

December 29, 2016

Paul R. Brown, Ph.D.
President
Monmouth University
400 Cedar Avenue
West Long Branch, New Jersey 07764-1898

Re: Case No. 02-15-6001
Monmouth University

Dear Dr. Brown:

This letter is to notify you of the resolution of the above-referenced compliance review that was initiated by the U.S. Department of Education (Department), Office for Civil Rights (OCR). OCR investigated whether the University discriminated against female students by denying them an equal opportunity to participate in intercollegiate athletics. Specifically, OCR investigated whether the University's athletic program adequately met the interests and abilities of its female students. In addition, the review assessed whether the University provided equal opportunity to male and female athletes regarding athletic financial assistance (AFA).

OCR initiated this compliance review under Title IX of the Education Amendments of 1972 (Title IX), as amended, 20 U.S.C. § 1681 *et seq.*, and its implementing regulation at 34 C.F.R. Part 106, which prohibit discrimination on the basis of sex in programs and activities receiving financial assistance from the U.S. Department of Education (the Department). The University is a recipient of financial assistance from the Department. Therefore, OCR has jurisdictional authority to conduct this compliance review under Title IX.

During the course of the investigation, OCR determined that the University failed to establish that it has effectively accommodated the athletic interests and abilities of women, the underrepresented sex; therefore, OCR determined that the University was in violation of the regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1). OCR also determined that there was a disparity in favor of female athletes in academic year 2013-2014 regarding AFA, for which the University did not provide a justification; but in academic year 2014-2015, there was a disparity in favor of male athletes. The University has agreed to resolve this compliance issue without further investigation. On December 20, 2016, the University signed a resolution agreement (Agreement) to resolve the compliance review.

Applicable Legal Standards

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 opportunity for members of both sexes.

Accommodation of Interests and Abilities

The regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1), states that in determining whether equal 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. OCR's Three-Part Test assesses athletic opportunities.¹ The Three-Part Test furnishes three individual avenues for measuring compliance with the requirement to provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. 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.

OCR applies the Three-Part Test as follows to assess whether an institution is providing equal participation opportunities for individuals of both sexes:

- i. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- ii. 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 that is demonstrably responsive to the developing interests and abilities of that sex; or
- iii. Where the 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 an institution meets any one part of the Three-Part Test, OCR will determine that the institution has provided each sex with equitable opportunities to participate. If an institution's athletic program also equitably provides each sex with the level of competition reflective of their

¹ For further information, see the OCR Intercollegiate Athletics Policy Interpretation, issued December 11, 1979; 44 Fed. Reg. 71413 (1979) (**1979 Policy Interpretation**); a letter from OCR, dated January 16, 1996, entitled "Clarification of Intercollegiate Athletic Policy Guidance: the Three-Part Test" (**1996 Clarification**); a letter from OCR, dated July 11, 2003, entitled "Further Clarification of Intercollegiate Athletics Policy" (**2003 Clarification**); and a Dear Colleague Letter, issued on April 20, 2010, regarding the three-part test (**April 2010 DCL**).

respective abilities, OCR will determine that the institution has effectively accommodated athletic interests and abilities.²

In addition to determining whether men and women are afforded equitable opportunities to participate, OCR also will assess the following factors to determine whether the quality of competition provided to male and female athletes equally reflects their abilities:

- i. Whether the competitive schedules for men's and women's teams, on a program-wide basis, afford proportionately similar numbers of male and female athletes equivalently advanced competitive opportunities.
- ii. Whether the University can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

If an institution meets any one part of the Three-Part test, and can also demonstrate that it provides an equitable level of competition to athletes of each sex, OCR will determine that the institution has effectively accommodated the athletic interests and abilities of the underrepresented sex.³

Athletic Financial Assistance

The regulation implementing Title IX, at 34 C.F.R. § 106.37(c), provides 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 . . . intercollegiate athletics.”

In determining compliance with this provision, OCR examines whether the University made proportionately equal amounts of financial assistance (scholarship aid) available to the men's and women's athletics programs. OCR calculates this by dividing the amounts of aid available for the members of each sex by the numbers of male and female participants in the athletics program, and comparing the results. An institution is considered to be 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. 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 regulation implementing Title IX. OCR evaluates each case in terms of its particular facts. Even if an institution consistently has less than a 1% disparity, the presumption of compliance with Title IX might still be rebutted if, for example, there was direct evidence of discriminatory intent.

Where a disparity exists, i.e., there is a “difference between the aggregate amount of money athletes of one sex received in one year, and the amount they would have received if their share

² For further information, see 1996 Clarification; 2003 Clarification.

³ For further information, see 1996 Clarification; 2003 Clarification.

of the entire annual budget for athletic scholarships had been awarded in proportion to their participation rates,” OCR allows for consideration of whether the awards to the men's and women's programs were based on legitimate, nondiscriminatory factors.⁴ An institution must do more than merely assert a nondiscriminatory justification; it is required to demonstrate that its asserted rationale is in fact reasonable and does not reflect underlying discrimination.⁵ OCR therefore judges each matter on a case-by-case basis, and recognizes that disparities may be explained by a number of factors, such as actions taken to promote athletic program development; differences between in-state and out-of-state tuition at public colleges⁶; legitimate efforts undertaken to comply with Title IX requirements, such as participation requirements⁷; or unexpected fluctuations in the participation rates of males and females.⁸

Findings of Fact

OCR collected and analyzed data for academic years 2013-2014 and 2014-2015, conducted interviews of Athletic Department personnel, and made compliance determinations with respect to the accommodation of athletic interests and abilities and AFA.

A. Background:

Monmouth University is a private liberal arts university located in Long Branch, New Jersey, offering undergraduate and graduate degrees. The University is a member of the National Collegiate Athletic Association (NCAA) and the University's athletic teams compete in NCAA Division I and Division I Football Championship Subdivision.

B. Effective Accommodation of Athletic Interests and Abilities

OCR examined whether the University 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(c)(1). There are two aspects to OCR's analysis of this program component. OCR first considered the opportunities provided to students of each sex to compete in intercollegiate events, and then compared the quality of competition provided to women's teams with the quality of competition provided to men's teams.

1. Part One: Are Competitive Opportunities Substantially Proportionate to Enrollment?

Under Part One of the Three-Part test, where an institution provides intercollegiate level participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes. OCR will

⁴ For further information, see a letter from OCR to the General Counsel of Bowling Green State College (**Bowling Green Letter**), dated July 23, 1998.

⁵ *Id.*

⁶ 44 Fed. Reg. at 71415.

⁷ See, e.g., *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1005-06 (S.D. Iowa 1995)

⁸ For further information, see the Bowling Green Letter. For example, a disparity may be explained if an athlete who had accepted an athletic scholarship decided at the last minute to enroll at another school.

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 intercollegiate 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.⁹

To establish whether competitive opportunities were substantially proportionate to enrollment, OCR examined participation opportunities for academic years 2013-2014 and 2014-2015. To establish the number of intercollegiate athletic participation opportunities, OCR examined the squad lists prepared by University for the NCAA, and compared these to the participation numbers per team calculated by the University and provided to OCR. In determining participation opportunities, OCR counted the number of actual athletes participating¹⁰ in each competitive sport.¹¹

Academic Year 2013-2014

In academic year 2013-2014, there were 1,858 (41.12%) males and 2,661 (58.88%) females enrolled at the University as full-time undergraduates; 4,519 in total. The University provided 376 (58.20%) of the total athletic opportunities for male students, and 270 (41.80%) of the total athletic opportunities for female students; for a total of 646 athletic opportunities.

Based on this information, OCR determined that in academic year 2013-2014, males had more opportunities to participate than did females. Females had 270 (41.80%) of the athletic opportunities while they represented 2,661 (58.88%) of the overall enrollment. The difference between female enrollment and opportunities is 17.08%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 268 for a total of 538. OCR determined that the University had an average female team size of 25 for academic year 2013-2014. The underrepresentation of 268 athletes is more than the average team size of 25; thus the University does not satisfy Part One for academic year 2013-2014.

Academic Year 2014-2015

In academic year 2014-2015, there were 1,881 (41.23%) males and 2,681 (58.77%) females enrolled at the University as full-time undergraduates; for a total of 4,562. The University provided 367 (56.20%) of the total athletic opportunities for male students, and 286 (43.80%) of the total athletic opportunities for female students; for a total of 653 athletic opportunities.

⁹ For further information, see 1996 Clarification.

¹⁰ As a general rule, OCR counts all student athletes listed on a team's squad or eligibility list who are on the team as of the team's first competitive event. Under the interests and abilities analysis, a student athlete who participates in more than one sport will be counted separately as a participant in each sport.

¹¹ An extracurricular activity not involving competition as its purpose is not considered a competitive sport for purposes of the interests and abilities analysis.

Based on this information, OCR determined that in academic year 2014-2015, females had 286 (43.80%) of the athletic opportunities while they represented 2,681 (58.77%) of the overall enrollment. The difference between female enrollment and opportunities is 14.97%. In order to achieve exact proportionality with male opportunities and overall enrollment, female athletic opportunities would need to be increased by approximately 237 for a total of 523. OCR determined that the University had an average female team size of 26 for academic year 2014-2015. The underrepresentation of 237 athletes is more than the average team size of 26, thus the University does not satisfy Part One for academic year 2014-2015.

2. Part Two: Is there a 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 intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- A record of increasing the numbers of participants in intercollegiate 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.

In order to determine whether the University has shown a history and continuing practice of program expansion that has been demonstrably responsive to the developing interests and abilities of the under-represented sex (women), OCR reviewed data that the University submitted and conducted interviews with athletics program staff.

Information provided by the University revealed that the first women's team was added in 1960 (swimming), with five women's teams added in 1970 (basketball, field hockey, softball, tennis,

and volleyball) and one women's team added in 1972 (soccer). Two new women's teams were added in 1983 (track & field and cross-country), but three women's teams were also eliminated that year (swimming, field hockey, and volleyball). The University added women's lacrosse in 1994, reinstated field hockey in 1997, and added women's golf in 1998. Finally, the University added women's bowling in 2010, and reinstated women's swimming 2015. In contrast, the University has added 10 men's teams since 1945 (baseball, basketball, swimming, soccer, tennis, track & field, cross country, golf, football and lacrosse). The University only eliminated one men's team, in 1983 (swimming), but reinstated the team in 2015.

The University provided a copy of its Gender Equity Plan (the Plan), adopted in spring 1995. The Plan reflects the University's commitment to compliance with Title IX and gender equity and included a study of the University's compliance with OCR's Three-Part test, and the University's determination to focus the University's gender equity plan on meeting Part 1 or Part 2. Since the adoption of the Plan, the University has added five sports to its athletics program: women's field hockey (1995); women's golf (1999); women's bowling (2010); men's lacrosse (2013); and men's and women's swimming (2015).

The University stated that it does not have a specific policy with regard to the addition of sports, but considers the following criteria when adding sports:

- Sports sponsored by the NCAA but not sponsored by the University;
- High school sport sponsorship;
- Ten most popular high school sports for each sex;
- New Jersey State Interscholastic Athletics Association data and sports sponsored by recruitment area;
- Shore conference sports (immediate geographic area high school conference)

The University has various committees with authority to make recommendations concerning athletics. The Athletics Advisory Committee (AAC) is a faculty-based committee with at least two to three student members that advises the University's President, who has oversight over all athletics procedures. The Athletics Committee to the Board (ACB) reports to the Chairmen of the Board of Trustees. The ACB consists of either trustees or members of the University community. The University provided substantial documentation regarding the process for recommendation and approval of additional teams, specifically relating to every team added to the University's athletic program since 1992. These reports reflect consideration of the above-listed criteria as well as other primary criteria; including number of participants, grant necessity, recruiting potential, and availability of competition. There is also consideration of secondary criteria; including operating costs, availability of facilities, staffing needs, support staff, conference status, tradition, revenue potential, club interest/intramural, diversity potential and student input.

OCR determined that through the addition of the sports mentioned above (women's field hockey, women's golf, women's bowling, men's lacrosse, and men's and women's swimming), the University has established a record of increasing the number of participants for the underrepresented sex. Specifically, the addition of women's field hockey, women's golf, women's bowling and women's swimming created approximately 68 participation opportunities

for women in the past 20 years. OCR found no evidence, however, that the University has a current policy or procedure for specifically requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of such policy or procedure to students. In addition, the University has only added two women's teams in the last 10 years: bowling and swimming. Within the same time frame, the University has added two men's teams: swimming and lacrosse.

OCR determined that University has a history of program expansion, but it is unclear if that history is demonstrably responsive to the developing interests and abilities of the underrepresented sex since there is no policy or procedure for requesting the addition of sports. Further, OCR determined that the University has a plan of program expansion, in accordance with its goal of compliance with Title IX and gender equity; however, the plan of expansion led to the addition of an equal number of both men's and women's teams in the last ten years, which does not demonstrate a history and continuing practice of program expansion that has been demonstrably responsive to the developing interests and abilities of the under-represented sex (women). Based on all of the above, OCR cannot determine that the University has established compliance under Part Two of the Three-Part Test.

3. Part Three: Is the Institution Fully and Effectively Accommodating 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. Although disproportionately high athletic participation rates by one sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the other, underrepresented sex, an institution can satisfy Part Three where there is evidence that the imbalance does not reflect discrimination; i.e., where it can be demonstrated that notwithstanding disproportionately low participation rates of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR considers whether there is (1) unmet interest in a particular sport; (2) sufficient ability to sustain a team in the sport; and (3) a reasonable expectation of competition for the team. Because women are substantially underrepresented in the University's competitive sports relative to their percentage of the student population, OCR investigated whether there was unmet interest in a women's sport that was not offered by the University. OCR evaluates a broad range of indicators in determining whether an institution has unmet interest and ability to support an intercollegiate team in a particular sport, including the following five elements: (1) whether an institution uses nondiscriminatory methods of assessment when determining the athletic interests and abilities of its students; (2) whether a viable team for the underrepresented sex recently was eliminated; (3) multiple indicators of interest; (4) multiple indicators of ability; and (5) frequency of conducting assessments.

An institution may determine the athletic interests and abilities of its students using methods of its own choosing provided that:

- 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 an 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 intercollegiate competition who are members of an underrepresented sex.

An institution should document its assessment of students' interests and abilities. OCR evaluates the interests of the underrepresented sex by examining multiple indicators, including:

- Requests by students and admitted students that a particular sport be added;
- Requests for the elevation of an existing club sport to intercollegiate status;
- Participation in club or intramural sports;
- Interviews with students, admitted students, coaches, administrators and others regarding interests in particular sports;
- Results of surveys or questionnaires of students and admitted students regarding interest in particular sports;
- Participation in interscholastic sports by admitted students; and
- Participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students.

An institution may not rely on a survey alone, regardless of response rate, to determine whether it is fully and effectively accommodating the interests and abilities of its underrepresented students.

OCR must examine multiple indicators when determining whether there is sufficient ability among interested students of the underrepresented sex to sustain a team, including:

- The athletic experiences 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 an institution regarding whether interested students and admitted students have the potential to sustain an intercollegiate team;
- 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 intercollegiate team;
- Participation in other sports, intercollegiate, 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.

OCR's evaluation of whether an institution assesses interest and ability periodically so as to be able to identify any developing interests and abilities of the underrepresented sex in a timely and responsive manner takes several factors into account, including:

- The degree to which the previous assessment captured the interests and abilities of the institution's students and admitted students of the underrepresented sex;
- Changes in demographics or student population at the institution (e.g. virtually complete student body turnover every four years at a typical four-year institution); and
- Whether there have been complaints from the underrepresented sex with regard to a lack of athletic opportunities or requests for the addition of new teams.

From 2004 to 2014, the University conducted an athletic participation survey every two years to assess students' interests and abilities. The University provided to OCR the aggregate results of the surveys conducted in 2010, 2012, and 2014. The University reported that it hired a consultant to develop an "Athletic Interest and Participation" survey, using as the template the model survey OCR previously published.¹² The University reported that it distributes the survey to all undergraduate students during the fall via electronic mail (email) and that it sends reminder emails every two weeks until it closes the survey. The University stated that although the survey is conducted online, it would provide a hard copy to any student who requests one, but it has never received such a request.

The University reported that in academic year 2010-2011, 1063 students completed the survey (representing 23% of the undergraduate student body); 52.8% of the responding students were female, 43.3% were male, and 3% did not provide a response as to sex. OCR determined that the survey results were representative of each class, with between 22% to 28% of each class responding. The summary of survey results showed the largest numbers of students indicated a past experience in the following sports: track and field (men and women) 202; soccer (men and women) 151; basketball (men and women) 132; football 110; and lacrosse (men and women) 97. With regard to interest in sports not currently offered by the University, the survey responses indicated that the female students expressed a sufficient interest in the following sports to conceivably sustain a program of intercollegiate competition: swimming/diving; gymnastics; skiing; fencing; volleyball; ice hockey; rifle; equestrian; and rowing. Based on these results and its gender equity plan, the University determined that its focus should be directed towards the following sports: swimming, gymnastics, fencing, volleyball, equestrian, and rowing.

The University reported that in academic year 2012-2013, 712 students completed the survey (representing 15% of the undergraduate student body); 46.5% of the responding students were female, 32.0% were male, and 21.5% did not provide a response as to sex. OCR determined that the survey results were representative of each class, with 31.1% of respondents being freshmen, 22.3% sophomores; 21.8% juniors and 19.5% seniors. The University noted that its response

¹² The Department published a "User's Guide to Student Interest Surveys under Title IX" on March 17, 2005, which was referenced in OCR's now-rescinded 2005 Clarification letter.

rate was significantly lower than for prior survey administrations, as a result of the survey being administered, and typical reminders being sent, after Hurricane Sandy. Athletics administrators determined that it would be insensitive to send additional reminders.¹³ The summary of survey results showed the largest numbers of students indicated a past experience in the following sports: track and field (men and women) 127; soccer (men and women) 108; basketball (men and women) 74; football 54; softball 52; baseball 48; and lacrosse (men and women) 49. With regard to interest in sports not currently offered by the University, the survey responses indicated that the female students expressed a sufficient interest in the following sports to conceivably sustain a program of intercollegiate competition: swimming/diving; gymnastics; skiing; volleyball; rifle; and equestrian. Based on these results and its gender equity plan, the University determined that its focus should be directed towards the following sports: swimming, gymnastics, volleyball, equestrian, and rowing.¹⁴

The University reported that in academic year 2014-2015, 769 students completed the survey (representing 17.6% of the undergraduate student body); 48.1% of the responding students were female, 29.0% were male, and 22.9% did not provide a response as to sex. OCR determined that the survey results were representative of each class, with 26.5% of respondents being freshmen, 21.5% sophomores; 22.9% juniors and 21.7% seniors.¹⁵ The summary of survey results showed the largest numbers of students indicated a past experience in the following sports: track and field (men and women) 118; soccer (men and women) 108; basketball (men and women) 89; football 57; softball 54; and lacrosse (men and women) 84. With regard to interest in sports not currently offered by the University, the survey responses indicated that the female students expressed a sufficient interest in the following sports to conceivably sustain a program of intercollegiate competition: gymnastics; skiing; fencing; volleyball; water polo; rifle; and rowing. Based on these results and its gender equity plan, the University determined that its focus should be directed towards the following sports: gymnastics, volleyball, and skiing.

OCR's review of the survey data indicated that the results established unmet interest of female students in a number of sports sufficient to field a team. Particularly, OCR noted that female students expressed consistent interest in gymnastics, skiing, rifle, and volleyball. OCR determined that the University has extensively studied the feasibility of offering volleyball at the intercollegiate level numerous times, most recently in 2013, when it instead recommended adding men's and women's swimming to the University's athletics program. The Athletic Director informed OCR that when the University joined the MAAC conference, it was required to add either volleyball or swimming to its program as condition of membership. She noted that these were two of the sports that have continually come up in their survey as high interest sports. The xxxxxxxx University's Athletic Advisory Committee advised OCR that the Committee looked at the pros/cons of each sport and felt that the University had a strong tradition of swimming. The University noted that it has never received a student request to add volleyball. Additionally, the University considers the establishment and maintenance of a club support to be a strong indicator of interest for purposes of elevating a sport to varsity level. The Athletic

¹³ The University is located in the coastal/shore region of New Jersey, one of the areas hit hardest by Hurricane Sandy. The University acted as an evacuation center following the storm.

¹⁴ While the survey results did not show sufficient numbers of students who were interested in rowing or equestrian to field a team for intercollegiate competition, it showed more than sufficient numbers for intramural competition.

¹⁵ Twenty-seven respondents, or 7.4%, did not provide a class.

Director stated that there is no club volleyball team, there is only a co-ed intramural volleyball team; the difference being that a club sport requires regular practices and intercollegiate competition. The University noted that, historically, the Shore Conference (the local geographic high school conference) only recently became strong in volleyball.

The University stated that, typically, any sport added to the University's intercollegiate athletics program would have first been an established club sport. The exceptions to this have been swimming and women's lacrosse. The University stated that at the time women's lacrosse was added in 1995, there were no women's club sports at the University. Bowling and field hockey had very strong club programs prior to being added to the University's intercollegiate program.

OCR determined that although the University is surveying its undergraduate population every two years to assess student interest, it is not taking action responsive to the survey results, as required by Part Three. Further, the University is not using multiple factors in determining interests and abilities, such as requests by students and admitted students that a particular sport be added; requests for the elevation of an existing club sport to intercollegiate status; participation in club or intramural sports; participation in interscholastic sports by admitted students; and participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students. Accordingly, OCR determined that the University has not established compliance under Part Three of the Three-Part Test.

Equivalent Levels of Competition

The University is a member of the NCAA; therefore, the University is subject to its policies, procedures, rules and regulations. The University competed at the NCAA Division I level in all sports, except football which participated in Division I FCS.¹⁶ During academic years 2013-2014 and 2014-2015, men's lacrosse was the only team to compete against institutions outside of the Division I level (three games in 2013-2014 and one in 2014-2015).¹⁷ OCR notes that academic year 2013-2014 was the inaugural season of the men's lacrosse team.

OCR did not find evidence to indicate that athletes did not receive genuine athletic participation opportunities or that the opportunities provided were not equivalent based on sex. Accordingly, OCR determined that the University overall provided equitable levels of competition for those students afforded athletic opportunities.

C. Athletic Financial Assistance (AFA)

The NCAA regulates the University's provision of AFA, and all sports at the University compete at the Division I level as defined by the NCAA.¹⁸ The NCAA regulations provide that all

¹⁶ At the start of OCR's investigation, the University also was a member of the Metro Atlantic Athletic Conference in all sports except football, which participated in Division I FCS.

¹⁷ Women's basketball played a pre-season scrimmage against a Division II institution in academic year 2013-2014.

¹⁸ The NCAA groups colleges and universities into the following divisions for the purpose of determining athletic competition, post-season athletic opportunities, and AFA availability: Division I, Division I FCS (Football only - formally known as Division IAA), Division II and Division III.

member institutions, with the exception of Division III institutions, may provide student athletes with AFA. Therefore, all student athletes at the University are eligible to receive AFA, although there are limits on the number of AFA awards available for each team. The University's policies and procedures relating to the granting of AFA are facially neutral, in that they are not discriminatory in language on the basis of sex.

To establish the AFA provided to athletes, OCR examined the squad lists and data containing athletic aid information for academic years 2013-2014 and 2014-2015 that the University provided to the Department's Office of Postsecondary Education (OPE), as required by the Equity in Athletics Disclosure Act (EADA). OCR then verified this information with the Athletic Director and Athletic Department administrators.

In academic year 2013-2014, a total of 532 athletes participated in the University's athletics program.¹⁹ There were 320 males, representing 60.15% of athletic opportunities; and 212 females, representing 39.85% of opportunities. The University provided a total of \$7,531,773 in AFA.²⁰ Of this amount, \$4,244,747 or 56.36% went to male athletes, who represented 60.15% of participants; and \$3,287,026 or 43.64% went to female athletes, who represented 39.85% of participants. This amounted to a difference of 3.79%, in favor of female athletes. This disparity was greater than 1%, and the University did not provide a legitimate, nondiscriminatory justification for the disparity. Therefore, OCR determined that in academic year 2013-2014, male athletes did not receive AFA in an amount that was substantially proportionate to their respective rates of participation in the athletes program.

In academic year 2014-2015, a total of 523 athletes participated in the University's athletics program. There were 300 males, representing 57.36% of athletic opportunities; and 223 females, representing 42.64% of opportunities. The University provided a total of \$8,567,545 in AFA. Of this amount, \$4,956,908 or 57.86% went to male athletes, who represented 57.36% of the participants; and \$3,610,637 or 42.14% went to female athletes, who represented 42.64% of the participants. This amounted to a difference of 0.50% favoring male athletes. As previously stated, 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. OCR determined that if female athletes had received AFA in proportion to their participation rates, they would have received \$3,653,201.19. The difference between what they would have received if proportionate (\$3,653,201.19) and what they actually received (\$3,610,637.00) is \$42,564.19. OCR determined that the amount represented by the .50% difference was less than the value of one full scholarship to the University based on tuition, room and board, and other fees for academic year 2014-2015; further supporting that the disparity was reasonable.

¹⁹ For purposes of analyzing the provision of AFA, an athlete is counted only one time even if the athlete plays on more than one team. Accordingly, these participation rates are different from participation rates indicated in the interests and abilities section of this report.

²⁰ OCR included summer athletic aid in its analysis of AFA information for academic years 2013-2014 and 2014-2015.

Conclusion

Based on the above, OCR determined that although the University provided equitable levels of competition, the University did not demonstrate that it provides each sex with equitable athletic opportunities under any part of the Three-Part Test. Therefore, OCR determined that the University failed to establish that it has effectively accommodated the athletic interests and abilities of women, the underrepresented sex, as required by the regulation implementing Title IX, at 34 C.F.R. § 106.41(c)(1).

With regard to AFA, OCR determined that there was a disparity in favor of female athletes in academic year 2013-2014; but in academic year 2014-2015, there was a disparity in favor of male athletes. The University did not provide a justification for the disparity in either year; however, the disparity was below 1% in academic year 2014-2015, so there is a strong presumption that such a disparity is reasonable and based on legitimate and nondiscriminatory factors. OCR will review and verify the University's reported participation numbers for academic year 2015-2016 as part of its monitoring of the Agreement, including reviewing team rosters, interviewing coaches, and assessing the University's justification for any disparity for academic year 2015-2016.

Summary of Resolution Agreement

In accordance with the Resolution Agreement, the University agrees to:

- Provide participation opportunities for female and male students that effectively accommodate the athletic interests and abilities of members of both sexes by affording athletic participation opportunities that are either substantially proportionate to each sex's enrollment or by demonstrating that the interests and abilities of female students are fully and effectively accommodated by the University's current athletics program;
- Review the results of a survey administered in April 2015 and other indicators of interests and abilities, to determine the existence and/or scope of any unmet athletic interests of female students and conduct other periodic assessments of athletic interests and abilities in subsequent years;
- If, through its assessment, the University identifies a sport or sport in which there is sufficient but unmet interest, and if applicable, ability of female students to participate at the intercollegiate level, the University will add athletics opportunities until, by June 30, 2020, either (1) the University is fully and effectively accommodating the expressed interests and abilities of female students; or, (2) the participation rate for female students is substantially proportionate to their rate of enrollment;
- Create and implement a process and written procedure for requesting the addition of new sports or levels of new sports at the University; and ensure the effective communication of the process and procedure to students and staff;
- Have OCR provide training to the Title IX Coordinator and coaches regarding the provision of equal athletic opportunities to both sexes and the process for adding new sports and/or levels of sports;
- Demonstrate that during academic year 2015-2016, the amount of athletic scholarships/grants-in-aid awarded to male and female athletes was substantially equal to

their intercollegiate athletic participation rates; examining whether there are any legitimate, nondiscriminatory explanations for any differences that exist; and making a determination whether any resultant disparity is less than or equal to 1% of the entire budget for athletic scholarships and/or grants-in-aid;

- Establish a procedure, or review and revise as necessary its current procedures, to review, on an annual basis, whether AFA provided to male and female athletes is substantially proportionate to their respective rates of participation; and
- Assign an administrator to implement the procedure to ensure that AFA is substantially proportionate to male and female athletes' participation rates.

OCR will monitor implementation of the Agreement. If the University fails to implement the Agreement, OCR may initiate administrative enforcement or judicial proceedings to enforce the specific terms and obligations of the Agreement. Before initiating administrative enforcement (34 C.F.R. §§ 100.9, 100.10), or judicial proceedings to enforce the Agreement, OCR shall give the University written notice of the alleged breach and 60 calendar days to cure the alleged breach.

This letter should not be interpreted to address the University'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, 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.

Thank you for the cooperation extended by you and your staff to resolve the compliance review. Should you have any questions, please contact Stacy Bobbitt, Senior Compliance Team Investigator, at (646) 428-3823 or stacy.bobbitt@ed.gov; Jocelyn Panicali, Senior Compliance Team Attorney, at (646) 428-3796 or jocelyn.panicali@ed.gov; or Nadja Allen Gill, Compliance Team Leader, at (646) 428-3801 or nadja.r.allen.gill@ed.gov.

Sincerely,

/s/

Timothy C.J. Blanchard

Encl.

cc: xxxxxxxxxxxxxxxxxxxx