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*Via U.S. Mail and Email*

June 6, 2018

Rich Alderson  
President  
Vista Unified School District  
1234 Arcadia Avenue  
Vista, CA 92084

Anthony Barela  
Principal  
Vista High School  
1 Panther Way  
Vista, CA 92084

RE: *Vista High School – Title IX Violations*

Dear Mr. Alderson and Mr. Barela,

The California Women's Law Center ("CWLC") has become aware of serious gender-based inequalities in the Vista High School ("Vista") athletic program (hereinafter "athletic program"), as described below through illustrative, non-exhaustive examples of program inequities. We request that Vista make immediate changes to ensure Title IX compliance.

**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).

Vista is out of compliance with Title IX. Based on available information, we understand that throughout Vista's athletic program, male students receive disproportionately more participation opportunities as well as superior treatment and benefits with regard to scheduling, equipment, spending, coaching, facilities, and more.

**II. TITLE IX COMPLIANCE**

Under Title IX, educational institutions must provide female students with equal athletic treatment and benefits as compared to male students. *See* Department of Education, Office for Civil Rights' Policy Interpretation, 44 Fed. Reg. 71,415 (1979); 34 C.F.R. § 106.41(c)(2)–(10); *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1111-12 (S.D. Cal. 2012) (finding unequal treatment and

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benefits as to class of female athletes). Further, 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*, 858 F. Supp. 2d at 1113.

### A. Equal Treatment and Benefits

Based on available information, Vista fails to provide female athletes with equal treatment and benefits. Equality in treatment and benefits is analyzed based on the following factors, among other considerations: equipment and supplies; scheduling of games and practice time; travel allowances; opportunities to receive coaching; assignment and compensation of coaches; locker rooms, practice and competitive facilities; training facilities and services; and publicity and necessary funds for teams for one sex. 34 C.F.R. § 106.41(c).

#### 1. *Provision of Equipment and Supplies*

“Equipment and supplies” include, but are not limited to, uniforms, sport-specific equipment, and general equipment. 44 Fed. Reg. 71,416. Supplies may be assessed based on quality, amount, suitability, maintenance and availability. *Id.* Here, Vista provides female athletes with inferior equipment and supplies.

Female uniforms are not of the same quality and quantity as male uniforms. For instance, male baseball players receive newer uniforms in better condition than female softball players.

As to equipment, the equipment Vista provides to its female softball teams is outdated. The majority of the equipment provided to the female softball program is secondhand. The softball program has not had any safety or equipment upgrades in at least the last five years.

#### 2. *Opportunities to Receive Coaching*

Compliance with Title IX with regard to coaching is assessed by examining the relative availability of full-time coaches, part-time coaches, and assistant coaches. 44 Fed. Reg. 71,416. Coaches for male teams at Vista, in particular the and baseball teams, are generally permanent school staff members. In comparison, female sports teams at Vista have more “walk-on” coaches who lack both teaching credentials and comparable access to school resources, facilities and students for recruiting purposes. Furthermore, there is a higher turnover rate for coaches of girls’ teams compared to boys’ teams. In fact, very recently the girls’ varsity head softball coach left the program and was replaced by the Junior Varsity coach who does not have significant coaching experience for a Varsity level. Again the team is faced with a lack of continuity.

The boys’ team coaches in general are more experienced and receive better compensation. The opening for the girls’ Varsity head coach was not widely promoted and instead the school chose convenience and speed in hiring within the program rather than conducting a thorough search to find the best coach possible for the girls’ Varsity team. Finally, the female sports teams at Vista have a higher player

to coach ratio than male sports teams. Thus, Vista female student athletes are not receiving the same benefits as to coaching. *See Ollier*, 858 F. Supp. 2d at 1105 (finding school district violated Title IX by failing to hire consistent coaching staff for female athletes).

### 3. *Provision of Practice and Competitive Facilities*

Compliance with Title IX is assessed by examining the quality and availability of practice and competition facilities, as well as the quality and availability of team rooms. 44 Fed. Reg. 71,416. Here, Vista provides vastly inferior practice and competitive facilities to female athletes. *See Ollier*, 858 F. Supp. 2d at 1100 (finding the locker room, practice and competition facilities available to female athletes were unequal as compared to those available to male athletes).

Vista maintains pristine baseball fields, but its softball fields are regularly neglected. The baseball field has high quality turf in the outfield while the softball field has uneven grass that is regularly damaged. The baseball stadium has a permanent fence in the outfield while softball only has a temporary fence that the team has to set up before each game and take down after each game. The softball field's chain link dugouts are far inferior to the baseball field's covered cinder block dugouts. While the softball field has a shade screen on their dugout, it does not block rain and therefore mud and rain puddles are a constant problem at the entrances of the dugouts. In addition, the baseball team has their own separate all-weather batting cage while the softball team has an older batting cage that is unusable in rain. The baseball field has quality stands and a mini "stadium" for spectator viewing while the softball field has basic metal bleacher seating and no shade.

The baseball team has a scoreboard appropriately positioned in left/center field, while the softball team's scoreboard is installed down the first base line in the right field outfield where it is very difficult to see. The baseball field has a built in snack stand structure and the softball field has no snack stand. The baseball field has a portable restroom adjacent to the field, while the softball players must go all the way back down the stairs to the main campus to use a restroom. Also, the baseball field is secured and can be locked up, while the softball field is not secured and wide open to entrance by anyone. Other teams often practice or compete on the softball outfield which contributes to its poor condition that is not remedied by any maintenance. For example, baseball has a golf cart that it can use to drag its infield and to load and unload its equipment and supplies to transport, while softball has no access to the golf cart or any other maintenance items.

Complaints have been made several times to Vista's administration about the condition of the field and facilities, but Vista has repeatedly failed to remedy the condition of the softball fields. Vista is grossly out of compliance in this area, and although we recognize that the District's May 4, 2018 letter agreed to make certain improvements in this area such as adding a portable bathroom for softball and "allowing" the softball teams an "opportunit[y]" to use the baseball batting cages, these improvements are grossly inadequate and fail to remedy the vast majority of

inequities in this area.<sup>1</sup> *See Ollier*, 858 F. Supp. 2d at 1100 (relying on an expert report that concluded the facilities available to female athletes were inferior based on the quality of the fields, location of fields, etc.).

#### 4. *Provision of Training Facilities and Services*

Another category requiring examination under Title IX is the adequacy of training facilities and services including, among other factors, the availability and quality of weight and training facilities. 44 Fed. Reg. 71,416. The training facilities and services at Vista are more readily available to male athletes than female athletes, who use them substantially more. *See Ollier*, 858 F. Supp. 2d at 1106 (noting a weight training facility for women's sports will "typically have lower weight plates, free weights, flexibility equipment, core strength equipment.").

#### 5. *Publicity and Promotional Support*

Publicity is assessed by examining, among other factors, the "[a]ccess to . . . publicity resources for men's and women's programs," and the "[q]uantity and quality of publications and other promotion devices featuring men's and women's programs." 44 Fed. Reg. 71,417. Vista promotes the male athletes and teams much more widely than those of female athletes. For instance, the school's website does not even list softball as a Spring sport, but does list baseball. (<http://vhs.vistausd.org/student-life/athletics/spring-sports/>)

In addition, Vista's baseball field has a speaker system and an announcer that calls all the home games, while the softball team has no speaker system and thus no announcer. There is also a sign in the parking lot directing spectators to the baseball field while there is no directional sign for the softball field, however we appreciate that the District's May 4 letter indicated that it will install a directional sign for softball and we look forward to confirmation that has been done. *See Ollier*, 858 F. Supp. 2d at 1112 (finding Title IX violation where female sports were covered less in yearbooks, fewer announcements were made in the school's daily newsletter, and cheerleaders attended more male athletic games than female athletic games).

#### 6. *Fundraising*

Although the unequal expenditure on boys' and girls' sports does not itself constitute noncompliance, compliance may be assessed by examining the "failure to provide necessary funds for teams for one sex." C.F.R. § 106.41(c). At Vista, girls' teams more heavily rely on external fundraising than boys' teams in order to obtain proper equipment and uniforms. For instance, baseball is able to sell concessions at their home games because they have a built in snack stand, while softball is not. In addition, the softball team only recently was able to establish a booster club, while the baseball program has a booster committee that raises funds for them all season and does not share those funds with the softball program.

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<sup>1</sup> In addition, the District's vague assertion that it will "continue to review and explore" other inequity items is not sufficient to meet its burden under Title IX to ensure equity on the school campus.

## B. 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, Vista 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) (rejecting 6.7% as an acceptable gap between girls' enrollment and participation in athletics); *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).

The athletic opportunities Vista provides for females and males are not substantially proportionate. Based on the 2016-2017 enrollment numbers, male students represented 52.2% of the student population and female students

represented 47.8% of the student population.<sup>2</sup> However, based on an analysis of 2016-2017 athletic seasons, female students received 35.4% of athletic opportunities overall, constituting a participation gap of 12.4%. Vista would need to add 208 female athletes to achieve proportionality under Title IX.

Therefore, Vista fails part one of the test. *See Ollier*, 768 F.3d at 856-57 (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 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).

Here, Vista cannot show a history and continuing practice of program expansion demonstrably responsive to girls' interest. In fact, the participation rate has only become substantially worse. While the participation gap for the 2015-2016 school year was 7.3%, the participation gap for the 2016-2017 season was 12.4%, a very large increase of over 5%.

## 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. *See, e.g., Ollier*, 768 F.3d at 858-59 (noting school's inability to find a field hockey coach does not indicate female students' interest waned). It is not a defense to cite evidence that more boys try out or express interest in sports, if interested girls are turned away. *Neal v. Cal. State Univs.*, 198 F.3d 763,

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<sup>2</sup> *See* California Interscholastic Federation - Participation Census Submission Data, *available at* <http://cifstate.org/coaches-admin/census/index>.

769-73 (9th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d at 178-80.

Here, Vista female students' interest in athletics is not satisfied by existing programs. Vista does not adequately accommodate girls interested in participating because Vista could likely form additional teams with the girls it cuts during try-outs for girls' teams. Further, female students interested in athletics are sometimes not aware of try-outs being held despite their desire to join Vista sports teams. Furthermore, Vista does not take affirmative steps to gauge female interest in new sports.

As Vista does not accommodate female interest in athletics, Vista does not meet part three of the test. Vista thus fails to provide its female students with equitable participation opportunities under the law.

### III. REMEDY

We request that Vista take immediate steps to remedy violations of Title IX. If we do not hear from you by June 20 regarding concrete changes to address the above Title IX violations, we intend to file a complaint in the U.S. District Court for the Southern District of California to remedy these violations. For your information, from the Title IX matter of *Ollier v. Sweetwater Unified School District*, we enclose a copy of the Southern District of California's 2009 Order Granting Plaintiffs' Motion for Summary Adjudication, that court's 2012 Findings of Fact and Conclusions of Law, and the Ninth Circuit Court of Appeals' September 2014 decision affirming the entirety of the trial court's rulings. The district and appellate courts found in favor of the female athlete plaintiffs in the *Sweetwater* matter. There the school district chose not to engage in productive, structured negotiations, instead opting to litigate for more than seven years, at the expense of the plaintiffs, their families, and all female student athletes. For further background, we also include a copy of the 2009 Fee Order from the Central District of California in the Title IX case *Cruz v. Alhambra School District* and other recent, relevant opinions. We hope to avoid litigation to resolve these critical issues through negotiations on a quick timeline. However, if we are not able to reach a fair and just resolution, we will have little choice but to pursue litigation.

We look forward to hearing from you.

Sincerely,

Amy Poyer

A handwritten signature in black ink, appearing to read 'A Poyer'.

California Women's Law  
Center

Encl.

- *Working v. Lake Oswego Sch. Dist.*, No. 3:16-CV-0581-SB, 2017 WL 3083256, (D. Or. July 19, 2017)
- *T.S. by & through Struthers v. Red Bluff Joint Union High Sch. Dist.*, No. 217CV00489TLNEFB, 2017 WL 2930702 (E.D. Cal. July 10, 2017) (denying reconsideration)
- *T.S. by & through Struthers v. Red Bluff Joint Union High Sch. Dist.*, No. 2:17-CV-0489-TLN-EFB, 2017 WL 3149425 (E.D. Cal. June 28, 2017)
- *Ollier v. Sweetwater*, Ninth Circuit Court of Appeals Decision (September 2014)
- *Ollier v. Sweetwater*, Findings of Fact and Conclusions of Law (February 2012)
- *Ollier v. Sweetwater*, Order Granting Plaintiffs' Motion for Summary Adjudication (March 2009)
- *Cruz v. Alhambra School District*, Fee Order (2009)