

**UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS, REGION I**

5 POST OFFICE SQUARE, 8TH FLOOR
BOSTON, MASSACHUSETTS 02109-3921

September 28, 2012

Dr. Christopher Hopey, President
Merrimack College
315 Turnpike Street
North Andover, Massachusetts 01845-5800

Re: Compliance Rev. No. 01-10-6001

Dear Dr. Hopey:

I write to advise 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. Title IX prohibits discrimination on the basis of sex in education programs and activities that receive Federal financial assistance from the U.S. Department of Education.

This compliance review addressed two issues: first, whether Merrimack College (College) provided male and female students an equal opportunity to participate in its intercollegiate athletics program by effectively accommodating their interests and abilities, in accordance with 34 C.F.R. § 106.41(a) and (c)(1); and second, whether the College provided its athletes with scholarship and financial aid opportunities in proportion to the number of students of each sex participating in intercollegiate athletics, in accordance with 34 C.F.R. § 106.37(c). As will be discussed below, OCR identified compliance concerns in both areas and the College has agreed to remedy these concerns as set forth in the enclosed Resolution Agreement.

INVESTIGATIVE BACKGROUND

During OCR's investigation, OCR interviewed the now former Athletic Director, as well as his former and current compliance officers, the entire head coaching staff, student-athletes representing every sport at the College, and various other relevant administrators. OCR also reviewed extensive data before reaching its conclusions.

LEGAL ANALYSIS

The Title IX implementing regulation, at 34 C.F.R. §106.41(a) states that "no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient [of

Federal financial assistance], and no recipient shall provide any such athletics separately on such basis.” The regulation, at 34 C.F.R. §106.41(c), in relevant part, requires a recipient to provide equal athletic opportunity for members of both sexes, including the provision of a “selection of sports and levels of competition [to] effectively accommodate the interests and abilities of members of both sexes.” The regulation also addresses athletic financial aid in 34 C.F.R. §106.37(c), stating that “to the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate programs.”

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. Taken together, these documents outline OCR’s analytic approach to the issues that were the focus of this review. Each issue will be addressed in turn.

A. EFFECTIVE ACCOMMODATION OF INTERESTS AND ABILITIES

As mentioned above, OCR first looked at whether the College provided male and female students an equal opportunity to participate in its intercollegiate athletics program by effectively accommodating their interests and abilities, in accordance with 34 C.F.R. § 106.41(a) and (c)(1). This interest and ability analysis consisted of two parts. First, OCR used the “Three-Part Test” to determine whether the College was in compliance with the Title IX regulations with regard to the participation levels in its intercollegiate athletic program. That test involved consideration of the following three questions:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where members of one sex 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 that sex; or
3. Where members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited 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.

If a recipient meets any one of the three parts of the Three-Part Test, the institution is providing equal opportunity to compete to its male and female student-athletes.

Following its analysis of each part of the Three-Part Test, OCR also considered the levels of competition available at the College in completing its review of College's ability to meet the interests and abilities of its student population.

THE THREE-PART TEST

Part One: Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.

The Title IX Policy Interpretation 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 eligibility or squad lists maintained for each sport; or (d) [w]ho, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability."

In assessing this first part of the Three-Part Test, OCR requested various data from the College for a period encompassing 2008 through the present day and also reviewed historical data collected by the Department pursuant to the Equity in Athletics Disclosure Act (EADA). This data included enrollment data, team roster data, NCAA squad lists, financial budgets, strategic plans, and other data that shed light on the number of students attending the College and the percentage of those students who were athletes, as defined by OCR guidance. OCR also interviewed every head coach, as well as a number of athletes, the College's former and current compliance officers, the former Athletic Director, and other administrators involved in the enrollment of students, financial aid, and the athletic program.

Following these interviews and a review of all of the data submitted by the College, OCR determined that for the 2009-10 academic year at issue, women made up 47.4% and men made up 52.6% of the full-time undergraduate student body. In that same year, the College provided men with 65.2% of the athletic opportunities, while providing women with 34.8% of the athletic opportunities. This represented a significant disparity of 12.6% between women enrolled at the College and women participating in intercollegiate sports. To achieve proportionality in opportunities

without decreasing opportunities for male students, the College would have to create 87 new participation opportunities for female athletes.¹

OVERALL STUDENT POPULATION

	2008-09*	2009-10**	2010-11**
MALES	934 (49.2%)	981 (52.6%)	997 (52.0%)
FEMALES	966 (50.8%)	885 (47.4%)	920 (48.0%)
TOTAL	1,900	1,866	1,917

**Equity in Athletics Data Analysis (EADA)*

***Data provided by the College*

ATHLETIC POPULATION

	2008-09*	2009-10**	2010-11**
MALE ATHL.	244 (64.7%)	236 (65.2%)	251 (63.9%)
FEMALE ATHL.	133 (35.3%)	126 (34.8%)	142 (36.1%)
TOTAL	377	362	393

**Equity in Athletics Data Analysis (EADA)*

***Coach Interviews and Roster/Squad List Review*

Accordingly, OCR concluded that the College is not providing participation opportunities for male and female student-athletes in numbers substantially proportionate to their respective enrollments. Women are underrepresented in the intercollegiate athletics program.

Part Two: Where members of one sex 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 that sex.

In considering whether past actions of an institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities, OCR examines an institution’s record of adding intercollegiate teams, or upgrading club or intramural teams, for the underrepresented sex; its record of increasing participation numbers for the underrepresented sex; and its affirmative responses to student requests for the addition

¹ OCR collected data for the 2010-11 academic year as a means of providing the College a more recent gauge of its program by the end of OCR’s review. However, because interviews were being conducted and data was being reviewed *during* the 2010-11 academic year, OCR used the prior year (2009-10) as its compliance “snapshot” of the College, as all three seasons of athletes had already competed and been provided athletic financial aid. OCR noted that the 2010-11 academic year review indicated a smaller, but still substantial, disparity of 11.9% between the women enrolled at the College and the women participating in athletics.

or elevation of sports. OCR also examines current practices that support continued expansion.

The chart below lists the teams currently offered and the years those sports originated at the College.

SPORT-BY-SPORT INCEPTION

MEN'S TEAM	FIRST YEAR OF COMPETITION	WOMEN'S TEAM	FIRST YEAR OF COMPETITION
BASKETBALL	1949-50	BASKETBALL	1972-73
HOCKEY	1956-57	CROSS COUNTRY	1982-83
SOCCER	1970-71	VOLLEYBALL	1984-85
CROSS COUNTRY	1982-83	SOCCER	1985-86
FOOTBALL	1985-86	FIELD HOCKEY	1996-97
LACROSSE	1995-96	TENNIS	1997-98
TENNIS	1997-98	SOFTBALL	1997-98
BASEBALL	1997-98	LACROSSE	1998-99
INDOOR TRACK	2009-10	INDOOR TRACK	2009-10
OUTDOOR TRACK	2009-10	OUTDOOR TRACK	2009-10

According to the College (former Athletic Director and former compliance officer), no teams have been cut from the College's athletic program.

As the chart above indicates, the College's first program was its men's basketball program in 1949. Two more men's sports (hockey and soccer) were then added before the first female sport was added in 1972 (women's basketball). In the 1980s, the College started two men's sports (cross country and football) and three women's sports (soccer, cross country, and volleyball). The College added the bulk of its sports in the 1990s, including baseball, softball, men's and women's tennis, men's and women's lacrosse, and field hockey. Men still constituted the overwhelming percentage of athletes in comparison to their representation in the College through the six years prior to OCR's review. The chart below provides longitudinal data from the EADA that illustrates this point.

ATHLETIC POPULATION OVER TIME

	2003	2004	2005	2006	2007	2008
MALE STUD.	875/44.6%	940/46.6%	841/44.9%	995/46.9%	868/49.0%	934/49.2%
FEM. STUD.	1,088/55.4%	1,079/53.4%	1,033/55.1%	1,126/53.1%	905/51.0%	966/50.8%
MALE ATHL.	218/62.2%	217/62.5%	250/61.6%	221/62.8%	245/64.3%	244/64.7%
FEM. ATHL.	132/37.8%	130/37.5%	156/38.4%	131/37.2%	136/35.7%	133/35.3%
TOT. STUD.	1,963	2,019	1,874	2,121	1,773	1,900
TOT. ATHL.	350	347	406	352	381	377
DISPARITY	17.6%	15.9%	16.7%	15.9%	15.3%	15.5%

Based on EADA Data

In sum, female athletes have been underrepresented since the inception of the College’s athletic program and have remained so since the passage of Title IX. The recent addition of indoor and outdoor track did create female opportunities, but it created close to the same number of male opportunities, which impeded the College’s ability to make up ground in its historic disparity. In January 2011, the College announced that it would be adding women’s golf and crew teams; this occurred after OCR began its review, and its impact in terms of athletic opportunities was not significant enough to bring the College into Title IX compliance.

Based on this information, OCR concluded that the College could not demonstrate both a “history” and “continuing practice” of program expansion for women. While there were periods of time in the College’s history where it increased participation opportunities for women, there were significant periods of time when no expansion occurred. Accordingly, OCR determined that the College did not meet part two of the Three-Part Test.

Part Three: Where members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion, 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.

Even when a school cannot demonstrate compliance with either parts one or two, OCR may find the school in compliance through part three of the Three-Part Test if it can be shown that the underrepresented sex’s interests and abilities are met by the current athletics program. To make this determination, OCR will consider assessments of unmet interest and ability, if an institution has a practice of conducting such assessments. OCR also typically looks to an institution’s club and/or intramural program as indicators of possible interest and ability to participate in intercollegiate sports, and considers other indicators of possible interest and ability such as developing

sports on a nation-wide level and/or the sports offered in the areas from which the College draws its students.

In this case, the College did not have a practice of conducting periodic athletics-focused assessments of its student body to gauge their athletic interests and abilities. The College did provide OCR with a general survey it conducted of its student body in January 2010 that asked students about club and intramural athletic opportunities on campus, but the focus of the survey was more broadly about satisfaction with student life than building the intercollegiate athletic program and it did not solicit input on athletic interests or abilities in general, or with regard to specific sports.²

OCR next turned to the College’s club and intramural programs to determine the extent and scope of these programs, and to determine the interests and abilities of female athletes in this realm and whether they indicated interest in the potential growth of specific intercollegiate sports. While the club and intramural programs participants continue to be largely male, the programs have grown dramatically since 2008.

CLUB TEAMS

TEAM (CREATION)	EVENTS	MALES	FEMALES
SKI (2004)	0	3	2
ULTIMATE FRISBEE (2007)	4	18	2
HOCKEY (2008)	13	18	0
RUGBY (2008)	5	27	19
WRESTLING (2008)	3	6	0
MEN’S LACROSSE (2009)	7	28	0
BASEBALL (2009)	8	20	0
WOMEN’S LACROSSE (2010)	0	0	14
TOTAL		120	37

In addition to the club teams that competed against other colleges, shown above, the College also created several intramural teams in September 2008, including indoor and outdoor soccer, softball, basketball, and a men’s and women’s hockey team.³ In both

² The survey in question asked several questions that gauged students’ satisfaction with club and intramural activities, as well as other “student life” focused areas.

³ The expanded list of intramural sports includes outdoor soccer, flag football, indoor volleyball, softball, dodgeball, ping pong, 8-ball, men’s basketball (outdoor), co-ed basketball (outdoor), floor hockey, hiking, paintball, women’s basketball (indoor), men’s basketball (indoor), co-ed basketball (indoor), men’s hockey, women’s hockey, indoor soccer, indoor lacrosse, wiffle-ball, and other variations of these games. Of the 2,677 participants in the intramural teams at the College, approximately 2,213 (or 83%) were men and 464 participants were women. The intramural participation data was provided by the College and it includes multi-sport participants.

the club and intramural programs, recent additions appear to reflect increasing interest in organized athletic opportunities among female students.

When assessing the College's ability to achieve compliance through part three, OCR also takes into consideration the College's recruiting practices; namely whether it reaches a more extensive pool of athletes through recruiting than it typically reaches in its general student population. If the College does recruit athletes from a larger pool than its general student population, this broader group of potential student athletes may be considered when determining if the College could attain the interest and ability to field a competitive team through recruitment.

In this case, the College recruits almost all of its varsity athletes from a regional, national, and - in the case of men's hockey - international pool, and relatively few students "walk on" to varsity teams at the College. OCR examined these potential recruiting opportunities in weighing the existence of unmet interests and abilities. A case in point was the College's lack of a women's hockey team in a region in which hockey has long been a popular and successful sport for both men and women. There are over 80 public and private girls' high school hockey teams in Massachusetts alone, including almost every town surrounding the College (*e.g.*, Reading, North Reading, Wilmington, Andover, and North Andover). The College is aberrational in this region of the nation insofar as it has a Division I men's hockey team, but no women's hockey team. Almost every other Division I men's hockey team that participates in Hockey East has an analog female team that competes at the Division I level in the same conference. Accordingly, OCR determined - and the College agreed - that there was sufficient interest and ability of female hockey players in the College's normal geographic competitive and recruiting areas to support a team.

Because we were unable to determine that the College's current athletic program met the interests and abilities of the underrepresented sex, in this case, women, OCR was unable to conclude that the College met part three of the Three-Part Test.

LEVELS OF COMPETITION

In addition to the Three-Part Test, OCR also considered the levels of competition available to male and female athletes at the College as part of its interest and ability analysis. Specifically, OCR considered whether the competitive schedules for both male and female athletes, on a program wide basis, afforded proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities. In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules that equally reflect their abilities.

In this case, the College is a member of the National Collegiate Athletic Association (NCAA) and all of its teams compete at the Division II level and are members of the Northeast-10 conference. The only exception is the men's ice hockey team, which competes at the Division I level and is a member of the ultra-competitive Hockey East conference. In conversations with the coaches of each team, each coach affirmed that the competition level and schedule in their specific conference was appropriate for the ability level of their team. In every instance except the men's hockey team (which currently does not have a female analog), the men's and corresponding women's teams participated in the same conference.

OCR concluded that the College is not in compliance with any one part of the Three-Part Test, and is therefore, not providing equal opportunity for women to participate in its intercollegiate athletics program. Women are significantly underrepresented in the College's athletics program when compared to their representation in the student body. A history and continuing practice of program expansion for women could not be established, as there were substantial gaps in the expansion of women's sports for many years. Finally, the College has not established a practice of adequately assessing the interests and abilities of students to participate in its intercollegiate athletics program, including considering relevant information related to emerging sports and/or participation in sports at the areas from which it draws its students to determine any unmet interest in these and other sports not currently offered in its program. Although the levels of competition are relatively equal, OCR noted that the men's hockey team is the only team that currently competes at the Division I level and receives the associated competitive benefits.

B. ATHLETIC FINANCIAL ASSISTANCE

OCR next looked at whether the College provided its athletes scholarship opportunities in proportion to the number of students of each sex participating in intercollegiate athletics, in accordance with 34 C.F.R. § 106.37(c). As referenced above, the Title IX regulation provides that, when a college or university awards athletic scholarships, reasonable opportunities for these scholarship awards must be provided to "members of each sex in proportion to the number of students of each sex participating in...intercollegiate athletics."

Under the Policy Interpretation, OCR conducts a "financial comparison to determine whether proportionately equal amounts of financial assistance (scholarship aid) are available to men's and women's athletic programs." The Policy Interpretation goes on to state that "[i]nstitutions may be found in compliance if this comparison results in substantially equal amounts or if a resulting disparity can be explained by adjustments to take into account legitimate, nondiscriminatory factors." A disparity in awarding athletic financial assistance (AFA) refers to the difference between the aggregate

amount of money athletes of one sex in fact received and the amount they would have received if their share of the entire budget for athletic scholarships had been awarded in proportion to their participation rates. In other words, this section does not require a proportionate number of scholarships for men and women (*e.g.*, seven scholarships for male lacrosse players does not necessitate seven scholarships for female lacrosse players) or individual scholarships of equal dollar value (*e.g.*, if a male soccer player receives \$7,000, a female soccer player does not also have to receive \$7,000); however, it does mean that the total amount of scholarship aid made available to men and women must be substantially proportionate to their overall participation rates.

As noted above, institutions can be found in compliance with the requirements of Title IX even in the absence of substantially proportionate rates of scholarship aid, if an identified disparity can be explained by legitimate nondiscriminatory factors. If any unexplained disparity in the scholarship budget for athletes of either sex is one percent or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than one percent is in violation of the “substantially proportionate” requirement.

In analyzing this aspect of the College’s program, OCR reviewed each scholarship award provided by the College and confirmed the number of scholarships with each of the coaches and the former compliance officer. OCR determined that for the 2009-10 academic year in question, women constituted 124 (34.6%) of the student athletes, while men constituted 234 (65.4%) of those athletes.⁴ In that same year, the College provided men with AFA totaling \$2,380,713 (69.5%), while providing women with AFA totaling \$1,043,378 (30.5%). This differential between athletes and the AFA received meant that the College did not provide funding substantially proportionate to the men’s and women’s athletic participation rates. The following chart indicates that in both the years before and after the 2009-10 season, the College was also not providing funding substantially proportionate to the men’s and women’s programs.

⁴ For purposes of determining the number of athletic participants when analyzing AFA, OCR counts each athlete only once, even if they participate in more than one sport. Four athletes, two males and two females, were multi-sport athletes who received their athletic aid package in one sport or the other. Although the resulting numbers differ slightly from the numbers used to calculate participation rates, the overall ratio of male to female student participation was approximately the same.

ATHLETIC FINANCIAL AWARDS (AFA) BY SEX

	2008-09 AFA	2008-09 PARTICIP.	2009-10 AFA	2009-10 PARTICIP.	2010-11 AFA	2010-11 PARTICIP.
MALE ATHLETES	\$2,263,016 (69.6%)	64.7%	\$2,380,713 (69.5%)	65.4%	\$2,486,884 (66.6%)	63.9%
FEMALE ATHLETES	\$989,260 (30.4%)	35.3%	\$1,043,378 (30.5%)	34.6%	\$1,247,566 (33.4%)	36.1%
DISPARITY	4.9%		4.1%		2.7%	
TOTAL AFA	\$3,252,276		\$3,424,091		\$3,734,450	

Financial award data provided by the College

In sum, the total percentage of funding received by female athletes remained disproportionate. Although the disparity in aid has narrowed since its high of 4.9% in 2008-09, in 2010-11 the disparity was still 2.7%, which is higher than the 1% disparity that OCR consistently uses as a presumption to determine whether there exists a violation of the “substantially proportionate” requirement.⁵

In speaking with various administrators involved in the granting of financial aid, OCR was not provided any non-discriminatory justifications for the disparity in the provision of AFA in 2009-10. There was no apparent connection between the Athletic Department and the Financial Aid Department - nor was there apparent oversight - to ensure that the AFA was provided in proportion to the number of athletes by sex. (It should be noted that, as of the 2011-12 season, the College will move to a more streamlined AFA system that will allow them to better manage the proportionate disbursement of aid.)

Based on the above, OCR concluded that the College is not in compliance with 34 C.F.R. § 106.37(c), insofar as it is not providing AFA to its student athletes in a way that ensures that members of each sex will receive AFA in proportion to their overall participation.

CONCLUSION

Upon OCR presenting its findings, the College aggressively sought to address these issues, as set forth in the enclosed Agreement. The Agreement, when fully implemented, will resolve 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

⁵ In 2008-09 the disparity was 4.9%, which equated to approximately \$158,000; and in 2010-11 the disparity was 2.7%, which equated to approximately \$102,000.

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

OCR would like to thank you and your staff, especially Vice President and General Counsel Alexa Abowitz, for their cooperation during the course of this compliance review. From the inception of our review, OCR was welcomed to the College and provided full cooperation from your staff. We look forward to continuing to work productively with you and your staff as we monitor the College's implementation of the enclosed agreement.

If you have any questions, please feel free to contact me at (617) 289-0011 or Thomas.Hibino@ed.gov. A member of your staff may also wish to contact Phil Catanzano, Civil Rights Attorney, at (617) 289-0038 or Philip.Catanzano@ed.gov, or Fred Dow, Senior Investigator, at (617) 289-0025 or Fred.Dow@ed.gov.

Sincerely,

/s/

Thomas J. Hibino
Regional Director

Enclosure

Cc: Alexa Abowitz, Vice President & General Counsel