UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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STEPHANIE BIEDIGER, ET AL	:	No. 3:09cv-621 (SRU)
	:	915 Lafayette Boulevard
vs.	:	Bridgeport, Connecticut
	:	
	:	May 14, 2009
QUINNIPIAC UNIVERSITY	:	

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PRELIMINARY INJUNCTION HEARING

B E F O R E:

THE HONORABLE STEFAN R. UNDERHILL, U. S. D. J.

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I N D E X

WITNESSES:

SUMMATIONS:

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(1:40 o'clock, p. m.)

THE COURT: Good afternoon. Where are we on the expert?

MR. ORLEANS: Your Honor, I received now from defense counsel the defendant's cross designations of expert testimony and I'm prepared to file with the court our designation which I had given to counsel yesterday but not filed. I also brought with me the original transcript, complete set of the DVDs and the complete set of the plaintiff's exhibits. We accidentally omitted to copy the defendant's exhibits but when I get back to my office we'll copy them and have them.

THE COURT: Exhibits to the depositions?

MR. ORLEANS: Yes, I think you should have them. Certainly there's a great deal of overlap. Many of the documents that are marked as exhibits at the expert's depositions have also been marked as exhibits in the trial, but we just have them as deposition exhibits, so --

THE COURT: All right.

MS. GAMBARDELLA: We omitted a cross designation of exhibits but we can supplement and email that later. I have a hard copy of the designations. I don't think it will be a complicated project for Your Honor to understand what we're doing.

MR. ORLEANS: Right, and we have no objection to

defendant --

THE COURT: And so everyone's in agreement, I'm just going to take and view this?

MR. ORLEANS: You're going to view at least the portions we designated and cross designated and we're leaving it up to you.

Let me hand up to your clerk the deposition transcript, the plaintiff's exhibits and the DVDs. Here are the hard copies of both parties' designations.

(Hands Court.)

THE COURT: Great. Thank you.

MR. ORLEANS: Your Honor, should we efile the designations as well?

THE COURT: Probably a good idea.

MR. ORLEANS: All right, we'll do that when we get back but we don't have to append copies of the transcripts, or the whatever, to that?

THE COURT: No.

MR. ORLEANS: Good.

MS. GAMBARDELLA: I have a really minor housekeeping matter, Your Honor. May defendants have permission to file a brief today that exceeds the limit by five pages?

THE COURT: Sure.

MS. GAMBARDELLA: Thank you.

MR. ORLEANS: Your Honor, with respect to our brief I regret to say it's still being polished and will be filed by the end of the day.

MS. GAMBARDELLA: Ours is basically ready and we'll file it by the end of the day, efile.

THE COURT: I'll look for those. I did notice efiling of Defendant's motion to strike the testimony of Ms. Fairchild.

MS. GAMBARDELLA: Your Honor, we prepared closing remarks presuming the testimony is in and you can reach your decision based on anything you want.

THE COURT: I appreciate that, but let me understand whether the defendant wishes to call any additional witnesss in light of Coach Fairchild's testimony. Do you wish to recall her now to undertake --

MS. GAMBARDELLA: No, I would have recalled Mr. McDonald for a very finite purpose.

THE COURT: You're free to do that.

MS. GAMBARDELLA: Am I?

THE COURT: Absolutely.

MR. ORLEANS: Your Honor, we would just note our objection to this. We're caught a little by surprise. Just if I could be heard, about two sentences, Your Honor?

THE COURT: Sure.

MR. ORLEANS: To the extent that this motion to

strike is based on our purportedly delayed disclosure of Ms. Fairchild, the disclosure was less than 24 hours after the pretrial conference.

THE COURT: Fair enough, but my recollection is the defendant never formally rested. I think everybody understood that the defendant was resting but we still had the expert issue, we were in a tight time situation yesterday where I was pushing counsel through because I had other lawyers waiting for another matter. And it seems to me that if all the defense wants to do is call Mr. McDonald back, it cures any concern in the motion and, frankly, I'd rather have the full story, so --

MR. ORLEANS: Understood, Your Honor. I'll withdraw that objection. Thank you.

THE COURT: All right.

J O H N M c D O N A L D, called as a witness on behalf of the Defendant, having been duly sworn previously by the Court, testified as follows:

THE COURT: Sir, you're still under oath.

THE WITNESS: Okay, thank you.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MS. GAMBARDELLA:

Q. Thank you, Your Honor. Good morning -- good afternoon, Mr. McDonald.

Mr. McDonald, you were present in court when Ms. Fairchild testified, correct?

A. Yes, I was.

Q. All right. I just have a couple questions for you.

Can you tell me how coaches are told what their budgets are going to be each year?

A. They are basically told after the trustees are approved in May that this is the number they will have for the following fiscal year.

Q. Are they told specifically how to allocate their budget?

A. In their operating budget they have a lump sum. That includes their travel, their lodging, equipment, recruiting. So they have a lump sum that it's their discretion. And some sports recruit a lot, let's say men's ice hockey travels to Canada, and some sports don't have a high recruiting budget because they recruit locally.

Q. So is it within their discretion to decide how to spread the money around?

A. Yes, it is.

Q. Did you ever come to know that in 2007 or during that academic year, as Ms. Fairchild --

A. Child.

Q. -- Fairchild suggested -- don't print that -- that

Ms. Fairchild suggested, that she had run out of money for uniforms and equipment and that led to nine players quitting, had you ever heard that before?

A. No.

Q. All right. And so who is to determine how to spread the money among the roster participants that they are given to meet?

A. It's up to each coach.

Q. Okay. And had she ever complained about her budget?

A. No, no more than other people do for any kind of financial issues, but the answer is directly no.

Q. So you had no idea until yesterday of a suggestion that she ran out of money for uniforms and that's why some players quit in 2007?

A. I was surprised. Thought the other two coaches had a different opinion on that.

Q. And, finally, Mr. McDonald, can you tell us how her particular budget compares to other teams' budgets?

A. In teams of similar, we have sport of emphasis, such as basketball and ice hockey, we would put them in one section. Most of the other sports are referred to as team sports, soccer, lacrosse, field hockey, volleyball. Baseball and softball are a little bit higher or a lot higher, one third higher than those other sports? So, her budget was significant and has been and it's almost

tripled in the last eight years.
Q. Are other coaches asked to supply more players on less?
A. Yes.
Q. Just give us an example.
A. Well, for example, men's/women's soccer has a number of 25 which we heard a lot about yesterday. This -- both men's and women's soccer coaches have one full-time coach, like softball, and one less part-time coach. Softball has two coaches. The two soccers have only one paid coach.
So I think softball is well taken care of. Lacrosse, similar. They have more players, 30 players for women, 35 for men, and their resources are the same or less.
MS. GAMBARDELLA: I have no further questions.
THE COURT: All right, cross?
MR. ORLEANS: Very briefly, Your Honor.
MS. GAMBARDELLA: Yeah yeah.
BY MR. ORLEANS:
Q. Mr. McDonald, when Ms. Fairchild was given a roster target of 25, was she given any increase in her budget to reflect the increased number of players she would be expected to carry?
A. No, nor did anybody else.
MR. ORLEANS: Nothing further.
THE COURT: All right, sir, you're excused.

Thank you.

(Whereupon the witness was excused.)

MS. GAMBARDELLA: Thank you so much, Your Honor. Appreciate that.

THE COURT: No problem.

All right. I think as a formal matter, I will deny the motion to strike simply saying that although the disclosure was not handled ideally, I think under the circumstances there's been no prejudice that hasn't been addressed by the opportunity either to call other witnesses or --

MS. GAMBARDELLA: Yes, I appreciate that, Judge. Thank you very much.

THE COURT: Sure. All right. Is there anything else to take up before closings?

MR. ORLEANS: Not that I can think of, Your Honor.

MS. GAMBARDELLA: Well, stop thinking.

THE COURT: I'm not going to give you any more time.

MS. GAMBARDELLA: I'm all set, Your Honor.

THE COURT: All right. Mr. Orleans?

MR. ORLEANS: Judge, I don't want to overstay my welcome. How much time have you allocated to us?

THE COURT: I'll be frank, I haven't really

allocated time. I believe -- I'm going to ask my clerk to confirm this, I believe I have a 3:00 o'clock, is that right?

THE CLERK: (Nodding head affirmatively.)

THE COURT: So --

MR. ORLEANS: I don't anticipate any trouble meeting that at all.

THE COURT: Okay.

MR. ORLEANS: Your Honor, I'd like to step back for a second and try and put the case in some kind of context before I address the specific facts in law that are applicable to this situation.

It's a Title IX case. Title IX was enacted to prevent sex discrimination in institutes that receive federal funds. And as applied to intercollegiate athletics, Title IX requires that women receive equal participation opportunities with men. In practice, this means that participation opportunities for women have to be increased until their interests are accommodated as fully and effectively as men's are.

The point of this little disposition about the purposes of Title IX is to emphasize that it's not about making the numbers. I had the sense as I listened to the testimony that at Quinnipiac, the desire to make the numbers came to obscure the purpose of Title IX.

The purpose of Title IX is not about making numbers, it's not about technical compliance with reporting requirements of either the equity in Athletics Disclosure Act or of the NCAA. Title IX is about real participation opportunities for real atheletes, some of whom were sitting in this courtroom on Monday and Tuesday.

I would point the court respectfully to the Cohen v. Brown University line of cases for that principle that Title IX is about real opportunities, not just about statistical compliance. And I think that that notion runs through most of the Title IX cases, that the participation opportunities have to be real. And I believe, we believe that it's important to keep that fundamental principle in mind as the court parses the facts and the law on the preliminary injunction motion.

So, with that as an introductory, what I'd like to do is first address the key facts and then the applicable law.

Facts. The plaintiffs. You met the plaintiffs. They are a thoroughly impressive group of young women and a dedicated coach. The loss of the opportunity to compete in Division I volleyball would be an incalculable blow to these women in a myriad of ways and I think that was obvious in the testimony and I am sure that the court understands that.

Second, Quinnipiac. There's no dispute that it's subject to Title IX. I don't think that there's any serious dispute that Quinnipiac is not currently in compliance with Title IX on any prong of the three prong test under the Title IX regulations.

Quinnipiac has admitted that it is not in compliance with prong one, the proportionality standard, in the current year or in the previous year. And there's some evidence in the evidence that it wasn't in compliance in prior years either, including the NCAA self study that was -- or the portion of it that was admitted into evidence.

Quinnipiac asserted through some of its witnesses and asserts in the self study that prior to the upcoming year, it complied with Title IX through prong two. We dispute that. We don't think that there is, based on the evidence of record, a history and continuing practice of program expansion.

THE COURT: Is that really at issue at this hearing?

MR. ORLEANS: Well, it is to the extent that I'm about to argue to you, Your Honor, that if they are out of compliance now, they can't cut a women's team, and that is something that I'm about to argue. So I am asking the court to make a determination whether Quinnipiac is

currently in compliance with Title IX. That's the relevance of the prong two issue.

I know the court heard the evidence, the self study evidence that Quinnipiac has not added a women's sport in nearly a decade. And although I anticipate that Quinnipiac will point to data that indicates some increase in opportunities for women over the last decade, that increase is not steady, even using Quinnipiac's numbers, and for reasons I think the court is aware of at this point, and that I'll get into a little more detail in a few minutes, we don't think those numbers are entirely trustworthy.

And I don't think there's any serious contention that Quinnipiac could currently be in compliance under prong three, there having been no systematic attempt at all to assess the interests or abilities of the under-represented sex.

We know, I don't think there's any dispute that Quinnipiac now has a plan to cut two men's sports, golf, outdoor track, and one woman's sport, volleyball. Quinnipiac claims that it will be in compliance next year through the use of roster management and by elevating a club team in an unrecognized and controversial sport, competitive cheer, to varsity status.

I'll just comment that I find there to be

something sad and cynical about Quinnipiac's approach to this. They've got an existing vibrant program with athletes who are, you know, terrific human beings who came -- who are highly skilled, who came to Quinnipiac to play, a coach who they recruited, they've got a, you know, a good program which they are prepared to cut and then go through this exercise to appear to be in compliance using roster management in ways that I don't think was intended, that I don't think the concept is really intended to be used. And I think it's sad.

And it's also sad that one of the, one of the results of all this is to appear to pit volleyball players against cheer team members, which is certainly not anything that we wanted or intended to occur. And I'll address that further in another minute or two as well.

Let me talk about roster management for a second. Roster management is, I think the testimony established, the practice of managing roster sizes of men's and women's teams, certainly with an eye toward Title IX compliance, and it makes sense in a school, for instance, where you typically get lots of walk-on candidates for men's teams and there's a history of men's coaches letting those walk-ons tryout, stay with the team for the experience and practice and the skill development and so forth. And in that context, you know, when the

school is interested in providing proportional opportunities, maybe it makes sense to say to the coaches, let's keep the squad size to the traditional size or the average size for the conference or the average size for the NCAA. We're not going to let you carry a bunch of extra players. But roster management seems to have been used at Quinnipiac in a different way.

Men's, the men's roster sizes have been set not uniformly but with some consistency below comparable squad sizes in the conference or in the NCAA. Women's squad sizes have been set with some consistency above the averages in the conference or in the NCAA. And it seems to me that the picture that we have of roster management at Quinnipiac is, is of a technique that is being used to distort real participation opportunities. It enables the university to report, and we're not claiming -- I should be quite clear, we're not claiming that the university has lied in its reporting.

I don't think we put on, I don't think the evidence would support a claim that the reporting was false under the EADA or NCAA rules. The squad sizes that were reported as of the first day of competition were genuine squad sizes. But the court heard the evidence about, heard the evidence and can look at the documents, the add/drop list and the season of competition use list

which are in evidence, to see that after the first day of competition, things change so that the real participation opportunities do not match what is reported on the EADA reports or reported to the NCAA. And that, it seems to me, is not how roster management was intended to be used.

So, to sum up that little piece of the argument, I think it's fair to say based on the evidence that the court heard, that there's a history of roster management at Quinnipiac causing some disconnect between the reporting and the reality; some overstatement of women's opportunities and understatement of men's opportunities on a fairly consistent basis over a period of time.

THE COURT: Is there case law in which courts have held that the EADA reports, if they show proportionality as of the first day of competition, that there's a further inquiry under Title IX?

MR. ORLEANS: I don't know of a case that has put it that way, Your Honor, but I was going to come to the Chokey against Slippery Rock University case which is a case that addresses roster management. I don't recall the opinion specifically addressing the question of the EADA reports, but I guess what I would say about that is that I think that the language in the cases that appears in many cases, as I've said, that what you're supposed to be looking at under Title IX is real participation

opportunities, which suggests that if there's evidence that the EADA reports, even if technically compliant with the requirements of that statute, which of course is a separate statute from Title IX, if those reports don't reflect genuine participation opportunities, then the court ought to look beyond those reports to the evidence of what the real participation opportunities are.

Now, let's talk about next year for a second. The roster management targets for next year raise a substantial risk that the disconnect between roster management targets and team participation opportunities is going to continue. And you'll see that in the testimony of Dr. Lopiano when you view that, that deposition and read that testimony. And you can also see it if you compare the roster management target squad sizes which appear in Plaintiff's Exhibit 3, the letter from Janet Judge to me with the averages in the NCAA or in the Northeast Conference. And you'll see that the squad sizes for men are consistently a little more than the relevant averages and the squad sizes -- excuse me, I'm backwards. Squad sizes for men are consistently a little lower, target sizes and the squad sizes for women are consistently a little higher.

And we think that that suggests that the roster management targets are not realistic. And even if those

targets are made, they will not reflect real participation opportunities.

You also heard some evidence that I'm not sure you would have been able to put totally in context until you read the Lopiano testimony, about the way track athletes are counted. And, you know, I suspect, Judge that you know more about track than I do, so I'm not here to instruct the court on the sport of track, but I would suggest that to the extent that EADA or the NCAA regs permit track athletes to be counted in each of the three seasons, the cross country season in the Fall, the indoor season in the Winter, and the outdoor season in the Spring, that that may also, and in Quinnipiac's case, does distort the counting of genuine participation opportunities. Because -- and Dr. Lopiano goes into this at some length -- if you have men's and women's teams that are both three season teams and you triple-count all of them, then mathematically it's more or less of a wash. But if, as Quinnipiac proposes, you have a men's team that ostensibly runs in two seasons and a women's team that ostensibly runs in three, then you're distorting the real participation opportunities. It looks like you have more opportunities for women and fewer for men than you really do, and you'll read and see Dr. Lopiano's testimony on that.

And I think Mr. McDonald agreed with, agreed with me when he testified, that if you count, you know, you count the men twice and you count the women three times, you may not be counting participation opportunities in a fully accurate way.

So, we think that when you take into account all that evidence, even if you assume that the 40 member competitive cheer team ought to be counted as a sport, do the math. Quinnipiac won't be in compliance with prong one because they have overstated the number of opportunities for women, understated the number of opportunities for men, and they'll be out of compliance without volleyball in the Fall.

Now, let me talk about cheer. This isn't, as I said, it's not that volleyball players against the cheerleaders. Nobody is saying that the competitive cheer squad are not athletes. I think it was obvious from the videotape that we all viewed that what they do is very athletic. It was obvious from the testimony of Ms. Powers as she described the skills that they have to have, that they are athletes. But that is a different question from whether the sport of competitive cheer has yet established the circumstances that are necessary to count it as a legitimate varsity sport, varsity intercollegiate sport for Title IX purposes.

The best place to go for this is to the letter of April 11, 2000, from Dr. O'Shea of the Office for Civil Rights at the Department of Education, to David Stead or Stead of Minnesota State High School League. It is Plaintiff's Exhibit 30 something. I'm sorry that I don't recall the precise number but --

MS. GAMBARDELLA: Your guess is as good as mine.

MR. ORLEANS: I'm sorry?

MS. GAMBARDELLA: Your guess is as good as mine.

MR. ORLEANS: I thought you would have that committed to memory.

That letter, which obviously is in evidence, lists a set of criteria, a set of factors that OCR will consider in evaluating whether an activity is a sport.

THE COURT: Thirty-four?

MR. ORLEANS: That is Exhibit 34, and I believe that the way that the exhibit is set up, there is a letter of May 20th, if I recall, that is the first page and the second -- then the letter from, the letter of April 11, 2000, begins on the second page of the exhibit if I remember correctly. Is that consistent with what you're seeing, Your Honor?

THE COURT: Yes.

MR. ORLEANS: And on the second page of the letter, OCR goes through a list of criteria that it will

consider in determining whether an activity is a sport. Says it's going to consider these on a case by case basis.

And these criteria include such things as whether the activity is limited to a defined season. Competitive cheer is not.

Whether the primary purpose of the activity is athlete competition and not the support or promotion of other athletes. That's at least questionable in the case of competitive cheer.

Whether organizations knowledgeable about the activity agree that it should be recognized as a sport. There's been no evidence of that presented by Quinnipiac, and I think when you look at Dr. Lopiano's testimony, you'll see that she relies on statements from the American Association of Cheer, Coaches and Advisors and from the Women's Sport Foundation that it should not be recognized as a sport.

I think there's evidence in the record that it's not recognized by the NCAA, by the Northeast Conference. It's not on the NCAA's emerging sport list because nobody has requested that it be put there.

Whether state, national or conference championships exist for the activity. Certainly no conference championships. The national championships that Coach Powers testified about and Mr. McDonald testified

about I think we were able to establish are, you know, run by private organizations. It's sort of a pay to play situation. There's no play in -- there's no tournament structure that leads the best to the national championship. You send in your application and your entry fee and you go.

There are no uniform rules. And the existence of a state, national or conference rule book is one of the OCR criteria. And, significantly, Quinnipiac has not taken advantage of the process offered by OCR to request OCR to come in and perform an evaluation and assist Quinnipiac in setting this activity up to be a competitive sport.

So it would be our view, reflected in the opinion of our expert, Dr. Lopiano, that although cheer, competitive cheer may very well be considered a varsity intercollegiate sport for purposes of Title IX at some point in the perhaps not too distant future, you can't count it now.

All right. That was my, that was intended to be my disposition on the facts. I think I went a little bit into the law, but let me address the preliminary injunction standard with you. After all, that is what brings us here.

First, we have to show irreparable harm. No

court that has been confronted with a group of female athletes whose team has been taken away, program has been eliminated, has failed to find that they were irreparably harmed. As far as I'm aware, I don't know a case.

The denial of the opportunity to compete, to participate in an intercollegiate varsity athletic competition is considered and has been considered by many courts to be irreparable harm.

Second hurdle for the plaintiffs. Can we show a likelihood of success on the merits. As we've stated to Your Honor several times, our view of the law is that if Quinnipiac is not currently in compliance, and it's not, then it must become compliant before it may reduce existing opportunities for women.

We think that that is inherent in the language of the three prong test. The first prong, proportionality, is written in the present tense. It asks whether right now the institution is, it provides proportional opportunities. The second and third prongs are really written in the past tense. They look backward, is there a history of program expansion? Has there been an effort to identify and accommodate the interests of the under-represented gender? There is no prong of this test that looks forward and says, well, are you going to be compliant in the future.

THE COURT: The way you stated that test was the university can not eliminate opportunities for women. Does that mean that they cannot cancel a women's team or does that mean they cannot, they cannot have fewer opportunities next year than they have this year total?

MR. ORLEANS: We think, Your Honor, that it means that they cannot eliminate a currently existing set of women's opportunities, i.e., a current women's team, until they have first gotten into compliance. And I wanted to read you a quotation from the Barrett against Westchester University case, which I think makes that point, if I can find where I put it down.

Here it is. Barrett was a case where the university announced, Westchester -- Barrett against Westchester County of Pennsylvania, it's an Eastern District of Pennsylvania case from 2003. The university announced the elimination of women's gymnastics and men's lacrosse and the addition of women's golf. The plaintiffs were members of the gymnastics team who sought a preliminary injunction to reinstate the program. And the court said "The defendants argue that they have simply replaced the participation opportunities in gymnastics with those of the future women's golf team. In light of the present status of the women's golf team, this argument is unpersuasive. At present what defendants offer as a

replacement for a team with a tradition and history of accomplishment is a mere promise of a golf team for next Spring. Unless and until Westchester University offers proportional participation opportunities to its male and female athletes, Westchester University violates the third prong of the accommodation test when it eliminates women's intercollegiate teams."

In every case that I'm aware of, Your Honor, where an university has proposed to eliminate an existing team, an existing women's team, whether or not it simultaneously proposed to replace those lost opportunities with some other set of opportunities, the court has entered a preliminary injunction to prevent the elimination of those existing opportunities on the ground that the university was at that moment out of compliance.

THE COURT: So, just to press you a little bit, in your view.

MR. ORLEANS: I do -- sure, I'm sorry.

THE COURT: An university that's out of compliance with Title IX could not eliminate football and women's volleyball, thereby increasing proportionality because it was doing it in a way that eliminated a woman's team. In other words, they are cutting 80 football slots and then cutting 15 volleyball slots, so they have a net of 65 more opportunities net.

MR. ORLEANS: And if that -- can I extend the hypothetical just a bit? If that action alone would put the university into compliance, could they do it? Our argument would be no. You got to get into compliance first. Cut the football team this year, then you're in compliance, then you want to look at cutting women's opportunities down the road, you can do that. But our argument would be you can't cut the women's opportunities until you're already in compliance.

However, having said that, it's not necessary for the court to agree with me on that statement of the position in order to find for the plaintiffs in this case, because we think it is also true, and it is also the law, that a plan to comply where there has been no compliance is not sufficient, particularly where that plan is not credible due to the history of a misuse of roster management.

And for that case, for that argument, I would rely first on the Barrett case that I just mentioned, which is a case where there was a plan to replace, to add women's golf and the court entered an injunction and said, you know, maybe you'll get a golf team but right now it's only a promise and we're not going to let you eliminate the gymnastics team on the basis of a promise of a golf team.

But even more on point is the Chokey case from the Western District of Pennsylvania in 2006, decided by the Chief Judge of the district, which is really remarkably analogous to this case. And I want to take a few minutes to point out ways in which it's parallel.

Slippery Rock University, whose initials I can't help but notice are S R U --

THE COURT: I noticed the same thing.

MR. ORLEANS: I thought you probably might have -- announced the elimination of three women's sports and five men's sports. It later rescinded the elimination of one of the women's sports which was field hockey.

The plaintiffs in the case included a group of student athletes, members of the swim team and a coach. Just as we have here. Slippery Rock proposed, like Quinnipiac does, to achieve proportionality through the use of roster management and the addition of a lacrosse team which previously had been a club sport, just as Quinnipiac here proposes to achieve proportionality through roster management in the addition of a, quote unquote, "competitive cheer team" which Mr. McDonald described as having been something like a club sport.

The court in the Chokey case looked first at the history, noting that the university had conducted some internal studies and was aware of its past noncompliance.

The court rejected an argument made by the university that, you know, gosh, we've got budget issues and our existing facility isn't adequate, we have to make major capital improvements in order to continue the swim team. The court said, you know, it's been good enough, it's still usable, kind of like the Burt Kahn court at Quinnipiac.

The court rejected a roster management plan that really, when you read the case, is remarkably similar to Quinnipiac's. It was a plan in which roster sizes had been set to achieve proportionality. What they did at Slippery Rock apparently was they got all the coaches in a room and they said we need this many men's spaces and this many women's spaces, you guys negotiate it out. And they let the coaches haggle it out. It's not described in great detail in the opinion. You don't know whether the athletic director was involved in this or not. But what is clear is the goal of the roster management plan, just as here, was we've got to make the numbers.

The court notes that the new women's lacrosse team was given a target of 24 players, even though the club team only had 17. In our case, the new women's competitive cheer team has been given a target of 40 players, even though the current team only had I think 31 or 32, and even though Coach Powers testified that she's

only got 18 committed to coming back next year.

Neither the club lacrosse team nor representatives of the student body had asked that lacrosse be elevated to status of a varsity sport in the Chokey case. Just as here, there really is not, I don't think, solid evidence that the cheer squad had requested elevation to a varsity sport. I thought the testimony on that was a little bit less than clear. Mr. McDonald said they'd been talking about it for a while. He said he'd received requests, but Coach Powers said she hadn't made them so I think the evidence is, at best, inconclusive on that. Certainly there's no written record of any request having been made, and on those facts, the court found that the use of the proposed lacrosse team as a means of achieving proportionality was, quote unquote, not particularly meaningful.

Because of the allotment of more positions than it previously had had as a club team, and there was no coach hired. That's not the case here. There were no players that had been recruited. That is the case here. There were no scholarship funds that had been set aside. That's also the case here. We heard that there might be scholarships but we don't know for sure. And clearly Quinnipiac went into this process without having made any serious and comprehensive and detailed plan about how they

were going to elevate cheer to the status of a varsity sport.

The court then looked at the roster management system at Slippery Rock and concluded that the increase in roster sizes for women's teams would be a paper increase only. And it did that by comparing the roster management targets at Slippery Rock to average squad sizes.

The Judge says, "I find it odd that women's cross country would be allocated 28 positions while men's cross country would be allocated only 16 positions."

THE COURT: Yes, I see it, 14, 25.

MR. ORLEANS: Yes. Similarly, he says, "Or why men's soccer would be allocated 25 positions while women's soccer would be allocated 28." And once again, there's a very similar differential in our case.

And then the court says that, you know, "Slippery Rock has never satisfied substantial proportionality. It urges that it will become compliant, that it has plans to become compliant through the use of roster management but," says the court, "having a plan to ameliorate inequities is not the same as having ameliorated them. "A plan was not convincing to the court in view of the history of men's teams increasing roster sizes, despite the established limits and the apparently artificial increase in roster sizes for the women's

teams."

So, certainly it's our view, Your Honor, that Chokey is right on point and it stands for the proposition that, you know, a plan is not sufficient to comply with Title IX on these facts under those circumstances.

What's more, Your Honor, even if the court is willing to entertain the prospect that a plan to comply is as good as actual compliance -- excuse me -- the plan has to be credible. And for all the reasons that I discussed earlier, our view is that Quinnipiac's plan depends on roster sizes and on counting methods that are not credible or appropriate in view of Title IX's purpose of increasing real participation opportunities, not just technical compliance or apparent opportunities.

So, we don't think that the court even has to get to the question of whether cheer should be counted in order to find that we've established a likelihood of success, because based on the three slightly different approaches that I've just outlined to Your Honor, you can find that we have a likelihood of success on the merits even without getting to the issue of whether cheer should be counted and the 40 slots allocated to cheer should count toward proportionality. But for the reasons that I discussed earlier, we don't think that cheer should count if the court decides to reach that issue, and I won't

belabor those issues again.

Now, under the 2nd Circuit preliminary injunction standard, even if the court were to conclude that the plaintiffs have not shown a likelihood of success on the merits, the court still should issue the preliminary injunction if we have established fair grounds for litigation going to the merits and a balance of the hardships tipping decidedly in our favor.

For all the reasons that I've been through in my remarks today, as well as what we've put in our, our proposed findings and conclusions and what you've seen in our trial brief, and based on the nearly three days of seriously contested hearing that we had, we think it's very clear that there are fair grounds for litigation going to the merits in this case.

And as to the balance of the hardships, you know, every court in those Title IX cases that has looked at a university's argument about financial hardship versus the harm to plaintiffs being deprived of competitive opportunities, has found that the potential harm to the plaintiff outweighs any hardship to the university.

And on those lines I would just note that I thought the testimony was significant regarding the Burt Kahn court and the T D Banknorth arena. It appears from Mr. McDonald's testimony that there was a budget crunch at

the university, he was told to reduce the budget by ten percent, he cut the budget without cutting volleyball. Then he was told that he had to cut volleyball. And, as he explained, the reason for that is the that university has a space crunch, there are plans to use the space occupied by the Burt Kahn court for other purposes, they were going to build a new volleyball gym but they are no longer plan to build a new volleyball gym.

But he went on to say that the cheer squad is going to practice and/or compete in the Burt Kahn court next year, so clearly there are plans to convert it in the foreseeable future and there is evidence in the record, there's evidence from Coach Sparks although there was some hearsay, some evidence excluded on the basis of hearsay, there are inexpensive ways to make it possible for the volleyball team to continue to practice and play at Quinnipiac either in the rec center or on the tennis court or at T D Banknorth until things shake out. You know, the economy can look different in a year or when this litigation is concluded and it might be at that point it would be possible to create an appropriate facility.

But it's a little odd, I thought, to say, well, you know, we can't provide them with a first class Division I opportunity in T D Banknorth because we don't have locker rooms and offices for them so we'll just cut

out their program all together. As far as a balance of the hardships goes, I think that really pretty much speaks for itself.

Finally, Your Honor I want to take note of an argument that the defendant made, I think in its proposed findings and conclusions, but perhaps in its brief in opposition to the Temporary Restraining Order motion; I'm not sure. And that was essentially an argument that the court ought not to micromanage the university and tell it how to run its program, what sports it needs to have. Frankly, where you've got a group of plaintiffs who have been harmed, that sort of argument is really nonsense.

I would refer the court to the Roberts against Colorado State University case where that argument is specifically addressed, but, you know, we've got a group of named plaintiffs who have been harmed by a specific action. They are seeking equitable relief and it's obvious, seems obvious to me at least, that the remedy ought to be tailored to provide them with the relief that they seek and, therefore, it is not, certainly is not beyond the court's authority or misuse of the court's discretion to enter an injunction regarding the reinstatement of this specific program pending the end of the litigation. The end of litigation may be different, and I would note in the Cohen and Brown University case,

the court initially entered a preliminary injunction that restrained Brown from denying two women's sports to club status. When they got to the end of the case -- and in that case, there was a mediated partial settlement so it didn't proceed totally along in a -- straightforwardly along litigation lines, but at the end of the road, the university was invited to submit its own plan for compliance, which the court evaluated to determine whether it would be in compliance, and then approved. And, in fact, the last appellate decision in the line of cases in Cohen and Brown has the appellate court ruling that the district court should be more differential to the proposal that Brown submitted. And that's completely appropriate when you get to the end of the road in this case, and Brown -- and the university has been ordered to make itself compliant and it gets to submit a credible plan for court approval to do so.

But at the preliminary injunction stage, it certainly is appropriate for the court to enter relief that's tailored to the plaintiffs who came to court seeking relief.

So, I thank you very much for your patience in letting me go on for so long, Your Honor. In summary, we think that there's no question that we've established irreparable harm. We think that we're likely to succeed

on the merits, whether the court takes any of the number of views of the merits and how they should be approached. If the court should decide that we haven't quite gotten over the hump of establishing likelihood of success, we certainly think it's clear that there are fair grounds for litigation going to the merits and we think that the balance of hardships tips decidedly in our favor and we, therefore, respectfully request that the court enter a preliminary injunction reinstating the Quinnipiac University women's volleyball program with all of the benefits of varsity status at Quinnipiac University, including practice time, training, competition, facilities, equipment, scholarships, and the coach.

Thank you very much, Your Honor.

THE COURT: Thank you.

MS. GAMBARDELLA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MS. GAMBARDELLA: Your Honor, Title IX is a shield, not a sword. This case is, indeed, has become about, it's come to be about whether or not a private university has the discretion to allocate resources, manage its budget in extremely tough economic times, while simultaneously seeking compliance with a law that clearly is very important to them to be in compliance with.

Title IX. You heard in closing what counsel

feels and what makes sense for Quinnipiac University, but every single case that we will proffer on this issue is very careful, courts have are very careful to say this is not about telling schools what programs they can maintain and not maintain. Schools can make business decisions as long as they are compliant.

Now, what they'd like you to do, what they are asking this court to do, is find as a matter of law that they should be punished because three years ago in connection with a self study, a voluntary self study where they committed to making the numbers better over time, that because they didn't cut it by some deadline on prong one, that you should determine as a matter of law you'll never cut it, you can't cut it and the court is going to tell you until you cut it, you've got to keep women's volleyball. You've got to keep a particular program.

Now, Your Honor, this has never been about gender. Title IX is about gender. It's about equity in opportunities across gender lines. You did not hear one plaintiff testify that volleyball was targeted because they are women. Not one. And very nicely, I believe, on cross examination of my clients, it was established how much they struggled with this decision.

Now, while I assume the point they were trying to make was you struggled so isn't that proof that you

shouldn't have done it, what defendant asserts is that it very nicely established they struggled. This was not an easy decision. As you acknowledged yesterday or the day before, nobody's happy about this, but the bottom line is a school is entitled to achieve compliance and articulate on what prong it is going to rely.

Now, counsel has said to you that he believes the evidence demonstrated, believes the evidence demonstrated that we admit we've never been in compliance with any prong. Now, I don't know what hearing counsel was at, with all due respect, but I don't think we've ever taken the position. In fact, the position has been that if we were adjudicating past compliance, we would be relying on different prongs and there's been not shred of evidence, real evidence, to suggest that we're wrong.

Not one plaintiff has standing to adjudicate those two prior years. Every plaintiff, student plaintiff, is a member of a volleyball team that got to play last year. Their need was met. They got to play last year. There was one plaintiff, two plaintiffs who didn't get to play because of injuries, not because of anything Quinnipiac did. So I'm not sure where that contention comes from, but I am here to clarify, the record will speak for itself, we have never said we're not in compliance.

And the only other piece of so-called evidence that the plaintiffs have proffered to substantiate that claim, even if it's relevant, which we're not conceding it is relevant at all, is Dr. Lopiano's unsubstantiated testimony with respect to prong two particularly, and she said and you'll read it, "They've never been in compliance with prong two because they haven't added a woman's sport since whatever year they added ice hockey."

And she said -- we asked where she got that from and she said it's a two, three look-back, and when pressed on cross, she couldn't point to one authoritative source for that proposition. And on cross, what she finally said was, well, I can't find it but I think I had some conversation with some OCR person sometime ago.

The bottom line is the materials you have in front of you establish very clearly that's a subjective test. It's an analysis on a case by case basis, and we have never conceded not to be in complains with prong two or prong three. But the bottom line is for purposes of today, for this hearing, these plaintiffs can't adjudicate that.

Now, that having been said, what the defendant has articulated here is that it is, it has introduced roster management which not one case or authoritative source has said is not appropriate. In fact, the opposite

has been said. We read it to Mr. McDonald and I asked him about his understanding. They put it in as an exhibit. Roster management is an acceptable mechanism to achieve compliance with Title IX. OCR doesn't love men's sports to be cut, to be sacrificed to achieve it, but it's acceptable.

THE COURT: Let me press you a little bit on that.

MS. GAMBARDELLA: Sure.

THE COURT: I understand OCR to have approved efforts by a university to come to compliance with Title IX either by cutting a men's sport.

MS. GAMBARDELLA: Yes.

THE COURT: Or by capping participation in men's sports.

MS. GAMBARDELLA: Yes.

THE COURT: Putting aside for a minute the motion that roster management is perhaps not technically a cap, depending on how strictly it's enforced, but put that aside.

MS. GAMBARDELLA: Sure.

THE COURT: Do you have authority supporting the roster management of floors for teams as opposed to caps for men's teams? In other words, is permissible roster management limited to capping men's participation rather

than working both sides?

MS. GAMBARDELLA: No. Roster management is not restricted to capping the size of men's teams, although that's permissible to use that aspect. You can cap men's participation opportunities while simultaneously increasing opportunities for female athletes to achieve proportionality.

THE COURT: I don't doubt that you can increase the opportunities; the question is whether you can set floors as well as caps. In other words --

MS. GAMBARDELLA: Floors meaning a minimum?

THE COURT: Meaning a minimum. In other words --

MS. GAMBARDELLA: Yes.

THE COURT: And what authority do you have for that proposition?

MS. GAMBARDELLA: Yes. Well, the OCR advisory opinions and some of the cases that we cite for you in the brief you will get this afternoon, talk about roster management which can include setting numbers of teams. Now, I don't have a case that says you may establish a floor. What it says is you can establish sizes of teams, either capping men's or increasing females to achieve proportionality.

And I must mention, too, that not one of the

cases, and I'll deal with Chokey in a minute, have a scenario where men's teams have been cut or capped and a woman's team cut, and simultaneously adding additional female participation opportunities which we're seeking to do here which I'll talk about.

But there's no exact wording for what you're looking for, Judge, but what the cases establish is that roster management includes the concept of capping and increasing female opportunities, which is consistent with potentially saying you can't have less than so many females on this team. We have to achieve proportionality.

Now, there's been a contention that our numbers are not realistic, and I'll get to why there's been no evidence of that for Quinnipiac, but -- am I answering your question?

THE COURT: Well, I understand that's your view. I guess what I'm looking for is authority supporting that view.

MS. GAMBARDELLA: Sure.

THE COURT: I don't need it this minute if it's in the brief.

MS. GAMBARDELLA: It's in the brief. Aside from the OCR advisory, which talks about what roster management means, then I would say --

THE COURT: Which exhibit is that?

MS. GAMBARDELLA: What's that?

THE COURT: Which exhibit number?

MS. GAMBARDELLA: That is the 1996 -- they are in both exhibits.

MR. ORLEANS: If it's the 1996, it's Plaintiff's Exhibit 7.

MS. GAMBARDELLA: Plaintiff's 7. One of the things that the advisory does talk about is having enough to support a viable team. They do talk about that. It's in the brief. Let me find it.

There's OCR -- Exhibit 7 but it might have been renumbered -- OCR 1996 clarification, trial exhibit, I think we have it as 7. OCR considers a sport season -- I'm sorry.

OCR has made it clear roster management is acceptable and --

THE COURT: Well, you look at Exhibit 7, page four, the second and third full paragraphs --

MS. GAMBARDELLA: Page four?

THE COURT: Yes.

MS. GAMBARDELLA: Uh huh.

THE COURT: All right. That third full paragraph says, three sentences in, "An institution can choose to eliminate or cap teams as a way of complying with part one of the three part test. So that suggests

you can cap a team.

MS. GAMBARDELLA: Uh huh.

THE COURT: The paragraph above talked -- it's obviously not quite what we're talking about here but basically it says that the OCR will not count unfilled slots, potential positions. Doesn't matter that you have to have actual --

MS. GAMBARDELLA: Right.

THE COURT: -- actual, real, not illusory participation.

MS. GAMBARDELLA: Right, and admittedly, Your Honor, even the cases interpreting this say that what OCR is saying is that, for example, I can't say we have 50 participation opportunities on a lacrosse team but they have to be actual opportunities. In other words, we have to know we can put the heads in those opportunities, if that makes sense, so it does eventually have to be actual, you have to put the bodies in the slots to comply. So, in other words, we couldn't rely and say we're going to increase lacrosse to 50 --

THE COURT: I understand.

MS. GAMBARDELLA: -- and then look back, we have 40, and assuming that we're not talking about people that dropped out through normal attrition or whatever, injuries, say, well, we had 50 opportunities. You have to

work hard at filling them, there's no doubt about that.

THE COURT: Right.

THE COURT: Okay.

MS. GAMBARDELLA: This page also says under-representation alone is not indicative of discrimination necessarily.

Thanks, Jon, I really appreciate it. All right.

Now, what they suggested to the court is that what you should order us to do is reinstate volleyball because it's no big deal to convert an existing facility for them to play volleyball and have competitions. The evidence on that was clear and consistent that it's not just a matter of putting sleeves in a floor or just letting them play, Your Honor. There is a considerable amount of, there are a considerable amount of decisions that have to be accommodated here.

One is they've already cut out two men's sports. They've already notified the golf coach that his contract will not be renewed and the team has been disbanded. They have already explained ad nauseum the space crisis at the university. I mean the volleyball team, for lack of a better word, was selected in large part, not just because of budget cuts but there's a space crisis at Quinnipiac University. And the proposed resolution is that the court order the university to figure out how to figure that out

on their own, spend more money, build another facility, build another team and then drop us. That's not the intent of Title IX. Title IX's intent is to provide equitable gender opportunities, not tell schools how to manage their resources and manage their budgets. Maybe the proposal would be raise tuition across the board for students so we can figure out how to resolve a crisis that does affect all students.

So, let's talk about what the plaintiffs need to prove, what is their burden of proof. It's interesting to the defendant that they ended with irreparable harm. Irreparable harm is the first hurdle, not the last. The first hurdle is to establish that they will suffer irreparable harm. So what is the irreparable harm, taking everything plaintiff said as true, that they will suffer in the absence of reinstatement of the volleyball team?

Erin Overdevest, and I'm sorry if I'm mispronouncing her name, like all the students, focused primarily on emotional harm, upset and disappointment. Because she can't play a sport of her choice while she's going to school for free, she will continue on full scholarship, and what she admitted is that she missed an entire year of play last year because of her injury. When pressed on cross, what she claimed is that doesn't take her out of the running to continue to play volleyball

competitively. She didn't agree that the one year hiatus would harm her or her ability to pick up right where she left off and be competitive again.

But, most compelling, she said she chose Quinnipiac and chose to remain at Quinnipiac because of its nationally reknowned occupational therapy program. She never once said I picked Quinnipiac because of volleyball. So the bottom line is she will not be denied any life altering opportunity and she'll get to finish her education on scholarship.

She did testify that had she known volleyball would be eliminated, she was a graduate student, Your Honor, she's got one year left to play, she would have braved it through the pain and played last year and delayed her surgery, which testimony we can only category as tenuous and, frankly, somewhat incredible.

Ms. Biediger admitted that she's completely unable to play volleyball next year because she's got to have surgery. The sole harm she represented, therefore, is that she can't, quote unquote, rehab with her team, which is hardly the type of irreparable harm the dramatic remedy of injunction is designed to prevent. At the same time, she admitted she's never been denied access to the med room and she fully expects to be able to access those services next year.

This alone deprives her of standing for at least this procedural stage to adjudicate anything for next year, and her claim in her declaration that the timing of the announcement made it too late to transfer is incredibly tenuous and actually somewhat disingenuous because she can't play next year. She has all of next year to transfer if what she needs to do with her life is play volleyball. And she goes to Quinnipiac next year for free.

Now, what's important to note is, you may recall that I asked her if she admitted that not playing next year would set her back so badly that her competitive volleyball life would be over, and she refused to agree with me, which not only undercuts her own claim but serves to undercut everybody else's.

The two students who are out of commission, so to speak, for a year would not concede that that ends their volleyball career, for lack of a better word.

And she's on an academic scholarship, not athletic.

The minor, L. R., testified through her mother. She testified that despite where we started, and this has been kind of a moving target in this case, Judge, when we first started from the papers, the representation was by the time Quinnipiac made the announcement it was too late

for those students to transfer. Now we find out that, contrary to that representation, what we heard was, well, it was difficult to look at schools and find a transfer, but what we learned from Mrs. Riker is that her daughter has been offered a scholarship to play Division I volleyball at Fairfield University and it's her daughter's unilateral decision to put that on hold. And she admitted on cross examination that she is stalling to see what you do.

So, if her daughter's irreparable injury is personal devastation, then query why on earth would you risk that, wait for this, instead of accepting a viable offer from a terrific school to play Division I volleyball next year? And chance this? So, query, is it really irreparable harm? Is she really -- has she really satisfied her burden on that point?

So, obviously the representation we started with, it was too late to transfer, it's not true.

Ms. Lawler completed her freshman year at Quinnipiac and testified as to similar emotional distress. She testified at the age of 19 that her life is over and she testified that after she was told volleyball was being eliminated, she contacted a number of Division I schools and has been offered a scholarship to play Division I volleyball at the University of Rhode Island. So what did

she do with that? She declined it because, quote, she didn't "connect with the coach," end quote, on a one day visit. Now, if a 19 year old young lady's life is over if she doesn't play volleyball, query whether or not any so-called irreparable harm is of her own doing or of something that we did.

It was also undisputed, not only will her scholarships continue but that any letters of intent, and mind you, the minor, L. R., hadn't even signed hers, Quinnipiac is going to let them out of it so they can play elsewhere. That alone, in terms of the student plaintiffs, defeats their claim. They cannot sustain their burden of proving irreparable harm, which is the first hurdle before you get to likelihood of success.

And we've cited some cases in our brief where courts in the same inquiry, Title IX cases under similar facts, have said denying a preliminary injunction under Title IX in one case, Miller v. University of Cincinnati, preliminary injunction was denied in a Title IX case to prevent the elimination of a women's rowing team because the court found the plaintiffs had not proven they would suffer irreparable harm because the university committed to continuing their scholarships to any rower would not be able to compete because of termination of the program and agreed to release, under NCAA rules, any rower who wished

to remain in competitive collegiate rowing to transfer. And there are a number of cases to that point.

So, what's the harm? Defendants respectfully assert that by their own admissions, it's not irreparable, at least not of the type required for issuance of an injunction.

All right. Let's talk about what's left and that would be, if anything else, it would be financial, if there's a differentiation in scholarships or some extra costs associated with their, the elimination of their team, that obviously by their very definition is not suitable for injunctive relief.

Let's talk about Plaintiff Sparks for a moment. You know we have a motion to dismiss for lack of standing so I'm not going to belabor the point except to say that everything we contended in that motion was confirmed by her own testimony on the stand. Her only claim of irreparable harm is she's going to lose her job. And she says in her complaint that that's related to the gender of her students but it is unequivocally clear and consistently held she may not ride the coattails of her students. She cannot adjudicate their rights; they are all plaintiffs and, therefore, she has no standing.

She wants Quinnipiac to reinstate the team. That's not her irreparable harm. And because she's hoping

it will compel Quinnipiac to renew her contract. If her claim is individual discrimination based on her own gender, which is not alleged in the complaint, that's a Title VII claim which preempts Title IX in this particular scenario. An injunction to prevent loss of employment is never allowed, and we will cite a variety of cases for that proposition.

The rest of her claims sound in breach of contract or promissory estoppel, not Title IX violations. So, even if she has standing on Title IX, all of her claimed damages are financial, and there's an adequate remedy at law.

THE COURT: Let me just interrupt you briefly and let me tell the participants who are here for the 3:00 o'clock proceeding we'll be starting about 15 minutes late. You're free to stay or feel free to go. We'll not start before 3:15.

MS. GAMBARDELLA: Thank you.

So, let's leave irreparable harm. And, again, they can't overcome that to even get to likelihood of success, so let's go quickly to likelihood of success.

We have heard a variety of inflammatory and misleading and unsupportable allegations about this university for three or four days, and in the media. The university's never been in compliance. We did hear the

university finesses its EADA reports and engaged in fraudulent EADA reporting. This morning I heard that's no longer the contention, but we heard that before. We've heard that the defendant plays fast and loose with roster management.

So, what is the evidence that was brought to you to substantiate those claims? What are the challenges to the hard numbers? The plaintiffs -- or the defendant's proportional numbers for next year. They say we've not been in proportionality in any prior year and, therefore, you should determine as a matter of law, don't believe them. They've said there's not been compliance with any other prong in Title IX in the past with, to be respectful, the lightest of evidence, and that you should determine as a matter of law, don't believe them.

They've obsessively, obsessively focused on the first year of roster management at Quinnipiac, 2007, initial year, where several coaches attempted to change numbers before and after first days of competition and, therefore, you should conclude as a matter of law and despite the total lack of evidence that the incidents were approved, systematic, unaddressed, encouraged, suggested or even that they continued beyond the first year, which Ms. Flynn herself said was an anomaly. And, therefore, because of those occasions, don't believe them.

They said even if the athletic participation opportunities are true, we can't duplicate or duplicate count indoor, outdoor, cross country, and as a matter of law, in advance, you should hold our competitive cheer team could never count. And plaintiffs have it wrong, Judge. They said defendants haven't proved it would count. They have to prove it wouldn't. We don't have to prove it would.

So, what was the evidence on competitive cheer? They have a standard season, they have a budget, they have been completing. It is not the Chokey case, Slippery Rock. In Chokey -- which is, by the way, heavy on legal conclusions and fairly light on facts -- in Chokey, the court found, made a factual determination that nobody wanted to elevate lacrosse. Now, again, in the hearing that defendant was in, Ms. Powers testified and Mr. McDonald testified the students have been asking for it. They are still inquiring about it. That alone is wholly distinguishable. We think Chokey is distinguishable on other bases which we'll peruse in our brief and I won't take up time now. But Chokey also involved a situation where roster management was being introduced. Roster management was introduced three years ago. They've gone through their growing pains. And you heard about the commitment, you heard about the

monitoring, you heard about the forms, you heard about the squad lists. And they need to prove and wholly failed to sustain their burden at an injunctive hearing, injunction hearing that the OCR would never approve the competitive cheer team to count.

OCR has indicated there's a test for a sport to be classified as such for Title IX compliance purposes. Not every element of the test has to be met, it's a case by case analysis and there's absolutely no authority for the proposition that we had to do this in advance. Other sports aren't assessed by OCR in advance. OCR reacts to complaints. So, to suggest -- even their own expert, what I got her to say was, well, it's not required but it would be unwise. Well, the University of Maryland has had discussions with OCR. That's an exhibit in the complaint. And things are changing with respect to competitive cheer, Judge, and they just have failed to produce sufficient evidence for you to find as a matter of law in advance they'd never count. It's not illusory, it's not a promise; they exist. The roster numbers are easily filled.

Let me move to why they are fixated on that. They are fixated on 2007 because 2008 doesn't help them. 2008, you didn't see those occasions, and no matter how they try to inflate that there were few occasions, one of

them by Ms. Fairchild adding before competition and then dropping, no matter what else they do, they can't prove to you, they can't satisfy their burden that past noncompliance is egregious, that there's fraudulent reporting, that there's intent, that there are shenanigans. They haven't sustained their burden as a matter of law and, in any event, it assumes that all behavior will remain constant throughout next year.

I'd like to just jump now to -- I don't have much longer, Judge -- Dr. Lopiano's opinion about competitive cheer should be totally disregarded. Dr. Lopiano didn't know that Quinnipiac engaged in competitions. She didn't know it existed. She said it's only sideline cheer. They don't exist. When asked about the source of her information, she said I pulled the roster off the website. She didn't take five minutes to get any facts. She also didn't use real squad lists. She used the least reliable source, website rosters, which Mr. McDonald testified, uncontroverted, are the least reliable source.

And her predisposition against competitive cheer is no secret. She's been quoted over and over and over again -- in fact, she told me at deposition she would like us to start a bowling team; that would have been better for her. And there are lots of NCAA sports like squash

and sailing and things like that that she probably wouldn't have had a problem with, but she is predisposed against competitive cheer. She is not neutral with respect to that opinion, Judge. She's an activist. She is not a neutral expert in the traditional sense of the word. She did no research into Quinnipiac whatsoever.

But that conceded, if the primary purpose would be to compete on a regular season, like basketball or gymnastics, and regular practices are conducted while under the supervision of the coach, these activities could be considered sports.

Let's just talk briefly about the duplicate counting. The evidence is uncontroverted, they are different seasons, different competitions, different sports. And what they would like this court to find as a matter of law is because there's overlap, some overlap, they don't get to count it three times. The NCAA does it, other schools do it and, according to their own expert, they could count more than once if there's different events and so forth, and she, indeed there again, relied on completely erroneous information about Quinnipiac University. And there's absolutely no regulation or case or authority for the proposition that you can never count those sports three times.

So, here again, they are asking you as a matter

of law to say Quinnipiac's teams could never count more than once.

Let's just address quickly coaches' testimony. One coach was put up complaining about her budget. She said that her budget constraints wouldn't allow her to support 26 teams (sic) and while she didn't come out and say it exactly, she suggested they don't have enough money for uniforms and so forth. That was 2007, and the coaches all were struggling a little bit, but in 2008, she admitted she had a roster target of 25 and she got to 23. The budget didn't change. She was asked about her budget and she said I made it work. She doesn't like it, nobody likes it, but the testimony of Becca Kohli and Mr. McDonald this morning confirms that the coaches are given the budgets and they decide how to spread it out. If she didn't spread out enough for uniforms for 26, 24, 23 players, it has nothing -- there's nothing that the university did or didn't do.

And you heard testimony about the budgets and everybody else's constraints this morning. Conversely in stark contrast, we have two women's coaches who said -- and actually Ms. Fairchild agreed with this -- roster management is a policy. Roster management targets have to be met. Numbers can be higher than what they are accustomed to, but at this juncture one of the coaches

wants more. They do it. They figure it out. They are not offended it's left to them, that it's left to their discretion. So do we punish them? Do we punish Quinnipiac because they said to coaches, you have to determine your tryouts, you have to determine your skill levels, and you have to determine your budget? Should we spoon-feed them like children and tell them every dollar they need to spend? Plaintiffs haven't proven that that alone sustains their burden on an injunction.

Finally, in the alternative, even if they prove irreparable harm, likelihood of success, which we say they cannot, they can't alternatively establish -- it's serious questions on this, it's not the questions -- serious, meaning the court is on the fence. If the court is on the fence, then there's a balance of hardships test. Based on the arguments I've already raised about lack of irreparable harm, and the harm to Quinnipiac if you reinstate, if you order the team to be reinstated, including, not just space crisis which still has to be figured out, men's golf, do we have to eliminate more men's sports to achieve proportionality to them, if this team is reinstated? Do we have to go back to square one with our budgets. What do we do with competitive cheer, which already they think they are going to be varsity? They are excited, they are ready to compete. They exist,

Judge. There are a number of returning, there are a number more. Ms. Powers had tons of interest in this.

So, it's clear that the -- even if you get there, the balance of hardships decidedly tips in Quinnipiac's favor.

No expert should be permitted to persuade this court on legal conclusions or assessments of credibility. No expert should be allowed to use their political agenda to convince you, especially when based on erroneous facts. In sum, it's the defendant's assertion that the plaintiffs have failed to meet, to sustain their burden as to every element of that burden. And I'm going to end with the way I began. Title IX is a shield, not a sword.

Thank you, Your Honor.

THE COURT: All right, thank you.

Mr. Orleans, I'm going to forego rebuttal.

MR. ORLEANS: That's fine, Your Honor.

THE COURT: You know, I have been living with this case this week and it raises difficult and interesting questions and I can anticipate, I think, arguments both of you would make as to the evidence and the law and we have many folks waiting.

I do want to thank counsel and the parties for, I'm tempted to say a good game. I thought it was handled well by everyone, that there was good sportsmanship

exhibited. And it doesn't make the case any easier but I certainly appreciate that in any case, and thank all of you for that.

I will get a decision to you as quickly as I can. I always cringe to say that because I've said that and sometimes it's been months but in this case I know it's important to get it out quickly. I do need to take a look at the expert's testimony.

And there's a last housekeeping matter I wanted to follow up briefly on a comment, Ms. Gambardella, you made. My understanding at the beginning of the trial with the stipulated exhibits was that those exhibits were being admitted as full exhibits. If there are exhibits that you've stipulated to that you're offering and in fact don't want me to consider --

MS. GAMBARDELLA: No, no. I'm sorry, I don't mean to cut you off.

THE COURT: There was one point --

MS. GAMBARDELLA: I know what it was. It was, I actually said it because it was the video, do you remember the video that was admitted? What happened is in our haste to make sure we got everything loaded, I was forwarding to my colleague a video and we were supposed to select one so I was just loading up three and then we selected one and we had all three. So all I was saying to

Mr. Orleans was I'm not going to submit the three, even though I indicated so. So that was an anomaly.

THE COURT: So everything that's in the record is in the record?

MS. GAMBARDELLA: Yes.

THE COURT: All right, thank you all. We'll stand in recess. I'll be back in five minutes for the next matter.

(Whereupon the above matter was adjourned at 3:15 o'clock, p. m.)

C E R T I F I C A T E

I, Susan E. Catucci, RMR, Official Court Reporter for the United States District Court for the District of Connecticut, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/ Susan E. Catucci

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