UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KRISTEN CORINALDESI, KAYLA LAWLER and ERIN OVERDEVEST, 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. 3:09-cv-621 (SRU)**
PLAINTIFFS,	:	
v.	:	
QUINNIPIAC UNIVERSITY	:	
DEFENDANT.	:	**May 14, 2009**

DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant, Quinnipiac University (hereinafter "Quinnipiac" or the "Defendant'), hereby respectfully submits its Proposed Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT:

1. Plaintiffs, with the exception of Robin Sparks, are current and incoming students of Defendant, and current and incoming prospective members of the University's volleyball team.
2. Plaintiff Robin Sparks was the coach of the women's volleyball team. Sparks alleges non-renewal of her contract due to the "gender of her students".
3. Plaintiffs seek to compel reinstatement of the women's volleyball team at Defendant, which was terminated effective the end of academic year 2008-09.

4. Defendant Quinnipiac is a private, coeducational university located in Hamden, Connecticut.

5. During the past 2008-2009 academic year, Defendant had an undergraduate enrollment of 2089 male students and 3366 female students, or a male-to-female percentage distribution of 38.3% to 61.7%, respectively. (Tr. Ex. 3)

6. In early 2009, Quinnipiac undertook to reorganize its athletic program, in conjunction with all University operations across the board, for budgetary and related reasons. The first athletic program targeted for elimination was men's golf, then its women's volleyball team. (See Tr. Ex. 3. at 2; testimony of Jack McDonald)

7. These two sports on each side provided the smallest number of athletic opportunities; 8 for men's golf and 14/15 for women's volleyball.

8. Following further internal discussions, in particular regarding the steps needed to ensure Title IX compliance when cutting a women's sport, men's outdoor track suffered the same fate.

9. At the same time, Quinnipiac decided to elevate its nationally recognized women's competitive cheer team participants to varsity status, adding 40 spots for female athletic participation. (Id.)

10. As Quinnipiac's Athletic Director, Jack McDonald, represented, budgetary and space pressures mandated a discussion of program cuts.

11. Men's golf and women's volleyball were identified first; with respect to women's olleyball, the space "crisis" had been discussed for some time. (See McDonald Dep.. pp. 11-14, 16-21; trial testimony)

12. The facility used for volleyball already was being used for a number of other purposes.

13. As Mr. McDonald testified, it was initially proposed that, rather than eliminate volleyball, the University could explore future building of a new facility for the program. However, with the economic crisis occurring starting in 2007 and forward, it was clear the University could not include such expenditures into its budget. (See McDonald Dep. at pp. 11-4, 16-21, 26-34; trial testimony).

14. Plaintiff L.R. has been offered a partial athletic scholarship to play Division 1 volleyball at Fairfield University next year, but has decided to put that opportunity on hold pending the outcome of this litigation. Leslie Riker, L.R.'s mother conceded that the decision to place the opportunity on hold could result in L.R. losing the opportunity. See Trial Testimony.

15. Plaintiff Kayla Lawler was offered a full athletic scholarship to play Division 1 Volleyball next year at University of Rhode Island, but declined the opportunity because she "didn't connect with the coach." See Trial Testimony.

16. Plaintiff Stephanie Biediger will be medically unable to play volleyball next academic year due to medically necessary surgery.

17. Ms. Biediger testified that sitting out one year will not destroy her ability to play competitive volleyball in the future. See Trial Testimony.

18. None of the Plaintiffs presented evidence that they have been scouted by or targeted by any professional volleyball programs for after graduation.

19. On or about March 4, 2009, Defendant announced for budgetary and related reasons, effecting academic year 2009-10, it was eliminating three athletic programs; women's volleyball, men's golf, and men's outdoor track.

20. At the same time, Defendant announced that, effective academic year 2009-10, it would elevate its existing competitive cheer team to varsity status.

21. Plaintiffs were permitted to play volleyball during the entire academic year 2008-09.

22. The only assertion by Plaintiffs regarding alleged "harm" for the current academic year is that they could not practice with their Coach. The Defendant agreed to permit such practice following the hearing on Plaintiffs' request for a temporary restraining order held on April 17, 2009.

23. Defendant has had a competitive cheer team in place at the University for a number of years. This team performs and competes in activities wholly distinguishable from sideline cheerleading.

24. The coach of the competitive cheer team is Mary Ann Powers.

25. The Defendant's competitive cheer team placed 6th in national competitions.

26. Defendant's current cheer team competes in a standard season; in organized competitions involving a number of other schools' competitive cheer teams.

27. Current and prospective competitive cheer participants have requested the team eliminate any sideline cheer activities, and elevation to varsity status.

28. Coach Powers testified to the above, as well as provided significant information regarding the training, conditioning, practice sessions, and other elements of the competitive cheer team activities

29. Quinnipiac has approved scholarships and a budget for a cheer team that will engage solely in competitive cheer activities. Ms. Powers will be employed full time for competitive cheer team activities alone.

30. A wholly separate sideline cheer team will be formed, with its own part time coach.

31. Defendant presented Plaintiffs with information, prior to the filing of this suit, reflecting its athletic participation opportunities for academic year 2009-10.

32. Defendant's information reflected that such participation opportunities, broken down by gender, would be proportionate to the gender breakdown of highest possible anticipated enrollment for next year.

33. Defendant has committed to evolving toward such proportionality for the past several years, evidenced by, among other things, a written commitment to increasing athletic opportunities for women contained in an NCAA self-study, the introduction of roster management in 2006/2007, and inclusion of policies and procedures in the Athletic Department manuals concerning roster management as an official policy of the Department.

34. In its plan for 2009-10, Defendant separately counts indoor and outdoor track, and cross country track, as three separate programs for both men and women.

35. Such counting is permitted by NCAA guidelines, nor is such counting prohibited by any judicial precedent or Office of Civil Rights regulations or guidelines.

36. Furthermore, the Office of Civil Rights has not indicated that competitive cheer may not be counted for purposes of Title IX compliance; to the contrary, it has repeatedly indicated that competitive cheer may count if the multi-part test established is met.

37. The University of Maryland, for example, has engaged the Office of Civil Rights in its competitive cheer team guidelines, which guidelines are being utilized by Defendant for administration going forward of its program.

38. Defendant here has maintained a competitive cheer team that Plaintiffs have not proven cannot satisfy such test, and thus, that Defendant is not entitled to count these roster spots toward compliance with prong I of Title IX.

39. Plaintiffs have failed to present sufficient evidence to establish that the athletic participation opportunities presented by Defendant cannot be filled and are otherwise "unrealistic" or "incredible".

40. For example, the sole evidence proffered by Plaintiffs was the testimony of the women's softball coach who opined that her target of 25 players was "too high" for a softball team.

41. Yet, Defendant proffered two other women's coaches who testified to the contrary.

42. Furthermore, the women's softball coach also conceded that while the first year of roster management she believed her budget was insufficient, in 2008 she was able to fill 23 out of 25. The proposed roster target for women's softball for next year remains at 25.

43. If Defendant is compelled to reinstate the volleyball program, it will be forced to reverse a number of decisions made and actions already taken, not the least of which is to expend significant sums it cannot provide to satisfy its space constraints it has been enduring for several years.

PROPOSED LEGAL CONCLUSIONS:

1. Plaintiffs cannot establish that they would suffer irreparable harm is that the record establishes that Quinnipiac will continue the Student-Plaintiffs' scholarships through graduation, and release any Student-Plaintiffs who request it from their National Letters of Intent to play volleyball at Quinnipiac. See Equity in Athletics, Inc. v. Dept. of Educ., 291 Fed.Appx. 517, 521 (4th Cir. 2008) (affirming the denial a Title IX preliminary injunction in part because, even if there was a recognizable harm "to the student-athletes

of not being able to compete in the sport and at the university of their choice ... the student-athletes would not lose their scholarship funding if they chose to stay at [the university]" and "the students were free to transfer to other colleges offering their chosen sport"); see also Miller v. Univ. of Cincinnati, No. 1:05-cv-764, 2007 WL 2783674, at *11 (S.D. Ohio Sept. 21, 2007) (denying plaintiff's motion for preliminary injunction under Title IX to stop the elimination of the women's rowing team where the court found that the plaintiffs had not proved that they would suffer an irreparable because "[t]he University ha[d] committed itself to continuing scholarship assistance to any rower who will not be able to compete because of termination of the program" and it "ha[d] also agreed to 'release' under NCAA rules any rower who wishe[d] to remain in competitive collegiate rowing to transfer to another school."); Butler v. National Collegiate Athletic Ass'n., No. 06-2319 KHV, 2006 WL 2398683, at *4 (D. Kan. Aug. 15, 2006) (finding that student who sought a temporary restraining order to play collegiate football for a sixth year claiming that he would suffer irreparable injury because he would be unable to complete his education and lose his opportunity to be scouted and recruited by the National Football League ("NFL") would not suffer irreparable injury where his financial aid package was not affected by his elimination from the football team, and the loss of an opportunity for a professional football career was "speculative.")

2. Plaintiffs' allegations clearly establish that the essence of their alleged harm is financial, which is remediable in an action for damages-perhaps suing Quinnipiac for the scholarship amount she would need to play at another school—which clearly brings their claims outside the realm of a claim for injunctive relief. See Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 404 (2d Cir. 2004) ("If an injury can be appropriately compensated by

an award of monetary damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief.") (citing Borey v. Nat'l Union Fire Ins. Co., 934 F.2d 30, 34 (2d Cir. 1991)).

3. Plaintiffs bear the heightened burden of establishing "'clear' or 'substantial' likelihood of success on the merits" because they seek a mandatory injunction as they seek that the Court order Defendant to reinstate volleyball, among other things, the Defendant would have to potentially re-assess the statistics to ensure compliance with Title IX and reinstate other men's programs; and/or reduce spots in other programs; and/or cancel Varsity Cheer after it has already been announced, and cancel scheduled Competitive Cheer varsity competitions. Resources already committed to other functions would have to be retracted. Such actions can hardly be deemed to constitute "maintenance of the status quo." See Doninger, 527 F.3d at 47.

4. Plaintiffs cannot establish any likelihood of success because they cannot demonstrate that Quinnipiac intentionally discriminated against them on their basis of their sex, which is a prerequisite to their Title IX claim. Cannon v. University of Chicago, 648 F.2d 1104, 1109 (7th Cir.), cert. denied, 454 U.S. 1128, 102 S.Ct. 981, 71 L.Ed.2d 117 (1981) ("Similarly, Title IX requires that a plaintiff show intentional sex discrimination") (holding plaintiff's claim that medical school's admission policies had disparate impact on women was insufficient to meet Title IX's intentionality requirement, even when the university ostensibly knew of the impact of said policies); see also Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1193 (S.D.N.Y. 1988); Nagel v. Avon Board of Education, 575 F. Supp. 105, 109 (D. Conn. 1983).

5. As a jurisdictional matter, several Plaintiffs lack standing. Therefore, a fortiori, they cannot establish likelihood of success. For example, Plaintiff Robin Lamott Sparks' claim must be dismissed, as she lacks standing to assert the rights of her students. While Coach Sparks may attempt to characterize her claim as one of discrimination arising under Title IX, it is clear that she is simply trying to assert the purported rights of her students, something she cannot do. See Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58 (2d Cir. 1994) ("Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party.")

6. Plaintiff Spark's Title IX claim is preempted by Title VII. It is well settled that Title VII provides a "carefully balanced remedial scheme" whereby employees may pursue private claims for employment discrimination. See Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995). In short, because Coach Sparks and other members of the class lacks standing, the plaintiffs cannot establish likelihood of success on the merits.

7. Plaintiffs cannot show likelihood of success because Quinnipiac "stays on Title IX's sunny side by meeting Title IX's substantial proportionality safe harbor (a/k/a, prong I) for the 2009-2010 Academic Year. See Cohen v. Brown Univ., 991 F.2d 881, 901 (1st Cir. 1993).

8. If, and only if, Plaintiffs meet this burden does the burden then shift to Defendant, which can still establish compliance with Title IX provided they can satisfy the second or third prong of the test. Id. However, if Plaintiffs fail to satisfy their burden on the first prong, the Court need not even address the other two prongs. See Cohen, 991 F.2d at 897-98 ("[A] university which does not wish to engage in extensive compliance analysis may stay on the sunny side of Title IX simply by maintaining gender parity between its

student body and its athletic lineup.") (*emphasis added*). Boulahanis v. Bd. of Regents, 198 F.3d 633, 639 (7th Cir. 1999) ("Because the University has achieved substantial proportionality..., it is presumed to have accommodated the athletic interests of that sex."); Horner v. Kentucky High School Athletic Ass'n., 43 F.3d 265, 275 (6th Cir. 1994) ("'[S]ubstantial proportionality' provides a safe harbor for recipients of federal funds."); accord Roberts v. Colorado State Bd. Of Agric., 998 F.2d 824, 829 (10th Cir. 1993). Quinnipiac will be in compliance with prong 1 in the 2009-10 academic year.

9. Quinnipiac may "comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population." Roberts, 998 F.2d at 830; see also Neal v. Board of Trustees of the California State Universities, 198 F.3d 763, 769-70 (9th. Cir. 1999). Plaintiffs have not sustained their burden of proof that for the upcoming academic year, Defendant cannot and will not satisfy the proportionality test, prong I, of Title IX.

10. If the Court deems Defendant failed to comply with prong 1, the Court may not compel the Defendant to retain any particular athletic program, such as the volleyball team. Equity in Athletics, Inc. v. Dept. of Educ., 504 F. Supp. 2d 88, 100 (W.D. Va. 2007) ("Title IX does not establish a right to participate in any particular sport in one's college and there is no constitutional right to participate in intercollegiate ... athletics.") (citing Gonyo v. Drake Univ., 837 F. Supp. 989, 994 (S.D. Iowa 1993); Miami Univ. Wrestling Club v. Miami Univ., 302 F.3d 608, 615 (6th Cir. 2002)).

11. Past Quinnipiac EADA reports and Title IX compliance data are irrelevant and inadmissible.

12. Plaintiffs' expert's testimony is inadmissible. See Motion in Limine.

13. Under applicable OCR regulations and agency precedent, it is proper for Quinnipiac to count the positions in the 2009-10 Varsity Competitive Cheer Team towards its total number of athletic opportunities for women in 2009-10. See OCR Letters re Univ. of Md. And Exhibit 7. At a minimum, Plaintiffs failed to prove Defendant's competitive cheer team, as a matter of law, in advance, would not be counted toward Title IX compliance.

14. Quinnipiac may use roster management to achieve prong I in 2009-10 because OCR has made it clear that roster management is acceptable, and participants are counted by season as of the first date of competition. See OCR 1993's Clarification ("OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event... As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR.")

15. OCR Regulations and case law clearly establish that Quinnipiac may use so-called "duplicate" athlete counts in calculating its athletic opportunities for men and women for the 2009-10 Academic Year. See OCR's 1996 Policy Clarification, Guidance from the Department of Education; Miller v. Univ. of Cincinnati, No. 1:05-cv-764, 2008 WL 203025, at *7 (S.D. Ohio 2008)(slip copy) (citations omitted).

16. In addition, the balance of hardships does not tip decidedly in Plaintiffs' favor so as to entitle them to a preliminary injunction because Quinnipiac would suffer financial harm and lose control over its athletic program, which is a right courts recognize that academic institutions have. Equity in Athletics, Inc., 291 Fed.Appx. at 521.

17. The Court should not grant the pending Plaintiffs' Motion for Waiver or Security required by Rule 65(c) because the evidence establishes that there is a strong likelihood of harm to the Defendant if it ultimately prevails on the merit after a preliminary injunction is issued. See International Controls Corp. v. Vesco, 490 F.2d 1334, 1356 (2d Cir.), cert. denied, 417 U.S. 932 (1974) ("[A] district court may dispense with security where there has been no proof of likelihood of harm to the party enjoined.").

18. In conclusion, the Plaintiffs' request for a preliminary injunction is denied.

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CERTIFICATE OF SERVICE

I hereby certify that, on May 14, 2009, a copy of the foregoing 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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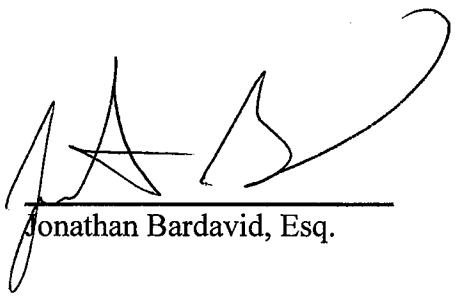

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