



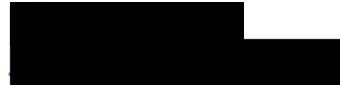
DEPARTMENT OF EDUCATION

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December 11, 2013

Kevin Charles
Executive Director
Delaware Interscholastic
Athletic Association
Kevin.Charles@doe.k12.de.us



RE: Title IX Grievance

Dear Mr. C [REDACTED] and Mr. Charles:

This letter is my decision on Mr. C [REDACTED]'s (hereinafter referred to as "Complainant") complaint alleging that the Delaware Interscholastic Athletic Association's (DIAA) scheduling of girls' soccer in the "nontraditional" spring season discriminates against female athletes on the basis of gender and thus violates Title IX. For the reasons set forth herein, I find that DIAA's scheduling decision does not violate Title IX.

I. Procedural Background

According to Complainant he initially filed a complaint with the Office of Civil Rights (OCR) alleging that DIAA scheduling of girls' soccer in the "nontraditional" spring season while boys' soccer is scheduled in the "traditional" fall season discriminates against female athletes on the basis of gender and thus violates Title IX. At the same time, he reached out to Kevin Charles, DIAA's Executive Director to discuss his concerns with the scheduling of girls' soccer in Delaware. On advice of counsel, Mr. Charles invited Complainant to present his concerns to the DIAA Board rather than meet with him one-on-one. Thereafter, Complainant initiated this grievance and Mr. Charles cancelled the presentation due to the filing of the instant administrative complaint.

I met with the Complainant and his counsel, Ben Schladweiler, Esq., on November 20, 2013. Complainant presented the testimony of two witnesses and introduced several documents into the record. Thereafter, I met with Mr. Charles and his counsel, Paula Fontello, Esq., on November 25, 2013. Mr. Charles likewise presented the testimony of one witness and introduced several documents into the record.

II. Title IX

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in federally funded education programs or activities. 20 U.S.C. §§ 1681 et

seq. Specifically, the statute declares, “No person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance,” subject to certain exceptions not applicable here. 20 U.S.C. § 1681(a).

The original Title IX legislation, which set forth broad prohibition against sex discrimination but provided little detail about specific programs or activities, made no mention of sports. However, the Education Amendments of 1974 directed the Department of Health, Education, and Welfare (HEW), which was the predecessor of the Department of Education, to issue implementing regulations, “which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of the particular sports.” P.L. 93-380 § 844.

Under Title IX regulations, recipients of federal financial assistance are prohibited from discriminating on the basis of sex in their sports programs. Specifically, the regulations provide, “No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient.” 34 CFR § 106.41(a).

An important principal embodied in the Title IX regulations is the principle of equal opportunity. Under the regulations, recipients such as the Delaware Department of Education (DDOE) must “provide equal athletic opportunity for members of both sexes.” *Id.* at § 106.41(c). When evaluating whether equal opportunities are available, the United States Department of Education (USDOE) examines, among other factors, (1) whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes; (2) the provision of equipment and supplies; (3) scheduling of games and practice time; (4) travel and per diem allowance; (5) opportunity to receive coaching and academic tutoring; (6) assignment and compensation of coaches and tutors; (7) provision of locker rooms and practice and competitive facilities; (8) provision of medical training facilities and services; (9) provision of housing and dining facilities, and services; and (10) publicity. *Id.* The complaint asserts that DIAA does not provide equal opportunities to girls and boys under factor three, “scheduling of games and practice time.”

A policy Interpretation issued by HEW’s Office of Civil Rights and used by USDOE’s Office for Civil Rights explains that compliance under factor three, “scheduling of games and practice time,” is assessed by examining, among other factors, the equivalence for girls and boys of:

- The number of competitive events per sport;
- The number and length of practice opportunities;
- The time of day competitive events are scheduled;
- The time of day practice opportunities are scheduled;
- The opportunities to engage in available preseason and post-season competition.

Title IX of the Education Amendments of 1972, A Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,416 (Dec. 11, 1979).

The Policy Interpretation makes clear that identical scheduling for boys and girls is not required. Rather, compliance is assessed by first determining whether a difference in scheduling has a negative impact on one sex, and then determining whether that disparity is substantial enough to deny members of that sex equality of athletic opportunity. See *McCormick v. The School District of Mamaroneck*, 370 F.3d 275, 293 (2nd Cir. 2004). Further, the Policy Interpretation contemplates that a disparity disadvantaging one sex in one part of a school's athletic program can be offset by a comparable advantage to that sex in another area. *Id.*; See *Policy Interpretation*, 44 Fed. Reg. at 71,415.

III. Investigation and Factual Findings

A. Complainant

Complainant asserts that by scheduling girls' soccer in the spring, DIAA is in violation of Title IX of the federal Educational Amendments Acts of 1972, which prohibits discrimination against women and girls in education, including high school athletics. Specifically, Complainant argues that the scheduling of the girls' high school soccer season in the spring deprives girls of opportunities for college recruitment, scholarships, Olympic Development program events, College I.D. tournaments and National team player I. D. events that Delaware high school boys who play soccer in the traditional fall season do not face.

Complainant is the father of three daughters. [REDACTED]

[REDACTED] His middle daughter is goal keeper in girls' soccer. She started varsity for her high school as a ninth grader, participated for five years in the Delaware Olympic Development Program and joined an Elite Club National League team last spring. Complainant's daughter plays for an ECNL team based in Pennsylvania as there is no ECNL team in Delaware.

Complainant testified that the Delaware girls' soccer season is out of alignment with traditional fall seasons played in most states in the United States, the NCAA and Club play. Complainant notes that the boys' soccer season in Delaware is in the fall and that 37 states play both boys' and girls' soccer in the same season. Further, high school girls' soccer programs in Maryland, Pennsylvania, New Jersey, New York, Connecticut and Massachusetts are played in the fall. All college women's soccer programs are played in the fall season.

Complainant asserts that ECNL is the highest club level available for female high school soccer players. Because most ECNL teams in the north east play high school girls' soccer in the fall, the ECNL has structured its game/tournament schedule to take place in the spring so as not to conflict with high school programs. Because Delaware schedules girls' soccer in the spring, girls participating in both their high school programs and on an ECNL team run the

danger of being over played leading to increased chance of injury. Further, when comparing his daughter's high school game schedule and her ECNL practice schedule, they have identified 11 scheduling conflicts.

Complainant further asserts that the spring scheduling affects the girls' college recruitment opportunities. It is alleged that most Division I and II recruitment takes place at the club level thus forcing girls to choose between participating in their high school programs or on an ECNL team. For example, the May Players Development Academy tournament has conflicted for years with the quarter finals of the State girls' soccer tournament.

B. DIAA

The National Federation of State High School Associations Soccer – State Association Competition Dates Report for the 2013-2014 school year indicates that for boys 32 states play soccer in the fall, 6 states play in the winter season and 14 states pay in the spring season. In comparison, 26 states play girls soccer in the fall, 6 states play in the winter and 20 states play in the spring. Delaware is one 9 states that schedule boys soccer in the fall and girls soccer in the spring (Colorado, Delaware, Illinois, Kansas, Michigan, Missouri, North Carolina, North Dakota, Wisconsin). Another 11 states play both girls' and boys' soccer in the spring (Alabama, Alaska, Arkansas, Georgia, Iowa, Nebraska, Oklahoma, South Carolina, Texas, Virginia, Wyoming).

Girls' soccer is the only high school sport in Delaware played outside the NCAA schedule. When girls' soccer was first established as a high school sport in 1995-1996, member schools were surveyed to determine when to schedule girls' soccer. It was determined that girls' soccer would have a greater opportunity to flourish in the spring given the popularity of other sports and the availability of coaches, officials, and fields. Subsequently, following the 1999 World Cup, interest in girls' soccer skyrocketed. In 2012-2013, DIAA had 49 member high schools playing girls soccer with 1606 female athletes. It is the number one girls sport in Delaware.

According to DIAA, most college recruiting takes place at the high school level with the exception of Division I (High) which recruits predominately from elite club teams. DIAA estimates that we have approximately 10 girls in Delaware playing soccer at the ECNL/Division I (High) level. College recruiting begins during a girl's sophomore year when the athlete may begin contacting coaches. Direct contact between coaches and athletes begins after September 1 of the athlete's junior year when programs can begin sending direct marketing material to student athletes. Telephone contact by coaches may begin after July 1 of the athlete's junior year. Division 1 soccer programs must identify their potential prospects to the NCAA in advance of their senior year.

The highest boys' club league is the Boy Academies run by the US Soccer Association. There are no US Soccer Academies for Girls. Boys that play on one of the US

Soccer Academy teams are barred by US Academy rules from playing on their high school soccer teams.

The Delaware Youth Soccer Association is sanctioned by the US Soccer Association. There are approximately 11,000 female players in Delaware participating on teams U20 and down. In August 2013, Delaware moved the State Girls' Cup to the fall not to conflict with spring U15 and above players who may be playing for their high school teams. Regionals will be played in Rhode Island this year in July 2014. This past year, 8 U15-U18 teams participated in the Girls Cup.

Mr. Charles disclosed that his research indicated that the scheduling of girls' soccer had been raised twice in 2007. The matter was referred by the DIAA Board of Directors to the Tournament Committee who decided not to take any action on rescheduling.

DIAA recently conducted an informal survey of its membership regarding scheduling of girls soccer. DIAA received 37 responses representing 1240 female soccer players. Of the 1240 female soccer players, 554 or 45% play a fall sport. Of the 37 responses, 32 were opposed to moving girls' soccer to the fall, 3 were in favor of the move and 3 were neutral. Twenty-four responded that they would have insufficient field space to accommodate an additional sport in the fall and 10 responded that they would have sufficient space.

According to DIAA the biggest impact of moving girls' soccer to the fall would be on the availability of officials. Both the Diamond State Soccer Officials Organization and the DE Soccer Official Association have indicated that they would not be able to accommodate increased games in the fall season. In order to ensure a pool of well-trained officials and sufficient playable field space should an additional sport be added to the fall season, DIAA anticipates that it would have to drop the number of games being played which could be accomplished by (1) reducing the number of games played by both girls and boys; (2) dropping the JV soccer program at the high school level for both girls and boys; or (3) dropping the middle school soccer program for both girls and boys.

Mr. Charles did acknowledge the conflict with the Players Development Academy tournament over Memorial Day weekend. Mr. Charles stated that it will be his recommendation to the Tournament Committee to reschedule the girls' quarterfinals to either right before or right after the holiday weekend. It was further noted that the PDA Tournament is one of five tournaments annual tournaments and ECLN teams must compete in three. The tournaments are held in November, December, February, April and May.

IV. Conclusion

Girls in Delaware have more athletic opportunities than boys. Pursuant to DIAA Rules and Regulations, if a school does not offer a girls' team in a particular sport then girls can participate on the boys' teams. Sports are considered the same when one set of NFHS Rules govern both genders. *See 14 DE Admin. Code 1009.5.1.4.*

FALL		WINTER		SPRING	
Boys	Girls	Boys	Girls	Boys	Girls
Cross Country	Cross Country	Basketball	Basketball	Baseball	Baseball
Soccer	Volleyball	Swimming/Diving	Swimming/Diving	Golf	Golf
Football	Football	Indoor Track	Indoor Track	Tennis	Tennis
	Field Hockey	Wrestling	Wrestling	Outdoor Track	Outdoor Track
				Lacrosse	Lacrosse
					Softball
					Soccer

Girls who play soccer in the spring have the same access to State Championship play as boys do in the fall. Spring scheduling has the potential of exposing more female high school soccer players to more Division III coaches as coaches are able to travel to high school games during their off season to observe high school prospects. It does not appear on the record presented that the scheduling of girls soccer in the spring has had a negative impact of Division I recruiting as these programs must identify their prospects to the NCAA before the athletes' senior year. Further, the testimony was consistent that the Division I programs recruit mostly from Club events.

No evidence was presented that the scheduling of girls' soccer in the spring leads to increased injuries. Without a doubt, girls who chose to play Club soccer in addition to their high program will be playing more soccer; regardless of whether they participate in ECNL, US Soccer or OPD sanctioned programs. The fact that Delaware does not have an ECNL team does mean that girls who chose to play in this league will have to travel further for games. However, this is not the result of girls' high school soccer being scheduled in the spring; but rather is the result of a choice to play elite club soccer. It is further noted that boys who play for the US Soccer Academies are prohibited from playing for their high school soccer teams by US Academy rules.

For the reasons stated here I find that the while the opportunities are different for boys and girls that play high school soccer in so far as the seasons are different, I do not find a negative impact on the record presented. "The Policy Interpretation makes clear that identical scheduling is not required. Rather, compliance is assessed by first determining whether a difference in scheduling has a negative impact on one sex, and then determining whether that disparity is substantial enough to deny members of that sex equality of athletic opportunity." *McCormick*, 370 F.3d at 293. Further, even if a negative impact exists as a result of the scheduling difference, the overall effect of any differences is negligible. This is especially true when one looks at the State high school athletic program where girls have more athletic opportunities than boys.

The instant matter is distinguishable from *McCormick* in that the scheduling of girls' soccer does not bar girls in Delaware from competing in regional or state championships. Likewise, this matter is distinguishable from the New York City case in that New York City's scheduling of girls' soccer in the spring deprived the girls of the opportunity to compete against

teams outside of New York City. All high schools in Delaware, both public and private (members of DIAA), play girls' soccer in the spring. I do recommend that DIAA move the quarterfinals of the girls' soccer State Championship from Memorial Day Weekend. This will allow girls participating on ECNL teams to participate in the Players Development Academy. Lastly, this matter is distinguishable from *Communities for Equity v. MHSAA*, 178 F.Supp 2d 805 (W.D. 2001), *aff'd* 459 F.3d 676 (6th Cir. 2006), which held that the scheduling of girls soccer in Michigan in the spring was a violation of Title IX. There was no evidence presented that weather is a factor in Delaware, that girls are forced inside for practice and tryouts or that girls' are forced to play more games per week as their season is shorter than the boys' season. Further, there was no evidence presented that girls' playing soccer in the spring have post-season play after the end of the school year.

For the reasons set forth herein, I find that the scheduling of girls' soccer high school soccer in the spring does not violate Title IX. If either party is not satisfied with this response, they may within five (5) working days of receipt of this decision request in writing a review of this grievance by the Secretary of Education, or the Secretary's designee. Such request should be addressed to:

Mark T. Murphy, Secretary of Education
Department of Education
401 Federal Street, Suite 2
Dover, DE 19901

Sincerely,



Mary L. Cooke
Title IX Compliance

cc: Kevin Charles, Executive Director, DIAA
Paula Fontello, Deputy Attorney General
Ben Schladweiler, Esq.
Ilona Kirshon, Deputy Attorney General
Karen Field Rogers, Associate Secretary