



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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SAN FRANCISCO, CA 94105

REGION IX
CALIFORNIA

July 15, 2016

Jason Archard
Principal
Innovative Horizons Charter School
1461 North A Street
Perris, California 92570

(In reply, please refer to case no. 09-15-1075.)

Dear Mr. Archard:

The U.S. Department of Education, Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against the Innovative Horizons Charter School (School). The complainant alleged that the School discriminated against the Student on the basis of sex. Specifically, OCR investigated the following issues:

1. Whether the School discriminated against the Student¹ based on sex when School personnel told her that female students could not try-out for and participate in the School's basketball team this winter.
2. Whether the School discriminates based on sex in its interscholastic athletics program with respect to accommodating the interests and abilities of female students.
3. Whether the School failed to promptly and effectively respond to notice of harassment based on sex when the Student's classmates teased her during try-outs for the basketball team.
4. Whether the School or District has designated a Title IX coordinator.

OCR investigated this complaint pursuant to its authority under Title IX of the Education Amendments of 1972. Title IX and its implementing regulation prohibit discrimination on the basis of sex in programs and activities operated by recipients of Federal financial assistance. The School and the Perris Elementary School District (District) are recipients of Department funds ("recipients") and are therefore subject to the requirements of Title IX and its implementing regulations.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant, School, and District. After careful review of the information gathered in the investigation, we concluded that the School did not violate Title IX with regard to issues one and two, but did violate Title IX with respect to issues three and four. The individual allegation in

¹ OCR previously provided the School with the identity of the student. We are withholding her name from this letter to protect her privacy.

issue three was withdrawn by the Complainant; however OCR found systemic issues regarding relevant policies and procedures. Pursuant to the OCR Case Processing Manual (CPM) at Section 110(l), OCR administratively closed the individual allegation and has resolved the systemic concerns pursuant to the enclosed Resolution Agreement (Agreement). The findings of fact, applicable legal standards, and reasons for our determinations are summarized below.

Issue 1: *Whether the School discriminated against the Student based on sex when School personnel told her that female students could not try-out for and participate in the School's basketball team this winter.*

Legal Standards

The Title IX regulations, at 34 C.F.R. §106.41(a), provide that 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 intercollegiate athletics offered by a recipient college or university, and no recipient college or university shall provide any such athletics separately on such basis. Section 106.41(b) allows a recipient to operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. The regulation states that contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

Findings of Fact

The following facts are relevant to OCR's analysis.

- The Student is a female, and, during the 2014-2015 school year, she was a XXXXX grader at the School. The School enrolls students from kindergarten through eighth grade and is chartered under the District. The District also has seven elementary schools, which enroll students in transitional kindergarten through sixth grade and one preschool. The District enrolls just over 5800 students in kindergarten through eighth grade.
- The School started its interscholastic program for middle school students in the 2013-2014 school year. In 2013-2014, the school offered boys' teams in cross country and basketball and girls' teams in cross country and softball. In the 2014-2015 school year, the School offered boys' teams in cross country, flag football and basketball and girls' teams in cross country, volleyball and softball. The School's volleyball, softball, basketball and flag football teams participate in the Inland Valley League. The school's cross country team participates in the Middle School League.
- Prior to the commencement of try-outs, the Student asked the boys' basketball coach (Coach), if she could play on the boys' basketball team. The Coach told the Student that he needed to ask the Athletic Director and would get back to her after the Athletic Director checked with the league. The Athletic Director sent a text message to the league's schedule coordinator to ask if there was such a thing as coed sports. According to the School, the schedule coordinator texted her back saying "no." The Athletic Director then reported to the coach that the league had said that she could not play on

the boys' team. The Coach then told the Student that she could not try-out for the boys' basketball team.

- Thereafter, on the first day of try-outs, the Student's grandmother spoke to the Coach in-person about the Student trying out. The Coach told her that the Student was not allowed to play, and the grandmother said that she believed the School was discriminating against the Student in violation of Title IX. The Coach reported to OCR that he told the grandmother to give him a day to find out if there was a way for the Student to be approved to try-out.
- Shortly after the grandmother spoke with the Coach, the Student called her mother and told her the situation. The mother then spoke with the Assistant Principal. The mother explained to the Assistant Principal that her daughter had been told that she was not allowed to try-out for the basketball team because she is a girl and that she believed that this was discrimination in violation of Title IX. The mother asked the Assistant Principal if he was aware of Title IX. In his interview with OCR, the Assistant Principal stated that he had been candid with the mother and admitted that he had not heard of Title IX. He told the mother that he would look into the issue and get back to her. According to the Assistant Principal, right after the conversation with the mother, he discussed the issue with the Principal and started researching Title IX. The Assistant Principal also reached out to the Athletic Director to find out more information.
- The same day, the Athletic Director checked with the Director of the basketball league (League Director) about whether the Student could participate on the boys' basketball team. The League Director told the Athletic Director that they should allow the Student to try-out for the basketball team. The Athletic Director told the Assistant Principal that the Student should be allowed to play. The Coach was then informed that the Student must be allowed to try-out for the team. The Student was then informed that she could try-out for the team.

Legal Analysis and Conclusion

Title IX allows Schools to provide "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport." Here, the Student requested to try out for the boys' basketball team. The regulation states that the excluded sex "must be allowed to try-out for the team offered unless the sport involved is a contact sport." As stated in the regulation itself, "contact sports include ... basketball."

Because basketball is a contact sport, and the School otherwise satisfies the equal participation requirements as noted in issue two below, there was no requirement under Title IX for the Student to be allowed to try out for or participate in the boys' basketball team. Therefore, OCR finds no violation of Title IX or the implementing regulations as to issue one.

Issue 2: Whether the School discriminates based on sex in its interscholastic athletics program with respect to accommodating the interests and abilities of female students.

Legal Standards

The Title IX regulations, at 34 C.F.R. §106.41(c), provide that a recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, OCR will consider,

among other factors, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

As a means of assessing compliance under the regulations, OCR follows the Policy Interpretation issued by the Department on December 11, 1979.² The 1979 Policy Interpretation states that, to effectively accommodate the interests and abilities of male and female athletes, recipients must provide the opportunity for individuals of each sex to participate in interscholastic competition, and for athletes of each sex to have competitive team schedules that equally reflect their abilities.

The 1979 Policy Interpretation permits three alternate ways of assessing whether recipients are providing nondiscriminatory opportunities to participate in interscholastic athletics, commonly referred to as the “three-part test.” The three-part test is intended to allow recipients to maintain flexibility and control over their athletic programs. Recipients can demonstrate compliance in any one of the following ways:

1. Interscholastic level 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, the recipients can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among interscholastic athletes and the recipient cannot show a history and continuing practice of program expansion, 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.

Findings of Fact

The following facts are relevant to OCR’s analysis.

- In the 2014-15 school year, the School enrolled 889 students, 457 boys (51.40%) and 432 girls (48.59%). That year, there were 96 athletic participation opportunities overall.³ Boys had 52 athletic participation opportunities (54.16%) and girls had 44 athletic participation opportunities (45.83%) at the School.
- For exact proportionality of opportunities, the School would need to provide 49.15 participation opportunities for girls as opposed to the 44 opportunities actually available. In other words, exact proportionality would require an additional 5.15 athletic opportunities for girls.
- The average female team size at the School is 14.66 athletes per team (44 female athletes/3 teams).

Legal Analysis and Conclusion

² 44 Fed. Reg. 71413, *et seq.* (1979).

³ The number of athletic opportunities referred to here is a duplicated count (i.e., an athlete who participates in more than one sport is counted as a participant in each sport in which he or she participates).

The School has stated that it is in compliance with first part of the three-part test. For the requirements of substantial proportionality, we look to OCR's 1996 Clarification, which states:

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not 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 intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution. (emphasis added)

In this case, the School has an average female team size of 15 (44 female athletes/3 teams). Female under representation of 5 athletes is not enough to sustain a viable team, and is less than the average team size of 15. Therefore, the School satisfies the first part of the test. Thus, OCR finds no violation of Title IX or the implementing regulations as to issue two.

Issue 3: Whether the School failed to promptly and effectively respond to notice of harassment based on sex when the Student's classmates teased her during try-outs for the basketball team.

Issue 4: Whether the School or District has designated a Title IX coordinator.

The legal standards, findings of fact, and legal analysis and conclusions sections for issues 3 and 4 are combined below.

Legal Standards

Grievance Procedures

When responding to alleged sexual harassment, a recipient must take immediate and appropriate action to investigate or otherwise determine what occurred. The inquiry must be prompt, reliable, and impartial. If the investigation reveals that discriminatory harassment has occurred, a recipient must take timely, appropriate, and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring. The recipient also should take steps to prevent any retaliation against the student who made the complaint or those who provided information, testified, participated, or assisted in any manner with the investigation.

To carry out these requirements, the recipient is required to adopt and publish grievance procedures providing for the prompt and equitable resolution of complaints of sex discrimination (34 C.F.R. § 106.8[b]). Title IX does not require a recipient to provide a separate grievance procedure for sexual harassment complaints. A recipient may use student disciplinary or other separate procedures for these complaints; however, any procedures used to adjudicate complaints of sexual harassment, including sexual violence, including disciplinary proceedings, must afford a prompt and equitable resolution.

OCR examines a number of factors in evaluating whether a recipient's grievance procedures are prompt and equitable, including whether the procedures provide for the following: notice of the procedure to students, parents of elementary and secondary school students, and employees, including where to file

complaints; application of the procedure to complaints alleging discrimination by employees, other students, or third parties; adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; designated and reasonably prompt timeframes for major stages of the complaint process; notice to the parties of the outcome of the complaint; and an assurance that steps will be taken to prevent recurrence of any discrimination and to correct its effects.

Title IX Coordinator

The regulations, at 34 C.F.R § 106.8(a), require that recipients designate at least one employee to coordinate compliance with the regulations, including coordination of investigations of complaints alleging noncompliance. This provision further requires that the recipients notify all of its students and employees of the name (or title), office address, and telephone number of the employee(s) so designated. In addition, recipients must notify all students and employees of the email address of the Title IX Coordinator(s). The recipient's website must include complete and current information about the Title IX Coordinator. The recipient must ensure that employees designated to serve as Title IX coordinators have adequate training or experience in handling sexual harassment complaints and in the operation of the recipient's grievance procedures. All persons involved in implementing a recipient's grievance procedures, including investigators, must have training or experience in handling complaints of sexual harassment, as well as training in the recipient's grievance procedures and applicable confidentiality requirements. If a recipient designates more than one Title IX coordinator, the notice should describe each coordinator's responsibilities and one coordinator should be designated as having ultimate oversight, while the others should have titles showing that they are in a deputy or supporting role to the senior coordinator. The Title IX coordinators should not have other job responsibilities that may create a conflict of interest, such as serving as general counsel or a disciplinary hearing board member.

Findings of Fact

The following facts are relevant to OCR's analysis.

- At the outset of this investigation, OCR staff searched the School and District websites for information regarding Title IX. At the time, neither the District nor the School had any information about the Title IX coordinator, Title IX protections, or process for filing a Title IX complaint easily accessible on its website.
- The District's Assistant Superintendent of Educational Services (Assistant Superintendent) has been designated the Title IX Coordinator for the District. In addition to being the Title IX Coordinator, the Assistant Superintendent is responsible for overseeing all aspects of the educational program, including: English learner identification, professional development, parent training, uniform complaint procedures for the District, student services, special education, homeless student services, student enrollment, intradistrict transfer, preschool program, LCAP, after school program grant and new teacher support.
- During the course of the investigation, the District learned about OCR's April 2015 Dear Colleague letter and resource guide on Title IX Coordinators and updated its website. As of December 2, 2015, the district website includes a page with a description of Title IX protections, nondiscrimination statements, the District's sexual harassment policy, an explanation of how to

file a discrimination or harassment complaint, and the name and contact information of the Title IX Coordinator. However, no email address for the Title IX coordinator is included in the contact information. The website and the District's notifications still do not provide notice that questions concerning Title IX may be referred to OCR in addition to the Title IX Coordinator. In her interview with OCR, the Assistant Superintendent stated that the person who holds her position is traditionally designated the Title IX Coordinator for the District. She reports directly to the Superintendent in her role as Title IX Coordinator and does not have any staff that she supervises in her Title IX capacity. She described her Title IX role as "a one person shop." She said that her role as Title IX Coordinator was to ensure that the District was in compliance with Title IX, to investigate any Title IX complaints, to ensure that proper notifications and postings are done.

- The Title IX Coordinator told OCR that she has not had any formal training related to her Title IX role. She stated that information related to Title IX is sometimes forwarded to her by the Superintendent, but not very often. She stated that she is not aware of any District personnel receiving training on Title IX or the handling of Title IX complaints. She said that she believed that additional training on Title IX would be beneficial to her. None of the other District personnel OCR staff interviewed during the course of this investigation had received any training on Title IX while at the District.
- The Title IX Coordinator told OCR that in the four years that she has held the position in the District, she has not received a single Title IX complaint. When asked whether anybody in the District informed her of the underlying issues in the instant complaint prior to the OCR investigation, she stated that nobody informed her of the concern, but that they should have done so.
- None of the District personnel that OCR staff interviewed during the course of the instant investigation knew that the District had a Title IX coordinator prior to OCR's investigation. All of those interviewed stated that they had no training on Title IX while employed with the District, and some acknowledged that they did not even know what Title IX was prior to the incidents underlying this case. Several of the individuals who OCR staff interviewed also stated that they were unsure of the process if someone raises a concern about equity or sex discrimination.
- OCR reviewed the District's grievance Procedures (BP 5145.3 – Student Nondiscrimination/Prevention of Harassment; BP/AR 5145.7 – Sexual Harassment procedure; BP/AR 1312.3 UCP).
- During the review, OCR found deficiencies in the particular policies and procedures that were reviewed. These deficiencies included, but were not limited to, the following:
 - Discussing sexual harassment in the educational setting only. The policy does not include the application of procedures to all school & school related programs and activities whether or not they occur on or off campus.
 - The designated and reasonably prompt timeframes for major stages of the grievance process, as well as the process for extending timelines, requires notification to the complainant and an explanation of reasons; however the policy lacks a notice requirement to the respondent regarding extending timelines.

- An adequate, reliable, and impartial investigation, including an equal opportunity to present witnesses and relevant evidence is required, but the UCP only discusses notice to a complainant, and not the respondent.
- Written notice to the parties of the outcome of the complaint is required. The policy says that if there is discipline, “the decision shall simply state that effective action was taken and that the student or employee was informed of district expectations. The report shall not give any further information as to the nature of the disciplinary action.” However, the School or District may need to disclose information regarding discipline or sanctions imposed when the sanction relates directly to the targeted student.

Legal Analysis and Conclusion

Title IX Coordinator

The District has designated a Title IX Coordinator who was already in place at the time of the allegations underlying the instant complaint. However, the District’s dissemination of information regarding the Title IX coordinator and training with respect to Title IX were insufficient. School employees were unaware of their Title IX responsibilities at the time that the events underlying the instant complaint arose. None of the School personnel interviewed by OCR knew the District had a Title IX coordinator prior to OCR’s investigation, let alone the identity of that individual. Some of the School administrators acknowledged not even knowing what Title IX was when the Complainant raised concerns with them. OCR found that School personnel were unaware of the District process for handling Title IX complaints.

During her interview, the Title IX Coordinator told OCR that no one informed her of the allegations underlying the instant complaint prior to the OCR investigation. She also stated that she has never received a Title IX complaint during the four years that she has served as the District’s Title IX Coordinator. The Title IX Coordinator told OCR that she has not received any Title IX training while serving in that role with the District; she was not aware of any District personnel receiving training on Title IX or the handling of Title IX complaints. She stated that training on Title IX would be beneficial.

The preponderance of the evidence shows that the District is not in compliance with the notification and training requirements regarding its Title IX Coordinator. The District’s efforts to notify employees, students and parents about its Title IX Coordinator were inadequate to meet Title IX’s requirements. In addition, the Title IX Coordinator has received insufficient training and support to serve in her role effectively.

Policies and Procedures

OCR found that, as written, the District’s BP and AR (specifically 1312.3, 5145.3, and 5145.7), while compliant in many respects, do not meet all of the requirements under Title IX and its regulations. In light of the deficiencies noted above, OCR finds that the District is not in compliance with Title IX and the implementing regulations with regard to issues three and four.⁴

⁴ In conducting this limited analysis of the procedures identified above, and making a finding limited to them, OCR is not making a finding as to whether the procedures as a whole are compliant with Title IX and its implementing regulations and nothing in this document should be construed as a finding of compliance with respect to the grievance procedures reviewed in this case.

Conclusion

This concludes the investigation of this complaint.

To address the issues of noncompliance found with respect to issues three and four, the District, without admitting to any violation of law, entered into the enclosed Agreement which is aligned with the findings and information obtained by OCR during its investigation. This Agreement will require the District to review and revise its Title IX policies and procedures, train the Title IX coordinator, and provide staff guidance and training on Title IX requirements.

Based on the commitments made in the enclosed Agreement, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently. When fully implemented, the Agreement is intended to address all of OCR's compliance concerns in this investigation. OCR will monitor the implementation of the Agreement to ensure compliance.

OCR's determination in this matter 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. 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, 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 me at Zachary.Pelchat@ed.gov.

Sincerely,

/S/

Zachary Pelchat
Team Leader

cc: Vincent J. Ponce, Superintendent, Perris Elementary School District
John W. Dietrich, Esq. (via email only)