

**LEGAL
AID AT
WORK**

180 Montgomery Street, Suite 600
San Francisco, CA 94104-4244
T: 415 864 8848 | F: 415 593 0096
www.legalaidatwork.org

LEGAL STAFF

Galen Ages
Attorney
Alexis Alvarez
Staff Attorney
Mana Barari
Senior Staff Attorney
Marisa C. Diaz
Staff Attorney
Katherine Fiester
Staff Attorney
Juliana Franco
Attorney
Michael T. Galtley
Director, Community Legal Services
Jenna Gerry
Attorney
Christopher Ho
Director, Immigration and
National Origin
Jinny Kim
Director, Disability Rights
Elizabeth Kristen
Director, Gender Equity & LGBT Rights
Rachael Langston
Senior Staff Attorney
William C. McNeill III
Director, Racial Equality
Julia Parish
Staff Attorney
Maria Tapia-Hernandez
San Diego Workers' Rights Clinic Fellow
Sharon Terman
Director, Work and Family
Kim Turner
Senior Staff Attorney
Carole Vigne
Director, Wage Protection
Katherine Wutchiett
Attorney

PARALEGAL/**LEGAL ASSISTANTS**

Ruby Ponce
Tishon Smith
Valerie Sprague

CLINIC STAFF

Leslie Chairas
Community Legal Services Outreach
Coordinator
King Szeto
Language Access Coordinator

SPECIAL COUNSEL

Robert E. Borton
Honorable Joseph R. Grodin (Ret.)
Henry Hewitt
Cecilia Kim
Ruth Silver Taube
Daniela Urban

Joan Messing Graff
President

Via U.S. Mail and Facsimile: (510) 879-4046

September 18, 2018

Marion McWilliams
General Counsel
Oakland Unified School District
Office of the General Counsel
1000 Broadway, Suite 680
Oakland, CA 94607

RE: *Oakland Unified School District – Title IX Violations*

Dear Ms. McWilliams,

Legal Aid at Work has recently become aware of gender-based inequality issues throughout the Oakland Unified School District (“OUSD”) athletic program. We request that OUSD make the changes necessary to ensure immediate and long-term Title IX compliance. We have provided a copy of the Compliance Plan from *Ollier v. Sweetwater* as it provides a road map to equity for girls. We look forward to beginning discussions with you about these matters.

I. TITLE IX

Title IX of the Education Amendments of 1972 prohibits educational programs receiving federal financial assistance from discriminating against students on the basis of sex. 20 U.S.C. § 1681, *et seq.* Title IX’s implementing regulations specifically provide: “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.” 34 C.F.R. § 106.41(a). Title IX further prohibits retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 870-71 (9th Cir. 2014).

Based on the most recent available information, we understand that throughout the athletic program, male OUSD students receive disproportionately more participation opportunities than their female counterparts do, and this inequality will likely continue in the future, if changes are not made immediately.

Letter to Marion McWilliams
September 18, 2018
Page 2

II. TITLE IX COMPLIANCE

Title IX requires female students be afforded equal participation opportunities, 20 U.S.C. § 1681, and prohibits any retaliation against those raising Title IX concerns, *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1113 (S.D. Cal. 2012)

A. Equal Participation Opportunities

The Department of Education, Office for Civil Rights' 1979 Policy Interpretation created a "three-part" test to determine whether a recipient of federal funds is in fact providing equal participation opportunities for male and female students. 44 Fed. Reg. 71,418.

In determining whether a recipient is providing the sexes with "equal athletic opportunity," one factor listed in the regulations is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c). The 1979 OCR interpretation created a "three-part" test to determine whether a recipient is effectively accommodating both sexes as follows:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of an underrepresented sex; or
- (3) Whether it can be demonstrated that the interests and abilities of the members of an underrepresented sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,418. While initially written in the collegiate context, this test unambiguously applies to high school sports as well. See *Ollier*, 768 F.3d at 855 ("[T]he three-part test applies to a high school."). Here, OUSD cannot show it satisfies the test under any of its three parts.

1. *Part One: Participation Numbers Are Not Substantially Proportionate*

Part one examines whether participation opportunities for male and female students are substantially proportionate to their respective enrollments. *Cohen v. Brown*, 101 F.3d 155, 163 (1st Cir. 1996) (affirming that the "participation opportunities" offered by an institution are measured by counting *actual* participants on teams). "Substantial proportionality requires a close relationship between athletic participation and enrollment." *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1271-72 (S.D. Cal. 2009); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 91 (2d Cir. 2012) (describing a non-compliant 3.62% disparity between female enrollment and female athletic participation).

Letter to Marion McWilliams
September 18, 2018
Page 3

The athletic opportunities OUSD provides for females and males are not substantially proportionate despite revising their proposed cuts in light of recent donations. Based on the 2017-2018 enrollment numbers, male students represented 51.5% of the student population and female students represented 48.5% of the student population.¹ However, based on an analysis of 2017-2018 athletic season, and adjusted for the proposed cut of the wrestling, swimming, boys golf, boys tennis, boys volleyball, and girls badminton programs, female students would receive 43.9% of athletic opportunities overall, constituting a participation gap of 4.6%.² OUSD would need to add 248 opportunities for female athletes to achieve Title IX proportionality this year.

Additionally, stark disparities in athletic opportunities exist in many of the individual schools part of OUSD. Three of the ten schools in OUSD have a participation gap of 3.62% or more for the 2017-18 school year: Castlemont High School has a participation gap of 5.2%; Fremont High School has a 10.4% gap; and Life Academy has 10.1% gap.

Finally, it is unclear how the recent donations will correct this inequality in the future. The recent donations by an anonymous donor and the Oakland Raiders organization total roughly \$288,000, which covered OUSD's proposed \$275,000 cut this year. However, this gives OUSD only \$13,000 next year to address the same \$275,000 budgetary issues it had this year. So far, OUSD has announced no plans to ensure that the same Title IX issues do not arise next year (or any following years), nor has OUSD announced plans to reinstate wrestling, swimming, or girls badminton to meet its Title IX obligations for the current year.

Therefore, OUSD will not show it maintains substantially proportional participation opportunities. See *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856-57 (9th Cir. 2014) (affirming as unacceptable 6.7% gap between female enrollment and participation in athletics).

2. Part Two: No History or Practice of Program Expansion for Female Students

Where an institution fails to meet proportionality under part one, it bears the burden of showing a history and continuing practice of program expansion demonstrably responsive to girls' interest. *Cohen v. Brown Univ.*, 991 F.2d 888, 901-02 (1st Cir. 1993). Part two examines an "institution's record of adding female participation opportunities and its current 'plan of program expansion that is demonstrably responsive to the developing interests and abilities' of women." *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 969 (9th Cir. 2010) (citing the 1996 Office for Civil Rights Guidance Letter); see also *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 WL 328446, at *11 (N.D.N.Y. June 11, 1996) ("[t]he hallmarks of this defense are *continuity and persistence*." (emphasis added)). Title IX was passed over forty-five years ago and thus, all educational institutions that receive federal funding have been on notice of the law's requirements

¹ See California Interscholastic Federation - Participation Census Submission Data, available at <http://cifstate.org/coaches-admin/census/index>.

² See <https://www.ousd.org/schoolsports>; OUSD Sports Community Letter, by Superintendent Dr. Kyla Johnson-Trammell (Aug. 24, 2018), available at *supra*.

Letter to Marion McWilliams
September 18, 2018
Page 4

since the 1970s. *See Ollier*, 768 F.3d at 857 (finding defendants failed to demonstrate a history and continuing practice where female participation had dramatic ups and downs during the relevant period).

Based on the information provided by the California Interscholastic Federation, which appears to be incomplete (it is missing several schools in certain years), the gender participation gap in OUSD dramatically varied between 7.6% and 3.1% between 2015 and 2018.³ Here, OUSD cannot show a history and continuing practice of program expansion demonstrably responsive to girls' interest. In fact, its immediate history and practice shows that OUSD failed to adequately consider the interests of its female athletes. By its own numbers, OUSD initially proposed to cut substantially more opportunities for female athletes than for male athletes—347 to 183, respectively. When confronted with this inequity, OUSD officials stated that it made cuts without a clear understanding of how they would affect gender equity concerns.⁴ OUSD did not adjust its athletic program according to girls' interest in sports. Consequently, OUSD cannot meet part two of the test.

3. *Part Three: No Effective Accommodation of the Interests of Female Students*

As to part three, “[i]f there is sufficient interest and ability among [girls], not slaked by existing programs, an institution necessarily fails this prong of the test.” *Cohen*, 991 F.2d at 898.

Existing OUSD programs do not satisfy female students' interest in athletics. The public outcry of frustrated parents and student athletes alone demonstrates this. Moreover, as shown above, OUSD's current cuts are disproportionately taking away athletic opportunities from female athletes based on its own projections. Despite reporting less female athlete than male in 2017-18, OUSD's current cuts take away *more* athletic opportunities for female athletes than male. Simply put, OUSD's athletic programs do not satisfy the interests of female athletes as required under Title IX.

III. REMEDY

We request that OUSD representatives meet with us to engage in productive and structured negotiations to help OUSD make positive long-term changes to ensure compliance with Title IX requirements.

In the Title IX matter of *Ollier v. Sweetwater Unified School District*, the school district chose not to engage in productive, structured negotiations, instead opting to litigate for years, at the expense of the plaintiffs, their families, and all female student athletes. The school district's legal expenses untimely totaled in the millions of dollars. Both the district and appellate courts

³ *See supra*.

⁴ *Oakland Schools Reconsider Sports Cuts After Gender Equity Concerns*, Jill Tucker (Aug. 25, 2018), <https://www.sfgate.com/bayarea/article/Oakland-schools-may-reconsider-sports-cuts-after-13182728.php>

Letter to Marion McWilliams
September 18, 2018
Page 5

found in favor of the female athlete plaintiffs in that matter. Due to the Courts' decisions, Sweetwater engaged in a compliance plan that will be in effect until 2024. The District's actions under the plan already are showing positive results for girls district-wide.

We hope to avoid litigation and resolve these critical issues through negotiations on a quick timeline. Please direct all communications regarding these matters to Legal Aid at Work. We look forward to hearing from you.

Sincerely,



Elizabeth Kristen

Encl.

- *Ollier v. Sweetwater*, Compliance Plan (via mail only)