



Oregon

Kate Brown, Governor



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Colt Gill

Acting Deputy Superintendent of Public Instruction

October 17, 2018

BY EMAIL AND US MAIL




Superintendent Don Grotting
Beaverton School District
16550 SW Merlo Rd.
Beaverton, Oregon 97003

Case Reference Number 2017-KM04

This letter is the investigatory determination on the appeal of a complaint filed with the Beaverton School District (District), regarding possible violations of ORS 659.850 (prohibiting discrimination in an education program or service financed in whole or in part by moneys appropriated by the Legislative Assembly), OAR 581-021-0045 (prohibiting discrimination in certain educational agencies, programs, or services under the jurisdiction of the State Board of Education), and OAR 581-029-0049 (requiring school districts to adopt written procedures for the prompt resolution of complaints of discrimination).¹ To ensure the compliance to this requirement, the Department will review the local school district procedures and findings of fact to determine if proper procedures were followed and what action if any shall be taken.²

I. APPELLATE PROCEDURES FOR COMPLAINTS ALLEGING DISCRIMINATION

 (Parent) alleges that the District discriminated against female student athletes' involvement in district athletic programs. Parent specifically alleges that:

- The District charges female student athletes more than it charges male student athletes to participate in team sports.
- The District requires female student athletes to attend high cost, off-season camps and does not require male student athletes to attend off-season camps.
- The District provides financial assistance information to male student athletes and does not provide financial assistance information to female student athletes.
- The District does not grant female student athletic teams same access to facilities that it grants to male student athletic teams.

¹ Case Reference No. 2018KM04.

² OAR 581-021-0049(1);

- The District does not grant female student athletes the same access to school transportation services that it grants to male student athletes.
- Within the District, female student athletes do not have an equal number of teams per sport as male student athletes, regardless of student requests or demonstrated need.

The Oregon Department of Education (Department) has jurisdiction to resolve this complaint under OAR 581-021-0049. When a person files with the Department an appeal alleging discrimination, the Department will initiate an investigation to determine whether discrimination may have occurred.³ If the Department finds that discrimination may have occurred, the Deputy Superintendent of Public Instruction (Deputy Superintendent) will issue an investigatory determination and require the school district that is the subject of the appeal to attempt to reach an agreement with the person through conciliation.⁴ If the school district cannot reach an agreement with the person through conciliation within 30 days, the Deputy Superintendent will schedule a hearing for the purpose of determining whether the school district is in compliance with ORS 659.850.⁵ If the Deputy Superintendent determines that the school district is not in compliance with ORS 659.850, the Deputy Superintendent will issue an order requiring compliance.⁶ If the school district fails to comply with the order within 30 days, the Deputy Superintendent will issue an order imposing an appropriate remedy.⁷ Appropriate remedies include: (1) withholding all or part of one or more quarterly payments that otherwise would be paid to a school district under ORS 327.095, (2) assessing a daily fine against the school district, (3) forbidding the school district to participate in interschool activities, and (4) any other appropriate remedy.⁸

On this appeal, the Department has completed its investigation to determine whether discrimination may have occurred. This letter constitutes the Department's investigatory determination as to whether discrimination may have occurred.

II. PROCEDURAL BACKGROUND

On February 13, 2017, Parent filed several complaints with the District alleging that district athletic programs were discriminatory. The District investigated the allegations and submitted the District's findings to Parent on February 27, 2017. Parent submitted this appeal to the Department on July 6, 2017.

In a letter dated September 6, 2017, the Department formally notified the District of this appeal, noting that the complaint raised possible violations of ORS 659.850 and OAR 581-021-0045.

The Department met with Parent on several occasions to discuss Parent's specific allegations. The Department met with Parent on September 24, 2017, October 19, 2017, November 2, 2017, December 10, 2017, January 23, 2018, February 25, 2018, and June 29, 2018. During the meetings, the Department collected from Parent information relevant to this appeal.⁹ In addition to in-person meetings, the

³ *Id.*

⁴ OAR 581-021-0049 (1)(b).

⁵ OAR 581-021-0049 (2).

⁶ OAR 581-021-0049 (3).

⁷ OAR 581-021-0049 (3).

⁸ OAR 581-021-0049 (3)(a) to (d).

⁹ The Department also collected from Parent information that she argues is relevant to this appeal, but is not. The information that is not relevant to this appeal pertains to allegations that Parent did not make when she first filed her complaint with the District and, thus, does not pertain to an allegation that the Department can accept on appeal.

Department communicated with Parent by phone, email, and written correspondence on numerous occasions. Notably, Parent did not identify during the Department's investigation a specific individual, student, or family that was affected by the alleged discrimination.

On March 27, 2018, Parent requested that this appeal be withdrawn. On May 7, 2018, before the Department provided notice of the withdrawal, Parent requested that this appeal be reinstated.

The Department met with district staff members on November 9, 2017, March 3, 2018, August 17, 2018, and September 11, 2018. During the meetings, the Department collected from the District information relevant to this appeal.

In conducting its investigation, the Department collected additional relevant information and toured relevant sites.

III. FINDINGS OF FACT

After conducting its investigation, the Department makes the following findings of fact:

1. Parent is the parent of children who attend school in the District.
2. On appeal, Parent does not identify a specific individual, student, or family affected by discrimination. Parent alleges that the District's policies and practices are discriminatory on the basis that they are applied inequitably.
3. In the District, students can participate in dance and cheer. In the District:
 - a. The cost of participating in dance and cheer exceeds the cost of participating in district athletic programs;
 - b. Dance and cheer are not developed or organized in the same manner that district athletic programs are developed and organized; and
 - c. The cost of participating in dance and cheer is the result of several factors specific to those activities, such as the use of numerous costumes for individual performances.
4. In the District, students may participate in off-season camps for numerous sports.
 - a. The District sponsors some of the off-season camps. The remainder of the off-season camps are sponsored and fully funded by other entities or organizations. District staff members occasionally provide services at off-season camps for these entities and organizations. However, when district staff members provide such services, they are not agents of the District.
 - b. With respect to off-season camps sponsored by the District, the cost of attending the camps varies greatly between different district athletic programs.

- c. Where off-season camps sponsored by the District are comparable, differences in the cost are associated with factors related to the provision of a service, such as offering more instructional time.
 - i. Sunset High School offers off-season soccer camps for female student athletes and male and male student athletes.
 - ii. For women's soccer, the Sunset High School offers two off-season camps: (1) a six week long camp where students attend two sessions per week, each session lasting two hours for a total of 24 hours, and (2) a four day long camp where students attend three and a half hours per day for a total of 14 hours. The women's off-season soccer camps cost \$190 per student for a total of 38 hours of instructional time.
 - iii. For men's soccer, the Sunset High School also offers two off-season camps: (1) two four day long camps, one where students attend two and half hours per day for a total of 10 hours, and (2) one where students attend two and three quarter hours per day for a total of 11 hours. The men's off-season soccer camps cost \$160 per student for a total of 21 hours of instructional time.
5. Parent and other individuals sent emails to district coaches. The emails contained a list of questions about participating in district athletic programs. Some of the questions pertained to off-season camps. District coaches responded to the emails. Many of the responses suggest that participation in an off-season camp may result in additional experience and better conditioning, which, in turn, increases the likelihood of earning a spot on a team. None of the responses state that participation in an off-season camp is required to participate in a district athletic program.
6. An accounting of the number of students who paid the District's athletic participation fee and the number of students who received financial support substantiates the percentage of female student athletes and male student athletes who received financial support for each sport.
 - a. The percentage of students who receive financial support for each sport varies from year to year. During the 2016-2017 school year, four percent of male student athletes received financial support in the sport of wrestling. One year later, during the 2017-2018 school year, fifty four percent of male student athletes received financial support in the sport of wrestling.
 - b. During the 2016-2017 school year, 4% of female student athletes and 12% of male student athletes received financial support for soccer.
 - c. During the 2016-2017 school year, 10% of female student athletes and 10% of male student athletes received financial support for basketball.

- d. During the 2016-2017 school year, 21% of female student athletes and 21% of male student athletes received financial support for track.
 - e. During the 2016-2017 school year, 8% of female student athletes and 5% of male student athletes received financial support for tennis.
 - f. During the 2017-2018 school year, 25% of female student athletes and 47% of male student athletes received financial support for soccer.
 - g. During the 2017-2018 school year, 23% of female student athletes and 26% of male students received financial support for basketball.
7. Between October, 2016, and February, 2017, female student athletes had access to batting cages located at the school attended by Parent's children on one or two days a week, for less than two hours each day. Between March, 2017, and June, 2017, female student athletes were denied access to the batting cages.
- a. The batting cages were used more often by male student athletes than female student athletes.
 - b. A single coach was responsible for scheduling when student athletes could use the batting cages.
 - c. The batting cages were purchased with moneys donated at fundraisers for the baseball team.
 - d. Currently, the District requires the use of the batting cages to be scheduled through the District's calendaring system and adheres to a policy that balances the needs of female student athletes and the needs of male student athletes.
8. Prior to this appeal, the District was constructing a new school. Part of that construction included new turf fields where the softball team would practice. At the time of this appeal, the turf fields are complete and available for use by both female student athletes and male student athletes.
- a. Prior to this appeal, varsity softball players and varsity and junior varsity baseball players practiced at the school attended by Parent's children.
 - b. Prior to this appeal, junior varsity softball players practiced at a softball field located 0.6 miles from the school. The junior varsity softball players walked the 0.6 miles to the practice location.
 - c. Prior to this appeal, freshman baseball players practiced at a baseball field located at a different location, 4.6 miles from the school. The freshman baseball players were transported to the practice location by bus.

- d. Prior to this appeal, transportation was available to both the junior varsity softball team and the freshman baseball team. However, transportation was not available immediately after school.
 - e. Prior to this appeal, the junior varsity softball team held practice immediately after school.
 - f. At the time of this appeal, both the junior varsity softball team and the junior varsity baseball team are transported to the new school where they both practice on the new turf fields.
9. The District designates a sport as either a "cut" sport (i.e., a sport where a student has to try out for the sport and may not be able to participate) or a "no-cut" sport (i.e., a sport where a student does not have to try out for the sport and is allowed to participate upon request). The District designates a sport as a "cut" or "no-cut" sport by determining the projected number of students who want to participate in the sport.
- a. In the District, softball and baseball are both "cut" sports.
 - b. Softball and baseballs teams have rosters of between 16 and 18 student athletes.
 - c. During the 2017-2018 school year, the number of students who wanted to participate in softball exceeded the number of positions available to field two teams. However, the number of students did not equal the number of positions required to field three teams.
 - d. During the 2017-2018 school year, six total female students were cut from the varsity softball team and the junior varsity softball team.
 - e. During the 2017-2018 school year, the number of students who wanted to participate in baseball exceeded the number of positions available to field three teams. However, the number of students did not equal the number of positions required to field four teams.
 - f. During the 2017-2018 school year, the total number of male students cut from varsity baseball, junior varsity baseball, and freshman baseball directly correlated with the number of male students in excess of the number of positions available to field three teams.

IV. ANALYSIS OF SPECIFIC ALLEGATIONS

Under Oregon law,

A person may not be subjected to discrimination in any public elementary, secondary or community college education program or service, school or interschool activity or in any higher education program or service, school or interschool activity where the program, service,

school or activity is financed in whole or in part by moneys appropriated by the Legislative Assembly.¹⁰

For purposes of this prohibition, “discrimination” is defined to mean “any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on race, color, religion, sex, sexual orientation, national origin, marital status, age or disability.”¹¹

In applying this prohibition to school districts, OAR 581-021-0045 (3) specifically states that a school district may not:

(a) Treat one person differently from another in determining whether such person satisfies any requirement of condition for the provision of [an] aid, benefit, or service;

(b) Provide different aid, benefits, or services; or provide aids, benefits, or services in a different manner;

(c) Deny any person such aid, benefit, or service;

(d) Subject any person to separate or different rules of behavior, sanctions, or other treatment; [or]

* * *

(f) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

The questions presented on appeal are whether the District (1) treated female student athletes differently than male student athletes in determining whether they satisfied a requirement to participate in district athletic programs, (2) provided female student athletes with different benefits or services than male student athletes, (3) subjected female student athletes to different treatment than male student athletes, or (4) otherwise limited for female student athletes the enjoyment of a right, privilege, advantage, or opportunity.

A. Jurisdiction of the Oregon Department of Education

Under OAR 581-021-0049, a person must exhaust “local grievance procedures” before the Department can accept an appeal alleging discrimination.¹² In this case, Parent did not exhaust local grievance

¹⁰ ORS 659.850 (2). OAR 581-021-0045 (2) applies this prohibition specifically to the types of schools regulated by the Department: “No person in Oregon shall be subjected to discrimination in any public elementary or secondary school, educational program or service, or interschool activity where the program, service, school, or activity is financed in whole or part by monies appropriated by the Legislative Assembly.”

¹¹ ORS 659.850 (1). OAR 581-021-0045 (1)(a) uses an identical definition for “discrimination” for purposes of the Department’s regulatory authority over public elementary and secondary schools.

¹² OAR 581-021-0049 (1) (stating that “[p]ersons may, after exhausting local grievance procedures or 90 days (whichever occurs first) appeal in writing to the Superintendent of Public Instruction” a complaint alleging discrimination).

procedures for many of the allegations that she raises on appeal because she did not make the allegations when she first filed a complaint with the District. As a result, the District did not have an opportunity to investigate and remedy the allegations, and the Department cannot accept them. These allegations include:

- The District charges female student athletes more than it charges male student athletes to participate in team sports.
- The District requires female student athletes to attend high cost, off-season camps and does not require male student athletes to attend off-season camps.
- The District provides financial assistance information to male student athletes and does not provide financial assistance information to female student athletes.

Parent exhausted local grievance procedures for the remainder of the allegations that she raises on appeal. The District had an opportunity to investigate and remedy the allegations, and the Department can accept them. These allegations include:

- The District does not grant female student athletic teams same access to facilities that it grants to male student athletic teams.
- The District does not grant female student athletes the same access to school transportation services that it grants male student athletes.
- Within the District, female student athletes do not have an equal number of teams per sport as male student athletes, regardless of student requests or demonstrated need.

Where the Department lacks the authority to accept an allegation on appeal, this investigatory determination serves only the purpose of evaluating information provided by Parent and the District. It does not serve as the basis for any potential corrective action.

B. Allegation that the District is charging female student athletes more than it is charging male student athletes to participate in team sports.

Parent alleges that the District charges female student athletes more than it charges male student athletes to participate in team sports. Parent bases her allegation on two primary arguments: first, the cost of participating in dance and cheer exceeds the cost of participating in district athletic programs available only to male students; second, female student athletes are charged more to participate in off-season camps than male student athletes. Both arguments raise the issue of whether the District: (1) requires female student athletes to satisfy different requirements than male student athletes for the provision of an aid, benefit, or service in violation of OAR 581-021-0045 (3)(a), (2) treats female student athletes differently than male student athletes in violation of OAR 581-021-0045 (3)(b), or (3) otherwise limits female student athletes' enjoyment of a right, privilege, advantage, or opportunity in violation of OAR 581-021-0045 (3)(f).

Parent did not present either argument to the District or provide the District with information related to the arguments. Parent first presented the arguments on appeal. As a result, the District did not have an opportunity to address this part of Parent's allegation during the original complaint.

That said, because Parent and the District provided the Department with a surfeit of information related to this allegation, the Department will briefly evaluate the information to provide guidance about its evidentiary worth.

With respect to analyzing Parent's first argument, the Department relies on the federal anti-discrimination law known as Title IX¹³ and the interpretation of that law by federal courts. Title IX prohibits educational institutions that receive federal funds from discriminating on the basis of sex. Because Title IX has the same intent as ORS 659.850 and OAR 581-021-0045, and because the text of ORS 659.850 and OAR 581-021-0045 allow the statute and rule to be applied broadly, the interpretation of Title IX by federal courts is an important tool for the Department to use in adjudging the application of ORS 659.850 and OAR 581-021-0045.

Among other applications, Title IX ensures that educational institutions treat female student athletes and male student athletes equally.¹⁴ Title IX requires school districts to distribute moneys equally between female student activities and male student activities that qualify as a "sport." Under Title IX, activities such as dance and cheer do not automatically qualify as a sport.¹⁵ Courts have determined that activities like dance and cheer are not a "sport" when they are "too underdeveloped and disorganized" to be considered "as offering [a] genuine . . . athletic participation opportunit[y] for students."¹⁶

In the District, dance and cheer are not developed or organized enough to offer students a genuine athletic participation opportunity. Thus, the protections of Title IX do not apply to the cost of participating in dance and cheer insofar as that cost exceeds the cost of participating in district athletic programs available only to male student athletes.

Furthermore, the cost of participating in dance and cheer is the result of several factors specific to those activities, such as the use of numerous costumes for individual performances. Even if dance and cheer were developed and organized enough to offer students a genuine athletic participation opportunity, the Department would find that the cost of participating in dance and cheer is not discriminatory because the cost does not reflect a comparable aid, benefit, or service or a uniform right, privilege, advantage, or opportunity.

In order to substantiate her second argument, Parent provided the Department with emails from district coaches. Parent and other individuals sent emails to district coaches. The emails contained a list of questions about participating in district athletic programs. Some of the questions pertained to off-season camps. District coaches responded to the emails. Some of the responses include information about the cost of attending off-season camps. Parent argues that the emails substantiate that female student athletes are charged more to participate in off-season camps than male student athletes.

During its investigation, the Department discovered that the District does not sponsor all of the off-season camps. With respect to off-season camps not sponsored by the District, the Department does not have

¹³ See Education Amendments of 1972, Public Law No. 92-318, Title IX, §§ 901-907 (codified at 20 U.S.C. §1681 *et seq.*).

¹⁴ *Biediger v. Quinnipiac University*, 728 F.Supp.2d 62, 99 (D.Conn. 2010).

¹⁵ *Biediger v. Quinnipiac University*, 728 F.Supp.2d 62, 99-101 (D.Conn. 2010).

¹⁶ *Biediger v. Quinnipiac University*, 928 F.Supp.2d 414, 419 (D.Conn. 2013), *citing* *Biediger*, 728 F. Supp.2d at 99-100.

the authority to regulate the camps because they are not a “program, service, school or activity . . . financed in whole or in part by moneys appropriated by the Legislative Assembly.”¹⁷

With respect to off-season camps sponsored by the District, the cost of attending the camps varies greatly between different district athletic programs, making it difficult to compare the average or median cost for female student athletes and the average or median cost for male student athletes. Where off-season camps are comparable, differences in the cost are associated with factors related to the provision of a service, such as offering more instructional time, not with a bias favoring male student athletes. For example, Sunset High School offers off-season soccer camps for female and male student athletes. For women’s soccer, the school offers two off-season camps: (1) a six week long camp where students attend two sessions per week, each session lasting two hours for a total of 24 hours, and (2) a four day long camp where students attend three and a half hours per day for a total of 14 hours. For men’s soccer, the school also offers two off-season camps: (1) two four day long camps, one where students attend two and half hours per day for a total of 10 hours, and (2) one where students attend two and three quarter hours per day for a total of 11 hours. The women’s off-season soccer camps cost \$190 per student. The men’s off-season soccer camps cost \$160 per student. Given that female student athletes pay for a total of 38 hours of instructional time and male student athletes pay for a total of 21 hours of instructional time, the price discrepancy reflects a difference in instructional time, not a bias favoring of male student athletes.

The evidence suggests that the District did not violate OAR 581-021-0045 (3)(a), (c), or (f). However, even if there was sufficient evidence to establish that the District may have violated OAR 581-021-0045 (3)(a), (b), or (f), the Department would have to direct Parent to refile that part of the allegation with the District because it was not a part of Parent’s initial complaint.

C. Allegation that the District requires female student athletes to attend high cost, off-season camps and does not require male student athletes to attend off-season camps.

Parent alleges that the District requires female student athletes to attend high cost, off-season camps. Parent alleges that the District does not require male student athletes to attend off-season camps. Parents allegations raise the issue of whether the District violated OAR 581-021-0045 (3)(a) by requiring female student athletes to satisfy a different requirement than male student athletes for the provision of an aid, benefit or service.

Parent did not identify any individual student who has been affected by the alleged practice. In support of her allegation, Parent provided the Department with emails from district coaches. As described previously, parent and other individuals sent emails to district coaches. In part, the emails included questions pertaining to off-season camps.

Parent did not present the argument to the District or provide the District with information related to the argument. Parent first presented the argument on appeal. As a result, the District did not have an opportunity to address this part of Parent’s allegation during the original complaint.

That said, because Parent provided the Department with information related to the allegation, the Department will briefly evaluate the information to provide guidance about its evidentiary worth.

¹⁷ ORS 659.850.

In the emails, district coaches responded to questions pertaining to off-season camps. Although many of the emails suggest that participation in an off-season camp may result in additional experience and better conditioning, which, in turn, increases the likelihood of earning a spot on a team, none of the emails state that participation in an off-season camp is required. The evidence suggests that the District did not require female student athletes to attend high cost, off-season camps.

The evidence suggests that the District did not violate OAR 581-021-0045 (3)(a). However, even if there was sufficient evidence to establish that the District may have violated OAR 581-021-0045 (3)(a), the Department would have to direct Parent to refile that part of the allegation with the District because it was not a part of Parent’s initial complaint.

D. Allegation that the District provides financial assistance information to male student athletes and does not provide financial assistance information to female student athletes.

Parent alleges that the District provides financial assistance information to male student athletes and does not provide financial assistance information to female student athletes. Parent’s allegation raise the issue of whether the District violated OAR 581-021-0045 (3)(b) by providing aids, benefits, and services to female student athletes in a different manner than it provided aids, benefits, and services to male student athletes or whether the District violated OAR 581-021-0045 (3)(c) by denying female student athletes an aid, benefit or service that is available to male student athletes.

Parent did not identify any individual student who had been affected by the alleged practice. In support of her allegation, Parent provided the Department with an accounting of the number of students who paid the District’s athletic participation fee and the number of students who received financial support. As with the previous two allegations, Parent did not present the argument to the District or provide the District with information related to the argument. Parent first presented the argument on appeal. As a result, the District did not have an opportunity to address this part of Parent’s allegation during the original complaint.

That said, because Parent provided the Department with information related to the allegation, the Department will briefly evaluate the information to provide guidance about its evidentiary worth.

In consideration of the information provided by Parent, the Department was able to discern the percentage of female student athletes and male student athletes who received financial support for each sport. These percentages are reflected in the following chart:

Season	Sport	Percentage of Male student athletes Receiving Financial Support	Percentage of Female student athletes Receiving Financial Support
Fall 2016	Football	15%	
Fall 2016	Soccer	12%	4%
Fall 2016	Volleyball		5%

Winter 2016—2017	Basketball	10%	10%
Winter 2016—2017	Wrestling	4%	
Spring 2017	Track	21%	21%
Spring 2017	Baseball	4%	
Spring 2017	Softball		21%
Spring 2017	Tennis	5%	8%
Spring 2017	Golf	9%	0%
Fall 2017	Football	27%	
Fall 2017	Soccer	47%	25%
Fall 2017	Volleyball		11%
Winter 2017—2018	Basketball	26%	23%
Winter 2017—2018	Wrestling	54%	

For purposes of determining whether the District violated ORS 659.850, this accounting is of limited value. Unknown factors affect the data. For example, during the 2016-2017 school year, four percent of male student athletes received financial support in the sport of wrestling. One year later, during the 2017-2018 school year, fifty four percent of male student athletes received financial support in the sport of wrestling. Without further information, it is difficult to determine the basis for any discrepancy. Without further proof that a discrepancy exists on the basis of differentiating female student athletes and male student athletes—such as specific incidents where information was kept from female student athletes and provided to male student athletes—the Department cannot find that the District provides financial assistance information to male student athletes and does not provide financial assistance information to female student athletes.

Notably, the greatest parity between female student athletes and male student athletes exists where both female student athletes and male student athletes participate in the sport. The percentage of female student athletes who received financial support and the percentage of male student athletes who received financial support is the most similar in basketball, track, and tennis. During the 2016-2017 school year, 10% of female student athletes and 10% of male student athletes received financial support for basketball. During the 2016-2017 school year, 21% of female student athletes and 21% of male student athletes received financial support for track. During the 2016-2017 school year, 8% of female student athletes and 5% of male student athletes received financial support for tennis. During the 2017-2018 school year, 23% of female student athletes and 26% of male students received financial support for basketball.

The evidence suggests that the District did not violate OAR 581-021-0045 (3)(b) and (c). However, even if there was sufficient evidence to establish that the District may have violated OAR 581-021-0045 (3)(b) and (c), the Department would have to direct Parent to refile that part of the allegation with the District because it was not a part of Parent’s initial complaint.

Oregon Department of Education

E. Allegation that the District does not grant female student athletic teams same access to facilities that it grants to male student athletic teams.

Parent alleges the District does not grant female student athletic teams the same access to facilities that it grants to male student athletic teams. Specifically, Parent alleges that female student athletes do not have the same access to batting cages as male student athletes and that the baseball field is superior to the softball field. Parent's allegation raises the issue of whether the District: (1) violated OAR 581-021-0045 (3)(b) by providing aids, benefits, and services to female student athletes in a different manner than it provided aids, benefits, and services to male student athletes, (2) violated OAR 581-021-0045 (3)(c) by denying female student athletes an aid, benefit or service that is available to male student athletes, or (3) violated OAR 581-021-0045 (3)(f) by limiting female student athletes' enjoyment of a right, privilege, advantage, or opportunity.

On February 13, 2017, Parent filed a formal complaint with the District. In the complaint, Parent alleged that between the months of October and February, female student athletes had access to batting cages located at the school attended by Parent's children on one or two days a week, for less than two hours each day. Parent further alleged that between the months of March and June, female athletes were denied access to the batting cages. In both situations, Parent argued that the District did not provide female student athletes with the same access to the batting cages as it provided male student athletes.

The District investigated Parent's complaint and determined that the allegations were accurate. The District found that the batting cages were used more often by male student athletes than female student athletes.

On appeal, Parent argues that booster clubs influenced the scheduling of the batting cages. A single coach was responsible for scheduling when student athletes could use the batting cages. During its investigation, the District found that the batting cages were purchased with moneys donated at fundraisers for the baseball team.

After conducting its investigation, the District required the use of the batting cages to be scheduled through the District's calendaring system. The District implemented a policy of balancing the needs of female student athletes and the needs of male student athletes. The District provided the oversight necessary to ensure the implementation of this policy. During its investigation, the Department confirmed that the District continues to schedule the use of the batting cages through its calendaring system and that the District continues to provide the oversight necessary to ensure the equitable use of the batting cages.

In the February 13 complaint, Parent also alleged that the baseball field is superior to the softball field. Parent specifically alleged that the baseball field withstands rainy conditions much better than the softball field. The District initially responded to Parent's complaint by modifying the softball team's practice schedule so that the softball team would miss fewer practices because of the weather. At the time the District was investigating Parent's complaint, the District was constructing a new school. Part of that construction included new turf fields where the softball team would practice. At the time of this appeal, the turf fields are complete and available for use by both female student athletes and male student athletes.

The Department finds that the District, prior to this appeal, may have discriminated against female student athletes on the basis that the District did not grant female student athletic teams the same access to facilities that it granted to male student athletic teams. However, the District corrected any discriminatory practice prior to this appeal. For that reason, the Department finds that the District, at the time of this appeal, is not in violation of OAR 581-021-0045 (3) (b), (c), or (f).

F. Allegation that the District does not grant female student athletes the same access to school transportation services that it grants male student athletes.

Parent alleges that female student athletes who play softball practice off-site without the benefit of transportation while male student athletes who play baseball practice on-site or, if they practice off-site, are provided with transportation. Parent's allegation raises the issue of whether the District violated OAR 581-021-0045 (3)(c) by denying aids, benefits, and services to female student athletes that are available to male student athletes.

The Department investigated Parent's allegation. In the District, softball and baseball coaches determine where softball and baseball teams practice. A softball field and a baseball field are located at the school attended by Parent's children. At the time of the District's investigation, varsity softball players practiced at the softball field located at the school. Junior varsity softball players practiced at a softball field located 0.6 miles from the school. The junior varsity softball players walked the 0.6 miles to the practice location. Varsity and junior varsity baseball players practiced at the baseball field located at the school. Freshman baseball players practiced at a baseball field located 4.6 miles from the school. Whereas the junior varsity softball players walked to their practice location, freshman baseball players were transported to their practice location by bus.

The District argues that the junior varsity softball players—in having to walk 0.6 miles to the practice location—were not discriminated against for three reasons. First, transportation was available to both the junior varsity softball team and the freshman baseball team. However, transportation was not available immediately after school. The coach of the junior varsity softball team preferred to hold practice as early as possible to allow the softball players to return home as early as possible.

Second, the difference between walking 0.6 miles and 4.6 miles justifies the difference in treatment. The practice location for the softball team was within a reasonable walking distance. The practice location for the baseball team was not within a reasonable walking distance. The disparate treatment was based on the distance between the school and the respective practice locations. The disparate treatment was not based on sex.

Third, at the time the District was investigating Parent's complaint, the District was constructing a new school. Part of that construction included new turf fields where the junior varsity softball team and the junior varsity baseball team would practice. At the time of this appeal, the turf fields are complete and available for use by both female student athletes and male student athletes. Both the junior varsity softball team and the junior varsity baseball team are transported to the turf fields. Thus, there currently is no disparate treatment between female student athletes and male student athletes on the basis that female student athletes are not transported to a practice location.

The Department finds all three of the District's arguments compelling. Prior to this appeal, female student athletes were not denied aids, benefits, and services that were available to male student athletes. They were provided with a different service in lieu of the one available to male student athletes: they practiced earlier in the day and returned home earlier in the day. They also were not denied a service that was available to male student athletes: whereas female student athletes walked a reasonable distance to a practice location, male student athletes were transported to a practice location that was not within a reasonable walking distance. Finally, at the time of this appeal, any outstanding issues concerning transportation are moot because both the junior varsity softball team and the junior varsity baseball team are currently transported to the same location.

In consideration of law and fact, there is insufficient evidence to establish that the District may have violated OAR 581-021-0045 (3)(c).

G. Allegation that within the District, female student athletes do not have an equal number of teams per sport as male student athletes, regardless of student requests or demonstrated need.

Parent alleges that within the District, female student athletes do not have an equal number of teams per sport as male student athletes. Parent specifically alleges that the school attended by Parent's children fields only two softball teams--a varsity softball team and a junior varsity softball team--and fields three baseball teams--a varsity baseball team, a junior varsity baseball team, and a freshman baseball team. Parent's allegation raises the issue of whether the District (1) violated OAR 581-021-0045 (3)(b) by providing aids, benefits, and services to female student athletes in a different manner than it provided aids, benefits and services to male students, (2) violated OAR 581-021-0045 (3)(c) by denying female student athletes an aid, benefit, or service that is available to male student athletes, or (3) violated by OAR 581-021-0045 (3)(f) by limiting female student athlete's enjoyment of a right, privilege, advantage, or opportunity.

The Department investigated Parent's allegation. The District designates a sport as either a "cut" sport (i.e., a sport where a student has to try out for the sport and may not be able to participate) or a "no-cut" sport (i.e., a sport where a student does not have to try out for the sport and is allowed to participate upon request). Whether the District designates a sport as a "cut" or "no-cut" sport depends on the projected number of students who want to participate in the sport. If the District determines that the projected number of students who want to participate exceeds the number of positions available to field a team, the sport is a "cut" sport. If the District determines that the projected number of students who want to participate does not exceed the number of positions available to field a team, the sport is a "no-cut" sport.

In the District, softball and baseball are both "cut" sports. Softball and baseballs teams have rosters of between 16 and 18 student athletes. With respect to softball, the number of students who want to participate exceeds the number of positions available to field two teams. However, the number of students does not equal the number of positions required to field three teams. During the 2017-2018 school year, six total female students were cut from the varsity softball team and the junior varsity softball team. With respect to baseball, the number of students who want to participate exceeds the number of positions available to field three teams, but does not equal the number of positions required to field four

teams. During the 2017-2016 school year, the total number of male students cut from varsity baseball, junior varsity baseball, and freshman baseball directly correlated with the number of male students in excess of number of positions available to field three teams.

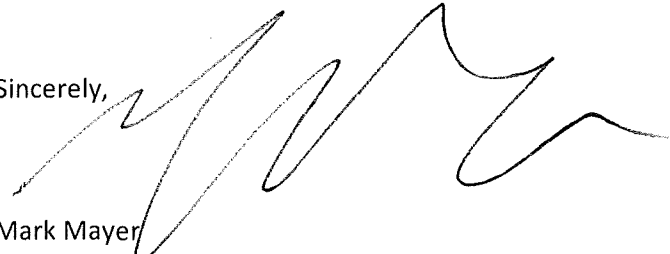
Determining the size of the roster for a team is based on several factors, including the different rates of attrition for different types of sports, the different demographics of schools within the District, choices made by individual coaches, and the requirements of associations like the Oregon School Activities Association and the National Federation of State High School Associations.

In consideration of the District's policies and practices, the Department finds that female student athletes were afforded the same processes as male student athletes for determining whether a sport is a "cut" sport or a "no-cut" sport, for determining the number of teams that a school should field for a sport, and for determining the size of the roster for each team. In consideration of law and fact, there is insufficient evidence to substantiate that the District may have violated OAR 581-021-0045 (3)(b), (c), or (f).

I. CONCLUSION

The Department finds that the District did not discriminate against female student athletes in violation of ORS 659.850 or OAR 581-021-0045. Accordingly, Parent and the District are not required to enter into conciliation and this proceeding is dismissed.

Sincerely,



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