

Nancy Hogshead-Makar
904-384-8484
Internet Address:
Hogshead@ChampionWomen.org

August 6, 2015

University of Southern Mississippi, Gulf Coast
Barber Building, Gulf Park Campus
730 East Beach Boulevard
Long Beach, MS 39560

Dear Helen Grant,

Thank you for speaking with me on Monday, when we spoke for 1.6 hours. *Champion Women* is here to provide assistance to schools that are serious about coming into compliance with the law.

I'm writing because, based on what I heard, I'm concerned about the messages you are sending your clients that I'll lay out here.

Title IX compliance requires fortitude, planning, and a long-term commitment to fairness and doing the right thing, both for the institution and for the male and female students attending. There will always be excuses for those that do not wish to provide equality. Outside consultants should not cave to excuses that have been dismissed both legally and empirically. They should be clear what the law requires, offer informed suggestions on how to move towards equality, and be mindful of the harms that befall women – long term academic, professional and health consequences – who are prevented from sports participation.

First, would you let me know if you recorded our conversation? Other than taking notes?

Second, is this a complete list of the schools that you are representing?

- University of Southern Mississippi (where you're an instructor)
- Florida Atlantic University
- Florida International University
- Stephen F. Austin State University
- Troy University
- Sam Houston State University

Third, I'd like to summarize points we discussed on our phone call, to make sure I heard them accurately.

Below are the justifications you stated as to why schools are not complying with Title IX:

- "The problem is the budget."

- “Women don’t want to play sports now that they have so many professional opportunities. Women can now pursue careers in medicine, law, business.”
- “The problem is that so many women want to pursue higher education, and aren’t interested in playing sports.”
- “Women don’t want to play rugby in the south.”
- “Title IX brought big changes; it made school have to start sports for women, but didn’t cause them to fund it at the same level in all the program areas, including the maximum number of coaches, facilities, equipment and all the others.”
- Schools can’t comply with Prong 1 of Title IX, now that so many women are in higher education; enrollment is now up to 60% women at some schools.
- Stephen F. Austin cut equestrian because it was too expensive.

Your personal beliefs about the law, a school’s failure to comply with the law, and the future of women’s equality in athletics include:

- “The OCR won’t allow schools to comply with Prong 3.”
- “Why are we saying women are being discriminated against just because a school doesn’t meet Prong 1?”
- “A school’s only option is to cut men’s sports.”
- You believe that Title IX forced JMU to cut women’s programs.
- You believe that schools are not *intentionally* discriminating against women when they are not complying with the 1979 three-part test.

Your personal beliefs about the future of women’s sports:

- Sports parity, or gender equality, “will never happen.”
- “We need to change the law.”

In addition, you are not alarmed by the downward trend in women in coaching because:

- “Coaching is a low-paying job, and women don’t want to coach because they have so many other fields to get into now that used to be closed to them.”

We discussed that you have information that is not reflected in the EADA, which may show compliance with Prong 3. You said that you would be responding to me with this additional information.

Finally, to sum up our conversation, you also asked if *Champion Women* was going to file a lawsuit against these schools.

Let me know if I’ve erred in any of these representations about our telephone conversation.

A few quick Google searches will show you that the assertions I heard are myths, and have been repeatedly debunked, both empirically and as legal conclusions in courts of law. I’ll address the types of beliefs you stated, but overall I’m concerned that you are not providing good legal and ethical guidance for your clients, and that your advice is short-changing women a life-changing educational experience at these schools.

I think it is important to recognize that the opportunity to play a sport in college is a rare, rationed educational opportunity for both men and women. Nationally, just 1.9% of those high school students that play a sport are offered a sports experience in D1.

<http://www.scholarshipstats.com/varsityodds.html> Both men and women would likely rush to fill new athletic teams. Because colleges and universities constrict sports opportunities, it is important to do so fairly; particularly when we know that sports participation creates women leaders.

In this regard, your assertion that women now have more opportunities to do other things, so they aren't interested in sports participation, is exactly backwards. Women athletes are more likely to do other things – to move into STEM fields, to work full-time, to rise to the highest levels of business – because they play sports. Sports participation is not merely *associated* with future success – Betsey Stevenson's research shows that sports participation *causes* future success. See, e.g., <http://blogs.wsj.com/economics/2010/02/08/economists-link-athletics-to-success-in-school-job-markets/> “A 10 percentage-point rise in girls' participation in high school sports leads to a 1 percentage point increase in female college attendance and a 1 to 2 percentage point increase in female labor-force participation.”

<http://www.forbes.com/sites/alanaglass/2013/06/24/ernst-young-studies-the-connection-between-female-executives-and-sports/> “E&Y research found that 96% of C-suite women were athletes. Moreover, in comparing C-level female respondents to other female managers, far more had participated in sports at a higher level. Ultimately, 55% of the C-suite women had played sports at a university level, compared with 39% of other female managers.” Given the boost to future success that a sports experience provides participants, it is important to dole these opportunities out fairly.

“Prong 1 was unfair when women were 60% of the student body.”

For a good overall explanation of the 3-Prong test, see, Kristen Galles and Jocelyn Samuels: *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity* <http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1404&context=sportslaw> As this article states, and as I tried to explain on the phone: because sports are sex-segregated, under proportionality, schools are providing men and women with the same ratio-to-opportunities to participate. In other words, proportionality provides both men and women with a 1-in-20 chance to play a sport, if the school provided 5% of the student body with an athletic opportunity. Both men and women would have an equal opportunity to play sports, even when *either* men or women are disproportionately represented in the student-body.

“We can't afford to be fair.”

The excuse “we can't afford equality” has been a common refrain since the law was passed. Courts have held these budget-excuses are invalid reasons for denying women new sports teams; and repeated by the OCR. Congress has heard testimony to this effect repeatedly over the years, and the hearings and submissions have not resulted in any changes to the law or regulations. Moreover, budget concerns aren't a valid reason to allow a school to drop a sport and deepen inequality. High cost may be a valid reason for choosing one sport over another, but it is not a reason to allow deepening inequality, like dropping equestrian at Stephen F. Austin State University without simultaneous replacement of that sport.

Over the past 10 years, more than a billion dollars in new media money rolled into the NCAA and the BCS conferences, yet women actually saw a backslide in gender equity. There has been a similar backslide in high school athletics.



“Women aren’t interested in sports.”

If it is true that “women aren’t interested in sports” or aren’t interested in a particular sport like rugby, then the school should have no problem complying with Prong 3. Indeed, the legal test is intended to measure just such an idea; whether girls do indeed have the interest and ability to play at the school.

See <http://www.nwlc.org/sites/default/files/pdfs/titleixdebunkingthemythstfactsheet.pdf>

“The OCR won’t allow schools to comply with Prong 3.”

As recently as 2010, under the current administration, the OCR has affirmed the validity of Prong 3. Indeed, most schools report to the OCR that they are complying with Prong 3.

The NCAA has a terrific secondary source for Prong 3 compliance, available here: <http://www.ncaapublications.com/productdownloads/EQT112.pdf> Please see pages 20 – 22. It specifically addresses the inability of a school to comply with Prong 3 when the school has cut a women’s sport.

The schools *Champion Women* has targeted will have a particularly difficult time complying with Prong 3, not because there is something wrong with the test, but because these schools have tiny athletic departments in comparison with their enrollment. These schools offer less than 5% of their student body with a sports experience, as compared with the national average of 60% of incoming freshmen who will be athletes. Again, sports are rare, rationed educational opportunities for both sexes. Sports opportunities at the schools receiving *Champion Women’s* letters are even more rationed than at most other schools.

“Lack of interest” is a stereotype that harms women; lulling consultants and schools to accept a constricted women’s athletic department. Instead, the reason the schools that you represent cannot comply with Prong 3 is that women *are enormously interested in playing sports.*

“A school’s only option is to cut men’s sports.”

72% of colleges and universities that have added women’s teams have done so without cutting

any teams for men (GAO 2001). This myth is addressed by ESPN here, #2:

<http://espn.go.com/espnw/title-ix/article/7729603/five-myths-title-ix>

There is nothing in Title IX or its policies that requires schools to cut or reduce men's opportunities in order to be Title IX compliant. It is a *permissible choice*, never a requirement. I wrote a law review article that included this discussion:

http://bclawreview.org/files/2013/01/04_hogshead-makar.pdf starting on page 474. As such, JMU had many choices as to how it would like to structure its athletic department. JMU's decision to move to a smaller athletic department, with a higher cost-per-athlete ratio, is permissible, but the choice of competitive levels is certainly not dictated by a law requiring fairness to men and women. Moreover, JMU could not have cut the three women's programs without relying on Prong 1, as cutting a women's sport precludes compliance with Prongs 2 and 3.

So please do not use these old, tired excuses as an excuse for discrimination, or allow your clients to do so. It does not serve you as a consultant or the institutions you represent, who are now at risk of bad press, an OCR complaint or a federal lawsuit. Most important, these excuses harm the women attending these institutions, who are unfairly denied a sports opportunity.

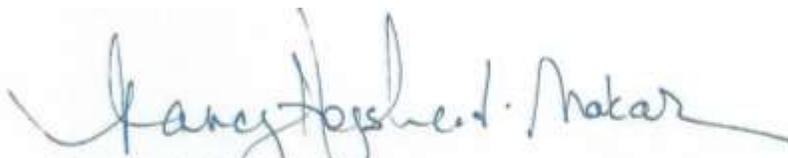
The meaning of *intentional* discrimination.

Intentional discrimination does not require demonstrating some animus or maliciousness on the part of the school. Intentional discrimination means intent to treat men and women athletes differently, including whether the school is rationing opportunities fairly between men and women. When a school designs its athletic department and chooses not to comply with one of the three-prongs, it will be deemed to have intended the foreseeable outcome of discrimination against the female athletes.

Finally, I replied to your question about *Champion Women's* intention to sue by expressing my sincere hope that universities could achieve gender equity in athletics without litigation and without an OCR complaint. The statute, the regulations and case law are uncommonly clear, and in those circumstances spending tax dollars, insurance payouts and institutional funds on OCR investigations and lawsuits isn't appropriate. In any other type of case, (such as a contract dispute, medical malpractice, tax evasion) where the law and the facts are clear, parties do not bring lawsuits.

The law is now 43 years old, and Title IX compliance cannot only happen when a school receives a sudden monetary windfall. Instead, equity is a planned result, representing a commitment from the school to treat men and women equally. I hope you will be part of that effort, for your clients and for the women attending these schools.

Sincerely,



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