

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF CONNECTICUT

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STEPHANIE BIEDIGER, KAYLA LAWLER,	:	
ERIN OVERDEVEST, KRISTEN	:	CIVIL ACTION NO:
CORINALDESI, and LOGAN RIKER,	:	
individually and on behalf of all those	:	3:09-CV-00621 (SRU)
similarly situated; and	:	
ROBIN LAMOTT SPARKS, individually,	:	
	:	
Plaintiffs,	:	June 21, 2010
	:	
against	:	
	:	
QUINNIPIAC UNIVERSITY,	:	
	:	
Defendant.	:	
-----	X	

**DEFENDANT'S TRIAL BRIEF**

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## **PRELIMINARY STATEMENT**

Quinnipiac University complies with Title IX by providing athletic participation opportunities to male and female students that are substantially proportionate to their respective undergraduate enrollment. In the 2009-2010 academic year, Quinnipiac offered genuine participation opportunities to its athletes, implementing new procedures to ensure that roster numbers were established based on the needs of the teams and that any addition to or deletion from a team was made for a legitimate reason.

Plaintiffs' arguments in this case raise three principal questions: (1) whether Quinnipiac's roster numbers reflect genuine participation opportunities, (2) whether the women's cross country team, indoor track and field team and outdoor track and field team count as three separate sports, and (3) whether Quinnipiac's varsity Competitive Cheer team counts as a sport. As explained below, the evidence will show that the answer to each of these questions is yes.

With respect to the first question, the men and women who were listed on the rosters for varsity sports at Quinnipiac received genuine athletic participation opportunities. This past year, the team sizes were set by the University's Senior Vice President for Academic and Student Affairs, Dr. Mark Thompson, after discussions with the coaches and consideration of the NCAA average squad sizes to ensure that each team would provide students with genuine participation opportunities. The evidence will show that the students did receive such opportunities and that almost every single athlete trained and practiced, received coaching, and competed. Of the students who did not compete, the vast majority were injured and trained to recover during the season.

Plaintiffs' assertion that some student-athletes should not "count" for Title IX because they were not elite athletes who meet Plaintiffs' arbitrary and nebulous classification of "varsity-level" is based on neither fact nor law and is contrary to both the letter and spirit of Title IX. Despite having months to analyze Quinnipiac's squad lists, Plaintiffs are unable to contest any of the University's designations of athletes who were on teams as of the first date of competition. Instead of showing any evidence of manipulation, Plaintiffs cling to a handful of "red flags" based solely on Plaintiffs' speculation about athletes who they think may or may not have actually participated, and develop new unsupported ways of counting athletes that have no basis in logic or the law.

On the second question, Quinnipiac properly counts its cross country, indoor track and field and outdoor track and field athletes. Cross country, indoor track and field, and outdoor track and field are each distinct sports with separate championships. The NCAA and every other athletics governing body recognize them as three distinct sports.

Finally, Quinnipiac's Competitive Cheer team is a varsity team that is run like every other varsity sport at the University. The team is administered by the athletics department, gives scholarships to its athletes, practices in accordance with NCAA rules, and the sole purpose of the team is to compete with other college teams. The team follows the rules and competes in the defined season set by the National Competitive Stunts and Tumbling Association ("NCSTA"), which was formed in 2009 as the national governing body for Competitive Cheer.



In short, Quinnipiac is in compliance with Title IX and will remain in compliance next year, even with the elimination of the women's volleyball team.<sup>1</sup>

### **ARGUMENT**

Title IX provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a). The regulations implementing Title IX prohibit sex-based discrimination in athletic programs offered by a recipient of federal funds, and require recipients to “provide equal athletic opportunity for members of both sexes.” 45 C.F.R. § 86.41(c) (subsequently codified at 34 C.F.R. § 106.41(c)). The regulations specify that, in determining whether equal opportunities are available, one must consider “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” *Id.*

The Department of Health, Education and Welfare (now the Department of Education) issued a 1979 Policy Interpretation of Title IX's application to college sports, stating that to be in compliance, a school can meet one of three prongs: (i) provide women and men with proportionate participation opportunities at rates that are substantially proportionate to their respective rates of enrollment as fulltime undergraduates, or (ii) demonstrate continuing program expansion for the underrepresented sex, or (iii) fully accommodate the athletic interests of the underrepresented sex.

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<sup>1</sup> For a thorough statement of facts, please see Quinnipiac's Proposed Findings of Fact and Conclusions of Law.

Prior to 2009-2010, Quinnipiac relied on Prong 2 of the three prong test for compliance with Title IX and never claimed to be in compliance with Prong 1. For the first time in 2009-2010, Quinnipiac is relying on Prong 1. Quinnipiac's athletic participation opportunities in 2009-2010 were substantially proportionate to its undergraduate population. The number and percent of male and female athletes in 2009-2010 and the gender breakdown of the undergraduate population is shown below:

	Male	Female	Total
<b>2009-2010 Varsity Athletes (Number)</b>	166	274	440
<b>2009-2010 Varsity Athletes (Percent)</b>	37.73%	62.27%	100%
<b>2009-2010 Undergraduate Population</b>	38.13%	61.87%	100%
<b>2008-2009 Undergraduate Population</b>	38.40%	61.60%	100%

(Attached as Exhibit A is a more thorough breakdown of the first date of competition and last date of competition roster numbers for each sport during the 2009-2010 academic year.) Similarly, Quinnipiac's roster numbers established by Dr. Thompson for 2010-2011 are substantially proportionate to its enrollment, even without the women's volleyball team. (Attached as Exhibit B is a chart with the 2010-2011 roster numbers.)

Quinnipiac achieved substantial proportionality because (1) its roster numbers reflect genuine participation opportunities, (2) it correctly counts athletes who compete on cross country, indoor track and field and outdoor track and field teams as competing

in three separate sports, and (3) its varsity Competitive Cheer team provides genuine athletic participation opportunities.

Plaintiffs cannot meet their burden of proving – by a preponderance of the evidence – that Quinnipiac does not provide substantially proportionate participation opportunities to men and women. *See Bruneau ex rel. Schofield v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2d Cir. 1998); *Williams v. Paint Valley Local School Dist.*, 400 F.3d 360, 363 (6th Cir. 2005).

I.

**QUINNIPIAC’S ROSTER NUMBERS  
REFLECT GENUINE PARTICIPATION OPPORTUNITIES**

**A. Quinnipiac’s Roster Management Program is a Legitimate Means of Complying with Title IX**

Roster management does not equate with roster manipulation, nor is roster management a dirty word. The NCAA 2008 Gender Equity Manual notes that, “Unfortunately, there currently appears to be a negative connotation when the term ‘roster management’ is used.” Manual at 180. The roster management program at Quinnipiac was carefully designed and managed to ensure students received genuine athletic participation opportunities.

In 2009-2010, Quinnipiac’s roster management program did not involve “floors” or “ceilings,” but rather specific targets that were determined by Dr. Thompson. In July 2009, Dr. Thompson assumed responsibility for the Athletics Department and took charge of the roster management program. Dr. Thompson determined proposed roster numbers based on the sizes of Quinnipiac’s teams in past years and NCAA averages. Then, Dr. Thompson engaged in an interactive process with the coaches, discussing the proposed roster numbers with each coach to ensure that they could provide genuine

athletic opportunities to all of the students on their rosters. When coaches asked for changes to their roster numbers, Dr. Thompson worked with the coaches to adjust their rosters where possible.

The roster management program changed substantially from the program Quinnipiac had in place prior to the 2009-2010 academic year, when the school was not relying on Prong 1. With Dr. Thompson at the helm, carefully setting roster numbers and vigilantly monitoring additions and deletions from teams to make sure they were only made for legitimate reasons, the roster spots on Quinnipiac's teams represented genuine athletic participation opportunities.

Although Quinnipiac did not set "ceilings" or "floors" in 2009-2010, such a practice is discussed and approved of in the NCAA Gender Equity Manual. The Manual explicitly recognizes that roster management can refer to setting caps on the number of men who can participate in each sport, and "roster management may also set minimum numbers for each varsity team in the women's program." *Id.* The Manual goes on to discuss the benefits of roster management, stating, "In summary, if maximums for men and minimums for women are truly fair, this practice can assist administrators in predicting more accurately future expenditures in each sport, while simultaneously permitting a more equitable distribution of the financial resources between men and women." *Id.*

More generally, the Office of Civil Rights ("OCR") and courts have long accepted roster management as a legitimate means of complying with Title IX. In OCR's Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, issued January 16, 1996 ("OCR 1996 Clarification"), OCR makes clear that "An institution can

choose to eliminate or cap teams as a way of complying with part one of the three-part test,” and that “Title IX provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.” Thus, OCR recognizes the practice of roster management and explicitly acknowledges that it is a legitimate means of achieving proportionality.

Courts have similarly endorsed roster management as a legitimate tool for complying with Title IX. See, e.g., *Neal v. Board of Trustees*, 198 F.3d 763 (9th Cir. 1999) (holding “an institution in which male athletes are overrepresented can bring itself into Title IX compliance by reducing sufficiently the number of roster spots available to men”).

Indeed, for a school to achieve substantial proportionality within a small margin, roster management is the only truly feasible mechanism. This is particularly true at a school like Quinnipiac, where the entire number of student athletes is only about 440, and so a difference of a handful of students on men’s teams and women’s teams can have a significant impact on the percentages of male and female athletes.<sup>2</sup> Setting roster sizes for men’s teams is not enough. To keep substantial proportionality (and *certainly* to keep the strict proportionality Plaintiffs erroneously suggest is required), schools have little option but to manage the sizes of both men’s and women’s teams. If the sizes of women’s teams were not controlled, schools could face lawsuits each year from either women or men claiming that the school did not provide proportional opportunities, depending on the number of spots that happen to be filled in a given year.

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<sup>2</sup> In 2009-2010, Quinnipiac had 12 women’s varsity teams. Thus, if each of these teams decided to have just 2 fewer students on the roster, that would equate to 24 fewer participation opportunities for women, representing over 2 percent of total athletic opportunities.

This is an untenable situation for universities. Thus, roster management is not only approved by the NCAA Gender Equity Manual, OCR, and the courts, but it is a practical necessity for schools trying to achieve proportionality and satisfy Prong 1.

**B. The Definition of “Participant” for Purposes of Title IX Compliance**

Roster management only serves to achieve compliance with Title IX if the number of students listed on team rosters reflects genuine participation opportunities. See PI Decision at 34. This is the case at Quinnipiac. OCR’s 1979 Policy Interpretation and 1996 Clarification both define participants as those athletes:

- a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport’s season; and
- b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport’s season; and
- c. Who are listed on the eligibility or squad lists maintained for each sport, or
- d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

The 1996 Clarification goes on to explain that “In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons) . . . and those athletes who practice but may not compete.” OCR explains why athletes still count as participants, even when they do not compete:

OCR’s investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate team. Because these are significant benefits, and because

receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

The OCR also clarifies that, “As a general rule, all athletes who are listed on a team’s squad or eligibility list and are on the team as of the team’s first competitive event are counted as participants by OCR.” Indeed, the Equity in Athletics Disclosure Act (“EADA”) helps reveal whether schools are complying with Title IX by requiring schools to report the number of participants on teams as of the first date of competition.

The EADA definition of “participants” differs slightly from the OCR definition, and, when taken together, these two definitions provide a guide to determining who should count as an athletic participant for purposes of Title IX. The regulation implementing the EADA defines participants as “students who, as of the first day of a varsity team’s first scheduled contest –

- (A) Are listed by the institution on the varsity team’s roster;
- (B) Receive athletically related student aid; or
- (C) Practice with the varsity team and receive coaching from one or more varsity coaches.

34 C.F.R. § 668.47(b)(3). The regulation goes on to note that “Any student who satisfies one or more of the criteria . . . is a participant, including a student on a team the institution designates or defines as junior varsity, freshman, or novice, or a student withheld from competition to preserve eligibility (*i.e.*, a redshirt), or for academic, medical, or other reasons.” *Id.*

**C. The Athletes on Quinnipiac’s Female Teams Receive Genuine Participation Opportunities**

An athlete counts as a participant for Title IX purposes if he or she is a member of a team, regardless of whether the athlete actually participates in a given number of competitions or performs at a certain level in those competitions. See *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 835 (10th Cir. 1993) (“Nothing in Title IX requires an institution to create a ‘top flight’ varsity team . . . .”); *Choike v. Slippery Rock Univ. of Pennsylvania of the State System of Higher Education*, No. 06-622, 2006 WL 2060576, at \* (W.D.Pa. July 21, 2006) (noting that for a position on an athletic team to be “meaningful” it must be “filled”).

Of course, just because a school has roster numbers that look proportional, this does not necessarily mean that a school complies with Prong 1. OCR noted in the 1996 Clarification that “participation opportunities must be real, not illusory.” There are two steps to a school providing genuine athletic opportunities such that when you “look behind the numbers,” the rosters reflect genuine participation opportunities. The first step is to look at the number of athletes on each team. The second step is to look at how the teams actually functioned, and whether there were athletes who were merely “padding” for Title IX purposes, but did not receive genuine athletic opportunities.

1. Quinnipiac’s Teams Are Appropriately Sized

When Dr. Thompson took charge of the athletics department and began supervising the roster management program, he took several steps to ensure that teams were appropriately sized. First, Dr. Thompson studied the average squad sizes for NCAA teams. Dr. Thompson developed proposed roster numbers for each team based on these averages, which he distributed to coaches in June 2009. Dr. Thompson



then personally met with each coach and discussed the proposed roster numbers to determine whether the numbers were reasonable and appropriate for their teams.

Dr. Thompson had follow-up meetings and correspondence with many of the coaches, engaging in back and forth to make sure that each team was properly sized.

Dr. Thompson adjusted rosters by adding or deleting spots, based on the input from the coaches. The roster-sizing process culminated with the Athletic Director, Jack McDonald, sending the coaches a letter with their roster number and asking the coaches to certify that they were able to provide a genuine opportunity for a Division I experience for the number of athletes on their roster.

Notwithstanding the careful and good faith process Quinnipiac undertook in determining roster sizes, Plaintiffs argue in the Joint Pre-Trial Order that Quinnipiac violated Title IX by “maintaining women’s teams in certain sports that are so large that not all student-athletes get genuine participation opportunities.” Joint PTO at 3. Plaintiffs argue that the squad size of the women’s softball team is a “red flag,” and also question the size of the women’s cross country, indoor track and field and outdoor track and field teams.

*a. Softball*

Coach Germaine Fairchild of the women’s softball team was the only coach to continue objecting to the number of athletes on her team, after engaging in detailed conversations with Dr. Thompson regarding the appropriate squad size for the team. For 2009-2010, Dr. Thompson reduced the softball roster to 20, from the 23 students on the softball team as of the first date of competition in the 2008-2009 academic year. In setting this number, Dr. Thompson considered Coach Fairchild’s testimony at the Preliminary Injunction Hearing that 20 would be a “doable” number for a softball team.

PI Tr. at 530. Dr. Thompson also took into account the average squad size for an NCAA Division I women's softball team in 2007-2008 (the number that was available to Dr. Thompson when he was crafting the appropriate squad sizes), which was 19.4. In addition to looking to Coach Fairchild's assessment and the NCAA average squad size, we now have the benefit of hindsight, and can look at whether Coach Fairchild was able to give genuine participation opportunities to 20 women. The answer is indisputably "yes."

Coach Fairchild filled her team with 20 athletes, each of whom stayed on the team throughout the entire season. Indeed, Coach Fairchild added an additional athlete to her team because she needed to fill a specific position when one of the team members became injured. Of the 21 women on the team by the end of the season, 19 of them competed. The two women who did not compete were both scholarship athletes.

*b. Women's Cross Country, Indoor Track and Field and Outdoor Track and Field*

The head coach of the women's cross country, indoor track and field and outdoor track and field teams changed during the summer of 2009 from Shawn Green to Carolyn Martin. Thus, Dr. Thompson set the 2009-2010 roster numbers based on discussions with former Head Coach Green. The women's cross country team had 18 members, and the women's indoor and outdoor track and field teams each had 30 members. The NCAA average squad size for a women's Division I cross country team in 2007-2008 was 16.3, the average size of an indoor track and field team was 37.5,

and the average size of an outdoor track and field team was 36.9.<sup>3</sup> As Defendant's expert on cross country and track and field, Samuel Seemes, testified, there is significant variation of squad sizes for cross country, indoor track and field and outdoor track and field teams within the NCAA and Northeast Conference. For example, within the NEC Conference, women's cross country teams range from 7 to 27 athletes, women's indoor track and field teams range from 18 to 55 athletes and women's outdoor track and field teams range from 18 to 55 athletes.

Of the 18 athletes on the women's cross country team, 16 actually competed in cross country meets, and the two athletes who did not compete were both scholarship athletes who were red-shirted. On the women's indoor track and field team, of the 30 athletes, 26 competed during the season. Of the 4 who did not compete, 3 were scholarship athletes and the 4th was injured. Of the 30 athletes on the women's outdoor track and field team, 24 competed. Of the 6 who did not compete, 3 were scholarship athletes, 2 non-scholarship athletes were injured, and the third took medical leave.

Indeed, for the 2010-2011 season, Head Coach Carolyn Martin requested (and received) significant increases in the sizes of the women's cross country, indoor track and field and outdoor track and field teams.

## 2. The Athletes on Quinnipiac's Teams Receive Genuine Athletic Opportunities

The members of Quinnipiac's teams receive the host of benefits that come from being part of a varsity collegiate team. Even those members of the teams who did not

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<sup>3</sup> The average size for a track and field team is not directly comparable as Quinnipiac does not compete in most field events.

compete because of injury or because they were not as skilled as the other members of the team, obtained genuine athletic opportunities. OCR explicitly recognizes that athletes include members of a team who “practice but may not compete,” and that there are tangible benefits like training and practice time, coaching, tutoring, locker room facilities and equipment, and “important non-tangible benefits” that come from being a member of an intercollegiate athletic team. 1996 Clarification. The athletes at Quinnipiac, from the star performer to the last man or woman on the bench, receive these benefits.<sup>4</sup> Thus, Plaintiffs’ arguments regarding sub-varsity athletes and their speculation about “red flags” on women’s teams are without merit.

*a. Plaintiffs’ Assertion Regarding “Sub-Varsity” Athletes is Baseless*

Plaintiffs assert that some players who practiced and trained with their teams all season and participated in numerous competitions should not count for Title IX purposes because they were not good enough. In particular, Plaintiffs make this assertion with respect to the women’s cross country, indoor track and field and outdoor track and field teams. As the Head Coach of the Women’s cross country, indoor track and field and outdoor track and field teams testified, the athletes on her teams all attended practices, trained with the team, and received coaching and equipment, regardless of whether they were the fastest or the slowest runners on the team. The team members also received the intangible benefits of learning teamwork, self-discipline and dedication, which are among the most important reasons colleges and universities support athletic teams.

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<sup>4</sup> There are just a handful of athletes who, for various reasons, did not practice and train with their teams. These athletes include one female and one male basketball player who had exhausted their eligibility prior to the 2009-2010 season, but were scholarship athletes, and so were still counted for EADA purposes, and a female scholarship athlete who was studying abroad during the indoor and outdoor track and field seasons.

Not only do the individual athletes obtain a plethora of benefits by being members of a varsity intercollegiate team, the teams benefit from having them as members. For example, Coach Martin testified that one of her slowest runners helped contribute to the team by being skilled at developing tactics for beating her competitors. Although she may not have had the fastest legs, she ran smart and she ran hard. A slower runner or a less skilled member of any team can still benefit his or her team in a wide variety of ways, including practicing with the team to provide for competitive intra-team scrimmages, inspiring other athletes to work harder, exemplifying certain skills, and participating in positive play (community service conducted by Quinnipiac's varsity athletes) with the rest of the team.

Benchwarmers are a reality of college (and professional) athletics. There will always be a last man or woman on the bench, regardless of how good the team is. Not everyone can be a starter or a star. Indeed, it will be a sad day for student-athletics (and student-athletes) when courts only concern themselves with elite athletes receiving proportional opportunities under Title IX. Just as the 120th member of the men's football team who serves as the "tackling dummy" counts for Title IX purposes, so too does the athlete who runs a little slower than the other members of her team. Indeed, on Quinnipiac's men's teams, there were numerous athletes who either did not compete at all, or only competed in one or two games all season (and only played for a few minutes in those games).

Of course, there are extreme examples where a student is nominally a member of a team, but should not count as a participant for Title IX purposes. For example, if a school added students to a team who had no background in a sport, lacked athletic

ability, and could not participate in any meaningful way in team practices or activities, these individuals would not appropriately be counted as participants in a team; this could accurately be deemed “padding.” But, to suggest that a track or cross country athlete who finished her race in the bottom 25% – but by no means consistently came in last – was not an athlete for purposes of Title IX, runs contrary to the spirit of this law and its fundamental purpose to increase athletic participation opportunities for women. *Cf. Neal*, 198 F.3d at 773 (9th Cir. 1999) (“Title IX has enhanced, and will continue to enhance, women’s opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics.”).

Not only is it an absurd test to judge the number of athletes at a school by assessing the quality of students’ athleticism in specific meets, this is an unworkable legal construct. Who would be the arbiter of which athletes are “sub-varsity,” and how would a school know which athletes to count as participants under this regime (especially at the beginning of the season when it is often unclear which students will emerge as regular players)? Moreover, Plaintiffs’ approach, if adopted, would likely have the perverse effect of *decreasing* women’s participation opportunities, as schools could claim that many of the athletes on men’s teams (such as the last 30 men on the 120-man football team) should not be counted as genuine participants, thus allowing schools to achieve proportionality while offering far fewer athletic opportunities to women.

Plaintiffs’ misguided approach of not counting athletes they deem “sub-varsity” also does not take into account the fact that, with coaching, practice and training,

athletes improve; the benchwarmer in her freshman year may be a starter or even the most valuable player by her senior year.<sup>5</sup> Indeed, sports lore is filled with examples of athletes who were walk-ons, who were not put into games for some time, and who turned out to be star players who flourished and led their teams to victory. In short, the evidence will show that the athletes on each of Quinnipiac's teams received genuine participation opportunities.

*b. Plaintiffs' "Red Flags" Regarding Individual Athletes Are Based Solely on Misguided Speculation*

In addition to creating the concept of "sub-varsity" athletes, Plaintiffs also identify 18 women whose participation they believe raise "red flags," based on nothing other than their own ill-informed conjecture. Of these 18 athletes, spread out among the women's field hockey team, women's ice hockey team, women's lacrosse team and women's soccer team, only 7 did not compete and were not on scholarship. Plaintiffs have not deposed and are not calling at trial any of the coaches of the teams with "red flags," so they presumably plan to rely on sheer speculation regarding the quality of these students' participation opportunities. There is no reason to believe that any of these 18 "red flags" did not practice with their teams and receive the many benefits of team-membership, including coaching, training, uniforms, and equipment. The women's ice hockey team provides a good example of the utterly baseless nature of Plaintiffs' "red flags."

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<sup>5</sup> In certain sports, students regularly join the team without any significant experience playing that sport (such as rowing), making an analysis of participants for Title IX purposes based on skill even more ill-suited. See *Miller v. University of Cincinnati*, No. 1: 05-cv-764, 2008 U.S. Dist. LEXIS 4339 (S.D. Ohio Jan. 22, 2008) (citing testimony that "[t]he majority of students who eventually row competitively matriculate without previous competitive rowing experience," and that the "rowing team usually gets its members through try-outs, walk-ons, word-of-mouth, or through notice on the University's web site").

Plaintiffs identify 5 “red flags” on this team. Two of these “red flags” were scholarship athletes who were on the team for the entire season and played in almost every game, but were deleted from the roster after the season was over because they had poor attitudes and Coach Seeley did not want them on the team the following year. It is unclear what about these athletes raised “red flags” to Plaintiffs. The other three women were walk-ons who had each played ice hockey very competitively in high school, and began the season practicing, training and receiving coaching with the team. These athletes ultimately parted ways with the team at different points during the year because of poor attitudes and disciplinary problems.

Indeed, Coach Seeley explained all of this to Plaintiffs’ lawyer after Plaintiffs placed Coach Seeley on their witness list and arranged to speak with him. *Immediately* after speaking with Coach Seeley, Plaintiffs decided not to call him as a witness after all. Plaintiffs are now making a last-ditch effort to mislead the court into thinking there is something nefarious going on with respect to the women’s teams, based on nothing other than their baseless (and erroneous) speculation.

#### **D. Quinnipiac Correctly Counts the Athletes on its Male Teams**

Plaintiffs desperately attempt to show the number of male participants in varsity sports at Quinnipiac is higher than the roster numbers that were set by Dr. Thompson by: (i) counting athletes who were added after the last date of competition, (ii) double-counting participation opportunities, by including athletes who were added to a team for legitimate reasons after the first date of competition as well as athletes who were deleted from that same team also for proper reasons during the course of the season, and (iii) counting athletes who were deleted from teams before the first date of competition and never practiced or played with the team.



1. Additions to Rosters After All Competition is Over

Contrary to express OCR guidance, Plaintiffs assert that athletes who were added to a team after the last date of competition still count as participants for that year. The OCR 1979 Policy Interpretation and 1996 Clarification both define participants as athletes who received “coaching, equipment, medical and training room services, on a regular basis *during a sport’s season*” and who “are participating in organized practice sessions and other team meetings and activities on a regular basis *during a sport’s season*.” The OCR 1996 Clarification goes on to state, “Under this definition, OCR considers a sport’s season to commence on the date of a team’s first intercollegiate competitive event and to conclude on the date of the team’s final intercollegiate competitive event.” Thus, Plaintiffs are asking this Court to adopt a definition of “participant” that is contrary to the explicit instructions of the OCR.

2. Double-Counting Participation Opportunities

Plaintiffs attempt to redefine how the OCR, EADA, courts and universities have been counting participants for decades. In Plaintiffs’ view, where a single team deleted one athlete who left the team in the middle of the season and added an athlete to fill his position during the course of the season, both athletes should count for purposes of determining how many athletes participated. Thus, under Plaintiffs’ view, a team with 30 athletes that had 5 members quit on a certain date and added 5 members the next day actually offered 35 participation opportunities, whereas a team with 30 athletes that had no deletions or additions over the course of the season would only have 30 participation opportunities. Presumably, under this analysis, women’s teams could increase their participation numbers simply by cutting athletes mid-season and adding

new women to take their places. This is an illogical way of counting participants and it has no legal basis.

In accordance with OCR guidance, to determine proportionality, schools ordinarily look at the number of athletes on a team as of the first date of competition. OCR's 1996 Clarification explains that "As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR." The EADA similarly looks to athletes on a team "as of the varsity team's first scheduled contest" to determine participation opportunities. 34 CFR § 668.47. Of course, if there were reason to believe that the number of athletes on the first date of competition was not representative of the athletes obtaining a genuine participation opportunity on a team, it would be necessary to look at the number of participants during some other point in the season.<sup>6</sup>

There will always be fluctuations in team rosters over the course of a season for legitimate reasons. The evidence will show that Quinnipiac's first date of competition numbers are reflective of the number of participants over the course of the season. Indeed, as of the last date of competition in the championship seasons, the number of women participating on athletic teams at Quinnipiac remained proportional to female enrollment at the University: there were 162 male athletes (37.50%) and 270 female athletes (62.5%), which are almost exactly the same percentages as the first date of competition. (See Exhibit A ) To the contrary, Plaintiff's method of calculating

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<sup>6</sup> Alternatively, in *Cohen v. Brown Univ.* the court calculated participation rates by looking at "those athletes who were members of varsity teams for the majority of the last complete season," which yields a very similar result to looking at the number of Quinnipiac's athletes on the first or last date of competition. 101 F.3d 155, 164 (1st Cir. 1996). This approach similarly refutes Plaintiffs' assertion that an athlete who was on the team for the first few weeks of the season counts *and* the athlete who was added to the team at that point to replace him *also* counts.

participation numbers is illogical, unworkable, contrary to OCR guidance, and has no basis in the law.

3. Athletes Deleted Before the First Date of Competition

Plaintiffs' final and, perhaps, most desperate attempt to show some manipulation that does not exist, is their argument that four male athletes raised "red flags" because they were cut or quit their teams before the first date of competition. Again, the OCR's guidance could not be clearer that athletes who are not on a team as of the first date of competition do not count as participants. Plaintiffs will not be able to point to a single piece of evidence that any of these four men was actually on a varsity team, practiced with a team, received coaching or equipment, or competed on a team in the 2009-2010 academic year.

II.

**Quinnipiac Correctly Counts its Cross Country,  
Indoor Track and Field and Outdoor Track and Field Athletes**

Quinnipiac counts its athletes as the NCAA and EADA direct it to, counting athletes who participate in more than one sport two or three times based on how many sports they participate in. OCR instructs schools that "In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will be counted as a participant in each sport in which he or she participates." 1996 Clarification. Thus, Quinnipiac appropriately counts female athletes who are on the cross country team, indoor track team and outdoor track team multiple times.

**A. Cross Country, Indoor Track and Field and Outdoor Track and Field Are Three Separate Sports**

Quinnipiac appropriately counts its athletes on the women's cross country, indoor track and field and outdoor track and field teams because these are widely recognized as three separate teams. The NCAA Division I 2009-2010 Manual explicitly states, "Cross country, indoor track and field, and outdoor track and field shall be considered separate sports." Division I Manual § 14.2.3.3. The NCAA allows schools to count each of these three teams – cross country, indoor track and field and outdoor track and field – towards the required number of sports offered at a school for membership in a particular Division. See *id.* § 20.9.4.1. The NCAA and the Northeast Conference – of which Quinnipiac is a part – both offer separate championships for cross country, indoor track and field and outdoor track and field. In *Miller v. Univ. of Cincinnati*, No. 1:05-cv-764, 2008 U.S. Dist. LEXIS 4339 (S.D. Ohio, Jan. 22, 2008), the court held that "it is proper for the University to count an athlete who competes on the cross-country team, indoor track team and outdoor track team as competing on three separate teams" because the Department of Education established this format. See also *Boucher v. Syracuse University*, 164 F.3d 113, 116 n.6 (2d Cir. 1999) (discussing school's history of adding women's sports, and noting that three additional women's sports were added to the varsity roster in 1981: "These were indoor track, outdoor track, and cross country.").

As expert Samuel Seemes, the CEO of the U.S. Track and Field Coaches Association, testified, there are numerous differences between these sports, and every governing body considers them to be separate sports. Thus, Plaintiffs' argument that these are not separate sports is completely without merit.

**B. Quinnipiac Has Legitimate Indoor Track and Field and Outdoor Track and Field Teams**

In addition to Plaintiffs' argument that cross country, indoor track and field and outdoor track and field are inherently the same sport, Plaintiffs also argue that the way these sports are run at Quinnipiac makes them all "extensions" of the cross country team rather than three distinct sports. Quinnipiac runs its women's indoor and outdoor track and field teams in accordance with the NCAA rules. The teams have more than the minimum number of athletes and compete in the required number of meets. There is no NCAA rule requiring a school to compete in a certain number of events or a certain distribution of track versus field events for the team to be legitimate.

Indeed, there is no concept of a "bona fide" team in the NCAA rules. No court has held that a team did not qualify for Title IX purposes when it was recognized as a team by the NCAA. The NCAA gives schools the flexibility to focus their track and field programs on whatever events they see fit. Thus, Plaintiffs' arguments that the indoor track and field and outdoor track and field teams should not count for Title IX purposes is baseless.

There are 12 women on the indoor and outdoor track and field teams who were not on the cross country team – yet Plaintiffs seem to suggest that these women who participated in two varsity sports should not count for Title IX because the teams they were members of focused on certain events and did not win the meets they entered. Plaintiffs again concoct their own standards that have no basis in NCAA rules or Title IX jurisprudence.

Plaintiffs also have a third fall-back position that, even if cross country, indoor and outdoor track and field are three separate sports, and even if Quinnipiac's cross

country team is a separate team from its indoor and outdoor track and field teams, Quinnipiac's indoor and outdoor track and field teams should nevertheless count as just one sport. Again, this argument has no basis in the NCAA rules or in the law. Plaintiffs try to argue that Quinnipiac's outdoor track and field team is not a "bona fide" team because the school does not have its own outdoor track and does not host track and field meets, but this position has no merit. As expert Sam Seemes testified, there are numerous schools that have outdoor track and field teams without having their own outdoor track and without hosting meets. And, as explained above, the fact that Quinnipiac focuses its efforts on the track aspects of "track and field" rather than the field aspects is completely within the school's purview and does not have any impact on whether the teams exist and offer genuine participation opportunities to the athletes who are members of them.

Thus, Quinnipiac correctly counts its athletes who participate on the women's cross country, indoor track and field and outdoor track and field teams.

### III.

#### **Quinnipiac's Competitive Cheer Athletes Count for Title IX Purposes**

Varsity Competitive Cheer is a sport that provides genuine athletic opportunities to women at Quinnipiac. OCR clarified the definition of the term "sport" in a "Dear Colleague" letter dated September 17, 2008. In this letter, OCR set forth numerous factors to examine in making an "overall" determination of whether an activity constitutes a sport. OCR explained that it considers "whether the activity is structured and administered in a manner consistent with established intercollegiate or interscholastic varsity sports in the institution's athletics program," looking at whether

such things as its budget and coaching staff are administered by the school's athletics department, whether participants are eligible to receive scholarships, and whether participants are recruited consistent with other varsity sports.

OCR also considers whether the team has practice opportunities consistent with other varsity sports, competitive opportunities, pre-season and/or post-season competition, and whether the "primary purpose of the activity is to provide athletic competition at the intercollegiate or interscholastic varsity levels rather than to support or promote other athletic activities." OCR clarified that its policy is "to encourage compliance with the Title IX athletics regulations in a flexible manner that expands, rather than limits, student athletic opportunities." It is clear that OCR seeks to encourage schools to expand opportunities for women by sponsoring new sports and that their guidance should be interpreted with that in mind.

There can be no serious dispute that Quinnipiac's Competitive Cheer team meets the standard for a varsity sport. The evidence will show this sport is extremely athletic and demands high levels of strength, precision and flexibility. The sole purpose of the Competitive Cheer team is to engage in intercollegiate competition. Quinnipiac's Competitive Cheer team does not cheer for other teams. Quinnipiac has a separate, unrelated sideline cheerleading squad that cheers for other sports teams. The team trains and practices like other varsity teams, recruits like other teams, offers scholarships like other teams, and competes like other teams. The Competitive Cheer team is administered by Quinnipiac's athletics department in the same way as every other varsity sport at the University.

Because the sport is in its infancy, there are currently a limited number of varsity Competitive Cheer teams in the country, so, in addition to its competition against other varsity teams, Quinnipiac's team engages in some competition with club teams and hybrid competitive/sideline teams. This is similar to many other new and emerging sports, like Rugby, where there are a small number of varsity teams that must compete against club teams to maintain a full competition schedule. The only way for new varsity sports to develop, and thereby to create new participation opportunities for women, is to allow varsity teams to compete against non-varsity competitors during the infancy of the sport. If a team could only be counted for Title IX purposes if it had a full schedule of varsity competitors, then no school would ever be willing to be among the first to sponsor a new sport, and the expansion of athletic opportunities for women would abruptly end. This is true not only for an entirely new sport, but also in a situation where a school wants to introduce a sport that is not currently popular in that region of the country.

In 2009, a number of schools, including Quinnipiac, joined together to form the National Competitive Stunts and Tumbling Association ("NCSTA"), a national governing body for Competitive Cheer. The NCSTA set a defined season for the sport and the coaches and administrators agreed upon certain general rules. The NCSTA developed a competition format that is broken down by skill, so individuals and small groups of athletes can be judged. The format has five events: stunts, basket toss, pyramid, tumbling and the traditional team routine. Teams go head to head in competition and qualified judges assess the athletes' performance based on the difficulty of the skills exhibited and the execution of those skills.



In 2009-2010, Quinnipiac competed in this new format twice and competed in eight other meets run by independent organizations. These competitions were based on the traditional team routine and judged the same principal elements, jumps, tumbling, basket tosses, pyramids, partner stunts, choreography and transitions. The athletes were assessed based upon the difficulty of the skills they executed and the precision with which they executed those skills. In each of these meets, Quinnipiac competed against other college teams.<sup>7</sup> In the upcoming 2010-2011 season, Quinnipiac has already scheduled five meets against other varsity teams in the NCSTA format and plans to participate in a total of ten or more competitions.

Quinnipiac's varsity Competitive Cheer team provides genuine athletic opportunities to many young women who receive scholarships, train, practice, and compete, just like athletes on all the other varsity teams at the University. The evidence will show that the women of Quinnipiac's Competitive Cheer team are varsity athletes, and they should be recognized as such under Title IX.

#### IV.

#### **Even if Any of Plaintiffs' Three Theories Had Merit, Quinnipiac Still Provides Substantially Proportionate Opportunities**

##### A. **Definition of Substantial Proportionality**

For Quinnipiac to satisfy Prong 1, it need only provide *substantially* proportionate athletic opportunities to men and women. The determination of substantial proportionality must be made on a case-by-case basis.

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At the Sacred Heart Challenge, Quinnipiac's competitors – University of Connecticut and Fairfield University – withdrew at the last minute.

In *Equity in Athletics, Inc. v. Department of Educ.*, 675 F. Supp. 2d 660 (W.D. Va. 2009), the court states that it has been unable to locate “any authority to support the proposition that a disparity as low as 2% is substantially disproportionate as a matter of law,” dismissing this aspect of plaintiff’s claim because a 2% disparity was “insufficient to state a plausible claim for relief under Title IX.” *Id.* at 682-3. The court noted that there is no requirement for institutions to achieve exact proportionality immediately after eliminating an athletic program in an attempt to comply with Title IX, stating, “Such a requirement would not only be plainly unreasonable, but also contrary to the 1979 Policy Interpretation and its subsequent clarifications, which reflect the need for flexibility and recognize that natural fluctuations in enrollment and/or participation rates can impede an institution’s attempts to attain substantial proportionality.” *Id.* at 683. The court also clarified that the appropriate test is not whether the participation gap is large enough to create an additional team for the underrepresented sex (as Plaintiffs argue in this case), and that OCR “in no way mandates” a finding of non-compliance in such a situation. *Id.* at 682 n.5.<sup>8</sup>

Similarly, in *Boulahanis v. Board of Regents*, the Seventh Circuit found it undisputed that the university achieved substantial proportionality between men’s enrollment and men’s participation in athletics, where the number of male athletes was within three percentage points of enrollment following the elimination of men’s soccer and wrestling. 198 F.3d 633, 639 (7th Cir. 1999). The Sixth Circuit, in *Miami Univ. Wrestling Club v. Miami Univ.*, emphasized that the university removed its men’s

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<sup>8</sup> Contrary to the position of Plaintiffs’ expert, OCR says that this factor, in any event, looks to whether a gap is as large as “the average size of teams offered for the underrepresented sex” at the school, not simply whether the gap is as large as the smallest conceivable team a school could offer. OCR 1996 Clarification.

wrestling, soccer, and tennis teams in an attempt to comply with Title IX and that the university “was successful in that attempt,” since the number of female athletes was within two percentage points of the number of female students. 302 F.3d 608, 611-14 (6th Cir. 2002). In *Miller v. University of Cincinnati*, the court held that the university was in compliance with Title IX during the 2005-2006 reporting period, where the student body was 52.5% male and 47.5% female, and the number of student athletes was 51.1% male and 48.9% female. No. 1:05-cv-764, 2008 U.S. Dist. LEXIS 4339, at \*20 (S.D. Ohio Jan. 22, 2008).

On the other hand, courts have found that schools failed to obtain the substantial proportionality required by Prong 1 when they have had much larger disparities. See, e.g., *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993) (holding a 10.5% disparity was not substantially proportionate); *Ollier v. Sweetwater Union High School District*, 604 F. Supp. 2d 1264 (S.D. Cal. 2009) (holding disparities of 6.7% and 10.3% were sufficient to demonstrate failure to comply with Prong 1); *Brust v. Regents*, No. 2:07 –cv-1488, 2007 U.S. Dist. LEXIS 91303 (E.D. Cal. Dec. 12, 2007) (holding plaintiff stated a claim under Title IX where a 6% disparity existed).

OCR makes clear that it “recognizes that natural fluctuations in an institution’s enrollment and/or participation rates may affect the percentages in a subsequent year,” and that “it would be unreasonable to expect the institution to fine tune its program in response to [a 1%] change in enrollment.” 1996 Clarification.

#### **B. Quinnipiac Provides Substantially Proportionate Participation**

Even in the unlikely event that this Court should find that any one of Plaintiffs’ three theories has merit, Quinnipiac is still in compliance with Title IX because it

provides athletic participation opportunities substantially in proportion to the undergraduate enrollment.

First, even under Plaintiffs' own expert's calculations of the total number of male and female participants, female athletes made up 61.1% and male athletes made up 38.1% of the total athletes at Quinnipiac, once the 30 Competitive Cheer athletes are added to her calculations. This is just a 0.8% difference from the actual enrollment proportions of men and women.<sup>9</sup>

Similarly, even if the Court somehow found that indoor track and field and outdoor track and field are really just one sport and athletes who compete in these two sports should only count once for Title IX purposes, Quinnipiac would still be in compliance. If indoor and outdoor track and field athletes were only counted once, Quinnipiac would have 244 female athletes and 166 male athletes, with women comprising 59.51% of the student athletes. This is only a 2.36% difference with the percentage of females in the undergraduate population.

Similarly, if the Court finds that the athletes on Quinnipiac's Competitive Cheer team did not count for Title IX purposes in 2009-2010, there would be 244 female athletes and 166 male athletes, again creating a mere 2.36% gap with the percentage of women in the undergraduate population. No court has found a differential that small to constitute lack of compliance with Prong 1.

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<sup>9</sup> With the 30 Competitive Cheer athletes added, Plaintiffs' numbers are 277 women and 176 men, for a total of 453 athletes.

V.

**The Appropriate Remedy if the Court Finds for Plaintiffs**

Even if the Court should find that Quinnipiac did not comply with Title IX, the University should not necessarily be ordered to maintain the women's volleyball team. Instead, Quinnipiac should be given an opportunity to develop a compliance plan. See *Cohen v. Brown University*, 991 F.2d 888, 906 (1st Cir. 1993) (Cohen II) (noting "if [the court] ultimately finds Brown's athletic program to violate Title IX, it will initially require the University to propose a compliance plan rather than mandate the creation or deletion of particular athletic teams"); see also *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 302 (2d Cir. 2004) (holding district court should oversee submission by the school districts of compliance plans); *Communities for Equity v. Michigan High School Athletic Ass'n*, 2007 WL 2078753, at \*1 (W.D. Mich. 2007) (ordering defendant to submit a compliance plan). This is particularly important because Plaintiffs bring this action on behalf of a class, not solely for themselves. Thus, the University should be allowed to take the interests of all Quinnipiac students into account in developing a compliance plan if the Court finds the University is not currently in compliance. Also, class members would be entitled to appropriate notice, and absent class members who would be affected should be given an opportunity to be heard as to the proper remedy.

**CONCLUSION**

Defendant requests that Count I of Plaintiffs' complaint regarding proportionality of athletic opportunities be dismissed in its entirety.

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