

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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STEPHANIE BIEDIGER, ET AL : No. 3:09CV-621 (SRU)  
 : 915 Lafayette Boulevard  
 vs. : Bridgeport, Connecticut  
 :  
 : October 22, 2009  
 QUINNIPIAC UNIVERSITY :  
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STATUS CONFERENCE

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

A P P E A R A N C E S:

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1 (Whereupon the following session was held in  
2 chambers.)

3 (2:00 O'CLOCK, P. M.)

4 THE COURT: Good afternoon. I'm going to go  
5 around the room and ask everybody to identify themselves  
6 for the record.

7 MR. ORLEANS: Jonathan Orleans for the  
8 plaintiffs.

9 MR. HERNANDEZ: Alex Hernandez for the  
10 plaintiffs.

11 MS. GALLES: Kristen Galles for the plaintiffs.

12 MR. BRILL: Edward Brill, Proskauer Rose, for  
13 the defendant. And with me is my associate, Susan  
14 Friedfel.

15 MS. GAMBARDELLA: And Mary Gambardella, Wiggin &  
16 Dana, also for the defense.

17 THE COURT: All right. I understand we're here  
18 principally to try and get a schedule in place and I have,  
19 from Mr. Brill's recent letter dated October 20th, a  
20 modification of the defendant's point of view on  
21 scheduling.

22 I've got the following -- just confirm these are  
23 the dates that you're fighting about, perhaps.

24 We have motions to join parties: Plaintiffs  
25 proposed December 1; Defendants propose November 13.

1 Plaintiff's submission of class certification;  
2 Plaintiffs propose January 15th; Defendants propose  
3 November 13th of this year.

4 Jump in if I get anything wrong.

5 Motions to join additional parties: Plaintiffs  
6 propose January 1, with no competing proposal from the  
7 Defendants.

8 MR. BRILL: That's for the defendants to add  
9 parties. For the plaintiffs to add additional parties,  
10 they are proposing December 1st. We don't intend to  
11 propose any additional parties so it's not applicable.

12 THE COURT: All right. Completion of discovery,  
13 October 1st versus February 5th of 2010.

14 Completion of fact depositions, June 1 versus  
15 December 22nd. That's December 22nd of this year.

16 Plaintiff's designation of experts, March 1st  
17 versus December 22nd of this year.

18 Completion of depositions of Plaintiff's  
19 experts, April 15th versus January 15th.

20 Plaintiff's designation of rebuttal experts:  
21 September 1st is the proposal from the Plaintiff.

22 Completion of depositions of Plaintiffs'  
23 rebuttal experts: October 1st.

24 Plaintiffs' designation of experts: June 1 is  
25 Plaintiff's proposal; January 22nd is the Defense

1 proposal.

2 Completion of depositions, Defendant's propose  
3 September 1st versus February 5th.

4 Damages analysis: March 1st versus  
5 November 13th of this year.

6 And dispositive motions: November 1st versus  
7 February 1st.

8 Have I got it right?

9 MR. BRILL: We didn't make a specific proposal  
10 on dispositive motions based on the discovery schedule. I  
11 think it would have to be sometime after -- our new cutoff  
12 is February 5th of 2010 so it would have to be sometime  
13 after that.

14 THE COURT: So --

15 MR. BRILL: I would say 30 days before that.

16 THE COURT: So March 30th, or -- excuse me,  
17 March 5th.

18 MR. BRILL: And the only other thing I would  
19 note is that with respect to rebuttal experts, we didn't  
20 propose a specific date. We said the leave of court would  
21 have to be required.

22 THE COURT: Sure, okay.

23 MR. BRILL: Otherwise you're all right there.

24 THE COURT: Let's maybe discuss a little bit why  
25 each side's proposal makes sense. Mr. Orleans?

1 MR. ORLEANS: You want to hear from us?

2 THE COURT: Sure.

3 MR. ORLEANS: Your Honor, essentially all of the  
4 deadlines flow from the question of when are we going to  
5 have a merits trial, working back from that. The  
6 defendant, I think, wants to have a merits trial as soon  
7 as possible because the defendant would like to eliminate  
8 the volleyball team before the next academic year.

9 Our view, Your Honor, is that even, even on the  
10 most constricted view of what's at issue in the case,  
11 which it is the defendant's view that the only thing  
12 that's at issue in this case is the statistical component  
13 with prong one of 2009 in the current year, you can't  
14 really evaluate that until the current year has been  
15 completed and, among other things, the defendant will not  
16 have filed its NCAA reports until next October. They have  
17 never provided this kind of information any earlier than  
18 October of the following academic year.

19 So, in our view it's just completely unrealistic  
20 to think we could have a merits hearing before the  
21 defendant, which the court has found to have manipulated  
22 its participation figures in the past, can demonstrate or  
23 before we know how the defendant has operated its program  
24 for this entire year. And, therefore, we think this  
25 notion of having a merits trial sometime in the early part

1 of 2010 is just not practical or warranted under the  
2 circumstances.

3 We also think that there are, you know, we have  
4 some disagreements on the scope of discovery obviously.  
5 We are intending to amend our complaint and we may very  
6 well be adding retaliation claims. We may be adding  
7 claims relating to financial support for men's and women's  
8 sports. Those are going to create some additional  
9 discovery issues and, again, it's not, not going to be  
10 practical to complete the necessary discovery and schedule  
11 a trial during the current academic year.

12 And, therefore, we have proposed a schedule that  
13 gets us a trial reasonably early in the next academic year  
14 so that if the plaintiffs -- if the defendant should win  
15 at that stage, there would be adequate time then to make  
16 whatever adjustments are necessary in the athletic program  
17 and for the student athlete plaintiffs to find other  
18 places to play if that's what they want to do.

19 THE COURT: What's really at issue between the  
20 parties is one more year of volleyball?

21 MR. ORLEANS: Before merits are heard.

22 MR. BRILL: It's true, our goal is to have a  
23 trial, if possible, by early Spring so that we can have a  
24 decision on the University's ability to eliminate the  
25 volleyball team. We don't think that there's all that

1 much discovery that would be needed with respect to that  
2 issue. And there's no reason that the facts would not be  
3 available by, certainly by March. The EADA numbers, we  
4 already have the first day of competition for 14 out of 16  
5 sports and the other two will be available within the next  
6 two weeks.

7 With respect to the sports that start in the  
8 Spring, so that the championship season starts in the  
9 Spring, the last day -- or the first day of championship  
10 competition is early March and there's no need to wait  
11 until the end of the school year.

12 As we said in the Rule 26(f) report, there's  
13 been significant changes made by the University with  
14 respect to the issues that concerned the court at the  
15 preliminary injunction hearing. There's now an entirely  
16 new set of controls over the roster numbers whereby the  
17 Senior Vice President of Academic Affairs, who's  
18 essentially the provost of the University, is directly  
19 responsible for roster numbers, and no roster can be  
20 changed, nothing can be added or deleted to the roster  
21 without his approval. Every roster is set by an  
22 interactive process with the coach who signs off on the  
23 adequacy of the roster in order to provide meaningful  
24 participation experience.

25 The specific sports where the court found

1 there'd been a problem in the past, such as men's lacrosse  
2 and women's softball, competitive cheer, those numbers  
3 have all been substantially changed and we are prepared to  
4 demonstrate, to have discovery on those issues and to have  
5 a trial on our compliance with the substantial  
6 proportionality test which can easily be accomplished by  
7 the Spring. There's not really much discovery that would  
8 be necessary for that. And it would be better, we  
9 believe, to have that determination made in, you know, in  
10 March or early April at the latest so that there is a  
11 track record of the entire year of Fall sports and the  
12 beginning of the competition season for Spring sports.

13 But there's no reason to assume that any  
14 problems that occurred in the past would continue based on  
15 the changes that have been made, which the plaintiffs can  
16 have discovery about and the court can have testimony  
17 about and a demonstration that the, you know, the roster  
18 numbers are now true and correct and that we're in,  
19 completely in compliance with Title IX for this academic  
20 year, and that, even eliminating the women's volleyball  
21 team, the school would be in compliance going forward.

22 So that is the issue between us and it's not a  
23 small thing to say so they'll continue the volleyball team  
24 for another year. We've continued it for one additional  
25 year beyond what the school had intended but -- I didn't

1 mention there's been another men's team that's been  
2 eliminated, so three men's teams have been eliminated now  
3 and, you know, the men athletes have borne the brunt of  
4 that. The coaches of those teams, money's been saved with  
5 respect to those teams, and there is no reason that we  
6 have to wait yet another year to determine whether the  
7 volleyball team can be eliminated when all the evidence on  
8 that would be available by early Spring.

9           With respect to -- it's difficult to address the  
10 issue of new claims that the plaintiffs may add because we  
11 haven't seen them, but I would say those claims would be  
12 significantly different than anything that's now in this  
13 case and that if they do amend the complaint, for example,  
14 to raise issues of I think equal facilities or equal  
15 support or with respect to other sports, those could  
16 really be separated out for purposes of discovery at  
17 trial.

18           And we're entitled to a ruling, you know, one  
19 way or the other on the issue of the continuation of the  
20 volleyball team. We'd rather, frankly, have a trial on  
21 the merits rather than having to make a motion to lift the  
22 injunction, which obviously we could do if it turns out  
23 that the case is going to continue on that length of time,  
24 but there's really no reason to have to do that, have that  
25 issue resolved in that procedural posture.

1 MS. GALLES: Your Honor, this is Kristen Galles.  
2 Can I speak in rebuttal or --

3 THE COURT: Sure.

4 MS. GALLES: Okay. I actually would like to  
5 point out that I would strongly disagree with Mr. Brill's  
6 characterization about the counting of the numbers.  
7 Actually for all of the Fall sports, their competitive  
8 season has not started yet so there would -- there are no  
9 EADA numbers, for example, for basketball, ice hockey, and  
10 I believe they are claiming cheer as a Winter sport, even  
11 though there is no set season.

12 And as for the Spring sports -- and although we  
13 disagree, we believe OCR disagrees in terms of counting  
14 indoor track as a separate sport, obviously that has not  
15 even begun yet so they could not count those sports yet.

16 As for the Spring sports, outdoor track,  
17 lacrosse, softball and baseball, again, those are all  
18 sports where the EADA numbers obviously cannot be provided  
19 and so, therefore, their first competition date, the only  
20 numbers that Quinnipiac could provide under the schedule  
21 they've proposed and could provide would be for the Fall  
22 sports.

23 And then, secondly, we aren't just talking about  
24 EADA numbers. As the court found, EADA is just sort of a  
25 presumption of, hey, here's what the school says are the

1 numbers. What really counts for Title IX purposes are who  
2 actually has an opportunity, and as was shown at the  
3 preliminary injunction hearing, you need to look behind  
4 those to find out, hey, how many men had genuine  
5 opportunities and actually participated in the entire  
6 season but were not counted for EADA purposes. And, in  
7 the alternative, how many women were being counted but  
8 never actually participated in a contest because they were  
9 cut or because they were improperly playing under the EADA  
10 in the Fall as opposed to the Spring.

11 And then, of course, there's the whole, we  
12 believe, the whole idea of the triple counting of track,  
13 which legally is improper, and we will need the full  
14 year's worth of information in order to demonstrate our  
15 allegation that, hey, Quinnipiac really only has a cross  
16 country team, it does not have a track team, and part of  
17 showing that is going through and seeing who's  
18 participating at what time in what event, what are the  
19 schedules. Are they really running this as a separate  
20 track team or is this really just a cross country team  
21 that runs in a few track meets.

22 All those things, of course, are very  
23 fact-intensive and would require the full year's view of  
24 what is going on because, of course, you know, our  
25 contention is Quinnipiac has not complied with Title IX in

1 37 years. The court found that it did not comply, so the  
2 volleyball team was reinstated.

3 So Quinnipiac's position is, okay, we promised  
4 to comply for the 2009-2010 school year and so we need to  
5 really complete the 2009-2010 school year and to  
6 essentially audit what's happened during that 2009-2010  
7 school year in order to see whether they, indeed,  
8 fulfilled that promise to come into compliance for this  
9 year. Thank you.

10 MR. BRILL: May I respond to that, Your Honor?

11 THE COURT: All right. As I understand the  
12 plaintiff's position, the discovery that's necessary  
13 before a trial on the current claims would be the  
14 participation numbers?

15 MR. ORLEANS: I don't think it's limited to  
16 that, Your Honor. There would be current participation  
17 numbers, there would be inquiry into the operation of the  
18 cheer program because, as Your Honor observed in the  
19 preliminary injunction proceedings, competitive cheer  
20 might, if it were properly administered and run, be  
21 appropriately counted as a varsity athletic opportunity,  
22 but it also might not, and so we're going to need to  
23 inquire as to how it's being operated and run.

24 Mr. Brill has mentioned changes to the operation  
25 of the athletic program at Quinnipiac which are intended

1 to insure compliance and we need to inquire into those  
2 because, frankly, without going into all the details, we  
3 are not entirely convinced that the changes that he's  
4 outlined will actually function to assure compliance with  
5 Title IX.

6 For example, the interactive process that he  
7 mentioned, under which coaches were ostensibly consulted  
8 about their roster sizes, might have been read by the  
9 coaches as coercive or retaliatory, and I think we're  
10 going to need to depose every coach to inquire about how  
11 that went and whether the letter that they were required  
12 to sign reflected their real opinions. So I think there's  
13 really quite a bit to be done.

14 In addition, for preliminary injunction  
15 purposes, I understood that Quinnipiac relied entirely on  
16 prong one of Title IX. I believe that that was stipulated  
17 or announced at some point in open court.

18 MS. GALLES: Uh huh. (Affirmative.)

19 MR. ORLEANS: But I don't know that that's going  
20 to be true on a merits hearing. In other words, as Your  
21 Honor knows, Title IX -- prong one, the statistical  
22 compliance is a safe harbor for a university whose  
23 compliance with Title IX is challenged, but if the  
24 university does not comply with prong one, the  
25 university -- it's still open to the university to show

1 that it is in compliance with Title IX by demonstrating  
2 compliance with prongs two or three. And unless the  
3 university is prepared to stipulate that its only defense  
4 is a prong one defense, then we have to conduct some  
5 discovery in order to prepare for a possible contested  
6 trial on prongs two and three. So --

7 THE COURT: All right, let's sort that out.

8 MR. BRILL: We do stipulate that that's our  
9 defense, is prong one, and we agree to the areas that  
10 Mr. Orleans has identified for discovery, but that's not a  
11 year's worth of discovery. Other than deposing every  
12 coach, which I'm not sure is justified, he is entitled to  
13 discovery in our view into the operation of the cheer  
14 program and into the, the roster calculations.

15 I'm not, you know, I'm not taking a position now  
16 about deposing every coach but certainly some discovery  
17 into how the new system operated and how the coaches have  
18 responded to the interactive process would be appropriate.  
19 But we think two months, which we proposed, is more than  
20 adequate for that and it doesn't take a year.

21 Can I go back to responding to what she said for  
22 a minute?

23 THE COURT: Sure.

24 MR. BRILL: There were three points she made in  
25 her remarks, that the EADA numbers are not available until

1 the competitive season starts; that's just factually  
2 inaccurate, Your Honor. I didn't make copies of this but  
3 I have the schedule of the first day of competition for  
4 every sport which is what the EADA numbers are based on,  
5 and 14 of the 16 sports have had their first day of  
6 competition. The spring sports do have competition in the  
7 fall, that's not the championship season but they do have  
8 a competition. The only two remaining are men's and  
9 women's basketball which are coming up within the next ten  
10 days and, frankly, there's no real issue about the  
11 basketball rosters in any event but the EADA numbers are  
12 now -- will be set within the next two weeks.

13 I agree also that the EADA numbers are not to be  
14 the be all and end all of the matter, and that's why I  
15 said that we agree that the hearing could take place in  
16 the early Spring, after the spring season championship  
17 competitions have begun. But I don't think anything in  
18 the judge's prior -- in your prior opinion, or common  
19 sense, would say you need to wait for the entire season to  
20 be completed before you can make a determination.

21 The concerns that the court had with respect to  
22 roster manipulation or any people practicing that, all of  
23 these occurred shortly after the competition had begun and  
24 it's not necessary to wait until the school year is over  
25 to see whether these numbers are legitimate.

1           We're, you know, we are the ones who are at  
2 risk, frankly, in saying that we're content to have a  
3 trial on the merits in March or April. If we can't  
4 convince the court at that time that the numbers are  
5 legitimate and reliable, then it's our risk, it's not the  
6 plaintiff's risk. And we believe that the combination of  
7 the changes that we made and having, you know, some  
8 significant period of time, a championship competition for  
9 every sport would be more than enough for the court to  
10 make a ruling that whatever problems that there were in  
11 the past are no longer an issue.

12           As I said, the University is in compliance and  
13 there's no reason to believe that eliminating women's  
14 volleyball would take us out of compliance and we'd like  
15 to have that ruling in the Spring, out of fairness to the  
16 volleyball players as well as out of fairness to the  
17 University, because if it's delayed until late Spring or  
18 Summer, and then the court rules that Quinnipiac can go  
19 ahead and eliminate the volleyball team, you know, they  
20 are going to be complaining that it's too late for the  
21 volleyball players to make plans for next year.

22           I mean, frankly, we would like to have the  
23 hearing right now or a month from now, but we recognize  
24 that the court may need and the plaintiffs may need some  
25 additional record of compliance and some additional facts,

1 but we think that ought to be done at the earliest  
2 reasonable opportunity and that would be fairer to both  
3 parties.

4 THE COURT: Well, I tend to agree that we ought  
5 to do the merits trial at the earliest fair date.

6 MS. GALLES: Your Honor, could I chime in and  
7 sort of rebut what he had stated or do you want me to shut  
8 up?

9 (Laughter)

10 MS. GALLES: I'm not there so I can't read the  
11 dynamics, I apologize.

12 THE COURT: I don't think I've ever told a  
13 lawyer to shut up so I'm not going to start now.

14 MS. GALLES: You may have wanted to.

15 THE COURT: Well, fair enough.

16 MS. GALLES: I just think it might be helpful to  
17 explain in terms of the discovery and why we need it and  
18 why it's not going to be available until after the full  
19 school year is over.

20 THE COURT: Sure. Let me give you my initial  
21 thoughts and then perhaps you can even make your comments  
22 reflect your reaction to that.

23 I'm always reluctant to have a decision that I  
24 make on procedural grounds, the scheduling of a trial, the  
25 timing of discovery, affect the substance of the

1 discovery. And if we extend this trial too late, it's a  
2 form of relief for the plaintiffs which occurs without any  
3 evaluation of whether that relief is justified on the  
4 merits, and so my preference would be to do an earlier  
5 trial consistent with everyone's ability to get ready for  
6 it, and I think the suggestion of severing out claims is a  
7 good one.

8 I understand the need to undertake discovery  
9 even potentially for the bulk, if not the entire academic  
10 year, but I'd like to be in a position to try the case  
11 very quickly thereafter and perhaps in May or June. So  
12 let me get your reaction to that.

13 MS. GALLES: Yes, sir. First off, the reason  
14 why we definitely would need -- number one, we definitely  
15 disagree with Mr. Brill in terms of his assertions of the  
16 measuring date for the numbers for the EADA. It's our  
17 position Spring sports, we don't report them until the  
18 competitive season, but beyond that, because essentially  
19 our belief is -- and if you look at the past treatment of  
20 the cross country program at Quinnipiac is that Quinnipiac  
21 has only a cross country program, has always only had a  
22 cross country program, and only recently in order to  
23 manipulate its numbers in order to falsely reflect a prong  
24 one that they have done this idea of claiming they have an  
25 indoor track team, an outdoor track team. You know, we

1 believe that's absolutely not the case, and we need to be  
2 able to prove that. We were not allowed to go into  
3 discovery in the preliminary injunction stage to really  
4 investigate that and to present the expert to demonstrate  
5 what really is going on and has gone on and how track  
6 works and, you know, that's a very fact-intensive inquiry  
7 that will require certainly for Quinnipiac to finish what  
8 it claims to be its full track season in order for our  
9 experts to look at, hey, who's running track, what events  
10 are they running, what is the schedule, is this being run  
11 as a cross country program, is this being run as a track  
12 program?

13 And so obviously that kind of factual  
14 information is not going to be available until after the  
15 track season and I don't believe the track season ends  
16 until late May, early June. That's when the NCAA  
17 championships are.

18 THE COURT: I was going to guess that  
19 Quinnipiac's outdoor track season ends closer to late  
20 April, early May. Does anybody have this information?

21 MS. GALLES: We have the championship dates.

22 THE COURT: Well, the NCAA -- let's be frank,  
23 Quinnipiac probably isn't going to send anybody to the  
24 NCAA championships.

25 MS. GALLES: I have no idea. I have no idea.

1 So we would obviously need -- in addition, we definitely  
2 would need all of that factual information.

3 Secondly, in terms of the cheer issue, no court  
4 and OCR has never ever accepted cheer as a competitive  
5 sport. Quinnipiac is trying to get this done or  
6 recognized as a sport for the first time ever, and I  
7 believe OCR continues to disagree that it is a competitive  
8 sport, and so if we're going to be setting that kind of  
9 precedent that is contrary to 37 years of Title IX  
10 precedent, at least from the executive agency in charge of  
11 it, of saying that this is a sport, we really do need the  
12 factual inquiries and we intend to have, you know, expert  
13 witnesses come in and explain why this is not a sport, why  
14 it's not being run as a sport, even if it were open to  
15 being a sport. And that is going to require obviously a  
16 full look at the cheer program, and since cheer doesn't  
17 have a competitive season, you know, we would have to look  
18 at all the way through when Quinnipiac claims that its,  
19 you know, cheer season is over.

20 And also in terms of -- here's why separating  
21 out the claims is not really possible. Title IX, unlike  
22 other discrimination claims, when you're talking about  
23 athletics, you're talking about a sex segregated  
24 environment, and so either you violate Title IX or you  
25 don't. It's not like just the volleyball team, you know,

1 claim or complaint, you know, dealt with, hey, Quinnipiac  
2 does not offer enough opportunities to female students,  
3 and that would be far more than just volleyball.  
4 Obviously the preliminary injunction was to only get  
5 volleyball reinstated but, you know, how you work Title IX  
6 is you have the three part test, number one being the  
7 substantial proportionality, and if you are off on the  
8 substantial proportionality and, you know, if they are  
9 conceding they don't meet two or three, then, hey, you  
10 need to be adding additional women's sports, and we are  
11 contending that one of the issues is we believe that there  
12 should be a women's track team. We don't believe that  
13 they offer one, but they believe that there should be and,  
14 indeed, that the prior coach for many years had requested  
15 that he have a women's track team, that he have sprinters  
16 and jumpers and throwers and all that, and was repeatedly  
17 denied the chance for that.

18 And so -- and as we also indicated, there are  
19 many, many sports in the conference that Quinnipiac does  
20 not have, and so when you -- so Title IX has a programatic  
21 view of whether you comply with Title IX. We couldn't  
22 have separate lawsuits of, all right, the young women, the  
23 people who want a separate legitimate women's track team  
24 and the bowling team and the gymnastics team and the swim  
25 team and the volleyball team, we don't have four or five

1 separate lawsuits trying to each get a team because,  
2 frankly, Quinnipiac's numbers aren't that bad. You know,  
3 we may be fighting over, hey, they should have two or  
4 three of these sports, not all five of these sports. So  
5 they all have to be, and this is to decide which of the  
6 sports they should be having, all need to be adjudicated  
7 in one litigation and, of course, you know, we can't have  
8 inconsistent verdicts of having volleyball players only  
9 over here and track people only over here, and again,  
10 unlike Title VII where you might violate it as to one  
11 employee but not violate it as to another employee in the  
12 Title IX context because of the sex segregated nature, you  
13 either violate it or you don't, and so you really have to  
14 adjudicate all of the participation problems at least in  
15 one lawsuit.

16 And, and because of that, again, the preliminary  
17 injunction was only volleyball because that's the only one  
18 where we were trying to prevent it from being dropped as  
19 opposed to requiring Quinnipiac to increase its  
20 opportunities, or in the realm of track, to make a  
21 legitimate opportunity with a legitimate track team, not  
22 what we would consider a faux track team, and that's the  
23 reason why you can't really separate out any claims  
24 related to the participation issues.

25 THE COURT: Okay, I think we have the date --

1 MR. ORLEANS: Yes, Your Honor. According to the  
2 Quinnipiac 2009-10 Athletics and Recreation Staff  
3 Handbook, the Women's Outdoor Track Championship will be  
4 May 1 and 2; Men's Lacrosse is May 2 through 4; Softball  
5 is May 14 and 15, and; Baseball is May 20 through 22.

6 MR. BRILL: Could I see that?

7 MR. ORLEANS: Absolutely.

8 (Hands Counsel)

9 MR. ORLEANS: If I could make just a couple of  
10 brief points -- I don't want to wear out our welcome here.  
11 It seems to me that even a trial in April or May, even if  
12 we were to have a trial in April or May --

13 THE COURT: I was thinking May or June.

14 MR. ORLEANS: Well, we're then going to run into  
15 the same problem we ran into last year as far as what  
16 happens to the volleyball girls, what happens to these  
17 athletes. You know, Coach Sparks is recruiting now and  
18 you're going to have students who were accepted, you're  
19 going to have problems with people. What happens to their  
20 scholarships? Where do they go? Can they find other  
21 opportunities? I'm sure you recall the testimony on those  
22 points.

23 So that even if we have a trial that soon, it  
24 seems to me that, as a practical matter, Quinnipiac will  
25 be compelled to maintain the volleyball program for one

1 more year, and as long as it's going to have to do that,  
2 there's no reason to rush into that trial. We could just  
3 as well have the trial in the Fall as in the Spring  
4 because the whole reason Quinnipiac wants the trial in the  
5 Spring is to be able to eliminate the volleyball program  
6 that much sooner.

7 And, secondly, I would say with all respect to  
8 the defendants' position, they are operating under a  
9 preliminary injunction and it should be as limited in time  
10 as possible. I would say it's really their own fault.  
11 They decided to announce this change in March of 2009,  
12 giving very little time for students or their parents to  
13 make alternative plans. They could have, when they  
14 announced that they were eliminating the volleyball  
15 program, they could have said we're eliminating the  
16 volleyball program a year from now, and given the students  
17 and their parents and the coach and so forth time to make  
18 alternative plans. They didn't. When we filed the  
19 lawsuit, they could have stipulated to something like  
20 that.

21 In other words, it was fully within Quinnipiac's  
22 control to handle this in a way that would have gotten  
23 them a merits trial in ample time to eliminate the team  
24 for next year, but they chose not to. They timed their  
25 announcement, they chose their defense in such a way that

1 now here we are trying to schedule a merits trial and it's  
2 virtually impossible to schedule that merits trial in time  
3 to allow them to eliminate the program for 2010-2011, and  
4 it's nobody's fault but the defendant's.

5 And so it seems to me that, you know, it's  
6 appropriate to give us adequate time to prepare the case  
7 and have the trial, and if the plaintiff should lose the  
8 trial, then the student athletes should have a reasonable  
9 opportunity to find other places to go.

10 MS. GALLES: And, Your Honor --

11 MR. BRILL: I'm sorry --

12 MS. GALLES: -- one more thing I would like to  
13 throw in about why we need to make sure we have adequate  
14 time to prepare the trial, is that in reality this case is  
15 not just about Quinnipiac. This is a -- these practices  
16 are going on nationwide in terms of schools are, you know,  
17 like tax cheats. We believe that there are many, many  
18 schools that are going -- in order to appear like they are  
19 in compliance with prong one, when in fact they are not,  
20 they are being taught these same techniques. And because  
21 of that, schools and lawyers all over the country are very  
22 intensely looking at this particular case and, indeed, it  
23 will likely be sort of a test case on these issues and  
24 what schools can do, can't do, should do, whether these  
25 manipulations are allowed or not. And because of that,

1 you know, we really need to make sure that this case is  
2 done right because everybody is going to be looking to it  
3 as to what is allowed or not allowed going forward for  
4 many years to come.

5 MR. BRILL: I'm sorry to have to respond but  
6 there's a lot to respond to. First of all, obviously I  
7 don't think comparison to tax cheats or saying that people  
8 all around the country are looking at this case has  
9 anything to do with the schedule that we realistically  
10 need to set here.

11 There's a whole body of case law under Title IX,  
12 and what we're talking about here is a very specific  
13 factual inquiry relating to what Quinnipiac has done. And  
14 it's simply not true to say that if we have a trial, as  
15 the court suggested, if we had a trial in May -- it would  
16 be a very short trial, presumably it's not going to take  
17 very long for the court to make a ruling. If the ruling  
18 is in defendant's favor, we will eliminate the volleyball  
19 team and the plaintiffs, we've told the plaintiffs that.  
20 We've been telling them that all along.

21 That's our plan, either to have a trial on the  
22 merits or to file a motion to eliminate the preliminary  
23 injunction. So there's no surprises here and people can  
24 make their plans accordingly. Both sides are at some risk  
25 but that's what happens when you have litigation. And we

1 don't think, again, we don't think it's fair to force the  
2 University in effect to continue for another year, simply,  
3 but if the earliest opportunity to have these claims tried  
4 on the merits is in May, we'd be prepared to have the  
5 trial earlier but the plaintiffs say no, they need more  
6 discovery. So, you know, if they want more discovery and  
7 more time, the cost of that is not having an early  
8 decision for them.

9 As I said, if they want to have a hearing in two  
10 months over continuation of the preliminary injunction,  
11 we'd be prepared to put our evidence in at that point, but  
12 we think it makes more sense to do as much discovery as  
13 reasonably possible and to have a trial on the merits. I  
14 don't think you need to go to the NCAA championships to  
15 make a ruling. I think by April or early May the seasons  
16 will have been substantially complete. It would make  
17 little sense to say the University is going to wait until  
18 the last two weeks of the season or the last few weeks  
19 under the season and it will be manipulating a roster.  
20 There was no evidence that that type of thing was  
21 happening and it wouldn't make any sense.

22 I think what the court identified in the past  
23 was that there was one or two, or two or three instances  
24 where teams had put in a number for the EADA report and  
25 then immediately after that, changed the roster numbers.

1 There's no showing that during the course of a season,  
2 once the championship competition had begun, that there  
3 was some wholesale effort to change the rosters.

4 And, again, the last -- the first day for every  
5 Spring sport of competition is no later than, March 5th I  
6 think is the last date that any Spring sport starts  
7 competition. So by March and April, you've got two full  
8 months at a minimum of championship competition. If you  
9 waited until early May for a trial or mid May, that's two  
10 and-a-half months. That's almost the entire semester and  
11 there's no reason that discovery can't be completed by  
12 that date.

13 As far as the issues about the track team, I  
14 don't really understand what the claim is but if there's  
15 some claim that the indoor/outdoor women's track teams are  
16 not bona fide and haven't been, first of all, there's  
17 history of the track teams in the past and, as I  
18 understand, there's been some discovery as to that  
19 already, and there's been expert testimony about that.

20 So you have the past experience with the  
21 indoor/outdoor track teams and you certainly have the  
22 complete indoor track season that's been completed by the  
23 beginning of the spring semester. And, as I said, you'd  
24 have two months of the outdoor track season which is  
25 substantially the entire season by the end of April.

1           The other argument that was made was that  
2           somehow you can't segregate out the claims. I really  
3           don't understand that, the only claim here that we're  
4           talking about having a trial on is the substantial  
5           compliance and proportionality claim. That's the same  
6           whether you're talking about the volleyball team or any  
7           other team.

8           If the University is in compliance with Title  
9           IX, the case law is very clear it's completely within the  
10          university's discretion whether -- how it's going to  
11          comply, whether to eliminate men's teams, add women's  
12          teams, or add a different women's team. The court has no  
13          role in that and the plaintiffs have no role in that. If  
14          we're not in compliance, then obviously the court can  
15          issue whatever remedy is appropriate under those  
16          circumstances. But if we are, that's only one issue to be  
17          tried.

18          And, by the way, the plaintiffs here, at least  
19          so far, are only volleyball players, so the issue of  
20          there's some unmet need to start a women's rugby team or  
21          some other kind of women's team for people that aren't  
22          being plaintiffs, that's not really part of this case at  
23          the moment. Right? I mean the only issue that's properly  
24          before this court on these complaints with these  
25          plaintiffs is whether the volleyball team can be

1 eliminated.

2 MS. GALLES: Your Honor, I would completely  
3 disagree on two points. First of all, in order to decide  
4 whether the volleyball team should stay reinstated, as a  
5 point of legal analysis, it requires a program-wide  
6 analysis, which means that even if this were only about  
7 volleyball, it would require us to do the very  
8 fact-intensive analysis of what's going on in particular  
9 with the track and the cheer programs. We might agree  
10 that in terms of the numbers manipulation in the other  
11 sport, what goes on early in the season may be what is  
12 most important, although, again, we would indicate what  
13 they showed for lacrosse, like the men's lacrosse, they  
14 were not reporting the men and it took us to see the  
15 entire year of schedule and NCAA data to find out that,  
16 oh, indeed, these men had played many times throughout the  
17 season and had not been counted. How would we know that  
18 until after that lacrosse season was over?

19 And the same in terms of -- more important, in  
20 terms of the track team, yes, we are alleging that the  
21 indoor and outdoor track teams are not legitimate teams.  
22 We have always alleged that and that means can they be  
23 counted for prong one purposes? Our position is no, they  
24 cannot be counted for prong one purposes because they are  
25 not legitimate teams and that means we do have to have an

1 intense analysis and intense review of what's going on in  
2 the track program in order to decide whether the  
3 university meets prong one for purposes of the volleyball  
4 team.

5 So that's why this -- when he keeps saying, you  
6 know, about volleyball, no, you have to look at how the  
7 numbers are counted in every single sport and the reality  
8 of what's going on underneath those numbers. That's why I  
9 keep using the auditing analogy. Those numbers have to be  
10 audited and examined in order to decide what to do in  
11 terms of the volleyball program.

12 But then, in addition to that, we would disagree  
13 that this case is only about volleyball. This case is  
14 about equal opportunity and making sure that Quinnipiac  
15 indeed complies with all three prongs. They've admitted  
16 they are not relying on prongs two and three. We believe  
17 we have shown that they did not and have never complied  
18 with prong one in the 37 years of Title IX, and so,  
19 therefore, hey, they need to be. And they can't cut any  
20 more men's teams in order to remain at the Division I  
21 level. They are sort of stuck with what they have.

22 And so, in order to comply with prong one, they  
23 are going to need, we believe, to add more women's teams.  
24 And part of our, why we wanted time for the motion to  
25 amend, although there is clearly case law that our

1 particular plaintiff can represent a class of all female  
2 students who want to add a sport or participate in a sport  
3 not offered by the school, in order to remove all doubt,  
4 you know, we are expecting to have plaintiffs come in who  
5 indeed are particular to those sports and, again, they all  
6 have to end up being in the same lawsuit to decide, all  
7 right, Quinnipiac, did you comply with prong one? You  
8 know, if you do, fine. If you don't, then you're going to  
9 have to add all these sports.

10 And I would say that Quinnipiac keeps talking  
11 about the burden of volleyball. Well, you know,  
12 Quinnipiac for 37 years has gone without complying with  
13 Title IX, has gone without providing its female athletes  
14 with an equal opportunity to participate, and so what they  
15 claim is a burden is really compliance with what has long  
16 been federal law. And, again, it presumes that they keep  
17 counting a cheer team that has not even competed in a  
18 single event yet. So you're looking at the balancing of  
19 the inequities and the public interest. Obviously keeping  
20 the volleyball team is of utmost importance.

21 THE COURT: Let me inquire whether Quinnipiac  
22 would be prepared to provide within 48 hours every  
23 intercollegiate contest, a certified roster of the  
24 participants in the sporting event for the rest of this  
25 case through the trial date?

1 MR. BRILL: Unfortunately I can't answer that  
2 yes or no. I mean my inclination would be to say yes but  
3 I don't know how quickly that's available.

4 THE COURT: Well, okay. Doesn't to have be 48  
5 hours; I mean 72 hours, whatever.

6 MR. BRILL: Whatever reasonable period is  
7 possible, we would certainly be willing to do that.

8 THE COURT: I mean we should not have to have  
9 intense discovery to figure out who participated in sports  
10 events. Presumably when you take the field in a baseball  
11 game, you provide the referee with a list of your players  
12 and indicate who's going to be playing.

13 MR. BRILL: I think there is a participation  
14 report done.

15 MS. GAMBARDELLA: There is.

16 MR. ORLEANS: Of course we want to see not only  
17 who is listed on the roster but who actually plays.

18 THE COURT: Right.

19 MS. GALLES: Who competed.

20 MS. GAMBARDELLA: I believe it is reported that  
21 way.

22 THE COURT: I think that should be provided  
23 voluntarily, and if not voluntarily, by order of the  
24 court, after every contest for this academic year. And  
25 that being said, I think we should try the case on the

1 merits beginning May 3rd.

2 MR. BRILL: May --

3 THE COURT: Three. I'm assuming this case can  
4 be tried in about a week, and I would strongly urge both  
5 sides to forego dispositive motions so that the parties  
6 can instead -- with a bench trial, there's no point in  
7 having a dispositive motion right before the bench trial  
8 because if you're going to win summary judgment, you're  
9 going to win the bench trial.

10 MR. ORLEANS: Are you agreeable to that?

11 MR. BRILL: Yes.

12 MR. ORLEANS: Okay. So are we.

13 THE COURT: And that way you can focus on  
14 getting your discovery done and preparing your witnesses  
15 and having an efficient trial.

16 We should at the appropriate time talk about  
17 mechanisms to make that trial efficient, and I am very  
18 open to trial by submission of deposition transcripts that  
19 are highlighted.

20 MS. GAMBARDELLA: By fire.

21 THE COURT: You know, putting on affidavits for  
22 direct, having crosses, however we want to do it in a way  
23 that makes this thing efficient but, at the same time,  
24 fair. But I really think that both sides have raised  
25 strong points about the timing, suggested timing of the

1 trial. The fundamental thing for me, it seems, is I think  
2 that there is a reasonable compromise if we get it done  
3 the first week of May, it's not ideal for the volleyball  
4 players who want to switch schools, but it, I think, gives  
5 the plaintiffs the opportunity to take the discovery they  
6 need to get prepared, and to have essentially a full  
7 academic, almost a full academic or athletic season for  
8 every sport and for both sides to make their arguments  
9 based upon that record.

10 MS. GALLES: Your Honor, could I just raise one  
11 issue around that date?

12 THE COURT: Sure.

13 MS. GALLES: Whether that's finals week. We  
14 expect to have many of these students testifying and do we  
15 know when finals are? I understand that you want to do it  
16 early but, depending upon when finals are, it may require  
17 to do it one week later or --

18 THE COURT: My belief is the finals may be  
19 somewhat later but we ought to confirm that.

20 MS. GALLES: Okay. So that it would not  
21 conflict with the final exams.

22 MS. GAMBARDELLA: What were the dates of our  
23 hearing?

24 MR. ORLEANS: 11th and 12th.

25 MS. GAMBARDELLA: Because finals week, I

1 believe, was around there or the week after, last year.

2 MR. BRILL: We'll confirm that relatively  
3 quickly.

4 THE COURT: Because it's a bench trial, if it  
5 turns out we have some students that need to testify, I  
6 can work you in earlier too, so those students can testify  
7 in April.

8 MS. GAMBARDELLA: Your Honor, may I inquire, so  
9 if the complaint is -- Ed, if you don't mind -- if the  
10 complaint is amended and there are more claims brought, is  
11 there a bifurcated discovery period or would discovery on  
12 any other claims brought in be simultaneous? I'm not  
13 sure --

14 MR. BRILL: We'd have to see what the new claims  
15 were, probably.

16 THE COURT: That's what I was going to say.  
17 Let's see how it goes.

18 MR. BRILL: There's one -- I'm sorry, were  
19 you --

20 THE COURT: No.

21 MR. BRILL: We had, as I understand it, the  
22 defendant had not answered the original complaint because  
23 there was some understanding the complaint was about to be  
24 amended, we had an informal understanding about that, so I  
25 think we ought to have something formal now. If there is

1 going to be an amended complaint, we'd just like to wait  
2 to answer the amended complaint, if that makes sense.

3 MR. ORLEANS: Yes, we don't have any problem  
4 with the defendant not answering until an amended  
5 complaint is filed, and we'll endeavor to get the amended  
6 complaint filed as soon as we can.

7 I should just tell Your Honor I've got a trial  
8 in front of Judge Thompson coming up in November and I'm  
9 pretty swamped for the next few weeks, but we do have  
10 other lawyers working on the case as well. We'll do our  
11 best to get an amended complaint filed reasonably promptly  
12 and, as we indicated in the Rule 26 report, we will  
13 substitute Logan Riker, who's now 18, for her mother. And  
14 I understand there's no objection to that.

15 MR. BRILL: No.

16 THE COURT: Ms. Gambardella, going back to the  
17 question about simultaneous discovery, I think discovery  
18 should, unless there's a good reason not to, should  
19 proceed with respect to any issues that are --

20 MS. GAMBARDELLA: I assume that's what you meant  
21 but just wanted to make sure.

22 THE COURT: If a coach is going to be deposed,  
23 it would be unfortunate, I think, to limit it to --

24 MS. GAMBARDELLA: Agreed.

25 THE COURT: -- issues that are going to be

1       tried.

2               MR. ORLEANS:  And we agree as well.  No point in  
3       deposing a coach twice.

4               MS. GAMBARDELLA:  Absolutely not.

5               MR. ORLEANS:  Explore all the issues.

6               MS. GAMBARDELLA:  Thank you.

7               THE COURT:  In terms of other deadlines, rather  
8       than trying to work through these now, because I have a  
9       sentencing scheduled, frankly, I'm going to ask counsel to  
10      go back --

11              MR. ORLEANS:  I think we should be able to work  
12      something out.

13              THE COURT:  I'm hopeful in light of the trial  
14      work you can work back, and if you have trouble, give me a  
15      call and we'll sort it out.

16              MR. BRILL:  Working back from the trial date.

17              THE COURT:  But my hope is everybody can agree  
18      what makes sense with all these other deadlines based upon  
19      the trial date.

20              In terms of a pretrial memo, I don't need that  
21      more than, say, a week before trial starts.  And if you  
22      think there's going to be a need to do so, I could even  
23      get it later than that.  If I could get it three or four  
24      days before trial, that should be enough.  So if you  
25      believe that there's critical last minute discovery that

1 has to get included in a trial memo, then let me know and  
2 we'll try and accommodate that.

3 MR. ORLEANS: Certainly, Your Honor.

4 THE COURT: All right. What else can we  
5 usefully take up today?

6 MR. BRILL: I think that's about it for today.

7 MR. ORLEANS: Pretty much it for today.

8 MR. BRILL: We need some time to try and work  
9 things out based on this trial date.

10 THE COURT: I'll look for hopefully a joint  
11 motion, if not a joint schedule.

12 MR. ORLEANS: We'll set a schedule.

13 MR. BRILL: We're certainly free to begin  
14 discovery at this point?

15 THE COURT: I don't think anybody should hold  
16 back on discovery.

17 MR. ORLEANS: Okay.

18 THE COURT: The case is proceeding and it ought  
19 to proceed, and the only thing I would say is if you hit a  
20 bump in the road, call me sooner than rather than later so  
21 we can try and work it out. I would not want a dispute  
22 about whose deposition is going forward first or what is  
23 going to happen, anything to slow this case down and  
24 interfere with the trial date.

25 MR. ORLEANS: There are no indications thus far

1 we'll be subject to that sort of dispute.

2 THE COURT: I've had those before though, trust  
3 me.

4 MR. ORLEANS: So have I.

5 THE COURT: All right, thank you all.

6 (Whereupon the above matter was adjourned at 3:00  
7 o'clock, p. m.)

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## C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

**/S/ Susan E. Catucci**

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