IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KAYLA LAWLER ERIN OVERDEVEST, KRISTEN CORINALDESI, and LOGAN RIKER, individually and on behalf of all those similarly situated; and ROBIN LAMOTT SPARKS, individually,	)	Case No. 3:09-CV-621(SRU)
Plaintiffs,	)	July 1, 2010
v.	)	
QUINNIPIAC UNIVERSITY,	)	
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF

INTRODUCTION

Trial in this action concluded on June 25, 2010. At the pretrial conference, the Court strongly discouraged post-trial briefing. Nonetheless, on June 30, 2010 Defendant filed its "Supplemental Brief Responding to New Arguments in Plaintiffs' Trial Brief." Because the arguments in Plaintiff's Trial Brief are not new, Plaintiffs urge the Court not to consider Defendant's Supplemental Brief. If, however, the Court elects to consider Defendant's Supplemental Brief, Plaintiffs request that the Court also consider this brief response.

ARGUMENT

It is nonsense for the Defendant to contend that the benefits it provides its female track athletes were not at issue at trial, or that it was somehow caught unaware by Plaintiffs' contention that the track teams should not be counted for purposes of the "Prong One" test of Title IX

compliance. QU's contention in this regard exposes its fundamental misunderstanding of what it is that must be counted when analyzing participation under Title IX.

The central allegation of Plaintiffs' First Claim for Relief is that the "Defendant fails to provide female students an equal opportunity to participate in varsity intercollegiate athletes." [Am. Compl., ¶ 90]. To determine under Prong One of the Three-Part Test whether an institution provides nondiscriminatory participation opportunities, one does not simply count the number of student athletes on team rosters on the first and last days of competition, as Defendant urges. Rather, the law and OCR interpretations require counting genuine participation opportunities used by student athletes. This necessarily involves a degree of qualitative analysis of the opportunities an institution claims to provide, in contrast to the strictly quantitative approach advanced by the Defendant.

The qualitative analysis urged by Plaintiffs is supported by OCR's policy statements and interpretations. As OCR stated in its January 16, 1996 "Dear Colleague" letter that accompanied the 1996 Clarification:

> Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, *i.e.*, those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

And, in the 1996 Clarification itself, OCR commented:

> 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 interests and abilities in conjunction with equivalence in the availability, quality and kinds of other athletic benefits and opportunities 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 non-discriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

(The 1996 Dear Colleague Letter and Clarification were admitted in evidence as Exhibit 7, and are also attached as Exhibit A to the Brief of the United States as *Amicus Curiae.*)

Furthermore, the 1979 Policy Interpretation defines "participants" as those athletes "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 . . . ." 44 *Fed. Reg*. at 71415. A robotic counting of names on roster lists is plainly inadequate to assess the many aspects of institutional support of which those listed are only examples. Thus, in counting participants at Quinnipiac, one necessarily must consider whether the athletes on the track teams are in fact "receiving the institutionally-sponsored support normally provided" to varsity athletes at the University. (The 1979 Policy Interpretation is attached to the Amended Complaint as Exhibit 3.)

OCR underscores this point in discussing, in the 1996 Clarification, why it counts walk-ons, athletes who practice but do not compete, and teams that are required to raise some of their own operating funds.

> 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 athletic 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.

Conversely, athletes who do not receive such benefits should not be counted.

QU cannot seriously argue, given the allegations of the Amended Complaint and OCR's pronouncements, that the quality of the participation opportunities offered to its varsity female athletes was not at issue in determining who counts as a "participant" for purposes of Prong One. An institution that holds out a team as a "varsity" intercollegiate team but provides that team with none of the benefits that usually accompany varsity status obviously cannot count those athletes as "participants" for the Prong One analysis. The fact that Plaintiffs, in their Third Claim for Relief, seek relief specifically addressed to the unequal allocation of benefits at QU, certainly does not render evidence of that misallocation irrelevant to the First Claim, to the extent that evidence bears on the quality of the participation opportunities offered to certain athletes.

Contrary to Quinnipiac's contention, Supp. Brf. at 3-4, there was ample evidence that the women of Quinnipiac's indoor and outdoor track teams do not receive the same benefits of varsity participation that athletes receive in other sports. Witnesses testified that Coach Martin is the only coach who coaches four sports, that the indoor track facility is inadequate for competition or for practicing field events, and that there is no outdoor track facility. *See, e.g.,* Martin Dep. at 130-132:3; 166:23-166:25; trial testimony of Jack McDonald.[1] Coach Martin conceded (reluctantly) that the track teams cannot realistically hope to win any meet that they enter because they do not compete in field events. Martin Depo. at 185:12-187:14. She also testified that all of the available

scholarship assistance goes to athletes who run cross country; thus, athletes who run only track do not receive scholarships. *Id.* at 139:4-139:20. Coach Martin admitted that the track team is operated primarily as an adjunct to the cross country program. *Id.* at 167:17-167:23.

Defendant's claim that it had no fair warning of Plaintiffs' argument, because Plaintiffs did not include it in the joint pretrial order, rings hollow. Plaintiffs contended in the joint pretrial order that "the University operates its women's track program essentially as an adjunct to the cross country team," that QU "does not offer athletic scholarships to runners who do not run cross country, does not compete in field events . . . and rarely competes in sprints or hurdles." Plaintiffs further contended in the joint pretrial order that the track teams cannot ever win meets, and that it is "factually inaccurate to say that a runner who runs cross country, indoor track, and outdoor track uses three genuine participation opportunities . . . ." Moreover, throughout the trial Plaintiffs questioned witnesses concerning the quality of the track program and the benefits received by track athletes, without objection from Defendant.

The question whether members of the Quinnipiac University track teams may be counted for Title IX purposes as "participants" separate and apart from their participation in cross country was clearly one of the significant issues raised by Plaintiffs. Defendant's claim that this issue was a "new" argument raised for the first time in Plaintiffs' Trial Brief is spurious. The remaining arguments in Defendant's Supplemental Brief are without merit and require no further response.

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1 Plaintiffs did not order trial transcript and therefore cannot cite to specific transcript pages.

CONCLUSION

For the foregoing reasons, as well as those set forth at trial, in Plaintiffs' Proposed Findings of Fact and Conclusions of Law, and in Plaintiffs' Trial Brief, judgment should enter for Plaintiffs on the First Claim for Relief.

Dated: July 1, 2010

Respectfully submitted,

THE PLAINTIFFS

By: /s/ Jonathan B. Orleans

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CERTIFICATION OF SERVICE

I hereby certify that on the date hereon, a copy of the foregoing *PLAINTIFFS' RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF* 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.

Dated: July 1, 2010

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