

EXPERT REPORT
of
DONNA A. LOPIANO, PH.D.

SHANNON MILLER, JEN BANFORD, AND
ANNETTE WILES
vs.
THE BOARD OF REGENTS OF
THE UNIVERSITY OF MINNESOTA

1. IDENTITY OF EXPERT

Donna A. Lopiano, Ph.D.

President

Sports Management Resources

452 Fisher Court

Shelton, CT 06484

II. EXPERT QUALIFICATIONS

I am the president of Sports Management Resources ("SMR"), a consulting practice that focuses on helping educational institutions and sport organizations solve sports program integrity, equity, growth, and development challenges. My practice includes an emphasis on gender equity and college athletics management.

Before founding SMR, I was the Chief Executive Officer of the Women's Sports Foundation, a national 501c (3) not-for-profit education organization located in East Meadow, New York (1992-2007). I previously served as a coach, assistant professor, and athletics director at various NCAA institutions, including 18 years as Director of Women's Athletics at the University of Texas at Austin. I also served as president of the Association of Intercollegiate Athletics for Women, the organization that formerly regulated women's intercollegiate athletics prior to the National Collegiate Athletic Association, the National Association for Intercollegiate Athletics and the National Junior College Athletic Association offering programs for women. I have received many national and international awards recognizing my work in gender equity and sports management.

I am considered one of the foremost national experts on gender equity in athletics. I have testified about gender equity before congressional committees and state and federal administrative commissions several times. I also served as a gender equity consultant to the

Office for Civil Rights of the U.S. Department of Health, Education, and Welfare (now the Department of Education). In that capacity, I played a role in drafting the Office for Civil Rights 1979 Policy Interpretation on Title IX and Intercollegiate Athletics (which was intended to help institutions to understand and comply with their gender equity obligations under Title IX) and the 1980 Investigators Manual (which was updated in 1990 and intended to educate OCR investigators about how to assess athletic program Title IX compliance).

In my capacities as a nationally recognized athletics administrator and the Chief Executive Officer of the Women's Sports Foundation ("WSF"), I was often called upon by the Director of the Office for Civil Rights of the U.S. Department of Education and legal counsel at the Equal Employment Opportunity Commission to advise in the development of "Dear Colleague" letters and other advisories and interpretations related to Title VII and Title IX applications to interscholastic and intercollegiate sport. At the Women's Sports Foundation, I oversaw the production of numerous research projects related to gender equity and sports participation of girls and women, including a comprehensive study of the Office of Civil Rights Title IX athletics enforcement efforts. I have also served as a gender equity consultant to state education agencies, school districts, and institutions of higher education.

I am also considered an expert in athletics administration and sports management. I have taught a wide range of graduate and undergraduate university-level courses involving the management of interscholastic and intercollegiate sport, assisted colleges and universities in assessing their organizational climates with regard to gender and racial diversity, and have spoken at numerous conferences on these subjects. I am currently an adjunct instructor at Southern Connecticut State University teaching both undergraduate and graduate courses in sports management. I train future athletic directors and sports administrators. With Dr. Constance Zotos, I have authored the *Athletic Director's Desk Reference*, considered by most to be the most comprehensive policy compilation focused on meeting the needs of high school and college athletic directors and have written numerous articles on gender equity in sports,

sports management, intercollegiate athletics reform and the benefits of sports participation for women and girls.

My expert qualifications are based upon my education, academic background, previous employment, experience, and other related factors. My background and qualifications, as well as a listing of my publications, to the best of my recollection, are set forth in the attached curriculum vitae as Exhibit A. My www.SportsManagementResources.com web site contains my blogs on athletics issues and other policy related advice produced by me that are not included in my curriculum vitae.

III. OTHER CASES IN WHICH THE EXPERT HAS TESTIFIED

The cases in which I was retained to testify as an expert are included on pp. 6-7 in my curriculum vitae at Exhibit A.

IV. COMPENSATION

SMR's consulting fees and terms are attached at Exhibit B. I have agreed to charge at the following specified hourly rates for my preparation and consulting services on this case:

- \$250 per hour for report preparation
- \$175 per hour for consultation with attorneys related to preparation for expert reports or depositions
- \$350 per hour for deposition or court testimony
- \$200 per hour for preparation for depositions or court testimony
- \$2,500 per day for site visits
- No charge for hours spent traveling
- Actual out-of-pocket expenses.

V. DOCUMENTS, DATA OR INFORMATION CONSIDERED IN THE FORMATION OF EXPERT OPINIONS

In preparation for this report, I have reviewed and my opinions rely upon a number of documents, which are listed and attached at Appendix C or cited as footnotes in this report. I reserve the right to review and rely on additional relevant documents that have been requested but not yet delivered, depositions which have yet to be taken in this case or other information which comes to my attention following the date of submission of this report and to prepare a supplemental report that reflects such new information. Finally, I reserve the right to depend on information that I am able to recollect based on questions asked of me following the submission of this report and during my testimony at deposition or trial.

VI. ANTICIPATED TESTIMONY/OPINIONS

1. Provide a historical background and explanation for the continuing failure of college and university athletic programs to afford female athletes equal participation, financial aid, treatment and benefits compared to that afforded their male student-athlete counterparts and how this gender discrimination against female athletes relates to how and why athletic programs discriminate against female coaches.

Many people think that when civil rights laws like Title IX are passed by Congress, that the discrimination prohibited by these laws, gender, sexual orientation, age or national origin discrimination as in this case, stops. When these laws pass, they are fairly successful at stopping overt verbalization of discrimination, such as sexist talk, homophobic slurs and other grossly evident expressions of prejudice in public settings. Rightfully, people are more cautious about demonstrating such bigotry because they know it is against the law. But sexism, ageism, national origin discrimination and homophobia don't disappear. Rather, discrimination becomes more artful and difficult to detect, especially in the cultural institutions of sport, the military and religion. These previously all-male environments in which predominantly white

males historically disrespected the skills and abilities of women and where they occupied all of the most powerful positions and controlled all hiring processes and decision-making regarding the distribution of resources, have been particular resistant to sharing power with women and other minorities and eliminating sexist, homophobic, xenophobic and other practices that discriminate against protected classes. These cultural institutions were and still are the slowest to change.

Historically, prior to 1972 when Title IX, the federal law prohibiting discrimination on the basis of sex in federally funded educational programs and activities, was adopted, women's athletic programs were under the jurisdiction of women's physical education departments with no institutional funding. No athletic scholarships were offered and women's teams had fundraising events like cookie sales to raise money for operating expenses. Coaches of women's teams were 90% female and almost all were physical education instructors and professors who volunteered for such extracurricular service, or received small \$1,000 to \$3,000 stipends for these extra duties. Some of these coaches, in lieu of receiving stipends, were assigned one or two less classes if they served in these capacities. Men's athletics was administered by men's athletic departments that existed independent from men's physical education and academia. Men's teams were funded by the institution's general fund, student fees, alumni donations and ticket sales and male athletes received athletic scholarships. Coaches of men's teams were 100% male and paid to coach. Most coaches of men's teams did not have to teach, did not wish to teach or did not have the educational credentials to do so.

Following the adoption of Title IX in 1972 and the issuance of its implementing athletics regulations in 1975, the vast majority of institutions instructed their men's athletic departments to administer women's athletics. Only a handful of institutions established athletic departments for women separate from the men's athletic departments. These separately administered women's athletic programs were led by female athletic directors and were more likely to have female coaches and staff. These programs were significantly more successful on the playing

fields and courts than women's athletic programs merged into existing men's athletic departments which were more likely to have male athletic directors and coaching staffs that were predominantly male.

Within these merged athletic department cultures, women's sports and female coaches were not treated with the same priority or respect. Women were not hired to coach men's teams but men were hired to coach women's teams. However, whether administered separate from men's athletics or under a merged structure, women's teams have never been provided with the same financial resources or support as men's teams. In merged athletic departments, predominantly male athletic directors were not willing to redistribute resources to accomplish gender equity and, in control of hiring, were more likely to hire males than females. In higher competitive divisions such as the NCAA's Division I membership category (the top competitive division), the failure to achieve gender equity was directly related to decades old arms races in football and men's basketball or selected men's sports traditionally emphasized by the institution. These "priority" sports were and still are excessively funded (inflated operating budgets, extra administrative support positions, lavish locker rooms, practice and competition facilities and significantly higher head coach salaries) while other men's and women's sports are underfunded comparatively. Even when a women's sport is designated among these priority sports, the funding, promotional and publicity support, facilities and treatment and benefits provided to female athletes is significantly below that afforded male athletes and salaries of female coaches are well below their male counterparts.

More than 44 years following the passage of Title IX, the vast majority of athletic programs are still not providing equal participation opportunities for female athletes and are shortchanging women in the provision of athletic scholarships, treatment and benefits. Table 1 provides a view from 30,000 feet, based on the most recent data, 2014-15 Equity in Athletics Disclosure Act reports to the federal government that include 2,057 two- and four-year higher education institutions that sponsor athletic programs:

Table 1. 2014-15 EADA Reports (N=2,057 institutions)¹

	Male	Female	Estim. Female Shortfall
Undergraduate Enrollment	46%	54%	
Title IX Equal Treatment Area:			
Participation Opportunities	58%	42%	160,178
Financial Aid (N=1,340)	55%	45%	\$640,352,614
Recruiting	67%	33%	\$107,214,266

The employment picture is equally troubling. For example, examining NCAA Sports Sponsorship, Participation and Demographic Search data for Divisions I and II, the competitive divisions in which the University of Minnesota-Duluth participates:

Table 2. 2014-15 NCAA Division I and II Top Positions²

Position	Division I		Division II	
	Male	Female	Male	Female
Head Coach, Men's Sports	97%	3%	96%	4%
Assistant Coach, Men's Sports	91%	9%	91%	9%
Head Coach, Women's Sports	61%	39%	64%	36%
Assistant Coach, Women's Sports	52%	48%	51%	49%
Athletic Director	91%	9%	81%	19%
Associate Athletic Director	71%	29%	61%	39%
Assistant Athletic Director	69%	31%	66%	34%

As depicted in Table 2 above, athletic directors, who are predominantly males have demonstrated that they are more likely to hire males as head coaches and in the highest paid, most powerful administrative positions. Academicians and researchers have labeled this practice “homologous reproduction” – perpetuating the majority demographic of the power structure. This is the reality of the athletics environment, forty-four years after Title IX, and it is very similar to the environment of previously all-male cultural institutions such as the military and religion in which women are also experiencing significant equal treatment issues.

¹ Equity in Athletics Disclosure Act, 2014-15 data for all reporting institutions (N=2,057) with financial aid data including only those institutions that award athletics financial aid (N=1,340). Retrieve at: <http://ope.ed.gov/athletics/#/>

² The small presence of women as head coaches in men's cross country, indoor track, outdoor track and swimming is a reflection of combined men's and women's teams and coaching staffs in these sports NCAA Sports Sponsorship, Participation and Demographics Search. Retrieve at: <http://web1.ncaa.org/rgdSearch/exec/instSearch>

Gender inequities affect the success of women's sports programs and in turn, the success of their coaches, who are judged on the basis of the success of their programs. Not only are coaches of insufficiently supported women's teams in a much more vulnerable position than coaches of better supported men's sports, female coaches may be in double jeopardy when leaders of athletic departments also engage in practices that discriminate based on the coach's gender, sexual orientation or other protected categories.

The data clearly show that gender equity is still far from realized. What data doesn't show is very limited Title IX enforcement efforts and how the athletics culture practices the more artful mechanisms of discrimination. First, federal enforcement efforts are almost non-existent. The U.S. Office for Civil Rights has neither the budget nor the manpower to enforce Title IX. Individuals do bring federal or state lawsuits, but these one-at-a-time change mechanisms are slow, expensive and typically the "last resort" for plaintiffs. Typically, a women's sport is eliminated or a staff member's employment terminated before parents or affected employees respectively turn to the courts.

At the institutional level, athletes and athletic department employees are afraid to raise their voices in protest over unequal treatment for fear of retribution. Female athletes believe they will be ostracized by coaches and teammates, or will lose starting playing positions or scholarships or be punished through the mechanisms of less playing time or coaching inattention if they use the courts. It is simply unrealistic to expect athletes to stand up to their coaches or athletic departments. The power imbalance is simply too great. The situation is the same for female coaches. When coaches attempt to use institutional complaint procedures, they are often forced to turn to the courts, external state civil rights commissions or the U.S. Department of Education Office for Civil Rights, to hear their complaints because the institution refuses to act against its own best interest. The coach faces the same fear of retaliation as their female students when considering whether to file a complaint. The most recent (2016) and most comprehensive national survey of 2,565 current and former male and female coaches of

women's collegiate teams reveals a clear picture of subtle and not so subtle employment discrimination. These survey results demonstrate the presence of all the mechanisms favoring males and supporting homologous reproduction – preferential hiring, higher salaries, double standards of treatment related to salary increases, promotion and retention and include the following specific statistically significant findings:

- Large majorities of current and former coaches (73 percent and 75 percent) reported that the person in charge of hiring them was a male athletics director (80 percent of all athletics directors at NCAA institutions were male in 2014–15), implying a possible favoritism toward men, a commonly recognized occurrence in male-dominated occupational fields.
- When coaches were asked questions about access to resources, a third of both female and male coaches of women's teams believed they did not have adequate access to the resources they needed to be successful (lack of access to suitable office space and financial resources), more than 40 percent reported that their departments did not invest in their professional development, and nearly half of all coaches reported not having a sufficient budget to be successful.
- Thirty-one percent of female coaches believed that they would "risk their job" if they spoke up about Title IX and gender equity; 20 percent of male coaches of women's teams also indicated that they worried about negative repercussions for pointing out Title IX and gender equity issues.
- LGBTQ female coaches were the most vulnerable in terms of fears regarding Title IX and gender equity, with 34 percent believing they would risk their jobs if they spoke up about Title IX or gender equity.
- Fifteen percent of female coaches and 9 percent of male coaches reported that they found a "noticeable level of homophobia" among some of their colleagues, with more than a third of female coaches (36 percent) and a quarter of male coaches (24 percent) indicating that it would be difficult to raise concerns about homophobia.
- Coaches who identified as sexual minorities were nearly twice as likely to report a "noticeable level of homophobia" in their immediate workplace, with a higher percentage of LGBTQ coaches (29 percent male and 21 percent female)

expressing the belief that their athletics department hampered them from speaking up about homophobia compared to heterosexual colleagues (9 percent of males and 14 percent of females).

- There was a range of issues associated with support areas and coaches' contracts, their retention, and their ability to move up and be promoted: (1) 65 percent of current coaches felt that it was easier for men to get top level coaching jobs; (2) nearly three quarters of current coaches believed men had an easier time negotiating salary increases; and (3) more than half (54 percent) believed that men were more likely to be promoted, to secure a multiyear contract upon hiring (52 percent), and to be rewarded with salary increases for successful performance (53 percent).
- Respondents indicated that coaches of men's teams also wielded more influence in general with 56 percent indicating that coaches of men's teams had more influence with the director of athletics and 53 percent believing that coaches of men's teams had more influence on the allocation of fiscal resources.
- There was a clear difference along gender lines in viewpoints with regard to professional advantage: (1) while 80 percent of female coaches of women's teams believed it was easier for men to get top coaching jobs, just 33 percent of male coaches of women's team believed this was the case; (2) 91 percent of female coaches believed it was easier for men to negotiate for higher salaries (34 percent of male coaches thought this was true); and (3) female coaches (70 percent) held the belief that it was easier for male coaches to be promoted, while 19 percent of male coaches held that same belief.
- Coaches of female teams believed they were subjected to a double standard: (1) a quarter of female and male coaches of women's teams (25 percent and 27 percent, respectively) reported being criticized because of their coaching styles; (2) three in ten female coaches indicated that they were vulnerable to potential retaliation should they speak up about gender bias, and another 27 percent reported that doing so could be perceived as a "weakness" by administrators and colleagues; (3) more than 40 percent of female coaches said they were "discriminated against because of their gender," compared to 28 percent of their male coaching colleagues; (4) almost half of the female coaches and just over a quarter of the male coaches (27 percent) reported "being paid less for doing the same job as other coaches;" and (5) female coaches were more than twice as

likely as male coaches in the study to believe that their coaching performance was evaluated differently because of their gender.

- Job security and the ability to advance are very different for female coaches in the collegiate athletics workplace: (1) 36 percent of female coaches agreed that their job security was “tenuous;” (2) more female coaches (46 percent) than male coaches (36 percent) reported being called on to perform tasks that were not in their job descriptions; (3) one in five female coaches (19 percent) indicated that male coaches at their institutions had access to more professional development opportunities; (4) nearly 25 percent of female coaches believed they had not gotten a coaching job because of their gender; and (5) less than half of female coaches (44 percent) said they would “apply to coach a men’s team.”³

These data overwhelmingly support the existence of covert mechanisms that are used to treat female athletes and female coaches in lesser ways than their male counterparts. For example, there are five circumstances that I have found are commonly used to justify non-renewal or termination of employment and lower compensation levels for female coaches that, on their face, appear appropriate but are in actuality commonly used to mask discriminatory treatment:

- (1) student complaints about strong coaching pedagogy of female coaches -- when such behavior on the part of male coaches is disregarded, thereby representing a discriminatory gender based standard, or when such complaints are purposely misrepresented with regard to abnormality, frequency or seriousness or are the result of improper use of evaluations or failure to use gradually escalating disciplinary practices;
- (2) lack of team competitive success – when female coaches of women’s teams are not provided with the same resources to achieve success as are provided to male coaches of men’s teams (positions for which females are not hired), this is considered unequal treatment as prohibited by Title IX;

³ Don Sabo, Phillip Veliz, and Ellen J. Staurowsky, *Beyond X’s & O’s: Gender Bias and Coaches of Women’s College Sports* (East Meadow, N.Y.: Women’s Sports Foundation, 2016).

- (3) poor student-athlete academic achievement – when such a characterization is misrepresented based on improper use of one or more academic metrics;
- (4) failure to comply with NCAA rules – when such violations are misrepresented in relation to seriousness or frequency or when male and female coaches with identical violations are treated differently with the female receiving stronger penalties including termination of employment; or
- (5) other concerns never raised prior to a decision to terminate, which are manufactured after the fact to support a decision to terminate or imposed as a mechanism to retaliate or create a hostile environment intended to force an employee to resign due to stress or anxiety.

I have found all of these circumstances present in this case, among others, and each is specifically addressed in my responses to subsequent questions.

The bottom line is that we cannot look for people who are engaged in discrimination to say or admit that they are discriminating on the basis of sex or other protected categories. Civil rights laws have effectively silenced such obvious admissions. Thus, we have to look under the proverbial “hood” to identify specific actions or behaviors over time that together, by their sheer volume demonstrate consistently different and prejudiced treatment, thereby giving us confidence to conclude that administrators and institutions are discriminating on the basis of sex, sexual orientation, age or national origin.

With regard to discrimination against female athletes, this assessment requires an examination of whether, for example, the following practices, among others, exist:

- a low number female participants and failure to add women’s teams if the number of female participants is not proportional to female undergraduate enrollment;
- the athletic department tells coaches of female teams to recruit and retain larger numbers of participants than the same or comparable men’s teams, short-changing

female athletes with regard to coach to athlete instructional ratios and equal access to legitimate competitive opportunities;

- coaches of women's teams have insufficient budgets to recruit, unable to travel the same geographical distances as coaches of men's teams to observe or visit with prospects or offer the same numbers of paid campus visits to prospective athletes;
- larger proportions of male athletes are treated better than female athletes with regard to quality of locker rooms, practice and competition facilities;
- lower sport budgets for women's teams result in differences in treatment like the use of commercial air travel versus chartered bus so classes are less likely to be missed;
- fewer, less experienced or lower compensated coaches are provided to female athletes compared to male athletes;
- "paper hires"⁴ are used to obtain coaches of female teams while coaches of men's teams are aggressively recruited in the marketplace; and
- weak excuses for justifying lesser treatment of female athletes are used such as "female athletes don't eat as much" or "female athletes told me they wanted a female coach"

Similar but often more artful mechanisms are typically used to discriminate against female coaches who are unfairly treated because of their gender, sexual orientation, age or national origin. Such treatment not only includes lesser benefits and compensation compared to male coaches but often also includes the use of techniques to silence, intimidate, isolate, retaliate or cause fear. For example, in attempting to unearth discrimination, I typically try to determine whether female coaches or members of a protected class are treated differently with regard to the following circumstances, among others:

⁴ The term "paper hire" commonly refers to the absence of an aggressive marketplace search that includes soliciting the interest of and applications from coaches who would not be expected to apply for a position. – seeking to hire someone away from another institution. Instead, the school only considers applications in response to published advertisements, seeking a lower priced candidate.

- the offer of at-will versus multi-year employment agreements and the terms of such agreements;
- the likelihood of having contracts not renewed or employment terminated;
- receipt of compensation commensurate with experience and qualifications;
- inclusion in department social or fundraising events;
- recognition of performance achievements such as bonuses, salary increases and/or contract extensions;
- inappropriate comments related to protected status;
- purposeful isolation or obstruction preventing participation in normal conversation or department activities;
- acknowledgement on the occasion of significant life events typically noted among all employees;
- proper use of performance evaluations;
- respectful verbal or inclusive treatment as employees;
- the occurrence of treatment changes following raising concerns regarding equitable treatment;
- double standards for regarding pedagogy of the protected class ranging from reaction to student or parent complaints to criticisms of pedagogy based on inappropriate gender or other stereotypes;
- double standards in the application of disciplinary processes;
- favored treatment of non-members of the protected class;
- double standards in responses to minor or serious violations of institutional or NCAA rules;
- use of fear or other tactics to induce anxiety or a stressful hostile environment;

- use of stereotypical reasons for not hiring, promoting or fairly compensating members of the protected class; and
- failure to provide insufficient resources necessary for program success (e.g., recruiting budgets, scholarships, facilities, sufficiently paid and numbers of assistant coaches, administrative support, promotions and publicity that would result in fan attendance or revenue success, etc.)

In summary, in my analysis of the circumstances of a case, looking for these overt and covert indicators of discrimination in the athletics environment is essential. I address all of these mechanisms in my responses to subsequent questions.

2 Explain how athletic programs experiencing financial challenges normally respond to financial crisis, specifically addressing management best practices applicable to athletic programs similarly structured to the UMD athletic program which financially tiers its athletic program to provide men's and women's ice hockey with NCAA Division I competition opportunities requiring higher funding than other sports that must compete at a lower, less resourced competition level.

First, it is important to understand that once an athletic department establishes a tiered sport structure, placing priority sports in a top tier and then placing the remaining men's and women's sports in one, two or three lower tiers receiving lesser financial support – the UMD program structure -- every effort is made to insulate the priority sports from any budget cuts in the event of financial exigency. Second, the last thing an athletic director would do is to reduce the salary or terminate the employment of the head coach of a successful top priority sport. In my 22 years as an athletics administrator and 40 years in sports management, I have never seen the employment of successful priority sport coach terminated because of budget constraints or even such a coach's salary reduced other than for an across-the-board

emergency reduction of all employee salaries at an institution due to institutional financial crisis. This is because the head coach is the number one asset in the development of a successful sport program.

That being said, there is model management practice with regard to how to approach the need for athletic program budget cuts. First, eliminating a men's or women's sport should not be considered because such action will incur the wrath of generations of alumni who played that sport, thereby creating a fundraising liability that has implications beyond the athletic department. Second, any action taken must maintain gender equity as required by Title IX. Because so many institutions are not currently in compliance with Title IX, such institutions may find that they must impose cuts on men's sports and not women's sports. Third, all administrators and head coaches should be required to participate in relationship-building development initiatives targeting the top 10% of current and prospective donors. The athletic director should schedule personal meetings with top donors in each sport to encourage early and significant gifts to address the financial crisis. No cuts should be made to the staffing or budget of the development/fundraising unit. Increasing and maintaining fundraising and other revenues is absolutely critical. Fourth, a moratorium should be placed on capital projects (construction and renovation). Fifth, as a general rule, the largest expense line items should be tackled first for budget cuts: salaries, scholarships, and travel, in that order and in the following manner:

- a. Salaries. Salaries are the largest expense item in any budget. Voluntary early retirement with replacements hired at lower salaries because retirees will most likely be at the top of their salary scales because of seniority, should be a first consideration. Voluntary across the board low fixed percentage salary reductions – all positions – should be considered next. Such small across-the-board salary reductions of all staff may insure that no full-time employees need to be eliminated and no one person or group of employees takes the brunt of a salary reduction. Also, if and when budget

conditions improve, salary augmentations can more easily be initiated to replace such losses. Next, layoffs of non-critical full-time positions that could be replaced by third party non-benefit part-time contract labor (non-critical clerical staff, administrative, and lower tier non-priority sport assistant coaches in that order).

- b. Scholarships. Scholarships are usually the second largest operating expense in athletics. Reducing the number, restricting numbers of out-of-state scholarships or eliminating scholarships completely in non-priority lowest tier sports should be considered.
- c. Travel. Limiting non-conference team travel of non-priority sports to in-state competitions, implementing restrictions on the number of overnight trips in non-priority sports, reducing recruiting travel for non-priority sports, and eliminating all non-essential administrative staff travel should all be considered.
- d. Sport Operating Budgets. Consideration should be given to implementing fixed percent across the board cuts in sport operating budgets. Small fixed percentage cuts can be tolerated by most sport programs and applying such cuts to all programs may lower the fixed percentage amount. Consideration should be given to including priority sports in such cuts because these larger operating budgets better tolerate small fixed percentage reductions, especially if these budgets are overly inflated.

If budget stress is anticipated to continue over the long term, a special committee should be appointed to reassess the current structure of the athletic department to implement financial tiers (if the program is not currently tiered), increase the number of financial tiers, reduce financial expenditures in lower tiers, move more sports into lower tiers, create a non-scholarship tier or evaluate similar financial solutions. If sufficient savings cannot be accommodated in this manner, changing conference membership to more geographically proximate members or to conferences which impose more strict financial limitations on members should be considered.

Finally, moving the entire athletic program to a lower NCAA competitive division should be considered.

In summary, UMD's choice of terminating the most successful female head ice hockey coach in the program's only Division I high priority sport and increasing the male coaches' salaries and program support of the less successful men's ice hockey program appears to be a targeted action against Shannon Miller, the occupant of that position, rather than part of any rational budget reduction strategy. In my opinion, the Miller employment decision does not conform to any normal industry practice regarding athletics financial management expected in UMD's budgetary circumstance.

Further, the fact that Athletic Director Josh Berlo chose not to fundraise for Miller's salary or for the support of women's ice hockey as a first choice in facing a financial issue is significant. It's the first thing an athletic director or athletic department development officer should have explored. In fact, on September 16, 2014, just several months prior to Miller's termination, in a meeting called by Berlo and Development Director Gary Holquist, coaches Miller and Banford were specifically queried about wealthy supporters who would donate significant funds to women's ice hockey. However, none of these donors were ever solicited. Following the announcement of Miller's non-renewal later that fall, donors actually offered to provide for her salary when the financial reason for her termination was announced and such offers were rejected. Specifically, Angie Nichols, the UMD GLBTA advisor, asked Chief of Staff to the Chancellor, Lucy Kragness, if it was possible for an interested donor to contribute to cover Miller's salary. Kragness referred Nichols to Holquist and Berlo. (UM_000010935) Ira Salmela, A UMD employee, met with Chancellor Lendley Black and notified him as well that there were potential donors who would contribute money for Miller's salary. Salmela asked Black if he would be open to reinstating Miller as she believed there were interested donors, but wanted to know if they would be open to that before they proceeded to seek donors. Black told Salmela that he didn't think donors were allowed to donate funds for a salary and that he would get back

to her. Black never got back to Salmela. That such a UMD policy position ever existed is highly suspect and I have asked plaintiff's attorneys to query about this at depositions. It is common practice nationally among institutions of higher education to seek to endow faculty and coaching positions, with the latter common practice at Division I institutions. In fact, a University of Minnesota policy exists to encourage such gifts.⁵

When a coach leaves and the institution seeks a high salaried replacement, it is not unusual for an alumni or booster group to guarantee all or part of such a salary. Indeed, according to my interview with Shannon Miller, it appears that the UMD athletic department has accepted donated funds restricted for salary use. Specifically, it was common knowledge that the men's ice hockey program was allowed to fundraise for the specific purpose of providing or enhancing the salary offer for men's assistant coach, Brett Larson in 2015.

Further undermining the weak contention that eliminating Miller's salary was a financial necessity given the budgetary plight of the department, is the fact that UMD showed no restraint in holding the line or reducing salaries or operating budgets in other sports. What UMD accomplished by replacing Miller with Crowell was not reducing the athletics budget by \$69,000, but rather shifting the \$119,212 women's ice hockey budget reduction to support the men's athletics program with \$61,588 of that amount going to men's ice hockey and remainder enabling an increase in the head coach salaries of men's Division II sports, further exacerbating gender inequities in the compensation of coaches. See Table 3.

⁵ University of Minnesota Administrative Policy *University Endowed Chairs, Professorships and Faculty Fellowships*. Retrieve at: <http://policy.umn.edu/education/endowedchairs> states "Gifts are accepted by the University of Minnesota for the purpose of creating endowed chair, professorship, or faculty fellowship positions. These positions may be permanently endowed; or established as a 10 year term position if the annual support is equal to 1/10 of the total needed for appropriate endowment level..."

Table 3. Difference Between UMD Salary Expenditures on Men's and Women's Sport Coaching Staffs: 2014-15 to 2015-16 (UM_000002400-2416, 8617-8633)

Total Coaching Expense	2014-15	2015-16	Difference in Dollars	% increase/ Decrease
Division I Sports				
Men's Ice Hockey	\$ 632,543	\$ 694,131	\$ 61,588	10%
Women's Ice Hockey	\$ 415,391	\$ 296,179	\$ (119,212)	-29%
Division II Sports				
Men's Sports	\$ 532,657	\$ 557,990	\$ 25,333	5%
Women's Sports	\$ 415,958*	\$ 356,682	\$ (59,276)	-14%

*Portion of 2014-15 head softball coach/ice hockey director of operations position assumed to be for head softball coach duties was \$37,213 plus \$931 merit based on UM_000003221

Further, despite the fact that on December 11, 2014, UMD took the position that the Miller employment action was financially driven, three months later, in the institution's April 1, 2016 response to a U.S. Office for Civil Rights query, UMD added two additional highly suspect reasons for non-renewal of Miller's employment: (1) "slippage" with regard to ice hockey team success and (2) deficiencies with regard to the academic performance of ice hockey players. In my opinion, both of these reasons are without credibility. With regard to the former, UMD chose the weakest five year period of Miller's career to allege "slippage" in the success of the women's ice hockey program, purposefully implying that her performance was weak instead of fairly and more accurately identifying 2012-13 and 2013-14 as a two-year career anomaly among her sixteen years at UMD that was the result of critical position injuries, the loss of three top Swedish full scholarship recruits just prior to the start of the school year, lack of budgetary support, lack of support staff, and the assignment of a number of inadequately skilled and unprofessional athletic training staff members to the women's ice hockey program. I came to this conclusion on the basis of an extensive discussion with Coach Miller regarding the two year period that was below par, a discussion that any competent athletics manager would have been expected to have with any head coach, and present my findings from that investigation to support this opinion.

Prior to being terminated in December of 2014, Miller's teams advanced to the WCHA championship tournament (top four teams) every single year except 2012-13 because neither of the top two goaltenders could play, leaving the third goaltender in net for play-offs. In these two seasons, the team's number one goal tender was out the entire first season with an injury, and out for more than 95% of the second season. The number two goal tender played most of the games, but had significant health problems that also affected the team's performance. Injuries at the goalie position are critical to a team's success. During the 2012-2013 season, Miller's team lost three full scholarship players late August, right before the season began. One Swedish National Team player was not admitted by UMD due to her TOELF score, one Swedish National Team player did not make it through the NCAA Clearinghouse and the third Swedish National Team player quit the process because it was taking UMD so long to get her admitted and then at the last minute she lost her teammates who were supposed to move to Duluth with her. When a team loses three full scholarship players late August, they are unable to recruit to replace them. This fact hurts a team for a minimum of two years, as most North American recruits commit two years in advance.

Also, the 2013-2014 season was an Olympic year. Due to the nature of the women's hockey international roster, every four years the program loses some players to centralization in their respective countries and some players remain at UMD but go in and out of the line-up for international events. The Olympic players either (a) miss the entire season and cannot be replaced because their scholarship must be held for their return or (b) they miss several UMD games intermittently for many international events, plus the three weeks of competition during the Olympic Games. During the 2013-2014 Olympic year, Miller and her staff added lower level, non-scholarship players to make sure the team had enough players on the roster to be able to compete and survive the Olympic year. At the completion of the academic year, every effort is made to keep some of those players on the roster and assist others in finding an environment where they will have academic and athletic success. For the 2013-2014 season Miller also lost

two other scholarship players – one athlete had to have major knee surgery and missed the entire season; the other athlete had her father pass away and she dropped out of UMD and quit the team. Miller’s team was extremely short handed for the 2013-2014 season.

Besides the goaltenders’ injuries, other players suffered injuries and their return to participation was delayed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The result of lack of administrative action was less quality players on the ice and a disruption of team chemistry, both factors having an adverse effect on team success.

Even though it is inaccurate and inappropriate to compare Miller’s won/lost record during the selected five-year period with the supposedly more successful up and coming men’s ice hockey coach, who had all the resources he needed to be successful while Miller did not, the facts actually support the conclusion that Miller’s women’s ice hockey program enjoyed four of the five seasons with win/loss records equal to or better than that of her counterpart:

Table 4. Comparison of Men’s and Women’s Ice Hockey Program Success:
2010-11 through 2014-15 and Career Head Coach Records

	Shannon Miller		Scott Sandelin	
	Wins/Losses/Ties	%	Wins/Losses/Ties	%
2014-15	20-12-5	.608	21-16-3	.562
2013-14	15-15-6	.500	16-16-4	.500
2012-13	14-16-4	.470	14-19-5	.434
2011-12	21-14-4	.676	25-10-6	.683
2010-11	22- 9-3	.691	26-10-6	.690
CAREER*	363-144-50	.696	268-261-70	.506

*at UMD, 16 yrs. for Miller and 15 years for Sandelin through 2014-15

The allegation of program success “slippage” ignored all of the above described unusual circumstances and support inequities suffered by Miller’s program. Further, there were discriminatory administrative decisions that Miller had to overcome to produce a successful women’s ice hockey program. From 2009-10 on, each year, Coach Miller complained to the athletic director that her recruiting was being hurt because she was unable to promise that her scholarship players would receive the extra benefit of summer school and fifth year athletic financial aid support – benefits regularly provided to female athletes participating on opposing Division I hockey teams at other institutions, thereby affecting the overall recruiting and competitive success of Miller’s women’s ice hockey program. Opposing women’s hockey programs that were able to offer the 5th year scholarship bonus realized a significant advantage over UMD’s women’s program. The promise of an extra year on athletic scholarship is a significant benefit to a prospect and her parents and hurt UMD’s women’s ice hockey program recruiting. The summer school benefits were provided to UMD male hockey players but not female players, a Title IX equal treatment inequity. Thus, UMD female ice hockey players had to pack more courses into each regular semester during the traditional fall/spring academic year in order to complete their eligibility within four years of enrollment covered by their scholarship support. Their male counterparts, who could receive summer school financial aid, could take the minimum number of courses required to meet full-time enrollment standards during the regular academic year and then spread additional coursework over the summer terms. Summer school support also allowed male players to stay on campus to train over the summer, a considerable advantage. Further, fifth year scholarship athletes contribute to the success of the hockey team in other ways. They are athletes who have exhausted their eligibility to compete but are allowed on the ice at practices thereby filling the role of experienced players against whom currently eligible players can practice. Fifth year athletes also reduce the workload of coaches because they support other on and off ice team activities, much like graduate assistant coaches.

Despite these recruiting and current athlete scholarship and summer aid advantages afforded the men's program and not enjoyed by the women's program, Miller maintained a more successful regular season program than Sandelin. Berlo also chose to offer no perspective to explain Miller's post-season record. While Sandelin qualified for the NCAA championships in three of these five years, winning one national championship, Miller qualified once during this five year career snapshot, and were it not for the NCAA quarterfinal game versus the eventual national champion (a 2-1 loss) would have qualified UMD women for the 2010-11 Frozen Four. In this year, portrayed by Berlo as unsuccessful, UMD women's ice hockey team was ranked 6th in the nation, hardly program "slippage". Also, at the time of her termination, on December 9, 2014, Miller's program was ranked sixth in the pairwise national poll (poll most closely associated to what the NCAA uses to rank and select teams) and third in their league, the WCHA.

In addition, the athletic director and the athletics compliance officer, responsible for supporting the admission of international female hockey players, did not fulfill these normal duties which could have been because international athletic scholarships are more expensive and/or this was another example of athletic administrators practicing xenophobia, or both reasons. This lack of support from athletic administrators was in direct opposition to institutional policy which sought an increase in international student admissions. Non-athlete international students with lower TOEFL scores were admitted while female international hockey players were rejected. These rejected players were among the best in the world and would have significantly enhanced women's ice hockey program success. I further discuss this issue of administrators choosing not to perform their normal duties on behalf of Miller's international recruits in more detail on pp. 108-113.

Thus, I concluded that the arbitrary selection of a 5-year period with no inclusion of injury explanations, national ranking information in addition to post-season results, international admissions failures, failure to provide summer school or fifth year financial aid, an Olympic year

with depleted roster, and athletic trainer staffing issues as explanations for variance from past five year periods appears to be a purposeful intent to mislead. Last, it appears that the last year of the five year snapshot was one in which the success of the women's ice hockey program was purposefully derailed by the actions of the Athletic Director. In 2014-15, the year in which Miller was fired, UMD was ranked 6th in the country, favored to qualify for the NCAA Play-Offs and the Frozen Four and on the day she was fired in the middle of her season, sported a 12-5-3 record. Immediately following her termination, Athletic Director Berlo met with players and their parents, sending the players into an emotional tailspin thereby undermining team chemistry and disrupting the team's performance over the remainder of the year. Unsuccessful Division I head coaches may be fired in the middle of the season but head coaches are not fired in the middle of successful seasons, especially seasons in which they are contending for national titles. Any athletic director would know that taking such an action would have a significant adverse impact on the current team's success.

Coach Miller's body of work was simply superior to Coach Sandelin's on every measure: five national championships compared to one for Sandelin, seven Frozen Four appearances compared to two for Sandelin and ten NCAA tournament berths compared to five for Sandelin. It is simply an incredible record for a coach who in 10 of 16 years, qualifies for the NCAA tournament (top eight in the nation) and then advances to the Frozen Four in seven of those years. Coach Miller is the only head hockey coach in the country that has been honored at the White House by the President of the United States five times. No athletic director in their proverbial "right mind" would terminate Miller based on a rationale of "slippage" in program achievement or suggest that Sandelin was a better coach than his female counterpart. In my opinion, such a position is the epitome of sexism. In addition, even if Miller's record wasn't as successful as Sandelin's, because UMD failed to provide the women's ice hockey program with the same resources as men's ice hockey, as required by Title IX (see full discussion in my

response to Question Six), UMD could not hold Miller to the same program success standard because her failure would be the result of sex discrimination.

It was similarly misleading for UMD to suggest that Coach Miller's players were failing academically, as UMD did in its response to the OCR complaint:

The UMD Women's Hockey Team received the lowest APR score in the conference, and either the lowest or second lowest APR score in all of NCAA Division I women's hockey, every year from 2009-2010 through 2013-2015. The team's 2014-2015 APR was the lowest of any year since 2009-2010. UMD assumes the team will once again rank last in the conference and the NCAA in APR for 2014-2015. (UM_000001805)

First, the APR (Academic Progress Rate) is not a measure of academic achievement. It is a measure of retention and eligibility that is used to disqualify teams from NCAA post-season play. The APR standard, which must be met for a very limited championship disqualification purpose, is .930. The 2014-15 UMD women's ice hockey APR was .962⁶, well above the NCAA post-season play .930 standard. Second, it should be noted that, nationally, Women's Division I Ice Hockey teams have the highest average APR among all NCAA men's and women's sports (.992).⁷ Thus, saying that UMD is at the bottom of the list of 35 Division I ice hockey programs that have some of the highest APRs in the nation is anything but a characterization of failure. Third, it is not appropriate to compare the UMD APR scores to other institutions that have vastly different academic programs. The proper comparator for use of the NCAA APR or any other NCAA academic metric is between groups of students attending UMD, either comparing the differences between UMD athletic teams or comparing UMD athletes to non-athletes. The men's ice hockey team APR was .985. All that can be accurately said is that the men's ice hockey team APR in 2014-15 was higher than the women's ice hockey team APR of .962. But even that is an unfair comparison because UMD male hockey players were offered the opportunity to attend summer school, spreading their classes out the entire year, and the female

⁶ NCAA APR Searchable Database. Retrieve at: <http://web1.ncaa.org/maps/aprRelease.jsp>

⁷ National Collegiate Athletic Association. National and Sport Group APR Averages and Trends, April 2016. Retrieve at: https://www.ncaa.org/sites/default/files/2016APR_public-release_20160420.PDF

hockey players were not. This added benefit allows the male student-athlete to have more success academically and, because they have smaller academic class loads, experience less stress and are more likely to be able to rest more in season, to be more successful athletically. Because all other UMD sports are Division II, no APR scores are kept for these sports. Fourth, APR is considered by most to be a significantly flawed NCAA academic metric.⁸ Last, I opine that UMD purposely tried to find a metric that would reflect poorly on the women's ice hockey program. For instance, if UMD wanted to compare the academic performance of women's ice hockey with other prominent ice hockey programs, it could have selected Women's Collegiate Hockey Association (WCHA) All-Academic Team selections. From 2011 to 2015, the UMD women's ice hockey team had 50 players recognized compared to the University of Minnesota – Twin Cities with 56.

The best measure of a coach's influence on academic success is the graduation rate of players. The coach's most important academic promise to a recruited player is that they will receive a college education. The Federal Graduation Rate (FGR) is the best measure because it allows the comparison between athletes and non-athletes at an institution. The FGR is based on a 6-year rolling cohort. In 2014-15 (2008 cohort results), the graduation rate for men's ice hockey was 59% compared to 76% for women's ice hockey and the UMD undergraduate FGR was 59%.⁹ The NCAA also publishes a Graduation Success Rate (GSR) which is suspect for a number of reasons, not the least of which is that it does not allow for a non-athlete student

⁸ Gurney, G., Lopiano, E. Snyder, D., Willingham, M., Meyer, J., Porto, B., Ridpath, D.B., Sack, A., and Zimbalist, A. (2015) The Drake Group Position Statement: Why the NCAA Academic Progress Rate (APR) and Graduation Success Rate (GSR) Should Be Abandoned and Replaced with More Effective Academic Metrics. (October, 2015) Retrieve at: <https://thedrakegroup.org/2015/06/07/drake-group-questions-ncaa-academic-metrics/>

⁹ See NCAA GSR Search database at <http://web1.ncaa.org/GSRSearch/exec/homePage> which contains both the GSR and FSR by sport for each NCAA member institution. The Federal Graduation Rate (FGR) is defined and required by the U.S. Department of Education and a comparison of athlete versus non-athlete FGR is the most commonly used indicator of academic success for college student-athletes. FGR measures the percentage of first-time, full-time freshman who graduate within six years of entering their original four-year institution. The expectation would be that athletes and non-athletes would not have different FGRs.

comparisons. However, even using the GSR, women's ice hockey outperformed men's ice hockey 100% to 83%.¹⁰ Last, it would be reasonable to me, that the team GPA of women's ice hockey or any team with five or more players who speak English as a second language, would be lower than any team with players who have English as their primary language. However, team GPAs vary greatly from year to year and are not typically used as the measure of a coach's recruiting and academic success influence.

Having opined on the impropriety of basing Miller's adverse employment decision on financial grounds, low APRs compared to other Division I women's ice hockey programs nationally, and slippage in program success, in the questions that follow I address the possibility of Coaches Miller, Banford and Wiles' adverse employment treatment being due to discrimination based on one or more of the protected category characteristics of these individual – gender, national origin, sexual orientation or age and/or retaliation due to these individuals' objection to Title IX athletic program gender inequities. I also examine whether student evaluations, minor violations of NCAA rules or other information were intentionally used to portray the performance of these coaches as deficient.

3. With regard to student-athlete retention on a team, coach communication with student-athletes and student-athlete satisfaction with their athletics experience, are there differences between Division I and Division II programs that award athletic scholarships and Division III or high school athletic program experiences in which financial aid is not a factor? Are there differences in how athletes adjust to these more competitive Division I and II program environments? Do player adjustment failures affect team chemistry? What model professional practices are required to successfully deal with individual player adjustment challenges or adverse team chemistry situations? Are

¹⁰ Ibid. For a critique of the GSR, see Gurney as listed in FN #9 above.

such player adjustment differences commonly understood by Division I and II coaches and athletics administrators?

Because UMD has raised the issue of student-athlete dissatisfaction being considered in relation to employee retention in the case of several of the plaintiffs in this case, I believe it is important to first address the Division I and II student-athlete experience generally, in order to provide proper context, and then, in later questions, to address whether UMD engaged in the proper use of student-athlete evaluations of coaches.

Generally, there are significant differences between NCAA Division I and II¹¹ scholarship-awarding athletic programs and less competitive NCAA Division III, National Junior College Athletic Association (NJCAA) or National Association for Intercollegiate Athletics (NAIA) and high school athletic programs that do not award scholarships with regard to student-athlete retention, coach communication and student-athlete satisfaction with their Division I or II athletics experience. These differences involve how athletes adjust to these Division I and II program environments, how player adjustments affect team chemistry and the professional practices required to deal with challenging individual player adjustments or dysfunctional team chemistry situations. Such differences are commonly understood by Division I and II coaches and athletics administrators.

First, it is important to understand the differences between coaching styles used and the pressures to perform placed on student-athletes in Division I and II versus Division III and other less competitive programs. Division I in particular caters to athletes with professional or Olympic/national team aspirations. Division II athletes seek higher levels of competitive excellence than Division III, NJCAA, and NAIA athletes. Male and female coaches in these

¹¹ There are many Division II institutions that do not award substantial amounts of athletic aid and depend on partial scholarship athletes to pay a substantial portion of their tuition. At these institutions, to the extent the institution depends on these tuition revenues for maintaining its regular enrollment and economic well-being, athlete retention may be more important than winning and program success as a coach expectation. In such cases, coaches and administrators are usually well aware of these retention expectations and athletics recruiting is an acknowledged factor in the institution's strategic plan.

lower competitive level programs, unlike their Division I and II male and female counterparts, face the added pressure of being judged on their ability to retain athletes and recruit athletes who can pay for a substantial portion of their own educations. Athletics recruiting in these lower competition level programs is the equivalent of admissions office recruiting with athletics department efforts often considered to be the primary vehicle for institutions to “make” an incoming class that will assure its financial solvency. No such retention pressure confronts Division I and II coaches except in cases where the institution does not wish to add new women’s teams and the athletic director pressures coaches of women’s teams and not men’s teams to keep large and sometimes inflated size teams, often a purposeful discriminatory practice.

To contend that Division I and II female coaches have a caretaking and retention obligation similar to lesser Division III and other programs or high school coaches while that same standard is not applied to male coaches is also indicative of lesser respect for female coaches and an anachronistic gender stereotype. To also require that women coaches adjust their communication to be less forceful, less demanding or less insistent about effort and the pursuit of excellent performance – more reflective of a weaker and gentler gender stereotype -- is a discriminatory double standard.

It is simply normal for Division I and II institutions to experience higher levels of student-athlete turnover and dissatisfaction than Division III and lower competition level institutions. This is because at the higher competition levels, a normal program would not expect coaches to coddle athletes who don’t have the skills or commitment to train for athletics excellence. The environment is tougher and requires considerable individual athlete adjustment and resilience. Thus, athlete turnover at this level is a normal occurrence and should not be considered a coaching deficiency. It is also commonly understood that Division I and II coaches communicate in straightforward and more direct ways. They are detail oriented experts about their sport who will spend 95% of their time in error correction and much less time than high

school or lower competitive level coaches in non-skills specific encouragement. When an administrator rates these higher competitive level college coaches on quality of a practice, 80-90% of the practice should be time-on-task skill practice and athlete communication should reflect 50%-50% positive and negative skill evaluation – “yes, you did this right” or “no, you should be in this position, not that one.” The athlete who is at the lower level of the skill continuum or who isn’t exerting maximum effort in practice will receive more critical comments than praise. Thus, the transition from being the proverbial “big fish in a small pond” in high school to Division I and II athletics where an athlete who experienced all-state or record-breaking success or was a starter in every game at the high school level may not make the starting team or is at risk at being cut from the team, causes considerable angst for many athletes and their families. Division I and II athletics is simply an incredibly stressful environment.

It is also common for Division I and II athletes who find themselves sitting the bench, to transfer to institutions where they are more likely to become starters. For example, NCAA research on Division I men’s basketball transfers show more than half of all transfers moving to Division II or NAIA or other non-NCAA member institutions. To put transferring to another institution in proper perspective, it should be noted that one in four college students transfer and the rate is similar among athletes, despite rules which impose athletic eligibility penalties in sports like football and basketball.

To complicate matters further, parents are also required to adjust their expectations about the skills and abilities of their sons or daughters who attend Division I or II institutions. Hopefully, they provide the appropriate support depending on a realistic and unbiased assessment of their children’s skill, ability and effort in comparison to other members on the team, becoming positive forces in the athlete’s decision to stay with the program or to find and transfer to a program where they can be starters rather than bench sitters. Unfortunately, some parents simply refuse to believe that their child does not have what it takes to experience

success at the higher competitive level. In these cases, it is not uncommon or surprising to find parents that blame coaches or others for their child's lack of playing time, success or satisfaction. These are the most difficult cases for a coach or athletic administrator to handle. The player wants to please his or her parents and many players are simply not yet mature enough to undertake a self-evaluation that agrees with the coach's analysis or to independently determine whether they have the ability to succeed. Or, even if the player realizes that his or her skill level isn't at the level required to be a starter, the player may not be capable of taking a position opposite to the opinion of a parent. In such cases the anger of the parent may even fuel an angry reaction by the player. To make matters worse, the player may seek the support of other players on the team who also aren't playing as much or who are not experiencing the kind of success they think they should. In such situations, it becomes almost impossible for the coach to develop positive team chemistry because half the team members may be flourishing, excited, satisfied and highly competitive and the other half may be unhappy, dissatisfied or angry.

In my eighteen years as a Division I athletic director and experience as a national team coach and player, and in my training of future sport managers for all competitive divisions, I emphasize that encountering such team chemistry challenges at one or more points in any coach's career is inevitable but there are key mechanisms to use to try to avoid such challenges. First is making sure that coaches inform athletes and parents about the demands of Division I and II athletics during the recruiting process. Second, the coach should repeat this message with all team members at the beginning of each year, explaining the intensity of instruction and training at the Division I and II level, how it differs from previous and lower levels of competition. Coaches should emphasize the importance of athletes meeting with coaches if they have concerns. Third, early intervention by the coach to counsel individual athletes without the necessary skills and abilities and who are unwilling to play a supporting and positive role as a second string player spending most of their time on the bench and supporting their

teammates, is essential. Coaches may have to raise the possibility of an athlete leaving the program and finding another institution where they can be happy as a starting player – a continuation of their high school status. Fourth, the athletic administrator should never “second guess” a coach’s judgment regarding the talent, playing time or contribution to positive team chemistry of a player or meet with athletes without the coach being present. Such micromanagement is beyond the knowledge base of the administrator, will inevitably result in miscommunication common to three way conversations and will worsen rather than provide a solution to an athlete adjustment issue. The last thing a Division I or II administrator should do is force a coach to keep a player who is not contributing to the success of a team or who undermines team chemistry. Fifth, if parents are a part of the issue and the athlete wants parents to intercede on his or her behalf, an early informal meeting with the coach, the player and the player’s parents might be in order. However, such an intervention is often easier said than done when emotions or anger runs high. Sixth, the coach’s immediate supervisor can be helpful. Student evaluation summaries should be reviewed every year by the coaching staff and administrative supervisor to brainstorm how to tackle team chemistry issues, including the supervisor working hand-in-hand with the coach to help to communicate with unhappy parents should also be explored. The bottom line is that criticism of a coach from a player dissatisfied with his or her playing time should be taken with the proverbial ‘grain of salt’.

These Division I and II differences in the intensity of instruction and demands for maximum effort are commonly understood by Division I and II administrators who know that this intensity is in large part created by the value the administrator places on the achievement of athletics excellence. This requirement for program success is clearly communicated to coaches in their employment agreements, annual performance evaluations and administrative decisions related to the offer of multi-year employment agreements, bonuses, merit increases in compensation and renewal or termination of employment. Coaches and administrators at this level fully understand the pressures for excellence that are exerted by coaches and how some

athletes readily adjust to the transition to a more demanding program, some athletes struggle, and some athletes never adapt or never meet the elevated level of expected skill or effort.

I queried all coaches about their respective understanding of these adjustment pressures and all informed me that it was their common practice respectively to support and assist any student who wished to transfer or to encourage students without the skill and ability to have a satisfying UMD competitive experience to transfer to another institution where they were more likely to be starters. It was also clear that Berlo understood these common coach practices to be acceptable. Coach Miller related an example where she extensively discussed, planned and encouraged the transfer of six players with Berlo for the spring of 2014, specifically seeking his approval, which he gave. All six players successfully transferred, the team was aware and supportive of the departures and the players who transferred were satisfied with the process. Despite this responsible handling of these players adjustments and the meticulous effort of Miller to keep the athletic director informed, Berlo and Strong would later pull in a number of these and current players for individual meetings to try to solicit information indicating player dissatisfaction with Coach Miller's handling of these players.

In Question Four, I address the proper and improper use of student-athlete annual coach evaluations and student-athlete exit interviews. In Question Five, I address the proper and improper treatment of student-athlete or parent complaints about coaches.

4. What is the proper use and construction of student-athlete exit interviews and annual student-athlete coach evaluations, their respective purposes and whether these instruments should be used to identify coach misconduct? Based on an examination of UMD athletic department student-athlete annual evaluation and exit interview instruments and policies, did you form any conclusions about these instruments and whether use of results conformed to model practice?

First, it is important to understand that it is not the function of a student-athlete to evaluate a coach's performance. Coach evaluation is the primary responsibility of each coach's immediate administrative supervisor and is based on goals and responsibilities listed in the employee's job description and/or employment agreement. Generally, these goals usually include:

- sport success goals (won-lost records, rank nationally or within the conference, post-season success, etc.) usually stated in the coach's job description and employment agreement;
- the academic performance of players, usually a graduation rate expectation;
- the supervisor's evaluation of the coach's pedagogy and communication with players, officials and others based on the supervisor's observations at practices and competitions;
- player improvement based on objective measures;
- the growth in mature behavior and human development of players;
- operational efficiency (staying within budget, meeting deadlines, conformance with rules and policies etc.); and
- recruiting success. In Division I, sport program success on the playing field is typically more heavily weighted than in Division II with regard to importance but not to the exclusion of any other element. Ideally, institutions of higher education want coaches who win, coaches who follow NCAA rules, student-athletes who graduate, individual athlete improvement in skill development, student-athletes who demonstrate emotional maturity and resilience in highly competitive environments and exemplary community and sportsmanlike conduct by coaches and student-athletes that reflects well on the reputation of the institution.

Based on a review of the performance evaluations of coaches Miller, Banford and Wiles in which they were consistently rated as above average, all of these coaches were consistently rated above average, fully meeting the expectations of their employer.

Student-athlete exit interviews and annual evaluations do provide coach and supervisor input, but they should never be used for the determination of compensation and employment (termination and non-renewal) decisions for two main reasons: (1) susceptibility to gender bias, (2) susceptibility to bias based on whether a player starts or participates in a game frequently or infrequently or whether the team as a whole is experiencing success, and (3) lack of student-athlete expertise and training in the evaluation of pedagogy practices. The use of student evaluations of teachers (SET) by UMD fails to recognize the research demonstrated gender bias of students who regularly rate female teachers lower than males:

SET primarily do not measure teaching effectiveness, that they are strongly and non-uniformly biased by factors including the genders of the instructor and student, that they disadvantage female instructors, and that it is impossible to adjust for these biases. SET should not be relied upon as a measure of teaching effectiveness. Relying on SET for personnel decisions has disparate impact by gender, in general.¹²

In fact, Stark cautions, “class action lawsuits against universities that rely on these evaluations for employment decisions will start this year, and that there’s evidence to support such cases.”¹³ Boring, Ottoboni, and Stark further state that the “onus should be on universities that rely on SET for employment decisions to provide convincing affirmative evidence that such reliance does not have disparate impact on women, underrepresented minorities, or other protected groups.”¹⁴ It would be difficult for UMD to demonstrate such evidence when there are no women employed as coaches of men’s teams and therefore no men evaluating female coaches,

¹² Anne Boring, Kellie Ottoboni, and Philip B. Stark. (2016) Student evaluations of teaching (mostly) do not measure teaching effectiveness. *ScienceOpen Research* 2016 (DOI: 10.14293/S2199-1006.1.SOR-EDU.AETBZC.v1)

¹³ Ibid

¹⁴ Ibid.

which would be required to demonstrate lack of gender bias in the evaluation of coaches. Absent such specific evidence, “SET should not be used for personnel decisions.”¹⁵

Further, the literature regarding the use of SET in athletics settings (Levoi, Crossett, et al) is clear. When female coaches “coach” like males (i.e., act like males) they are sanctioned more harshly because they are not conforming to traditional gender norms. Lavoie, in her most recent research study to be published in 2017, reveals that the strongest female coaches are rated lowest by female athletes compared to male counterparts who coach in identical ways. This implicit gender bias of female athletes occurs when they perceive, evaluate and interpret strong female coach behavior and results in discrimination against female coaches when SETs are misused for compensation and employment non-renewal purposes. Lavoie also notes that this implicit and conscious gender bias is present in athletic directors who evaluate and interpret SETs for female coaches, most of whom are men.

Given the negative impact of gender bias on female coaches, using student-evaluations to support employment termination or non-renewal decisions or to determine merit increases, both practices that were used by UMD, will always give male coaches an inherent advantage. For example, an examination of the UMD aggregated results of 2013-14 annual student-evaluation summaries for all sports (UM_000000590-651) with regard to coach ratings used for UMD merit compensation increases demonstrates the point. All four female coaches – all coaching women’s sports and all rated only by female athletes - were among the five lowest rated coaches. [REDACTED]

[REDACTED] The practice of using SETS for compensation and employment decisions will always favor male coaches who will benefit from the an inherent advantage of female athlete gender bias negatively affecting same sex coach evaluations and the fact that there are no female

¹⁵ Ibid

coaches for male athletes to evaluate. As previously stated, the proper use of annual student athlete evaluations is providing valuable but limited input toward the end of achieving coaching and program improvement.

With regard to allowing student-athletes to evaluate coaching or teaching practices when they have no training to do so, such a practice is simply irresponsible. If a student-athlete evaluation indicates concern about a teaching practice, that information should be used to make sure the coach's supervisor increases direct observation of the coach in practice and competition settings. Such teacher or coach evaluations should be made by trained professionals – not untrained students. These two points having been made, there is a valid use of student-athlete exit interviews and annual evaluations with regard to improving coaching and all elements of the athlete support program.

Student-Athlete Exit Interviews – Model Practice. Student-athlete exit interviews should occur at the end of an athlete's four years of athletic eligibility, upon graduation or prior to transfer to another institution, whichever occurs first. See Appendix D for a model sample instrument. Model practice is as follows:

- **“General.** The associate director for student affairs shall make every effort to have every student-athlete who leaves the athletic program complete an exit interview. Each student-athlete shall be given the choice between completing an oral interview with a member of the intercollegiate athletic council or submitting a written questionnaire which may be signed or unsigned. The results of such interviews shall remain confidential with regard to the identity of the interviewee.
- **Oral Interview.** The oral interview shall be conducted by a faculty member of the intercollegiate athletic council. Every effort shall be made to have the faculty member be of the same gender and race as the student-athlete to maximize the comfort level of the interview. The interview shall include all the questions on the written questionnaire which should be used to record the student-athletes comments. The completed form shall be submitted to the faculty athletic representative.

- **Written Interview.** If a student-athlete declines an oral interview, the associate director for student affairs shall give the exiting student-athlete a written exit interview questionnaire and a stamped return envelope for its return. The envelope shall be addressed to the faculty athletic representative.
- **Exit Interview Summary.** The faculty athletic representative shall prepare a summary of the results of all exit interviews, which shall be reviewed annually by the intercollegiate athletic council and athletic department senior staff.”¹⁶

This end-of-collegiate-athletic-experience snapshot is intended to provide the faculty athletic council (an advisory body to the president) and athletics department senior staff with a more mature student-athlete perspective on their academic and sport experience. It is not intended to be an annual evaluation instrument or mechanism to detect coaching misconduct after the fact. Also, if an athlete is transferring to another institution prior to graduation or completion of athletic eligibility, there should be a consideration of whether such an evaluation could be biased based on failure to achieve a starting position or similar factors.

I asked for a copy of the UMD student exit interview form and results for women’s basketball for the past four or five years. To date, I have received documents that appear to be the interviewer’s typed notes from four 2014-15 basketball student-athletes’ exit interviews, one handwritten 2014-15 ice hockey exit interview, and one 2014-15 softball exit interview – all negative (UM_000004433-4442, 4857, and 4720). There is no way to determine whether selected athletes were invited to participate. Every student-athlete who leaves the program should be interviewed and I must see interview results over a multiyear period to determine context and whether they reveal program issues. An extended number of years of interviews is required because of the low number of athletes who may graduate or transfer in a given year and the possibility of exaggerated outlier bias. The exit interviews I reviewed also to be conducted by an administrator involved in the termination or non-renewal employment

¹⁶ Lopiano, D. and Zotos, C. (2013) Athletic Director’s Desk Reference. Human Kinetics. See sample policy 8.15.

decisions, which poses the question of bias. Instead, model practice is for exit interviews to be conducted by a disinterested member of the intercollegiate athletics advisory council. This practice ensures that student-athletes who may wish to critique aspects of the athletic program aren't intimidated by speaking with an athletics administrator.

In short, it is difficult to believe that the only exit interviews that exist for the three coach plaintiffs are from unhappy student-athletes leaving their programs. If only selected interviews were sought, this is further evidence of a biased attempt to manufacture a case against the coaches. My review of exit interviews from the previous years and not just the last year of Wiles' tenure, are particularly important in order to determine whether Coach Wiles' behavior in her last year or so might be atypical -- such as being affected by players dissatisfied with a less than successful sports season (as was the case in 2014-15 and 2013-14 in which team records were 12 wins/15 losses and 14 wins-13 losses respectively), the graduation of a large group of seniors or transfers who might not have been happy with their playing status and/or reflecting behaviors of Coach Wiles that might indicate her failure to cope with the hostile environment she alleges to have endured. I reserve the right to render an opinion in a supplemental report pending review of all exit interviews conducted during at least a four or five year period.

Student-Athlete Annual Evaluations. The annual student-athlete evaluation, like the annual employee performance evaluation, has as its primary purpose, improvement of coaching instruction and the student-athlete experience. It should be rigidly constructed to provide forced choices regarding the frequency of occurrence of model instructional practices (i.e., always, almost always, sometimes, seldom or similar objective choice system) and each question should include the opportunity to comment in a constructive way, usually asking the athlete to offer suggestions for improvement. See Appendix E for a sample instrument. The format of questions should not be open invitations to complain and the purpose of questions should not focus on discovery of coach misconduct. This is because student-athlete complaints regarding coach conduct should be raised as soon as they occur and corrected immediately via a student

complaint process separate from the annual student-athlete evaluation. Administrators should not be accumulating coach complaints for discussion in an end-of-year assessment.

I reviewed the aggregated summaries of 2013-14 annual student evaluations for all men's and women's sports except men's and women's cross country (UM_000000590-651) and believe their validity should be questioned because of low response rates. Only four teams had at least 50% of the athletes on the roster complete evaluations. With such low response rates, a small number of happy or dissatisfied athletes can skew results. See Table 5.

Table 5. 2013-14 Student-Athlete Annual Evaluations

	Responses	Players on Roster	Response Rate
Women's Sports			
Basketball	11	15	73%
Cross Country	0	15	0%
Ice Hockey	7	23	30%
Soccer	9	27	33%
Softball	17	17	100%
Tennis	3	8	38%
Track and Field	22	112	20%
Volleyball	6	16	38%
Men's Sports			
Baseball	20	35	57%
Basketball	14	14	100%
Cross Country	0	24	0%
Football	13	101	13%
Ice Hockey	7	26	27%
Track and Field	21	104	20%

Based on the response rates depicted in Table 5, I would question whether UMD practice regarding the administration of student evaluation conforms to industry standards and whether the evaluations were consistently administered to entire teams in meetings held for that purpose. Model practice is for the student-athlete evaluation instrument to be administered by the coach's supervising senior staff member (or other senior staff member) to the entire team at the same time during a meeting for that purpose. The administrator should explain that the

purposes of the evaluation are (1) to assess the athlete's experience under the direction of a member of the coaching staff from whom the athlete has received instruction in sports skills and strategy and (2) to provide information to improve the athlete's experience. The evaluation should not be signed by the athlete. All student-athlete assessments should be aggregated into a summary report that is discussed as part of each coach's annual performance evaluation meeting with his or her supervisor. If the evaluation also includes an assessment of other athletic department support services (i.e., athletic training, strength and conditioning, etc.), these results should be discussed with the respective staff members responsible for those services. Any concerns raised by student athletes should be discussed in a meeting of the supervisor and coach (or support services staff member) with a collaborative focus on strategies to improve the student-athlete experience. Each student's evaluation form should be destroyed after the data have been transferred to the aggregate summary and the supervisor should express this fact to athletes at the time of administration, explaining that it is a mechanism designed to protect confidentiality with regard to the identity of athletes.

In addition to the above described 2013-14 student evaluation results, I received only one sport's 2014-15 annual student evaluations -- women's basketball -- that reflected a 100% response rate but which may have been administered under unusual circumstances, according to Coach Wiles. Coach Wiles alleges that only part of the team met for a paper and pencil administration of the instrument while some members participated in closed door one-on-one meetings with athletic director Berlo and telephone interviews were conducted with other team members by another senior staff member. This would not be acceptable practice.

I was particularly concerned with the suspect origins of the [REDACTED] complaint dated May 17, 2014 because this athlete quit the women's basketball team in [REDACTED] and it appears that this email was solicited by athletic department administrators for the express purpose of manufacturing a student dissatisfaction case against Wiles (UM_000004417-4419). Proper procedure would have been to administer any exit interview to [REDACTED] at the time the

player left the team. I've asked plaintiff's attorneys to inquire and confirm the methodology of administration for documents labeled (UM_000000681-691). It is important for the administration methodology to be unbiased. Further, as previously mentioned, SETs can be affected by the competitive successes or failures of a team. The fact that Wiles' team had just completed a 12 wins and 15 losses season should be considered by administrators in judging the validity of results.

In my telephone interviews with coaches Banford, Miller and Wiles, I asked whether, during their tenures, it was the policy or practice of the UMD athletic department to require annual review of the aggregated summary of annual student evaluations in meetings between the head coaches and their supervisors. All three coaches responded in the negative on both counts. This absence of coach/supervisor review of results defeats the purpose of any evaluation – leaving results unused. If student concerns are kept secret from coaches until they fester into formal complaints or the administration wants to use them to build a case for non-renewal of employment, neither the best interest of the student nor the professional growth of the coach are well served. If the coach and supervisor discuss the student-athlete evaluation summary in detail every year, problems will be identified early before they morph into complaints and such process will become a positive force for professional growth. In my opinion, the use of student-evaluations by the UMD athletic department was incredibly dysfunctional. In the case of Wiles, it appears that administrators may have purposefully used the administration of student evaluations to find fault with and intimidate Coach Wiles, with the intended purpose of pressuring her to leave.

5. How should parent or student-athlete complaints regarding coach conduct be handled with regard to model practice? Did you form any conclusions about these policies and practices at UMD?

There are three keys critical to the oversight of professional conduct of coaches: (1) the existence of a comprehensive athletic department policy regarding standards of coaching conduct that explicitly defines prohibited behaviors, (2) the requirement that the coach's supervisor have an annual meeting with the team and the coaches prior to the start of practice to review the policy so that student-athletes as well as coaches clearly understand prohibited conduct and student-athletes understand the complaint process, and (3) having a policy that requires all staff members to report observed violations. When I asked Miller, Banford and Wiles whether any of these three policies or practices were in place in the UMD athletic department, they replied in the negative.

I was not provided with a UMD athletic department policy handbook despite my request for this document. I would expect to find the following model athletic department policies and procedures:

1. Coaches and other staff members working with athletes should be required to comply with a Code of Ethics, which includes specific descriptions of prohibited behaviors¹⁷, as a condition of employment with such requirement documented in any employee at-will or multiyear employment agreement. Specifically, the agreement should also include employee acknowledgement that engaging in any of the following instances of serious misconduct will subject the employee to immediate suspension (while charges are pending) or termination of employment following completion of investigation and adjudication processes (see #8 below):
 - Arrests for or convictions of crimes committed at work or outside of work which reflect unfavorably upon a staff member's suitability for continued employment;

¹⁷ See Lopiano, D., Gurney, G., Polite, F., Porto, B., Ridpath, D.B., Sack, A., and Zimbalist, A. (2016) The Drake Group Position Statement: Athletic Governance Organization and Institutional Responsibilities Related to Professional Coaching Conduct. (November, 2016). Retrieve at: <http://thedrakegroup.org/> for a comprehensive list of such behaviors.

- Violation of the criminal laws on Institutional property or while on Institutional business;
- The manufacture, possession, use, distribution, dispensation or sale of illegal drugs or the abuse of alcohol on university time or premises;
- Failing to act reasonably to voice or causing violation of safety rules or procedures or engaging in prohibited pedagogical or other practices that results in endangering the health, causing significant physical injury, psychological harm or death of athletes or others; or
- Violation of the institution's employee conduct policies.

The agreement should also include a provision specifying that refusal by the employee to respond fully and accurately during investigations of such complaints by the institution would be considered as a presumption of guilt unless coach involvement in a pending or potential lawsuit would make such testimony self-incriminating.

2. Athletic department employees should be designated as mandatory reporters if they observe violations of the Ethics Code, with failure to report resulting in disciplinary penalties.
3. The institution should provide "whistleblower protection" to any athlete or athletic department employee submitting a complaint or alleging coaching misconduct. Retaliation against a complainant or reporter in any form should be strictly prohibited.
4. The athletic department should conduct annual staff and athlete education meetings detailing the requirements of the Ethics Code and misconduct complaint procedures.
5. Misconduct complaint procedures should include the reporting of misconduct to either the athletic director or a trained non-athletic department compliance employee. In the case of Title IX sexual harassment or assault allegations, the complaint procedure

should not be handled by the athletic department due to possible conflict of interest concerns. These complaints should be directed to the Title IX Compliance Coordinator.

6. In the case of minor misconduct by coaches (e.g., using profanity, engaging in verbal discourse that denigrates another, grabbing an athlete by the face guard, yanking an athlete into position in anger by grabbing her jersey, etc.¹⁸) that do not result in significant physical or psychological harm to the athlete but represents unacceptable pedagogical practice, the institution's standard HR gradual escalation of disciplinary processes should be utilized by the employee's supervisor: (1) informal oral warning, (2) written warning and performance improvement plan, including reevaluation at a time certain and (3) written warning including specific corrective action (e.g., suspension, termination, etc.) in the event of a failure to correct.
7. The institution should be prohibited from providing the employee with legal representation during investigation and adjudication processes (unless all employees are provided with legal representation) or otherwise interfering with the misconduct complaint proceedings.
8. In cases involving serious coach misconduct resulting in harm to athletes or other individuals (see #1 above), the institution should be responsible for implementing the following procedures:
 - a. Prior to the suspension of any employee for serious misconduct, the institution should be required to convene an independent third party panel (unbiased parties with no association to the institution as employees, donors, alumni or business affiliates) to determine the plausibility of allegations. The complainant and the coach alleged to have engaged in misconduct, among others determined by the panel, should have the opportunity to appear before the panel. If the allegation is

¹⁸ It should be noted that, historically, the athletics culture has inappropriately tolerated such coach behavior. If such behavior is inappropriate for an academic teacher in the classroom, it should be unacceptable for the conduct of educational sport on the playing field or court.

determined to be plausible the coach shall be suspended pending the outcome of investigatory and adjudication processes.

- b. The coach should be entitled to retain legal counsel at his or her own expense to advise the coach during interviews and proceedings.
- c. The institution should provide the complainant and the coach accused of misconduct with a written statement of the allegations and should conduct a formal investigation by an independent third party that shall include interviews with all witnesses, the complainant and the coach accused of misconduct.
- d. The institution should convene an independent third party panel to receive and consider the report of the investigator and conduct adjudication procedures which should include the opportunity for the coach to respond to all allegations and the requirement for a written decision.
- e. The accused and the complainant (or the victim of the abuse if other than the complainant) should both have the right to appeal the decision of the adjudication panel which should be required to provide a written decision.”¹⁹

I asked Miller, Banford and Wiles whether they had ever received or seen athletic department policies that address the above misconduct behaviors or processes to be used in the event of such allegations. All responded in the negative.

If the athletic department does not have its own policies to deal with coach professional misconduct issues, the UMD Student Conflict Resolution policy²⁰ should be communicated student-athletes on an annual basis. However, the absence of an athletics-specific coaching misconduct policy or professional code of ethics specific to athletics would leave student-athletes and coaches without clear knowledge of acceptable professional conduct because the UMD student conflict resolution policy lacks sufficient specificity to unprofessional behaviors commonly encountered in athletic settings. Because of the power imbalance between coaches and their student-athletes, the likelihood of an athlete reporting coaching misconduct is slim if

¹⁹ Id, Lopiano, D.A. et al. Note that references to a “Code of Conduct” or “Ethics Code” relates to this publication’s recommendation that detailed descriptions of coaching misconduct be contained in a Code of Ethics, with department policy mandating adherence to the Code.

²⁰ UM Administrative Procedure. “Reporting and Addressing Concerns of Misconduct”. Retrieve at: <http://policy.umn.edu/operations/misconductreporting-proc01>

the athletic department doesn't clearly define unacceptable conduct and encourage athletes to report the occurrence of these harmful behaviors. Definitions of misconduct are particularly critical because the athletics culture has perpetuated and tolerated coach abuse of athletes using the questionable rationale of "toughening" athletes.

It is also important to emphasize that it is not appropriate to use an employee annual performance evaluation as the mechanism for addressing coaching misconduct, whether serious or minor. Misconduct should always be immediately addressed and not "stored up" for an end-of-year conversation. Hiding and gathering evidence against an employee and not informing an employee of unacceptable behavior is not only highly unethical but also allows an unsafe instructional environment to continue to affect student learning. That being said, it is important to recognize the concomitant obligation of administrators to verify that unacceptable behavior actually occurred, to inform the employee of any allegations and provide an opportunity for the employee to address allegations, and if found to be true, to explicitly inform the employee that continuation of such behavior is unacceptable and clearly state orally or in writing (depending on the stage of the disciplinary process) that such behavior must cease and not be repeated. Title IX clearly specifies that institutions have a responsibility to protect students and employees in order to maintain a safe educational environment and these are the proper mechanisms administrators must use to do so.

It is important to be clear about the conditions under which coaching misconduct rises to the level where suspension or termination of employment is justified. Such consequences are justified when (a) the misconduct results in serious harm to athletes or other individuals and a reasonable individual should have known of its consequences regarding student safety even if there has been no formal HR warning process or (b) In the middle or at the end of the discipline process, after the employee has been previously warned, there is written documentation of such warning either in the context of a performance improvement plan and/or corrective action letter

and the misconduct reoccurs. This did not occur at UMD. I was provided with a copy of one student complaint document regarding Coach Miller and two parent and one student complaints related to Coach Wiles. These documents were never shared with the coaches during their tenure. Coach Miller was never informed of the complaint against her. On one occasion, Athletic Director Berlo mentioned to Coach Wiles that there was a parent and a student complaint. However, when asked by Wiles for a copy of the complaint and what the complaint was about, Berlo refused to give her further information about the substance of the complaints or who made them. I saw no evidence of either an investigation or disciplinary action. If a student alleges coach misconduct during a practice or other team setting, management best practice would be to ask the immediate supervisor of the coach to observe the coach on a regular basis during practices for the purpose of verifying the existence of such misconduct. If such behavior is verified, the coach should receive an oral warning, written warning or notice of disciplinary action related to these complaints.

Thus, the complaint of an athlete critical of coach pedagogy is not a cause for disciplinary action unless it is corroborated by observation by a skilled supervisor knowledgeable about proper coaching pedagogy and an adequate investigation. I queried Miller, Banford and Wiles as to whether it was regular practice or, following any student-athlete complaint, was there any increase in supervisor observations of their respective practices and was informed that supervisors never sat through even one full practice a year. There was no regular observation of coaches' pedagogy by their supervisors. The absence of UMD written policy and procedures in handling such occurrences and the failure of management to follow these best practices, leads me to conclude that UMD administrators were only interested in using student-athlete evaluations, exit interviews and complaints for the purpose of terminating the employment of these coaches rather than advancing their professional growth or properly responding to instances of coaching misconduct.

It is also important to address another area of coach misconduct – failure to comply with NCAA rules. It is important to note that it is very common for institutions to self-report minor violations of NCAA rules termed “secondary” violations. NCAA rules, especially NCAA recruiting rules, are so complex, that it is difficult to avoid minor violations, especially if a coach has had no previous experience in collegiate sport. As long as the transgression is “minor”, the same violation is not repeated, and the violation is not intentional, these violations should not be considered cause for non-renewal or termination of employment. I was only provided with eight documents concerning eight minor violations of NCAA rules by Coach Miller during her 16 years of employment with violations occurring in 1999 (1), 2003 (1), 2007 (2), 2010 (1), 2011 (1), 2014(1) and 2015 (1). (UM_000004081, 4092, 4093, 4083, 4094, 3777, 4090, 4091) There was also summary provided by UMD that lists the 5 violations that purportedly occurred in the last 5 years. However, Miller maintains that two of these allegations are factually incorrect. She maintains that the 2011 violation was adequately explained by Miller at the time it was alleged and the letter about this violation dated November 10, 2011 to Miller from Nielson (UM_000003777) was never sent to Miller.

The December 2, 2014 violation was also factually incorrect. On November 25, Berlo called Coach Miller to advise her of a forthcoming potential violation. Miller asked for details which were not explained by Berlo. Miller then urged Berlo to make sure the allegation was adequately investigated, especially any allegation from [REDACTED] who had just left the program. Berlo responded “But Coach, you have an impeccable record. Don’t worry about it.” When Miller received the details of the allegation, she assembled all of the members of her women’s ice hockey staff and the strength coach in a meeting with Athletic Director Berlo and Abby Strong, Director of Compliance, to address the validity of the NCAA violation alleged by [REDACTED]. No member of the coaching or strength staff was present at the so-called practice session the student alleged to have occurred. Strong concluded that she would accept the word of the student over the testimony of the ice hockey staff and strength coach. (UM_000004087) Coach

Miller contests this finding. It should be noted that the complaint was from a student-athlete [REDACTED], exceedingly unhappy about her playing time and whose allegations of verbal and mental abuse focused on coaches' criticism of her play and effort and decisions not to play her. (UM_000001215-1218) I find the decision by Strong to be extraordinary. Even if all eight NCAA violations were true, they were all minor, none were repeated offenses, none were intentional and none individually or as a whole would be considered cause for termination or non-renewal of employment.

I also reviewed documents concerning three NCAA violations by Coach Banford during her 2006 to 2015 period of employment, one each in 2006, 2007 and 2011 (UM_000003357, 3358, 3233) and similarly found these to be in the same unusual category of minor infractions, none intentional and none individually or as a whole cause for termination or non-renewal of employment. I saw no documents alleging NCAA violations by Coach Wiles.

I have requested but not received copies of all such violations involving all male and female coaches. I would normally review all such instances to determine whether male and female coaches were treated equally with regard to institutionally suggested penalties, letters of admonishment or other disciplinary actions. However, even without reviewing such documentation, I have determined that these violations are in the "minor" category deserving of no substantial disciplinary notice.

6. What did you find, in your examination of University of Minnesota – Duluth ("UMD") documents provided to you or any research you have conducted into this matter, with regard to whether UMD male and female athletes were equally treated as required by Title IX and whether any athletics department staff member could rightfully raise Title IX compliance concerns? Further, if inequities were found, did you find (a) any Title IX inequities with regard to the ice hockey, basketball or softball programs that would negatively impact an evaluation of coaching performance or program success

and/or (b) differences in employment or compensation that might also raise Title IX, Equal Pay Act or Title VII gender equity concerns?

Because (a) the success of a team is dependent on the team receiving the necessary resources required for success, (b) the coach's success is judged on the team's success, and (c) coach/program success affects decisions related to coach compensation and renewal of employment agreements, gender equity in the provision of resources, benefits and treatment is a critical consideration. Title IX also specifically prohibits retaliation against employees or student-athletes for raising gender equity issues.

I utilized UMD data from the federal government's Equity in Athletics Disclosure Act database submissions, UMN NCAA Revenues and Expenses and Demographic and Sport Sponsorship reporting forms and UMD's response to the United States Department of Education Office for Civil Rights ("OCR") regarding a Title IX complaint and various other documents provided by UMD and listed in Appendix C to determine compliance with Title IX on those Title IX elements where sufficient data was provided to such an analysis. I also interviewed coaches Miller, Banford and Wiles with regard to areas in which they had expressed concerns about Title IX inequities and how such treatment and support concerns may have affected their coaching performance, recruiting or program success. I assessed a sufficient sample of Title IX elements to express my opinion with the highest level of confidence that the UMD athletic program was not in compliance with Title IX in 2014-15 and provide and explanation for this conclusion in the following paragraphs..

Participation Inequities. With regard to the University's obligation to provide equitable participation opportunities, UMD should have been providing male and female participation opportunities overall in proportion to the enrollment of male and female undergraduates respectively.²¹ See Table 6 which reveals a 2014-15 female participation gap of 34.

²¹ This is the "Prong One" proportionality option. The institution has two other options to comply with the participation standard, neither of which it appears UMD can or ever has

Table 6. 2014-15 UMD Athletics Participation and
Computation of the Female Participation Gap

SUMMARY	Male	Female
Total # Students in this school	4801	3936
Percent of all students	55.0%	45.0%
Total # Athletes (Varsity/JV/Fr)	317	226
Percent of all athletes	58.4%	41.6%
Female Participation Gap*		34
TIER I (Div. I) SPORTS	# Male Participants	# Female Participants
Ice Hockey	26	25
Total Participants this Competitive Level	26	25
% Participants this Competitive Level	8%	11%
TIER II (Div. II) SPORTS	# Male Participants	# Female Participants
Baseball	34	0
Softball	0	17
Basketball	20	14
Cross Country**	20	19
Football	108	0
Soccer	0	26
Tennis	0	12
All Track and Field Combined***	109	97
Volleyball	0	16
Total Participants this Competitive Level	291	201
% Participants this Competitive Level	92%	89%

* Assuming male participation remains constant and is equal to male student body enrollment. Formula is (#male athletes divided by % male students) minus (total male and female athletes). GAP equals that number of female athletes that would have to be added for the percent female athletes to equal percent female undergraduates.

** Numbers based on rosters listed on UMD internet site for 2014-15

***EADA "Track and Field combined" number less cross country number based on 2014-15 cross country roster listing at <http://umdbulldogs.com/roster.aspx?roster=33&path=mcross> and <http://umdbulldogs.com/roster.aspx?roster=35&path=wcross> on the UMD athletics Web site

used. The "Prong Two" option would require UMD to show that, despite lack of male/female athletic participation proportional to the percentage of males and females in the undergraduate student body, in the last 44 years, female participation has never declined and teams for the underrepresented sex have regularly been added. Since it has been 44 years since Title IX was adopted, UMD had a sufficient amount of time to add women's teams and has not given the current 34 females participation gap. The "Prong Three" option would require UMD to show that despite lack of proportionality, it has fully met the needs and interests of the underrepresented gender and no additional sports could be added. It is highly unlikely that UMD would be eligible to use these option since there are numerous women's teams that could be added.

Further, because UMD supports its sports programs on different competitive levels or financial tiers (i.e., Division I and Division II), it is obligated to provide the same proportion of opportunities (percentages of male and female athletes respectively) at each level or tier. Men's and women's ice hockey compete in the NCAA's Division I (the highest competition level) and receive significantly greater financial support than all other UMD sports that compete at the NCAA Division II level. Therefore, in addition to remedying the female participation gap of 34, UMD must ensure that equal proportions of male and female athletes are in each competition tier. See Table 6 which also shows the current inequitable placement of males and females in each competitive level.²²

Specifically, as Table 6 shows, in 2014-15 female athletes were shortchanged by 34 participation opportunities. UMD recognized that it was not in compliance with the Title IX proportionality requirement, producing a memorandum that sought to justify this female participation gap based on a suggestion that it was the function of a sudden significant increase in the percent of female undergraduates:

"While completing the sport sponsorship report for the 2014-15 academic year, I noticed that our participation numbers have moved slightly to 60% male and 40% female. The study [sic] body percentages are 52% male and 48% female. Historically, our student athlete population has closely mirrored the general student body. In 2013-14 the student athlete populations was 54.9% male and 45.1 % female. In 2012-13 the student athlete population was 52.8% male and 47.2% female. With this recent shift in the student athlete population, I suggest we take action to get our numbers to more closely reflect the student body."²³

²² There is a good possibility that UMD currently operates an athletic program with three financial tiers rather than two, treating women's tennis and the men's and women's cross country, indoor and outdoor track programs in a substantially lesser manner than other Tier Two sports. However, I did not feel comfortable coming to this conclusion without more data. I reserve the right to revisit this conclusion at a later date if I receive additional information that would allow me to make such a determination and if it is deemed important to this case. However, I opine with the highest level of confidence that whether examining UMD on the basis of a two tier or three tier structure, UMD is significantly out of compliance with Title IX athletics participation requirements.

²³ Memorandum to Josh Berlo, Athletic Director and Karen Stromme, Associate Athletic Director/Senior Woman Administrator from Abbey Strong, Assistant Athletic Director for

This same claim was made in response to OCR's request for information related to an OCR complaint filed against UMD. This characterization of a recent shift in the student body is misleading and inaccurate based on UMD Equity in Athletics Disclosure Reports for the 2012-13 through 2014-15 academic years. The change in male and female undergraduate student enrollment was not significant: .03% from 2012-13 to 2013-14 and .05% from 2013-14 to 2014-15. See Table 7.

Table 7. UMD Undergraduate Student Population and Athletic Population Percentage Comparisons by Gender: 2012-13 through 2014-15

Year	Undergraduate Student Population					Athlete Population			
	Number Males	% Male	Number Female	% Female	Total	Number Males	% Male	Number Female	% Female
2012-13	4952	54.8%	4083	45.2%	9035	295	52.8%	264	47.2%
2013-14	4844	54.5%	4046	45.5%	8890	295	54.9%	242	45.1%
2014-15	4801	55.0%	3936	45.0%	8737	317	58.4%	226	41.6%

Having chosen the Prong One proportionality method of achieving participation equity, it was UMD's obligation to impose and continuously manage roster limits in men's and women's sports to ensure that the female participation gap never exceeded the size of a new women's team that could be added. UMD cannot float in and out of participation proportionality as a result of managing and then not managing roster limits when actual changes in undergraduate enrollment were less than one percent and well within the flexibility range of the proportionality requirement. As a practical matter, the Title IX proportionality requirement gives UMD the flexibility of, overall, being within eight to ten participation slots of proportionality (the size of a team which could be added) each and every year. Female enrollment would have to change by more than 1.5 to 2% in a single year for extraordinary enrollment fluctuation to be an acceptable

justification for misjudging UMD's roster management obligation. Thus, on the factor of overall participation alone, UMD was out of compliance with Title IX.

When participation is examined within financial tiers, where males and female are required to be given equal participation opportunities at each level of competition, while it appears that females have an 8% versus 11% Division I advantage (see Table 6) and males are overrepresented in Division II, 92% versus 89%, these differences would disappear mathematically if UMD corrects the female participation gap of 34 as it is required to do.

Financial Aid. Title IX also requires that males and females be provided with athletics financial aid in proportion to their participation in the athletic program with a one percent allowable dollar difference. Table 8 indicates UMD financial aid expenditures:

Table 8. 2014-15 Athletics Financial Aid Expenditures
(UM_000002400-2416)

2014-2015 Budget	Women's Sports	Men's Sports
Baseball	--	\$22,025
Basketball	\$181,152	\$191,000
Cross Country and Track	\$86,250	\$1,000
Football	--	\$418,571
Ice Hockey	\$460,785	\$408,754
Soccer	\$79,500	--
Softball	\$69,082	--
Tennis	\$3,000	--
Volleyball	\$143,788	--
Total	\$1,023,557	1,041,350
Percentage	50%	50%

In an August 9, 2015 memo from Assistant Athletic Director for Compliance Strong to Berlo, she reports "I ran the numbers of scholarships. The student body population is 53% Male, 47% Female. Our scholarship numbers are 52.2% Male and 47.8% Female. Can't get any closer than that." (UM_000013208) These numbers are not at issue. Rather, there is a question of whether summer school athletics financial aid was awarded to males and females on the same basis. Plaintiff coaches raised the issue that male scholarship athletes in ice hockey were able

to receive such aid whenever it was requested while female athletes were not permitted this benefit unless their team had unused scholarship dollars which could be used for this purpose and then only if there was a special request and administrative approval. Summer school financial aid should be separately accounted for and treated as a “benefit” if it is not provided to all male and female scholarship athletes on the same basis and in proportion to their respective regular academic year athletic scholarships.²⁴ If summer school aid is distributed on a gender neutral basis, male and female athletes do not have to be treated equally. For example, if UMD establishes a policy limiting the award of summer school aid to only those athletes who need credit hours required to retain eligibility, maintain normal progress toward a degree, complete courses needed to graduate prior to the beginning of the next academic year, or similar conditions, and any male or female meeting these conditions is awarded such aid, gender equity is not an issue.

An UMD athletics policy manual was not produced and my examination of the department’s student athlete manual did not reveal any policy related to conditions for the award of summer school aid. In my conversation with Coach Miller, she revealed that she was told by Athletic Director Berlo that summer school scholarships for her players could not be awarded unless she had unused athletic scholarship dollars from her 18 allowable scholarships and that a request for women’s ice hockey and men’s football summer scholarship money was pending with the institution. Men’s ice hockey was under no such restriction in that they were able to award summer school scholarships even if all of their athletics financial aid (18 allowable scholarships) was in use. No women’s sport received such treatment. Thus, it appears that female athletes were treated differently on the basis of their gender.

²⁴ In order to receive summer school aid, a student athlete must have been a scholarship recipient in the immediately previous academic year and the amount of such summer school aid must not exceed the proportion of a full scholarship actually received during the previous academic year. Unlike the regular academic year award, the scholarship athlete has no initial or renewable entitlement to that aid.

Treatment and Benefits. With regard to the determination of gender equity in the provision of treatment and benefits to male and female student-athletes, the Title IX assessment is a comparison of the treatment of all male athletes in all sports with the treatment of all female athletes in all sports within each competition level or financial tier. A complete treatment and benefits analysis would encompass the following areas:

- Equipment and supplies
- Practice and competition apparel and uniforms
- Scheduling of games and practice times
- Travel and daily allowance
- Access to/quality of tutoring and academic support services
- Access to/quality of coaches
- Locker rooms
- Practice and competitive facilities
- Medical and training facilities and services
- Pre- and Post-game meals, drinks,
- Publicity and promotion
- Awards and Recognition
- Administrative and support services for coaches/office space
- Recruitment

TIER ONE (Division I) GENDER EQUITY ANALYSIS

Since ice hockey is the only men's and women's sport in Tier One, a direct comparison between men's and women's ice hockey with regard to treatment and benefits is all that is necessary to assess Tier One compliance. All other compliance assessments must compare the treatment of all male athletes in Tier Two to the treatment of all female athletes in Tier Two. The comparison is not budgetary. Rather the comparison is whether the treatment or benefit that budget expenditures permit is equal for male and female athletes. For instance, in the case of uniforms, the comparison would be the number and quality of uniforms provided, not the cost of the uniform because a quality football uniform with all necessary pads and equipment will cost far more than a uniform for a cross country runner. Also, the source of money used to

purchase benefits or provide treatment does not matter. Once the institution accepts money from any source, it is required to spend it in a non-discriminatory manner.

In my opinion, Coach Miller, the Head Women's Ice Hockey coach, properly raised the following treatment inequities:

a. Recruiting. UMD consistently provided women's ice hockey with significantly less recruiting financial resources than men's ice hockey. These significantly lower recruiting budgets negatively affected her ability to recruit talented athletes. It is not the fact that the budgets for recruiting male ice hockey players were larger. What is at issue is that the women's ice hockey budget was insufficient in any given year did not enable her to engage in the same volume of recruiting activities as her male counterpart: paid travel for campus visits of female prospects, campus entertainment of visiting prospects (quality of meals, student host stipends, etc.), support for coaches' travel to observe their prospects playing and to meet and visit with their families to the same extent as men's ice hockey coaches. Table 7 provides a five year comparison.

Table 7. Recruiting Allocations for UMD Men's and Women's Ice Hockey
As a Percent of Total Recruiting Expense
2010-11 through 2014-15
(UM_000013391, 13401, 13407, 13418, 06634, 06646)

Academic Year	Men's Ice Hockey	Women's Ice Hockey
2010-11	\$ 53,210 (60%)	\$ 35,521 (40%)
2011-12	\$ 54,210 (60%)	\$ 36,295 (40%)
2012-13	\$ 73,699 (66%)	\$ 38,181 (34%)
2013-14	\$ 66,866 (69%)	\$ 30,723 (31%)
2014-15	\$ 57,392 (68%)	\$ 26,717 (32%)

In the case of recruiting where at UMD there is a direct correlation between dollars spent and the recruiting activities and benefits that can be provided, it is proper to look at these significant budgetary differences as indicative of discriminatory treatment.

In addition to budget limitations, women's ice hockey was not allowed the same opportunity to promote their coaches and program among and cultivate future prospects through

the offering of on-campus summer youth hockey camps. For instance, women's ice hockey was relegated to one week of summer camp which was scheduled by UMD to occur in conjunction with the Fourth of July holiday when camper attendance was most likely to conflict with family vacations while men's hockey had three weeks with no such conflict. This one week not only limited the number of future prospects that could be exposed to Miller's program but also damaged the recruiting efforts of women's ice hockey coaches because this women's summer camp week was the first week of allowable NCAA recruiting for the following year's incoming class. Women's ice hockey coaches could not also be on the road visiting with top prospects and their families. The first week of allowable recruiting is significant because top prospects and their families gauge the status and interest of college coaches based on whether they "camp out" all week to watch the prospect play. This first week recruiting commitment to top prospects can make the difference in getting the best players or not.

Further, there was a scheduling treatment difference that had a negative impact on women's ice hockey recruiting. The athletic director approves all schedules. Despite Coach Miller's protest that it would harm women's ice hockey recruiting, women's ice hockey was not given a home scheduling opportunity during the Friday and Saturday nights when the biggest local girls tourney was played at their home arena and local rinks and these evenings were reserved for the participants to view women's college ice hockey games. Women's ice hockey was forced to play away or, if at home, at 3 pm in the afternoon in direct conflict with the local girls tournament. If the UMD men's team was playing at home that weekend they were given the evening game times that allowed the girls tournament participants to attend. This represented a significant recruiting disadvantage for women's hockey. Also, when the high school boys' play offs were played at UMD's home arena, the UMD men's team was never displaced, but the UMD women's team was.

In addition, UMD athletics administrators failed to support Miller's recruiting of female international ice hockey prospects in the same manner as they supported the recruiting of male

ice hockey athletes. See extensive discussion of athletic department staff failures to support these admissions on pp. 105 to 108.

Last, unlike the treatment of her male counterpart, the athletic department did not provide Miller with early renewal of her employment agreement, a common practice that ensures prospects that the head coach who recruited them is in a stable employment position and will remain at that institution for the duration of their eligibility.

In summary, UMD's athletic department treatment of Miller related to recruiting was inequitable compared to their support of Sandelin's efforts. Recruiting talented athletes is crucial to team success and team success is a primary consideration in coach retention and compensation. Notably, in Miller's case, program success "slippage" was presented as one of the precipitating factors for not renewing her employment agreement.

b. Provision of Quality Coaching. Title IX requires that female athletes be provided with the same quality coaches as are provided to male athletes. Both the men's and women's ice hockey programs were provided with a full-time head coach and two full-time assistant coaches. I was not provided with formal written job descriptions for these positions. The expectations and duties listed in the multiyear employment contracts of the head coaches in both programs were identical with the exceptions of term and compensation. Despite the fact that Miller's experience, qualifications, and achievements were superior to Sandelin, the male head ice hockey coach, Miller was treated significantly less favorably. See Table 9 for a comparison of the two coaches.

Table 9
Comparison of Salaries, Experience and Success
Head Coaches of Men's and Women's Ice Hockey 2014-15

Factors	Sandelin – Men's Head Coach**	Miller – Women's Head Coach***
Base Salary*	\$ 265,000**	\$ 205,800***
Supplemental Retirement Contribution	\$ 25,000**	0
Total Bonus Opportunities-WCHA	\$ 18,500	0
Total Bonus Opportunities-NCAA	\$ 30,000	0
Contract Term	6 years	1 year at will
UMD Winning Percentage	.506	.707
UMD Years as Head Coach	15	16
# Regular Season Conference Titles	0	4
# of Conference Tournament Championships	1	5
# of NCAA National Tournament Berths	5	10
# of Frozen Four Appearances	2	7
# of National Championships	1	5
Junior National Team Coach	1	0
National Team Coach	0	7
Olympic Medals	0	1
World Championship Gold Medals	0	3
Education	Bachelor's	Master's

*Salary includes base salary, merit increases, temporary pay reduction, position augmentation, but excludes car allowance and one-time bonuses based on team performance

** UM_000012234-12243

***UM_000010908 (signed copy) (Note: UM_00002452 \$207,800 unsigned was not used.)

With regard to term, the male ice hockey head coach was provided with a six year term. When the five year term of the female ice hockey coach ended in 2012-13, instead of renewing that agreement for a six year term to match treatment of the less successful male ice hockey coach, a two year addendum was given with no supplemental retirement compensation, no bonus opportunities and an unspecified salary to be determined based on performance. These were onerous contractual provisions compared to the agreement provided to the male head coach. The two-year addendum also ignored Miller's 2010 fifth NCAA national championship which normally would have resulted in a significant salary increase and early contract renewal and the fact that she actually took a roll back in salary after this achievement because of

institution-wide financial troubles. Similarly, the base salary discrepancies between male and female head coaches were significant and do not appear to be justified by differences in experience or program success. Miller was significantly more experienced and had achieved greater program success compared to Sandelin. See Table 10 for a comparison of the salary agreements of both coaches.

Table 10
Comparison of Salary Agreements* - 2010-11 to 2015-16
Head Coaches of Men's and Women's Ice Hockey**

Academic Year	Sandelin – Men's Head Coach			Miller – Women's Head Coach		
	Base Salary	Retirement Supplement	Bonus Opportunity	Base Salary	Retirement Supplement	Bonus Opportunity
	<i>During 2nd multiyear agreement</i>			<i>During 3rd renewal - 5 year agreement</i>		
2008-09		Not provided		\$ 160,000	\$ 15,000	\$ 25,000
2009-10		Not provided		\$ 170,000	\$ 20,000	\$ 25,000
2010-11		Not provided		\$ 180,000	\$ 20,000	\$ 25,000
	<i>With 1 year left-agmt. renewed for 6 yrs.</i>					
2011-12	\$ 235,000	\$ 25,000	\$ 48.500	\$190,000	\$ 20,000	\$ 25,000
				<i>No effort to renew agreement 1 yr. out</i>		
2012-13	\$ 245,000	\$ 25,000	\$ 48.500	\$ 200,000	\$ 20,000	\$ 25,000
				<i>2 year extension w/ no Supp/Bonuses</i>		
2013-14	\$ 255,000	\$ 25,000	\$ 48.500	\$ 205,800	\$ 0	\$ 0
2014-15	\$ 265,000	\$ 25,000	\$ 48.500	\$ 207,800	\$ 0	\$ 0
				<i>New coach hired at lower salary</i>		
2015-16	\$ 275,000	\$ 50,000	\$ 48.500	\$ 140,000	\$ unknown	\$ unknown
	<i>With 1 year left-agmt. renewed for 6 yrs.</i>					
2016-17	\$285,000	\$ 50,000	\$ 85.000	\$ 147,700	\$ unknown	\$ unknown

* Salary includes base salary, merit increases, temporary pay reduction, position augmentation, but excludes car allowance and one-time bonuses based on team performance

** I reserve the right to complete this chart upon receipt of additional information that allows me to fill in the blanks labeled as "unknown"

Once the two ice hockey coaching positions are demonstrated to be equal with regard to duties and responsibilities, as in this case, UMD would be obligated to show that differences in pay were due to non-gender based criteria, specifically "(I) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a

differential based on any other factor other than sex.”²⁵ Neither a seniority system, merit system nor quantity/quality production system is present in this case. While “marketplace” value is a justifiable explanation at the time of a hire, such explanation must be based on UMD actually having to match or exceed a marketplace offer for the person being hired and not UMD choosing to pay a male the comparable salary to other males when there was no marketplace pressure to do so – simply because it could. If UMD could choose, with no marketplace pressure to pay the male coach what UMD thought a head ice hockey coach should receive given the responsibilities specified in the job description, it could choose to pay a female head ice hockey coach that same salary. It must be remembered that lower women’s head ice hockey coach salaries nationwide are the result of historical sex discrimination and a continuation of such discrimination cannot be used to justify lower salaries for female coaches who are never hired to coach men’s ice hockey teams.

Even if there was an actual marketplace offer on the table at the time of the hire of either Sandelin or Miller that may have justified a higher initial salary offer, over time, assuming UMD subsequently did not have to match an attempt by another institution to lure either coach away, the salaries of the male and female coach should have been gradually equalized as UMD sought to compensate two employees performing the same job duties, with the same experience and comparable performance in an equal manner. For example, when Miller’s contract ended in 2012-13, there was no reason for UMD not to offer her the same base salary, deferred compensation and bonuses as was then being paid to the head men’s ice hockey coach with the same six year term. UMD did not, instead extending Miller’s inadequate agreement for two years on less beneficial terms. As depicted In Tables 9 and 10, UMD consistently provided higher compensation and bonus opportunities to the lower performing male head ice hockey coach compared to the more successful female ice hockey coach.

²⁵ Ibid at para. 21.

Further, while Miller received a \$600 per month car allowance, Sandelin received a \$750 per month car allowance.

In 2009-10, after winning her fifth national championship, Miller took a voluntary salary reduction consistent with a salary rollback applied to all other coaches and university staff. One year later (spring of 2011), on the occasion of men's hockey team winning their first national championship, in addition to being paid applicable bonuses for this achievement in that year, the men's ice hockey head coach was given a new multiyear agreement and a significant salary increase, from \$170,000 to \$235,000 – a \$65,000 increase on the occasion of his first national championship. These significant compensation increases were awarded despite the financial issues being faced by the University (UM_000012234-12243, 13446-13454).

In 2003 and 2008, when Miller won her 3rd and 4th NCAA Championship, she was given new 5 year contracts, with raises, but nothing like Sandelin received. For instance, in 2008-09 after Miller won her 4th national championship and in response to a \$200,000 salary offer from another institution, Miller received a new contract and a \$25,000 salary increase from \$135,000 to \$160,000. Following Miller's 5th championship in 2010, she was given neither a salary increase nor a multiyear contract renewal. Instead, UMD chose to extend a no supplemental retirement and no bonus year-to-year employment agreement for an additional two years.

In addition, it should be noted that Sandelin was afforded the added security and benefit of having his employment agreement renewed for an additional term at least equal to the previous term, one year prior to the end of each term on at least two occasions (see Table 10) as in the normal practice among Division I head coaches. Miller was never afforded this benefit. Renewing an employment agreement before it is due to end or providing a rolling agreement that extends the term by one year each year, so the coach always has the full term, is common practice among the most valued Division I coaches. These practices are important in that they assure the coach of employment stability, a significant employment benefit, and, as previously discussed, ensure prospective athletes that their head coach will not be leaving, thereby

contributing to the ability of a coach to recruiting and overall program success, factors considered in the receipt of other employment and compensation benefits.

It is also important to note that differences in the revenue success of both programs may only be used to justify head coach salary differences if the head coaches had different job descriptions with different and specific fundraising/donor development responsibilities -- which they did not -- and/or, with regard to ticket revenues, if both programs were equally promoted and supported -- which they were not. The reality is that Division I head coaches' jobs are to field winning programs while other staff members in the department have primary responsibilities for fundraising and promotions/publicity. For example, both the Sandelin and Miller head coach agreements included the provision "assisting with Departmental or University fund raising and public relations." Other non-coaching staff members were assigned these primary revenue production responsibilities.²⁶ As is typical in Division I programs, these other staff members, rather than coaches, are responsible for leveraging sport program success for the purpose of generating program revenues.

Further, the compensation package of the head coaches included the ability for each to conduct summer camps to supplement their salaries. In the case of men's ice hockey, Sandelin was given the three prime summer camp weeks in July to generate revenues while women's ice hockey was given one and the worst summer camp week -- over the 4th of July holiday weekend -- which depressed camper enrollment due to conflicts related to family vacations. This summer camp compensation limitation existed for Miller but not for Sandelin.

In addition, because there was discrimination in promoting, publicizing and making other efforts to generate spectator attendance with greater efforts supporting the program of the male

²⁶ The UMD athletic department employs an Assistant Athletic Director for Revenue and Special Projects, an Assistant Athletic Director for Communications, a Senior Development Officer, a Director and Assistant Director of Ticket Sales and Operations, an Associate Development Director, a Director of Marketing and Corporate Relations, a Development Assistant and two marketing and events interns.

head coach than the program of the female head coach. Therefore, UMD cannot maintain that revenue production was a sex neutral factor justifying a higher salary for the male head coach.²⁷

In summary, the above analysis of identical UMD men's and women's head ice hockey coaches positions clearly shows that UMD failed to provide equal employment agreements or to equally compensate the male and female head coaches occupying these positions as required under the Equal Pay Act and Title VII.²⁸ In fact, Table 9 supports the premise that Miller should have been better compensated than her male counterpart in that she was more experienced, successful and qualified.

I was not provided with sufficient information to determine whether any of the men's or women's ice hockey assistant coaches received multiyear employment contracts but reserve the right to examine this factor in my supplemental report if this information is provided to me. No female assistant coaches were provided with multiyear agreements. Neither were female

²⁷ Equal Employment Opportunity Commission. Enforcement Guidance on Sex Discrimination in the Compensation of Sports Coaches in Educational Institutions. EEOC NOTICE Number 915.002 Date 10/29/97. Source: <http://archive.eeoc.gov/policy/docs/coaches.html>

²⁸ "The Equal Pay Act prohibits employers from paying employees at a rate less than employees of the opposite sex at the same establishment "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. . . ." 29 U.S.C. § 206(d)(1). The jobs need not be identical, but only substantially equal. 29 C.F.R. § 1620.13(a). Title VII forbids discrimination because of sex "against any individual in hiring or "with respect to his compensation, terms, conditions, and privileges of employment" 42 U.S.C. § 2000e-2(a)(1). Title VII also makes it an unlawful practice for an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" 42 U.S.C. § 2000e-2(a)(2). Both sections are applicable to charges of wage discrimination. A claim of unequal pay can be brought under either statute, as long as the jurisdictional prerequisites are met. There is considerable overlap in the coverage of the EPA and Title VII, although the two statutes are not identical. Principally, Title VII prohibits wage discrimination, not just unequal pay for equal work. Thus, an employment practice that would violate Title VII would not necessarily violate the EPA. Any violation of the EPA, however, is also a violation of Title VII. 29 C.F.R. § 1620.27(a). In analyzing whether pay discrimination exists in educational coaching positions, two additional general points should be kept in mind. First, the jobs should be analyzed functionally, i.e., in terms of what the actual job requirements are, and not simply with regard to the particular physical skills which are being taught or coached." Legal analysis issued by the Equal Employment Opportunity Commission. (1997) "Enforcement Guidance on Sex Discrimination in the Compensation of Sport Coaches in Educational Institutions". Retrieve at: <http://archive.eeoc.gov/policy/docs/coaches.html>

assistant coaches provided with bonuses on the occasion of a national championship as was the case when men's ice hockey won their first national title. The salary discrepancies between male and female assistant coaches were significant -- over \$30,000 more for each male assistant coach compared his female counterpart. See Table 11.

Table 11
Comparison of Assistant Coach Compensation
Men's and Women's Ice Hockey 2014-15*

Position	Men's Ice Hockey	Women's Ice Hockey
First Assistant (Herter/Schuler)	\$ 99,074	\$ 67,210
Second Assistant (Plante/Kingsbury)	\$ 94,850	\$ 60,600

* Includes base salary, car allowance and merit allocations [Bates # 000006588, 6626,6582,6610,6611]

Based on Table 11 information, it is my opinion that either of two gender inequity conclusions is justifiable. First, if the female assistant coaches were not as experienced, successful or qualified as their male counterparts, it is likely that women's ice hockey was not allowed or did not have the financial resources to conduct the same marketplace search (i.e., travel funds to visit with candidates, provision of paid visits to campus for finalist interviews, offer of competitive salaries to qualified prospects, etc.) as men's ice hockey. The second possibility is that the female assistants were as experienced, successful or qualified but were not paid comparable salaries to their male counterparts and the institution is at risk with regard to compensation discrimination. In either case, in my opinion, UMD demonstrated discrimination on the basis of sex.

c. Provision of Other Athlete and Program Support Services. Title IX requires that female athletes be provided with the same quality services and professional staff supplying those services as are provided to male athletes. Such support services also directly affect the coach's program success. The more time coaches have to spend coaching or recruiting rather than dealing with the issues handled by support personnel, the more successful their programs will be. Further, in specialized areas of expertise, some of which require

licensure or certification (i.e., strength and conditioning coach, athletic trainer), the program success contributions of these staff members are critical and significant. Competent and sufficient staffing in these areas results in stronger and healthier athletes who spend more time on the ice (as opposed to recovering from injury), perform better (skate faster and shoot harder) and are less susceptible to injury because they are less likely to become fatigued.

Compared with women's ice hockey, men's ice hockey support personnel were either paid more than the individuals serving in the same capacity for women's ice hockey, enjoyed larger percent time allocations for their ice hockey duties, were more experienced or qualified and/or men's ice hockey was provided with a larger number of positions. The men's ice hockey program was provided with a strength and conditioning coach (Palmer) whose primary time and responsibilities were devoted to men's ice hockey and significantly lesser time and responsibilities assigned to support baseball. Miller estimates that Palmer spent approximately 90% of his time devoted to men's ice hockey and approximately 10% of his time on baseball. Vasichcek served as the strength and conditioning coach for women's ice hockey (25% time) and women's basketball (10% time) but she also served as the equipment manager for women's ice hockey (65%) with these time estimates provided by Miller. See Table 12.

Table 12
Comparison of Support Staff Positions and Compensation* Supporting
Men's and Women's Ice Hockey 2014-15

Position	Men's Hockey	Women's Hockey
Strength and Conditioning Coach (Palmer/Vasichcek)	\$ 27,865	\$ 22,362
Athletic Trainer (Hoppe/Clute-/Phillips)	\$ 45,780/49,769 ^{***}	\$ 26,929/35,628*
Skating Coach	Wages/weekly ^{***}	Wages/Monthly ^{***}
Yoga Instructor	Wages/weekly ^{***}	Wages/Monthly ^{***}
Director of Operations (Koelling/Banford)	\$ 51,128	\$ 24,539 ^{****}
Operations Assistant (Watson/none)	unknown wages	none
Equipment Manager (Garner/Vasichcek ^{**})	\$ 49,385	\$ ****
Assistant Equipment Manager (Haagenson/none)	unknown wages	none

* Includes base salary, car allowance and merit allocations

** Annual salary for all sport assignments

*** Men pay from hockey budget; Women pay from camp proceeds via reduction in head coach compensation

**** No equipment manager position was included in the ice hockey budget; but Vasicheck served as equipment manager in addition to her ice hockey and basketball strength and conditioning coach duties

As previously mentioned, women's ice hockey players suffered injuries and too often their return to participation was delayed [REDACTED]

[REDACTED] were paid a low salary (\$26,929 and \$35,628) in contrast to Susan Hoppe, the highly experienced and highly paid (\$45,780 and \$49,769), Ph.D level trainer UMD assigned to the men's hockey team. (UM_000010850, 13418) [REDACTED]

[REDACTED] Title IX requires the provision of training services of equal quality for male and female athletes and also requires administrators to act to protect athletes from hostile or professionally inappropriate educational environments.

The men's ice hockey budget was able to provide for the hiring of a skating coach for weekly lessons and small group or more individualized skating work as well as weekly yoga instruction. The women's ice hockey budget was insufficient to afford these services. Miller voluntarily reduced her summer camp compensation and used camp revenues to provide monthly skating instructor services to her female athletes, but no yoga instruction was provided. These gender inequities are not permitted by Title IX.

The women's ice hockey program was provided with a 65% time Equipment Manager (Vasicheck) while the men's hockey program was provided with a 100% time Equipment Manager (Garner) as well as an hourly wage Assistant Equipment Manager (Haagenson). The

men's ice hockey program was provided with a 100% time Director of Operations (Koelling) and an hourly wage Operations Assistant (Watson).²⁹ The women's ice hockey program was provided with a part-time Director of Operations (Banford) and no assistant.

The construction of Banford's dual Softball Head Coach and Women's Ice Hockey Director of Operations position over the term of her employment is unclear with regard to expectations of how her time was split between these two positions. According to Banford, she was hired as a 100% time softball coach (UM_000003599) in 2005 and it was represented on her visa application which had to be renewed each year that she was a 100% time softball coach. However, in the athletic department's annual Equity in Athletics Disclosure Act (EADA) reports to the federal government, she was only reported as a full-time head softball coach in 2005-06 and 2006-07, her first two years of UMD employment. In all remaining years UMD EADA reports indicated she was a part-time head softball coach. Her annual appointment letters and supplemental appointment memos appear to reveal a number of different and questionable mechanisms used to construct her salary. Until 2013-14, there was no indication of the percentage time split between Banford's Head Softball Coach and Director of Women's Ice Hockey Operations responsibilities. Even in her 2014-15 appointment memorandum, there was no mention of her Ice Hockey Director of Operations duties. I have requested but not received formal position descriptions applicable to the pre-2013-14 academic years. See Table 13 for a chronological summary of the construction of Banford's position.

²⁹ Since the equipment and operations assistants were not listed as volunteers, I assumed their hourly wage status.

Table 13. Chronological Overview of the Construction of Jennifer Banford's
Head Softball Coach/Women's Ice Hockey Director of Operations Position
(UM_000003599,3600, 3585, 3614, 3145, 3146, 3147, 3254, 3221, 3222; JB 316, 231, 459,
230,216, 300, 229, 206, 228, 411, 201, 645, 646, 384, 196)

Period	Base Salary	Extra Pay	Position
Aug. 29, 2005-May 28, 2006	\$24,000		Head Softball Coach
2006-2007 (no start/end date)	\$24,700		Head Softball Coach
Jan. 11, 2007-May 27, 2007		\$ 2,000	Temp.-Physical Educ. Instructor
2007-2008 (no start/end date)	\$25,785		Head Softball Coach
June 11, 2008-Aug. 31, 2008		"38% Appt"	Administrative Duties assigned by AD.
2007-2008 (over 12 months)		\$ 3,750	Overload Assignment-Event Mgmt.
Jan. 10, 2008-May 25, 2008		\$ 2,000	Temp.-Physical Educ. Instructor
2008-2009 (12 months)	\$31,515		Head Softball Coach-Event Mgmt/Ops
Aug. 25, 2008-Jan, 7, 2009		\$ 1,152.70	Temp.-Physical Educ. Instructor
2008-2009		\$ 1,800	Salary Augmentation/Operations Duties
Jan. 8, 2000-May 24, 2009		\$ 4,391.75	Temp.-Physical Educ. Instructor
2009-2010 (12 months)	\$31,515		Head Softball Coach-Event Mgmt/W-IH
2009-2010		\$10,000	Salary Augmentation
June 1, 2010 to June 30, 2011	\$31,042 - reflects		Head Softball Coach
2010-2011 (12 months)	1.15% salary reduction		Head Softball Coach-Duties AD assigned
2010-2011		\$15,000	Salary Augmentation/W-IH Admin. Asst.
2011-2012	No appointment letter produced		\$25,812 (softball budget) \$23,343 (ice hockey budget)
2012-2013 (12 months)	\$35,500		Head Softball Coach-Duties AD assigned
	No appointment letter for salary augmentation		\$27,210 (softball budget) \$24,070 (ice hockey budget)
June 1, 2013-May 31, 2016	3 year "continuous employment" memorandum*		
2013-2014 (12 months)	\$36,280	\$15,000	Head Softball Coach— 60%-Director of Women's Ice Hockey Operations – 40%
2014-2015 (12 months)	\$37,223	\$15,000	Head Softball Coach – no mention of ice Hockey Operations
	\$ 941 (merit)		
2015-2016 (12 months)	\$37,223	\$15,000	Based on 12/31/12 3-year continuous Employment memorandum

* This agreement through 2015-2016 was submitted with Banford's Green Card/Permanent Residency application.

In addition, I examined the Women's Softball and Women's Ice Hockey budgets from 2009-10 through 2014-15 which simply did not reflect the 60% Head Softball Coach/40% Director of Operations salary structure mentioned in the 2013-14 appointment memorandum or distinguish any rate of pay differences in these two positions. See Table 14.

Table 14. June 30 Year-To-Date Salaries and Percentage Breakdowns for the Head Softball Coach/Women's Ice Hockey Director of Operations: 2009-10 Through 2015-2016 (UM_000013391, 13401, 13407, 13418, 06634, 06646, JB201, JB196)

Employment Year	Women's Softball Budget Head Softball Coach Salary	Women's Ice Hockey Budget Director of Operations Salary
	<i>Banford</i>	<i>Banford</i>
2009-2010	\$30,321 (75%)	\$10,000** (25%)
2010-2011	\$31,745 (68%)	\$15,000** (32%)
2011-2012	\$25,812 (53%)	\$23,343 (47%)
2012-2013	\$27,210 (53%)	\$24,070 (47%)
2013-2014	\$27,918 (53%)	\$24,306 (47%)
2014-2015	\$28,615 (54%)	\$24,539 (46%)
	<i>New Coach</i>	<i>New Dir. of Operations</i>
2015-16	\$35,481 (100%)	\$31,256 (% time unknown)

* FY10 (2009-10) showing previous year FY09 Actual

** No formal designation as Ice Hockey Director of Operations-salary supplement for Additional ice hockey event management duties

The position requirements of the Head Softball Coach could not have changed. Thus, the reduction of this salary over the 2011-12 through 2014-15 period does not make sense. I cannot think of how these lower salaries could be justified. Given the fact that the men's ice hockey Director of Operations position was budgeted to be \$51,128 and Banford was receiving half of that, best practice would dictate that the UMD Office of Human Resources be asked to examine these two job descriptions to determine percent time differences if any and fair compensation. Banford and Miller approached both Neilson, the former athletic director and his successor, athletic director Berlo as well as Sue MacDonald, the Athletics Budget Manager each year to object to the percent of her salary being paid from the women's ice hockey budget, the amount allocated for women's ice hockey Director of Operations responsibilities and the

designation of her softball head coach position as a part-time position. Banford maintained that she was a 100% time head softball coach and should have received a salary augmentation that represented her women's ice hockey Director of Operations duties. According to Banford, each of her pay stubs indicated a base salary figure and a separate salary augmentation figure but never distinguished what she was being paid for each of her coaching and administrative positions. Both athletic directors were unresponsive to her requests for clarity.

According to Miller, men's ice hockey was also provided with part-time clerical student assistant who worked for men's hockey only but I could not find this expense in the budget and suspect that such assistance might be a student work-study position paid from an administrative account. Women's ice hockey was not able to afford any clerical assistance, part-time wages, student work study or otherwise.

The above described staffing inequities resulted in female athletes receiving less and in many cases lower quality support services and female coaches having to compensate by performing many of these functions which their male coach counterparts did not have to do. These staff support differences represent Title IX gender inequities.

d. *Provision of Non-Travel Related Nutritional Benefits.* Members of the men's ice hockey team received two meals on weekends while members of the women's ice hockey team received one meal on weekends. In 2014-15, \$10,000 was budgeted and \$8,939 was expended to provide for these men's ice hockey nutritional benefits compared to \$1,000 budgeted and \$647 expended for women's ice hockey. (UM_000006646)

e. *Summer School Scholarships.* As previously mentioned in my discussion of financial aid on pp. 55-58, it does not appear that female ice hockey athletes are provided with summer school scholarships on the same basis as male ice hockey players. My interview with Coach Miller revealed that while male ice hockey athletes regularly received this benefit, female athletes received summer school aid only if there is excess unused scholarship money. Miller had unused scholarship money and requested its use for summer school aid in only two

years of the sixteen years that Miller was employed and those were the only times her female athletes were permitted to receive summer school aid. Prior to confirming the existence of a gender inequity, I have asked for a copy of the athletics department policy on summer school financial aid (if one exists) in order to determine whether gender neutral criteria exist. I reserve the right to address this question in a supplemental report.

f. Facilities. I queried Coaches Miller and Director of Operations Banford on the specific differences between men's and women's ice hockey locker room, practice and competition facilities but am unwilling to opine on gender inequities without reviewing photographs or making a site visit. I reserve the right to include such an assessment in a supplemental report. That being said, I will pay particular attention to Coach Banford's allegation that men's ice hockey has a superior entertainment center in their locker room compared to women's ice hockey and a separate and significantly better player's lounge/meeting area with a high ceiling, kitchen area and lounge furniture that pales in comparison to that provided for women's ice hockey. I will also pay careful attention to whether a larger equipment room with an adequately sized equipment manager's office is provided to men's ice hockey but not to women's ice hockey. Further, the men's locker room, lounge and certain surrounding hall areas are decorated with professional displays of player jerseys, awards, trophies and celebrated player artwork, with not nearly as much provided for women's ice hockey, which also represents a recruiting advantage for men's ice hockey. In addition, during ice hockey contests, men's ice hockey is provided with the use of headsets that permit the video manager and operations director to communicate with the bench, representing a "fourth coach" advantage. According to Coach Banford, women's ice hockey is not permitted to utilize this equipment, a gender inequity that could affect game success.

g. Scheduling of Competitions. Both the men's and women's ice hockey programs were funded to schedule the maximum number of contests permitted by the NCAA, a Title IX equity requirement. However, with regard to non-conference play significant for NCAA

rankings used to select and seed teams for post-season play, men's ice hockey had sufficient resources to schedule more away contests than women. The athletic director approves schedules and contrary to the objections of Coach Miller, refused to provide the financial resources or approve the scheduling of an equal number of away contests. For example, in 2014-15, 58% of men's ice hockey contests (22 of 38) were away games compared to 47% of women's ice hockey contests (16 of 34). In 2013-14, 51% of men's ice hockey contests (19 of 35) were away games compared to 42% of women's ice hockey contests (14 of 33).

Women's ice hockey was further disadvantaged with regard to scheduling, when their games were displaced to Sundays instead of prime times on Friday or Saturday for arena entertainment events or when boys' hockey play-offs were conducted in the arena. Men's hockey retained their optimum Friday or Saturday home game playing times. For example in 2013-14, women's ice hockey had to play on Sunday twice, and in 2014-15 five times while men's ice hockey never played on Sundays.

h. Promotions and Publicity. Title IX permits the justification of higher game day expenses for men's ice hockey contests due to the need to accommodate a greater number of attendees with greater numbers of security personnel, ticket takers, etc. These expenses are not at issue. However, Title IX also requires that male and female athletes be equally treated with regard to promotion of their events. In 2014-15, UMD, in conjunction with M9 television, provided men's hockey head coach Scott Sandelin 20 opportunities to market and promote their program, while only providing Miller 3 opportunities. Simultaneously, the UMD Bulldog KQ Morning Radio Show provided men's hockey coaches with 11 marketing and promotional opportunities, while only giving women's hockey one. Home event attendance is affected by the extent to which these events are promoted on television and radio. Home event attendance is also affected by the quality of the event experience which is consistently enhanced for men's ice hockey through the use of smoke, spotlights, music, videos, operation of video board and other promotional mechanisms which requires significant expenditures. The home events budget for

men's hockey permits regular use of these promotional elements while the women's budget does not. See Table 15 for a four year review of men's and women's ice hockey home event expenses.

Table 15. Comparative Men's and Women's Ice Hockey Home Event Promotional and Game Day Expenses as a Percent of Total Resources Allocated for this Purpose
2011-12* through 2014-2015
June 30 Year-To-Date Budgets (UM_000013391, 13401, 13407, 13418, 06634, 06646)

Year	Men's Ice Hockey	Women's Ice Hockey
2011-2012	\$ 48,672 (64%)	\$ 27,768 (36%)
2012-2013	\$ 34,245 (64%)	\$ 19,300 (36%)
2013-2014	\$ 45,525 (77%)	\$ 13,622 (23%)
2014-2015	\$ 11,641 (71%)	\$ 4,750 (29%)

* Prior to 2011-12, the women's ice hockey budget did not include a line item for this expense.

Table 15 demonstrates the high probability of this event experience gender inequity. Again, the difference in the amount of each line item is not the issue. Rather, it is the fact that the size of the event budgets for men's and women's ice hockey did not permit the use of the same event promotional enhancements for women's ice hockey as for men's hockey after different attendance-related costs were accommodated.

Other promotional inequities are identified with relative ease. Cheerleaders perform at men's ice hockey events but do not perform at women's events. Despite requests from the UMD Commission for Women and others, the athletic department continues to use "UMD Hockey" as the Twitter handle for men's hockey and "UMDW Hockey" as the Twitter handle for women's hockey (UM_000001675-1676) while men's and women's basketball use "M" and "W" respectively in their handles to appropriately identify the gender of the team.

i. Medical Equipment. Title IX requires that male and female athletes be provided with equal medical treatment and services. In response to my queries about unequal treatment in this area, Coach Miller explained that the men's ice hockey training room was fully equipped with all necessary modalities. The women's ice hockey training room was not

provided with an ultrasound machine, a key modality utilized on a daily basis for the treatment of athletic injuries. The athletic trainer assigned to women's ice hockey was not permitted to borrow the ultrasound machine from the men's training room, which would have provided a joint use solution. After years of requesting this key piece of equipment and being denied, during the 2011-2012 season Coach Miller solicited a contribution from a donor, which permitted the purchase of this equipment for the women's ice hockey training room.

j. *Provision of Equipment, Uniforms and Supplies.* Title IX requires that male and female ice hockey players be equally treated with regard to the provision of uniforms, equipment and supplies. Normally, it is necessary to examine up-to-date inventories in order to assess the validity of unequal treatment concerns. Specifically, I would assess whether female ice hockey players are provided with the same number/pairs of skates, socks, sock tape, game jerseys, rink boards, practice apparel and travel gear such as winter coats, track suits, sweat suits, and hats. Title IX also requires that male and female athletes have equal access to equipment. Because differences in expenditures on equipment, uniform, and supplies between male and female athletes are permitted based on the nature of the sport or other gender neutral reasons, budget differences alone should not be used to determine gender inequity. However, in the case of single sport comparators as is the case with the UMD Division I men's and women's ice hockey programs, consistent and large differences in the equipment, uniforms and supplies line item should be considered highly suspect. Thus, I examined these budgets over a five year period. See Table 16.

Table 16. Comparative Men's and Women's Ice Hockey Equipment and Supplies
Expenditures as a Percent of Total Resources Allocated for this Purpose
2010-11 through 2014-2015
June 30 Year-To-Date Budgets (UM_000013401, 13407, 13418, 06634, 06646)

Year	Men's Ice Hockey	Women's Ice Hockey
2010-2011	\$128,592 (59%)	\$ 88,689 (41%)
2011-2012	\$163,294 (69%)	\$ 73,917 (31%)
2012-2013	\$133,902 (64%)	\$ 76,445 (36%)
2013-2014	\$172,307 (72%)	\$ 66,625 (28%)
2014-2015	\$132,437 (60%)	\$ 90,098 (40%)

Even considering the fact that men's ice hockey has greater stick breakage and other wear and tear issues that are a function of larger and heavier players or differences due to differences in contact rules related to the nature of the sport, based on my experience, I believe these consistently large expenditure differences produced inequities in equipment, uniforms and supplies benefits afforded female athletes. My confidence is particularly high because Coach Miller is able to point to specific items that are publicly visible and identifiable that are not being provided for female ice hockey players and their coaches because of insufficient funds:

- Male ice hockey players are provided with two or more pairs of skates each year while female players receive one pair
- Male ice hockey players are provided with a special "third" set of jerseys (often gold) on an annual or every other year basis while female players have rarely received this benefit
- Male ice hockey players are provided with new sticks whenever they are required while the insufficient women's ice hockey budget must stop the purchase of sticks early in the year for women
- Coaches of the men's ice hockey teams are provided with multiple sets of apparel (golf shirts, warm-ups and other clothing) while the women's budget is insufficient to provide for such purchases.

k. Practice Times. Title IX requires that male and female athlete have equal access to preferred practice times. If teams share the same practice facility, those practice times should be rotated. In the case of UMD ice hockey, there is no rotation of early and late practice times and therefore an obvious gender inequity. Women's ice hockey is relegated to the late practice time slot which is from 3:30 to 6:00 pm. Practice is followed by a one-hour weight room work-out and showers. Players haven't yet eaten dinner when they are finished around 7:30 pm. The men's team has the preferred 12:30-3:00 pm time slot which means they are done with practice, weights and showers by dinner time. Complaints to Athletic Director Nielson for two years by Coach Miller and Coach Banford resulted in a three-year period in the past in which practice times were rotated each semester. However, under Athletic Director Berlo, the rotating practice times ended in 2014-15 and the men's team again received the preferred early practice times while the women's team was relegated to the late time slot. A rotation system is important because it allows both male and female players to plan a four year academic course schedule in which practice times will complement rather than conflict with afternoon classes and labs.

I. Fundraising Support. "Title IX requires that the opportunity to fundraise not be limited in a discriminatory fashion. If men's teams are allowed to fundraise and/or supported by institutional personnel, facilities or resources, then women's teams should be provided the same opportunity and support."³⁰ Therefore, Coach Miller correctly raised the Title IX inequity involved when women's ice hockey was not provided with the same fundraising treatment and benefits as men's ice hockey. Men's ice hockey did not engage in coach or team-directed fundraising events because men's ice hockey development efforts were managed by the athletic department's athletic director and development staff members. These staff

³⁰ Judge, J. and O'Brien, T. (2010) Gender Equity in Collegiate Athletics: A Practical Guide for Colleges and Universities. National Collegiate Athletic Association. Indianapolis, IN. p.66-67.

members either independently solicited donations or they traveled with the coach to solicit individual donor gifts. Women's ice hockey received no such athletic director or development staff support. Thus, it was improper and inequitable for the athletic department to ask the women's hockey team to work for money cleaning the ice prior to and during men's ice hockey contests, which they did, as a fundraising initiative, because male athletes were not subjected to such a requirement.

Further, it is not permissible under Title IX to condition the provision of an equal benefit or treatment of one sex on the ability of the unequally treated sex to fundraise or generate program revenues while the beneficially treated sex has no such requirements. UMD regularly told coaches of women's teams in response to their requests for equal treatment and benefits that they had to fundraise, imposing fundraising as a condition for being equally treated, Title IX prohibits such practices. Even if the source of funds is a donor that restricts his or her donation for the use of a particular teams or purpose, Title IX demands that the institution has an obligation not to accept any gift that will allow the members of one sex to be treated better than members of the other sex unless it has identified other resources that can be used to equalize such benefits: "...institutions must be aware that even though targeted donations are received for a particular purpose, all of the money that comes in is considered the institution's money as a whole. As a result, the institution may need to reallocate some budgeted money from men's programs to women's programs in order to offset the effect of a targeted donation."³¹

Summary Tier I Treatment and Benefits Conclusion. It is my expert opinion that the above described Tier One ice hockey inequities, contrary to Title IX, Title VII and Equal Pay Act requirements, existed during Coach Miller's employment and negatively impacted both the experiences of female student-athletes, the working conditions of coaches and the ability of the coaches to produce as successful an ice hockey program as they could. Despite these inequities, Coach Miller and her coaching and other staff members were able to produce a more

³¹ Ibid.

successful ice hockey program than her male counterparts for which they received lesser compensation and benefits. Female ice hockey athletes were treated less favorably than their male counterparts, contrary to Title IX requirements.

TIER TWO (Division II) GENDER EQUITY ANALYSIS

Ninety-two percent of all male athletes (291 of 317) and eighty-seven percent of all female athletes (201 of 226) are offered Tier Two or NCAA Division II competitive opportunities (see Table 6 on page 53) by UMD. Unlike Tier I in which the treatment of one sport for men could be directly compared to the treatment one sport for women, the treatment and benefits analysis within this tier must compare all male athletes in all sports at this competitive level to all female athletes in all sports at this competitive level. Because I did not have access to all information for all sports, I performed a very limited analysis, looking at only those treatment and benefit areas for which I could obtain the information for all sports or those areas where I had the information for the majority of all male or female participants and could mathematically extrapolate that remaining participants were treated in lesser or better ways. In this manner, I was able to render an opinion (1) regarding whether the head coaches of women's basketball and women's softball properly raised gender inequity concerns and (2) whether their compensation, employment or treatment was negatively impacted by such inequitable treatment.

It should be noted that UMD is not obligated to distribute funds or equally treat all sports within Tier Two. It can treat sports differently, but when it does, UMD must demonstrate that an equal percentage of male and female athletes within that tier are provided with the same treatment or same quality benefits. The method of analysis dictated by Title IX is qualitative rather than expenditure based, although at times, when there is a direct correlation between money and what such financial support can buy that does not vary according to the nature of a

sport (i.e., recruiting travel) or varies based on other gender neutral reasons, per capita or other sport expenditures may be a basis for comparison.

Generally, the first step in a treatment and benefits assessment is to create, for each element³² examined (i.e., quality of uniforms, quantity of uniforms, practice times, quality of practice facilities, quality of competition facilities, etc.) three definitions that show a range of qualitative differences in treatment, usually “superior”, “adequate” and “inadequate” or, in some cases, differences in treatment may simply be “yes, the benefit is provided” or “no, the benefit is not provided. For example, Title IX requires gender equality with regard to the quality of competition uniforms. The qualitative definitions or ratings for this Title IX element would normally be “Superior”, defined as top of the line custom color and design game uniforms (i.e., Nike, Adidas, etc. at the highest uniform cost price points) provided; “Adequate,” defined as mid-range priced standard catalog, limited design choices and customization (i.e., Russell, Moore, etc.); and “Inadequate,” defined as the lowest quality and priced catalog uniforms, purchased as depicted in the catalog with no customization other than lettering. In this way, differences in the cost of a uniform related to the nature of a sport (e.g., football uniforms are more expensive than cross country uniforms) can be disregarded as required by Title IX. The second step is to assign the proper ratings for each team. The third step is to compute the percent of male and percent of females respectively receiving Superior, Adequate or Inadequate quality uniforms. If the rating of the Title IX element was “provided” or “not provided”, the same computation would be used – a comparison of percent of all female athletes receiving the benefit compared to the percent of all male athletes receiving the benefit. Thus, sports can be treated differently as long as the same percentage of males and females in each qualitative category are treated in the same way.

³² All of the athletic program elements are defined in the U.S. Department of Education 1990 Office for Civil Rights Title IX Investigators’ Manual.

As previously mentioned, at times, per capita budget figures or other budget figures may be appropriate to use in areas such as recruiting where there is a direct correlation between financial resources and the number of trips and distances traveled that can be afforded, as I determined was appropriate to do in the analysis of ice hockey. Some institutions may have written policies that limit recruiting activities, specifically using geographical restrictions such as “Superior” permitting a coach to travel nationally or internationally to visit and observe recruits; “Adequate,” limiting a coach to regional travel (i.e., the Northeast or grouping of states contiguous to the state where the institutions is located); and “Inadequate” when the coach is limited to in-state travel. In the absence of such restrictive recruiting specific policies, if sports within Tier II are given different recruiting budgets equal treatment would be assessed using per capita budget allocations. Superior, Adequate or Inadequate ratings would be created using different recruiting budget ranges. Definitions or ratings or such budgetary ranges must make sense and be defensible for the particular institution being assessed. There are no common definitions established by OCR.

a. Recruiting. Recruiting expenditures by sport was information available to me and it was my understanding from interviewing the two Tier II coaches (Banford and Wiles) who are plaintiffs in this lawsuit, that budgetary allocation is the only limitation on recruiting (i.e., there were no geographical or other recruiting restrictions by policy). Using 2014-15 budget data provided by UMD, I calculated that UMD provides \$46,397 in total recruiting support to Tier II sports of which 34% is provided to women’s teams and 66% to men’s teams. Even adjusting for differences in total Tier II participant numbers, the \$106 per capita expense for 291 male participants exceeds the \$78 per capita expense for 201 female participants. In every case, even when men’s and women’s teams are participating in the same sport, men’s sports receive greater recruiting resources. See Table 17.

Table 17. Distribution of Recruiting Resources by Gender
Among Tier II Sports: 2014-15
(UM_000006645 – June FY Actual Year to Date)

SPORT/Participants	Men-Total	Women-Total
Basketball	\$ 7,148	\$ 4,508
Baseball/Softball	\$ 5,685	\$ 3,916
Football	\$ 16,644	
Soccer		\$ 2,895
Volleyball		\$ 3,106
Tennis		\$ 51
T&F/Cross Country	\$ 1,239	\$ 1,205
Percent of Tier II Exp.	66%	34%
Per capita expense	\$ 30,716	\$ 15,681

Again, the difference in the amount of funds provided to men's and women's teams is not the issue. What matters is whether there are sufficient funds to provide males and females with equal treatment and benefits. However, in the case of recruiting, there is a direct dollar correlation between the benefits and treatment that can be provided to male and female athletes. Coach Wiles points to inadequate funding that does not permit her to provide travel expenses for recruits to come to campus while such visits are regularly provided to men's basketball and other men's teams. Just examining the rosters of men's and women's basketball appears to support her contention. Recruited female basketball players come from Minnesota, Wisconsin and Michigan compared to male basketball players who also come from these states but there are also five recruits from Arizona and players from Indiana and California. The men's team also has more players (20 compared to 14 on the women's team). Thus, it is my opinion that that Tier II coaches of women's sports were not equally supported in their efforts to recruit female athletes compared to the support provided to coaches of men's teams.

b. Competitive Schedule – Quantity of Contests. Title IX requires that male and female athletes be provided with the same opportunities to compete. Using 2014-15 UMD schedules as reported on the UMD athletics web site, I was able to assess whether Tier II men's and women's teams were able to schedule the same percentage of maximum permissible

regular season competitions allowed by the NCAA.³³ Clearly, with regard to Tier II sports competition schedules, female athletes were treated less favorably than male athletes and in my opinion, UMD was clearly out of compliance with Title IX on this factor. See Table 18 and Appendix F detailed analysis.

Table 18. 2014-15 Analysis of UMD Provision of Regular Season Competition Opportunities to Tier II Men's and Women's Sports* (UM_000005107-5109 and Division II NCAA Manual)

Male Athletes Benefitting From:			
95% or greater than maximum NCAA limits	Superior		44%
85-95% of maximum NCAA limits	Adequate		12%
Less than 85% of maximum NCAA limits	Inadequate		44%
Female Athletes Benefitting From:			
95% or greater than maximum NCAA limits	Superior		29%
85-95% of maximum NCAA limits	Adequate		22%
Less than 85% of maximum NCAA limits	Inadequate		48%

*See Appendix F for calculation details.

With specific regard to basketball, even though men's and women's basketball were able to schedule 100% of the NCAA maximum allowable contests, Coach Wiles was not provided with the financial support to ever take a 1-in-4 international trip during any of the seven years of her UMD employment and her budget was insufficient to enable her to take advantage of up to three additional "exempt" contests permitted by the NCAA, competition privileges enjoyed by men's basketball and opportunities which would have enhanced Coach Wiles' ability to recruit top prospective athletes. For example, in 2014-15 the men's basketball team played their maximum allowable contests, maximum allowable exempt contests and traveled to Canada to participate in a 1-in-4 international trip allowed by NCAA rules.³⁴ With regard to the 1-in-4 trip, men's basketball was able to bring players back to campus early to prepare, receiving financial

³³ Tier I men's and women's ice hockey were considered separately from Tier II sports (both men's and women's ice hockey played 100% of the maximum allowable NCAA contests).

³⁴ See *Duluth New Tribune* new report at <http://www.duluthnewtribune.com/content/college-mens-basketball-dogs-rally-exhibition-win-canada>. These competitions did not appear on the 2014-15 men's basketball schedule.

support for doing so. Coach Wiles has never been given the financial support to provide such a benefit to her female athletes or to consistently schedule all possible exempt contests.

With regard to such 1-in-4 trips, Athletic Director Berlo informed coaches that, by policy, such foreign tour opportunities would be permitted only if a team successfully fundraised to support the cost of that activity. Specifically, the following statement was contained in the April 6, 2016 UMN response to a U.S. Department of Education Office for Civil Rights (OCR) gender equity inquiry:

“In accordance with NCAA rules, UMD allows all teams to compete in one foreign tour or international competition every four years, in accordance with NCAA rules. All teams who wish to do so must cover the cost of the foreign tour or international competition through fundraising.” (UM_000001804)

Title IX does not permit UMD to condition the provision of equal treatment of male and female athletes on the fundraising success of a team (see my previous explanation on pp. 79-80 of this report). Thus, this is an impermissible policy under Title IX. Further, with regard to the provision of such opportunities, without regard to the source of funding support, if such opportunities are provided to male athletes in any given year, whether they fundraise for it or not, an equal proportion of female athletes must receive the same benefit. While it appears that women’s soccer may have fundraised and participated in a foreign trip in 2014-2015³⁵, I have not been provided with a complete list of such foreign tours during Coach Wiles’ tenure and therefore cannot confirm whether gender inequities in the provision of this benefit in 2014-15 or any other year existed.

c. Compensation. Given plaintiffs Banford’s and Wiles’ allegations of gender inequities in compensation, I examined UMD comparator Tier II/Division II male head coaches – the men’s basketball and men’s baseball head coaches specifically. Although I was not provided with formal position descriptions which were requested, I assumed that they are identical with regard to duties and responsibilities. I also reviewed the experience,

³⁵ Ibid.

qualifications, and achievements and salary histories of UMD comparator positions: female head softball coach compared to male head baseball coach and female head basketball coach compared to male head basketball coach.

Female head softball coach Banford's experience, qualifications, and achievements were superior to those of male head baseball coach Rients on all comparator elements except for coaching salary and status as a full-time versus part-time employee. Rients achieved a winning record in only two of his ten (2006 through 2015) coaching seasons. Banford achieved a winning record in ten her eleven (2005 through 2015) coaching seasons. Further, while Banford performed the same duties and functions as the head baseball coach, had one year more seniority and experience as a head coach than Rients and was imminently more successful, it does not appear that she was fairly compensated for these duties. See Table 19.

Table 19
Comparison of Salaries, Experience and Success*
Head Coaches of Men's Baseball and Women's Softball- Through 2014-15

Factors	Rients – Men's Head Baseball Coach	Banford – Women's Head Softball Coach
2014-15 Coaching Salary*	\$ 37,969	\$28,615**
Contract Term	1 year at will	1 year at will
Coaching Assignment	Full-time	Part-time*
UMD Overall Won/Lost Record	190 W/239L	332W/212L
UMD Winning Percentage	.443	.639
UMD Years as Head Coach	10	10
# Regular Season Conference Titles	1	1
# of NCAA Region Tournament Berths	1	4
Conference Coach of Year Awards	1	1
Education	Bachelor's	Master's

* Coaching records and other measures of success and education were derived from UMD coach bios. For Rients, retrieve at: <https://issuu.com/umdbulldogs/docs/umdbaseball2016> and for Banford, retrieve at: <http://umdbulldogs.com/coaches.aspx?path=&rc=281>

** Both salary figures were taken from the June 30, 2015 Year-To-Date softball budget (see UM_000006646). It was assumed that salary included base salary, merit increases, temporary pay reduction, and "augmentations". Note that the structure of Banford's position has never been clear. See complete discussion on pp. 71-72 of this report, specifically at Table 13 on p. 71.

Further, Banford, during all but two years of her ten years of employment, also performed Ice Hockey Director of Operations duties with no percentage time distinctions made in either assignment until 2013 when it appears that the athletic director made what I consider to be an arbitrary designation that her position represented 60% time head softball coach and 40% time Women's Ice Hockey Director of Operations. I consider this percent time construction to be arbitrary because (1) there is no doubt that she performed the same duties, and accomplished them at a higher level than her male baseball counterpart who was categorized as a 100% time head baseball coach, (2) she also performed the same duties as her 100% time male counterpart men's ice hockey Director of Operations, (3) her salary in the softball and ice hockey budgets does not reflect a 60%/40% position split and (4) there was never a formal Human Resources Office audit of her time and duties which would be standard industry practice in the case of such a combined position. I did not have access to a complete salary history for Rients for all responsibilities, who I understand may have also had an events assignment in football that did not overlap his baseball season. However, his salary did not appear in the football budget. Table 20 is a five-year review compensation review of Rients compared to Banford based on data derived from UMD athletics budgets from 2010-11 through 2014-15.

Table 20
Comparison of Salaries- 2010-11 to 2014-15
Head Coaches of Men's Baseball and Women's Softball
June 30 Year-To-Date Budgets (UM_000013401, 13407, 13418, 06634, 06646)

Employment Year	Rients Baseball Head Coach	Banford Softball Head Coach	Banford Women's Ice Hockey Director Operations
2010-2011	\$32,436	\$31,745	\$15,000*
2011-2012	\$25,812**	\$25,812**	\$23,343
2012-2013	\$26,460	\$27,210	\$24,070
2013-2014	\$37,044	\$27,918	\$24,306
2014-2015	\$37,969	\$28,615	\$24,539

* Women's ice hockey salaries in this budget year are aggregated; however Banford's appointment letters show a \$15,000 "salary augmentation"

** Salary reductions appear questionable, especially since they exactly align Banford's and Rients' salaries

The data reveal significant compensation inequities in the treatment of Banford compared to her male counterpart Rients with regard to sport coaching compensation. Further, the 2013-14 salary increase of 40% for Rients is highly suspect after a 14 wins/26 losses 2012-13 season and no similar increase is given to Banford following an absolutely outstanding and record-breaking 41 wins/13 losses 2012-13 season in which she is named conference Coach of the Year and won the regular season conference title.

Table 21 below, compares the experience, qualifications, and achievements of the head female women's basketball coach Wiles' to the comparator male head men's basketball coach Bowen.

Table 21
Comparison of Salaries, Experience and Success*
Head Coaches of Men's and Women's Basketball - Through 2014-15

Factors	Bowen – Men's Head Basketball Coach	Wiles – Women's Head Basketball Coach
2014-15 Coaching Salary*	\$ 89,492	\$ 79,688**
Contract Term	4 years	4 years***
Coaching Assignment	Full-time	Full-time
UMD Overall Won/Lost Record	36 W/48 L	109 W/86 L
UMD Winning Percentage	.429	.559
UMD Years as Head Coach	3	7
# Regular Season Conference Titles	0	0
# of NCAA Region Tournament Berths	0	2
Conference Coach of Year Awards	0	0
Overall Years Experience as Head Coach	9	22
Overall Coaching Record – All Institutions	100W/150L	408W/229L
Overall Winning Percentage	.400	.640
Education	Master's	Master's

* Coaching records and other measures of success and education were derived from the Bowen UMD coach bios on the Bulldogs internet site. Retrieve at:
<http://umdbulldogs.com/staff.aspx?staff=3>

** Both salary figures were taken from the June 30, 2015 Year-To-Date men's and women's basketball budgets respectively (see UM_000006646). It was assumed that salary included base salary, merit increases, temporary pay reduction, and "augmentations".

*** Initial employment agreement was for 4 years, renewed one year before the end for 4 years with Nielson; Wiles' request to Berlo to renew one year prior to the end of her second agreement was disregarded.

Prior to being hired in 2012-2013 by UMD, Bowen served as the head men's basketball coach at Bemidji State University for six years, achieving a 64 wins and 102 losses record and a winning record in only one of these six coaching seasons (2006-07 through 2011-12), his first head coaching position. Wiles is a highly experienced and success collegiate head coach) having achieved her landmark 400th career win in 2014-15 and suffered only two losing seasons among her 22 career seasons. Despite her superior experience and achievements she was compensated at a significantly lower level than her less experienced and less successful male counterpart.

Table 22
Comparison of Salaries- 2010-11 to 2015-16
UMD Head Coaches of Men's and Women's Basketball
June 30 Year-To-Date Budgets and UMD Academic Rate Sheets (UM_000013401,
13407, 13418, 06634, 06646, AW15, AW17, AW 22)

Employment Year	Men's Basketball Head Coach	Wiles-Women's Basketball Head Coach
	Holquist*	
2010-2011	unknown	\$ 69,450
2011-2012	\$ 79,100**	\$ 75,000
	Bowen	
2012-2013	\$ 82,391***	\$ 76,630
2013-2014	\$ 87,482	\$ 78,622
2014-2015	\$ 89,492	\$ 79,688
		Pearson
2015-2016	\$ 91,549	\$ 69,029
* Sufficient data was not available regarding this previous men's basketball coach comparator, who over the four years prior to the hiring of the current position occupant (corresponding to the start of Wiles' employment) appeared to have comparable college head coaching experience but was not as successful with regard to program performance (.460 winning percentage for 51 wins/60 losses from 2008-09 through 2011-12) compared to Wiles (.565 winning percentage for 69 wins/53 losses over that same period). 2010-11 budget aggregated salaries of all coaches so could not extrapolate Holquist salary		
** Coaching change made at end of year-Holquist \$61,100 from basketball budget plus \$18,000 presumed from administration...moved into administration upon arrival of Bowen		
*** Assumed a combination of the \$67,380 FY13 budget plus \$15,011 from FY12 budget		

Thus, I concluded that both Banford and Wiles were unfairly compensated with regard to base salaries compared to their male comparators in identical positions for all of most of their careers at UMD. And, as was the case with Miller, after succeeding in getting Wiles to resign

because of the hostile environment created to harass her and after demoting Banford and making a disingenuous head softball coach offer, UMD replaced both coaches less experienced, less successful and lower compensated coaches.

An additional compensation equity issue is the UMD athletic department's provisions regarding the provision of the use of a car dealer vehicle or the provision of monthly stipends to Tier II coaches. Title IX requires that coaches of men's and women's teams be provided with equal support in the performance of their duties and be treated equally with regard to compensation, opportunities for bonuses and other benefits. Taking ice hockey out of the assessment equation because they have been previously examined as a Tier One sport, I was not provided with sufficient data to determine what head and assistant coaches were eligible for vehicle benefits. I found no data supporting the UMD OCR response statement that "Contract provisions are reviewed regularly to ensure equity in the providing of vehicles and/or car allowances." (at UM_000001855). Given the fact that the car allowances for Miller and Sandelin were not equal - Miller received a \$600 per month allowance compared to Sandelin who received \$750 per month – this statement cannot be true. I do not believe that UMD understands its gender equity obligations in this regard. Further, other information supports my opinion that even if the dealer car or monetary vehicle allowance fringe benefit was provided, it was not administered in the same manner to male and female coaches. For example, female coaches were not reimbursed for damage or over mileage car expenses in the same manner as male coaches and their vehicles were not replaced after the specified use period (see UM_000000494). In addition, in my interview of Wiles, she indicated that male coaches choosing to receive car allowances were provided with the opportunity by Krenzen Honda Nissan Lincoln for below blue book value purchase of top model used vehicles with the difference between the blue book and actual sale value claimed as a donation to the athletic department (a practice I have observed with a number of my past clients). I have asked attorneys to query the UMD staff member in charge of the UMD vehicle program to determine if

this practice occurred. These examples of inequitable treatment reflect some of the artful mechanisms commonly used to discriminate against female coaches while institutions contend that male and female employees are being equally treated.

d. Provision of Band and Cheerleaders and Promotional Issues. Title IX requires that an equal proportion of male and female athletes be supported with regard to promotions and publicity including the arrangement for cheerleaders and band to perform at Tier II competitive events. Cheerleaders and band appear at men's football and men's and women's basketball, thus providing 44% of male athletes and 7% of female athletes with this benefit. However, based on my interview with Coach Wiles, only a small contingent of three to four band members appear at the end of women's basketball games compared to a 20-25 member contingent at men's basketball events and the full band at football games, representing an additional treatment inequity. "Midnight madness", a special promotional event marking the first allowable practice date in basketball, is conducted for men's basketball and not for women's basketball. Thus, I concluded that, in my opinion, these are Title IX treatment gender inequities.

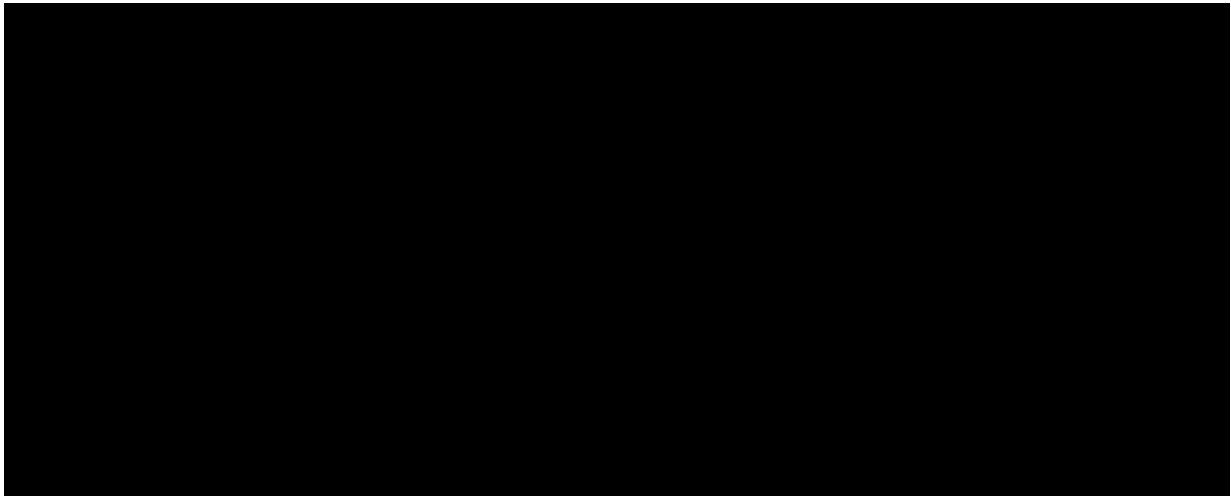
e. Other Treatment and Benefit Issues. Because I did not have data for all Tier II sports, I cannot give an opinion at this time regarding the following allegations of inequities but reserve the right to do so in a supplemental report if such data is provided to me:

- whether the athletic department complimentary meals programs (food contributions from local businesses) provided male athletes with higher quality and more valuable meal benefits than female athletes
- whether the athletic department by policy or practice conducted a uniform replacement system that provided male athletes with new uniforms more frequently, imposed different standards for men's and women's teams on the colors or quality of uniforms or provided lesser quality or quantities of practice apparel and other gear

- whether equal quality, sized and maintained locker rooms, lounge areas, practice and competitive facilities are provided to men's and women's teams, including spectator and team meeting areas with equal amenities
- whether access to equipment was more restricted for women's teams than men's teams
- whether men's teams were given priority for use of practice and competition areas during their traditional championship seasons and women's teams were not

TERMINATION, EMPLOYMENT NON-RENEWALS AND FORCED RESIGNATIONS

The treatment of Miller, Banford and Wiles raised red flags within UMD. The Co-Director of UMD's Office for Human Resources and Equal Opportunity fully recognized the likelihood of a discrimination action in a December 8, 2014 email to Athletic Director Berlo:



The athletic department has a clear history of inequitable employment of female coaches. See Table 23 on the following page which reveals the low employment of females as a systemic issue. For example, at least since 2005-06, the athletic department never hired a female for a head coaching position for men's sports and hired males for 90% of all assistant coaching positions in men's sports. Generally, all of these men's sports positions paid higher salaries than for women's sports. In addition, close to half of all the head and assistant coaching positions in women's sports went to males.

Table 23. Percent of Males and Females Occupying UMD Head and Assistant Coach Positions: 2005-06 – 2014-15
(EADA data – Retrieve at: <http://ope.ed.gov/athletics/#/>)

Year	Head Coaches		Assistant Coaches		All Coaches		All Coaches	
	Male	Female	Male	Female	Male	Female	% Male	% Female
2005-06	10	2	26	10	36	12	75%	25%
2006-07	9	3	24	8	33	11	75%	25%
2007-08	13	3	30	10	43	13	77%	23%
2008-09	13	3	30	17	43	20	68%	32%
2009-10	12	4	23	11	35	15	70%	30%
2010-11	8	4	23	8	31	12	72%	28%
2011-12	8	4	24	10	32	14	70%	30%
2012-13	8	4	27	9	35	13	73%	27%
2013-14	8	4	27	12	35	16	69%	31%
2014-15	8	4	25	8	33	12	73%	27%

I reviewed the employment of head coaches by the athletic department over the period from 2004-2005 through 2014-15. During this ten year period none (0%) of the thirteen male head coaches had their employment terminated or non-renewed compared to three of the four female head coaches (75%) whose employment ended due to UMD actions, with 100% of those females being homosexual. I note that Wiles resigned because of the hostile employment environment that was negatively impacting her health and in my opinion this was a forced resignation. This employment data supports the premise that female head coaches experienced discriminatory employment treatment disproportionately based on their gender and sexual orientation.

The sheer weight of these solely female adverse employment decisions is indicative of the failure of athletic department and institutional leadership to honor their obligations to follow institutional policy and legal obligations regarding discrimination against individuals on the basis of gender or sexual orientation. I do not consider the fact that all females and one homosexual were hired to replace Miller, Banford and Wiles to be redeeming or offsetting factors given the obvious fact that UMD was cognizant and forewarned of the litigation risk involved in the Miller,

Banford and Wiles actions. Further, all ice hockey and basketball replacement coaches were hired at lower salaries, were substantially younger, were American, less successful, and less experienced than their predecessors. The replacement softball coach was older but only had experience at the Division III level. She was offered a three-year contract and offered a higher salary than offered to Banford, supporting my subsequent opinion that UMD's renewal offer to Banford was disingenuous. In UMD's response to the OCR investigation, UMD stated that they intended to significantly increase the softball coach's salary for the 2016-17 season. UMD effectively and purposefully eliminated three strong, outspoken and successful female coaches who would not accept the gender inequities and hostile treatment to which they were subjected.

In my response to Question Two, I detailed the reasons why I found the reasons of (a) need to reduce the athletic department budget, (b) program success slippage, and (c) low team APRs to be without merit with regard to a decision not to renew Miller's employment. While no reason was given to remove Banford from her position as head softball coach, the reason given for her non-renewal as ice hockey director of operations was because Berlo contended it was protocol when a head coach is fired to terminate all the coach's staff and let the new head coach select their staff. However, normally only the assistant coaches are in this category, not administrative or other professionals serving team or athlete needs. For example, the equipment manager/strength coach and the athletic trainer (who are both American) were not terminated. Athletic Director Berlo knew that Banford's supervisor was Finnerty and not Miller. Further, in my opinion, the offer of renewal of Banford's head coaching position was unclear, belated and when it was forthcoming two months following her notice of termination from both her softball and operations positions, was disingenuous in that the head softball salary offer was ridiculously low, \$15,000 less than her previous year's earnings, and it was a demotion. Banford remained removed from her Women's Ice Hockey Director of Operation position for no reason other than Berlo's mindset that associated Banford with her partner, Miller, losing not only this salary but the loss of summer ice hockey camp compensation. Furthermore, Berlo knew that

Banford was in her final stages of application for her United States Permanent Residency, that she personally financed at the cost of \$12,000. When Berlo non-renewed Banford he jeopardized her US Immigration Status.

In the case of Wiles' resignation, it is my opinion that her treatment was purposefully hostile, had an adverse effect on her health and was intended to force a resignation from her position. In subsequent sections in response to this question, I discuss this treatment in the context of hostility because of her sexual orientation and past success as a female coach. I also address these issues with regard to Miller and Banford.

Summary Treatment and Benefits Conclusion. In summary, it is my opinion that the above analysis of inequities affecting Tier One and Tier Two female coaches and their female athletes reveals a clear pattern of systemic gender discrimination. Significantly, males are hired for one hundred percent of the head and assistant coaching positions of men's teams, almost all of whom were better compensated than the male and female coaches of female teams. The most successful female coaches have been paid far less than their less experienced and less successful male counterparts and have been intentionally under resourced compared to their male counterparts. This under resourcing has occurred on a consistent basis over time, affecting the ability of female coaches to perform their position duties and realize compensation benefits related to performance success. In all Title IX treatment and benefit areas in which I had sufficient data to perform an assessment, female athletes received lesser treatment. Because athletic teams are sex separate and determinations of budget allocations determine treatment, the perpetuation of such inequities are considered gender based and intentional.

7. Did you find any evidence of coaches Miller, Banford and/or Wiles being harassed and/or treated differently as employees because of their sexual orientation, national origin and/or age or being subjected to retaliation because they raised gender or other protected category inequity issues in the treatment of themselves or their female athletes?

In the previous question, I identified clear instances of unequal compensation based on the sex of each of these female employees with regard to compensation and the failure of the institution to provide equitable support, benefits and treatment to their sport programs all of which involve the participation of female athletes.

It is important to acknowledge that, neither in the previous question nor in my response to this question, am I making a legal conclusion, matters for a judge or jury to decide. Rather, I have assembled and tried to present all of the material I have examined to demonstrate that it is their sum total coupled with the specificity of the coaches' descriptions of how they were treated that led me, and in my opinion, should lead any reasonable person, to opine that the plaintiff coaches experienced persistent discriminatory treatment over a long period of time because of their status as members of protected categories of employees.

Thus, in my response to this question, I continue the process of aggregating and organizing materials and allegations in order to determine whether coaches Miller, Banford and Wiles were also subjected to overt as well as the often more subtle treatment demonstrating discrimination based on sexual orientation, national origin or age and whether they experienced retaliation. Even though I tried to fit these examples of discrimination and retaliation into these four discreet categories, it should be recognized that there is a great deal of overlap. For example, harassment based on sexual orientation can also be retaliation for raising gender, sexual orientation or other instances of unequal treatment.

a. Discrimination Based on Sexual Orientation. I tried to determine if there was evidence to support the plaintiffs' contentions that lesbian employees endured a

homophobic athletic department culture that existed over a long period of time and was never addressed by the athletic department or institutional leadership. It is important to recognize that homophobic individuals don't stand up in a public meeting and say "I hate gays." Rather, these sentiments are expressed behind closed doors to persons perceived to be allies because they are either male, heterosexual or both. Or, such discrimination may be the sum total of numerous, persistent, seemingly small verbal or treatment transgressions easily denied if individuals are confronted and that eventually reach critical mass over time. In my opinion, the volume and consistency of homophobic incidents within the athletic department would lead any reasonable person to believe in the existence of a pattern or culture of discriminatory behavior based on sexual orientation. It is within this cumulative context that the following incidents led me to conclude that Miller, Banford and Wiles were victims of sexual harassment based on their sexual orientation:

1. In the summer of 2006, Miller and Banford, gay coaches, were intentionally excluded from participating in an athletics department and community golf tournament. Even when athletic director Nielson was confronted about the occurrence, he refused to speak with Miller about the issue. In the spring of 2007, Banford was again excluded from a Proctor, Minnesota fundraising event despite having paid for the event. Upon her arrival at the event, Banford was told there was no place for her to sit. Such exclusionary incidents are common in other athletics lawsuits involving discrimination based sexual orientation for which I have served as an expert. Homophobic athletic department administrators are fearful that female coaches who do not present as heterosexual women will negatively impact fundraising efforts.

2.



- [REDACTED]
3. In 2007, Miller served on a search committee that hired a female head women's basketball coach and in doing so, rejected the favored candidacy of the brother of Karen Stromme, Senior Women's Administrator, an action that angered some staff members. On that occasion, the ice hockey athletic trainer overheard the comments of [REDACTED], who said, "She won't get away with this...I will do everything I can to bring her down." [REDACTED] was the same individual who previously, on the occasion of Miller serving on the search committee that hired Nielson as athletic director, confronted Miller concerning that search, advising, "I don't know why you are bringing in a black woman to interview. The people around her won't accept a woman as an AD and certainly won't accept a black one." Miller would later file additional complaints against [REDACTED] for his homophobic, racist and xenophobic comments. On both occasions, [REDACTED] homophobic hostile remarks toward Miller and racist remarks about the athletic director candidate were reported to no avail (UM_000000225-230). A formal complaint to the institution in July of 2008 about these instances of bigoted remarks resulted in a finding of "no unlawful discrimination" (UM_000000134-135) despite the fact that the finding also included acknowledgement that "there is a problem that must be addressed in the athletic department at UMD." In my experience with similar institutional investigations, I have never encountered an institutional admission of unlawful action. Due to the institution's priority obligation to

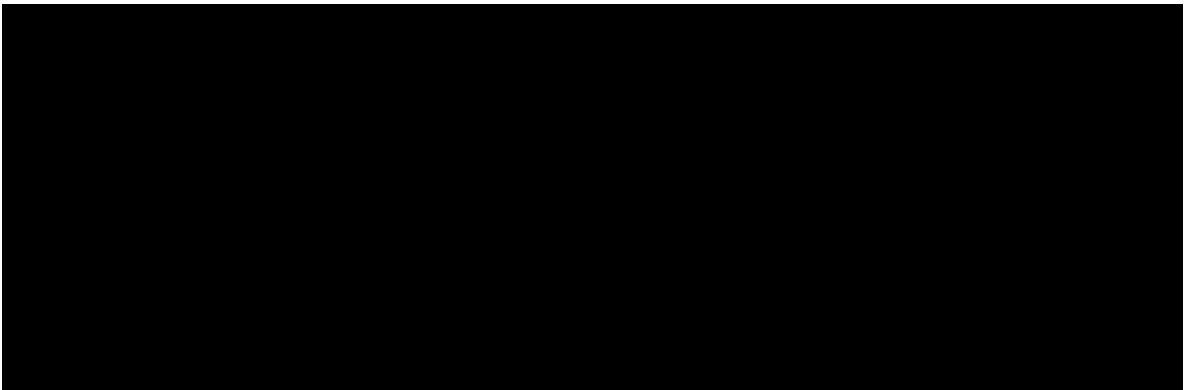
protect itself from lawsuits, instead of an unlawful finding, there is the common use of similar coded phrases related to the need to address problems internally. This self-interest must be recognized and the absence of formal findings of discrimination appropriately weighed when multiple similar instances occur and continue to be unaddressed, as was the case at UMD.


4. On several occasions from 2010 to 2011, Miller received harassing mail in her work mail box. For example, she received several pieces of mail calling her a “dyke” and suggesting that she “go” home, saying “goodbye,” “the end,” and mail containing newspaper clippings showing the disparity between attendance at women’s hockey games versus men’s hockey games, with Miller’s salary handwritten on them. Some notes were on department stationery accessible only to athletics staff members. The placard on Miller’s office door was defaced and her name was replaced with the word “dyke.” Miller and Banford reported each of the incidents to the Human Resource department, including Human Resources Director Judith Karon (JB 2, UM_000000036-37, 6029). Given these direct and overt incidents, the athletic director, on the occasion of the first offense, should have (a) explained what happened at an all-department meeting, (b) stated in no uncertain terms that the institution has a strong policy and state and federal laws prohibit discrimination or harassment based on sexual orientation and (c) warned that any employee violating these policies and laws would be subject to serious disciplinary action up to and including termination of employment. None of these overt homophobic incidents were ever mentioned in any department meeting and Athletic Director Neilson never publicly condemned these acts of bigotry. The culture of the athletic department is ultimately established by the voice and actions of the athletic director. Further, the athletic director first promised to install a lock on Miller’s mail box and then promised to arrange for Coach Miller’s mail to be delivered directly to

DECC/Amsoil Arena, in order to protect against further similar incidents. Neither of these changes occurred.

5. On the occasion of a September 30, 2011 event recognizing Bill Haller's (the retiring Compliance Coordinator) induction into the UMD Athletics Hall of Fame, Billy Olsen, the person introducing Haller to the 90% male audience, inappropriately suggested that Coach Miller and Coach Banford did not attend event because Haller was being honored. Despite being in attendance, the athletic director failed to correct the public humiliation of Miller, despite the fact that he knew that the reason Coach Miller and Coach Banford were absent was due to their engagement in the first ice hockey game of her season (UM_00000014, 26-28, 29, 121-125). Acting to correct the untrue statement and the hostile environment created by it was the athletic director's responsibility. Even though the event "roasted" many of the honorees, sexually harassing jokes are considered sexual harassment and cannot be excused. A subsequent UMD HR Office investigation of this and other allegations of discrimination mischaracterized and improperly excused this introduction because they considered Olsen's comment to be a joke. The UMD investigation also accepted athletic director Nielson's excuse that he didn't correct the hostile comment because he did not wish to bring further attention to the matter. Contrary to this conclusion, Title IX requires that Mr. Nielson act to correct a hostile environment. Silence in the face of wrongdoing indicates acceptance of that action.

6.



- 
7. Following the announced non-renewal of Miller's and Banford's employment, an anonymous Twitter account was created containing inflammatory comments about Banford and Miller. These comments were "followed" (social media terminology used for spreading the comment to others) by various men's hockey players, the men's hockey equipment manager and the official UMD hockey Twitter account run by a male Assistant Athletic Director.

8.



9. ██████ would chat with Miller on occasion over the years and tell her that people saw her as an outsider and that she would never fit it. When Miller queried ██████ about why he would say that, he would respond with comments about her being Canadian and being gay. ██████ also told Miller she didn't have to win all the time, just be competitive. ██████ would say, we're a Division II school, we are not UM or UW. ██████ also told Miller, "I have Berlo in my pocket and I have the Chancellor's ear."
10. During the fall semester of 2014 Gary Holquist asked Miller if she could attend and speak at an athletic event. Miller said yes, and Holquist said he would put her on the flyer and promote it. The flyer went out to all Bulldog supporters with male head coaches being advertised as speakers, and Miller was not on it. Banford saw the flyer and knew Holquist had asked Miller to speak and that she had agreed. Banford confronted Holquist about the absence of Miller on the flyer and he said he erred and would revise and resend the flyer with Miller included. Holquist did not do that.
11. In October of 2013, on the occasion of Wiles' being the keynote speaker at the GLBT National Coming Out Day luncheon on the UMD campus, without looking at his calendar, then athletic director Berlo refused Wiles' invitation to be at her table by informing her that he would be out of town. On the day of the event, Wiles' again invited Berlo, who was not out of town, to attend and he told her he was not available. Following the event, Berlo asked Wiles "Did you give it a lot of thought before you decided to speak?" – a typical coded phrase indicating that Berlo viewed Wiles' decision to speak as an "out" lesbian in a high visibility public forum in a negative manner. Further, immediately following this public appearance of Wiles as an "out" lesbian, both Berlo and Assistant Athletic Director Strong changed their demeanor toward Wiles with regard to professional interactions. Berlo simply ceased communication, including failing to respond to Wiles' cordial greetings in hallways except when his behavior was observed by others, a typical artful practice used to avoid any impression of homophobic

behavior. Creating an unwelcoming, uncomfortable and “outcast” working environment for an openly lesbian coach is a typical tactic used by homophobic administrators because they realize that more obvious or forceful public expressions of anger or hostility would be noticed by others as both unusual and discriminatory. In private meetings with no observers, Wiles’ interactions with Strong became openly hostile whenever she requested anything or raised an issue of inequity or unfairness. And it was following the previously mentioned public display of Wiles’ sexual orientation, that the harassment of Wiles began – including such actions as athletic department administrators openly seeking negative player evaluations, making threats that her continued employment was in danger because of student exit interviews and asking her to do things coaches are not normally asked to do such as signing a contractual agreement that she would stay within her sport budgets, a process that included a verbal threat of termination if she failed to sign the document. Later, Wiles would have her budget reduced in the middle of the school year to increase this pressure.

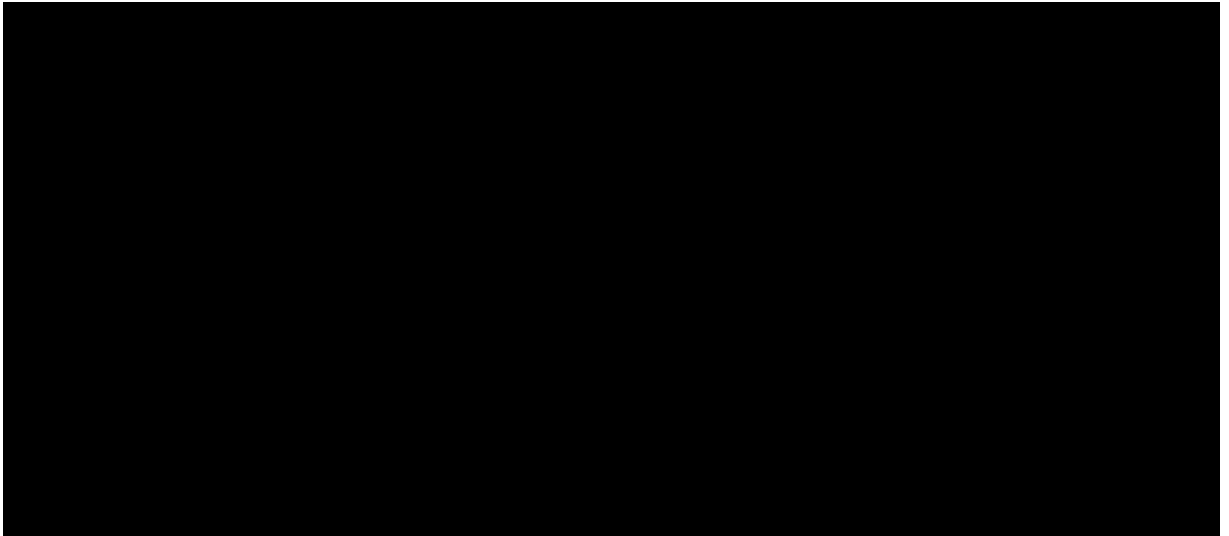
12. During the summer of 2013, Coach Wiles introduced her wife and daughter to Berlo and his wife and their response was notably “cold” and “uncordial.”
13. Berlo purposely used exclusionary tactics such as not inviting Miller and Wiles to a strategic planning meeting dealing with the future of the department, creating the appearance that their failure to attend was the coaches’ decision not to show up. (AW 243-244) When the coaches asked why they were excluded, Berlo would respond that they weren’t needed. There was never any acknowledgement by Berlo during the meetings when Miller and Wiles were not present that their absence was with his approval. Former Athletic Director Nielson also excluded Miller from department meetings, creating the impression that Miller chose not to attend when her excused absence was not noted. Acknowledgement of the excused status of absent staff

members is an administrative best practice that should be followed at every department meeting.

I queried Miller about other examples of purposeful exclusion in order to determine if this was an isolated instance or a pattern of administrative behavior. She was able to recall other instances. For instance, during the fall of 2013, UMD was hosting the Russian Olympic Women's Hockey team in Duluth as they prepared to host the 2014 Winter Olympic Games. [REDACTED] called her and asked if she could attend and speak at a donor/fan event at a local restaurant. Miller explained that her responsibilities with the Russian team would not end until 6 pm and if he scheduled the event at that time or later, she would be delighted to speak. [REDACTED] scheduled the event at 5 pm. [REDACTED] was attending that event and called Miller, expressing irritation that she was not at the event. [REDACTED] did not let anyone know why Miller was not present. Similarly, each spring [REDACTED] organized a 'Caravan with Coaches'. He would call and ask Miller when she would be out of town on vacation. He would then schedule The Caravan on dates coinciding with Miller's vacation time. Again, these are examples of subtle discriminatory behavior.

14. Unlike the traditional termination of assistant coaches along with the head coach in order to allow the new head coach to hire his or her own coaching staff, there was no justification for use of this rationale to remove Banford from her position as Ice Hockey Director of Operations. Miller did not supervise Banford. Banford was an administrative employee supervised by an assistant athletic director. There was never an expression of dissatisfaction with Banford's performance as Women's Ice Hockey Director of Operations. This was clearly an action motivated by Banford's status as the lesbian partner of Miller. Such tactics against a homosexual employee's partner are frequently intended to retaliate against or create a hostile environment for the lesbian employee.

15.



Again, I am not attesting to the factual existence of each of the above listed actions. Rather, I have assembled all of these allegations to show that it is their sum total, and the specificity of their descriptions, that lead me to opine that the plaintiff coaches experienced persistent discriminatory treatment over time that the athletic department knowingly created and allowed a stressful, hostile and potential mentally and physically damaging working environment to exist. Athletic department and UMD leadership did virtually nothing to establish strong deterrents to such abusive behaviors. From personnel in the HR office who handled formal complaints from Wiles, Banford and Miller to a formal UMD athletic department “audit” not requested by these coaches, it was common knowledge that something was significantly wrong in the athletic department. Given the specific examples listed above, the fact that all three homosexual coaches had similar experiences, and the fact that neither the athletic department nor the institution responded to remove this hostile environment, forms the basis for my overall opinion that there is ample evidence to support the contention that lesbian employees endured a homophobic athletic department culture.

b. Discrimination Based on National Origin. The toxic culture of the athletic department was not limited to discrimination based on gender and sexual orientation. In my opinion, there was also evidence of harassment and bias with regard to national origin and race. Racism is often present in xenophobic environments because it becomes indistinguishable from

discrimination based on national origin when persons of color, in particular African-Americans and native Americans are treated as if they do not really belong in America. Again, the number of incidents and the failure to address these concerns by the athletic department leadership allowed this hostile culture to continue to operate over many years. I note the following examples in support of this opinion:

1. Coach Miller related an incident involving a [REDACTED]

[REDACTED]

[REDACTED] With [REDACTED], the athlete was subsequently accepted (UM_000000038)

2. In 2011, Coach Miller again informed Athletic Director Nielson of the [REDACTED] bias against foreign athletes, via an email with supporting documentation expressing these concerns directly to [REDACTED]. She related to Nielson that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Nielson did not respond.

(UM_000000041-50) It should be noted that international student scholarships are more expensive for the Athletic department than scholarships to American students but this cannot be used as a justification for discrimination based on national origin.

3. Coach Miller lost two Swedish national team players and one [REDACTED] national team player due to a combination of Admissions changing their acceptance practice of TOEFL scores and [REDACTED] delays in processing international recruiting prospects, a process which requires timely submissions. (UM_000000067) In the case of the [REDACTED] national team player [REDACTED], a full scholarship prospect that would have played from 2009 to 2013, she had all of her required paperwork submitted by the late spring or early summer of 2009. She quit her job, gave up her apartment and only had to go the embassy to pick up her visa papers before boarding her booked flight to Duluth. [REDACTED] called Coach Miller in mid-August to tell her that [REDACTED] could not be admitted because she was short a math class – a course she could have taken that summer. Needless to say, both the student-athlete and the [REDACTED] national team coach were extremely upset with the lack of timely notice by UMD. Miller believes this late notification by [REDACTED] was done on purpose and I opine that this behavior would be consistent with [REDACTED] past actions.

Losing three national team players very late during the admissions process greatly affects the strength of a team's roster and overall team performance for many years. Only [REDACTED], had access to the NCAA web site related

to processing these players. No other teams were recruiting international players to the same extent as Coach Miller. Even if processing international students involved more work and effort on the part of [REDACTED] there is no justification for permitting [REDACTED] to discriminate on the basis of national origin in handling prospective athlete admissions.

4. Trish O'Keefe, a staff member in the International Office took Coach Miller to meet with [REDACTED] for the purpose of explaining to her boss what was happening to international female ice hockey applicants. [REDACTED] stated that it appeared that "women ice hockey players were experiencing reverse discrimination." Instead of the institution going out of its way to admit international athletes, as it does for non-athlete international students with lower TOEFL scores, UMD was going out of its way to deny admission to international athletes with lower TOEFL scores. UMD's standard practice with international applicants for admission whose TOEFL scores were too low, was to admit them and require them to take an ESL (English as a Second Language) course. UMD was not doing this in the case of some female ice hockey players.
5. On two occasions in 2014, in conversations between Banford and Berlo in his office, Berlo displayed his discriminatory feelings about individuals from other countries. In the first meeting, involving a conversation about Banford's green card, he stated, "There are too many Canadians around here" and suggested to Banford, "Why don't you just get married to an American?" Banford responded that, "I am going to do this the right way." On the second occasion, during another meeting discussing the new assistant women's ice hockey coach, who was a Canadian, said, "I've never seen so many damn Canadians."
6. In January and February of 2014, Miller met with Berlo on several occasions concerning making an assistant coach change, specifically moving out [REDACTED] who was Canadian, and having a search for a better assistant. Berlo commented, "It's odd that

you have so many Canadians on your staff. A lot of Canadians around here.” He asked Miller if she tried to hire an American. Miller responded, I tried, but I did not get the applicants. Some Canadians had better applications. Hockey is the number one sport in Canada.” Later in the Spring, during the search for the new assistant coach, Miller identified her top three candidates, all American. Berlo responded, “Good, there’s too many Canadians around here. Those are all good options.”

7. In 2010, in addition to the homophobic messaging in the hate mail received by Miller, those comments included “Go home” implying that the United States was not her home (UM_000000036-37)
8. In 2007-08, [REDACTED] obstructed the recruiting of a Russian athlete by telling Miller for months that all communication with the athlete must be by express mail rather than by facsimile. This was not true. He would also say things like, “Why are you recruiting a kid from Russia when you could recruit a kid from Minnesota?” and “All of these international students that you bring to UMD can’t even speak English and it’s way more work for me to process.” Miller would respond, “Well, it’s a lot of work for the coaches too, but they are our best players and it is worth doing the work.” (UM_000000203-206)
9. Once admitted, Banford had several experiences with the [REDACTED] [REDACTED] concerning players from Russia, the Czech Republic, Sweden and Finland. [REDACTED] was unwilling to assist them. For example, when the Russian athlete needed her help to be accepted into the UMD Master of Education program, [REDACTED] refused. Coach Banford walked the athlete over to the Education department to assist her. When Banford returned and reported her success, [REDACTED] asked “How the hell did you get this done?” With the Czech student who needed [REDACTED] and Berlo to sign off on admissions paperwork in order for her to be eligible to compete, after promising Miller that the paperwork would be completed in time for the weekend competition, both administrators

failed to do so until Banford confronted Berlo the Thursday before the contest and demanded that it be done immediately. He angrily agreed.

10. [REDACTED] consistently demonstrated that she was unwilling to help international students, saying "It's not my fault if they can't speak English" whenever she was approached to do her job.
11. Racist comments were not limited to those made by [REDACTED]. For example, [REDACTED] made derogatory remarks about Wiles' players on several occasions. For example, Wiles related that she once made comments in our public office hallway about a female basketball player's current grades in a class, saying "I see 'your girl' [REDACTED] is failing a class and not doing so well at UMD". On a separate occasion, Wiles related that [REDACTED] sat in her practice one day for five minutes and asked her "why did you recruit [REDACTED] she's terrible. I will laugh when she can't make shots in games". Both of the players she negatively commented on were African American. (UM_000000496)

In my opinion, this treatment of international students, employees from other countries and persons of different races as if they don't measure up to Americans or belong in America, is unconscionable and constitutes differential and negative treatment on the basis of national origin.

c. Discrimination Based on Age. Offensive remarks about a person's age constitute prohibited harassment based on age when comments are so frequent or severe that they create a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted) when the employee victim is over the age of 40. Miller was among the older head coaches in the athletic department at age 51 and suffered an adverse employment decision in that her employment agreement was not renewed. Wiles was also among the older head coaches in the athletic department at the age of 45 and suffered a hostile employment environment that I believe was intended to drive her to resign. I consider Miller's and Wiles' ages to have been a consideration because of the following

experiences both coaches related to me during my interviews with them and my experience in having observed numerous instances of older, higher paid female coaches being replaced with younger, less experienced coaches for the purpose of saving money:

1. The reason for Miller's non-renewal was stated as financial savings. As the oldest and most senior female head coach in the department, she was earning the highest salary. No effort was made to remove a younger male employee in an identical position who was earning more than Miller. It appears the UMD is admitting targeting Miller because of her seniority.
2. Like Miller, it appears that UMD created a hostile employment environment in a successful effort to get Wiles, the second highest paid and second oldest female coach, to resign. No similar effort was made to encourage a younger male employee in an identical position who was earning more than Wiles to resign.
3. Both Miller and Wiles were replaced by a younger, more inexperienced and lower paid coaches. Not only was this process indicative of discrimination on the basis of age, this is also a common mechanism used to discriminate against female athletes because it deprives them of older, more experienced and successful coaches and results in providing them with less experienced and lower quality coaches.
4. Berlo repeatedly threatened Wiles with termination of employment due to player surveys that he said indicated that she "had a problem", "don't have a relationship with your players", "are not close to your players" and could not "relate to players," implying that her older age was a causative factor. Coaches and teachers should not be expected to engage in "close" relationships with players or students and it was highly improper for Berlo to create such an employee expectation. I highly doubt whether any male coach under the age of forty was told they were expected to have "close" relationships with their players.

5. No male head coach under the age of forty had athletic administrators solicit the submission of complaint letters from athletes who had voluntarily left their programs, as was true with coaches Miller and Wiles, and as was true with Wiles, had a “Student Athlete Welfare” review initiated by athletic administrators in which administrators conducted personal interviews with athletes (UM_000004415) in place of normal evaluation procedures used for all teams.
6. No male head coach under the age of forty was subjected to hostile and angry outbursts during normal meetings with their supervisor or were treated in a manner that effectively isolated the employee from cordial and civil discourse with her supervisors, thereby creating a hostile employment environment that was having a negative impact on Wiles’ physical and psychological health. When Wiles confronted Abby Strong, objecting to her use of such a hostile communication tone, Strong told Wiles “don’t talk to me in that way”, slammed Wiles’ door on the way out and her own office door on her way in, a level of anger that was questioned by a graduate assistant in an adjacent office. (UM_000000494)
7. Assistant Athletic Director Finnerty informed Wiles that Athletic Director Berlo again assigned her to the UMD Diversity committee. Wiles stated that the department needed to broaden its diversity involvement on campus and suggested that Finnerty serve on the committee. Finnerty replied that he had “better things to do than listen to a bunch of old ladies talk diversity.” (Bates UM_ 000000491-496)
8. In the spring of 2013, while UMD was conducting the search for a new Athletic Director, Miller was in a parking lot with the head of the search committee, former Vice Chancellor Vince Magnuson. Out of the blue, Magnuson told Miller maybe it was time for her to move on or retire. Miller responded with “What? Why would you say that?” Magnuson said, “Look around you. Everyone is younger than you.”

9. In the fall of 2012 there were rumors that Athletic Director Nielson was looking to leave and find a head coaching job in football. Stromme and Holquist asked Miller out to dinner to discuss the idea of one of them applying for the job if Nielson was to leave. They said they couldn't decide if it would be better if Stromme applied or if Holquist applied and they wanted to know what Miller thought. They also asked Miller if she still liked coaching and wanted to keep coaching, relating to her that they both got tired of coaching as they got older and couldn't relate to the student athletes anymore. They talked about retirement and asked Miller directly, "aren't you tired? Aren't you finding it hard to relate to the kids today?" Miller responded, agreeing that many of today's athletes are spoiled, soft and selfish but she clearly communicated the passion she still had for coaching. Miller clearly understood that these influential senior staff members believed that older coaches did not have the energy or stamina to relate to this generation of athletes or retain their passion for coaching.

Again, my opinion is not based on any one example, but rather the sum total of these examples that indicate a pattern of behavior that reflects an athletics department culture that does not respect or value older and more experienced coaches.

d. Retaliation for expressing inequitable treatment concerns. In addition to the adverse employment decisions, ageism and hostile homophobic and xenophobic environments described in the previous sections, the following additional occurrences support my opinion that Coaches Miller, Banford and Wiles experienced retaliatory treatment:

1. I believe that the treatment of Banford, Miller's partner, with regard to her full-time head coaching and operations director position was clearly retaliation. Banford's original position was both 100% time head softball coach and a significant extra workload as director of women's ice hockey operations. She was never given a job description and the percent time assignment and salary for each job responsibility was constantly manipulated. In December 2014, she was initially informed that she would be

terminated from both positions. Over one month later, with no communication during this period, Berlo maintained, in the face of significant pressure from state legislators, that UMD's adverse employment action was only in regard to the ice hockey operations director position and that she would remain as head softball coach. However, Berlo reduced the salary for that part-time head softball coach position from \$38,000 to \$28,000, an absolutely disingenuous offer that Banford rightfully refused, especially when accompanied by termination from her administrative position. I could find no evidence of any male head coach salary being reduced.

2. Banford experienced numerous instances of disparate treatment and harassment by Berlo, Finnerty and other athletic department administrators that ranged from the childish but frustrating withholding of purchased softball and ice hockey equipment (equal access to equipment and supplies is mandated by Title IX athletics provisions) to being excluded from department fundraising events.
3. In the spring of 2014 Berlo called Banford while she was on vacation and tried to "bully" her into moving her office to a location without a window. Banford expressed to him that it was unfair for a head coach to be the only one moving to a location without a window while male assistant and other head coaches were in offices with windows. Berlo became very angry with her, said she wasn't a team player and abruptly hung up on her. When Banford returned to work at UMD, her entire office had been moved to a new location, which was an office with a window. Banford's property was thrown everywhere, half the carpet was missing, there was a hole in the ceiling and the walls were extremely filthy. This was done despite the fact that Banford had informed Berlo's office when she would be returning to campus and that she would move her own office because she had recruits coming to campus. All of her belongings were moved without her consent. Jay Finnerty asked to meet with Banford when she returned from vacation. In that meeting Finnerty told Banford he was telling her as a friend, that "Josh is done with you over this

office deal.” In response to Banford asking why, Finnerty responded, “Jen, all I can tell you is that Josh is done with you and that it’s going to take you a while to win him back”. This hostility was a drastic change from Berlo’s treatment of her from February of 2014.

4. In February of 2014, Banford organized a hockey jersey auction with Julianne Vasichuk to raise money for the women’s hockey team. This was approved by the athletic department. Vasichuk and Banford solicited Olympic jerseys from various countries from all of the current or former Bulldogs that would be playing that year in Sochi. When the auction was over, Banford asked Berlo to transfer the money into the women’s hockey budget. His reply to Banford was that she shouldn’t worry about where the money was going. The women’s hockey program never received these funds.
5. During a home softball series in the spring of 2015 which was scheduled to honor a former softball player, [REDACTED] who had died. Finnerty purposely set the outfield banners up in the wrong order. He knew the correct order from previous home games and Banford had sent explicit text messages to the facilities employee, Shane Peterson, who was responsible for hanging the banner. When Banford arrived at the field for warm ups, she was very upset and was informed by Peterson that Finnerty instructed him to place the banners in the incorrect order. Finnerty was confrontational with Banford, said he didn’t have time to deal with the matter and then walked away from her. He then walked out to the outfield and started instructing the student workers to place the banners in the correct order, which delayed the pre-game warm ups.
6. Neither Banford’s immediate supervisor nor Berlo honored department policy giving field use time priority to the softball team during its championship season, creating daily problems with regard to the coach and operations director’s ability to balance student-athlete attendance requirements, visiting team travel and scheduling of officials. Further, Finnerty encouraged hostility toward Banford by informing the football, track and soccer coaches during one-on-one meetings that Banford was the reason they could not use

fields for their sport practices. Banford was specifically informed by Finnerty and Stromme that softball would not be given field priority for rescheduled games, resulting in more missed classes for softball players

7. On multiple occasions during the winter and spring of 2015, Finnerty failed to respond to Banford's budget questions in a timely manner, thereby interfering with decision-making for the women's hockey program during its competitive season.
8. Wiles was given a one percent merit increase based on her 2014 performance review, lower than any other male, heterosexual, under forty years of age coach in the department, an action appealed to HR by Wiles, which was subsequently decided in favor of Wiles. (UM_000000589)
9. On threat of termination of employment, Wiles was told that her position would be immediately terminated if she failed to sign an agreement to adhere to her sport budget despite the fact that no budget was attached to that agreement. When she eventually received her 2114-15 budget, it contained substantial decreases in scholarships and other line items representing significant reductions compared to the budget promised to her. Subsequent to this meeting and without any discussion with Wiles, Berlo further reduced her budget during the academic year, causing significant stress. Banford and Miller were also required to sign these budgetary agreements without actual budgets being attached. While, on its face, expecting a coach to adhere to a budget appears reasonable, this expectation was wielded in such a way as to be unduly threatening and when combined with initial and continued budget reductions, was unreasonable and retaliatory. I have never encountered an athletic department that required coaches to sign such agreements.
10. Following the notification of Miller and Banford of their employment termination, Berlo selectively disciplined Banford when she missed meetings. She was told to come in for

meeting “make-ups” with Strong and Berlo while other coaches who were not in attendance were not required to appear for “make-ups”,

11. Unlike efforts in support of the programs of male coaches, Berlo made no effort to identify donors willing to assist with basketball, ice hockey or softball program needs. Further, it should be noted that it was not Wiles’ obligation to find new funds to replace budget cuts. By contract, head coaches were only obligated to “assist” athletic department staff responsible for fundraising. Rather, it was the institution’s responsibility under Title IX to distribute existing revenues from all sources in a manner that does not discriminate on the basis of sex. This double standard re: supporting men’s sports and not women’s sports through additional fundraising efforts was reported to the HR office as retaliatory and discriminatory treatment to no avail.
12. Unlike their counterpart male coaches, Wiles and her assistant coaches were not allowed to use their sport program budgets, fundraising accounts or camp budgets to pay for damages or excess mileage charges on dealer cars. Further, they were required to keep their dealer cars longer than male coaches which resulted in female basketball coaches incurring greater expenses. This double standard re: use of institutional funds to support dealer car costs for male coaches and not female coaches was reported to the HR office as retaliatory and discriminatory treatment to no avail. Title IX requires that if the institution pays these expenses for male coaches, it must also do so for female coaches, whether the female coaches were able to raise such funds or not. Title IX would also require that male and female coaches be treated equally with regard to other dealer car provisions such as the quality of the car, new car replacement, insurance, etc.
13. Following Coach Banford’s public claims of discrimination with regard to non-renewal of Coach Miller’s and her employment, [REDACTED] told other athletic department staff members that he would have “punched Coach Banford in the face” if he had seen her following an ESPNw article on the Miller/Banford UMD

employment action. [REDACTED]

- [REDACTED]
14. The athletic director's threat of a negative performance evaluation if the head women's basketball coach did not sign her budget was tantamount to asking the coach to agree to treat participants in her sport unequally and retaliation prohibited under Title IX.

e. Summary Conclusions. During the course of my review of documents related to the commonly acknowledged rude and unacceptable behavior of [REDACTED] and others within the athletic department, I was amazed at the athletic director's and the institution's tolerance for the unprofessional behavior of [REDACTED] and others. On numerous occasions ranging from simple straightforward employee appeals to athletic department supervisors and administrators to formal complaints to offices outside the athletic department, UMD failed to find that [REDACTED] acted inappropriately because they maintained that he acted that way with all sports, all athletes and all coaches – as if this universal conduct excused his discriminatory conduct. By doing so, UMD knowingly allowed and perpetuated his discriminatory behavior. There is a difference between an employee acting badly with everyone – being ornery, cross, angry, uncooperative or unprofessional -- and illegal behavior. Once an employee crosses the line into discriminatory conduct or harassment based on gender, sexual orientation, national origin or age, athletic administrators and UMD were obligated to act to restore a safe educational and employment environment. A single instance of verbal harassment or differential treatment based on gender, sexual orientation, national origin or age must be stopped immediately by issuing a zero tolerance verbal or written warning to the offending employee. To do otherwise is to permit such behavior and be complicit. This is the space occupied by UMD over a long period of time.

Further, the institution could not conveniently blame athletic director Nielson for not acting without holding him accountable, thereby evading responsibility, because on numerous occasions, Nielson's failures became formal complaints to institutional offices. The institution

was well aware that Mr. Nielson was both the head football coach and athletic director and either ignored or was indifferent to the conflict of interest inherent in this dual assignment. Further, it was common knowledge that Mr. Nielson was adverse to handling conflict. Given the obligation of Nielson to ensure that employees in his department complied with institutional policy and federal law and his failure to address the hostile environment created by his disregard of numerous formal complaints to those outside the athletic department, the institution effectively enabled such dereliction of duty by failing to insist that he correct the athletic department's hostile environment. This hostile environment continued unabated under Berlo, with Berlo making the decisions to terminate Miller and Banford and force Wiles to resign. The institution fully realized that Berlo's actions against three of the four female head coaches would result in litigation and did nothing to stop it.

8. Given your experience as a director of women's athletics at a major division I institution and expert in numerous cases similar to this lawsuit, what is your opinion regarding Miller, Banford and Wiles' prospects for obtaining comparable employment as collegiate head coaches.

There are only 35 women's ice hockey playing institutions in Division I, the top competitive division of the NCAA, who can afford a coach of the caliber of Shannon Miller. Head coach positions at these institutions are at the top of the salary and prestige scale in Miller's chosen career field. It is my opinion that it is highly unlikely that the predominantly male athletic directors in this small group who know and regularly interact with each other would hire Coach Miller or any woman who has formerly sued her employer institution for discrimination on the basis of gender or sexual orientation. It is also highly unlikely that

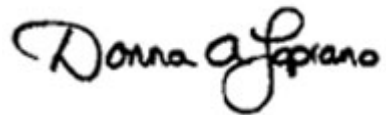
someone of Coach Miller's stature would accept a Division II or III coaching position offering salaries at significantly lower levels. In my opinion, it is highly likely that the UMD position will be her last collegiate coaching job.

Thus, my prediction for Miller's future employment is that there will be an abrupt and unfortunate halt to her Division I collegiate coaching career with no possibility of a lateral move or even a modest recovery. Given her age and experience in the workforce, smaller less resourced institutions will consider her over-qualified and will be unable to compensate her at a level commensurate with her experience and qualifications. Further, Miller will have to explain her career interruption during litigation and to express her motivation for going to court which will most likely have a depressing effect on how she is evaluated among position applicants. My colleagues working for executive search firms confirm that they would not advance a qualified individual to candidacy for any top level position while the individual is still involved in pending litigation.

With regard to Banford and Wiles, while there are a far greater number of Division II softball and women's basketball programs than Division I ice hockey programs, I believe it is also very unlikely that a higher level Division II program similar to UMD would hire any woman who has formerly sued her employer institution for discrimination on the basis of gender or sexual orientation. It is far more likely that Banford and Wiles will have to move to lower level Division II programs if they are able to stay at that level at all. Most Division III and community college program positions will pay far less and represent significant steps backward in the coaching job market. Over the course of my experiences with female litigants experiencing discrimination in collegiate athletics who had their employment terminated, I have observed that they end up with three viable but unsatisfactory options: (1) accepting employment in lower competitive division institutions where they must be satisfied with lower paid and lower status

coaching positions, (2) move into lower compensated non-coaching positions or (3) go into business for themselves at the open amateur sport level or a non-sports business.

Respectfully submitted,

A handwritten signature in black ink that reads "Donna A. Lopiano". The signature is written in a cursive, flowing style with a large initial 'D' and a prominent 'L'.

Donna A. Lopiano, Ph.D.

Date: January 1, 2017