



U.S. Department of Justice
Civil Rights Division
Educational Opportunities Section

SAS:WMP:MLT:ACP
SMH:ML:SM
DJ 169-11-69

U.S. Mail: 950 Pennsylvania Avenue, NW
4CON, Room 10.1613
Washington, D.C. 20530
Overnight: 4 Constitution Square
150 M Street NE, Room 10.1613
Washington, D.C. 20002
Phone: (202) 305-3488 (direct line)
Email: Michelle.Tucker@usdoj.gov
Anne.Parham@usdoj.gov

September 21, 2021

VIA ELECTRONIC MAIL

Leora Freedman
Associate Vice Chancellor and Deputy General Counsel
Office of General Counsel
The California State University
401 Golden Shore
Long Beach, CA 90802-4210
lfreedman@calstate.edu

Re: Summary of the Department's Title IX Investigation of San José State University and Related Findings

Dear Ms. Freedman:

We write regarding the U.S. Department of Justice's (the "Department") investigation into San José State University's ("SJSU") response to reports of employee-on-student sexual harassment, including sexual assault, within SJSU's Athletics Department ("SJSU Athletics"). The Department also investigated reports of retaliation by SJSU against SJSU Athletics employees. The investigation principally covered the period from the start of the 2008-09 academic year in August 2008 until June 2021 (the "Relevant Period"), and focused on allegations that a former SJSU athletic trainer (the "Athletic Trainer") engaged in unwelcome sexual touching of female student-athletes' breasts, groins, buttocks, and/or pubic areas during treatment in the SJSU training facility for more than a decade, and that SJSU retaliated against SJSU employees who alerted SJSU to the threat the Athletic Trainer posed or who otherwise engaged in related protected activity.

The Department, through its Civ

As described in more detail below, the Department found that during the Relevant Period, SJSU did not comply with Title IX and its implementing regulations in key respects, including in its response to allegations of sexual harassment against the Athletic Trainer, despite widespread knowledge and repeated reports of the allegations. As a result, student-athletes remained vulnerable to, and suffered, further sexual harassment. In addition, the Department found that SJSU retaliated against two SJSU Athletics employees (Employees “A” and “B”) for their roles in opposing conduct unlawful under Title IX. These employees experienced retaliation in the form of a negative performance evaluation and wrongful termination, among other adverse actions.

On September 21, 2021, the Department and the Board of Trustees of the California State University, on behalf of SJSU (California State University (“CSU”) and SJSU referred to collectively as the “University”), entered voluntarily into the attached Resolution Agreement to resolve the Department’s findings. The Department appreciates the University’s ongoing cooperation, its commitment to address sexual harassment and retaliation as memorialized in the Resolution Agreement, and the University’s recent steps to begin addressing the Department’s findings of non-compliance with Title IX. The Department also thanks the University’s leadership and each member of the University and SJSU community who provided relevant information to the Department during its investigation, especially the current and former students who bravely shared their personal experiences.

BACKGROUND

SJSU is a large, public university located in San José, California, and is one of the 23 campuses that make up the CSU system. The Department’s inquiry focused on SJSU Athletics. SJSU Athletics employs a sports medicine staff that includes full-time athletic trainers and certified graduate assistant athletic trainers responsible for the care of student-athletes. SJSU Athletics maintains 22 National Collegiate Athletic Association (“NCAA”) Division I men’s and women’s athletic teams as part of the Mountain West Conference.¹ From academic year 2009-10 through 2020-21, approximately one thousand female student-athletes participated on an SJSU athletic team, served and supported by SJSU’s athletic trainers.

SJSU’s Title IX practices and policies evolved during the Relevant Period. Prior to 2010, Title IX complaints involving employees were handled by SJSU’s Office for Equal Opportunity (“OEO”) within Human Resources, now University Personnel. In 2010, the University adopted systemwide Title IX policies, and campus-level Title IX administrators on each of the 23 CSU campuses, including SJSU, began to oversee Title IX cases, although SJSU did not employ a full-time Title IX Coordinator until 2015. Since then, SJSU has had significant turnover in the Title IX Coordinator position. For instance, since 2018, at least four different individuals served as Title IX Coordinator, with some serving only on an interim basis. SJSU also designated Deputy Title IX Coordinators in departments across the campus to support the Title IX Coordinator. The role of the Deputy Title IX Coordinators varied widely between departments, with little to no oversight. In some instances, Deputy Title IX Coordinators attempted to handle complaints independent of the Title IX Coordinator.

¹ *San Jose State University (SJSU)*, NCAA Directory, <https://perma.cc/MBL2-8Q3K>.

THE DEPARTMENTS INVESTIGATION

On June 29, 2020, the Department notified SJSU that it was initiating a Title IX compliance review into SJSU, specifically regarding allegations of employe-on-student sexual harassment and related retaliation within SJSU Athletics, and issued a Request for Information. During the Department's investigation, we viewed thousands of pages of University documents, including documents related to the 2009-10 and 2020-21 investigations into allegations against the Athletic Trainer, as well as related retaliation against SJSU Athletics employees.

The Department also spoke to a broad cross-section of SJSU constituents and conducted 35 interviews, including interviews with current and former SJSU administrators, coaches, athletic trainers, and staff, as well as interviews with current and former student-athletes. In addition, the Department created a community email address and toll-free phone number, through which the public was able to provide the Department with relevant information.

L EGA L STANDARDS

Title IX and its implementing regulations prohibit discrimination on the basis of sex in education programs and activities supported by recipients of federal financial assistance. The statute grants the Department, among other federal agencies, the authority to take administrative action to effectuate Title IX's nondiscrimination mandate, 20 U.S.C. § 1682. The regulations are aimed at preventing and addressing sex discrimination. Recipients of federal financial assistance agree to comply with these regulations as a condition of receiving funding.

I. Application of Title IX Nondiscrimination Mandate to Sexual Harassment

Sexual harassment is a form of discrimination covered by Title IX. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 649–50 (1999); *Webster v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett Cnty. Pub. Schs.*,

A school's assessment tool that has been an official part of its
take corrective action to end that discrimination is actual notice
Gebser, 524 U.S. at 290. No particular response is required;
sexual harassment by a Title IX official refuses to take
action to bring that harassment to an end.
Davis, 526 U.S. at 648. When a Title IX official refuses to take
action to bring that harassment to an end, the school is liable for
damages.

If the reason for taking the recipient to be *Id.* Pretext is established by showing that the employer's or can be proven indirectly by showing that the employer's offered explanation is unworthy of credence. *Id.*

Title IX does not require the employer to prove that the discrimination was intentional because retaliation claims are not subject to the same burden of proof as recognized in *Jackson*, 544 U.S. at 190. T. The Supreme Court has recognized that Title IX does not require the employer to prove that the discrimination was intentional. *Id.* at 181 (citation omitted). *Id.*

III. The Department's Title IX Procedural Requirements

The Department's Title IX regulations do not contain the same procedural requirements as the Department's review of SJSU's Title IX complaints. See 28 C.F.R. §4.135(a). The Department's Title IX regulations do not require the Title IX Coordinator to conduct an investigation of reports of sexual harassment. See *Id.* The Department's Title IX regulations do not require the Title IX Coordinator to conduct an investigation of reports of sexual harassment. See *Id.* The Department's Title IX regulations do not require the Title IX Coordinator to conduct an investigation of reports of sexual harassment. See *Id.*

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FINDINGS REGARDING SJSU'S COMPLIANCE WITH TITLE IX

Consistent with Title IX, the Department reviewed SJSU's compliance with Title IX and found that SJSU violated Title IX causing significant and preventable injuries to students and employees.

I. SJSU's Response to Allegations of Sexual Harassment against the Athletic Trainer Violated Title IX

Based on our investigation, the Department¹ found that SJSU violated Title IX in its response to known sexual harassment² by the Athletic Trainer, rendering additional students vulnerable to sexual harassment.

In December 2009, Employee A learned that multiple members of an athletic team were sexually harassed by the Athletic Trainer during treatment.³ Specifically, student-athletes reported to Employee A that the Athletic Trainer touched their breasts, groins, buttocks, and/or pubic areas during treatment that was, at times, described to them by the Athletic Trainer as “trigger-point therapy” or “pressure-point therapy,”⁴ and that the Athletic Trainer’s touching was outside of the area of their injuries. Employee A raised the student-athletes’ reports to Employee A’s supervisor, who in turn alerted the Athletic Director, who contacted OEO to initiate an investigation. The Department’s investigation revealed many deficiencies in OEO’s 2009-10 investigation. For example, OEO did not interview—or even reach out to—all of the student-athletes who reported misconduct and designated only one of the student-athletes as a “complainant” in its investigation. SJSU did not inform the other student-athletes that it was only investigating the one allegation from the designated complainant. Department interviews also revealed that student-athletes who were interviewed by OEO identified additional student-athletes from other athletic teams who may have had similar experiences with the Athletic Trainer. OEO failed to interview all of those potential victims.

Nearly five months after Employee A’s initial reporting of the allegations, OEO concluded the Athletic Trainer had not violated any University policy. At that time, OEO informed only one student-athlete—the student identified as the complainant—of the final outcome of the investigation and did not inform the other student-athletes who had also reported sexual harassment. None of the student-athletes, including the one complainant, were offered any supportive nor remedial measures by SJSU or SJSU Athletics.⁵ The OEO’s report also stated that the Athletic Trainer was not suspended or terminated.

to avoid seeking treatment from the Athletic Trainer. For these reasons, the Department concluded SJSU's response to the 2009 report violated Title IX.

The Department spoke with current and former student-athletes who suffered sexual harassment by the Athletic Trainer in the years following the 2009-10 OEO investigation. These student-athletes described conduct similar to that reported by the student-athletes who came forward in 2009, including non-consensual touching on their breasts, buttocks, and/or pubic areas under the pretense of trigger therapy or pressure-point therapy. As a result of SJSU's failure to comply with Title IX, subjected student-athletes to an ongoing hostile environment that impeded their access to sports programs and activities, exposed additional students to sexual harassment by the Athletic Trainer, and rendered many more students vulnerable to sexual harassment.

additional Title IX training was needed within SJSU Athletics. In response, SJSU required additional Title IX training the following year. However, interview notes produced to the Department also referenced ongoing concerns about the Athletic Trainer, but SJSU took no action with respect to the Athletic Trainer, who was allowed to continue treating female student-athletes. The Department found that SJSU's response to concerns about the Athletic Trainer was wholly inadequate and did not comply with Title IX.

In 2018 and 2019, Employee A again raised 2009 allegations against the Athletic Trainer, concerns that the 2009-10 investigation was inadequate, and complaints about the continued disregard for the rule that the Athletic Trainer was not allowed to treat female student-athletes. Employee A addressed these concerns internally within SJSU Athletics as well as across SJSU, including the Title IX Office. In response, SJSU leadership either failed to respond or relayed that the Athletic Trainer had been cleared following the 2009-10 investigation. Given SJSU's continued inaction, in November 2019, Employee A ultimately shared the allegations and these overarching concerns with the NCAA. After becoming aware of this communication and a later communication to the Mountain West Conference, SJSU retaliated against Employee A, described further below.

In November 2019, CSU was made aware of Employee A's complaint to the NCAA, and in December 2019, the NCAA referred Employee A's complaint to SJSU for internal handling. Only then, in December 2019, did SJSU address concerns about the allegations.

At the time of the incident, the student was advised by the 6 In addition, the report
SJSU's instruction to the student was an unreasonable and insufficient response, given that similar directives to the
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At the time of the incident, the student was advised by the 6 In addition, the report
student-at the time of the incident, the student was advised by the 6 In addition, the report
student experienced sexual harassment from the Title IX Trainer after the 2020-21 investigation
had commenced.

The student was interviewed at the time of the incident in SJSU's Title IX

continued to victimize students. The Department with current and former student-athletes who suffered sexual harassment by the Athletic Trainer in the years following the 2009-10 investigation. The Athletic Trainer sexually harassed a student as recently as February 2020, after the Athletic Trainer was explicitly directed not to treat student-athletes pending SJSU's investigation. These student-athletes described nonconsensual touching on their breasts, groins, buttocks, and/or pubic areas under the pretense of ping-pong therapy or pressure-point therapy. This harassment was preventable. The risk of sexual harassment within SJSU Athletics was known, but in neither the 2009-10 or 2020-21 investigations nor in the intervening years when employees reminded SJSU of the ongoing threat, did SJSU take necessary steps to identify the scope of the problem, the extent of the victims, or reasonable steps to prevent the harassment from recurring. SJSU's actions gave the Athletic Trainer unfettered access to student-athletes and led students to feel that further sexual harassment would be futile. The Department has reason to believe that in addition to students interviewed as part of our investigation, there are potentially many more victims who were subjected to sexual harassment, including potential victims who were not interviewed, during SJSU's recent investigation. The Athletic Trainer has now voluntarily separated and retired from SJSU and cannot be properly disciplined by SJSU.

III. SJSU Violated Title IX by Retaliating against SJSU Athletics Employees

SJSU further violated Title IX by retaliating against SJSU Athletics employees who opposed conduct made unlawful under Title IX. Specifically, following extensive review of documents produced by SJSU and interviews with SJSU employees, the Department concluded that SJSU retaliated against SJSU Athletics employees, Employee A and Employee B.

First, the Department concluded that SJSU retaliated against Employee A in violation of Title IX for reporting, internally and externally, sexual harassment by the Athletic Trainer and SJSU's mishandling of investigating sexual harassment by the Athletic Trainer and for filing grievances alleging retaliation by SJSU officials in violation of Title IX. The Department found that Employee A engaged in protected activity when Employee A reported allegations of sexual harassment against the Athletic Trainer, raised concerns that SJSU mishandled the 2009-10 investigation into the Athletic Trainer, or expressed dissatisfaction and frustration that the Athletic Trainer continued to have access to treat female student-athletes. Recent examples include reports to SJSU leadership in 2018, to AAUW in 2019, and the Mountain West Conference in 2020. Additionally, Employee A engaged in further protected activity by submitting two grievances raising Title IX concerns in early 2020. Shortly after these reports, SJSU admonished Employee A and assigned Employee A lower performance evaluation ratings. SJSU officials asserted that these adverse actions were of unprofessional communications sent by Employee A to a coworker, as well as a party not because Employee A's protected activity. However, Employee A's communications focused on detailing Employee A's ongoing Title IX concerns within SJSU Athletics. The Department thus concluded that SJSU retaliated against Employee A for engaging in protected activity in violation of Title IX.

Second, the Department concluded that SJSU retaliated against Employee B. In early February 2020, a supervisor directed Employee B to meet with Employee A about alleged insubordinate behavior toward a coworker. Employee B raised a concern that taking action a

*Employee A would constitute retaliation for the employee's complaints of Title IX violations and
S h ortsly responsibilities and ul ereafter, SJS*

2018, SJSU
different SJSU departments and with
reporting or referral protocols between titles and titles and the coordinator, and Deputy
reports and referrals to the Coordinator were inconsistent with
Department learned that
at some Deputy Title Coordinator attended
their own Subordinate Office

CONCLUSION

The significant failures in Department of Health and Safety, and procedural violations in violation of Title IX, SJSU Trainer, and its employees and students, taking initial steps to resolve the issues identified in this letter.

On September 21, 2021, the University voluntarily adopted a Resolution Agreement to resolve the findings of Title IX violations. The Resolution Agreement, SJSU will ensure that the Title IX Coordinator is available in person and accessible for responding to sex discrimination, develop informational materials to educate the University's Title IX Coordinator on all available ways for reporting and employment Title IX violations, and remedies to student-athletes who were sexually harassed or sexually assaulted. The Resolution Agreement also provides financial relief to individuals who were sexually harassed or sexually assaulted. The Title IX Department recognizes that an investigation and resolution would not be fair to the current and former students who came forward and supported the Title IX Department. If you have any questions regarding this Resolution Agreement, please contact the Title IX Department.

The Department appreciates the cooperation of SJSU's administrators, faculty, staff, and students, and look forward to continuing to engage with you. If you have any questions regarding this Resolution Agreement, please contact the Title IX Department.

CC: Chancellor Joseph I. Castro
Office of the Chancellor
The California State University
401 Golden Shore
Long Beach, CA 90802-4210
jcastro@calstate.edu

President Mary A. Papazian
Office of the President
San José State University
One Washington Square
San José, CA 95192-0002
sjsupres@sjsu.edu