IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KAYLA LAWLER ERIN OVERDEVEST, and KRISTEN CORINALDESI, individually and on behalf of all those similarly situated; LESLEY RIKER on behalf of her minor daughter, LOGAN RIKER, individually and on behalf of all those similarly situated; and ROBIN SPARKS, individually,	)	**No. 3:09-CV-00621 (SRU)**
Plaintiffs,	)	**November 12, 2009**
v.	)	
QUINNIPIAC UNIVERSITY,	)	
Defendant.	)	

MOTION FOR MISCELLANEOUS RELIEF
(REQUEST FOR RESOLUTION OF SCHEDULING DISPUTE)

Plaintiffs Stephanie Biediger et al ("Plaintiffs") hereby request that the Court enter a scheduling order that resolves the parties' current scheduling dispute in this action. Plaintiffs' and Defendants' proposed pretrial schedules are attached as Exhibits A and B, respectively.

BACKGROUND

On March 4, 2009, Defendant Quinnipiac University ("QU") announced that it would eliminate its women's varsity volleyball team. Plaintiffs, who are team members and their coach, believed that QU's athletics program did not and had never complied with Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq) and that the elimination of the volleyball team would exacerbate QU's noncompliance. Accordingly, on April 16, 2009, Plaintiffs filed this action and sought to enjoin elimination of the team. The Court conducted a

hearing on May 11-14, 2009, and granted the preliminary injunction on May 22, 2009.

Thereafter, the Court referred the parties to mediation. When mediation failed, the Court ordered the parties to confer and file a Report of Planning Meeting pursuant to D.Conn.L.Civ.R. 26(f). The parties were unable to agree on a schedule and submitted very different proposals. The Court held a scheduling conference on October 22, 2009, at which it rejected both parties' proposed schedules and set a trial date of May 3, 2009, so that all parties may know before the next school year whether QU will be required to continue to field a varsity women's volleyball team. The Court set this date after QU represented that (1) its final exams would take place later in May and (2) its spring sports seasons – particularly varsity track - would be completed by then.

To enable Plaintiffs to prepare for this early trial date, the Court directed QU to produce documentation to Plaintiffs showing which QU athletes participate in each varsity athletic contest for each sport, within 72 hours after each such contest. This information is critical to several aspects of Plaintiffs' case, because they contend (among other things) that (1) QU's EADA roster size reports are not credible, and thus must be audited to determine how many athletes actually receive varsity athletic participation opportunities; (2) QU does not operate its cheer team as a legitimate varsity sport and thus cannot count its cheerleaders as athletes for purposes of Title IX; and (3) QU does not sponsor a legitimate women's indoor or outdoor track team, and thus cannot triple-count its female cross country athletes for purposes of Title IX. When Plaintiffs expressed concern that much crucial information will not even exist until after the end of the spring athletic season, the Court indicated that the parties will necessarily continue exchanging discovery until trial. The Court then directed the parties to confer about other scheduling issues and to either jointly present a schedule or request the Court's assistance if they could not agree.

The parties have not been able to agree upon a schedule. Plaintiffs propose the schedule

attached as Exhibit A, while QU has insisted upon the schedule attached as Exhibit B. Plaintiffs contend that QU's proposed schedule is not feasible because: (1) the trial week conflicts with QU's final exams (QU's counsel were mistaken in their representations at the scheduling conference concerning the exam dates); (2) Plaintiffs' experts cannot produce their reports until *after* they receive and have time to analyze information that QU cannot supply until *after* the spring sports conclude their seasons; (3) QU's proposed schedule fails to reflect the flexibility that the Court recognized would be required for such an early trial date; (4) Plaintiffs have good reason for concern that QU will not make timely disclosure of necessary information, including the participation information that the Court ordered as a condition precedent to an early trial date; and (5) the current trial date presumes a bench trial, but Plaintiffs demanded a trial by jury.

Defendant first proposed its schedule to Plaintiffs, who countered with the schedule on Exhibit A in an effort to deal with the issues set forth above while still accommodating QU's desire to have a merits trial before the next volleyball season.[1] QU rejected Plaintiffs' proposal, suggesting only that the trial might be held earlier to avoid the conflict with final exams.

Plaintiffs submit this Request for Resolution of Scheduling Dispute in order to facilitate the Court's consideration of the issues and the parties' disparate proposed schedules. [2]

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1 This schedule is not the schedule that Plaintiffs proposed before the scheduling conference and it is not the schedule that Plaintiffs believe would be best for fully and fairly litigating the matters at issue in this case. However, Plaintiffs propose this accelerated schedule based upon the Court's expressed preference for an early trial . Of course, the plausibility of Plaintiffs' proposed schedule depends upon whether QU promptly produces the information ordered by the Court and the information Plaintiffs have sought and expect to seek in discovery.

2 Plaintiffs can provide the Court with a more detailed pleading concerning scheduling issues – including declarations of proposed experts concerning the information they will need – if the Court thinks it will be helpful. Plaintiffs believe that denying them the opportunity to conduct adequate discovery into the many issues raised by this action - and by Defendant's reliance on its operation of this year's athletic program - would be so fundamentally unfair that it would constitute a denial of due process.

SCHEDULING PROBLEMS

I. Plaintiffs Should Not Have to Choose Between Final Exams and Enforcing Their Civil Rights

After the October 22 scheduling conference, Plaintiffs discovered that, contrary to defense counsel's statements, QU's final exams are scheduled for the week of May 3 — the tentative week of trial. The student Plaintiffs should not be expected to miss final exams (or studying for final exams) to enforce their civil rights at trial, so Plaintiffs suggested that the parties agree to a later trial date (but still early enough for QU to eliminate volleyball if it wins). QU refused and instead suggested that the trial occur *earlier*.

As an institution of higher education, QU should want to ensure that all of its students – including Plaintiffs – are able to adequately prepare for and take their final exams. Plaintiffs obviously cannot attend final exams and trial if they are scheduled during the same week. QU's proposal that the trial occur *earlier* appears to resolve this problem, but it exacerbates others, because much of the discoverable information Plaintiffs' experts will need to complete their reports before trial will not even exist by then. (Plaintiffs elaborate on this problem in Section II below.) Moreover, QU's suggestion ignores the nature of the academic conflict. Plaintiffs will not be able to study adequately for final exams if trial occurs during the prior week. The student Plaintiffs are not merely passive participants in this matter. They are deeply involved and their participation at trial and in trial preparation will be crucial. They should be permitted to focus on school during the school year, and on trial preparation during the weeks preceding trial. It simply is unreasonable to force them to choose between taking (or studying for) final exams and enforcing their civil rights. It is especially unreasonable for their own university to force this conflict. But instead of acknowledging and reasonably resolving the problem, QU tries to gain

tactical advantage from it.

II. Information That Plaintiffs Will Need to Prove Their Case Will Not Even Exist and Cannot Be Analyzed by Experts Until After the Spring Sports Seasons

A. General Considerations

Plaintiffs contend that QU does not comply with the equitable participation requirements of Title IX, and that QU has never complied with those requirements in the 37 years since the law's passage or the 30 years since OCR's promulgation of the Three-Part Test for measuring equitable participation. QU contends, wrongly, that this history is irrelevant because it will use "roster management" during the 2009-2010 school year to meet the substantial proportionality prong ("Prong One") of the Three-Part Test this year. Although Plaintiffs vigorously disagree that QU could escape liability even if it could show compliance with Prong One in the current academic year, Plaintiffs must be able to discover the information necessary to refute the defense.

QU seems to believe that to satisfy its disclosure obligations in this case it need only turn over its self-reported roster counts for each sport, which it says will be available immediately after the first date of competition of each sport.[3] Plaintiffs contend that in light of the evidence presented at the preliminary injunction hearing, QU's claimed counts are unworthy of credence. Plaintiffs demonstrated that QU has a history of manipulating its rosters in order to falsely appear closer to compliance under Prong One of the Three-Part Test than it actually is. Accordingly, Plaintiffs must be allowed to thoroughly audit the professed numbers to determine whether they are accurate.

In order to accomplish this, Plaintiffs must obtain various documents including rosters,

3 Even if this were true, it should be noted that QU has not yet produced the information for the fall sports whose first competition dates have already long passed. For any sports whose first dates of competition occur in the spring, QU will not be able to produce rosters until March, which is after QU's

competition schedules, participation lists, drop and add reports, NCAA eligibility information, season of competition used reports, and change of status forms, so that they can present complete information to the Court – including expert opinions – about actual athletic participation at Quinnipiac. By ordering Defendant to produce detailed participation information for each contest in the current academic year, the Court recognized the significance of this information. But all of this information will not be available – because it will not exist – until after all competitions occur and the sports seasons end. Although QU's website does not currently show Spring schedules for all sports (*see* www.quinnipiacbobcats.com [last visited November 11, 2009]), it appears that, *e.g.,* the women's softball team will be competing through at least May 2, 2010, and the men's baseball team through at least May 23, 2010. Significantly, no schedules are posted for "competitive cheer" or women's track.

Plaintiffs also expect to offer expert testimony on the subject of whether QU provides genuine varsity athletic participation opportunities to its female athletes. Plaintiffs' experts will need complete information concerning the operation of and participation in the QU athletic program for the entire 2009-10 academic year in order to render their opinions.

Plaintiffs already proved that the (EADA) participation numbers QU provided to OCR were not accurate, that the numbers it submitted to the NCAA were not accurate, and that it failed to comply with its own roster management squad size mandates. Plaintiffs must be able to obtain the most accurate, detailed, admissible information available from QU's own records to audit any purported participation numbers that QU may offer. Much of that information will not exist until the competitions are over.

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proposed deadline for disclosure of expert opinions.

B. Cheer

QU's defense – that it will comply with Prong One this year – requires the Court to accept that "competitive cheer" constitutes a "sport" for purposes of Title IX, that QU operates its cheer program in a way that satisfies all of the OCR criteria for an activity to count as a sport, and that QU actually has the number of cheer participants it claims. Neither OCR nor any court has ever accepted cheer as a sport for purposes of Title IX. Indeed, OCR has repeatedly rejected attempts by schools and high school athletic associations to count their cheer programs as sports. Instead, OCR has stated that while athletic associations can assert that activities are sports for their own purposes, that does not mean that those activities are sports (or will be counted as sports by OCR) for Title IX purposes.

Despite this absence of any supporting precedent, QU insists that in 2009-2010 it will sponsor a "competitive cheer" program and operate it in such a matter that it can (for the first time at QU and for the first time in the history of Title IX) count its participants as varsity athletes. Although QU asserts that its cheer program is "competitive," it has never previously counted its cheerleaders as varsity athletes for Title IX (or any other) purpose. Plaintiffs must therefore obtain detailed information about how QU operates this year's team. This information must include all of the factors listed in OCR's cheer and sports definition guidance. *See* Letters from Dr. Mary Frances O' Shea to David V. Stead (April 11, 2000 and May 24, 2000) (Exhibit C attached) . The information will not all be available until the season ends. Plaintiffs intend to offer the testimony of experts in cheer who will review and analyze this information, conduct additional research if necessary (such as determining whether QU's opponents were competitive or sideline cheer squads), and render opinions whether QU can legitimately claim to run its cheer program as a sport. QU undoubtedly will want to depose Plaintiffs' experts, and may then decide

to offer its own expert, whom Plaintiffs will of course need to depose. All of this will take time, and the process cannot even *begin* until the end of QU's first "competitive" cheer season.

Plaintiffs respectfully point out that the cheer issue became even more important after the issuance of the preliminary injunction decision. In view of the accelerated scheduling of the hearing, the Court limited Plaintiffs to only one expert witness. As a result, Plaintiffs did not present a cheer expert. Moreover, no varsity "competitive cheer" program yet existed at QU. Yet the Court stated that competitive cheer "has all the characteristics of a potentially valid competitive 'sport,'" *Docket Entry No. 51, at* 33, and concluded that Plaintiffs were not likely to prevail on the merits of their claim that "competitive cheer" cannot count as a sport for Title IX purposes. In light of this preliminary determination by the Court, it is particularly important that Plaintiffs be allowed to fully investigate QU's cheer program and that their experts have the time and information necessary to assess whether QU operates it as a legitimate sport. The information will not be available until the team actually competes and the season ends.

C. Track

QU's defense also depends on triple-counting each of its female cross country athletes, by counting them as participants in cross country, indoor track, and outdoor track. Plaintiffs dispute this approach to counting participation opportunities in two respects. First, Plaintiffs contend that indoor and outdoor track are the same sport played in different seasons (just like baseball, softball, golf, tennis, crew, etc.). Second, Plaintiffs contend that QU does not have a genuine track program of any kind. Instead, some of its cross country athletes merely participate in distance events in winter and spring track meets – something that all collegiate cross country teams are allowed to do whether or not the school has a track team.

Plaintiffs expect to present track and NCAA experts to support their contentions

concerning track. The experts must receive and analyze detailed information about which athletes participate in which events in each track meet in which QU competes. They must review detailed information about both QU's men's and women's teams and the teams of schools that sponsor both cross country and legitimate track programs, and compare this information to the NCAA's minimum requirements for track. If QU does not offer genuine varsity track participation opportunities to its female runners, then QU cannot double or triple count its female cross country runners in order to appear closer to proportionality. Plaintiffs' experts cannot opine on this subject until *after* QU's purported track season ends.

Like the cheer experts, Plaintiffs' track experts will need time to review the large amount of information, organize it, write reports, and render opinions. Again, QU will likely want a rebuttal expert, and both experts will be deposed. Plaintiffs emphasize that this expert process will not end with the last track contest but instead will only begin at that point. Plaintiffs' proposed schedule allows time for this process (although less than Plaintiffs think necessary) while also allowing a trial before next fall's volleyball season. QU's proposed schedule does not.

It is particularly crucial that Plaintiffs obtain discovery on the entire track season because the Court stated in granting the preliminary injunction that it found "nothing suspect about the way Quinnipiac counts its cross country and track athletes," and that indoor track and outdoor track are separate sports. *Docket Entry No. 51, at 32.* The Court made these statements even though Plaintiffs had received only minimal discovery concerning track at QU and thus had not been able to present evidence on how QU historically operated its track program, and even though Plaintiffs had not offered a track expert at the hearing. Plaintiffs must have a fair opportunity to obtain the evidence necessary for their experts to attempt to convince the Court to reexamine its preliminary conclusions on this subject.

Plaintiffs emphasize that detailed and complete information from this 2009-2010 school year is so important to their case because QU's defense relies entirely upon it. QU has never complied with Title IX, but promises that it will meet Prong One during the 2009-2010 school year. No one can accurately assess whether it has done so until its 2009-2010 sports seasons are over. The experts and parties will then require time to prepare and explore opinions and reports on those assessments. Thus, QU's defense itself dictates that the trial not take place until a reasonable time after completion of the spring 2010 seasons.

III. QU's proposed schedule fails to reflect the flexibility that the Court required to accommodate QU's request for an early trial date.

QU's proposed schedule (Exhibit B) sets deadlines that cannot possibly be met. These deadlines fail to reflect the fact that, as the Court recognized, much of the information that the parties will exchange will not exist until the spring sport seasons end, necessitating discovery through the end of those seasons – even if up to trial. Yet QU proposes deadlines without regard to this practical reality. QU cannot rely on a defense based entirely on 2009-2010 school year data unless it is prepared to continue discovery until all of that data has been generated. Plaintiffs address below each of QU's proposed deadlines and seek, at minimum, the schedule at Exhibit A.

QU proposes an amended complaint and class certification deadline of Monday, November 16. Plaintiffs expect to amend the complaint to reflect new information and add new claims, including claims of discriminatory treatment, discriminatory allocation of athletic scholarships, and retaliation, but must conduct some discovery to confirm the accuracy of these claims before doing so.

Plaintiffs contend that their current complaint encompasses participation claims on behalf of all current and prospective female students who want to participate in a sport that QU does not

offer. QU wrongly thinks this case is only about volleyball. In order to counter this misconception even more clearly, Plaintiffs must conduct some discovery to assess whether they should add new plaintiffs who want to participate in new sports – such as track – or whether their current complaint is sufficient.

Plaintiffs pled class certification allegations in their original complaint, but may wish to change these allegations based upon the nature of the claims asserted or parties added in the amended complaint. It is unreasonable to expect Plaintiffs to amend their complaint before December 7, 2009 or move for class certification before January 31, 2010. These proposed deadlines will not prejude QU in any way.

Plaintiffs agree that QU should have 30 days to respond to the amended complaint. Indeed, QU has not yet responded to the original complaint, but Plaintiffs have cooperated by agreeing not to demand an answer until the amended complaint is filed.

Plaintiffs are willing to provide a money damages analysis 4 weeks after QU answers the amended complaint, provided that QU has responded to Plaintiffs' preliminary discovery (or at least the discovery related to damages) in time for Plaintiffs to produce such an analysis.

The most serious area of disagreement between the parties concerning the schedule has to do with the deadlines for expert disclosures and discovery. QU's schedule would set January 22, 2010 as the deadline for disclosure of Plaintiffs' experts and their reports. QU's winter sports will not be over by then and its spring sports will not even have started. Neither QU's "cheer" nor "track" teams will have completed – or possibly have started – their seasons. As set forth above, Plaintiffs' experts cannot possibly produce written reports until they receive complete information about actual participation and the actual operation of QU's athletic teams. This information is

especially critical for track, which will not end until May, 2010. The parties will then need time to exchange reports and depositions.

Because QU has never had a varsity competitive cheer team before and because no school has ever qualified a competitive cheer team as a sport, Plaintiffs' cheer experts cannot produce their report until after QU's purported cheer season is over – and not until after the purported cheer teams against which QU participates also complete their seasons. Only then can the experts assess whether QU ran its program as a true sport under OCR guidelines and whether it competed against legitimate competitive cheer teams, or merely against other schools' sideline spirit squads. Because competing against sideline or spirit squads would be akin to competing against other schools' intramural teams, QU's team could not be counted as a varsity sport if it does not compete against other varsity teams. None of this information will be available by January 22, 2010. Complete information will not be available until May.

Accordingly, Plaintiffs propose that their expert reports should be due on May 15, 2010. This date is extremely short and will require intensive work by their track expert in particular, but Plaintiffs nonetheless are willing to compromise at this date in order to give QU the merits trial it wants before the next school year begins.[4]

QU proposes that discovery end on March 12, 2010. For all of the reasons discussed above, this discovery cut-off date is completely untenable. A significant portion of the information Plaintiffs will need to provide to their experts will not even exist as of March 12,

4 Plaintiffs continue to contend that QU has not established a sufficient reason for its insistence on an early trial date, especially because it is QU's total reliance on the facts of its 2009-2010 sports seasons (rather than on its decades of athletic participation) that necessitates detailed discovery and analysis of that discovery through the end of the spring sports seasons. As the Court observed in granting the preliminary injunction, QU is not substantially harmed by being required to maintain the volleyball program. Plaintiffs believe that fundamental fairness requires a more thorough review of QU's actions during the 2009-2010 school year, and thus a later trial date.

2010. Plaintiffs instead propose a fact discovery deadline of May 31 and an expert deposition deadline (both Plaintiffs and Defendant) of June 30. As set forth above, the end of the spring sports seasons is only the starting point for the expert process. Thus, the expert deadlines for both parties must be after those seasons. Plaintiffs then propose a trial date in mid July.

All of these dates are sooner than Plaintiffs would prefer, or even consider reasonable. They are significantly sooner than those requested in Plaintiffs' Local Rule 26(f) report. They will require Plaintiffs, their counsel and their experts to work intensely to meet the deadlines. They will require that QU promptly meet its discovery obligations – including those already outstanding and already late. But given the Court's stated desire to accommodate QU, the proposed schedule at Exhibit A is the only way that Plaintiffs can obtain evidence that only QU has (or will have) while keeping a trial date before the next volleyball season.

IV. Plaintiffs Have Good Reason For Concern That QU Will Not Produce Necessary Information In A Timely Fashion

At the October 22 scheduling conference, the Court ordered QU to turn over information about which athletes participated in which events during each competition for each sport within 72 hours after each contest. QU already should have produced such information for all competitions that took place through November 7, 2009. *It has not produced any.*

Although defense counsel has expressed Defendant's intent to comply with the order, counsel indicated that the information is not yet available and that gathering and producing it may be more difficult than anticipated. This academic year's athletic competitions started in August. If over two months after the start of competition and three weeks after the Court's order QU cannot produce any information on participation in those early contests, Plaintiffs have reason to fear that QU will not timely produce such information - especially crucial track and cheer

information – in the future. It is absolutely crucial that Plaintiffs receive participation information from QU's spring sports in time for Plaintiffs and counsel to review it and have experts analyze and prepare reports on it before trial. Because QU's spring sports do not end competition until May, it certainly appears extremely unlikely that QU will be able to produce the required information sufficiently in advance of a May 3 trial date to allow for necessary expert analysis and subsequent expert discovery.

QU's history of recalcitrance in production is not limited to the information required by the Court's recent order. Plaintiff Robin Sparks made a written request for QU's Equity in Athletics Disclosure Act reports on March 9, 2009. She never received them. Plaintiffs also requested the EADA reports in their April document requests before the preliminary injunction hearing. They were not timely produced.[5] Despite defense counsel's expressed willingness to cooperate, QU has not yet produced these reports — which federal law required QU to produce to Ms. Sparks promptly after her request in March, even without litigation. 20 U.S.C. 1092(g)(3). Obviously, the EADA reports are critical evidence of QU's noncompliance with Title IX and of QU's athlete counting practices. If eight (8) months after federal law required production of the EADA reports QU still has not produced them, Plaintiffs believe it is reasonable for them to be concerned that QU will not timely produce the more detailed information the Court has now ordered it to disclose.

Finally, Plaintiffs point out that during discovery prior to the preliminary injunction hearing, the parties had significant disagreements as to the relevance of information requested by Plaintiffs, necessitating the Court's involvement. Plaintiffs do not believe Defendant ever made

5 On the eve of the preliminary injunction hearing, QU produced *portions* of *some* of the EADA reports, but Plaintiffs still have no reports for most of the years requested and still have only portions of most of the remaining reports. At the preliminary injunction hearing Plaintiffs used information from OCR's internet database. For a trial on the merits, Plaintiffs must be able to provide the actual reports with the

full disclosure even of the information it agreed – or was ordered – to produce. Plaintiffs are concerned that pretrial discovery will result in similar disagreements and delays.

In sum, in view of QU's history of recalcitrance in providing discoverable information, Plaintiffs have a reasonable basis to doubt that QU will timely produce the information Plaintiffs need to prepare adequately for a trial in early May of 2010.

V. The Trial Schedule Must Accommodate Plaintiffs' Jury Demand

Although the Court has set this case down for a bench trial, Plaintiffs' Complaint includes a jury demand. Plaintiffs have not yet determined whether they will waive their right to a trial by jury. Should they elect not to do so, it will be important to schedule the trial at a time when the Court has sufficient consecutive days available. It would not be feasible, for example, to schedule the bulk of the trial for early May, but schedule the student Plaintiffs to testify later in the month after final examinations. Also, based upon Plaintiffs' counsel's prior experience in trying Title IX cases, the number of experts that Plaintiffs' counsel expect to call, and the fact that the far more limited preliminary injunction hearing required 3.5 days, Plaintiffs respectfully suggest that the Court should anticipate that the trial will last at least two weeks.

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signed, sworn data in them to their experts for analysis and to the finder of fact.

CONCLUSION

For all of the foregoing reasons, Plaintiffs request that the Court approve their proposed schedule for pretrial discovery in this case (Exhibit A) and reset the trial date for July, 2010.

Dated: November 12, 2009

PLAINTIFFS

By _____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2009, a copy of the foregoing **Motion for Miscellaneous Relief (Request for Resolution of Scheduling Dispute)** was filed electronically and served by mail on anyone 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 as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/
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