



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

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February 28, 2022

Ms. Jennifer Smith
Franczek P.C.
300 South Wacker Drive, Suite 3400
Chicago, IL 60606

Sent via email only to: jas@franczek.com

OCR Case No. 05-21-2297

Dear Ms. Smith:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its complaint resolution activities regarding the above-referenced case filed with OCR against Western Illinois University (University), alleging discrimination based on sex in the University's intercollegiate athletic program. Specifically, OCR investigated whether the University discriminates against female students based on sex because it fails to provide equal athletic opportunity in its intercollegiate program in the following components:

1. Effectively accommodating the interests and abilities of female students;
2. Opportunity to receive coaching and assignment and compensation of coaches; and
3. Recruitment of student athletes.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681-1688, and its implementing regulation at 34 C.F.R. Part 106, which prohibits discrimination on the basis of sex in any educational program or activity operated by a recipient of Federal financial assistance from the Department. As a recipient of Federal financial assistance from the Department, the University is subject to Title IX.

During its investigation, OCR interviewed the Complainant and reviewed documents provided by the Complainant and the University. Prior to the conclusion of OCR's investigation, the University requested to resolve the complaint under Section 302 of OCR's *Case Processing Manual*. OCR determined that a 302 agreement is appropriate in this case. A summary of OCR's investigation to date and the 302 agreement follows.

Legal Standards

The Title IX regulation, at 34 C.F.R. § 106.41(a), states, "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 recipient, and no recipient shall provide any such athletics separately on such basis.” The Title IX regulation, at 34 C.F.R. § 106.41(c), states, “A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.”

- Effectively accommodating interests and abilities

The Title IX implementing regulation, at 34 C.F.R. § 106.41(c)(1), and applicable OCR policies,¹ require a recipient of Federal financial assistance from the Department to provide participation opportunities in its intercollegiate athletic program for male and female students that equally and effectively accommodate the athletic interests and abilities of members of both sexes. OCR uses a three-part test to assess whether the interests and abilities of members of both sexes are being effectively accommodated to the extent necessary to provide an equal opportunity to participate in the intercollegiate athletic program. A recipient may demonstrate compliance with Title IX by demonstrating compliance with any one part of the following Three-Part Test:

1. The recipient is providing intercollegiate athletic participation opportunities for female and male students in numbers substantially proportionate to their respective enrollments; or
2. The recipient has a history and continuing practice of intercollegiate athletic program expansion that is demonstrably responsive to the developing interests and abilities of students who are members of the underrepresented sex; or
3. The interests and abilities of students who are members of the underrepresented sex have been fully and effectively accommodated by the recipient’s current intercollegiate athletic program.

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.

- Program Components

In addition, the Title IX regulations at 34 C.F.R. § 106.41(c)(6) requires a recipient of Federal financial assistance from the Department to provide equal opportunities in the opportunity to receive coaching and assignment and compensation of coaches. Further, consistent with the regulations at 34 C.F.R. § 106.41(c) and the *Intercollegiate Athletics Policy Interpretation* (Policy Interpretation) issued December 11, 1979, found at 44 *Fed. Reg.* 71413 *et. seq.*, a recipient must provide equal athletic opportunity for members of both sexes in the provision of recruitment of student-athletes.²

OCR evaluates compliance by comparing the availability, quality and kinds of benefits, opportunities and treatment afforded members of both sexes. An institution is in compliance if the compared program components are equivalent; that is, equal or equal in effect.

¹ The policies pertaining to the accommodation of athletic interests and abilities include the December 11, 1979, *Intercollegiate Athletics Policy Interpretation* (Policy Interpretation), at 44 *Fed. Reg.* 71413 *et seq.*

² See <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>.

OCR examines each factor relating to the benefits, opportunities or treatment of male and female athletes in the applicable program component, and determines whether the same or similar benefits, opportunities or treatment were provided for all students; or if not, whether the differences had a negative effect on one sex that resulted in a disparity. When OCR identifies disparities between the men's and women's teams (*e.g.*, if a men's team receives a superior benefit in some way), OCR considers whether the benefit provided to a team was offset by an unmatched benefit to any of the teams in the program of the opposite sex. In making this comparison, and before OCR concludes that a benefit to one team offsets a benefit provided to a team of the opposite sex, OCR considers whether the offsetting benefits were 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 within the program component.

If OCR finds no evidence of offsetting of disparities, OCR then considers whether the differences between the benefits provided to the men's and women's programs are negligible. Where the disparities are not negligible, OCR examines whether the disparities are the result of legitimate, nondiscriminatory factors. If OCR finds no legitimate, nondiscriminatory reasons for the disparities, OCR 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 program component 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 athletic program provides equivalent benefits to males and females.

Facts

University's Athletic Program

The University's offers an intercollegiate athletic program that participates in Division I of the National Collegiate Athletic Association (NCAA). The athletic program currently consists of eight men's teams (baseball, men's basketball, men's cross country, football, men's golf, men's soccer, men's indoor track and field, and men's outdoor track and field) and nine women's teams (softball, women's basketball, women's cross country, volleyball, women's golf, women's soccer, women's tennis, women's indoor track and field, and women's outdoor track and field). The University's intercollegiate athletic teams participate in the Summit League Conference, with the exception of the men's football team, who participate in the Missouri Valley Football Conference.

Interests and Abilities

For the 2018-2019 academic year, the University enrolled 2,849 (47.9%) full-time undergraduate male students and 3,100 (52.1%) full-time undergraduate female students. The University identified 306 (61.9%) male participation opportunities and 188 (38.1%) female participation opportunities in its intercollegiate athletic program. This represents a minus 14.0% difference in the participation and enrollment rates for female students. There were 118 more male participation opportunities than female participation opportunities.

For the 2019-2020 academic year, the University enrolled 2,408 (46.7%) full-time undergraduate male students and 2,743 (53.3%) full-time undergraduate female students. The University

identified 260 (60.2%) male participation opportunities and 172 (39.8%) female participation opportunities in its intercollegiate athletic program. This represents a minus 13.5% difference in the participation and enrollment rates for female students. There were 88 more male participation opportunities than female participation opportunities.

For the 2020-2021 academic year, the University enrolled 2,230 (44.6%) full-time undergraduate male students and 2,769 (55.4%) full-time undergraduate female students. The University identified 260 (64.2%) male participation opportunities and 145 (35.8%) female participation opportunities in its intercollegiate athletic program. This represents a minus 19.6% difference in the participation and enrollment rates for female students. There were 115 more male participation opportunities than female participation opportunities.

The University eliminated the following women's teams since 1972: gymnastics (1982), badminton (1983), field hockey (1985), and swimming and diving (2020). The University eliminated women's golf in 1979 and reinstated it in 2001. The University eliminated the following men's teams: hockey (unknown), judo (unknown), water polo (unknown), gymnastics (1978), wrestling (1985), tennis (2016), and swimming and diving (2020).

According to the data response information provided by the University, the University plans to achieve compliance with Title IX by providing athletic participation opportunities for female and male students in numbers substantially proportionate to their respective enrollments through roster management, and if necessary, the addition of women's programs.

Opportunity to Receive Coaching and Assignment and Compensation of Coaches

The Policy Interpretation lists three factors to be assessed in determining whether a recipient provides equal opportunities in the opportunity to receive coaching: (1) relative availability of full-time coaches, (2) relative availability of part-time and assistant coaches, and (3) relative availability of graduate assistants. The Policy Interpretation lists two factors to be assessed in determining compliance for the assignment of coaches: (1) training, experience, and other professional qualifications, and (2) professional standing. The Policy Interpretation lists seven factors to be assessed in determining compliance in the compensation of coaches: (1) rate of compensation (per sport, per season), (2) duration of contracts, (3) conditions relating to contract renewal, (4) experience, (5) nature of coaching duties performed, (6) working conditions, and (7) other terms and conditions of employment.

The University does not have a written policy for determining the number of coaches assigned to a team or coaches' salaries. The University reported basing its decisions about the number of coaching positions on NCAA and league requirement and/or recommendations. The University determines compensation using a variety of evaluative factors, including experience, allocations to similar positions, and league and University data.

The University provided information that each of its intercollegiate athletic programs during 2019-2020³ and 2020-2021 had one head coach, who was employed full time on a twelve-month contract. The following teams shared the same coach for the men's and women's teams, which

³ The women's softball head coach resigned in August 2019, and the Assistant Athletic Director served as the head coach in a part-time position on a temporary contract from November 2019 through May 2020 due to a "failed search." A full-time head coach was in place for the 2020-2021 academic year.

equaled a full-time position: men's and women's golf, men's and women's soccer, and men's and women's swimming and diving. The University employed one head coach for the men's and women's cross country and the men's and women's track and field teams. The University also employed a number of assistant coaches during the 2019-2020 and 2020-2021 academic years, all of which were full-time positions with twelve-month contracts, with the exception of one men's baseball coach who had a ten-month contract in 2019-2020 and did not coach again in 2020-2021. No head coach or assistant coach had "non-coaching" duties, except the men's and women's golf coach who also serves as the director of the golf course. The men's baseball team is the only team that has a volunteer coach.

According to the University's *Report on Athletic Program Participation Rates & Financial Support Data* (Athletic Program Report) for the period from July 2019 through June 2020, the average institutional salary per head coach for men's teams was \$66,570 and the average head coach salary for women's teams was \$43,198, with the annual institutional salary per full-time equivalent being \$99,464 for the head coaches of men's teams and \$60,735 for the head coaches of women's teams. During the 2019-2020 academic year, the University paid in salary \$367,899 for three men's program non-shared head coaches and \$250,486 for four women's program non-shared coaches. The average salary for non-shared head coaches for the men's program was \$122,633 and in the women's program it was \$62,622. The average institutional salary per assistant coach for men's teams was \$30,611 and the average assistant coach salary for women's teams was \$19,134, with the annual institutional salary per FTE being \$38,681 for the assistant coaches of men's teams and \$28,832 for the assistant coaches of women's teams. The total number of FTE assistant coach positions for the men's teams was 17.41 and the total number for women's teams was 8.63. Based on the information in the Athletic Program Report, the ratio of coaches to athletes for the men's program was 1:11.8 and for the women's program was 1:12.

According to the University's Athletic Program Report for the period from July 2020 through June 2021, the average institutional salary per head coach for men's teams was \$86,264 and the average head coach salary for women's teams was \$56,956, with the annual institutional salary per full-time equivalent being \$120,931 for the head coaches of men's teams and \$75,510 for the head coaches of women's teams. During the 2020-2021 academic year, the University paid in salary \$428,844 for three men's program non-shared head coaches and \$309,948 for four women's program non-shared coaches. The average salary for non-shared head coaches for the men's program was \$142,948 and in the women's program it was \$77,487. The average institutional salary per assistant coach for men's teams was \$40,754 and the average assistant coach salary for women's teams was \$26,879, with the annual institutional salary per FTE being \$44,922 for the assistant coaches of men's teams and \$36,101 for the assistant coaches of women's teams. The total number of FTE assistant coach positions for the men's teams was 16.33 and the total number for women's teams was 8.19. Based on the information in the Athletic Program Report, the ratio of coaches to athletes for the men's program was 1:12.6 and for the women's program was 1:10.8.

Recruitment of Student Athletes

The Policy Interpretation lists three factors to be assessed in determining whether a recipient provides equal opportunities in the recruitment of student athletes: (1) whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit, (2) whether the financial and other resources

made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program, and (3) whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

According to the University’s data response, the University primarily recruits within a five-hour radius of the University but recruiting extends nationally and internationally. Recruiting was halted when campus was closed due to the COVID-19 pandemic during the 2020-2021 school year.

In the University’s Athletic Program Reports, the University reported the following actual recruiting expenses:

	2018-2019		2019-2020		2020-2021*	
	Men	Women	Men	Women	Men	Women
Participation opportunities	306 (61.9%)	188 (38.1%)	260 (60.2%)	172 (39.8%)	260 (64.2%)	145 (35.8%)
Recruiting expenses	\$131,222 (87%)	\$19,693 (13%)	\$66,888 (79%)	\$17,917 (21%)	\$9517 (65%)	\$5138 (35%)

*The University noted that the recruiting budget and expenses for 2020-2021 was affected by COVID-19.

Conclusion and Resolution Agreement

Based on the information gathered in OCR’s investigation thus far, OCR has concerns that the University does not effectively accommodate the interests and abilities of members of both sexes in its intercollegiate athletic program and does not provide equal athletic opportunity in the program components of the opportunity to receive coaching and assignment and compensation of coaches and recruitment of student athletes.

Despite not providing participation opportunities substantially proportionate enrollment rates for females, the University suspended and then eliminated the University’s women’s swimming and diving program in 2020. Additionally, the University provided information demonstrating that there remains a large disparity in the average coach’s salary between men’s and women’s sports, with coaches of men’s teams being compensated nearly double more on average than coaches of women’s teams. The University also provides a larger number of coaches to its men’s teams than its women’s teams. Further, OCR has concerns that the disproportionate recruiting budgets for the men’s and women’s teams favors the men’s program participants.

The resolution agreement is tied to the allegations and the evidence obtained during the investigation and is consistent with the applicable regulations. OCR will monitor the implementation of the agreement.

This concludes OCR’s resolution activities regarding the complaint and should not be interpreted to address the University’s compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The 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 University 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 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 privacy.

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

OCR would like to thank the University for the courtesy and cooperation extended to OCR during the investigation. OCR looks forward to working with the University during the monitoring of the Resolution Agreement. If you have any questions about this letter, you may contact Mr. Shawn Peters at (312) 730-1508 or Shawn.Peters@ed.gov.

Sincerely,

Dawn R. Matthias
Team Leader

Enclosure

cc: Dr. Guiyou Huang, President