UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KAYLA LAWLER ERIN OVERDEVEST, and KRISTEN CORINALDESI, individually and on behalf of those similarly situated; LESLEY RIKER, on behalf of her minor daughter, L.R., individually and on behalf of those similarly situated; and ROBIN LAMOTT SPARKS, individually,	:	**Civil Action No. 09 CV 621 (SRU)**
PLAINTIFFS,	:	
v.	:	
QUINNIPIAC UNIVERSITY,	:	
DEFENDANT.	:	**MAY 7, 2009**

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION IN LIMINE TO PRECLUDE THE EXPERT TESTIMONY OF DR. DONNA LOPIANO

Defendant, Quinnipiac University (hereinafter "Quinnipiac" or the "Defendant'), hereby respectfully submits this Memorandum of Law in Support of its Motion to Preclude the Expert Testimony of Dr. Donna Lopiano, pursuant to Fed. R. Civ. Proc. 26 and Federal. R. Evid. 702, 703 and 704. Specifically, Defendant respectfully requests that the testimony of Dr. Lopiano be excluded as, a) Dr. Lopiano's testimony asserts legal conclusions and usurps the function of this Court in deciding the law; b) Dr. Lopiano bases her testimony on erroneous facts and incomplete experts of deposition testimony; c) Dr. Lopiano is improperly seeking to testify as to the credibility of the evidence; and d) Plaintiffs failed to submit an expert report in compliance with

Fed. R. Civ. Proc. 26(a)(2)(b) as Dr. Lopiano testified at her deposition to matters not disclosed during her oral Rule 26 report.[1]

I. PRELIMINARY STATEMENT

This action was commenced by Plaintiffs, the majority of whom are current or incoming students at Quinnipiac University who are likewise members or potential members of the volleyball team, as well their coach, Robin Sparks. Plaintiffs allege that they will be denied an equal opportunity to participate in varsity intercollegiate athletics at Quinnipiac as Quinnipiac eliminated the volleyball team for the upcoming 2009-2010 academic year. See Complaint ¶53. In support of their claims Plaintiffs seek to introduce the testimony of Dr. Donna Lopiano, a purported expert in Title IX.

On May 5, 2009, a *de bene esse* deposition was conducted, as Dr. Lopiano is apparently unavailable to testify at trial. Plaintiffs seek to introduce this testimony and Defendant's cross-examination via videotape at the hearing scheduled for May 11, 2009. Although the expedited transcript of that deposition is not currently available, Dr. Lopiano's purported expert opinions were as follows. First, Plaintiffs seek to introduce Dr. Lopiano's testimony generally to instruct the Court as to the three prong test for Title IX compliance. Plaintiffs next seek to introduce Dr. Lopiano's purported expert conclusions: a) that Quinnipiac is violating Title IX and will not be in compliance with Title IX for the 2009-2010 academic year; b) that Quinnipiac is improperly

[1] Additionally, along these lines, Defendant has already noted the following for the Court: the desire to disclose an expert was unduly delayed in the first place by Plaintiffs, having never been mentioned in Court despite direct inquiry regarding expedited discovery desired; not mentioned until nearly one week thereafter during a telephone conference with the Court; no written disclosure of the opinion or specific bases therefore made until ordered by the Court, despite the clear mandates of Fed. R. Civ. Proc. 26; along with the inadequacy of the verbal disclosure given the fact that additional documents not specified during the "disclosure" phone conference were marked at the trial deposition for the first time, and cited as partial bases for the expert's opinions.

counting sports, based upon **her** interpretations of the guidelines set forth by the Office of Civil Rights ("OCR") and the relevant statutes; and c) that in her opinion Quinnipiac's Competitive Cheer Team cannot meet the definition of a sport as defined by OCR. As set forth herein, this testimony represents legal conclusions and statements about the credibility of the evidence, which as a matter of law cannot be presented by an expert.

It is well settled that an expert cannot opine as to legal conclusions as that invades the province of the Court and the trier of fact. Here, all of Dr. Lopiano's purported expert opinions represent testimony on the ultimate legal issues in the case. This Court is fully capable of evaluating the evidence and applying the law and the Plaintiffs should not be permitted to make legal arguments through a lay witnesses.

Moreover, Dr. Lopiano's testimony is based solely on documents produced in discovery and the testimony of other witnesses, which the Court can evaluate on its own. Along those lines, Dr. Lopiano's testimony is replete with statements going to the credibility of the evidence at issue. There are numerous fact witnesses who can testify as to the documents at issue and the Court does not need expert testimony to evaluate documents and testimony of other witnesses. As a matter of law, the trier of fact is the arbiter of credibility and an expert cannot opine on the credibility of the evidence. Further the majority of Lopiano's opinion on whether Quinnipiac can achieve proportionality for the 2009-2010 academic year relies on "facts" that are incorrect and is pure speculation and conjecture. In short, Dr. Lopiano's testimony violates the Federal Rules of Evidence and must be precluded in its entirety.

Plaintiffs should also be precluded from presenting the testimony of Dr. Lopiano as they failed to comply with Rule 26 of the Federal Rules of Civil Procedure. Specifically, although this Court required the Plaintiffs to supplement their purported expert disclosure, which simply listed documents, including vague references to websites, and comply with Rule 26 orally during

a telephone conversation, Dr. Lopiano testified beyond the scope of her oral Rule 26 report and relied on documents not referenced in that oral report. When Defendant objected at the deposition to the introduction of documents not discussed during Dr. Lopiano's oral Rule 26 report, Plaintiffs' counsel responded that the documents were listed on the prior purported disclosures. This was the very thing that the Court deemed incomplete and required an oral report so Defendant could determine which specific documents Dr. Lopiano relied upon and why she relied upon them. Thus, for this additional reason Plaintiffs should be precluded from presenting Dr. Lopiano's testimony. Additional facts will be set forth herein on this issue as necessary.

II. ARGUMENT

A. The Standard For Motion to In Limine

A district court has the inherent authority to manage the course of its trials which encompasses the right to rule on motions in limine. See Luce v. United States, 469 U.S. 38, 41 n. 4, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). "The purpose of an in limine motion is to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial." Palmieri v. Defaria, 88 F.3d 136, 141 (2d Cir.1996) (internal quotation marks omitted). "[Q]uestions relating to the admissibility of evidence, relevancy of proffered evidence and the scope of cross-examination are all questions to be determined subject to the rules of evidence and in doubtful cases subject to the discretion of the trial court." See United States v. Corr, 543 F.2d 1042, 1051 (2d Cir.1976).

A. Dr. Lopiano's Testimony Seeks to Introduce Legal Conclusions and Invades the Province of this Court in Interpreting the Law

Plaintiffs first seek to introduce the testimony of Dr. Lopiano to generally explain the three part test for Title IX compliance. Federal Rule of Evidence ("FRE") 702 provides that the court may admit the testimony of an appropriately qualified expert if that expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue." The Court must ensure, as set forth in FRE 702 that the expert testimony at issue is "helpful ... in comprehending and deciding issues beyond the understanding of a layperson." DiBella v. Hopkins, 403 F.3d 102, 121 (2d Cir.2005). While an expert witness may testify as to an ultimate fact issue the trier of fact will decide, see Fed.R.Evid. 704, the general rule is that an expert may not testify as to what the law is, because such testimony would impinge on the trial court's function. See Nimely v. City of New York, 414 F.3d 381, 397 (2d Cir.2005); FAA v. Landy, 705 F.2d 624, 632 (2d Cir.), cert. denied, 464 U.S. 895 (1983). As such, Dr. Lopiano, who is a layperson, cannot instruct this Court on the three prong test for Title IX. See Nimely v. City of New York, 414 F.3d at 397.

Plaintiffs not only seek to have Dr. Lopiano improperly instruct this Court on the three prong test for Title IX, but Plaintiffs seek to have Dr. Lopiano instruct this Court on the legal conclusions to be drawn from the facts. Dr. Lopiano's legal conclusion testimony is three-fold. First she testified during her deposition that in her "expert" opinion Quinnipiac is violating Title IX and will not be in compliance with Title IX for the 2009-2010 academic year. Second, Dr. Lopiano seeks to tell this Court that Quinnipiac is improperly counting sports, based upon **her** interpretations of the guidelines set forth by the OCR and the relevant statutes. Third, Dr. Lopiano seeks to testify that in her opinion that Quinnipiac's Competitive Cheer Team cannot meet the definition of a sport as defined by OCR. These are the ultimate legal issues that this Court will be asked to decide in this matter. As a matter of law, however, Dr. Lopiano is not allowed to tell this Court what legal conclusions it should reach. See Hugh v. Jacobs, 961 F.2d

359, 363-64 (2d Cir.1992) (holding that the district court should have excluded expert testimony in an excessive force case where the expert testified that defendant's conduct was "not justified [or warranted] under the circumstances" and "totally improper," noting that the expert's opinions "merely [told] the jury what result to reach"); Rieger v. Orlor, Inc., 427 F.Supp.2d 99, 103 (D. Conn. 2006); Primavera Familienstifung v. Askin, 130 F.Supp.2d 450, 530 (S.D.N.Y.2001) (excluding expert report and finding that the report "does no more than counsel for [plaintiff] will do in argument, i.e., propound a particular interpretation of [defendant]'s conduct. This is not justification for the admission of expert testimony.")

Our District Court's decision in Rieger, is particularly instructive. In Rieger, the plaintiff brought an action pursuant to the Americans With Disabilities Act and sought to introduce expert testimony *to wit* that defendant could have accommodated the plaintiff's disability and that the defendant retaliated against the plaintiff. See Rieger, 427 F.Supp. 2d at 103. The District Court excluded the experts testimony and found that because the expert's opinion "does not proffer any specialized knowledge, and invokes legal standards . . ., his opinion would not *aid* the jury in making a decision, but rather attempts to substitute [his] judgment for the jury's." Id. (internal quotations and citations omitted). Like the expert in Rieger, Dr. Lopiano seeks to instruct this Court on what conclusions to draw from the evidence, which is simply improper. Id.

As a practical matter there is no reason for Dr. Lopiano to provide "expert" testimony. The issue before this Court is fairly straightforward *i.e.* is Quinnipiac in compliance with Title IX for the 2009-2010 academic year. As the Court is aware, Defendant asserts that they are in compliance and rely on prong one of the three prong test for Title IX compliance; that the athletic opportunities provided for male and female student athletes is proportional to the gender makeup of the Quinnipiac undergraduate student body. See Cohen v. Brown Univ., 991 F.2d

881, 901 (1st Cir. 1993). This is largely a function of straight numerical calculation. Either the number of athletic opportunities is proportional or it is not. To the extent there are sub-issues within the calculation *i.*e whether Quinnipiac is properly counting the number of athletic participation opportunities or whether Competitive Cheer meets the OCR's definition of a sport, this Court can clearly evaluate these propositions, interpret the law and the relevant OCR regulations and guidance, without the assistance of an expert. Simply put, as a matter of law, Dr. Lopiano cannot tell this Court what legal conclusions to draw from the evidence. See Humphreys v. Regents of University of California, 2006 WL 1867713, at *4-5 (N.D. Cal. Jul. 6, 2006)(excluding testimony of Dr. Lopiano and concluding that "Lopiano's expert report consists of little more than a recitation of plaintiff's evidence, combined with her conclusion that the evidence demonstrates that plaintiff was discriminated against. Allowing this form of testimony would greatly infringe upon the role of the jury.")

Moreover, Dr. Lopiano's testimony is not based upon any personal knowledge, but rather sets forth her conclusions based upon documents created by other parties. Dr. Lopiano conceded that she did not speak to anyone at Quinnipiac University, but rather simply relied upon the documents provided in discovery and the deposition testimony of Defendant's witnesses. Furthermore, the majority of the facts that Dr. Lopiano relied upon for her legal conclusions are incorrect. For example, Dr. Lopiano conceded that she was unaware that Quinnipiac actually had a competitive cheer team in place during the 2008-2009 academic year and that the competitive cheer team was a separate and distinct entity from the sideline cheerleaders. Similarly, while Dr. Lopiano testified that she relied upon the depositions of Defendant's witnesses, upon further examination it was clear that Dr. Lopiano relied on select portions of that testimony and failed to read the entire depositions. As aptly noted by Judge Scheindlin, in similar circumstances, "testimony by fact witnesses familiar with those documents would be far

more appropriate ... and renders [the expert witness'] secondhand knowledge unnecessary for the edification of the jury." LinkCo, Inc. v. Fujitsu Ltd., 2002 WL 1585551, *2 (S.D.N.Y. July 16, 2002).

In short, Plaintiffs are essentially using Dr. Lopiano to make their counsel's legal arguments (which should be asserted in a pre-trial memorandum or closing arguments) in the hopes that the Court will accept their legal arguments because they are being delivered by a purported expert in Title IX. Such improper attempt should be denied and this Court should preclude Dr. Lopiano's testimony in its entirety.

B. All Testimony By Dr. Lopiano Concerning the Credibility of Defendant's Roster Spots for the 2009-2010 Academic Year Must Be Precluded.

To the extent this Court permits Dr. Lopiano to testify, Dr. Lopiano should still be precluded from testifying about Quinnipiac's purported prior non-compliance with prong one of the three prong test; the proportionality test. As noted, Dr. Lopiano seeks to testify that Quinnipiac is not in compliance with Title IX for the 2009-2010 academic year. Subsumed within this purported "expert opinion" is Dr. Lopiano's conclusion that the numbers set forth in Quinnipiac's letter to Plaintiffs' counsel stating the number of available athletic participation opportunities for the upcoming school year (2009-2010) are not correct[2]. Dr. Lopiano's testimony, however, improperly seeks to opine on the credibility of Defendant's documents and witness testimony. Specifically, Dr. Lopiano testified that she did not "trust" the numbers provided by Quinnipiac for the for 2009-2010 academic year[3]. Dr. Lopiano's testimony in this

[2] As set forth in Defendant's pre-trial memorandum Defendant objects to the admission of any evidence of purported prior non-compliance with prong 1 of Title IX test as irrelevant to the claims in this litigation.

[3] In support of this conclusion Dr. Lopiano relied on the prior EADA numbers and her belief that the squad sizes did not match average squads of other schools. It is noteworthy that Dr. Lopiano

regard was replete with phases such as "I don't believe" and "I don't think." Lest there be any doubt that Dr. Lopiano was opining on the credibility of the roster numbers for 2009-2010 Dr. Lopiano testified "What confidence do I have with the [numbers for 2009-2010]?" and "If it walks like a duck quacks like a duck it must be a duck" It is well settled however that "an expert cannot testify as to credibility issues. Rather, credibility questions are within the province of the trier of fact . . . ." Woodman v. WWOR-TV, Inc. 411 F.3d 69, 86 (2d Cir 2005) (quoting Goodwin v. MTD Prods., Inc., 232 F.3d 600, 609 (7th Cir.2000)); LinkCo, Inc. v. Fujitsu Ltd., No. 00 Civ. 7242 (SAS), 2002 WL 1585551, at *2 (S.D.N.Y. July 16, 2002) (holding that it was inappropriate for an expert to opine on the credibility of evidence.) Clearly Dr. Lopiano's testimony concerning the 2009-2010 roster spots goes to the issue of credibility and accordingly, all of Dr. Lopiano's testimony concerning the accuracy of the 2009-2010 roster numbers and Quinnipiac's past compliance with Title IX must be precluded. See Woodman, 411 F.3d at 86.

C. Plaintiffs' Failed to Timely Submit a Proper Rule 26 Report

Rule 26(a)(2)(b) provides in relevant part that the expert disclosure "must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain: (i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the data or other information considered by the witness in forming them; (iii) any exhibits that will be used to summarize or support them . . . ." The following additional facts clearly establish that Plaintiffs failed to comply with Rule 26(a)(2)(b):

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ignored the fact and that the rosters sizes for 2009-2010 are nearly identical to the actual squad sizes for the 2008-2009 school year.

The parties appeared before this Court on April 17, 2009, on Plaintiffs' motion for a temporary restraining order. The parties reached an agreement and the Plaintiffs withdrew their request for a TRO. Thereafter the Court set a date, May 11, 2009, for a hearing on Plaintiffs' motion for a preliminary injunction. While Plaintiffs requested expedited discovery in advance of the hearing no mention was made of any purported expert. Indeed, it was not until almost a week after the initial Court appearance, during the tail end of a discovery conference call with the Court on April 23, 2009, that Plaintiffs mentioned that they were intending to call any expert witness. Defendant indicated that they wanted to receive the expert report required under Rule 26 of the Federal Rule of Civil Procedure. On April 27, 2009, Defendant received Plaintiffs' purported expert report. A copy of Plaintiffs April 27th submission is annexed hereto as Exhibit A. The purported report set forth general topics of testimony and referred vaguely to some documents. Defendant immediately informed Plaintiffs that the report woefully failed to meet the requirements of Rule 26. On April 30, 2009, Defendant received Plaintiffs' purported amended expert disclosure, which consisted of a further vague list of documents including general references to websites. A copy of the Plaintiffs' April 30th submission is annexed hereto as Exhibit B. Defendants again objected to the submission and sought the intervention of the Court. As such, a telephone conference call was held on May 1, 2009, concerning this issue. During the call, the Court agreed that Plaintiffs had to comply with Rule 26, offered to move the hearing date three days until May 14, 2009, to which Plaintiffs declined, and ordered the Plaintiffs to comply with Rule 26 by Sunday, May 3, 2009. The Court indicated that the Plaintiffs could provide an oral Rule 26 report. On Sunday May 3, 2009, a conference call was had between the parties and Dr. Lopiano where Dr. Lopiano purported to orally provide her Rule 26 report. During the call Dr. Lopiano set forth her purported expert opinion and the documents she relied on for that opinion. Dr. Lopiano was extensively questioned by Defendants' counsel

to determine what specific documents Dr. Lopiano relied upon. Nonetheless at the deposition held on May 5th Dr. Lopiano sought to testify as to matters that were not discussed during the May 3rd call and sought to rely on documents not identified during her May 3rd call.

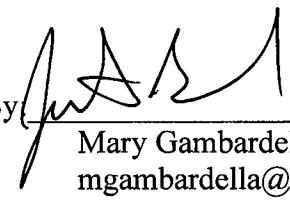
As noted, Rule 26 requires an expert to provide a detailed report. The purpose of an expert report is "to provide the opposing party with the scope of the opinion that will be provided at trial [and] to allow for an effective cross examination of the witness. . . ." Ordon v. Karpie, 223 F.R.D. 33, 36 (D.Conn.2004). This is particularly important where, as here, the expert is not available for trial and the deposition testimony will be read at trial. Plaintiffs' willful failure to timely provide the Defendant with an expert report severely prejudiced the Defendant and denied the Defendant a meaningful opportunity to cross-examine Dr. Lopiano. For this reason alone the Court should preclude Dr. Lopiano's testimony. See Softel, Inc. v. Dragon Med. & Scientific Comm., Inc., 118 F.3d 955 (2d Cir.1997); Emmpresa Cubana Del Tabaco v. Culbro Corp. 213 F.R.D. 151 (S.D.N.Y. 2003); Coleman v. Dydula, 190 F.R.D. 316 (W.D.N.Y. 1999). The late submission of any purported expert report was compounded by Dr. Lopiano testifying during her deposition to matters outside the scope of her oral Rule 26 report. Accordingly, Dr. Lopiano's testimony outside the scope of her oral Rule 26 report must be precluded. See Dairy Farmers of America, Inc. v. Travelers Ins. Co., 391 F.3d 936 (8th Cir. 2004).

In sum Plaintiffs failed to timely comply with Rule 26 and essentially sandbagged the Defendant at Dr. Lopiano's deposition. Such willful violation of the rules should not be permitted and Dr. Lopiano's testimony should be precluded in its entirety.

III. CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court preclude the testimony of Dr. Lopiano in its entirety, together with such other and further relief as the Court deems just and proper.

WIGGIN AND DANA LLP

By 

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2009 the foregoing Defendant's Memorandum of Law in Support of its Motion to Motion in Limine to Preclude the Expert Testimony of Dr. Donna Lopiano was filed electronically, and 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, and specifically to the following counsel of record:

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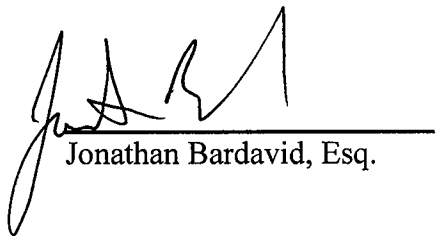

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