

February 12, 2015

Carmen Fariña
Chancellor
New York City Department of Education
Tweed Courthouse
52 Chambers Street
New York, New York 10007

Re: Case No. 02-11-1028
New York City Department of Education

Dear Chancellor Fariña:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against the New York City Department of Education (NYCDOE). The complainant alleged that the NYCDOE subjected high school girls to discrimination on the basis of sex because the selection of interscholastic sports at the NYCDOE's high schools does not effectively accommodate the interests and abilities of members of both sexes to the extent necessary to provide equal athletic opportunity.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The NYCDOE is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Title IX.

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

In determining equality of opportunity, OCR considers factors set forth in 34 C.F.R. § 106.41(c), and in the following clarifying policy and guidance documents: the OCR Intercollegiate Athletics Policy Interpretation issued December 11, 1979, 44 Fed. Reg. 71413 (1979) (Policy Interpretation); a letter from OCR, dated January 16, 1996, entitled "Clarification of

Intercollegiate Athletic Policy Guidance: the Three-Part Test” (1996 Clarification); a letter from OCR to the General Counsel of Bowling Green State College (Bowling Green Letter), dated July 23, 1998; a letter from OCR, dated July 11, 2003, entitled "Further Clarification of Intercollegiate Athletics Policy" (2003 Clarification); and a letter from OCR, issued on April 20, 2010, entitled “Intercollegiate Athletics Policy Clarification: The Three Part Test – Part Three” (2010 Clarification).

OCR’s investigation included a comprehensive review and analysis of documents and other data that the complainant and NYCDOE submitted from school years 2008-2009, 2009-2010, 2011-2012 and 2012-2013. OCR also reviewed historical information that the NYCDOE provided from school year 2002-2003 to 2009-2010, regarding the addition of teams. OCR conducted on-site visits to interview administrators and athletics staff responsible for the operation of the athletic program at NYCDOE high schools in each of the five boroughs. OCR also conducted interviews with Public School Athletics League (PSAL) staff.¹

In determining whether the NYCDOE provided male and female students an equal opportunity to participate in its interscholastic athletics program by effectively accommodating their interests and abilities, OCR first considered the opportunities provided to students of each sex to compete in interscholastic events. If an institution meets any one part of the Three-Part test, OCR will determine that the institution has provided each sex with equitable opportunities to participate. Each part of the Three-Part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities. An institution is in compliance, and considered to be providing equal athletic opportunities, if it meets any one of the following: (1) the athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) there is a showing by the institution of a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex; or (3) it is demonstrated that the interests and abilities of the underrepresented sex are fully and effectively accommodated by the present program. The results of our investigation and the NYCDOE’s compliance with each component of the Three-Part test are discussed below.

Part One: Are Competitive Opportunities Substantially Proportionate to Enrollment?

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

The NYCDOE has not claimed compliance with Part One. Enrollment and participation data show that the NYCDOE does not comply with Part One on the system level. During school year 2012-2013, females constituted 48% (152,200) of enrolled high school students, compared to 52% (161,769) for males; however, females accounted for only 44% (21,586) of athletic participants, compared to 56% (27,048) for males. This means that in order to achieve proportionality to

¹ OCR determined that the NYCDOE’s athletic program is administered by the PSAL. The terms NYCDOE and PSAL are used interchangeably herein.

enrollment, the NYCDOE would need to add at least 3,862 athletic opportunities for girls across the system. Thus, OCR has determined that athletic participation is not substantially proportionate to enrollment.

Part Two: Is There a History and Continuing Practice of Program Expansion Demonstrably Responsive to the Developing Interests and Abilities of the Underrepresented Sex?

The NYCDOE asserted that it satisfies Part Two of the Three-Part Test, *i.e.*, that it has a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex. The following italicized language excerpts are taken from OCR's 1996 Clarification regarding the Three-Part Test and set forth the standard for compliance under the Part Two option. Relevant information gathered regarding the NYCDOE is summarized below under each italicized provision:

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- *an institution's record of adding teams, or upgrading teams to interscholastic status, for the underrepresented sex.*

The NYCDOE did not provide any information regarding the upgrading of teams to interscholastic status. The NYCDOE provided documentation demonstrating that it added 353 girls' teams from school year 2002-2003 to school year 2009-2010; however, the documentation also demonstrated that the NYCDOE eliminated 309 girls' teams over the same time period. Accordingly, there was a net increase of 44 girls' teams over that eight year period.² Over the same time period, NYCDOE's documentation demonstrated that it added 478 boys' teams and eliminated 340 boys' teams; for a net increase of 138 boys' teams. Accordingly, 94 more boys' teams than girls' teams were added over the eight year period. Observed in a different way, the NYCDOE added 125 more boys' teams than girls' teams over the relevant period (478 boys' teams added as compared to 353 girls' teams added). Accordingly, OCR determined that the NYCDOE does not have a history of adding teams, or upgrading teams to interscholastic status, for the underrepresented sex.

- *an institution's record of increasing the number of participants in athletics who are members of the underrepresented sex.*

The NYCDOE submitted documentation demonstrating that it added 6,241 participation opportunities for girls during the period from 2003 to 2010; however, the elimination of teams over this period resulted in a loss of 3,218 girls' athletic participation opportunities. Accordingly, a net of 3,023 new athletic participation opportunities were added for girls. Information the NYCDOE submitted also demonstrated that when accounting for fluctuations in overall enrollment, the rate of female participation in athletics was 10.2% in school year 2002-2003, and rose to 14.1% in school year 2012-2013; a total gain of 3.9% over that ten year period. The NYCDOE submitted

² The NYCDOE did not provide information indicating how many teams it added annually over the course of this time period; instead, the information provided was a snapshot of total girls' and boys' teams active for each year.

documentation demonstrating that it added 8,894 participation opportunities for boys during the period from 2003 to 2010; however, the elimination of teams over this period resulted in a loss of 3,446 boys' athletic participation opportunities. Accordingly, a net of 5,448 new athletic participation opportunities were added for boys. This resulted in the addition of 2,425 more boy athletes than girl athletes over that ten year period. When accounting for fluctuations in enrollment, the rate of male participation in athletics was 13.5% in school year 2002-2003, and rose to 16.7% in school year 2012-2013; a total gain of 3.2% over that ten year period. While this data shows a trend in the right direction, the numbers do not establish a history of increasing the number of girl participants in athletics when compared to the number of participation opportunities added for boys.

- *an institution's affirmative responses to requests by students or others for addition or elevation of sports.*

The NYCDOE has not provided any documentation to demonstrate that it maintained records of requests for new teams prior to school year 2008-2009. As of school year 2008-2009, the NYCDOE adopted a mechanism for requesting the addition of a new team through the school principal; however, the NYCDOE does not have a process that allows students, parents, or coaches to make direct requests for the addition of teams to the PSAL. The NYCDOE acknowledged that there is no mechanism for, or system-level record of, requests generated by students, parents, coaches or other individuals for new teams or sports.

Principals OCR interviewed stated that although students or parents may bring a request to them or the athletic director, the principals decide which requests are forwarded to PSAL for review. Requests are made by principals through a password-protected application form on the PSAL website. Principals stated that, generally, before submitting a request, they consider whether there is: (a) sufficient interest; (b) facilities for practice and competition; and (c) coaching staff. Athletic directors OCR interviewed stated that if they know that they do not have sufficient numbers of participants, budget, or an available coach in order to support a request, they may not forward the request to the principal for consideration. Accordingly, OCR determined that there may be instances in which there is sufficient interest in a new team or sport that may not be communicated to the PSAL because some requests are filtered out by the structure of the PSAL request system.

During school year 2008-2009, 28 out of 51 (55%) requests for girls' teams were approved; and 54 of 114 (47%) requests for boys' teams were approved. During school year 2009-2010, 25 of 102 (25%) requests for girls' teams were approved; and 46 of 124 (37%) requests for boys' teams were approved. OCR notes that after the filing of the complaint in school year 2010-2011, none of the 127 requests for boys' teams were approved; whereas, 85 of 129 (66%) requests for new girls' teams were approved. Adding data from the two years together, the NYCDOE approved 53 of 153 (34.6%) requests for the addition of girls' teams, and 100 of 238 (42%) requests for the addition of boys' teams. It also is reasonable to assume that the number of requests made by students, parents, coaches, or others to high school principals or athletic directors for new girls' teams not forwarded to PSAL was greater than the number of formal requests actually made by the schools.

Based on the above, OCR has determined that the NYCDOE has not established a pattern of affirmative responses to requests by students or others for the addition of sports and/or teams.

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

- *an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students.*

As stated above, there is no system-level formal procedure for students, coaches, parents, or others to request additional sports. Students, parents and coaches may make requests to their athletic directors or principals, but those requests are not necessarily submitted to the PSAL for a variety of reasons. Information about the request process is included on the PSAL website, but it is not directed to students or parents. The NYCDOE informed OCR that the manner in which schools collect and record student interest in new teams may vary and is not overseen at the system level. For example, some schools may rely on lists of student signatures indicating interest in a new sport, but this is not the case for all schools; and the NYCDOE does not generate or maintain such information itself. The NYCDOE also stated that in addition to ensuring sufficient interest, schools proposing new teams are responsible for reserving space in their budget to cover the entirety of the team's financial support for its first year, and the approval of new team requests is contingent on available funding. In addition, schools must have a potential coach available, as well as a facility the team can use. OCR determined that this process is insufficient to demonstrate that the NYCDOE has a nondiscriminatory policy or procedure for students or parents to request the addition of a sport, or that the NYCDOE effectively communicates any such policy or procedure to students or parents.

- *an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.*

Beyond the formal request/approval process referenced above, the NYCDOE informed OCR that it has no specific system-level plan of program expansion.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex; for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

The NYCDOE informed OCR that it has not conducted assessments on the system level to monitor developing interests and abilities of the underrepresented sex. OCR determined that during the course of the investigation, in school year 2012-2013, the NYCDOE included questions related to athletic interests and abilities in its annual school climate survey; however, the NYCDOE informed OCR that the athletics questions would not continue to be part of the school climate survey. During school year 2012-2013, the PSAL appointed a Title IX Coordinator who conducted site visits at nine high schools, during which the Coordinator met with small groups of female students regarding their athletic interests.

Based on the above, OCR determined that the NYCDOE has not, on the system level, established a history and continuing practice of athletic program expansion responsive to the interests of female students; thus NYCDOE does not comply with Part Two. Rather, the increased opportunities for male students have, at least until this investigation started, outpaced those for female students. Additionally, the NYCDOE does not have a system for capturing interests expressed by students themselves; student interest is only represented in the requests made at the school level by principals. Even among such school-level requests, as recently as school year 2009-2010, three out of every four requests for new girls' teams were rejected.

Part Three: Are the Athletic Interests and Abilities of Female Students Being Fully and Effectively Accommodated?

Although disproportionately high athletic participation rates by one sex (as compared to their enrollment rates) may indicate that a recipient is not providing equal athletic opportunities to its students of the other, underrepresented sex, a recipient can satisfy Part Three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that notwithstanding disproportionately low participation rates of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated. In making this determination, OCR considers whether there is (1) unmet interest in a particular sport; (2) sufficient ability to sustain a team in the sport; and (3) a reasonable expectation of competition for the team. If all three conditions are present, OCR will find that the recipient has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

The 2010 Clarification provides that OCR evaluates a broad range of indicators in determining whether a recipient has unmet interest and ability to support an intercollegiate team in a particular sport, including the following five elements: (1) whether the recipient uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students; (2) whether a viable team for the underrepresented sex recently was eliminated; (3) multiple indicators of interest; (4) multiple indicators of ability; and (5) frequency of conducting assessments. The 2010 Clarification adds that a recipient should document its assessment of students' interests and abilities, and states that OCR evaluates the interests of the underrepresented sex by examining multiple indicators, including:

- Requests by students that a particular sport be added;
- Requests for the elevation of an existing club sport to interscholastic status;
- Participation in club or intramural sports;
- Interviews with students, coaches, administrators and others regarding interests in particular sports;
- Results of surveys or questionnaires of students regarding interest in particular sports;
- Participation in interscholastic sports by students at lower grade levels; and
- Participation rates in sports in middle schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.

The 2010 Clarification also explains that OCR's evaluation of whether an institution assesses interest and ability periodically so as to be able to identify any developing interests and abilities

of the underrepresented sex in a timely and responsive manner takes several factors into account, including:

- The degree to which the previous assessment captured the interests and abilities of the institution's students of the underrepresented sex;
- Changes in demographics or student population at the institution (e.g. virtually complete student body turnover every four years at a typical four-year institution); and
- Whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

The NYCDOE has not asserted that it is in compliance with Part Three of the Three-Part test. The NYCDOE acknowledged that it did not conduct any surveys or other system-wide assessments of interest until school year 2012-2013, when it included questions regarding sports on its annual school climate survey; nor does it keep track of intramural, community, amateur or other athletic participation by its students on any centralized basis. To the extent that the NYCDOE has not maintained records regarding its accommodation of athletic interests and abilities, OCR cannot conclude that it complies with Part Three of the Three-Part test.

Moreover, OCR found explicit evidence of unmet interest. As discussed under the Part Two analysis above, there have been 282 requests for the addition of new girls' teams from school years 2008-2009 to 2010-2011, of which more than half (144) were rejected. This pool of rejected requests shows that there was unmet interest from girls in several sports; including volleyball, softball, basketball, soccer, tennis, cross-country, bowling, golf, and swimming. Again, these were requests from the school principal, and do not necessarily reflect less formal expressions of student interest or requests for new teams, of which the NYCDOE keeps no specific records.

Based on the information summarized above, OCR determined that the NYCDOE failed to meet any one part of the Three-Part Test to demonstrate that it is effectively accommodating the athletic interests and abilities of both sexes to the extent necessary to provide equal athletic opportunity. OCR's investigative activities confirmed that athletic participation is not substantially proportionate to enrollment. Further, the NYCDOE has not demonstrated a history of continued practice of program expansion demonstrably responsive to the developing interests and abilities of the underrepresented sex. Additionally, all of the data and interviews confirmed that there are female students whose interests and abilities are not currently being met by the athletic opportunities available. Therefore, OCR determined that the NYCDOE is in violation of Title IX with respect to the issue investigated.

On January 22, 2015, the NYCDOE entered into the attached Agreement to address this compliance concern. The Agreement requires the NYCDOE to provide participation opportunities for students at the NYCDOE's high schools that effectively accommodate their athletics interests and abilities, and assess whether there is unmet interest and ability among female students in the NYCDOE's high schools. The Agreement also provides that if, through the assessments, the NYCDOE identifies a sport or sports in which there is sufficient but unmet interest and, if applicable, ability of female students to participate at the interscholastic level at a particular high school, the NYCDOE will continue to add athletic opportunities at the high school level. The Agreement further provides that the NYCDOE will develop a process or

procedure for students or other interested parties, such as coaches or parents, to use in requesting the addition of new sports or levels of sports at the NYCDOE’s high schools, and will publicize that process; and, provide training to the Athletic Director at each high school on the relevant requirements of Title IX as it pertains to equal athletic opportunities.

OCR will monitor implementation of the Agreement. If the NYCDOE fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce the Agreement, OCR shall give the NYCDOE written notice of the alleged breach and sixty (60) calendar days to cure the alleged breach.

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. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the NYCDOE 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. If we receive such a request, we will seek to protect, to the extent possible, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions about OCR’s determination, please contact Helen Whitney, National Equity Expert, at (646) 428-3838 or helen.whitney@ed.gov; Anna Moretto Cramer, Senior Compliance Attorney, at (646) 428-3826 or anna.moretto.cramer@ed.gov; or Jocelyn Panicali, Senior Compliance Team Attorney, at (646) 428-3796 or jocelyn.panicali@ed.gov.

Sincerely,

Timothy C. J. Blanchard

cc: XXX, Esq.
XXX, Esq.