



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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REGION IX
CALIFORNIA

March 6, 2017

Nicholas B. Dirks
Chancellor
University of California, Berkeley
200 California Hall
Berkeley, CA 94720-1520

(In reply, please refer to case no. 09-15-2296.)

Dear Chancellor Dirks:

The U.S. Department of Education, Office for Civil Rights (OCR), has resolved the above-referenced complaint against the University of California, Berkeley (the University). OCR began an investigation of whether the University's intercollegiate athletics program discriminates against women because it does not provide female students equivalent benefits.

OCR investigated the complaint under the authority of Title IX of the Education Amendments of 1972, and its implementing regulation. Title IX and its implementing regulation, at 34 C.F.R. §106.31, prohibit discrimination based on sex by recipients of Federal financial assistance. The University receives Department funds and is subject to the requirements of Title IX and its implementing regulation.

The Title IX regulations, at 34 C.F.R. §106.41, provide 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 intercollegiate athletics offered by a recipient college or university, and no recipient college or university shall provide any such athletics separately on such basis. The regulation requires a recipient that sponsors intercollegiate athletics to provide equal athletic opportunity for members of both sexes.

To investigate this complaint, OCR interviewed the field hockey head coach, third- and fourth-year field hockey athletes, the Senior Associate Athletic Director, and other University administrators. OCR also reviewed all of the documents and other information provided by the parties and conducted an on-site visit to assess compliance with respect to all areas reviewed. Prior to OCR completing its investigation, the University voluntarily agreed to address certain areas of concern identified by OCR with respect to the issues being investigated. This letter summarizes the applicable legal standards, the relevant facts obtained during the investigation, and the terms of the resolution reached with the University.

Analysis of Program Benefits

Using the applicable regulations (cited below) and the criteria provided in its published Title IX Athletics Policy Interpretation ("Policy Interpretation"),¹ OCR examined the program benefits provided to male and female athletes, also known as the "laundry list."

¹ Policy Interpretation: 44 Fed. Reg. 71413, *et seq.* (1979).

In its investigation, OCR examined the following eleven areas of the University Athletic Program: equipment and supplies; scheduling of games and practice times; travel and per diem allowances; opportunity to receive tutoring; opportunity to receive coaching; provision of locker rooms, practice and competitive facilities; provision of medical and training facilities and services; housing and dining facilities and services; publicity; support services; and recruitment of student athletes.

In each of the areas, OCR examined whether the availability and quality of benefits, opportunities, and treatment provided were equivalent – as equal or equal in effect -- for members of both sexes. In accordance with the 1979 Policy Interpretation, OCR compared components of the men’s program and the women’s program on an overall basis, not on a sport-by-sport basis that would compare, for example, the men’s basketball uniforms and the women’s basketball uniforms. Where disparities were noted, OCR considered whether the differences were negligible. Where the disparities were not negligible, OCR determined whether they were the result of nondiscriminatory factors. Finally, OCR determined whether disparities resulted in the denial of equal opportunity to male or female athletes, either because the disparities collectively were of a substantial and unjustified nature or because the disparities in individual program areas were substantial enough by themselves to deny equality of athletic opportunity. Nondiscriminatory differences based on unique aspects of a particular sport are considered.

OCR reviewed the University’s policies and practices in the eleven laundry list components described above. Through its investigation, OCR determined that Title IX Compliance on the UC-Berkeley campus is addressed through a campus-level organization, with support from two athletic department-level points of contact. Specifically, the University has a named campus Title IX Officer whose oversight role includes Title IX athletics compliance. Within the University’s Athletics Department, there are two staff that serve as leads for Title IX Athletics compliance: the Senior Woman Administrator and the individual assigned to scheduling of games and practice times. The Senior Woman Administrator oversees sport administration for the University’s 30 sport programs and is responsible for monitoring Title IX compliance and gender equity within the University’s Athletics department. The University informed OCR that this structure allows for Title IX equity to be monitored and evaluated consistently, within the day-to-day operational context, by two internal staff members. OCR also learned that the University’s Athletics department conducts bi-monthly sports supervisor meetings, at which questions about the components that make up Title IX compliance are regularly addressed. The Athletics department also maintains several internal database systems in order to track its expenditures and allocation of department personnel responsibilities to ensure that all of the intercollegiate teams receive appropriate services and resources.

As discussed in detail below, in evaluating the individual laundry list components, OCR did not find evidence of significant disparities favoring one sex or the other in the provision of services, benefits, and opportunities for male and female athletes in the first eight laundry list program components: equipment and supplies; scheduling of games and practice times; travel and per diem allowances; opportunity to receive coaching and academic tutoring; assignment and compensation of coaches and tutors; provision of medical and training facilities and services; housing and dining facilities and services; and support services.

In the last three components discussed below, however, OCR did have concerns about whether there was a significant disparity favoring male students with respect to the following: (1) locker rooms, practice facilities, and competitive facilities; (2) publicity; and (3) recruitment of student athletes.

OCR provides the legal standard, relevant facts, and analysis for each of the eleven program components below.

Equipment and Supplies

In assessing compliance in this area, OCR considers the quality, suitability, amount, maintenance, replacement, and availability of equipment and supplies. Equipment and supplies include uniforms, other apparel, sport-specific equipment and general equipment. 34 C.F.R. §106.41(c)(2).

OCR determined that during the 2015-2016 season, the University provided all teams with uniforms and apparel of the same quality. The University maintains a budget worksheet for all teams that includes the uniforms and apparel purchased for the team, sports equipment purchased for the team, and sports equipment repairs and maintenance items. Team budgets showed that each team used budget to purchase some apparel above the University sponsorship with an apparel company capped amount, as well as for sport-specific equipment. OCR did not identify this as a disparity because the way the University allocates budget above the capped amount resulted in equitable treatment. While the cycle for each sport is different and therefore may result in some differences in spending in a given year, the equity determination is not made on an aggregate expenditures basis.

Scheduling of Games and Practice Times

In assessing compliance in this area, OCR considers the number of competitive events per sport, the number and length of practice opportunities, the time of day that competitive events and practice opportunities are scheduled, and the opportunities to engage in pre-season and post-season competition. 34 C.F.R. §106.41(c)(3).

The University provided OCR with screen shots of the intranet site it uses to schedule games and practices. The Intercollegiate Athletics scheduling unit produces all competition schedules and is responsible for scheduling all intercollegiate athletics spaces including fields, courts, pools, and meeting rooms in Haas Pavilion and the Simpson Center. Competition schedules go through an approval process that involves submitting the schedule to the Intercollegiate Athletics scheduler, who inputs the schedule to the intranet site and routes the schedule for approval through compliance staff and the Sport Administrator. The University provided OCR with a sample of the Event Schedule showing how all the NCAA teams were scheduled into facilities throughout the day.

Based on OCR's understanding of the University's scheduling process and the documents reviewed, OCR did not identify any compliance concerns regarding the scheduling of games and practice times.

Travel and Per Diem

In assessing compliance in this area, OCR considers the modes of transportation; housing furnished during travel; length of stay before and after competitive events; per diem allowances; and dining arrangements. 34 C.F.R. §106.41(c)(4).

The University provided OCR with an August 26, 2015 travel chart indicating the limit on how many student-athletes, coaches, trainers, managers, and other staff can attend regular season contests,

conference championships, and NCAA regionals or championships. Based on OCR's review of this information, OCR did not observe any non-sport specific disparities between male and female teams.

The University also maintains a Student-Athlete Database that stores the competition schedules for all sports, which allows the coaches to create travel manifests, establish per diem for team travel, and create per diem signature sheets. The per diem amounts are pre-programmed to reflect the department limits across sports. The per diem rates for away travel are generally the same for all athletes regardless of sex: \$10 for Breakfast; \$10 for Lunch; and \$20 for dinner. Two men's sports and two women's sports (football, men's and women's basketball, and women's volleyball) receive a higher per diem amount as NCAA anchor sports. Based on the per diem amounts provided by the University, OCR did not identify a significant disparity based on gender in the per diem amounts.

The University also provided OCR with a copy of the 2013-2014 composite mileage by intercollegiate team. For that year, the men's teams traveled a distance of approximately 94,000 one-way miles, including approximately 21,000 one-way conference miles. Women's teams traveled a distance of approximately 107,000 one-way miles, including approximately 33,000 one-way conference miles. OCR did not identify a compliance concern with respect to these numbers, given that sports where there is less competition nearby may need to go further to reach a competitor, especially here where a number of the women's sports are not in the Pac-12 Conference. Given that, OCR did not find a concern with the difference in miles because OCR found it was related to the geographic location of the competitor team as opposed to the choice of the men's or women's team.

Tutoring

In assessing compliance with the students' relative opportunity to receive academic tutoring, OCR considers the amount of time tutors are available for athletes, tutors' qualifications and experience, rates of pay, and employment conditions. 34 C.F.R. §106.41(c)(5)-(6).

The University provided OCR with a chart of tutorial hours showing the number of students using tutorials and the average tutorial hours used per student-athlete for the intercollegiate teams. That chart showed that approximately 60% of female athletes used tutorial services, compared to approximately 54% of male athletes. Female athletes used an average of 32.9 tutoring hours, while male athletes used an average of 31.1 tutoring hours.

The University also told OCR that all teams are assigned an Academic Advisor from the Athletic Study Center, and that tutors and Learning Specialists are not assigned to specific athletic teams but rather work with caseloads of students from various teams. Student athletes are assigned tutors after they make a request through the Athletic Study Center's online tutor request system, and those requests are filled in the order in which they are received. The University also provided OCR with a copy of the Summer 2016 Athletic Study Center Tutorial Program Handbook, which notes that tutor pay rates are set by the Academic Student Employee (ASE) union and are the same across campus. Based on this information, OCR did not find any evidence of disparities between male and female athletes as to opportunities to receive tutoring.

Coaching

In assessing compliance for the opportunity to receive coaching, OCR considers three components: (1) the relative availability of coaches, assistant coaches, and graduate assistants; (2) the training,

experience, and other professional qualifications of coaches; and (3) the compensation of coaches for men's versus women's programs. Of these three factors, OCR's primary focus is on the availability of coaches. 34 C.F.R. §106.41(c)(5)-(6).

The University provided OCR with coach appointment and salary information for all sports as of June 1, 2016. With this information, OCR examined the number of associate head coaches and assistant coaches in each sport and their relative compensation. In reviewing these assignments and the respective compensation information, OCR did not find evidence of disparities in either the availability of coaches or in the compensation of coaches for men's versus women's teams that would lead to a negative impact on men's athletes when compared with women's athletes.

Medical and Training Facilities and Services

When evaluating medical and training facilities and services, OCR considers the availability of medical personnel and assistance; health, accident and injury insurance coverage; the availability and quality of weight and training facilities; the availability and quality of conditioning facilities; and the availability and qualifications of athletic trainers. 34 C.F.R. §106.41(c)(8). During its on-site review, OCR observed the University's medical and training facilities and also interviewed University administrators and reviewed documentation regarding the allocation of training staff. Based on this review, OCR did not identify any disparities regarding the availability of medical or training facilities or staff based on gender.

Housing and Dining Facilities and Services

When evaluating housing and dining facilities and services, OCR considers two factors: (1) what housing is provided and (2) any special services as part of housing arrangements (e.g. laundry facilities, parking space, maid service). 34 C.F.R. §106.41(c)(9).

Here, the University commits to providing student-athletes with housing for their first year. After that, student-athletes can choose to stay in campus housing or move to private housing, which can be paid for through a stipend provided as part of athletic scholarships. Students on scholarship also receive a standard meal plan, and coaches are provided a consistent per diem allotment for pre- and post-game meals, which coaches can choose to use for team meals or to allocate the per diem to each athlete. OCR did not identify any gender-based disparities as to the provision of student housing or dining based on the University's policies and interviews with University administrators regarding the provision of housing and special services.

Support Services (Administrative and Clerical Support Provided to Athletic Program)

When evaluating support services, OCR considers the following two factors: (1) the amount of administrative assistance provided; and (2) the amount of secretarial and clerical assistance provided to the men's and women's programs. 34 C.F.R. §106.41(c).

The University's Athletics Department is overseen by the Director of Intercollegiate Athletics, who has one executive assistant. There are two senior associate athletic directors and seven associate athletic directors who oversee various program areas, including a Senior Woman Administrator. The associate athletic directors and Senior Woman Administrator split up the 28 teams and provide oversight and support to those teams. Each of the directors has a team of non-coaching staff to provide support in the

areas they supervise, and there are also teams of staff who operate the equipment room, ticket sales, scheduling, facilities maintenance, strength/conditioning, student performance, and sports medicine.

OCR did not identify any disparities as to how support staff are allocated to the men's and women's teams.

Provision of Locker Rooms and Practice and Competitive Facilities

OCR examines the quality and availability of the facilities provided for practice and competitive events; exclusivity of use of facilities provided for practice and competitive events; the availability and quality of locker rooms; maintenance of practice and competitive facilities; and preparation of facilities for practice and competitive events. 34 C.F.R. §106.41(c)(7).

This complaint arose out of events related to the temporary displacement of the women's field hockey team due to construction under their original facility. OCR's investigation, however, included locker rooms and facilities for all University sports. As part of that review, OCR conducted a site visit on July 27, 2016 and examined virtually all of the locker rooms and practice and competitive facilities. Overall, with the exception of the women's Field Hockey and Beach Volleyball facilities, OCR did not have concerns with the equivalency of locker rooms and practice and competitive facilities for male and female athletes. Facilities were either used by both men's and women's teams, of equivalent quality, had minor differences that did not rise to the level of a disparity, or had few disparities that were offset by disparities in the overall program for both sexes. OCR did, however, have concerns about disparities with respect to the field hockey facility, and noted other potential concerns with respect to the beach volleyball facility, which are addressed in more detail below.

With respect to the field hockey facility, OCR found that prior to November, 2013, the field hockey team held practice and games at the Maxwell Family Field on the University campus. No other NCAA teams were using the original facility as their practice and competition field. There is no male field hockey team counterpart.

Beginning in November, 2013, the Maxwell Family Field was withdrawn from service during construction of a below-field parking structure. The University informed OCR that its original intent was to restore the field hockey field so that the team could continue to use the site for practice and competition. However, the University failed to retrofit the original facility to regulation quality, leaving the team without an on-campus regulation field. The University then decided to move the field hockey field to another location on campus, rather than returning the team to the original field. The Maxwell Family Field is now used for practice for the NCAA football team, and other non-NCAA intra-mural or recreational sports.

Because the University lacked an appropriate field hockey facility, the field hockey team had to practice and compete at Stanford University, about 40 miles from campus, during the Spring, Summer and Fall of both 2014 and 2015. This required the athletes to wake up as early as 5:00 A.M. two days a week for practice and return to campus between 11:00 A.M. and noon, in addition to overnight travel for weekend games. As a result, the students were unable to take morning classes, were fatigued throughout the day, lost study and lab time due to the travel and fatigue, and had a difficult time bringing in a fan base to support the team at "home" games. The students expressed to OCR that they did not feel like they were a University team, and even organized to walk onto the field at their first game of the fall 2015 season without the University jerseys. Further, some athletes informed OCR that

they had to choose courses they would not otherwise have taken to maintain the required credit load and to switch their majors because the prerequisite courses conflicted with their practice schedule. During the disruption, the University provided the team with interim athletic benefits and opportunities such as a traveling tutor and athletic trainer, and academic accommodations.

By March, 2015, when OCR received this complaint, the University had the funding committed, the facility plans drawn and had begun the bid and contracting process to construct a regulation field hockey field on an existing facility on campus. Physical construction for the new field began in May 2015.

On or about July 22, 2015, the University learned that the material used to level the surface of the new field had failed. The University had originally projected a facility completion date of August 21, 2015, but correcting the flaw pushed back the projected completion date to December 2015.

In December 2015, the University and the Complainants (members of the field hockey team) entered into a Facilities Settlement Agreement describing the timeline and construction of the field hockey facility and field elements. The settlement agreement included that:

- The new field was projected to be completed by December 20, 2015 and would include the field surface, field watering system, scoreboard, sound system, power, data and network access, secure field access, and parking access.
- By January 4, 2016, the University agreed to provide secure storage containers for the team's equipment and supplies at the facility.
- By January 15, 2016, the University agreed to submit its plans, construction schedule, and cost estimates for providing permanent home and visiting team rooms near the field.
- The parties agreed to negotiate in good faith regarding the Complainants' comments on the plan and the implementation of the plan.
- Non-complainant athletes could submit individual claims of academic harm resulting from practicing or competing at the off-campus facility at any point prior to the completion of the new field hockey facility. Further, if the new facility was not completed according to schedule, all field hockey athletes could submit requests for academic accommodations if the delay had an adverse impact on their academic progress.

At the same time, the University also entered into individual settlement agreements with each complainant athlete in consideration of the academic harm and diminished academic progress resulting from travel to practice and competition at Stanford. These settlement agreements provided athletic and financial aid to these students.

The field hockey team held their first scrimmage on the new field in February 2016. On March 29, 2016, the Complainants' counsel informed OCR that they believed that the field components described in the Facilities Settlement Agreement were incomplete, and therefore, the facility was still not comparable to the competition facilities of other NCAA teams at the University.

During the site visit on July 27, 2016, OCR observed that the field hockey facility was lacking access to spectator stands, a press platform, a team meeting space, power, data and network access, equipment storage, and a sound system equivalent to other facilities. While other facilities, such as rugby, had a similar setup, there were procedures in place to ensure the other facilities were set up appropriately with on-field components for competitive events. According to information obtained by OCR, the current field hockey facility, while of regulation size and high quality, is missing essential components to fully host a competition and could not host a championship event. The Complainants' counsel informed OCR that the components were still missing as of November 29, 2016.

The information obtained by OCR to date thus revealed that, even after the settlement agreement, current Title IX compliance concerns remained. That is, even after the new field hockey facility was opened, OCR continued to have concerns about how the facility compared to facilities for male sports at the University. Before the conclusion of OCR's investigation, however, the University agreed to enter into a Resolution Agreement that would address the concerns about the new field hockey facility, including an equivalent sound system and spectator stands, elevated press platform, secure storage containers, and permanent team rooms.² By phone call with OCR on December 1, 2016, the University informed OCR that it completed the design portion of the field components and had a projected timeline for completion of April 2017.

As noted above, in its on-site review, OCR also identified potential concerns regarding the women's beach volleyball facility. During its site visit, OCR reviewed the beach volleyball facility and identified concerns about whether the facility was equivalent to facilities for male sports in the areas of adequate athlete and spectator seating, restrooms for spectators and athletes, medical and training room access, the scoreboard, sound, and hydration for athletes. Before the conclusion of OCR's investigation, however, the University agreed to address this issue through a provision in the Resolution Agreement that the University will ensure that all women's field and court based sports have practice and competition facilities that contain the elements listed above.

Publicity

When evaluating publicity, OCR considers the following factors: (1) availability and quality of sports information personnel; (2) access to other publicity resources for men's and women's programs; and (3) quantity and quality of publications and other promotional devices featuring men's and women's programs. 34 C.F.R. §106.41(c)(10).

One aspect of publicity is how University teams are branded. Team branding is the process of telling the story, personality and image of the team and how the team's identity and messaging are presented to the community. This branding is an important aspect of publicity because the messaging communicates how the University perceives the value of the student-athletes, and the branding also serves as a recruiting tool.

During OCR's site visit, OCR observed differences in the branding and team/athlete recognition in certain male and female team facilities. Specifically, OCR observed a difference in the quality and quantity of the University branding and team/athlete recognition on the walls and displays in the men's

² Because the settlement agreements entered into by the University provided a mechanism to compensate the field hockey athletes for harm suffered while the team did not have an on-campus facility, OCR does not address those individual harms as part of the resolution agreement.

and women's basketball locker rooms. OCR also observed that the men's baseball field was branded with a level of athlete recognition that did not exist for female sports, in that there were images of specific players on the outfield wall. These differences raised a concern for OCR regarding the equity of publicity for male and female athletes.

Prior to the completion of the investigation, the University agreed to enter into a Resolution Agreement through which the University would conduct an assessment of the Athletics Department's branding and team/athlete recognition and would address any gender-based disparities that were identified.

Recruitment

With respect to recruitment, OCR considers the following three factors: (1) whether the 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. 34 C.F.R. §106.41(c).

As part of OCR's investigation, the University provided OCR with the 2015-2016 recruiting budget for each sport. All teams received a recruiting budget, and the budgets ranged from approximately \$4,000 to approximately \$523,000. The total recruiting expenditures for male sports were approximately \$856,000 (or approximately 73% of the total recruiting budget), and the total women's sports expenditures were approximately \$324,000 (or approximately 27% of the total recruiting budget). As an initial point of comparison, OCR noted that for 2015-16 there were 589 male athletes (58% of all athletes) and 426 female athletes (42%).

The difference in those recruiting budgets led OCR to begin to obtain additional information regarding the process used by the University to make recruiting budget allocations. The University's legal counsel told OCR by email on December 8, 2016 that the University's Senior Woman Administrator was not involved in the allocation of the recruitment budget, and that the recruitment budget was not generally adjusted annually based on need.

OCR therefore had concerns as to whether the University was able to ensure that these recruitment budget decisions were equitable. Prior to the completion of the investigation, however, the University agreed to enter into a Resolution Agreement whereby the Senior Woman Administrator would be responsible for ensuring that the allocation of recruitment funds is equitable between men's and women's teams. As part of the Resolution Agreement, the University agreed to provide a copy of the recruiting budget to OCR for review, and while the Resolution Agreement is in effect the Senior Woman Administrator is required certify to the University's Title IX Coordinator on an annual basis that the allocation is equitable.

Conclusion

Based on the commitments made in the enclosed Agreement to address OCR's concerns, OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainants concurrently. When fully implemented, the Agreement is intended to address all of OCR's compliance

concerns in this investigation. OCR will monitor the implementation of agreement until the University is in compliance with the statute and regulations at issue in the case.

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

OCR routinely advises recipients of Federal funds and public education entities that Federal regulations prohibit intimidation, harassment or retaliation against those filing complaints with OCR and those participating in the complaint resolution process. Complainants and participants who feel that such actions have occurred may file a separate complaint with OCR.

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

OCR would like to thank you and your staff for your courtesy and cooperation in resolving this case. If you have any questions, please contact Blake Thompson, Civil Rights Attorney, at (415) 486-5630.

Sincerely,

/s/

Zachary Pelchat
Team Leader

Encl: Resolution Agreement