

#### UNITED STATES DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

THE WANAMAKER BUILDING, SUITE 515 100 PENN SQUARE EAST PHILADELPHIA, PA 19107-3323 REGION III DELAWARE KENTUCKY MARYLAND PENNSYLVANIA WEST VIRGINIA

# May 18, 2023

# IN RESPONSE, PLEASE REFER TO: 03222243

### VIA E-MAIL ONLY: president@umes.edu

Dr. Heidi M. Anderson, President University of Maryland Eastern Shore J.T. Williams Hall, Suite 2107 11868 Academic Oval Princess Anne, MD 21853-1299

Dear President Anderson:

Specifically, OCR investigated whether:

1. the University discriminated against XXXXXX on the basis of sex when it failed to properly investigate the Title IX complaint filed by XXXXXXXXXXXXXXXX, with the University's Office of Institutional Equity (OIE).

Finally, OCR investigated whether the University discriminated against females at the University on the basis of sex, because it fails to provide equal opportunities to female athletes in its intercollegiate athletic program in the following areas:

- 6. interests and abilities;
- 7. equipment and supplies;
- 8. scheduling of games and practice times;
- 9. travel and per diem allowance;
- 10. availability, assignment, and compensation of tutors;
- 11. assignment and compensation of coaches;
- 12. locker rooms, practice, and competitive facilities;
- 13. medical and training facilities and services;
- 14. publicity; and
- 15. recruitment.

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 prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. Title IX also prohibits retaliation. As a recipient of Federal financial assistance from the Department, the University is subject to Title IX and its implementing regulations. Additional information about the laws OCR enforces is available on our website at <a href="http://www.ed.gov/ocr">http://www.ed.gov/ocr</a>.

In reaching a determination, OCR reviewed documents and information provided by the Complainant, XXXXXX, and the University. OCR also interviewed XXXXXX and other University staff.

The University requested to voluntarily resolve Allegations 1 and 6-15 and, on April 26, 2023, entered into a Voluntary Resolution Agreement with OCR to resolve these allegations. OCR has determined that there is insufficient evidence to support a finding of retaliation with regard to Allegations 2-5. An explanation of our findings is below.

#### **Background Information**

# **ALLEGATIONS 1, 6-15: VOLUNTARY RESOLUTION AGREEMENT**

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#### Legal Standard

The Title IX regulation, at 34 C.F.R. § 106.8(c), requires recipients to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints of Title IX violations other than formal complaints of sexual harassment. A recipient

must provide notice to required persons of the recipient's grievance procedures, including how to report or file a complaint of sex discrimination and how the recipient will respond. OCR evaluates on a case-by-case basis whether the resolution of such a complaint is prompt and equitable. Whether OCR considers an investigation to be prompt as required by Title IX will vary depending on the complexity of the investigation and the severity and extent of the alleged conduct.

# Facts

# Title IX Policy

The University stated that its *Policy and Procedures on Sexual Harassment, Other Forms of Sexual Misconduct and Gender-Based Discrimination* (the Policy) applies to the XXXXX Title IX complaint to OIE. OCR reviewed the Policy and notes that it describes prohibited conduct that meets the definition of harassment, rather than general discrimination or different treatment on the basis of sex. Moreover, the definitions in the Policy all pertain to complaints of sexual harassment filed against a specific individual (the Respondent).

The Policy states that University seeks to resolve formal complaints within 120 days. The timeframe may be extended for good cause, such as the absence of a witness or to ensure the integrity and thoroughness of the investigation. The Policy also provides for written notice of the extension of the 120-day timeframe to both Parties with the reason(s) for the delay.

### XXXXXXXXXXXXXXX

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### <u>Analysis</u>

Based on OCR's review, the Policy does not appear to apply to complaints of different treatment on the basis of sex. The title of the Policy states that it applies to "Sexual Harassment, Other Forms of Sexual Misconduct and Gender-Based Discrimination" but the Policy itself defines gender-based discrimination as <u>conduct</u> based on sex. The Policy addresses the steps the University should take to address complaints of "Prohibited Conduct" and assumes that the complaint is against a particular person, or Respondent. Here, the XXXXXXX complaint involved different treatment on the basis of sex, not conduct by a particular person.

Further, even if OCR were to find that the Policy applies to the XXXXXX complaint, OCR has concerns about how the University applied the Policy to the XXXXX complaint. According to the University's own statement to OCR, it did not finish its investigation, nor did it provide any kind of written outcome of the results of its investigation to XXXXX, as required by the Policy. The Policy also required that the resolution of the XXXXX formal complaint be completed within 120 days; however, at the time XXXXX filed this complaint with OCR in XXXXXXXX, her formal complaint with the University had been unresolved for over a year. While the Policy provides for an extension of time to investigate the complaint, none of the documentation submitted by the University addressed this delay or the reason for it.

# Allegations 6-15: Systemic Title IX Athletics Allegations

The Complainant alleged the University discriminates against females on the basis of sex, because it fails to provide equal opportunities to female athletes in its intercollegiate athletic program in various areas.

# 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 University.

The regulation implementing Title IX at 34 C.F.R. § 106.41(c), states that a recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, OCR considers factors such as: whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; the provision of equipment and supplies; the scheduling of games and practice times; travel and per diem allowance; the availability, assignment, and compensation of tutors; the assignment and compensation of coaches; the provision of locker rooms, practice and competitive facilities; the provision of medical and training facilities and services; the provision of publicity; and, the provision of recruitment. The Title IX Athletics Policy Interpretation, issued December 11, 1979, states that the Department will assess compliance by comparing the availability, quality and kinds of benefits, opportunities, and treatment afforded members of both sexes. Institutions will be in compliance if the compared program components are equivalent; that is, equal or equal in effect. Under this standard, identical benefits, opportunities, or treatment are not required, provided the overall effects of any differences is negligible. If comparisons of program components reveal that treatment, benefits, or opportunities are not equivalent in kind, quality or availability, then a finding of compliance may still be justified if the differences are the result of nondiscriminatory factors.

### **Relevant Facts**

The University's athletic teams compete in Division 1 of the National Collegiate Athletic Association, known as the NCAA. OCR's investigation established that the University offers the following sports: men's and women's basketball, men's and women's cross country, men's and women's golf, men's and women's indoor track, men's baseball, women's softball, women's bowling, and women's volleyball.

*Allegation 6*: Whether the University effectively accommodates the interests and abilities of members of both sexes. The Complainant alleges that for the 2019-2020 school year, there is a participation gap of 32 females which is more than enough for a viable team. OCR calculated the University's accommodation of the interests and abilities of females for the 2019-2020 and 2021-2022 school years and found that females were underrepresented and that, for both years, the participation gap was large enough to sustain a viable team.

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*Allegation 9*: Travel and per diem allowance. The Complainant alleges that, for the 2021-2022 season, the men's basketball team took chartered planes as transportation to away games and the women's basketball team took a bus.

# Analysis

Based on the information provided to OCR thus far, OCR has identified concerns that the University may not be providing equal athletic opportunity for members of both sexes in each of the areas alleged above.

# **Resolution Agreement**

Consistent with OCR's procedures, the University requested to resolve Allegations 1 and 6-15 through a Voluntary Resolution Agreement (Agreement) and OCR determined that such a resolution was appropriate. The University signed the enclosed agreement on April 26, 2023, which, when fully implemented, will address the evidence obtained and concerns noted by OCR regarding Allegations 1 and 6-15. The Agreement requires the University to revise its policy for addressing complaints of discrimination on the basis of sex, train certain personnel on the new policy, and investigate XXXXX complaint XXXXXXX pursuant to the new policy. With

respect to the athletic interests and abilities of its students, the Agreement requires the University to provide athletic participation opportunities that are either substantially proportionate to each sex's enrollment in its programs or demonstrate that the interests and abilities of female students are fully and effectively accommodated by the University's current athletic programs. Finally, the Agreement requires the University to provide male and female student athletes equal athletic opportunities for each of the remaining systemic Title IX allegations. Once the Agreement is fully implemented, the University will be in compliance with Title IX with respect to the issues addressed in this letter. OCR will monitor the University until it determines that the University has fully and effectively implemented the terms and obligations of the Resolution Agreement.

# ALLEGATIONS 2-5: INSUFFICIENT EVIDENCE OF A VIOLATION OF TITLE IX

### Legal Standards

The Title IX regulation, at 34 the C.F.R. § 106.71, which incorporates the procedural provisions of the regulation implementing Title VI of the Civil Rights Act of 1964, prohibits retaliation against any individual who asserts rights or privileges under Title IX or who files a complaint, testifies, assists, or participates in a proceeding under Title IX.

In analyzing an individual's claim of retaliation against a recipient, OCR analyzes whether: (1) the individual experienced an adverse action caused by the recipient; (2) the recipient knew that the individual engaged in a protected activity; and (3) there is some evidence of a causal connection between the adverse action and the protected activity. In determining whether an action taken by a recipient is adverse, OCR considers whether the alleged adverse action caused lasting and tangible harm, or had a deterrent effect. Merely unpleasant or transient incidents usually are not considered adverse. If all these elements are present, this establishes an initial, or *prima facie*, case of retaliation. OCR then determines whether the recipient has identified a legitimate, non-retaliatory reason for taking the adverse action or whether the reason is a pretext for retaliation.

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Net for the softball scoreboard

#### XXXXX

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# <u>XXXXX</u>

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# XXXXX

### **CONCLUSION**

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 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 at sarah.haake@ed.gov; 215-656-6416.

Sincerely, /s/ Catherine C. Deneke Supervisory Attorney Philadelphia Office

Attachment Cc: Kristin H. McFarlane, Counsel for the University (via email only)