

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,	:	
	:	
-v-	:	
	:	
QUINNIPIAC UNIVERSITY,	:	June 24, 2010
	:	
Defendant.	:	
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PLAINTIFFS’ PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Plaintiffs submit these Proposed Findings of Fact and Conclusions of Law pursuant to the Court’s pre-trial instructions.

Background

The background of this case is detailed in the Court’s May 22, 2009 ruling granting the Plaintiffs’ Application for a Preliminary Injunction. See *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277 (D. Conn. 2009).

PROPOSED FINDINGS OF FACT

Facts Which Are Not In Dispute

The Plaintiffs and Defendant entered into a series of stipulations filed with the Court on June 10, 2010. As a consequence, the facts set forth in paragraphs 1 – 38 below are not in dispute.

1. Plaintiffs Stephanie Biediger, Kayla Lawler, and Logan Riker, are female student athletes who currently attend Defendant Quinnipiac University in Hamden, Connecticut (“QU” or “the University”). They are members of the Defendant’s varsity women’s volleyball team.

2. Plaintiffs Kristen Corinaldesi and Erin Overdevest were, through academic year 2009-10, female student athletes who attended QU. They were members of the Defendant’s varsity women’s volleyball team.

3. Robin Lamott Sparks is the women’s varsity volleyball coach at QU and has been so employed since 2007. She also is an adjunct professor in communications at the Defendant university.

4. Defendant QU is a private university which receives federal financial assistance and is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681-88 (“Title IX”).

5. Jack McDonald is the Defendant University’s Athletic Director. As such, he is responsible for managing the Athletic Department’s personnel, budget, fund-raising and revenue efforts, athletic events and campus athletic facilities. With the assistance of his staff, he also contributes to oversight of QU’s compliance with all applicable rules and regulations of the National Collegiate Athletic Association (“NCAA”) and with Title IX.

6. Tracey Flynn is employed by the Defendant University in its Athletic Department and holds the titles of Senior Women’s Administrator (“SWA”) and Assistant Athletic Director for Compliance.

7. (RFA #2)¹ The University provides varsity intercollegiate athletic participation opportunities for both male and female students.

8. (RFA #3) The University does not provide intercollegiate athletic participation opportunities at the sub-varsity level, including club team sports.

9. (RFA #4) The University provides male and female students with opportunities to participate in intramural sports.

10. (RFA #9) The University compiles and submits athletic gender equity data to the NCAA each school year.

11. (RFA #49) There are enough current and/or prospective female students at the University who have the interest and ability to participate in varsity, intercollegiate volleyball to maintain a team.

12. The University claims, in this action, that it complied with Title IX in 2009-10 and will comply with Title IX in 2010-11 under “Prong One” of OCR’s 1979 Policy Interpretation concerning compliance with Title IX’s requirement that institutions effectively accommodate the athletic interests and abilities of members of both sexes.

13. The University does not claim, in this action, that it complied with Title IX in 2009-2010 and/or will comply with Title IX in 2010-2011 under “Prong Two” or “Prong Three” of the 1979 Policy Interpretation.

14. (RFA #57) The University is a member of the Northeast Conference (“NEC”).

15. (RFA #58) Both the NCAA and the NEC sponsor championships in Division I intercollegiate volleyball.

¹ References in the form “(RFA # __)” refer to Defendant’s Responses to Plaintiffs’ Requests for Admissions, Plaintiffs’ Trial Exhibit (“PX”) __.

16. (RFA #66) The following schools are members of the NEC: Central Connecticut State University, Fairleigh Dickinson University, Long Island University, Monmouth University, Mount St. Mary's University, Robert Morris University, Sacred Heart University, St. Francis University (NY), St. Francis University (PA), and Wagner University.

17. (RFA #70) The following colleges are located in the state of Connecticut and participate in NCAA Division I athletics: Quinnipiac University, Yale University, University of Connecticut, Central Connecticut State University, Sacred Heart University, Fairfield University, and Hartford University.

18. (RFA #72) The University enrolls students from all 50 states and the District of Columbia.

19. (RFA #109) There is no international governing body for competitive cheer as a sport.

20. (RFA #111) Competitive cheer is not recognized as an Olympic sport.

21. (RFA #118) During the 2008-2009 school year, the University did not have a competitive cheer team that it counted as a varsity sport for purposes of Title IX.

22. (RFA #119) The University offers athletic scholarships for varsity athletes, including volleyball players.

23. (RFA #121) The University has not conducted a national search for a competitive cheer coach.

24. (RFA #122) The University recruits athletes for its varsity intercollegiate sports teams.

25. (RFA #125) The University did not recruit athletes for its competitive cheer team before the recruiting season for the 2009-2010 school year.

26. (RFA #126) The University's cheerleaders did not complete NCAA sports eligibility forms for the 2008-2009 school year.

27. (RFA #127) The University's cheerleaders did not go through the NCAA's sports clearinghouse before the 2008-2009 school year.

28. (RFA #133) The NCAA Division I women's spring track championships include the following events: 100 meter dash, 200 meter dash, 400 meter dash, 800 meter run, 1500 meter run, 5000 meter run, 3000 meter steeplechase, 4X100 meter relay, 4X400 meter relay, 4X800 meter relay, 100 meter hurdles, 400 meter hurdles, high jump, long jump, triple jump, pole vault, shot put, discus, hammer throw, and javelin.

29. (RFA #134) The University does not have an outdoor track on campus.

30. (RFA #155) The EADA report form includes gymnastics, golf, bowling, swimming, and volleyball as varsity sports.

31. (RFA #156) University students participate in intramural volleyball but not in intramural competitive cheer.

32. (RFA #159) The University's men's and women's lacrosse teams play games in both the fall and spring.

33. (RFA #161) The University's men's baseball and women's softball teams play games in both the fall and spring.

34. (RFA #163) The University's men's and women's tennis teams play matches in both the fall and spring.

35. (RFA #164) The University's men's and women's tennis teams have played varsity intercollegiate matches indoors and outdoors.

36. (RFA #167) The University's spring championship sports teams practice in the fall, winter, and spring of each school year.

37. (RFA #172) The University's varsity intercollegiate ice hockey, basketball, softball, baseball, field hockey, lacrosse, soccer, and volleyball coaches coach only one sport at the University.

38. (RFA #178) All or most of the non-freshmen members of the University's 2009-2010 competitive cheer team were members of the University's 2008-2009 sideline cheer team.

Facts Relating to Competitive Cheer

39. Quinnipiac's version of "competitive cheer" is a new form of competitive cheerleading.

40. The first competitions in this new form of competitive cheer were held in 2010.

41. There is neither an international governing body for competitive cheer as a sport, nor is it recognized as an Olympic sport.

42. During the 2008-2009 academic year, the University did not have a "competitive cheer team" that it counted as a varsity sport for any purpose.

43. While the University generally recruits off-campus for its varsity intercollegiate sports teams, it did not recruit athletes off-campus for its competitive cheer team before the recruiting season for the 2009-2010 school year or the upcoming 2010-11 school year.

44. QU did not conduct a national search for a coach for its Competitive Cheer Team.

45. Other than its freshmen, nearly all of the members of the University's 2009-2010 competitive cheer team were also members of the University's 2008-2009 sideline cheer team.

46. While Quinnipiac University students participate in intramural volleyball, they do not participate in intramural competitive cheer.

47. The QU Competitive Cheer Team is coached by Mary Ann Powers.

48. Her current position at QU is "Head Competitive Cheer Coach." She has been so employed since July of 2009. Prior to that, Coach Powers was the "Head Cheerleading Coach" since 1998.

49. The QU Sideline Cheerleading squad first competed in 1999.

50. The Sideline Cheer squad competed three times during the academic year 2008-09.

51. QU's Sideline Cheer squad also competed at the NCA/NDA National Championships in Florida on March 11, 2009, sponsored by Varsity Brands, a for-profit cheerleading company.

52. "All Star" Competitive Cheer Programs are sponsored by private gyms or clubs. All Star Competitive Cheer Programs have competitors beginning at ages of two and one-half to three years old, and all the way up to Level Six, which includes athletes eighteen years and older.

Competitive Cheer Schedule 2009-10

53. QU's first cheer event of the 2009-10 academic year occurred on December 3, 2009 when it performed an inaugural exhibition.

54. QU's competitive cheer team entered a competition held on December 5, 2009 which was sponsored by a private cheer company known as Spirit Unlimited, an organization similar to Varsity Brands, but smaller than Varsity Brands. At this event, QU competed against the Babson and Stonybrook cheer teams, neither of which were strictly competitive cheer teams. The competition consisted of a 2 and ½ minute routine.

55. This event also included All Star non-collegiate divisions.

56. The format and scoring system for the event were determined by Spirit Unlimited, the company.

57. Varsity Brands has a different scoring system, which includes a sideline cheer aspect.

58. The National Cheerleaders Association ("NCA") runs competitions with a different format and scoring system.

59. The UCA, another organization also connected to Varsity Brands, has another competitive cheer scoring system.

60. In UCA-sponsored competitive cheer events, there is a break in the middle of the presentation for a crowd response section, and a different weighted score on the sideline aspect.

61. Both the NCA and UCA competitions are based on 2 ½ minute team routines.

Walter Camp Charity Exhibition

62. On January 14, 2009, the QU Competitive Cheer squad performed an exhibition for the Walter Camp Foundation at the New Haven Field House.

Sacred Heart Pioneer Cheer and Dance Challenge

63. QU was scheduled to compete in the Sacred Heart Pioneer Cheer and Dance Challenge on January 16, 2010, an event sponsored by Sacred Heart University in Fairfield, Connecticut, against a club team sponsored by the University of Connecticut, and a cheer squad from Fairfield University, a sideline cheer squad that also competes.

64. The University of Connecticut and Fairfield University cheer squads did not compete due to injuries. QU was declared the winner of this event.

All Girl Collegiate Competitive Cheer Competition

65. In February 2010, the QU Competitive Cheer squad competed at the All Girl Collegiate Competitive Cheer Competition, at Kennesaw State University in Georgia, against the University of Maryland, University of Oregon and Georgia, in the first event sponsored by the newly formed National Competitive Stunt and Tumbling Association (“NCSTA”).

66. The NCSTA is in the process of developing its own meet format and scoring system, different from other cheer organizations. NCSTA’s format features individual and small group competitions in specific skills, plus team competitions in 2 ½ minute routines that combine the skills.

67. Six schools were at the Kennesaw State University competition: Fairmont, Quinnipiac, Maryland, Oregon and Georgia. All of the teams who competed at this event were strictly competitive cheer squads.

Cheer Sport Nationals Competition

68. QU's Competitive Cheer team participated on February 6 and 7, 2010 in an event sponsored by Cheer Sport, another competitive cheer organization with a scoring system distinct from the systems employed by Spirit Unlimited, the NCA and UCA.

69. The Division in which QU competed at the Cheer Sport Nationals included two sideline cheer teams: Louisville and Coastal Carolina. North Carolina State, Georgia and Ohio State competed at the Cheer Sport Nationals as club teams.

70. Louisville did not compete under the banner of the University of Louisville. Rather, it competed as "Louisville Gym Tyme", an All Star cheer program.

Quinnipiac All Star and Competitive Cheer Challenge

71. On February 27 and 28, 2010, QU sponsored the Quinnipiac All Star and Competitive Cheer Challenge, which was held at the university's TD Bank Sports Center.

72. This QU-sponsored event occurred over two days. Saturday competition included high school and middle school athletes. Sunday included competitions among All Star and college teams. Later, Quinnipiac University's Competitive Cheer team and University of Maryland's Cheer squad competed against each other under the NCSTA scoring system.

The USA Wildcat All Stars and Dance Challenge

73. QU's Competitive Cheer team participated in the March 20, 2010 USA Wildcat All Stars and Dance Challenge, sponsored by USA Wildcat All Stars, an All Star gym organization.

74. The competition was based on 2 ½ minute cheer routines.

The All New England Open

75. On March 27, 2010 QU's Competitive Cheer team competed in an event sponsored by the New England Cheerleaders Association ("NECA"), an event known as the All New England Open. This event had its own scoring system.

76. None of the teams which QU competed against at this event were strictly competitive cheer squads.

77. The NECA Championship event included competition among All Star and college cheer squads.

78. The All Star cheer squads included athletes from elementary school all the way up through eighteen years of age and over, competing in the NECA scoring system, which consisted of two and one-half minute routines. QU's Competitive Cheer team competed in the Collegiate Division against college squads from University of New Hampshire and Nichols, neither of which are strictly competitive cheer squads.

Daytona Beach, Florida

79. On April 8 and 9, 2010 the QU Competitive Cheer team participated in the NCA/NDA College Nationals in Daytona Beach, Florida, sponsored by Varsity Brands, using a format and scoring system which included a crowd response component of 45 seconds.

QU's Competitive Cheer Program

80. In March 2010, Jack McDonald, Tracey Flynn, and Bill Mecca informed Coach Powers that cheer would become a varsity sport at Quinnipiac.

81. No one in the QU Athletic Department consulted with Coach Powers about making Competitive Cheer into a varsity sport before announcing their decision to her.

82. Prior to QU's making Competitive Cheer into a varsity sport, Coach Powers had not been involved in any organized effort to make cheer a varsity sport.

83. Prior to setting Competitive Cheer's roster management target of 30 participants for Academic Year 2009-10, Coach Powers was not consulted about an appropriate number for her team.

84. Because the NCAA does not recognize Competitive Cheer as a varsity sport, QU was not able to purchase insurance in the same way it obtains insurance for all of the other varsity teams it sponsors.

85. QU was required to purchase a separate catastrophic insurance policy for the Competitive Cheer team.

86. QU's Competitive Cheer team did not have an assigned locker room in 2009-10.

87. Pursuant to NCAA Regulations, coaches are not permitted to recruit student athletes off campus until the coaches have passed the NCAA Recruiting Test.

88. Neither Coach Powers nor her two coaching assistants had taken the NCAA recruiting test during the 2009-10 academic year. She passed the test in June 2010, which will permit her to begin off-campus recruiting in August 2010.

89. In the Fall of 2009, Coach Powers began recruiting student athletes from within the QU student body for the 2009-10 Competitive Cheer season.

90. Because Coach Powers had not passed the Recruiting Test, she has not been able to recruit off the QU campus, and has not initiated any contacts with prospective student athletes who may be interested in QU's Competitive Cheer Team.

91. Other than Coach Powers, all of the other Head Coaches at QU had passed the NCAA Recruiting Exam before the 2009-10 academic year.

92. The Competitive Cheer team was budgeted six athletic scholarships for the Academic Year 2009-10. Coach Powers, however, decided not to use all of the six scholarships.

93. Coach Powers' team follows NCAA rules on practicing. In the pre-season, practice is limited to eight hours per week. Once the Competitive Cheer Team reached its 132-day declared season, her athletes' practice was limited to not more than twenty hours a week.

The National Competitive Stunts and Tumbling Association ("NCSTA")

94. The National Competitive Stunt and Tumbling Association ("NCSTA") is an organization consisting of coaches and administrators from universities and colleges which either claim to treat competitive cheer as a varsity sport, or intend to.

95. The September 2009 initial meeting of the NCSTA was known as "the Maryland Cheer Summit," and was attended by representatives from QU, University of Maryland, University of Oregon, Baylor University, Fairmont University and Ohio State University.

96. Mr. McDonald has had experience organizing sports leagues for ice hockey, lacrosse and track and field, and is intimately involved in establishing and expanding the NCSTA.

97. The attendees of the Maryland Cheer Summit discussed the establishment of seasons of competition, roster sizes, the establishment of scholarships, coaching and national competition.

98. At the time of the initial summit of the NCSTA, there was no agreed-upon set of rules of competition for competitive cheer.

99. Jack McDonald, Cheryl Thomes and Coach Powers attended the Maryland meeting on behalf of QU. In April 2010, athletic department administrators from member schools attended a meeting in Daytona, Florida. QU was represented by Jack McDonald at the April meeting.

100. The formal structure of the NCSTA's governing board and any committees are not yet formalized.

101. NCSTA has not been incorporated.

102. Currently, NCSTA member schools include University of Oregon, University of Maryland, Baylor, Fairmont State, Azusa Pacific, UMass/Dartmouth and Quinnipiac University.

103. The organization is working to establish uniform rules, regulations, a scoring system, and a new competitive cheer meet format for intercollegiate, varsity competition.

104. Members of the NCSTA have not reached a consensus on what to name their new sport.

105. Administrator members of the NCSTA have determined that in Academic Year 2010-11, up to half of its members' competitions may be held outside of the NCSTA format and against non-member institutions.

106. The scoring system and meet format for NCSTA competitions are undergoing revisions.

107. One of the NCSTA's principal goals is to have Competitive Cheer recognized by the NCAA as an emerging sport for women, but the organization does not plan to submit a proposal to the NCAA's Committee on Women's Athletics until 2011.

108. In order to submit a new sport to the NCAA for emerging sport status, ten university presidents must submit letters stating that their institutions intend to offer the sport as a varsity sport.

109. At this time, the NCSTA has seven universities who are prepared to apply to the NCAA to make its proposed, unnamed activity designated an emerging sport.

110. The NCSTA is still in the process of formalizing membership requirements for the organization.

111. There is disagreement among those organizations affiliated with Varsity Brands and those affiliated with the NCSTA, about whether the word "cheer" should be included in the name of their organizations and/or in the name of any new sport that may evolve from cheerleading.

112. QU is aware that the NCAA does not recognize Competitive Cheer as a sport.

113. Notwithstanding the fact that the NCAA does not recognize Competitive Cheer as a sport, QU intends to treat Competitive Cheer in the same way it would treat its NCAA-recognized sports for purposes of EADA reporting.

114. At the 2009 Maryland Cheer Summit, NCSTA determined that the squad size for Competitive Cheer Teams would be 30 athletes.

115. Recently, the NCSTA determined that the size of Competitive Cheer squads would be set at 36.

116. The NCSTA has yet to adopt bylaws for the organization.

117. At this time, the NCSTA has determined that twelve scholarships is an appropriate number for Competitive Cheer squads.

118. The NCSTA has determined that a maximum 24 student athletes would actually compete on the floor in the “team event” portion of an NCSTA-sanctioned meet. The NCSTA has not set a minimum number of competitors for the team event.

119. At this time, the NCSTA projects that Competitive Cheer travel parties would include 28 student athletes, but the overall roster is projected to consist of 36.

120. The NCSTA and its member universities intend to make the NCSTA the national governing body for the proposed new sport.

121. The NCSTA members have not agreed upon a name for their proposed new emerging sport, and its members continue to discuss different proposed names.

122. At this time, the NCSTA and its member universities have determined that each member institution is allowed to name the new proposed sport whatever name the member institution chooses.

123. QU projects that its 2010-11 Competitive Cheer team will carry 36 female student athletes.

124. QU intends to report members of its Competitive Cheer team as participants in a varsity sport in its EADA Report for Academic Year 2009-10.

125. QU did not count the members of its Competitive Cheer team as varsity athletes for EADA purposes in connection with its 2008-09 academic year, a report which it submitted in October 2009.

126. QU does not have a letter from the Office of Civil Rights confirming that the OCR has determined that its Competitive Cheer team constitutes a varsity sport, although QU knows that OCR has instructed schools to obtain such a determination letter before counting cheerleading as a varsity sport for EADA purposes.

127. The NCSTA and its member universities intend to ask the Office of Civil Rights whether its proposed new sport may be counted as a varsity sport towards Prong One Title IX compliance, but such a request has not yet been made.

QU's Cross-Country and Track and Field Teams

128. QU does not have either an indoor or outdoor track facility suitable for holding or hosting track and field competitions.

129. QU's Women's Indoor Track Team practices on a track in the Recreation Center.

130. Members of QU's outdoor men's and women's track teams practice on the roads, on the grass and a couple of days of the week at Cheshire High School.

131. QU does not have any plans to construct an outdoor track facility.

132. QU has decided not to permit members of its Men's Cross Country Team to compete in any indoor or outdoor track events.

133. Most of the women student athletes who run Indoor Track also run Outdoor Track.

134. Most of the women student athletes at QU who run Cross-Country also run Indoor Track and Outdoor Track.

135. All of QU's female student athletes in running sports who receive scholarship, compete in three running sports, Cross-Country, Indoor Track and Outdoor Track. Track and Field competitions include running events, and field events, that is, discus, pole-vault, hammer throw, javelin, triple jump and long jump.

136. QU does not enter any of its women student track athletes in any of the field events.

137. According to QU's business records, in 2009-10, three women student athletes are identified as receiving scholarships in Women's Outdoor Track. There are no scholarship recipients, however, listed in either Women's Cross-Country or Women's Indoor Track.

138. The NCAA average squad size for a Men's Cross-Country team is fifteen.

139. In academic years 2009-10 and 2010-11, QU set the target roster management number for its Men's Cross-Country team at 13.

140. The NCAA average squad size for a women's Cross-Country team is 17.

141. The target roster management number for QU's women's cross-country team for academic years 2009-10 and 2010-11, were set at 18 and 24, respectively.

142. The NCAA average squad size for a women's indoor track and field squad is 38, while the average outdoor track and field squad is 37.

143. QU's target roster management number for both its women's Indoor and Outdoor Track and Field Squads for Academic Year 2009-10 was set at 30, notwithstanding the fact that neither of these teams competes in field events.

144. QU's target roster management number for academic year 2010-11 projects that its Women's Indoor and Outdoor Track and Field Teams will carry 35 student athletes, notwithstanding the fact that QU does not compete in any field events.

145. Prior to eliminating the women's volleyball team, and the men's golf and track teams at QU, members of QU's Athletic Council were not consulted about the decision.

146. Carolyn Martin has been employed as the Men's and Women's Head Cross-Country Coach and the Women's Indoor and Outdoor Track Head Coach beginning Academic Calendar Year 2009-10. Prior to that, she was QU's Assistant Coach for Women's Cross Country and Indoor and Outdoor Track for approximately five years.

147. Coach Martin was asked by the QU Athletic Department to reach a target roster management number of 18 student athletes for the 2009-10 academic year for women's cross-country.

148. The sport of indoor track consists of a variety of running events of various lengths. In addition, there are throwing and jumping events falling under the category of "field events".

149. In calendar year 2009-10, QU women's indoor track team competed in the 200-meter dash the 400-meter dash, the 500-meeter dash, the 800-meter dash, the 1000-meter run, the mile run (also known as the 1,600 meter), the 3,000-meter run, the 5,000-meter run, the 4 x 400 meter relay, the 4 x 800 meter relay, and a distance medley relay.

150. The QU Women's Indoor Track Team did not compete in the sprint events, such as the 55 or 60-meter dash runs.

151. QU's women's indoor track and field team also did not compete in the field events: long jump, the high jump, the pole-vault, the hammer throw or shot-put.

152. Women's indoor track has year-end championships, including the Northeast Conference Championship, the Eastern Collegiate Athletic Conference Championship and the NCAA National Championship.

153. In October of 2009, Coach Martin held walk-on tryouts for the women's indoor track team, as a result of which she added a number of student athletes.

154. The women's indoor track team began practicing in October 2009, and their first competition was held on December 5, 2009.

155. For Academic Year 2009-10, the women's track team was directed to meet a target roster management number of 36 student athletes.

156. Quinnipiac University's women's track and field team does not have facilities which allow student athletes to train or compete in field events.

157. The same women student athletes who run indoor track at QU also run in the outdoor track competitions. Practices for outdoor track commenced on March 22, 2010, and the first date of competition for outdoor track was March 27, 2010.

158. Coach Martin and her coaching staff actively recruit male student athletes for the men's cross-country team and women student athletes for the three women's running sports at QU.

159. QU allocates two full scholarships for men's cross-country, and four scholarships for the women's running teams.

160. QU has traditionally focused its efforts at developing distance runners for both the men's and women's running sports.

161. The target roster management number for the men's cross-country team for academic year 2009-10 was set at 13 student athletes.

162. According to Coach Martin, for the coming Academic Year 2010-11, she requested an increase to the target roster management numbers for members of the women's running teams.

163. For the coming academic year 2010-11, she has requested that her target roster management number for women's cross-country be increased to 35.

164. Coach Martin is the only Head Coach at QU who coaches four teams. There are no other head coaches at QU who serve as the head coach for even as many as three teams.

165. On August 6, 2009, Coach Martin signed a letter, acknowledging the target roster management numbers for her Men's Cross Country Team, Women's Cross-Country and Women's Indoor and Outdoor Track teams.

166. Prior to signing the letter, she did not have any conversations or input into the target roster management numbers chosen for her team, with either Jack McDonald

or Dr. Mark Thompson. She had no choice but to sign the Target Roster Management letters presented to her.

167. Although QU does not sponsor a men's indoor or outdoor track team, members of the men's cross-country team are permitted to compete in up to five indoor and outdoor track meets as representatives of QU. QU, however, prohibits members of the Men's Cross-Country Team to compete individually as representatives of QU. They are, however, allowed to compete individually, although not as representatives of QU.

168. Coach Martin considers indoor and outdoor track as the same sport held in different seasons.

169. In Coach Martin's view, the track program at QU has been operated primarily as an adjunct to the cross-country program.

170. None of QU's female student athletes on the Indoor or Outdoor Track Team who run distances shorter than 800 meters, receive athletic aid.

171. All of Coach Martin's female cross-country student athletes are also required by her to run indoor and outdoor track.

Facts Relevant to Multiple Counting of Track & Field Athletes

172. The NCAA Division I women's spring track championships include the following events: 100 meter dash, 200 meter dash, 400 meter dash, 800 meter run, 1500 meter run, 5000 meter run, 3000 meter steeplechase, 4X100 meter relay, 4X400 meter relay, 4X800 meter relay, 100 meter hurdles, 400 meter hurdles, high jump, long jump, triple jump, pole vault, shot put, discus, hammer throw, and javelin.

173. The University's men's and women's lacrosse teams, men's baseball and women's softball teams play games in both the fall and spring. Its men's and women's

tennis teams play matches in both the fall and spring and have played varsity intercollegiate matches indoors and outdoors.

174. The University's spring championship sports teams practice in the fall, winter, and spring of each school year.

175. The University's varsity intercollegiate ice hockey, basketball, softball, baseball, field hockey, lacrosse, soccer, and volleyball coaches coach only one sport at the University.

Legal Standards

176. The Department of Education, Office for Civil Rights ("OCR"), Office of the Secretary, issued its policy interpretation of Title IX on December 11, 1979, appearing in the Federal Register Volume 44. Number 239. The policy interpretation provides, in relevant part, as follows:

4. *Definition* – For purposes of examining compliance with this Section, the Participants will be defined 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 sports season; and (b) who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sports 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.

177. On January 16, 1995, Norma V. Cantu, Assistant Secretary for Civil Rights, issued a Dear Colleague letter which enclosed "Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test" (the "Clarification"). The Clarification provides, in part, as follows.

It is important to note that under the Policy Interpretation, the requirement to provide nondiscriminatory participation

opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an “overall determination of compliance” is made by OCR, 44 Fed. Reg. 71417, 71418, OCR examines the institution’s program as a whole. Thus, OCR considers the effective accommodation of interest and abilities in conjunction with equivalents in the availability, quality and kinds of other athletic benefits and opportunity provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games and publicity, among others. An institution’s failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment and services.

178. The OCR has and does review on a case-by-case basis, whether an athletic activity may properly be considered part of an academic institution’s interscholastic or intercollegiate athletic program within the meaning of Title IX regulation.

179. The OCR has considered a number of factors determining whether a particular activity should be considered part of an institution’s athletic program for purposes of Title IX. Those factors include, but are not limited to, the following.

whether the activity is sponsored for the primary purpose of preparing for and engaging in athletic competition against other similar teams; whether the team prepares for and engages in competition in the same way as other teams in the interscholastic or intercollegiate athletic program, *e.g.*, whether it receives coaching, conducts tryouts, engages in regular practice sessions, and has regularly scheduled athletic competitions; and, whether selection for the team is based upon factors related primarily to athletic ability. In contrast, if the purpose of the team is primarily to support and promote other

athletes, then OCR will not consider the team to be engaged in a sport.

But OCR will also consider other factors relevant to the activity that may help demonstrate that the activity is part of an institution's interscholastic or intercollegiate athletic program. Whenever a future case is filed with us, we will continue to apply this kind of analysis.

180. Since 1995, the Office of Civil Rights has consistently taken the position that cheerleading should be treated as an extracurricular activity, and not as part of an educational institution's athletic program within the meaning of Title IX Regulation. Letters from different personnel within the Office of Civil Rights have memorialized the Office of Civil Rights' position in letters dated April 26, 1995, May 18, 1995, January 26, 1996, October 13, 1998 and September 16, 1999. Copies of those letters have been received into evidence as Plaintiff's Exhibit 19.

181. Most recently, by way of letter dated April 11, 2000, OCR has expanded the criteria by which it will determine whether an athletic activity may be recognized as a sport. That letter provides, in relevant part, as follows.

OCR may also consider other evidence relevant to the activity, which might demonstrate that it is part of an institution's athletic program. Such evidence that may be considered includes, but is not necessarily limited to, the following:

- whether organizations knowledgeable about the activity agree that it should be recognized as an athletic sport;
- whether the activity is recognized as part of the interscholastic or intercollegiate athletic program by the athletic conference to which the institution belongs and by organized state and national, interscholastic or intercollegiate athletic associations;
- whether state, national, and conference championships exist for the activity;

- whether a state, national, or conference rulebook or manual has been adopted for the activity;
- whether there is state, national, or conference regulation of competition officials along with standardized criteria upon which the competition may be judged; and
- whether participants in the activity/sport are eligible to receive scholarships and athletic awards (e.g., varsity awards).

Process to be Followed

Certain school activities in which students are engaged may be activities that require a considerable amount of athleticism, but not athletic activity qualifies as a sport. Consistent with earlier policy statements, there is a presumption by OCR that drill teams, cheerleading and other like activities are extracurricular activities, and are not considered sports or part of an institution's athletic program within the meaning of Title IX Regulation.

Donna A. Lopiano

182. Donna A. Lopiano, PhD., President of Sports Management Resources ("SMR"). Dr. Lopiano is considered one of the foremost national experts on gender equity in athletics. As such, she is an expert in Title IX athletics regulations, and offered her expert opinion regarding the meaning and spirit of Prong 1 of Title IX, which requires educational institutions receiving federal financial support to provide athletic competition opportunities for male and female student athletes in numbers substantially proportionate to their respective enrollments.

183. Based on her training, experience and expertise, she found that QU's athletic squad sizes differed from reasonable, average squad sizes of other NEC and NCAA schools, to such an extent that it suggested that QU has and continues to engage in artificial roster manipulation through the manner in which it employs its roster management system

184. The manner in which QU applies the program creates the appearance of proportional gender equity. Assessing whether a given educational institution's participation rate among male and female student athletes provides comparable, genuine varsity competition opportunities, however, is not a purely quantitative determination as suggested by annual EADA reporting requirements. Rather, it is a fact-specific, qualitative inquiry.

185. The manner in which an educational institution fills its male and female athletic rosters is one of the factors which must be examined to determine whether a given institution is providing equal athletic opportunities.

186. To the extent that a university fills its athletic rosters by recruiting high school athletes with the athletic ability to play at the school's competition level, then the women's teams should be finding their athletes in the same way. For example, if women's coaches must meet their mandated roster management target numbers by recruiting women student athletes from a pool of walk-on student athletes, then this is an indication that the additional female student athletes may not have the necessary skills for genuine varsity competitive opportunities.

187. By diluting a varsity team with female student athletes who cannot compete at the varsity level, it necessarily dilutes the competitive varsity experience for the other varsity female student athletes.

188. Whether a university is providing genuine varsity competitive opportunities to its male and female student athletes in substantial proportion to their enrollment in the undergraduate population, will depend upon how the institution counts its athletic participation opportunities.

189. Title IX requires that schools provide male and female students with equal opportunities to participate at each level of athletic competition offered, such as intramural programs, club sports and intercollegiate athletics.

190. Club teams and competition with club teams which are not fully supported by the institution, or that play non-varsity schedules, cannot be counted as varsity teams, or as providing varsity competitive opportunities for purposes of Prong 1. Rather, equity at the club level must be measured separately. Maintaining this distinction is crucial in order to insure that the schools do not end up supporting men's competitive opportunities at the varsity level, while women's sports opportunities are supported only at the lower club or intramural level.

191. If men's teams play at the varsity Division I level against other varsity Division I teams, then the school must also provide its women's teams with a comparably competitive schedule. If, for example, an institution's women's teams are competing primarily against club, or non-Division I teams, then those women's teams may not be operating as varsity teams comparable to the competitive opportunities being offered the male varsity students.

192. After carefully reviewing QU's own data, and applying the principles for counting "participants" as set forth in OCR policy, she determined that QU has over-counted the number of female participation opportunities and under-counted the number of male participation opportunities to such an extent that QU has not and cannot be in compliance with Prong One in the coming academic year 2010-11.

193. It is also important when assessing Prong One compliance to examine closely the activities which a given institution counts towards its compliance numbers.

194. The OCR's Guidelines for Completing EADA Forms expressly states that schools may not count cheerleading unless they have received an approval letter from the Department of Education. Thus, a school may not properly count members of its cheer team as part of its Prong One compliance, unless and until it receives approval from OCR to do so.

195. Eliminating the proposed 36 female competitive cheer athletes from QU's 2010-11 participation rosters places QU out of Prong One compliance.

Enrollment and Athletic Participation in Academic Year 2009-10

196. In academic year 2009-10, QU had an undergraduate population of 5,686 students.

197. In academic year 2009-10, QU's undergraduate population consisted of 3,518 women and 2,168 men, or 61.9% female and 38.1% male.

198. In academic year 2009-10, QU continued to rely on a roster management program in order to comply with Prong One of Title IX.

199. QU's 2009-10 roster management program resulted in the creation of 166 competitive opportunities for male student athletes.

200. QU purports that its 2009-10 roster management program resulted in 274 competitive opportunities for women student athletes, or 61.9% of the varsity competitive opportunities.

201. In order for QU's athletic program to reach perfect proportionality in academic year 2009-10, it needed to allocate 61.9% of the varsity competitive opportunities to women, a total of 270.

202. QU's roster management program for 2009-10 included, among others, 18 female cross country athletes, 30 female indoor track athletes, 30 female outdoor track athletes, 30 female Competitive Cheer athletes, and 12 female volleyball athletes.

203. Subtracting the 30 competitive cheer athletes from the Defendant's roster yields a total female athletic participation rate of 244, which translates into a relative participation rate of 56%.

Projected Enrollment and Athletic Participation for Academic Year 2010-11

204. QU estimates that it will enroll a total of 5,900 undergraduates for the 2010-11 academic year, consisting of 2,188 men and 3,712 women, resulting in a population which is 37% male and 63% female.

205. QU plans to continue to implement a roster management program in an effort to comply with Prong One of Title IX in the coming academic year 2010-11.

206. QU's projected roster management program for 2010-11 includes 24 female cross country athletes, 35 female indoor track athletes, 35 female outdoor track athletes, 36 female competitive cheer athletes, and 14 female volleyball athletes.

207. QU's roster management program for 2010-11 projects that there will be 168 competitive opportunities for male student athletes, or 36.21% of the 464 total proposed varsity competitive opportunities.

208. For the 168 allocated male athletes to constitute 37% of the University's total roster positions, there would have to be approximately 454 total athletes competing at QU in the coming year. $(168 M \div 0.37 = 454)$

209. Perfect female proportionality of 63% in a constellation of 454 total athletes means that the Defendant would need to have no fewer than 286 female

student athletes. Subtracting the 36 proposed competitive cheer athletes results in a total of 250 female student athletes which yields a participation rate of 55%.

210. Using the defendant's projected 2010-11 rosters also results in a lack of proportional female athletic participation, even if competitive cheer is retained and volleyball is eliminated.

211. The defendant's own 2010-11 roster projects a total of 464 athletes, 296 of whom are female student athletes which include the 36 competitive cheer and 14 volleyball athletes. Subtracting the 14 volleyball players from the projected 296 female student athletes results in 282, which represents a participation rate of 60.7%, a difference of 2.3 basis points.

CONCLUSIONS OF LAW

212. This Court defers, as it must, to the OCR's policy statements and interpretations of Title IX.

213. Not all athletic activities may be properly considered a "sport" for Title IX compliance purposes.

214. The OCR has set forth specific factors to evaluate whether a given athletic activity may properly be considered towards Title IX substantial proportionality compliance under prong one.

215. The OCR has set forth specific factors to evaluate whether a given athletic activity may properly be considered towards Title IX substantial proportionality compliance under Prong One.

216. The OCR has set forth specific factors to evaluate whether a given athletic activity may properly be considered towards Title IX substantial proportionality compliance under prong one.

217. Applying the factors set forth by the OCR for evaluating whether the proposed athletic activity of competitive cheer constitutes a “sport” for Title IX purposes, the Court finds that competitive cheer is not sufficiently developed as an athletic activity to provide genuine varsity competitive opportunities to its female student athletes.

218. Subtracting the 36 proposed varsity competitive cheer participants from the Defendant’s projected 2010-11 roster, the Court finds that QU’s female athletic participation rate will fall to 55%, and thus fail to provide substantially proportional competitive opportunities to its female undergraduate population which constitutes 63% of the undergraduate population.

219. QU’s practice of requiring female cross country athletes to run indoor and outdoor track and proceeding to count those athletes three times for Title IX compliance purposes, while it simultaneously limits the male runners to cross country competition, constitutes the imposition of an impermissible minimum or “floor” on women’s participation rosters.

220. The manner in which QU has counted the number of “participants” in its athletic activities focuses narrowly on the first date of competition roster numbers which are required for EADA reporting purposes, and fails to properly count the total number of “participants” as that term is defined by OCR policy statements.

221. Carefully analyzing QU's athletic participation data reveals that it continues to under-count the number of participants on its men's teams and over-count the participation rate of its female student athletes.

222. The manner in which QU counts its female student athletes, and fails to count accurately its male student athletes, creates the appearance of proportional gender equity in its athletic program without creating gender equity in fact.

223. The Plaintiffs have demonstrated that Defendant Quinnipiac University's proposed roster management program for academic year 2010-11 will fail to provide genuine athletic participation opportunities for women in substantial proportion to the projected undergraduate enrollment of women.

224. The Plaintiffs are seeking the enforcement of federal civil rights in connection with their education, and monetary damages alone would not adequately compensate them.

225. If a permanent injunction is not entered, the Plaintiffs will be denied the unique educational opportunities which flow from participation in collegiate athletics and thus would suffer substantial and irreparable harm in the absence of a permanent injunction.

226. The public interest will be served by enforcing Title IX civil rights legislation which prohibits discrimination on account of the Plaintiffs' sex.

227. The Court will enter a permanent injunction subjecting the Defendant to court-supervision of its athletic department and enjoining the Defendant from eliminating its women's volleyball team and from discriminating against its present and prospective female student athletes.

Respectfully submitted:

THE PLAINTIFFS

By: Alex V. Hernandez

Alex V. Hernandez (ct08345)
Jonathan B. Orleans (ct05440)
Pullman & Comley, LLC
850 Main St., P.O. Box 7006
Bridgeport, CT 06601-7006
Telephone: (203) 330-2000
Facsimile: (203) 576-8888
Email: jorleans@pullcom.com
Email: ahernandez@pullcom.com

David McGuire (ct27253)
American Civil Liberties Union Foundation
of Connecticut
2074 Park Street, Suite L
Hartford, CT 06106
Telephone: (860) 523-9146
Email: dmcguire@acluct.org

Co-counsel admitted *pro hac vice*:

Kristen Galles
Equity Legal
10 Rosecrest Avenue
Alexandria, VA 22301
Telephone: (703) 722-1071
E-Mail: kgalles@comcast.net

THEIR ATTORNEYS

CERTIFICATION

I hereby certify that on June 24, 2010, a copy of the foregoing Plaintiffs' Proposed Findings of Fact and Conclusions of Law was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Alex V. Hernandez

Alex V. Hernandez (ct08345)