



UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

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September 13, 2018

Dr. Alexis McGloin  
Superintendent  
Upper Perkiomen School District  
2229 E. Buck Road  
Pennsburg, PA 18073

**IN RESPONSE, PLEASE REFER TO: 03-18-1175**

Dear Dr. McGloin:

This is to advise you of the resolution of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR) against the Upper Perkiomen School District (the District). The Complainant alleged the District discriminates on the basis of sex in its interscholastic sports at the Upper Perkiomen High School (the School) in the following components:

1. Interests and Abilities;
2. Scheduling of Games and Practice Times;
3. Opportunity to receive Coaching;
4. Locker Room, Practice, and Competitive Facilities; and,
5. Publicity.

OCR enforces Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 et seq., which prohibit discrimination on the basis of sex in programs and activities receiving federal financial assistance from the Department. As the District receives Federal financial assistance from the Department, OCR has jurisdiction pursuant to Title IX.

To date, OCR has investigated this complaint by reviewing information provided by the Complainant and District. Prior to the completion of OCR's investigation, the District asked to resolve this complaint. On September 11, 2018, the District submitted the enclosed signed resolution agreement (the Agreement) to OCR. When fully implemented, the Agreement will resolve the issues in the complaint.

**Legal Standards**

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, club, or intramural

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

athletics offered by a recipient. The Title IX regulation, at 34 C.F.R. § 106.41(c), states that a recipient which operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.

In determining whether a recipient is in compliance with Title IX with respect to athletics, OCR follows “A Policy Interpretation: Title IX and Intercollegiate Athletics” (the Policy Interpretation), which was published at 44 Federal Register No. 239, December 11, 1979.

In assessing whether the interests and abilities of the members of both sexes are being effectively accommodated to the extent necessary to provide equal opportunity to participate in interscholastic athletics, OCR uses a three-part test.<sup>1</sup>

The three-part test provides the following three compliance options:

1. Whether interscholastic level 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 interscholastic 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 interscholastic athletes and the District cannot show a history and continuing practice of program expansion as described above, whether the District can demonstrate that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

If a District has met any part of the three-part test, OCR will determine that the District is meeting this requirement.

### **Investigation to Date**

#### **Interests and Abilities**

##### *Part One: Substantially Proportionate Participation Opportunities*

Under Part One of the Three-Part test, where an institution provides interscholastic level participation opportunities for male and female students in numbers substantially proportionate to their respective full-time enrollment, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes. OCR does not require *exact* proportionality between participation and enrollment for the underrepresented sex, but *substantial* proportionality. OCR would consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team.

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<sup>1</sup> The three-part test was first established in the Policy Interpretation.

To establish the number of interscholastic athletic participation opportunities, OCR examined the eligibility lists prepared by the District for the 2016-2017 and 2017-2018 academic years. For determining participation opportunities, athletes were counted once for each team for which they were eligible to compete. The chart below arrays the participation and enrollment rates of boys and girls in the interscholastic athletics programs during the 2016-2017 and 2017-2018 academic years.

<b>Athletic Program Participation and Enrollment</b>				
	<b>BOYS</b>		<b>GIRLS</b>	
<b>YEAR</b>	<b>Participation</b>	<b>Enrollment</b>	<b>Participation</b>	<b>Enrollment</b>
2017-18	334 (60.3%)	525 (53.9%)	220 (39.7%)	449 (46.1%)
2016-17	271 (60.6%)	497 (52.9%)	176 (39.4%)	443 (47.1%)

Given the rates of participation and enrollment for the 2016-2017 and 2017-2018 academic school years, OCR determined that the District is not providing equivalent interscholastic level participation opportunities for female students in numbers substantially proportionate to their enrollment.

*Part Two: History and Continuing Practice of Program Expansion*

Under Part Two of the Three-Part test, an institution may demonstrate compliance by showing that it has a history and continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex. Part Two examines an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.

OCR considers the following factors, among others, as evidence indicating an institution's history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- A record of adding interscholastic teams, or upgrading teams to interscholastic status, for the underrepresented sex;
- A record of increasing the numbers of participants in interscholastic athletics who are members of the underrepresented sex; and
- An affirmative response to requests by students or others for addition or elevation of sports.

OCR will also consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- The current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students; and

- The current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR will not determine that an institution satisfies Part Two where it merely promises to expand its program for the underrepresented sex at some time in the future.

In order to determine whether the District has shown a history and continuing practice of program expansion which has been demonstrably responsive to the developing interests and abilities of the under-represented sex (girls), OCR reviewed data submitted by the District. The District provided information regarding the approximate inception dates of the sports comprising the boys' athletic program. All sports comprising the men's program were interscholastic before 1975 with the exception of Soccer and Golf.

Based on documentation provided by the District, six girls' teams existed prior to the enactment of Title IX. Five girls' teams were added between 1977 and 1990. The District reported eliminating four girls' interscholastic athletic teams over the last twelve years.

OCR has determined that the District has not added a girls' sport within the last twenty-eight years. Furthermore, its participation numbers have not meaningfully increased, nor does it have a formal process currently in place for requesting and adding a new sport.

Thus, OCR concluded that the District does not have a history and continuing practice of program expansion which was demonstrably responsive to the developing interests and abilities of female athletes.

### *Part Three: Effective Accommodation of Interest and Abilities*

In determining compliance with Part Three of the three-part test, OCR determines whether, despite being unable to satisfy either Part One (substantial proportionality) or Part Two (history and continuing practice of program expansion), an institution is nevertheless fully and effectively accommodating the interests and abilities of the underrepresented sex. In making this determination, OCR considers whether: (a) there is an unmet interest in a particular sport; (b) there is sufficient ability to sustain a team in the sport; and (c) there is a reasonable expectation of competition for the team. OCR uses a broad range of indicators to make this determination, including:

- whether the institution uses nondiscriminatory methods of assessment when determining interests and abilities;
- the frequency of the institution's surveys/assessments;
- whether the institution's surveys/assessments have been used to eliminate viable teams;
- an evaluation of multiple indicators to assess interest; and
- an evaluation of multiple indicators to assess ability.

The Policy Interpretation provides that an institution may determine the athletic interests and abilities of students by nondiscriminatory methods of its choosing provided:

- the processes take into account the nationally increasing levels of women’s interests and abilities;
- the methods of determining interest and ability do not disadvantage the members of the underrepresented sex;
- the methods of determining ability take into account team performance records; and
- the methods are responsive to the expressed interests of students capable of interscholastic competition who are members of an underrepresented sex.

OCR considers a range of indicators to assess whether there is sufficient ability among interested students of the underrepresented sex to sustain a team in the sport. When making this determination, OCR examines indicators such as:

- The athletic experience and accomplishments in interscholastic, club or intramural competition of underrepresented students and admitted students interested in playing the sport;
- Opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an interscholastic team; and
- If the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an interscholastic team.

The District has no policy or procedure for requesting the addition of sports. However, the District is in the process of reviewing the possibility of developing such formal procedures. Specifically, the Superintendent contacted the Board on April 23, 2018 about creating a committee to oversee and adopt a formal process for adding/eliminating sports. Also, the District does not have a formal policy for determining the athletic interests and abilities of its students. The District asserts that while it does not conduct formal “surveys”, it reviews athletic opportunities available to its students on an ongoing basis.

### **Other Program Areas**

In order for OCR to finish its investigation, OCR would need to obtain additional documentation related to the District’s provision of Scheduling of Games and Practice Times, Opportunity to receive Coaching, Locker Room, Practice, and Competitive Facilities and Publicity of the boys’ and girls’ sports teams, conduct interviews of District administrators, coaches, and athletes, and conduct a site visit of the School.

As noted above, prior to the completion of our investigation, the District signed an agreement with OCR. In light of the commitments the District has made in the Agreement, OCR finds that the complaint is resolved, and OCR is closing its investigation as of the date of this letter. OCR will monitor the District’s implementation of the Agreement to ensure that the commitments

made are implemented timely and effectively. OCR may request additional information as necessary to determine whether the District has fulfilled the terms of the Agreement and is in compliance with Title IX with regard to the issue raised.

If the District fails to implement the Agreement, OCR may initiate administrative or judicial proceedings to enforce specific terms and obligations of the Agreement. Before initiating administrative (34 CFR §§ 100.9, 100.10) or judicial proceedings to enforce the Agreement, OCR will give the District written notice of the alleged breach and sixty (60) calendar days to cure the breach.

This concludes OCR's investigation of the complaint and should not be interpreted to address the District's compliance with any other regulatory provision or to address any issues other than those addressed in this letter. 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.

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, OCR will seek to protect, to the extent provided by law, personally identifiable information that could reasonably be expected to constitute an unwarranted invasion of personal privacy if released.

Thank you for the assistance Justin Barbetta extended to OCR in resolving this compliance review. If you have any questions, please contact Cynthia Wesley at (215) 656-8548 or [Cynthia.wesley@ed.gov](mailto:Cynthia.wesley@ed.gov).

Sincerely,

/s/

Nancy E. Potter  
Team Leader

Enclosure: Resolution Agreement