



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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September 19, 2017

IN RESPONSE, PLEASE REFER TO: 03161007

Dr. Nicholas Guarente
Superintendent
Greenwood School District
405 E. Sunbury Street
Millerstown, Pennsylvania 17062

Dear Dr. Guarente:

This is to advise you of the resolution of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR), against the Greenwood School District (the District). The Complainant alleged that the District discriminated against middle school and high school female athletes on the basis of sex by failing to provide equal opportunity to girls in its interscholastic athletic program in the area of accommodating interests and abilities (Allegation 1). XXXXXX (Allegation 2).

OCR enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, and its implementing regulation, 34 C.F.R. Part 106, which prohibits discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the District is subject to Title IX and its implementing regulation.

OCR applies a preponderance of the evidence standard to determine whether the evidence is sufficient to support a particular conclusion. Specifically, OCR examines the evidence in support of and against a particular conclusion to determine whether the greater weight of the evidence supports the conclusion or whether the evidence is insufficient to support the conclusion.

During our investigation, we interviewed the Complainant, XXXXXX, members of the soccer team and District personnel. We also reviewed documents submitted by the Complainant and the District. Prior to the conclusion of OCR's investigation, the District requested to resolve Allegation 1 as it applies to the District's High School through a Voluntary Resolution Agreement (the Agreement). After carefully considering all of the information obtained during the investigation, OCR determined that there is insufficient evidence to support the remaining allegations in this complaint: Allegation 1 as it applies to the District's Middle School and Allegation 2. OCR's findings and conclusions are discussed below.

Allegation 1 – Accommodation of Interests and Abilities

Legal Standards

The Title IX regulation, at 34 C.F.R. § 106.41(a), provides 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 interscholastic, intercollegiate, club, or intramural athletics offered by a District. The Title IX regulation, at 34 C.F.R. § 106.41(c), states that a District which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.

In determining whether a District is in compliance with Title IX with respect to athletics, OCR follows “A Policy Interpretation: Title IX and Intercollegiate Athletics” (the Policy Interpretation), which was published at 44 Federal Register No. 239, December 11, 1979; the “Title IX Athletics Investigator’s Manual” (1990) (the Manual) (available at <http://eric.ed.gov/?id=ED400763>), and other applicable policy documents.

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 a three-part test.¹

The three-part test provides the following three compliance options:

1. Whether interscholastic level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among interscholastic athletes, whether the District can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among interscholastic athletes, and the District cannot show a history and continuing practice of program expansion as described above, whether the District can demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

If a District has met any part of the three-part test, OCR will determine that the District is meeting this requirement.

¹ The three-part test was first established in the Policy Interpretation. OCR also refers to other policy guidance that has been issued since the Policy Interpretation was issued and that 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.

Part 1: Substantial Proportionality

A district could demonstrate compliance if it provided athletic participation opportunities for boys and girls in numbers substantially proportionate to their respective enrollments. OCR will 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.

Part 2: History and Continuing Practice of Program Expansion

OCR reviews the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution. There are no fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

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 adding additional competitive levels for existing teams, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

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

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.

Part Three: Effective Accommodation of Interests and Abilities

Under Part Three of the Three-Part Test, OCR considers whether: (a) there is an unmet interest in a particular sport; (b) there is sufficient ability to sustain a team in the sport, and (c) there is a reasonable expectation of competition for the team. OCR uses a broad range of indicators to make this determination, including:

- whether the institution uses nondiscriminatory methods of assessment when determining interests and abilities;
- the frequency of the institution’s surveys/assessments;
- whether the institution’s surveys/assessments have been used to eliminate viable teams;
- an evaluation of multiple indicators to assess interest; and
- an evaluation of multiple indicators to assess ability

Factual Background

The tables below provide enrollment and athletic participation numbers for the 2016-17 school year at the High School and Middle School.

| High School 2016-17 | | | | | |
|---|--------------|---------------|-------------|--------------|--------------|
| Sport | Girls | %Girls | Boys | %Boys | Total |
| Soccer | 4 | | 17 | | 21 |
| Field Hockey | 27 | | 0 | | 27 |
| Competitive Spirit ² | 8 | | 0 | | 8 |
| Basketball | 13 | | 21 | | 34 |
| Baseball | 0 | | 15 | | 15 |
| Softball | 20 | | 0 | | 20 |
| Track and field | 27 | | 37 | | 64 |
| Football | 0 | | 20 | | 20 |
| Golf | 1 | | 4 | | 5 |
| Wrestling | 0 | | 6 | | 6 |
| Cross Country | 5 | | 4 | | 9 |
| Swimming | 0 | | 1 | | 1 |
| Total (w/Competitive Spirit) | 105 | 45.7% | 125 | 54.3% | 230 |
| Total (w/out Competitive Spirit) | 97 | 43.7% | 125 | 56.3% | 222 |
| Enrollment | 111 | 49.1% | 115 | 50.9% | 226 |

² OCR is not making a determination at this time as to whether the District’s competitive spirit team counts as a sport for Title IX purposes.

| Middle School 2016-17 | | | | | |
|------------------------------|--------------|---------------|-------------|--------------|--------------|
| Sport | Girls | %Girls | Boys | %Boys | Total |
| Soccer | 0 | | 14 | | 14 |
| Field Hockey | 22 | | 0 | | 22 |
| Basketball | 14 | | 15 | | 29 |
| Wrestling | 0 | | 6 | | 6 |
| Total | 36 | 50.7% | 35 | 49.3% | 71 |
| Enrollment | 79 | 42.9% | 105 | 57.1% | 184 |

Analysis and Conclusion

High School

Under OCR procedures, complaint allegations may be resolved before the conclusion of an investigation if a recipient asks to resolve it by signing a Resolution Agreement. The provisions of the Agreement must be aligned with the complaint allegations or the information obtained during the investigation and be consistent with applicable regulations. Such a request does not constitute an admission of liability on the part of a recipient, nor does it constitute a determination by OCR of any violation of our regulations.

This allegation is appropriate for resolution via a Resolution Agreement because OCR would need to obtain and analyze additional information to determine whether the District's High School is providing equal opportunity to girls in its interscholastic program in the area of accommodating interests and abilities under each part of the applicable three-part test, as explained below.

2016-17 High School I&A numbers not including the District's competitive spirit team

OCR determined that in academic year 2016-17, girls comprised 97 (43.7%) of the 222 athletic opportunities while they represented 111 (49.1%) of the overall enrollment of 226. The difference between enrollment and athletic participation was 5.4%. In order to achieve exact proportionality, athletic opportunities for girls would need to be increased by approximately 24, for a total of 121. OCR determined that the District has an average girls team size of approximately 14 participants. The underrepresentation of 24 athletes is greater than the average team size of nearly 14; therefore, the High School is not in compliance with Part 1 of the three-part test (substantial proportionality).

2016-17 High School I&A numbers including the District's competitive spirit team

Including the District's competitive spirit team, in academic year 2016-17, girls comprised 105 (45.7%) of the 230 athletic opportunities while they represented 111 (49.1%) of the overall enrollment of 226. The difference between enrollment and athletic participation was 3.5%. In order to achieve exact proportionality, athletic opportunities for girls would need to be increased by approximately 16, for a total of 121. OCR determined that the District has an average girls team size of approximately 13 participants, including the District's competitive spirit team. The underrepresentation of 16 athletes is greater than the average team size of 13; therefore, the High

School is not in compliance with Part 1, even if one were to include the District's competitive spirit team as a sport for Title IX compliance purposes.³

Regardless of whether OCR counts the District's competitive spirit team as a sport for Title IX purposes, the District's High School is not in compliance with Part 1 of the three-part test for the 2016-17 school year because the percentage of girls who are athletes is not substantially proportionate to the percentage of girls enrolled at the High School. In order to complete its investigation of Allegation 1 as it pertains to the High School, OCR would need to obtain and analyze additional information as to whether the District's High School meets either Part 2 (a history and continuing practice of program expansion) or Part 3 (unmet interest in a particular sport) of the three-part test; this analysis would be necessary in order to determine if the District discriminates against girls on the basis of sex by failing to provide equal opportunity to girls in its interscholastic program in the area of accommodating interests and abilities.

Consistent with OCR's procedures, the District requested to resolve Allegation 1 as it pertains to the High School through a Voluntary Resolution Agreement (the Agreement), which was executed on September 14, 2017. Accordingly, OCR is concluding its investigation of this complaint allegation. A copy of the signed Agreement is enclosed. As is our standard practice, OCR will monitor the District's implementation of the Agreement.

Middle School

With respect to the District Middle School, OCR determined that there is insufficient evidence that the District failed to provide equal opportunity to girls in its interscholastic athletic program in the area of accommodating interests and abilities. Specifically, in the 2016-17 academic year, the percentage of girls participating in the interscholastic athletic program (50.7%) exceeds the percentage of girls enrolled at the Middle School (42.9%). Therefore, there is insufficient evidence that the District is discriminating against girls at the Middle School by failing to accommodate their athletic interests and abilities.

Allegation #2 - Sexually Hostile Environment

Legal Standards

The Title IX regulation at 34 C.F.R. § 106.31 provides generally that, except as provided elsewhere in the regulation, no person shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination in education programs or activities operated by recipients of Federal financial assistance. Sexual harassment that creates a hostile environment is a form of sex discrimination prohibited by Title IX. When investigating an allegation of sexual harassment or hostile environment, OCR determines whether: (1) a student was subjected to harassment on the basis of sex; (2) the harassment rose to a level that denied or limited the student's ability to participate in or benefit from the educational program, service or aid; (3) the recipient had actual or constructive notice of the harassment; and (4) the recipient failed to take prompt and remedial action to end the harassment and prevent its reoccurrence.

³ OCR is not making a determination at this time as to whether the District's competitive spirit team counts as a sport for Title IX purposes.

To establish a violation under the hostile environment approach, OCR must determine whether the collective incidents and social atmosphere constitute a hostile environment from the totality of the circumstances, including a consideration of whether the sexual harassment was severe, pervasive, or persistent. In making this determination, OCR examines the context, nature, scope, frequency, duration, and location of harassing incidents, as well as the identity, number, and relationships of the persons involved. OCR considers the conduct in question from both an objective perspective and the subjective perspective of the alleged victim of harassment. In addition, as with other forms of harassment, OCR must take into account the relevant particularized characteristics and circumstances of the victim. For example, the age and maturity of the students and, or, staff involved must be considered. Under OCR policy, the harassment must, in most cases, consist of more than casual, infrequent, or isolated incidents to constitute a hostile environment on the basis of sex. Harassment based on sex, if sufficiently severe, denies or limits a student's ability to participate in or benefit from the school program. In addition, where a recipient has notice of the conduct, we determine whether it took prompt and effective action to eliminate the hostile environment and prevent its recurrence.

When responding to harassment, a district must take immediate and appropriate action to investigate or otherwise determine what occurred. The specific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors. In all cases, however, the inquiry should be prompt, thorough, and impartial. If an investigation reveals that discriminatory harassment has occurred, a district must take prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring.

XX – paragraphs redacted -- XX

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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 District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. If OCR receives such a request, we will seek to protect personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released, to the extent provided by law.

If you have any questions, please contact Sarah Haake, Attorney at 215-656-6416 or sarah.haake@ed.gov, or me at 215-656-8522 or vicki.piel@ed.gov.

Sincerely,

/s/

Vicki Piel
Team Leader/Supervisory Attorney
Philadelphia Regional Office