



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION II

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March 15, 2016

John F. Quinn
President
Erie Community College
6205 Main Street
Williamsville, New York 14221

Re: Case No. 02-14-2223
Erie Community College

Dear President Quinn:

This letter is to notify you of the determination made by the U.S. Department of Education, New York Office for Civil Rights (OCR) regarding the above-referenced complaint filed against Erie Community College (the College). The complainant alleged that the College discriminated on the basis of sex in its intercollegiate athletics program, by failing to fully and effectively accommodate the athletic interests and abilities of female students to the extent necessary to provide equal opportunities to members of both sexes.

The College is a two-year community college that is part of the State University of New York system. It serves Erie County and the surrounding communities of western New York. During the time period of OCR's investigation, approximately half of the College's enrollment was female and College athletes competed in 12 National Junior Collegiate Athletics Association (NJCAA) sports.

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 U.S. Department of Education (the Department). The College is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to investigate this complaint under Title IX.

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The regulation implementing Title IX, at 34 C.F.R. § 106.41(a), specifically prohibits discrimination on the basis of sex in athletic programs offered by recipients of financial assistance from the Department. The regulation implementing Title IX, at 34 C.F.R. § 106.41(c), states that a recipient that operates or sponsors athletic teams must provide equal opportunity for members of both sexes. The regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1), states that in determining whether equal opportunities are available, OCR will consider, among other factors, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.

There are two aspects to OCR's analysis. OCR first considers the opportunities provided to students of each sex to compete in intercollegiate events, and then compares the quality of competition provided to women's teams with the quality of competition provided to men's teams.

OCR applies the following three-part test to assess whether an institution is providing equal participation opportunities for individuals of both sexes:

- i. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- ii. 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 that is demonstrably responsive to the developing interests and abilities of that sex; or
- iii. 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 demonstrate 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.

Part One: Are Competitive Opportunities Substantially Proportionate to Enrollment?

Under Part One of the three-part test, where an institution provides intercollegiate level participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR compared the number of male and female full-time students enrolled with the number of athletic opportunities available to each sex within the College's athletic program for academic

years 2011-2012, 2012-2013 and 2013-2014. For academic years 2011-2012 through 2013-2014, the College offered participation opportunities in 12 sports: six men's teams (basketball, soccer, bowling, baseball, ice hockey and football) and six women's teams (basketball, soccer, bowling, softball, lacrosse and volleyball). In determining participation opportunities, OCR counted the number of actual athletes participating¹ in each competitive sport.²

OCR determined that during academic year 2011-2012, women had 34.30% (95) of the athletic opportunities while they represented 50.23% (4627/9211) of the overall enrollment; and, men had 65.70% (182) of the athletic opportunities while they represented 49.77% (4584/9211) of the overall enrollment. The difference between women's enrollment and women's athletic opportunities is 15.93%. Analyzing this information in a different manner, in order for women to achieve athletic opportunities proportionate to their enrollment as compared to men, women's athletic opportunities would need to be increased by 89, which is greater than the average women's team size of 16 (95 existing participation opportunities divided by 6 teams)³ during 2011-2012.

OCR determined that during academic year 2012-2013, women had 28.96% (86) of the athletic opportunities while they represented 49.69% (4508/9073) of the overall enrollment; and, men had 71.04% (211) of the athletic opportunities while they represented 50.31% (4565/9073) of the overall enrollment. The difference between women's enrollment and women's athletic opportunities is 20.73%. Analyzing this information in a different manner, in order for women to achieve athletic opportunities proportionate to their enrollment as compared to men, women's athletic opportunities would need to be increased by 122, which is greater than the average women's team size of 14 (86 existing participation opportunities divided by 6 teams) during 2012-2013.

OCR further determined that during academic year 2013-2014, women had 33.08% (87) of the athletic opportunities while they represented 48.39% (3912/8084) of the overall enrollment; and, men had 66.92% (176) of the athletic opportunities while they represented 51.61% (4172/8084) of the overall enrollment. The difference between women's enrollment and women's athletic opportunities is 15.31%. Analyzing this information in a different manner, in order for women to achieve athletic opportunities proportionate to their enrollment as compared to men, women's athletic opportunities would need to be increased by 78, which is greater than the average women's team size of 14 (87 existing participation opportunities divided by 6 teams) during 2013-2014.

¹ As a general rule, OCR counts all student athletes listed on a team's squad or eligibility list, and who are on the team as of the team's first competitive event. Under the interests and abilities analysis, a student athlete who participates in more than one sport will be counted separately as a participant in each sport.

² An extracurricular activity not involving competition as its purpose is not considered a competitive sport for purposes of the interests and abilities analysis.

³ 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. As a frame of reference in assessing this situation, OCR considers the average size of teams offered for the underrepresented sex, a number which would vary by institution.

Based on the foregoing, OCR concluded that the athletic participation opportunities for women and men were disproportionate to their respective enrollments in each of the three years reviewed. Therefore, the College failed to satisfy Part One.

Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under Part Two of the three-part test, an institution may demonstrate compliance by showing that it has a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex. Part Two examines an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.

OCR considers the following factors, among others, as evidence indicating an institution's history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- A record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- A record of increasing the number of participants in intercollegiate athletics who are members of the underrepresented sex; and
- An affirmative response to requests by students or others for addition or elevation of sports.

OCR may also consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- The current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and
- The current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR reviewed the College's sports offerings for the first year of intercollegiate competition, the years that sports were dropped and restored, and the College's sports offerings for the year OCR initiated the investigation.⁴ The College began offering a men's sports program in academic year 1948-1949, with the men's baseball and basketball teams; thereafter, the College added four additional men's sports: bowling, 1967-1968; soccer, 1971-1972; ice hockey, 1976-1977; and football, 2001-2002. The College added its first women's team in academic year 1971-1972,

⁴ The information on dropped and restored sports is only for sports that are currently part of the College's sports' programs offerings. In the data response, the College also refers to a number of sports that are no longer available, but did not provide specific start dates for these sports.

volleyball; thereafter, the College added five additional women's sports: basketball, 1973-1974; bowling, 1975-1976; softball, 1976-1977; soccer, 1980-1981; and, lacrosse, 2005-2006.⁵

The College reported that all of its athletic teams are part of the NJCAA; however, different sports play at different division levels. Five teams play in Division 3 (men's and women's soccer, baseball and softball and women's volleyball); two teams play in Division 2 (men's and women's basketball); and five teams play at the non-divisional level⁶ (football, men's ice hockey, men's and women's bowling and women's lacrosse).

The College reported that in 2010, it hired a consultant to assess and evaluate the number of sports that it was offering in light of increasing budget constraints with declining enrollment and decreased funding for capital improvements. At the time, the College was offering 22 sports (11 men's and 11 women's). The consultant analyzed data on sports offerings at other similarly situated colleges, the average number of sports for NJCAA institutions, and a cost analysis (including but not limited to cost per athlete) at given participation levels. The average number of sports offerings for NJCAA institutions was 12, as compared to 22 at the College. The consultant recommended a decrease in both women's and men's sports to bring the College in line with comparable institutions. As a result of the recommendations of the consultant and financial considerations such as capital costs to maintain fields and facilities, the College eliminated the following sports: men's and women's swimming and men's and women's diving (2010-2011); men's and women's track and men's and women's cross-country (2009-2010); and men's and women's golf (2009-2010).

The College reported that it assesses students' interest in activities and clubs through surveys that the Student Affairs Division conducts after events. The College also stated that the Athletics Department maintains a Sports Application Form on the Athletics Department website, through which students can express their interest in sports at the institution.⁷ The interest form is transmitted to the Director of Athletics, who in turn sends it to the applicable coach; however, if the student requests to be on a sports team that is not currently offered by the institution, the Director of Athletics typically notifies the student that the sport is not available.

The College reported that a search of its records revealed that from August 1, 2012, through December 31, 2012, 14 students (10 men and 4 women) completed the Sports Application Form.⁸ Two of the requests were from women expressing interest in swimming and diving, a program that is no longer available. From January 1, 2013, to December 30, 2013, 38 men and 15 women completed the form. Two of the requests were from women expressing interest in swimming and diving, and track and field; sports that are no longer available. From January 1, 2014, to May 19, 2014, 15 men and 4 women completed the form. Three of the requests were from women expressing interest in track and field, cross-country, and swimming and diving; sports that are no longer available.

⁵ Women's soccer was dropped in academic year 1984-1985, and restored in academic year 1991-1992.

⁶ The reason these teams play at the non-divisional level is because NJCAA has only one division for these sports.

⁷ At <http://elinks.ecc.edu/forms/sportsform.asp>

⁸ The form does not require the participant to disclose gender, but based on the names of the requesting students, the College surmised that ten of the requests came from men and four from women.

Based on the above, OCR determined that while the College has put in place a limited mechanism to collect data on student interest in sports, it does not meet the requirement that a recipient have formal procedures in place for students, coaches, or others to request that additional sports be added. Rather, if a student requests an opportunity to participate in a sport not currently among the offerings in the College's sports program, the student is informed that the sport is not available. Additionally, OCR determined that although the College has increased the number of women's sports teams since the women's program began, it has also added several men's teams; including the addition of football in academic year 2001-2002, just a few years before it determined that budgetary considerations required the cutting of several sports, including three women's teams. Therefore, OCR cannot conclude that the College has a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex.

Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under Part Three of the three-part test, OCR determines whether an institution is fully and effectively accommodating the interests and abilities of the underrepresented sex. Although disproportionately high athletic participation rates by one sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the other, underrepresented sex, an institution can satisfy Part Three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can demonstrate that notwithstanding disproportionately low participation rates of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR considers whether there is (1) unmet interest in a particular sport; (2) sufficient ability to sustain a team in the sport; and (3) a reasonable expectation of competition for the team. If all three conditions are present, OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

OCR evaluates a broad range of indicators in determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, including the following five elements: (1) whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students; (2) whether a viable team for the underrepresented sex recently was eliminated; (3) multiple indicators of interest; (4) multiple indicators of ability; and (5) frequency of conducting assessments. OCR examines multiple indicators when determining whether there is sufficient ability among interested students of the underrepresented sex to sustain a team, including: (1) the athletic experiences and accomplishments – in interscholastic, club or intramural competition – of underrepresented students and admitted students interested in playing the sport; (2) opinions of coaches, administrators, and athletes at an institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team; (3) if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team; (4) participation in other sports, intercollegiate, interscholastic or otherwise, that may demonstrate skills or abilities that

are fundamental to the particular sport being considered; and, (5) tryouts or other direct observations of participation in the particular sport in which there is interest.

During the course of investigating whether the College met Part Three of the three-part test, OCR determined that since 2009-2010, the College eliminated women's swimming; women's diving; women's track; women's cross country; and women's golf. OCR also determined that if a student requests to be on a sports team that is not currently offered by the institution, the Director of Athletics typically notifies the student that the sport is not available, and women have expressed an interest in sports that were eliminated. Further, OCR determined that while the College has put in place a limited mechanism to collect data on student interest in sports, it does not meet the requirements of Title IX that a recipient have formal procedures in place for students, coaches, or others to request that additional sports be added.

Prior to OCR's obtaining information about and completing an analysis of all of the factors regarding Part Three of the three-part test, the College expressed an interest in resolving the complaint. OCR determined it was appropriate to negotiate a resolution and therefore did not complete its investigation to determine whether the College could satisfy Part Three of the three-part test.

On March 3, 2016, the College voluntarily entered into the attached resolution agreement to resolve the allegations in this complaint without further investigation. Among other action items, the College agreed to conduct a survey (to be reviewed and approved by OCR) of women in its student body to determine possible interest and ability in sports not currently offered by the College; identify any sports, squads, and levels of sports for female students that are not currently offered by the College but are offered either by schools that compete within the league in which the College competes or by schools that are within the College's normal competitive region and geographic area; create and implement a nondiscriminatory policy or procedure for requesting the addition of sports/levels (including the elevation of intramural teams) and ensuring the effective communication of the policy or procedure to students and others; beginning with academic year 2016-2017, if the College identifies a sport or sports in which there is sufficient but unmet interest, and if applicable, ability of female students to participate at the intercollegiate level, the College will add athletics opportunities until such time as either (1) the school is fully and effectively accommodating the expressed interests and abilities of female students (i.e., there remains no unmet interest and ability) or (2) the participation rate for female students in intercollegiate athletics program is substantially proportionate to their rate of enrollment; and, conduct periodic assessments of the athletics interests and abilities of its students in subsequent years to ensure it is equally and effectively accommodating the athletic interests and abilities of its male and female students consistent with Title IX and its implementing regulation. OCR will monitor implementation of the resolution agreement.

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

Please be advised that the College may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant 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 law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

If you have any questions regarding OCR's determination, please contact Tracey Beers, Senior Compliance Team Attorney, at (646) 428-3804 or tracey.beers@ed.gov, or Felice Bowen, Team Leader, at (646) 428-3806 or felice.bowen@ed.gov.

Very truly yours,

/s/

Timothy C.J. Blanchard

Encl.

cc: XXXXXXXXX XXXXXXX, Esq.