IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KAYLA LAWLER, ERIN OVERDEVEST, KRISTEN CORINALDESI, and LOGAN RIKER, individually and on behalf of all those similarly situated; and ROBIN LAMOTT SPARKS, individually,	:	CIVIL ACTION NO: 3:09-CV-00621 (SRU)
Plaintiffs,	:	June 10, 2010
against	:	
QUINNIPIAC UNIVERSITY,	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION IN LIMINE

The central issue for trial in this phase of the case is whether Quinnipiac University is currently complying with Title IX by providing substantially proportionate athletic participation opportunities to men and women. Quinnipiac's past history of compliance or non-compliance with Title IX is simply not relevant to the question of whether the school is currently providing proportionate opportunities, and whether plaintiffs consequently have any right to declaratory or injunctive relief. Moreover, Quinnipiac's practices and procedures with respect to roster management changed substantially beginning in July 2009, when Mark Thompson, Quinnipiac's Senior Vice President for Academic and Student Affairs, assumed responsibility for the Athletic Department and took direct control over roster management. As a result, evidence of past roster management practices has no relevance as to how Quinnipiac is currently determining and managing team rosters. Quinnipiac therefore, requests (1) that evidence regarding Quinnipiac's past compliance with Title IX before 2009-2010 be excluded during the trial; and (2) that evidence from the Preliminary Injunction Hearing regarding Quinnipiac's roster practices before the 2009-2010 academic year be eliminated from the trial record.

I. The Appropriate Inquiry is Quinnipiac's Current Compliance

Title IX provides that no person shall be "excluded from participation in" or "subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). OCR's 1979 Policy Interpretation sets out three ways for a university to comply with Title IX, based on:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

A school can comply with Title IX by meeting any of these three prongs. *See* May 22, 2009 Ruling and Order Granting Preliminary Injunction ("PI Decision") at 31. Quinnipiac is relying on Prong 1 for the first time in 2009-2010; in previous years, it relied on Prong 2. The Court made no findings in its Preliminary Injunction decision as to whether Quinnipiac was in compliance with Title IX under Prong 2 prior to 2009-2010, noting only that "Quinnipiac has explicitly relied on Prong 1 for Title IX compliance for the upcoming 2009-2010 academic year." PI Decision at 31. A trial over whether Quinnipiac was in compliance in years prior to 2009-2010, when the school was relying on an entirely different prong, would be a complete waste of the time and resources of the Court and the parties.

Although Prong 2 looks to whether an institution can show a history of program expansion responsive to the developing interests of the underrepresented sex, Prong 1 does not require a history of compliance. Instead, Prong 1 deals solely with a school's present compliance through offering participation opportunities for male and female athletes in numbers substantially proportionate to their respective enrollments.

Plaintiffs made this precise point in their Trial Brief in Support of Plaintiffs' Motion for Preliminary Injunction, dated May 14, 2009. Plaintiffs stated,

> [P]rong one deals with present proportional sports opportunities. An institution is either *presently* providing substantially proportional opportunities or it is not. Prong 1 of the three-prong test is worded in the *present* tense. It measures whether opportunities *are* provided in substantially proportionate numbers . . . .

Plaintiffs' PI Brief at 17 (emphasis in original). Because Prong 1 requires *present* compliance, evidence regarding alleged past non-compliance with a different prong should not be admitted at trial.

In *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993), the Tenth Circuit held that past failure to comply with Title IX does not impact whether a school is currently in compliance and that only current compliance is relevant to whether a school is violating Title IX. The court found that "because the reinstatement of the softball team is predicated upon defendant's Title IX violation, if that violation were remedied in accordance with either of the other two benchmarks of the effective accommodation test defendant would then no longer be obligated to maintain its softball program." *Id.* at 834. The court went on to state, "If, for example, defendant chose to cut its athletic programs in such a way as to meet the substantial proportionality benchmark, plaintiffs would have no basis for asserting their right to play softball." *Id.* The Tenth Circuit's approach is consistent with the purpose of Title IX, which is to ensure compliance in the present, not to punish schools for alleged non-compliance in the past.

II. Quinnipiac's Changes in Administering its Roster Management Program

Not only is evidence of Quinnipiac's alleged historical non-compliance immaterial from a legal standpoint because Prong 1 deals solely with present compliance, but this evidence is further irrelevant because Quinnipiac substantially changed its roster management practices and procedures for the 2009-2010 academic year.

In July 2009, Dr. Mark Thompson, Quinnipiac's Senior Vice President for Academic and Student Affairs, assumed responsibility for the Athletics Department and began overseeing the roster management program. Dr. Thompson set roster numbers in 2009-10 based on a review of past squad sizes, NCAA average squad sizes for each sport, and conversations with coaches to ensure that each team's roster size would provide genuine participation opportunities for all athletes on the team. This was not a "cap" for men's teams or a "floor" for women's teams, but actual roster numbers that each coach was expected to – and did – adhere to. Dr. Thompson also made clear to the coaches that if they wanted to add or delete an athlete after the initial roster was set, they needed approval from him. Dr. Thompson kept a vigilant watch over the roster management program and ensured that there was absolutely no manipulation of the roster numbers. Dr. Thompson also worked closely with the coaches to determine appropriate roster numbers for 2010-2011, which he recently set, and he will continue to oversee the roster management program in the future.

The coaches also received training in Title IX, including roster management, during the fall semester. They were educated on the University's requirement that each team's roster size had to reflect genuine participation opportunities for all athletes, and also on what they could and could not do with respect to their rosters during the year. For example, a coach could add a member to the team if there was a need to fill a certain position because of unforeseen injuries, but could not simply add another member to the team without any justification. The coaches worked together with the athletic department and Dr. Thompson so that women and men were provided with genuine athletic opportunities, substantially proportionate to the undergraduate

population in 2009-2010. In sum, there were significant changes in the practices and procedures for roster management at Quinnipiac.

III. Evidence Of Quinnipiac's Past Practices Should Be Excluded Because it is Irrelevant and Prejudicial

Defendant objects to evidence regarding Quinnipiac's roster management practices or its alleged non-compliance with Title IX prior to 2009-10 as inadmissible under Federal Rule of Evidence 402 because it is irrelevant to the narrow question before the Court and under Rule 403 because the danger of unfair prejudice outweighs any potential probative value.

Defendant understands that this Court has already heard evidence regarding the school's past practices during the Preliminary Injunction Hearing, and that evidence from a preliminary injunction hearing typically becomes part of the trial record under Federal Rule of Civil Procedure 65(a)(2). Nonetheless, such evidence must still be "admissible at trial" for it to come into evidence at trial. *See Home Oil Co. v. Sam's E., Inc.*, 252 F. Supp. 2d 1302 (M.D. Ala. 2003) (striking from an opposition to a summary judgment motion testimony that had come in during a preliminary injunction hearing because it would not be admissible at trial, and thus did not become part of the record under Rule 65(a)(2)); *see also WWP, Inc. v. Wounded Warriors, Inc.*, No. 8:07CV370, 2009 WL 3063050, at *1 (D. Neb. Sept. 21, 2009) ("The evidence presented during a preliminary injunction may be re-presented at trial, so long as the evidence is relevant and not inadmissible under some other rule."). The court necessarily considered evidence as to Quinnipiac's roster management practices in 2007-08 and 2008-09 in determining whether Quinnipiac would likely be in compliance with Prong 1 in 2009-10. But the Court can now determine whether Quinnipiac is in compliance with Prong 1

based on the evidence as to what actually happened in 2009-10. The evidence presented at the preliminary injunction hearing concerned practices at a time when Quinnipiac was not relying on Prong 1, and before the significant changes in administration of the roster management program described above.

Finally, Rule 65(a)(2) makes clear that its purpose is to ensure that evidence from a preliminary injunction "need not be repeated upon the trial." F.R.C.P. 65(a)(2); *see SEC v. N. Am. Research & Dev. Corp.*, 59 F.R.D. 111, 114 (S.D.N.Y. 1972) (noting Rule 65(a)(2) was added to "permit a saving of time and the elimination of duplicating evidence"); *Wright & Miller* F.R.P. § 2950 (noting the purpose of Rule 65(a)(2) as achieving "some economy" by making "repetition of evidence . . . unnecessary"). Defendant is not asking that the evidence from the Preliminary Injunction Hearing be excluded from the record just so it can be repeated again at trial. To the contrary, Quinnipiac asks that this evidence be excluded in its entirety.

CONCLUSION

The Court should preclude plaintiffs from presenting evidence at trial regarding Quinnipiac's alleged failure to comply with Title IX and roster management practices prior to 2009-10 and should eliminate from the trial record any such testimony or documentary evidence that is already in evidence from the Preliminary Injunction Hearing.

Dated: June 10, 2010

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