



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

REGION IX  
CALIFORNIA

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MAIL BOX 1200; ROOM 1545  
SAN FRANCISCO, CA 94102

August 17, 2017

**VIA ELECTRONIC MAIL**

David Curry  
Superintendent  
Union Hill School District  
10879 Bartlett Drive  
Grass Valley, CA 95945

(In reply, please refer to case no. 09-17-1130.)

Dear Superintendent Curry:

The U.S. Department of Education, Office for Civil Rights (OCR), has resolved the above-referenced complaint against Union Hill School District (the District). OCR began an investigation into whether Union Hill Middle School (School) discriminates against female students on the basis of sex in its athletics program by not effectively meeting the interests and abilities of female students to participate in interscholastic athletics.

OCR investigated the complaint under the authority of Title IX of the Education Amendments of 1972, and its implementing regulation. Title IX and its implementing regulation, at 34 C.F.R. §106.31, prohibit discrimination based on sex by recipients of Federal financial assistance. The District receives Department funds and is subject to the requirements of Title IX and its implementing regulation.

OCR gathered evidence in this investigation by reviewing documents and correspondence provided by the Complainant and the District and by speaking with the Complainant and the District's Superintendent. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the District.

**Legal Standard**

The regulation implementing Title IX, at 34 C.F.R. § 106.41(a), specifically prohibits discrimination on the basis of sex in athletic programs offered by recipients of financial assistance from the Department. The regulation implementing Title IX, at 34 C.F.R. § 106.41(c), states that a recipient that operates or sponsors athletic teams must provide equal opportunity for members of both sexes.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

OCR examines whether the District provides male and female students an equal opportunity to participate in its interscholastic athletics program by effectively accommodating their interests and abilities, in accordance with 34 C.F.R. § 106.41(c)(1). OCR considers whether the selection of sports at the District effectively accommodates the interests and abilities of both sexes.

OCR applies the following three-part test (“Three-Part Test”) to assess whether an institution is providing equal participation opportunities for individuals of both sexes with respect to the selection of sports:

1. Whether interscholastic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among interscholastic athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of that sex; or
3. Where the members of one sex are underrepresented among interscholastic athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

If an institution meets any one part of the Three-Part Test, then OCR will determine that the institution provides each sex with equitable opportunities to participate. Each part of the Three-Part Test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities. If an institution meets any part of the Three-Part Test, OCR will determine that the institution is meeting this requirement.

### **Facts Gathered to Date**

The District operates one middle school, Union Hill Middle School (the School), which serves grades 7 and 8. The School participates in the Nevada County Athletic League (NCAL).

The District’s athletic program offers sports in four seasons, each lasting up to eight weeks. Both male and female students have the opportunity to compete in five sports – flag football, cross country, basketball, volleyball, and track. However, as shown in the table below, the seasons are scheduled such that two of the seasons have no sports for female students, so female students can participate in a maximum of two sports, whereas male students can participate in up to four sports.

<b>Season 1</b>	<b>Season 2</b>	<b>Season 3</b>	<b>Season 4</b>
Cross Country (Co-Ed)	Boys Volleyball	Boys Basketball	Track (Co-Ed)
Flag Football (Co-Ed)			Girls Volleyball
Girls Basketball			

OCR was informed that there would be additional interest from female students in the District both in potential new sports and in existing sports that female athletes could not currently compete in based on the existing schedule.

As shown in the chart below, according to information provided by the District, in 2015-16, the enrollment at the School was 52 male students and 77 female students. According to the 2015-16 athletic team rosters provided by the District, male students were provided 67 participation opportunities (51.5%) and female students were provided with 63 participation opportunities (48.5%). The average team size for female students was 12.6 athletes.

<b>2015-16 Total Enrollment and Athletic Participation</b>			
	<b>Male Students</b>	<b>Female Students</b>	<b>Total</b>
<b>Enrollment</b>	52 (40.3%)	77 (59.7%)	129 (100.0%)
<b>Athletic participation opportunities</b>	67 (51.5%)	63 (48.5%)	130 (100.0%)

According to the District, the District has offered the same sports for middle school students since the 1996-97 school year, with the exception that wrestling was offered as a co-ed sport between 2007-08 and 2012-13.

The District surveys its students about their satisfaction levels for participation in extra-curricular activities. It specifically asks students about each of the sports currently offered by the District. It does not ask students whether there are any additional sports or programs they would like to participate in that are not currently offered. The District does not have a formal policy or procedure for students, coaches or others to request the addition of an interscholastic team.

**Analysis**

*Part One: Substantially Proportionate Participation Opportunities*

Under Part One of the Three-Part Test, if an institution provides interscholastic participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

For the purposes of conducting interests and abilities calculations under the first part of the Three-Part Test, (Prong I), participants who participate on more than one team are counted in each sport. This is because an athlete can receive multiple athletic participation opportunities in one academic year, and it is known as the “duplicated count.”

OCR reviewed the School’s total male and female student enrollment and its total male and female athletics participation for the 2015-16 school year. The District reported that in 2015-16, the School had enrollment of 52 male students (40.3% of the student population) and 77 female students (59.7% of the student population). The District also reported that its interscholastic athletics program had a total of 130 participants, consisting of 67 males (51.5% of all participants) and 63 females (48.5% of all participants).

Based on the enrollment figures, there would need to have been 99 female participants for female participation to be in exact proportionality with the number of male participants (67) in the 2015-16 academic year. Because there were only 63 female participants in the 2015-16 school year, 36 additional female participation opportunities were needed to achieve exact proportionality, without cutting any athletic opportunities for male students.

When additional athletic opportunities are needed for the underrepresented sex to attain substantial proportionality, OCR also makes an assessment regarding whether the number of additional athletic opportunities that would be needed to achieve substantial proportionality would be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an interscholastic team. As a frame of reference in making this assessment, OCR may consider the average size of teams offered for the underrepresented sex at the School, which during this period was 12.6 female athletes. Here, because the number of additional opportunities required is 36, that number would be more than sufficient to sustain a viable team of average size at the School.

Therefore, based on the information gathered to date, OCR had concerns that the number of interscholastic participation opportunities for male and female students are not substantially proportionate to their enrollments, as required under Prong 1. In order to make a compliance determination as to Prong 1, however, OCR would need to verify the participation numbers with the coaches and athletes, including potentially interviewing coaches and students who were on the teams during that school year.

*Prong Two: History and Continuing Practice of Program Expansion*

Under Part Two of the Three-Part Test, an institution may demonstrate compliance by showing that it has a history and continuing practice of program expansion that is demonstrably

responsive to the developing interests and abilities of the underrepresented sex. Part Two examines an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.

(i) History

OCR considers the following factors, among others, as evidence indicating an institution's history of program expansion is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- A record of adding interscholastic teams for the underrepresented sex;
- A record of increasing the numbers of participants in interscholastic athletics who are members of the underrepresented sex; and
- An affirmative response to requests by students or others for addition or elevation of sports.

(ii) Continuing Practice

OCR also considers the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- The current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports and the effective communication of the policy or procedure to students; and
- The current implementation of a plan of program expansion that is responsive to developing interests and abilities.

As described above, female students are the underrepresented sex in the District's interscholastic athletics program. Here, the information gathered to date indicates that the District has not added any teams since at least 1996, except for the temporary addition of a co-ed wrestling team, which was added in 2007-08 and ended after the 2012-13 season. Information from the District also indicates that the District does not have a formal policy or procedure for students, coaches or others to request the addition of an interscholastic team.

Based on the information gathered to date, OCR determined that the District has not demonstrated a history and continuing practice of program expansion that has been demonstrably responsive to the developing interests and abilities of female students, as required to satisfy Part Two of the Three-Part Test.

*Part Three: Full and Effective Accommodation of Interest and Abilities*

In determining compliance with Part Three of the Three-Part Test, OCR determines whether, despite being unable to demonstrate substantial proportionality or a history and continuing

practice of program expansion, an institution is nevertheless fully and effectively accommodating the interests and abilities of the underrepresented sex. In making this determination, OCR considers whether there is: (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport, and (c) a reasonable expectation of competition for the team.

An institution may determine the athletic interests and abilities of students by nondiscriminatory methods of its choosing, provided that:

- the process takes into account the nationally increasing levels of women's interests and abilities;
- the methods of determining interest and ability do not disadvantage the members of the underrepresented sex;
- the methods of determining ability take into account team performance records; and,
- the methods are responsive to the expressed interests of students capable of interscholastic competition who are members of an underrepresented sex.

In determining whether there is unmet interest and ability to support an interscholastic team in a particular sport, OCR uses a broad range of indicators, including:

- whether the school uses nondiscriminatory methods of assessment when determining athletic interests and abilities of students;
- whether a viable team for the underrepresented sex recently was eliminated;
- multiple indicators of interest;
- multiple indicators of ability; and
- the frequency of the assessments conducted by the school.

OCR also evaluates the interests of the underrepresented sex by examining multiple indicators, such as:

- requests by students that a particular sport be added;
- interviews with students, coaches, administrators and others regarding interests in particular sports;
- results of surveys or questionnaires of students regarding interest in particular sports;
- participation rates in club or community sports leagues that operate in areas from which the school draws its students.

In assessing ability, OCR examines indicia such as:

- the athletic experience and accomplishments of students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the school regarding whether interested students have the potential to sustain a team.

Finally, OCR determines whether there is a reasonable expectation of interscholastic competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the school competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the school does not now compete.

The District did not provide any information to OCR about any efforts it has made to determine whether there are additional sports in which there may be sufficient student interest and ability for an additional team for female students. OCR was informed, however, that there was additional interest from female students in the District both in potential new sports and in existing sports that female students could not compete in based on the existing schedule.

Based on the information gathered by OCR to date, OCR therefore had compliance concerns with respect to whether the District is meeting the third part of the three-part test. In order to make a compliance determination, OCR would potentially need to conduct interviews with the District administrators and staff and to conduct student focus groups to determine whether there are currently any unmet interests and abilities among students of the underrepresented sex.

#### *Summary of Analysis of Three-Part Test*

As described above, based on the investigation to date, OCR had concerns about whether the District was meeting any of the three parts of the Three-Part Test for assessing whether the District provides male and female students at the School an equal opportunity to participate in its interscholastic athletics program by effectively accommodating their interests and abilities.

Prior to the completion of OCR's investigation, the District expressed an interest in voluntarily resolving the allegation pursuant to a Resolution Agreement under Section 302 of OCR's case processing manual, and OCR determined that voluntary resolution was appropriate.

The Resolution Agreement entered into by the District requires the District to submit a plan for OCR review and approval that would ensure that the District is in compliance with Title IX under either Prong 1 or Prong 3 of the three-part test. The District is then required to implement the plan and provide evidence that the District is in compliance with Title IX by effectively meeting the interests and abilities of females with respect to participation in interscholastic athletics.

The Agreement also requires the District to provide documentation showing compliance with 34 C.F.R § 106.8, which requires that the District "notify all its students and employees of the name, office address and telephone number of the employee or employees appointed" as the Title IX Coordinator.

Conclusion

This concludes OCR's investigation and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant by concurrent letter. The Complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

This letter sets forth OCR's determination in an individual OCR case. This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

Please be advised that the District may not harass, coerce, intimidate, retaliate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Blake Thompson, Civil Rights Attorney, at (415) 486-5630.

Sincerely,

/s/

Zachary Pelchat  
Team Leader

cc: Bryan Martin, Esq. (by email)

Enclosure: Resolution Agreement