

**BOARD OF REGENTS**  
EASTERN MICHIGAN UNIVERSITY

SECTION: 10

DATE:

December 17, 2009

**RECOMMENDATION**

**ATHLETIC AFFAIRS COMMITTEE**

**ACTION REQUESTED**

Working agenda for December 17, 2009 and the October 20, 2009 minutes to be received and placed on file.

**STAFF SUMMARY**

- The minutes for the October 20, 2009.
- Director of Athletics, Derrick Gragg announced new indoor practice facility
- Director Gragg introduced, Dr. Jon Steinbrecher, the new MAC Commissioner.
- Game Guarantee
- Bowen Field House Update

The agenda for the December 19, 2009 meeting will include:

- Approval of October 20, 2009 Minutes
- Title IX Review Update Presentation
- Good News from Athletics

**FISCAL IMPLICATIONS**

To be determined

**ADMINISTRATIVE RECOMMENDATION**

The proposed Board action has been reviewed and is recommended for Board approval.

December, 2009

Derrick L. Gragg, Ed.D.

**BOARD OF REGENTS  
ATHLETIC AFFAIRS COMMITTEE  
Tuesday, December 17, 2009  
Welch Hall**

**A G E N D A**

- A. Approval of Tuesday, October 20, 2009 Minutes
- B. Title IX Review Update Presentation
- C. Good News from Athletics

**Eastern Michigan University  
Board of Regents  
ATHLETIC AFFAIRS COMMITTEE  
Minutes of October 20, 2009**

**MEMBERS:**

Regents: Philip Incarnati, James Stapleton, Roy Wilbanks, Gary Hawks and Floyd Clack  
Athletics: Derrick Gragg, Director of Athletics

Regent Incarnati called the Athletic Affairs Committee to order at 12:40p.m.

Approval of the September 22, 2009 Minutes, passed unanimously.

- **GROUNDBREAKING CEREMONY** – Dr. Gragg thanked everyone who participated in today’s groundbreaking ceremony for the indoor multi-purpose practice facility. Several EMU student-athletes, coaches, athletic and university administrators as well as Ypsilanti community members attended the ceremony.
- **NEW MAC COMMISSIONER** – Dr. Gragg introduced, Dr. Jon Steinbrecher, the new Mid-American Conference Commissioner. He spoke about the current issues facing NCAA institutions and MAC athletic programs in particular:
  - The BCS Bowl System,
  - The current MAC bowl agreements and the future of these arrangements,
  - MAC men’s and women’s basketball formats – they have been changed back to the format from a few years ago where the first round games will be held at campus sites with the winners of those games advancing to play in Cleveland;
  - The MAC academic APR is currently 971, which is the highest rate for all non-BCS institutions.
  - The conference has begun a strategic planning process involving university presidents and athletic directors.
- **FOOTBALL GAME GUARANTEE** – (handouts presented) There was a joint discussion regarding the football and men’s basketball game guarantee fund and the athletic department’s scheduling philosophy going forward. The Athletic Affairs Committee has recommended that the Director of Athletics work in conjunction with the University’s Chief Financial Officer to determine what is needed to make a recommendation regarding the current procedure of using guarantee game funding for increases to the football operational budget for coaches’ salaries, etc. The Director of Athletics was also asked to make a recommendation regarding the philosophy of future

football scheduling. Regent Wilbanks wanted to know how much we still owed. John Lumm estimated about \$275,000. Regent Wilbanks wanted assurance there is no double dipping. John assured him that it was the same as last year; President Martin must approve the Game Guarantees.

- **BOWEN FIELD HOUSE Update** (handouts presented) Dr. Gragg introduced Doug Dowdy who presented an overview of the short term and long term improvements needed in Bowen per Regent Wilbanks request. Also handed out was a Fundraising Master Plan of Athletics' Development that was also requested at the September 22<sup>nd</sup>, Board of Regents Athletic meeting.
- **ATHLETIC UPDATE:** The EMU Women's Soccer Team which finished 2<sup>nd</sup> in the MAC last year is having another great year with an 8-3-5 record overall and a 4-1-3 record in the MAC. We are currently ranked 2<sup>nd</sup>.

Men's and Women's XC championships will be held at Ohio University on Saturday, October 31<sup>st</sup>. The men are four time defending MAC champions. Men's Cross Country student-athlete Curtis Vollmar was recently named Mid-American Conference runner of the Week. He has placed in the top 5 of each of EMU's races this season. Outstanding work and a tribute to our great XC coach John Goodridge.

Athletic Affairs Committee adjourned by Regent Incarnati at 1:27 p.m.

Respectfully submitted,

Administrative Secretary  
Intercollegiate Athletics

kah  
Minutes, October 20, 2009.doc

**EASTERN MICHIGAN UNIVERSITY  
DEPARTMENT OF INTERCOLLEGIATE ATHLETICS  
2009-2012 GOALS AND OBJECTIVES**

**OBJECTIVE I – INTEGRITY**

Eastern Michigan University (EMU) athletic programs will comply with all NCAA and Mid-American Conference (MAC) rules and regulations.

**Goal 1**

The Department of Intercollegiate Athletics will review NCAA and MAC rules and regulations with all EMU coaches and student-athletes on an annual basis.

**Goal 2**

Athletic staff members and representatives of athletics interests will be educated on NCAA and MAC rules and regulations.

***Outcome Measures***

1. No major infractions reported to the NCAA or MAC during 2009-12.
2. All secondary infractions will be reported to the NCAA and/or MAC in a timely fashion.
3. Institution will earn designation of “certified” by the NCAA Division I Committee on Athletics Certification.

**OBJECTIVE II – ACADEMIC SUCCESS**

EMU will recruit student-athletes who predict academic success and will support the academic endeavors of student-athletes with the intent that all student-athletes should graduate within five years of first enrollment.

**Goal 1**

The Department of Intercollegiate Athletics will maintain a six-year graduation equal to or higher than that of the general student body and increase the overall student-athlete graduation rate by 10% by 2012.

**Goal 2**

The Department of Intercollegiate Athletics will monitor the academic progress and semester course enrollment of every student-athlete to ensure academic success.

### **Goal 3**

The Department of Intercollegiate Athletics will strive to maintain an overall grade point average of 3.0 for all student-athletes.

#### ***Outcome Measures***

1. Annual graduation rate compared to University graduation rate and to prior year.
2. Overall grade point average improvement of all student-athletes (compared to prior year).
3. Grade point averages by team.
4. Number of students academically ineligible by team (compared to prior year).
5. Number of students by team who do not meet Academic Progress Rate (APR) standards on an annual basis (compared to prior year).

### **Objective III – COMPETITIVENESS**

EMU athletic programs will be competitive in the Mid-American Conference and at the NCAA national championship level.

#### **Goal 1**

All EMU athletic teams will rank at least in the top 50 percent of MAC programs.

#### **Goal 2**

The EMU men's athletic programs will finish in the top third of the competition for the Reese Cup and the women's athletic programs will finish in the top half of the competition for the Jacoby Trophy.

#### **Goal 3**

EMU teams will compete for MAC West Division and overall championships as well as MAC tournament championships.

#### **Goal 4**

EMU teams and individual athletes will compete in NCAA regional and national championships.

#### ***Outcome Measures***

1. Ranking of each team in the conference.
2. Ranking of men's athletic program in Reese Cup competition and women's athletic program in Jacoby Trophy competition.
3. Number of teams that win divisional championships.

4. Number of teams/individual athletes that compete in NCAA regional and/or national championship competition.

#### **OBJECTIVE IV – FISCAL INTEGRITY AND FUNDRAISING**

EMU athletic programs will operate prudently and responsibly within University and Foundation fiscal policies and procedures and seek to increase its operational budget by at least 10% by 2012 through additional revenue streams.

##### **Goal 1**

All athletic departments and programs will operate within their approved budgets.

##### **Goal 2**

Athletic fund raising total will increase compared to prior year. All gifts to athletic departments and programs will be processed through the EMU Foundation.

##### **Goal 3**

EMU sports programs will develop methods to increase the principle in their endowments.

##### **Goal 4**

Corporate sponsorships will be increased by 25% by 2012.

##### ***Outcome Measures***

1. No infractions of University policies or procedures will be identified through an internal or external audit.
2. The athletic department operates within its approved budget.
3. All athletic gifts are acknowledged by the EMU Foundation and appropriate athletic programs.
4. Corporate sponsorships are increased (compared to prior year).

#### **OBJECTIVE V – TITLE IX COMPLIANCE**

The EMU Department of Athletics' subcommittee for Title IX/Gender Equity will formulate recommendations and devise a strategy to meet federal standards for gender equity/Title IX compliance. The Department of Intercollegiate Athletics will also continue to institute policies, programs and practices that foster a diverse cohort of student-athletes, coaches and staff.

##### **Goal 1**

The Department of Intercollegiate Athletics will achieve full Title IX compliance by 2012.

*Outcome Measures*

1. The Department of Athletics/University will undergo a Title IX audit during the 2009-10 academic year.
2. The Department of Athletics will establish a 2009-2014 Gender Equity Plan.

**OBJECTIVE VI – INCREASE ACTUAL ATTENDANCE FOR FOOTBALL**

**Goal 1**

The Department of Intercollegiate Athletics will devise strategies to increase actual home football attendance.

*Outcome Measures*

1. Actual home game attendance will be 10,000 for the 2010 football season.
2. Actual home game attendance will be 12,500 for the 2011 football season.
3. Actual home game attendance will be 15,000 for the 2012 football season.



## 1) **EXECUTIVE SUMMARY**

### **A. INTRODUCTION**

This Independent Title IX Review (“Review”) was conducted during the 2009 Fall Sport Season, at the request of the Eastern Michigan University Athletic Department (“EMU”). The purpose of the Review was to assess the status of EMU’s compliance with the athletic provisions of Title IX of the Education Amendments of 1972, as amended, 20 U.S.C. 1681, *et. seq.* and its implementing regulations at 34 C.F.R. Part 106. Notably, this Review was not precipitated by any complaint, formal or informal, against EMU, but rather is part of EMU’s ongoing monitoring and periodic assessments to ensure Title IX compliance throughout its athletic programs.

Relevant policy interpretations issued by the U.S. Department of Education, Office of Civil Rights (“OCR”), policy clarifications, and Title IX case law were carefully followed and applied in reaching all findings and recommendations contained in this Review. While this Review is both comprehensive and independent, it is advisory, only, as formal determinations of compliance with Title IX and its regulations fall under the jurisdiction of the OCR and the federal courts.

The findings and recommendations set forth herein are solely those of the author, based upon an analysis of extensive data and information obtained through pertinent EMU records and documents, as well as on-site facility tours and lengthy interviews with EMU athletic personnel, including coaches, administrators, and student-athletes. The author gratefully acknowledges the assistance and cooperation of EMU’s athletic administration in gathering the requested data and information and in

coordinating the tours and interviews. The following was requested and considered in the course of this Review:

**Materials and Data Requested:**

- *EMU Squad Lists*
- *Equity in Athletics Data Analysis (EADA) 2007-08, 2008-09*
- *EMU Enrollment/FTE/Full and Part-time Status by Gender and Level 2008-09*
- *Budgets and Operating Expenses by Team*
- *Eastern Equity Plan 2003-2008*
- *Sport Media Guides/Schedules (2009-10)*
- *Facilities Master List (7/09)*
- *Promotional/Advertising List (Vandenberg)*
- *EMU Plan Report for Operating Principle 4.1 Gender Issues*
- *Update on Title IX Committee Work (Werner, 6/09)*
- *Women's Rowing Program Investigation Report (Abraham, 2007)*
- *EMU Athletic Events List 2009-10 (Fink, 2009)*
- *Title IX Compliance Report (L. Daniel, 2006)*
- *EMU Spring/Summer Financial Aid Policy*

**On-Site Interviews/Tour of Facilities:**

(October 6-12, 2009):

**Interviews:**

- *EMU Head Coaches (12 coaches, 14 sports)*
- *EMU Assistant Coaches (8)*
- *EMU Student-Athletes (10, male and female)*

- *EMU Athletic Administrators (7)*

Facility Tour (with Associate AD Doug Dowdy):

- *EMU Practice and Competitive Facilities*
- *EMU Coaches' Offices*
- *EMU Team Locker Rooms*

## **B. TITLE IX: LAW AND REGULATIONS**

Title IX of the Educational Amendments of 1972 prohibits discrimination on the basis of sex in any educational program or activity that receives federal funds. The statute is not directed specifically at intercollegiate athletics, but rather addresses discrimination throughout educational institutions.

To comply with the athletic requirements of Title IX, institutions must meet the requirements in three areas: (1) Participation, (2) Athletic Financial Assistance (Scholarships), and (3) Other Program Areas (Treatment of Athletes).

### **1. Participation**

Participation deals with overall sport and athletic participation offerings available for men and women. Participation opportunities for female and male students must satisfy one of the “three-prong” tests in order to comply with Title IX: (1) Proportionality-males and females participate in athletics in numbers “substantially proportionate” to their respective enrollments; or (2) The institution shows a “history and continuing practice of program expansion” which is demonstrably responsive to the developing interests and abilities of members of the underrepresented sex; or (3) The “interests and abilities of the underrepresented sex are fully and effectively accommodated by the existing programs.

## **2. Athletic Financial Assistance**

This Title IX requirement pertains to athletic scholarships. Scholarships must be allocated in proportion to the number of female and male students participating in intercollegiate athletics. Funding for men's and women's programs does not have to be equal, but the OCR allows no more than a one-percent (1%) variance in determining proportionality under this requirement.

## **3. Other Program Areas**

This Title IX requirement addresses equal treatment in other athletic benefits and opportunities. It covers eleven (11) program areas, referred to by the OCR as the "laundry list," to determine equivalence of overall treatment. The regulations do not mandate that each men's and women's program receive identical treatment. Rather, the OCR has determined that the men's and women's programs, in their entirety, should receive equal treatment, i.e., the same level of service, facilities, and supplies in the following areas: a) locker rooms, practice, and competitive facilities; b) equipment and supplies; c) scheduling of games and practice times; c) scheduling of games and practice times; d) publicity; e) coaching; f) travel and daily allowance; g) academic tutoring; h) provision of medical training facilities and services; i) provision of housing and dining facilities and services; j) recruitment of student-athletes; and k) support services. The standard is one of "quality" as opposed to dollars spent.

## **C. SUMMARY OF FINDINGS**

As of November, 2009, the principal areas of concern with respect to Title IX compliance at EMU are in several "treatment" areas identified in the regulations as (1)

provision of locker rooms, practice and competitive facilities, (2) provision of equipment and supplies, (3) opportunity to receive coaching and assignment and compensation of coaches, and (4) travel and daily allowance. It is important to understand that in analyzing equal treatment under Title IX, the OCR compares the total program afforded to male athletes and the total program afforded to female athletes (not a “sport by sport” comparison”). Title IX requires that the women’s program and the men’s program receive the same level and quality of service, facilities, and supplies. With this standard in mind, there are nonetheless equal treatment issues at EMU in the foregoing areas, particularly arising from the women’s sport of rowing, which is inadequately funded and impacts all of the above treatment areas. The sports and specific examples which raise equal treatment concerns and related recommendations are set forth in detail in Section 5 herein.

Notably, ongoing focus and attention is also needed at EMU in the area of “effective accommodation of interests and abilities”, which measures participation numbers, by gender, under an alternative “three-prong” compliance test. The first prong examines whether participation opportunities for male and female students are substantially proportionate to their respective enrollments. EMU’s full-time undergraduate female student population is close to 60%, which has presented difficulty in achieve substantial proportionality under the first prong within the existing sport allocation. EMU has utilized roster management over the last several years to narrow the variance; however, substantial proportionality has still not been achieved within the meaning of the regulations. Prong two, a “history and continuing practice of program expansion”, is unmet because no women’s sport has been added at EMU since 1999

(rowing) and there are no current plans to add women's sports. The third prong might be met by a demonstration that the interests and abilities of the underrepresented gender (female athletes in EMU's case) have been fully and effectively accommodated by the present program. Survey evidence is now admissible to satisfy this test, however, no reliable survey methodology has been undertaken at EMU and many experts, as well as the NCAA, reject the "model survey" proposed in a 2005 policy clarification<sup>1</sup> due to reliability concerns. Section 3 herein contains recommendations in the area of participation.

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<sup>1</sup> The Dept. of Education's March 17, 2005 letter announced an "additional clarification" of its policies for collegiate compliance with Title IX in athletic programs. The letter and accompanying "model survey" state that there is a presumption of compliance with the third prong if an email survey to current students demonstrates that interest (by the underrepresented sex) is lacking. This contravenes prior policy interpretations and case law holding that surveys of current students are inaccurate, biased, and an invalid method to determine compliance under Title IX.

## 2) **BACKGROUND**

### **A. TEAMS/PARTICIPANT NUMBERS**

EMU presently offers twenty-one varsity intercollegiate teams. There are nine men's sports and twelve women's sports. The sports and participant numbers<sup>2</sup>, by gender, are as follows:

<b>SPORT</b>	<b>MEN PARTICIPANTS</b>	<b>WOMEN PARTICIPANTS</b>
Baseball	33	n/a
Basketball	16	18
Football	107	n/a
Golf	11	7
Gymnastics	n/a	20
Rowing	n/a	35
Soccer	n/a	22
Softball	n/a	15
Swimming and Diving (combined)	38	31
Tennis	n/a	7
Track & Field and Cross Country (combined)	64	28
Volleyball	n/a	12
Wrestling	33	n/a
<b>TOTAL PARTICIPANTS (Men's/Women's Teams)</b>	<b>302</b>	<b>195</b>

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<sup>2</sup> Number of participants as of the day of the first scheduled contest. EADA, Reporting year 2008-09. Participant numbers for 2009-10 academic year could not be verified as of Review date.

## **B. FULL-TIME UNDERGRADUATE ENROLLMENT**

IRIM data at EMU for Fall 2008 and Fall 2009 shows the following undergraduate full-time enrollment numbers, by gender, as follows:

	<b>MEN</b>	<b>WOMEN</b>
2009 FT Undergraduates	5,552 (43.4%)	7,256 (56.6%)
2008 FT Undergraduates	5,204 (42.4%)	7,062 (57.6%)

## **C. INTERCOLLEGIATE HISTORY**

EMU's women's intercollegiate athletics program commenced in 1976. Program expansion occurred through the addition of women's varsity teams as follows:

<b>SPORT</b>	<b>YEAR</b>
Basketball	1976
Cross Country	1976
Gymnastics	1976
Swimming/Diving	1976
Tennis	1976
Track & Field	1976
Volleyball	1976
Softball	1982
Soccer	1995-96
Golf	1996-97
Rowing	2001-02



At or about the time of the addition of women's rowing, both men's tennis and men's soccer were discontinued at EMU. The decision to cut those sports was implemented by a former Director of Athletics; the elimination of men's sports has never been required or recommended under Title IX or its regulations. In fact, it is a disfavored practice to attempt to achieve participation compliance by simply cutting men's teams. The current athletic administration recognizes that such a practice is not recommended to attain Title IX participation compliance at EMU.

### **3) PARTICIPATION**

#### **A. Full and Effective Accommodation of Interests and Abilities**

An institution's athletic program will be deemed to offer non-discriminatory participation opportunities if it can meet any of the following three tests: 1) its intercollegiate level participation for male and female students are "substantially proportionate" to their respective full-time undergraduate enrollments; 2) it has a "history and continuing practice of program expansion for the underrepresented sex ; 3) it is "fully and effectively" accommodating the interests and abilities of the underrepresented sex. A common misunderstanding is that proportionality is the only safe measure of compliance (and that the law therefore imposes "quotas"<sup>3</sup>). To the contrary, no part of the test is favored over another and the test is clearly drafted in the alternative.

Athletic participants, under the applicable OCR policies, are defined as those: 1) receiving institutionally sponsored support normally provided to athletes competing at the institution on a regular basis during a sport's season; and 2) participating in organized practice sessions and other team meetings and activities; and 3) listed on the eligibility or squad lists maintained for each sport; or 4) because of injury, cannot meet 1, 2 or 3, but continue to receive athletic financial aid. (1979 Policy Interpretation and 1996 Clarification)

#### **B. EMU Participation Opportunities**

##### **1. EMU does not meet "substantial proportionality" test**

The OCR has not specifically defined an acceptable variance, by percentage

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<sup>3</sup> In fact, all U.S. Circuit Courts of Appeals addressing this question have found that Title IX does not impose quotas.

points, but instead looks at the percentage gap on a case-by-case basis. Percentage point disparities represent varying numbers of actual participants, depending upon the overall size of the athletics program. Some enforcement specialists believe that anything greater than 1 % would raise red flags, while prior settlement agreements in federal courts have been approved in cases with participation variances as high as 5%.

EMU's participation numbers and full-time undergraduate enrollment for the years 2008-09 are presented in the tables contained in Section 2 (A) and (B) above. In 2009, the reported full-time undergraduate enrollment was 56.6 % female and 43.4 % male. In 2008, those percentages were 57.6 % female and 42.4% male. The participation rate based on 2008-09 EADA reporting (number of participants as of the day of the first scheduled contest) is 60% male (302) and 40% female (195). The significant disparity demonstrates that, under any accepted analysis, EMU is not providing participation opportunities to female student-athletes in substantial proportion to the enrollment rate of female students.

EMU has utilized roster management, wherein target roster numbers are developed with an aim toward increasing participation of the underrepresented sex. Each coach is apprised of the target number for his/her sport through consultation with respective sport administrators. Roster management remains a viable and legitimate vehicle through which participation compliance may be sought. EMU has made some impact in reducing its participation variance through these efforts over the last several years. The 2009 enrollment numbers also reflect a percentage increase in male undergraduate students at EMU. That trend, combined with continued roster management efforts, will lead to continued progress toward substantial proportionality.

## **2. EMU does not meet “history of continuing expansion” test**

The table presented in Section C. above provides the commencement date of all current varsity women’s teams. As of 2001, when rowing was added, it could be demonstrated that EMU had a history and continuing practice of expansion of its women’s athletic program.

Since the addition of rowing, EMU has not added any women’s sport and there are no plans in place to do so. EMU had notable statistical increases in the participation rates of females through 2001-02; however, isolated gains without any plans for future growth generally will not provide the “history” and “continuing practice” evidence necessary to meet the test. It does not appear likely that EMU can presently satisfy the second prong in evaluating its participation compliance.

## **3. EMU might satisfy “interests and abilities” test**

Schools such as EMU that cannot show substantial proportionality or a history and continuing practice of expansion, may still be in compliance if they can demonstrate that they are fully and effectively accommodating the athletics interests and abilities of the underrepresented sex. There is a participation compliance issue under Title IX, however, where it can be shown that there are women waiting, ready, and able to participate in athletics and where men already occupy a disproportionate number of the existing opportunities.

There have recently been legal and policy conflicts in this area of compliance (the “third prong”). In 2005, an “Additional Clarification” stated that schools may now rely on a web-based “model survey” to assess whether there is sufficient interest to sustain a varsity team for the underrepresented sex, and further stated that non-responses by

students may be counted as an “actual lack of interest”. Under this analysis, there is a presumption of compliance raised by a properly administered model survey (showing insufficient interest) which can be overcome only if the OCR finds direct and very persuasive evidence of unmet interest. Examples of such evidence would be the recent elimination of a women’s team or a recent petition from an existing club team for elevation to varsity status. Significantly, under the Additional Clarification, the OCR (in an investigation) or students (in an on-site grievance) have the burden of proof, and schools that rely upon this test for compliance need not affirmatively demonstrate such compliance in the absence of “actual evidence” of unmet interest and abilities. However, it is important to note that the NCAA has come out strongly against the email “model survey” and federal courts have previously rejected survey evidence as unreliable.

Accordingly, EMU may be in participation compliance under the third prong, unless there exists a sport for women for which three conditions are met: 1) unmet interest sufficient to sustain a varsity team in the sport; 2) sufficient ability to sustain an intercollegiate team in the sport; and 3) reasonable expectation of intercollegiate competition for a team in the sport within the school’s normal competitive region. Based on my October, 2009 interviews with EMU athletic administrators, coaches, and student-athletes, I ascertained that there are no pending requests or petitions to add a women’s sport or to elevate an existing women’s club or intramural sport to varsity status at EMU. EMU has not recently conducted any survey of students regarding interest in any particular sport, or the participation by admitted students in particular interscholastic sports which are potential new intercollegiate sports for women at EMU.

Examples of such sports which are currently not offered at EMU but have significant statewide and regional interscholastic participation for girls include bowling, lacrosse, field hockey, and water polo. Each of these sports was also identified in response to specific inquiries about interest during on-site interviews.

### **C. Recommendations**

- Given the large disparity in female undergraduate enrollment, EMU will continue to have difficulty achieving substantial proportionality, notwithstanding roster management efforts. This is a common situation encountered by many other institutions which have a significantly higher percentage of female students.

I recommend that roster management be continued at least through the upcoming two years to narrow the variance, because of the current legal and policy uncertainties which surround participation compliance under the alternative third prong.

- I agree with EMU's position not to eliminate men's teams to increase women's participation. If potential interest is demonstrated in any women's sport through petitions or requests by a club team for elevated varsity status, EMU must be prepared to grant such requests.
- Carefully monitor "interests and abilities" to achieve compliance under the third prong. EMU must be proactive to rely upon this test to demonstrate compliance. Suggested measures, consistent with NCAA recommendations, to determine where EMU stands with respect to unmet interest are: 1) distribute athletics

interest surveys<sup>4</sup> to all current and admitted female students; 2) implement a publicized process for incoming and current students to request to add or elevate sports; 3) conduct ongoing reviews of the school's club or intramural sport participation levels; 4) stay updated on girls' high school sports in the State of Michigan and the respective participation levels; and 4) track the interscholastic athletics participation of admitted students, coaches, administrators and others affiliated with EMU with regard to interest in particular women's sports.

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<sup>4</sup> Note that a "census" is not a survey. If a survey is utilized, the process should be designed to get mandatory and meaningful responses.

#### 4) **ATHLETIC FINANCIAL ASSISTANCE**

##### **A. Law and Regulations**

Institutions that provide financial aid to students on the basis of their athletic ability (i.e., athletic scholarships) are required under Title IX to award scholarship dollars to male and female student-athletes proportionate to their participation. In this area, the OCR has clear expectations: the allowable difference between the rates of participation and scholarship awards may not exceed one-percent (1%).<sup>5</sup> Financial aid participation, unlike athletics participation described above, counts student-athletes one time, only, irrespective of the number of sports played by that individual.

EMU's data reported to EADA for 2008-09 reflects athletically-related student aid as follows:

	<b>MEN</b>	<b>WOMEN</b>
2008-09	\$4,877,483 (54%)	\$4,234,658 (46%)
2007-08	\$4,085,756 (53%)	\$3,594,271 (47%)

Currently, the award ratio exceeds the allowable variance in that women represent 40% of the participants and receive 46% of the aid. At EMU, the excess is in favor of women participants and may be justified by fluctuations in participation rates of males and females together with EMU's efforts to fund all women's and men's sports with grants-in-aid at NCAA maximum levels, which are non-discriminatory reasons to justify the disparity.

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<sup>5</sup> This constitutes a violation of 34 C.F.R. Section 106.37(c), unless justified by a legitimate, nondiscriminatory reason. See, OCR "Bowling Green Letter", issued July 23, 1998.



Spring/Summer aid is not included in the analysis under this Title IX requirement; however, such aid must not be awarded on the basis of gender. I was provided with EMU's written policies for athletic financial aid which clearly sets forth non-discriminatory criteria, unrelated to gender, for the award of spring/summer aid at EMU.

## **B. Recommendations**

- At EMU, the ratio of athletic scholarship dollars to participation rates presently favors female student-athletes, in excess of the allowable variance. The trend is decreasing as women participation numbers continue to increase and the reason for the variance is non-discriminatory. These amounts should continue to be monitored annually, however, in conjunction with participation numbers.
- Spring/Summer aid is administered fairly at EMU, although interviews with student-athletes and coaches revealed that there is not a clear understanding of the criteria. Sport administrators should provide additional policy updates to all coaches regarding this area and ensure that the coaches accurately apprise their student-athletes of the criteria.

## 5) **TREATMENT: OTHER PROGRAM AREAS**

### **A. Law and Regulations**

The controlling regulation requires that institutions “provide equal athletics opportunities for members of both sexes”. The OCR considers the following “laundry list” of treatment issues throughout the entire men’s and women’s athletic programs: (1) Provision and maintenance of equipment and supplies; 2) Scheduling of games and practice times; 3) Travel and per diem expenses; 4) Opportunity to receive coaching and assignment and compensation of coaches; 5) Opportunity to receive tutoring and the assignment and compensation of tutors; 6) Provision of locker rooms, practice and competitive facilities; 7) Provision of medical training facilities and services; 8) Provision of housing and dining facilities and services; 9) Publicity; 10) Recruitment of student-athletes; and 11) Support services.<sup>6</sup>

Accordingly, this Review evaluates the current availability, quality and kinds of benefits, opportunities, and treatment provided male and female student athletes at EMU to assess compliance. The law does not mandate *identical* benefits, opportunities, or treatment; however, if one sex receives more favorable treatment in one area, it is expected to be offset by treatment in another area favoring members of the other sex. Sources of funds such as donations, “booster” clubs, or fund-raising are not relevant to this requirement. Note that under Title IX, one team is not compared to the same team in each sport. The OCR examines the total programs afforded to male and female athletes.

### **B. Treatment: Areas of Concern at EMU**

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<sup>6</sup> As set forth in 34 C.F.R. Section 106.41(c)

This section discusses four specific areas of concern which were identified in my analysis of EMU data and information, extensive interviews, and tour of facilities. Subsection 5, below, specifically addresses treatment concerns related to EMU Rowing, which negatively impacts female athletes in the overall treatment analysis under Title IX.

### **1. Locker rooms, practice and competitive facilities**

There is a notable disparity in the overall quality and availability of EMU team locker rooms. Men's football, baseball, basketball and wrestling have superior quality and exclusive use of their locker rooms. Women's basketball (Convocation Center) and softball (newly constructed, adjacent to the field) are of equivalent high quality and exclusive use. The respective locker rooms men's/ women's swimming and diving, (Jones Natatorium) and cross country/track are of similar fair quality and availability. Men's and women's golf have the Eagle Crest Golf Club facilities equally available and women's tennis has a locker room available, though not exclusively (shared by club members) indoors at the Chippewa Club in Ypsilanti, where they practice and compete. Two women's teams - rowing and gymnastics - are not provided suitable locker rooms. Rowing (see par. 5 below) has no locker room at all and gymnastics has inadequate, cramped space in the corner adjacent to their practice gym (Bowen). Women's soccer does not have exclusive use of its locker room and the area is available for use by visiting men's teams. The soccer locker room is also problematic because of its small size and, in particular, its location (Convocation Center) which is a considerable distance from the practice and game fields. Women's volleyball appears to have a fair quality, dedicated locker room at the Convocation Center; however, at the time of this

Review, there were significant shower drainage problems, as well as an overcrowded locker area due to water overflow, ongoing repairs and equipment.

There are also practice and competitive facilities concerns at EMU which have a disparate impact overall on female athletes. Through my interviews (with coaches and athletes) and facility tour, I determined several issues with respect to the quality, exclusivity of use, and maintenance of facilities, which tend to favor the overall men's program. Rowing's lack of facilities is a significant concern and is addressed in detail in paragraph (5) below. The soccer practice field is unevenly maintained and not exclusive. There have been recent substantial improvements to the softball facilities; however, suitable fencing and upgraded dugouts are needed. An interesting question is also presented by the fact that the baseball facility (Oestrike Stadium) has lights but the softball facility does not. While a direct sport to sport comparison is not required; baseball and softball are typically compared in a treatment analysis. Lights are not essential to a competitive MAC softball program, however, in the case of baseball, lights allow for scheduling of night games (which can reduce travel expenditures), enhances recruiting, and, allows for fund-raising through night rentals for community teams and other events. Basic campus facilities are also lacking in the sport of Women's Tennis. The tennis team practices and competes at the Chippewa Club, which is a private tennis club in Ypsilanti. Those facilities are suitable and there has been good cooperation with the shared use by club members. Nonetheless, at a minimum, a Division I tennis program ought to have outdoor tennis courts for varsity use on its campus. The addition of at least six outdoor tennis courts on the EMU, sufficient for

varsity practice and matches, is a reasonable and recommended expenditure for overall treatment compliance.

## **2. Equipment and supplies**

Overall, the quality of equipment and supplies is reported by most coaches and student-athletes as good and suitable for each sport. There were no gender-based complaints concerning the assignment of equipment managers and some head coaches use student managers in this area. The glaring exception is rowing, where basic equipment (boats and oars) are inadequate, outdated, and in disrepair. This has a disparate impact on the overall women's program and is discussed more fully in paragraph (5) below.

## **3. Opportunity to receive coaching**

In analyzing this treatment area, I examined the numbers of full-time assistant coaches as well as graduate assistants for the men's and women's programs. Specific coach compensation is relevant only to the extent it does not allow for the hiring and provision of adequate numbers and quality of coaches. At EMU, I do not see Title IX concerns with respect to the qualifications or caliber of the coaches. The availability of coaches and thus the opportunity to receive coaching is of concern in some women's sports which lack full-time assistants. Overall, the men's and women's programs have several teams with maximum number of coaches allowable by the NCAA; however, there is a disparity on the women's side with fewer full-time assistants. Volleyball is a notable example of a premier women's sport which allows 2 full-time assistants. EMU Volleyball does not have a second full-time assistant, which affects not only the opportunity to receive coaching but also the ability to recruit. I recommend that

EMU consider a second full-time assistant for volleyball to reduce the overall disparity in the coaching numbers and the part-time/full-time status of assistants. Coaching compensation should, of course, continually be reviewed so that it is administered equitably, with any disparities justified by a non-discriminatory reason.

#### **4. Travel and daily allowance**

This area requires analysis of modes of transportation, housing furnished during travel, length of stay before/after competition, per diem allowances, and dining arrangements. Overall, the men's and women's programs had no disparities or record of any complaints relative to modes of transportation, per diem or dining arrangements. There are some complaints regarding reduced travel/length of stay with some of EMU's "Olympic sports", however, those are not gender-based, but rather reflect travel budget constraints affecting both men's and women's sports. In this area, frequent complaints were mentioned about football, which is provided hotel accommodations on campus for nights preceding home games, while other sports (men's and women's) drive extended hours before and after competition, whenever possible, so that they do not incur hotel expenses on the road. If such overnight accommodations for football are customary and standard in the sport, it might constitute justification for this disparity in treatment; however, it is of some concern that no women's team has ever been afforded this opportunity at EMU. The area of housing during travel presents a treatment issue at EMU with regard to the maximum number of student-athletes permitted in each room. Nearly all men's teams are assigned two athletes per room. Several women's teams routinely have three or four athletes per room and, in some instances, teams (e.g., gymnastics) reported that athletes were expected to share beds at hotels during road

travel. The coaches involved reported that this is done at their discretion to reduce travel expenses. The over-crowding of rooms and sharing of beds, however, clearly raises compliance issues as it occurs exclusively in the women's sports. Surprisingly, one coach failed to grasp the issue at all, stating that the practice is acceptable because female athletes are "smaller". I recommend that EMU implement and communicate clear policies regarding housing on the road, consistent for men's and women's teams, to include maximum number of student-athletes permitted in each room. Coaches should not be given discretion, without administrative approval, in this area.

## **5. Women's Rowing**

EMU Rowing has ongoing treatment compliance concerns under Title IX. It appears that this sport was added (2001-02) with an aim toward increasing female participation numbers<sup>7</sup>. In fact, the addition of rowing has assisted EMU's efforts toward participation compliance. Unfortunately, while EMU now provides rowing scholarships at the NCAA maximum limit (20), the sport is very expensive and is significantly under-funded at EMU, creating problems in numerous treatment areas including facilities, locker rooms, equipment and supplies, availability of coaching, scheduling, and recruiting. In October, 2005, the former rowing head coach complained of Title IX violations internally through EMU's Office of Diversity and Affirmative Action.<sup>8</sup> Several allegations were substantiated in a Confidential Investigation Report; however, not all substantiated problems have been remedied.<sup>9</sup>

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<sup>7</sup> 2008-09 EADA records reflect 35 female participants in rowing. In my October, 2009 interview with the head coach, he stated that the current rowing roster number is 43.

<sup>8</sup> The former head coach, Pamela Besteman, resigned and there was no formal complaint filed with the OCR.

<sup>9</sup> Quality uniforms (jackets) were provided this year and the assistant coach is fairly compensated. Suitable training area (ERG room) completed and available at Convocation Center.

Rowing practices and competes at Ford Lake Park, owned and operated by City of Ypsilanti. EMU relies upon Ypsilanti park personnel to open and close the gates for early morning practices, which presents basic safety issues for student-athletes. There is no permanent facility (boathouse) which is essential to house, store and protect equipment. There are portable docks which are inadequate. There are no locker rooms, lockers, or bathroom facilities (other than public park bathrooms and Porta-Johns) for student-athletes. The boats (shells) and oars are outdated and in disrepair. The lack of quality equipment and supplies directly impacts the team's competitive ability and the lack of quality facilities seriously impacts recruiting as well as scheduling of events, since the venue is not equipped to properly host rowing competitions.

If EMU plans to maintain its rowing program, it must be properly funded. I strongly recommend that a boathouse/storage facility, including suitable locker room facilities, be an immediate priority for EMU. It is also essential the venue be accessible to coaches and student-athletes without reliance upon parks employees who are not under the jurisdiction or control of EMU. The rowing budget should also be increased to allow for the provision of basic equipment (boats and oars) and supplies needed to field a competitive intercollegiate team. Further, all recommendations set forth in the internal Investigation Report should continue to be monitored by the sport administrator, with feedback from the current head coach, for reasonable and appropriate corrective action, as needed.

### **C. Treatment: Overview of Additional Areas at EMU**

#### **1. Areas with no concerns**

Based on analysis of the relevant data and extensive interviews, there were no



equity concerns raised or perceived in the following treatment areas: academic tutoring, provision of housing and dining, and support services. The availability of academic tutoring was consistently evaluated as excellent. Support services, which includes administrative support as well as the quality, size, and location of coaches offices, raised issues between those coaches located at Bowen and those at the Convocation Center, however, those concerns did not disparately affect the overall men's or women's programs. The provision of medical and training facilities was also uniformly rated highly by coaches and student-athletes. There is a concern in that area relative to rowing, since no trainer is ever available at rowing practice; and there is also a concern about high turnover rate attendant to student trainers who are assigned to Olympic sports. On an overall program comparison, however, I do not consider these areas to be of particular concern.

Similarly, publicity is provided equitably and in compliance with Title IX standards. In examining this area, it is necessary to evaluate the quality of sports information personnel, access to publicity resources for men's and women's programs, and the quantity and quality of publicity and promotions featuring men's and women's programs. At EMU, six men's and women's teams are provided posters and schedule cards. Men's basketball, football, women's basketball and volleyball have regular radio and television broadcasts/coverage as well as game-day promotions. EMU Sports Information produces comprehensive media guides for all sports, although some coaches choose to utilize only the on-line version to reduce expenses. In addition, at EMU, sport marketing and promotions is presently supervised by the Senior Woman Administrator who has a thorough understanding of this Title IX component.

## **2. Areas to “watch”**

The remaining two program areas, scheduling of games and practices and recruitment of student-athletes, are discussed herein as areas to watch or monitor, mainly because each is linked to one or more areas of concern identified in Section A. above. Specifically, the scheduling requirement includes the number of competitive events offered per sport and whether they are equitable in the overall programs. The number and length of practices are also considered in this area, together with the NCAA rules which govern practice hours in each sport. The EMU men's and women's basketball and volleyball teams all practice and compete at the Convocation Center and demonstrate an extremely cooperative and equitable assignment and use of the facility for practice and games. Due to funding issues in its sport, however, rowing competed in only eight (of an allowable NCAA maximum 20) races this past year. This is significant and not offset by any team in the men's program.

There is also some evidence of disparate impact in the area of recruiting, favoring the men's program, as a result of some of the differences in treatment identified in Section A. above. Specifically, the lack of a rowing facility (and other rowing problems discussed in Section A. 5 above), impacts the ability to recruit student-athletes. Similarly, the lack of varsity tennis courts on the EMU campus negatively affects recruiting of female tennis players. In volleyball, recruiting opportunities are limited without the assistance of a second full-time assistant coach. Overall, the allocation of recruiting dollars may appear equitable, however, the other resource concerns with some EMU women's these EMU women's teams have a disproportionately limiting effect upon the recruitment of female athletes.

#### **D. Recommendations**

Based on the foregoing, I recommend that EMU take the following actions to meet Title IX requirements in “treatment” areas:

- Appropriate funding, facilities, and equipment for rowing
- Locker room improvements for gymnastics, soccer, and volleyball
- Improved facilities for soccer and tennis
- Second full-time assistant coach for volleyball
- Continued upgrades to softball facility
- Implement consistent and clear policies for travel accommodations

## **6) OUTSTANDING ISSUES**

### **A. TITLE IX: TRAINING AND EDUCATION**

The law and regulations surrounding Title IX are constantly evolving and widely misunderstood. It is advisable that EMU incorporate specific training and education in this area for its coaches and administrators, particularly EMU's new hires, on at least on annual basis.

Based upon this Review, while there is general understanding of Title IX's participation and scholarship requirements amongst the coaches and student-athletes at EMU, some of the more complicated issues arise in evaluating and ensuring non-discriminatory treatment in areas including facilities, equipment, travel, "booster clubs," and the hiring/firing of coaches. Periodic training in such areas is highly recommended for all EMU's coaches and for administrators, to stay updated on key legal developments in Title IX litigation.

### **B. TITLE IX: SEXUAL HARASSMENT REPORTING AND EDUCATION**

Sexual harassment is a violation of law and impairs girls' and women's access to educational opportunity and resources. Many are aware that sexual harassment in the workplace is prohibited under Title VII of the Civil Rights Act of 1964. In an educational setting, sexual harassment of employees or students is also prohibited, and constitutes illegal sex discrimination in violation of Title IX.

No specific complaints or evidence of sexual harassment at EMU were identified in the course of this Review. Nonetheless, it is important to recognize that staff and/or students are likely to have concerns or questions related to sexual harassment in employment and the treatment of EMU's student-athletes. The implementation and

enforcement of University reporting policies regarding sexual harassment are essential to Title IX compliance. These policies should include periodic sexual harassment training and education for EMU coaches, administrators, and student-athletes and will likely decrease the occurrence of such offenses and reduce liability to EMU for any such acts committed on the part of its supervisory personnel.

### **C. EASTERN EQUITY PLAN 2009-2014**

This Review and its underlying data and information will be considered in preparation of EMU's new 5-year gender equity plan. A draft of the upcoming Eastern Equity Plan is underway for discussion, review, and implementation by EMU's Associate Athletic Director for Compliance. Valuable input for the plan was also received from a Title IX subcommittee, comprised of University-wide faculty and personnel, whose work and findings were summarized in a June, 2009 report from Committee Chair, M. Reifel-Werner.

### **D. RETALIATION ADVISEMENT**

In 2005, a private cause of action for retaliation under Title IX was recognized by the U.S. Supreme Court in the landmark case Jackson v. Birmingham Board of Education. Since that case, wrongfully terminated coaches of women's teams have obtained multi-million dollar jury verdicts and settlements against major universities across the country, where gender equity advocacy under Title IX led to their removal as head coaches.

At the time of this Review, EMU has no pending claims of retaliation under Title IX. Importantly, EMU athletic administrators should continue to be mindful that retaliatory action against those who raise Title IX concerns or complaints is prohibited.

Respectfully submitted,

Dated: November 27, 2009

MARISSA W. POLLICK, J.D.