



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

REGION IX
CALIFORNIA

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SAN FRANCISCO, CA 94102

December 13, 2018

James Donahue
President
Saint Mary's College of California
1928 Saint Mary's Road, Moraga, CA 94575

(In reply, please refer to OCR Docket Number 09-18-2225.)

Dear President Donahue:

The U.S. Department of Education (Department), Office for Civil Rights (OCR), has completed its investigation of the above-referenced complaint against Saint Mary's College of California (the College). The complainant alleged discrimination on the basis of sex.¹ Specifically, OCR investigated the following issue:

- 1) Whether the College discriminates against women because the College's interscholastic athletic program does not fully and effectively accommodate the interests and abilities of women.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the Department. The College is a recipient of financial assistance from the Department. Therefore, OCR had jurisdiction to investigate this matter under Title IX.

To investigate this complaint, OCR conducted interviews and reviewed documents and other information provided by the Complainant and the College. After careful review of the information gathered in the investigation, OCR identified a compliance concern that the College did not fully and effectively accommodate the interests and abilities of women in its athletics program during the 2017-18 with regard to the issue OCR investigated. However, before the completion of OCR's investigation, the College expressed interest in a voluntary resolution of this complaint pursuant to Section 302 of OCR's case processing manual. OCR determined that such resolution was appropriate, and on December 10, 2018, the College entered into a voluntary resolution agreement to address the compliance concern identified. The legal standards, facts gathered, and the reasons for OCR's determinations are summarized below.

Issue 1: Whether the College discriminates against women because the College's interscholastic athletic program does not fully and effectively accommodate the interests and abilities of women.

Legal Standards

The Title IX regulations, at 34 C.F.R. §106.41(a), 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

¹ OCR previously provided the College with the identity of the Complainant. We are withholding the Complainant's name from this letter to protect their privacy.

university, and no recipient college or university shall provide any such athletics separately on such basis. Section 106.41(c) requires colleges and universities to provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the regulations provides that OCR will consider, among other factors, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of students of both sexes (34 C.F.R. §106.41(c)(1)).

As a means of assessing compliance under the regulations, OCR follows the Policy Interpretation issued by the Department on December 11, 1979, 44 Fed. Reg. 71413, et seq. (1979). The 1979 Policy Interpretation states that, to effectively accommodate the interests and abilities of male and female athletes, colleges and universities must provide the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules that equally reflect their abilities.

Equal Opportunities to Compete

The 1979 Policy Interpretation permits three alternate ways of assessing whether colleges and universities are providing nondiscriminatory opportunities to participate in intercollegiate athletics, commonly referred to as the “three-part test.” The three-part test is intended to allow colleges and universities to maintain flexibility and control over their athletic programs. Colleges and universities can demonstrate compliance in any one of the following ways:

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

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

Facts

The following facts are relevant to OCR’s analysis:

- I. In 2017, the College cut Women’s lacrosse (women’s LAX) as a varsity sport and offered it as a club sport for the 2017-18 school year.**

On June 4, 2018, OCR interviewed the Senior Associate Athletics Director for Finance & Student-Athlete Services (Associate Athletics Director); her responsibilities include compliance with Title IX requirements concerning participation opportunities for male and female athletes and other athletics-related compliance activities under NCAA regulations and Equity in Athletics Disclosure Act reporting requirements.

During this interview, the Associate Athletics Director stated that the decision to cut Women's LAX as a varsity sport and offer Women's LAX as a club sport was part of the College's 2017-2022 Athletics and Recreation Strategic Plan (Strategic Plan). From 2016 through the spring of 2017, the College conducted a review of all varsity athletics programs in order to develop a five-year plan for the College's varsity, club, and recreational athletic offerings. An athletics strategic planning committee was formed for this purpose, and this planning committee included members of the College's Board of Trustees, Board of Regents, Faculty, staff, alumni, and the Athletics Department.

The strategic planning committee considered the following factors in recommending that Women's LAX be cut as a varsity sport and instead offered as a club sport:

- During the 2016-17 school year, Women's LAX had 21 athletes on its squad. This made it difficult for athletes to stay healthy and competitive throughout the season, as this was a smaller squad size than other teams that they competed against.
- Women's LAX was the College's only varsity team that did not participate in the West Coast Conference (WCC), and all other schools in the WCC offer women's lacrosse as a club sport.
- Women's LAX had not participated in playoff competition in several years and did not have a strong record in the Mountain Pacific Sports Federation (MPSF), the athletics conference in which the Women's LAX team competed.
- The MPSF was to be dissolved at the end of the 2016-17 school year. As a result, for all future school years the Women's LAX team would have only three other teams to compete against. Further, Women's LAX would be disqualified from post-season NCAA competition because NCAA regulations require that a conference have six teams in order to be eligible for such. The College reached out to the PAC-12, of which the College is considered an affiliate, to determine whether the Women's LAX team could alternatively compete in the PAC-12 conference. The PAC-12 responded that it was not accepting new affiliate teams.

The Board of Trustees approved the Strategic Plan in the spring of 2017 and, as a result, Women's LAX was cut from the College's varsity sports and offered as a club sport for the 2017-18 school year.

The Associate Athletics Director stated that Women's LAX participants were notified of this decision so that individual athletes could decide whether to pursue varsity lacrosse opportunities elsewhere or if they would like to play club lacrosse for the College. The College honored all existing scholarships for Women's LAX athletes.

II. 2017-18 participation data for male and female athletes, as reported by the College.

In its response to OCR's initial data request, the College report that during the 2017-18 school year, the College enrolled a total of 2,603 full-time undergraduate students; 1,545 were female and 1,058 were male as reported on the first date of the Fall 2017 semester. During this period, the College offered seven men's intercollegiate sports teams and nine women's intercollegiate sports teams and reported a total of 324 student-athletes, of which 189 were participants on women's teams and 135 were participants on men's teams. The College reported that these participants were listed on the squad lists as of the first date of competition for each sport, consistent with the Equity in Athletics Disclosure Act (EADA) report guidelines and the NCAA Membership financial report.

In an interview with OCR, the Associate Athletics Director stated that the College relied on EADA guidance concerning the calculation of participation opportunities for male and female athletes when assessing Title IX compliance with Prong 1 of the three part test. Specifically, the College relied on EADA guidance states that "male practice players who are listed on the women's teams' roster as of the day of the first scheduled contest should be counted as participants on the women's teams". As such, in its initial data response to OCR the College counted 14 male practice players on its women's basketball team as female participation opportunities and, based on this information, the College stated that it was in compliance with Prong 1 of the three part test during the 2017-18 school year.

III. Concerns related to the College's participation data, as reported by the Complainant.

In an interview with OCR, the Complainant stated that participation numbers for the women's rowing team may be inflated because several individuals were counted as participants who did not actually meet the definition of a participant under Title IX. OCR requested additional information from the Complainant regarding this concern, and the Complainant provided a list of female students on the rowing team that included students who the Complainant felt did not meet the definition of a participant. After being provided with the definition of a participant under Title IX, the Complainant was unable to identify the reason why she felt that specific listed students did not meet the definition of a participant.

On August XX, 2018, OCR conducted additional interviews with two members of the women's rowing team who the Complainant identified as not being actual participants despite the fact that the College had counted the student as a participant on the squad lists provided to OCR. One witness stated that she participated on the team from the beginning of the season in September 2017 and left the team in February 2018 XXX XX XXXXXXXX. This team member stated that she went to practice every day, participated in the team's first competition in October 2017, received regular coaching and team uniforms, thought that she was on the eligibility list, and considered herself a participant. Another witness identified by the Complainant as not being an actual participant stated that she participated on the team from the beginning of the season in September 2017 through the end of the season in May 2018, received supports usually associated with being on an intercollegiate team including coaching and a uniform, believed that she was on the eligibility list even though she did not compete, and participated in practice and team meetings during the season.

Analysis

I. Females were underrepresented in athletics participation during the 2017-18 school year.

Under Title IX, "participants" for the purposes of determining substantial proportionality under Prong 1 of the three part test are defined as students who (a) are receiving the institutionally-sponsored support normally provided to athletes competing at the institution on a regular basis during a sport's season, e.g., coaching, equipment, medical and training room services; and (b) who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and (c) who are listed on the eligibility or squad lists maintained for each sport or (d) students who, because of injury, cannot meet a, b, or c above, but continue to receive financial aid on the basis of athletic ability.

Due to differences in the directions provided to recipients of Federal funds in reporting participants for EADA compliance and the manner that OCR counts participants when assessing Title IX compliance, the College believed it was providing more participant opportunities to females than OCR determined. The EADA instructions direct recipients to count male student athletes who practice on female teams as female participants, and to make note of this in the recipient's submission. As a result, the College

counted male practice players on the women’s basketball team as female participants and noted this in the squad rosters provided in response to OCR’s data request. As described above, OCR’s definition of a participant does not include any manner for counting male students as a female participant.

During the 2017-18 school year, 40.6% of full-time enrolled students were male and male athletes made up 43.5% of the College’s participation opportunities. During the same period, 59.4% of full time enrolled students were female and female athletes made up 56.4% of the college’s participation opportunities.

The percentage of female athletes (56.4%) is lower than their proportion of the student population (59.4%), so females were the underrepresented sex in the College’s athletics program during the 2017-18 school year.

Full-time student enrollment – Fall 2017		
Male	1058	40.6%
Female	1545	59.4%
Total	2603	

Athletic Participation – 2017-18 school year		
Males	135	43.5%
Females, not counting male Bball practice players	189 – 14 = 175	56.4%
Total	310	

II. 22.5 additional female participation opportunities are needed to achieve exact proportionality.

$$\begin{array}{rcl} X \text{ Females} & = & 59.4\% \text{ of all full time enrolled students} \\ \hline 135 \text{ Males} & = & 40.6\% \text{ of all full time enrolled students} \end{array}$$

$$40.6X = (135 \times 59.4)$$

$$40.6X = 8019$$

$$X = 197.5, \text{ exact proportionality for female participation opportunities}$$

$$\begin{array}{r} 197.5 \text{ (exact proportionality for female participation opportunities)} \\ -175 \text{ (actual female participation opportunities)} \\ \hline 22.5 \text{ additional female participation opportunities to reach exact proportionality} \end{array}$$

III. The number of additional participation opportunities needed to meet exact proportionality (22.5) is larger than the average roster size for female teams during the 2017-2018 school year (19.4).

OCR would consider 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, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. Here, the average roster size for the underrepresented sex

was 19.4 students for the 2017-18 school year. As such, the average female team size at the College is less than 22.5, the number of opportunities needed to achieve exact proportionality for female athletes. This raises a compliance concern because the number of participation opportunities required to achieve exact proportionality (22.5) is enough to sustain a viable team (19.4 students on the average female team).

IV. Additional information provided by the Complainant does not tend to suggest that the College is inaccurately reporting women's participation numbers.

While the Complainant asserted that the College was not in compliance due to inflated numbers of participants on the women's rowing team, the Complainant was unable to provide specific information explaining why several students that were listed on the women's rowing squad roster were not actual participants.

In interviews with OCR, two students that the Complainant identified as not being actual participants on the women's rowing team despite being listed on the squad roster stated that they received institutionally-sponsored support normally provided to College athletes on a regular basis during the 2017-18 crew season, including coaching and equipment, and participated in organized practice sessions, team meetings, and other activities on a regular basis. Although one student interviewed left the team in February 2018 XXX XX XXXXXXXX and the other student did not participate in team competitions, both students met the definition of a participant under Title IX due to their listing on the squad roster on the first day of competition, the receipt of institutionally-sponsored support, and their participation in team practices and activities. Therefore, OCR found that the Complainant's claim that the College inflated women's participation numbers to be unsubstantiated.

V. Summary and Resolution.

Based on the facts gathered to date, OCR identified a concern that, during the 2017-18 school year, the College did not adequately accommodate the interests and abilities of female athletes because the number of participation opportunities for female athletes was not substantially proportionate to full-time undergraduate female student enrollment. Specifically, the College would have needed 22.5 more female participation opportunities to achieve exact proportionality under Prong 1 of the three part test and, because the average roster size for the underrepresented sex (females) was 19.4 students, the number of additional participation opportunities needed to reach exact proportionality would have been sufficient to sustain a viable female team. Furthermore, OCR did not find any evidence that the College was over reporting female participation by inflating its squad lists with students who did not meet the definition of a participant under Title IX

Additionally, during a meeting with OCR on October 10, 2018, the College confirmed that until that date the College relied on the EADA reporting guidelines with respect to which students may be counted as participants for the purposes of calculating compliance with Title IX under Prong 1 of the three part test. OCR explained that, while these guidelines are appropriate for EADA reporting, Title IX defines a participant as a student who (a) is receiving the institutionally-sponsored support normally provided to athletes competing at the institution on a regular basis during a sport's season, e.g., coaching, equipment, medical and training room services; and (b) who is participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and (c) is are listed on the eligibility or squad lists maintained for each sport or (d) a student who, because of injury, cannot meet a, b, or c above, but continues to receive financial aid on the basis of athletic ability.

In order to determine whether the College was fully and effectively accommodating the interests and abilities of female students during the 2017-18 school year, OCR would need to conduct interviews with

coaches and student athletes for each team to verify 2017-18 squad lists and determine which athletes met the definition of a participant pursuant to Title IX and its implementing regulations. However, prior to the conclusion of OCR's investigation and to address the issues alleged in this complaint, on October 26, 2018, the College expressed interest in a voluntary resolution agreement pursuant to section 302 of OCR's case processing manual. On December 10, 2018, the College, without admitting to any violation of law, entered into the enclosed resolution agreement (Agreement) which is aligned with the complaint allegations and the information obtained by OCR during its investigation.

Under the Agreement, the College will provide OCR with enrollment data, squad rosters, and other information and materials for the 2019-20 school year to allow OCR to independently verify that the College is adequately accommodating the interests and abilities of female athletes pursuant to applicable Title IX regulations and OCR guidance concerning interests and abilities in athletics.

This concludes OCR's investigation of the complaint and should not be interpreted to address the College's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation. OCR is closing the investigation of this complaint as of the date of this letter, and notifying the Complainant concurrently.

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 College may not harass, coerce, intimidate, retaliate, 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, it will seek to protect, to the extent provided by the law, personal information that, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

Thank you for your cooperation in resolving this case. If you have any questions regarding this letter, please contact Alexis Turzan at alexis.turzan@ed.gov or Robert Danese at robert.danese@ed.gov.

Sincerely,

/s/

Sara Berman
Team Leader