**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF CONNECTICUT**

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| **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 all those similarly similarly situated; and ROBIN SPARKS,** | ) | **Case No. 3:09-CV-00621 (SRU)** |
| **Plaintiffs.** | ) | |
| **v.** | ) | |
| **QUINNIPIAC UNIVERSITY,** | ) | |
| **Defendant.** | ) | **May 14, 2009** |

**TRIAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

## I. Introduction

This Court held a hearing on May 11 -14 on the Plaintiffs' Motion for a Preliminary Injunction directing the Defendant Quinnipiac University ("QU") to reinstate its women's volleyball program, as more specifically set forth in the Plaintiffs' motion.

For the reasons that follow, the Plaintiffs respectfully submit that they have satisfied their burden of establishing that: (1) the Plaintiffs have suffered and will suffer irreparable harm; (2) there exist sufficiently serious questions going to the merits to make them a fair ground for litigation; and (3) the balance of hardships tips decidedly toward the Plaintiffs. As set forth in greater detail below, the Plaintiffs have also established that they are likely to succeed on the merits. Under these circumstances, the Plaintiffs' motion for preliminary injunction should be granted. *Dennin v. Connecticut Interscholastic Athletic Conference,* 913 F.Supp. 663 (D.Conn.

1996), *citing Sperry Int'l Trade, Inc. v. Gov't of Israel,* 670 F.2d 8, 11 (2nd Cir. 1982) and *Jackson Dairy, Inc., v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2nd Cir. 1979).

## II. Relevant Facts

Recognizing that the preliminary injunction hearing has just concluded and that the parties previously submitted Proposed Findings of Fact and Conclusions of Law, the undersigned are confident that the Court is now thoroughly familiar with the relevant facts in this matter. We therefore recite only the most pertinent facts here.

Stephanie Biediger and Kayla Lawler are both freshmen members of the QU volleyball team who intend to continue their collegiate volleyball careers at QU (although Ms. Biediger will likely be rehabbing from surgery next Fall). Erin Overdevest is a graduating senior who has one more year of volleyball eligibility, and will play if the program is reinstated. Lesley Riker is the mother of a 17-year-old athlete who will graduate from high school this spring, and who had been recruited and had committed herself to attend QU to play volleyball.[1]

Robin Sparks is the volleyball coach at Quinnipiac University. QU recruited her to leave her job in New York and move her family to Connecticut to take the head volleyball coach position at QU. She received assurances that the University would continue to support the program. Coach Sparks alleges that QU discriminated against her based on the sex of the athletes she coaches, thus violating her rights under Title IX.

All of the plaintiffs testified eloquently concerning the impact upon them of QU's decision to eliminate women's volleyball. Plaintiffs submit that the harm they described – including the loss of the opportunity to compete in varsity intercollegiate sport – is not compensable in money.

Defendant Quinnipiac University is a private institution of higher education that offers both graduate and undergraduate educational programs. QU is a member of the National Collegiate Athletic Association ("NCAA") and competes athletically in Division I, the NCAA's highest level of competition. The NCAA provides championships and support in many sports, and also recognizes a number of "emerging sports" for women.

QU is also a member of the Northeast Conference ("NEC"), which offers intercollegiate competition in a variety of sports. QU does not offer women's bowling, golf, or swimming/diving, all of which are women's sports recognized by the NCAA and offered by other schools in the NEC.

As a Division I institution, QU completed a NCAA Certification Self Study in 2006, which included an examination of gender equity issues. (Pl. Ex. 37). The Self-Study Report acknowledged, based on examination of information for the academic years from Fall 2001 through Spring 2004, that QU did not offer enough athletic participation opportunities for women, that the percentage of women athletes had not increased during the period studied, and that participation by male student-athletes had increased during the period by 31 students, while participation by females had increased by only 7.

At the hearing, Quinnipiac Athletic Director Jack McDonald admitted that QU is not currently (2008-09) and was not last year (2007-08) in compliance with Title IX's proportionality requirement (prong one). He contended that the University complied with prong two, but that contention simply does not withstand scrutiny.

Following the Self-Study, QU implemented a program of "roster management," under which the University attempted to increase roster sizes for women's teams and decrease them for

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[1] A fourth named Plaintiff, Kristen Corinaldesi, did not testify, but alleged in the Verified Complaint that she is a

men's teams in order to approach or achieve proportionality. There was considerable evidence presented at the hearing that the roster management program led – in both academic years 2007-08 and 2008-09 – to *reporting* of athletic participation that, even if it may have been technically legal, nonetheless did not accurately reflect *actual* participation opportunities. Women's participation opportunities were frequently overstated, while men's opportunities were frequently understated. The program stressed "making the numbers," rather than providing genuine participation opportunities.

For the coming year (2009-10), QU has established roster management squad size targets that it claims will bring it into compliance with prong one, contingent upon counting its proposed team of 40 "competitive cheerleaders" as athletic participants for Title IX purposes. Competitive cheer is not recognized as an intercollegiate varsity sport by the NCAA, the NEC, or the OCR, and has never been so recognized for Title IX purposes by any court. No organization has sought "emerging sport" status with the NCAA for competitive cheer. There is no national governing body and no uniform set of rules; even the number of contestants on a team varies by venue. Additionally, Plaintiffs' expert Donna Lopiano pointed out that, even if the competitive cheer team is counted, and even if the target squad sizes are presumed to be realistic and to accurately reflect participation opportunities, Quinnipiac still would not be in compliance because it distorts its participation statistics by counting male runners twice (as participants in cross country, track's Fall season, and indoor track, the Winter season), while counting female runners three times (as participants in cross country, indoor track, and outdoor track).

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junior, a member of the volleyball team, and intends to continue to participate.

## III. Governing Law

### A. Title IX

For the assistance of the Court, Plaintiffs have attached to this Brief as an Appendix a memorandum prepared by counsel that sets out some of the relevant history of Title IX, the interpretation of the statute by the OCR, and its construction by the courts.

### B. Preliminary Injunction

It is "well-settled" in the Second Circuit that a movant for a preliminary injunction must show: "(a) irreparable harm and (b) either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party seeking injunctive relief." *Dennin v. Connecticut Interscholastic Athletic Conference,* 913 F.Supp. 663 (D.Conn. 1996), *citing Sperry Int'l Trade, Inc. v. Gov't of Israel,* 670 F.2d 8, 11 (2nd Cir. 1982) and *Jackson Dairy, Inc., v. H.P. Hood & Sons, Inc.,* 596 F.2d 70, 72 (2nd Cir. 1979). Plaintiffs readily satisfy these requirements.

## IV. Argument

### A. Irreparable Harm

The Plaintiffs have demonstrated that they will suffer irreparable harm if QU eliminates the volleyball program. Plaintiffs were recruited by QU to play volleyball and chose the Defendant university over other universities specifically because of its volleyball program and Coach Sparks. If QU is permitted to eliminate the program, these young women will lose the opportunity to participate *this* (next) year, with *this* team, and *this* coach. Several of the plaintiffs will likely lose forever the opportunity to play Division 1 sport. These are not experiences that they can make up later in their lives - even if they transfer to other schools. Nothing can duplicate the team, the

relationships, and the academics these student-athletes sought by choosing to attend QU and play volleyball. They will lose not only the physical benefits of fitness, skill development, and competition, they will also be deprived of the social, emotional, day-to-day interaction with their teammates. They will be deprived of the mentoring and teaching of the coach for whom they chose to play. They will lose all of the other benefits that QU varsity athletes receive, such as strength & conditioning coaching, athletic training, and academic support. They will lose all of the life lessons that intercollegiate athletics teaches. Perhaps most importantly, they will lose out on the camaraderie and lifelong ties they would otherwise build with their teammates and coach in pursuit of their common goals.

Courts have not hesitated to find that losing such a unique educational opportunity constitutes irreparable harm – especially when the school recruited the athlete to enroll for the very purpose of participating in the program. *See, e.g.,Phillip v. NCAA,* 960 F.Supp. 560 (D.Conn. 1997)(student would suffer irreparable harm if not allowed to play college basketball); *Dennin v. CIAC*, 913 F.Supp. 663 (D.Conn. 1996); *Roberts v. Colorado State Board of Agriculture,* 998 F.2d 824, 833 (10th Cir. 1993) (deprivation of opportunity to play softball held to be irreparable harm); *Hadley v. Rush Henrietta Central School Dist*., 409 F.Supp.2d 164 (W.D.N.Y. 2006) (high school lacrosse player would suffer irreparable harm if not allowed to play his senior year); *Ganden v. NCAA,* 1996 WL 680000 (N.D.Ill. 1996)(swimmer would suffer irreparable harm if denied a year of eligibility, but did not prove likelihood of success on merits); *Manuel v. Oklahoma City University,* 833 P.2d 288 (Ok.Ct. Ap. 1992)(student would be irreparably harmed if not allowed to play college basketball).

**B. Likelihood of Success on the Merits**

In the Second Circuit, a movant who shows she has suffered irreparable harm is entitled to a preliminary injunction if she is likely to prevail on the merits of her case, or if she can demonstrate sufficiently serious questions going to the merits to make them a fair ground for litigation. *Dennin v. CIAC,* 913 F.Supp. 663 (D.Conn. 1996); *Phillip v. NCAA,* 960 F.Supp. 560 (D.Conn. 1997). Here, the Plaintiffs have demonstrated both.

Quinnipiac violates Title IX by failing to provide female students with an equal opportunity to participate in varsity intercollegiate athletics. So long as it remains out of compliance, it cannot eliminate any women's opportunities. Its planned elimination of the women's volleyball program would aggravate QU's already existing sex discrimination and must be enjoined.

Equal opportunity for athletic participation is governed by 34 C.F.R. §106.41(c)(1): "Whether the selection of spots and levels of competition effectively accommodate the interests and abilities of the sexes." The 1979 Policy Interpretation and 1996 Clarification (Pl. Ex. 7) measure compliance with this regulation pursuant to the "three pronged test" as follows.

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
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> (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
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> (3) Where the members of the 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.

1979 Policy Interpretation, 44 Fed. Reg. at 71418(C)(5)(a); 1996 Clarification, Pl. Ex. 7. *See*, *e.g.*, *Cohen v. Brown University,* 879 F.Supp. 185, 204 (D.R.I. 1995), *aff'd in part* 101 F.3d 155 (1st Cir. 1995); *Favia v. Indiana University of Pennsylvania*, 812 F.Supp. 578, 584 (W.D. Pa. 1993), *aff'd* 7 F.3d 332 (3rd Cir. 1994); *Roberts v. Colorado State Bd. of Agriculture,* 998 F.2d 824 (10th Cir. 1993); *Horner v. Kentucky High School Ath. Ass'n,* 43 F.3d 265 (6th Cir. 1994); *Pederson v. LSU,* 213 F.3d 858 (5th Cir. 2000).

The first prong reflects actual equity, under which each male and each female student has an equal opportunity to participate in athletics. The second and third prongs are exceptions to the rule of prong one that may apply when actual equity does not currently exist at a given institution. Defendants - not plaintiffs - have the burden of proof on prongs two and three. *Cohen v. Brown University,* 991 F.2d 888, 901 (1st Cir. 1993); *Roberts,* 998 F.2d at 828; *Horner,* 43 F.3d at 275. Quinnipiac violates all three prongs of the test.

1. Quinnipiac fails to provide female students with a substantially proportionate opportunity to participate in varsity athletics

Scholastic athletic competition is unique in that it is the only educational activity that regularly separates males and females as a matter of course. While men and women may compete against each other for the same slot in a chemistry class, they do not compete against each other for slots on the same athletic teams. Accordingly, when schools decide which sports teams to sponsor for which sex, they decide how many opportunities they will offer for males and how many they will offer for females. The total number of opportunities sponsored does not matter so long as the allocation of those opportunities is equitable. Absent discrimination, that allocation

should be proportional to enrollment. This is the basis for prong one and is the only measure of actual equity.

The Equity in Athletics Disclosure Act ("EADA") requires all schools to report sex-based enrollment and athletic participation statistics to OCR in October of each year. QU's EADA reports for 2006-07 and 2007-08 are in evidence as Pl. Exs. 1 & 4. QU also has estimated its statistics for 2008-2009. *See* Pl. Ex. 2. Plaintiffs' expert witness, Dr. Donna Lopiano, prepared a chart comparing QU's self-reported enrollment and athletic participation statistics. Pl. Ex. 5.

The chart shows the number of athletes on each team for each year, and the total numbers of athletes. The row entitled, "# women required for equity" shows the number of women's opportunities that QU should have offered in order to be equitable. The "GAP" row below it shows the difference between the number of athletic opportunities that QU actually offered to women, and the number it needed to offer to be in compliance with prong one.[2] This is the "equity gap." The equity gap represents how many additional athletic opportunities QU should have offered to female students to equate women's enrollment and athletic participation percentages given the actual number of male athletes.

For example, during this 2008-2009 academic year, according to QU's own participation statistics, it offered 212 varsity athletic opportunities to male students and 235 varsity athletic opportunities to female students. Pl. Ex. 2. QU claims that women received 52.6% of all athletic opportunities. But QU's full-time undergraduate enrollment – again according to QU's own numbers – is 61.6% female. Holding constant the 212 male opportunities that actually exist, QU should be providing females with 340 opportunities in the current 2008-2009 school year

[2] This analysis assumes the accuracy of QU's reported statistics. However, as set forth in the next section, there are general reasons to question QU's reporting.

(340W/(212M+340W) = 61.6%). Only then would the percentage of athletic opportunities offered to women equal the percentage of women enrolled, which is the definition of substantial proportionality.

Because QU should have sponsored 340 women's athletic opportunities but in fact only sponsored 235, its "equity gap" is 105 opportunities. QU could add women's golf, bowling, and swimming teams -- women's sports offered by other NEC schools but not QU -- and still not close its 105 opportunity equity gap. It also could have offered a full track team (with sprinters, hurdlers, throwers, and jumpers).

In sum, based upon QU's own statistics, it does not offer its female students substantially proportionate opportunities to participate in varsity intercollegiate athletics. QU indisputably violates prong 1 of the three-part test. QU has admitted this fact for 2007-08 and 2008-09. Despite this current and historic noncompliance, QU decided to eliminate an established women's team in a sport which has been recognized by the Office of Civil Rights, as well as the NCAA and NEC.

2. QU Does Not Have a History and Continuing Practice of Program Expansion

QU has expressly disclaimed reliance on prong two for 2009-10. It does, however, argue that it complied with prong two in 2007-08 and 2008-09. Prong two examines a school's "past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." 1996 OCR Clarification (Pl. Ex. 7) at 5. An assessment of an institution's compliance with prong two requires a review of an athletic program's *entire* history. *Id.*

Prong two was devised to measure a school's "good faith remedial efforts" and to account for Congress' expectation that women's interest in athletic participation would expand as discrimination and stereotypes decreased – thus the language that schools be "demonstrably

responsive to the developing interests" of their female students. Schools were expected to monitor the developing interests and abilities of their female students, and to add new women's teams as expeditiously as possible as those interests matured. *See* 1996 OCR Clarification factors for assessing prong 2, Pl. Ex. 7 at pp. 5-8. QU has neither monitored its female students' developing interests and abilities, not added women's teams expeditiously. QU has never surveyed the interests of its current or prospective students so that it could assess their developing interests. The only women's sport QU has added in the last 10 years is ice hockey. QU never offered women's golf despite years of golf opportunities provided to men, nor gymnastics (despite Coach Powers' testimony that the student body includes advanced gymnasts).

The 1996 OCR Clarification expressly states that schools cannot show progress for women by cutting or capping men's teams. Neither may QU demonstrate progress in participation for women under prong 2 by showing progress in other areas, such as treatment or scholarships. Pl. Ex. 7 at p. 5 (also indicated as page 10 of 17) fn. 2.

QU has not added a women's varsity team since 1998 when it added women's ice hockey. Pl. Ex. 37. The University's decade-long period of failing to expand women's participation opportunities is too long a hiatus to support a finding of continued expansion. As the court found in *Cohen I*, "evidence has shown that Brown does not have a continuing practice of program expansion for women athletes, even though it can point to impressive growth in the 1970s." *Cohen v. Brown University,* 809 F.Supp. 978, 991 (D.R.I. 1992) ("*Cohen I"*). *See also Barret v. West Chester University of Pennsylvania*, 2003 WL 22803477 at *7 (E.D. Pa. 2003) (decade long failure to expand opportunities for women found insufficient to constitute continuing expansion for women athletes). The defendant's nearly decade-long failure to expand women's

competitive opportunities is punctuated here with the elimination of an established women's varsity team. The Defendant has failed to show compliance with prong two.

3. QU does not fully and effectively accommodate the athletic interests and abilities of its female students

Prong three measures whether a school fully and effectively accommodates the athletic interests and abilities of a school's female students. QU does not do so. The Defendant has eliminated an established women's sports program which has a well-document and demonstrated interest among women student athletes. The demonstrated abilities, commitment and interest of the members of the women's volleyball team are not seriously in dispute. Neither has the Defendant proven that its decision to add competitive cheer as a new varsity athletic opportunity was in response to an unmet demand among women student athletes. Other than anecdotal expressions of interest, the Defendant has not surveyed its present student body nor has it surveyed its incoming female students. There is, in short, no evidence to support a finding that the Defendant's challenged actions are a response to an unmet need among present or prospective female student athletes.

The National Federation of High Schools, which is the umbrella body for all state high school athletic associations, keeps state-by-state athletic participation statistics, which are listed in Def. Ex. P. These statistics show that significant numbers of high school girls in Connecticut, New Jersey, New York, and Pennsylvania -- all states in which QU teams compete and recruit -- play golf, do gymnastics, swim, and participate in many other sports not offered by QU. If QU added these recognized, established sports, there would be no shortage of female students to fill the teams. In sum, QU does not satisfy prong 3 or any prong of Title IX's three-part test for measuring equal opportunity to participate.

Based on the foregoing, the Plaintiffs respectfully submit that they have demonstrated a likelihood of success on the merits of their claim that QU is not in compliance with Title IX, and therefore may not eliminate an existing women's varsity team.

4. Serious Questions Going to the Merits

Assuming, for the sake of argument, that the Court does not find that Plaintiffs are likely to succeed on the merits, there are nonetheless sufficiently serious questions going to the merits to make them a fair ground for litigation. The following are only some of the serious questions going to the merits which constitute fair grounds for litigation in this case:

- Whether QU's target roster sizes set forth in the Janet Judge letter (Pl. Ex.3) are realistically achievable.

- Whether the manner in which Quinnipiac University has employed roster management complies with the spirit of Title IX.

- Whether the Defendant university's EADA reports accurately reflect the athletes who actually participated in each sport.

- Whether Quinnipiac University's promise to comply with prong one is grounded in fact rather than speculation.

- Whether the Defendant university will actually reduce the number of participation opportunities for male athletes.

- Whether the Defendant university has a plan for funding the additional female athletes which it proposes to add in its roster management targets.

- Whether the Defendant university will be required to expand recruitment efforts for women athletes in order to meet roster management targets.

- Whether there is in fact an adequate interest and ability among current and incoming female students to meet the targeted squad size for competitive cheer.

- Whether the Defendant university will provide scholarships for the additional women athletes reflected in its roster management targets.

- Whether the Defendant university is required to purchase additional uniforms and equipment to supply the women it has added to its roster management targets.

- Whether the Defendant university will be providing additional coaching for the women added to its rosters.

- Whether the Defendant university will allocate sufficient resources to allow the added women to travel with their teams.

- Whether the roster targets proffered by the Defendant university are reasonable and attainable for each sport.

- Whether the Defendant university's proposed men's squad sizes are so far below the NCAA and NEC average squad sizes as to be unrealistic.

- Whether the Defendant university has used roster management to distort the actual number of athletic participation opportunities for men and women as compared to those reported in its EADA filings.

- Whether the Defendant university may, consistent with Title IX, count the members of its men's track and cross-country teams twice, while counting female track and cross-country athletes three times, as proposed in the letter from Attorney Judge. Pl. Ex. 3.;

- Whether the Defendant university's use of roster management is resulting in a systematic over-counting of female student athletic opportunities.

- Whether the Defendant university's use of roster management is resulting in the systematic undercounting of male student athlete opportunities.

- Whether the Office of Civil Rights is likely to or may properly recognize competitive cheer as a sport.

- Whether the Defendant university's plan for implementing competitive cheer is adequate to comply with the dictates of Title IX.

- Whether members of the competitive cheer team will be chosen based upon objective factors related primarily to their athletic ability.

- Whether the competitive cheer team will compete within a defined season.

- Whether the competitive cheer team will prepare for and engage in competition in the same manner as other teams in the University's athletic program with respect to coaching, recruitment, budget, tryouts, eligibility and length and number of practice sessions and competitive opportunities.

- Whether the primary purpose of the competitive cheer program will be athletic competition and not the support or promotion of other athletes.

- Whether organizations knowledgeable about competitive cheer agree that it should be recognized as an athletic sport.

- Whether competitive cheer is recognized as part of the NCAA or by the Northeast Conference.

- Whether competitive cheer will be recognized by organized state and national interscholastic and/or intercollegiate athletic associations.

- Whether state, national and conference championships exist for competitive cheer.

- Whether a state, national or conference rulebook or manual has been adopted for competitive cheer.

- Whether there exist standardized criteria upon which competitive cheer may be judged.

- Whether competitive cheer participants are eligible to receive scholarships and athletic awards, such as varsity letters.

The testimony presented at the hearing demonstrated that the foregoing issues are seriously contested between the parties, and many of them – derived directly from the caselaw or OCR regulations and opinion letters – must be resolved before a final order may enter in this case. It seems very clear that there are serious question going to the merits of the case that provide fair ground for litigation.

**C. Balance of Hardships**

For essentially the same reasons that Plaintiffs must be recognized to have suffered irreparable harm, the balance of hardships here tips decidedly in their favor. While QU complains of interference with its managerial discretion and its alleged financial crisis, the evidence suggests that QU will not realize any significant savings from the elimination of the volleyball program because of its plans to spend those savings on cheer. It clearly would be possible and relatively inexpensive to continue – at least during the pendency of this action – to allow the volleyball team to play on the Burt Kahn Court, or in the TD BankNorth arena. Nor can QU's right to managerial discretion trump Plaintiffs' civil rights. Courts repeatedly have held in similar circumstances that the balance of hardships favors the plaintiff student-athletes. *See, e.g., Cohen v. Brown University,* 991 F.2d 888, at 905 (1st Cir. 1993) (affirming district court's conclusion that balance of hardships in Title IX action favored student-athlete plaintiffs).

**D. The Defendant's Promise of Future Compliance is Insufficient as a Matter of Law**

The Title IX regulations provide for three clearly defined and limited safe harbors for academic institutions seeking to comply with the requirement that institutions effectively accommodate the interests and abilities of both successes. This is the "three pronged test." Rather than argue that is currently in compliance with prong one, QU offers that it will become compliant in the upcoming academic year through its continued use of roster management and the addition of 40 opportunities for women's competitive cheer. A promise to achieve substantial proportionality in the future, however, is not the same as having established proportionality as required by Title IX. *Choike v. Slippery Rock University*, 2006 WL 2060575, *7 (W.D.Pa. 2006).[3]

[3] The *Choike* court rejected such promises as inadequate, and also questioned the University's proposed roster

Notably, the 1996 Clarification (Pl. Ex. 7) provides in part as follows.

> 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.*

*Id.*, p. 4 of 17 (emphasis added). Thus, only actual rather than imagined or promised opportunities were meant to count towards an institution's Title IX compliance obligations. Further, the Defendant's proffered defense is inconsistent with a plain reading of the three-pronged test.

First, prong one deals with present proportional sports opportunities. An institution is either *presently* providing substantially proportional opportunities or it is not. Prong 1 of the three-prong test is worded in the *present* tense. It measures whether opportunities *are* provided in substantially proportionate numbers — not whether such numbers *will be* provided at some date in the future. It is a safe harbor only for institutions that are *presently* compliant.

Prong two creates a safe harbor for those institutions which do not presently provide proportional opportunities, but have a demonstrated history of continuously expanding opportunities for the underrepresented sex. Prong three creates a haven for institutions whose underrepresented students (and the pool of high school students from which the institution recruits) are not interested in additional opportunities to compete. Thus, prongs two and three measure whether a school *already* has expanded its women's opportunities and whether a school *already* fully and effectively accommodates women's interests and abilities. They do not look at whether a school will do so in the future or whether a school promises to do so in the future.

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sizes, observing that they appeared to be designed to create the appearance of proportionality rather than to reflect actual interest or actual team needs.

The regulations provide no refuge for a non-compliant institution such as the Defendant university which only *promises* to comply with prong one. This is not surprising. Under the Defendant's view of the three-pronged test, a non-compliant institution could defeat any Title IX complaint simply by promising to do better in the future. Congress or the Department of Education presumably could have fashioned such an easy escape for institutions that have continued to discriminate, but they did not. In short, the Defendant university is asking the Court to fashion an exception to Title IX out of thin air. The Defendant's proffered defense, therefore, is insufficient as a matter of law. *See Choike,* 2006 WL 2060576, *7 ("Having a plan to ameliorate inequities is not the same as having ameliorated them."); *Barrett v. West Chester Univ. of PA*, 2003 WL 22803477, *9 (E.D. PA) (rejecting as too speculative a plan to replace an existing women's gymnastics team with a proposed women's golf team).

## CONCLUSION

QU does not currently comply with Title IX. The Plaintiffs have satisfied their burden of showing that they have suffered and will suffer irreparable harm absent entry of preliminary injunction, and that they are likely to succeed on the merits of this action. They have also demonstrated that there exist sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tilts decidedly in their favor. Accordingly, an injunction should issue to preclude QU from eliminating the women's volleyball program or any other women's opportunities pending full litigation of this matter.

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## CERTIFICATE OF SERVICE

This is to certify that on this date, a copy of the foregoing TRIAL BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION was filed electronically and served by mail on any party or counsel 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. Parties may access this filing through the court's CM/ECF system.

Dated: Bridgeport, CT, May 14, 2009

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Jonathan B. Orleans

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