



**UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS**

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**REGION V**  
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August 24, 2016

Dr. Guy Schumacher  
Superintendent  
Libertyville School District 70  
1381 Lake Street  
Libertyville, IL 60084

Re: OCR Case No. 05-16-1181  
Libertyville School District 70

Dear Dr. Schumacher:

This is to advise you of the disposition of the above-referenced complaint filed with the U.S. Department of Education (Department), Office for Civil Rights (OCR) on February 24, 2016, against Libertyville School District 70 (District) alleging discrimination on the basis of sex. Specifically, the complaint alleged the District is subjecting female students at its Highland Middle School (School) to discrimination based on sex because the selection of interscholastic sports at the School does not effectively accommodate the interests and abilities of members of both sexes to the extent necessary to provide equal athletic opportunity.

OCR is responsible for enforcing Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 - 1688, and its implementing regulation, 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in any education program or activity operated by a recipient of Federal financial assistance. As a recipient of Federal financial assistance from the Department, the District is subject to Title IX.

During OCR's investigation of the complaint, OCR reviewed information provided by the Complainant and the District and interviewed District staff including the Superintendent, the Title IX Coordinator, the Athletic Director, the School Principal, and the Director of Curriculum, Instruction and Assessment. Prior to the conclusion of OCR's investigation, the District requested to resolve the complaint. Subsequent discussions with District officials resulted in the District signing the enclosed Resolution Agreement (Agreement) on August 22, 2016. Under the terms of the Agreement, the District will provide an equal opportunity for male and female students to participate in interscholastic athletics at the School. The provisions of the Agreement are aligned with the issue raised in the complaint and the information obtained during OCR's investigation and are consistent with the applicable regulations. The Agreement, when fully implemented, will resolve the complaint. OCR will monitor the District's implementation of the Agreement.

### Legal Standard

The regulation implementing Title IX, at 34 C.F.R. § 106.41(a), specifically prohibits discrimination on the basis of sex in athletic programs offered by recipients of financial assistance from the Department. The regulation implementing Title IX, at 34 C.F.R. § 106.41(c), states that a recipient that operates or sponsors athletic teams must provide equal athletic opportunity for members of both sexes. The regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1), states that in determining whether equal athletic opportunities are available, OCR will consider, among other factors, whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.<sup>1</sup>

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 applies the following three-part test:

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

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. Thus, if an institution meets any one part of the three-part test, then OCR will determine that it provides each sex with equitable opportunities to participate.

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<sup>1</sup>In addition to the Title IX regulations, the following clarifying OCR policy and guidance documents are also applicable: the OCR Intercollegiate Athletics Policy Interpretation (Policy Interpretation), issued December 11, 1979; 44 *Fed. Reg.* 71,413 (1979), available at <http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>; the January 16, 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test and Dear Colleague Letter, available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>; and a Dear Colleague Letter, issued by OCR on April 20, 2010, Intercollegiate Athletics Policy Clarification: The Three-Part Test – Part Three, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html>. The principles set forth in these policies generally apply to interscholastic athletics.

## Facts

### *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 enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes. OCR will also 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; i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an interscholastic team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number that might vary by institution.

The District operates four elementary schools (grades K-5) and the School, which is the District's only middle school (grades 6 -8). For the 2015 – 2016 school year, the School, offered participation opportunities in six sports for boys and in six sports for girls: cross country, soccer, basketball, wrestling, volleyball, and track and field. The District provided separate teams for boys and girls in basketball and volleyball at the 7<sup>th</sup> and the 8<sup>th</sup> grade levels, co-ed teams for boys and girls in soccer at the 7<sup>th</sup> and 8<sup>th</sup> grade levels, and co-ed teams for boys and girls in cross country, wrestling, and track and field at the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> grade levels.<sup>2</sup> OCR examined the athletic team rosters for 2015-16, and confirmed athletic participation<sup>3</sup> with coaches. For the 2015 – 2016 school year, of the 486 interscholastic athletic participants, 277 (57.0%) are male and 209 (43.0%) are female.

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<sup>2</sup>Students participating in cheerleading and pom poms were not counted for purposes of determining Title IX compliance. Information provided by the District indicates that students in these activities also provide support or promote other School interscholastic athletic teams. OCR's 2008 Dear Colleague Letter: Athletic Activities Counted for Title IX Compliance (Sep. 17, 2008) ([www.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html](http://www.ed.gov/about/offices/list/ocr/letters/colleague-20080917.html)), discusses factors to consider in determining whether an activity is a sport that can be counted as part of an institution's interscholastic athletics program for the purpose of determining compliance with Title IX. The letter notes in relevant part that one factor to consider is whether the primary purpose of the activity is to provide athletic competition at the interscholastic varsity level rather than to support or promote other athletic activities.

<sup>3</sup>In accordance with the Policy Interpretation and as clarified in 1996 guidance from OCR, participants are those who 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 who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and who are listed on the eligibility or squad lists maintained for each sport, or who, because of injury, cannot meet the criteria above, but continue to receive financial aid on the basis of athletic ability.

**Athletic Participants: 2015-16**

# Boys	Sport	# Girls
75	Cross Country	46
28	Soccer	9
30	Basketball	30
46	Wrestling	0
25	Volleyball	31
73	Track and Field	93
<b>277</b>	<b>Total</b>	<b>209</b>

OCR compared the number of male and female students enrolled with the number of athletic opportunities available to each sex at the School for the 2015 – 2016. The following chart displays student full-time enrollment and athletic participation rates at the middle school during the 2015 – 2016 school year:

**Athletic Participation and Student Enrollment: 2015-16**

Gender	Athletic Participation Opportunities		Enrollment	
<b>Male</b>	<b>277</b>	<b>57.0 %</b>	<b>458</b>	<b>49.8%</b>
<b>Female</b>	<b>209</b>	<b>43.0 %</b>	<b>462</b>	<b>50.2%</b>
<b>Total</b>	<b>486</b>		<b>920</b>	

In the 2015 – 2016 school year, the disparity between the girls’ enrollment rate (50.2%) and athletic participation rate (43.0%) was 7.2 percentage points, which represented as many as 70 additional female participation opportunities that would have been necessary to achieve proportionality, without cutting any athletic opportunities for boys. This number exceeds the average size of teams offered at the School for the underrepresented sex, girls.

*Part Two: History and Continuing Practice of Program Expansion for the Underrepresented Sex*

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 also considers 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 reviewed information as to the School's sport offerings and the first year of interscholastic competition for each sport, the years that sports were added or dropped, and the School's sports offering in the year OCR initiated the investigation.<sup>4</sup> The School began offering sports opportunities in 1983. Information provided by the School concerning the history of interscholastic sports indicates the following:

<b>Sport</b>	<b>Year Competition Began</b>
Cross Country (co-ed)	1983
Boys and Girls Basketball	1983
Boys and Girls Volleyball	1983
Soccer (co-ed)	1983
Wrestling (co-ed) <sup>5</sup>	1983
Track and Field (co-ed)	2009

The School participates in the Lakeside Athletic Conference (LAC) for all sports except wrestling. The School participates in the Illinois Elementary Sports Association (IESA) for

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<sup>4</sup>The District states the School added co-ed softball as well as boys' and girls' golf around 2001. The School does not currently offer those sports, and it is unclear when those sports were discontinued. None of the District's staff interviewed by OCR could recall when and why they were discontinued.

<sup>5</sup>The District categorizes wrestling as co-ed, because it has had female participants in the past. According to the District's Athletic Director, the most recent female participant in wrestling was during the 2013 – 2014 school year.

wrestling. The School stated it joined the IESA for wrestling because there was insufficient wrestling competition within the LAC. OCR observed that the LAC and the IESA provide post-season competition for all of the sports in which the District participates. Documentation provided by the District indicates that the School provides post-season competition to all of its athletes.<sup>6</sup>

According to the District and interviews with District staff, the District has made an effort to increase student extracurricular (athletic or otherwise) participation at the School. Although the School added track and field for both boys and girls as recently as 2009, there is no specific District initiative to increase female interscholastic athletic participation. The District currently does not have any plans to add interscholastic athletic opportunities for girls.

*Part Three: Full and Effective Accommodation of the Interests and Abilities of the Underrepresented Sex*

Under Part Three of the three-part test, OCR determines whether an institution is fully and effectively accommodating the interests and abilities of the underrepresented sex. In determining compliance with Part Three of the three-part test, OCR determines whether, despite being unable to demonstrate substantial proportionality or a 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 there is: (a) unmet interest in a particular sport, (b) sufficient ability to sustain a team in the sport, and (c) a reasonable expectation of competition for the team in the institution's normal competitive region. If all three conditions are present, then OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

In determining whether there is unmet athletic interest among an institution's students that are the underrepresented sex, OCR examines:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to interscholastic team status;
- participation in club or intramural sports;

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<sup>6</sup>The Complainant initially expressed a concern that the District did not participate in the IESA for track and field, which prevented her son from participating in IESA track and field post-season competition. However, the evidence indicates that the District provides post-season competition to all of its male and female athletes. The Superintendent stated that the School will join the IESA for track and field as well as cross country in the 2016 – 2017 school year. The other sports will remain in the LAC as most of the District's neighboring schools are members of the LAC.

- results of surveys or questionnaires of students and admitted students regarding interests in particular sports; and
- participation in interscholastic sports by admitted students.

OCR evaluates a broad range of indicators in determining whether an institution has unmet interest and ability to support an interscholastic team in a particular sport, including whether nondiscriminatory methods of assessment were used when determining the athletic interests and abilities of its students; multiple indicators of interest and multiple indicators of ability; and frequency of conducting assessments. If an institution has recently eliminated a viable team from the interscholastic program, OCR will find that there is sufficient interest, ability, and available competition to sustain an interscholastic team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

In assessing ability to sustain an interscholastic team, OCR examines indicia of ability and notes that neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an interscholastic team. In determining potential to sustain an interscholastic team, OCR examines multiple indicators such as the athletic experience and accomplishments in interscholastic, club or intramural competition, opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain an interscholastic team; the competitive experience of a club or intramural team at the institution, participation in other sports, interscholastic or otherwise, that may demonstrate skills or abilities that are fundamental to the particular sport being considered; and, tryouts or other direct observations of participation in the particular sport in which there is interest.

Finally, OCR determines whether there is a reasonable expectation of interscholastic competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including competitive opportunities offered by other schools against which the institution competes and competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

The School's current webpage<sup>7</sup> informs students to set up an appointment with a School administrator if they are interested in a sport not currently offered at the School. However, the webpage does not specifically refer to interest in interscholastic sports and instead indicates that "clubs and intramurals can be explored with a 'pilot process' . . . [and] administration will set up a meeting to explore the possibilities." The webpage also notes

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<sup>7</sup> <http://www.d70schools.org/schoolsites/lib/files/documents/4/ExtraCurricular.pdf>

that some current intramural sports were created due to student feedback on surveys of School students.

The District has conducted two student surveys since September 2011 to determine students' interests and abilities in interscholastic athletics. The first survey was administered in September 2011 and the survey results do not indicate the number of respondents, nor are the survey results disaggregated by sex. District staff were unaware whether any action was taken based on the September 2011 survey results. The second survey was administered during the fall of 2015 for the 2015 – 2016 school year. The fall 2015 survey results are disaggregated by sex, but the survey does not provide students an opportunity to share their athletic interests and abilities. There is no section in the 2015 – 2016 survey where respondents could provide comments to request additional sports or to add levels of competition to existing interscholastic athletic teams. District staff informed OCR during the investigation that they had not yet met to review the results of the 2015 – 2016 survey. As such, the District has not yet developed a plan to take any action based on the 2015 – 2016 survey results.

#### The Resolution Agreement

On August 23, 2016, OCR received the enclosed Resolution Agreement that the District voluntarily entered into to resolve this complaint, prior to the conclusion of OCR's investigation. Among the action items in the Agreement, the District agreed to demonstrate compliance with any one part of the three-part test during the 2016 – 2017 school year. In the event the District is unable to demonstrate compliance in 2016 – 2017 with any one part of the three-part test, the District will determine possible interest and ability in sports not currently offered by the School; identify any sports, squads, and levels of sports for female students that are not currently offered by the School but are offered either by schools that compete within the conference(s) in which the School competes or by schools that are within the School's normal competitive region and geographic area; and, create and implement a nondiscriminatory policy or procedure for requesting the addition of sports/levels (including the elevation of intramural teams) and ensuring the effective communication of the policy or procedure to students and others. If there is a sport or sports in which there is sufficient but unmet interest, and if applicable, ability of female students to participate at the interscholastic level, then by no later than the 2017-18 school year the School will add athletics opportunities until such time as either the School is fully and effectively accommodating the expressed interests and abilities of female students (i.e., there remains no unmet interest and ability) or the participation rate for female students in the interscholastic athletics program is substantially proportionate to the rate of enrollment for female students. OCR will monitor implementation of the Resolution Agreement.

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



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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.

The complainant may have the right to file a private suit in federal court whether or not OCR finds a violation.

Please be advised that the District may not harass, coerce, intimidate, or discriminate against any individual because he or she has filed a complaint or participated in the complaint resolution process. If this happens, the complainant may file another complaint alleging such treatment.

Under the Freedom of Information Act, it may be necessary to release this document and related correspondence and records upon request. In the event that OCR receives such a request, it will seek to protect, to the extent provided by law, personally identifiable information, which, if released, could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We wish to thank you and your staff, and particularly XXXXX XXXXX, for the cooperation extended to OCR during the processing of this complaint. If you have any questions, please contact Daniel Kim at (312) 730-1482 or by email at [daniel.kim@ed.gov](mailto:daniel.kim@ed.gov).

Sincerely,

Ann Cook-Graver  
Supervisory Attorney

Enclosure

cc: XXXXX XXXXXX  
XXXXXX XXXXXX