



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS
230 SOUTH DEARBORN ST, 37th FLOOR
CHICAGO, IL 60604

REGION V

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May 27, 2020

Dr. Ryan McTague
Superintendent
McHenry Community High School District 156
Sent via email only to nbb@franczek.com on District's behalf

RE: OCR # 05-15-1344

Dear Dr. McTague:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) completed its investigation of one of the allegations in the complaint filed against the McHenry Community High School District 156 (District) alleging discrimination on the basis of sex. Specifically, the Complainant alleged:

1. The District discriminates against females in the District's interscholastic athletics program by failing to provide equal athletic opportunities to males and females in the accommodation of interests and abilities;
2. The District failed to promptly and equitably respond to XXXXXXXX; and
3. The District failed to ensure that Student A had access to a XXXXXX during an away water polo game during the 2015 season, but did provide its male athletes with access to a XXXXXXXX.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 et. seq., 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 from the Department. As a recipient of Federal financial assistance, the District is subject to the provisions of Title IX. Accordingly, OCR has jurisdiction over this complaint.

OCR determined that Allegation #1 is appropriate to resolve under Section 302 of OCR's *Case Processing Manual*, and on May 18, 2020, the District signed the enclosed Agreement.¹

Legal Standard

The provision of equal athletic opportunities in athletics programs is specifically addressed by the Title IX implementing regulation at 34 C.F.R. § 106.41(c)(1), which states that in determining whether equal opportunities are provided, OCR considers whether the selection of sports effectively accommodates the interests and abilities of members of both sexes to the extent necessary to provide equal opportunity.

¹ OCR continues to investigate Allegations 2 and 3 of the complaint.

In assessing whether the interests and abilities of the members of both sexes are being effectively accommodated with respect to the opportunity to participate in interscholastic athletics, OCR uses the three-part test first established in the Department's "Intercollegiate Athletics Policy Interpretation," issued December 11, 1979, and found at 44 Fed. Reg. 71413 *et seq.* (Policy Interpretation).

OCR also considers the principles set forth in the "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" of January 16, 1996 (the Clarification)², and the April 20, 2010, Dear Colleague Letter, entitled "Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three."³ The principles of the Policy Interpretation, the Clarification and the Dear Colleague Letter are generally applicable to interscholastic athletics.

Specifically, OCR applies the following criteria:

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 institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex; or
3. Where the members of one sex are underrepresented among interscholastic athletes, and the institution cannot show a continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of that sex, 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.

This three-part test offers three separate ways for a District to establish that it is providing equal opportunities to participate in athletics for its male and female students. Each of the three parts of the test is equally sufficient and a separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities.

Facts and Analysis

The District is located in McHenry, Illinois and has two high schools, East Campus High School and West Campus High School. The District is a member of the Fox Valley Conference. The District has 13 boys athletic teams (boys cross country, football, boys golf, boys soccer, boys basketball, boys bowling, boys swimming, wrestling, boys lacrosse, baseball, boys tennis, boys track and water polo) and 12 girls athletic teams (girls cross country, girls golf, girls swimming,

² <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>

³ <http://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-20100420.html>

girls tennis, volleyball, girls basketball, girls bowling, girls lacrosse, girls badminton, girls soccer, softball and girls track).

The Complainant asserts that the District discriminates against female high school students by not providing them the opportunity to play girls water polo. Instead, females play on the boys water polo team. The Complainant alleged there is significant interest from District females to form a separate girls water polo team. OCR applied the three-part test to evaluate this allegation.

Part One: Whether interscholastic-level participation opportunities for male and female students are substantially proportionate to their respective enrollments.

During the 2018-19 academic year, the District had 2103 total students with 1062 male and 1041 female students. OCR compared the athletic participation rates of girls to their overall enrollment rate in the District's high schools. OCR found that females comprised 50% (1041) of the District's enrolled high school students and 38% (338) of the District's interscholastic participation slots. This twelve percentage-point disparity represents approximately 206 interscholastic athletic participation opportunities for girls. While Title IX does not require exact proportionality, such a large number cannot be explained by natural fluctuations in enrollment and is sufficient to sustain a viable team. Therefore, OCR has concluded that the District has not satisfied part one.

Part Two: Whether the institution has a history and continuing practice of program expansion for the underrepresented sex.

In assessing whether a district has a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex, OCR focuses on three factors: (1) a district's record of adding interscholastic teams, or upgrading teams to interscholastic status, for the underrepresented sex; (2) a district's record of increasing the numbers of participants in interscholastic athletics who are members of the underrepresented sex; and (3) a district's affirmative response to requests by students or others for addition or elevation of sports.

In assessing whether a district has a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex, OCR focuses on the following two factors: (1) 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 (2) an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.

In the District, females represent 50% of overall enrollment and 38% of athletic participants, while males represent 50% of overall enrollment and 62% of athletic participants. Consequently, females are the underrepresented sex in terms of athletic participants.

District Policy 5.4, "Establishment of a Co-Curricular Club," describes the process of establishing a co-curricular club activity in the District. Interested students or staff submit a request to the assistant principal in charge of activities and the request goes to the District's Board of Education for decision. If approved, the first year of the sport is a club team. After the first year, the District could elevate the team from a club level to an interscholastic sport.

The District asserts that its current plan of program expansion that is responsive to developing interests and abilities is the sports interests survey it sends out to all students. The AD reviews the results and may take additional steps as warranted.

The AD reported that in the last ten years, the District added girls bowling, girls golf and girls lacrosse as interscholastic sports. The District has no other current club sports that could be elevated. The District indicated that it has not rejected any requests for addition of new girls' interscholastic sports.

The creation of three new sports for girls in the last ten years, and the absence of any District plans, other than issuing a survey, for the addition of sports or levels of sports for girls in the future, leads OCR to conclude that the District cannot show a history and continuing practice of program expansion for female students. Therefore, the District does not meet part two.

Part Three: *Whether the District is fully and effectively accommodating the interests and abilities of the underrepresented sex.*

OCR examined whether female District students have sufficient unmet interest and ability to sustain an interscholastic team. The Complainant asserted that there are a sufficient number of girls interested in water polo to sustain a varsity team for girls water polo at the District. A water polo team consists of six players, one goalie and 5 players.

The AD reported that within the last ten years, the District added girls bowling, girls golf and girls lacrosse. The District has not received any requests for a girls water polo team. Currently there are no club sports in the District or community. No District sports have been eliminated in the last 10 years.

The District conducts biennial interest surveys to all students regarding participating on sports teams. The District most recently surveyed in the 2017-18 school year. According to the AD, the surveys are sent out by email to all students in May of each surveyed year. The AD reviews the survey results to see if any sport not currently at the District has significant interest such that he should look further into possibly adding it into the District's athletics program. The AD also shares the survey results with the coaches.

The District asserts it does not have enough girls expressing interest in the surveys to form a girls water polo team, and there has only been a maximum of five girls ever on the boys water polo team in any one year. The Complainant asserted that many girls, beyond the girls who participate on the boys water polo team, do not want to get in the water with boys; however, they would join a girls water polo team if it existed in the District.

Conclusion

OCR determined that this allegation is appropriate to resolve under Section 302 of OCR's *Case Processing Manual*, and the District subsequently signed the enclosed Agreement. OCR will monitor the implementation of the Agreement.

This concludes OCR's investigation of Allegation #1 of the complaint and should not be interpreted to address the District's compliance with any other statutory provision or to address any issues other than those addressed in this letter. OCR is closing the investigation of this allegation as of the date of 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 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, 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.

We wish to thank you and your staff for the cooperation the District extended to OCR in its investigation of this allegation. If you have any questions about this letter, please contact Leticia Soto, Senior Attorney, at leticia.soto@ed.gov or at 312-730-1740.

Sincerely,

Jeffrey Turnbull
Team Leader

Enclosure

cc: Nicki Bazer, Attorney for the District