

September 26, 2013

Superintendent Emmanuel Caulk
Portland Public Schools
196 Allen Avenue
Portland, Maine 04103

Re: Compliance Rev. No. 01-11-5001

Dear Superintendent Caulk:

I write to inform you of the resolution of the above-referenced compliance review that was initiated by the U.S. Department of Education, Office for Civil Rights (OCR), under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* (Title IX), and its implementing regulation at 34 C.F.R. Part 106. As you know, the purpose of this compliance review was to determine whether the Portland Public Schools (District) was providing its students an equal opportunity to participate in its interscholastic athletics program by effectively accommodating the interests and abilities of its male and female students, as required by 34 C.F.R. § 106.41(a) & (c)(1). OCR also analyzed whether the District provides males and females equal opportunity with respect to (1) the opportunity to receive coaching and assignment and compensation of coaches, and (2) the provision of locker rooms and athletic facilities, as required by 34 C.F.R. § 106.41(a) & (c)(5 - 7). While OCR's review determined that the District was not in compliance with the Title IX requirements in these areas, the District agreed to address these issues as set forth in the enclosed Resolution Agreement.

As part of the investigation, OCR met with the prior superintendent, the District's athletic directors, legal counsel, and other administrative officials. These individuals, as well as many others within the District, fully cooperated with OCR, providing documentation and access to District facilities and coaches, students, and staff. We appreciated the District's cooperation in our investigation and negotiations and are confident this will continue into the monitoring period to follow.

I. JURISDICTION

OCR undertook this compliance review pursuant to Title IX and its implementing regulation at 34 C.F.R. Part 106, which prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance. As a recipient of Federal financial assistance from the Department, the District is subject to Title IX. In addition to the language from the Regulation, OCR also uses as a means of assessing

compliance the Intercollegiate Athletics Policy Interpretation issued on December 11, 1979 in the Federal Register (Policy Interpretation); the Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test, issued on January 16, 1996; and the Intercollegiate Athletics Policy Clarification: The Three Part Test – Part Three, issued on April 20, 2010. The provisions of these policy documents are generally applicable to interscholastic athletics programs.

II. BACKGROUND

The District is the largest school district in the state of Maine. It has two primary high schools: Portland High School (Portland High) and Deering High School (Deering High). The District also has a third high school – Casco Bay High School – but it is a small “school of choice” for the District, enrolling only approximately 275 students. Casco Bay High School does not operate its own athletics program. Instead, Casco Bay students seeking to participate in interscholastic athletics are provided the choice to take part in the athletics program of either Portland High or Deering High. OCR accounted for Casco Bay students in reviewing the programs of both Portland High and Deering High, but this student population was not a determining factor in OCR’s review as both schools had relatively small and approximately equal numbers of Casco Bay female and male students participating in their athletics programs.

III. ISSUES INVESTIGATED

OCR investigated the following issues during this compliance review:

- A. Whether the District provided female students an equal opportunity to participate in its interscholastic athletics program by effectively accommodating their interests and abilities, in accordance with 34 C.F.R. § 106.41(a) & (c)(1).
- B. Whether the District provided female athletes an equal opportunity in the following areas:
 - 1) The opportunity to receive coaching; assignment and compensation of coaches, in accord with 34 C.F.R. § 106.41(a) & (c)(5)-(6).
 - 2) The provision of locker rooms, practice facilities, and competition facilities, in accord with 34 C.F.R. § 106.41(a) & (c)(7).

IV. ISSUE ONE: EQUAL ATHLETIC OPPORTUNITIES

The Title IX provision of equal opportunities with respect to the opportunity to participate in interscholastic 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 boys and girls, 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. OCR’s determination of whether equal athletic opportunities are provided involves a two-part analysis that examines whether both sexes have (1) equal opportunities to compete, and (2) equivalent levels of competition.

A. EQUAL OPPORTUNITIES TO COMPETE

With regard to the first part of the analysis – whether both sexes have equal opportunities to compete – OCR considers three factors to determine whether a district is providing nondiscriminatory participation opportunities. These factors are commonly referred to as the “Three Part Test” and are described in the Policy Interpretation and subsequent OCR policy clarifications. A district must meet at least one part of the Three Part Test to be in compliance with the regulation. The three parts are as follows:

1. Whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among athletes, whether the district can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
3. Where the members of one sex are underrepresented among athletes, and the district cannot show a history and continuing practice of program expansion, as described above, whether it can demonstrate that the interests and abilities of the members of the underrepresented sex are fully and effectively accommodated by the present program.

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.

PART ONE: PARTICIPATION IN PROPORTION TO ENROLLMENT

The Policy Interpretation, in relevant part, defines athletic participants as those athletes: “(a) [w]ho are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, *e.g.*, coaching, equipment, medical and training room services, on a regular basis during a sport’s season; and (b) [w]ho are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport’s season; and (c) [w]ho are listed on the [rosters]

maintained for each sport...” Using this definition as a guide, OCR reviewed team rosters from the 2009-10, 2010-11, and 2011-12 seasons and interviewed head coaches, as well as assistant coaches, athletes, and the Athletic Directors of both Portland High and Deering High. OCR focused its analysis on the 2010-11 and 2011-12 academic years. Based on our investigation, OCR determined that the District was not providing participation opportunities for female students in numbers substantially proportionate to their 2010-11 or 2011-12 enrollment at either Portland High or Deering High.

In reviewing the District’s program, OCR analyzed each high school with an interscholastic athletics program individually because they had separate athletic directors, separate budgets, and competed against each other in the same league. As mentioned above, the District does have a third high school – Casco Bay – but it is a small school of choice and students wishing to participate in athletics from Casco Bay have the option of participating at either Deering High or Portland High. Also, OCR did note these students in its review, but found that the students broke evenly between the schools and were roughly equivalent with regard to the male and female breakdown of the athletes.¹ The overall numbers for the District were as follows:

PORTLAND SCHOOL DISTRICT STUDENT POPULATION*

	2010-11		2011-12	
MALES	1,195	51.33%	1,110	49.91%
FEMALES	1,133	48.67%	1,114	50.09%
TOTAL	2,328		2,224	

**Data provided by the District and the Maine Dept. of Education*

PORTLAND SCHOOL DISTRICT ATHLETIC PARTICIPATION*

	2010-11		2011-12	
MALE ATHL.	830	54.97%	793	53.65%
FEMALE ATHL.	680	45.03%	685	46.35%
TOTAL	1,510		1,478	

**Data compiled from team rosters and coach interviews*

As a result, OCR determined that in 2010-11, girls were underrepresented in the District’s athletics program, with a disparity of 3.64%. In 2011-12, that disparity remained and even grew slightly to 3.74%. OCR then conducted its analysis in each school to determine whether the disparities in question would yield enough athletes to potentially field a team.

¹ Deering High had 7 students from Casco Bay participating in its program in 2010-11, 4 girls and 3 boys; in 2011-12 they had 5 such students participating in its interscholastic athletics program, 3 girls and 2 boys. Portland High had 3 Casco Bay athletes participating in its interscholastic athletics program in 2010-11 and 2011-12; in both years there were 2 boys and 1 girl.

PORTLAND HIGH

At Portland High, OCR learned that there was an enrollment of 995 students during the 2010-11 academic year. Boys accounted for 480 of those students, or 48.24% of the student body. In that same year, girls accounted for 515 of those students, or 51.76% of the student body. OCR also determined that there were 408 boys and 364 girls participating in the Portland High athletics program, for a total of 772 athletic opportunities during the 2010-11 academic year. Boys constituted 52.85% of those athletic opportunities and girls constituted 47.15%. Accordingly, there was a disparity of 4.61% between the girls’ representation in the overall student body and their athletic participation rate. This constituted approximately 74 athletic opportunities needed for girls to achieve parity without cutting any athletic opportunity for boys.

During the 2011-12 academic year, OCR learned that there was an enrollment of 944 students at Portland High. Boys accounted for 442 of those students, or 46.82% of the student body. In that same year, girls accounted for 502 of those students, or 53.18% of the student body. OCR also determined that there were 392 boys and 354 girls participating in the Portland High athletics program, for a total of 746 athletic opportunities during the 2011-12 academic year. Boys constituted 52.55% of those athletic opportunities and girls constituted 47.45%. Accordingly, there was a disparity of 5.73% between the girls’ representation in the overall student body and their athletic participation rate. This constituted approximately 91 athletic opportunities needed for girls to achieve parity without cutting any athletic opportunity for boys.

PORTLAND HIGH STUDENT POPULATION*

	2010-11		2011-12	
MALES	480	48.24%	442	46.82%
FEMALES	515	51.76%	502	53.18%
TOTAL	995		944	

**Data provided by the District*

PORTLAND HIGH ATHLETIC PARTICIPATION*

	2010-11		2011-12	
MALE ATHL.	408	52.85%	392	52.55%
FEMALE ATHL.	364	47.15%	354	47.45%
TOTAL	772		746	

**Data compiled from team rosters and coach interviews*

DEERING HIGH

At Deering High, OCR learned that there was an enrollment of 1,052 students during the 2010-11 academic year. Boys accounted for 560 of those students, or 53.23% of the student body. In that same year, girls accounted for 492 of those students, or 46.77% of the student body. OCR also determined that there were 422 boys and 316 girls

participating in the Deering High athletics program, for a total of 738 athletic opportunities during the 2010-11 academic year. Boys constituted 57.18% of those athletic opportunities and girls constituted 42.82%. Accordingly, there was a disparity of 3.95% between the girls’ representation in the overall student body and their athletic participation rate. This constituted approximately 55 athletic opportunities needed for girls to achieve parity without cutting any athletic opportunity for boys.

During the 2011-12 academic year, OCR learned that there was an enrollment of 986 students at Deering High. Boys accounted for 525 of those students, or 53.25% of the student body. In that same year, girls accounted for 461 of those students, or 46.75% of the student body. OCR also determined that there were 401 boys and 331 girls participating in the Deering High athletics program, for a total of 732 athletic opportunities during the 2011-12 academic year. Boys constituted 54.78% of those athletic opportunities and girls constituted 45.22%. Accordingly, there was a disparity of 1.53% between the girls’ representation in the overall student body and their athletic participation rate. This constituted approximately 21 athletic opportunities needed for girls to achieve parity and without cutting any athletic opportunity for boys.

DEERING HIGH STUDENT POPULATION*

	2010-11		2011-12	
MALES	560	53.23%	525	53.25%
FEMALES	492	46.77%	461	46.75%
TOTAL	1,052		986	

**Data provided by the District*

DEERING HIGH ATHLETIC PARTICIPATION*

	2010-11		2011-12	
MALE ATHL.	422	57.18%	401	54.78%
FEMALE ATHL.	316	42.82%	331	45.22%
TOTAL	738		732	

**Data compiled from team rosters and coach interviews*

Numbers aside, the District’s interscholastic athletics program is similar across its two major high schools. Portland High’s interscholastic athletics program consists of 25 sports, of which there are 10 female teams competing at the varsity level, 11 male teams competing at the varsity level, and 4 teams classified as co-ed that compete at the varsity level.² Deering High’s athletics program is similar, consisting of 23 sports, of which there are 10 female teams competing at the varsity level, 10 male teams

² Boys’ sports include cross-country, football, soccer, basketball, hockey, indoor track, wrestling, baseball, lacrosse, tennis, and outdoor track. Girls’ sports included cross country, field hockey, soccer, basketball, hockey, indoor track, lacrosse, softball, tennis, and spring track. The co-ed sports included golf, skiing, swimming, and sailing.

competing at the varsity level, and 3 teams classified as co-ed that compete at the varsity level.³ At both Portland High and Deering High, there exist several levels of athletic opportunities available, *i.e.*, varsity, junior varsity, and “first teams” (or freshman teams). However, in certain sports, *e.g.*, golf and tennis, the athletes are listed on one team and certain members competed formally in varsity matches while others competed in informal junior varsity level matches. The District has a boys’ and girls’ team in almost every sport sanctioned by the state’s interscholastic sport governing body, the Maine Principals’ Association (MPA). The only MPA-sanctioned girls’ sport not currently offered in the District is volleyball. Portland High also has a sailing team that is not sanctioned by the MPA, but competes interscholastically in a regional league with other New England towns. Still, there remains room for growth at both Portland High and Deering High in terms of the levels of participation, *e.g.*, adding an additional level of a team or adding volleyball.

In sum, OCR found that there was a district-wide disparity of close to 4% between the enrollment of girls and their participation in the District’s interscholastic program; OCR also found disparities at each of the high schools. Accordingly, the District is not in compliance with part one of the Three Part Test. Portland High would need to create 91 athletic participation opportunities to reach compliance on this first part of the Three Part Test; Deering High would need to add 21 opportunities, for a total of 112 opportunities District wide.⁴ It is also possible that the two high schools could collaborate – as they currently do with girls’ hockey – if there is an insufficient number of students to create a team at either school but there would be a sufficient number to create a combined team.

PART TWO: HISTORY OF PROGRAM EXPANSION

OCR next analyzed whether the District – at either Portland High or Deering High – demonstrated a history and continuing practice of program expansion responsive to the developing interests and abilities of the under-represented sex. This part of the Three Part Test looks at a district’s past and continuing efforts to provide non-discriminatory participation opportunities through program expansion. OCR first considers a district’s historical record of adding interscholastic teams for the under-represented sex. If a district can demonstrate a consistent effort to add interscholastic teams for the underrepresented sex over time, OCR then looks at other factors that demonstrate a district’s commitment to providing equal athletic opportunities to both sexes, for example, its implementation of a nondiscriminatory policy or procedure for requesting

³ Boys’ sports include cross-country, football, soccer, basketball, indoor track, wrestling, baseball, lacrosse, tennis, and outdoor track. Girls’ sports included cross country, field hockey, soccer, basketball, hockey, indoor track, lacrosse, softball, tennis, and spring track. The co-ed sports included golf, skiing, and swimming. Also, the girls’ hockey team is actually a combined team with Portland High; for purposes of this review, the athletes were counted at their respective schools.

⁴ When Casco Bay is factored in, the total number of opportunities is similar, at 111.

the addition of sports and the effective communication of the policy or procedure to students.

In analyzing this part of the Three Part Test, OCR reviewed the start date (or best estimate) for every sport offered by the District that had a recorded history. The District informed OCR that the start dates of many additional sports were unknown or could not be defined with any accuracy because they were started long ago. For example, OCR was informed that the District's athletics program history dates back to at least 1908, when boys' basketball began at Portland High. OCR reviewed team pictures from the early 1900s that indicated that boys' football and baseball started at approximately the same time. Additional sports were added in the 1970s, 1980s and through the 2000s at both Portland High and Deering High, however, there was no written record of when sports were specifically added. The District has canceled or combined sports teams for the underrepresented sex in the past few years, including a girls' first team field hockey at Portland High and girls' hockey at Deering High.⁵ OCR noted that both high schools also had first teams in softball in previous years.

Based on this information, OCR concluded that the District could not demonstrate both a "history" and "continuing practice" of program expansion for its underrepresented sex. While there were periods of time in the District's history when it increased participation opportunities for girls, there were significant periods of time when little or no expansion occurred and other, more recent periods of time when the District shrunk its program offering for girls. Accordingly, OCR determined that the District did not meet part two of the Three Part Test.

PART THREE: INTERESTS AND ABILITIES

When a school cannot demonstrate compliance with either parts one or two, OCR next turns to part three of the Three Part Test to determine if the District is fully and effectively accommodating the athletic interests and abilities of the underrepresented sex. To make this determination, OCR considers the District's assessment of any unmet interest and ability in its athletics program. OCR also considers other indicators of possible interest and ability such as developing sports on a regional or national level, as well as local youth and feeder programs in the areas from which a district draws its students.

The District had not conducted an athletic interest survey at either Portland High or Deering High during the tenure of either of the relatively new Athletic Directors (both starting within the last 4 years) and it was unclear when, if ever, any survey was conducted or what other outreach efforts were undertaken to assess athletic interest of

⁵ The Portland High first team field hockey team was cancelled in 2010-11. The Deering High girls' hockey team was combined with the Portland High girls' hockey team in 2010-11, but since then there have only been 1-2 Deering High girls participating in the combined girls' hockey team at any one time.

the girls in the District. OCR learned during its interviews of athletes and coaches of potential interest in a volleyball team, the only MPA sanctioned sport not currently offered for girls. OCR also learned about a coed volleyball club that existed at Portland High, and it learned of some opportunities offered by the City of Portland to encourage girls to participate in hockey and soccer, but there was no indication that the District had coordinated with any of those efforts to improve its own athletics program. Both of the Athletic Directors interviewed by OCR expressed their commitment to improving athletic opportunities in the District.

Lastly, OCR also noted that the District's criteria and process for starting new sports are very informal and not well publicized, with much discretion left at the local high school level with students ostensibly approaching the Athletic Directors and making their case to start teams.

Based on its investigation, OCR determined that the District has not satisfied prong three of the Three Part Test because the interests and abilities of female students have not been fully and effectively accommodated by its interscholastic athletics program. The District had not adequately assessed or taken other steps prior to OCR's review that would demonstrate that it has met its students' interests and abilities. The District had not undertaken a recent district wide survey or other assessment of the athletic interest and abilities of any of its students. OCR's investigation revealed potential interest in girls' volleyball, the only MPA sanctioned sport not currently offered for girls, as the result of a survey conducted by the District during our investigation. The District has agreed to add girls' volleyball in the 2014-15 academic year, as described below.

B. EQUAL LEVELS OF COMPETITION

The second part of the two-part athletic opportunity analysis examines the level and quality of competitive opportunities provided to the athletes. In making this determination, OCR considers whether the competitive schedules for boys' and girls' teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities. OCR compares the competitive events for each team at the institution's declared competitive level(s) and determines whether any of the teams compete below the declared levels.

In this case, the District is a member of the Southern Maine Activities Association (SMAA) and competes primarily against other teams at the same level in the SMAA. Portland High's coed sailing team is an exception: it is a collaborative team with a nearby private school and it competes in the New England Schools Sailing Association (NESSA), a division of the Inter-Scholastic Sailing Association. OCR asked each individual coach interviewed whether they felt that their teams played at the appropriate competitive level and against appropriate teams, and in each instance this was confirmed. Virtually every coach OCR interviewed described the SMAA as the

premier large school league in the state of Maine. Similarly, the Portland High Athletic Director confirmed that the NESSA is very competitive.

As a result of these findings, OCR concluded that the levels of competition for boys' and girls' teams, on a program-wide basis, generally afforded male and female athletes equivalent competitive opportunities.

In conclusion, OCR has determined that the District interscholastic athletics program does not provide students an equal opportunity to participate in its interscholastic athletics program by effectively accommodating the interests and abilities of its male and female students, as required by 34 C.F.R. § 106.41(a) & (c)(1).

Pursuant to the terms of the enclosed Resolution Agreement and based on the District's assessment of student interest and ability in girls' volleyball, the District has agreed to add girls' volleyball to its interscholastic athletics program beginning in the 2014-15 school year unless further assessment determines interest at either Deering or Portland High School is not sufficient to field a team. The District will promote and recruit for the teams prior to the next school year and will provide resources and facilities, including locker rooms, practice and competitive facilities, to the new volleyball teams that are comparable to those provided to other teams. The District also agreed to continue to assess student interest and ability and to add teams and additional athletic opportunities for girls so that by no later than the 2015-16 school year, the District's interscholastic athletics program will meet part one of the Three Part Test (in that the number of girls participating in athletics will be in proportion to their enrollment) or part three of the Three Part Test (the interscholastic program will fully accommodate the interest of girls in athletics). The District will provide also notice each year to the District community of all of the sports available for students to participate in at the high school.

V. ISSUE TWO: COMPARABLE ATHLETIC BENEFITS

The Title IX regulation at 34 C.F.R. § 106.41(a) provides 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 athletics offered by a recipient district. In ensuring compliance with this section of Title IX, OCR examined several aspects of the District's program to ensure that it was providing female students an equal opportunity to benefit from its interscholastic athletics program, in accord with 34 C.F.R. § 106.41(a) and (c), as well as the Policy Interpretation mentioned above. OCR specifically examined whether the District provided female athletes an equal opportunity in the following areas:

1. The opportunity to receive coaching; assignment and compensation of coaches, in accord with 34 C.F.R. § 106.41(a) and (c)(5) & (c)(6).
2. The provision of locker rooms, practice facilities, and competitive facilities, in accord with 34 C.F.R. § 106.41(a) & (c)(7).

In considering each of these areas in the District's athletics program, OCR conducted an overall review of the boys' and girls' teams at both Portland High and Deering High. In other words, OCR compared the facilities and coaches provided to the teams in the girls' programs at each individual school to the facilities and coaches provided to the teams in the boys' programs at the same school. When disparities were identified between the girls' and the boys' teams, *e.g.*, if a boys' team received a superior benefit in some way, OCR considered whether the benefit provided to the boys' program was offset by an unmatched benefit to any of the teams in the girls' program. In making this "program-wide" comparison, and before OCR concluded that a benefit to one of the teams in the girls' program offset a benefit provided to one of the teams in the boys' program, OCR considered whether the offsetting benefits were equivalent or equal in effect. In other words, OCR only found the benefit offsetting if it had the same or a similar effect on the student-athlete(s) or team within this program component.

Once OCR identified disparities and found no evidence of offsetting, we considered whether the differences between the benefits provided to the boys' and girls' programs were negligible. Where the disparities were not negligible, OCR examined whether they were the result of legitimate, nondiscriminatory factors. If OCR found no legitimate, nondiscriminatory reasons for the disparities, OCR then determined whether the identified disparities resulted in the denial of equal opportunity to male or female athletes, either because the disparities collectively were of a substantial and unjustified nature or because the disparities in the program component were substantial enough by themselves to deny equal athletic opportunity. The result of this comparison was not to ensure identical benefits, opportunities, or treatment, but rather, to ensure that, overall, the athletics program provided equivalent benefits to boys and girls.

Further, the District has a responsibility under Title IX to ensure that equivalent benefits and services are provided to members of both sexes in its athletics programs, regardless of the funding source(s) for these benefits and services. Thus, OCR considers benefits and services provided through the use of private funds, including booster club funding, in combination with all other benefits and services. Where private funds provide benefits or services that assist only teams of one sex, the district must ensure that teams of the other sex receive equivalent benefits and services. If private funds provide benefits and services to athletes of one sex that are greater than what the institution is capable of providing to athletes of the other sex, then the institution shall take action to ensure that benefits and services are equivalent for both sexes.

A. OPPORTUNITY TO RECEIVE COACHING & THE ASSIGNMENT AND COMPENSATION OF COACHES

The regulations at 34 C.F.R. § 106.41(c)(5) and (c)(6) require that, in determining whether equal opportunities are provided to both sexes in an athletics program, OCR consider the availability, assignment, and compensation of coaches. The Policy Interpretation discusses several considerations to take into account in assessing Title IX compliance regarding coaching, including the relative availability of full-time, part-time, and assistant coaches, as well as the training, experience, other professional qualifications and professional standing. The Policy Interpretation states that a violation will be found where compensation or assignment policies or practices deny male and female athletes coaching of equivalent quality, nature, and availability. The Policy Interpretation states that nondiscriminatory factors can affect the compensation of coaches, however, OCR must determine whether differences are caused by permissible factors such as the range and nature of duties, the experience of individual coaches, the number of participants for particular sports, the number of assistant coaches supervised, and the level of competition at issue.

In reviewing this component, OCR again met with the Athletic Directors from both Portland High and Deering High. Both Athletic Directors described a system whereby a formula dictates the pay for coaches based on whether they are a head coach or an assistant. They explained that they had general budgets and the prior coaches' salary to use as a guide in determining coaching salaries.

In examining individual coaching salaries, OCR determined that most coaching salaries are equal within sports, for example, the boys' and girls' varsity cross country coaches both receive the same compensation (\$3,195), even if they receive less than the girls' field hockey or boys' and girls' soccer coaches (\$4,791). Similarly, most salaries are relatively equivalent between sports, for example, the field hockey coaches earn the same as the boys' or girls' lacrosse coaches, and slightly more than the cross-country or golf coaches. The only exception to this rule is the varsity football coaches, the varsity boys' and girls' basketball coaches, and the boys' and girls' hockey coaches, who earn more than any other coaches in the District. All eight head coaches (four varsity basketball coaches, two varsity hockey coaches, and two varsity football coaches at both Portland High and Deering High) received these higher salaries (\$7,187), and the District explained that it is because of the length of the season and the commitment required from the positions, *e.g.*, the football coaches report in early August and work until Thanksgiving, whereas many other fall sports do not start until late August and wrap up in early November. Given that the salary is the same for each sport and that three of the coaches at issue are coaches of girls' teams, OCR accepted this non-discriminatory justification.

With regard to duration of contracts, conditions relating to contract renewal, and other terms and conditions of employment, contracts are year to year, and the information gathered by OCR did not reveal any examples of involuntary non-renewal. The nature of the coaching duties, working conditions, and terms of employment also appeared equivalent for all coaches. With regard to training, experience, other professional qualifications and professional standing, we found that the coaches were equivalent and there were no instances where a boys' team received superior coaches in this regard.

Next OCR interviewed the coaches and assistant coaches, as well as the players, to determine the nature of coaching assignments for each team. OCR determined that the District primarily follows a model that assigns a head coach to each varsity, junior varsity, and first team. For many sports, such as football, wrestling, and soccer, the junior varsity and first team coaches also serve a dual role as assistants to the varsity coaches. In other sports, like lacrosse and basketball, the coaches focus primarily on their own team and volunteers assist the head coaches at each level. OCR also noted that many varsity teams in the District also have dedicated assistant coaches, *e.g.*, football, girls' hockey, boys' and girls' track, swimming, etc. In these cases, OCR spoke with the assistant coaches and tried to determine their responsibilities, which range from general assistant duties to being a specialized positional coach.

In talking with coaches and students, OCR also learned that most teams have volunteer coaches that do not appear on the District's budgets. While many of these volunteers are true volunteers that do not receive compensation, the various booster clubs compensated many volunteer coaches. For example, OCR learned that the football, as well as boys' soccer and basketball teams all have "volunteer" assistant coaches who are given gifts or payments by the booster clubs at the end of the season. Once a "volunteer" receives a payment by a booster club, for purposes of its analysis of the availability of coaches, OCR considered it a benefit to the team that received the coaching services of that volunteer and included it in the same analysis as the District-hired coaches.

With that as a framework, it became evident that, although the teams largely receive coaches of equivalent quality, training and experience and they are paid using a consistent formula, the boys' teams receive the primary benefit from the paid volunteer coaching system that exists in the District. For example, while the Portland High boys' and girls' basketball teams have an equal number of paid head coaches, the boys have an additional paid "volunteer" coach. At Deering High there are similar situations, with the boys' baseball team receiving several "volunteer coaches" that are paid by booster clubs, while the softball team receives none. Even comparing the teams that have no analog (football, field hockey), the boys' teams (football) have more paid "volunteer" coaches than any girls' teams that do not have a boys' analog (field hockey). This is true at both Portland High and Deering High.

In conclusion, OCR’s review demonstrated that there are disparities in favor of the boys in regard to the availability of coaching. Specifically, several boys’ teams received additional coaching opportunities that were not provided to the girls, due to the remuneration provided to volunteer assistant coaches through the booster clubs. OCR has concluded that the disparities favoring boys were not offset by any disparities favoring girls, and were substantial enough to deny female athletes an equal opportunity to receive coaching, and that the District failed to comply with the applicable Title IX regulation.

The Resolution Agreement requires the District to ensure that it is providing equal athletic opportunities in the provision of coaching for boys and girls at the high schools and also specifically required the District to provide OCR with a salary re-assessment by December 31, 2013. The Resolution Agreement also requires that the District ensure that booster club and other private funding are considered as part of the District’s responsibility to provide equivalent athletics benefits and services to both sexes. The District has already revised its policy on booster club operation. It is currently instituting a model that only allows a single booster club that is centrally administered for all sports. It is expected that this change to the booster club policy will directly impact the provision of paid “volunteer” coaches.

B. LOCKER ROOMS, PRACTICE FACILITIES & COMPETITIVE FACILITIES

The regulation at 34 C.F.R. § 106.41(c)(7) states that, in determining whether equal opportunities are provided to both sexes in an athletics program, OCR will consider the provision of locker rooms, practice facilities, and competitive facilities. The Policy Interpretation discusses a number of factors to be considered in determining whether a district is providing equal opportunity in this area, including the quality and availability of locker rooms, practice facilities, and competitive facilities, and the exclusivity, maintenance and preparation of practice and competitive facilities.

In conducting its review, OCR visited each of the District’s practice and competitive facilities, as well as its locker rooms, weight room, trainer’s room, and storage facilities to inspect them for each of these attributes. OCR also interviewed the Athletic Directors, the grounds crew chief, and coaches and athletes from virtually all of the District’s sports to ask them about the quality and exclusivity of their facilities. With regard to each area, OCR analyzed whether there were differences between boys’ and girls’ facilities, locker rooms, etc. In the event that there were differences, OCR looked to determine the overall effect of these differences on a program-wide level. In the instance that the overall effect of any difference was more than negligible, OCR offset those differences with other benefits for the opposite sex. After completing this review, OCR determined that there were disparities in favor of the boys’ program.

1. THE QUALITY, AVAILABILITY, AND EXCLUSIVITY OF USE OF THE FACILITIES PROVIDED FOR PRACTICE AND COMPETITIVE EVENTS

As an initial matter, OCR determined that, given the limited space available in the District, boys' and girls' sports teams at both Portland High and Deering High shared facilities whenever possible. For example, the boys' and girls' outdoor track teams at both Portland High and Deering High use Fitzpatrick Stadium for practice and competition. This type of facility sharing is a common practice for all of the running sports, *e.g.*, indoor track and cross country, at both Portland High and Deering High. But the practice is not limited to just these sports. For example, the boys' and girls' soccer teams at Deering High use the fields behind the school for practices and can use different parts of the same facility at the same time.

Another practice that both Portland High and Deering High use to ensure their teams have appropriate facility access is to have teams alternate usage of the facilities. For example, the Portland High boys' and girls' lacrosse teams use the same fields for practices and games and alternate between these fields as required, *i.e.*, when the girls have a game they play at Fitzpatrick Stadium and the boys practice at the Preble Street fields and vice versa. Similarly, both the boys' and girls' hockey teams at Portland High share the Portland Ice Arena and alternate the times for practice and competition. Both high schools also alternate field usage among different sports. For example, the football programs at both Portland High and Deering High share the competitive fields they play on (Fitzpatrick Stadium and Memorial Field, respectively) with other boys' and girls' teams of several other fall and spring sports teams, *e.g.*, field hockey, lacrosse, soccer.

In instances where the common practice for a sport is to alternate usage of a facility, OCR examined the practice and competition times of all the teams using the facility and questioned the coaches to ensure that the teams shared the facilities fairly. OCR also spoke with parks and recreation officials from the City of Portland who played an important role in scheduling the District's athletic events on City-owned fields to better understand the difficulties in that process. Finally, for sports classified as co-ed, OCR asked if there are any distinctions based on sex, *e.g.*, do the boys have the option to use an aspect of the facility more or in a different way than the girls.

Based on this review, OCR determined that, with regard to the teams that share a facility with another team of a different sex, for the most part both teams use the same facilities for the same purposes, the fields are the same quality for both users, *i.e.*, no additional maintenance is done with respect to the sex that is playing, and the use of the facility is scheduled such that no sex unfairly receives the benefits of the most convenient practice times, or shoulders the burden of practicing or playing at difficult times, *e.g.*, no sex is forced to consistently use fields in the early morning or at dusk when lighting is poor or it is cold.

There is, however, one primary disparity in favor of boys. Specifically, the boys' varsity baseball program at both Portland High and Deering High compete at Hadlock Stadium, home to the Portland Sea Dogs, a Double-A professional baseball team. Hadlock Stadium is a professional grade field that houses 7,000 fans. Meanwhile, the girls' varsity softball teams at both Portland High and Deering High compete at Payson Park and Harlow Field, both of which have poorer quality fields, poorer dugouts, and a seating capacity of only about 100 fans. Moreover, Deering High's varsity softball team practices at Deering High's softball field, which is of similar poor quality and also serves as the competition field for the junior varsity team. Although the dimensions of Hadlock Stadium make it inappropriate for softball, and the fact that the District does not own the field makes it impossible to change these dimensions, the District (in conjunction with the City) has agreed to provide substantial renovations to address the disparity between Payson Park and Hadlock Field, while also providing a level of exclusivity that the boys do not enjoy at Hadlock Field. This plan is set forth in the enclosed Resolution Agreement.

2. THE QUALITY, AVAILABILITY & EXCLUSIVITY OF USE OF THE LOCKER ROOM FACILITIES

OCR next examined the District's locker room facilities to ensure that boys and girls are provided equivalent locker rooms of adequate quality, that the locker rooms are sufficiently available for their use, and that the locker rooms are appropriately exclusive to the team in question. After interviewing both Athletic Directors and interviewing coaches at Portland High and Deering High, OCR gained an understanding of how locker rooms are assigned and used in the District. Although the District does not have a formal policy for locker room assignments and use, the District does have a consistent practice of assigning locker rooms to teams at either their respective high school or the facility in question, *e.g.*, the Expo, the Riverdon Pool, the Portland Ice Arena, and Hadlock Field, whenever possible. Sports that fall into this category include the indoor and outdoor track teams, the baseball teams, the swimming teams, and the tennis teams. Still other coaches informed OCR that their team does not use lockers or are not assigned locker rooms, *e.g.*, the golf and skiing teams, while other teams are assigned locker rooms at both the Expo and their playing facility, *e.g.*, the girls' and boys' hockey teams. OCR took all of this information into consideration when comparing the boys' and girls' programs at both Portland High and Deering High.

As with the playing facilities, above, the biggest concern raised in OCR's review of the locker rooms at Portland High was the inequity that occurred when teams are provided locker rooms outside of the high schools. For example, while the Portland High baseball team is assigned a designated locker room at the Expo (which is adjacent to Hadlock Field), OCR learned that the girls' softball team does not receive the benefit of a designated locker room, and girls change at the high school or wherever they are able

to find space. Similarly, while the boys' and girls' soccer teams have assigned locker rooms at the Expo, the boys enjoy the benefit of an exclusive locker room while the girls share their locker room with umpires and football officials.

At Deering High there exist similar concerns, as well as concerns with the locker rooms at the school. For example, Deering High uses its general physical education locker rooms for its athletes, but the boys' teams also have the benefit of a dedicated varsity locker room that is the same size as the boys' physical education locker room. The "varsity" locker room is a separate room reserved for male athletes while the physical education locker room is the sole locker room for every girl in the school. The lockers in this varsity locker room are also considerably larger than the general physical education locker room lockers and there is a bench with a white board for team usage. The boys' team coaches – and male coaches, generally – also have access to a coach's office and a coaches' locker room in the boys' locker room area, while the girls' locker room does not include any equivalent space. Because this was a consistent practice at Deering High – the boys using the dedicated varsity locker room while the girls used the general physical education locker room – OCR found that it was a concern.

3. THE MAINTENANCE AND PREPARATION OF PRACTICE AND COMPETITIVE FACILITIES

Finally, OCR also examined the quality of each athletic facility and locker room. As discussed above, most of the facilities are used jointly by both the girls' and boys' teams and are scheduled in accord with the teams' needs and without regard to sex. Thus, in the instances where certain fields have specific problems, *i.e.*, poor field conditions, the problems are shared equally between the sexes and do not adversely affect one sex over another with the exceptions noted above.

In conclusion, OCR found several disparities regarding locker rooms, practice facilities, and competitive facilities at both Portland High and Deering High. Specifically, the boys had access to high quality playing fields that the girls could not use, and the girls received inferior locker room facilities, which were not offset by benefits to the boys. These disparities were substantial enough to deny equal opportunity to female athletes in the District. The District has set out specific steps that it is taking to remedy these concerns in the enclosed Resolution Agreement. The District has agreed to ensure that locker rooms, practice and competitive facilities for girls' teams will be equivalent to those provided to boys' teams and to maintain girls' athletic facilities to ensure they are equitable as compared to the boys' facilities. Renovations will be made to locker rooms and coaches rooms and substantial upgrades will be made to the girls' softball field. OCR noted that the District has already begun construction on these projects.

VI. CONCLUSION

OCR will monitor the District's implementation of the enclosed Resolution Agreement. The Resolution Agreement, when fully implemented, will address the issues covered by the review.

Please be advised that this letter and the enclosed agreement cover only the issues investigated as part of this compliance review and should not be construed to address any other Title IX issues not investigated at this time. Letters of finding contain fact-specific investigative findings and dispositions of individual cases. They are not formal statements 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.

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 District written notice of the alleged breach and a minimum of sixty (60) calendar days to cure the alleged breach.

OCR would like to thank outside legal counsel Melissa Hewey, Chief Operating Officer Peter Eglinton, Athletic Directors Melanie Craig and Michael Connolly, and former Athletic Directors Michael McCullum and Bill LeRoy, as well as other District and City staff for their cooperation during the course of this compliance review. We look forward to continuing to work productively with you and your staff as we monitor the District's implementation of the enclosed agreement.

If you have any questions, please feel free to contact Phil Catanzano, Civil Rights Attorney, at (617) 289-0038 or philip.catanzano@ed.gov, or Anthony Cruthird, Compliance Team Leader, at (617) 289-0037 or anthony.cruthird@ed.gov. You may also contact me at (617) 289-0011.

Sincerely,

/s/

Thomas J. Hibino
Regional Director

Enclosure

cc: Melissa Hewey, Esq. (by e-mail)