

August 8, 2017

James R. Stellar  
Interim President  
University at Albany  
State University of New York  
1400 Washington Avenue  
Albany, New York 12222

Re: Case No. 02-17-2037  
State University of New York at Albany

Dear President Stellar:

This letter is to notify you of the determination made by the U.S. Department of Education, Office for Civil Rights (OCR), with respect to the above-referenced complaint filed against the State University of New York, University at Albany (the University). The complainant alleged that the University discriminates against female students, on the basis of sex, by failing to fully and effectively accommodate the interests and abilities of female students to the extent necessary to provide equal athletic opportunities to members of both sexes.

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 University 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.

### **Applicable Legal Standards**

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.

*Accommodation of Interests and Abilities*

The regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1), states that 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. OCR's Three-Part Test assesses athletic opportunities.<sup>1</sup> The Three-Part Test furnishes three individual avenues for measuring compliance with the requirement to provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. 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.

OCR applies the Three-Part Test as follows to assess whether an institution is providing equal participation opportunities for individuals of both sexes:

- i. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- ii. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of that sex; or
- iii. Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, 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.

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. If an institution's athletic program also equitably provides each sex with the level of competition reflective of their respective abilities, OCR will determine that the institution has effectively accommodated athletic interests and abilities.<sup>2</sup>

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<sup>1</sup> For further information, see the OCR Intercollegiate Athletics Policy Interpretation, issued December 11, 1979; 44 Fed. Reg. 71413 (1979) (**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, dated July 11, 2003, entitled "Further Clarification of Intercollegiate Athletics Policy" (**2003 Clarification**); and a Dear Colleague Letter, issued on April 20, 2010, regarding the three-part test (**April 2010 DCL**).

<sup>2</sup> For further information, see 1996 Clarification; 2003 Clarification.

In addition to determining whether men and women are afforded equitable opportunities to participate, OCR also will assess the following factors to determine whether the quality of competition provided to male and female athletes equally reflects their abilities:

- i. Whether the competitive schedules for men’s and women’s teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities.
- ii. Whether the University can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

If an institution meets any one part of the Three-Part test, and can also demonstrate that it provides an equitable level of competition to athletes of each sex, OCR will determine that the institution has effectively accommodated the athletic interests and abilities of the underrepresented sex.<sup>3</sup>

### **Findings of Fact**

OCR collected and analyzed data for academic years 2014-2015, 2015-2016 and 2016-2017; conducted interviews of the complainant, third parties, and the XXXXXXXXXXXXXXX; and made compliance determinations with respect to the accommodation of athletic interests and abilities.

#### **A. Background**

The State University of New York, University at Albany (the University) is a public university located in Albany, New York. The University is a member of the National Collegiate Athletic Association (NCAA) and the University’s athletic teams compete in NCAA Division I and Division I Football Championship Subdivision.

#### **B. Effective Accommodation of Athletic Interests And Abilities**

OCR examined whether the University provides male and female students an equal opportunity to participate in its intercollegiate athletics program by effectively accommodating their interests and abilities, in accordance with 34 C.F.R. § 106.41(c)(1). There are two aspects to OCR’s analysis of this program component. OCR first considered the opportunities provided to students of each sex to compete in intercollegiate events, and then compared the quality of competition provided to women’s teams with the quality of competition provided to men’s teams.

##### **1. Part One: Are Competitive Opportunities Substantially Proportionate to Enrollment?**

Under Part One of the Three-Part test, where an institution provides intercollegiate level participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is

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<sup>3</sup> For further information, see 1996 Clarification; 2003 Clarification.

providing nondiscriminatory participation opportunities for individuals of both sexes. OCR will 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 that might vary by institution.<sup>4</sup>

To establish whether competitive opportunities were substantially proportionate to enrollment, OCR examined participation opportunities for academic years 2014-2015, 2015-2016 and 2016-2017. In determining participation opportunities, OCR counted the number of actual athletes participating<sup>5</sup> in each competitive sport.<sup>6</sup> To establish the number of intercollegiate athletic participation opportunities, OCR examined the squad lists prepared by University for the NCAA; and compared these to the participation numbers per team calculated by the University and provided to OCR; as well as to the participations numbers reported on the EADA.

#### Academic Year 2014-2015

In academic year 2014-2015, there were 6,228 (51.49%) males and 5,867 (48.51%) females enrolled at the University as full-time undergraduate students; 12,095 in total. The University provided 346 (or 57.00% of the total) athletic opportunities for male students, and 261 (or 43.00% of the total) athletic opportunities for female students; for a total of 607 athletic opportunities.

Based on this information, OCR determined that in academic year 2014-2015, males had more opportunities to participate than did females. Females had 261 (43.00%) of the athletic opportunities while they represented 5,867 (48.51%) of the overall enrollment. The difference between female enrollment and opportunities is 5.51%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 65 for a total of 326. OCR determined that the University had an average female team size of 25 for academic year 2014-2015. The underrepresentation of 65 athletes is more than the average team size of 25; thus, the University does not satisfy Part One for academic year 2014-2015.

#### Academic Year 2015-2016

In academic year 2015-2016, there were 6,591 (51.09%) males and 6,311 (48.91%) females enrolled at the University as full-time undergraduates; for a total of 12,902. The University provided 324 (or 55.96% of the total) athletic opportunities for male students, and 255 (or

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<sup>4</sup> For further information, see 1996 Clarification.

<sup>5</sup> As a general rule, OCR counts all student athletes listed on a team's squad or eligibility list, and who are on the team as of the team's first competitive event. Under the interests and abilities analysis, a student athlete who participates in more than one sport will be counted separately as a participant in each sport.

<sup>6</sup> An extracurricular activity not involving competition as its purpose is not considered a competitive sport for purposes of the interests and abilities analysis.

44.04% of the total) athletic opportunities for female students; for a total of 579 athletic opportunities.

Based on this information, OCR determined that in academic year 2015-2016, females had 255 (44.04%) of the athletic opportunities while they represented 6,311 (48.91%) of the overall enrollment. The difference between female enrollment and opportunities is 4.87%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 55 for a total of 310. OCR determined that the University had an average female team size of 25 for academic year 2015-2016. The underrepresentation of 55 athletes is more than the average team size of 25; thus, the University does not satisfy Part One for academic year 2015-2016.

#### Academic Year 2016-2017

In academic year 2016-2017, there were 6,154 (49.49%) males and 6,280 (50.51%) females enrolled at the University as full-time undergraduates; for a total of 12,434. The University provided 338 (or 57.68% of the total) athletic opportunities for male students, and 248 (or 42.32% of the total) athletic opportunities for female students; for a total of 586 athletic opportunities.

Based on this information, OCR determined that in academic year 2016-2017, females had 248 (42.32%) of the athletic opportunities while they represented 6,280 (50.51%) of the overall enrollment. The difference between female enrollment and opportunities is 8.19%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 97 for a total of 345. OCR determined that the University had an average female team size of 25 for academic year 2016-2017. The underrepresentation of 97 athletes is more than the average team size of 25; thus, the University does not satisfy Part One for academic year 2016-2017.

#### 2. Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under Part Two of the Three-Part test, an institution may demonstrate compliance by showing 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. Part Two examines an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.

OCR considers the following factors, among others, as evidence indicating an institution's history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- A record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- A record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and

- An affirmative response to requests by students or others for addition or elevation of sports.

OCR will also 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:

- The 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; and
- The current implementation of a plan of program expansion that is responsive to developing interests and abilities.

*A record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex.*

The University's intercollegiate athletics program dates to the 1890s, but the University reported that its development was hampered due to inadequate facilities, lack of financial support and the relatively few numbers of male students enrolled at the institution at the time. The University stated that the men's tennis program began in 1898 and men's basketball in 1909; however, the University's attempts to field teams in football (1922), baseball (1896-1901), swimming and hockey were eventually aborted.

The University stated the following regarding the development of its athletics program and the approximate inception dates of the sports constituting the men's and women's athletic programs:

- 1960s – men's lacrosse, track and field, cross country and swimming upgraded from club to varsity status; introduction of women's tennis, softball, field hockey, basketball and swimming.
- 1973 – football upgraded from club to varsity status.
- 1995-1997 – women's field hockey and women's golf added as varsity sports; wrestling, men and women's swimming, men's tennis and JV basketball were discontinued.<sup>7</sup>

The University last added a women's sport to its athletics program during 1995-1997,<sup>8</sup> even though the number of female athletes continues to be disproportionate to enrollment. Additionally, OCR determined that the University eliminated women's tennis effective at the conclusion of the 2015-2016 season. Based on this information, OCR determined that the University has not demonstrated a record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex.

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<sup>7</sup> The University reported that these sports were discontinued to achieve equity in participation rates.

<sup>8</sup> The University was unable to provide a more specific date.

*A record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex.*

The University provided to OCR a copy of its 2001 NCAA Equity, Welfare and Sportsmanship Self Study; its 2010-2011 NCAA Division I Athletics Certification Self Study Instrument (2010-2011 Self Study) and its NCAA Sports Sponsorship and Demographics Form for 2016-2017. The 2010-2011 Self Study noted that women were underrepresented in athletic participation opportunities and set forth the goal of full and effective accommodation for the underrepresented sex for the period 2010-2011 through 2014-2015.

The University indicated that one step it has taken in furtherance of its goal is roster management. Specifically, it has capped the rosters of men's baseball and men's track and field. The XXXXXXXXXXXXXXXXXXXX stated that this has resulted in closing the participation gap for women; however, OCR's analysis indicated that while male participation opportunities have decreased over the three year period, so have female participation opportunities. The XXXXXXXXXXXXXXXXXXXX also stated that the University uses walk-on tryouts for all teams to increase participation numbers. The University indicated that teams have a lot of walk on players as a result, but was unable to articulate specifically whether this action has increased participation opportunities for the underrepresented sex.

*An affirmative response to requests by students or others for addition or elevation of sports.*

The University stated that it has not received any written or oral requests to expand the men's and/or women's intercollegiate athletic programs in the past five (5) years.

*The 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*

The University stated that it does not have a specific policy with regard to the addition of sports, but that it would follow the NCAA rules and regulations for creating Division I sports programs.

*The current implementation of a plan of program expansion that is responsive to developing interests and abilities.*

The University stated that it does not have a current plan to expand its athletics program.

OCR determined that during academic year 2015-2016, the University discontinued the women's tennis team, despite demonstrated interest and ability of University students. The University stated that in summer and fall 2015, three member schools of the America East Conference announced that they were discontinuing women's tennis on their respective campuses, leaving only three member schools (the University, SUNY Binghamton, and SUNY Stony Brook) in the American East Conference. With only three members, the America East Conference no longer met the NCAA's six team minimum for automatic qualification for the national tournament; therefore, the conference discontinued its sponsorship of women's tennis. The University stated

that it unsuccessfully attempted to identify options that would allow it to continue sponsoring women's tennis and afford the team the opportunity to participate in the NCAA national tournament. The XXXXXXXXXXXXXXXXXXXX explained that Division I is very competitive and the reason a university will support a Division I team is to participate in post season competition. He stated that if you take away the opportunity to compete in post season competition, it is not consistent with why you sponsor Division I programs. The University also examined the possibility of allowing the tennis team to continue independently, but stated that to do so would create too much uncertainty in terms of which teams the University would play and when they would play; and also would not afford the opportunity to participate in post-season competition. The XXXXXXXXXXXXXXXXXXXX explained that without the automatic post-season qualifier, recruitment would suffer, causing athletic excellence to suffer.

Based on the foregoing, OCR determined that University has not demonstrated a history of program expansion, and there is no policy or procedure for requesting the addition of sports. Therefore, OCR cannot determine that the University has established compliance under Part Two of the Three-Part Test.

3. Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under Part Three of the Three-Part test, OCR determines whether an institution is fully and effectively accommodating the interests and abilities of the underrepresented sex. Although disproportionately high athletic participation rates by one sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the other, underrepresented sex, an institution 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.

Because women are substantially underrepresented in the University's competitive sports relative to their percentage of the student population, OCR investigated whether there was unmet interest in a women's sport that was not offered by the University. OCR evaluates a broad range of indicators in determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, including the following five elements: (1) whether an institution 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.

An institution may determine the athletic interests and abilities of its students using methods of its own choosing provided that:

- The processes take into account the nationally increasing levels of women's interests and abilities;
- The methods of determining interest and ability do not disadvantage the members of an underrepresented sex;
- The methods of determining ability take into account team performance records; and
- The methods are responsive to the expressed interests of students capable of intercollegiate competition who are members of an underrepresented sex.

An institution should document its assessment of students' interests and abilities. OCR evaluates the interests of the underrepresented sex by examining multiple indicators, including:

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

An institution may not rely on a survey alone, regardless of response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students.

OCR must examine multiple indicators when determining whether there is sufficient ability among interested students of the underrepresented sex to sustain a team, including:

- The athletic experiences and accomplishments – in interscholastic, club or intramural competition – of underrepresented students and admitted students interested in playing the sport;
- Opinions of coaches, administrators, and athletes at an institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team;
- If the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team;
- Participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and

- Tryouts or other direct observations of participation in the particular sport in which there is interest.

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 and admitted 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.

OCR determined the University has not surveyed the student body to assess students' interests and abilities. The University's mandatory admissions application includes an "Activities" section requesting that the applicant report any activities that he/she participated in during high school, or college if a transfer applicant; and whether the individual intends to participate in a similar activity in college. The information is shared with the Athletics Department. The University did not indicate that it has taken any action responsive to information gleaned from the admissions data. The University also completes an in-depth exit interview with each student athlete leaving the athletics program, and analyzes information gleaned from such interviews to discover trends. The XXXXXXXXXXXXXXXXXXXX stated that he has not discovered any trends indicating that there are students interested in sports that are not currently offered by the University. The XXXXXXXXXXXXXXXXXXXX stated that he believes the current program effectively accommodates female students' interests and abilities; however, as stated above, OCR determined that during academic year 2015-2016, the University discontinued the women's tennis team, despite demonstrated interest and ability of University students.

Accordingly, OCR determined that the University has not established compliance under Part Three of the Three-Part Test.

#### *Equivalent Levels of Competition*

The University is a member of the NCAA; therefore, the University is subject to its policies, procedures, rules and regulations. The University is a member of the America East Conference in all sports except football, which is a member of the Colonial Athletic Conference; and women's golf, which is a member of the Metro Atlantic Athletic Conference.

The University competed at the NCAA Division I level in all sports, except football, which participated in Division I FCS. OCR determined that during academic year 2016-2017, women's basketball (one Division II opponent), baseball (one Division II opponent), men's basketball (one

Division II opponent) were the only teams to compete against institutions outside of the Division I level during the regular season.<sup>9</sup>

OCR did not find evidence to indicate that athletes did not receive genuine athletic participation opportunities or that the opportunities provided were not equivalent based on sex. Accordingly, OCR determined that the University overall provided equitable levels of competition for those students afforded athletic opportunities.

### **Conclusion**

Based on the above, OCR determined that although the University provided equitable levels of competition, the University did not demonstrate that it provides each sex with equitable athletic opportunities under any part of the Three-Part Test. Therefore, OCR determined that the University failed to establish that it has effectively accommodated the athletic interests and abilities of women, the underrepresented sex, as required by the regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1).

On August 7, 2017, the University agreed to implement the enclosed resolution agreement, which addresses the compliance concerns noted above. OCR will monitor implementation of the Agreement. If the University 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 University written notice of the alleged breach and 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 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 individual may file a 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 law, personally identifiable information that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

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<sup>9</sup> Women's basketball also played a pre-season scrimmage against a Division III institution in academic year 2016-2017.

Should you have any questions, please contact Jocelyn Panicali, Senior Compliance Team Attorney, at (646) 428-3796 or [jocelyn.panicali@ed.gov](mailto:jocelyn.panicali@ed.gov); or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or [nadja.r.allen.gill@ed.gov](mailto:nadja.r.allen.gill@ed.gov).

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXXXXXXXXXXXXX