To: Kent Fuchs, President
   Amy M. Hass, Interim General Counsel
   Heather White, Associate Vice President and Dean of Students
   Joseph Glover, Provost and Senior Vice President
   James W. Heavener, Chair of the Board of Trustees
   Scott Stricklin, Athletic Director
   Lynda Tealer, Executive Associate Athletic Director/SWA
   Jamie McCloskey, Senior Associate Athletic Director, Compliance
   Kim Green, Associate Athletic Director, Compliance
   Bonnie Moradi, Chair, Women’s and Gender Studies
   Ronald L. Anderson, University Ombudsman
   Ian Green, Student Body President
   Dr. Michael Sagas, Faculty Athletics Representative
   Dr. Russell Froman, Title IX Coordinator
   Tom Mitchell, Vice President, UF Advancement
   Matt Hodge, Interim Alumni Association Executive Director
   Madi Rigdon, Panhellenic President
   Barbra Bengston, University Women’s Club President
   President, Florida Association of Women Lawyers UF
   Duuna Desir, Women of Respect, Achievement, Perseverance, and Service
   Eric Esterline, Advisor for Association for Women in Sports Media

From: Nancy Hogshead-Makar, CEO, Champion Women
Date: May 8, 2018
Re: Legal Memo, The University of Florida’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 2% of the University of Florida’s (“UF”) 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 UF’s EADA report.⁴ Unless there is some information that is not represented in your EADA report, it appears that UF 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]. 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]. Each year, colleges and universities provide the Department of Education with data from their athletic department regarding
Prong 1: UF cannot comply with Prong 1. Although in the 2016-2017 academic year women represented 56.2% of the student body, UF provided them with just 45.7% of the athletic opportunities. In order to provide women with the same opportunities to participate in sports, UF must add 126 female athletes or an average of 134 female athletes per year over the past fourteen years.\(^5\)

Prong 2: UF cannot comply with Prong 2, which requires a showing of a “history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex.”\(^6\) In the past fourteen years, UF participation rates have actually shrunk, from 261 female athletes participating in 2003 to 240 in 2016-2017. Moreover, in 2003 UF had a high of 261 athletes, and was at the lowest in 2013 with 202 athletes. Therefore, it cannot be said that UF can comply with Prong 2 rather than Prong 1 because the school shows no continuous history and practice of adding opportunities for women in its athletics offerings.

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.

\(^5\) Starting from the duplicated number of athletes, that number of athletes equals 148.

\(^6\) Mansourian v. Bd. Of Regents of Univ. of Cal., 594 F. 3d 1095, 1108. (9th Cir. Cal. 2010) (schools must have both a history and continuing practice of expanding opportunities for women for Prong 2 compliance.).
**Prong 3:** UF 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). Since UF recruits nationally, the interest for sports is evaluated on the same national basis. Based on EADA data, UF is offering less than 2%—or just 1.72%—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, UF will have a large percentage of students (both male and female) who would compete on a new team if offered.

**Recruiting:** In 2016-2017, UF spent $1,545,320 recruiting its male athletes, and just $610,891 recruiting female athletes. UF must provide this type of benefit equally in its overall athletic offerings. In the off-chance that UF 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 UF complied with Title IX participation opportunities and provided women with the additional 126 athletic opportunities, women would be entitled to an additional $1,397,433 in scholarships per year. These are important sources of funding for educational attainment that women are being denied because they are women.

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

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

   (1) Provision and maintenance of equipment and supplies;

   (2) Scheduling of games and practice times;

   (3) Travel and per diem expenses;

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

8 Parker v. Franklin County Community School Corp., 667 F.3d 910 (7th Cir. 2012).
4. **Equal Compensation for Coaches of Women’s Teams**

In addition, the EADA reports on UF’s exceedingly large discrepancies in coaching compensation. In 2016-2017, the average men’s salary was $1,163,592 while the average women’s salary was $279,798. In addition, the average male assistant coaching position is compensated at $292,066. Assistant coaches to women’s teams, meanwhile, earn less than half of what their male counterparts earn, at $97,392. 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.

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.⁹

The substantial pay inequities at UF 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

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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.”

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 UF 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 UF 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,

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

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