

June 22, 2010

Deputy Assistant Secretary for Enforcement

Office for Civil Rights

U.S. Department of Education

400 Maryland Ave. S.W.

Washington DC 20202-1475

**RE: APPEAL for OCR COMPLAINT No. 11-09-1022, Letter of Findings**

On behalf of the concerned parties involved in this OCR Complaint, I hereby appeal the Letter of Findings based on the following circumstances:

I. ERRORS OF FACT

II. OMISSION OF EVIDENCE

III. MISINTERPRETATION AND ANALYSIS OF LEGAL STANDARD

IV. IRREGULARITIES IN INVESTIGATION, PARTICULARLY ON-SITE INVESTIGATION BY MR. CHOI AND MR. GELISSEN

Included are specific factual and legal concerns that are convincing enough to warrant

- a) a demand to OCS to validate and verify information provided by them that was either omitted or incorrect/inconsistent with other data
- b) a demand for OCR to request necessary information regarding coaching qualifications to make a valid finding
- c) a closer look at the analysis of data, especially when the findings were based on incomplete data multiple times
- d) a review of application of Title IX Policy Interpretation, particularly the Javits Amendment
- e) a review of the application of the procedures outline in the Title IX Athletics Investigator's Manual (1990)
- f) a Letter of Findings which instructs OCS to revisit their rate of compensation (using nationally approved tier models), position descriptions that become the basis for selection of coaches and determination of compensation, recruitment and hiring procedures, efforts to reach underrepresented populations in coaching, an end to hiring coaches for men's sports based first on coaching qualifications and second on teaching credentials while hiring coaches for women's sports based first on teaching credentials and second on coaching qualifications, and end to the retaliatory funding discrepancies toward Cedar Ridge since the filing of this complaint.
- g) a formal investigation into the nature of the on-site investigation and the ethical and professional behavior of Mr. Gelissen during the course of the investigation.

Please review carefully the attached information, including Appendices, that I have documented as a basis for this appeal. I look forward to your timely response.

Elisabeth Penland,

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**I. ERRORS OF FACT**

There are multiple instances of factual information supplied by OCS that either do not match information obtained by concerned parties through FOIA or are inconsistent.

**A. TOTAL ATHLETES/MALE AND FEMALE PARTICIPATION**

Pages 3-4 OCR Letter of Findings		FOIA information submitted by Greg Hicks (Asst Superintendent) on 10-28-2009
2007-08	OHS  413 (69%) male participation 185 (31%) female participation	OHS  251 (61%) male participation 167 (39%) female participation
	CRHS 976 students 403 (62%) male participation 243 (38%) female participation	CRHS  300 (57%) male participation 225 (43%) female participation
	TOTAL OCS = 1244  816 (66%) male participation 428 (34%) female participation	TOTAL OCS = 943  551 (58%) male participation 392 (42 %) female participation
2008-09	OHS  424 (64%) male participation 235 (36%) female participation	OHS  391 (58%) male participation 283 (42%) female participation
	CRHS  374 (59%) male participation 255 (41%) female participation	CRHS  250 (58%) male participation 180 (42%) female participation
	TOTAL OCS (1288)  798 (62%) male participation 490 (38%) female participation	TOTAL OCS -= 1104  641 (58%) male participation 463 (42 %) female participation

You can see that the information provided by the district under FOIA and information provided to OCR creates a significant difference in proportions that are used throughout the findings to measure disparities.

These numbers should be verified by an independent entity.

**B. Table 2 (pages 10-11 of Letter of Findings): Years of Coaching Experience and Records of High School Head Coaches and Assistant Coaches**

**1) Errors in data:** Because OCR did not collect information according to the Investigator’s Manual or Policy Interpretation (background and experienced related to each individual’s selection as a coach or verify through interviews that background information, particularly coaching at different levels), the “coaching experience” is both inaccurate and inadequate for comparative data analysis. The “coaching experience,” based on information and belief, is not necessarily experience in the sport that the experience is provided for – so giving someone 35 years coaching experience who has not coached

women's basketball for 35 years constitutes errors in factual data according to Title IX policy interpretation and the investigative manual.

*Examples:* Based on information and belief, the varsity and junior varsity girls basketball coaches at both OHS and CRHS do not have the years experience indicated in high school interscholastic basketball. The years experience they provided include experience at the recreational or middle school level or in other sports.

**2) Inconsistency** – Head volleyball coaching experience provided at Cedar Ridge (page 11) is for a coach who was fired in the middle of the season – a coach with only 2 years experience (determined by OCS board Policy 7406, Appendix) -- replaced her. To use those years is both disingenuous and misleading, especially when the investigators are supposed to include in their investigation intentions and plans – the county did not intend or plan for that coach to resume her duties at any level at any school in OCS. Using that data provides skewed experience findings.

### C. TABLE 3: Compensation (page 13 from Letter of Findings)

- 1) **Boys Varsity Football:** The compensation provided does not include the 12-month salary aspect of the contract (2 extra months of teacher pay). According to the OCS/NCDPI pay scale, just one head coach with only a Bachelor's degree and 29 years of experience (the head football coach at CRHS) would make \$11,364 ABOVE the coaching stipend/supplement. The other head coach would receive comparable compensation based on years experience and degree.
- 2) **Per diem compensation, preseason for football:** At the time of the investigation, head and assistant football coaches were receiving a per diem for summer and post-season. These facts are not included in the report.

Given the inaccuracies of both participation numbers and compensation, the “data summarized indicates that” (page 16, Letter of Findings) becomes glaringly inaccurate:

*Examples:*

From Letter of Finding:

- 63% of students who participated at both schools were male (including football) and 37% were female.
- 67% (\$126,558/\$188,521) of coaching funds went to the boys' programs and 33% went to the girls' programs.

If FOIA data is more accurate, (58% of students who participated at both schools were male and 42% were female), then the coaching funds/compensation show a greater discrepancy and possible negative effect, especially if you add over \$20,000 in coaching compensation that OCS did not report for football coaches.

The discrepancy *becomes* a difference of

- 70% of coaching compensation going to males (with only 58% participation of males) and 30% of coaching compensation going to girls (with 42% participation of females).

Despite the fact that these are not the only errors that we believe are in the report, based on information and belief, these few glaring errors mentioned indicate that the conclusions reached in the Letter of Findings are not valid because they are based on incorrect factual data provided by OCS. Considering that OCS has

provided one set of data to OCR--favoring the district's position--and another set of data through an FOIA request -- that show the district in a less favorable position-- the necessity for verification of this data and questions about any intent in providing these inaccuracies becomes a matter of ethics and fairness in the very investigation itself.

**3) Data for baseball/softball experience/compensation:** Another inconsistency and obvious error in factual data occurs in the data for baseball and softball at OHS:

- If you match the coaching experience of the softball program at OHS and the baseball program at OHS for 2008-09, it does not add up to the \$6253 discrepancy in coaching compensation (\$6440 for softball program and \$12,696 for baseball program), even considering years experience. No math, using the OCS pay scale, adds up to the difference. And is it a coincidence that the boys baseball team won a state championship that year?

**4) Medical and Training facilities:** Incorrect data includes

- the female athletes do not have access to any physical therapist
- female athletes at both schools do not have the same access to trainers
- coaches of girls' sports provide more diagnosis and treatment because of the absence of qualified trainers at practices and at games. Data would support that.

## **II. OMISSION OF EVIDENCE**

**A. DNP (data not provided)** – occurs 28 times over the course of the “Tables” in the Letter of Findings Table 2

1. Boys JV Football (2)
2. Boys JV Basketball (3)
3. Girls JV Basketball (1)
4. Boys Tennis (1)
5. Boys JV Baseball (6)
6. Girls JV Softball (2)
7. Boys JV Soccer (1)
8. Girls JV Soccer (3)
9. Girls JV Volleyball (5)
10. Boys JV Lacrosse (2)
11. Boys Golf (2)

Notice that 11 times the records/years experience for boys' sports with female counterparts is not provided (basketball, baseball, soccer), and 8 more times (4 different sports) the data for records /years experience for boys sports is missing. Only a total of 4 girls sports has missing data while 7 boys sports have missing data.

Obviously, reasonable people would not agree with the Letter of Findings, Footnote 14 (page 10) that states

*“We do not believe that the missing data has had a significant impact on the accuracy of our analysis of this issue, as the teams for which data was not provided were evenly divided between mostly JV girls' and boys teams.”*

We cannot accept the conclusions stemming from the averages provided when the data is conveniently incomplete in more boys' sports than girls' sports. In their "findings," investigators concluded that average experience for boys' coaches was 9.2 yrs (for which they received data) and that of girls' coaches was 8.7 yrs. Given that OCS did not provide years of experience for at least 8 boys coaches and 4 girls' coaches, it is impossible to draw conclusions from "average experience" for either group.

**Also, years experience should have been figured separately for Head coaches, assistant coaches.**

Likewise, the disparity between the percentage of games won for all boys teams (for which OCR received data) – 56% (342/611) – and that for girls teams (for which OCR received data – 57% (342-611) cannot be used as a valid finding when OCR is missing records for 13 boys' seasons (jv football, jv basketball, tennis, jv baseball, golf) and is missing records for only 6 girls' seasons (girls basketball, jv softball, jv soccer, jv volleyball). In fact, we know that the record for each of those girls' seasons were somewhat abysmal and we know the opposite to be true for most of those missing boys' seasons.

### **B. Assignment of coaches – omissions**

As required by the Title IX Policy Interpretation and Investigator's Manual, missing information regarding the qualifications of coaches (not collected or not provided and compared in the Letter of Findings) includes

- Professional qualifications
- Nature of coaching experience
- Professional standing
- Training
- Hiring and selection criteria

Without this data, there is no way to decide whether or not the district has a pattern of assigning less qualified coaches to the program for students of one sex (especially given that the Letter of Finding concedes that years of experience only may not reflect quality of coaching and hence benefit of competition for girls and boys).

On page 9, the Letter of Findings states: *"that there was little, if any, specialized training received by coaches, so this was not a factor in our analysis. We also determined that 'other qualifications' also were not a factor, as there was no evidence indicating that either girls' or boys' coaches generally had more such qualifications that [sic] the other."*

First, OCR did not solicit or collect most of the information required in assessing training or qualifications or professional standing, much less accurate records of nature of/levels of coaching experience for each team/sport. Many of the coaches of boys' sports in OCS have tremendous professional standing (wrestling coach just inducted into N.C. Hall of Fame and several have All Star coaching status as well as other honors). Also, many coaches do have quite a bit of "training," even certifications in their prospective fields, even though there is no state certification. Additionally, OCR did not even collect information about the professional memberships of various coaches. If they had, they would have found a gulf of disparity in coaches of boys' sports and girls' sports, with boys' sports coaches having significantly more of each. This obviously would show a negative effect for women. Professional standing and training not only offer more competitive benefits, they also provide the benefits of networks for recruiting, honors and awards, and other increased opportunities.

Secondly, OCR omitted information that they had in terms of the hiring patterns of coaches for male and female sports:

- The district posts jobs for male sports but has never to our knowledge posted a job for female sports. In particular, the district requires that a “search team” be commissioned to interview prospective football coaches and hires them based on coaching qualifications, then creates teacher assignments. Mr. Gelissen and Mr. Choi were provided written proof of this.
- The district moved 2 inexperienced coaches into the head coaching position of the women’s basketball programs at both schools after firing both previous coaches. Worse, they turned down 2 experienced and well-qualified/expert prospective coaches for women’s basketball and instead appointed a first-year teacher to coach the basketball team at Cedar Ridge, disregarding qualifications or recommendations from the school, simply on the basis of their personal animosity toward the fired coach. OCR interviewed the assistant basketball coach who was recommended internally at CRHS and had evidence from several sources that she was fired without cause. They also had a written statement from K.M., a college basketball player and college coach, who was offered the job at CRHS by the superintendent, but the offer was essentially taken away after she told him she played for the fired coach’s brother at UNC and knew the other qualified coach who was turned down.

Since, as the Letter of Findings acknowledges, there has been so little turnover in coaches UNTIL THE PRESENT MALE SUPERINTENDENT was hired in 2008 (replacing a female superintendent), OCR should have compared the recent firings and hirings – 3 experienced and successful female basketball coaches fired during his 1-year tenure and replaced internally with no job posting, search committee, recruitment, or consideration of qualifications. Rather, personal issues were used, which since that time, a judge has found to warrant a trial based on tortious interference with at least one of those jobs. While football coaches were recruited for their football coaching qualifications, women’s coaches were not. That is a pattern – a pattern established by the only hiring/firing done by the present administrations.

Also missing from the report is the evidence that the present district leadership had a pattern of UNDOING the equity and quality of coaching that had previously existed in both male and female sports, much more equal before their tenure than at the time of the investigation.

### **C. Plans or commitments for current year (from OCS) - omissions**

OCR did not acknowledge information about stipends, 12-month contracts, paid weight room supervisors (always coaches of male sports), possibly because of verbalized but not written plans or commitments from district? Because they were not yet a reality or in writing in any kind of policy or manual, we think they should not have been omitted from the report. Also, those intentions relied supposedly on “economic” hardships, which may change. OCR in its Letter of Findings, by not addressing this, has not insured that the district will not renew those discriminatory practices.

Also, OCR omitted the plan/commitment of the firing of the volleyball coach, instead using her considerable experience to “average” years of experience for boys and girls sports, obviously misleading since she was not the coach for the entire season or would not be the coach the next season.

**D. Table 3: Compensation – omissions**

- Boys Varsity Football and JV Football total coaching supplement per team is missing. The Javits Amendment in no way supports conclusions drawn from missing data of sports that may result from legitimate non-gender related differences like cost of equipment, event management, etc.
- Boys Varsity football – approximately \$20,000 in coaching compensation not reported

**E. Data for rate at which athletes are injured in the sport, coaching duties in terms of time commitment and amount of supervision required, number of games, equipment used, rules of play, maintenance and preparation of the facility for games and practices – omitted.**

Since OCR (on page 14, Letter of Findings) justified glaring inequities in coaching compensation and number of coaches by the District’s consideration of those factors, they are required to provide that data to show that there is a comparable difference, as Title IX Policy Interpretation and the Investigator’s Manual require. For example, the following omissions make it impossible to show the justification for huge differences in compensation:

- The OCS coaching manual that describes duties does not differentiate in duties of coaches that would provide the kind of discrepancy found in RATES of compensation.
- There is no data that validates any differences in time commitment
- There is no data provided by district or OCR to verify differences in the rate at which athletes are injured in the sport as justification for discrepancies, and data provided in the Appendix shows in fact that the rate of injury is higher and participation time missed because of injury is higher for volleyball than quite a few other sports compensated at a higher rate.
- There is no data provided regarding amount of supervision required.
- There is no data provided regarding coaching duties of maintenance and preparation of facility for games and practice (as almost ALL of this is not done by coaches—and baseball coaches actually do more of this than football coaches, etc.)

**F. OCR omitted information regarding recruitment and retention of quality coaches**, such as facilities and other considerations (no women’s coaching office at OHS until they “created one” right before the on-site visit), booster support (money, incentives, gifts, less fund-raising, more uniforms, etc).

**G. Regarding retention of coaches**, OCR omitted information regarding unequal treatment of complaints against coaches of boys’ and girls’ sports. The investigators had information regarding a completely different standard and nature of investigation into the exact same complaints coming from a boys’ team and a girls’ team.

**III. MISINTERPRETATION AND ANALYSIS OF LEGAL STANDARD**

**A. By excluding football (both from data not provided and otherwise), the Letter of Findings has erroneously applied the intent of the Javits Amendment.** While the Tower Amendment did attempt to “exclude” football (and subsequently was not passed), the Javits Amendment does not exclude football in any comparators for the discrimination on the basis of sex in the provision of coaching that does not include differences in set comparators of duties and other components.

It absolutely does not allow football or any other exclusions in the following:

- 1) opportunity to receive coaching, relative availability of coaches and assistant coaches
- 2) with respect to the assignment of coaches (1) training, experiences, and other qualifications of coaches; and (2) the professional standing/success of coaches; and

and is very limited in its application of

- 3) concerning the compensation of coaches, the: (1) rate of compensation (per sport, per season); (2) the duration of contracts; (3) conditions relating to contract renewal; (4) experience; (5) nature of coaching duties performed (6) working conditions; and (7) other terms and conditions of employment.

In regard to OCS' explanation about the disparities in supplement levels, (page 15, Letter of Findings), "*the District confirmed that it relied on the factors listed in the previous paragraph. More specifically, the District stated that, with regard to football, the higher supplements were also due to the rules of play and the maintenance and preparation of the facility for games and practices, and the resulting increase in the duties of the coaches.*" We would maintain that the "District" has NO idea what time commitments, rules of play, or duties women's coaches have. While some comparators may necessitate an increase in duties and responsibilities, the Javits Amendment/Policy Interpretation considers most of those factors as justification for disparities in total funds spent by different teams/sports (i.e. event management, officials, security, etc.), not necessarily for gross disparities in compensation for football which do not accurately reflect the same difference in job duties.

Regarding disparities in compensation, the Women's Sports Foundation and other models (see Appendix) use tiers that provide equity throughout the tiers, even for interscholastic stipends. In those tiers, to provide equity and make sure there is no negative effect on girls' sports, a proportional number of male and female participants are in each tier, regardless of sport. In OCS, there is no proportional distribution of coaching compensation.

At no time does any Policy Interpretation or aspect of the Investigator Manual suggest that it is okay, especially in interscholastic competition, to recruit and hire more qualified coaches for any male sport than for a female sport.

In fact, Title IX specifically functions to erase the traditional deficit in quality coaches for women's sports. If anything, Title IX Policy Interpretation supports an inequity FOR girls' sports that would erase that deficit.

By simply accepting the district's rationale without written policies, procedures, and data to support it, the Letter of Finding does not accurately apply the legal standards necessary to determine whether or not girls' sports are negatively impacted by the district's actions.

**B. On page 17, the Letter of Finding states:** "*We note that you disagree with the District's termination of a particular coach. However, the termination of one coach is an insufficient basis on which to find that the District has denied girls equitable opportunities with respect to coaching*" This assessment is completely inaccurate. While many parents disagree with the termination of a particular coach, OCR was given evidence of at least 3 coaches of girls' sports being fired since this present district leadership took over in 2008, in addition to evidence of disparate standards in hiring and firing. In fact, this OCR complaint was NOT filed in

reaction to the termination of a particular coach, but AFTER 2 other qualified coaches of girls' sports were terminated or not hired by the District, showing a clear pattern of discrimination.

### **C. Medical and Training Facilities:**

Again, the Letter of Findings reveals a misinterpretation of legal standards and review:

#### 1) Weight Room:

(page 19, Letter of Findings): “the frequency of use is determined by the preferences of each coach rather than lack of availability”

OCR neglected to mention that the only paid weight room supervisors are coaches of male sports; consequently, those players have more opportunity to work out in the weight room with trained personnel.

Also, in applying Title IX, OCR must consider the qualifications of the coaches for each sport. None of the present coaches of female sports have training in the use of weights for conditioning or to improve performance (the only female coach who did was fired), while most coaches of boys' sports have formal training or informal training through their own weight room experiences.

2) The Letter of Findings states that *“During only one interview did an athlete state that a weight room was not available, and the coach of that athlete/team (in a separate interview) stated that her team doesn't use the weight room because she prefers 'field training over weight room training,' and pointed out that the availability of the weight room was 'not an issue.'”*

Since OCR did not gather any formal data, and since that coach was interviewed in the presence of a lawyer representing OCS, and since the district now has a reputation for retaliation against those who complain or who supported the complaint or fired coaches (which OCR had been informed of), that comment can hardly be considered verified evidence.

Additionally, in applying the standards of Title IX, this could also be considered a quality of coaching issue, given that no expert coach in conditioning and strength training would support a conclusion that suggested field training only could provide women with the same competitive benefits as weight training AND field training.

### **IV. INVESTIGATION COMPLAINTS:**

- At various times, both in written and verbal communication, Peter Gelissen was not only unprofessional, rude, and intimidating, but failed to communicate with the complainants in the same manner that he communicated with the District and District's legal team. He did not provide the same information nor did he provide opportunities to answer or deal with the legal wrangling of OCS. I hope that someone will contact me personally to discuss my interactions with him, as I can much better convey the content of emails and conversations (as limited as they were).
- OCS had lawyers present at every meeting: they sat in on every interview at OHS (intimidation of coaches) and though no coach or player at CRHS wanted them during the interview, the lawyers for OCS told every interviewee (before the interview) that they were not “allowed” to even mention the names of two of the fired coaches, which skewed interviews regarding qualifications and assignments of coaches.

In fact, several girls' basketball players did not get a chance to explain why they chose not to play their senior year because of “quality of coaching.”

- OCR was informed that OCS had deleted names from the interview list. Mr. Gelissen said he was not interested.

- The investigative team not once interviewed K.M. (coach offered the job and then taken away because of associations with fired coaches) or other parents who could comment on the recent trend and patterns of the present administration.
- OCR ignored the aspects of the investigation that were both urgent and pertinent to the present district leadership, even though they were told that most of the inequities did not exist until Mr. Rhodes, the superintendent assumed leadership.
- OCR allowed undue influence from OCS' lawyers regarding the fired women's coaches, essentially creating a warped "frame" in which all information was assessed.
- OCR was so careless in its data collection that it became impossible to draw valid conclusions.
- OCR's delay in completing the investigation and Letter of Finding ignored the urgency of the situation, essentially imposing drastic effects on two women's programs, creating disparities that not only had negative effects on the female athletes during competition, but also has negatively affected scholarship opportunities. A prompt and fair investigation could have changed the situation and required OCS to address that negative effect.

In summary, the situation in Orange County Schools changed drastically with the new leadership and has had a significant negative impact on several women's programs. Also, the pattern of this administration in the past 2 years continues to grow that inequity.

As parents, we asked the Office of Civil Rights for help – to investigate the current situation and what had happened in to our daughters as a result of district leadership that circumvented board policy, created different standards for hiring and firing coaches of boys' and girls' sports (creating gross inequities in the overall program), and was non-responsive to our concerns.

And as laymen, we are certain that the legal interference from OCS influenced the investigation in a way that may not have happened if we had counsel – but OCR is supposed to make sure that doesn't happen, whether complainants have legal counsel or not. OCR has been a terrible disappointment to all of us.

We were perfectly prepared to accept your findings, but we are not prepared or willing to accept findings that show such a careless and incompetent investigation, whether the fault of OCR or OCS.

We do not understand how a federal agency can allow a school district to refuse to comply with requests for data. We also do not understand how a federal agency can fail so completely to collect all of the necessary information needed to make a decision.

We once again reiterate what we believe should happen:

- a) a demand to OCS to validate and verify information provided by them that was either omitted or incorrect/inconsistent with other data
- b) a demand for OCR to request necessary information regarding coaching qualifications to make a valid finding
- c) a closer look at the analysis of data, especially when the findings were based on incomplete data multiple times
- d) a review of application of Title IX Policy Interpretation, particularly the Javits Amendment

- e) a review of the application of the procedures outline in the Title IX Athletics Investigator's Manual (1990)
- f) a Letter of Findings which instructs OCS to revisit their rate of compensation (using nationally approved tier models), position descriptions that become the basis for selection of coaches and determination of compensation, recruitment and hiring procedures, efforts to reach underrepresented populations in coaching, an end to hiring coaches for men's sports based first on coaching qualifications and second on teaching credentials while hiring coaches for women's sports based first on teaching credentials and second on coaching qualifications, and end to the retaliatory funding discrepancies toward Cedar Ridge since the filing of this complaint.
- g) a formal investigation into the nature of the on-site investigation and the ethical and professional behavior of Mr. Gelissen during the course of the investigation.