



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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REGION VII  
ARKANSAS  
KANSAS  
MISSOURI  
NEBRASKA  
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SOUTH DAKOTA

March 26, 2020

**SENT VIA EMAIL**

XXXXXX X XXXXXX

General Counsel  
South Dakota Board of Regents  
306 East Capitol Avenue, Suite 200  
Pierre, SD 57501  
XXXXXX.XXXXXX.XXXXXX

Re: Dakota State University  
OCR Case Number: 07-19-2126

Dear XX XXXXXX:

On October 10, 2019, the U.S. Department of Education (Department), Office for Civil Rights (OCR), opened the above-referenced complaint that the Complainant filed against the Dakota State University (University), Madison, South Dakota, to investigate whether the University discriminates against male students, on the basis of sex, in administering the following scholarships: (1) the Fiegen Price Athletic Endowed Scholarship; (2) the Arleen Amert Annual Scholarship; (3) the Dr. Cecilia Wittmayer Endowed Scholarship; (4) the Helen Walker Memorial Endowment; (5) the Madison Business and Professional Women Endowed Scholarship; and (6) the Schultz and Collignon Family Endowed Scholarship. The University has voluntarily submitted a Resolution Agreement (Agreement) to OCR to resolve this complaint.

OCR is responsible for enforcing, among other civil rights statutes, Title IX of the Education Amendments of 1972 (Title IX), 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 (FFA). Under Title IX, OCR has enforcement jurisdiction over recipients of FFA from the Department. The University is a recipient of FFA from the Department and is therefore subject to Title IX and to OCR's jurisdiction. Additional information about the civil rights laws OCR enforces is available at <http://www.ed.gov/ocr>.

To protect individuals' privacy, the names of the Complainant, the University's employees, witnesses, and other parties were not used in this letter.

In reaching a determination in this complaint, OCR considered information both the Complainant and the University submitted. The legal and factual bases for OCR's determination are set forth below.

The Department of Education's mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access.

### **Legal Standard**

The Title IX regulation at 34 C.F.R. § 106.31(a) states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other educational program or activity operated by a recipient of FFA. The Title IX regulation at 34 C.F.R. § 106.31(b)(1)(2)(3)(4) and (7), states that, in providing any aid, benefit, or service to a student, a recipient shall not on the basis of sex,

- (1) treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) deny any person any such aid, benefit, or service;
- (4) subject any person to separate or different rules of behavior, sanctions, or other treatment; ... and
- (7) otherwise limit any person in the enjoyment of any right, privilege, advantage or opportunity.

The provision of athletic scholarships or grants-in-aid is addressed in the regulation implementing Title IX 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.” In determining compliance with this provision, OCR examines whether the University made proportionately equal amounts of financial assistance (scholarship aid) available to the men's and women's athletics programs.

OCR calculates proportionality by dividing the amounts of aid available for the members of each sex by the numbers of male and female participants in the athletics program and comparing the results. An institution is considered to be 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 regulation implementing Title IX. OCR evaluates each case in terms of its particular facts. For example, at those colleges where 1% of the entire athletic scholarship budget is less than the value of one full scholarship, OCR will presume that a disparity of up to the value of one full scholarship is equitable and nondiscriminatory. Even if an institution consistently has less than a 1% disparity, the presumption of compliance with Title IX might still be rebutted if, for example, there was direct evidence of discriminatory intent.

### **Finding of Insufficient Evidence with Regard to the Fiegen Price Athletic Endowed Scholarship**

Section 303 of OCR’s Case Processing Manual (CPM)<sup>1</sup> states that at the conclusion of an investigation, OCR will determine, using a preponderance of the evidence standard, whether there is insufficient evidence to support a conclusion of noncompliance, or the evidence supports a conclusion of noncompliance. When OCR determines that the preponderance of the evidence does not support a conclusion that the recipient failed to comply with applicable statute(s) and regulation(s), OCR will issue a letter of finding(s) to the parties explaining the reasons for its decision. Based on a preponderance of the evidence standard, OCR found insufficient evidence to conclude that the University violated Title IX as it relates to the Fiegen Price Athletic Endowed Scholarship.

During the investigation, the University told OCR that the Fiegen Price Athletic Endowed Scholarship, is a female-only athletic scholarship, but it had analyzed the scholarship under 34 C.F.R. 106.37(c), and determined that the scholarship, while restricted to female athletes, was offset/countered by the appropriate opportunity for students participating in men’s athletics.

OCR conducted its own independent analysis of the Fiegen Price Athletic Endowed Scholarship to determine whether the University provides its athletes opportunities for financial assistance in proportion to the number of students of each sex participating in intercollegiate athletics. In academic year 2019-20, a total of 494 athletes participated in the University’s athletics program. There were 339 males representing 69% of athletic opportunities and 155 females representing 31% of athletic opportunities. The University provided a total of \$836,953 in athletic financial assistance. Of this amount, \$587,979 or 70% went to male athletes who represented 69% of participants and \$248,974 or 30% went to female athletes who represented 31% of participants. There is a 1% statistical difference in the percentage of male and female athletes, and the amount of financial assistance awarded is therefore presumed to be reasonable and based on legitimate and nondiscriminatory factors.

OCR determined that in academic year 2019-20, female athletes did not receive athletic financial assistance in an amount that was substantially disproportionate to their respective rates of participation in the athletics program, and OCR has not identified any concerns with regard to the Fiegen Price Athletic Endowed Scholarship.

OCR has concluded that there is insufficient evidence to establish a violation of Title IX with regard to the Fiegen Price Athletic Endowed Scholarship, and is therefore closing this allegation of the complaint, effective the date of this letter.

### **OCR’s Investigation to Date Regarding Non-Athletic Single-Sex Scholarships**

OCR reviewed the webpage descriptions of the five remaining non-athletic single-sex scholarships and found that they were published as being restricted to female students.

During the investigation, the University provided OCR data which showed that the Complainant had also previously communicated with the University regarding these allegations. Documents provided by the University showed that, upon learning of the allegations from the Complainant, the University conducted a detailed review of all scholarships offered or administered by the

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<sup>1</sup> The Case Processing Manual is available on OCR’s website at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

University and determined that some of the scholarships were restricted to female students. The University told OCR that it then contacted the donors associated with those scholarships, and with the exception of the Fiegen Price Athletic Endowed Scholarship, began implementing revisions to those scholarships in order to remove any restrictions based on sex.<sup>2</sup>

After receiving that information from the University, OCR reviewed the University's scholarship webpages, and determined that the University had removed all references to sex on the published scholarship descriptions, except for the Fiegen Price Athletic Endowed Scholarship.

The University advised OCR that it has been working to implement a plan for ensuring that the five non-athletic scholarship programs identified in the complaint, along with the three additional scholarships identified by the University, are revised and administered in a manner that ensures that students are eligible to compete for such scholarships without regard to sex. The University also agrees to provide a plan to OCR with a timeline to continue and complete that effort.

### **Resolution of Remaining Allegations**

Prior to the completion of OCR's investigation into the remaining allegations of the complaint, the University indicated its interest in entering into a voluntary resolution agreement with OCR pursuant to Section 302 of OCR's Case Processing Manual.<sup>3</sup> OCR determined that such a resolution would be appropriate with respect to the non-athletic scholarships identified during its investigation, since the existence of the non-compliant scholarships at the time of the Complainant's initial allegation raised Title IX concerns. The University signed an Agreement (copy attached) on January 29, 2020, which, when fully implemented, will resolve OCR's concerns. The Agreement requires the University to develop and implement a plan and a proposed timeline to revise all non-athletic sex-restricted financial aid programs or benefits administered by or on behalf of the University to ensure that students are eligible to compete for the financial aid or benefit without regard to sex. For more information, please consult the Agreement.

OCR considers this complaint resolved effective the date of this letter and will monitor the University's implementation of the Agreement. When OCR concludes the University has fully implemented the terms of the Agreement, OCR will close the complaint. If the University fails to carry out the Agreement, OCR may resume its investigation.

Recipients of federal funds are prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by federal civil rights law. Complaints alleging such retaliation may be filed with OCR.

Under the Freedom of Information Act, it may be necessary to release this document and related

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<sup>2</sup> During the review process the University identified three additional scholarships which raised Title IX concerns (the Dr. Richard and Marilyn Belatti Endowment Scholarship; SBS CyberSecurity and Gamewell Family Endowed Scholarship; and Streff Family Endowed Scholarship). During its investigation, OCR checked and confirmed that these additional scholarship descriptions were also adjusted to remove any restrictions based on sex of the scholarship applicant.

<sup>3</sup> The Case Processing Manual is available on OCR's website at <https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf>.

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 that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

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

If you have questions concerning this letter, please contact XXXXXXX X XXXXXXX, attorney, at (816) 268-XXXX (voice) or (877) 521-2172 (telecommunications device for the deaf), or by e-mail at XXXXXXX.XXXXXX@XX.XXX

Sincerely,

J. Earlene Gordon  
Supervisory Attorney

Attachment

