



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

500 WEST MADISON ST., SUITE 1475
CHICAGO, IL 60661-4544

REGION V
ILLINOIS
INDIANA
IOWA
MINNESOTA
NORTH DAKOTA
WISCONSIN

May 3, 2012

Mr. James M. Danko
President
Butler University
4600 Sunset Avenue
Indianapolis, IN 46208

Re: OCR Compliance Review #05-11-6001

Dear Mr. Danko:

This is to advise you of the resolution of the above-referenced compliance review that was initiated at Butler University (University) by the U.S. Department of Education (Department), Office for Civil Rights (OCR), under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681, and its implementing regulation, 34 C.F.R. Part 106. The compliance review addressed the following issues: whether the University discriminates against female students by denying them an equal opportunity to participate in intercollegiate athletics and whether the University discriminates against male or female students by not awarding athletic scholarships or grants-in-aid in proportion to the number of students of each sex participating in intercollegiate athletics.

OCR had authority to initiate this compliance review under Title IX and its implementing regulation, which prohibit discrimination on the basis of sex in education programs and activities that receive federal financial assistance from the U.S. Department of Education (Department). The University is a recipient of Federal financial assistance from the Department.

Legal Standards

The provision of equal opportunities with respect to the opportunity to participate in intercollegiate athletics is addressed in the Title IX implementing regulation at 34 C.F.R. § 106.41(c)(1). The implementing regulation states that in determining whether equal opportunities are provided for males and females, OCR considers whether the selection of sports effectively accommodates the interests and abilities of members of both sexes to the extent necessary to provide equal opportunity.

In assessing whether the interests and abilities of the members of both sexes are being effectively accommodated to the extent necessary to provide equal opportunity to participate in intercollegiate athletics, OCR uses the three-part test first established in the Department's "Intercollegiate Athletics Policy Interpretation," issued December 11, 1979, and found at 44 *Fed. Reg.* 71413 *et seq.* (Policy Interpretation). OCR also refers to other policy guidance that was

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

issued in 1996 and 2010 and that specifically discusses the application of the three-part test.¹ Each part of the three-part test is an equally sufficient and separate method of complying with the Title IX regulatory requirement to provide nondiscriminatory athletic participation opportunities. In essence, each part of the three-part test is a safe harbor, and no one part is favored. Thus, an institution is in compliance if it has met any one of the following three parts of the test: (1) the athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) there is a showing by the institution of a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex; or (3) it is demonstrated that the interests and abilities of the underrepresented sex are fully and effectively accommodated by the present program. 44 *Fed. Reg.* at 71416.

The provision of athletic scholarships or grants-in-aid is addressed in the Title IX implementing regulation at 34 C.F.R. § 106.37(c), which states that to the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in intercollegiate athletics. In determining whether equal opportunities are being provided in the awarding of athletic scholarships or grants-in-aid, OCR refers to guidance provided in the Policy Interpretation. Under the Policy Interpretation, compliance with 34 C.F.R. § 106.37 (c) is measured by dividing the amounts of aid available for the members of each sex by the numbers of male or female participants in the athletic program and comparing the results. Institutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors including but not limited to reasonable professional decisions concerning the awards most appropriate for program development. OCR also relies on investigative guidance issued by OCR in the form of a “Dear Colleague” letter issued in 1997 discussing compliance with 34 C.F.R. § 106.37(c).²

Facts

Butler University is a private, co-educational institution. The University’s intercollegiate athletics teams compete in the National Collegiate Athletic Association’s (NCAA) Division I. The University offers 19 varsity sports that compete in the Horizon League, except for football, which participates in the Pioneer Football League. Sports offered for men and for women include: basketball; cross country; golf; indoor and outdoor track; soccer; tennis. The University also sponsors softball, swimming, and volleyball for women, and baseball and football for men.

According to data provided by the University, during the 2010-11 school year, women comprised 2,267, or 59.6%, of the University’s full-time undergraduate students and comprised 164, or 36.5%, of the University’s 449 intercollegiate athletes. The University reported that it established each of the intercollegiate athletics teams it currently sponsors for women between

¹ <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>;
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>

² <http://www2.ed.gov/about/offices/list/ocr/docs/bowlgrn.html>

1975 and 1991. The University stated that it has never eliminated a women's varsity team. In April 2011, the University surveyed the athletic interests and abilities of its male and female students. Information provided by the University indicates that the University received 474 completed surveys from female respondents. The methodology of the survey was not specified to OCR but the response rate to the survey represents approximately 21% of the University's female full-time undergraduate students. Of these respondents, 11 female students stated they were currently participating in the sport of lacrosse at the club level at the University. An "accommodation of interests and abilities worksheet" that was completed by the University in 2007-08 as part of an NCAA "Title IX self-study" revealed that female University students were participating in club activities in the sports of crew and lacrosse and that female students in the University's normal competitive region were participating at the high school or community level in gymnastics, lacrosse and field hockey. The self-study also noted that competition was available in the University's normal competitive region in the sports of crew, equestrian, fencing, field hockey, gymnastics, and lacrosse.

For purposes of calculating the provision of athletic financial assistance to males and females, OCR determined that male athletes represented 64.6% of the University's intercollegiate athletes and female athletes represented 35.4% of the University's intercollegiate athletes.³ Information provided by the University revealed that during the 2010-11 academic year, the University distributed \$3,811,438.30 in athletic scholarships or grants-in-aid to its male and female intercollegiate athletes. Female athletes received \$2,033,501 (53.4%) of this amount and men received \$1,777,937.30 (46.6%) of this amount.

Prior to the conclusion of OCR's investigation, the University requested to resolve the compliance review. Subsequent discussions with University officials resulted in the University signing the enclosed agreement (Agreement), which, when fully implemented, will fully resolve the issues covered by the review. The provisions of the Agreement are aligned with those issues and the information obtained during OCR's investigation and are consistent with the applicable regulations.

OCR will monitor the University's implementation of the Agreement. We look forward to receiving the University's first monitoring report, which is due by September 1, 2012.

The University understands and acknowledges that OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of this Agreement. Before initiating administrative enforcement or judicial proceedings to enforce this Agreement, OCR shall give the University written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

OCR wishes to thank you, your staff and Ms. Roberta S. Recker, the University's Counsel, for the cooperation extended to OCR during the course of this review. If you or your staff members have any questions regarding this matter, please do not hesitate to contact me or Dave Blom of my staff at 312-730-1566.

³ In assessing the awarding of athletic financial assistance, OCR only counts athletes who participate in more than one sport once.

Sincerely,

/s/

Debbie Osgood
Director

Enclosure

cc: Ms. Roberta S. Recker
Counsel