



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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WASHINGTON, DC 20202-1475

REGION XI
NORTH CAROLINA
SOUTH CAROLINA
VIRGINIA
WASHINGTON, D.C.

June 24, 2015

James A. Anderson
Chancellor
Fayetteville State University
1200 Murchison Road
Fayetteville, North Carolina 28301

Re: OCR Complaint Nos. 11-14-2234 through 11-14-2239
Letter of Finding

Dear Chancellor Anderson:

This is to notify you of the disposition of the above-referenced complaints against Fayetteville State University (the University), which were filed on April 3, 2014, with the U.S. Department of Education's Office for Civil Rights (OCR). The Complainants filed these complaints alleging discrimination on the basis of sex in the operations of the University's athletics programs. Specifically, the complaints alleged:

1. The University is denying women an equal opportunity to participate in intercollegiate athletics;
2. The University discriminates against female athletes by not awarding athletic scholarships or grants-in-aid in proportion to the number of students of each sex participating in intercollegiate athletics; and
3. The University does not provide equal opportunities with respect to the provision of equipment and supplies, the scheduling of games and practice time, the provision of travel and per diem allowances, the opportunity for coaching and academic tutoring, the assignment and compensation of coaches and tutors, the provision of locker rooms and practice and competitive facilities, the provision of medical and training services and facilities, the provision of publicity, the recruitment of student athletes, and the provision of support services.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any program or activity receiving Federal financial assistance from the Department. Because the

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

University receives Federal financial assistance from the Department, OCR has jurisdiction over it pursuant to Title IX.

During the investigation, OCR reviewed documentation submitted by the Complainants and the University. Prior to the completion of OCR's investigation, the University requested to voluntarily resolve the matter pursuant to Section 302 of OCR's *Case Processing Manual* (CPM), and signed the enclosed resolution agreement (the Agreement), which, once implemented, will fully address the issues raised in this complaint. We set forth below the applicable regulatory requirements, a summary of OCR's investigation to date, and a summary of the resolution.

Applicable Legal and Policy Standards

OCR enforces 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. Part 106. The Title IX regulation, at 34 C.F.R. § 106.41, prohibits discrimination in athletics, and 34 C.F.R. § 106.37(c) separately requires that athletic scholarships be available to members of each sex in proportion to the number of students participating in athletics. Additionally, OCR has multiple policy documents interpreting this provision, including but not limited to, the Intercollegiate Athletic Policy Interpretation (Policy Interpretation) issued December 11, 1979 (44 Fed. Reg. 71413 *et seq.* (1979)); January 16, 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test and Dear Colleague Letter; July 23, 1998 "Bowling Green State University" Dear Colleague Letter, the April 20, 2010 Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three, and Dear Colleague Letter.

Background

Fayetteville State University (University) is located in Fayetteville, North Carolina. It was founded in 1867 and is part of the University of North Carolina System. The University reports that for the 2013-2014 academic year there were 2,684 full time female undergraduate students and 1,251 full time male undergraduate students enrolled at the University. The University reports undergraduate enrollment by gender is 31.8% men and 68.2% women. The University currently offers the following four intercollegiate men's sports: football, basketball, golf, and cross country. The University also offers the following six intercollegiate women's sports: softball, basketball, cross country, bowling, tennis, and volleyball. The University competes at the Division II level as a member of the National Collegiate Athletic Association (NCAA) and in the Central Intercollegiate Athletic Association (CIAA).

In a Title IX athletics investigation, OCR collects information from the complainant and the recipient regarding the athletics program. Based on this information OCR conducts interviews with multiple athletes, coaches, and administrators about the implications of differences noted in the initial information provided.

Allegation 1: Accommodation of Athletic Interest and Abilities – 34 C.F.R. § 106.41(c)(1)

The Title IX regulation requires institutions to effectively accommodate the interests and abilities of students to the extent necessary to provide equal opportunity in the selection of sports and the levels of competition available to members of both sexes. In effectively accommodating the interest and abilities of male and female athletes, institutions receiving Federal financial assistance must provide the opportunity for individuals of each sex to participate in intercollegiate competition and to have competitive team schedules that equally reflect their abilities. To determine compliance with this component area, OCR examined whether the selection of sports and levels of competition in the intercollegiate athletics program at the University fails to effectively accommodate the interests and abilities of members of both sexes.

The Policy Interpretation provides that for the first element of this determination, OCR will apply the following Three-Part test to assess whether an institution is providing equal participation opportunities for individuals of both sexes:¹

- (1) Whether 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, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

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 intercollegiate athletics. If an institution has met any part of the Three-Part test, OCR will determine that the institution is meeting this requirement.

The University did not provide participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments during the 2012-2013 to 2014-2015 academic years.² Women were, and continue to be, underrepresented in the intercollegiate athletics program when compared to their representation in the student population. Therefore, the University does not meet the first part of the Three-Part Test. Prior to the conclusion of OCR's investigation as to whether the University met the second or third parts, the

¹ See also Dear Colleague letter, dated January 16, 1996, entitled "Clarification of Intercollegiate Athletic Policy Guidance: the Three-Part Test" (1996 Clarification); Dear Colleague letter dated July 11, 2003 entitled "Further Clarification of Intercollegiate Athletics Policy" (2003 Clarification); and Dear Colleague Letter issued on April 20, 2010 entitled "Intercollegiate Athletics Policy Clarification: The Three Part Test – Part Three" (2010 Clarification).

² The female enrollment has been 66.88%, 67.26% and 69.21% respectively. Compared to the female athletes have been 40.56%, 37.58%, and 35.22% respectively.

University requested to voluntarily resolve this complaint. Therefore, the attached agreement, when implemented, will resolve this allegation.

Allegation 2: Athletic Financial Assistance – 34 C.F.R. § 106.37 (c)

The Title IX regulation, at 34 C.F.R. §106.37(c), requires that a university provide reasonable opportunities for athletic scholarship awards for members of each sex in proportion to the number of students of each sex participating in its intercollegiate athletics program. The Policy Interpretation provides that OCR will examine compliance primarily by means of a financial comparison to determine whether the total amounts of financial assistance (scholarship aid) available to men's and women's athletic programs is substantially proportionate to their respective participation rates. To assess this, OCR divides the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and compares the results. The analysis is conducted on a case-by-case basis, but institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments that take into account legitimate, nondiscriminatory factors (such as differences in in-state vs. out-of-state tuition at public institutions, as long as out-of-state scholarships are not disproportionately limited to one sex; or reasonable professional decisions concerning awards necessary for program development) that the institution can demonstrate are reasonable and do not reflect underlying discrimination.

After taking into account any legitimate, nondiscriminatory explanations demonstrated by the institution, if there is an unexplained disparity in the athletic financial assistance budget favoring either sex, OCR will presume that such disparity is reasonable and based on legitimate and nondiscriminatory reasons if: 1) the disparity is one percent or less for the entire athletic scholarship budget; or 2) the disparity is greater than one percent, but no greater than the value of one full scholarship. For example, if men are 60 percent of the athletes, OCR would expect that the men's athletic scholarship budget would be within 59 to 61 percent of the total budget for athletic scholarships for all athletes. For those colleges or universities where one percent of the entire athletic scholarship is less than the value of one full scholarship, OCR will presume that a disparity up to the value of one full scholarship is equitable and nondiscriminatory. However, even if an institution consistently has a less than one percent disparity, the presumption of compliance with the Title IX regulation might still be rebutted if there is direct evidence of discriminatory intent.

OCR reviewed the participation rates for student athletes. During the 2014-2015 academic year, the University reported participation rates of 49 female athletes and 102 male athletes, a total of 151 athletes. Therefore, for 2014-2015, there were 32.45 percent female athletes, and 67.55 percent male athletes. Female athletes were awarded \$226,471 of the \$697,602.51 (or 32.46%) in athletic financial aid. Again, a disparity of one percent or less is presumed reasonable. Here, the difference is 0.01 percent. This is in compliance with the Title IX requirements. OCR finds insufficient evidence of violation with regard to this allegation and is closing it effective the date of this letter.

Allegation 3: Laundry List

As explained above, the Title IX regulation requires that recipients provide equal athletic opportunities for members of both sexes. In determining whether an institution provides equal opportunity, OCR considers the following factors, often collectively referred to as the “laundry list.” The Agreement signed by the University on June 12, 2015, resolves the complaint allegation related to inequality in the provision of the laundry list factors. These are:

1. **Equipment and Supplies - 34 C.F.R. § 106.41(c)(2):** The Title IX regulation requires recipients to provide equal athletic opportunity for members of both sexes regarding the provision of equipment and supplies. The Policy Interpretation states: “Equipment and supplies include but are not limited to uniforms, other apparel, sport-specific equipment and supplies, instructional devices, and conditioning and weight training equipment.” The Policy Interpretation lists five factors to be assessed in determining compliance: (1) quality (*e.g.*, condition); (2) amount (*e.g.*, adequacy); (3) suitability (*e.g.*, officially sanctioned); (4) the availability of equipment and supplies (*e.g.*, amount of time equipment is accessible); and (5) maintenance and replacement policies and practices (*e.g.*, maintenance services such as laundry, equipment storage, and replacement schedule) of the institution regarding equipment and supplies.
2. **Scheduling of Games and Practice Time - 34 C.F.R. § 106.41(c)(3):** In assessing whether the University is providing male and female athletes equivalent benefits and opportunities with respect to the scheduling of games and practice time., OCR considers the number of competitive events per sport, the time of day that competitive events and practice opportunities are scheduled, the number and length of practice opportunities, and the opportunities to engage in pre-season and post-season competition.
3. **Travel and Per Diem Allowance - 34 C.F.R. § 106.41(c)(4):** In assessing compliance in this area, OCR considers modes of transportation, housing and dining arrangements furnished during travel, length of stay before and after competitive events, and per diem allowances.
4. **Opportunity To Receive Academic Tutoring, and Assignment and Compensation of Tutors - 34 C.F.R. § 106.41(c)(5) & (6):** Compliance in the opportunity to receive academic tutoring and the assignment and compensation of tutors component is determined by examining multiple factors, including the equivalence for men and women of the availability of tutoring and the procedures and criteria for obtaining tutorial assistance as well as tutor qualifications and experience.
5. **Opportunity To Receive Coaching, and Assignment and Compensation of Coaches - 34 C.F.R. § 106.41(c)(5) & (6):** In determining compliance with regard to this component, the Policy Interpretation requires consideration of the relative availability of: (1) full time coaches; (2) relative availability of part time and assistant coaches; and (3) relative availability of graduate assistants. Additionally, the training, experience, and other professional qualifications; and professional standing are considered.

- 6. Locker Rooms, Practice, and Competitive Facilities - 34 C.F.R. § 106.41(c)(7):** When assessing compliance with the program component of the Provision of Locker Rooms, Practice, and Competitive Facilities, OCR analyzes the following six factors:

 - (1) Quality and availability of facilities provided for practice and competitive events;
 - (2) Exclusivity of use of facilities provided for practice and competitive events;
 - (3) Availability of locker rooms;
 - (4) Quality of locker rooms;
 - (5) Maintenance of practice and competitive facilities; and
 - (6) Preparation of facilities for practice and competitive events.
- 7. Medical and Training Facilities and Services - 34 C.F.R. § 106.41(c)(8):** In determining compliance in the provision of medical and training facilities and services, OCR addresses five factors. To assess compliance in this area, OCR considers the following:

 - (1) Availability of medical personnel and assistance;
 - (2) Health, accident and injury insurance coverage for athletic participants;
 - (3) Weight and conditioning facilities;
 - (4) Availability and qualifications of athletic trainers; and
 - (5) Quality and availability of training facilities.
- 8. Housing and Dining Facilities and Services - 34 C.F.R. § 106.41(c)(9):** In assessing compliance in this area, OCR considers the equivalence of men's and women's housing and dining facilities and services or other related special services provided for student athletes.
- 9. Publicity - 34 C.F.R. § 106.41(c)(10):** In assessing compliance regarding the provision of publicity, OCR considers the availability and quality of sports information personnel, the services they provide, other publicity resources, and the quality and quantity of publications and other promotional devices featuring men's and women's programs.
- 10. Provision of Support Services - 34 C.F.R. § 106.41(c):** In assessing compliance in this area, OCR considers, among other factors, the equivalence for men's and women's teams regarding the amount of administrative, secretarial, and clerical assistance received, and the availability of office space, equipment and supplies, and other support services.
- 11. Recruitment of Student Athletes - 34 C.F.R. § 106.41(c):** In assessing compliance in this area, OCR considers the following:

 - (1) Whether coaches or other professional athletic personnel in University's 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 University's men's and women's teams are equivalently adequate to meet the need of each program; and
 - (3) Whether the differences in benefits, opportunities, and treatment afforded to prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of athletes of either sex.

OCR's investigation included gathering information regarding the laundry list factors, including the locations of the facilities used by each team. The only team that did not have a facility on campus was the Women's Softball team.³ The University provided OCR the schedules of competition and practice. On average during the 2013-2014 school year the men's team's participated in 83.74% of the NCAA Guideline competitions compared to 75.09% for female teams.

Additionally, the University provided the following information regarding the number of coaches and their compensation for 2013-2014. The University spent approximately \$677,200 total to compensate its coaching staff in 2013-2014 (excluding cross country, a co-ed team). Of that, approximately 72% was received by men's coaches, and 28% was received by women's coaches. Next, OCR determined the percentage of the University's athletes (151 total⁴) by sex, and found that for 2013-2014, male athletes (96) accounted for about 64% of athletes at the University, and female athletes (55) accounted for about 36% of athletes.

OCR also reviewed the University's policy regarding recruiting is equitable on its face. OCR also reviewed two spreadsheets provided by the University, one of prospective athlete visits to campus and one of recruiting trips for recruiters. There were only three sports that had subsidized prospective athlete visits to campus during the 2013-2014 academic year: Women's Basketball, Men's Basketball, and Men's Football. Approximately 40% of the money spent on athlete recruitment was spent on female athletes, and about 60% was spent on male athletes. When compared with the fact that about 35% of the athletes are female, these numbers seem reasonable. However, the records were unclear as to which recruiting trips were subsidized.

Voluntary Resolution Prior to Conclusion of OCR's Investigation

As noted above, prior to the completion of this complaint investigation, the University expressed interest in resolving this complaint under Section 302 of the CPM. The CPM provides that a complaint may be resolved before the conclusion of an OCR investigation if a recipient asks to resolve the complaint and signs a resolution agreement that addresses the complaint allegation(s). The provisions of the resolution agreement are aligned with the complaint allegation(s) and the issues investigated and are consistent with applicable law and regulations.

On June 12, 2015, the University signed the enclosed Agreement, which, when fully implemented, will resolve the complaint. The Agreement requires the University to evaluate its athletics program and determine if there are inequities and develop a plan to resolve those inequities with OCR's review and approval.

³ The Women's Tennis team had a facility on campus, but used an off-campus facility as theirs was damaged and in need of repair.

⁴ As noted previously, men's and women's cross country athletes are excluded from the coaches' analysis, as they are considered a combined team; i.e., the men's and women's teams have the same coaches, and practice and compete at the same or similar times.

Conclusion

In light of the signed Agreement, OCR is closing its investigation as of the date of this letter. OCR will, however, monitor the University's implementation of the Agreement.

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

This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the University's compliance with any other regulatory provision or to address any issues other than those addressed in this letter.

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

Please be advised that the University may not retaliate against an individual who asserts a right or privilege under a law enforced by OCR or who files a complaint, testifies, or participates in an OCR proceeding. If this happens, the individual may file a retaliation complaint with OCR.

OCR appreciates the cooperation of the University during the investigation and resolution of these complaints, especially that of Wanda Jenkins, General Counsel. If you have any questions about this letter or OCR's resolution of this case, you may contact Judith Risch, the OCR attorney assigned to this complaint, at (202) 453-5925 or judith.risch@ed.gov.

Sincerely,

/S/

Dale Rhines
Program Manager
District of Columbia Office
Office for Civil Rights

cc: Wanda Jenkins, General Counsel

Enclosure