To: Dr. John Kelly, President  
David L. Kian, Vice President and General Counsel  
Dr. Larry Faerman, Associate Vice President and Dean of Students  
Myra Morga, Director of External Relations  
Dr. Gary Perry, Provost and Vice President for Academic Affairs  
Brian White, Vice President and Director of Athletics  
Danielle Daniel, Associate Athletic Director, Internal Operations, SWA, Deputy Title IX Coordinator  
Samantha Sweeney, Associate Athletic Director, Compliance  
Dr. Kim Dunn, Faculty Athletics Representative  
Angie Gifford, University Ombudsman  
Emily Lawless, Student Body President  
Audrey Pusey, Title IX Coordinator for Students  
Michael D’Eugenio, Director of Development, Student Affairs  
Pablo E. Paez, Chair of Alumni Association Board of Directors  
Kristine Talley, Panhellenic President

From: Nancy Hogshead-Makar, CEO, Champion Women  
Date: May 8, 2018  
Re: Legal Memo, Florida Atlantic University’s Title IX Athletic Department Compliance

On June 23, 2018, Title IX will celebrate its 46th anniversary. The law, when properly applied, will continue to open up sports opportunities for millions of girls and women. Sports participation opportunities are rare and rationed, serving less than 4% of Florida Atlantic University’s (“FAU”) student body, yet these opportunities provide life-long benefits for participants in educational attainment, employment, and health. However, by every measurable criterion, women lag behind men, including opportunities to play, scholarship dollars, and treatment. This letter is part of a Champion Women project to remedy sex discrimination in athletic departments across the country.

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

1. Equal Opportunity to Participate; Equal Quantitative Educational Opportunity

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

• Under Prong 1, a school can show that the percentage of male and female athletes is the same as the percentage of male and female students enrolled in the school (the proportionality test), OR;

• Under Prong 2, the school can show it has a history and a continuing practice of expanding opportunities for female students, OR;

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

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

We have looked at the past fourteen years of FAU’s EADA report.⁴ Unless there is some information that is not represented in your EADA report, it appears that FAU is discriminating against its female students in its athletic offerings.

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² A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. at 71413 (1979), available at [https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html.](https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html) For ease of reading, I have substituted “female athletes” instead of the verbiage in the regulations that refers to protecting the “underrepresented gender.” While a few women’s colleges apply the test to men, the overwhelming majority of schools apply the test to women, as it does in The University of Florida.
³ See Chalenor v. University of North Dakota, No. 00-3379ND (8th Cir. May 30, 2002); Pederson v. Louisiana State University, 213 F.3d 858, 879 (5th Cir. 2000); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763, 770 (9th Cir. 1999); Horner v. Kentucky High School Athletic Association, 43 F.3d 265, 274-75 (6th Cir. 1994); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); Cohen v. Brown University, 991 F. 2d 888 (1st Cir. 1993) (Cohen I), and 101 F.3d 155, 170 (1st Cir. 1996), cert. denied. 520 U.S. 1186 (1997) (this case was before the First Circuit twice, first on Brown University’s appeal of a preliminary injunction granted by the district court (Cohen I), and the second time after a trial on the merits (Cohen II)); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824, 828 (10th Cir. 1993), cert. denied, 510 U.S. 1004 (1993); Williams v. School District of Bethlehem, 998 F.2d 168, 171 (3d Cir. 1993).
⁴ UF’s Equity in Athletics Disclosure Act report is available here: [https://ope.ed.gov/athletics/#/K.](https://ope.ed.gov/athletics/#/K) Each year, colleges and universities provide the Department of Education with data from their athletic department regarding numbers of participation opportunities provided to the students, scholarships, staffing, and revenues and expenses, that are broken down by the men’s and women’s teams.
The data from the 2016-2017 year is an aberration. It does not appear that FAU added a sport team during that year; rather it suddenly counted its women’s track and field program as having 222 participants. The data for the previous year shows 98 participants and for the 2017-2018 school year the online roster shows only 31 participants. As a result the data will not be used in further conclusions of this memo.

The University of South Florida was called out for this practice of counting athletes that were not actually participating on a sports team. As a result the 2016-2017 data will not be included.

### Prong 1: FAU cannot comply with Prong 1.

Although in the 2015-20176 academic year women represented 55.7% of the student body, FAU provided them with just 30.8% of the athletic opportunities. In order to provide women with the same opportunities to participate in sports,

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6 Biediger v. Quinnipiac University, 691 F.3d 85 (2nd Cir. 2012) (Under a policy interpretation made by the Department of Education’s Office of Civil Rights (OCR), for an athlete to be counted under Title IX, he or she must be afforded a participation opportunity that is real, not illusory, in that it offers the same benefits as would be provided to other bona fide athletes).
FAU must add 240 female athletes or an average of 203 female athletes per year over the past fourteen years.\(^7\)

**Prong 2:** FAU cannot comply with Prong 2, which requires a showing of a “history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex.”\(^8\) In the past fourteen years, FAU participation rates have fluctuated, reaching a high of 177 in 2014-2015, and a low of 121 in 2007-2008. However, after reaching a high in 2014-2015 the numbers declined once again to 132 the following year. This number is lower than the first year FAU reported their data, which was 2003-2004 when the school had 159 participants. Therefore, it cannot be said that FAU can comply with Prong 2 rather than Prong 1 because the school shows no recent and continuous history and practice of adding opportunities for women in its athletics offerings.

**Prong 3:** FAU cannot comply with Prong 3, which requires a showing that women have no unmet demand for more sports opportunities; that their interests and abilities are accommodated by the current program. To measure compliance with Prong 3, the OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students and admitted students in particular sport(s).\(^9\) Since FAU recruits nationally, the interest for sports is evaluated on the same national basis. Based on EADA data, FAU is offering less than 4%—or just 3.21%—of its student-body a sports experience, as compared with 60% of the typical incoming freshmen class. Given the institution’s national recruiting pool, combined with the small number of sports opportunities offered, FAU will have a large percentage of students (both male and female) who would compete on a new team if offered.

**Recruiting:** In 2016-2017, FAU spent $409,801 recruiting its male athletes, and just $169,415 recruiting female athletes. FAU must provide this type of benefit equally in its overall athletic offerings. In the off-chance that FAU does not have students ready-and-willing to play the new sports offered, money comparable to sums spent on men’s recruiting can bring them to the institution.

2. **Equal Scholarship Opportunities**

If FAU complied with Title IX participation opportunities and provided women with the additional 240 athletic opportunities, women would be entitled to an additional $2,033,310 in

\(^7\) Starting from the duplicated number of athletes, that number equals 163.

\(^8\) Mansourian v. Bd. Of Regents of Univ. of Cal., 594 F. 3d 1095, 1108. (9th Cir. Cal. 2010) (schools must have both a history and continuing practice of expanding opportunities for women for Prong 2 compliance.).

\(^9\) A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. At 71413 (1979), available at https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html. Other factors courts and the OCR will use to evaluate compliance with Prong 3 can be found here: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf.
scholarship dollars per year. These are important sources of funding for educational attainment that women are being denied because they are women.

3. **Equal Treatment; Equal Qualitative Educational Experience**

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

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

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

4. **Equal Compensation for Coaches of Women’s Teams**

   In addition, the EADA reports on FAU’s exceedingly large discrepancies in coaching compensation. In 2016-2017, the average men’s salary was $199,575 while the average women’s salary was $79,304. In addition, the average male assistant coaching position is compensated at $89,360. Assistant coaches to women’s teams, meanwhile, earn less than half of what their male counterparts earn, at $36,257. The average male assistant coaching position earns more than the average female head coaching position. This creates the obvious Equal Pay Act and Title VII concerns for coaches.

¹⁰ Parker v. Franklin County Community School Corp., 667 F.3d 910 (7th Cir. 2012).

To be clear, employer-schools cannot pay a coach less because the coach is a woman or because the employee coaches women athletes. The “market rate” defense does not allow schools to split the market into two; one market for men’s basketball coaches and another for women’s basketball coaches. Schools can justify unequal pay if the male coach brings in more money, but only if the school provides the women’s coaches with the same marketing, resources and staffing to bring in that revenue. Moreover, schools cannot discriminate in the provision of these resources to the women’s teams. Similarly, if coaches are evaluated on their team’s success, schools must provide the same resources to achieve that success, including recruiting resources and program presentation.\(^\text{12}\)

The substantial pay inequities at FAU also raise equal treatment concerns under Title IX. Coaches are not fungible, and they directly contribute to the educational experience that the athlete receives. Women athletes have the right to the same educational opportunity, which includes receiving coaches of equal quality and competence. If the large pay discrepancies are defended on a market rate for that particular coach because the women’s coach is less competent, has less education, or has less experience; it would indicate that women athletes are not receiving the same quality coaching that UF is providing to the male athletes. To remedy UF’s enormous discrepancies, please refer to “Creating Gender Neutral Coaches’ Employment and Compensation Systems; a resource manual.”\(^\text{13}\)

Title IX, in interpreting regulations and case law, have been uncommonly consistent: schools are expected to provide their male and female students with equal athletic opportunities, treatment and scholarships. After almost 45 years, it is time for FAU to fully comply with Title IX. The goal of gender equity in athletics cannot be relegated to the athletics department or legal counsel’s office. We sincerely hope that FAU will be a leader in this area, and not just strict legal compliance that is performed grudgingly, but in service to the larger goals of the University.

Please let us know if we can provide further guidance. I look forward to hearing your plans to rectify the current inequalities before May 30, 2018. Please respond to this correspondence by email or by phone.

Sincerely,

\[\text{signature}\]

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

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