

Kelly Jennings Yeoman, Esq.
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, Ohio 43215

Re: OCR Docket #15-14-2049

Dear Ms. Yeoman:

This letter is to notify you of the disposition of the complaint filed on January 13, 2014, with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against Denison University (the University), alleging that the University has discriminated against female students on the basis of sex in intercollegiate athletics by not providing equal athletic opportunities for members of both sexes.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation, 34 C.F.R. Part 106 (Title IX). Title IX prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. Athletics programs are specifically addressed at 34 C.F.R. § 106.41 of the Title IX implementing regulation. As a recipient of Federal financial assistance from the Department, the University is subject to Title IX. Accordingly, OCR had jurisdiction to investigate this complaint.

Based on the complaint allegation, OCR investigated whether the University's selection of intercollegiate sports and levels of competition at the University effectively accommodated the interests and abilities of members of both sexes to the extent necessary to provide equal athletic opportunity, as required by the Title IX implementing regulation at 34 C.F.R. § 106.41(c)(1).

During OCR's investigation, OCR interviewed University staff and administrators and reviewed information provided by the Complainant and the University. Prior to the completion of OCR's investigation, the University requested to voluntarily resolve the issues of the complaint, pursuant to Section 302 of OCR's *Complaint Processing Manual* (the *Manual*) and signed the enclosed resolution agreement (the Agreement), which, once implemented, will fully address the allegation raised in this complaint. We set forth below the applicable regulatory requirements and a summary of OCR's investigation to date.

Applicable Regulatory Requirements

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, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis. Section 106.41(c) requires recipients to provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the regulations provide that OCR will consider, among other factors, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of students of both sexes (34 C.F.R. § 106.41(c)(1)).

In assessing whether the interests and abilities of the members of both sexes are being effectively accommodated to the extent necessary to provide equal opportunity to participate in intercollegiate athletics, OCR uses the three-part test first established in the Department's "Intercollegiate Athletics Policy Interpretation," issued December 11, 1979, and found at 44 *Fed. Reg.* 71413 *et seq.* (Policy Interpretation). OCR also refers to other policy guidance that has been issued since the Policy Interpretation was issued and that specifically discusses the application of the three-part test. Specifically, OCR looks to the Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, issued on January 16, 1996; and the Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three, issued on April 20, 2010. Taken together, these documents outline OCR's analytic approach to the issue raised in this complaint.

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. In essence, each part of the three-part test is a safe harbor, and no one part is favored. OCR assesses whether an institution is providing nondiscriminatory athletic participation opportunities for individuals of both sexes by determining:

1. whether participation opportunities for male and females 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 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 athletes, and the institution cannot show a history and continuing practice of program expansion, 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.

Summary of OCR's Investigation to Date

Denison University (the University) is a private educational institution with an approximate enrollment, for the 2013-2014 academic year, of 2,300 students. The University offers the following sports for both men and women: basketball; cross country; golf; lacrosse, indoor track; outdoor track; soccer; swimming and diving, and tennis. The University also offers field hockey, softball, and volleyball for women, and baseball and football for men.

The University's intercollegiate athletics teams compete in the National Collegiate Athletic Association's (NCAA) Division III. The University is in the North Coast Athletic Conference (NCAC). The ten universities that are members of the NCAC are located in Indiana, Pennsylvania and Ohio and are: Allegheny College, Earlham, DePauw University, Hiram College, Kenyon College, Oberlin College, Ohio Wesleyan, Wabash (men's only school), Wittenberg and Wooster College. The University offers all sports that are played in the NCAC.

In addition to 23 varsity sports teams, the University has approximately 30 club sports and a wide array of intramural sports. Club teams compete externally against other universities' club teams. There are no academic eligibility requirements for a student athlete to participate on a club team. Intermural sports are funded through the athletic department's recreational sports budget. Intramural sports involve internal competition within the University community.

The University's Athletic Director (AD) reported to OCR that before the University will consider adding a varsity sport, there needs to be student interest and available competition either within the NCAC or at regional Division III schools outside of the NCAC. The AD explained that the member schools in the NCAC have similar values, such as placing academics before athletics by holding practices and games so that they do not conflict with a student's academic endeavors. In this regard, the AD's focus is on identifying competition against colleges and universities in the Ohio, Indiana, Pennsylvania and Michigan region to ensure that travel can be completed within a few hours so students do not have to miss academic instruction and to keep the University's costs low. The AD

explained that, for the NCAC to add a championship tournament in any new varsity sport, at least five of the member universities have to host the team at the time of the request. The AD told OCR that the last time the University added a varsity sport was when it elevated the women's club golf team to the varsity level in 2006. At the time, other NCAC schools were also adding varsity-level women's golf teams. Prior to adding women's golf, the University added varsity softball for women in 1996.

The Senior Associate AD explained to OCR the process of adding a sport at the University. Specifically, she stated that first there must be student interest in the sport. If there is interest and if the students make a request to add a particular sport, the Senior Associate AD sets up an organizational meeting to determine if the interest is sustainable among the student body. If there does not appear to be sustainable interest for the particular requested sport, the Senior Associate AD suggests that the requested sport become a club team first to demonstrate sustained interest over a multiple year period and as a way to determine whether the team can be competitive. If the requested sport can demonstrate sustained interest, then the next step is to discuss elevating the team to a varsity team. When elevating or adding a sport to the varsity level, the Senior Associate AD researches whether there is student interest at the regional high schools and if the University can successfully recruit players. The Senior Associate AD considers the University's facility capacity and how practice and game time might impact facility use. Also, the athletic department considers whether it can hire additional staff, such as coaches or trainers.

Both the AD and the Senior Associate AD told OCR that there is no formal written policy regarding adding varsity sports at the University. The AD stated that she is a visible presence at all sporting events and is constantly speaking with student athletes regarding their athletic interest. She stated that her door is "always open" and students know that they can speak with her regarding a request to add a sport. She further stated that the University's athletic department is always evaluating options; therefore, she believes the process is very organic and students would simply come to her if they wanted to request to add a varsity team. The coaches OCR interviewed said that they believed that the University fully accommodated the athletic interest of female students and had extensive athletic offerings for female student athletes.

For Part 1 of the "Three-Part Test", OCR sought to determine whether the University's athletic participation rates for male and female students are substantially proportionate to their respective enrollments and, if not, whether the number of intercollegiate athletic participation opportunities represented by the disparity between the intercollegiate athletic participation and enrollment rates of the underrepresented sex is sufficient to sustain a viable team. According to information provided by the University, during the 2013-2014 school year, women comprised 1,316, or 57.9%, of the University's 2,274 full-time undergraduate students, but only comprised 268, or 43.8%, of the University's 612 intercollegiate athletes. Thus, there was a 14.1% disparity between overall female enrollment and athletic participation. With the 14.1% disparity during the 2013-2014 school year, OCR determined that the University would need to create 205 new

intercollegiate athletic participation opportunities for women to achieve proportionality in opportunities without decreasing opportunities for male students. Based on this information, OCR determined that the University does not meet Part I; the participation opportunities for female athletes are not substantially proportionate with enrollment.

For Part 2 of the “Three-Part Test,” OCR sought to determine whether the University has a history and continuing practice of program expansion. In considering whether past actions of an institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities, OCR examines an institution’s record of adding intercollegiate teams, or upgrading club or intramural teams, for the underrepresented sex; its record of increasing participation numbers for the underrepresented sex; and its affirmative responses to student requests for the addition or elevation of sports. OCR also examines current practices that support continued expansion.

In the present case, the University does have some history of expanding its athletic program for women, having added two women’s sports over the past two decades: varsity softball and women’s golf. In addition, the University has never eliminated a women’s varsity team. However, the preliminary information obtained by OCR indicates that the University has not showed a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of female students. The University has maintained historical intercollegiate athletics participation data beginning in 1995 through the present. The information the University provided suggests that the number of women participating in intercollegiate athletics has fluctuated over the years, but that the current number of women participating in intercollegiate athletics is not as high as the number of women who have participated in prior years. The University has indicated, to date, that it has no plan of program expansion that is responsive to developing interests and abilities. Additionally, the University does not have a consistent history of providing affirmative responses to requests for the addition or elevation of sports, as the University denied a request, to elevate the women’s club rugby team to a varsity team in approximately May 2014, based on a variety of factors. Therefore, OCR has determined, based on the information obtained to date, that the University does not meet Part II of the three-part test, as it is unable to show a continued expansion of its women’s athletic programs.

Part III of the three-part test focuses on full and effective accommodation of the interests and abilities of the university’s students who are members of the underrepresented sex. In determining compliance with Part III, OCR considers all of the following: (a) whether there is unmet interest in a particular sport; (b) whether there is sufficient ability to sustain a team in the sport; and (c) whether there is a reasonable expectation of competition for the team. If all three questions are answered affirmatively, OCR will find that a recipient is not fully and effectively accommodating the interests and abilities of the underrepresented sex; thus, the recipient is not in compliance with Part III.

In determining whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex, OCR considers whether the university has conducted a survey or used another method for determining interests and abilities. If the university cannot demonstrate that its current program equally, effectively accommodates interests and abilities through such a method, OCR must make this determination. OCR reviews whether the university failed to accommodate expressed interest, such as a request from a club or group that a sport be offered. In addition, OCR may review other programs indicative of interest and abilities, such as club and intramural sports and community regional sports programs.

In this case, OCR began an analysis and review of data the University submitted during the investigation and information obtained from OCR onsite activities. With respect to surveying the interest and abilities of its students, in approximately 2010, the University conducted a survey regarding student interest in athletics, but OCR's preliminary review of this survey found that it focused primarily on the University's recreational sports offerings and facilities, and not on the athletic interest and abilities of its students or incoming students. The University also told OCR that it does not monitor developing interests and abilities of its female students and admitted students by conducting periodic nondiscriminatory assessments of developing interests and abilities or through any other method. Additionally, the preliminary information OCR has obtained, to date, shows that although there are written guidelines for students wanting to form club teams, there are no written materials to guide students through the process of requesting that the University's athletic department add a new varsity sport or elevate a club sport to the varsity level.

Voluntary Resolution Prior to Conclusion of OCR's Investigation

As noted above, prior to the completion of this complaint investigation, the University expressed interest in resolving this complaint under Section 302 of the *Manual*. The *Manual* provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegation(s). Such a request does not constitute an admission of liability on the part of the University, nor does it constitute a determination by OCR that the University has violated any of the laws that OCR enforces. The provisions of the resolution agreement are to be aligned with the complaint allegation(s) or the information obtained during the investigation and consistent with applicable regulations.

On January 12, 2015, OCR received the enclosed Agreement which, when fully implemented, will resolve the complaint. The Agreement requires the University to demonstrate that it is effectively accommodating the interests and abilities of men and women by meeting Part 1, Part 2, or Part 3 of the three-part tests, or by submitting a detailed plan to OCR to ensure compliance by the 2016-2017 academic year, including the interim steps the University will take during the 2015-2016 academic year to increase intercollegiate athletic participation opportunities for women.

In light of the signed Agreement, OCR finds that this complaint is resolved, and we are closing our investigation as of the date of this letter. OCR will, however, monitor the University's implementation of the Agreement. Should the University fail to fully implement the Agreement, OCR will reopen the complaint and take further appropriate action to ensure compliance with Title IX.

This concludes OCR's investigation of the complaint and should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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 University 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 harmed individual may file another complaint alleging such treatment.

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

We appreciate your cooperation and that of the University during the preliminary investigation and resolution of this complaint. If you have any questions about this letter or OCR's resolution of this case, please contact Lisa M. Lane, Supervisory Attorney/Team Leader, at (216) 522-2678 or by e-mail at Lisa.M.Lane@ed.gov. For questions about implementation of the Agreement, please contact Ms. Chandra Bowling, who will be monitoring the University's implementation of the Agreement, at Chandra.Bowling@ed.gov or at (216) 522-2669. We look forward to receiving the University's first monitoring report by June 30, 2015. Should you choose to submit your monitoring reports electronically, please send them to OCRCleMonitoringReports@ed.gov.

Sincerely,

Meena Morey Chandra
Director

Enclosure