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OFFICE FOR CIVIL RIGHTS

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September 22, 2017

Honorable Chris Reykdal
Superintendent of Public Instruction
Office of the Superintendent of Public Instruction
P.O. Box 47200
Olympia, Washington 98504-7200

Re: Washington State Office of the Superintendent of Public Instruction
OCR Reference No. 10115004

Dear Superintendent Reykdal:

This is to advise you of the resolution of the referenced compliance review that was initiated by the U.S. Department of Education (Department), Office for Civil Rights (OCR), of the Washington State Office of the Superintendent of Public Instruction (OSPI). In the compliance review, OCR examined whether OSPI correctly applied the Title IX legal standards for assessing whether school districts are providing equal athletic opportunities for members of both sexes.

OCR investigated this compliance review under the authority of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 *et seq.* (Title IX), and its implementing regulation at 34 C.F.R. § 106, which prohibit discrimination on the basis of sex in educational programs and activities receiving federal financial assistance (FFA) from the Department. OSPI receives FFA from the Department. OSPI also distributes FFA to public school districts in Washington State, which also directly receive FFA. As recipients of FFA, both OSPI and the school districts are required to comply with Title IX. See 34 C.F.R. § 106.2(i).

Recipients of FFA must provide equal opportunities in interscholastic athletics. Title IX requires that a “recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.” See 34 C.F.R. § 106.41(c). In determining whether equal opportunities are available for boys and girls, OCR considers whether the selection of sports effectively accommodates the interests and abilities of members of both sexes. See 34 C.F.R. § 106.41(c)(1).

As a recipient of FFA, OSPI must not aid or perpetuate discrimination by providing significant assistance to districts that do not comply with the requirements of Title IX. See 34 C.F.R. § 106.31(b)(6); 34 C.F.R. § 106.2(h)(1)(ii). This includes providing that no person, on the basis of sex, is excluded from participation in, denied the benefits of, treated differently or otherwise

discriminated against in any interscholastic athletics offered by any school district to which OSPI extends assistance. See 34 C.F.R. § 106.41.

In conducting its review, OCR considered whether OSPI violated Title IX by aiding or perpetuating discrimination against students by providing significant assistance to school districts that discriminate on the basis of sex by failing to provide equal athletic opportunity to both sexes. OCR reviewed the procedures and methods that OSPI used to review school districts' interscholastic athletics programs and activities for compliance with Title IX. In particular, OCR considered whether OSPI correctly applies the legal standards developed by OCR for assessing whether school districts provide equal athletic opportunity for members of both sexes under 34 C.F.R. § 106.41(c).

Three-Part Test

In determining whether the interests and abilities of members of both sexes are being effectively accommodated to the extent necessary to provide equal opportunity to participate in interscholastic athletics, OCR uses the Three-Part Test first established in OCR's "Intercollegiate Athletics Policy Interpretation" (Policy Interpretation), issued December 11, 1979, and found at 44 *Fed. Reg.* 71413 *et seq.*

Under the Three-Part Test, OCR considers:

1. Whether interscholastic 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 interscholastic athletes, whether the institution 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 have been and are underrepresented among interscholastic athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether 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.

In evaluating participation and enrollment numbers under Part One of the Three-Part Test, OCR determines if participation is substantially proportionate to enrollment. OCR 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 based on the average size of teams offered for the underrepresented sex at an institution. OCR takes into account that natural fluctuations in an institution's enrollment and/or participation rates may

affect the percentages in a subsequent year and recognizes that it would be unreasonable to expect institutions to fine tune their programs in response to annual changes in enrollment.

Part Two requires consideration of an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities for the underrepresented sex through program expansion. OCR considers a variety of factors as evidence indicating compliance with Part Two, including whether an institution has: (1) a record of adding teams or upgrading teams to interscholastic status; (2) a record of increasing the number of participants; (3) responded affirmatively to requests by students or others for addition or elevation of sports; (4) implemented and effectively communicated a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams); and (5) implemented a plan of program expansion that is responsive to developing interests and abilities.

In determining compliance with Part Three, OCR determines whether, despite being unable to satisfy either Part One or Part Two, an institution is nevertheless fully and effectively accommodating the interests and abilities of the underrepresented sex. In making this determination, OCR considers whether: (1) there is sufficient unmet interest in a particular sport; (2) there is sufficient ability to sustain a team in the sport; and (3) there is a reasonable expectation of competition for the team. OCR uses a broad range of indicators to make this determination, including: whether the institution uses nondiscriminatory methods of assessment when determining interests and abilities; the frequency of the institution's surveys/assessments; whether the institution's surveys/assessments have been used to eliminate viable teams; an evaluation of multiple indicators to assess interest; and an evaluation of multiple indicators to assess ability.

The Three-Part Test furnishes three individual avenues for measuring compliance with the requirement to provide individuals of each sex with nondiscriminatory opportunities to participate in interscholastic athletics. If an institution has met any part of the Three-Part Test, OCR will determine that the institution is meeting the requirement of Title IX to provide equal opportunity to participate.

Findings of Fact

OSPI monitors multiple federally funded programs under the Elementary and Secondary Education Act (ESEA) and fulfills its compliance monitoring requirements under Federal regulations through its Consolidated Program Review (CPR) process. Under this process, OSPI staff conducts periodic reviews of school district programs. The reviews are designed to focus on the results of the school districts' efforts to implement critical requirements of the ESEA and other programs using available resources and flexibility provisions. OSPI uses its Equity and Civil Rights Office (ECRO) to conduct these CPRs and to review how districts implement the civil rights laws, including with respect to athletics.

General Information about ECRO's Monitoring

OSPI is required under the Revised Code of Washington (RCW) at RCW 28A.640.020, to “develop a student survey to distribute every three years to each local school district in the state to determine student interest for male/female participation in specific sports.” Consistent with the Title IX regulations, under the Washington Administrative Code (WAC) rules applicable to interscholastic athletic activities, each school district is required to provide “equal athletic opportunities for members of both sexes within each school” and must consider, when determining whether equal opportunities are available “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. See WAC 392-190-025.

Each school district school must “evaluate the recreational and athletic program at each school at least once each year to ensure that equal opportunities are available to members of both sexes with respect to...athletics that are operated, sponsored, or otherwise provided by the school district.” See WAC 392-190-030. Also, under WAC 392-190-040(2), each school district “must administer the survey developed under this section at least once every three years at each school and grade level where...athletics are conducted...[and] must consider the results of the survey when planning and developing recreational and athletic activities offered within the school district...and when determining whether equal opportunities are available to members of both sexes under [WAC 392-190-025].”

OSPI developed new rules relating to discrimination in recreational and athletic activities, as well as other district program areas, after RCW 28A.642 was enacted, which expanded the categories of persons to be protected from discrimination.¹ These new rules outlined OSPI's monitoring procedures and required district complaint and appeal procedures to address allegations of discrimination. See WAC 392-190. These new administrative rules went into effect on May 13, 2011, less than a month after OCR notified OSPI of this review.

Under these rules, OSPI collects the results of annual self-evaluations that school districts must conduct of their interscholastic athletic programs to determine if they are providing equal opportunities for boys and girls. OSPI is required, under these rules, to develop a student survey to distribute every three years to each district to determine student interest for male/female participation in specific sports, and school districts must administer and report to OSPI the results of the student athletic interest and abilities survey at least once every three years. OSPI issued a directive to school districts, dated August 2, 2011, requiring that school districts use the OSPI sample athletic survey when administering their surveys. As required by the WACs, school districts must survey students every three years and utilize the results of the required survey in selecting the sports and levels of competition that are offered at each school. Schools report to the ECRO, only in years in which they are scheduled for CPRs, the results of

¹ RCW 28A.642 in 2010. That law prohibits discrimination in Washington public schools based on race, creed, religion, color, national origin, sexual orientation, including gender expression or identity, veteran or military status, or disability. RCW 28A.642 is similar to the state's existing sexual equality law applicable to schools, RCW 28A.640.020, but added new categories of protected classes.

their surveys and any new sports or levels of competition that are added in response to those results.

OSPI Monitoring of Athletics

According to the ECRO's Director, the ECRO's full implementation of the process under the May 2011 rules has taken several years. She referred to the 2011-2012 year as a "technical assistance" year, during which the ECRO provided guidance to districts that were not in compliance regarding steps that they could take to achieve compliance. Since the 2011-2012 review cycle, the ECRO has expanded the CPR process to include a more detailed review of district athletics programs and ECRO staff members now participate in site reviews.

Separate from the obligations of conducting an annual self-evaluation and administering a student survey every three years, each of the state's school districts are reviewed under the CPR once every five years, except for the four districts that receive the largest amount of FFA, which are reviewed every year. In the spring of 2014, the CPR process was modified to incorporate the use of an electronic database reporting system, developed by OSPI, which requires school and district athletic directors to input participation numbers directly into the reporting system.

At the beginning of each CPR cycle, the ECRO notifies each district scheduled for review to collect and submit data for the specific schools selected by the ECRO. For each school selected, the district reports the number of male and female students enrolled, the number of athletic opportunities available for male and female students, all sports and levels of competition added or dropped during the previous five years, and the top sports requested in the most recent athletic interest survey administered. The ECRO uses this data to determine compliance under the Three-Part Test. Within 45 days of the ECRO notifying a district that a school is not in compliance, the district is to develop and submit for approval an action plan for achieving compliance.

The ECRO's practice is to make a determination that a district is in compliance under Part One if the district would be required to add fewer than 15 or 20 additional participation opportunities for members of the disproportionately under-represented sex, depending on the size of the school.

CPR Results

OCR reviewed the results of the CPRs conducted during the 2011-2012 through 2015-2016 review cycles. OCR's analysis focused on the ECRO's reviews under the expanded CPR process.

During the 2011-2012 review cycle, the ECRO did not make any out-of-compliance determinations; however, of the 61 districts reviewed that year, the ECRO identified four districts that it could deem out of compliance with the requirement to conduct a self-evaluation regarding the provision of equal athletic opportunity. The ECRO provided technical assistance

to the districts but did not require an action plan to address the issue. The ECRO did not conduct any analysis of whether or not the districts were in compliance with the Three-Part Test.

In 2012-2013, ECRO reviewed 55 districts and found 15 out of compliance with respect to conducting a self-evaluation regarding equal athletic opportunity. The ECRO required these districts to submit an action plan to demonstrate that they would have a process in place to analyze participation and address any disparity between enrollment and participation or unmet interest. The ECRO did not conduct any analysis of whether or not the districts were in compliance with the Three-Part Test.

In 2013-2014, ECRO reviewed 71 districts and found 26 out of compliance with respect to conducting self-evaluations. During this review cycle, the ECRO began providing a software tool for districts to analyze their compliance under the Three-Part Test and began conducting its own analysis of whether or not a district was in compliance with the Three-Part Test.

In February 2016, OCR conducted an on-site visit to OSPI to interview staff and review additional data. OCR focused on information collected during the then-current CPR review cycle (2015-2016). OCR reviewed CPR information for 16 districts. For each of the 16 districts, OCR reviewed the ECRO's most recent CPR, its compliance determination, any action plan that was required as a result of its determination, and the ECRO's follow up with regard to each non-compliance determination. OCR reviewed the CPRs with the Director and several ECRO program directors; the review included five districts that were categorized by the ECRO as "in-compliance," and five districts categorized as "out-of-compliance" during the 2015-2016 CPR cycle.

OCR also reviewed additional districts in the 2015-2016 CPR cycle for the specific purpose of determining whether the ECRO identified any districts as being in compliance under Part One utilizing the practice of determining that a district is in compliance under Part One if the district would be required to add fewer than 15 or 20 additional participation opportunities for members of the disproportionately under-represented sex. Of the districts identified for this purpose, OCR determined that three districts were determined to be in Part One compliance based on needing less than 15 to 20 additional participation opportunities.

Analysis and Conclusion

OSPI's Application of Part One of the Three-Part Test

OCR determined that the practice of the ECRO is to collect data regarding the number and percentage of male and female students enrolled at the school and the total number of participation opportunities for male and female students, and then calculate whether the participation opportunities are substantially proportionate to the enrollment.

OCR determined that the ECRO's practice is to make a determination that a district is in compliance under Part One if it would be required to add fewer than 15 or 20 additional participation opportunities for members of the disproportionately underrepresented sex, depending on the size of the school.

Determining compliance under Part One requires an analysis to determine whether athletic opportunities are substantially proportionate. The determination with regard to whether participation opportunities are "substantially" proportionate to enrollment rates depends on the institution's specific circumstances and the size of its athletic program. This determination is to be made on a case-by-case basis.

Opportunities can be considered 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 interscholastic team; as a frame of reference one may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

OCR determined that the ECRO's application of Part One of the Three-Part Test does not comply with Title IX because the ECRO does not make determinations under Part One on a case-by-case basis. Based on interviews with the Director, and confirmed by reviewing CPR files, OCR determined that the ECRO, when considering if the school is meeting Part One, does not use the student surveys, which would contain information about the number of interested and able students, to determine if a viable team could be sustained or not as part of determining substantial proportionality under Part One. In addition, OCR determined that the ECRO does not consider enrollment and participation rates for multiple years, a practice that would avoid making erroneous Part One compliance (or non-compliance) determinations based on short-term fluctuations in annual enrollment or participation. Instead, the ECRO uses a fixed standard that a district is in compliance under Part One if the district would be required to add fewer than 15-20 additional participation opportunities for members of the disproportionately under-represented sex, depending on the size of the school. Thus, the ECRO uses a fixed numerical test instead of a case-by-case assessment based on relevant factors to determine compliance under Part One.

OSPI's Application of Part Two of the Three-Part Test

OCR only identified two instances where the ECRO was presented with information or asked to make a determination of compliance based on Part Two. The ECRO reported that one school district initially provided an action plan that contemplated that it could demonstrate Part Two compliance. The ECRO determined that adding one sport for the underrepresented sex under the proposed plan would likely not result in Part Two compliance. In the other instance, the ECRO correctly determined that the district's assertion that it was in compliance under Part Two was not supported by the history provided by the district, because the school had eliminated a sport or squad for the underrepresented sex within the previous few years.

OSPI's Application of Part Three of the Three-Part Test

OCR determined that, with respect to schools that did not meet Part One or Part Two, where the school had survey results indicating that interest existed in sports not currently offered by the school or district, the ECRO routinely required the district to include in its action plan steps to determine if competition was available in the league in which it competed or in the district's normal competitive region and, if so, to take steps to add sports in response to the interest expressed. OCR also determined that the ECRO had a practice of requiring schools to administer interest surveys if the school did not have information about what were the sports in which members of the underrepresented sex were interested. Finally, OCR also determined that the ECRO generally required that the action plans be implemented within 45 days of their approval by the ECRO and, in one instance, returned a proposed action plan to the submitting district four times before it was approved as meeting the ECRO's standards for specific and timely action.

OCR determined that the ECRO, in applying Part One of the Three-Part Test, did not make its determinations on a case-by-case basis as required by Title IX and its regulations. The information obtained by OCR reflects that, in some instances, ECRO improperly approved school districts' interscholastic athletics programs, and thereby perpetuated discrimination against students by providing significant assistance to those school districts that discriminated on the basis of sex by failing to provide equal athletic opportunity to both sexes. OCR has concluded that OSPI has not met its obligation to not perpetuate discrimination in school districts that are not in compliance with Title IX.

With respect to the ECRO's application of Parts Two and Three, OCR found insufficient evidence to establish that the ECRO has established policies and practices that violate Title IX or perpetuate discrimination at school districts. OCR has also concluded that OSPI is taking appropriate, albeit limited steps to ensure that school districts whose reports indicate that they are not in compliance with Title IX develop action plans to ensure that schools are able to demonstrate compliance under Part Three. OCR also notes that, since April 2011 when OCR notified OSPI that it was initiating the review, OSPI has developed a process for identifying and addressing inequities in athletic participation opportunities for students in the state's schools through its CPR.

With regard to the compliance issue identified by OCR with respect to the ECRO's application of the standard utilized in its Part One determinations, OSPI has entered into a resolution agreement with OCR to resolve that issue. The resolution agreement will require the OSPI to:

- review and revise its policies, procedures, guidelines, and practices, as applicable, to ensure that its CPR complies with the requirements of Part One of the Three-Part Test;

- provide training to its ECRO staff and supervisors and any other relevant administrators and employees who are involved with overseeing school districts' compliance with the provisions of Title IX and its regulations that relate to athletics. The training will fully address making a case-by-case determination with respect to Part One of the Three-Part Test; and
- issue written notice to all school and district administrators, which includes a description of the requirements of Part One of the Three-Part Test.

OCR will monitor the implementation of the resolution agreement and will close the compliance review when OCR determines that the terms of the agreement have been satisfied.

This letter sets forth OCR's determination in this compliance review. 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 OSPI may not retaliate against any individual because he or she participated in an OCR investigation. If this should occur, the individual may file a complaint alleging such retaliation.

Under the Freedom of Information Act, it may be necessary to release this letter 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 that you and your staff extended to OCR staff in resolving this compliance review. If you have any questions about this letter, you may contact Mark Farr, Senior Equal Opportunity Specialist, by telephone at (206) 607-1607 or by e-mail at mark.farr@ed.gov.

Sincerely,

/ s /

Monique M. Malson
Program Manager

Enclosure: Resolution Agreement