



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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May 10, 2018

Mr. Joshua P. Thompson  
Attorney  
Pacific Legal Foundation  
930 G Street  
Sacramento, California 95814

Re: OCR Docket #05-18-4007  
Minnesota State High School League

Dear Mr. Thompson:

The U.S. Department of Education (Department), Office for Civil Rights (OCR) has completed its investigation of the complaint you filed on behalf of your client, Miranda Lynch, against the Minnesota State High School League (League) alleging discrimination on the basis of sex. OCR assigned docket #05-18-4007 to the complaint.

Specifically, Pacific Legal Foundation alleges the League's current Bylaws discriminate against boys on the basis of sex in violation of Title IX because the League does not allow boys to participate in League-sponsored dance team competitions.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681-1688, and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. OCR has determined that the Association is subject to the requirements of Title IX. Additional information about the laws OCR enforces is available on our website at <http://www.ed.gov/ocr>.

During its investigation, OCR reviewed documents provided by Pacific Legal Foundation and the League. OCR carefully considered the relevant evidence in this case and has determined, based on a preponderance-of-the-evidence standard, that there is insufficient evidence to conclude the League discriminated against boys on the basis of sex as alleged. The bases for OCR's determination are set forth below.

**Legal Standard**

*Title IX*

The Title IX regulation at 34 C.F.R. §106.31(a) states that no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

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

discrimination under any educational program or activity operated by a recipient of Federal financial assistance.

With respect to athletics, the regulation specifically states, at 34 C.F.R. § 106.41(a), that 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, and no recipient shall provide any such athletics separately on such basis. The regulation allows an exception in that recipients may provide separate boys' and girls' sports teams. The regulation states, at 34 C.F.R. §106.41(b), that "a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited,<sup>1</sup> members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport."<sup>2</sup>

#### *Minnesota Law*

OCR does not enforce Minnesota law; however it applies to the League. Unlike Title IX, Minnesota state law pertaining to equal opportunity in athletics<sup>3</sup> does not have a contact sports exemption. Like Title IX, the Minnesota administrative law allows students whose athletic participation opportunities have been limited to try out for the team of the other gender, under limited circumstances. The administrative rule states:

When overall athletic opportunities for one sex have previously been limited, members of that sex shall be permitted to try out and, if successful, to participate on any team in any sport. This part does not prohibit any elementary or secondary school from making participation on a team in a sport dependent upon a demonstrated level of skill and ability. When an educational institution has established a team exclusively for members of the sex whose overall athletic opportunities have previously been limited, members of the other sex may not try out for or participate on that team.<sup>4</sup>

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<sup>1</sup> Whether athletic opportunities for members of a particular sex have previously been limited is determined by examining the athletic opportunities provided to each sex overall, not just in a particular sport

<sup>2</sup>The regulation defines contact sports to include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

<sup>3</sup>See MINN. STAT. ANN. §§ 121A.03 and 121A.04 (2014) at <https://www.revisor.mn.gov/statutes/?id=121a.04>

<sup>4</sup> <https://www.revisor.mn.gov/rules/?id=3535.3200>

### Factual Summary

#### *The League*

The League, founded in 1916, provides support and governance to nearly 500 member high schools concerning interscholastic athletics and extra-curricular activities. The support and governance provided by the League for interscholastic athletics includes the following: developing and implementing rules and Bylaws for League member high schools; organizing and supervising regional and state interscholastic athletic events; developing programs addressing sportsmanship, enforcing League prohibitions of alcohol, tobacco, and performance enhancing substances, and scholarship recognition; overseeing and training more than 4,500 registered contest officials and judges; and educating League member coaches on various subjects relevant to participation in the League. The League also provides support and governance over extra-curricular activities.

According to the League, it adds interscholastic sports and extra-curricular activities based on requests by member schools, individuals, and private athletic associations. The addition of interscholastic sports or extra-curricular activities takes place at the League's yearly member representatives meeting. In reviewing a request to add a sport or an activity, the League requires proof of competitive activity in the state as well as a level of interest by students in member schools. The League may itself survey member schools to ascertain interest in the requested sport or activity. The League's Board of Directors submits the request with supportive information to the membership for a vote. The member schools (two representatives per school) then vote on whether to add the requested interscholastic sport or activity.

According to the League, it sanctions the following 20 interscholastic sports:

<b>Sponsored League Sports</b>		
<b>Boys</b>	<b>Sport</b>	<b>Girls</b>
	badminton	X
X	baseball	
X	basketball	X
X	cross country	X
	dance team	X
X	football	
X	golf	X
	gymnastics	X
X	ice hockey	X
X	lacrosse	X
X	alpine skiing	X
X	nordic skiing	X

<b>Sponsored League Sports (continued)</b>		
<b>Boys</b>	<b>Sport</b>	<b>Girls</b>
X	soccer	X
	softball	X
X	swimming and diving	X
	synchronized swimming	X
X	tennis	X
X	track and field	X
	volleyball	X
X	wrestling	

The League sponsors a season-ending tournament or competition for each of the sanctioned sports, including dance team. The League also sponsors the following extra-curricular activities: cheer, one-act play, music (band, orchestra and vocal), debate, speech and visual arts.

#### *League Bylaws*

The League's Bylaws are comprised of five sections (100.00 through 500.00). Each section includes rules that apply to the League's interscholastic athletics, the League's extra-curricular activities, or to both. For example, Bylaw 100 - General Eligibility, sets forth rules on age restrictions, physical examinations, enrollment, and academic credits applicable to students in athletics and cheer (to the exclusion of students in one-act play, music, debate, speech and visual arts). Bylaw 200 - Student Eligibility, also applicable to students only in athletics and cheer, defines amateur status, athletic camps and clinics, and national team and Olympic development programs. Bylaw 300 - Administration of Student Eligibility, sets forth rules on eligibility for all students in athletics and extra-curricular activities. Bylaw 400 - Administration of Athletic Programs, applies to all athletics and extra-curricular activities and sets forth rules for all contests, scheduling of contests and reporting violations of League Bylaws. Bylaw 500 - Interscholastic Sport Activities, which applies only to students in athletics, establishes the maximum number of competitions and the daily and seasonal participation limitations for athletics.

#### *Dance Team as a League Sport*

According to the League's Executive Director, athletic participation opportunities for girls have previously been limited in Minnesota interscholastic athletics. Therefore, girls are permitted to try out for the football, baseball and wrestling teams. The League sponsors dance team, which it characterizes as a non-contact "sport," for girls, but not for boys. Boys are prohibited from trying out for dance team, as well as gymnastics, softball, volleyball and synchronized swimming. The League limits these sports for girls because it asserts athletic participation opportunities for boys have not previously been limited.

According to the League, dance team is a League sport, not an extra-curricular activity. The League states that, based on a request from the Minnesota Association of Dance Teams, requests from member high schools and verification of competition and participation within the state, it recognized dance team as an interscholastic sport on March 20, 1996. With this recognition, the League dance teams became subject to the same participation and competition Bylaws as the Leagues' other interscholastic sports.

In March 2000, the League and the Minnesota Department of Education (MDE) sought clarification from OCR regarding whether or not Minnesota schools could claim dance team as a sport for purposes of Title IX. After receiving technical assistance from OCR, the League and MDE developed an assessment and determination tool by which a Minnesota school could claim dance team as a sport for purposes of Title IX. Since then, only dance teams certified by MDE to meet these standards may participate in League-sponsored dance team events.

During the 2016-17 school year, the League sanctioned 170 dance teams, all of which had been previously assessed by MDE to qualify as a sport. During the same school year, there were 17 non-League sanctioned dance teams, which competed against non-League sanctioned dance teams and provided support for athletic teams.<sup>5</sup> The League does not recognize any of the 17 non-sanctioned dance teams as an extra-curricular activity or as a League sport. Currently, the League limits participation in dance team to females. The League provides no boys' dance team competitions and there is no indication or information to suggest that high schools or dance associations have requested the League to establish dance team as a sport for boys.

#### *Interscholastic Athletic Opportunities*

OCR examined whether athletic opportunities for the boys have been previously limited such that they must be permitted to try out for and participate in dance team. According to data provided by the National Federation of High School Athletic Associations (NFHSAA), during the 2013-14, 2014-15, 2015-16 and 2016-17 school years in the United States, boys averaged 57.8% of total participants in interscholastic athletics, while girls averaged 42.2% of total participants in interscholastic athletics during the same timeframe.

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<sup>5</sup> According to the League, League members decide whether to have a dance team and whether to seek MDE approval to have their dance team certified as a sport. League members may choose to have a spirit dance team that is not part of the League; in such case while the dance team cannot participate in League-sponsored events, it will not be subject to Bylaw 412 (and may include boys).

<b>Nationwide Interscholastic Athletic Participation Rates by Gender</b>			
<b>Year</b>	<b>Boy Participants</b>	<b>Girl Participants</b>	<b>Total Participants</b>
2013-14	4,527,994 (58.0%)	3,267,664 (41.9%)	7,795,658
2014-15	4,519,312 (57.8%)	3,287,735 (42.1%)	7,807,047
2015-16	4,541,959 (57.7%)	3,324,306 (42.3%)	7,866,265
2016-17	4,563,238 (57.3%)	3,400,297 (42.7%)	7,963,535
<b>Average</b>	<b>4,538,125 (57.8%)</b>	<b>3,320,000 (42.2%)</b>	<b>7,858,126</b>

Over the last four years 1,218,125 (15.6%) more boys participated nationwide in interscholastic sports, on average, than girls.

In Minnesota, between 2013 and 2017, League schools' total enrollment averaged 265,463 students. Of those students, League schools' enrollment averaged 135,676 (51.3%) boys and 129,787 (48.7%) girls. Between 2013 and 2017, the gender demographics of League athletes averaged 120,307 (52.2%) boys and 109,958 (47.8%) girls.

<b>League Member School Enrollments and Athletes by Gender</b>					
<b>Year</b>	<b>League Members Enrollment Boys</b>	<b>League Members Enrollment Girls</b>	<b>League Athletes Boys</b>	<b>League Athletes Girls</b>	<b>Underrepresented Sex</b>
2013-14	133,964 (51.3%)	127,364 (48.7%)	119,034 (53.2%)	104,706 (46.8%)	Girls (-1.9%)
2014-15	134,879 (51.3%)	128,128 (48.7%)	118,899 (52.4%)	108,084 (47.6%)	Girls (-1.1%)
2015-16	136,257 (51.3%)	129,394 (48.7%)	121,024 (52.4%)	110,023 (47.6%)	Girls (-1.1%)
2016-17	137,603 (51.4%)	130,263 (48.6%)	122,269 (51.1%)	117,020 (48.9%)	Boys (-0.3%)
<b>Average</b>	<b>135,676 (51.3%)</b>	<b>128,787 (48.7%)</b>	<b>120,307 (52.2%)</b>	<b>109,958 (47.8%)</b>	<b>Girls (-1.0%)</b>

When compared to their respective enrollments in the League schools, girls were underrepresented in athletics at an average percentage rate of 1.0% during the 2013-14, 2014-15 and 2015-16 school years, and boys were underrepresented in athletics at an average percentage rate of .3% during the 2016-17 school year. Although the most recent data obtained by OCR (2016-17) show boys slightly underrepresented in League interscholastic athletics (by -0.3%) OCR observed that overall athletic opportunities for boys in the State of Minnesota have not been limited, and that girls have been underrepresented when comparing their enrollment statewide to their athletic representation.



As a consequence of the historic underrepresentation of girls in sports, the League, in addition to dance team, limits participants to girls only in gymnastics, softball, synchronized swimming and volleyball. According to information provided by the League, it has received only two requests by an individual male (one in 2016 and one in 2017) to participate in dance team events sponsored by the League. The League denied both requests. Conversely, according to information provided by the League, based on sustained, expressed interest by the administrations of its member schools, the League plans to introduce boys' volleyball as its next sanctioned sport.

*Sports without an Opposite Gender Counterpart*

The League sponsors eight sports that do not offer the same or similar sport to the other gender (stand-alone sport). The Leagues sponsors girl's gymnastics, softball, synchronized swimming, volleyball, and dance and sponsors boys' football, baseball, and wrestling for boys. The average overall participation rate in the eight stand-alone sports during the 2013-14, 2014-15, 2015-16 and 2016-17 school years was 23,083. During those school years, the three boys' sports had an average participation rate of 15,759 (68.3%) of all athletes participating in stand-alone sports. The five girls' sports had an average participation rate of 7,324 (31.7%).

<b>Participation in One-Gender/No Counterpart League Sports (2013-2017)<sup>6</sup></b>					
<b>Sport</b>	<b>2013-14</b>	<b>2014-15</b>	<b>2015-16</b>	<b>2016-17</b>	<b>Four Year Averages</b>
<b>girls dance</b>	4,785	4,812	4,956	4,925	4,870
<b>girls gymnastics</b>	2,534	2,608	2,595	2,627	2,591
<b>girls softball</b>	12,056	12,737	13,029	13,240	12,766
<b>girls volleyball</b>	15,129	16,102	16,222	16,379	15,958
<b>girls synchronized swimming</b>	435	446	432	430	436
<b>Girls Total Average</b>	6,988	7,341	7,447	7,520	7,324
<b>boys football</b>	26,563	25,487	25,650	25,010	25,678
<b>boys baseball</b>	13,146	13,145	13,515	13,778	13,396
<b>boys wrestling</b>	8,236	8,224	8,154	8,197	8,203
<b>Boys Total Average</b>	15,982	15,619	15,773	15,662	15,759

<sup>6</sup>Participation opportunities reported by the NFHSAA.

### Analysis

Pacific Legal Foundation alleges the League discriminates against boys on the basis of sex in violation of Title IX because it does not allow boys to participate in League-sanctioned dance team competitions.

The evidence indicates that the League sponsors dance team as an interscholastic sport. League members seek MDE approval so their dance teams can compete as a sport. Schools may also offer dance team as an extra-curricular activity, but those dance teams are not in the League and are not the subject of this complaint.

Further, both Title IX and the League's Bylaws allow it to restrict teams to one gender so long as overall athletic opportunities for that gender have been limited. In this case, the evidence shows that athletic opportunities for boys nationwide as well as boys enrolled in League-member schools have not previously been limited. As such, the League is not required to provide boys the opportunity to try out for and participate in League-sponsored dance team competitions.

In Minnesota, the three stand-alone boys' sports have an average participation rate over a five-year period which is more than double that of the average participation rate in the five stand-alone girls sports over the same time period. The evidence shows that historically, girls enrolled in League-member schools have been underrepresented in athletic opportunities. At the national level, girls have been underrepresented in athletics between 2013 and 2017. Although the gap nationwide in participation rates for boys and girls has decreased slightly over the years, and in 2016-17, in Minnesota, boys were underrepresented, the addition of boys' volleyball would most likely reverse the current trend and return girls to underrepresented status. Additionally, the 0.3% underrepresentation of boys in the State of Minnesota during the 2016-17 school year does not establish that boys have been historically underrepresented in athletics among member schools. During that same year, girls were underrepresented in athletics on a national level by more than 14%.

As such, Title IX does not currently require the League to allow boys to participate in League-sponsored dance team events. Accordingly, OCR has determined the preponderance of the evidence is insufficient to conclude that the League discriminated against boys on the basis of sex as alleged.

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. Pacific Legal Foundation may file a private suit in federal court whether or not OCR finds a violation.



Mr. Thompson  
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This concludes OCR's investigation of the complaint. This letter should not be interpreted to address the League's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. Please be advised that the League 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 Pacific Legal Foundation or your client 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, we 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, you may contact Miguel Figueras, Attorney, at (312) 730-1578 or by email at [miguel.figueras@ed.gov](mailto:miguel.figueras@ed.gov).

Sincerely,



Ann Cook-Graver  
Supervisory Attorney