



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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CLEVELAND, OH 44115-1812

REGION XV
MICHIGAN
OHIO

September 29, 2023

Via e-mail only to: [redacted content]

Kathy Perrico, Esq.
Weston Hurd, LLP
1300 East 9th Street, Suite 1400
Cleveland, Ohio 44114

Re: OCR Docket No. 15-23-1173

Dear Kathy Perrico:

This letter is to notify you of the disposition of the above-referenced complaint filed on [redacted content], with the U.S. Department of Education, Office for Civil Rights (OCR), against Boardman Local School District (the District) alleging that the District was not providing equal athletic opportunity to female student athletes with respect to the scheduling of high school basketball games.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), 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 any education program or activity operated by a recipient of federal financial assistance. As a recipient of federal financial assistance from the Department of Education, the District is subject to this law.

Based on the complaint allegation, OCR opened an investigation of the following legal issue: whether the District provides equal athletic opportunity to members of both sexes with respect to the scheduling of games and practice times, as required by the Title IX implementing regulation at 34 C.F.R. § 106.41(c)(3).

During its investigation to date, OCR reviewed information provided by the Complainant and the District and interviewed the Complainant and District staff. Before the conclusion of OCR's investigation, the District requested to voluntarily resolve this complaint pursuant to Section 302 of OCR's Case Processing Manual. OCR's investigation to date is summarized below.

Facts

The Complainant alleged a disparity in the scheduling of the District's boys' and girls' high school varsity basketball games, in that girls' games are rarely scheduled on Friday nights. Specifically, the Complainant alleged that during the 2022-2023 basketball season, the District's boys' high school basketball team had 22 scheduled games, nine of which were on Friday night.

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Comparatively, the District's girls' high school basketball team had 22 scheduled games, zero of which was on Friday night.

OCR examined the District's competitive high school sports schedules for the 2022-2023 school year. With respect to basketball, OCR found that the boys' varsity basketball team was scheduled to play 22 regular season game of which there were: nine on Friday night; 11 on weekday nights (Monday-Thursday);¹ one on Saturday night; and one on Sunday afternoon. OCR found that the girls' varsity basketball team was scheduled to play 22 regular season games of which there were one on a Friday afternoon, 14 on weekday nights, six on Saturday afternoon, and one on Saturday night.

With respect to other sports, the boys' varsity football team was scheduled to play almost exclusively on Friday nights, except for one Saturday morning game, which appeared to be a scrimmage. The boys' varsity wrestling team schedule included five combined Friday morning, afternoon, and night meets, six combined Saturday morning and afternoon meets, with the remainder of the meets scheduled for weekday morning and evenings. The District's [redacted content] noted that the District did not have a girls' wrestling team due to lack of interest. The girls' varsity volleyball team was scheduled to played primarily weekday night games with four Saturday morning games. The boys' and girls' varsity cross country teams had almost identical schedules including an equivalent number of meets on weekday nights and Saturday mornings and Saturday afternoons. The swim team is co-ed and had most meets on Saturday mornings and afternoons, with one Friday night meet and a few weekday night meets. Boys' and girls' varsity golf had similar schedules, with each team playing two Friday tournaments during the day. Boys' and girls' varsity soccer both played primarily on weekday nights, but the boys' schedule included three Saturday night games while the girls' schedule only included one. Both boys' and girls' varsity tennis played primarily on weekday afternoons and the boys' and girls' varsity track teams had identical schedules. Boys' varsity baseball and girls' varsity softball also had similar weekday and weekend schedules, as did boys' and girls' varsity lacrosse, although girls' lacrosse had three Friday night games on the schedule while the boys' had none. Finally, the varsity boys' and girls' bowling teams had near identical schedules.

The District's [redacted content] told OCR that the District is part of the All-American Conference, with the exception of football and boys and girls lacrosse, which are not in a conference. The conference is small and only includes four other schools. The [redacted content] stated that the District intended to stay in the conference for the foreseeable future, although it was difficult not being in a conference for football. [redacted content] stated that the conference sets schedules about year in advance. The conference has a Commissioner, who runs monthly conference meetings with all athletic directors and also assigns the athletic directors for each district to a certain sport to schedule in-conference contests for that given sport for the next year. The athletic director for each district is then responsible for scheduling all non-conference contests for their respective district. The [redacted content] stated that all members of the conference schedule in-conference games first and then work on scheduling the non-conference games which are also scheduled in advance. [redacted content] said typically, after a non-conference game is over, [redacted content] will ask the opposing team if they want to play again

¹ For purposes of this letter, weekday refers to any game scheduled Monday-Thursday.

next year. If they agree, then they will essentially keep the same weekend/weekday game for the following year but alternate sites.

Regarding basketball scheduling, the [redacted content] said that boys' varsity and junior varsity (JV) in-conference games are scheduled on Tuesday and Friday nights, and that girls' varsity and JV in-conference games are scheduled on Wednesday nights and Saturday afternoons, except for one district in the conference that schedules all girls' home games for 7:00pm on Saturdays. The [redacted content] stated that there was no policy or procedure in place for the scheduling of boys' and girls' games in that manner, but rather it was born out of tradition. [redacted content] also stated that even for non-conference games, when the opponent is at home, they prefer scheduling girls' games on Saturday afternoons rather than Saturday nights. [redacted content] noted that before [redacted content] became the District's [redacted content] the District had surveyed the girls' freshman, JV, and varsity basketball teams and asked if the players preferred Saturday afternoon or evening games. [redacted content] stated that a majority wanted Saturday afternoon. The District recently conducted another poll asking the same question of the District's girls' basketball teams and that 90% preferred Saturday afternoon versus Saturday night games. However, [redacted content] acknowledged that the poll did not ask the players if they preferred Friday night to Saturday games, regardless of time.

Regarding attendance at girls' and boys' varsity basketball games, the [redacted content] stated that boys' games have higher attendance during the weekday and weekend games. [redacted content] stated that girls' attendance has gone up due to their successful record during the 2022-2023 season. [redacted content] pointed out that at a recent Saturday afternoon girls' game they drew a big crowd, but acknowledged that the game's attendance was still lower, although comparable, to boys' Friday night crowds.

Legal Standard and Analysis

The Title IX implementing regulation at 34 C.F.R. § 106.31(a) prohibits recipients from, on the basis of sex, excluding a person from participation in, denying the person the benefits of, or subjecting the person to discrimination under any education program or activity operated by the recipient.

Athletics programs are specifically addressed at 34 C.F.R. § 106.41 of the Title IX implementing regulation, which requires a recipient that operates or sponsors interscholastic athletics to provide equal athletic opportunity for members of both sexes. As a means of assessing compliance, OCR follows the Department's Policy Interpretation (Policy Interpretation) issued December 11, 1979, 44 Fed. Reg. 71413 *et seq.*

Pursuant to the Policy Interpretation, OCR examines whether the availability and quality of benefits, opportunities, and treatment provided are equivalent for members of both sexes. There are thirteen major factors listed in the Title IX regulation and the Policy Interpretation that may be investigated by OCR to determine whether equal opportunities are available. OCR has termed these thirteen major factors "program components." They include the scheduling of games and practice time. 34 C.F.R. § 106.41(c)(3). Interscholastic athletics investigations may not be limited to anything less than a program component. For each of the thirteen program components, the Policy Interpretation lists specific factors to be investigated.

In accordance with the Policy Interpretation, OCR compares the boys' program and the girls' program on an overall basis, not on a sport-by-sport basis (such as, for example, baseball vs. softball). In evaluating program components, a disparity is a difference in benefits or services, on the basis of sex, which has a negative impact on athletes of one sex when compared with benefits or services available to athletes of the other sex. As some differences in benefits provided to boys and girls may be the result of nondiscriminatory reasons, such as the unique aspects of a particular sport, making a determination that a disparity exists requires more than simply identifying differences in benefits and services. Where any disparities are noted, OCR then considers whether the differences are negligible. Where the disparities are not negligible, OCR determines whether they are the result of nondiscriminatory factors.

Finally, OCR determines whether the disparities identified resulted in the denial of equal athletic 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.

For the program component of scheduling of games and practice time, 34 C.F.R. § 106.41(c)(3), pursuant to the Policy Interpretation, OCR examines the following five factors in assessing compliance: 1) the number of competitive events per sport; 2) the number and length of practice opportunities; 3) the time of day competitive events are scheduled; 4) the time of day practice opportunities are scheduled; and 5) the opportunities to engage in available pre-season and post-season competition.

An institution is not required to schedule the same number of games or practices for men's and women's teams of the same or similar sport. However, any differences favoring, for example, men's teams, should be offset by differences favoring women's teams in other sports.

The provision of greater access to teams of one sex to premium game times for competition can result in a denial of equal athletic opportunity to athletes of the opposite sex.

Based on evidence OCR has reviewed to date, including the 2022-2023 schedules for the girls' and boys' basketball teams, OCR has a cause for concern that the boys' varsity basketball team plays significantly more games on Friday nights than the girls' varsity basketball team, which had zero Friday night games scheduled and only one Saturday night game and six Saturday afternoon games. Moreover, attendance is higher for the boys' basketball team, even when compared to a Saturday afternoon girls' game with high turnout. The evidence obtained to date also shows that, in the fall, the only team that plays only on Friday nights is the boys' varsity football team. Collectively, boys' sports teams play significantly more Friday night games than girls' sports teams. Thus, disparity for the girls' basketball team is not offset by more favorable primetime scheduling for other girls' teams. This evidence raises a cause for concern that the District does not provide equal athletic opportunity to members of both sexes with respect to the scheduling of games, as required by the Title IX implementing regulation at 34 C.F.R. § 106.41(c)(3).

Voluntary Resolution and Conclusion

Under Section 302 of OCR's *Case Processing Manual*, allegations under investigation may be resolved at any time when, prior to the conclusion of the investigation, the recipient expresses an interest in resolving the allegations and OCR determines that it is appropriate to resolve them because OCR's investigation has identified concerns that can be addressed through a resolution agreement. In this case, the District expressed an interest in resolving the allegation prior to the conclusion of OCR's investigation and OCR determined resolution was appropriate. On September 29, 2023, the District signed the enclosed Resolution Agreement, which, when fully implemented, will address all of the allegations in the complaint. OCR will monitor the implementation of the Resolution 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. Individuals who file complaints with OCR may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District must not harass, coerce, intimidate, discriminate, or otherwise retaliate against an individual because that individual asserts a right or privilege under a law enforced by OCR or files a complaint, testifies, assists, or participates in a proceeding under a law enforced by OCR. If this happens, the individual may file a retaliation complaint with OCR.

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, it will seek to protect, to the extent provided by law, personally identifiable information, that, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

OCR looks forward to receiving the District's first monitoring report by December 1, 2023. For questions about implementation of the Agreement, please contact Alysa Kociuruba, who will be overseeing the monitoring. Ms. Kociuruba can be reached by telephone at (202) 987-1837 or by e-mail at Alysa.Kociuruba@ed.gov. If you have questions about this letter, please contact me by telephone at (202) 987-1838 or by e-mail at Denise.C.Vaughn@ed.gov.

Sincerely,

Denise C. Vaughn
Team Leader

Enclosure