IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KAYLA LAWLER ERIN OVERDEVEST, and KRISTEN CORINALDESI, individually and on behalf of all those similarly situated; LESLEY RIKER on behalf of her minor daughter, L[redacted] R[redacted], individually and on behalf of all those similarly situated; and ROBIN LAMOTT SPARKS, individually,	)	CIVIL ACTION NO.
Plaintiffs,	)	
v.	)	
QUINNIPIAC UNIVERSITY,	)	
Defendant.	)	APRIL 16, 2009

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER

The Plaintiffs, Stephanie Biediger, Kristen Corinaldesi, Kayla Lawler, and Erin Overdevest, individually and on behalf of all those similarly situated; Lesley Riker on behalf of her minor daughter, L[redacted] R[redacted], individually and on behalf of all those similarly situated; and Robin Lamott Sparks, individually (collectively "Plaintiffs"), submit this Memorandum of Law in Support of their Motion for Temporary Restraining Order (on notice) against Quinnipiac University ("QU" or the "Defendant").

I. INTRODUCTION

On March 4, 2009, Quinnipiac University announced that it will discontinue women's volleyball as an intercollegiate varsity sport at the end of the current academic

year. This decision, and the timing of the announcement, will deprive current team members and recruits of the opportunity to compete next year, and will continue QU's record of noncompliance with its nondiscrimination obligations under Title IX. Plaintiffs, who include both current members of the team and high school seniors who were recruited to play at QU and intend to matriculate, have brought this case to prevent QU from carrying out its discriminatory plan.

Because QU receives federal financial aid, it is subject to the provisions of Title IX of the Education Amendments of 1972 (20 C.F.R. §1681, *et seq.*) and its implementing regulations (34 C.F.R. Part 106) (collectively, "Title IX"), which require that QU provide female students with an equal opportunity to participate in varsity intercollegiate athletics. By eliminating varsity women's volleyball, the Defendant, which historically has not complied with its Title IX obligations to provide equal athletic opportunities for women, will fall farther into non-compliance with the law.

Elimination of the women's volleyball team will deny each of the named Student Plaintiffs and the members of the proposed Plaintiff class an equal opportunity to participate in intercollegiate varsity sports at QU. Some will lose athletic scholarships. Some will be deprived entirely of the opportunity to participate in intercollegiate athletic competition, while others will not see that opportunity completely destroyed, but will see it substantially diminished. Similarly, Plaintiff Robin Sparks, QU's women's varsity volleyball coach, who moved her family to Connecticut from New York State for her current position, will be deprived of the opportunity to coach the female athletes she recruited to play at QU, she will lose her job, and her coaching career will be interrupted or destroyed.

Damages for harms of this nature are necessarily difficult to quantify and may not readily be compensated in money. The time within which a college athlete may compete is limited to the student's term of enrollment, approximately 4 years. Loss of even a single year's opportunity to compete as a varsity athlete will result in irreparable, life-long harm to the Plaintiffs.

Defendant's announcement of its plan to eliminate volleyball as a varsity sport could not have come at a worse time for the Plaintiffs. For the currently enrolled athletes, it came too late to allow them to explore transfer opportunities for next year (assuming that there are schools that are both appropriate for the Plaintiffs academically and have roster slots and scholarships available). Similarly, for the incoming freshman Plaintiffs, it came too late to allow them to find opportunities at other schools, most of which have already committed their available athletic scholarships for next Fall. And for Coach Sparks, it came too late to allow her a realistic opportunity to apply for or obtain another coaching position within reasonable geographic proximity.

Accordingly, the Plaintiffs seek a Temporary Restraining Order to reinstate women's volleyball at QU and otherwise restore the state of affairs that existed prior to QU's announcement, and a hearing on their contemporaneously filed Motion for Preliminary Injunction.

II. RELEVANT FACTS

Quinnipiac University sponsors a broad varsity intercollegiate athletic program. Prior to March 4, 2009 it sponsored varsity teams in men's ice hockey, women's ice hockey, men's basketball, women's basketball, men's cross country, women's cross country, men's indoor track, women's indoor track, men's outdoor track, women's

outdoor track, men's lacrosse, women's lacrosse, men's soccer, women's soccer, men's tennis, women's tennis, men's baseball, women's softball, men's golf, women's field hockey, and women's volleyball. In choosing which sports to offer to each sex, and regulating the number of roster spots on each team, QU chooses how many varsity athletic participation opportunities it provides to men and how many varsity athletic participation opportunities it provides to women. Historically, QU has always offered its male students proportionally more opportunities to participate in varsity intercollegiate athletics than it has offered its female students (as measured by the proportions of men and women in QU's undergraduate student population).

Quinnipiac University is a member of the NCAA and participates in Division I, the highest level of intercollegiate competition. As such, QU offers athletic scholarships to members of its varsity teams including the women's varsity volleyball team.

Quinnipiac University recruits high school students to apply to and enroll at QU for the purpose of participating on QU's varsity athletic teams. On information and belief, few if any QU varsity athletes are walk-ons (*i.e.*, students who try out for and earn a spot on the team without being recruited by the coaches).

Plaintiffs were recruited by QU to participate on its women's varsity volleyball team. Some are currently on the team while others were recruited to enroll as freshman and to play during the 2009-2010 academic year. All expected to participate in volleyball during each of their four years at QU. They would have not enrolled at QU but for the opportunity to participate in women's varsity volleyball and, in some cases, the receipt of an athletic scholarship.

The present claims are brought on behalf of present and future members of the women's varsity volleyball team. As such, the Plaintiffs constitute a class, and this suit is brought as a class action. Some of the Plaintiffs are described below.

Stephanie Biediger

Ms. Biediger is a freshman recruited by Quinnipiac and a number of other schools. She decided to attend Quinnipiac because it was one of few schools where she could both play competitive volleyball and major in psychobiology. She grew up in Texas (where her family still lives) and attends Quinnipiac on an academic scholarship hoping one day to go to medical school. Because of her demonstrated academic and athletic abilities, she was also recruited by a number of other schools.

Ms. Biediger suffered a painful injury to her anterior cruciate ligament ("ACL") in the fall of 2008 but played through the pain and finished the season for her team, deferring surgery until after the season was over. She is presently in a rehabilitative program and will need additional surgery during the summer. As a consequence, she decided to sit out ("red shirt") her sophomore year – that, is the 2009 volleyball season and the 2009-10 academic year – believing that she would be able to return to volleyball competition in 2010-11. In addition, the University, through Coach Sparks, promised her a full athletic scholarship for the 2012-13 academic year, which will be her 5th year at Quinnipiac and represents her last year of eligibility to play varsity women's volleyball.

As a result of her injury and surgeries, and the fact that she will not be playing in the 2009 season, it will be extremely difficult for Ms. Biediger to find another Division I volleyball program that will offer her a position in its program or an athletic scholarship, and even more difficult to find another varsity volleyball program at a school which offers a psychobiology academic program comparable to Quinnipiac's.

Kayla Lawler

Ms. Lawler attended high school in Indiana where she participated in varsity basketball, tennis and volleyball. After she graduated from high school, her family moved to Kentucky. She was recruited by Quinnipiac to play varsity women's volleyball

and awarded a full athletic scholarship which, in addition to the obvious prestige which it carries, represents approximately $43,100.00 per year. Because of her recognized academic and athletic skills, other schools also recruited her for their varsity volleyball teams, some of which offered athletic scholarships. Because of assurances made to her by members of the athletic department at Quinnipiac, however, she decided to attend the Defendant university.

Although Ms. Lawler is an athlete in demand at other colleges, the timing of Quinnipiac's announcement to eliminate the volleyball program will effectively prevent her from being able to transfer. At the time of the announcement, other schools had generally finished recruiting for next year's volleyball team. Those schools are thus not likely to be able to offer her a full athletic scholarship as a transfer student. Due to financial constraints, moreover, transferring to another school with a substantially diminished or non-existent athletic scholarship program is simply not a realistic option for her or her family.

Even if she were willing or able to compete for an athletic scholarship at another school, the Defendant's decision to deny her team gymnasium privileges and barring them from training with coach Robin Sparks will prevent her from doing so. Because she is not allowed to practice with her team and coach, her volleyball skills and physical conditioning specific to volleyball are deteriorating daily.

L[redacted] R[redacted]

Ms. R[redacted] is a 17 year old high school senior living with her family in Ohio. Throughout high school she participated in varsity volleyball and was a member of the school's equestrian team. L[redacted] was recruited by Quinnipiac to play varsity women's volleyball and was awarded an athletic scholarship in the amount of $28,000 per year and an academic scholarship in the amount of $15,000 per year.

Because of her demonstrated academic and athletic accomplishments, Ms. R[redacted] was recruited by the Defendant as well as Fairfield University; and Alderson-Broaddus College. After meeting Coach Sparks and some of her future teammates, she fell in love with Quinnipiac and did not apply to any other colleges once she was accepted and committed to attending the Defendant university. On of the reasons she decided to commit to the Defendant is because Coach Sparks told her that the Defendant's women's volleyball was an up and coming program with lots of dedication, drive and potential.

After learning that the Defendant was canceling the women's volleyball program, L[redacted]'s mother Lesley spoke by telephone with Jack McDonald, QU's Athletic Director, and expressed her concerns about L[redacted]'s lost opportunity to play volleyball at the Defendant university. He observed that if L[redacted] is good enough to play at Quinnipiac, he was sure that another school would pick her up to play. Unfortunately, however, due to the late notice provided by the Defendant, scholarship opportunities at most other schools were already gone and the application deadlines for admission to other schools had already passed when L[redacted] learned of the Defendant's decision.

As a consequence of Quinnipiac's late announcement, L[redacted] may be forced to take the fall semester off in order to find another school. This will set her back academically and socially for at least the first semester which is so important to establishing college friendships. Although L[redacted] has dreamed of playing collegiate volleyball since she was in grade school, she now fears that her dream of playing college volleyball may never come true. As is true of many of the Plaintiffs, losing an academic and/or athletic scholarship will cause her and her family financial distress.

Robin Sparks

Coach Sparks was recruited to coach women's varsity volleyball by the Defendant university. She was told by representatives of QU during the recruiting

process that the University was committed to volleyball and that she would have at least five years to make the team competitive in the Northeast Conference. After agreeing to work for the Defendant, she and her family moved from Troy, New York to live in Connecticut. Coach Sparks is the primary wage earner in her household and has been told by the Defendant that effective June 30, 2009, her coaching position will be eliminated.

Defendant's Mistreatment of Plaintiffs, and Their Response

In early March, 2009, the Defendant announced that it will no longer sponsor women's varsity volleyball beginning next academic year. Thereafter, the Defendant revoked the team's gymnasium time and prohibited Coach Sparks from training members of the team. After QU's announcement, Plaintiffs, their parents, and Coach Sparks all complained to QU athletic director John McDonald, QU president John Lahey, and other QU personnel about the elimination of the women's varsity volleyball program. They notified them that eliminating the women's varsity volleyball program would worsen QU's disparate treatment of its female students by offering females even fewer athletic opportunities. They demanded that QU not eliminate the program, but QU affirmed its intent to do so.

On March 27, 2009, counsel for the Plaintiffs sent Defendant a letter complaining about the elimination of the women's varsity volleyball program, explaining why eliminating the program constitutes sex discrimination in violation of Title IX, and requesting a response by April 1 and a dialog concerning continuation of the volleyball program. Defendant received the letter on March 30, 2009, but did not respond to counsel until April 15, 2009, after receiving notice of this action.

The harm to the Plaintiffs, including but not limited to the violation of their statutory right against sex discrimination and the loss of their opportunity to compete in intercollegiate varsity athletics, is permanent, irreparable and cannot be adequately compensated in money. For these reasons, the Plaintiffs have brought suit and moved for a temporary restraining order (on notice), and for a preliminary injunction prohibiting the Defendant's anticipated violations.

III. Governing Law

A. The Temporary Restraining Order

The decision to grant a TRO is consigned to the sound discretion of the district court and reviewed for abuse of discretion. *Devlin v. Transportation Communications Intern. Union*, 175 F.3d 121 (2d Cir. 1999), *Chemical Bank v. Haseotes*, 13 F.3d 569, 573 (2d Cir. 1994).

In general, a party who moves the court for a temporary restraining order must make the same showing that is required for a preliminary injunction; *i.e.*, he must demonstrate: (1) that he is likely to suffer irreparable injury if relief is denied; and that there is either (2) a likelihood of success on the merits, or (3) a sufficiently serious question going to the merits to make them a fair ground for litigation, with a balance of hardships tipping decidedly in plaintiff's favor. *Proctor & Gamble Co. v. Cheesborough-Pond's, Inc.*, 747 F.2d 114, 118 (2d Cir.1984).

Plaintiffs are entitled to a temporary restraining order upon a showing that they will suffer irreparable harm if the status quo is not preserved until a ruling on their contemporaneously-filed application for a preliminary injunction. *See Warner Bros. v. Dae Rim Trading Inc.*, 877 F.2d 1120, 1124 (2d Cir. 1989). A TRO should be granted if

immediate and irreparable injury, loss or damage will result to the Plaintiff before the adverse party may be heard in opposition. To obtain a temporary restraining order, Plaintiffs must show irreparable harm and a likelihood of success on the merits. *See Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir.1979); *Spencer Trask Software & Info. Servs. LLC v. RPost Int'l Ltd.*, 190 F.Supp.2d 577, 580 (S.D.N.Y.2002), *National Abortion Federation v. Ashcroft*, 287 F.Supp.2d 525 (S.D.N.Y. 2003).

Irreparable harm is often presumed in cases involving the enforcement of civil rights. *See, e.g., Able v. United States*, 847 F. Supp. 1038, 1043 (E.D.N.Y. 1994) ("[P]possible violation of constitutional rights [under Fifth and First Amendments] constitutes irreparable harm."); *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) ("Victims of discrimination suffer irreparable injury, regardless of pecuniary damage."); *Gresham v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984) (housing discrimination "almost always results in irreparable injury").

B. Injunctive Relief

A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. *Grand River Enterprise Six Nations, Ltd. v. Pryor*, 481 F.3d 60 (2d Cir. 2007). A preliminary injunction is usually prohibitory and seeks to maintain the status quo pending a trial on the merits. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108 (2d Cir. 2006).

The standard applicable to temporary restraining orders is identical to the standard governing preliminary injunctions. *See Local 1814, International Longshoremen's Association, AFL-CIO v. New York Shipping Association, Inc.*, 965 F.2d 1224, 1228 (2d Cir.1992) (quoting Judge Sand's ruling on a temporary restraining order equating the standards governing preliminary injunctions and temporary restraining orders); *see also Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d* § 2951, pp. 254-55 ("When the opposing party actually receives notice of the application for a restraining order, the procedure that is followed does not differ functionally from that on an application for a preliminary injunction .... if there is an adversary hearing or the order is entered for an indeterminate length of time, the 'temporary restraining order' may be treated as a preliminary injunction.").

Plaintiffs are entitled to preliminary injunctive relief upon a showing that: (a) they would otherwise suffer irreparable injury, and (b) either (1) they are likely to succeed on the merits, or (2) there are sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of the hardships tipping decidedly in the

Plaintiffs' favor. *Jackson Dairy, Inc. v. H.B. Hood and Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979); *Caulfield v. Board of Education*, 583 F.2d 605 (2d Cir. 1978).

Pursuant to Fed. R. Civ. P. 65(a)(1), the movant is required to give notice to the respondant of movant's intention to seek a TRO. *Rosen v. Siegel*, 106 F.3d 28, 31-32 (2d Cir. 1997) (compliance with notice requirement is mandatory); *see United States v. Vulpis*, 961 F.2d 368, 371 (2d Cir. 1992) (pursuant to Rule 7(b), company president received adequate oral notice of government's motion to enjoin bankruptcy filing).

C. The Requirements of Title IX

Enacted in 1972, Title IX provides in relevant part as follows:

> 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 Civil Rights Restoration Act of 1987 made plain Congress' intent that the term "program or activity," as used in Title IX, applies to any program or activity so long as any part of the public institution receives federal financial assistance. 20 U.S.C. § 1687. Thus, a university which receives any federal financial assistance and offers varsity athletics to its students is subject to Title IX even if none of the funding for either its men's or women's athletic programs comes from federal sources.

In 1975, the Department of Health, Education and Welfare (the predecessor of the United States Department of Education ("DOE")) adopted regulations interpreting Title IX. These regulations are codified at 34 C.F.R. Part 1061 (the "Regulations"). The Regulations are enforced by the Office for Civil Rights ("OCR") within DOE, and are accorded "substantial deference" by the courts. *Cohen v. Brown University*, 991 F.2d at 888, 896-7 (1st Cir. 1993).

[1] The DOE regulations adopting the HEW regulations are at 45 C.F.R. Part 86.

With regard to athletic programs, 35 C.F.R. § 106.41(a) provides that interscholastic athletics are included within the "program or activity" requirements of Title IX:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

Id.

Title 34 C.F.R. § 106.41(c) specifies ten (10) factors that may be considered in the determination of whether an institution is providing equal athletic opportunity:

1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;
8. Provision of medical and training services;
9. Provision of housing and dining facilities and services; and
10. Publicity.

Another factor to be considered is a school's "failure to provide necessary funds for teams for one sex." *Id.*

In 1979, the OCR issued a policy interpretation of Title IX and the Regulations. This policy interpretation is found at 44 Federal Register 71,413 (1979) (the "Policy Interpretation"). The Policy Interpretation provides that, in order to comply with Title IX and 34 C.F.R. § 106.41(c), schools must provide equal athletic opportunities in three general areas.

> (1) equal athletic participation opportunities,
> (2) equal athletic financial assistance, and
> (3) equal treatment and benefits.

34 C.F.R. §106.41(c)(1).

Only equal athletic participation opportunities are currently at issue in this case. According to the Policy Interpretation, compliance in the area of equal athletic participation opportunities is determined by the following three-part test:

> (1) whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;
>
> (2) where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) where the members of one sex are under-represented among intercollegiate athletes and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

See 44 Fed. Reg. 71,418.

This three-part test was further clarified after notice and comment in OCR's 1996 Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the "1996 OCR Clarification").

The first prong of the three-part tests considers whether a school has provided each male and each female student with a mathematically equal opportunity to participate in athletics. The second and third prongs of the test acknowledge that in certain circumstances schools may nevertheless comply with Title IX even if they have not achieved this actual equity. Should Defendants fail to provide the mathematically equal opportunities described under prong one, they -- not Plaintiffs -- have the burden of proof in demonstrating that they have nevertheless complied with Title IX pursuant to prong two or three. *Cohen v. Brown Univ.*, 991 F.2d 888, 901 (1st Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Horner v. Ky. High Sch. Athletic Ass'n.*, 43 F.3d 265, 275 (6th Cir. 1994).

Prong two examines a school's "past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." 1996 OCR Clarification at 5. Its assessment requires a review of an athletic program's entire history. *Id.* Prong two was devised to measure schools' "good faith remedial efforts" and to account for Congress's expectation that women's interest in athletic participation would expand as discrimination and stereotypes decreased. Schools were expected to reach full compliance by meeting the existing demands of the under-represented sex (female) by 1978. *Id.* at 7.

Prong three measures whether a school fully and effectively accommodates the athletic interests and abilities of its female students. In passing Title IX Congress

intended to encourage women to participate in sports and "to remedy the discrimination that results from stereotyped notions of women's interests and abilities." *Neal v. Bd. of Trustees*, 198 F.3d 763, 768 (9th Cir. 1999). As the First Circuit has emphasized in this context, "[I]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience." *Cohen v. Brown Univ.*, 101 F.3d at 178-179. Thus, schools must encourage females to participate in varsity athletics by fully and effectively accommodating their interests and abilities as these interests and abilities continue to develop and expand. "Had Congress intended to entrench rather than change the status quo -- with its historical emphasis on men's participation opportunities to the detriment of women's opportunities -- it need not have gone to all the trouble of enacting Title IX." *Id.*

The Regulations require that sponsors of intercollegiate athletics (such as the Defendant here) take such remedial actions as are necessary to overcome the effects of sex discrimination in violation of Title IX. *See* 34 C.F.R. §106.3(a). The Regulations also require that federal fund recipients like Defendant adopt nondiscrimination policies and grievance procedures, appoint and train a Title IX officer to receive and investigate sex discrimination complaints, and disseminate this information to all students, faculty, and employees. 34 C.F.R. §§106.8 & 106.9. They further require that each recipient confirm and promise compliance by filing an Assurance of Compliance with DOE each time it applies for or receives federal financial assistance. 34 C.F.R. §106.4.

Not surprisingly, these statutes and regulations have generated considerable litigation.

In *Roberts v Colorado State Bd. of Agriculture*, 998 F2d 824, (10th Cir. 1993), *cert denied*, 126 L Ed 2d 478, 114 S Ct 580 (199), Colorado State University discontinued the women's fast-pitch softball team, and its members filed a Title IX action in which they sought reinstatement of their team. The trial court entered a permanent injunction reinstating the team. On appeal, the Tenth Circuit affirmed the injunction, holding that Colorado State University violated Title IX's requirement of substantial proportionality between enrollment and athletic participation for each sex. Further, the university's failure to demonstrate a history and continuing practice of expanding women's athletic opportunities was also found to violate Title IX, as was the university's failure to fully and effectively accommodate the interests and abilities of its women softball players. Significantly, the court found that a plaintiff need not prove that the defendant institution acted with discriminatory intent in order to prevail on its Title IX claim. The court looked to Title VII of the Civil Rights Act of 1964, (42 U.S.C.A. § 2000e-17) as the most appropriate analog for defining Title IX's substantive standards and found that a successful claim does not require proof of discriminatory intent.

In *Cohen v Brown* University, 991 F2d 888 (1st Cir. 1993), the First Circuit affirmed the trial court's issuance of a preliminary injunction ordering Brown University to reinstate its women's gymnastics and volleyball teams pending the resolution of the athletes' Title IX class action. The court clearly articulated an athlete plaintiff's burden of proof in a Title IX action. First, she must show a disparity between the gender composition of the defendant institution's student body and its athletic program, thereby demonstrating that one gender is underrepresented in athletics. Second, she must demonstrate the presence of an unmet athletic interest among members of the

underrepresented gender. Having established both conditions, she proves her case unless the defendant college or university shows a history and continuing practice of program expansion in athletics that responds to the interests and abilities of members of the underrepresented gender.

In granting the athletes' request for a preliminary injunction, the court concluded that they were likely to succeed on the merits of their Title IX claim. The athletes demonstrated that both before and after the challenged budget cuts, women were disproportionately underrepresented among varsity athletes at Brown University. They also demonstrated that the university's decision to discontinue women's gymnastics and volleyball resulted in an unmet athletic need among female students at Brown; and since Brown University did not show a continuing practice of expanding athletic opportunities for its female students, it could not overcome the athletes' *prima facie* case. The appellate court also concluded that it was within the trial court's discretion to require Brown University to temporarily reinstate the two teams.[2]

IV. ARGUMENT

A. The Plaintiffs Will Suffer Irreparable Harm In The Absence Of a TRO and Injunctive Relief

Granting of a TRO and injunctive relief are appropriate where the Plaintiffs make out a *prima facie* claim of sex discrimination under Title IX. *Favia*, *Roberts*, *Cohen*, *supra*. Those courts necessarily found that a Title IX violation may result in irreparable harm to the aggrieved and those suits commenced with the granting of a TRO. Here,

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2 The court noted, however, that the same remedy may not be suitable post-trial, even if the athletes prevail. Rather, the appropriate remedy at that point may be to direct the university to devise a plan for achieving compliance with Title IX, rather than specific relief.

the Plaintiffs are seeking to enforce important civil rights codified in Title IX to insure that they not be discriminated against on account of sex. As noted above, irreparable harm is often presumed in cases involving the enforcement of civil rights.

The Declarations of Plaintiffs Biediger and Lawler and the Verified Complaint establish that Plaintiffs have been and will be irreparably harmed by QU's lately declared decision to terminate the varsity women's volleyball program. L[redacted] R[redacted] will be denied the opportunity ever to play varsity women's volleyball at QU, notwithstanding the fact that she was recruited to play there and induced to matriculate based on the offer of an athletic scholarship. Ms. Biediger has played volleyball at QU, but will be denied the opportunity to complete her anticipated tenure as a member of the team. The opportunity to participate in intercollegiate sports is limited to approximately 4 years, and denial of even one year's participation will permanently disenfranchise these athletes and deprive them of a significant aspect of their expected collegiate experience. The fact that these female athletes are denied these opportunities to participate in athletics while male athletes at QU are proportionally overrepresented in violation of Title IX cements Plaintiffs' claim that they will suffer irreparable injury.

B. The Plaintiffs Are Likely To Succeed On The Merits

In order to prevail on their claim that they have been impermissibly denied equal opportunities to compete in varsity sports, the plaintiffs must demonstrate, first, that there exists a disparity between the gender composition of the defendant institution's student body and its athletic program, thereby demonstrating that one gender is underrepresented in athletics; and second, that there exists an unmet athletic interest among members of the underrepresented gender. *Cohen*, *supra*. As set forth in the

Verified Complaint, QU's student body is 38% male and 62% female. QU, however, has traditionally and continues to offer more than 38% of its athletic participation opportunities to males, and less that 62% to female students.

The fact of the present suit, supported by the Declarations of Student Plaintiffs Biediger and Lawler and the Verified Complaint, evidence that there exists an unmet athletic interest among the women athletes of QU. By eliminating women's volleyball as a varsity sport, QU will further reduce the number of athletic opportunities available to women by approximately the 12-15 team members who are required to field a team.

Having established both that QU does not provide athletic opportunities to male and female students in proportion to their representation in the undergraduate student body, and that there is (or will be, upon elimination of volleyball) an unmet athletic interest among female students, the Plaintiffs have proven their case unless QU can demonstrate that it has a history and continuing practice of program expansion in athletics that responds to the interests and abilities of its women athletes. Clearly it does not. As set forth in the Verified Complaint, QU has historically been remiss in providing equal varsity athletic opportunities to women. There exists a proposed class of women athletes interested in pursuing their interest and demonstrated abilities in varsity women's volleyball whose needs are going and will go unmet.

The Plaintiffs are likely to succeed on the merits. If they are denied the TRO and later the injunctive relief which they seek, they will suffer an irreparable harm. The court should enter the proposed temporary restraining order.

CONCLUSION

The Plaintiffs have demonstrated that they are presently suffering an irreparable harm by the Defendant's decision to terminate its varsity women's volleyball program. These athletes have had their gymnasium privileges as a team revoked and they are not allowed to practice with their coach, Robin Sparks. Because of this, these talented

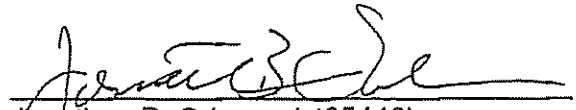
female athletes are daily suffering a loss of the opportunity to develop their full potential as student-athletes, and their skills and conditioning are suffering. Because they are unable to maintain their competitive skills, they are also being denied the opportunity to pursue their interests at other schools inasmuch as other schools which may offer athletic scholarships are daily less likely to extend them to the plaintiffs.

The Plaintiffs will be harmed irreparably if the Defendant is permitted to proceed with its declared decision to eliminate women's varsity volleyball. Moreover, the balance of hardships tips decidedly in favor of the Plaintiffs inasmuch as they are suffering from discrimination on account of sex.

The Plaintiffs, therefore, respectfully request that this Court issue a temporary restraining order restraining Defendant from continuing to discriminate against female students on the basis of sex, restraining Defendant from eliminating the women's varsity volleyball program, and an injunctive order requiring Defendant to provide female students of QU with an equal opportunity to participate in varsity intercollegiate athletics

by sponsoring additional women's varsity athletic opportunities based upon the interests and abilities of Defendant's present, prospective, and future female students.

Respectfully submitted by:



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CERTIFICATION

A copy of Plaintiffs' Memorandum of Law in Support of Their Motion for Temporary Restraining Order has been emailed to Defendant on this date, and shall be served on the named Defendant in accordance with the Plaintiff's service obligations under Federal Rule of Civil Procedure 4.

Dated: April 16, 2009

Jonathan B. Orleans (ct05440)
Alex V. Hernandez (ct08345)

Bridgeport/73061.1/JORLEANS/755216v1