

February 11, 2016

Ms. Janna Stevens
District Administrator
School District of Superior
Administrative Offices
3025 Tower Avenue
Superior, Wisconsin 54880

Re: OCR Docket #05-15-1327

Dear Ms. Stevens:

This is to advise you of the resolution of the above-referenced complaint filed against the School District of Superior (District) with the U.S. Department of Education (Department), Office for Civil Rights (OCR).

Specifically, the complaint alleged that the District subjects female athletes to discrimination on the basis of sex in the District's high school interscholastic athletics program by failing to provide boys and girls with equal athletic opportunities in its locker rooms and practice and competitive facilities.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 - 1688, and its implementing regulation, 34 C.F.R. Part 106. Title IX 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.

Legal Standard

The Title IX implementing regulation, at 34 C.F.R. § 106.41(a) states, in relevant part, "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 ... athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." A recipient must provide boys and girls with equivalent treatment in the provision of benefits and opportunities in various component areas including at 34 C.F.R. §106.41(c)(7), in the provision of locker rooms and practice and competitive facilities.

To assess whether a recipient is providing equal athletic opportunities to members of both sexes, OCR uses the Department’s “Intercollegiate Athletics Policy Interpretation,” issued December 11, 1979, and found at 44 Fed. Reg. 71,413 *et seq.* (Policy Interpretation), which is generally applicable to interscholastic athletics.

With respect to the District’s alleged failure to provide equal athletic opportunity for members of both sexes in the provision of locker rooms and practice and competitive facilities, the Complainant asserted that the softball field is of poor quality compared with the baseball field. In particular, the Complainant cited deficiencies in dugouts, fencing, storage areas, and seating and a lack of batting cages, nearby restrooms and locker rooms, and concessions. In examining these concerns, OCR considers on an overall basis whether an actual denial of a benefit, service or opportunity exists, and if the identified disparities consistently adversely affect one gender more than the other.

Thus, in considering the provision of locker rooms and practice and competitive facilities, OCR conducts an overall review of the boys’ and girls’ teams at the high school. If disparities are identified between the girls’ and the boys’ teams, *e.g.*, if a boys’ team receives a superior benefit in some way, OCR considers whether the benefit provided to the boys’ program is offset by an unmatched benefit to any of the teams in the girls’ program. In making this comparison, and before OCR concludes that a benefit to one of the teams in the girls’ program offsets a benefit provided to one of the teams in the boys’ program, OCR considers whether the offsetting benefits are equivalent or equal in effect. OCR only finds the benefit offsetting if it has the same or a similar effect on the student-athlete(s) or team in the area of locker rooms and practice and competitive facilities.

If OCR identifies disparities and finds no evidence of offsetting, OCR then considers whether the differences between the benefits provided to the boys’ and girls’ programs are negligible. If the disparities are not negligible, OCR examines whether they are the result of legitimate, nondiscriminatory factors. If OCR finds no legitimate, nondiscriminatory reasons for the disparities, OCR then determines whether the identified disparities result in the denial of equal opportunity to male or female athletes, either because the disparities collectively are of a substantial and unjustified nature or because the disparities in the locker rooms and practice and competitive facilities are substantial enough by themselves to deny equal athletic opportunity. The result of this comparison is not to ensure identical benefits, opportunities, or treatment, but rather, to ensure that, overall, the athletics program provides equivalent benefits to boys and girls in the provision of locker rooms and practice and competitive facilities.

Background Information

In 2015-16, the District’s Superior High School (the School) enrolls 666 male students and 662 female students in grades nine through twelve. The School is a member of the Wisconsin Interscholastic Athletic Association (WIAA).

In 2015-2016, the School offers the following sports for boys and girls:

**2015-16 interscholastic sports offered at the high school
and number of male and female participants**

Sport	# of female participants	# of male participants
Baseball	0	33
Basketball	36	33
Cross Country	31	21
Football	14	126
Golf	12	19
Gymnastics	8	0
Hockey	20	37
Soccer	46	37
Softball	23	0
Swimming	29	14
Tennis	22	19
Track	34	42
Volleyball	42	0
Wrestling	2	23
TOTAL	319	404

Some of the sports have multiple teams, such as varsity and junior varsity.

In 2015-16, girls compose 49.85% of the students at the School and 44.12% of the athletes.

Facts

Under the Policy Interpretation, OCR assesses six factors in determining whether the District provides equal opportunities to males and females in the provision of locker rooms and practice and competitive facilities: (1) the quality and availability of the facilities provided for practice and competitive events; (2) the exclusivity of use of facilities provided for practice and competitive events; (3) the availability of locker rooms; (4) the quality of locker rooms; (5) the maintenance of practice and competitive facilities; and (6) the preparation of facilities for practice and competitive events.

Locker Rooms at School Facilities

There are four locker rooms at the School: varsity boys' and girls' locker rooms and physical education (PE) boys' and girls' locker rooms. All four locker rooms are located across the hall from the School Gymnasium.

All female athletes share the girls' varsity locker room each season. The football players have exclusive use of the varsity boys' locker room in the fall, while the boys' cross country and soccer players share the boys' PE locker room in the fall. All male athletes share the boys' varsity

locker room in the winter and spring seasons. Visiting boys' and girls' teams in need of locker rooms use the PE locker rooms.

The girls' varsity locker room has 414 lockers, 404 of which are 35 inches tall and 22 inches wide and 10 of which are 70 inches tall and 9 inches wide. The boys' varsity locker room has 163 lockers, 102 of which are 70 inches tall and 9 inches wide and 62 of which are 70 inches tall and 15.5 inches wide. The District told OCR that the boys' varsity locker room has wider lockers to accommodate football equipment.¹ The boys' PE locker room has 643 lockers, 600 of which are 22.5 inches tall and 9 inches wide and 43 of which are 70 inches tall and 9 inches wide. All the locker rooms have showers, toilet stalls, a multi-use sink, and a water fountain. The boys' locker rooms also have urinals. There are no offices in the locker room areas.

Male and female athletes alike said there are a sufficient number of lockers to accommodate all athletes in each season. The male and female athletes who use the varsity locker rooms and their coaches expressed no concerns about the quality of or access to the varsity locker rooms. Some male cross country and soccer players who share the boys' PE locker room in the fall said that the locker room is in poor condition. In particular, they expressed concern about broken and rusty lockers.

OCR observed the locker rooms and found that the varsity lockers rooms are of similar quality, although the girls' varsity locker room is newer, more spacious, and cleaner.² The boys' PE locker room has a significant number (around 200) of broken and rusty lockers, although there are a sufficient number of functional, non-rusty lockers to accommodate the athletes who use this locker room. The cross country and soccer teams include 14% of all male athletes.

Locker Rooms at Other Facilities

The gymnastics team has exclusive use of a locker room at Twin Ports Gymnastics Center for the season. The girls' hockey team has exclusive use of a locker room at Superior Ice Arena (SIA) for the season. The boys' hockey team has use of a locker room at Wessman Arena (Wessman) for the season; however, at times, male athletes have to empty their locker room for other events being held at Wessman. All the locker rooms have hooks and/or cubbies, showers, toilet stalls, and sinks. Visiting teams have the use of another locker room at each of these facilities.

The athletes who use the locker rooms at SIA and Wessman said there are a sufficient number of lockers to accommodate all athletes. The athletes and their coaches expressed no concerns about the quality of or access to these locker rooms.

OCR observed these off-campus locker rooms and found that they are of similar size and quality, with similar amenities.

¹A female football player told OCR that she uses two lockers in the girls' varsity locker room to accommodate her equipment.

² The girls' varsity locker room was built in 1994. The other three locker rooms were built in 1965.

Practice and Competitive Facilities

The School's cross country teams use various locations, such as city streets, for practices and they compete at the Nemadji Golf Course. Testimony from athletes revealed no concern about the quality, maintenance, or preparation of facilities used by the boys' and girls' cross country teams for practices and competitions.

Both boys' and girls' golf teams practice and compete at the Nemadji Golf Course, an 18-hole course. Testimony from athletes revealed no concerns about the quality, maintenance, preparation or availability of the course, although the boys' golf athletes characterized the greens on the course as only adequate.

The School has one main gymnasium used by interscholastic teams. The volleyball, boys' and girls' basketball, wrestling and, during inclement weather, baseball, softball, soccer, and track teams all use the gym. The volleyball team has exclusive use of the gym during the fall season. During winter, boys' and girls' basketball teams share use of the gym, practicing at varying rotated times based on a schedule set up by the coaches, and the wrestling team uses the gym for home meets, but uses the multi-purpose room for practices. Testimony from athletes revealed no concerns that would suggest one gender was affected more than the other by the rotated times for basketball practices.

OCR's on-site investigation revealed that the gymnasium is suitable for the sports and of good quality. Male and female athletes stated no concerns about the gym for practices and competitions. Both the boys' and girls' basketball coaches commented that the gym needs more space and additional courts. There were no other objections to the quality of the gym and no concerns noted about the maintenance and preparation of the gym.

In addition, boys' and girls' junior varsity (JV) and freshman basketball teams use the Middle School gym for practices and competitions, approximately the same number of times for both teams. The coaches and athletes voiced no concerns about the quality of the Middle School gym and or the maintenance and preparation of this gym.

There are four outdoor tennis courts at the School used by the boys' and girls' tennis teams, which compete during different seasons. These courts do not have seating. There are also windscreens for the tennis courts and a ball machine. Testimony from coaches revealed the courts were resurfaced two years ago. OCR's on-site investigation revealed that these courts are suitable for the sport and of good quality. Testimony from coaches and athletes revealed that the courts are generally in good condition; however, boys' tennis players commented that they need additional courts, and despite the recent resurfacing, some courts have cracks. The athletes and coaches for boys' and girls' teams did not raise concerns about the preparation or maintenance of the courts.

In addition, the boys' and girls' JV tennis teams use the Middle School tennis courts for practices and competitions, approximately the same number of times for both teams. The coaches and

athletes voiced no concerns about the quality of the tennis courts or the maintenance and preparation of the courts.

The District's Sports Complex (the Complex), built in 2014, is an outdoor facility located behind the School; the Complex has an artificial turf football/soccer field surrounded by a track and other track and field facilities and an artificial turf baseball field. The Complex has bleachers, concessions, a press box, restrooms, storage, a flag pole, artificial turf, lighting, a ticket booth, a public address system, and an electronic scoreboard. The football/soccer field and surrounding area at the Complex are used by the football team and the boys' and girls' track and soccer teams for practices and competitions. OCR observed during the visit that the Complex facilities appeared to be of excellent quality. The athletes and coaches did not raise concerns about the preparation or maintenance of the Complex facilities.

Testimony from the School's football team revealed no concerns that the football field was unavailable for competitions when needed. Football practices are also held at the baseball field, three grass soccer fields located across the street from the School, and the gymnasium. As stated above, OCR observed during its on-site investigation that the football field is of excellent quality; OCR also observed that the practice fields are of adequate quality. The athletes and coach did not raise any concerns about the preparation and maintenance of the football field or the practice fields.

The School's soccer teams use the soccer field at the Complex and the three dirt soccer fields located across the street from the School. Both boys' and girls' soccer competitions are held at both locations, as are practices; practices are also held in the gymnasium. There was no difference on the basis of sex in the location of practices and competitions for the boys' and girls' soccer teams. Testimony from athletes revealed no concerns that these fields were ever unavailable when they were needed. OCR observed during its on-site investigation that the soccer fields across the street are of adequate quality. The soccer fields lack bleachers, but have concessions, a portable public address system, a portable scoreboard, and portable restrooms. The boys' soccer coach commented that it would be more convenient to have running water available at the field; he said they bring over a cooler.

A track used by both the boys' and girls' track teams circles the football/soccer field at the Complex. The jumping and throwing areas are located in the stadium area. The athletes and coaches said the track is of excellent quality. The boys' track coach said it is one of the best in the area. The athletes and coaches did not raise concerns about the preparation or maintenance of the track.

The District has two regulation softball fields at the Middle School located about 1.5 miles from the School, which are used exclusively by the softball teams for practices and competitions. The School does not provide transportation to practices and home competitions for the players; the girls' softball players informed OCR that they drive themselves to practice or ride with teammates. The softball fields have bleachers, a public address system, concessions, an electronic scoreboard, portable restrooms, storage, a flag pole, chain link fence dugouts, a batting cage, a bullpen, and hitting stations. There are no lights at the fields.

OCR's on-site investigation observation revealed that the softball fields are in poor condition. The softball players told OCR that the outfield grass is not always mowed, has holes, and pools water after it rains and that they often roll their ankles and step in puddles. They also said the infield is not maintained properly or regularly dragged, so there are often a lot of rocks making it difficult to run, field balls, and slide into bases, and that they cannot practice or compete after dark because the field does not have lights. The former softball coach said fencing is inadequate because it does not extend all the way alongside the field, that grass along the infield and outfield fences is not properly maintained, that the field does not drain well, and that tarps must be put up to block wind from coming into the dugout. The School's athletic director (AD) told OCR the drainage problems are a result of where on the middle school grounds the fields are placed and they have attempted to make improvements with the drainage but he would like to continue to make improvements to the field; he also said that because of the proximity of the field to the airport the District is not permitted to put up lighting. The softball players and coach did not identify the lack of dugouts or a bullpen as problematic; however, the players said they would like to have a second batting cage at the field and would like better amenities.

The School's baseball team uses the artificial turf baseball field at the Complex for practices and games. The baseball field is an excellent facility. The baseball field has bleachers, a public address system, concessions, an electronic scoreboard, a press box, restrooms, storage, a flag pole, brick dugouts, bullpens, two batting cages, artificial turf, and lights. The AD told OCR that the baseball field can be converted to a softball field if inclement weather does not permit the girls' softball team to play at the Middle School. The former softball coach told OCR that the baseball field, when converted to a softball field, is not ideal for softball because the temporary backstop is not high or wide enough, the fence from the foul line is not the correct distance, and the field is not regulation for a WIAA playoff game. Testimony from the softball team was split; some athletes said they would not want to practice or compete at the baseball field for the same concerns raised by the former coach, while other athletes said they want to practice and have games there during the season. The baseball coach and players expressed no concerns with the quality, maintenance, and preparation of the facility.

The District also has one baseball field at the City Field location, which is located one mile from the School and used exclusively by the JV baseball team for competitions; the JV team practices at the varsity baseball field. The City Field has bleachers, a public address system, concessions, an electronic scoreboard, restrooms, storage, a flag pole, chain link fence dugouts, a bullpen, a batting cage, and lights. The School does not provide transportation to home competitions for the players; the boys' baseball players informed OCR that they drive themselves or ride with teammates. OCR's on-site investigation observation revealed that the field is in adequate condition. The coach and players expressed no concerns with the quality, maintenance, and preparation of the facility.

The School has an eight-lane swimming pool with a separate diving well. Both boys' and girls' swimming teams, which have different sports seasons, use this pool for practices and competitions. OCR's on-site investigation observation revealed that this pool is suitable for the sport and of excellent quality. The pool has bleachers, a public address system, an electronic

scoreboard, and restrooms, but does not have concessions. Testimony by male and female athletes revealed no concerns with the quality, maintenance, or preparation of the facility.

Wessman, located off school grounds, opened in 1970. Wessman is the home practice and competition arena for the University of Wisconsin at Superior's men's and women's ice hockey teams, and is used as a competition and practice facility by the boys' ice hockey team and also hosts other events such as youth programs. SIA, located off school grounds, opened in 1989, and is primarily used by the girls' ice hockey team for practices and competition.

OCR's tour of the hockey arenas confirmed that each is a high quality athletic facility that includes similar features, as both have bleachers, a public address system, concessions, an electronic scoreboard, restrooms, and a practice shooting station; however, the scoreboard at Wessman is above the ice and is larger than the scoreboard at SIA that is mounted on the arena wall. Testimony from the girls' ice hockey coach and female athletes revealed that girls favored the smaller, more intimate environment offered at SIA, which they believed was more consistent with the level of attendance and fan interest enjoyed by the girls' ice hockey team, as well as the larger Olympic-sized arena as opposed to the NHL regulation sized arena at Wessman. Female hockey athletes informed OCR that the quality of the ice and the temperature at SIA was superior to Wessman, as the ice remained colder and therefore in better condition for hockey. The players acknowledged that SIA was not as modern, or as large of a facility as Wessman. Testimony by male and female athletes revealed no concerns with the quality, maintenance, or preparation of the hockey facilities.

The School's gymnastics team uses the Twin Ports Gymnastics Center, which is located less than one mile from the School, for practices and competitions. OCR's on-site investigation observation revealed that this facility is suitable for the sport and of adequate quality. Testimony by athletes revealed no concerns with the quality, maintenance, or preparation of the facility.

Analysis and Conclusions

With regard to the availability of locker rooms, all teams except for two boys' teams (cross country and soccer) are provided access to varsity locker rooms, while the boys' cross country and soccer teams share the boys' PE locker room because the District chooses to provide its football team with exclusive access to a locker room. The gymnastics and hockey teams have access to locker rooms at the outside facilities, although the boys' ice hockey team sometimes has to remove their equipment from lockers to accommodate other patrons at the ice arena. The testimony of male and female athletes revealed that there are a sufficient number of lockers to accommodate all athletes in each season at the School and at outside facilities, and the coaches and athletes did not express concerns about access to the locker rooms.

As to the quality of locker rooms, OCR's on-site investigation inspection and testimony of coaches and athletes confirmed that varsity locker rooms provided to boys and girls were of similar quality, although the girls' varsity locker room is newer; in addition, the boys' PE locker room has a significant number of broken and rusty lockers, although the majority of lockers in this locker room are functional. Some male cross country and soccer players said the PE locker

room is in poor condition; the two teams required to use the PE locker rooms are 14% of all male athletes, while the football team, which has exclusive use of the varsity locker room in the fall, is 31% of all male athletes. While the boys' varsity locker room has larger lockers than those provided in the girls' locker rooms, this is because of the nature of the sports, namely the need to store larger football equipment.

With regard to the exclusivity of use of facilities provided for practice and competitive events, many boys' and girls' teams alike are required to share facilities with one another or in the case of off-site facilities, with community members. There are three boys' teams (baseball, swimming, and tennis), which collectively compose 16% of all male athletes, and three girls' teams (softball, swimming and tennis), which collectively compose 18% of all female athletes, that are provided exclusive use of their facilities during their competitive seasons.

With regard to the availability of the facilities provided for practice and competitive events, the basketball teams have developed schedules to ensure that the gymnasium is equally available for boys and girls when it is needed. Athletes did not express any concerns about the availability of their facilities for practices and competitions, and there was no indication that athletes of one gender had greater access than the other.

The evidence revealed that, with the exception of the concerns noted by the softball players about the maintenance of the softball infield and outfield, coaches and athletes generally had no complaints about the maintenance and preparation of practice and competitive facilities.

With regard to the quality of boys' and girls' facilities provided for practice and competitive events, OCR's investigation revealed that the field used by the softball team is inferior to the field used by the baseball team, in that the field is off-campus, the outfield has drainage problems and holes, the infield has rocks, and the field lacks proper fencing. In addition, the baseball field has numerous modern amenities not similar to the softball field, as well as lighting and non-portable restrooms, which are not available at the softball field. While the AD indicated that the baseball field can be converted for use by the softball team, this is only done during inclement weather. The softball team composes 6% of all female athletes.

OCR found that the other teams had facilities that were of at least adequate quality, and four boys' and four girls' teams played in facilities that were of excellent quality. A total of 54% of male athletes and 39% of female athletes have access to excellent quality facilities.

OCR did not identify any disparities on the basis of sex in the availability and exclusivity of use of the District's practice and competitive facilities, the availability of locker rooms, or the maintenance and preparation of the practice and competitive facilities. However, OCR identified significant disparities in the quality of the practice and competitive facilities provided to baseball and softball players in the District, which adversely affect female athletes. The District did not identify any factors to suggest that the disparities identified were negligible or justified. In addition, at the hockey facilities, the boys have a larger, more modern arena with a superior scoreboard. The facts that some male athletes in the fall season have to use an inferior locker room, that boys' hockey players have to vacate their lockers on occasion, and that the ice at the

girls' hockey facility is superior to that at the boys' hockey facility do not offset the disparities that favor boys, particularly the extensive differences between the baseball and softball fields. The disparity between the facilities provided for baseball and softball negatively affects 6% of the District's female athletes.

Based on the above, OCR confirmed the Complainant's assertion that the softball field is of poor quality compared with the baseball field. OCR observed deficiencies in the softball fields as to drainage, dugouts, fencing, storage areas, batting cages, nearby restrooms and locker rooms, and concessions. OCR found no evidence that the benefit offered to boys is offset by a benefit provided to any of the girls' teams and the differences between the benefits provided to the boys' and girls' programs in the provision of locker rooms and practice and competitive facilities are not negligible or the result of legitimate, nondiscriminatory factors. Accordingly, the disparities are sufficiently substantial to deny female students an equal opportunity in the area of locker rooms and practice and competitive facilities, in violation of 34 C.F.R. §106.41(c)(7). Therefore, OCR determined that the District is not in compliance with the Title IX regulation at 34 C.F.R. §106.41(c)(7).

Subsequent discussions with District officials resulted in the District signing the enclosed agreement (Agreement), which, when fully implemented, will fully resolve the issues covered in the complaint. The provisions of the Agreement are aligned with those issues and the information obtained during OCR's investigation and are consistent with the applicable regulations. OCR will monitor the implementation of the Agreement.

This concludes OCR's investigation of the complaint and should not be interpreted to address 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.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the Complainant may file another complaint alleging such treatment.

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

The Complainant may file a private suit in federal court, whether or not OCR finds a violation.

OCR wishes to thank you, Mr. Ray Kosey, District Director of Activities & Community Events, and Mr. Kyle H. Torvinen, Counsel, for the cooperation extended to OCR during the course of

this investigation. If you or any of your staff members have any questions regarding this matter, please do not hesitate to contact Salina Gamboa of my staff at 312-730-1627 or by e-mail at Salina.Gamboa@ed.gov.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Mr. Kyle H. Torvinen