.)

7 On June 5, 2007, defendants filed a motion for judgment on
8 the pleadings pursuant to Federal Rule of Civil Procedure 12(c).
9 (Defs.' Mot. for J. on Pleadings (Docket #188), filed June 5,
10 2007.) The court granted the motion for all claims, except
11 plaintiffs' claim for ineffective accommodation. (Mem. & Order
12 (Docket #226), filed Oct. 18, 2007.) Defendants' filed the
13 instant motion on January 11, 2008. (Defs.' Mot. for Summ. J.
14 (Docket #280), filed Jan. 11, 2008.)

15 **STANDARD**

16 The Federal Rules of Civil Procedure provide for summary
17 judgment where "the pleading, depositions, answers to
18 interrogatories, and admissions on file, together with the
19 affidavits, if any, show that there is no genuine issue as to any
20 material fact. Fed. R. Civ. Proc. 56(c); see California v.
21 Campbell, 138 F.3d 772, 780 (9th Cir. 1998). The evidence must
22 be viewed in the light most favorable to the nonmoving party.

23 _____
24 ⁵ Specifically, the court denied plaintiffs' request to
25 amend the complaint to assert claims for denied opportunities in
26 women's rugby and field hockey. The court found that "[w]hile
27 the plaintiffs may have sought to bring challenges on behalf of
28 all women athletes at UC Davis . . . [t]he factual allegations in
the original complaint related only to the opportunities
available for women to participate in the UC Davis wrestling
program and plaintiffs alleged inability to receive the benefits
of being a varsity wrestler." (Mem. & Order at 11:13-20 (Docket
#175), filed Mar. 20, 2007.)

1 See Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en
2 banc).

3 The moving party bears the initial burden of demonstrating
4 the absence of a genuine issue of fact. See Celotex Corp. v.
5 Catrett, 477 U.S. 317, 325 (1986). If the moving party fails to
6 meet this burden, "the nonmoving party has no obligation to
7 produce anything, even if the nonmoving party would have the
8 ultimate burden of persuasion at trial. Nissan Fire & Marine
9 Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1102-03 (9th Cir. 2000).
10 However, if the nonmoving party has the burden of proof at trial,
11 the moving party only needs to show "that there is an absence of
12 evidence to support the nonmoving party's case." Celotex Corp.,
13 477 U.S. at 325.

14 Once the moving party has met its burden of proof, the
15 nonmoving party must produce evidence on which a reasonable trier
16 of fact could find in its favor viewing the record as a whole in
17 light of the evidentiary burden the law places on that party.
18 See Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th
19 Cir. 1995). The nonmoving party cannot simply rest on its
20 allegations without any significant probative evidence tending to
21 support the complaint. See Nissan Fire & Marine, 210 F.3d at
22 1107. Instead, through admissible evidence the nonmoving party
23 "must set for specific facts showing that there is a genuine
24 issue for trial." Fed. R. Civ. Proc. 56(e).

25 **ANALYSIS**

26 Defendants assert that plaintiffs' ineffective accommodation
27 claim must fail because plaintiffs have not alleged they gave
28 defendant notice and an opportunity to remedy any purported

1 systemic non-compliance with Title IX. Defendants' argument
2 presents an issue of first impression in this jurisdiction. The
3 court concludes that money damages cannot be awarded unless a
4 plaintiff has given notice of and an opportunity to rectify the
5 specific violation alleged by a Title IX plaintiff. The court
6 also concludes that plaintiffs have failed to demonstrate a
7 triable issue of fact regarding whether such notice and
8 opportunity were given in this case.

9 **A. Notice and Opportunity to Cure in Title IX Cases**

10 Title IX prohibits sex discrimination in education programs,
11 including athletic programs, at institutions receiving federal
12 funding. 20 U.S.C. § 1861 (West 2008). Although the statute is
13 silent on the question of private remedies, the Supreme Court has
14 held that Title IX provides individuals with a private cause of
15 action. Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979).
16 However, because a private cause of action is judicially implied,
17 a court must "shape a sensible remedial scheme that best comports
18 with the statute." Id.

19 The express system of enforcement in Title IX provides a
20 robust administrative remedial scheme. Bruneau v. S. Kortright
21 Ctr. Sch. Dist., 163 F.3d 749, 756 (2d Cir. 1998). Under the
22 enforcement scheme, injured persons can file a complaint with the
23 DOE, which is required to investigate the allegations. 34 C.F.R.
24 § 100.7(b)-(c); Bruneau, 163 F.3d at 756. The DOE is also
25 permitted to conduct periodic compliance reviews without a
26 complaint. 34 C.F.R. § 100.7(a). If the DOE concludes based on
27 its investigation of a complaint or a periodic review that an
28 institution has violated Title IX, it may terminate federal

1 funding to the institution or institute other proceedings
2 authorized by law. 20 U.S.C. § 1682. Significantly, the DOE may
3 not initiate any enforcement proceedings until it "has advised
4 the appropriate person or persons of the failure to comply with
5 the requirement and has determined that compliance cannot be
6 secured by voluntary means." Id. Similarly, the administrative
7 regulations require resolution of compliance issues "by informal
8 means wherever possible," id. § 100.7(d)(1), and prohibit
9 enforcement proceedings absent a showing the aid recipient "has
10 been notified of its failure to comply and of the action to be
11 taken to effect compliance," id. § 100.8(d).⁶ Thus, both the
12 statute and its implementing regulations condition enforcement
13 proceedings on notice and an opportunity to cure non-compliance.

14 "A central purpose of requiring notice of the violation . .
15 . and an opportunity for voluntary compliance before
16 administrative enforcement proceedings can commence is to avoid
17 diverting education funding from beneficial uses where a
18 recipient was unaware of discrimination in its programs and is
19 willing to institute prompt corrective measures." Gebser v. Lago
20 Vista Ind. Sch. Dist., 524 U.S. 274, 289 (1998). When an
21 institution's athletic program is out of compliance with Title
22 IX, knowledge of the violation cannot be imputed to the
23 institution simply because it oversees the program. Grandson v.
24 Univ. of Minn., 272 F.3d 568, 575 (8th Cir. 2001). Even if
25 knowledge of failure to provide full and effective accommodation

26
27 ⁶ The court notes that the cited regulations pertain to
28 Title VI of the Civil Rights Act of 1964. However, the
implementing regulations of Title IX expressly incorporate by
reference these provisions. See 34 C.F.R. § 106.71.

1 of interest could be imputed, an institution may otherwise be in
2 compliance with Title IX because (1) there is substantial
3 statistical proportionality between athletic participation and
4 enrollment rates of an underrepresented sex; or (2) the
5 institution has a continuing practice of program expansion to
6 accommodate an underrepresented sex. Neal v. Bd. of Trustees of
7 Cal. St. Univs., 198 F.3d 763, 767-68 (9th Cir. 1999) (listing
8 three ways in which an institution may comply with Title IX: (1)
9 full and effective accommodation interest; (2) substantial
10 statistical proportionality between participation and enrollment;
11 or (3) continuing practice of program expansion). Thus, failure
12 to provide notice prior to filing suit may result in the type of
13 harm the notice requirement is intended to prevent, that is, a
14 court order diverting education funds where an institution is
15 unaware of the violation and willing to take corrective measures.

16 Moreover, "[i]t would be unsound . . . for a statute's
17 *express* system of enforcement to require notice to the recipient
18 and an opportunity to come into voluntary compliance while a
19 judicially *implied* system of enforcement permits substantial
20 liability without regard to the recipient's knowledge or its
21 corrective actions upon receiving notice." Gebser, 524 U.S. at
22 289-90 (emphasis in original). This is particularly true given
23 that Congress has conditioned the statute's most severe sanction
24 -- termination of federal funding -- upon notice and an
25 opportunity for voluntary compliance. 20 U.S.C. § 1682; 34
26 C.F.R. §§ 100.7(d)(1), 100.8(d). The court does not find that
27 Congress intended to create an implied enforcement scheme that
28 may impose greater liability, in the form of monetary damages

1 potentially exceeding the level of federal funding, absent
2 comparable conditions. Gebser, 524 U.S. at 290. "Because the
3 express remedial scheme under Title IX is predicated upon notice
4 to an 'appropriate person' and an opportunity to rectify any
5 violation . . . [the court] conclude[s], in absence of further
6 direction from Congress, that the implied damages remedy should
7 be fashioned along the same lines." Id.

8 In similar circumstances, the Eighth Circuit has also held
9 that notice and an opportunity to cure alleged violations of
10 Title IX are required to sustain a private damages action.
11 Grandson, 272 F.3d at 575-76. In Grandson, female student
12 athletes filed actions for monetary relief claiming a funding
13 disparity between the men's and women's soccer teams and
14 ineffective accommodation. Id. Relying on Gebser, the Eighth
15 Circuit upheld the district court's grant of summary judgment to
16 the University of Minnesota because "[t]here was no allegation of
17 prior notice of [plaintiffs'] complaints to appropriate UMD
18 officials, no allegation of deliberate indifference by such
19 officials, and no allegation [plaintiffs] afforded UMD a
20 reasonable opportunity to rectify the alleged violations." Id.
21 Because defendants in this case also seek summary judgment on the
22 basis plaintiffs failed to provide notice and an opportunity to
23 cure an ineffective accommodation claim, Grandson provides
24 persuasive support for the court's conclusion that notice and an
25 opportunity to cure are required to sustain a private damages
26 action.

27 In asserting that notice is not required because plaintiffs
28 are asserting a claim for ineffective accommodation, plaintiffs

1 argue the court's reliance on Gebser is misplaced. Specifically,
2 plaintiffs contend the Supreme Court's holding in Gebser is
3 limited to cases of sexual harassment because, in such cases, the
4 institution may not be aware of the alleged violation.

5 Plaintiffs contend an institution necessarily has knowledge of an
6 ineffective accommodation violation because it oversees the
7 athletic program. Thus, plaintiffs assert they may seek damages
8 without giving notice to the institution and an opportunity to
9 cure. However, the Gebser Court's reasoning applies equally to
10 both sexual harassment and ineffective accommodation claims. The
11 Supreme Court in Gebser was concerned about creating a judicially
12 implied remedial system that was broader than the express
13 enforcement scheme created by Congress, particularly where
14 damages may exceed a recipient's level of federal funding. 524
15 U.S. at 289-90. The Court therefore required that the remedial
16 scheme for private plaintiffs mirror the remedial scheme mandated
17 for federal enforcement agencies. Id. If the court adopted
18 plaintiffs' position, it would create an implied enforcement
19 scheme with the potential to impose greater liability on an
20 institution without conditions comparable to the express remedial
21 scheme provided by Congress. See id. The Supreme Court's
22 analysis in Gebser is therefore equally applicable to this case.

23 Moreover, there is nothing in the statute or its
24 implementing regulations to support the argument that Congress
25 intended a different remedial scheme to apply based on the nature
26 of the Title IX claim. Section 902 broadly advises that no
27 remedial actions shall be taken by a federal enforcement agency
28 until it "has advised the appropriate person or persons of the

1 failure to comply with the requirement and has determined that
2 compliance cannot be secured by voluntary means." 20 U.S.C. §
3 1682. Similarly, the regulations instruct agencies to resolve
4 matters "by informal means wherever possible" and abstain from
5 taking action until "the responsible Department official has
6 determined that compliance cannot be secured by voluntary means
7 [and] the recipient or other person has been notified of its
8 failure to comply and of the action to be taken to effect
9 compliance." 34 C.F.R. §§ 100.7(d)(1), 100.8(d). Notably absent
10 from these provisions is language limiting their application to
11 sexual harassment claims. The court will not infer an intent on
12 the part of Congress to create an implied scheme differentiating
13 between sexual harassment and ineffective accommodation claims
14 where the express scheme contains no such distinction.

15 Plaintiffs argue that under Davis v. Monroe County Bd. of
16 Educ., 526 U.S. 629, 642 (1999), and Jackson v. Birmingham Bd. of
17 Educ., 544 U.S. 167, 174 (2005), notice is not required where an
18 institution intentionally violates Title IX. However, Davis and
19 Jackson implicitly support the conclusion that notice and an
20 opportunity to cure specific violations are prerequisites for
21 private damages claims under Title IX. In Davis, the Supreme
22 Court held that an institution can be liable for student-to-
23 student sexual harassment where it exhibited "deliberate
24 indifference to known acts of harassment." 526 U.S. at 643
25 (emphasis added). In that case, the complaint alleged that the
26 defendants had knowledge of the alleged violation because
27 plaintiff or her mother reported each of the incidents to the
28 classroom teacher, another classroom teacher, and the school

1 principle over several months. Id. at 634-35. Further, the
2 institution had an opportunity to cure the violation over several
3 months after such notice was given, but it deliberately failed to
4 take action. Id. at 635, 644. Rather, it was only after more
5 than three months of reported harassment, that plaintiff was
6 allowed to change her classroom seat so that she no longer sat
7 next to petitioner. As such, the Supreme Court's holding in
8 Davis supports the holding that notice and an opportunity to cure
9 is required.

10 Similarly, in Jackson, the Court held an institution is
11 liable for retaliation against a coach that complains of sex
12 discrimination. 544 U.S. at 183. In that case, the complaint
13 alleged that the defendant had knowledge of the alleged violation
14 because the plaintiff basketball coach complained to his
15 supervisors about the unequal treatment of the girls' basketball
16 team at the institution. Id. at 171. The plaintiff's complaints
17 went unanswered. Id. at 171. Subsequently, instead of
18 addressing the complaints or curing the alleged violations, the
19 defendant allegedly retaliated against the plaintiff by giving
20 him negative work evaluation and , ultimately, removing him from
21 his position as the girls' basketball coach. Id. at 172. Thus,
22 in Jackson, the defendant had an opportunity to cure the alleged
23 violations, but chose to take retaliatory action instead.
24 Therefore, like Davis, the Court's holding in Jackson supports,
25 rather than refutes, the court's holding that notice and an
26 opportunity to cure are required in Title IX cases.

27 Finally, plaintiffs contend that any reliance on Grandson is
28 misplaced because "it stands alone in applying Gebser to a claim

1 of intentional discrimination." (Pls.' Opp'n to Defs.' Mot. for
2 Summ. J. (Docket #342), filed Mar. 6, 2008, at 37). However,
3 plaintiffs fail to recognize that there are less than two dozen
4 reported Title IX cases, and Grandson is the only reported case
5 to address the specific issue of notice and opportunity to cure
6 presented by this case. While Grandson is not controlling on
7 this court, it is persuasive authority for addressing whether
8 notice and an opportunity to rectify specific violations of Title
9 IX are required to sustain a private damages action.

10 **B. Notice and Opportunity to Cure in this Case**

11 Having concluded notice and an opportunity to cure specific
12 violations alleged by Title IX plaintiffs are required to sustain
13 a private damages action, the court considers whether plaintiffs
14 have raised a triable issue of fact as to notice and opportunity
15 to cure in this case. Alleged violations of Title IX are
16 generally divided into two categories of claims: unequal
17 treatment claims and ineffective accommodation claims. Unequal
18 treatment claims focus on, *inter alia*, inequalities of
19 scholarships, coaches' salaries, facilities, training, and travel
20 between male and female athletic programs. See 34 C.F.R. §
21 106.37(c), 106.41(c)(2)-(10); Pederson v. La. State Univ., 213
22 F.3d 858, 865 n.4 (5th Cir. 2000). Ineffective accommodation
23 claims determine whether equal athletic opportunities for members
24 of both sexes are available and effectively accommodate the
25 interest and abilities of members of both sexes. See 34 C.F.R. §
26 106.41(c)(1); Pederson, 213 F.3d at 865 n.4.

27 The undisputed evidence establishes that plaintiffs did not
28 provide defendants with notice and an opportunity to cure a

1 violation of Title IX for ineffective accommodation. Plaintiffs'
2 complaints filed with the OCR provide no indication of a claim
3 for a failure to provide sufficient athletic opportunities for
4 women. Plaintiff Ng's complaints allege unequal treatment in
5 recruiting, scholarships, competitive schedules, facilities, and
6 services at UCD. (Defs.' Ex. HHH ¶¶ 1-4; Defs.' Ex. KKK at W419.)
7 Similarly, plaintiff Mansourian's complaint alleges "ongoing
8 sexual discrimination" and asks for "equal rights, as women, so
9 that we can again wrestle on UCD's intercollegiate wrestling
10 team." (Defs.' Ex. LLL at W417.) Thus, the complaints do not
11 indicate that plaintiffs were challenging UCD's entire athletic
12 program.⁷ Rather, the complaints allege specific acts of unequal
13 treatment with respect to women's wrestling.⁸ Plaintiffs

14
15 ⁷ Plaintiffs argue that UCD was given adequate notice of
16 an ineffective accommodation claim with respect to the wrestling
17 team and, thereby, was given notice of a challenge to the
18 athletic program. Assuming *arguendo* a challenge to a single team
19 would notify an institution of a challenge to its entire athletic
20 program, plaintiffs' proffered evidence does not support their
21 assertion. Plaintiffs' complaints to defendants and the OCR do
22 not set forth an ineffective accommodation claim with respect to
23 either wrestling or UCD's entire athletic program. Rather,
24 plaintiffs' complaints allege unequal treatment of female
25 wrestlers.

26 ⁸ In its Memorandum and Order addressing defendants'
27 motion for judgment on the pleadings, the court construed that
28 plaintiffs' allegation that UCD violated Title IX by "choosing to
make fewer athletic opportunities to female students than to male
students" as sufficient to state a claim for ineffective
accommodation. (Mem. & Order at 23:2-7 (Docket #226), filed Oct.
18, 2007 (citing Pls.' Compl. ¶ 129 (Docket #1), filed Dec. 18,
2007.)) However, it was not clear until oral argument on
defendants' motion that plaintiffs were pressing such a claim.
As such, in keeping with the spirit of liberal notice pleading,
the court allowed the parties to submit supplemental briefing on
this issue due to the failure to incorporate such arguments with
any type of specificity or particularity in the moving papers.
In this supplemental briefing, defendants argued they were not
aware plaintiffs were pressing this theory of liability. (See
Defs.' Reply to Pls.' Supplement Br. at 1:12-18 (Docket #212),

1 complaints therefore fail to raise a triable issue of fact as to
2 whether defendants received notice and an opportunity to cure an
3 ineffective accommodation claim.

4 Plaintiffs argue they are not required to file a complaint
5 with the OCR to satisfy notice and opportunity to cure. The
6 court agrees. Indeed, plaintiffs could have satisfied these
7 requirements in any number of ways. However, the only evidence
8 of potential notice, beyond the complaints filed with the OCR, is
9 a meeting that occurred in January 2001 between defendant
10 Warzecka and plaintiffs Mansourian and Ng. (DRAF ¶ 70.) The
11 deposition testimony of Mansourian and Ng indicates the parties
12 discussed why women were removed from the wrestling team.
13 Specifically, Mansourian and Ng assert the parties discussed that
14 women wrestlers were "way too much liability for the UC," that
15 female wrestlers could not waive liability, that the NCAA does
16 not support mixed wrestling teams, and that women interested in
17 wrestling needed to "do the club sports." (See Pls.' Ex. B:33 at
18 189-199 (Docket #334), filed Mar. 6, 2008; Pls.' Ex. B:38 at 173-
19 76 (Docket #335), filed Mar. 6, 2008.) Thus, the evidence fails
20 to establish plaintiffs notified defendants of a complaint for
21 ineffective accommodation during the meeting with Warzecka.
22 Accordingly, plaintiffs have not raised a triable issue of fact
23 as to whether they otherwise provided UCD notice and an
24 opportunity to cure.

25 Plaintiffs also assert that requiring notice of specific
26 violations of Title IX imposes an unprecedented burden on

27 _____
28 filed Aug. 17, 2007.)

1 plaintiffs to allege violations with a high degree of specificity
2 in OCR complaints. Plaintiffs contend that requiring potential
3 litigants to distinguish between an unequal treatment claim and
4 an ineffective accommodation claim is a burden not contemplated
5 by the statute or even required by the pleading standard set
6 forth in the Federal Rules of Civil Procedure. Contrary to
7 plaintiffs' assertion, the court's holding does not require Title
8 IX plaintiffs to plead their allegations with precision or
9 specificity. However, the allegations must provide some
10 indication of the basis for the institution's non-compliance so
11 that an institution may attempt to remedy the situation
12 voluntarily. The evidence simply fails to establish that
13 plaintiffs gave defendants notice of a Title IX claim for failing
14 to provide enough athletic opportunities to female athletes.

15 In the alternative, plaintiffs contend that even if they did
16 not provide notice of an ineffective accommodation claim,
17 defendants should have been on notice that plaintiffs were making
18 such a claim because the OCR actively investigated program-wide
19 non-compliance with Title IX as a result of plaintiffs'
20 complaints.⁹ However, the evidence proffered by plaintiffs fails
21 to support this assertion. Moreover, even if the OCR conducted

22
23 ⁹ Plaintiffs implicitly argue that if defendants knew of
24 the alleged ineffective accommodation violation, the absence of
25 any complaints directed at this specific type of violation by
26 plaintiffs is immaterial. The court notes that this argument
27 neglects the requirement that defendants be given an opportunity
28 to cure the violations alleged by an aggrieved party. However,
because, as set forth *infra*, plaintiffs have not presented
evidence that the OCR actively investigated a complaint of
program-wide violations, that defendants were aware the OCR was
conducting such an investigation, or that defendants were
informed by the OCR that there were any such violations, the
court need not reach the merits of this argument.

1 an investigation into alleged program-wide violations, plaintiffs
2 fail to present evidence that defendants were on notice of any
3 program-wide violation as a result.

4 First, plaintiffs cite to the deposition testimony of
5 Swanson, which they allege demonstrates that "the majority of the
6 [OCR investigation] was spent on the issue of women's
7 opportunities." (Pls.' Ex. B:55 at 104:19-20 (Docket #336),
8 filed Mar. 6, 2008.) The deposition testimony does not support
9 this assertion. Swanson's testimony establishes that the OCR
10 investigated the issue of women's athletic opportunities *in*
11 *wrestling*:

12 I think that the meeting was much more directed to the
13 opportunity for women on the team, what had taken place
14 in the past, what we were willing to do from this point
15 forward. Concerns that had we really discriminated
16 against these women, had we taken away the opportunity
17 to be involved as they had been in the past.

18 (Pls.' Ex. B:55 at 104:1-8.) Swanson's testimony does not
19 establish that the OCR investigated the athletic program's
20 compliance with Title IX. Therefore, plaintiffs have not raised
21 a triable issue of fact as to notice and opportunity to cure
22 based on this testimony.

23 Second, plaintiffs cite a letter from a UCD official in
24 support of their contention that the OCR investigated program-
25 wide compliance with Title IX. The letter opens, "[UCD]
26 welcome[s] the opportunity to have the [OCR] review [UCD's]
27 athletic gender equity compliance with Title IX." (Pls.' Ex.
28 A:35 (Docket #335), filed Mar. 6, 2008.) This statement is
merely an introductory paragraph containing a basic salutation to
the OCR, not a concession that UCD was aware of a claim for

1 ineffective accommodation. In fact, the very next paragraph of
2 the letter begins, "I would like to take this opportunity to
3 respond to the sexual discrimination complaint filed by three UC
4 Davis female students who participate with our NCAA Division I
5 men's wrestling team." (Pls. Ex. A:35 ¶ 2.) Thus, the letter
6 indicates the OCR investigated discrete acts of discrimination
7 with respect to women's wrestling. Plaintiffs therefore have not
8 raised a genuine issue of material fact on the basis of this
9 letter.

10 Third, plaintiffs argue the deposition testimony of Warzecka
11 establishes that the OCR investigated the amount of athletic
12 opportunities UCD provided all female athletes. In his
13 deposition, Warzecka was asked whether the OCR investigated all
14 Title IX issues at UCD or merely the issues surrounding women's
15 wrestling. (Pls.' Ex. B:65 at 368:24-369:1 (Docket #337), filed
16 Mar. 6, 2008.) Warzecka responded:

17 [The OCR] responded to a complaint that the four women
18 made. And did their--did they take latitude to look at
19 other things outside of that complaint? Yes, they did.
20 . . . And I feel a lot of the questions they asked
helped them provide background of how we do things at
UC Davis and how we handle club sports.

21 (Pls.' Ex. B:65 at 369:2-12.) While Warzecka's response
22 indicates the OCR asked questions about matters outside the
23 complaints, it does not establish the OCR investigated program-
24 wide compliance with Title IX. Rather, Warzecka indicates he
25 understood such questions to provide necessary background
26 information. Because Warzecka's testimony does not establish the
27 OCR investigated program-wide compliance or that UCD understood
28 the OCR was conducting such an investigation, plaintiffs have

1 failed to raise a triable issue of fact with respect to actual
2 notice and opportunity to cure.

3 Plaintiffs' assertion that the OCR investigated program-wide
4 compliance also fails because the voluntary resolution plan
5 adopted by the OCR following its investigation made no findings
6 with respect to program-wide violations. Instead, the plan dealt
7 exclusively with women's wrestling. Specifically, the plan
8 required UCD, *inter alia*, to encourage all men and women "to
9 compete for a position on the wrestling team," to "recruit the
10 best qualified wrestlers, irrespective of gender," to allow
11 members of the club wrestling team to practice concurrently with
12 members of the varsity wrestling team, to provide the club
13 wrestling team medical insurance service and use of facilities
14 equal to other university club sports, and to encourage members
15 of the club wrestling team to participate in the open wrestling
16 tournament sponsored by UCD. (Pls.' Ex. A:34 at 2 (Docket #327-
17 5), filed Mar. 6, 2008.)¹⁰ The OCR found that by taking these
18 steps, a "rapid resolution of the issues" could be reached.
19 (Pls.' Ex. A:34 at 1.) The plan's limited subject matter and
20 finding that issues could be resolved through action directed
21 solely at the wrestling team indicates that no investigation was
22 taken into UCD's program-wide compliance. At the very least, it
23 indicates that UCD was not on notice of any program-wide
24 violation as a result of the OCR's investigation. Thus, there is

25
26 ¹⁰ Plaintiffs object to defendants' request for judicial
27 notice of the cited evidence. (See Pls.' Opp'n to Judicial
28 Notice (Docket #323), filed Mar. 6, 2008.) The court overrules
this objection as plaintiffs also submitted the very evidence to
which it objects.

1 no evidence to support the assertion that the OCR investigated
2 anything other than the unequal treatment of female wrestlers at
3 UCD.

4 Finally, plaintiffs contend that UCD was on notice of an
5 ineffective accommodation claim due to the public outcry in
6 response to removal of females from the wrestling team. However,
7 "[a] vigorous public debate on these issues does not demonstrate
8 that [the university] knew of systemic non-compliance."

9 Grandson, 272 F.3d at 575. The evidence submitted by plaintiffs
10 demonstrates that the public outcry in this case was in response
11 to the allegedly gender biased and discriminatory removal of
12 women from the wrestling team. None of the evidence relating to
13 the public's response contains allegations or statements relating
14 to program-wide compliance or the failure of UCD to sufficiently
15 provide athletic opportunities to women.¹¹ Accordingly, the
16 cited evidence is not sufficient to raise a triable issue of fact
17 as to notice and opportunity to cure.

18 The court is mindful that Congress enacted Title IX to
19 prevent the use of federal resources to support sex-based
20 discrimination. 20 U.S.C. § 1681; Cannon, 441 U.S. at 704.
21 There is no question that student athletes are discriminated
22

23 ¹¹ Defendants' object to various letters, flyers,
24 newspaper articles, and other evidence of the public's outcry
25 following the removal of women from the wrestling team as
26 hearsay. (See Defs.' Objections to Evidence ¶¶ 1-10 (Docket
27 #344), filed Mar. 31, 2008.) However, the court does not
28 consider the subject evidence for the truth of the matter
asserted, but rather for the effect it had on UCD (i.e. notice).
Payne, 944 F.2d at 1472. Moreover, consideration of this
evidence does not prejudice defendants as it is not sufficient to
raise a triable issue of fact as to notice. Defendants'
objection is overruled.

1 against and suffer harm when subject to unequal treatment or
2 ineffective accommodation on the basis of their sex. However,
3 the limited issue presented by the facts of this case on this
4 motion is whether an institution may be held liable for damages
5 for a claim of ineffective accommodation, absent a showing of
6 notice by plaintiffs and an opportunity for defendants to rectify
7 the alleged non-compliance. Given Title IX's express enforcement
8 scheme, the Supreme Court's analysis in Gebser, and the Eighth
9 Circuit's opinion in Grandson, the court concludes a suit for
10 private damages cannot be sustained until notice and opportunity
11 to cure are given to an institution allegedly out of compliance
12 with Title IX. Plaintiffs have failed to demonstrate a triable
13 issue of fact regarding whether such notice and opportunity were
14 given in this case.

15 **CONCLUSION**

16 For the foregoing reasons, defendant's motion for summary
17 judgment is GRANTED. The Clerk is directed to close the file.

18 IT IS SO ORDERED

19 DATED: April 23, 2008.

20
21 

22

FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE