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Civil Rights Division
Educational Opportunities Section

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September 21, 2021

VIA ELECTRONIC MAIL

Leora Freedman
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Office of General Counsel
The California State University
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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 Civil Rights Division and the United States Attorney's Office for the Northern District of California, conducted the investigation under Title IX of the Education Amendments of 1972 ("Title IX"), as amended, 20 U.S.C. § 1681 *et seq.*, and the Department's implementing regulations, 28 C.F.R. pt. 54, which prohibit sex discrimination by recipients of federal financial assistance. SJSU is a recipient of financial assistance from the Department. This letter summarizes our investigation and findings and acknowledges the steps SJSU has agreed to undertake through implementation of the attached Resolution Agreement.

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 DEPARTMENT’S INVESTIGATION

On June 29, 2020, the Department notified SJSU that it was initiating a Title IX compliance review into SJSU, specifically regarding allegations of employee-on-student sexual harassment and related retaliation within SJSU Athletics, and issued a Request for Information. During the Department’s investigation, we reviewed 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.²

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.

LEGAL STANDARDS

Title IX and its implementing regulations prohibit discrimination on the basis of sex in education programs and activities operated 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. *See* 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’s Nondiscrimination Mandate to Sexual Harassment

Sexual harassment is a form of sex discrimination covered by Title IX. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 649–50 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74 (1992). Sexual harassment can include unwelcome sexual touching, sexual assault, and other sexual misconduct. A school violates Title IX when it has notice of sexual harassment that creates a hostile educational environment “and fails adequately to respond.” *See Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 646–47. The Supreme Court has held that sexual harassment creates a hostile educational environment when it “is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *See Davis*, 526 U.S. at 650. Sexual harassment may create a hostile educational environment for a single individual or for a group of students in the same class, program, or larger unit. *See id.* at 653 (holding school district liable for harassment of a single individual and acknowledging possible liability for failing to respond “to severe, gender-based mistreatment played out on a ‘widespread level’ among students”).

² During the pendency of the Department’s investigation, SJSU conducted its own investigation into allegations of sexual harassment against the Athletic Trainer and concluded that the Athletic Trainer sexually harassed nine out of ten student-complainants and engaged in sexual misconduct with the tenth student-complainant. The University also investigated retaliation claims by SJSU Athletics Employee A and concluded the employee experienced retaliation. SJSU’s investigation into retaliation against Employee B remains ongoing.

A school has notice of sexual harassment when an official of the school “with authority to take corrective action to end the discrimination” has actual notice of the sexual harassment. *Gebser*, 524 U.S. at 290. No particular response to sexual harassment is required; however, a school is in violation of Title IX if it does not respond reasonably in light of known circumstances. *Davis*, 526 U.S. at 648. When an official “who is advised of a Title IX violation refuses to take action to bring the [funding] recipient into compliance,” the inaction “is an official decision by the recipient not to remedy the violation.” *Gebser*, 524 U.S. at 290. A failure to investigate conduct that constitutes sexual harassment constitutes an inadequate response under Title IX, particularly when the sexual harassment persists. *See Davis*, 526 U.S. at 654 (permitting a Title IX claim to move forward on allegations that the school district “made no effort whatsoever either to investigate or to put an end to the harassment”). Even if a school reasonably attempts to address the hostile environment, if it learns that its response has failed to do so, the school may be in violation of Title IX if “it continues to use those same methods to no avail.” *Annamaria M. v. Napa Valley Unified Sch. Dist.*, No. C 03-0101 VRW, 2006 WL 1525733, at *4 (N.D. Cal. May 30, 2006) (quoting *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260–61 (6th Cir. 2000)).

A recipient can also violate Title IX if it maintains a general policy of indifference to sexual misconduct on campus. *See Karasek v. Regents of Univ. of Cal.*, 956 F.3d 1093, 1112 (9th Cir. 2020) (relying on *Gebser*, 524 U.S. at 290 (distinguishing the standard for a post-assault sexual harassment claim from a claim that “involve[s the] official policy of the recipient entity”). “[W]here the official policy is one of deliberate indifference to a known overall risk of sexual harassment, notice of a particular harassment situation and an opportunity to cure it are not predicates for liability.” *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 967 (9th Cir. 2010); *see also Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (“[A] funding recipient can be said to have ‘intentionally acted in clear violation of Title IX,’ when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance . . . obviously necessary for . . . a specific program or policy.” (internal citation omitted)).

II. Application of Title IX’s Nondiscrimination Mandate to Retaliation

Retaliation against an individual for complaining of sex discrimination, including sexual harassment, likewise constitutes prohibited sex discrimination. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005). For a recipient to be held liable for Title IX retaliation, (1) an individual must have engaged in a protected activity of which the recipient was aware, (2) the recipient must have taken adverse action against the individual, and (3) there must have been a causal connection between the two. *See Emeldi v. Univ. of Or.*, 698 F.3d 715, 724 (9th Cir. 2012). An individual engages in protected activity where he or she opposes any act made unlawful under Title IX or otherwise assists or participates in any manner in an investigation under Title IX. *See id.* at 725. A recipient’s action is adverse where “it well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination.” *Id.* at 726 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). Last, a causal connection can be established by changes in treatment to the individual after the protected activity, proximity in time between the protected activity and the adverse action, evidence of discriminatory animus in other contexts, or other direct or circumstantial evidence. *See id.* at 726–27.

If these elements are established, the recipient must articulate a legitimate, nonretaliatory reason for taking the adverse action. *See id.* at 724. If the recipient puts forth such a reason, for the recipient to be held liable, the evidence must demonstrate that the proffered reason is “pretextual.” *Id.* Pretext is established by showing “that a discriminatory reason more likely motivated the employer” or can be proven indirectly “by showing that the employer’s proffered explanation is unworthy of credence.” *Id.*

Title IX “does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint” because “retaliation claims extend to those who oppose discrimination against others.” *Jackson*, 544 U.S. at 179–80. The Supreme Court has recognized that “teachers and coaches . . . are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are the only effective adversaries of discrimination in schools.” *Id.* at 181 (citation omitted).

III. The Department’s Title IX Procedural Requirements

The Department’s Title IX regulations contain procedural requirements designed to help schools respond to sexual harassment and prevent its recurrence, and two provisions are relevant to the Department’s review of SJSU’s Title IX compliance. First, the regulations require that a school designate at least one employee to coordinate its Title IX compliance, including the investigation of reports the school receives alleging sexual harassment. *See* 28 C.F.R. § 54.135(a). Second, the school must notify students and employees of the name, office address, and telephone number of the Title IX Coordinator(s). *See id.* The Title IX Coordinator(s) should have adequate training on what constitutes sexual harassment, including sexual violence, and understand how the grievance procedures operate.

The school must also notify all students, employees, and applicants for admission and employment that it does not discriminate on the basis of sex in its education programs or activities. *See id.* § 54.140(a)(1). The notice must state that inquiries concerning Title IX or its regulations may be referred to the Title IX Coordinator. *Id.* The school must include the notice of nondiscrimination in all announcements, bulletins, catalogs, and application forms available to students, employees, and applicants and in all documents used in connection with the recruitment of students or employees. *See id.* § 54.140(b)(1).

FINDINGS REGARDING SJSU’S COMPLIANCE WITH TITLE IX

Consistent with the standards above, the Department reviewed SJSU’s compliance with Title IX, with a focus on SJSU Athletics. In sum, the Department 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 Department found that SJSU violated Title IX in its response to known sexual harassment 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 Athletics 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 Athletic Trainer, for all intents and purposes, resumed responsibilities. Many of the affected student-athletes recounted feelings of frustration and discomfort seeing the Athletic Trainer so freely working on campus and in the SJSU Athletics facilities, traveling with teams, and treating other student-athletes. Some said they experienced stress and anxiety surrounding athletic training as well as physical therapy, and some even became reluctant to seek treatment for potential or sustained injuries. Without SJSU’s protection, several of the student-athletes took it upon themselves to warn other student-athletes

³ Two of the student-athletes were minors when they first sought treatment from the Athletic Trainer.

⁴ “Trigger-point therapy” and “pressure-point therapy” were used interchangeably in SJSU documents and in interviews in reference to the Athletic Trainer’s conduct during treatment. In 2020, SJSU, through an outside medical expert hired by SJSU as part of its investigation, concluded that the Athletic Trainer’s actions were “inconsistent with accepted practice of athletic training” and “there [wa]s no reasonable evidence or explanation for the actions of the athletic trainer.”

⁵ Our investigation revealed many other deficiencies with the 2009-10 investigation. For instance, some participants from the 2009-10 investigation told the Department that their statements were mischaracterized. Others indicated their statements seemed to not even be considered as evidence. Moreover, a 2009 University Police Department memorandum raised concerns that OEO’s approach in contacting and interviewing students may have impeded others from coming forward.

to avoid seeking treatment from the Athletic Trainer. For these reasons, the Department concluded SJSU's response to the 2009 reports 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 endured by the student-athletes who came forward in 2009, including nonconsensual touching on their breasts, groins, buttocks, and/or pubic areas under the pretense of "trigger-point therapy" or "pressure-point therapy." As a result of SJSU's failure to comply with Title IX, SJSU subjected student-athletes to an ongoing hostile environment that impeded their access to SJSU's programs and activities, exposed additional students to sexual harassment by the Athletic Trainer, and rendered many more students vulnerable to sexual harassment.

II. SJSU Continued to Violate Title IX within SJSU Athletics Following the 2009-10 Investigation

The Department also determined that SJSU's failure to comply with Title IX within SJSU Athletics continued in the years after the initial investigation by ignoring ongoing concerns about the Athletic Trainer and the alleged deficiencies in the initial investigation until contacted by the NCAA about the underlying allegations. These continued failures put student-athletes at risk of, and ultimately caused additional student-athletes to fall victim to, sexual harassment that deprived them of SJSU's educational opportunities and benefits.

Despite documented notice to SJSU in 2010, 2012, 2013, and 2016, in the more than ten years that followed the 2009-10 OEO investigation, SJSU took no effective measures to limit the Athletic Trainer's access to student-athletes, even though the student-athletes' ability to use the training program was necessary and fundamental to their safety and success. This failure created a known or obvious heightened risk of sexual harassment for student-athletes. For example, the Department learned that SJSU Athletics adopted an informal rule following the conclusion of the 2009-10 investigation that the Athletic Trainer was not to treat female student-athletes and, specifically, no student-athletes on the athletic team of those who complained in 2009. The trainer received a similar instruction in 2012. But SJSU did not communicate this limitation to student-athletes or SJSU Athletics coaches and staff, and it was not monitored or enforced. Employee A reminded SJSU of this purported restriction time and time again following the 2009-10 investigation, but the Athletic Trainer continued treating female student-athletes, including members of the athletic team that was the subject of the initial investigation. The Athletic Trainer remained assigned to a women's athletic team following the 2009-10 investigation and had regular contact with student-athletes who sought treatment on a walk-in basis until voluntarily separating and retiring from SJSU.

SJSU's noncompliance continued despite employees raising concerns about the Athletic Trainer to SJSU again in 2016. That year, SJSU was made aware of serious concerns about the climate within SJSU Athletics, including that the Athletic Trainer remained employed and continued treating students despite the 2009-10 sexual harassment allegations. To its credit, SJSU requested a formal climate review of SJSU Athletics, and SJSU Athletics employees were interviewed by SJSU leadership. Among other findings, SJSU's own review concluded that

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 the 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 to leaders 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 open an investigation into allegations of sexual harassment against the Athletic Trainer, covering the period from 2006 through 2020. At that time, SJSU hired an external, independent investigator to lead its investigation and made efforts to contact each of the student-athletes who came forward during the 2009-10 investigation. At the beginning of SJSU's 2020-21 investigation, the Athletic Trainer was instructed orally and in writing to not treat any student-athlete during the pendency of the investigation. Later in 2020, the Athletic Trainer was temporarily suspended with pay when a current student-athlete came forward alleging that the Athletic Trainer engaged in unwelcome sexual touching during a treatment in February 2020, only a month after SJSU directed the employee not to treat student-athletes pending the investigation. In addition, during the course of its investigation, SJSU retained an outside medical expert, who concluded that the Athletic Trainer's behavior was not consistent with recognized treatment protocols and rose to the level of sexual harassment in violation of University policies.

Based on our investigation, the Department found that SJSU's 2020-21 investigation fell short in a number of respects. SJSU failed to promptly determine and remedy the full scope of the Athletic Trainer's sexual harassment throughout nearly 14 years as an SJSU athletic trainer. As a result, the only new complainants named by SJSU in this investigation either came forward on their own after reading related news articles or were referred to the investigator by Employee A. Additionally, similar to the 2009-10 investigation, complainants in SJSU's 2020-21 investigation notified the investigator of additional students who may have been sexually harassed by the Athletic Trainer. In some cases, SJSU made minimal or no effort to interview those additional potential victims. SJSU officials told the Department more than once that they did not consider expanding the scope of their investigation despite having notice of other potential victims. From reviewing rosters produced by SJSU, the Department estimates that from 2009-10 to the present, there were approximately one thousand female student-athletes who participated in SJSU

Athletics, and therefore could have been exposed to treatment by the Athletic Trainer.⁶ In addition, SJSU's instruction to the Athletic Trainer not to treat student-athletes during the pendency of the investigation was an unreasonable and insufficient response, given that similar directives to the Athletic Trainer not to treat student-athletes were unsuccessful in the past. SJSU did not instruct student-athletes not to seek treatment from the Athletic Trainer. As a result, at least one additional student experienced sexual harassment from the Athletic Trainer after its 2020-21 investigation had commenced.

The Athletic Trainer's conduct was within SJSU's control during the Athletic Trainer's period of employment at SJSU, which included serving as both a trainer and a part-time instructor in another SJSU department. Nearly all of the harassment occurred in SJSU Athletics training facilities during treatment and within the Athletic Trainer's capacity as a trainer.⁷ The Department learned from current and former student-athletes and SJSU Athletics employees, as well as through an interview with an expert in the field, how integral the athletic training program is for student-athletes. At a postsecondary level, an athletic trainer is the primary provider for student-athletes' acute health needs. Among other responsibilities, an athletic trainer serves to provide initial treatment, evaluations, and preventive and continued care, and collaborates with supervisory physicians.⁸ In short, a postsecondary athletics program cannot function without athletic trainers. Thus, the SJSU athletic trainers were essential members of SJSU Athletics, charged with ensuring student health and safety. SJSU student-athletes, some minors in their first year at SJSU and others who never received treatment during their earlier athletics career, trusted that the Athletic Trainer's course of treatment was necessary and appropriate, and the Athletic Trainer's role was one of real and perceived authority.

The student-athletes whom the Department interviewed voiced concerns about speaking out against the Athletic Trainer given that role is a position of authority. The student-athletes were worried about potential retaliation that could jeopardize their athletic scholarships or ability to compete. A number of the student-athletes experienced depression and sought therapy. Many took steps to avoid seeing the Athletic Trainer, which led to difficulties in scheduling treatment. A few student-athletes stated they avoided necessary treatment altogether to avoid the risk of being treated by the Athletic Trainer.

* * *

In summary, the Department found that as early as 2009, SJSU was on notice of allegations of inappropriate sexual touching of student-athletes by the Athletic Trainer, and that such harassment created a sexually hostile environment to which SJSU did not adequately respond. From the inadequate 2009-10 OEO investigation through the decade that followed, SJSU did not comply with its Title IX obligations. As a result of SJSU's noncompliance, the Athletic Trainer

⁶ This is an estimate based on rosters provided by SJSU identifying female student-athletes during the Relevant Period.

⁷ The Department is aware of only one incident that did not occur in an SJSU building.

⁸ The Department understands that SJSU employs a supervisory physician, but the physician does not provide day-to-day supervision of trainers and is not located on campus.

continued to victimize students. The Department spoke 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-athlete 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 "trigger-point therapy" or "pressure-point therapy." This harassment was preventable. The heightened risk of sexual harassment within SJSU Athletics was known, but in neither its 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 or 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 reports of 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 student-victims who were subjected to sexual harassment, including potential victims identified, but 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 each time 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 the NCAA 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 February 2020. Shortly after these reports, SJSU admonished Employee A and assigned Employee A low performance evaluation ratings. SJSU officials asserted that these adverse actions were because of unprofessional communications sent by Employee A to a coworker, as well as to a third party, not because of 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 former Employee B. In early February 2020, a supervisor directed Employee B to meet with Employee A about allegedly insubordinate behavior toward a coworker. Employee B raised a concern that taking action against

Employee A would constitute retaliation for the employee's complaints of Title IX violations. Shortly thereafter, SJSU reduced Employee B's job responsibilities and ultimately terminated Employee B. The Department found that SJSU took adverse actions against Employee B that were causally linked to protected Title IX activity. The Department asked SJSU to provide the basis for such adverse actions and its response was inconsistent with its own records and Department interviews of SJSU employees. The Department therefore did not credit the proffered justifications and thus concluded that SJSU retaliated against Employee B in violation of Title IX.

* * *

In sum, the Department found that two employees in SJSU Athletics engaged in protected activity under Title IX by opposing unlawful conduct under Title IX or otherwise supporting complaints under Title IX related to the Athletic Trainer and that SJSU was aware of this protected activity. The Department found that SJSU took adverse actions against these employees and that there was a causal connection between the protected activity and the adverse actions. SJSU's actions were likely to deter a reasonable person from exercising their Title IX rights. During the course of our investigation, SJSU did not articulate legitimate, nonretaliatory reasons for taking adverse actions against Employee A and Employee B that are more than mere pretext.

IV. SJSU Did Not Comply with Title IX's Regulatory Requirements

Procedural requirements in the Department's Title IX implementing regulations provide a framework to schools to prevent and respond to sex discrimination. SJSU's failure to comply with these requirements led to and compounded its failures to address sexual harassment, perpetuating a hostile environment for student-athletes in SJSU Athletics.

A. SJSU Failed to Coordinate Its Response to Sexual Harassment, as Required by the Title IX Regulations

Title IX's regulations require a recipient to "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations." 28 C.F.R. § 54.135(a). SJSU's own documents and employee interviews revealed that SJSU did not employ a full-time Title IX Coordinator until 2015 and that SJSU has had significant challenges retaining an employee in this role. Between 2018 and June 2021, the Title IX Coordinator position was held by at least four different individuals, with some serving only on an interim basis and some serving multiple, separate terms. During Department interviews, employees and students alike could not identify the name of the current Title IX Coordinator. The regulation also requires a recipient to notify all students and employees of the name, office address, and telephone number of the Title IX Coordinator. *Id.* During the Department's investigation, the name of the Title IX Coordinator was absent from several central locations on SJSU's webpages.

In addition, SJSU's use of Deputy Title IX Coordinators hindered the Title IX Coordinator's required coordination efforts. During interviews, the Department learned that, as of

2018, SJSU had delegated Title IX responsibilities to Deputy Title IX Coordinators, all housed at different SJSU departments and with varying roles. The Department found no clear or structured reporting or referral protocols between these Deputies and the Title IX Coordinator, and that reports and referrals to the Title IX Coordinator were inconsistent in both form and frequency. The Department learned that some Deputy Title IX Coordinators attempted to handle complaints on their own, independent of the Title IX Coordinator and SJSU's Title IX Office, and outside of the procedures used by the Title IX Office. Moreover, the Department learned that Deputy Title IX Coordinators did not receive SJSU-specific training for serving in the role, resulting in an inconsistent approach to handling Title IX complaints across SJSU departments.

When speaking to student-athletes as well as SJSU Athletics employees, there was much confusion about the complaint process. Some interviewed thought they were required to report Title IX complaints to the Deputy Title IX Coordinator within SJSU Athletics; some did not know there was a Title IX Coordinator outside of SJSU Athletics; and others thought they were prohibited from reaching out to the Title IX Coordinator and could only speak to the SJSU Athletics Deputy Title IX Coordinator. Consequently, SJSU's Title IX Coordinator was not always made aware of serious issues, and some complaints were handled improperly, leaving students without a proper understanding or vindication of their rights.

As part of SJSU's coordination failures, SJSU failed to meet its Title IX Coordinator obligations. With respect to the Deputy Title IX Coordinators, SJSU violated Title IX regulations by failing to train the Deputy Title IX Coordinators adequately regarding their role in implementing Title IX procedures and how to report and document complaints of sex discrimination in coordination with the Title IX Coordinator.

B. SJSU's Notice of Nondiscrimination Did Not Comply with Title IX Regulations, Impairing Some Students' Ability to Report Sexual Harassment

The Title IX regulations require a recipient to maintain a notice of nondiscrimination that refers Title IX inquiries to the Title IX Coordinator and to publish this notice in a variety of SJSU documents and forms. *See* 28 C.F.R. § 54.140. This notice communicates the recipient's obligation to comply with Title IX and informs the community where and how to report allegations of sex discrimination. The Department reviewed numerous documents subject to this requirement that either failed to include the notice of nondiscrimination or included a deficient notice. For example, the 2020-21 Academic Catalog included a notice of nondiscrimination but failed to provide contact information for the Title IX Coordinator and also identified OEO—an office within University Personnel—and the Student Advisory Board as contacts for related inquiries or complaints.

The impact of SJSU's failure to adequately disseminate an accurate notice of nondiscrimination with the minimal required information was clear from the Department's interviews with current and former student-athletes. For instance, when asked where to report sexual harassment, most student-athletes said they did not know where or what conduct to report. One student-athlete recalled she only became familiar with Title IX after she was sexually assaulted by a fellow student-athlete. She recalled that after reporting the assault, SJSU Athletics then offered an in-person Title IX training to student-athletes that covered sexual harassment.

CONCLUSION

The Department found significant failures in SJSU's handling of complaints of sexual harassment regarding the Athletic Trainer, as well as retaliation against SJSU Athletics employees and procedural violations in violation of Title IX. SJSU has undertaken a number of voluntary steps to bring SJSU into compliance with Title IX, including initial steps to resolve several of the issues identified in this letter.

On September 21, 2021, the Department and the University voluntarily entered into a Resolution Agreement to resolve the Department's findings of Title IX violations. Under the Resolution Agreement, SJSU will: ensure the Title IX Coordinator and the Title IX Office have the necessary resources to effectuate Title IX; maintain policies and develop protocols for responding to sex discrimination; develop informational materials to educate the SJSU community on the University's Title IX policies and multiple pathways for reporting Title IX concerns; deliver comprehensive Title IX training to students and employees; and provide supportive measures and remedies to student-athletes who were sexually harassed by the Athletic Trainer. The Resolution Agreement also provides financial relief to individuals who were sexually harassed by the Athletic Trainer and participated in the Department's Title IX investigation or SJSU's investigations. The Department recognizes that this investigation and resolution would not have been possible without the current and former students who came forward and shared their experiences and the employees who advocated for them and each other.

The Department appreciates the cooperation of the University and its counsel; SJSU; and SJSU's administrators, faculty, staff, and students, throughout the course of this investigation. We look forward to continuing to engage with the SJSU community throughout the term of the Resolution Agreement. If you have any questions regarding this letter, please do not hesitate to contact Michelle Tucker at Michelle.Tucker@usdoj.gov or Anne Parham at Anne.Parham@usdoj.gov with the Civil Rights Division, or Sai Mohan at Sharanya.Mohan@usdoj.gov with the U.S. Attorney's Office for the Northern District of California.

Sincerely,



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Encl.

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