



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION VI
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TEXAS

November 3, 2016

Re: OCR Docket # 06-15-6001

Dr. Rodney D. Bennett
University of Southern Mississippi
Office of the President
Trent Lott National Center, 3rd floor
118 College Dr., #5001
Hattiesburg, Mississippi 39406

Sent via U.S. Mail and Email

Dear President Bennett:

This letter is to notify you of the disposition of the above-referenced compliance review of University of Southern Mississippi (USM or University) by the U.S. Department of Education (the Department), Office for Civil Rights (OCR) under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, *et seq.*, and its implementing regulation at 34 C.F.R. § 106. The compliance review addressed whether USM is providing opportunities for financial assistance to members of both sexes in proportion to the participation rate of men and women in the intercollegiate athletics program, and whether USM is providing male and female students an equal opportunity to participate in its athletics program by effectively accommodating the athletic interests and abilities of members of both sexes.

OCR is responsible for enforcing Title IX and its implementing regulation, which prohibit 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, USM is subject to Title IX. Accordingly, OCR had jurisdictional authority to conduct this compliance review.

LEGAL STANDARDS

The Title IX implementing regulation, at 34 C.F.R. § 106.41(a) states generally 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,

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intercollegiate, club or intramural athletics offered by a recipient [of Federal financial assistance], and no recipient shall provide any such athletics separately on such basis.” In this review, OCR examined whether USM provides its athletes scholarship opportunities in proportion to the number of students of each sex participating¹ in intercollegiate athletics, i.e. competitive sports.² The provision of athletic scholarships or grants-in-aid is addressed in the Title IX implementing regulation at 34 C.F.R. § 106.37(c), which states that “to the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in [] intercollegiate athletics.”

OCR also examined whether USM provides male and female students an equal opportunity to participate in its intercollegiate athletics program by effectively accommodating their interests and abilities, in accordance with the Title IX implementing regulation at 34 C.F.R. § 106.41(c)(1). The implementing regulation states that in determining whether equal athletic opportunities are provided for males and females, 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.

In addition to language from the regulation, OCR also uses as a mean of assessing compliance guidance provided in the “Intercollegiate Athletics Policy Interpretation,” issued December 11, 1979, (Policy Interpretation); 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 issues that were the focus of this review. Each issue will be addressed in turn.

FACTS

USM is a public, coeducational university located in Hattiesburg, Mississippi. USM is a member of the National Collegiate Athletic Association (NCAA), Division I, Conference USA. The USM athletic program consists of 16 varsity sports: men’s baseball, basketball, football, golf, tennis, indoor track, and outdoor track; and women’s basketball, cross country, golf, softball, soccer, tennis, volleyball, and indoor and outdoor track.

¹As a general rule, OCR counts all student athletes listed on a team’s squad or eligibility list, and who are on the team as of the team’s first competitive event. Under the interests and abilities analysis, a student athlete who participates in more than one sport will be counted separately as a participant in each sport.

²An extracurricular activity not involving competition as its purpose is not considered a competitive sport for purposes of the interests and abilities analysis.

ATHLETIC FINANCIAL ASSISTANCE

Under the Policy Interpretation, compliance with 34 C.F.R. § 106.37(c) is measured by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results to determine whether proportionately equal amounts of financial assistance are available to men's and women's athletic programs. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors. If any unexplained disparity in the scholarship budget for athletes of either sex is one percent or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than one percent is in violation of the Title IX regulation.

OCR completed an analysis of the financial aid amounts awarded for the 2013-2014 and 2014-2015, and 2015-2016 academic school years and unduplicated counts of male and female athletic participation rates to assess proportionality in the awarding of financial assistance.³ OCR determined that for 2013-2014, the male athletes represented 61% of the University's intercollegiate athletes and the female athletes represented 39% of the University's intercollegiate athletes. Information obtained from the recipient revealed that USM distributed a total of \$4,666,319.73 of athletic financial assistance to its male and female athletes, with male athletes receiving \$2,848,203.91 (61%) and female athletes receiving \$1,818,115.82 (39%) for 2013-2014. OCR determined that for 2014-2015 academic year, male and female athletes represented 58.5% and 41.5% of the University's intercollegiate athletes respectively, with a total of \$4,718,702.76 of athletic financial assistance being distributed to its male and female athletes. Male athletes received \$2,831,221.56 (60%) and female athletes received \$1,887,481.20 (40%). OCR determined for the 2015-2016 academic year, male and female athletes represented 60.4% and 39.6% of the University's intercollegiate athletes respectively, with a total of \$4,784,664.80 of athletic financial assistance being distributed to its male and female athletes. Male athletes received \$2,907,577.40 (60.8%) and female athletes received \$1,877,087.40 (39.2%)

The statistical information provided by USM for 2013-2014 and 2014-2015 and 2015-2016 academic years reveals there was a 0.002 (less than 1%) disparity between the actual participation rates of both males and females in comparison to the actual financial aid awarded to male and female athletes respectively for the 2013-2014 academic year, a 0.015 (1.5%) disparity (favoring the males) between the actual participation rates of male athletes in comparison to the actual financial aid awarded to male athletes for the 2014-2015 academic year and a 0.004 (less than 1%) disparity (favoring the males) between the actual participation rates of male athletes in comparison to the actual financial aid awarded to male athletes for the

³ In assessing the awarding of financial assistance, OCR utilizes an unduplicated count of male and female athletes (i.e. only counts athletes who participate in more than one sport once).

2015-2016 academic year. As discussed above, OCR policy provides that if there is a disparity in the AFA budget favoring either gender, OCR presumes that such disparity is reasonable and based on legitimate and nondiscriminatory reasons if the disparity is one percent or less for the entire athletic scholarship budget. Accordingly, USM has demonstrated that for the most current academic year, 2015-2016, the less than one percent disparity in the AFA budget favoring the males is presumably reasonable and based on legitimate nondiscriminatory reasons, as is the less than one percent disparity for the 2013-2014 academic year. However, OCR determined that for the 2014-2015 academic year, AFA received by male athletes was not proportionate to the male athletic participation rate, with a resulting male disparity of 1.5%, suggesting possibly inconsistent compliance.

INTERESTS AND ABILITIES

OCR examined whether USM provided male and female students an equal opportunity to participate in its intercollegiate athletics program by effectively accommodating their interests and abilities, in accordance with 34 C.F.R. § 106.41(c)(1). This interest and ability analysis consisted of two parts: (1) equal opportunities to participate; and (2) quality, i.e., levels, of competition.

OCR used the “Three-Part Test” to determine whether USM provides equal opportunities to participate in its intercollegiate athletic program. The “Three-Part Test” involves consideration of the following three questions:

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments (Part 1);
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of that sex (Part 2); or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion, such as that cited above, whether it can be demonstrated that the interest and abilities of the members of that sex have been fully and effectively accommodated by the present program (Part 3).

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.

For Part 1 of the “Three-Part Test,” OCR sought to determine whether USM athletic participation rates for male and female students were proportionate to their respective enrollments. Information provided by USM revealed that, during the 2013-2014 academic year,

female students made up 64% of overall student enrollment, but were only 38.7% of the overall athletic participants. Comparatively, males made up 36% of overall enrollment and 61.3% of overall athletic participants. Thus, there was a 25.3% disparity between overall female enrollment and athletic participation. Analyzing this information in a different manner, in order for women to achieve athletic opportunities proportionate to their enrollment as compared to men, women's athletic opportunities would need to be increased by 110, which is greater than the average women's team size of 19 (168 participation opportunities divided by 9 teams).⁴ Similarly, OCR also considered 2014-2015 and 2015-2016 participation rates and found a disparity of 23% and 19.5% respectively, between overall female enrollment and athletic participation. For the 2014-2015 academic year, to achieve proportionality, women's athletic opportunities would need to be increased by 96, which is greater than the average women's team size of 19 (174 participation opportunities divided by 9 teams). To achieve proportionality for the 2015-2016 academic year, women's athletic opportunities would need to be increased by 77, which is, again, greater than the average women's team size of 20 (176 participation opportunities divided by 9 teams). Accordingly, OCR concluded that USM is not providing participation opportunities for male and female student-athletes in numbers substantially proportionate to their respective enrollments. Therefore, USM failed to satisfy Part 1.

For Part 2 of the "Three-Part Test," OCR sought to determine whether USM has a history and continuing practice of program expansion. In considering whether past actions of an institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities, OCR examines an institution's record of adding intercollegiate teams, or upgrading club or intramural teams, for the underrepresented sex; its record of increasing participation numbers for the underrepresented sex; and its affirmative responses to student requests for the addition or elevation of sports. OCR also examines current practices that support continued expansion, including current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams), the effective communication of the policy or procedure to students, and a plan of program expansion that is responsive to developing interests and abilities.

OCR reviewed data submitted by USM and conducted interviews with the USM athletics program staff, coaches and athletes to ascertain the USM athletic program's historical background. USM provided the following information regarding the approximate inception of the male and female sports (table appears on next page).

⁴OCR considers 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. As a frame of reference in assessing this situation, OCR considers the average size of teams offered for the underrepresented sex, a number which would vary by institution.

USM Sports Development History

Current Sports	Year Competition Began
Baseball	1913
Men's Basketball	1913
Women's Basketball	1913-1914
Football	1912
Men's Golf	1946-47
Women's Golf	1993
Men's Tennis	1974
Women's Tennis	1974
Women's Volleyball	1979
Women's Soccer	1997
Softball	1998
Women's Cross Country	1985
Men's Indoor Track	1979
Men's Outdoor Track	1979
Women's Indoor Track	1979
Women's Outdoor Track	1979

The information obtained from USM revealed, most importantly, that the University has not added an intercollegiate women's athletic team in 18 years. The evidence further revealed that the most recent expansion that has occurred in women's sports has been the addition of women's soccer in 1997 and softball in 1998. In light of this information, OCR determined that USM could not demonstrate a history and continuing practice of program expansion for women.

In determining compliance with Part 3, OCR began analysis and review of data submitted by USM during the investigation and information obtained from OCR's interviews activities concerning Part 3 of the "Three-Part Test." Although disproportionately high athletic participation rates by one sex (as compared to enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the other, underrepresented sex, an institution can satisfy Part 3 where there is evidence that the imbalance does not reflect discrimination, i.e., where it can demonstrate that notwithstanding disproportionately low participation rates of the underrepresented sex, the interest and abilities of these students are, in fact, being fully and effectively accommodated. To make this

determination, OCR will consider assessment of unmet interest in a particular sport, sufficient ability to sustain a team in the sport, and a reasonable expectation of competition for the team.

OCR evaluates a broad range of indicators in determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, including the following five elements: (1) whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students; (2) whether a viable team for the underrepresented sex recently was eliminated; (3) multiple indicators of interest; (4) multiple indicators of ability; and (5) frequency of conducting assessments. OCR examines multiple indicators when determining whether there is sufficient ability among interested students of the underrepresented sex to sustain a team, including: (1) the athletic experiences and accomplishments – in interscholastic, club or intramural competition – of underrepresented students and admitted students interested in playing the sport; (2) opinions of coaches, administrators, and athletes at an institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; (3) if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team; (4) participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and (5) tryouts or other direct observations of participation in the particular sport in which there is interest.

OCR's preliminary review of the initial data revealed that USM does not have established procedures and methodologies to assess whether there is interest in a particular sport, sufficient ability to sustain a team in the sport, and a reasonable expectation for competition for the team, nor is there a specific procedure for students or staff to request the addition of new sports. USM stated that periodically, the USM's Gender Equity Committee has reviewed regional states' high school sports sponsorship lists to determine the potential local interests of incoming students and a report created in May 2013 described three possible sport additions, swimming and diving, bowling and sand volleyball. In addition, USM reported to OCR that oral inquiries have been made by student club teams or third parties to elevate the sports to varsity: Men's Soccer (periodic requests from club team), Women's Rugby (request from club team in 2010-2011), which no longer exists as a club and Women's Gymnastics (request from athletics supporter in 2011).

Moreover, while OCR Policy clarifies that student interest surveys alone are not sufficient to determine interest and ability, the implementation of a survey can be part of an institution's assessment techniques. However, here, surveys submitted by administrators, coaches and students at USM confirmed that USM had not surveyed students at USM regarding their athletic interests and abilities in recent history. Notably, students surveyed by OCR expressed interests and abilities in various sports, including intercollegiate, intramural, and club sports. A review of the survey data revealed that of the 251 students who responded to the survey, 17 female students expressed interest and/or ability in sand/beach volleyball, which is arguably enough to field a team. Referred to by the NCAA as "beach volleyball," albeit a relatively new

NCAA sport,⁵ OCR found that at least one institution in the same conference as USM (Conference USA), the University of New Mexico, has a beach volleyball team.⁶ Additionally, beach volleyball was suggested to USM by the GEC as sport to add.

Prior to OCR's obtaining information about and completing an analysis of Part 3 and the quality, i.e., levels, of competition, USM expressed an interest in resolving the compliance review. OCR determined it was appropriate to negotiate a resolution and therefore did not complete its investigation.

On October 26, 2016, USM voluntarily entered into the attached resolution agreement (Agreement) to resolve the compliance review without further investigation. USM has chosen to demonstrate compliance with the applicable Title IX regulation by taking the specific actions set forth in the Agreement to evidence that the University is providing opportunities for financial assistance to members of both sexes in proportion to the participation rate of men and women in the intercollegiate athletics program, and that the selection of sports and levels of competition at the University effectively accommodate the athletic interests and abilities of members of both sexes. Specifically, USM has committed to either demonstrating to OCR that equal opportunities were provided in awarding athletic scholarships to male and female athletes during the 2016-2017 academic year or by submitting a detailed plan to ensure that, by the beginning of the 2017-2018 academic year, the University is in full compliance with its Title IX obligation to provide athletic scholarships in a nondiscriminatory manner. The Agreement requires USM to identify all legitimate, nondiscriminatory factors that may explain the disparities in athletic scholarships awarded to male and female athletes. Such factors may include USM's efforts to comply with Title IX participation requirements by, for example, phasing-in scholarships to build new teams for women quickly. In addition, USM must demonstrate to OCR that it is either currently accommodating effectively the interests and abilities of both sexes by meeting Part 1, Part 2, or Part 3 of the "Three-Part Test" or by submitting a detailed plan to OCR to ensure compliance by the 2019-2020 academic year, including the interim steps the University will take during the 2016-2017, 2017-2018, and 2018-2019 academic years to increase athletic participation opportunities for female students, including by adding new teams and/or expanding the opportunities to participate in sports currently offered. OCR will monitor USM's implementation of the Agreement.

This letter is not intended, nor should it be construed, to cover any other matters that may exist or were not specifically discussed herein. 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.

⁵ The first NCAA beach volleyball championship was in 2016.

⁶ <http://conferenceusa.com/> (last visited September 29, 2016) and http://www.golobos.com/sports/2015/5/12/GEN_2014010142.aspx# (last visited September 29, 2016).

The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

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, it 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.

Thank you for the cooperation extended by you and your staff to resolve the compliance review. If you have any questions about this matter, please contact Sakina Vidacak, Attorney, at 214-661-9628. We look forward to working with USM in implementing the Agreement.

Sincerely,

Taylor D. August
Director, OCR Dallas Office

Enclosure