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**ADMINISTRATIVE CLASS COMPLAINT**

**COMPLAINANT**

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**RECIPIENT**

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## **I. PRELIMINARY STATEMENT**

1. This complaint is filed by *Champion Women*, pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (“Title IX”) and the regulations and policies promulgated thereunder. *See* 34 C.F.R. § 106 *et seq.* Title IX prohibits discrimination on the basis of sex in federally funded education programs and activities, including athletics.

2. *Champion Women* is a 501(c)(3) that provides legal advocacy for girls and women in sports.

3. As detailed in the Factual and Legal Allegations below, data submitted by Otterbein University (“Otterbein”) to the Office of Postsecondary Education of the U.S. Department of Education pursuant to the Equity in Athletics Disclosure Act (“EADA”), 20 U.S.C. § 1092, as well as information collected from Otterbein’s website indicates that Otterbein is discriminating on the basis of sex. Otterbein is providing women with unequal educational opportunities in its athletic department and unequal athletic treatment and benefits, including recruitment funding.

4. In order to address these disparities, *Champion Women* requests that the Office for Civil Rights (“OCR”) investigate Otterbein to determine whether it is discriminating against women; whether it is providing women equal opportunities to participate in varsity sports and equivalent treatment and benefits, including recruitment funding as required by Title IX and, if not, to remedy any unlawful conduct.

## **II. JURISDICTION**

5. The OCR is responsible for ensuring compliance with Title IX and receiving information about, investigating, and remediating violations of Title IX and its implementing regulations and guidelines. 34 C.F.R. §§ 106.71, 100.7.

6. *Champion Women* has not filed this complaint with any other agency or institution.

7. As Otterbein currently violates Title IX’s athletic equity requirements, this complaint is timely.

## **III. FACTUAL ALLEGATIONS**

8. Otterbein receives federal financial assistance and is therefore prohibited from discriminating on the basis of sex pursuant to Title IX.

9. Data submitted by Otterbein to the U.S. Department of Education pursuant to the EADA that is publicly available on the Office of Postsecondary Education website for academic

years 2003-04 through 2021-2022 indicates that Otterbein is not currently and has not in the past been providing female athletes equal opportunities to participate in athletics under Title IX’s three-part participation test. Otterbein participates in the NCAA, Division III.

Year	Undergraduate Enrollment				Athletic Participation				
	Men	Women	Total	Percent Women	Men	Women Prong 2: This # should Rise Continuously and Steadily Over Time, Without Going Backwards	Total	Percent Women	Female Athletes Who Would Need to be Added to Achieve
2003-04	766	1322	2088	63.31%	340	190	530	35.85%	397
2004-05	821	1431	2252	63.54%	320	193	513	37.62%	365
2005-06	818	1443	2261	63.82%	311	174	485	35.88%	375
2006-07	962	1842	2804	65.69%	374	189	563	33.57%	527
2007-08	822	1448	2270	63.79%	338	186	524	35.50%	409
2008-09	866	1446	2312	62.54%	353	194	547	35.47%	395
2009-10	816	1432	2248	63.70%	360	206	566	36.40%	426
2010-11	879	1433	2312	61.98%	392	207	599	34.56%	432
2011-12	844	1411	2255	62.57%	412	215	627	34.29%	474
2012-13	836	1387	2223	62.39%	393	187	580	32.24%	465
2013-14	838	1365	2203	61.96%	399	226	625	36.16%	424
2014-15	825	1285	2110	60.90%	369	197	566	34.81%	378
2015-16	819	1277	2096	60.93%	364	216	580	37.24%	352
2016-17	884	1363	2247	60.66%	403	227	630	36.03%	394
2017-18	860	1393	2253	61.83%	373	254	627	40.51%	350
2018-19	865	1383	2248	61.52%	415	247	662	37.31%	417
2019-20	909	1398	2307	60.60%	458	227	685	33.14%	477
2020-21	818	1307	2125	61.51%	473	221	694	31.84%	535
2021-22	841	1242	2083	59.63%	434	185	619	29.89%	456

10. *Champion Women* has edited the EADA data in just one instance on its website: <https://titleixschools.com/> to remove male practice players who are counted up in the tally as “women”. These male practice players are not female athletes and have therefore been subtracted from the totals in the EADA.<sup>1</sup>

<sup>1</sup> See *Champion Women* website for every college and university receiving federal funds: <https://titleixschools.com/2023/05/20/eada-data/> High school data for these schools receiving federal funds is available here: <https://titleixschools.com/2023/06/06/check-your-high-school/>

11. Otterbein does not and has not provided athletic opportunities to female students in numbers substantially proportionate to their enrollment pursuant to part one of the Title IX participation test. Women are 59.63% of the student body, but just 29.89% of the student-athletes.

12. In 2021-2022, the most recent academic year for which EADA data is available that is not corrupted by disruptions related to Covid-19, Otterbein participation gap was 456 female athletes. In other words, Otterbein must add 456 additional athletic opportunities for women in order to provide athletic opportunities substantially proportionate to enrollment; this is enough to add almost an entire athletic department; Otterbein currently only has 185 women athletes. Assuming a new team would have an average of 25 athletes – some more, some less – Otterbein would need to add over 18 new women's sports teams.

13. The EADA data and evidence gathered on Otterbein's website show that Otterbein does not have a history and continuing practice of expanding athletic participation opportunities for women pursuant to Prong 2 of the Title IX participation test. The number of women athletes does not consistently increase over time.

14. Over the 19 academic years covered by the available EADA data, Otterbein has a net loss of 5 women's athletic opportunities. The numbers have gone up and down slightly with a high in 2017, while the men's program has marched along to an additional 96 male athletes.

*Champion Women* cannot know the 28-year history of adding sports between 1975 and 2003, but Otterbein cannot show a history of continuous program expansion that is demonstratively responsive to women's growing interest in sports of all kinds.

15. A review of Otterbein's website did not cover any policy or procedure for adding new sports or elevating existing club sports to varsity status. Nor did it reveal any athletic gender equity plan or any gender equity committee.

16. Otterbein sponsors 9 men's varsity sports (Baseball, Basketball, Football, Golf, Lacrosse, Soccer, Tennis, Track, and Wrestling) serving 370 men, and 8 women's varsity sports (Basketball, Golf, Lacrosse, Soccer, Softball, Tennis, Track, and Volleyball) serving 155 women.

17. Information available on Otterbein's website suggests that the university is not accommodating the interests and abilities of female athletes as required by part three of the Title IX participation test.

18. Otterbein women participate in the club sports of dance, cheerleading, and equestrian. The existence of these women's club teams indicates that there is unmet interest in women's athletics at Otterbein.

19. Otterbein is a member of the Ohio Athletic Conference (OAC), serving NCAA Division III schools. All competing member institutions are located in the state of Ohio.

20. The OAC sponsors Cross Country and Swimming and Diving, but Otterbein does not. Other schools in the geographic region offer Cross Country, which makes competition viable. Women's championship teams demonstrate women's interest in these sports and that competition for these women's sports exists in Otterbein's competitive geographic area.

21. High school-age girls in Ohio compete in a vast number of sports, including Field Hockey, Swimming & Diving, Wrestling, Ice Hockey, and Gymnastics. <https://www.nfhsnetwork.com/states/OH> Otterbein does not sponsor any of these sports. Women have therefore demonstrated their interest and athletic ability in these sports. Competition for these women's sports exists in Otterbein's competitive geographic area.

These Ohio girls in high school are provided very few college sports opportunities. According to the NCAA,<sup>2</sup> in 2020, only 1.7% of high school girls' basketball players were provided the opportunity to play in Division III, nationally. Just 5.8% of high school Field Hockey players, 2.1% of Golfers, 16.2% of Ice Hockey players, 6.2% of Lacrosse players, 2.9% of Soccer players, 2.2% of Softball players, 3% of Swimmers, 2% of Tennis players, 1.9% of Track & Field athletes, 1.6% of Volleyball players, 1.2% of Water Polo players nationally in high school are provided opportunities to play their sport in Division III.

High school-age girls in Ohio also compete in club sports, travel teams, or sports disconnected from schools. These include, but are not limited to Basketball, Soccer, Golf, Tennis, Track & Field, Soccer, Volleyball, Wrestling, Badminton, Table Tennis, Team Handball, Sailing, Field Hockey, Fencing, Swimming & Diving, Skateboarding, Water Polo, Archery, Field Hockey, Rifle, Triathlon, Ice Hockey, Sport Climbing, Artistic Swimming, Skiing, Snowboarding, Gymnastics, Rowing, Rugby, and all sorts of combat sports, like Judo, Karate, and Taekwondo, to name a few.

These metrics demonstrate that women have the athletic skills, and they have expressed enormous demand to compete in sports; demand that is unmet.

22. Rugby, Equestrian, Triathlon, and Wrestling are NCAA emerging sports. There are 163 college women's Wrestling programs, 42 NCAA schools sponsor Triathlon, 26 colleges sponsor women's varsity Equestrian, and at least 32 colleges currently sponsor women's varsity Rugby. Ice Hockey is popular in Ohio, and Otterbein University sponsors a men's wrestling program.

23. Sport Governing Bodies and the NCAA, for member schools, make it very easy to see where other competitors are located. The NCAA publishes the "NCAA Sports Sponsorship

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<sup>2</sup> NCAA: Estimated Probability of Competing in College Athletics:  
<https://www.ncaa.org/sports/2015/3/2/estimated-probability-of-competing-in-college-athletics.aspx>

and Participation Rates Report, 1956 - 2022” for schools to find competitors within the school’s normal competitive region: NCAA Sports Sponsorship and Participation Rates Report.<sup>3</sup>

24. A review of the Otterbein website does not reveal that Otterbein undertook any athletic interest surveys or other research into interest and competition to support the addition of women’s varsity sports. While surveys are never sufficient to deny women sports opportunities, they are often helpful in determining *which sports* the school should add.

25. Otterbein University is a Division III school and does not sponsor athletic scholarships.

26. Otterbein’s EADA data further indicates that the university provides inadequate and unequal funding for the recruitment of female athletes. In 2021-2022, Otterbein spent \$17,868 on men’s recruitment and only \$6,654 on women’s recruitment; women were allocated only 27.13 percent of the recruiting budget even though they account for 29.89 percent of the athletic population and 59.63 percent of the full-time undergraduate population. Otterbein needs to add an additional **\$19,733** for women’s teams – and women’s coaches – to be receiving equal recruiting dollars.

27. If, for some reason, the OCR determines that Otterbein University is, in fact, not discriminating against women in providing opportunities in sport, Otterbein would still need to provide its women’s sports teams – and women’s coaches – with **\$585** more recruiting dollars in order to be consistent with the school’s investment in men’s sports.

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<sup>3</sup> See

[https://ncaaorg.s3.amazonaws.com/research/sportpart/2022RES\\_SportsSponsorshipParticipationRatesReport.pdf](https://ncaaorg.s3.amazonaws.com/research/sportpart/2022RES_SportsSponsorshipParticipationRatesReport.pdf)

See individual sports’ governing bodies for more, e.g.,

Women’s College Rugby: <https://www.urugby.com/teams/womens-teams>

Collegiate Equestrian: <https://collegiateequestrian.com/sports/2020/5/6/schools.aspx>

Women’s Collegiate Wrestling: <https://wrestlelikeagirl.org/college-opportunities>

Collegiate Competitive Cheer Teams: <https://www.ncsasports.org/cheerleading/colleges> (not to be confused with sideline cheerleading)

Women’s Collegiate Triathlon: <https://www.usatriathlon.org/multisport/ncaa-triathlon>

Collegiate Sailing is governed by the Inter-Collegiate Sailing Association (ICSA) with 220 schools:

<https://www.collegesailing.org/about/overview>

Women’s Collegiate Ice Hockey: <https://www.uscho.com/teams/#d1women>

Collegiate Field Hockey: <https://www.teamusa.org/USA-Field-Hockey/PLAYERS/College/Team-Websites>

Collegiate Synchronized/ Artistic Swimming: <https://www.collegexpress.com/lists/list/colleges-with-notable-synchronized-swimming-teams/581/>

Collegiate Bowling - <https://collegebowling.bowl.com/teams>

Collegiate Rifle - <https://competitions.nra.org/competitions/nra-national-matches/collegiate-championships/collegiate-shooting-sports-directory/>

Collegiate Skiing – <https://www.uscsa.org/>

Collegiate Water Polo - <https://collegiatewaterpolo.org/>

Collegiate Women’s Gymnastics <https://www.ncaa.com/sports/gymnastics-women>

#### IV. LEGAL ALLEGATIONS

28. Title IX provides that “[n]o 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.” 20 U.S.C. §1681(a).

29. Title IX regulations prohibit athletic programs from discriminating on the basis of sex in interscholastic, intercollegiate, club or intramural athletics offered by the institution. 34 C.F.R. §106.41(a) (2000).

30. Title IX regulations require institutions that offer athletics programs to provide equal athletic opportunities to members of both sexes to participate in athletics. 34 C.F.R. §106.41(c)(1).

31. Pursuant to the 1979 Title IX Policy Interpretation, compliance with Title IX’s equal athletic participation requirement is measured by determining whether the educational institution meets one part of the following three-part test:

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

United States Department of Health, Education, and Welfare, Office for Civil Rights, *Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413 (Dec. 11, 1979) [hereinafter *Policy Interpretation*].

32. In determining substantial proportionality under part one of the three-part test, OCR considers the number of opportunities that would have to be added to achieve proportionality and whether it would be sufficient to support another team. If there are a significant number of unaccommodated women, it is likely that a viable sport could be added

and therefore the institution has not satisfied part one of the three-part test. United States Department of Education, Office for Civil Rights, *Clarification of Intercollegiate Athletics Policy Guidance: the Three-Part Test* (Jan. 16, 1996) [hereinafter *1996 Clarification*].

33. In 1975, schools were given three years to be in compliance with the equal participation mandate under Title IX. Schools had only one year to end sex discrimination in all other areas of Title IX's non-discrimination mandate. Only athletics gave schools three years to add athletic opportunities and to stop discriminating against women – or until 1978. That deadline passed 45 years ago. 34 C.F.R. §106.41(d).<sup>4</sup>

It is worth noting how odd Prong 2 is as a legal test, in comparison to other non-discrimination civil rights. For a school to be able to argue that it is still playing catch-up with non-discrimination – exists nowhere else in law. This is especially true 51 years after the passage of Title IX, and 48 years after the passage of the regulations OCR depends on, regulations that were passed by Congress. When a school uses Prong 2, it is admitting that it is not providing women with equal educational opportunities, but that their actions are acceptable, because the school is “improving.” Title IX's Prong 2 allows schools to provide girls and women with less.

34. Therefore, it is understandable that Prong 2 is a strict legal test. In determining whether an institution has a history and continuing practice of expansion under Prong 2 of the three-part test, OCR reviews the entire history of the athletic program and evaluates whether the institution has expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities, considering a number of factors, including:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex;
- an institution's affirmative responses to requests by students or others for addition or elevation of sports; and
- whether the institution has effective ongoing procedures for collecting, maintaining and analyzing information on the interest and abilities of students of the underrepresented sex, including monitoring athletic participation, and assessing interest and ability on a periodic basis.

United States Department of Education, Office for Civil Rights, *Intercollegiate Athletics Policy Clarification: The Three-Part Test- Part Three* (Apr. 20, 2010) [hereinafter *2010 Clarification*]; *1996 Clarification*.

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<sup>4</sup> 34 C.F.R. §106.41(d) “*Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.”



35. In determining whether an institution has a continuing practice of program expansion under Prong 2, OCR will consider a number of factors, including:

- an institution's current implementation of a non-discriminatory 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;
- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities; and
- an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

*2010 Clarification, 1996 Clarification.*

36. OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. *2010 Clarification, 1996 Clarification.*

37. Courts have found that schools must have both a history *and* continuing practice of expanding opportunities for women for Prong 2 compliance. *Mansourian v. Bd. Of Regents of Univ. of Cal.*, 594 F. 3d 1095, 1108. (9<sup>th</sup> Cir. Cal. 2010).

38. Prong 3 of the three-part test requires an examination of whether there is an unmet interest in a particular sport, a sufficient ability to sustain a team in the sport, and a reasonable expectation for competition for a team in the sport. *2010 Clarification, 1996 Clarification.*

39. Whether there is unmet interest and ability will be determined by examining a broad range of indicators, including whether the institution uses non-discriminatory methods of assessing interest and ability, the elimination of a viable team for the unrepresented sex, multiple indicators of interest and ability, and frequency of conducting assessments. *2010 Clarification.*

40. Sufficient interest can be established by student requests to add a sport or elevate a club sport, increases in club or intramural sport participation, responses to interviews and interest surveys, assessments of student athletic participation before entering the institution or in the secondary schools from which the university draws its students, and assessments of participation in intercollegiate sports in the institution's normal competitive regions. *Id.*

41. Ability may be established by the athletic accomplishments and competitive experience of club sports and admitted students, the opinions of coaches, administrators, and athletes, and student participation in other sports. *Id.*

42. Expectation of competition may be established through athletic opportunities offered by other schools with which the school competes or opportunities at other schools in the school's geographic area, including those against which the institution does not compete. *Id.*

43. Under Prong 3 of the three-part test, OCR will also examine an institution's recruitment practices. If an institution recruits potential student-athletes for its men's teams, OCR will examine whether the institution is providing women's teams with substantially equal opportunities to recruit potential student-athletes. *Id.*

44. Title IX also requires equal opportunity in the recruitment of student-athletes where equal athletic opportunities are not present for male and female students. Compliance will be assessed by examining the recruitment practices of the athletic programs for both sexes and evaluating whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program. *1979 Policy Interpretation.*

45. Title IX requires schools to provide women with equal treatment, including equipment and supplies; game and practice times; travel and per diem allowances; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, practice and competitive facilities; medical and training facilities and services; housing and dining facilities and services; and publicity. 34 C.F.R. §106.41(a) (2000), *Policy Interpretation.*

46. Lack of money is not a legal defense to sex discrimination. *See, e.g., Roberts Colorado State Univ.*, 814 F. Supp. 1507, 1518 (D. Colo. 1993) (“[A] financial crisis cannot justify gender discrimination.”); *Favia v Indiana University of Pennsylvania*, 812 F. Supp. 578, 585 (W.D. Pa. 1993) (finding that financial concerns alone cannot justify gender discrimination); *Cook v. Colgate University*, 802 F. Supp. 737, 750 (1992) (“[I]f schools could use financial concerns as a sole reason for disparity of treatment, Title IX would become meaningless.”); *Haffer v. Temple*, 678 F. Supp. 517, 520 (1987) (finding that financial concerns alone cannot justify gender discrimination).

47. Monies and in-kind benefits from third-party sources, such as donors, sponsorships, television rights, ticket sales, and student fees, are not a defense to a sex discrimination charge, whether those resources were used to build facilities, provide equipment and uniforms, or any other benefit of sports participation. None of those sources of money creates a legal defense against sex discrimination. Schools must ensure that their students are not receiving second-class educational opportunities because they are female. *See* 20 U.S.C. § 1687 (2005); *See* Office for Civil Rights, *Department of Education, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (June 11, 2003), *Cohen v. Brown Univ.*, 809 F. Supp. 978, 996 (D.R.I. 1992) (concluding that “all monies spent

by Brown's Athletic Department, whether originating from university coffers or from the Sports Foundation [booster club] must be evaluated as a whole under § 106.41(c)")

48. It is *Champion Women's* experience that most athletes and former athletes are acutely aware of all the ways they are treated as second-class within their athletics department, because they are women. As NIL monies become more available, equal promotion and publicity will be important for female athletes. *Champion Women* asked current collegiate athletes what equality would look like under this list. Here's what the athletes came up with:

- i. Men's and Women's sports would be equally featured, with equal prominence, on school and Athletic Department websites and social media.
- ii. Schools would invest equally in cameras and production equipment for Women's and Men's sports.
- iii. Schools would optimize Google searches for their Men's and Women's teams to receive equal search results.
- iv. Women's and Men's sports would employ an equal caliber of talent in their sports information and marketing departments, and they would be paid and promoted equally.
- v. Women's and Men's sports jerseys, apparel, and memorabilia would be equally and easily accessible.
- vi. The needs of Women's teams would not revolve around Men's football and men's basketball teams.
- vii. The Women's and Men's teams would have equal access to dining halls, nutrition, etc. at times equally convenient to both teams.
- viii. Men's and Women's teams would have equal access to optimal practice times when they share facilities.
- ix. Men's and Women's sports marketing efforts would focus on performance; Broadcasters and schools would not focus on a woman-athlete's appearance or sexuality.
- x. Women's and Men's medical care and athletic training access would be equal; Neither male nor female athletes would have priority accessing these resources.
- xi. Schools would hire competition officials of the same quality, with equal compensation, for the Women's and Men's teams.
- xii. Men's and Women's sports performance staff would be equal and would be paid and promoted comparably.
- xiii. Schools would intentionally use language that equally prioritizes Men's and Women's sports.
  1. Teams would be referred to as "Women's Basketball" and "Men's Basketball."
  2. "Basketball" would not be used to refer to Men's Basketball.

3. Schools would have Social Media handles that referred to men's and women's teams; "Oregon Soccer" would be changed to "Oregon Men's Soccer."

49. Otterbein's own data, as outlined in the Factual Allegations above, demonstrate that it is not providing equal opportunities for its female students to participate in sports under Title IX's three-part participation test, in addition to treatment and recruitment requirements.

## V. RELIEF REQUESTED

50. *Champion Women* expects OCR investigators will find additional violations of Title IX, the law guaranteeing women equal educational opportunities, including athletics. *Champion Women* requests that OCR:

- a. Investigate Otterbein University to determine whether it is providing female students with equal athletic participation opportunities and receiving equal treatment and benefits.
- b. Take all necessary steps to remedy any unlawful conduct that it identifies in its investigation, as required by Title IX and its implementing regulations. Secure assurances of compliance with Title IX from Otterbein University, that include full remedies for all the violations found.
- c. Among other steps to achieve compliance with Title IX, require Otterbein University to add more athletic opportunities for women, accord to additional teams and athletes the full range of benefits accorded to men's varsity teams and athletes, increase recruiting budgets and opportunities, and adopt and implement a plan to achieve compliance with Title IX.
- d. Monitor any resulting agreement with Otterbein University to ensure that the school achieves compliance with Title IX, now and in the future.

Respectfully submitted,



Nancy Hogshead, J.D., OLY  
September 24, 2023

