

August 29, 2018

Dr. Margaret L. Drugovich
President
Office of the President
Yager Hall
Hartwick College
Oneonta, New York 13820

Re: Case No. 02-18-2167
Hartwick College

Dear President Drugovich:

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 Hartwick College (the College). The complainant alleged that the College discriminates against female students, on the basis of sex, in its intercollegiate athletics program, 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 College 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.

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. 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.

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 College 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.

Findings of Fact

The complainant alleged that the College discriminates against female students, on the basis of sex, in its intercollegiate athletics program, 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. In support of her allegation, the complainant asserted

that women are underrepresented in athletics at the College; the College is not accommodating the interests and abilities of female athletes; and, the College made this worse by deciding to discontinue its women's water polo team at the conclusion of academic year 2017-2018.

OCR collected and analyzed data for academic years 2015-2016, 2016-2017 and 2017-2018. As discussed more fully below, before OCR completed its investigation, the College expressed interest in voluntarily resolving this complaint through a resolution agreement pursuant to Section 302 of OCR's Case Processing Manual (CPM).

A. Background

The College is a private college located in upstate New York in the city of Oneonta. The College is a member of the National Collegiate Athletic Association (NCAA) and the College's athletic teams compete in NCAA Division I and Division III. Following academic year 2017-2018, the College is withdrawing from Division I competition, and its athletic teams will compete only in Division III.

B. Effective Accommodation of Athletic Interests And Abilities

OCR examined whether the College 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 the regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1).

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 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.

To establish whether competitive opportunities were substantially proportionate to enrollment, OCR examined participation opportunities for academic years 2015-2016, 2016-2017 and 2017-2018. In determining participation opportunities, OCR relied on the College's report to OCR of the number of male and female participants for each of the College's intercollegiate athletic programs.

Academic Year 2015-2016

In academic year 2015-2016, there were 1,353 students enrolled at the College as full-time undergraduate students. Approximately 60% of these students were female and approximately 40% were male. The College provided 202 (or 54.30% of the total) athletic opportunities for male students, and 170 (or 45.70% of the total) athletic opportunities for female students; for a total of 372 athletic opportunities.

Based on this information, OCR determined that in academic year 2015-2016, males had more opportunities to participate than did females. Females had 170 (45.70%) of the athletic opportunities while they represented approximately 60% of the overall enrollment. The difference between female enrollment and opportunities is approximately 14%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 127, for a total of 297. OCR determined that the College had an average women's team size of 17 for academic year 2015-2016. The underrepresentation of 127 athletes is more than the average team size of 17; thus, the College does not satisfy Part One for academic year 2015-2016.

Academic Year 2016-2017

In academic year 2016-2017, there were 1,362 students enrolled at the College as full-time undergraduate students. Approximately 60% of these students were female and approximately 40% were male. The College provided 242 (or 56.94% of the total) athletic opportunities for male students, and 183 (or 43.06% of the total) athletic opportunities for female students; for a total of 425 athletic opportunities.

Based on this information, OCR determined that in academic year 2016-2017, males had more opportunities to participate than did females. Females had 183 (43.06%) of the athletic opportunities while they represented approximately 60% of the overall enrollment. The difference between female enrollment and opportunities is approximately 17%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 173 for a total of 356. OCR determined that the College had an average women's team size of 18.30 for academic year 2015-2016. The underrepresentation of 173 athletes is more than the average team size of 18.30; thus, the College does not satisfy Part One for academic year 2016-2017.

Academic Year 2017-2018

In academic year 2017-2018, there were 493 (41.05%) males and 708 (58.95%) females enrolled at the College as full-time undergraduates; for a total of 1,201 students. The College provided 223 (or 56.74% of the total) athletic opportunities for male students, and 170 (or 43.26% of the total) athletic opportunities for female students; for a total of 393 athletic opportunities.

Based on this information, OCR determined that in academic year 2017-2018, males had more opportunities to participate than did females. Females had 170 (43.26%) of the athletic opportunities while they represented 708 (58.95%) of the overall enrollment. The difference

between female enrollment and opportunities is 15.69%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 145 for a total of 315. OCR determined that the College had an average women's team size of 17 for academic year 2017-2018. The underrepresentation of 145 athletes is more than the average team size of 17; thus, the College does not satisfy Part One for academic year 2017-2018.

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 College's athletics program dates back to 1891, when students and neighbors built a baseball field behind the College. Thereafter, the College obtained a gymnasium in 1912. By 1920, the College had men's and women's basketball teams. The College stated that its intercollegiate athletic program commenced during academic year 1928-1929, when its men's football, men's basketball, and women's basketball teams began competition.

Beginning in the 1960's, the College began adding women's teams in addition to the women's basketball team. From the mid-1960's through academic year 2017-2018, the College added women's Field Hockey, Lacrosse, Indoor/Outdoor Track and Field, Tennis, Cross Country, Swimming/Diving, Soccer, Volleyball, Softball, Equestrian, and Water Polo. During academic year 2005-2006, the College discontinued its women's Indoor/Outdoor Track and Field and Softball programs.¹ In addition, the College informed OCR that it discontinued its women's Water Polo team following academic year 2017-2018.²

The College informed OCR that it will add intercollegiate athletic programs for men's and women's Indoor/Outdoor Distance-Only Track beginning in academic year 2018-2019. Accordingly, although the College has a record of adding women's athletic teams, it also has a record of discontinuing women's athletic teams.

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

As described above, the College has generally increased the number of women's intercollegiate athletic programs since its women's basketball team began competition in 1928; however, as described above with respect to Part 1, the number of athletic opportunities for women at the College remained generally consistent during academic years 2015-2016, 2016-2017, and 2017-2018 (170, 183, and 170 opportunities, respectively). Therefore, the College has not increased the overall number of athletic opportunities available to women in recent history.

In addition, as described above, the College decided to discontinue its women's Water Polo team following academic year 2017-2018, thereby eliminating 25 athletic opportunities for women, even though their enrollment has not decreased. With respect to its decision to add Indoor/Outdoor Distance-Only Track beginning in academic year 2018-2019, OCR notes that pursuant to the academic year 2018-2019 rosters provided by the College, all 16 members of the College's existing women's Cross-Country team will be participating on the women's Indoor and Outdoor Distance Only Track teams, which have 18 and 19 total members, respectively. Though OCR would typically use a duplicate count to assess the number of athletic opportunities for women, such that a female student athlete who plays, for example, soccer and basketball would be counted twice, the College, in the instant matter, seeks to "expand" its athletic opportunities for women by creating two entirely new "teams" whose rosters are almost entirely comprised of current female athletes who will be utilizing the same skill set required for the preexisting Cross-Country team (namely, distance running). Even assuming that Indoor/Outdoor Distance-Only Track teams can be determined to provide an additional 37 athletic opportunities for women to offset the elimination of the viable women's Water Polo team, the resulting number will still be substantially similar to the recent level of opportunities from 2010 through academic year 2017-2018.³ Thus, OCR determined that the College cannot be said to have a

¹ The College also discontinued its men's Baseball, Golf, and Indoor/Outdoor Track and Field programs.

² The College informed OCR that it is also discontinuing its men's Tennis team, and is reclassifying its men's Soccer team to compete in Division III in the Empire 8 Conference.

³ In 2010, the College offered 43% of all athletic opportunities to women at the College. In academic year 2015-2016 through 2017-2018, the College offered 45.70%, 43.06%, and 43.26% of all athletic opportunities to women at the College respectively. Assuming the College offered the same number of athletic opportunities in academic year 2018-2019 as it did in academic year 2017-2018, with the net addition of 12 athletic opportunities for women (25

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

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

The College historically has elevated women's club teams to the intercollegiate level, including Soccer in 1980, Volleyball in 1991, Equestrian in 1998, and Water Polo in 2001. The College also identified requests it received during the last five years to expand men's or women's athletic programs through the addition of new sports teams. Specifically, the College received a written request to add Indoor/Outdoor Distance-Only Track teams, and the College is implementing this request for academic year 2018-2019; two female students who participate in Cross Country requested to compete in Javelin and Discus field events, and the College is reviewing their request for the 2019 season; and, a Soccer club was requested and formed during academic year 2017-2018.

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 College did not provide any written policies, procedures, or criteria it uses for determining how and whether sports will be added to the men's and women's athletic programs; however, it provided a description of its practices for making such decisions. With respect to club sports, the College stated that its Student Life office provides information about forming new clubs during the College's Welcome Weekend, at the College's Taste of Wick organizational fairs, and through a video on the College's website describing how to form a new club. With respect to intramural sports, the College stated that opportunities are promoted on posters and through word of mouth by its athletics staff; and, requests for intramural sports are facilitated based on the level of interest. With respect to intercollegiate sports, the College stated that its athletics staff "has an open door for requests"; athletics staff members discuss opportunities during department meetings and make proposals; athletic staff members and coaches monitor the interests and abilities of students participating in club, intramural, and recreational sports; the College monitors the athletic offerings at the high school level across New York State; and, the College's admissions office collects and shares data regarding athletic interest. The College stated that it considers the following factors when considering proposals to add sports: competition in the College's geographic region; conference and division opportunity; gender equity; facilities; financial feasibility; and, recruitment/enrollment.

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

As stated above, the College informed OCR that it will add intercollegiate athletic programs for men's and women's Indoor/Outdoor Distance-Only Track beginning in academic year 2018-2019. The College also stated that it has considered adding intercollegiate women's Rugby and

water polo opportunities were removed, but 37 distance-only track program opportunities will be added), the College would still only offer 44.94% of all athletic opportunities to women.

Softball teams; however, it has not provided any information to OCR indicating a specific timeline for when either sport may be added.⁴

Based on the foregoing, OCR determined that the College has added program opportunities for women since 1928, and plans to continue to do so into academic year 2018-2019 with the addition of an Indoor/Outdoor Distance-Only Track team; however, it also eliminated its women's Water Polo team at the conclusion of academic year 2017-2018. Moreover, it has not demonstrated a recent history of increasing athletic opportunities for women, because even with the inclusion of a women's Indoor/Outdoor Distance-Only Track team in academic year 2018-2019, the overall number of athletic opportunities for women, dating back to 2010, remains generally similar. In addition, the College has no written policy or procedure for requesting additional sports teams; and although the College has described its practices, it has not explained how it consistently implements the practice or whether it effectively communicates the practice to the College community. Before OCR completed its investigation and reached a determination with respect to Part Two of the Three-Part Test, the College expressed an interest in voluntarily resolving this case.

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 College's competitive sports relative to their percentage of the student population, OCR's investigation would assess whether there was unmet interest in a women's sport that was not offered by the College. 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.

⁴ With respect to Softball, the College stated that maintaining a women's team remains unfeasible at this time because the College does not have facilities suitable for competition.

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.

The College identified various methods that it has used to assess the athletic interests and abilities of its students, including: reviewing the high school experiences and interests of students; assessing intramural and club sport participation; and, conducting surveys of current and prospective students' interests and abilities.

Before OCR completed its investigation and reached a determination with respect to Part Three of the Three-Part Test, the College expressed an interest in voluntarily resolving this case.

Equivalent Levels of Competition

The College is a member of the NCAA; therefore, the College is subject to its policies, procedures, rules, and regulations. During academic years 2015-2016, 2016-2017, and 2017-2018, the College was a member of the Empire 8 Conference in all sports except women's Equestrian, which participated in the Intercollegiate Horse Shows Association; men's Soccer, which participated in the Sun Belt Conference; and, women's Water Polo, which participated in the Collegiate Water Polo Association. The College competed at the NCAA Division III level in all sports, except men's Soccer and women's Water Polo, which participated in Division I. As discussed above, the College will no longer participate in Division I athletics, beginning in academic year 2018-2019.

Before OCR completed its investigation and reached a determination with respect to equivalent levels of competition, the College expressed an interest in voluntarily resolving this case.

Resolution

On August 29, 2018, the College signed the enclosed resolution agreement (the Agreement). OCR will monitor implementation of the Agreement. If the College 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 will give the College 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 College 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.

If you have any questions, please contact Eric Bueide, Senior Attorney, at (646) 428-3851 or eric.bueide@ed.gov; or Logan Gerrity, Compliance Team Attorney, at (646) 428-3791 or logan.gerrity@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: Monica C. Barrett, Esq.