



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

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CLEVELAND, OH 44115-1812

REGION XV
MICHIGAN
OHIO

July 3, 2023

Via e-mail only to: [redacted content]
[redacted content]

Lisa Woloszynek, Esq.
Kathryn Perrico, Esq.
Weston Hurd LLP
1300 E. Ninth Street, Suite 1400
Cleveland, Ohio 44114

Re: OCR Docket No. 15-23-1207

Dear Lisa Woloszynek:

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 Berea City School District (the District) alleging that the District discriminated against female students based on sex. Specifically, the Complainant alleged that the District does not provide equal athletic opportunity to female students 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 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 District's [redacted content].

Background

The District is a member of the Southwestern athletic conference with seven other school districts, including Amherst Steele, Avon, Avon Lake, Elyria, Midview, North Ridgeville, and

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Olmsted Falls. The District has been in the conference since approximately 2005 and it will continue in the conference during the 2023-2024 school year.

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, 9 of which were on Friday nights. Comparatively, the District's girls' high school basketball team had 22 scheduled games, 2 of which were on Friday nights.

Information obtained to date

OCR reviewed the District's basketball schedules for the 2022-2023 school year as provided by the District. The boys' varsity basketball team was scheduled for 23 games, nine of which were on Friday nights, one on a Saturday night, and one on a Saturday afternoon. The girls' varsity basketball team was scheduled for 24 games, 2 of which were on a Friday night, 1 on a Saturday night, 1 on a Sunday night, and 7 on Saturday afternoons (one post-season game). Both the boys' and girls' junior varsity (JV) teams were typically scheduled to play earlier on the same days as the varsity teams, although the girls' JV team was scheduled for two early Friday evening games. The girls' and boys' freshman basketball teams played most often at the earliest time slots on the same days the junior varsity and varsity teams played.

The District's [redacted content] said boys' varsity basketball games are on Tuesdays and Fridays and sometimes on Saturdays. Girls' conference varsity games are traditionally on Wednesdays and Saturdays. The [redacted content] said the conference puts together a schedule of 14 games for basketball, which leaves the District with 8 independent games to schedule on their own. He said they schedule non-conference games the same way for girls' and boys' games—he works with the coaches to come up with list of quality opponents. He said they try to look at special opportunities for both teams, such as a game next year at the Hoosier gym and a holiday tournament for both the boys and girls. He noted that boys'/girls' double-headers are something their conference has embraced and they are trying to do them more often. Next year there are four conference games scheduled with the boys and girls playing on the same night.

The [redacted content] provided OCR with some estimates of general admission attendance at high school basketball games. When asked what the typical attendance is for a basketball game on a Friday night, he said 500 or 600. He said they see more people on the weekends. He noted there are many factors (e.g., holidays, weather, opponent) that come into play regarding game attendance. He said a couple hundred people attend games during the week. When asked to describe the girls' games attendance versus the boys' games during the week, he said there are traditionally larger crowds at the boys' games regardless of what night. This year the boys were very successful, and the girls had some major injuries at the beginning of the season. He said attendance figures unfortunately go down when a team is not competitive.

The [redacted content] identified football and boys' basketball as the District sports that draw the most spectators, but he noted that it can depend on the opponent.

Legal Standard

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.

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 1979 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 times. 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 they are negligible. Where the disparities are not negligible, OCR determines whether they are the result of nondiscriminatory factors.

Finally, OCR makes a determination as to whether those 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.

Conclusion

Based on evidence OCR has reviewed to date, including the 2022-2023 schedules for the varsity girls' and boys' basketball teams, OCR has a cause for concern that the varsity boys' basketball team plays more games on Friday and Saturday nights, whereas the varsity girls' basketball team plays most of its games on either weeknights or Saturday afternoons. The varsity girls were scheduled for two Friday night games and one Saturday night game during the 2022-2023 season, with the rest of the games scheduled for school nights. The boys were scheduled for 10 games on a Friday or Saturday night. 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).

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 June 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.

Page 5 – Lisa Woloszynek, Esq.

OCR looks forward to receiving the District's first monitoring report by December 1, 2023. For questions about implementation of the Agreement, please contact Ms. Erin Barker-Brown, who will oversee the monitoring and can be reached by telephone at (202) 987-1842 or by e-mail at Erin.Barker-Brown@ed.gov. If you have questions about this letter, please contact me by telephone at (216) 522-7640.

Sincerely,

Sacara Miller
Supervisory Attorney/Team Leader

Enclosure